

## RACISM IN THE CREDIT CARD INDUSTRY\*

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*In a social and financial climate characterized by deep racial and socioeconomic divide, racism against credit card applicants and consumers is a core piece of the systemic inequality that perpetuates dramatic disparities in wealth, employment, health, and education. Over several decades, credit cards have evolved into an essential tool for lower- and middle-class families to maintain financial stability through strategic balancing between debt and disposable income. Now, without a credit card, many households cannot manage to meet the basic needs of their families. Credit card companies take advantage of this reality, imposing exploitative fees, interest rates, and other conditions on consumers who have no choice but to use the companies' products. Even worse, the companies do so in a racially discriminatory way, burdening Black and Latino customers with the worst credit card terms, often unrelated to credit risk. This type of consumer racism dates back to the Reconstruction era and reflects an unbroken chain of laws and policies cementing racial economic inequality. Social norms and stereotypes make the resulting inequality appear cultural and personal instead of systemic and structural.*

*This Article is the first to apply a critical race theory analysis to the problem of racism against credit card consumers. After describing the role that history and stereotyping play in allowing credit card*

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*corporations to discriminate against consumers, it identifies fatal flaws in the two laws designed to address racial discrimination and inequality in credit, the Equal Credit Opportunity Act and the Community Reinvestment Act. It then proposes amendments to the Consumer Accountability Responsibility and Disclosure Act based on rehabilitative reparations theory and slavery disclosure laws that would require credit card companies to make significant investments into the communities they harm.*

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## INTRODUCTION

*I'm Kan, the Louis Vuitton Don  
 Bought my mom a purse, now she Louis Vuitton Mom  
 I ain't play the hand I was dealt, I changed my cards  
 I prayed to the skies and I changed my stars  
 I went to the malls and I balled too hard  
 'Oh my god, is that a Black Card?'  
 I turned around and replied, why yes, but I prefer the term  
 African American Express*

*Kanye West, Last Call<sup>1</sup>*

When Karyn Morton applied for a Capital One credit card online, the company's website offered her two cards based on information gathered from a data mining company after Karyn clicked once on the company's website.<sup>2</sup> To its credit, Capital One accurately identified Karyn as a Black, Detroit homeowner who reads major metropolitan newspapers and watches the NAACP Image Awards.<sup>3</sup> But Capital One also got a lot wrong. It assumed that Karyn was over sixty-five years old and retired and that she had no children and some high school education.<sup>4</sup> In fact, Karyn was thirty-three years old, had a five-year-old child and a law degree, and earned a salary three times higher than Capital One predicted.<sup>5</sup> Based on the algorithm that assessed Karyn, Capital One classified her in its "City Roots" segment and showed her two credit cards.<sup>6</sup> Both cards sought to lure her in with a zero interest, six-month "teaser" rate.<sup>7</sup> After half a year, the interest rate shot up to either 24.9% or 13.9%.<sup>8</sup>

In contrast, analyzing Thomas Burney after he clicked once, Capital One correctly labeled him as a White college graduate who skis but predicted a salary higher than his actual one.<sup>9</sup> The company's data

1. KANYE WEST, *Last Call*, on THE COLLEGE DROPOUT (Roc-A-Fella Records 2004).

2. See *One Smart Cookie: Interactive Graphic*, WALL ST. J. (Aug. 4, 2010, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748704017904575409021400239454> [https://perma.cc/6SE8-ES2M (staff-uploaded archive)].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* The segment into which a consumer is categorized determines which cards they will be shown. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

software classified Thomas in its “God’s Country” segment and offered him a card with a relatively low 11.9% interest rate.<sup>10</sup>

This type of discrimination against credit card applicants through algorithms and data mining is an unregulated, but increasingly common, phenomenon.<sup>11</sup> Further, this example of discrimination and the ones that follow demonstrate ubiquitous racism against credit card consumers in settings that include an applicant’s initial inquiry, retail shopping with credit, and the collection of unpaid bills. Collectively, they illustrate the hostile climate in which Black and Latino consumers interact with credit and the need for significant reforms to industry practices, law and policy, and social attitudes in order to alter this environment.

In February 2015, three Black women, Kimmell McIntosh, Maxine Henry, and Melanie Henry, were enjoying a girls’ day out birthday celebration at Brooklyn’s Massage Envy Spa when several New York Police Department (“NYPD”) officers disrupted their day by entering the spa to question them.<sup>12</sup> The officers then hauled the women into the station to detain them on suspicion of credit card fraud.<sup>13</sup> A spa employee had incorrectly reported that the women used a stolen credit card because the card’s number was very close to another client’s card, but the officers failed to check for this simple mistake before making their dramatic and unnecessary bust.<sup>14</sup> Outraged by the officers’ assumptions of their criminality, the women subsequently planned to bring a suit against NYPD and the spa for false arrest and racial profiling.<sup>15</sup>

Similarly, in 2013, Robert Brown, star of the HBO series *Treme*, bought a \$1,350 Movado watch at Macy’s for his mother as a graduation present.<sup>16</sup> After he made the purchase, NYPD officers loudly accused

10. *Id.*

11. See, e.g., Latanya Sweeney, *Discrimination in Online Ad Delivery*, COMM. ACM, May 2013, at 44, 50–52 (analyzing advertisement text next to Internet searches and finding that Black-identifying names generated ads suggestive of an arrest at a higher rate than White-identifying names).

12. Keldy Ortiz & Reuven Blau, *African-American Women to Sue NYPD After They Were Accused of Using a Stolen Credit Card, Arrested*, N.Y. DAILY NEWS (Mar. 12, 2015, 2:30 AM), <http://www.nydailynews.com/new-york/black-women-sue-false-arrest-birthday-party-article-1.2146258> [<https://perma.cc/8PG3-QRBC>].

13. *Id.*

14. *Id.* Similarly, police officers institutionalized Kamilah Brock, a Black woman who truthfully claimed that she was a banker with her own BMW. Geenius at Wrok, *A Black Woman Says She’s a Banker? She Must Be Insane*, DAILY KOS (Mar. 24, 2015, 4:48 PM), <http://www.dailykos.com/story/2015/03/24/1373087/-A-Black-Woman-Says-She-s-a-Banker-She-Must-Be-Insane> [<https://perma.cc/A6L4-AHR8>].

15. See Ortiz & Blau, *supra* note 12.

16. Susanna Kim & Gillian Mohny, *Black Actor Alleges ‘Nationwide Pattern’ of Profiling in 2nd Suit Against Macy’s*, ABC NEWS (Nov. 14, 2013), <http://abcnews.go.com>

him of credit card theft, handcuffed him, paraded him through the crowded Macy's store, and detained him.<sup>17</sup> In response, Brown filed a class action suit against Macy's for racial profiling, which the parties settled for an undisclosed amount.<sup>18</sup>

In the same year, four NYPD officers disguised in plain clothes stopped and accused twenty-one-year-old Black nursing student Kayla Philips of credit card fraud in the middle of the street, three blocks away from Barneys, where she had just purchased a long-coveted \$2,500 orange suede Celine purse after cashing a tax return.<sup>19</sup> Barneys settled her case for \$525,000 and promised to stop discriminating against Black and Latino customers.<sup>20</sup> This incident came on the heels of a lawsuit filed by eighteen-year-old Trayon Christian against Barneys and the NYPD.<sup>21</sup> After Christian purchased a Ferragamo belt for \$349, undercover NYPD officers followed him from the store, claimed his card was a fake, and detained him in a holding cell.<sup>22</sup> Christian eventually received a \$45,000 settlement from the city.<sup>23</sup>

These incidents inspired protests and captured media attention, particularly in the wake of Oprah Winfrey's "shopping while Black" experience of racial discrimination in Switzerland, where a store clerk refused to show her a crocodile purse because it was too expensive.<sup>24</sup>

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/Business/black-actor-alleges-nationwide-pattern-profiling-2nd-suit/story?id=20880469 [https://perma.cc/XX3T-WS3D].

17. Rande Iaboni, *HBO Star Files Lawsuit Against NYPD, Macy's, Cites Racial Profiling*, CNN (Nov. 14, 2013, 8:21 AM), <http://www.cnn.com/2013/11/13/justice/hbo-star-lawsuit/> [https://perma.cc/4GRZ-9SSN].

18. Class Action Complaint at 1, *Brown v. Macy's, Inc.*, No. 13 CV 8092 (S.D.N.Y. November 13, 2013), 2013 WL 6003108; Order, *Brown v. Macy's, Inc.*, No. 13 CV 8092 (S.D.N.Y. July 16, 2014), ECF No. 23 (order recognizing settlement agreement); Julia Lull, *'Treme' Actor Settles Racial Profiling Lawsuit Against Macy's, NYC*, CNN (July 19, 2014, 1:55 PM), <http://www.cnn.com/2014/07/19/justice/hbo-star-lawsuit/> [https://perma.cc/S69L-THB4].

19. Tina Moore & Ginger Adams Otis, *Another Black Barneys Shopper Accused of Credit Card Fraud After Buying \$2,500 Purse: Claim*, N.Y. DAILY NEWS (Oct. 24, 2013, 8:02 PM), <http://www.nydailynews.com/new-york/black-barneys-shopper-accused-buying-2g-purse-article-1.1494855> [https://perma.cc/AV83-2W8W].

20. Dominic Rushe, *Barneys to Pay \$525,000 in Racial Profiling Settlement*, GUARDIAN (Aug. 11, 2014, 11:14 AM), <http://www.theguardian.com/world/2014/aug/11/barneys-racial-profiling-settlement> [https://perma.cc/TK5L-B3G5].

21. Victoria Bekiempis, *Black Student Wins \$45G Settlement over Alleged Barneys Profiling, NYPD Stop-Frisk*, N.Y. DAILY NEWS (Jan. 20, 2016, 4:10 AM), <http://www.nydailynews.com/new-york/manhattan/black-student-wins-45g-settlement-barneys-stop-frisk-article-1.2502760> [https://perma.cc/2XCL-NRR3].

22. *Id.*

23. Order, *Christian v. Barneys New York Inc.*, 1:14-cv-01303 (N.Y. Sup. Ct. Jan 20, 2016); Bekiempis, *supra* note 21.

24. Nick Thompson & Diana Magnay, *Oprah Winfrey Racism Row over Switzerland Shop Incident*, CNN (Aug. 11, 2013, 10:32 AM), <http://www.cnn.com/2013/08/09/world/oprah-winfrey-racism-switzerland/> [https://perma.cc/K4H6-FU6V]. A shop clerk in a high-end bag

Despite remonstration, however, racial profiling against Black and Latino credit card users persists.<sup>25</sup> It also takes place in the debt collection phase of credit card use.

Maria Guadalupe Mejia's life became fraught with anxiety when Portfolio Recovery Associates, a company that collects on credit card debt, relentlessly pursued a lawsuit against her for a \$1,000 debt that wasn't hers.<sup>26</sup> Mejia, a Latina from Kansas City, Missouri, shared,

My husband and I were already struggling just to keep the children fed and the lights on. The lawsuit terrified me. I feared they would take my house and I feared they would arrest me. I was very shocked that they sued me for one year and three months [until the court dismissed the case] even though I never had the credit card. And after they dismissed the case, they said they might sue me again.<sup>27</sup>

A jury awarded Mejia more than \$82 million in damages,<sup>28</sup> but this type of compensation is rare. Most harassment from credit card debt collectors goes unremedied.<sup>29</sup> Also, although there are no significant

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store, Trois Pomme, refused to show the celebrity a crocodile purse due to it being "too expensive." *Id.* The day after the story aired, on his late night talk show, Conan O'Brien joked, "Oprah was shopping in Switzerland recently and a Swiss clerk refused to show her a \$38,000 purse because she didn't think Oprah could afford it. To prove a point, Oprah bought Switzerland." TEAMCOCO, <http://teamcoco.com/jokes/aug-12-2013-oprah-s-been-a-big-story-lately-oprah-was-shopping-in-switzerland> [https://perma.cc/Q322-LK26].

25. See, e.g., Earl G. Graves, Sr., *The Fight Against 'Racial Profiling' and 'Shopping While Black' Continues*, BLACK ENTERPRISE (Nov. 6, 2013), <http://www.blackenterprise.com/blogs/racial-profiling-and-shopping-while-black/> [https://perma.cc/H69A-9V9M] ("Today, African American consumers are tolerated, at best, and deemed suspect, at worst, by too many of the retail outlets that benefit from our more than \$1 trillion in spending power. From world-renowned African Americans such as Oprah Winfrey to Barneys shoppers Trayon Christian and Kayla Phillips, black consumers continue to be racially profiled as potential thieves, credit card fraudsters, or otherwise unable to legitimately afford high-end merchandise available for purchase."). For a classic example of both racial profiling and legal storytelling, see PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 44-51 (1991).

26. Dan Margolies, *Jury Awards KC Woman \$83 Million in Debt Collection Case*, KCUR 89.3 (May 14, 2015), <http://kcur.org/post/jury-awards-kc-woman-83-million-debt-collection-case> [https://perma.cc/XW34-S5C6]; see also Anneta Konstantinides, *Missouri Woman Awarded \$83 Million After Debt Collection Agency Sued Her for \$1,000 and Harassed Her Non-Stop over a Credit Card She Never Even Owned*, DAILY MAIL.COM (May 20, 2015, 9:07 AM), <http://www.dailymail.co.uk/news/article-3088875/Woman-awarded-83million-debt-collection-agency.html> [https://perma.cc/JSY5-S6LU].

27. *Id.*

28. Portfolio Recovery Assocs., LLC v. Mejia, No. 1216-CV34184, 2015 WL 13106253, at \*3 (Mo. Cir. Ct. July 20, 2015); see also Margolies, *supra* note 26.

29. See CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2015, at 7, 12 (2015) (reporting that, in 2014, 77 million Americans debts were in the process of collection and only 88,300 complaints were registered during this time period).

differences in how many times Black and White credit card users pay their balances late, a survey found debt collectors make harassing phone calls to seven out of ten Black borrowers but only five out of ten White borrowers.<sup>30</sup>

In a social and financial climate characterized by deep racial and socioeconomic divide, racism against credit card applicants and consumers is a core piece of the systemic, structural inequality that perpetuates dramatic disparities in wealth, employment, health, and education. Each of the preceding stories represents one aspect of both the explicit and structural racism that complicates credit card use by consumers of color. These incidents arise from cultural misperceptions shaped by racial stereotyping and historical discrimination. Further, the attitudes and conduct of police, merchants, and bill collectors against consumers of color provide context for how credit corporations perceive and interact with non-White consumers. They also demonstrate the benefit of applying a critical race theory perspective to understand discrimination against credit card consumers and to guide the formulation of effective responses.<sup>31</sup>

Over several decades, credit cards have evolved into an essential tool for lower- and middle-class families to maintain financial stability through strategic balancing between debt and disposable income. Now, without a credit card, many households would not be able to meet the basic needs of their families. These households rely on credit for basic subsistence as well as to cope with financial emergencies.<sup>32</sup> Credit card companies take advantage of this reality, imposing exploitative fees, interest rates, and other conditions on consumers who have no choice

30. See Alan Pyke, *Debt Collectors Hound Black Borrowers More Frequently Than White Ones*, THINKPROGRESS (Dec. 18, 2013), <http://thinkprogress.org/economy/2013/12/18/3079731/debt-collectors-race/> [<https://perma.cc/5H3L-SBR9>].

31. Despite recognizing that racism against consumers of color is broad and comprehensive, this Article focuses mainly on how credit card companies treat Black consumers.

32. JOSÉ A. GARCÍA, DEMOS, *BORROWING TO MAKE ENDS MEET: THE RAPID GROWTH OF CREDIT CARD DEBT IN AMERICA* 1 (2007), [http://www.demos.org/sites/default/files/publications/Demos\\_BorrowingEndsMeet.pdf](http://www.demos.org/sites/default/files/publications/Demos_BorrowingEndsMeet.pdf) [<https://perma.cc/Q9SD-48KX>]; MILES RAPOPORT & JENNIFER WHEARY, DEMOS, *RUNNING IN PLACE: WHERE THE MIDDLE CLASS AND THE POOR MEET* 1, 8 (2013), [http://www.demos.org/sites/default/files/publications/RunningInPlace\\_0.pdf](http://www.demos.org/sites/default/files/publications/RunningInPlace_0.pdf) [<https://perma.cc/AYC5-7GVM>]; CATHERINE RUETSCHLIN & DEDRICK ASANTE-MUHAMMAD, DEMOS & NAACP, *THE CHALLENGE OF CREDIT CARD DEBT FOR THE AFRICAN AMERICAN MIDDLE CLASS* 1 (2013), [http://www.demos.org/sites/default/files/publications/CreditCardDebt-Demos\\_NAACP\\_0.pdf](http://www.demos.org/sites/default/files/publications/CreditCardDebt-Demos_NAACP_0.pdf) [<https://perma.cc/DM77-AFS8>]; AMY TRAUB & CATHERINE RUETSCHLIN, DEMOS, *THE PLASTIC SAFETY NET: FINDINGS FROM THE 2012 NATIONAL SURVEY ON CREDIT CARD DEBT OF LOW- AND MIDDLE-INCOME HOUSEHOLDS* 1–2 (2012), <http://www.demos.org/sites/default/files/publications/PlasticSafetyNet-Demos.pdf> [<https://perma.cc/Y9RJ-V57E>].

but to use their products. Even worse, the companies do so in a racially discriminatory way, burdening Black and Latino customers with the worst credit card terms, compared to White consumers, and often unrelated to credit risk.

For example, a 2008 survey found that, although Black borrowers carried lower balances on their cards, they paid more interest.<sup>33</sup> Specifically, a Black family that carried consumer debt with an average interest rate that made average monthly payments paid at least \$100 more in interest on the debt than an average White family, despite the fact that the Black family borrowed less.<sup>34</sup> This type of consumer racism dates back to the Reconstruction era and reflects an unbroken chain of laws and policies cementing racial economic inequality.<sup>35</sup> Social norms and stereotypes serve to make this inequality appear cultural and personal, instead of structural.

Unfortunately, although the financial precarity caused by institutional and corporate racism against credit card consumers is a vital and urgent issue, similar to the racial disparities in the treatment of mortgage and home consumers that capture national attention,<sup>36</sup> both the media and legal scholars have largely neglected this issue. This Article seeks to fill that gap. By focusing a critical race theory lens on predatory and discriminatory practices of the credit card industry, it opens the door to innovative approaches to reducing economic inequality. This perspective goes beyond the traditional legal formula of individual remedies for individual acts of discrimination by proposing systemic relief for communities besieged by institutionalized, structural racism supported by social and cultural stereotypes.

33. RUETSCHLIN & ASANTE-MUHAMMAD, *supra* note 32, at 8.

34. *Id.*

35. *See infra* Section I.A.

36. *See, e.g.,* Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC, June 2014, at 54, 57; Peter Eavis, *Study Strongly Links Baltimore Mortgage Denials to Race*, N.Y. TIMES, Nov. 17, 2015, at B3; Emily Badger, *Why a Housing Scheme Founded in Racism Is Making a Resurgence Today*, WASH. POST: WONKBLOG (May 13, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/05/13/why-a-housing-scheme-founded-in-racism-is-making-a-resurgence-today/> [https://perma.cc/74XV-9CGJ]; Jay Fitzgerald, *Black, Latino Mortgage Rejection Rates Still High*, BOS. GLOBE (Dec. 22, 2015), <https://www.bostonglobe.com/business/2015/12/21/blacks-latino-still-rejected-for-mortgages-higher-rates/kng3Kuc4v3uIK1pmDqBSjO/story.html> [https://perma.cc/22FB-AZT5]; Jeff Guo, *If You're Poor, Your Mortgage Rate Can Depend on the Color of Your Skin*, WASH. POST (Dec. 23, 2014), <https://www.washingtonpost.com/news/storyline/wp/2014/12/23/if-youre-poor-your-mortgage-rate-can-depend-on-the-color-of-your-skin/> [https://perma.cc/4FTU-BCJB]; Hamilton Nolan, *There Is Still Racial Discrimination in Mortgage Lending*, GAWKER (July 19, 2016, 10:32 AM), <http://gawker.com/there-is-still-racial-discrimination-in-mortgage-lendin-1783915158> [https://perma.cc/5VU3-ETXS].



This Article is the first to apply a critical race theory analysis to the problem of racism against credit card consumers, using this framework to propose a solution grounded in rehabilitative reparations theory. Beginning from the premise that the credit card industry's success depends on a business model that both perpetuates and exploits structural inequality,<sup>37</sup> the Article explores the specific role that credit discrimination plays in maintaining the racial economic divide. Critically, it crosses the bridge between theory and practice, inviting regulators to make concrete, fundamental changes to consumer law that would simultaneously deter acts of discrimination and alter the broader racial economic landscape.

The Article begins in Part I with a history of race and wealth in the United States that outlines the laws and policies precipitating the existence of a 20:1 wealth gap between White and Black Americans following the 2008 mortgage and financial crisis.<sup>38</sup> This crisis likely led to increased dependence on credit for Black households.<sup>39</sup> Further, statistically, there are racial disparities in every aspect of credit card use, from the application process to the terms of agreements to the need to

37. See Andrea Freeman, *Payback: A Structural Analysis of the Credit Card Problem*, 55 ARIZ. L. REV. 151, 153 (2013) ("Although most economists and legal scholars view the 'credit card problem' of excessive consumer debt as one of market failure, it is in fact a story of overwhelming market success. Through the use of sophisticated underwriting technology, the credit card companies learned that consumers who are on the verge of bankruptcy represent their greatest source of profits. The industry responded to this information by completely altering its business model. Instead of seeking customers who would pay off their bills at the end of each month, known in the industry as convenience users or *deadbeats*, the companies began to target low-income consumers who would maintain balances from month to month, known as revolvers." (footnotes omitted) (first quoting Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1374 (2004); then citing Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1379 (2004); then citing Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 385–91; and then citing Adam J. Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 BERKELEY BUS. L.J. 265, 317–18 (2005)); *id.* at 154 ("Consequently, low-income consumers now receive credit cards with high fees and interest rates, while higher-income consumers reap the rewards of credit card use, such as travel miles and concierge services. Credit card companies target vulnerable consumers for inferior products through tactics such as teaser rates, mass mailings of preapproved cards, . . . overly complex credit card agreements, and credit-card redlining. As a result of these practices, 80% of the industry's profits now come from interest payments and . . . fees instead of annual and interchange fees. This shift represents a massive redistribution of wealth from the poor to wealthier consumers and corporations." (citing U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-929, CREDIT CARDS: INCREASED COMPLEXITY IN RATES AND FEES HEIGHTENS NEED FOR MORE EFFECTIVE DISCLOSURES TO CONSUMERS 67 (2006))).

38. PAUL TAYLOR ET AL., PEW RESEARCH CTR., WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS, HISPANICS 1 (2011).

39. See REBECCA PERRON, AFRICAN AMERICAN EXPERIENCES IN THE ECONOMY: RECESSION EFFECTS MORE STRONGLY FELT 22–23 (2010), <http://assets.aarp.org/rgcenter/econ/economyaa.pdf> [<https://perma.cc/NNY7-HKVU>].

forego necessary medical treatment and abandon educational opportunities due to excessive debt. Part I describes the dramatically different experiences that White and Black households have with credit and the intersection of corporate conduct and structural inequality that accounts for these differences. Then, it explores the role that stereotypes about Black consumers play in creating and justifying racial disparities in credit. These stereotypes focus the blame for bad credit squarely on the individual, making legal reform and corporate responsibility appear both futile and unnecessary.

Part II looks closely at the two laws designed to address racial discrimination and inequality in credit, the Equal Credit Opportunity Act (“ECOA”) and the Community Reinvestment Act (“CRA”). This Part investigates the legislative history behind these statutes, identifying the problems that the laws’ proponents sought to solve with their enactment. It then outlines the major substantive and procedural aspects of these laws, describing the weaknesses that render them unable to fulfill their intended purposes. Acknowledging that these laws neither deter nor provide effective relief for racial disparities and discrimination in credit, Part II then calls for a new approach to consumer credit law founded on the insights of critical race theory.

Part III proposes amendments to the Consumer Accountability Responsibility and Disclosure (“CARD”) Act designed to reduce or eliminate racial discrimination by credit card companies, as well as to promote economic growth in underserved communities. Rehabilitative reparations theory provides the model for these proposals. Accordingly, Part III provides an overview of the history and philosophy of rehabilitative reparations theory, edifying its focus on uplifting communities instead of making individuals whole. Next, Part III details the history and success of slavery disclosure laws. These laws, which require certain companies to disclose their past ties with slavery, seek to create corporate accountability for racial harms. Part III argues for similar, but stronger consumer laws requiring credit card companies to disclose any racially discriminatory conduct and to compensate for it through significant investments into the harmed communities. The Article concludes by briefly engaging potential counter arguments to this proposal and acknowledging the major obstacle posed by the financial industry’s influence over politics.

## I. RACE AND CREDIT

A. *How Law and Policy Shaped Race and Wealth in the United States*

Analyzing modern conditions of race and credit from a critical race theory perspective requires delving into the economic history of race in the United States. This history begins with slavery and continues to the present, when economic inequality continues to create a high and captive demand for credit in Black families and individuals. This economic history reinforces several key critical race theory principles: that racism is permanent,<sup>40</sup> subject to relief only when White interests converge with the interests of those subject to racial oppression;<sup>41</sup> that race is a social construct designed to perpetuate White privilege;<sup>42</sup> and that law is a tool implemented to define race and enforce racial boundaries.<sup>43</sup>

The 20:1 wealth gap between Blacks and Whites in the United States is not a manifestation of cultural or individual differences, but the product of a long history of discriminatory laws and policies that inscribed racial disparities into society.<sup>44</sup> This history began when

40. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 12 (1992) [hereinafter BELL, *FACES AT THE BOTTOM OF THE WELL*]; see also DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 156–57 (1987) [hereinafter BELL, *AND WE ARE NOT SAVED*] (discussing the “ideological hegemony” of white racism).

41. See Derrick A. Bell, Jr., *Brown v. Board of Education & the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522–30 (1980).

42. See Devon W. Carbado & Mitu Gulati, Book Review, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1759 (2003); Teresa J. Guess, *The Social Construction of Whiteness: Racism by Intent, Racism by Consequence*, 32 CRITICAL SOC. 649, 650–51 (2006).

43. See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 419–20 (1856) (holding that no Black person, whether free or enslaved, could claim U.S. citizenship and, therefore, enslaved persons could not petition the Court for their freedom); Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, in CRITICAL RACE THEORY: THE CUTTING EDGE 429, 429–36 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) (contending that the law is “part of a broader cultural endeavor that attempts to promote European values and interests at the expense of all others”). See generally IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (rev. ed. 2006) (arguing that current race law, while purporting to be “colorblind,” nevertheless perpetuates racial inequality); Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive*, 8 J. SCHOLARLY PERSP. no. 8, Fall 2012, at 47, 51 (contending that “law and race co-construct each other”).

44. TAYLOR ET AL., *supra* note 38, at 1; see also Freeman, *supra* note 37, at 181–84 (describing the impact of the Social Security Act and the Fair Housing Act on Blacks’ inability to accumulate wealth at the same rate as Whites, as well as restrictions on business opportunities and price and credit discrimination). See generally IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005) (analyzing the discriminatory impact of key laws

enslaved Africans replaced European indentured servants as the source of labor for tobacco plantations.<sup>45</sup> The White servants' displacement brought them a number of advantages, placing them higher on the social scale than the newly arrived Africans who, viewed as property instead of humans, lacked legal personhood.<sup>46</sup>

After slavery officially ended, the exploitation of Black labor continued through Black Codes.<sup>47</sup> Black Codes were criminal laws designed to incarcerate Blacks in order to take advantage of the Thirteenth Amendment's exception allowing the government to impose forced labor on convicted criminals.<sup>48</sup> Section 1 of the Thirteenth Amendment states that: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."<sup>49</sup> To allow for broad discretion in arresting and incarcerating freed slaves, the southern states enacted Black Codes that attached criminal penalties, including prison time, to common activities. For example, a Mississippi Black Code criminalized:

[A]ll rogues and vagabonds, idle and dissipated persons, beggars, jugglers, or persons practicing unlawful games or plays, runaways,

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including the Social Security Act, the G.I. Bill, and labor laws implementing unemployment benefits, a minimum wage, and union protection); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (2d ed. 2006) (explaining how the wealth gap between Blacks and Whites in the United States has evolved and presently accounts for entrenched inequality that policies focused on income and taxation fail to address); DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* (2014) (exploring how racial privilege is perpetuated throughout generations through residential segregation, nepotism, and other social practices).

45. See, e.g., JAMES OLIVER HORTON & LOIS E. HORTON, *SLAVERY AND THE MAKING OF AMERICA* 28–30 (2005); PETER KOLCHIN, *AMERICAN SLAVERY: 1619–1877*, at 7–14 (rev. ed. 2003).

46. See, e.g., EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM* 328–37 (photo. reprint 2003) (1975) (positing that the status of Black slaves elevated that of White indentured servants, informing the development of race-based slavery in the Virginia colony); see also *Dred Scott*, 60 U.S. (19 How.) at 398–99; HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* 23–52 (1980).

47. E.g., *St. Landry, La., An Ordinance Relative to the Police of Negroes Recently Emancipating Within the Parish of St. Landry*, No. 35, §§ 4, 8 (July 15, 1865), reprinted in S. EXEC. DOC. NO. 39-2, at 93–94 (1865); *An Act to Amend the Vagrant Laws of the State*, § 1, 1865 Miss. Laws 90, 90; *Mechanics, Artisans, and Shopkeepers*, § LXXII, 1865 S.C. Acts 279, 279.

48. E.g., *An Act to Amend the Vagrant Laws of the State*, § 1, 1865 Miss. Laws 90, 90. See U.S. CONST. amend. XIII, § 1; DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE FROM THE CIVIL WAR TO WORLD WAR II*, at 53 (2008); Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 *FORDHAM L. REV.* 981, 1015 (2002).

49. U.S. CONST. amend. XIII, § 1.

common drunkards, common night-walkers, pilferers, lewd, wanton, or lascivious persons, in speech or behavior, common railers and brawlers, persons who neglect their calling or employment, misspend what they earn, or do not provide for the support of themselves or their families, or dependents, and all other idle and disorderly persons, including all who neglect all lawful business, habitually misspend their time by frequenting houses of ill-fame, gaming-houses, or tippling shops . . . .<sup>50</sup>

It is difficult to think of a person who does not habitually commit at least one of these so-called crimes. Thus, by criminalizing such innocuous and prevalent conduct, Black Codes allowed states and municipalities to continue oppressing newly-freed slaves and restrict their access to potential economic opportunities.

Further, despite the promise that freed slaves would receive forty acres and a mule to work their own land, the government has yet to give reparations to slaves or their descendants.<sup>51</sup> Instead, the federal government awarded up to \$300 per slave to their past owners, to compensate for their property losses.<sup>52</sup> Also, although some Blacks continued farming, with Black land ownership peaking at 218,000 Black-owned farms in 1910, discrimination and exclusion by the U.S. Department of Agriculture (“USDA”) over the following century resulted in that number dwindling down to 18,000 Black-owned farms by 1992, a decline of 92%.<sup>53</sup> Additionally, although the approximately \$2

50. An Act to Amend the Vagrant Laws of the State, § 1, 1865 Miss. Laws 90, 90; JAMES M. MCPHERSON, *ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION* 511–12 (1st ed. 1982).

51. W. T. Sherman, Special Field Orders, No. 15 (Jan. 16, 1865), in 47 *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES* 60, 60–62 (U.S. War Dep’t ed., 1985); see also GEORGE R. BENTLEY, *A HISTORY OF THE FREEDMEN’S BUREAU* 100–02 (1955); PAUL SKEELS PEIRCE, III, *THE FREEDMEN’S BUREAU: A CHAPTER IN THE HISTORY OF RECONSTRUCTION* 59–61 (1904); Meizhu Lui, *Doubly Divided: The Racial Wealth Gap*, in *THE WEALTH INEQUALITY READER* 42, 44–47 (Dollars & Sense & United for a Fair Econ. eds., 2004).

52. Act of Apr. 16, 1862, ch. 54, §§ 2–3, 12 Stat. 376, 376–77 (permitting compensation for former slave owners after abolishing slavery in the District of Columbia).

53. Chris Kromm, *The Real Story of Racism at the USDA*, NATION (July 23, 2010), <http://www.thenation.com/article/real-story-racism-usda/> [<https://perma.cc/UPQ6-K3Z3>]. The USDA granted its farm loans almost exclusively to White farmers, making it virtually impossible for Black farmers to expand to meet the subsidy requirements favoring large over small farms. See Jim Chen, *Of Agriculture’s First Disobedience and Its Fruit*, 48 VAND. L. REV. 1261, 1306 (1995); Andrea Freeman, *The 2014 Farm Bill: Farm Subsidies and Food Oppression*, 38 SEATTLE U. L. REV. 1271, 1277 n.32 (2015) (“The first farm subsidies allowed the white owners of large farms to invest in machines and chemicals, leading to their growth, while small farms operated by blacks received no assistance in the quest to modernize. In 2007, after many years of documented discrimination against black and Latino farmers by the USDA and other federal agencies, farm owners were ninety-eight percent white.” (citations omitted));

billion settlement in the ensuing landmark discrimination case against the USDA, *Pigford v. Glickman*,<sup>54</sup> represented the largest civil rights settlement in United States history,<sup>55</sup> the one-time cash payment of \$50,000 that most plaintiffs could obtain did little to compensate for the losses of generations of Black farmers driven from the land.<sup>56</sup> By 2007, 98% of farm owners were White,<sup>57</sup> and Blacks retained little hope of regaining their foothold in agriculture.

Parallel to the decline of Black farming was the trajectory of Black business, which peaked in the early twentieth century in cities including Atlanta; Chicago; Washington, D.C.; Knoxville; New York; East St. Louis; Tulsa, Oklahoma; and Rosewood, Florida.<sup>58</sup> Unfortunately, Whites who resented Black economic success often responded to thriving Black communities with acts of violence.<sup>59</sup> Perhaps the worst of these attacks took place in Tulsa on June 1, 1921, when bombing and burning completely destroyed the city's "Black Wall Street" over the course of twelve hours.<sup>60</sup> Other smaller Black business areas, however, such as Augusta's Golden Blocks and Atlanta's Auburn Avenue, survived into the 1950s.<sup>61</sup>

Black Codes also contributed to the segregated economy. For example, South Carolina's Black Code prohibited Blacks from practicing any trade except domestic or agricultural work unless a district court judge granted them a license to do so, a highly unlikely

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Madeleine Thomas, *What Happened to America's Black Farmers?*, GRIST (Apr. 24, 2015), <http://grist.org/people/what-happened-to-americas-black-farmers/> [<https://perma.cc/QX5Q-U2AH>].

54. 185 F.R.D. 82 (D.D.C. 1999), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000).

55. *Id.* at 95.

56. See Kromm, *supra* note 53; Thomas, *supra* note 53.

57. See Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 815 (2007).

58. See A Moore, *8 Successful and Aspiring Black Communities Destroyed by White Neighbors*, ATLANTA BLACK STAR (Dec. 4, 2013), <http://atlantablackstar.com/2013/12/04/8-successful-aspiring-black-communities-destroyed-white-neighbors/> [<https://perma.cc/6LG5-D6PQ>].

59. *Id.* The attacks happened in Atlanta, Georgia, in 1906; Tulsa, Oklahoma, in 1921; Chicago in 1919; Rosewood, Florida, in 1923; Washington, D.C., in 1919; Knoxville, Tennessee, in 1919; New York City, New York, in 1863; and East St. Louis, Missouri, in 1917. *Id.*

60. See EDDIE FAYE GATES, *RIOT ON GREENWOOD: THE TOTAL DESTRUCTION OF BLACK WALL STREET 7–29* (2003) (detailing the Tulsa race riot of 1921); JAMES S. HIRSCH, *RIOT AND REMEMBRANCE: THE TULSA RACE WAR AND ITS LEGACY* 77–98 (1st ed. 2002) (describing the Tulsa race riots and their legacy).

61. See *Blacks-Only Business District Thrived: Lenox Theatre Was Inspired by Jim Crowism*, AUGUSTA CHRON. (Aug. 29, 2010, 10:25 PM), <http://chronicle.augusta.com/225/2010-08-29/blacks-only-business-district-thrived> [<https://perma.cc/AG76-AJBH>]; *Sweet Auburn History District*, NAT'L PARK SERV.: ATLANTA, <http://www.nps.gov/nr/travel/atlanta/aub.htm> [<https://perma.cc/7K8K-PNVR>].

eventuality.<sup>62</sup> Similarly, a Louisiana parish ordinance put severe limitations on Blacks' ability to engage in gainful employment by declaring that

every negro is required to be in the regular service of some white person, or former owner, who shall be held responsible for the conduct of said negro. But said employer or former owner may permit said negro to hire his own time by special permission in writing, which permission shall not extend over seven days at any one time. Any negro violating the provisions of this section shall be fined five dollars for each offence, or in default of the payment thereof shall be forced to work five days on the public road, or suffer corporeal punishment as hereinafter provided.<sup>63</sup>

Mississippi's Black Code required Black workers to register with local authorities.<sup>64</sup>

In 1896, *Plessy v. Ferguson*<sup>65</sup> upheld the doctrine of "separate but equal" public accommodations, leading to the entrenchment of segregation into the national economy.<sup>66</sup> This segregation compelled Black business owners, prohibited from buying White land, to operate on the margins of cities and sell to a restricted market containing only

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62. Mechanics, Artisans, and Shopkeepers, § LXXII, 1865 S.C. Acts 279, 279.

63. St. Landry, La., An Ordinance Relative to the Police of Negroes Recently Emancipating Within the Parish of St. Landry, No. 35, §§ 4, 8 (July 15, 1865), *reprinted in* S. EXEC. DOC. NO. 39-2, at 93-94 (1865) ("[N]o negro shall sell, barter, or exchange any articles of merchandise or traffic within said parish without the special written permission of his employer, specifying the articles of sale, barter or traffic. Any one thus offending shall pay a fine of one dollar for each offence, and suffer the forfeiture of said articles, or in default of the payment of said fine shall work one day on the public road, or suffer corporeal punishment as hereinafter provided."). *See* CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (statement of Sen. Trumbull) (describing Black Codes as "laws that prevented the colored man going from home, that did not allow him to buy or to sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights").

64. An Act to Confer Civil Rights on Freedmen, and for Other Purposes, § 5, 1865 Miss. Laws 82, 83 ("[E]very freedman, free negro and mulatto, shall, on the second Monday of January, [1866], and annually thereafter, have a lawful home or employment, and shall have written evidence thereof, as follows, to-wit: if living in any incorporated city, town or village, a license from the mayor thereof; and if living outside of any incorporated city, town or village, from the member of the board of police of his beat, authorizing him or her to do irregular and job work, or a written contract . . . which licenses may be revoked for cause, at any time, by the authority granting the same.").

65. 163 U.S. 537 (1896).

66. *See id.* at 550-52. The inability of Blacks to participate equally with Whites in social activities relegated them to a fringe social and economic sphere that did not offer the same opportunities for economic prosperity available to White businesses that could cater to the more financially stable segment of the population. *See* LAURIE COLLIER HILLSTROM, *DEFINING MOMENTS: PLESSY V. FERGUSON* 63-69 (2013).

other Blacks.<sup>67</sup> Over the same period, Jim Crow laws, enacted in the late 19th and early 20th centuries and finally invalidated in the 1960s,<sup>68</sup> ensured Black subordination and the perpetuation of White privilege through fierce segregation of all sectors of society.<sup>69</sup> For example, a 1904 Oklahoma law declared:

Any instructor who shall teach in any school, college or institution, where members of the white race and colored race are received and enrolled as pupils for instruction, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten dollars nor more than fifty dollars for each offense . . . .<sup>70</sup>

Similarly, a 1913 North Carolina law proclaimed:

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67. See JOHN SIBLEY BUTLER, *ENTREPRENEURSHIP AND SELF-HELP AMONG BLACK AMERICANS: A RECONSIDERATION OF RACE AND ECONOMICS* 151–53 (rev. ed. 2005); JULIE E. K. WALKER, *THE HISTORY OF BLACK BUSINESS IN AMERICA: CAPITALISM, RACE, ENTREPRENEURSHIP* 193–96 (1st ed. 1998); see also Freeman, *supra* note 37, at 182–83 (“African-American businesses were traditionally confined to African-American neighborhoods and catered to a mostly African-American clientele, many of whom did not have high levels of disposable income. Although some of these niche industries flourished, such as hair and beauty products (which depend for the most part on the negative societal images of their clientele), many African-American businesses struggled to survive, particularly as successful African Americans emigrated away from all-African-American neighborhoods. Ghettoized economies prevent financial growth for small African-American businesses and individual consumers, forcing them to rely on debt to meet monthly expenses.” (citing OLIVER & SHAPIRO, *supra* note 44, at 48–51; *GOOD HAIR* (Chris Rock Productions & HBO Films 2009))).

68. An Act to Amend and Consolidate the Military Laws of North Carolina, ch. 47, § 1-4852, 1913 N.C. Sess. Laws 82, 82; Act of May 5, 1908, ch. 77, § 6, 1908 Okla. Sess. Laws 694, 695. After *Brown v. Board of Education*, 347 U.S. 483 (1954), held segregation in public schools unconstitutional, *id.* at 495, a line of cases and laws rendered all institutional segregation illegal, see *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (holding that Congress acted within its power in forbidding racial discrimination in restaurants); *Johnson v. Virginia*, 373 U.S. 61, 62 (1963) (desegregating courthouse seating); *New Orleans City Park Improvement Ass’n v. Detiege*, 252 F.2d 122, 123 (5th Cir. 1958) (*per curiam*) (affirming lower court decision that a city’s refusal to make publicly supported facilities available on an integrated basis to African American citizens is unconstitutional), *aff’d per curiam*, 358 U.S. 54 (1958); *Holmes v. City of Atlanta*, 223 F.2d 93, 95 (5th Cir. 1955) (ruling segregation at public golf courses unconstitutional), *vacated per curiam*, 350 U.S. 879 (1955); *Dawson v. Mayor of Baltimore*, 220 F.2d 386, 387–88 (4th Cir. 1955) (holding segregation at public beaches and bathhouses unconstitutional), *aff’d per curiam*, 350 U.S. 877 (1955); *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala. 1956) (holding statutes and ordinances requiring segregation on public buses unconstitutional), *aff’d per curiam*, 352 U.S. 903 (1956). See generally Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1981–2000h-6 (2015)) (invalidating government-sponsored discrimination based on race, among other protected designations).

69. See An Act to Amend and Consolidate the Military Laws of North Carolina, ch. 47, § 1-4852, 1913 N.C. Sess. Laws 82, 82; Act of May 5, 1908, ch. 77, § 6, 1908 Okla. Sess. Laws 694, 695.

70. Act of May 5, 1908, ch. 77, § 6, 1908 Okla. Sess. Laws 694, 695.



The white and colored militia shall be separately enrolled, and shall never be compelled to serve in the same organization. No organization of colored troops shall be permitted where white troops are available, and when permitted to be organized, colored troops shall be under command of white officers . . . .<sup>71</sup>

The harsh effects of a racially segregated military inspired the relatively privileged Charles Hamilton Houston to devote his life to dismantling *Plessy*'s "separate but equal" doctrine.<sup>72</sup> His determination, diligence, and prophetic strategizing led to *Plessy*'s eventual overruling by *Brown v. Board of Education* in 1954.<sup>73</sup>

Even in the cities where some Black businesses managed to thrive, the majority of Blacks worked as marginalized, unskilled workers and agricultural laborers.<sup>74</sup> Also, when calamities struck, such as the boll weevil scourge that cut Georgia's cotton production in half between 1914 and 1923<sup>75</sup> and the Great Depression, Blacks experienced some of the greatest and most sustained losses.<sup>76</sup> Further, New Deal programs designed to lift the national economy out of the Depression and to create important protections for workers largely bypassed Blacks.<sup>77</sup>

For example, the 1935 Social Security Act provided a safety net for all employees but excluded certain groups, including domestic servants

71. An Act to Amend and Consolidate the Military Laws of North Carolina, ch. 47, § 1-4852, 1913 N.C. Sess. Laws 82, 82.

72. See *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting); CHARLES H. HOUSTON: AN INTERDISCIPLINARY STUDY OF CIVIL RIGHTS LEADERSHIP 1 (James L. Conyers, Jr. ed., 2012); José Felipe Anderson, *Maryland Lawyers Who Helped Shape the Constitution: Father of Freedom—Charles Hamilton Houston*, MD. B.J., no. 4, July/Aug. 2011, at 4, 6; Roger A. Fairfax, Jr., *Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 HARV. BLACKLETTER L.J. 17, 24 (1998); THE ROAD TO BROWN (Larry Adelman 1990), <http://newsreel.org/transcripts/roadtob.htm> [<https://perma.cc/5PVU-LFKT>].

73. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); see also CHARLES H. HOUSTON, *supra* note 72, at 126; Anderson, *supra* note 72, at 5; Fairfax, *supra* note 72, at 24; THE ROAD TO BROWN, *supra* note 72.

74. Edward A. Hatfield, *Segregation*, NEW GA. ENCYCLOPEDIA (Chris Dobbs ed., Jan. 24, 2017), <http://www.georgiaencyclopedia.org/articles/history-archaeology/segregation> [<https://perma.cc/DSE6-YNEB>].

75. JACKIE SHECKLER FINCH, IT HAPPENED IN ALABAMA: REMARKABLE EVENTS THAT SHAPED HISTORY 43–45 (1st ed. 2011); Fabian Lange, Alan L. Olmstead & Paul W. Rhode, *The Impact of the Boll Weevil, 1892–1932*, 69 J. ECON. HIST. 685, 693 (2009); Phillip M. Roberts, *Boll Weevil*, NEW GA. ENCYCLOPEDIA (Oct. 12, 2016), <http://www.georgiaencyclopedia.org/articles/business-economy/boll-weevil> [<https://perma.cc/CSP7-R9AP>].

76. Hatfield, *supra* note 74.

77. E.g., Social Security Act of 1935, ch. 531, Pub. L. 74-271, § 210(b)(1)–(2), 49 Stat. 620, 625 (codified as amended at 42 U.S.C. § 410(a)(3)(A)–(B) (2012)); National Labor Relations Act, ch. 372, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

and agricultural workers, where Black labor was concentrated.<sup>78</sup> In the same year, the Wagner Act granted collective bargaining power to unions, making negotiations for fair wages possible and greatly expanding the middle class.<sup>79</sup> The Act, however, allowed unions to exclude domestic servants and farm workers and provided no protection against racial discrimination in benefits including health care, job security, and pensions.<sup>80</sup> The ensuing exclusion was so extreme that in 1972 all of the 3,000 members of Los Angeles's Steam Fitters Local 250 labor union were reportedly White.<sup>81</sup>

In addition to restricting Black employment and benefits, a number of laws, policies, and legally sanctioned agreements created and enforced residential segregation. In *Buchanan v. Warley*,<sup>82</sup> in 1917, a Black home buyer sued a White seller for refusing to complete the sale of his house in accordance with a Louisville ordinance prohibiting the sale of a home to a Black owner on a majority White block.<sup>83</sup> The Court ruled the ordinance unconstitutional under both the Fourteenth Amendment and the Civil Rights Act of 1866.<sup>84</sup> However, because there must be state action, such as the Louisville ordinance, for a Fourteenth Amendment violation, and the Civil Rights Act applies primarily to public accommodations, the decision did not cover private agreements.<sup>85</sup>

78. Social Security Act of 1935, ch. 531, Pub. L. 74-271, § 210(b)(1)–(2), 49 Stat. 620, 625 (codified as amended at 42 U.S.C. § 410(a)(3)(A)–(B) (2012)). See IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 259–60 (2013); Laura Ann Foster, *Social Security and African American Families: Unmasking Race and Gender Discrimination*, 12 UCLA WOMEN'S L. J. 55, 60 (2001). But see Larry DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, 70 SOC. SECURITY BULL., no. 4, 2010, at 49, 49; Robert C. Lieberman, *Race, Institutions, and the Administration of Social Policy*, 19 SOC. SCI. HIST. 511, 514 (1995).

79. National Labor Relations Act, ch. 372, § 2(3), 49 Stat. 449, 450 (1935) (codified as amended at 29 U.S.C. § 152(3) (2012)); KATZNELSON, *supra* note 78, at 257–58; Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 126 (2011); Larry Adelman, *A Long History of Racial Preferences—For Whites*, PBS, [http://www.pbs.org/race/000\\_About/002\\_04-background-03-02.htm](http://www.pbs.org/race/000_About/002_04-background-03-02.htm) [https://perma.cc/EV9V-FYTC].

80. National Labor Relations Act, ch. 372, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2012)). See PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY* 1–2 (2008); Perea, *supra* note 79, at 125–26.

81. Adelman, *supra* note 79.

82. 245 U.S. 60 (1917).

83. *Id.* at 70.

84. *Id.* at 82.

85. See 1920s–1948: *Racially Restrictive Covenants*, FAIR HOUSING CTR. GREATER BOS., <http://www.bostonfairhousing.org/timeline/1920s1948-Restrictive-Covenants.html> [https://perma.cc/W3XH-FGNC].

The Court revisited the issue several years later, in 1926, in *Corrigan v. Buckley*.<sup>86</sup> Here, the Court held that racially restrictive covenants were agreements between private citizens that fell outside the reach of the Fifth, Thirteenth, and Fourteenth Amendments.<sup>87</sup> The Court also affirmed that the Civil Rights Act contained no restrictions on the decisions of private property owners.<sup>88</sup> Eventually, in 1948, in *Shelley v. Kraemer*,<sup>89</sup> the Court decided that, although racially restrictive covenants created by private parties evaded review, judicial enforcement of them constituted state action.<sup>90</sup> Thereafter, any attempts to enforce a covenant through the courts resulted in invalidation. Twenty years later, in 1968, the Fair Housing Act prohibited them altogether.<sup>91</sup>

The covenant under review in *Shelley* is illustrative. It read:

no part of the affected property shall be “occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property . . . against the occupancy as owners or tenants of any portion of said property for resident or other purposes by people of the Negro or Mongolian Race.”<sup>92</sup>

Other covenants provided exceptions for domestic servants residing in the home.<sup>93</sup> Typically, a covenant becomes part of the deed passed on to new owners, who risk forfeiture if they violate its terms.<sup>94</sup> Further, covenants generally run with the land, making them enforceable against future buyers.<sup>95</sup> Individuals, in addition to real estate and neighborhood boards, took responsibility for enforcing racially restrictive covenants, a mission that often led to racial violence perpetrated to drive away Black

86. 271 U.S. 323 (1926).

87. *Id.* at 329–31.

88. *Id.*

89. 334 U.S. 1 (1948).

90. *Id.* at 19–20.

91. Fair Housing Act, Pub. L. 90-284, 82 Stat. 81, 81 (codified as amended at 42 U.S.C. §§ 3601–3619 (2012)).

92. *Shelley*, 334 U.S. at 9–10 (omission in original) (quoting *Kraemer v. Shelley*, 198 S.W.2d 679, 681 (Mo. 1946)).

93. TOWN OF WEST HARTFORD, CONN., LAND RECORDS: DRYAD’S GROVE 342 (1941), [http://magic.lib.uconn.edu/magic\\_2/vector/37840/155/primary\\_source/hdming\\_37840\\_155\\_1941\\_land\\_records\\_west\\_hartford\\_trinity\\_dryads\\_grove.pdf](http://magic.lib.uconn.edu/magic_2/vector/37840/155/primary_source/hdming_37840_155_1941_land_records_west_hartford_trinity_dryads_grove.pdf) [https://perma.cc/5TVU-TMQ2] (“No persons of any race other than the white race shall use or occupancy any building or lot, except that this covenant shall not prevent occupancy by domestic servants of a different race domiciled with an owner or tenant.”).

94. RESTATEMENT (THIRD) OF PROP. (SERVITUDES) § 1.3 (AM. LAW. INST. 2000); see also 1920s–1948: *Racially Restrictive Covenants*, *supra* note 85.

95. *Id.*

home buyers.<sup>96</sup> By 1940, racially restrictive covenants covered eighty percent of the property owned in Chicago and Los Angeles.<sup>97</sup>

Unfortunately, the creation of the Federal Housing Administration (“FHA”) in 1934 did little to alleviate the effects of private discrimination on segregation.<sup>98</sup> Instead, the agency increased segregation through policies such as redlining, which rendered residents of certain areas ineligible for federal housing loans.<sup>99</sup> Redlining began with the Federal Home Loan Bank Board’s request to the Home Owners’ Loan Corporation in 1935 “to create ‘residential security maps’ for 239 cities[.]”<sup>100</sup> These maps evaluated the “trend of desirability” for mortgage lending<sup>101</sup> and “indicate[d] the level of security for real estate investments in each surveyed city.”<sup>102</sup> The maps featured color-coded grades, ranging from (A), the highest, to (D), the lowest, based on an evaluation of housing conditions and residents’ “social status.”<sup>103</sup> Neighborhoods with non-White, immigrant, and poor residents received

96. JEANNINE BELL, *HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING* 57 (2013); *see also* ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA’S GREAT MIGRATION* 271–74 (2010); Coates, *supra* note 36, at 64 (featuring the story of Clyde Ross, one of the founders of the Contract Buyers League, designed to fight back against housing discrimination in Chicago).

97. U.S. COMM’N ON CIVIL RIGHTS, NO. 42, *UNDERSTANDING FAIR HOUSING* 4 (1973), <http://www.law.umaryland.edu/marshall/usccr/documents/cr11042.pdf> [<https://perma.cc/79TU-J82P>] (“By 1940, according to a magazine article, 80 percent of both Chicago and Los Angeles carried restrictive covenants [sic] barring black families.”); *1920s–1948: Racially Restrictive Covenants*, *supra* note 85.

98. *See* KATZNELSON, *supra* note 78, at 163; Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 476 (2010); George Steven Swan, *The Law and Economics of Affirmative Action in Housing: The Diversity Impulse*, 15 U. MIAMI BUS. L. REV. 133, 184 (2006); Alexis C. Madrigal, *The Racist Housing Policy That Made Your Neighborhood*, ATLANTIC (May 22, 2014), <http://www.theatlantic.com/business/archive/2014/05/the-racist-housing-policy-that-made-your-neighborhood/371439/> [<https://perma.cc/H4PM-BQVE>].

99. Strand, *supra* note 98, at 490; Swan, *supra* note 98, at 160.

100. Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Address at the Community Affairs Research Conference: The Community Reinvestment Act: Its Evolution and New Challenges (Mar. 30, 2007), <http://www.federalreserve.gov/newsevents/speech/bernanke20070330a.htm> [<https://perma.cc/DH2X-XTW7>]. *See generally* HOME OWNERS’ LOAN CORP., RESIDENTIAL SECURITY “REDLINING” MAP AND AREA DESCRIPTIONS: HARTFORD, CONNECTICUT (1937), [http://magic.lib.uconn.edu/magic\\_2/vector/37840/primary\\_source/hdimg\\_37840\\_064\\_1937\\_holc\\_national\\_archives\\_trinity.pdf](http://magic.lib.uconn.edu/magic_2/vector/37840/primary_source/hdimg_37840_064_1937_holc_national_archives_trinity.pdf) [<https://perma.cc/7V9V-YL2S>] (demonstrating that race and social status were taken into account when redlining neighborhoods in Hartford, Connecticut).

101. HOME OWNERS’ LOAN CORP., *supra* note 100, at § 1; Amy E. Hillier, *Redlining and the Homeowners’ Loan Corporation*, 29 J. URB. HIST. 394, 400 (2003); Madrigal, *supra* note 98.

102. Bernanke, *supra* note 100.

103. HOME OWNERS’ LOAN CORP., *supra* note 100, § 1.

the lowest grades.<sup>104</sup> The red shading of these Type D areas thus led to the creation of the term “redlining” to describe racial discrimination in mortgage and credit lending.<sup>105</sup>

Redlining allowed the FHA, a crucial part of Roosevelt’s New Deal,<sup>106</sup> to make home ownership possible for millions of White Americans, while excluding members of Black and integrated communities from access to this crucial path to financial stability and wealth accumulation, regardless of their creditworthiness.<sup>107</sup> Of the \$120 billion in home loans administered by the FHA between 1934 and 1962, 98% of them went to Whites.<sup>108</sup> Similarly, between 1946 and 1960, less than 100 of the 350,000 new homes in Northern California financed by the FHA went to Black families.<sup>109</sup>

Additionally, the FHA’s policies led White middle class inhabitants to leave integrated urban areas for the suburbs, thereby accelerating urban decay.<sup>110</sup> Under FHA rules, many White home owners found it easier to obtain a loan for a new home than for repairs and abandoned their residences accordingly.<sup>111</sup> FHA publications further discouraged integrated living by problematizing neighborhoods containing “inharmonious racial or nationality groups” as ones that disseminate “smoke, odors, and fog.”<sup>112</sup> An extreme response to FHA policies encouraging White flight sprang up in Detroit, where attempts to circumvent these negative characterizations and obtain an FHA loan to

104. *See id.*; Bernanke, *supra* note 100.

105. Bernanke, *supra* note 100; *see also* HOME OWNERS’ LOAN CORP., *supra* note 100, at § 1; Analiese Fernandes, *A Brief History of Racism in Redlining*, IMPACT (Oct. 22, 2016), <http://upennimpact.org/brief-history-racism-redlining/> [https://perma.cc/KYR2-M2QD].

106. National Housing Act of 1934, Pub. L. 84-345, 48 Stat. 847 (creating the FHA).

107. Brian Gilmore, *Home Is Where the Hatred Is: A Proposal for a Federal Housing Administration Truth and Reconciliation Commission*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 249, 259, 262 (2010); *see also* Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203, 210, 223 (2006); Bernanke, *supra* note 100.

108. GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* 6 (rev. ed. 1998) (citing JULL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* 91–92 (1994)).

109. Adelman, *supra* note 79.

110. *See* KEVIN M. KRUSE, *WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM* 60–61 (2005) (discussing how the FHA encouraged racial restrictions that segregated White and Black neighborhoods); Stacy E. Seicshnaydre, *The Fair Housing Choice Myth*, 33 CARDOZO L. REV. 967, 982 (2012).

111. Roslyn Corenzwit Lieb et al., *Abandonment of Residential Property in an Urban Context*, 23 DEPAUL L. REV. 1186, 1188–98 (1974); Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617, 625 (1999).

112. JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 129 (2006).

integrate a sparsely populated Black area led to the construction of a concrete wall between neighboring White and Black communities.<sup>113</sup>

In conjunction with the FHA, the Serviceman's Readjustment Act of 1944 ("GI Bill") failed to raise the Black community's economic status because it provided for fewer benefits to Black veterans than White veterans.<sup>114</sup> For example, under the GI Bill's directive to offer special support for veterans seeking to purchase new homes, less than 3% of FHA or Veterans Affairs loans went to non-White veterans.<sup>115</sup> This extreme disparity reflected both the FHA's racist policies and the biases of individual loan officers and bankers.<sup>116</sup> Other parts of the GI Bill, which provided veterans opportunities for job skills training and education, similarly bypassed Blacks because of the socially acceptable racist policies and attitudes of White officials, business people, administrators, and institutions.<sup>117</sup>

Employment programs funneled Blacks into low-paying jobs, and educational scholarships applied only to small Black colleges with few resources.<sup>118</sup> Illustratively, in October 1946, of the 6,500 workers awarded jobs through the GI Bill, Whites received 86% of the skilled and semi-skilled positions while Blacks, in stark contrast, garnered 92% of the unskilled positions.<sup>119</sup> Additionally, of the 9,000 students enrolled at the University of Pennsylvania, which had one of the most racially inclusive policies of Ivy League schools at the time,<sup>120</sup> only forty-six were

113. See DORCETA E. TAYLOR, *TOXIC COMMUNITIES: ENVIRONMENTAL RACISM, INDUSTRIAL POLLUTION, AND RESIDENTIAL MOBILITY* 241 (2014). This divide is otherwise "known as the Birwood Wall." *Id.*

114. See Servicemen's Readjustment Act of 1944 (G.I. Bill), Pub. L. No. 78-346, 58 Stat. 284 (codified as amended in scattered sections of 38 U.S.C.); KATZNELSON, *supra* note 44, at 114–15, 128; see also Mark Boulton, *How the G.I. Bill Failed African-American Vietnam War Veterans*, 58 J. BLACKS HIGHER EDUC. 57, 58–59 (2007); Juan F. Perea, *Doctrines of Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermine the Supreme Court's Affirmative Action Jurisprudence*, 75 U. PITT. L. REV. 583, 585 (2014); Sarah Turner & John Bound, *Closing the Gap or Widening the Divide: The Effects of the G.I. Bill and World War II on the Educational Outcomes of Black Americans*, 63 J. ECON. HIST. 145, 145 (2003) (describing how Black veterans were discriminated against, as compared to their fellow White soldiers, for educational opportunities following World War II).

115. Cyd McKenna, *The Homeownership Gap: How the Post-World War II GI Bill Shaped Modern Day Homeownership Patterns for Black and White Americans* 59 (May 22, 2008) (unpublished Master in City Planning thesis, Massachusetts Institute of Technology), <https://dspace.mit.edu/bitstream/handle/1721.1/44333/276173994-MIT.pdf> [<https://perma.cc/9MCQ-J3QK>].

116. GLENN C. ALTSCHULER & STUART M. BLUMIN, *THE GI BILL: THE NEW DEAL FOR VETERANS* 198–99 (2009).

117. See *id.* at 128–29.

118. See Perea, *supra* note 114, at 494–95.

119. KATZNELSON, *supra* note 44, at 138.

120. *Id.* at 130.

Black.<sup>121</sup> Correspondingly, during this period, the overwhelming number of enrollments in historically Black colleges and universities led those institutions to unprecedented growth, with enrollment numbers increasing from 29,000 in 1940 to 73,000 in 1947.<sup>122</sup>

Other laws, related to taxes<sup>123</sup> and inheritance,<sup>124</sup> similarly drove and maintained a wedge between Blacks' and Whites' abilities to further their economic status. Simultaneously, federal food policy contributed to racial health disparities: facially neutral policies that disproportionately benefited Whites took thousands of Blacks out of the workforce every year due to illnesses and premature deaths.<sup>125</sup> Finally, the criminal justice system ensnared hundreds of thousands of Black men and women, severely limiting their employment opportunities even upon release.<sup>126</sup>

121. *Id.*

122. *Id.* at 120.

123. See ANDRE L. SMITH, *TAX LAW AND RACIAL ECONOMIC JUSTICE: BLACK TAX* 67 (2015) (showing how tax laws have disadvantaged Black people). Professor Andre Smith traces the complicated history of racism and taxation, describing the effect of slavery as a 100% tax on Black labor, *id.* at 76; oppressive taxation of free Blacks before the Civil War to discourage slave revolts and competition with Whites, which lead to re-enslavement through incarceration for failure to pay, *id.* at 85–90; poll tax requirements for voting, *id.* at 151–54; preferential treatment for capital gains income, *id.* at 204; home mortgage deductions, *id.* at 167; and the redistributive potential of taxation. *Id.* at 181.

124. See Strand, *supra* note 98, at 464–68 (describing how inheritance law contributes to racial wealth inequality and proposing changes to testacy and intestacy laws to decrease the advantages bestowed on Whites and the disadvantages imposed on Blacks by these laws).

125. See Andrea Freeman, *Behavioral Economics and Food Policy: The Limits and Politics of Nudging*, in *NUDGING HEALTH: HEALTH LAW AND BEHAVIORAL ECONOMICS* 124, 133–34 (I. Glen Cohen, Holly Fernandez Lynch & Christopher T. Robertson eds., 2016); Andrea Freeman, *Fast Food: Oppression Through Poor Nutrition*, 95 CALIF. L. REV. 2221, 2227–28, 2242–45 (2007) (describing how cooperation between the fast food industry and the government leads to poor access to healthy food in many low-income communities of color, whose members suffer disproportionately from deaths and diseases related to poor nutrition); Andrea Freeman, “First Food” Justice: Racial Disparities in Infant Feeding as Food Oppression, 83 FORDHAM L. REV. 3053, 3063–66 (2015) (exploring how law and policy that supports the formula industry leads to racial disparities in breastfeeding, linked to higher infant mortality rates in Black children and other health disparities); Andrea Freeman, *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, 3 U.C. IRVINE L. REV. 1251, 1252–54 (2013) (exploring how the USDA’s attempts to dispose of the dairy surplus through partnerships with fast food companies and distribution through its nutrition programs disproportionately harm communities of color); Andrea Freeman, *Transparency for Food Consumers: Nutrition Labeling and Food Oppression*, 41 AM. J.L. & MED. 315, 316–21 (2015) (examining how the USDA’s focus on improving health by altering consumer behavior through nutrition labeling and consumer education perpetuates racial health disparities by neglecting the absence of choice many consumers of color have regarding food selection); see also David R. Williams & Pamela Braboy Jackson, *Social Sources of Racial Disparities in Health*, 24 HEALTH AFF. 325, 327–30 (2005).

126. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 26–58 (2010) (explaining how the criminal justice system creates and perpetuates a racial hierarchy in the United States). See generally ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (2003) (suggesting that the criminal justice system can achieve

In turn, these limitations on Black prosperity created greater opportunities for Whites to flourish. As Oliver and Shapiro explain in their seminal work, *Black Wealth/White Wealth*:

When black workers were paid less than white workers, white workers gained a benefit; when black businesses were confined to the segregated black market, white businesses received the benefit of diminished competition; when FHA policies denied loans to blacks, whites were the beneficiaries of the spectacular growth of good housing and housing equity in the suburbs. The cumulative effect of such a process has been to sediment blacks at the bottom of the social hierarchy and to artificially raise the relative position of some whites in society.<sup>127</sup>

One significant result of the systemic, institutionalized povertization of the Black community is a great need for credit. Without a safety net of wealth on which to fall back, even many middle-class Black families live paycheck-to-paycheck, existing only one unforeseen expense—such as a medical emergency or a broken car—away from financial crisis.<sup>128</sup>

In some ways, this type of urgent need for credit is unique to the United States because the U.S. government provides far less of a social safety net to its citizens and residents than most other developed countries.<sup>129</sup> For example, both Canada and England provide free health care to their citizens, so that individuals in those countries can maintain a minimum quality of life and need not fear that medical problems will lead to financial crisis, or that an inability to pay will cause them to forego necessary treatment.<sup>130</sup> In contrast, in the United States'

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justice with less incarceration); DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007) (examining the impact of crime policies on the rise of mass incarceration in the United States); BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION* (2012) (offering a way to broaden the collective understanding of violence against women of color and to challenge the evolution of anti-violence efforts in the United States); GLOBAL LOCKDOWN: RACE, GENDER, AND THE PRISON-INDUSTRIAL COMPLEX (Julia Sudbury ed., 2005) (attempting to shed new light on incarcerated women to shift the discourse on women's imprisonment); PRISON NATION: THE WAREHOUSING OF AMERICA'S POOR (Tara Herivel & Paul Wright eds., 2003) (suggesting the prison system is akin to a social experiment gone wrong through a collection of essays).

127. OLIVER & SHAPIRO, *supra* note 44, at 53.

128. See Freeman, *supra* note 37, at 181.

129. See Karen Jusko, *Safety Net*, PATHWAYS, no. 1, 2016, at 25, 30.

130. Canada Health Act, R.S.C. 1985, c. C-6; *About the National Health Service (NHS)*, NHS CHOICES (Apr. 13, 2016), <http://www.nhs.uk/NHSEngland/thenhs/about/Pages/overview.aspx> [https://perma.cc/U3L4-BHC6]; see also Steve Gold, *Four Healthcare Systems Divided by the English Language*, GUARDIAN (June 7, 2011, 2:30 AM), <https://www.theguardian.com/healthcare-network/2011/jun/07/healthcare-systems-australia-medicare-canada-saskatchewan> [https://perma.cc/7WSF-XPSH].



capitalist-based economy, even the Affordable Care Act's<sup>131</sup> expansion of health insurance, as opposed to government provision of health care, was controversial, and one of the first targets in the subsequent administration's campaign to dismantle social- and welfare-minded laws and policies.<sup>132</sup>

The absence of a social safety net in the United States makes credit an indispensable survival tool for both the lower and middle classes, a group often referred to as "the 99%,"<sup>133</sup> because they are vulnerable to shocks such as illness, job loss, and economic depression or inflation.<sup>134</sup> Further, in spite of the many problems documented here, credit cards are still usually preferable to fringe lending options, such as check cashing, payday loans, and pawn shops.<sup>135</sup> Additionally, residential and social segregation make it less likely that Black individuals in financial straits will have relatives or friends from whom they can borrow.<sup>136</sup>

The legacy of exploitation of Blacks' legally created and sanctioned economic disadvantage, originating in slavery, continues with the predatory and discriminatory practices of credit card corporations today. The following Section zeroes in on the history and current landscape of racial disparities in credit card lending.

#### *B. Racial Disparities and Discrimination in Credit Card Use*

Racial disparities in the treatment of credit card holders emerged as the industry's business model evolved. Initially, credit card companies sought out wealthy consumers who would pay off their bills at the end of

131. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at 42 U.S.C. § 18001 note (2015)).

132. Vann R. Newkirk II, *The Trump Administration's First Blow to Obamacare*, ATLANTIC (Jan. 24, 2017), <https://www.theatlantic.com/politics/archive/2017/01/the-trump-administrations-first-blow-to-obamacare/514103/> [https://perma.cc/4ZMC-JZKN].

133. See OXFAM, BRIEFING PAPER: AN ECONOMY FOR THE 99%, at 2 (2017), [https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/bp-economy-for-99-percent-160117-en.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp-economy-for-99-percent-160117-en.pdf) [https://perma.cc/2ZNA-KY2N]; Ezra Klein, *Who Are the 99 Percent?*, WASH. POST (Oct. 4, 2011), [https://www.washingtonpost.com/blogs/ezra-klein/post/who-are-the-99-percent/2011/08/25/gIQA87jKL\\_blog.html?utm\\_term=.aff31b024bf8](https://www.washingtonpost.com/blogs/ezra-klein/post/who-are-the-99-percent/2011/08/25/gIQA87jKL_blog.html?utm_term=.aff31b024bf8) [https://perma.cc/6MAB-6UBW].

134. PEW CHARITABLE TRS., THE ROLE OF EMERGENCY SAVINGS IN FAMILY FINANCIAL SECURITY: HOW DO FAMILIES COPE WITH FINANCIAL SHOCKS? 1-3 (2015), [http://www.pewtrusts.org/~media/assets/2015/10/emergency-savings-report-1\\_artfinal.pdf?la=en](http://www.pewtrusts.org/~media/assets/2015/10/emergency-savings-report-1_artfinal.pdf?la=en) [https://perma.cc/NB69-GA6C].

135. See, e.g., Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 2 (2002); Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1123-28 (2008).

136. Paul Kiel & Annie Waldman, *The Burden of Debt on Black America*, ATLANTIC (Oct. 9, 2015), <https://www.theatlantic.com/business/archive/2015/10/debt-black-families/409756/> [https://perma.cc/5BQY-Z4AC].

each month.<sup>137</sup> The companies eventually learned, however, that, counterintuitively, they could earn greater profits for their shareholders by targeting high-risk consumers who could not, in fact, pay their bills off in full, but would put some money toward them each month.<sup>138</sup> These “revolvers” are often “subsistence users”—consumers who rely on credit cards to pay, at least in part, for life’s necessities.<sup>139</sup> They are primarily the working poor and many of them are people of color who face significant obstacles to financial prosperity that arise from systemic and historical structural inequality.<sup>140</sup>

Credit card companies compound the financial difficulties of these subsistence users through unreasonable but unavoidable fees and high and fluctuating interest rates.<sup>141</sup> Further, drawing from the insights of behavioral economics, credit card companies attract these customers with appealingly low “teaser rates” (such as “0% introductory APR”) that skyrocket several months down the line.<sup>142</sup> Credit card companies also make unsolicited mass mailings of “pre-approved” card offers to households living in economically depressed neighborhoods, extending

137. For a comprehensive explanation of the evolution and present state of the credit card industry’s business model, as well as a discussion of structural racism in the credit card industry, see generally Freeman, *supra* note 37.

138. See RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS 81–82 (2006); Freeman, *supra* note 37, 161–62.

139. See TRAUB & REUTSCHLIN, *supra* note 32, at 9–10. Revolvers are credit card users who carry a balance from month to month. Transactor, INVESTOPEDIA.COM, <http://www.investopedia.com/terms/t/transactor.asp> [<https://perma.cc/2QUR-6LCX>]. Subsistence users do this out of necessity. Mary Beth Matthews, *The Credit CARD Act of 2009—Four Years Later*, 2013 ARK. L. NOTES 1488, ¶ 52; Freeman, *supra* note 37, at 153 (“A subsistence user is someone who uses credit cards to survive, to pay the electricity bill one month and the phone bill the next, or to purchase essential items such as gas, groceries, or diapers. This type of user contrasts with the ‘lifestyle user,’ who uses credit cards to enhance her lifestyle, either minimally or considerably.”). Lifestyle users generally enjoy the perks of credit card use, such as cash back and airline miles, for which subsistence users foot the bill. Adam J. Levitin, *The Antitrust Super Bowl: America’s Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 BERKELEY BUS. L.J. 265, 317 (2005).

140. See, e.g., Paul Burstein & Mark Evan Edwards, *The Impact of Employment Discrimination Litigation on Racial Disparity in Earnings: Evidence and Unresolved Issues*, 28 L. & SOC’Y REV. 79, 79–80 (1994); Freeman, *supra* note 37, at 179–88; Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 182 (2008); Lathonia Denise Stewart & Richard Perlow, *Applicant Race, Job Status, and Racial Attitude as Predictors of Employment Discrimination*, 16 J. BUS. & PSYCHOL. 259, 260–61 (2001); Jonathan C. Zeigert & Paul J. Hanges, *Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. APPLIED PSYCHOL. 553, 553 (2005); see also *supra* Part I.A.

141. See Freeman, *supra* note 37, at 166–68; Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1392–93 (2004). Although amendments to the CARD Act eliminated some of the more egregious fees, late fees and rising interest rates continue to be a problem. TRAUB & REUTSCHLIN, *supra* note 32, at 24.

142. Freeman, *supra* note 37, at 166–68; Oren Bar-Gill, *supra* note 141, at 1392–93.

exploitative credit terms to residents of predominately Black or Latino neighborhoods, while enticing residents of affluent, White neighborhoods with offers of “pre-approved” cards with perks such as cash back, air miles, and low interest rates.<sup>143</sup> In lower-income neighborhoods, it is likely that residents sometimes accept the terms of these cards without shopping for better ones based on a belief that they are ineligible for better, or any, credit.<sup>144</sup>

It is difficult, however, to identify the precise disparities in the treatment of Black and White credit card consumers because regulations do not require companies to disclose the details of their transactions, such as which cards they offer and sell to which consumers on which terms.<sup>145</sup> Keeping this information secret allows the companies to engage in discrimination that is very hard, if not impossible, for potential or actual plaintiffs to prove.<sup>146</sup> In the similar context of discriminatory practices in the mortgage industry, Congress recognized and addressed this problem in the 1975 Home Mortgage Disclosure Act (“HMDA”).<sup>147</sup>

HMDA initially required mortgage lenders in urban areas to collect, report, and make available to the public data about their lending practices.<sup>148</sup> Amendments to the Act in 1989 expanded the required data collection to include the race, gender, and income of home loan applicants and borrowers.<sup>149</sup> Further amendments in 2002 required disclosure of price data.<sup>150</sup> Unfortunately, however, continuing documentation of racial discrimination in mortgage lending illustrates that HMDA’s collection and disclosure requirements do not eliminate

143. See Angela Littwin, *Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers*, 86 TEX. L. REV. 451, 475 (2008); Freeman, *supra* note 37, at 166–68.

144. See Freeman, *supra* note 37, at 167.

145. See Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, Pub. L. 111-24, 123 Stat. 1734 (codified at 15 U.S.C. §§ 1601–1637 (2012)).

146. See, e.g., *Osborne v. Bank of America*, Nat’l Ass’n, 234 F. Supp. 2d 804, 812 (M.D. Tenn. 2012) (allowing the use of disparate impact analysis to prove lending discrimination). The standard of proof required to prevail on an ECOA discrimination claim is currently contested and unresolved by the Supreme Court. See Winnie Taylor, *Proving Racial Discrimination and Monitoring Fair Lending Compliance: The Missing Data Problem in Nonmortgage Credit*, 31 REV. BANKING & FIN. L. 199, 200 & n.4 (2011–2012).

147. Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, § 302(a)–(b), 89 Stat. 1125, 1125 (codified at 12 U.S.C. § 2801(a)–(b) (2012)); 12 U.S.C. § 2801(b) (2012). As discussed directly above, the Home Mortgage Disclosure Act (“HMDA”) does not effectively prevent discrimination, but it does put more pressure on lending institutions to comply with anti-discrimination laws and enable discovery of non-compliance.

148. § 304, 89 Stat. at 1125–26.

149. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 1211(a)(3)–(4), 103 Stat. 183, 524 (codified at 12 U.S.C. § 2803(b)(4) (2012)).

150. *History of HMDA*, FFIEC, <https://www.ffiec.gov/hmda/history2.htm> [<https://perma.cc/6KGG5-4AMK>].

discriminatory practices.<sup>151</sup> Nonetheless, they represent a crucial first step to reform that is heretofore absent in the consumer credit context. In contrast, lack of transparency on the part of the credit card companies enables discrimination by preventing its identification. It also helps to ward off the potential for reputational harm or consumer response that media attention to the problem might create.

However, despite the lack of access to definitive statistics on credit card industry practices, two studies analyzed available data to conclude that race, isolated from socio-economic status, has a significant effect on a user's ability to obtain a credit card and on which terms they receive. Specifically, in 2010, researcher Chi-Jack Lin demonstrated that race affects the likelihood of obtaining a credit card, the number of cards owned, the average credit line per card, the conditions and fees attached to a card, and the factors necessary to establish creditworthiness.<sup>152</sup> He found that this type of discrimination occurs based on the names listed on an application, which can often suggest racial identity,<sup>153</sup> or the physical appearance of credit card applicants who walk into banks to request a card in person.<sup>154</sup>

Additionally, a 2011 study published in the *Review of Economics and Statistics*, authored by Ethan Cohen-Cole and titled *Credit Card Redlining*, reports that living in a Black neighborhood significantly affects a credit card applicant's ability to get a card and the terms of that card.<sup>155</sup> The report documents that credit card applicants from White neighborhoods with risk profiles and credit histories identical to their

151. See Richard D. Marsico, *Looking Back and Looking Ahead as the Home Mortgage Disclosure Act Turns Thirty-Five: The Role of Public Disclosure of Lending Data in a Time of Financial Crisis*, 29 REV. BANKING & FIN. L. 205, 206 (2009) (positing that the 2002 amendments, like the 1989 amendments, did not require lenders to disclose the credit score of borrowers and thus "hamper[ed] efforts to determine whether higher rates of rejections of loan applications from minority borrowers than whites were due to relatively weaker creditworthiness or race"); cf. Mark Fogarty, *HMDA Data Offers Clues on Discrimination Against Gays*, NAT'L MORTGAGE NEWS (June 4, 2014, 4:46 PM), <https://web.archive.org/web/20160323070839/http://www.nationalmortgagenews.com/blogs/hearing/hmda-data-offers-clues-on-discrimination-against-gays-1041913-1.html> [<https://perma.cc/4XAS-TPNW>] (noting that discrimination against same-sex couples in the housing and mortgage lending industries still existed in 2012 despite HMDA amendments).

152. Chi-Jack Lin, *Racial Discrimination in the Consumer Credit Market* 45 (2010) (unpublished Ph.D. dissertation, Ohio State University) [https://etd.ohiolink.edu/!etd.send\\_file?accession=osu1276708518&disposition=inline](https://etd.ohiolink.edu/!etd.send_file?accession=osu1276708518&disposition=inline) [<https://perma.cc/CM3X-YN8>].

153. See Sweeney, *supra* note 11, at 16.

154. *Id.* at 32–33.

155. Ethan Cohen-Cole, *Credit Card Redlining*, 93 REV. ECON. & STAT. 700, 712 (2011). Cohen-Cole's study has been critiqued for its methodology. See Kenneth P. Brevoort, *Credit Card Redlining Revisited*, REV. OF ECON. & STAT., May 2011, at 714.

counterparts in Black neighborhoods receive approximately \$7,000 more in available credit.<sup>156</sup>

Similarly, Simon Firestone conducted a study, published in 2014, concluding that Blacks are less than half as likely as other groups to possess credit cards due to racial differences in credit card marketing.<sup>157</sup> Also, to counter the common argument that differences in credit terms and amounts simply reflect variances in credit and spending habits, a 2001 study by Sheila Ards and Samuel Myers refutes the myths that Blacks disproportionately overspend, fail to save, and are not creditworthy.<sup>158</sup> The study reveals that there is no statistically significant difference in bad credit rates between Blacks and Whites in the richest and poorest households.<sup>159</sup> In middle class Black and White households, where the authors note differences in bad credit ratings, they argue that the disparities arise from discriminatory treatment in the credit market, not variation in personal habits.<sup>160</sup>

Contrary to the type of racism described as “post-racial,”<sup>161</sup> which consists of offensive epithets and clearly stated ill intentions, most racial discrimination by the credit card industry is not the product of willful and malicious bias. Instead, this discrimination generally reflects rational economic decisions to exploit existing systemic and structural social inequalities for profit.<sup>162</sup> Racial stereotypes, pervasive in the media and

156. Cohen-Cole, *supra* note 155, at 708.

157. Simon Firestone, *Race Ethnicity and Credit Card Monitoring*, J. OF MONEY, CREDIT & BANKING, Sept. 2014, at 1206. *See also* Song Han, Benjamin J. Keys & Geng Li, *Unsecured Credit Supply over the Credit Cycle: Evidence from Credit Card Mailings* (manuscript at 26 & n.29), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1848206](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1848206) [<https://perma.cc/9WGV-GFAH> (staff-uploaded archive)].

158. *See* Sheila D. Ards & Samuel L. Myers, Jr., *The Color of Money: Bad Credit, Wealth, and Race*, 45 AM. BEHAV. SCIENTIST 223, 238 (2001).

159. *Id.* at 236.

160. *Id.*

161. *See generally* DEVON W. CARBADO & MITU GULATI, *ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA* (2013) (discussing post-racial bias in the workplace); Mario L. Barnes, *Reflection on a Dream World: Race, Post-Race and the Question of Making It Over*, 11 BERKELEY J. AFR.-AM. L. & POL’Y 6 (2009) (analyzing theories of a “post-racial” world); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009) (describing definitions in post-racialism); Ian F. Haney-López, *Essay, Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1024 (2010) (arguing for a “renewed focus on racism, in particular on ‘post-racial racism’ ”); Cheryl Harris, Professor, UCLA Sch. of Law, Address at the University of Virginia School of Law: Race Declassified: Post-Racial Divisions (Feb. 26, 2015).

162. *See* Benjamin Howell, Note, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CALIF. L. REV. 101, 108–09 (2006) (endorsing this theory in the context of redlining). When banks charge higher interest rates and fees, they collect more money from consumers, particularly when the higher rates and fees do not reflect credit risk. *Transactor*, INVESTOPEDIA.COM, <http://www.investopedia.com/terms/c/creditrisk.asp> [<https://perma.cc/U3QW-9UMW>]. For an explanation of how profit motivates

popular culture, provide support for and acceptance of this behavior. Further, even in cases of discrimination based on a face-to-face encounter or a person's name, bias may be unconscious or implicit, not intentional.<sup>163</sup> This distinction, however, is not important because the root of the problem and its solution are structural, not dependent on individuals' states of mind or personal beliefs.

Technological advancements in creditworthiness determinations further open the door to discrimination that is hard to identify or redress. For example, some credit card companies rely on personalization technology, or "data mining," to customize their Internet offers.<sup>164</sup> As described above, Capital One Financial Corporation employs micro-segmentation, the practice of analyzing a multiplicity of information gathered from data on a consumer's computer, to determine which cards to show first-time visitors to its website.<sup>165</sup> Other credit card companies, such as Citibank, previously relied on "push" segmentation to categorize consumers, utilizing more traditional markers, such as income, to determine card eligibility.<sup>166</sup> Now, Citibank depends primarily on FICO scoring.<sup>167</sup> However, FICO scores contain racial disparities that may reflect racist bias programmed

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discrimination in the mortgage industry, see Jordan Weissman, *Countrywide's Racist Lending Practices Were Fueled by Greed*, ATLANTIC (Dec. 23, 2011), <http://www.theatlantic.com/business/archive/2011/12/countrywides-racist-lending-practices-were-fueled-by-greed/250424/> [<https://perma.cc/8WDL-VXHU>]. For a colorful portrayal of this discrimination, see also THE BIG SHORT (Plan B Entertainment Inc. 2015).

163. See Mahzarin R. Banaji, R. Bhaskar & Michael Brownstein, *When Bias Is Implicit, How Might We Think About Repairing Harm?*, 6 CURRENT OPINION PSYCHOL. 183, 183 (2015); Erik J. Girvan, *On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law*, 26 GEO. MASON U. C.R.L.J. 1, 26 (2015); see also IMPLICIT RACIAL BIAS ACROSS THE LAW 9–24 (Justin Levinson & Robert J. Smith eds., 2012).

164. See ANINDYA GHOSE ET AL., DYNAMIC PRICING: A STRATEGIC ADVANTAGE FOR ELECTRONIC RETAILERS 305–06, [http://people.stern.nyu.edu/aghose/Dynamic\\_Pricing.pdf](http://people.stern.nyu.edu/aghose/Dynamic_Pricing.pdf) [<https://perma.cc/TLW5-5P6S>]; Emily Steel & Julia Angwin, *On the Web's Cutting Edge, Anonymity in Name Only*, WALL ST. J. (Aug. 4, 2010), <http://www.wsj.com/articles/SB10001424052748703294904575385532109190198>; Jennifer Valentino-Devries, Jeremy Singer-Vine & Ashkan Soltani, *Websites Vary Prices, Deals Based on Users' Information*, WALL ST. J. (Dec. 24, 2012), <http://www.wsj.com/news/articles/SB10001424127887323777204578189391813881534>.

165. Sharon McDonnell, *Microsegmentation*, COMPUTERWORLD (Jan. 29, 2001, 12:00 AM), <http://www.computerworld.com/article/2590756/it-management/microsegmentation.html> [<https://perma.cc/3Y2B-VEC9>]. See *supra* text accompanying notes 2–10.

166. McDonnell, *supra* note 165.

167. See William Charles, *What Credit Bureau Does Citibank Pull?*, DR. CREDIT (Sept. 8, 2016), <http://www.doctorofcredit.com/credit-bureau-citibank-pull/> [<https://perma.cc/B9XB-QTM3>] (reporting that Citibank will mostly rely on Experian and Equifax credit reports); *Be Aware—Don't Confuse Your FICO Score with "Educational" Scores*, MYFICO, <http://www.myfico.com/crediteducation/questions/why-three-scores.aspx> [<https://perma.cc/TFW3-TSSW>] (noting that Equifax, Experian, and TransUnion generate FICO scores).

into the algorithms that power the data collection that produces a score.<sup>168</sup>

Purchasing data from companies such as FICO to determine credit denials and terms affords credit card companies the opportunity to engage in indirect racial discrimination. For example, the companies often assess creditworthiness based on factors that stand in for race.<sup>169</sup> Most significantly, because most of the United States is residentially segregated, neighborhood can serve as a proxy for race.<sup>170</sup> Similarly, affinities, such as professional associations and sports teams, can point to income level or geographic location, indirectly providing insight into the consumer's race.<sup>171</sup> Additionally, although the big data that personalization technology can provide to corporations might appear to be race-neutral, using it to classify consumers can open the door to racial stereotyping in the marketplace.

Data analyst and writer Cecilia Rabess cautions, "When we translate cultural clichés and stereotypes into empirically verifiable datasets we introduce subjectivity into a discipline that strives for objectivity. When we imbue our big data insights with our race-based biases we project our prejudices onto subsequent observations."<sup>172</sup> The potential for a collision between racism and data collection therefore exists in credit card companies' use of information gathered on social media sites, such as Facebook, LinkedIn, and Twitter, to determine

168. See Sarah Ludwig, *Credit Scores in America Perpetuate Racial Injustice. Here's How*, GUARDIAN (Oct. 13, 2015, 10:14 AM), <https://www.theguardian.com/commentisfree/2015/oct/13/your-credit-score-is-racist-heres-why> [<https://perma.cc/E679-UUVX>]; cf. Lisa Rice & Deidre Swesnik, *Discriminatory Effects of Credit Scoring on Communities of Color*, 46 SUFFOLK U. L. REV. 935, 952–57 (2013) (outlining each category within the FICO scoring system and explaining how they may produce "disparate impact and unintended discriminatory outcomes").

169. For a comprehensive description of how racism becomes coded in "neutral" language and policy, see generally IAN HANEY-LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS* 92–102 (2014).

170. For an analysis of how racial disparities in different societal areas comprise an integrated system of oppression, see Barbara Reskin, *The Race Discrimination System*, 38 ANN. REV. SOC. 17, 20–24 (2012); see also ROITHMAYR, *supra* note 44, at 99–100.

171. See, e.g., *2013 Sports Fan Demographics*, OPENDORSE, <http://opendorse.com/blog/2013-sports-fan-demographics/> [<https://perma.cc/8FJ3-KXC2>]; *Which Sports have the Whitest/Oldest/Richest Fans?*, ATLANTIC (Feb. 10, 2014), <https://www.theatlantic.com/business/archive/2014/02/which-sports-have-the-whitest-richest-oldest-fans/283626/> [<https://perma.cc/D5WK-3FK7>].

172. Cecilia Esther Rabess, *Can Big Data Be Racist?*, BOLD ITALIC (May 31, 2014), <http://www.thebolditalic.com/articles/4502-can-big-data-be-racist> [<https://perma.cc/4WL3-2ESV>]. See *The Good Wife: Discovery* (CBS Television Studios Nov. 29, 2015) (examining the legal ramifications of racially discriminatory mapping software).

creditworthiness.<sup>173</sup> Also, credit scoring sites commonly provide credit card companies with lists of applicants' and customers' Facebook friends for purposes of solicitation and creditworthiness determinations.<sup>174</sup> Depending on how the companies use this information, it could contribute to a racial divide in credit scoring, as Black households report having significantly lower credit scores than White households.<sup>175</sup> Further, unfortunately, the already appreciable racial gap in credit scores between Black and White borrowers increased after the 2008 subprime mortgage crisis.<sup>176</sup>

On a brighter note, there has been a general trend toward greater protection for credit card users, and Black consumers report that some of the provisions of the 2009 Credit Card Accountability Responsibility and Disclosure Act ("CARD") improved their borrowing experiences.<sup>177</sup>

173. Evelyn M. Rusli, *Bad Credit? Start Tweeting*, WALL ST. J. (Apr. 1, 2013, 7:51 PM) <http://www.wsj.com/articles/SB10001424127887324883604578396852612756398>; *The "Social" Credit Score: Separating the Data from the Noise*, KNOWLEDGE@WHARTON (June 5, 2013), <http://knowledge.wharton.upenn.edu/article/the-social-credit-score-separating-the-data-from-the-noise/> [https://perma.cc/ZZ69-66JV]. For instance, Nathin Bathija, the founder of Neo, a company that assesses potential car buyers, told *The Economist* that he figured there would be enough data within a year to research the relationship between the tendency to make racist comments on Facebook and creditworthiness. *Stat Oil: Lenders Are Turning to Social Media to Assess Borrowers*, ECONOMIST (Feb. 9, 2013), <http://www.economist.com/news/finance-and-economics/21571468-lenders-are-turning-social-media-assess-borrowers-stat-oil> [https://perma.cc/2L5P-WCBT]. Another start-up founder found that consumers who type using all upper or all lower case are less likely to repay loans. *Id.*

174. See, e.g., Adrienne Jeffries, *As Banks Start Nosing Around Facebook and Twitter, the Wrong Friends Might Just Sink Your Credit*, OBSERVER (Dec. 13, 2011, 7:39 PM), <http://observer.com/2011/12/as-banks-start-nosing-around-facebook-and-twitter-the-wrong-friends-might-just-sink-your-credit-2/> [https://perma.cc/E2Z8-B3HX].

175. RUETSCHLIN & ASANTE-MUHAMMAD, *supra* note 32, at 2 ("When asked to identify their credit score within a range, just 66% of African American households report having a credit score of 620 or above, compared to 85 percent of white households. . . . When asked to describe their credit score, only 42 percent of African American households reported having "good" or "excellent" credit, compared to 74 percent of white households. . . . Among households reporting poor credit, African American households were more likely to report that late student loan payments or errors on their credit report contributed to their poor credit scores. White households were more likely to report that late mortgage payments and the use of nearly all existing lines of credit contributed to their poor credit scores."'). See Lea Shephard, *Toward a Stronger Financial History Antidiscrimination Norm*, 53 B.C. L. REV. 1695, 1730–31 (2012).

176. See, e.g., Ylan Q. Mui, *For Black Americans, Financial Damage from Subprime Implosion Is Likely to Last*, WASH. POST (July 8, 2012, 8:37 PM), [http://www.washingtonpost.com/business/economy/for-black-americans-financial-damage-from-subprime-implosion-is-likely-to-last/2012/07/08/gJQAwnmzWW\\_story.html](http://www.washingtonpost.com/business/economy/for-black-americans-financial-damage-from-subprime-implosion-is-likely-to-last/2012/07/08/gJQAwnmzWW_story.html) [https://perma.cc/27KE-AFMB].

177. See Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, Pub. L. 111-24, § 201, 123 Stat. 1734, 1744 (codified at 15 U.S.C. § 1637(b)(11)(B)(i)(2012)); TRAUB & RUETSCHLIN, *supra* note 32, at 20–21. It is important to note, however, that self-reporting does not necessarily reflect accurate statistics. See Jay L. Zagorsky, *Husbands' and*



For example, the CARD Act requires credit card companies to include clear statements on credit card bills describing how long it will take to pay off the balance if the customer pays only the minimum amount.<sup>178</sup> In one study, 37% of Black households reported that they pay more toward their monthly balances due to receiving this information, thereby shortening the specter of their debt.<sup>179</sup> The CARD Act also reduces the fees that companies can charge for exceeding credit limits and making late payments.<sup>180</sup> Thirty-two percent of Black households consequently reported paying fewer fees for exceeding their credit limit, and twenty-five percent stated that they paid fewer late fees.<sup>181</sup> Further, the amended CARD Act restricts the conditions under which companies can increase interest rates,<sup>182</sup> which has led to a self-reported 25% decrease in the amount of interest that the companies charge Black households.<sup>183</sup>

Despite the general improvements in some credit card conditions wrought by the CARD Act, however, there is little evidence it has reduced racial disparities. In 2007, twice as many Black credit card holders paid interest rates above 20% than White credit card holders did.<sup>184</sup> In 2013, over 40% of Black credit card users borrowed to pay for essential items, qualifying them as subsistence users.<sup>185</sup> Typically, when financial conditions worsen, as they did in the 2008 recession, these users do not reduce credit card usage in response, likely because they lack other sources of funds, or because the alternatives, such as payday lending, cash checking, and pawn shops, are even more exploitative than credit cards.<sup>186</sup> Nonetheless, because many Black credit card holders are

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*Wives' View of the Family Finances*, 32 J. SOCIO-ECON. 127, 127 (2003). On the other hand, it helps to measure perceptions of fairness and financial status.

178. Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009 § 201.

179. RUETSCHLIN & ASANTE-MUHAMMAD, *supra* note 32, at 6.

180. CARD Act § 171, 15 U.S.C. § 1666i-1 (2012).

181. RUETSCHLIN & ASANTE-MUHAMMAD, *supra* note 32, at 6–7 & tbl.1. The actual percentages may be even higher than consumers reported. See *CFPB Finds CARD Act Helped Consumers Avoid More Than \$16 Billion in Gotcha Credit Card Fees*, CFPB (Dec. 3, 2015), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-card-act-helped-consumers-avoid-more-than-16-billion-in-gotcha-credit-card-fees/> [https://perma.cc/LJ2M-J7ZH].

182. See, e.g., CARD Act § 171, 15 U.S.C. § 1666i-1(b)(1)(C). For example, companies may not impose retroactive increases. *Id.*

183. RUETSCHLIN & ASANTE-MUHAMMAD, *supra* note 32, at 7 tbl.1.

184. See JENNIFER WHEARY & TAMARA DRAUT, DEMOS, WHO PAYS? THE WINNERS AND LOSERS OF CREDIT CARD DEREGULATION 1, 6 tbl.4 (2007), [http://www.demos.org/sites/default/files/publications/whopays\\_Demos.pdf](http://www.demos.org/sites/default/files/publications/whopays_Demos.pdf) [https://perma.cc/US36-CZ89].

185. RUETSCHLIN & ASANTE-MUHAMMAD, *supra* note 32, at 1.

186. *Id.* at 3–4; see, e.g., David Ray Papke, *Perpetuating Poverty: Exploitative Businesses, the Urban Poor, and the Failure of Reform*, 16 SCHOLAR 223, 224–25 (2014).

without friends or family who possess extra resources to lend in times of need, in 2010, Black consumers were more than three times more likely than White consumers to pay off their credit card bills by going to loan sharks.<sup>187</sup> They were also more likely to declare bankruptcy due to credit card debt,<sup>188</sup> and to reach a settlement agreement with a credit card company.<sup>189</sup> These types of settlement agreements often harm, rather than help, the consumer.<sup>190</sup>

Credit card debt amassed to finance education also creates a particular burden for Black graduates, who have the highest debt balances among college graduates.<sup>191</sup> Over a thirty-year period beginning in the mid-1980s, the common perception of education as a public good worthy of state investment shifted to one of it as a private benefit that individuals should finance independently.<sup>192</sup> During that time, as states contributed increasingly less to the cost of higher education, an unprecedented number of Blacks and Latinos enrolled in colleges and universities and prepared to exchange debt for a diploma.<sup>193</sup> Due to the wealth gap, Black students are more likely than White students to take on debt to pay for college.<sup>194</sup> Additionally, disproportionately more Black parents incur credit card debt to finance their children's education.<sup>195</sup> Sadly, Blacks and Latinos are also three times as likely as Whites to stop going to school in order to pay off their credit card debt.<sup>196</sup> Further, Black students who graduate with student debt owe the largest amounts comparatively, with average reported debt thousands of

187. See DEMOS, *THE COLOR OF DEBT: CREDIT CARD DEBT BY RACE AND ETHNICITY* 1, 3 (2010), [http://www.demos.org/sites/default/files/publications/FACTSHEET\\_TheColorofDebt\\_Demos.pdf](http://www.demos.org/sites/default/files/publications/FACTSHEET_TheColorofDebt_Demos.pdf) [https://perma.cc/24PG-AWYY].

188. *Id.* at 3 fig.5.

189. DEMOS, *THE COLOR OF DEBT: CREDIT CARD DEBT BY RACE AND ETHNICITY* 3 (2008), [http://www.demos.org/sites/default/files/publications/FACTSHEET\\_TheColorofDebt\\_Demos.pdf](http://www.demos.org/sites/default/files/publications/FACTSHEET_TheColorofDebt_Demos.pdf) [https://perma.cc/2ZSU-N6SG]; Gene Park, *Don't Get Hooked*, HONOLULU STAR ADVERTISER (June 7, 2010), <http://www.staradvertiser.com/2010/06/07/business/dont-get-hooked/> [https://perma.cc/8E99-YYY8].

190. See *Settling Credit Card Debt*, FED. TRADE COMM'N, <https://www.consumer.ftc.gov/articles/0145-settling-credit-card-debt> [https://perma.cc/GT8B-X8XW]. The Federal Trade Commission warns of the risks involved in debt settlement, including negative effects on credit scores, the growth of fees and interest rates that can increase debt, the potential to be sued, scamming by companies, and hidden fees. *Id.*

191. RUETSCHLIN & ASANTE-MUHAMMAD, *supra* note 32, at 12.

192. *Id.*

193. *Id.*

194. *Id.* ("Eighty percent of African American college grads took out some amount of loans in order to attain a higher education, compared to 65 percent of whites.").

195. *Id.* ("[Fifty] percent of indebted African American households who incurred expenses related to sending a child to college report that it contributed to their current credit card debt.").

196. DEMOS, *supra* note 187, at 3.

dollars higher than White students' debt.<sup>197</sup> Although policy reforms that would make education more financially accessible would provide the best solution to this type of disproportionate debt, more credit card companies could ease this burden by offering low and fair terms for credit used to pay for education.

In addition to educational expenses, medical bills represent a significant cost that leads many Black families to spiral into debt. Many Black households do not have health insurance and, even when they do, the cost of deductibles, co-pays, and prescriptions often requires resorting to credit to pay them.<sup>198</sup> Even worse, the cost of health care can be prohibitive. Almost half of middle class Black families with credit card debt report that they have skipped a medical test, treatment, or follow-up, or did not fill a prescription or see a doctor when they needed to, in order to avoid increasing their debt.<sup>199</sup> Additionally, the exorbitant cost of emergency room visits is particularly problematic for Black families, whose members are more likely to suffer from chronic conditions, such as asthma, that require emergency care.<sup>200</sup> In these types of situations, credit cards can act as lifesavers, but the subsequent debt, exacerbated by exploitative interest rates and fees, can quickly spiral and contribute to enduring or additional health problems.<sup>201</sup>

Notwithstanding these bleak statistics, however, Black subsistence users often find ways to make monthly payments on their credit cards. Most of these payments do not reach the principal owed on the account or alleviate the consumer's debt in any way.<sup>202</sup> They do, however, generate profits for the credit card companies. Nonetheless, widespread stereotypes of these consumers as high credit risks persist. These false

197. RUETSCHLIN & ASANTE-MUHAMMAD, *supra* note 32, at 12 ("In 2008, student loan debt affected 15 percent more African American graduates than white graduates. . . . In the same year, the average African American senior leaving college with student loans owed \$28,692, compared to \$24,742 for whites.").

198. *Id.* at 13.

199. *Id.* at 15.

200. *Id.* ("According to the Department of Health and Human Services, the average emergency room visit costs \$1349. For the uninsured that price tag is even higher, at \$1843." (citing *Medical Expenditure Panel Survey*, U.S. DEP'T HEALTH & HUM. SERVS. (2011), [https://meps.ahrq.gov/data\\_stats/tables\\_compendia\\_hh\\_interactive.jsp?\\_SERVICE=MEPSSocket0&\\_PROGRAM=MEPSPGM.TC.SAS&File=HCFY2011&Table=HCFY2011\\_PLEXP\\_E&VAR1=AGE&VAR2=SEX&VAR3=RACETH5C&VAR4=INSURCOV&VAR5=POVCAT11&VAR6=MSA&VAR7=REGION&VAR8=HEALTH&VARO1=4+17+44+64&VARO2=1&VARO3=1&VARO4=1&VARO5=1&VARO6=1&VARO7=1&VARO8=1&\\_Debug](https://meps.ahrq.gov/data_stats/tables_compendia_hh_interactive.jsp?_SERVICE=MEPSSocket0&_PROGRAM=MEPSPGM.TC.SAS&File=HCFY2011&Table=HCFY2011_PLEXP_E&VAR1=AGE&VAR2=SEX&VAR3=RACETH5C&VAR4=INSURCOV&VAR5=POVCAT11&VAR6=MSA&VAR7=REGION&VAR8=HEALTH&VARO1=4+17+44+64&VARO2=1&VARO3=1&VARO4=1&VARO5=1&VARO6=1&VARO7=1&VARO8=1&_Debug) [<https://perma.cc/6BCU-LTAM>])).

201. Angus Deaton, *Health, Income, and Inequality*, NBER REP., Spring 2003, at 9, 10; David Odrakiewicz, *The Connection Between Health and Economic Growth: Policy Implications Re-examined*, 4 GLOBAL MGMT. J. 65, 67 (2012).

202. RUETSCHLIN & ASANTE-MUHAMMAD, *supra* note 32, at 8–9.

characterizations pervade popular culture through common and widely accepted racial and cultural stereotypes, labeling Blacks as lazy or materialistic.<sup>203</sup> Credit card companies stand to gain from these racial tropes because they justify steering Black customers into a subprime credit market on the false premise that they often default on their loans. The unfair and exploitative terms that characterize this subprime market become invisible when lenders, credit card holders, and racial advocates alike mistakenly believe that racial disparities in the treatment of credit card users arise from genuine differences in credit profiles, instead of deliberate corporate choices.

*C. How Racial Stereotypes Mask Structural and Institutional Racism Against Credit Consumers*

This analysis of racism against credit card consumers relies on the fundamental principles of critical race theory (“CRT”): that racism is a structural problem, not an individual one, and that racism is both pervasive and permanent.<sup>204</sup> These principles are central to the rehabilitative reparations approach<sup>205</sup> proposed in this Article, which shifts the focus from redress of individual harms to rebuilding communities. This analysis also relies on two important CRT methodologies. The first is the importance of narrative to shaping and countering collective understandings about race.<sup>206</sup> This Section, which explores how the stories that popular culture tells about Black

203. STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION 11–20 (2005); Regina Austin, “A Nation of Thieves”: Securing Black People’s Right to Shop and to Sell in White America, 1994 UTAH L. REV. 147, 147–48; see S. Christian Wheeler, W. Blair G. Jarvis & Richard E. Petty, *Think Unto Others: The Self-Destructive Impact of Negative Racial Stereotypes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 173, 179 (2001). See generally Laura Green, *Stereotypes: Negative Racial Stereotypes and Their Effect on Attitudes Toward African-Americans*, 11 PERSP. ON MULTICULTURALISM & CULTURAL DIVERSITY, no. 1, Winter 1998–1999, <http://www.ferris.edu/HTMLS/news/jimcrow/links/VCU.htm> [<https://perma.cc/C7VV-VUQ7>] (providing examples of different stereotypes of Blacks).

204. See, e.g., BELL, FACES AT THE BOTTOM OF THE WELL, *supra* note 40, at ix.

205. See Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 15–17 (2007).

206. See BELL, FACES AT THE BOTTOM OF THE WELL, *supra* note 40, at 10; Robert M. Cover, *The Supreme Court, 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2440–41 (1989); Charles Lawrence III, *Listening for Stories in All the Right Places: Narrative and Racial Formation Theory*, 46 LAW & SOC’Y REV. 247, 251 (2012); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987). See generally DERRICK BELL, RACE, RACISM AND AMERICAN LAW (6th ed. 2008) (documenting and narrating litigation and policy reform efforts aimed at improving rights of Black American rights in several areas, including education and housing).

consumers lead to stereotypes that justify discriminatory outcomes, proceeds from a belief in the power of storytelling to influence hearts, minds, law, and policy. The second and relatively new critical race theory approach utilized here is empirical critical race theory (“eCRT”), the marriage of critical race theory with empirical methods.<sup>207</sup> eCRT allows data, such as the statistics in the preceding Section, to illustrate that discrimination is often at work, even when the laws, policies, or practices that create the conditions described by the data appear to be facially neutral.<sup>208</sup>

A central tenet of CRT is that race is a social construction, created to rationalize and perpetuate social and economic equality.<sup>209</sup> Because race depends on social norms and expediencies, as opposed to biological, genetic, or cultural realities, race is fluid.<sup>210</sup> New races form when privileged members of society seek to oppress a group that has not yet been clearly racially identified, such as the quasi-religious “race” of Muslims.<sup>211</sup> Markers and perceptions of race are also fluid, and pliable through shifting allegories told in mass media and popular culture.

Stereotypes infiltrate the collective consciousness through the news media, movies, music, video games, and television. Often unconsciously, common stereotypes become part of the way that individuals see and order the world, influencing their decisions and attitudes.<sup>212</sup> The effects of this often “unconscious bias” can manifest themselves in both small

207. See, e.g., Kimani Paul-Emile, *Foreword: Critical Race Theory and Empirical Methods Conference*, 83 FORDHAM L. REV. 2953, 2954 (2015); Osagie K. Obasogie, *Foreword: Critical Race Theory and Empirical Methods*, 3 U.C. IRVINE L. REV. 183, 185 (2013).

208. See Paul-Emile, *supra* note 207, at 2954–55.

209. See Ian Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27–28 (1994).

210. *Id.* See KHIARA M. BRIDGES, *REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION* 8–10 (2011); LÓPEZ, *supra* note 43, at 2 (rev. ed. 2006); DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* 4–5 (2011).

211. See, e.g., Craig Considine, *Muslims Aren't a Race, So I Can't Be Racist, Right? Wrong.*, HUFFINGTON POST (Nov. 19, 2016), [http://www.huffingtonpost.com/craig-considine/muslims-are-not-a-race\\_b\\_8591660.html](http://www.huffingtonpost.com/craig-considine/muslims-are-not-a-race_b_8591660.html) [https://perma.cc/XQ75-ZSK2].

212. Girvan, *supra* note 163, at 32–33; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1166–67, 1247–48 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 345 (2007) [hereinafter Levinson, *Forgotten Racial Equality*]; Justin D. Levinson, Koichi Hioki & Syugo Hotta, *Implicit Bias in Hawai'i: An Empirical Study*, 37 U. HAW. L. REV. 429, 429–30 (2015) [hereinafter Levinson et al., *Implicit Bias*]; Yi Mou & Wi Peng, *Gender and Racial Stereotypes in Popular Video Games*, in *HANDBOOK OF RESEARCH ON EFFECTIVE ELECTRONIC GAMING IN EDUCATION* 922, 923 (Richard E. Ferdig, ed., 2009).

and large acts,<sup>213</sup> from selecting a seat on a bus to fatally shooting a child playing with a toy gun.<sup>214</sup> Stereotypes also affect decisions involving employment,<sup>215</sup> housing,<sup>216</sup> and credit.<sup>217</sup> Impressed almost indelibly into people's psyches, stereotypes can be so powerful that it is extremely difficult for individuals to separate them from their lived experiences and recognize them as externally created biases. Consequently, stereotypes often simply become unexamined truths that feel like common sense and guide people's behavior.<sup>218</sup>

Stereotypes about creditworthiness can be particularly harmful because of the key role that credit plays in modern life. According to a 2013 study, 70% of American consumers possess credit cards<sup>219</sup> and 34% of households do not pay them off in full at the end of the month.<sup>220</sup> Unfortunately, the reality of credit is that, instead of enabling people to make extravagant purchases, it barely covers the regular expenses of daily life, such as food, bills, transportation, and other necessities.<sup>221</sup> Further, debt prevents many individuals from advancing their lives in

213. Christopher Ingraham, *Three Quarters of Whites Don't Have Any Non-White Friends*, WASH. POST: WONKBLOG (Aug. 25, 2014), <http://www.washingtonpost.com/news/wonkblog/wp/2014/08/25/three-quarters-of-whites-dont-have-any-non-white-friends/> [https://perma.cc/5GMH-TFDF].

214. See Ralph Ellis & Melissa Gray, *Tamir Rice Report: No Proof Police Officer Shouted Warning Before Shooting*, CNN (June 15, 2015, 10:36 PM), <http://www.cnn.com/2015/06/13/us/tamir-rice-report/> [https://perma.cc/P4YV-EQCV].

215. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991 (2004); Katie Sanders, *Do Job-Seekers with 'White' Names Get More Callbacks Than 'Black' Names?*, POLITIFACT: PUNDITFACT (Mar. 15, 2015, 6:29 PM), <http://www.politifact.com/punditfact/statements/2015/mar/15/jalen-ross/black-name-resume-50-percent-less-likely-get-respo/> [https://perma.cc/EQG5-9YG6].

216. J. Rosie Tighe, *How Race and Class Stereotyping Shapes Attitudes Toward Affordable Housing*, 27 HOUSING STUD. 962, 962 (2012); Ilyce Glink, *Racism Alive and Well in Housing*, CBS (June 12, 2013, 9:03 AM), <http://www.cbsnews.com/news/racism-alive-and-well-in-housing/> [https://perma.cc/X5BQ-QBNH].

217. See Pager & Shepherd, *supra* note 140, at 182–85.

218. See Krieger, *supra* note 212, at 1191.

219. Jamie Gonzalez-Garcia, *Credit Card Ownership Statistics*, CREDITCARDS.COM (Oct. 25, 2016), <http://www.creditcards.com/credit-card-news/ownership-statistics.php> [https://perma.cc/7VUZ-LTRX] (citing SCOTT SCHUH & JOANNA STAVINS, FED. RES. BANK BOS., NO. 15-4, THE 2013 SURVEY OF CONSUMER PAYMENT CHOICE: SUMMARY RESULTS (2015), <http://www.bostonfed.org/economic/rdr/2015/rdr1504.pdf> [https://perma.cc/CR5H-2Q73]).

220. See Jamie Gonzalez & Tamara E. Holmes, *Credit Card Debt Statistics*, CREDITCARDS.COM, <http://www.creditcards.com/credit-card-news/credit-card-debt-statistics-1276.php> [https://perma.cc/TG6V-LD3G] (citing AM. BANKERS ASS'N, CREDIT CARD MARKET MONITOR 1 (2016), <http://www.aba.com/Press/Documents/ABA2016Q2CreditCardMonitor.pdf> [https://perma.cc/8S56-425G]).

221. See Martha C. White, *Today's Young Adults Will Never Pay Off Their Credit Card Debts*, TIME (Jan. 17, 2013), <http://business.time.com/2013/01/17/todays-young-adults-will-never-pay-off-their-credit-card-debts/> [https://perma.cc/7362-KJA7].

productive ways. For example, credit card debt causes many students to reduce their course loads, in turn lengthening their education, making graduation a more distant goal.<sup>222</sup> Also, many Black individuals and households are particularly susceptible to falling into debt spirals that restrict their life choices because they lack the financial safety net of accumulated wealth enjoyed by many Whites.<sup>223</sup>

As demonstrated above, race and economics are inextricably intertwined.<sup>224</sup> Part of this history is the story that popular culture tells about Black consumers.<sup>225</sup> This story rates Blacks far below Whites in the hierarchy of the market economy, due to Blacks' personal and culture failings.<sup>226</sup> This oft-repeated but false tale becomes truth as it plays out relentlessly through a variety of media, including news, dramas, comedies, and music videos.<sup>227</sup> In turn, this pervasive story about Blacks and money serves to justify social and economic inequality.<sup>228</sup> As Marlon Riggs set out in his groundbreaking film, *Ethnic Notions*,<sup>229</sup> since slavery, popular stereotypes have created myths about history, such as the happy slave and the nurturing Mammy, that justify oppression and subordination.<sup>230</sup>

Even as society has evolved to allow Blacks to gain greater control over media depictions of themselves,<sup>231</sup> many popular culture images continue to perpetuate harmful stereotypes.<sup>232</sup> For example, modern

222. JOSÉ GARCÍA, JAMES LARDNER & CINDY ZELDIN, UP TO OUR EYEBALLS: HOW SHADY LENDERS AND FAILED ECONOMIC POLICIES ARE DROWNING AMERICANS IN DEBT 13 (2008).

223. See OLIVER & SHAPIRO, *supra* note 44, at 52–54. In 2009, the gap in average net worth between Whites and Blacks was 20:1. HANEY-LÓPEZ, *supra* note 169, at 52–54.

224. See *supra* Section I.A.

225. See *infra* notes 227–73 and accompanying text.

226. See *infra* notes 227–73 and accompanying text.

227. See *supra* note 212 and accompanying text.

228. See, e.g., RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 48–49 (2d ed. 2012) (“These cultural influences are probably at least as determinative of outcomes as are the formal laws, since they supply the background against which the latter are interpreted and applied.”).

229. ETHNIC NOTIONS (Marion Riggs 1986).

230. *Id.* See Pamela J. Smith, *Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority*, 6 WM. & MARY J. WOMEN & L. 53, 118 (1999).

231. See RALPH J. BUNCHE CTR. FOR AFRICAN AM. STUDIES AT UCLA, 2015 HOLLYWOOD DIVERSITY REPORT: FLIPPING THE SCRIPT 1–2 (2015), <http://www.bunchecenter.ucla.edu/wp-content/uploads/2015/02/2015-Hollywood-Diversity-Report-2-25-15.pdf> [https://perma.cc/3YRV-G8MB].

232. 1 AFRICAN AMERICANS AND POPULAR CULTURE 200–05 (Todd Boyd ed., 2008).

roles that have earned Black actors the elusive Oscar award<sup>233</sup> include entertainer (Jennifer Hudson in *Dreamgirls*),<sup>234</sup> maid (Octavia Spencer in *The Help*),<sup>235</sup> abusive mother on welfare (Mo'nique in *Precious*),<sup>236</sup> and slave (Lupita Nyong'o in *12 Years a Slave*).<sup>237</sup> Similarly, *Empire*, a show about a family of Black rappers, criminals, and drug dealers, became the most popular show on network television during its first season.<sup>238</sup>

One of the enduring cultural messages about Blacks is that they are bad with money. In 1957, Black sociologist E. Franklin Frazier published a scathing critique of overspending by the Black middle class titled *Black Bourgeoisie*.<sup>239</sup> A few years later, the infamous 1965 public policy report by then Assistant Secretary of Labor Daniel Patrick Moynihan blamed Blacks' family values, or lack thereof, for their communities' poverty.<sup>240</sup> In 2004, in a controversial speech at the NAACP's fifty-year anniversary of *Brown v. Board of Education* celebration, Bill Cosby lamented that some Black parents are willing to spend \$500 on sneakers but not \$250 on Hooked on Phonics for their kids.<sup>241</sup>

Today, rapper Lil' Kim boasts about being a baller on a reality show,<sup>242</sup> exposés reveal that the cast members of *The Real Housewives of Atlanta* are actually broke,<sup>243</sup> and ubiquitous images show Black celebrities, from Oprah to Nicki Minaj, loaded down with designer shopping bags.<sup>244</sup> Black television icons like "Cookie" Lyon<sup>245</sup> and Olivia

233. Yolanda Sangweni, *The Way-Too-Short List of Black Oscar Winners*, ESSENCE (Feb. 26, 2015), <http://www.essence.com/galleries/way-too-short-list-black-oscar-winners> [https://perma.cc/XRB7-HJWG].

234. DREAMGIRLS (DreamWorks Pictures and Paramount Pictures 2006).

235. THE HELP (DreamWorks Pictures and Reliance Entertainment 2011).

236. PRECIOUS (Lionsgate 2009).

237. 12 YEARS A SLAVE (Regency Enterprises and River Road Entertainment 2013).

238. See Victor Beigelman, *Empire Overtakes The Big Bang Theory as the Most Popular Series on Network TV*, A.V. CLUB (March 30, 2015, 6:15 PM), <http://www.avclub.com/article/empire-overtakes-big-bang-theory-most-popular-seri-217272> [https://perma.cc/3YTR-EXDG].

239. E. FRANKLIN FRAZIER, BLACK BOURGEOISIE 230 (1st ed. 1957).

240. OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 5-12 (1965) (The Moynihan Report).

241. Dr. Bill Cosby, Address at the *Brown v. Board of Education* 50th Anniversary Commemoration (2004), [http://www.rci.rutgers.edu/~schochet/101/Cosby\\_Speech.htm](http://www.rci.rutgers.edu/~schochet/101/Cosby_Speech.htm) [https://perma.cc/9YR7-E4F2].

242. See *The Fabulous Life of: Lil' Kim* (Sharp Entertainment Nov. 12, 2003).

243. See Tracie Egan Morrissey, *4 out of 5 Real Housewives of Atlanta Are Actually Broke*, JEZEBEL (Dec. 15, 2008, 1:00 PM), <http://jezebel.com/5110249/4-out-of-5-real-housewives-of-atlanta-are-actually-broke> [https://perma.cc/7F96-97LM].

244. Marjon Carlos, *Nicki Minaj's Chanel Bag Habit Is Fit for a "Black Barbie"*, VOGUE (Dec. 8, 2016, 8:56 AM), <http://www.vogue.com/article/nicki-minaj-chanel-karl-lagerfeld-black-barbies-quilted-bags> [https://perma.cc/WS8W-5289]; Cassie Carpenter, *Mamma Mia! Billionaire Oprah Winfrey Beams with Delight after Buying 4 Bags of Clothes on Roman*



Pope<sup>246</sup> wear nothing but high-end designer clothing. And hip hop heroes, from EPMD (“Erick and Parrish Making Dollars”) in 1990<sup>247</sup> to Jay Z in 1998<sup>248</sup> to Kanye West in 2005,<sup>249</sup> release hits about “gold diggers.”

These stereotypes about Black consumers’ relationships to money and credit permeate the media and popular culture, influencing both creditors and borrowers. In particular, stereotypes of Blacks as profligate overspenders and irresponsible or deviant consumers, which date back to Reconstruction,<sup>250</sup> create obstacles to structural reform by attributing credit and financial disparities to cultural and personal differences instead of systemic, institutional discrimination. Credit card corporations stand to gain substantial profits from exploiting these racial tropes and, therefore, have a significant investment in perpetuating them. Additionally, in some cases, discrimination by credit card companies might not merely reflect profit-seeking efforts, but also the explicit and implicit biases of individual employees that arise from exposure to these stereotypes.

Specifically, powerful archetypes, such as the “welfare queen” and the “thug,” perpetuate stereotypes of Black women and men as materialistic, criminal overspenders. The welfare queen is a Black single mother who irresponsibly reproduces so that she can collect government benefits and live beyond her means.<sup>251</sup> In her case, reproduction is an act

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*Holiday With BFF Gayle King*, DAILY MAIL.COM (Oct. 16, 2014, 11:26 EDT), <http://www.dailymail.co.uk/tvshowbiz/article-2795686/billionaire-oprah-winfrey-beams-delight-buying-4-bags-clothes-roman-holiday-bff-gayle-king.html> [https://perma.cc/XS2Y-V35V].

245. See *Empire* (Imagine Television et al. Jan. 7, 2015–present); *Cookie’s Closet*, FOX, <http://www.fox.com/empire/article/cookies-closet-3> [https://perma.cc/9YYH-J9EP].

246. See *Scandal* (ShondaLand and ABC Studios Apr. 5, 2012–present); see also Janelle Grodsky, *The 15 Best Fashion Moments from Scandal Season 5*, INSTYLE (May 12, 2016, 12:45 PM), <http://www.instyle.com/reviews-coverage/tv-shows/scandal-season-5-olivia-pope-best-looks#1067206> [https://perma.cc/L5QK-2E26] (discussing Olivia Pope’s designer outfits from *Scandal* Season 5).

247. EPMD, *Gold Digger*, on BUSINESS AS USUAL, (Def Jam Recordings Dec. 18, 1990).

248. JAY Z, *Can I Get A . . .*, on DEF JAM’S RUSH HOUR SOUNDTRACK (Roc-A-Fella Records, Aug. 22, 1998).

249. KANYE WEST, *Gold Digger*, on LATE REGISTRATION (Roc-A-Fella Records Aug. 30, 2005).

250. See GEORGE RITZER, INTRODUCTION TO SOCIOLOGY 184 (2d ed. 2016); Heather Cox Richardson, *Killing Reconstruction*, JACOBIN (Aug. 19, 2015), <https://www.jacobinmag.com/2015/08/racism-reconstruction-homestead-act-black-suffrage/> [https://perma.cc/H5Q2-Q8X5].

251. See ANGE-MARIE HANCOCK, THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN 20–23 (2004); Ann Cammett, *Welfare Queens Redux: Criminalizing Black Mothers in the Age of Neoliberalism*, S. CAL. INTERDISC. L.J. 363, 367 (2016); Dawn Marie Dow, *Negotiating “The Welfare Queen” and “The Strong Black Woman.” African American Middle-Class Mothers’ Work and Family Perspectives*, 58 SOCIOLOGICAL

of fraud against the government.<sup>252</sup> Therefore, the trope goes, Black women should have restricted access to money and credit.<sup>253</sup> The reality of single Black mothers' lives differs radically from what this portrait suggests. Nonetheless, this powerful, false image influences society's vision of all Black women, contributing to a public blindness to the reality of race and poverty in the context of personal credit.

The myth of the welfare queen became popular through stories told by Ronald Reagan, during his 1976 presidential campaign, about Linda Taylor, a Chicago woman who had defrauded the government out of hundreds of thousands of dollars.<sup>254</sup> Taylor came to represent to the public all poor Black women and all Black single mothers.<sup>255</sup> This story of the welfare queen subsequently informed policymakers and government workers on issues ranging from how to police women in public housing to how to treat pregnant women who do drugs.<sup>256</sup> It also cautioned against putting cash into these women's hands under any circumstances.<sup>257</sup> Therefore, banks or other companies that extend credit to Black women essentially perform an act of charity, taking a great risk for which they should be (over) compensated.

Testing the power of the welfare queen myth, political scientist Shanto Iyengar found that, when presented with the image of a Black mother on welfare, viewers commonly attributed her need for benefits to her own personal failings instead of to public policy, historical

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PERSPECTIVES 36, 37 (2015); Camille Gear Rich, *Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse*, 25 S. CAL. INTERDISC. L.J. 257, 260; Robin A. Lehnhardt, *Black Citizenship Through Marriage?: Reflections on the Moynihan Report at Fifty*, 25 S. CAL. INTERDISC. L.J. 347, 356–57 (2016).

252. Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER, SOC. POL'Y & L. 247, 247–48 (2014).

253. *See id.* at 256–66.

254. Josh Levin, *The Welfare Queen*, SLATE (Dec. 19, 2013, 12:41 AM), [http://www.slate.com/articles/news\\_and\\_politics/history/2013/12/linda\\_taylor\\_welfare\\_queen\\_ronald\\_reagan\\_made\\_her\\_a\\_notorious\\_american\\_villain.html](http://www.slate.com/articles/news_and_politics/history/2013/12/linda_taylor_welfare_queen_ronald_reagan_made_her_a_notorious_american_villain.html) [<https://perma.cc/TT46-YX4A> (staff-uploaded archive)] (“She used 80 names, 30 addresses, 15 telephone numbers to collect food stamps, Social Security, veterans’ benefits for four nonexistent, deceased veteran husbands, as well as welfare. Her tax-free cash income alone has been running \$150,000 a year.” (quoting President Reagan’s characterization of the welfare queen at a presidential campaign rally in 1976)).

255. *See Rich, supra* note 251, at 260.

256. *See* Priscilla Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1271 (2012); Priscilla Ocen, *The New Racially Restrictive Covenants: Race, Welfare and the Policing of Black Women in Public Housing*, 59 UCLA L. REV. 1540, 1562–63 (2012).

257. *See* Gilman, *supra* note 252, at 256–66 (outlining political responses to the “welfare queen” myth).

discrimination, or any other structural factor.<sup>258</sup> Many Whites have no significant interaction with Blacks that would counter this false perception.<sup>259</sup> This racial segregation accounts for their inability to filter stereotypical images presented by popular culture, including news media, through their own lived experiences and understand these stereotypes as incorrect and harmful.

Instead, people often buy into a narrative script that equates welfare and poverty with Black single motherhood. A further study by Franklin Gilliam found that repeated exposure to this script leads to and reinforces the views: that receiving welfare is a result of personal failings; the government should cut spending on welfare; and women should take on traditional gender roles that entail financial dependency on men.<sup>260</sup> Further, even though significantly more Whites than Blacks receive welfare, the majority of images of welfare recipients in the media are of Blacks.<sup>261</sup>

Similarly, the popular image of the thug influences perceptions of Black male creditworthiness. The thug appears in countless hip hop videos,<sup>262</sup> an entire genre of movies focused on urban life,<sup>263</sup> and

258. SHANTO IYENGAR & DONALD R. KINDER, *NEWS THAT MATTERS: TELEVISION AND AMERICAN PERCEPTION* 39–42 (1987) (examining the affect Television has on perceptions on race and other cultural issues); Shanto Iyengar, *Framing Responsibility for Political Issues*, 546 AM. ACADEMY POL. & SOC. SCI. 59, 66 (1996). *See also* Franklin D. Gilliam, Jr., *The ‘Welfare Queen’ Experiment: How Viewers React to Images of African-American Mothers on Welfare*, 53 NIEMAN REP., Summer 1999, at 49, 50 (discussing Shanto Iyengar’s results from a series of laboratory experiments that tested viewers’ assumptions of women on welfare after seeing depictions of “a black welfare mother in the television news”).

259. Gilliam, *supra* note 258, at 50–51.

260. *Id.* at 49–52; *see also* FRANKLIN D. GILLIAM, JR., *FRAMEWORKS INST., THE ARCHITECTURE OF A NEW RACIAL DISCOURSE* 11–13 (2006), [http://www.frameworksinstitute.org/assets/files/PDF/gilliam\\_memo1106.pdf](http://www.frameworksinstitute.org/assets/files/PDF/gilliam_memo1106.pdf) [<https://perma.cc/KS8Q-B54B>].

261. *See* RACE AND POLITICS OF WELFARE REFORM 111 (Sanford F. Schram, Joe Soss & Richard C. Fording, eds., 2003) (tracing the racialization of poverty and noting that from 1950 to 1992 the percentage of Blacks depicted in newsmagazine photos of the poor increased from twenty percent to more than sixty percent and peaked at almost seventy-five percent in 1972); Arthur Delaney & Alissa Scheller, *Who Gets Food Stamps? White People, Mostly*, HUFFINGTON POST (Feb. 28, 2015, 7:30 AM), [http://www.huffingtonpost.com/2015/02/28/food-stamp-demographics\\_n\\_6771938.html](http://www.huffingtonpost.com/2015/02/28/food-stamp-demographics_n_6771938.html) [<https://perma.cc/EQD4-SZT3>] (noting that 40.2% of Supplemental Nutrition Assistance Program (“SNAP”) recipients in 2013 were White, while 25.7% of SNAP recipients in 2013 were Black).

262. *See, e.g.*, 50 Cent, *Many Men (Wish Death)*, YOUTUBE (Sept. 14, 2010), <https://www.youtube.com/watch?v=rnGZFzTAuAM>; Akon, *Locked Up ft. Styles P*, YOUTUBE (June 16, 2009), <https://www.youtube.com/watch?v=14PgWitIbSk>; C-Murder, *Y’all Heard of Me*, YOUTUBE (July 7, 2007), <https://www.youtube.com/watch?v=VbMuPvaxwn4>; Boosie Badazz, *Problem*, YOUTUBE (Feb. 9, 2016), [https://www.youtube.com/watch?v=\\_cPOv9ZE7Oo](https://www.youtube.com/watch?v=_cPOv9ZE7Oo). For a general overview of masculinity in hip-hop and the stereotypes it perpetuates, *see generally* Petra Filipová, *Images of African-American Masculinity in Hip Hop Music* (2011)

unbalanced media portrayals of crime.<sup>264</sup> Racism in the criminal justice system and mass incarceration<sup>265</sup> further reinforce this historical, “cartoonish, one-dimensional image[] of black men as sex-crazed, materialistic criminals.”<sup>266</sup> Elements of this stereotype include ostentatious dress, such as oversized jewelry and designer sneakers, and a taste for the finer things in life.<sup>267</sup> The thug’s desire to live the high life at all costs contributes to perceptions of Black men as individuals consistently purchasing beyond their means who are therefore unworthy of credit.

Both the welfare queen and the thug are modern incarnations of stereotypes with deep roots. During slavery, images in popular culture,

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(unpublished Master thesis, University of Pardubice), [https://dk.upce.cz/bitstream/handle/10195/40478/DP\\_poslat.pdf?sequence=3&isAllowed=y](https://dk.upce.cz/bitstream/handle/10195/40478/DP_poslat.pdf?sequence=3&isAllowed=y) [<https://perma.cc/3TTM-ZD4Q>].

263. See, e.g., BARBERSHOP (Metro-Goldwyn-Mayer 2002); BARBERSHOP 2: BACK IN BUSINESS (Metro-Goldwyn-Mayer 2004); BOYZ N THE HOOD (Columbia Pictures Corp. 1991); *Empire*, *supra* note 245; FRIDAY (New Line Cinema 1995); FRIDAY AFTER NEXT (Avery Pix, Cube Vision & New Line Cinema 2002); HUSTLE & FLOW (Crunk Pictures et al. 2005); MENACE II SOCIETY (New Line Cinema 1993); NEW JACK CITY (Warner Bros. 1991); NEXT FRIDAY (New Line Cinema & Cube Vision 2000).

264. See, e.g., Travis L. Dixon, *Psychological Reactions to Crime News Portrayals of Black Criminals: Understanding the Moderating Roles of Prior News Viewing and Stereotype Endorsement*, 73 COMM. MONOGRAPHS 162, 162 (2006); Travis L. Dixon & Daniel Linz, *Race and the Misrepresentation of Victimization on Local Television News*, 27 COMM. RES. 547, 547 (2000); Travis L. Dixon & Keith B. Maddox, *Skin Tone, Crime News, and Social Reality Judgments: Priming the Stereotype of the Dark and Dangerous Black Criminal*, 35 J. APPLIED SOC. PSYCHOL. 1555, 1555 (2005); Ryan J. Hurley et al., *Viewer Ethnicity Matters: Black Crime in TV News and Its Impact on Decisions Regarding Public Policy*, 71 J. SOC. ISSUES 155, 155 (2015).

265. See, e.g., Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 400 (2006); Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants*, 71 L. & CONTEMP. PROBS. no. 4, Autumn 2008, at 93, 102–03; Gary Ford, *The New Jim Crow: Male and Female, South and North, from Cradle to Grave, Perception and Reality: Racial Disparity and Bias in America’s Criminal Justice System*, 11 RUTGERS RACE & L. REV. 324, 330 (2010).

266. Lauren Carter, *The Black Thug Stereotype*, RAP REHAB (Jan. 30, 2014), <http://raprehab.com/richard-sherman-rap-music-and-the-black-thug-stereotype/> [<https://perma.cc/4869-X5W4>]; see also Commentary, *All Things Considered: The Racially Charged Meaning Behind the Word ‘Thug’*, NPR (Apr. 30, 2015, 5:25 PM), <http://www.npr.org/2015/04/30/403362626/the-racially-charged-meaning-behind-the-word-thug> [<https://perma.cc/VC36-QZPU>] (discussing the use of the word “thug” to describe Baltimore rioters).

267. See BEN BURGESS, JR., *Stereotypes*, in TIMES HAVE CHANGED AND LIFE IS STRANGE: COLLECTIVE WORKS OF URBAN POETRY AND STORY-TELLING 30, 30 (2008) (describing “new sneakers and baggy clothes” as stereotypical “characteristics of a thug”); Annabel Fenwick Elliott, *Photographer Creates Powerful Portraits of Nurses, Pastors and CEOs Dressed as Terrorists, Thugs and Vagrants to Challenge Social Stereotypes*, DAILY MAIL.COM (Oct. 2, 2014, 9:13 EDT), <http://www.dailymail.co.uk/femail/article-2777122/Photographer-creates-powerful-portraits-nurses-pastors-CEOs-dressed-terrorists-thugs-vagrants-challenge-social-stereotypes.html> [<https://perma.cc/6TYJ-T3E7>] (depicting a man in stereotypical “thug” clothing, which includes several large pieces of jewelry).

such as the Sambo and the Savage, commonly portrayed Blacks as less than human.<sup>268</sup> In the Reconstruction era, Whites had strong emotional reactions to seeing recently freed Blacks spend money and engage in previously forbidden activities such as going out to theatres and restaurants.<sup>269</sup> From that time, society has framed Black consumerism, particularly when it is ostentatious, as deviant and morally corrupt.<sup>270</sup>

Regina Austin eloquently summarizes the common understanding of the relationship between Blacks and money as follows: “It is assumed that blacks do not earn their money honestly, work for it diligently, or spend it wisely. When blacks have money, they squander it and cannot save it.”<sup>271</sup> Austin further explains that, through this lens, the companies or individuals who seek to exploit these assumed propensities to remain ignorant of financial best practices and overspend are blameless.<sup>272</sup> The onus is on Blacks to wise up or suffer the consequences: caveat emptor.<sup>273</sup>

In contrast, some social critics argue that stereotypes about Black consumerism are not false; instead, they assert that these portrayals accurately represent overspending as a form of resistance exercised by Black consumers, an expression of freedom.<sup>274</sup> From this perspective, “consumption is about pleasure, performance, and participation in prosperity.”<sup>275</sup> It is also “the site of a struggle to exploit the transformative potential of commodities” by using them “in ways that reveal the repressed or negated contradictions that underlie their production and distribution.”<sup>276</sup>

An example of this type of radical conspicuous consumerism exists in the hip hop fashions popularized in the 1990s. Black designers took expensive designer labels and enlarged them or created patterns of these logos to cover clothing and accessories in order to exaggerate the status

268. ETHNIC NOTIONS, *supra* note 229 (explaining that by reducing Blacks to dumb, primitive caricatures, these stereotypes justified their enslavement).

269. See Freeman, *supra* note 37, at 185 (citing Hannah Rosen, “Not That Sort of Women”: Race, Gender, and Sexual Violence During the Memphis Riot of 1866, in SEX, LOVE, RACE: CROSSING BOUNDARIES IN NORTH AMERICAN HISTORY 267, 269–71 (Martha Hodes ed., 1999)).

270. Nathaniel Mills, *Playing the Dozens and Consuming the Cadillac: Ralph Ellison and Civil Rights Politics*, 61 TWENTIETH-CENTURY LITERATURE 147, 160 (2015).

271. Austin, *supra* note 203, at 151.

272. *Id.*

273. See *id.* at 154–56.

274. See, e.g., Austin, *supra* note 203, at 154, 160; Roopali Mukherjee, *The Ghetto Fabulous Aesthetic in Contemporary Black Culture: Class and Consumption in the Barbershop Films*, 20 CULTURAL STUD. 599, 612 (2006).

275. Austin, *supra* note 203, at 160.

276. *Id.*

achieved by the wearer through designer clothing.<sup>277</sup> This style became so popular that it entered the mainstream and allowed certain Black hip hop artists and designers access to previously untapped fashion markets.<sup>278</sup> Roopali Mukherjee argues that this style—often called “bling” or “ghetto fabulous”—disrupts social expectations because it “points to African Americans indulging in conspicuous consumption as their ticket to the American Dream, their way into the American polity.”<sup>279</sup> In this way, Black consumption can be truly transformative because it signals a shift from Blackness-as-commodity to Black-as-consumer.<sup>280</sup>

Conversely, others contest popular stereotypes by viewing Black consumption as a symptom of alienation, a way to compensate for lives filled with micro-aggressions<sup>281</sup> and ever-present threats of violence, discrimination, exploitation, and humiliation.<sup>282</sup> This type of consumption, however, can ultimately cause more harm than good because it buys into a capitalist framework that equates consumption with status and material acquisitions with the good life.<sup>283</sup> In reality, dollars can never buy acceptance and equality. Advocates for racial justice, therefore, lament any attempts by Blacks to consume solely in order to accomplish or signal upward social mobility, particularly to the extent that this consumption replaces a struggle against White supremacy.<sup>284</sup>

A widely accepted equation of Blacks with materialistic overspending helps to explain the lack of effective legal recourse for discriminatory treatment against Black consumers under the Equal Credit Opportunity Act.<sup>285</sup> Additionally, due to the internalization of common, powerful stereotypes about Black creditworthiness, many

277. See, e.g., FRESH DRESSED (Mass Appeal 2015); see also Sacha Jenkins, *The Spirit of Being, Looking ‘Fresh,’* CNN (Sept. 3, 2015, 3:22 PM), <http://www.cnn.com/2015/08/28/opinions/fresh-dressed-sacha-jenkins-opinion/> [<https://perma.cc/EMS7-6VUC>] (director of *Freshly Dressed*) (ascribing clothing the role of radiating one’s identity and status).

278. See, e.g., FRESH DRESSED, *supra* note 277; Booth Moore, *‘Fresh Dressed’ Documentary Explores Hip-hop Fashion Through the Years*, L.A. TIMES (June 25, 2015, 5:00 AM), <http://www.latimes.com/entertainment/movies/la-et-mn-fresh-dressed-20150625-story.html> [<https://perma.cc/5XJH-S5V4>].

279. Mukherjee, *supra* note 274, at 612.

280. *Id.*

281. See, e.g., CLAUDIA RANKINE, *CITIZEN: AN AMERICAN LYRIC* 23–33 (2014).

282. Austin, *supra* note 203, at 156.

283. *Id.* at 164.

284. See, e.g., *id.* at 157–60.

285. See *infra* Part II; see also 15 U.S.C. § 1691(a) (2012); Austin, *supra* note 203, at 151–53. Although Austin discusses this phenomenon in the context of racial profiling shoppers, it is equally applicable to discrimination by the credit card industry. See Austin, *supra* note 203, at 151–53.

Black consumers may not view their treatment by credit card companies as discriminatory, but instead mistakenly perceive it as merely reflective of their weak financial standing.

Further, despite the overwhelming evidence that debt disparities are a product of laws and policies,<sup>286</sup> very few people view credit card debt as a structural, rather than personal, problem.<sup>287</sup> Critiques of personal financial management, whether they are benign (originating from members of the Black community seeking to uplift themselves and others)<sup>288</sup> or hostile (expressed by White voters and politicians as justification for withholding certain benefits),<sup>289</sup> tend to ascribe debt to personal failings. Reflecting this popular paradigm, a proliferation of materials promises to help individuals, and Blacks in particular, improve their financial standing.<sup>290</sup> This literature, however, ignores the structural realities that place many Blacks in a precarious financial position, making credit simultaneously more necessary and more difficult to obtain.

286. See *supra* Section I.A.

287. DIANA KENDALL, *SOCIOLOGY IN OUR TIMES* 4 (8th ed. 2011) (stating that although most people view the world in individualistic rather than structural frameworks, credit card debt and consumption habits are more appropriately viewed as rooted in structural conditions rather than characteristics of the individual).

288. See, e.g., GLINDA BRIDGFORTH, *GIRL, GET YOUR CREDIT STRAIGHT! A SISTER'S GUIDE TO DITCHING YOUR DEBT, MENDING YOUR CREDIT, AND BUILDING A STRONG FINANCIAL FUTURE* 2 (2007); PATRICE C. WASHINGTON, *REAL MONEY ANSWERS FOR EVERY WOMAN: HOW TO WIN THE MONEY GAME WITH OR WITHOUT A MAN* 1–2 (2013); Linton Hinds, Jr., *13 Reasons Why African Americans Are Broke and Most Likely Will Remain Broke, Unless . . .*, THYBLACKMAN.COM (Sept. 25, 2015), <http://thyblackman.com/2015/09/25/13-reasons-why-african-americans-are-broke-and-most-likely-will-remain-broke-unless/> [https://perma.cc/4LQ8-4HZS]; Lynnette Khalfani-Cox, Opinion, *Who Has a 'Moral Obligation' to Pay Off Our Debt?*, GRIO (June 29, 2011, 7:36 AM), <http://thegrio.com/2011/06/29/who-has-a-moral-obligation-to-repay-their-debts/> [https://perma.cc/8WYC-2DRT]; John H. McWhorter, *What's Holding Blacks Back?*, CITY J., Winter 2001, at 24, 26–31, [https://www.heartland.org/\\_template-assets/documents/publications/7928.pdf](https://www.heartland.org/_template-assets/documents/publications/7928.pdf) [https://perma.cc/6MNL-M968].

289. Brian Montopoli, *S.C. Lt. Gov. Andre Bauer Compares Helping Poor to Feeding Stray Animals*, CBS NEWS (Jan. 25, 2010, 11:52 AM), <http://www.cbsnews.com/news/sc-lt-gov-andre-bauer-compares-helping-poor-to-feeding-stray-animals/> [https://perma.cc/4RCV-V8TD].

290. See, e.g., *Best Money Sites for Young People*, BLACK ENTERPRISE (July 14, 2010), <http://www.blackenterprise.com/be-next/best-money-sites-for-young-people/> [https://perma.cc/5Q4F-LZD2]; Sheiresa Ngo, *4 Ways to Raise a Bad Credit Score*, BLACK ENTERPRISE (Feb. 12, 2013), <http://www.blackenterprise.com/b-e-exclusives/4-ways-raise-bad-credit-score/> [https://perma.cc/9Q5W-T2MS]; *Required Reading: 20 Books to Boost Your Financial Literacy*, BLACK ENTERPRISE (Apr. 22, 2010), <http://www.blackenterprise.com/lifestyle/arts-culture/required-reading-20-books-to-boost-your-financial-literacy/> [https://perma.cc/U7Z4-VUAP].

The following Part explains why the current legal regime designed to protect consumers from racial disparities and discrimination fails to do so.

## II. HOW CONSUMER LAW FAILS TO PROTECT CONSUMERS FROM RACIAL DISCRIMINATION

Consumer law is ill-equipped to police or redress inequitable treatment. Historically, consumer law has offered very limited protection to consumers.<sup>291</sup> Its restricted nature, in large part, reflects its position in the consumer capitalist society. Consumer law seeks primarily to encourage, not inhibit, consumption. Therefore, despite its somewhat deceptive name, it tends to favor corporate interests.

Credit card companies are profit-seeking corporations that exploit consumer weaknesses in order to maximize their earnings, benefit their shareholders, and increase their power.<sup>292</sup> Moreover, the consolidation of the credit card industry over time into an oligopoly dominated by two major players, Visa and Mastercard, with only a handful of other contenders, has left consumers with very few options when it comes to credit card terms and conditions.<sup>293</sup> Further, the greater the need individuals have for credit, the more susceptible they become to discriminatory and predatory practices. The founder of Providian Financial Services, Andrew Kahr, demonstrated how knowledge of this vulnerability permeates credit card companies' approach to poor consumers in a memo stating, "Is any bit of food too small to grab when

291. See Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309, 1311 (2015); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 70 (2008); Lauren E. Willis, *Against Financial Literacy Education*, 94 IOWA L. REV. 197, 264 (2008).

292. See *Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) ("A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders." (citing *Unocal v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985))); Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 155 (2012) ("[T]he corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders."); Noah Smith, *Credit-Card Companies Know How Little You Know*, BLOOMBERGVIEW (June 30, 2016, 8:00 AM), <https://www.bloomberg.com/view/articles/2016-06-30/credit-card-companies-know-how-little-you-know> [<https://perma.cc/L5PN-Y2CV>] ("Credit-card companies need people to spend more than they can afford, but not so much that they default on their payments. So they could benefit from targeting individuals who are more likely to have cognitive failings. This is the dark side of behavioral finance.").

293. Lawrence M. Ausubel, *The Failure of Competition in the Credit Card Market*, 81 AM. ECON. REV. 50, 51 (1991); Freeman, *supra* note 37, at 172–75; Nancy Folbre, *The Power of Plastic*, N.Y. TIMES (Nov. 12, 2012, 6:00 AM), <https://economix.blogs.nytimes.com/2012/11/12/the-power-of-plastic/> [<https://perma.cc/N5VL-NWT2>].



you're starving and when there is nothing else in sight? The trick is charging a lot, repeatedly, for small doses of incremental credit."<sup>294</sup>

Confronted with this merciless business philosophy and the immense power held by the credit card industry, it is inevitable that consumers suffer at the hands of their credit providers. This Part describes the laws currently in place to respond to this eventuality. The first, the ECOA, allows plaintiffs to bring suits against credit providers for unlawful discrimination.<sup>295</sup> Unfortunately, however, these suits rarely resolve in plaintiff's favor, often because they require them to prove intentional discrimination, a nearly impossible task.<sup>296</sup> The second, the CRA,<sup>297</sup> takes more of a preventive approach to the problem. It requires lending institutions to serve the needs of the communities in which they are located.<sup>298</sup> Banks rarely follow this admonition, however, due to erratic enforcement and their ability to flee low-income communities and relocate to wealthier neighborhoods or serve online constituents.<sup>299</sup> Fundamental weaknesses in both laws thus render their combined effect negligible in terms of preventing or penalizing racial discrimination by credit card companies.

#### A. *The Equal Credit Opportunity Act*

The enactment of the ECOA in 1974 reflected the efforts of a coalition of feminist organizations that decried widespread credit discrimination against women.<sup>300</sup> The five forms of credit discrimination

294. GARCÍA ET AL., *supra* note 222, at 48 (quoting Sam Zuckerman, *How Providian Misled Card Holders*, SFGATE (May 5, 2002, 4:00 AM), <http://www.sfgate.com/news/article/How-Providian-misled-card-holders-2840684.php> [<https://perma.cc/FH9X-AHBA>]).

295. Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (1974) (codified at 15 U.S.C. §§ 1691–1691f (2012)).

296. See, e.g., *Wise v. Vilsack*, 496 Fed.Appx. 283, 285–86 (4th Cir. 2012) (per curiam); *McDowell v. Huntington Fed. Sav. & Loan Ass'n*, 826 F.2d 1060 (4th Cir. 1987) (unpublished table decision) (per curiam), 1987 WL 38379, at \*1; *Willis v. Countrywide Home Loans Servicing, L.P.*, No. CIVA CCB-09-1455, 2009 WL 5206475, at \*7 (D. Md. Dec. 23, 2009); *Reece v. Countrywide Home Loans Inc.*, No. 7:06-CV-181-0, 2008 WL 4559809, at \*3 (N.D. Tex. Oct. 10, 2008).

297. Community Reinvestment Act, Pub. L. No. 95-128, 91 Stat. 111 (1977) (codified as amended at 12 U.S.C. §§ 2901–2908 (2012)).

298. 12 U.S.C. § 2901(b) (2012).

299. See Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 528–29 (2005).

300. *Fair Credit Billing: Hearing on S. 65 Before the Subcomm. On Fin. Insts. of the Comm. On Banking, Hous., & Urban Affairs*, 92d Cong. 59–64 (1971) (statements of Agnes D. Jeffrey, Phyllis Thompson, and Catharine Pszwaro) (collecting statements of women who experienced difficulty with credit card companies); FLORA DAVIS, *MOVING THE MOUNTAIN: THE WOMEN'S MOVEMENT IN AMERICA SINCE 1960*, at 147–52 (1st ed. 1991); see also LIZABETH COHEN, *A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* 368–70 (2003) (describing the greater access men had over women for

against women that catalyzed the Act were that (1) single women had more trouble obtaining credit than single men; (2) creditors generally required a woman to reapply for credit upon marriage, usually in her husband's name, while similar reapplication was not necessary for newlywed men; (3) creditors were unwilling to extend credit to a married woman in her own name; (4) creditors were generally unwilling to count the wife's income when a married couple applied for credit, even if she provided the sole support for the household; and (5) divorced or widowed women had trouble reestablishing credit.<sup>301</sup> Although not mentioned in the Act, perhaps the most egregious form of discrimination was some mortgage lenders' requirement of proof of a wife's birth control or sterilization before guaranteeing a married couple a loan.<sup>302</sup>

After the National Commission on Consumer Finance heard testimony on these issues in 1972, the National Organization of Women's ("NOW") Task Force on Consumer Credit received an outpouring of similar stories in support of its lobbying efforts.<sup>303</sup> At the same time, the American Civil Liberties Union, Parents Without Partners, and the Women's Equity Action League began to investigate credit discrimination complaints.<sup>304</sup> After Ralph Nader's organization donated \$10,000 to NOW for the cause, economist Jane Roberts Chapman and attorney Margaret Gates formed the Center for Women Policy Studies, and the Ford Foundation further enabled their research with a \$40,000 grant.<sup>305</sup>

The resulting efforts proved successful, culminating in Congress enacting the ECOA in 1974.<sup>306</sup> Its passage reflected the growing importance of credit and concerns about the possible effects of discriminatory and arbitrary standards for determining creditworthiness

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home mortgages and credit); KIMBERLY A. REED, *MANAGING OUR MARGINS: WOMEN ENTREPRENEURS IN THE SUBURBS* 129–30 (2013).

301. See NAT'L COMM'N ON CONSUMER FIN., *CONSUMER CREDIT IN THE UNITED STATES* 152–53 (1972); see also Gerald R. Ford, Statement on Signing Legislation Increasing Federal Deposit Insurance (Oct. 29, 1974), <http://www.presidency.ucsb.edu/ws/?pid=4522> [<https://perma.cc/RD6L-QUWH>] (noting that "[w]omen are still too often treated as second-class citizens in the credit world. . . [and] should have access to credit on the same terms as men" but remaining silent as to issues of racial or national origin discrimination).

302. DAVIS, *supra* note 300, at 148.

303. *Id.*

304. *Id.*

305. *Id.*

306. Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. §§ 1691–1691f (2012)).

on individuals' ability to exercise constitutionally guaranteed rights.<sup>307</sup> The first version of the ECOA focused almost entirely on the prohibition of discrimination on the basis of sex and marital status,<sup>308</sup> despite some testimony on racially discriminatory credit lending practices,<sup>309</sup> including testimony on the effect of intersectional discrimination on women of color.<sup>310</sup> Two years later, Congress amended the ECOA to add protections against unfair credit lending practices on the bases of age, religion, race, color, and national origin.<sup>311</sup>

The ECOA is the primary source of consumer protection against racial discrimination by credit card companies. Nonetheless, despite documentation of persistent and significant discrimination in this industry since the law's enactment in 1974,<sup>312</sup> to date there have been only three major settlements in favor of plaintiffs alleging discrimination by credit card companies on the basis of race or national origin.<sup>313</sup> This

307. See NAT'L COMM'N ON CONSUMER FIN., *supra* note 301, at 1–4; Linda S. Hume, *A Suggested Analysis for Regulation of Equal Credit Opportunity*, 52 WASH. L. REV. 335, 335–38 (1977); see also *To Amend the Equal Credit Opportunity Act of 1974: Hearings on H.R. 3386 Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking, Currency & Hous.*, 94th Cong. 98 (1975) (statement of Homer L. Stewart, Jr., Senior Vice President, Republic Bank of Dallas); *Credit Discrimination: Hearings on H.R. 14856 and H.R. 14908 Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking & Currency*, 93rd Cong. 1 (1974) (Hon. Leonor K. Sullivan, Chairman, Subcomm. on Consumer Affairs of the H. Comm. on Banking & Currency) [hereinafter *Credit Discrimination Hearings*].

308. See Equal Credit Opportunity Act, § 701, 88 Stat. at 1521–22.

309. See, e.g., *Credit Discrimination Hearings*, *supra* note 307, at 41 (statement of John H. Powell, Jr., Chairman, Equal Emp't Opportunity Comm'n) (“[I]t is very likely that the inability to obtain credit, or if obtained, the discriminatory terms and conditions which accompany its extension to certain groups in our society, are directly related to discrimination in employment.”); *id.* at 131 (statement of Hon. Arthur S. Flemming, Chairman, U.S. Comm'n on Civil Rights, and Comm'r, Admin. on Aging, Dep't of Health, Educ. & Welfare).

310. *Id.* at 131–37 (statement of Hon. Arthur S. Flemming, Chairman, U.S. Comm'n on Civil Rights, and Comm'r, Admin. on Aging, Dep't of Health, Educ. & Welfare).

311. Act of Mar. 23, 1976, Pub. L. No. 94-239, § 701, 90 Stat. 251, 251 (codified as amended at 15 U.S.C. § 1691(a) (2012)).

312. Cohen-Cole, *supra* note 155, at 702; Lin, *supra* note 152, at 45–50.

313. Consent Order at 10–13, *United States v. Synchrony Bank*, No. 2:14-CV-00454 (D. Utah June 27, 2014), ECF No. 16; Settlement Agreement and Order at 10–12, *United States v. Fidelity Fed. Bank*, No. CV-02-3906 (E.D.N.Y. July 25, 2002), <https://www.clearinghouse.net/chDocs/public/FH-NY-0021-0002.pdf> [<https://perma.cc/WVJ7-5ZXL>]; Settlement Agreement at 2, *United States v. Assocs. Nat'l Bank*, 1:99-cv-00196-SLR (D. Del. 1999), <https://www.clearinghouse.net/chDocs/public/FH-DE-0002-0003.pdf> [<https://perma.cc/3WZQ-NJ7W>]; VANITA GUPTA, THE ATTORNEY GENERAL'S 2014 ANNUAL REPORT TO CONGRESS PURSUANT TO THE EQUAL CREDIT OPPORTUNITY AMENDMENTS OF 1976, at 3–4 (2015), <https://www.justice.gov/sites/default/files/crt/legacy/2015/04/13/ecoareport2014.pdf> [<https://perma.cc/6HKQ-4LSF>]; R. Alexander Acosta, *The Attorney General's 2002 Annual Report to Congress Pursuant to the Equal Credit Opportunity Amendments of 1976*, U.S. DEP'T JUST. (Sept. 2003), <http://www.justice.gov/crt/about/hce/documents/ecoa2002.php> [<https://perma.cc/22PV-Q7AM>] (discussing Fidelity's \$1.6 million settlement with plaintiffs concerning allegations of harassment based on customers' “Hispanic national origin”); William R.

fact suggests that the substance or procedure of the law may be tipped in defendants' favor, and analysis of how these cases often proceed in court bear out this suspicion. Specifically, in this era of post-racialism, overt racism is socially unacceptable, such that credit providers rarely, if ever, make blatantly racist statements. Consequently, plaintiffs consistently lack "smoking gun" evidence of discrimination. Nonetheless, the Supreme Court has not decided whether plaintiffs may rely on statistics to prove discrimination under a disparate impact analysis.<sup>314</sup> This uncertainty leads to confusion and inconsistency among the lower courts.<sup>315</sup>

Additionally, because the law does not require credit card companies to collect and report data on the racial breakdown of their customers and applicants, plaintiffs rarely have access to the statistics they need to prove discrimination under a "disparate impact" theory.<sup>316</sup> Therefore, absent or awaiting significant legal reform to the adjudication of discrimination cases, the ECOA is of little use to borrowers denied access to necessary or fair credit due to their race.

The ECOA provides that it is "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of race."<sup>317</sup> The law defines an "adverse

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Yeomans, *The Attorney General's 2000 Annual Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976*, U.S. DEP'T JUST. (Apr. 2001), <https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-162> [<https://perma.cc/2933-83XG>] (detailing plaintiff's claims of discrimination on the basis of national origin by Associates National Bank and the subsequent \$1.5 million settlement).

314. Leonard N. Chanin, *Credit Cards May be Vulnerable to "Disparate Impact" Claims*, AM. BANKER: BANKTHINK (Nov. 12, 2013, 10:00 AM), <https://www.americanbanker.com/opinion/credit-cards-may-be-vulnerable-to-disparate-impact-claims> [<https://perma.cc/6PTC-ETPR>(staff-uploaded archive)] (analyzing the issue in light of the decision that disparate impact applies in Fair Housing Act claims in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*, 135 S. Ct. 2507 (2015), and noting that key language in the FHA that the Court interpreted to point to Congressional intention to allow disparate impact claims is missing from the ECOA).

315. See *Golden v. City of Columbus*, 404 F.3d 950, 963 n.11 (6th Cir. 2005) (expressing some uncertainty as to whether disparate impact claims are cognizable under the ECOA but ultimately assuming that they are); *Ramirez v. GerrnPoint Mortg. Funding, Inc.*, 633 F. Supp. 2d 922, 927 (N.D. Cal. 2008) (allowing disparate impact claim under the ECOA to proceed); see also Francesca Lina Procaccini, *Stemming The Rising Risk of Credit Inequality: The Fair and Faithful Interpretation of the Equal Credit Opportunity Act's Disparate Impact Prohibition*, 9 HARV. L. & POL'Y REV. S43, S70 (2015) (outlining arguments that courts are frequently presented as to why disparate impact claims are not cognizable under the ECOA).

316. See, e.g., *Golden*, 404 F.3d at 963.

317. 15 U.S.C. § 1691(a) (2012). The ECOA, as enacted in 1974, prohibited financial institutions from discriminating on the grounds of marital status or gender. Equal Credit Opportunity Act, Pub. L. No. 93-495, § 502, 88 Stat. 1521, 1521 (1974) (codified as amended at 15 U.S.C. § 1691 (2012)). Congress added race, color, religion, national origin, age, the receipt of public assistance income, and the good faith exercise of any right under the Consumer

action” as “a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested.”<sup>318</sup> As part of an initial challenge to an adverse action, an applicant is entitled to a statement of specific reasons for the action by the creditor.<sup>319</sup>

The regulations associated with the statute, promulgated by the Federal Reserve, also state that a creditor may not discourage prospective credit applicants from applying based on a protected ground.<sup>320</sup> A creditor may not inquire about a person’s race or national origin in relation to a credit transaction (including persons other than the applicant), but may inquire into an applicant’s permanent residence or immigration status.<sup>321</sup> As an exception to this rule, the regulations allow for the existence of a “special purpose credit program” where a creditor may extend credit to a class of persons who otherwise likely would not receive such credit or would receive it on less favorable terms.<sup>322</sup> For the purposes of establishing eligibility for one of these programs, creditors may inquire into otherwise prohibited areas, such as race and national origin.<sup>323</sup>

If an individual suspects that a credit issuer has violated their rights under the ECOA, they may complain to the creditor, ask the state attorney general’s office for advice, sue the creditor in federal court individually or as part of a class action, or report violations to the appropriate government agency.<sup>324</sup> In the event of a suit, the ECOA allows for actual damages, punitive damages, equitable relief, and attorneys’ fees.<sup>325</sup> Some district courts analyze ECOA cases using the same standards as cases alleging employment discrimination under Title

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Credit Protection Act as prohibited grounds for discrimination in 1976 amendments. Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, § 701(a), 90 Stat. 251, 251 (codified as amended at 15 U.S.C. § 1691 (2012)). Amendments in 1988 extended protection to small business credit applicants in addition to consumers. Equal Credit Opportunity Act Amendments of 1988, Pub. L. No. 100-533, § 301, 102 Stat. 2689, 2692 (codified as amended at 15 U.S.C. § 1691b(a) (2012)); DEE PRIDGEN & RICHARD M. ALDERMAN, 1 CONSUMER CREDIT AND THE LAW § 3:1, at 182–83 (2010–2011 ed. 2010).

318. 15 U.S.C. § 1691(d)(6).

319. *Id.* § 1691(d)(2)–(3).

320. 12 C.F.R. § 202.5(b) (2016).

321. *Id.* § 202.5(b), (e).

322. *Id.* § 202.8(a)(3).

323. *Id.* § 202.8(b)(2).

324. FED. TRADE COMM’N, YOUR EQUAL CREDIT OPPORTUNITY RIGHTS 8–9 (2013), <https://www.consumer.ftc.gov/articles/pdf-0071-equal-credit-opportunity.pdf#page=1&zoom=auto,-136,19> [<https://perma.cc/MWF4-GFK6>].

325. 15 U.S.C. §§ 1691e(a)–(d), 1691(d) (2012).

VII of the Civil Rights Act.<sup>326</sup> Under Title VII jurisprudence, plaintiffs who lack smoking gun evidence of the prohibited acts must follow the analysis established in *McDonnell Douglas Corp. v. Green*.<sup>327</sup>

The *McDonnell Douglas* test first requires the plaintiff to establish a prima facie case of discrimination.<sup>328</sup> This is a low hurdle to clear because a plaintiff can establish a prima facie case by demonstrating four relatively simple facts that led to the instigation of a suit.<sup>329</sup> First, the plaintiff must show that they are a member of the protected class—in this case, a racial minority.<sup>330</sup> Second, they must demonstrate that they were qualified to receive a benefit from the creditor, such as a credit card or a higher credit limit.<sup>331</sup> Third, they must prove that the creditor refused to grant them this benefit and, finally, they must demonstrate a “causal nexus between the harm suffered and the plaintiff’s membership in a protected class[.]”<sup>332</sup> During this initial phase, some courts allow plaintiffs to proceed under a disparate impact theory, which allows the use of statistics to establish a prima facie case.<sup>333</sup>

326. See, e.g., *Anderson v. Wachovia Mortg. Corp.*, 621 F.3d 261, 268 (3d Cir. 2010) (holding that “*McDonnell Douglas* tests should be applied to lending discrimination claims brought under § 1981”); *Hood v. Midwest Sav. Bank*, 95 Fed. App’x 768, 781 (6th Cir. 2004); *Moore v. U.S. Dep’t of Agric. ex rel. Farmer’s Home Admin.*, 55 F.3d 991, 993 n.5 (5th Cir. 1995) (noting that although there is little ECOA case law to guide courts, the similarities between cases involving the refusal to extend credit and those involving refusals to hire allowed the lower court to borrow from the Title VII framework in its ECOA analysis); *Frederick v. Capital One Bank (USA), N.A.*, No. 14-CV-5460 AJN, 2015 WL 5521769, at \*3 (S.D.N.Y. Sept. 17, 2015), *opinion amended on reconsideration sub nom. Frederick v. Capital One (USA) N.A.*, No. 14-CV-5460 (AJN), 2015 WL 8484560 (S.D.N.Y. Dec. 8, 2015); *Germain v. M & T Bank Corp.*, 111 F.Supp.3d 506, 525–26 (S.D.N.Y. 2015); *Boardley v. Household Fin. Corp. III*, 39 F.Supp.3d 689, 709–10 (D. Md. 2014); *Lugo-Berrios v. Citibank, N.A.*, No. CIV. 11-1224 JAF, 2013 WL 1314752, at \*2 (D.P.R. Mar. 26, 2013); *But see Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 714–15 (7th Cir. 1998) (holding that the *McDonnell Douglas* test does not apply in claims of credit discrimination).

327. 411 U.S. 792, 802 (1973).

328. *Id.*

329. *Id.*

330. *McDonnell*, 411 U.S. at 802; *Anderson*, 621 F.3d at 275.

331. *McDonnell*, 411 U.S. at 802; *Anderson*, 621 F.3d at 275.

332. *Anderson*, 621 F.3d at 275; see *McDonnell*, 411 U.S. at 802.

333. See, e.g., *Golden v. City of Columbus*, 404 F.3d 950, 963 (6th Cir. 2005); *Taylor v. Accredited Home Lenders, Inc.*, 580 F. Supp. 2d 1062, 1067 (S.D. Cal. 2008) (collecting cases). Not all courts allow use of this theory, however, due to doubts about the reliability of the data presented. See, e.g., *Bhandari v. First Nat. Bank of Commerce*, 808 F.2d 1082, 1101 (5th Cir.); *O’Dowd v. S. Cent. Bell*, 729 F.2d 347, 350 (5th Cir. 1984); *Umney v. Cmty. Fin. Members Fed. Credit Union*, No. CIV.A. 14-13328, 2015 WL 4530264, at \*2 (E.D. Mich. July 28, 2015); *Germain v. M & T Bank Corp.*, 111 F.Supp.3d 506, 525–26 (S.D.N.Y. 2015); *Chau v. Ball*, No. 5:13-CV-233-JMH, 2014 WL 1338683, at \*2 (E.D. Ky. Mar. 28, 2014); Craig E. Marcus, Note, *Beyond the Boundaries of the Community Reinvestment Act and the Fair Lending Laws: Developing a Market-Based Framework for Generating Low- and Moderate-Income Lending*, 96 COLUM. L. REV. 710, 734 (1996).

After the plaintiff meets these four elements, the burden shifts to the defendant-creditor to proffer a legitimate, nondiscriminatory reason for the challenged action.<sup>334</sup> This requirement is also not difficult to satisfy. Defendants can usually put forth a reasonable business justification for making a particular credit decision, most likely that the risk of borrowing appeared to be too great.<sup>335</sup> In response, the plaintiff can attempt to prove that the defendant's proffered reason was merely pretextual.<sup>336</sup> To make this argument, the plaintiff could assert, for example, that White applicants with similar or worse credit histories received superior cards and terms.<sup>337</sup> Proving this assertion, however, is difficult, if not impossible, because plaintiffs possess limited, if any, access to this type of information absent disclosure requirements.<sup>338</sup> Therefore, because the plaintiff has the burden to prove that illegal discrimination took place and the creditor need only present an acceptable motive for an adverse action, defendants generally prevail in these cases.<sup>339</sup>

Courts do not always use the *McDonnell Douglas* framework, however, due to dissimilarities between the employment and the credit contexts.<sup>340</sup> With allegations of employment discrimination, there is generally a point of comparison with other employees who are similarly situated yet receive different treatment, such as a promotion.<sup>341</sup> Credit, on the other hand, does not usually involve competition. Borrowers do not vie for finite resources, and it is generally difficult, if not impossible, for plaintiffs to prove that others received better treatment from a credit

334. Marcus, *supra* note 333, at 736.

335. See *Powell v. Am. Gen. Fin., Inc.*, 310 F. Supp. 2d 481, 488 (N.D.N.Y. 2004) (finding that defendant provided plaintiff with legitimate reasons for rejecting her application, such as lack of credit history, lack of collateral, and the absence of a co-signer).

336. Marcus, *supra* note 333, at 736.

337. See *Boardley v. Household Fin. Corp.* III, 39 F. Supp. 3d 689, 710 (D. Md. 2014) (finding that "Plaintiffs offer only conclusory allegations that others outside their protected class received loans on more favorable terms").

338. *Id.*; *Grant v. Vilsack*, No. 5:10-CV-201-BO, 2011 WL 308418, at \*2 (E.D.N.C. Jan. 27, 2011) (finding that "Plaintiff has failed to plead sufficient facts plausibly demonstrating the existence of a single non-minority who was (1) of similar credit stature as the Plaintiff and (2) given more favorable financial or credit-related treatment than Plaintiff").

339. See, e.g., *Wise v. Vilsack*, 496 Fed.Appx. 283, 285–86 (4th Cir. 2012); *McDowell v. Huntington Fed. Sav. & Loan Ass'n*, 826 F.2d 1060 (4th Cir. 1987); *Willis v. Countrywide Home Loans Servicing, L.P.*, No. CIVA CCB-09-1455, 2009 WL 5206475, at \*8 (D. Md. Dec. 23, 2009); *Reece v. Countrywide Home Loans Inc.*, No. 7:06-CV-181-0, 2008 WL 4559809, at \*2 (N.D. Tex. Oct. 10, 2008).

340. See text accompanying *supra* note 333.

341. See, e.g., *Coleman v. Donahoe*, 667 F.3d 835, 841–42 (7th Cir. 2012).

company based on their race. Nonetheless, many courts hold adverse treatment insufficient to prove discrimination.<sup>342</sup>

To date, there have been three major ECOA investigations into race or national origin discrimination by credit card issuers resulting in settlements. All of them involved Latino borrowers. In 2000, plaintiffs alleged that Associates National Bank (“ANB”) discriminated on the basis of national origin by requiring higher credit scores for applicants using a Spanish-language application form, giving lower credit limits to approved Spanish-language applicants, and failing to offer favorable credit promotions to Spanish-language account holders.<sup>343</sup> After a year of discovery, Citigroup acquired ANB and settled with the plaintiffs, a class of several hundred individuals, for \$1.5 million.<sup>344</sup>

In 2002, Fidelity Federal Bank settled a case brought by the United States alleging, among other things, that Fidelity engaged in abusive collection practices in its subprime credit card program that harassed customers based on their “Hispanic national origin” and denied credit to applicants who could not read or speak English.<sup>345</sup> Fidelity paid out \$1.6 million to victims of its ECOA violations and agreed to fund a consumer education program.<sup>346</sup> This aspect of the settlement appears to be of a self-serving nature, however, because it implies that the problem lies with the consumers’ lack of financial savvy, not the bank’s discriminatory practices.

In 2014, the Consumer Financial Protection Bureau, in a joint enforcement action with the Department of Justice (“DOJ”), ordered GE Capital Bank (“GE”) (which changed its name to Synchrony Bank shortly before the settlement) to pay \$169 million to approximately 108,000 borrowers.<sup>347</sup> Over a three-year time span, GE allegedly denied these customers access to product promotions because of the customers’

342. See, e.g., *Boardley*, 39 F. Supp. 3d at 710; *Grant*, 2011 WL 308418, at \*2.

343. Complaint at 1, *United States v. Assocs. Nat’l Bank*, 1:99-cv-00196-SLR (D. Del. 1999), <https://www.clearinghouse.net/chDocs/public/FH-DE-0002-0002.pdf> [<https://perma.cc/6X AQ-WCPB>]; Yeomans, *supra* note 313.

344. Settlement Agreement, *supra* note 313, at 2; Yeomans, *supra* note 313.

345. Settlement Agreement and Order, *supra* note 313, at 18; Complaint at 4, *United States v. Fidelity Fed. Bank*, No. 1:02-CV-03906 (E.D.N.Y. July 8, 2002), <https://www.clearinghouse.net/chDocs/public/FH-NY-0021-0001.pdf> [<https://perma.cc/MP6H-U3SM>]; Acosta, *supra* note 313.

346. Settlement Agreement and Order, *supra* note 313, at 10; Acosta, *supra* note 313; Yeomans, *supra* note 313.

347. Consent Order, *supra* note 313, at 17; *CFPB Orders GE Capital to Pay \$225 Million in Consumer Relief for Deceptive and Discriminatory Credit Card Practices*, CFPB (June 19, 2014), <http://www.consumerfinance.gov/newsroom/cfpb-orders-ge-capital-to-pay-225-million-in-consumer-relief-for-deceptive-and-discriminatory-credit-card-practices/> [<https://perma.cc/CSD3-BQNJ>] [hereinafter *CFPB Order Press Release*].



Latino national origin.<sup>348</sup> Specifically, between 2009 and 2012, GE offered certain qualifying borrowers the opportunity to receive a credit or waive their remaining account balances after paying a specified percentage of their balance.<sup>349</sup> Customers who indicated a preference to communicate in Spanish or had Puerto Rico addresses did not receive notice of these promotions.<sup>350</sup> Consequently, the settlement awarded these customers the amount they would have saved had they taken advantage of the offers.<sup>351</sup> Interestingly, GE instigated the investigation itself by self-reporting its discriminatory practices to the CFPB, likely to avoid harsher penalties.<sup>352</sup> The resulting court order represented the federal government's largest settlement for credit card discrimination to date.<sup>353</sup>

Despite these settlements, individual plaintiffs face an uphill battle establishing discrimination under the ECOA.<sup>354</sup> This fact supports critiques of the *McDonnell Douglas* framework as it operates both in ECOA cases and in the context of employment discrimination.<sup>355</sup> Additionally, the lack of racial data on credit card lending prevents plaintiffs from proving their cases based on disparate impact in jurisdictions that allow those claims.<sup>356</sup>

In summary, the ECOA's significant shortcomings render it inadequate to influence corporate practices or to make whole individuals who experience racial discrimination by credit card companies. Even the rare settlements described above represent a small percentage of the profits that credit card companies stand to make by imposing unfair interest rates and fees on Black and Latino cardholders

348. Complaint at 4, *United States v. Synchrony Bank*, No. 2:14-CV-00454 (D. Utah, 2014), <https://www.justice.gov/iso/opa/resources/505201461912455667192.pdf> [<https://perma.cc/A7ZU-QLHK>]; *CFPB Order Press Release*, *supra* note 347.

349. Complaint, *supra* note 348, at 4; *CFPB Order Press Release*, *supra* note 347.

350. Complaint, *supra* note 348, at 4; *CFPB Order Press Release*, *supra* note 347.

351. Complaint, *supra* note 348, at 17; *CFPB Order Press Release*, *supra* note 347.

352. *CFPB Order Press Release*, *supra* note 347. The bank successfully avoided the civil penalties. See Nancy R. Thomas & Angela E. Kleine, *Takeaways from GE Capital's \$225M Credit Card Settlement*, LAW360 (June 25, 2014, 9:05 PM), <http://www.law360.com/articles/551283/takeaways-from-ge-capital-s-225m-credit-card-settlement> [<https://perma.cc/5LR9-A2BK>].

353. GUPTA, *supra* note 313, at 4.

354. Majorie A. Shields, *Discrimination Against Credit Applicant on Basis of Race or National Origin Under Equal Credit Opportunity Act*, 15 U.S.C. § 1691 *et seq.*, 13 A.L.R. FED. 3D ART. 9 (2016) (demonstrating, for example, that in the 1st through 6th circuit's ECOA cases, plaintiffs won thirteen and defendants won forty-five).

355. See, e.g., Sandra F. Sperino, Essay, *Beyond McDonnell Douglas*, 34 BERKELEY J. EMP. & LAB. L. 257, 257 (2013).

356. See Winnie Taylor, *Proving Racial Discrimination and Monitoring Fair Lending Compliance: The Missing Data Problem in Nonmortgage Credit*, 31 REV. BANKING & FIN. L. 199, 201 (2011).

that should qualify for more favorable terms. These settlements therefore do not act as deterrents to unlawful conduct. Moreover, individual compensation represents a piecemeal approach to redressing and preventing discrimination that is unlikely to lead to significant change. The next Section evaluates the efficacy of the CRA, which contemplates a more holistic method of eliminating or reducing discrimination.

### B. *The Community Reinvestment Act*

The impetus for the CRA came from concerns about urban decay in many of the United States' major cities, particularly in low-income Black and Latino neighborhoods.<sup>357</sup> Testimony in favor of the Act linked credit availability to urban blight, asserting that limited access to credit encouraged White flight and impeded the rehabilitation of deteriorating neighborhoods.<sup>358</sup> The Act's proponents focused specifically on the actions of large financial institutions that managed the money of small, minority-owned businesses and lower-income residents but refused to lend to or invest in these companies and communities, regardless of their creditworthiness.<sup>359</sup> In short, the CRA was necessary to combat the racial discrimination that led to widespread disinvestment from lower-income neighborhoods.<sup>360</sup> Nonetheless, although the CRA committees heard and considered extensive testimony on racially discriminatory mortgage lending practices,<sup>361</sup> no language within the CRA expressly mentions racial discrimination.

Instead, banks' hostility to the Act's original objective of eliminating vestiges of redlining<sup>362</sup> resulted in a watered-down, vague, and conditional statement of purpose: "to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions."<sup>363</sup> Moreover, the CRA's enforcement mechanism is so

357. H.R. REP. NO. 95-236, at 2-3 (1977).

358. See H.R. REP. NO. 95-236, at 2-4; Bernanke, *supra* note 100.

359. See Bernanke, *supra* note 100; Michael S. Barr, *Credit Where it Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 515-17 (2005).

360. Cf. Bernanke, *supra* note 100; Thomas W. Beetham, Note, *The Community Reinvestment Act and Internet Banks: Redefining the Community*, 39 B.C. L. REV. 911, 913-15 (1998).

361. See, e.g., *Credit Discrimination Hearings*, *supra* note 307, at 39-53 (statement of John H. Powell, Jr., Chairman, Equal Employment Opportunity Commission).

362. See *Credit Discrimination Hearings*, *supra* note 307, at 39-53 (statement of John H. Powell, Jr., Chairman, Equal Employment Opportunity Commission); Barr, *supra* note 359, at 516-19 (stating that the CRA was passed in response to concerns about redlining and outlining major arguments that critics of the CRA employ).

363. 12 U.S.C. § 2901(b) (2012).

weak that, in its current form, it appears to have a negligible impact on banks' conduct.<sup>364</sup> Nonetheless, its underlying principles could serve as the basis for a revamping of the law to transform it into a strong tool against racial discrimination in credit.

The CRA authorizes regulators to make periodic assessments of banks' compliance with the mandate to meet the needs of traditionally underserved communities located within their purview.<sup>365</sup> The objectivity of these assessments, however, is questionable. First, banks possess a considerable degree of control over which entity regulates them. By creating either a state or a federal charter, a lending institution determines its regulator. The Federal Reserve and the Federal Deposit Insurance Corporation ("FDIC") regulate state-chartered banks.<sup>366</sup> The Office of the Comptroller of the Currency ("OCC") regulates nationally chartered banks.<sup>367</sup>

Second, the companies that the OCC regulates provide funding for the agency.<sup>368</sup> This relationship has the potential to erode the OCC's desire to make objective, negative assessments. The OCC's desire to keep its benefactors happy manifests itself, for example, in the steps it takes to protect the companies it regulates from potentially costly government attempts to protect consumers. To this end, the OCC has intervened in the efforts of several state attorney generals to crack down on credit card companies' predatory practices.<sup>369</sup> To halt these investigations, the OCC successfully argued that it, not the attorney generals' offices, has sole jurisdiction over the institutions it regulates.<sup>370</sup>

Further, the CRA assessment process appears to be ripe for abuse because it lacks definitive guidelines, allowing wide latitude for

364. See Keith D. Harvey et al., *Disparities in Mortgage Lending, Bank Performance, Economic Influence, and Regulatory Oversight*, 23 J. REAL EST. FIN. & ECON. 379, 405–06 (2001) (reporting on a study which provided “no support for a regulatory response to CRA ratings” and stating that other studies “may overstate the influence of regulatory factors on lending outcomes”). But see Linda Fischer, *CRA: How It Affects Communities and Banks*, BRIDGES, Summer 2003, at 4, 4, [https://www.stlouisfed.org/~media/Files/PDFs/publications/pub\\_assets/pdf/br/2003/br\\_su\\_03.pdf](https://www.stlouisfed.org/~media/Files/PDFs/publications/pub_assets/pdf/br/2003/br_su_03.pdf) [<https://perma.cc/SA6X-EPSh>] (suggesting that the effects of the CRA are unclear).

365. 12 U.S.C. § 2903(a).

366. 12 U.S.C. §§ 248, 1811, 1813. The Office of Thrift Supervision also performed this function before its dissolution in 2011. See 12 U.S.C. § 5412.

367. 12 U.S.C. § 24; GARCÍA ET AL., *supra* note 222, at 35.

368. 12 U.S.C. § 16; GARCÍA ET AL., *supra* note 222, at 35.

369. GARCÍA ET AL., *supra* note 222, at 35 (citing Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability* 73 U. CHI. L. REV. 157, 161 & n.26 (2006)).

370. GARCÍA ET AL., *supra* note 222, at 35 (citing *Credit Cards: They Really Are out to Get You*, CONSUMER REPS., Nov. 2005, at 12, 15).

discretion.<sup>371</sup> The system works as follows: after examining a lending institution's record serving low- and moderate-income ("LMI") communities, the FDIC regulator selects one of four ratings, which include "Outstanding," "Satisfactory" (which can be modified High or Low), "Needs To Improve," or "Substantial Noncompliance."<sup>372</sup> The CRA does not list specific criteria for regulators' evaluation of compliance. The FDIC asserts, however, that it considers, among other things, demographic data that reveals median income levels, household income distribution, housing costs, and the banks' self-reported product offerings and business strategy.<sup>373</sup>

Upon receipt of a poor rating, a bank receives a plan for improvement and must subsequently file public periodic reports describing its progress toward correction.<sup>374</sup> In New York, the law prohibits banks with the poorest CRA ratings from holding public deposits.<sup>375</sup> Additionally, the rating can affect how frequently the Federal Reserve makes future evaluations. A rating of Outstanding or Satisfactory serves to reduce the subsequent number of times that the Federal Reserve will assess a small bank.<sup>376</sup>

CRA ratings are available to the public on the Internet.<sup>377</sup> Consumers' ability to use this information to make decisions regarding which bank they wish to patronize represents one of the disciplinary

371. See Barr, *supra* note 359, at 603–04 (describing the CRA's "lack of clear rules," that many criticize but ultimately considering this one of the Act's chief virtues).

372. 12 U.S.C. § 2906(b)(2).

373. 12 C.F.R. § 345.21(b) (2016).

374. See *id.* § 345.21(a)(4).

375. See N.Y. STATE FIN. LAW § 106(C) (McKinney, Westlaw through ch. 7 2017). New York prohibits depositing state funds into a banking institution to which the CRA applies unless the institution has received at least a "satisfactory" rating. See *id.* Iowa allows substitution of the rating for a written statement (provided by the institution) that the institution has complied with state requirements and has a commitment to community reinvestment with a rating of satisfactory or higher. IOWA CODE ANN. § 12C.6A(2) (West, Westlaw through 2016 Reg. Sess.). In Maine, the state treasurer must consider the rating. ME. REV. STAT. ANN. tit. 5, § 135 (Westlaw through ch. 1 of the 1st Reg. Sess.). In Illinois, the CRA rating "may" be considered. 30 ILL. COMP. STAT. ANN. 235/8(a)(1) (West, Westlaw through P.A. 99-937 of 2016 Reg. Sess.) (emphasis added). Nebraska requires subsidiary banks of out-of-state banks to file a copy of the bank's written evaluation per the CRA, but does not require a Satisfactory CRA rating for these banks to receive public funds. NEB. REV. STAT. ANN. § 72-1268.07 (West, Westlaw through 2016 2d Reg. Sess.). Louisiana repealed its requirement for banks to have adequate ratings under the CRA in 2013. See Act No. 32, H.B. No. 114, 2013 Reg. Sess. (La. 2013).

376. See 12 U.S.C. § 2908(a), (c); NAT'L CMTY. REINVESTMENT COAL., CRA MANUAL 25 (2007), [http://www.ncrc.org/images/stories/pdf/cra\\_manual.pdf](http://www.ncrc.org/images/stories/pdf/cra_manual.pdf) [<https://perma.cc/GJ65-Z687>]. Small banks are banks with less than \$1.216 billion in assets. 12 C.F.R. § 228.12(u) (2016).

377. *Community Reinvestment Act (CRA): CRA Ratings Search*, BOARD GOVERNORS FED. RES. SYS., <http://www.federalreserve.gov/apps/crape/BankRating.aspx> [<https://perma.cc/ZHJ9-3EQL>].

aspects of the rating system. Also, community groups or media outlets may disseminate this information in efforts to affect a bank's reputation and potentially damage its bottom line. These options, however, were primarily theoretical until amendments to the Act in 1989 and 1994 rendered the ratings more accessible to the public, making enforcement through public pressure more viable.<sup>378</sup> Simultaneously, with the introduction of monolithic, nationwide banks through the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994,<sup>379</sup> more community groups devoted to the protection of consumer interests emerged.<sup>380</sup>

The chief enforcement mechanism of the CRA is the possibility that regulators will deny requests for mergers, acquisitions, closures, relocations, and new branches based on poor CRA performance.<sup>381</sup> Regulators can deny an application outright based on a poor rating, or give conditional approval pending steps taken to improve performance.<sup>382</sup> In 1989, twelve years after its enactment, the Federal Reserve first denied a proposed merger, between the Continental Illinois Corporation and Grand Canyon State Bank, due to a poor rating.<sup>383</sup> Since then, enforcement through this method remains extremely rare. In fact, a Federal Reserve Board official testified in 2007 that the agency held only thirteen public meetings on mergers in the previous seventeen years, despite a trend toward major consolidations during that period.<sup>384</sup> Further, although the Board received 13,500 applications for mergers and new banks since 1988, it denied only

378. *Community Reinvestment Act (CRA): CRA Ratings Search*, *supra* note 377; see also Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, § 110, 108 Stat. 2338, 2364–65 (codified as amended scattered sections of 12 U.S.C.); Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 807(b), 103 Stat. 183, 527–28 (codified as amended at 12 U.S.C. § 2906 (2012)).

379. Riegle-Neal Interstate Banking and Branching Efficiency Act § 110, 108 Stat. at 2364–65.

380. Ellen Seidman, *Don't Blame the Community Reinvestment Act*, AM. PROSPECT (June 26, 2009), <http://prospect.org/article/dont-blame-community-reinvestment-act> [https://perma.cc/775K-B9KL].

381. 12 U.S.C. §§ 2902–03.

382. 12 C.F.R. § 25.29(d), 228.29, 345.29 (2016). See Allen J. Fishbein, *The Community Reinvestment Act After Fifteen Years: It Works, but Strengthened Federal Enforcement Is Needed*, 20 FORDHAM URB. L.J. 293, 297 (1993).

383. Cont'l Ill. Bancorp., Inc., 75 Fed. Res. Bull. 304, 306 (1989); Fishbein, *supra* note 382, at 297.

384. John Taylor & Josh Silver, *The Community Reinvestment Act: 30 Years of Wealth Building and What We Must Do to Finish the Job*, 4 COMMUNITY DEV. INV. REV., Feb. 2009, at 148, 155.

twenty-five of those proposals and rejected only eight due to consumer protection or community-needs issues.<sup>385</sup>

Astonishingly, since the law's inception in 1977, regulators have awarded ninety-seven percent of the banks they evaluated a rating of Satisfactory or Outstanding.<sup>386</sup> These overwhelmingly positive assessments fail to reflect the reality of low-income borrowers who find themselves excluded from regular credit and banking institutions. In fact, many households turn to exploitative alternative lending businesses, such as payday lenders and pawn shops, to meet their credit and banking needs.<sup>387</sup> In turn, most banks focus on lucrative, wealthy clients, and fail to improve community access to their services unless required to do so to accomplish one of their own objectives.<sup>388</sup> This behavior is not unusual for a profit-seeking corporation. The desirability of tempering shareholder satisfaction with community responsibility, however, creates a need for regulatory intervention that the CRA appears unable to satisfy.

Additionally, enforcement inconsistency renders some lending institutions skeptical of the CRA's power. For example, in 2010, two New Jersey banks, Clifton Savings and Saddle River Valley, were the first in the state to receive poor CRA ratings since 2004, despite New Jersey's significant, underserved LMI population.<sup>389</sup> Both banks earned a Needs To Improve rating.<sup>390</sup> In response, Clifton postponed a stock

385. *Id.*

386. DARRYL E. GETTER, CONG. RESEARCH SERV., R43661, THE EFFECTIVENESS OF THE COMMUNITY REINVESTMENT ACT 9 (2015); David Dayen, *Banks Get Credit for Helping the Poor—By Financing Their Evictions?*, INTERCEPT (Aug. 24, 2015, 10:32 AM), <https://theintercept.com/2015/08/24/banks-get-credit-helping-poor-financing-evictions/> [<https://perma.cc/C8QX-376D>].

387. GARCÍA ET AL., *supra* note 222, at 27.

388. See Lawrence White, *Standard Chartered Targets Wealthier Customers in Retail Bank Revamp*, REUTERS (Feb. 9, 2015, 5:28 AM), <http://www.reuters.com/article/us-stanchart-retail-idUSKBN0LD0E820150209> [<https://perma.cc/Z8ZY-9KWJ>].

389. OFFICE OF THRIFT SUPERVISION, COMMUNITY REINVESTMENT ACT PERFORMANCE EVALUATION: CLIFTON SAVINGS BANK 2 (2010) [hereinafter OFFICE OF THRIFT SUPERVISION, CRA EVALUATION CLIFTON SAVINGS], [https://www.occ.gov/static/cra/craeval/OTS/CRAE\\_17988\\_20100907\\_65.pdf](https://www.occ.gov/static/cra/craeval/OTS/CRAE_17988_20100907_65.pdf) [<https://perma.cc/E7MP-ZTU8>]; OFFICE OF THRIFT SUPERVISION, COMMUNITY REINVESTMENT ACT PERFORMANCE EVALUATION: SADDLE RIVER VALLEY BANK 2 (2010) [hereinafter OFFICE OF THRIFT SUPERVISION, CRA EVALUATION SADDLE RIVER], [https://www.occ.gov/static/cra/craeval/OTS/CRAE\\_01997\\_20101227\\_59.pdf](https://www.occ.gov/static/cra/craeval/OTS/CRAE_01997_20101227_59.pdf) [<https://perma.cc/GT32-EK8S>]; Richard Newman, *OTS Says 2 NJ Banks Need to Improve Lending Practices*, NORTHJERSEY.COM (Mar. 9, 2011), <http://www.northjersey.com/news/banks-failed-to-serve-poor-feds-say-1.167648> [<https://perma.cc/NLU7-92B7>].

390. OFFICE OF THRIFT SUPERVISION, CRA EVALUATION CLIFTON SAVINGS, *supra* note 389, at 2; OFFICE OF THRIFT SUPERVISION, CRA EVALUATION SADDLE RIVER, *supra* note 389, at 2. See Newman, *supra* note 389.

offering originally planned for four days after the assessment became public.<sup>391</sup> In contrast, Saddle River experienced no ascertainable consequences, and its CEO publicly expressed doubt that the rating would serve as an obstacle to the bank's plans for future expansion.<sup>392</sup>

A few years later, in 2014, national and state groups sought to block the acquisition of the Florida bank First United Bancorp by New Jersey's Valley National Bancorp ("Valley") based on Valley's poor record of lending to low-income and Black households.<sup>393</sup> The community groups referenced government data from 2012 revealing that Valley made only 4.5% of its home loans to low-income individuals, despite the fact that 41.5% of the households in northern New Jersey and New York City are low-income.<sup>394</sup> Similarly, Valley reportedly gave only 1.5% of its home loans to Black households, which represented 20.5% of the area's population.<sup>395</sup> Nonetheless, Valley received a CRA rating of High Satisfactory in 2013.<sup>396</sup>

In rare cases, regulators have taken into account deceptive or predatory practices when making their assessments. In one such departure from the norm, the OCC gave Woodforest National Bank a Needs To Improve rating in 2012 based, not on its poor record of community investment, but on its unfair and deceptive overdraft program.<sup>397</sup> The CRA report on this conduct led to a \$32 million settlement with the government.<sup>398</sup> The OCC, however, did not release

391. See Newman, *supra* note 389.

392. Newman, *supra* note 389.

393. See Richard Newman, *Housing Groups Urge Regulators to Block Valley National Bancorp Purchase of Florida Bank*, NORTHJERSEY.COM (July 17, 2014, 8:26 AM), <http://www.northjersey.com/news/business/protests-over-bank-deal-1.1052171> [<https://perma.cc/ABJ8-5QDK>]; Tess Stynes, *Valley National to Buy 1st United Bancorp for \$300 Million*, WALL ST. J. (May 8, 2014, 9:27 AM), <https://www.wsj.com/articles/SB10001424052702304431104579549623011989090> [<https://perma.cc/8ZM5-6FGL>].

394. Newman, *supra* note 393.

395. Newman, *supra* note 393.

396. OFFICE OF THRIFT SUPERVISION, COMMUNITY REINVESTMENT ACT PERFORMANCE EVALUATION: VALLEY NATIONAL BANK 2 (2013), <https://www.occ.gov/static/cra/craeval/jun14/15790.pdf> [<https://perma.cc/3R9F-5ZAZ>]; Newman, *supra* note 393.

397. OFFICE OF THE COMPTROLLER OF THE CURRENCY, CHARTER NO. 16892, COMMUNITY REINVESTMENT ACT PERFORMANCE EVALUATION: WOODFOREST NATIONAL BANK 2 (2012) <https://www.occ.gov/static/cra/craeval/dec13/16892.PDF> [<https://perma.cc/D2Q5-LZB5>]; Collin Eaton, *Banks Face Scrutiny to Repair Overdraft Policies, Practices*, HOUS. BUS. J. (Apr. 27, 2012, 10:50 AM), <http://www.bizjournals.com/houston/blog/money-makers/2012/04/how-banks-repair-overdraft-policies-prac.html> [<https://perma.cc/Q7VW-FV4V> (staff-uploaded archive)].

398. OFFICE OF THE COMPTROLLER OF THE CURRENCY, AGREEMENT BY AND BETWEEN WOODFOREST NAT'L BANK AND THE COMPTROLLER OF THE CURRENCY 8 (2010), <https://www.occ.treas.gov/news-issuances/news-releases/2010/nr-occ-2010-122b.pdf> [<https://perma.cc/C4RH-5XSR>]; Eaton, *supra* note 397.

the Needs To Improve rating to the public until close to three years later.<sup>399</sup>

Similarly, the FDIC bestowed a Substantial Noncompliance rating on Evergreen Bank Group because of the unusual practices of one of its members, Oak Brook bank.<sup>400</sup> Oak Brook engaged in a national motorcycle lending business that offered variable interest rates, allowing a dealer to mark up rates and keep additional profits for itself as the originator of the loan.<sup>401</sup> Based on this practice, the FDIC determined that the bank treated similar borrowers differently, in violation of the CRA's principles.<sup>402</sup> In response to the Substantial Noncompliance rating, Oak Brook shifted to a flat fee arrangement with its dealers.<sup>403</sup>

Eagle Bank, based in Missouri, also made some changes based on a poor CRA rating. After receiving a Needs To Improve rating in 2012,<sup>404</sup> Eagle opened a branch in an economically diverse neighborhood.<sup>405</sup> This new branch offered postal services and the ability to pay utility bills free of charge.<sup>406</sup> Eagle also partnered with a number of other banks to create a construction loan fund for women and minority contractors featuring "relaxed qualifying criteria."<sup>407</sup> In May 2014, Eagle received a revised rating of Satisfactory.<sup>408</sup> Similarly, in West Virginia, WesBanco's CRA

399. COMPTROLLER OF THE CURRENCY ADM'R FOR NAT'L BANKS, CHARTER NO. 16892, COMMUNITY REINVESTMENT ACT PERFORMANCE EVALUATION: WOODFOREST NATIONAL BANK 2 (2012) <https://www.occ.gov/static/cra/craeval/dec13/16892.PDF> [<https://perma.cc/D2Q5-LZB5>]; Eaton, *supra* note 397.

400. Complaint at 5, *United States v. Evergreen Bank Corp.*, No. 1:15-cv-04059 (N.D. Ill. May 7, 2015), <https://www.justice.gov/file/evergreen-complaint/download> [<https://perma.cc/T9T5-HLV5>]; Steve Daniels, *Feds Slap Oak Brook Bank over National Motorcycle Lending Business*, CHI. BUS.: CRAIN'S (Mar. 4, 2014), <http://www.chicagobusiness.com/article/20140304/NEWS01/140309919/feds-slap-oak-brook-bank-over-national-motorcycle-lending-business> [<https://perma.cc/7TXH-4J8W>].

401. Complaint, *supra* note 400, at 2; Daniels, *supra* note 400.

402. Complaint, *supra* note 400, at 4–5; Daniels, *supra* note 400.

403. Daniels, *supra* note 400.

404. FED. DEPOSIT INS. CORP., NO. 17691, COMMUNITY REINVESTMENT ACT PERFORMANCE EVALUATION: EAGLE BANK AND TRUST 2 (2012), [https://www5.fdic.gov/crapes/2012/17691\\_120521.PDF](https://www5.fdic.gov/crapes/2012/17691_120521.PDF) [<https://perma.cc/US8D-4SM6>].

405. Lisa Brown, *Eagle Bank Gets Low Rating on CRA Evaluation*, STLtoday.com (Aug. 5, 2013), [http://www.stltoday.com/business/local/eagle-bank-gets-low-rating-on-cra-evaluation/article\\_d0ae7c93-790e-5389-bc34-3e4b8528099f.html](http://www.stltoday.com/business/local/eagle-bank-gets-low-rating-on-cra-evaluation/article_d0ae7c93-790e-5389-bc34-3e4b8528099f.html) [<https://perma.cc/A6N6-HCH4>].

406. *Id.*

407. Rebecca Rivas, *Regional Leaders Start Loan Fund for Minority and Women Contractors*, ST. LOUIS AM. (June 4, 2015), [http://www.stlamerican.com/business/local\\_business/article\\_5d1b1974-0a40-11e5-afb6-f79a4dd7f2f9.html](http://www.stlamerican.com/business/local_business/article_5d1b1974-0a40-11e5-afb6-f79a4dd7f2f9.html) [<https://perma.cc/KC3Y-3WDQ>].

408. FED. DEPOSIT INS. CORP., NO. 17691, COMMUNITY REINVESTMENT ACT PERFORMANCE EVALUATION: EAGLE BANK AND TRUST 2 (2012), [https://www5.fdic.gov/crapes/2014/17691\\_140512.PDF](https://www5.fdic.gov/crapes/2014/17691_140512.PDF) [<https://perma.cc/J7R3-R3XZ>]; Lisa Brown, *Eagle Bank Opening Central West End Branch in September*, STLtoday.com (Feb. 12, 2015), <http://www.stltoday.com/business/columns/building-blocks/eagle-bank-opening-central-west-end-branch->



assessment reported poor performance based on failure to make sufficient loans to minorities and LMI borrowers.<sup>409</sup> The bank appealed its initial rating and ultimately passed the exam, but the delay caused by the appeal process postponed regulatory approval of a desired merger.<sup>410</sup> WesBanco consequently increased its lending to its underserved constituents.<sup>411</sup>

In California, a community group, California Reinvestment Coalition, negotiated with Banc of California pending the bank's acquisition of twenty former Banco Popular branches.<sup>412</sup> As a result of this discussion, the bank committed to devoting twenty percent of its annual deposit earnings to public benefits and charitable lending for low-income members of the community.<sup>413</sup> On several other occasions, proposed mergers have given community groups opportunities to lobby banks to make pledges to improve their CRA performance.<sup>414</sup> A National Community Reinvestment Coalition ("NCRC") report stated that banks have made \$4.5 trillion in CRA agreements and commitments to LMI and minority communities,<sup>415</sup> which may be due in part to this type of community pressure. Also, after the report's release,

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in-september/article\_0140d1ab-8da7-5ffe-8684-8c95669a0e90.html [https://perma.cc/JQL7-QHHL]. Additionally, national bank BBVA Compass Bancshares, Inc. pledged \$11 billion in loans and investments to LMI customers and promised to fund a series of technology and outreach programs Press Release, *In First Full Year of Its \$11 Billion Commitment, BBVA Compass Puts 5,427 Families into Homes, Boosted 24,019 Small Businesses*, BBVA COMPASS (Apr. 20, 2016), [http://newsroom.bbvacompass.com/press\\_releases?item=132867](http://newsroom.bbvacompass.com/press_releases?item=132867) [https://perma.cc/9TPP-H6G4]; Michael Seale, *BBVA Compass Improves CRA Rating*, BIRMINGHAM BUS. J. (Apr. 20, 2016, 3:47 PM), <http://www.bizjournals.com/birmingham/news/2016/04/20/bbva-compass-improves-cra-rating.html> [https://perma.cc/88PT-S6AH (staff-uploaded archive)].

409. FED. RESERVE BANK OF CLEVELAND, RSSD: 645625, COMMUNITY REINVESTMENT ACT PERFORMANCE EVALUATION: WESBANCO BANK, INC., 45, 61, 101 (2007), <https://www.clevelandfed.org/banking-oversight/financial-system-supervisors/~media/Files/Banking%20Oversight/CRA%20PEs/2007/645625.pdf> [https://perma.cc/TJ28-88PQ]; Taylor & Silver, *supra* note 384, at 149.

410. Laura K. Thompson, *CRA Victory for WesBanco of W. Va.*, AM. BANKER (Nov. 13, 2001, 2:00 AM), <https://www.americanbanker.com/news/cra-victory-for-wesbanco-of-wva> [https://perma.cc/46QC-NQRU (staff-uploaded archive)]; Taylor & Silver, *supra* note 384, at 149.

411. Taylor & Silver, *supra* note 384, at 149.

412. E. Scott Reckard, *Groups Urge U.S. to Reject CIT Takeover of OneWest Bank*, L.A. TIMES (Oct. 14, 2014, 5:00 AM), <http://www.latimes.com/business/la-fi-onewest-cit-protest-20141014-story.html> [https://perma.cc/BJU8-R38A].

413. See Letter from Steven Sugarman, President & CEO, Banc of Cal. 1 (Aug. 25, 2014), <http://www.calreinvest.org/system/resources/W1siZiIsIjIwMTQvMDkvMDQvMTIhNTIhNDg2X0JhbmNfb2ZiQ2FsaWZvcn5pYV9DUkFfUGxhbi5wZGYiXV0/Banc%20of%20California%20CRA%20Plan.pdf> [https://perma.cc/VMG6-VZ4Z]; Reckard, *supra* note 412.

414. Taylor & Silver, *supra* note 384, at 149.

415. NAT'L CMTY. REINVESTMENT COAL., CRA COMMITMENTS 4 (2007), [http://www.ncrc.org/images/stories/whatWeDo\\_promote/cra\\_commitments\\_07.pdf](http://www.ncrc.org/images/stories/whatWeDo_promote/cra_commitments_07.pdf) [https://perma.cc/SVU8-Z36Y]; Taylor & Silver, *supra* note 384, at 149.

Bank of America pledged a further \$1.5 trillion to LMI lending during its acquisition of Countrywide.<sup>416</sup> The NCRC report also spurred further study by Federal Reserve economists, who concluded that banks make more home loans in areas covered by CRA agreements than in those where no pledges exist.<sup>417</sup>

Additionally, community groups sometimes leverage CRA ratings simply for the opportunity to acquire a voice in the discussion of a bank's proposed movements. For example, in 2015, several groups succeeded in persuading the Federal Reserve to hold a public hearing on the planned acquisition of OneWest Bank in Pasadena by New York-based CIT Group Inc. due to CRA-related concerns.<sup>418</sup>

Following this, albeit limited, success, activists sought a similar opportunity to voice their concerns about Royal Bank of Canada's proposed \$5.4 billion takeover of Los Angeles's City National Corp. ("National"), relying in part on National's CRA rating to insist on a public hearing.<sup>419</sup> According to a representative of the Los Angeles Latino Chamber of Commerce, National catered primarily to wealthy clients, providing no services to East Los Angeles's substantial Latino population, thereby widening the city's racial wealth divide.<sup>420</sup> In 2012, the OCC gave National a rating of Satisfactory because it made some loans to small businesses, despite the fact that most of its mortgage lending was to wealthy homeowners.<sup>421</sup> Seeking to reduce opposition to the takeover from the Latino community, and in spite of its Satisfactory rating, National pledged to expand its commitments under the CRA and designate over \$11 billion over five years for low-income customers and small businesses.<sup>422</sup> The new pledge carved out mortgages specifically for minority borrowers.<sup>423</sup>

416. Taylor & Silver, *supra* note 384, at 149 (citing Press Release, *Bank of America Details Community Development, Foreclosure Relief Goals*, BANK AM. (Apr. 28, 2008), [http://newsroom.bankofamerica.com/index.php?s=press\\_releases&item=8152](http://newsroom.bankofamerica.com/index.php?s=press_releases&item=8152) [<https://perma.cc/U9RD-ZEXH>]).

417. Raphael W. Bostic & Breck L. Robinson, *Do CRA Agreements Influence Lending Patterns?*, 31 REAL EST. ECON. 23, 23 (2003); Taylor & Silver, *supra* note 384, at 149.

418. Reckard, *supra* note 412.

419. E. Scott Reckard, *City National Critics Want 'Bank to the Stars' to 'Cater to the Poor'*, L.A. TIMES (Apr. 30, 2015, 7:32 AM), <http://www.latimes.com/business/la-fi-city-national-rbc-cra-20150423-story.html> [<https://perma.cc/97J9-DJFG>].

420. *See id.* (recounting a comment from Gilbert R. Vasquez, chairman of the Los Angeles Latino Chamber of Commerce).

421. OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMMUNITY REINVESTMENT ACT PERFORMANCE EVALUATION: CITY NATIONAL BANK 2 (2012), <https://www.occ.gov/static/cra/craeval/may14/14695.pdf> [<https://perma.cc/XJ68-ZBCV>]; Reckard, *supra* note 419.

422. *City National Announces New \$11 Billion, Five-Year Community Commitment*, CITY NAT'L BANK (Apr. 24, 2015), <https://newsroom.cnb.com/news/city-national-announces-new>

Concerned community activists in San Francisco similarly hoped to wield some power from the threat of poor CRA ratings to change the policies of First Republic Bank, a lending institution that reportedly services primarily wealthy customers.<sup>424</sup> In August 2015, protesters picketed outside First Republic Bank's headquarters in an effort to stop it from contributing to the displacement of the city's residents.<sup>425</sup> First Republic Bank allegedly provided loans to real estate investors who purchased property in San Francisco, evicted low-income and elderly tenants, and then sold the buildings to rich homeowners through California's legal loophole of "tenancy in common" ownership.<sup>426</sup> California's Ellis Act makes these evictions legal, despite the harm they do to low-income tenants who lack political clout.<sup>427</sup> The California Reinvestment Coalition claims that First Republic Bank's loans violate the CRA because they intentionally push renters out of the city instead of serving their needs.<sup>428</sup>

In 2011, the FDIC gave First Republic Bank's lending practice a rating of Low Satisfactory.<sup>429</sup> The FDIC stated that First Republic Bank's "distribution of borrowers reflects poor penetration among retail customers of different income levels and business customers of different revenue sizes, given the product lines offered by the bank."<sup>430</sup> In light of this statement and the claims of protesters, the rating, although low, seems generous. Moreover, it seems unlikely that it will have any negative impact on the bank. For example, Boston's OneUnited Bank, a similar lending institution, received a Needs To Improve rating based

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11-billion-%E2%80%A8five-year-community-commitment [https://perma.cc/XKF7-RE3V]; Reckard, *supra* note 419.

423. *City National Announces New \$11 Billion, Five-Year Community Commitment*, *supra* note 422.

424. Darwin BondGraham, *Tenants Accuse San Francisco Bank of Financing Evictions*, E. BAY EXPRESS (Aug. 18, 2015), <http://m.eastbayexpress.com/SevenDays/archives/2015/08/18/tenants-accuse-san-francisco-bank-of-financing-evictions> [https://perma.cc/5T4J-KW6X].

425. *Id.*; see also Dayen, *supra* note 386.

426. BondGraham, *supra* note 424.

427. See CAL. GOV'T CODE §§ 7060–7060.7 (West, Westlaw through Ch.3 of 2017 Reg. Sess.); Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 247–48 (2015) (describing the ill effects of the Act).

428. BondGraham, *supra* note 424; Paulina Gonzales, *CRC Guest Blog: Families Win When Banks Stop Funding Displacement*, MEDA (Feb. 18, 2016), <http://medasf.org/crc-guest-blog-families-win-banks-stop-funding-displacement/> [https://perma.cc/DVF4-7PQZ].

429. FED. DEPOSIT INS. CORP., NO. 59017, COMMUNITY REINVESTMENT ACT PERFORMANCE EVALUATION: FIRST REPUBLIC BANK, at 2 (2011), [https://www5.fdic.gov/crapes/2011/59017\\_111031.PDF](https://www5.fdic.gov/crapes/2011/59017_111031.PDF) [https://perma.cc/H35J-Z7EG].

430. *Id.*

upon its poor lending performance to low-income individuals,<sup>431</sup> but still received the approval it sought for a bank closure.<sup>432</sup>

Consequently, despite the occasional and notable opportunities that the CRA affords for greater community investment, leading scholars have criticized the law extensively from its inception.<sup>433</sup> Much of this criticism focuses on its lack of effective enforcement mechanisms and the apparent collusion between regulators and the institutions they supervise.<sup>434</sup> Despite the large arsenal of possible enforcement actions available, including cease and desist orders, formal agreements, and civil monetary penalties, Congress decided not to institute any of these as penalties for CRA non-compliance.<sup>435</sup> Critics also point to the sporadic nature of evaluations and uneven or non-existent consequences for non-compliance.<sup>436</sup>

Even worse, some banks' responses to potentially poor CRA ratings do more harm than good to households in need. For example,

431. FED. DEPOSIT INS. CORP., NO. 23966, COMMUNITY REINVESTMENT ACT PERFORMANCE EVALUATION: ONEUNITED BANK 2 (2013), <http://www.mass.gov/ocabr/docs/dob/community-reinvestment-act/bosboc.pdf> [<https://perma.cc/RLL3-E4AK>].

432. Dierdre Fernandes, *OneUnited Bank Closes L.A. Branch*, BOS. GLOBE (Feb. 18, 2015), <https://www.bostonglobe.com/business/2015/02/18/oneunited-closes-branch-that-was-part-its-expansion/yiKGhib1cV2AjVRsEJ598H/story.html> [<https://perma.cc/QF6A-AUF4>]; Beth Healy, *OneUnited Bank Gets 'Needs to Improve' on Community Lending*, BOS. GLOBE (Nov. 6, 2014), <https://www.bostonglobe.com/business/2014/11/06/oneunited-bank-gets-needs-improve-community-lending/ZWKcneQUTGsjsudhgveKSJ/story.html> [<https://perma.cc/76VY-FMDV>].

433. See, e.g., Barr, *supra* note 299, at 519, 526–33; Raymond H. Brescia, *Part of the Disease or Part of the Cure: The Financial Crisis and the Community Reinvestment Act*, 60 S.C. L. REV. 617, 626–27 (2009); Raymond H. Brescia, *The Community Reinvestment Act: Guilty, but Not as Charged*, 88 ST. JOHN'S L. REV. 1, 11–17 (2014); Cassandra Jones Havard, *Advancing the CRA—Using the CRA's Strategic Plan Option to Promote Community Inclusion: The CRA and Community Inclusion*, 29 W. NEW ENG. L. REV. 37, 44–47 (2006); Brent J. Horton, *In Defense of Private-Label Mortgage-Backed Securities*, 61 FLA. L. REV. 827, 863 (2009); Keith N. Hylton, *Development Lending and the Community Reinvestment Act*, 29 W. NEW ENG. L. REV. 59, 67–69 (2006); Keith N. Hylton & Vincent D. Rougeau, *Lending Discrimination: Economic Theory, Econometric Evidence, and the Community Reinvestment Act*, 85 GEO. L.J. 237, 241–46 (1996); Michael Klausner, *Market Failure and Community Investment: A Market-Oriented Alternative to the Community Reinvestment Act*, 143 U. PA. L. REV. 1561, 1592–93 (1995); A. Brooke Overby, *The Community Reinvestment Act Reconsidered*, 143 U. PA. L. REV. 1431, 1453–58 (1995).

434. See Barr, *supra* note 299, at 528–30 (cataloging arguments against the CRA).

435. Compare 12 U.S.C. § 1818(b)(1) (2012) (allowing federal agencies to bring cease and desist actions against financial institutions for “unsafe or unsound practice[s,]” violations of law, or breach of agreements with regulators), with *id.* § 2906(1) (requiring agencies to write reports evaluating “the institution’s record of meeting the credit needs of its entire community”).

436. See GETTER, *supra* note 386, at 8 (2015); Barr, *supra* note 299, at 529; Lawrence J. White, Essay, *The Community Reinvestment Act: Good Goals, Flawed Concept*, COMMUNITY DEV. INV. REV., Feb. 2009, at 185, 187; Mark Willis, *It's the Rating, Stupid: A Banker's Perspective on the CRA*, COMMUNITY DEV. INV. REV., Feb. 2009, at 59, 59.

many banks simply move out of underserved areas, leaving a gap that exploitative fringe lenders are delighted to fill.<sup>437</sup> In Chicago, for instance, low-income neighborhoods are home to only 2.3% of the city's full-service banking branches.<sup>438</sup> Moreover, savvy banks, such as JPMorgan and Wells Fargo, create partnerships with check cashing outlets and pay day lenders that remain to serve the areas that the banks no longer occupy.<sup>439</sup> By financing these ventures, the banks have the potential to profit twofold from their flight from economically depressed areas, making greater yields elsewhere while keeping a hand in the earnings from the poor they leave behind.<sup>440</sup> The CRA's regulations do nothing to address or prevent these practices.

Additionally, the CRA does not establish concrete guidelines for best practices, such as quotas for lending to LMI and minority individuals and businesses.<sup>441</sup> It also does not require regulators to use an objective scale to determine best practices.<sup>442</sup> Regulators simply compare banks to each other, and the different regulators do not coordinate or align their criteria.<sup>443</sup> Significantly, banks that do business over the Internet can evade thorough CRA assessment due to the difficulty in accurately identifying the geographic scope of their clientele.<sup>444</sup> Also, unsurprisingly, regulators generally establish

437. See Michael A. Stegman, Kelly Thompson Cochran & Robert Faris, *Toward a More Performance-Driven Service Test: Strengthening Basic Banking Services Under the Community Reinvestment Act*, 9 GEO. J. ON POVERTY L. & POL'Y 405, 445 (2002).

438. GARCÍA ET AL., *supra* note 222, at 27.

439. See KEVIN CONNOR & MATTHEW SKOMAROVSKY, *THE PREDATORS' CREDITORS: HOW THE BIGGEST BANKS ARE BANKROLLING THE PAYDAY LOAN INDUSTRY* 3 (2011), <http://public-accountability.org/wp-content/uploads/2011/09/payday-final-091410.pdf> [<https://perma.cc/7QTU-PYFY>]; Alexander Eichler, *Banks Increasingly Use Payday Loans Despite Crackdown on Predatory Lending: Study*, HUFFINGTON POST (Sept. 21, 2011), [http://www.huffingtonpost.com/2011/07/22/payday-loans-banks\\_n\\_906765.html](http://www.huffingtonpost.com/2011/07/22/payday-loans-banks_n_906765.html) [<https://perma.cc/LL56-ZAPF>]; Jessica Silver-Greenberg, *Major Banks Aid in Payday Loans Banned by States*, N.Y. TIMES (Feb. 23, 2013), [http://www.nytimes.com/2013/02/24/business/major-banks-aid-in-payday-loans-banned-by-states.html?\\_r=0](http://www.nytimes.com/2013/02/24/business/major-banks-aid-in-payday-loans-banned-by-states.html?_r=0) [<https://perma.cc/X9BN-NVPA>].

440. See Eichler, *supra* note 439.

441. See Willis, *supra* note 436, at 60.

442. *Id.* at 60–63.

443. *Id.* at 66.

444. See 12 U.S.C. § 2901(a)(1) (2012) (“[R]egulated financial institutions are required by law to demonstrate that their deposit facilities serve the convenience and the needs of the communities in which they are chartered to do business[.]”); see also Raymond H. Brescia, *The Community Reinvestment Act: Guilty, But Not as Charged*, 88 ST. JOHN'S L. REV. 1, 27 (2014) (“[A] bank's CRA assessment areas are those communities in which that bank has branches, ATMs, or does a substantial amount of its lending.”); Beetham, *supra* note 360, at 913, 924–928 (1998) (noting that “regulators are grappling with how to apply the CRA to the growing number of institutions on-line”); Oliver A. Thoenen, Comment, *Functional Obsolescence: The Community Reinvestment Act the Dilemma of Internet Banking Regulation*, 5 J. SMALL & EMERGING BUS. 425, 425, 440–44 (2001) (arguing that “in the absence of

relationships with the banks that they oversee, not the communities that the CRA requires them to serve. Finally, although discriminatory lending provides grounds for a poor rating, it appears that regulators do no more than a cursory inquiry into whether this type of conduct is occurring.<sup>445</sup>

These copious critiques of the CRA suggest that a complete overhaul is necessary to give teeth to the Act and effectively prevent exploitation and neglect of the poor by lending institutions. Nonetheless, the principles behind the CRA remain strong, and lend themselves nicely to a refashioning of the law into a tool to reduce or eliminate discrimination.<sup>446</sup> The following Part proposes amendments to the CARD Act that draw on these principles.

### III. CALL TO REFORM CONSUMER LAW BASED ON REHABILITATIVE REPARATIONS THEORY

In light of the failure of the present legal regime to redress and deter racial discrimination against credit card consumers, it is instructive to turn to models outside of the ECOA's anti-discrimination context for potential solutions. The reparations movement has long recognized that racially subordinated groups' inferior social and economic statuses arise from historical and present injustices, and that the entities complicit in creating these conditions should take affirmative steps to transform them.<sup>447</sup> Rehabilitative reparations focus on group, as opposed to individual, compensation for past harms.<sup>448</sup> Slavery disclosure laws embody this theory of rehabilitative reparations by holding corporations, in addition to governments, responsible for their role in perpetuating and exploiting economic disparities based on social

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congressional action, the CRA will become functionally irrelevant with regard to Internet banking services because of the inherent geographic limitations of the existing regulatory scheme under the statute").

445. Taylor & Silver, *supra* note 384, at 156 ("In most cases, even for the largest banks, the fair-lending section of the CRA exam reports in one to three sentences that the regulatory agency tested for evidence of illegal and discriminatory lending and that no such lending was found. Yet there is no discussion of what precisely had been done to reach its conclusion. In the past, agencies provided detailed descriptions in the fair-lending section of CRA exams under the "assessment factor" format of the exams. For example, under Assessment Factor F, which assessed evidence of discriminatory or illegal practices, the Federal Reserve Bank of Richmond in January 1996 conducted matched file reviews of more than 300 loan applications in a CRA exam of Signet Bank. The exam also described a regression analysis, which sought to determine if race was a factor in loan rejections." (footnote omitted)).

446. See generally THE IMPACT OF PUBLIC POLICY ON CONSUMER CREDIT (Thomas A. Durkin & Michael E. Staten eds., 2002) (discussing the issues surrounding consumer credit markets at the beginning of the twenty-first century and current policy debate).

447. See Yamamoto et al., *supra* note 205, at 2–3.

448. See *infra* notes 492–93 and accompanying text.

inequality and injustice.<sup>449</sup> These laws, by requiring disclosure, advance one of the reparations movement's main goals of truth-telling.<sup>450</sup>

This Part interrogates rehabilitative reparations' focus on community, instead of individual, repair, as well as slavery disclosure laws' ability to hold corporations accountable for their complicity in racial injustice. It argues that the principles behind rehabilitative reparations and slavery disclosure laws establish a framework and support for requiring credit card companies that engage in racial discrimination or exploit racial inequality to make reparative investments into the communities they harm. The Part begins with a proposal to reform consumer law by enacting those requirements.

#### A. *Proposal to Reform Consumer Law*

The CARD Act should require credit card corporations held to discriminate against consumers based on race to make significant financial investments into the harmed communities. The definition of "discrimination" under the law should encompass, in addition to explicit racism, unconscious, implicit, and structural racism, demonstrable through statistical racial disparities that do not correlate to credit risk, as revealed in compulsory, frequent, and public reports. These reporting requirements should follow the model provided by the Home Mortgage Disclosure Act ("HMDA"), and include the race, gender, and income of credit card applicants and borrowers, in addition to price data.

Although the failure of HMDA's disclosure requirements to prevent racial discrimination in mortgage lending casts some doubt on the potential of disclosure to lead to reform,<sup>451</sup> it is possible that HMDA simply does not go far enough in its reporting requirements.<sup>452</sup> To be useful, reporting must be comprehensive, and include every factor that goes into the creditworthiness determination, including neighborhood, affinities, and Facebook friends. Further, disclosure alone is insufficient to transform entrenched and profitable policies. Instead, accountability must form part of the law and the law must not be dependent on public response for enforcement.

The cost of these investments should serve to deter credit card companies from further discrimination, and their substance should facilitate considerable economic growth in the communities that receive

449. See *infra* Section III.C.

450. See *infra* note 473–75 and accompanying text.

451. See Cassandra Jones Havard, *Post-Racial Lending?*, 24 KAN. J.L. & PUB. POL'Y 176, 183 (2014).

452. Charles M. Lamb, et. al, *HMDA, Housing Segregation, and Racial Disparities in Mortgage Lending*, 12 STAN. J. C.R. & C.L. 249, 277–82 (2016).

them. For example, the investment might consist of the building and continued funding of educational institutions, affordable housing, or medical or legal clinics; large-scale business lending; or other significant support for projects designed to provide economic stability, essential and affordable services, and substantial entrepreneurial opportunities.

The identification of companies engaged in culpable conduct would occur through reporting requirements mandating disclosure of predatory practices such as credit card redlining, as well as detailed data that would reveal unwarranted disparities: which consumers, classified by race and other protected categories, receive which cards, and under which terms. The studies conducted by Chi-Jack Lin<sup>453</sup> and Ethan Cohen-Cole<sup>454</sup> documenting racial discrimination in the industry would provide direction on how to structure and analyze these disclosures.

The Consumer Financial Protection Bureau should oversee these disclosures and create guidelines to establish the threshold of allowable disparities and appropriate consequences that correspond to culpability. The public nature of the disclosures would also facilitate community response to revealed discrimination, which can encourage compliance and, in some cases, lead to even more extensive, voluntary changes.

The models for this proposal are the concept of rehabilitative reparations, which seeks redress for harms to racial groups through efforts directed at communities, instead of individuals;<sup>455</sup> and slavery disclosure laws, which attempt to hold corporations accountable for profits derived from racist and exploitative practices.<sup>456</sup> These innovative laws have elicited a number of substantial contributions from corporations to the Black community, despite the fact that the law does not require them.<sup>457</sup> Taking these types of laws one step further, by compelling corporate investment in response to discriminatory practices, would encourage lenders to eliminate these practices through reconfiguration of the credit industry's business model from one based on exploiting the most vulnerable consumers to one offering competitive services to consumers willing and able to pay for them.

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453. See generally Lin, *supra* note 152 (finding statistical discrimination in the consumer credit market against Black and Hispanic consumers).

454. See generally Cohen-Cole, *supra* note 155 (finding evidence of race-based differences in the availability of credit).

455. See *infra* notes 492–94 and accompanying text.

456. See *infra* Section III.C.

457. See *id.*



### B. Rehabilitative Reparations

The reparations movement has gone through many transformations throughout history, encompassing a variety of wrongs committed against racial groups, from Japanese internment to the overthrow of the Hawaiian monarchy to slavery.<sup>458</sup> This analysis focuses on slavery reparations. Although there is a broad range of opinions concerning what might, if anything, suffice to repair the lasting and monumental harms of slavery, reparations scholars generally agree that, in addition to acknowledgment and apology, some form of reconciliatory action or gesture is necessary.<sup>459</sup>

In contrast, some opponents of reparations assert that, in a post-racial United States, slavery no longer has lingering effects.<sup>460</sup> For example, many post-racialists view the fact that Americans elected a Black President twice as evidence that racial barriers no longer exist in this country.<sup>461</sup> Critical race scholars, in response, assert that Black exceptionalism is not evidence of the end of racism.<sup>462</sup> Instead, in some cases, Obama's presidency led to increased racial hostility toward Blacks.<sup>463</sup>

The legal institution of slavery allowed for the cementing of White economic and social privilege through law. Since its abolishment, there

458. For a historical overview of the American reparations movement, see Kaimipono David Wenger, *From Radical to Practical (And Back Again?): Reparations, Rhetoric, and Revolution*, J.C.R. & ECON. DEV. 697, 698–705 (2011); Yamamoto et al., *supra* note 205, 16–21.

459. See generally, e.g., Alfred Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811 (discussing various reparations theories and offering a new view for the moral basis of reparations theories); Yamamoto et al., *supra* note 205 (discussing disagreement between reparations scholars and offering a “social healing through justice” framework).

460. Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 491 (1998) (citing Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 607 (1993)).

461. See, e.g., R. Drew Smith, *Introduction to CONTESTING POST-RACIALISM: CONFLICTED CHURCHES IN THE UNITED STATES AND SOUTH AFRICA* 3 (R. Drew Smith et al. eds., 2015); Shelby Steele, *Obama's Post-Racial Promise*, L.A. TIMES (Nov. 5, 2008), <http://www.latimes.com/opinion/opinion-la/la-oe-steele5-2008nov05-story.html> [<https://perma.cc/BP8C-CEYB>] (exploring ideas of a post-racial America after the Obama election).

462. See, e.g., Smith, *supra* note 461, at 3. Oprah is another person often held up as an example of why racism no longer exists in the United States. See, e.g., Tim Wise, *The Oprah Effect: Black Success, White Denial and the Reality of Racism*, TIM WISE (July 28, 2006), <http://www.timwise.org/2006/07/the-oprah-effect-black-success-white-denial-and-the-reality-of-racism/> [<https://perma.cc/8P53-SXXG>].

463. See Mario Barnes & Angela Onwuachi-Willig, *The Obama Effect: Understanding Emerging Meanings of Obama in Anti-Discrimination Law*, 87 IND. L.J. 325, 327 (2012); see, e.g., Peniel Joseph, *Obama's Effort to Heal Racial Divisions and Uplift Black America*, WASH. POST (Apr. 22, 2016), <https://www.washingtonpost.com/graphics/national/obama-legacy/racism-during-presidency.html> [<https://perma.cc/YC3B-2Z4R>].

have been concerted and continuing efforts to maintain the financial advantages it established for Whites.<sup>464</sup> Laws and policies supporting these efforts include, inter alia, Jim Crow laws,<sup>465</sup> the Social Security Act,<sup>466</sup> the GI Bill,<sup>467</sup> the Fair Housing Act,<sup>468</sup> and the allocation of loans and benefits to farmers by the Department of Agriculture.<sup>469</sup> Reparations scholar Roy Brooks asserts that this history of discrimination renders Blacks who are living in the United States today direct victims of slavery.<sup>470</sup> This perspective counters the contentions that reparations are irrelevant or inappropriate because slaves and all of their direct descendants are long deceased.<sup>471</sup>

Supporting Brooks' claim, a quick look at statistics related to wealth, income, health, and other measurements of societal success reveals that, in fact, Blacks and other groups historically subject to adverse social and legal treatment continue to lag behind Whites significantly.<sup>472</sup> Some social critics argue that these disparities arise from

464. See ROITHMAYR, *supra* note 44, at 6; Joy Milligan, *Protecting Disfavored Minorities: Towards Institutional Realism*, 63 UCLA L. REV. 894, 918–21 (2016) (describing racial inequality in U.S. Department of Agriculture farm aid); Juan F. Perea, *Doctrines of Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermind the Supreme Court's Affirmative Action Jurisprudence*, 75 U. PITT. L. REV. 583, 586–89 (1995) (connecting Jim Crow laws, the G.I. Bill, and the Social Security Act to the continued entrenchment of white supremacy); Reginald Leamon Robinson, *The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, the Violence of Neighborhood Purity, and the Master Narrative of Black Inferiority*, 37 WM. & MARY L. REV. 69, 71–74 (1995) (connecting the failures of the FHA to the furtherance of White supremacy).

465. See, e.g., An Act to Amend and Consolidate the Military Laws of North Carolina, ch. 47, § 1-4852, 1913 N.C. Sess. Laws 82, 82; Act of May 5, 1908, ch. 77, § 6, 1908 Okla. Sess. Laws 694, 695.

466. Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.).

467. Servicemen's Readjustment Act of 1944 (G.I. Bill), Pub. L. No. 78-346, 58 Stat. 284 (codified as amended in scattered sections of 38 U.S.C.).

468. Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81, 81–90 (codified as amended at 42 U.S.C. §§ 3601–3631 (2012)).

469. See, e.g., *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 14, 41–42 (D.D.C. 2011) (approving a settlement agreement between the USDA and African-American farmers who were discriminated against on the basis of race in connection with federal farm credit transaction or benefit application).

470. See Roy L. Brooks, *The House Apologizes for Slavery and Segregation*, RACISM REV. (Aug. 7, 2008), <http://www.racismreview.com/blog/2008/08/07/the-house-apologizes-for-slavery-and-segregation/#more-452> [https://perma.cc/U8TN-E36G] (“The victims of Jim Crow are as alive today as were the victims of internment in 1988.”).

471. See BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* 9–10 (1973) (recounting these arguments and stating that when reparations are viewed as “back wages” for slavery, arguments that wrongdoers and victims are long gone are difficult to refute); Douglas G. Smith, *An End, or Prelude, to Further Litigation in the Reparations Movement?*, ENGAGE, Feb. 2007, at 22, 22 (listing counter arguments).

472. See Braden Goyette & Alissa Scheller, *15 Charts That Prove We're Far from Post-Racial*, HUFFINGTON POST (Mar. 3, 2016), <http://www.huffingtonpost.com/2014/07/02/civil->

racially based cultural and personal inadequacies.<sup>473</sup> On the contrary, they are evidence that the United States has failed to reverse the harms that its legal and political institutions have inflicted on Blacks and other groups subject to hegemony and occupation, such as Latinos, Native Americans, and Native Hawaiians.<sup>474</sup> Reparations thus represent continued efforts to right these wrongs in tangible and meaningful ways that would allow Blacks and other historically marginalized groups to gain social and financial, not just formal, equality.

In addition to seeking substantive results, there are rhetorical and psychological objectives underlying reparations advocacy. These goals include revealing and acknowledging truths, making apologies, and creating space for healing both within oppressed communities and in the relationships between the still-dominant White society and oppressed groups.<sup>475</sup> To these ends, some reparations advocates have sought to establish truth commissions.<sup>476</sup> Following this model, Brown University voluntarily formed a commission to investigate its history of slavery.<sup>477</sup> Additionally, Georgetown University's president announced that it would accord legacy status to descendants of the slaves that the university sold in 1838.<sup>478</sup>

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rights-act-anniversary-racism-charts\_n\_5521104.html [https://perma.cc/55RA-57KQ] (citing JOHN R. LOGAN, BROWN UNIV., US2010 PROJECT: SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS, HISPANICS AND ASIANS IN METROPOLITAN AREAS (2011), <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report0727.pdf> [https://perma.cc/XDH2-W659]).

473. See JAMES M. JONES, *PREJUDICE AND RACISM* 13–15 (2d ed. 1997) (describing individual, institutional, and cultural racism). Many scholars have recognized that in our lived experiences it is quite difficult to separate cultural from institutional racism, especially when our analytical focus turns to unintentional acts of racism. See Anthony Cook, Essay, *Cultural Racism and the Limits of Rationality in the Saga of Rodney King*, 70 DENV. U. L. REV. 297, 297 (1993).

474. See Yamamoto, *supra* note 460, at 480.

475. See Adjoa A. Aiyetoro & Adrienne D. Davis, *Historic and Modern Social Movements for Reparations: The National Coalition of Blacks for Reparations in America (N'COBRA) and Its Antecedents*, 16 TEX. WESLEYAN L. REV. 687, 689 (2010); Kaimipono David Wenger, "Too Big to Remedy?" *Rethinking Mass Restitution for Slavery and Jim Crow*, 44 LOY. L.A. L. REV. 177, 227–30 (2010).

476. See Yamamoto et al., *supra* note 205, at 4, 6 (discussing truth commissions used in Indonesia and Tulsa).

477. Claudia Irene Janssen, *Addressing Corporate Ties to Slavery: Corporate Apologia in a Discourse of Reconciliation*, 63 COMM. STUD. 18, 21 (2012) (citing Glenn C. Loury, *Brown University to Consider Reparations on Account of the Institution's Past Ties to Slavery*, J. BLACKS HIGHER EDUC., Spring 2004, at 18).

478. Terry L. Jones, *Georgetown Slave Descendants Bring in Legal Team to Help Negotiate with University on Reparations*, ADVOCATE (Mar. 23, 2017), [http://www.theadvocate.com/baton\\_rouge/news/communities/westside/article\\_b221befe-0f26-11e7-8783-330932e2f352.html](http://www.theadvocate.com/baton_rouge/news/communities/westside/article_b221befe-0f26-11e7-8783-330932e2f352.html) [https://perma.cc/RS4T-ZY95].

Jeffrey Brown argues that structural reparations designed to facilitate “internal cultural repair” should take priority over litigation-centered strategies intended to compensate individuals for their losses, due to the need to heal a damaged collective psyche that has internalized years of social stigma.<sup>479</sup> Emma Coleman Jordan, similarly focused on the need for mental and perceptual change, urges the reparations movement to create an intellectual challenge to the history of racism.<sup>480</sup> For example, she suggests re-positioning Blacks in history from economic parasites to unjustly deprived contributors.<sup>481</sup>

Brown and Jordan agree that reparations for slavery achieved through litigation would have a very limited capacity to lead to meaningful repair, in part because this type of relief necessarily focuses on individuals directly descended from slaves.<sup>482</sup> However, reparations that make no distinctions between, on the one hand, direct victims of slavery and their descendants and, on the other hand, Blacks without ancestral connections to slavery, may also be problematic.<sup>483</sup>

Reparations that seek to uplift entire communities are rehabilitative. Reparations that attempt to make direct victims whole are compensatory. For example, a scholarship fund set up for a victim’s family members would be compensatory. If, however, the fund is available to the victim’s entire community, it is rehabilitative. Similarly, the construction of memorials or museums is rehabilitative because it

479. Jeffery M. Brown, *Deconstructing Babel: Toward a Theory of Structural Reparations*, 56 RUTGERS L. REV. 463, 470–71 (2004).

480. Emma Coleman Jordan, *The Non-Monetary Value of Reparations Rhetoric*, 6 AFR.-AM. L. & POL’Y REP. 21, 21–24 (2004) [hereinafter Jordan, *Non-Monetary Value*]; see also Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 N.Y.U. ANN. SURV. AM. L. 557, 559 (2003) [hereinafter Jordan, *History Lesson*] (arguing that reparations efforts should focus on lynching and race riots instead of slavery because of their closer temporal proximity to the present).

481. Jordan, *Non-Monetary Value*, *supra* note 480, at 21–24; see also Jordan, *A History Lesson*, *supra* note 480, at 559.

482. See Brown, *supra* note 479, at 502–03; Jordan, *Non-Monetary Value*, *supra* note 480 at 24.

483. David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*, 87 WASH. U. L. REV. 1043, 1062 (2010) (“Reparations provided to a group as a whole fail to distinguish among former victims, providing benefits to all members without regard to the degree of harm suffered, potentially even benefitting some who did not suffer at all or who are themselves implicated in abuses.” (citations omitted)); see also *id.* at 1064 (“Perhaps more troubling is that beneficiaries may again and forever be identified as victims, denying full autonomy to individuals and the authority of identity creation to groups. For example, Justice Clarence Thomas, among others, has argued that affirmative action should be abandoned because it casts a shadow over the accomplishments of all African Americans and marks blacks as victims, incapable of succeeding on their individual merits.” (citations omitted)).

does not involve direct payments to individuals.<sup>484</sup> Affirmative action is another form of rehabilitative reparations because it is available to any community member.<sup>485</sup>

The determination of who deserves reparations is highly controversial. The complexity of this issue reveals itself most sharply in the debate over affirmative action. This form of reparations extends to individuals, regardless of ancestry.<sup>486</sup> In the Black community, this grouping of all Blacks into one social identity causes some individuals, including, and perhaps most famously, Justice Clarence Thomas, to assert that affirmative action stigmatizes Blacks and undermines the meritocracy upon which Thomas and others believe American institutions should be based.<sup>487</sup> Proponents of affirmative action counter this complaint with the contention that opportunity is more important than stigmatization and thus a valuable trade-off.<sup>488</sup> They also assert that American educational and other institutions operate within racist hierarchical structures and are therefore not in fact meritocratic, even absent affirmative action.<sup>489</sup>

Other critics of affirmative action observe that employers and educational institutions primarily use it to benefit wealthy, recent immigrants without strong ancestral ties to slavery<sup>490</sup> or to admit or hire

484. *Id.*

485. See ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A MODEL FOR BLACK REPARATIONS 259 (2004) (stating that affirmative action beneficiaries need not be victims of past government discrimination).

486. See Brown, *supra* note 479, 499–510.

487. See Grutter v. Bollinger, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part); see also Gratz v. Bollinger, 539 U.S. 244, 281 (2003) (Thomas, J., concurring).

488. *Affirmative Action: Overview*, NAT'L CONF. ST. LEGISLATURES (Feb. 7, 2014), <http://www.ncsl.org/research/education/affirmative-action-overview.aspx> [https://perma.cc/E5MS-BPL2]. See generally AM. CIVIL LIBERTIES UNION, WHO SUPPORTS AFFIRMATIVE ACTION?, [https://www.aclu.org/files/images/asset\\_upload\\_file670\\_37287.pdf](https://www.aclu.org/files/images/asset_upload_file670_37287.pdf) [https://perma.cc/W4A3-UNYV] (detailing the various institutions and individuals that support affirmative action).

489. See, e.g., OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., CIVIL RIGHTS DATA COLLECTION: DATA SNAPSHOT: SCHOOL DISCIPLINE 1–3 (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf> [https://perma.cc/NVT5-29FR] (supplying statistics demonstrating higher rates of discipline, suspension, etc., among Black students); Jeff Nesbit, *Institutional Racism Is Our Way of Life*, U.S. NEWS & WORLD REP. (May 6, 2015, 1:16 PM), <http://www.usnews.com/news/blogs/at-the-edge/2015/05/06/institutional-racism-is-our-way-of-life> [https://perma.cc/58EX-VSDM] (citing studies and reports by the American Psychological Association, the U.S. Department of Education Office for Civil Rights, NPR, and others, asserting institutional racism's survival in modern American school systems).

490. See, e.g., Javier E. David, *How Immigration Distorts Affirmative Action Policy: Academic*, CNBC (Feb. 14, 2015, 12:03 PM), <http://www.cnbc.com/2015/02/14/tion-distorts-affirmative-action-policy-academic.html> [https://perma.cc/6CVH-BLMM]; Lloyd Green, *How Affirmative Action Became an Upper-Middle Class Benefit*, DAILY BEAST (Apr. 7, 2013, 4:45

White-looking biracial or mixed-race individuals who often do not suffer from discrimination to the same extent as Blacks with darker skin or more African features.<sup>491</sup> Extensive literature documents, however, that people of color living in the United States generally suffer from discrimination, regardless of their economic class, connections to slavery, or specific physical characteristics.<sup>492</sup>

Another problematic aspect of affirmative action is the way in which it groups all Whites as perpetrators. This classification challenges accepted understandings of individual, not collective, responsibility. Further, dividing perpetrators and victims by race calls for racial categorization, an exercise that is not only often inaccurate, but also suggests that race is biological, although an overwhelming body of medical and scientific research establishes that it is not.<sup>493</sup>

Despite the complexities of the reparations movement, most of its proponents agree that acknowledgment and apology alone do not suffice to compensate for past harms.<sup>494</sup> On the contrary, expressions of regret usually appear empty when unaccompanied by acts that give life to the words. A gesture of goodwill is therefore necessary to signify a sincere attempt at repair. The act or gesture should embody either a compensatory or a rehabilitative approach to reparations.

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AM), <http://www.thedailybeast.com/articles/2013/04/07/how-affirmative-action-became-an-upper-middle-class-benefit.html> [<https://perma.cc/9P3X-84CC>].

491. See, e.g., Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1709 (2000); Angela P. Harris, *From Color Line to Color Chart?: Racism and Colorism in the New Century*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 52, 54 (2008); Trina Jones, *Intra-Group Preferencing: Proving Skin Color and Identity Performance Discrimination*, 34 N.Y.U. REV. L. & SOC. CHANGE 657, 658–59 (2010).

492. See, e.g., Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 952 n.28 (2002); Christian Sundquist, *Critical Praxis, Spirit Healing and Community Activism: Preserving a Subversive Dialogue on Reparations*, 58 N.Y.U. ANN. SURV. AM. L. 659, 671 (2003) (arguing that reparations must focus on the community, which must itself recognize its group injuries and need for remedies). Furthermore, “African-American reparations claims have not succeeded because a successful Black reparations claim has the potential to undermine white privilege and the existing structures of political power, as well as producing monetary liability that could literally bankrupt the nation.” Sundquist, *supra*, at 690 (citing Yamamoto, *supra* note 460, at 493). Additionally, “it is vital that the reparations movement seek to improve the conditions for *all* Black people in America, and not solely those Black Americans that are able to establish a historical connection to American slavery.” *Id.* at 695.

493. See GUY P. HARRISON, *RACE AND REALITY: WHAT EVERYONE SHOULD KNOW ABOUT OUR BIOLOGICAL DIVERSITY* 21 (2010); RACE: THE POWER OF AN ILLUSION (California Newsreel 2003); Agustín Fuentes, *Race Is Real, But Not in the Way Many People Think*, PSYCHOL. TODAY (Apr. 9, 2012), <https://www.psychologytoday.com/blog/busting-myths-about-human-nature/201204/race-is-real-not-in-the-way-many-people-think> [<https://perma.cc/YVG9-GLJN>].

494. Roy L. Brooks, *Age of Apology*, in WHEN SORRY ISN'T ENOUGH 3, 3–11 (Roy L. Brooks, ed. 1999).

Compensatory restitution seeks to make up for the losses of individual victims or their families.<sup>495</sup> Rehabilitative reparations, on the other hand, strive to build up harmed communities.<sup>496</sup> As such, they avoid the challenges of identifying direct descendants of victims and recognize that the structural inequalities created and perpetuated by legal, social, and business practices affect all people of color in the United States, regardless of their lineage.

Reparations scholar Roy Brooks explains that

reparations . . . directed toward the individual victim or the victim's family . . . are intended to be compensatory, but only in a symbolic sense; for nothing can truly return the victim to the status quo ante. In contrast, rehabilitative reparations are directed toward the victim's community. They are designed to benefit the victim's group, to nurture the group's self-empowerment and, thus, aid in the nation's social and cultural transformation.<sup>497</sup>

The effectiveness and appropriateness of these types of reparations depend in part on the entity that bestows them. For instance, apologies from corporations likely carry little restorative power as they could easily reflect a desire to enhance a company's professional reputation, not a genuine attempt to transfer profits derived from slavery or other wrong acts to those harmed by them. Instead, corporate apologies often appear to be acts of self-defense intended to restore a company's legitimacy and maintain the appearance of goodwill.<sup>498</sup>

495. BROOKS, *supra* note 485, at 156 (2004).

496. *See id.*; J. ANGELO CORLETT, HEIRS OF OPPRESSION 231 (2010); Roy L. Brooks, *Getting Reparations for Slavery Right: A Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251, 270 (2004); Gray, *supra* note 483, at 1063–64 (“[G]roup-based reparations must confront the twin concerns of essentialism and perpetuating a culture of victimhood. Paying reparations to a group ignores differences among individuals in the beneficiary group. So doing risks reifying and perhaps providing renewed legitimacy to the lines of opposition implicated in past abuses.” (citations omitted)); Natsu Taylor Saito, *Rebellious Lawyering in the Courts of the Conqueror: The Legacy of the Hirabayashi Coram Nobis Case*, 11 SEATTLE J. FOR SOC. JUST. 89, 109 (2012) (“The Basic Principles further articulate four dimensions of reparations: (1) restitution, designed to restore the victim as nearly as possible to the position they occupied prior to the harm; (2) compensation for damages that can be economically redressed; (3) rehabilitation, encompassing medical, psychological, social, and legal services; and (4) guarantees that the wrong will not be repeated.” (citations omitted)); Carlton Waterhouse, *Total Recall: Restoring the Public Memory of Enslaved African-Americans and the American System of Slavery Through Rectificatory Justice and Reparations*, 14 J. GENDER, RACE & JUST. 703, 711 (2011). *See generally* SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS (Raymond A. Winbush ed., 2003) (collecting historical, legal, and other perspectives on reparations for slavery).

497. BROOKS, *supra* note 485, at 156 (2004) (quoting Roy L. Brooks, *supra* note 494, at 9).

498. Janssen, *supra* note 477, at 19 (citing John B. Hatch, *Beyond Apologia: Racial Reconciliation and Apologies for Slavery*, 70 W.J. COMM. 186 (2006)); *see also* Keith Michael

Wary of these types of self-serving goals, a group of plaintiffs brought a suit for damages against a large group of corporations in *In re African-American Slave Descendants Litigation*.<sup>499</sup> The plaintiffs argued for relief under several different theories.<sup>500</sup> One told a simple story of unpaid debt: the descendants of slaves should receive the value of slave labor from those who stole it.<sup>501</sup> From this perspective, Blacks are creditors and Whites, represented in this case by wealthy corporations, are unjustly enriched debtors.<sup>502</sup>

By contrast, the slavery disclosure laws described in the following Section, which evolved in response to *In re African-American Slave Descendants Litigation*, are a form of rehabilitative reparations because, by requiring businesses to research and make public their past bad acts, they seek to uncover truths for the benefit of the community, not individuals.<sup>503</sup> Further, in addition to setting the historical record straight, proponents of these laws hope that disclosures will lead corporations to make financial investments into communities.<sup>504</sup> The proposal to require credit card companies that engage in racial discrimination to invest in the communities they harm is also a form of rehabilitative reparations because it requires both acknowledgment of discriminatory practices and a meaningful effort to repair the harm done.

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Hearit, "Mistakes Were Made": *Organizations, Apologia, and Crises of Social Legitimacy*, 46 COMM. STUD. 1, 6 (1995).

499. 375 F. Supp. 2d 721, 738 (N.D. Ill. 2005), *aff'd in part as modified, rev'd in part*, 471 F.3d 754 (7th Cir. 2006). For a detailed discussion of the suit, see *infra* notes 520–52 and accompanying text.

500. See *In re African-Am. Slave Descendants Litig.*, 375 F. Supp. 2d, at 740–42; *infra* notes 515–47 and accompanying text.

501. See *In re African-Am. Slave Descendants Litig.*, 375 F. Supp. 2d at 741 (quoting Plaintiff's Second Consolidated and Amended Complaint ¶¶ 305, 310, *In re African-Am. Slave Descendants Litig.*, 375 F. Supp. 2d 721 (N.D. Ill. 2005) (No. 02-CV-1862(CRN)), ECF No. 157); RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 207 (2000).

502. See Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 436 (1998).

503. Alfred L. Brophy, *The Cultural War over Reparations for Slavery*, 53 DEPAUL L. REV. 1181, 1185–89 (2004); see also, e.g., CHI., ILL., MUN. CODE § 2-92-585 (2016), [http://library.amlegal.com/nxt/gateway.dll/Illinois/chicago\\_il/title2citygovernmentandadministration/chapter2-92departmentofpurchasescontract?f=templates\\$fn=altmain-nf.htm\\$q=\[field%20folio-destination-name:%272-92-585%27\]\\$x=Advanced#JD\\_2-92-585](http://library.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/title2citygovernmentandadministration/chapter2-92departmentofpurchasescontract?f=templates$fn=altmain-nf.htm$q=[field%20folio-destination-name:%272-92-585%27]$x=Advanced#JD_2-92-585) [https://perma.cc/X65L-NG8T (staff-uploaded archive)] ("Each contractor with whom the city enters into a contract, whether subject to competitive bid or not, must complete an affidavit verifying that the contractor has searched any and all records of the company or any predecessor company regarding records of investments or profits from slavery or slaveholder insurance policies during the slavery era.").

504. See *infra* notes 528–35 and accompanying text.



*C. Slavery Disclosure Laws*

At the beginning of the twenty-first century, several cities and states introduced slavery disclosure laws that arose out of a multi-faceted strategy to compensate for and acknowledge the harms inflicted by slavery.<sup>505</sup> Initially, reparations advocates focused their efforts solely on government compensation, in recognition of the legal and political infrastructure that supported slavery and continued its legacy after its abolition.<sup>506</sup> After a series of attempts to receive official reparations failed, however, in the 2000s, activists turned their attention to corporations, seeking to divest them of profits gained through slavery and to compel community investments by these companies designed to bring Blacks closer to the social and financial positions they would hold absent the legacy of slavery.<sup>507</sup>

The quest for restitution from corporations began as a series of lawsuits, directed at a variety of corporate entities.<sup>508</sup> Reparations activist Deadria Farmer-Paellmann selected the first defendant, Aetna insurance company, based on the results of her investigation revealing that Aetna had issued policies on slaves' lives.<sup>509</sup> These insurance policies reduced or eliminated slaveholders' financial risk of loaning out their slaves for dangerous work in mines and on railroads, simultaneously increasing the slaves' exposure to physical harm, abuse, and death.<sup>510</sup> Inspired by Farmer-Paellmann's research, the Restitution Study Group ("RSG") formed to investigate additional connections

505. See Jason Levy, Note, *Slavery Disclosure Laws: For Financial Reparations or for "Telling the Truth?"*, 2009 COLUM. BUS. L. REV. 468, 472–73 (2009).

506. See *id.* at 474–77.

507. *Id.* at 477.

508. *Id.*

509. See *In re African-Am. Slave Descendants Litig.*, 375 F. Supp. 2d 721, 738 (N.D. Ill. 2005); Janssen, *supra* note 477, at 24.

510. See *In re African-Am. Slave Descendants Litig.*, 375 F. Supp. 2d at 738; James Cox, *Insurance Firms Issued Slave Policies*, USA TODAY (Feb. 21, 2002), <http://usatoday30.usatoday.com/money/general/2002/02/21/slave-insurance-policies.htm> [https://perma.cc/4QS6-5U8Y] ("Early in the 19th century, insurance companies debated whether to insure slaves as property—like work animals and buildings—or as human beings. Increasingly, owners renting their slaves out to mines, railroads and tobacco processors wanted to protect their investments. Insurers eventually began issuing one-year life policies at comparatively pricey premiums that reflected the dangerous nature of the slaves' work. . . . In 1847, the owners of Robert Moody insured his life with Nautilus Insurance, which later changed its name to New York Life. A handwritten note on the policy says he was hired out to work at the Clover Hill Pits, a coal mine near Richmond. Evidence of 10 more New York Life slave policies comes from an 1847 account book kept by the company's Natchez, Miss., agent, W.A. Britton. The book, part of a collection at Louisiana State University, contains Britton's notes on slave policies he wrote for amounts ranging from \$375 to \$600. A 1906 history of New York Life says 339 of the company's first 1,000 policies were written on the lives of slaves.").

between corporations' wealth-seeking actions and slavery.<sup>511</sup> These studies "focused on benefits corporations had gained from slavery by collecting duties and fees on slave ships, lending money to slave traders and on the exploitation of slave labor."<sup>512</sup> This labor reportedly amounted to three billion dollars by 1860 and contributed significantly to the construction of buildings, streets, and railroads and the productivity of cotton and tobacco fields.<sup>513</sup>

The media attention that the RSG's work received contributed to the enactment of the first slavery disclosure law in California in 2000.<sup>514</sup> This law requires insurance companies operating in the state that have past connections to slavery to join the State Slavery Insurance Registry or face penalties.<sup>515</sup> It also requires the state insurance commissioner to obtain all records of slaveholder insurance policies issued by predecessor corporations.<sup>516</sup> The City of Chicago followed suit in 2002, with a more expansive version of California's law.<sup>517</sup> Thanks to the advocacy of civil rights activist and alderperson Dorothy Wright Tillman, Chicago's law requires disclosure of past slavery-related activities by all organizations conducting business with the city, not just insurance companies.<sup>518</sup>

Based on the success of the Aetna suit, reparations activists targeted seventeen different corporate entities around the country with similar complaints.<sup>519</sup> Defendants included companies representing the financial, tobacco, textile, railroad, and insurance industries.<sup>520</sup> The

511. Janssen, *supra* note 477, at 25.

512. *Id.*

513. *Id.*

514. Act of Sept. 29, 2000, ch. 934, 200 Cal. Sess. Laws 6971, 6971–72 (codified at CAL. INS. CODE § 13810 (West, Westlaw through Ch. 3 of 2017 Reg. Sess.)); Janssen, *supra* note 477, at 25.

515. CAL. INS. CODE §§ 13811–13812 (West, Westlaw through Ch. 3 of 2017 Reg. Sess.); Janssen, *supra* note 477, at 25.

516. CAL. INS. CODE § 13812; Janssen, *supra* note 477, at 14.

517. CHI., ILL., MUN. CODE § 2-92-585 (2016), [http://library.amlegal.com/nxt/gateway.dll/Illinois/chicago\\_il/title2citygovernmentandadministration/chapter2-92departmentofpurchasescontract?f=templates\\$fn=altmain-nf.htm\\$q=\[field%20folio-destination-name:%272-92-585%27\]\\$x=Advanced#JD\\_2-92-585](http://library.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/title2citygovernmentandadministration/chapter2-92departmentofpurchasescontract?f=templates$fn=altmain-nf.htm$q=[field%20folio-destination-name:%272-92-585%27]$x=Advanced#JD_2-92-585) [https://perma.cc/X65L-NG8T (staff-uploaded archive)]; Janssen, *supra* note 477, at 25.

518. CHI., ILL., MUN. CODE § 2-92-585, [http://library.amlegal.com/nxt/gateway.dll/Illinois/chicago\\_il/title2citygovernmentandadministration/chapter2-92departmentofpurchasescontract?f=templates\\$fn=altmain-nf.htm\\$q=\[field%20folio-destination-name:%272-92-585%27\]\\$x=Advanced#JD\\_2-92-585](http://library.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/title2citygovernmentandadministration/chapter2-92departmentofpurchasescontract?f=templates$fn=altmain-nf.htm$q=[field%20folio-destination-name:%272-92-585%27]$x=Advanced#JD_2-92-585) [https://perma.cc/X65L-NG8T (staff-uploaded archive)]; Janssen, *supra* note 477, at 25.

519. First Consolidated and Amended Complaint and Jury Demand, *In re African-Am. Slave Descendants Litig.*, 375 F. Supp. 2d 721, 738 (N.D. Ill. 2005) (No. 02-CV-1862 (CRN)), ECF No. 58; Janssen, *supra* note 477, at 25.

520. *In re African-Am. Slave Descendants Litig.*, 375 F. Supp. 2d 721, 738 (N.D. Ill. 2005); Janssen, *supra* note 477, at 32–33 n.3 ("These defendants included Aetna, JP Morgan,

federal court consolidated these lawsuits into *In re African-American Slave Descendants Litigation* in the Northern District of Illinois.<sup>521</sup> The complaint sought relief based on both the companies' exploitation of slaves for profit and their attempts to deceive the public by covering up their misdeeds.<sup>522</sup> For example, in regard to the prominent bank FleetBoston (now part of Bank of America), plaintiffs alleged,

FleetBoston, through its predecessor bank, made loans to slave traders and also collected custom duties and fees on ships engaged in the slave trade. Plaintiffs further alleged that "FleetBoston engaged in a self-concealed business enterprise so that the Plaintiffs and others similarly situated would not be aware of the existence of this enterprise," and . . . "made various misleading statements to the Press from March 2000 to February 2002, attempting to disassociate its predecessor company from its current company."<sup>523</sup>

Similarly, the suit against private bank Brown Brothers Harriman alleged that it had "loaned millions directly to planters, merchants and cotton brokers throughout the South" in addition to owning "at least two cotton plantations totaling 4,614 acres and the plantations' 346 slaves" and had attempted to conceal these facts.<sup>524</sup>

The injuries laid out in the complaint encompassed many aspects of structural social inequality that plaintiffs traced back to slavery. Specifically, the complaint asserted that defendants' actions in support of slavery collectively led African Americans to trail significantly behind Whites in the areas of wealth accumulation, income, literacy, education, and life expectancy, while experiencing increased incarceration,

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American International Group (AIG), Lloyd's of London, New York Life Insurance Company, Southern Mutual Insurance Company, FleetBoston, Bank of America, AFSA Data Corporation, Brown Brothers Harriman, Bank One, Lehman Brothers, RJ Reynolds Tobacco Company, Brown and Williamson, Liggett Group Inc., Loews Corporation (Lorrillard), Canadian National Railway, CSX Corporation, Norfolk Southern Corp., and Union Pacific Railroad. Similar litigations were filed in New York, New Jersey, Virginia, North and South Carolina, Mississippi, Louisiana, and Texas.").

521. *In re African-Am. Slave Descendants Litig.*, 375 F. Supp. 2d 721, 726 (N.D. Ill. 2005), *aff'd in part as modified, rev'd in part*, 471 F.3d 736 (7th Cir. 2006).

522. *See id.* at 768–69.

523. *Id.* at 738 (citation omitted). Regarding CSX railway corporation, "[p]laintiffs allege that CSX 'is a successor-in-interest to numerous predecessor railroad lines that were constructed or run, at least in part, by slave labor.' . . . Plaintiffs further allege that 'CSX engaged in a self-concealed business enterprise as the plaintiffs and others similarly situated would not be aware of the existence of this enterprise,' and, in more recent times, 'withheld information or made a misleading statement to the Press regarding their participation in and profiting from slavery.'" *Id.* at 738 (citations omitted).

524. *Id.* at 738.

victimization, death penalty sentencing, and single-parent upbringings.<sup>525</sup> It alleged that plaintiffs lacked

the same opportunities as . . . their white contemporaries; . . . [must] overcome barriers to their human right to development which their white contemporaries [need] not; . . . suffer irreparable psychological damage from the loss of their history, language and culture; [and do not] know the actual birth names of . . . their forbearers and, consequently, to this day do not know their own real names.<sup>526</sup>

The remedies that plaintiffs sought included an accounting of the “monies, profits, and/or benefits derived by defendants” from their participation in activities related to slavery, “a constructive trust in the value of said monies, profits, and/or benefits, . . . full restitution in the value of all monies, profits, and/or benefits derived by defendants’ use of slave labor,” and “‘equitable disgorgement’ of these ‘monies, profits, and/or benefits. . . .’”<sup>527</sup>

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525. See Plaintiffs’ Memorandum in Opposition to Defendants’ Joint Motion to Dismiss the Second Amended and Consolidated Complaint at 1–2, *In re African-Am. Slave Descendants Litig.*, 471 F.3d 754 (N.D. Ill. 2006) (No. 1:02-CV-07764), ECF No. 161; see also *In re African-Am. Slave Descendants Litig.*, 375 F. Supp. at 738. The complaint asserted that

the practice of slavery has caused the following specific social inequities: twenty-six (26) percent of African-Americans in the United States live in poverty compared to eight (8) percent of whites. . . . 14.7 percent of African-Americans have four-year college degrees, compared with 25 percent of whites. . . . [A] black person born in 1996 can expect to live, on average, 6.6 fewer years than a white person. . . . African-Americans are more likely to go to jail, to be there longer and . . . to receive the death penalty. . . . [African-Americans] lag behind whites according to every social yardstick: literacy, life expectancy, income and education. They are more likely to be murdered and less likely to have a father at home. . . . Black families earn only \$580 for every \$1000 earned by white families.

*In re African-Am. Slave Descendants Litig.*, 375 F. Supp. 2d at 740 (alterations in original) (quoting Plaintiff’s Second Consolidated and Amended Complaint ¶ 41 n.1, *In re African-Am. Slave Descendants Litig.*, 375 F. Supp. 2d 721 (N.D. Ill. 2005) (No. 02-CV-1862(CRN)), ECF No. 157). These numbers represent statistics available in the 1998 census report. Plaintiff’s Second Consolidated and Amended Complaint ¶ 41 n.1, *In re African-Am. Slave Descendants Litig.*, 375 F. Supp. 2d 721 (N.D. Ill. 2005) (No. 02-CV-1862(CRN)), ECF No. 157.

526. Plaintiffs’ Memorandum in Opposition to Defendants’ Joint Motion to Dismiss the Second Amended and Consolidated Complaint, *supra* note 525, at 1–2; Lolita Buckner Inniss, *A Critical Legal Rhetoric Approach to the In re African-American Slave Descendants Litigation*, 24 ST. JOHN’S J. LEGAL COMMENT. 649, 679 (2010).

527. *In re African-Am. Slave Descendants Litig.*, 375 F. Supp. 2d at 757 (quoting Plaintiff’s Second Consolidated and Amended Complaint ¶ 41 n.1, *In re African-Am. Slave Descendants Litig.*, 375 F. Supp. 2d 721 (N.D. Ill. 2005) (No. 02-CV-1862(CRN)), ECF No. 157).

While this litigation ran its course in the courts, activists put pressure on the defendant corporations to settle and make restitution directly to the Black community.<sup>528</sup> Several organizations, church leaders, and politicians supported these campaigns,<sup>529</sup> which included boycotts against JPMorgan student loans and insurance policies from Aetna and New York Life.<sup>530</sup> JPMorgan and Wachovia subsequently issued public apologies for the companies' past ties to slavery.<sup>531</sup> Aetna also apologized,<sup>532</sup> and established a minority internship program and diversity scholarship fund.<sup>533</sup> JPMorgan similarly created a five million dollar scholarship fund for Black students in Louisiana.<sup>534</sup>

Farmer-Paellmann also sought restitution from corporations, through letters she wrote to thirteen corporations that had ties to slavery. She requested that they finance a historical commission to examine slavery, and set up an "interim humanitarian fund" for the health, education, and development of African Americans.<sup>535</sup>

Ultimately, the courts did not award plaintiffs damages in the reparations cases, due to a number of challenges facing reparations lawsuits generally, including: statutes of limitations; the difficulty of identifying directly harmed individuals; the absence of individual perpetrators; the lack of direct causation; and the indeterminacy of compensation amounts.<sup>536</sup> Courts likely also disfavored these suits

528. Janssen, *supra* note 477, at 26.

529. *Id.* at 26 (citing Diane Levick, *Aetna Facing Boycott Threat: Reparations Group Demands Trust Fund That Would Benefit Slaves' Descendants*, HARTFORD COURANT (Nov. 15, 2006), [http://articles.courant.com/2006-11-15/business/0611150453\\_1\\_deadria-farmer-paellmann-reparations-descendants](http://articles.courant.com/2006-11-15/business/0611150453_1_deadria-farmer-paellmann-reparations-descendants) [<https://perma.cc/E3T6-U6PB>]).

530. Conal Walsh, *JP Morgan Faces Boycott over Slave Trade Reparations*, GUARDIAN (Dec. 10, 2005), <http://www.theguardian.com/business/2005/dec/11/usnews.theobserver> [<https://perma.cc/K4BL-NAZF>].

531. Diane Levick, *Aetna Facing Boycott Threat: Reparations Group Demands Trust Fund That Would Benefit Slaves' Descendants*, HARTFORD COURANT (Nov. 15, 2006), [http://articles.courant.com/2006-11-15/business/0611150453\\_1\\_deadria-farmer-paellmann-reparations-descendants](http://articles.courant.com/2006-11-15/business/0611150453_1_deadria-farmer-paellmann-reparations-descendants) [<https://perma.cc/E3T6-U6PB>]; Walsh, *supra* note 530.

532. Janssen, *supra* note 477, at 26–29.

533. BROOKS, *supra* note 485, at 15.

534. JP MORGAN CHASE & CO., ANNUAL REPORT 2005 12 (2005) [https://www.jpmorganchase.com/corporate/investor-relations/document/ar05\\_complete.pdf](https://www.jpmorganchase.com/corporate/investor-relations/document/ar05_complete.pdf) [<https://perma.cc/J45W-FLU4>] (stating plans to expand the Smart Start scholarship program to Louisiana); John Carlisle, *Slave Disclosure Shakedowns*, AM. SPECTATOR (Feb. 18, 2005, 4:07 AM), <http://spectator.org/articles/48951/slave-disclosure-shakedowns> [<https://perma.cc/89DQ-7YUU>].

535. James Cox, *Aetna, CSX, FleetBoston Face Slave Reparation Suit*, USA TODAY (Mar. 24, 2002, 10:11 PM), <http://usatoday30.usatoday.com/money/general/2002/03/25/slave-reparations.htm> [<https://perma.cc/MJ2U-P25K>].

536. *In re African-Am. Slave Descendants Litig.*, 375 F. Supp. 2d 721, 780–81 (N.D. Ill. 2005). See Yamamoto et al., *supra* note 205, at 24–27; David Horowitz, *Ten Reasons Why Reparations for Blacks Is a Bad Idea for Blacks—And Racist Too*, FRONTPAGEMAG (Jan. 3,

because of the relatively low moral culpability of corporations, compared to long-deceased individual slaveholders or the government, which was not available as a defendant due to sovereign immunity.<sup>537</sup> On the other hand, many individuals have fewer reservations about suing corporations than the descendants of slave-owners, whom they view as innocent in comparison.<sup>538</sup>

Despite plaintiffs' loss, however, the court expressed its openness to the possibility of liability based on consumer fraud and protection resulting from corporations' failure to disclose slavery dealings.<sup>539</sup> Therefore, although plaintiffs did not win on this theory, it may have opened the door to wider acceptance of and advocacy for slavery disclosure legislation.

In any case, it is likely that plaintiffs did not envision a victory in court. Traditionally, reparations plaintiffs have sought settlements, with the additional goals of raising awareness of the lingering effects of slavery, and building political pressure for legislation. By that measure, the suits were a success. The City of Los Angeles<sup>540</sup> and State of Iowa<sup>541</sup> passed slavery disclosure laws in 2003. Detroit<sup>542</sup> and Philadelphia<sup>543</sup>

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2001), <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=1153> [<https://perma.cc/H5SJ-D399>].

537. Kaimipono David Wenger, *Reparations Within the Rule of Law*, 29 T. JEFFERSON L. REV. 231, 245–46 (2007).

538. James Cox, *Farmer-Paellman Not Afraid of Huge Corporations*, USA TODAY (Feb. 21, 2002, 12:52 AM), <http://usatoday30.usatoday.com/money/general/2002/02/21/slave-activist.htm> [<https://perma.cc/QM9A-YD6Y>].

539. See *In re African-Am. Slave Descendants Litig.*, 471 F.3d 754, 762–63 (7th Cir. 2006) (“The second qualification concerns a claim, rather buried in the complaint but not forfeited, that in violation of state fraud or consumer protection law members of the plaintiff classes have bought products or services from some of the defendants that they would not have bought had the defendants not concealed their involvement in slavery. . . . It is a complaint of consumers’ being deceived because sellers have concealed a material fact. . . . [T]he plaintiffs are charging the defendants with misrepresenting their activities in relation to slavery. A seller who learns that some class of buyers would not buy his product if they knew it contained some component that he would normally have no duty to disclose, but fearing to lose those buyers falsely represents that the product does not contain the component, is guilty of fraud. An example would be a manufacturer who represented that his products were made in the United States by companies that employ only union labor, whereas in fact they were made in Third World sweatshops. We do not offer an opinion on the merits of the consumer protection claims, but merely reject the district court’s ruling that they are barred at the threshold.” (citations omitted)).

540. L.A., CAL., ADMIN. CODE, ch.1, art. 15 (2003) (codifying Ordinance No. 175346: “Regulations Regarding Participation in or Profits Derived from Slavery by Any Company Doing Business with the City”).

541. H.R. 29, 80th Gen. Assemb., Reg. Sess. (Iowa 2003), <https://www.legis.iowa.gov/docs/publications/LGI/80/HR29.pdf> [<https://perma.cc/A9YL-6YNP>].

542. DETROIT, MICH., CITY CODE, ch. 18, art. 5, div. 7 (2005).

543. PHILA., PA., CODE § 17-104(2) (2004).

followed in 2004, as did San Francisco<sup>544</sup> in 2006. There are also slavery disclosure laws on the books in Berkeley,<sup>545</sup> Chicago,<sup>546</sup> Milwaukee,<sup>547</sup> Oakland,<sup>548</sup> Maryland,<sup>549</sup> Illinois,<sup>550</sup> and California.<sup>551</sup>

Despite their expansion, the somewhat limited reach of slavery disclosure laws precludes them from providing true and full restitution for the harms of slavery. Nonetheless, they accomplish several important goals. First, they generate public recognition of corporations' complicity with slavery and the moral wrong that their involvement represented. Second, they forge important connections between past exploitation and present corporate wealth, contributing to the movement that seeks to resist collective forgetting.<sup>552</sup> Third, they have the potential to lead to substantial investments into communities by corporations, even when these companies have not broken the laws.<sup>553</sup> Therefore, even though these laws are weak in the sense that they carry penalties only for failure to disclose, they can be effective rehabilitative tools. They also provide a useful model for regulation of harms related to slavery, such as racial discrimination in the credit card industry.

Clearly, racial discrimination by credit card companies is not the moral equivalent of slavery. Nonetheless, the economic and racial inequality that the credit card companies' predatory practices produce and the lack of resistance to them represent vestiges of slavery. Also, unlike past ties to slavery, which are merely censured and sometimes

544. S.F., CAL., ADMIN. CODE § 12Y (2006) ("San Francisco Slavery Disclosure Ordinance").

545. BERKELEY, CAL., MUN. CODE §§ 13.96.010–.030 (2005).

546. CHI., ILL., MUN. CODE § 2-92-585 (2002).

547. MILWAUKEE, WIS., CODE OF ORDINANCES § 310-14 (2014).

548. OAKLAND, CAL., MUN. CODE § 9.60.010 (2005).

549. MD. CODE ANN., INS. §§ 30-101 to -103 (West, Westlaw through ch. 2, 2017 Reg. Sess.).

550. 215 ILL. COMP. STAT. ANN. 5/155.41 (West, Westlaw through P.A. 99-938, 2016 Reg. Sess.).

551. CAL. INS. CODE § 13810 (West, Westlaw through 2016 Sess. laws). *See also* Levy, *supra* note 512, at 486.

552. *See* MARTHA MINOW, *BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR* 16 (2009); Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 308 (2003). *See generally* MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1999) (examining various reactions to mass violence and the ways in which countries have sought to heal trauma); *Peculiar Profits*, MOTHER JONES, July/Aug. 2000, <http://www.motherjones.com/politics/2000/07/outfront> [<https://perma.cc/8DGS-KMSF>] ("The statute of limitations could derail any class-action claims. But [Plaintiff] hopes that by exposing historical practices of corporations on her list, they will feel morally obligated to make restitution.").

553. For example, both JPMorgan and Aetna created scholarship funds voluntarily. *See* text accompanying *supra* notes 528–29.

excused, racial discrimination is illegal. The current legal regime, however, fails to penalize or prevent it effectively.

### CONCLUSION

Regulatory reform of the credit card industry is essential to protect consumers from exploitative practices that have dire consequences. Unfortunately, however, the powerful influence that some banks and other credit lending institutions have on Congress has heretofore disabled most serious attempts to shield consumers from companies' predatory tactics. Approximately \$11.6 million of the political action committee money given to the 2016 federal electoral candidates came from finance and credit card companies.<sup>554</sup> The size of these contributions suggests the existence of regulatory capture that is difficult, if not impossible, to dislodge.

Consumer advocacy is a target of the Trump administration. In January 2017, Republicans threatened to dismantle the Consumer Financial Protection Bureau, based largely on its lack of accountability to elected officials.<sup>555</sup> To this end, an executive order called for a report on the efficacy of the Dodd-Frank Wall Street Reform and Consumer Act, putting its continued existence into doubt.<sup>556</sup>

It is therefore appealing to consider remedies to this problem that do not require increased regulation or financial sacrifice by the corporations, such as financial education for consumers. But, although there is no doubt that every individual can benefit from full information regarding smart financial choices, consumer education cannot replace structural reform as a gateway to reducing financial and credit disparities. Realistically, even an individual armed with the best information possible cannot control the effects of structural, institutionalized discrimination.

Another argument against stronger regulation of credit card companies is that these companies will respond by ceasing to lend to the communities they currently exploit, forcing them into even more dire financial constraints or exploitative lending conditions. This outcome is highly unlikely, however, because of the high profit margin in subprime lending. Therefore, even with a reduction in opportunities to

554. *Finance/Credit Companies: Long-Term Contribution Trends*, OPENSECRETS.ORG, <https://www.opensecrets.org/industries/totals.php?cycle=2016&ind=F06> [<https://perma.cc/F5MW-ZSZD>].

555. Lucinda Shen, *Donald Trump is Targeting an Agency That Has Recovered \$11.8 Billion for Consumers*, FORTUNE (Jan. 27, 2017), <http://fortune.com/2017/01/27/donald-trump-cfpb-consumer-protection-financial-bureau-elizabeth-warren/> [<https://perma.cc/CG79-6T29>].

556. Exec. Order No. 13,772, 82 Fed. Reg. 9,965 (Feb. 8, 2017).



discriminate, credit card companies will most likely continue to issue cards to borrowers who make monthly payments, regardless of the amount of those payments.

A significant obstacle to achieving meaningful reform in this area is that it requires a major cultural shift. Social perceptions, shaped by a steady diet of popular culture and media, infiltrate individuals' daily lives. The stories they hear and the corresponding stereotypes they embrace inform their financial decisions and transactions, in addition to their perceptions of equality and justice. Social movements have always been at the forefront of major changes in the law, such as the Civil Rights Act and the Supreme Court cases recognizing marriage equality.<sup>557</sup> Occupy Wall Street began a conversation about economic equality that, perhaps fatally, failed to link its struggle to racial equality.<sup>558</sup> An intersectional movement that understands the connection between different forms of oppression is therefore necessary to guide legal reform.

From a much broader perspective, it may be unrealistic to try to solve this problem from within the system. Perhaps it is a mistake to strive for reform instead of revolution.<sup>559</sup> To function, capitalism relies on economic winners and losers, and systemic, structural racism identifies and perpetuates a racial class of losers that serves an essential role in this economic model. It is possible that only by imagining and adopting a completely new economic system can the law eliminate racism in the consumer credit industry or in any other sector.

This powerful vision surfaces in the critically acclaimed television show *Mr. Robot*, where masses take to the streets to celebrate after hackers infiltrate the world's largest bank and erase all consumer debt.<sup>560</sup> This may be the utopia for which we must strive. Until that moment, any social critique that focuses on the actions of the consumer instead of the credit card companies misguidedly redirects a conversation about structural inequality and exploitation to one about personal choices.

It is the role of the law to protect consumers from exploitation and discrimination. In the context of consumer credit, the law has failed to do so. Adopting disclosure and investment requirements for credit card

557. See Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 885–86, 893 (2013) (discussing social movements in the civil rights and marriage equality contexts).

558. See Rinku Sen, *Race and Occupy Wall Street*, THE NATION (Oct. 26, 2011), <https://www.thenation.com/article/race-and-occupy-wall-street/> [<https://perma.cc/QUS8-RVEN>].

559. Professor Amna Akbar, Remarks at the Yale CRT Conference (2016).

560. *Mr. Robot: eps1.9\_zero-daY.avi* (Anonymous Content and Universal Cable Productions Aug. 19, 2015).

companies would signal to consumers and corporations alike that the law will not tolerate predatory practices, and significantly raise the standards for corporate and social practice in the United States.