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Bringing Relevance Back to Consumer Bankruptcy

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BRINGING RELEVANCE BACK TO CONSUMER BANKRUPTCY

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This Paper was presented at the Seventeenth Annual *Emory Bankruptcy Developments Journal* Symposium in February of 2020. Less than a month later, all or most travel had ceased and many of us began the process of social distancing and restructuring our lives in the face of the coronavirus. No one could have predicted this event and its effects on the world are both profound and unknown. The virus has uncovered or at least highlighted vast inequalities in our entire economic system, including consumer credit systems. While some of us lament not being able to see our friends or teach live classes, others wonder when they will see their next paycheck, how they will pay the rent, or feed their families.

In light of these events, consumer bankruptcy seems not just irrelevant, but as some on the panel have suggested, downright ill-equipped to deal with the critical underlying issues, namely vast systemic economic and other inequalities. Consumer bankruptcy is at best a Band-Aid loosely adhering to the surface of a far larger problem. Having said that, the consumer bankruptcy system is still a pretty good short-term fix for a myriad of financial problems, large and small, but is a short-term solution at best. Thus, I admit upfront that when I proclaim consumer bankruptcy's irrelevance, I simply mean that the system could do a far greater job meeting the modern consumer's fundamental financial needs. Below I try to identify those needs, but none solve the real problems which are far larger than bankruptcy law can address.

In many ways and for many reasons, consumer bankruptcy has become virtually irrelevant. Like estranged lovers, consumers and bankruptcy have moved apart in the forty years since the 1978 Code was enacted. The Bankruptcy Code (Code) has changed drastically, through a series of amendments, but particularly the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 amendments (2005 Amendments). While much has been written about the game-changing 2005 overhaul in the law, those changes are dwarfed by the

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radical ways in which consumers' financial lives have changed over the same forty years.

To start, the wealth and income gaps between rich and poor are the largest today in history. Since bankruptcy's primary consumer users are middle class,[1] a shrinking middle class means smaller percentages of bankruptcy filers. America is also more diverse than it was forty years ago. A higher percentage of Americans are people of color but the wealth and income gaps between people of color and other Americans are also at all-time highs.[2] In short, wages and wealth are down for many if not most Americans, but even more so for Americans of color.

While wages and wealth are down, credit and debt are way up.[3] Americans of all races and socio-economics are plied with more credit than one could have imagined forty years ago. There is more mortgage debt, more credit card debt, more auto loan debt and exponentially more student loan debt. Indeed, student loans represent the fastest growing share of consumer debt and now exceed outstanding credit card or auto loan balances.[4] Borrowers owe more than $1 trillion in student loans held or guaranteed by the federal government and about $165 billion to private student loan lenders.[5] As a result, student loan debt is seen by many as the next big bubble, possibly large enough and precarious enough to generate the next big global financial crisis.

Debt structures carried by people of color are on average more disadvantageous than those of other Americans. People of color pay higher interest rates on mortgages, student loans, and credit cards even when adjusted

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1 *See* TERESA SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS 2 (2000).

2 Home ownership, one indicator of wealth, tracks these gaps. People of color are less likely to own a home than other Americans. As of the fourth quarter of 2019, 73.7% of white Americans owned their home, compared to 44% of black Americans, and 48.1% of Latinx Americans. *Quarterly Residential Vacancies and Homeownership, Fourth Quarter 2019*, U.S. Census Bureau (Apr. 7, 2020), https://www.census.gov/housing/hvs/files/currenthvspress.pdf.

3 Kimberly Amadeo, *Consumer Spending Statistics and Current Trends* (Apr. 2, 2020), https://www.thebalance.com/consumer-spending-trends-and-current-statistics-3305916 (last visited Apr. 10, 2020); *Personal Consumption Expenditures/Gross Domestic Product*, FRED ECONOMIC DATA (Apr. 29, 2020), https://fred.stlouisfed.org/graph/?g=hh3; *see also* WIKIPEDIA, *Consumer Spending*, https://en.wikipedia.org/wiki/Consumer_spending (stating that "In 1929, consumer spending was 75% of the nation's economy. This grew to 83% in 1932, when business spending dropped. Consumer spending dropped to about 50% during World War II due to large expenditures by the government and lack of consumer products. Consumer spending in the US rose from about 62% of GDP in 1960, where it stayed until about 1981, and has since risen to 71% in 2013.").

4 *See* Doug Rendleman & Scott Weingart, *Collection of Student Loans: A Critical Examination*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 215, 216–17 (2014).

5 *Id.* at 217.

for income and creditworthiness.[6] Their student loans are also larger than other Americans' student loans. This means that debtor-creditor laws have greater significance and greater impact or people of color than for other Americans.

Additionally, despite the endless credit, people in general are less financially literate than they were forty years ago, creating a perfect, ever-indebted, storm. Finally, the Consumer Financial Protection Bureau (CFPB) has been dismantled over the past few years and is no longer policing lending products.[7]

Consumer bankruptcy has never been a panacea, but it has become even less useful to consumers. Using data generated *before* the 2005 Amendments, Professors Deborah Thorne and Katie Porter showed that one year after filing for chapter 7, one in four debtors were struggling to pay routine bills, and one in three faced a financial situation similar to, or worse than, when they filed.[8] The 2005 Amendments made consumer bankruptcy far less useful to the average consumer. The amendments limited the secured debts that could be stripped down in a chapter 13, attempted to make more debtors file chapter 13 cases versus chapter 7 cases, and added further costly impediments to filing such as required financial literacy classes. Prior Code amendments limited the dischargeability of student loans. There is no doubt that the Code is less consumer-friendly today than it was prior to 2005.

This Paper presumes that readers want to make bankruptcy more useful for consumers and for society as a whole. If this is true, we need to ask two questions: first, what do individual consumers hope to get out of the system, and second, what does society hope to get out of the system? In other words, what is it that we expect the system to accomplish and what are its goals? While consumers may also want other things out of a bankruptcy system, most would like to discharge as many debts as possible and to keep as much of their property as possible, including their houses and cars. What society seeks from the system is more complex, but few would disagree that if we are going to have a consumer bankruptcy system, it should be useful.

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6 *See* Pamela Foohey, *Lender Discrimination, Black Churches, and Bankruptcy*, 54 HOUS. L. REV. 1079, 1096–98 (2017); *see generally* Pamela Foohey, *Access to Consumer Bankruptcy*, 34 EMORY BANKR. DEV. J. 341 (2018); Pamela Foohey, Robert M. Lawless, Katherine Porter, & Deborah Thorne, *"No Money Down" Bankruptcy*, 90 S. CAL. L. REV. 1055 (2017); Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. Rev. 1071, 1073–74 (2017) (showing that credit card companies charge more fees, higher interest rates, and impose other costly conditions on black and Latinx customers).

7 *See infra* notes 57–72 and accompanying text.

8 *See generally* Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67 (2006) (A large swath of chapter 7 bankruptcy debtors are no better off a year later. This article depressed me so much that I switched my research focus from bankruptcy law to consumer law shortly after reading it.).

Consumer bankruptcy can be useful again, through Code changes that could also play a role in stabilizing the economy.[9] First, all secured debts could be subject to strip-down, including home mortgages. This one change could create more prudence among home lenders and help stabilize the housing market and the global economy. Second, student loans could also be subject to discharge, after a few years of payment.[10] Finally, consumer debtors should have a more significant marker of their new fresh start, perhaps a celebration and forgiveness hearing to usher in his or her new life. All of these changes could support important societal values, such as education, homeownership, and stable of neighborhoods and communities. All could help make people happier and healthier, which would save society money but also create value beyond economics. Finally, allowing people to be and feel heard, whatever that may mean in the consumer bankruptcy context, could drastically increase the relevance of the bankruptcy system without costing much in return.

Part I of this Paper discusses the increase in debt over the last two decades, the growing wage and income gap, growing debt inequality and race, and the fall of the CFPB, all justifications for using the bankruptcy system to help ameliorate these problems. Part II discusses particular ways the Code could be amended to become more relevant, including allowing all secured debt to be stripped down and allowing more student loans to be discharged. Part III discusses the main policy justifications for our consumer bankruptcy system and suggests a third system modification that would make bankruptcy more relevant for consumers, namely a hearing or other forum in which consumers could be publicly forgiven of their debts and perhaps even be heard about their financial woes through the bankruptcy court system. Every litigant longs to be heard, perhaps even more so than to win. Providing the ability to be and feel heard in bankruptcy would serve consumer bankruptcy debtors at little cost to anyone else.

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[9] Adam Levitin, *Helping Homeowners: Modification of Mortgages in Bankruptcy*, 3 HARVARD L. & POL'Y REV. 1, 9 (Online) (Jan. 19, 2009) [hereinafter Levitin, *Helping Homeowners*] (available at http://www.hlpronline.com/Levitin_HLPR_011909.pdf). Again, this is questionable, given that individuals of modest means play less of a role in fueling the economy than they once did.

[10] Another way to increase relevance is to make consumer bankruptcy friendlier to low-income people. We know that bankruptcy is primarily a middle-class phenomenon, but as the middle class shrinks, so does consumer bankruptcy's relevance. To make the system more useful for low-income Americans, the *informa pauperis* (free fee) provisions could be expanded, there could be more education to attorneys about how to use bankruptcy to discharge high-cost credit such as payday and title loans, and more non-profit providers could be created to do free bankruptcies. While none of this will solve the primary problem faced by those with financial problems, which is low wages, it will be a step in the direction of creating relevance in our consumer bankruptcy system.

None of these suggestions are new, but all are more necessary and relevant now that debt levels are so high and that wealth and debt gaps are so large, and now that the CFPB is so disempowered. These suggestions are even more necessary to Americans of color given that they are more likely to have predatory home loans and high-cost student loans and given that discrimination in credit markets persists despite laws against these practices. The bankruptcy system can be amended to begin to close these gaps and aid in ameliorating these practices. Whether we make changes such as those suggested here, and by many others before, will depend upon the kind of nation we want to be, and on the values we choose to embrace. One of those values could be the value of our human lives, measured in health, financial stability, equanimity, and well-being.

I. THE DISCONNECT BETWEEN CONSUMER BANKRUPTCY LAW AND MODERN CONSUMER CREDIT

Part I discusses modern reasons why we need to amend the Code to be more helpful to consumers, including the increase in debt over the last two decades, the growing wage and income gap, growing debt inequality and race, and the fall of the CFPB.

A. The Rise of the Debt Nation

Overall, Americans are in worse financial shape today than they were in 1978. Every year since 2013, the Board of Governors of the Federal Reserve Bank has created a Report on the Economic Well-Being of U.S. Households.[11] In the last report, economic fragility persisted across the U.S., particularly related to income and educational attainment as they relate to ethnicity and race.[12] The report showed that, similar to prior reports, an unexpected expense of $400 would force more than one-third of American adults into a difficult financial situation and that one quarter of all adults had no retirement savings, and skipped necessary medical care in 2018 because they could not afford the cost.[13]

[11] *Report on Economic Well-Being of U.S. Households*, BD. OF GOVERNORS OF THE FED. RESERVE SYS. (2019), https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf.

[12] Eric Rosenbaum, *Millions of Americans are only $400 Away from Financial Hardship. Here's Why*, CBNC, (May 23, 2019, 12:47 PM EDT), https://www.cnbc.com/2019/05/23/millions-of-americans-are-only-400-away-from-financial-hardship.html.

[13] *Id.* The survey showed that the decade-long economic expansion and the low unemployment has failed to narrow the persistent economic disparities by race, education, and geography. While nearly eight in ten whites are at least doing okay financially, two-thirds of blacks and Hispanics reported being "at least doing okay financially."

In August 2007, there was so much credit in our system that it crashed the entire global economic structure.[14] The crash resulted from creditor and investor greed combined with irrational consumer behavior and government inaction, a perfect storm.[15] In this crisis, the credit gorge was on real estate credit but this is not the last crash we will see. Today, most defaulted loans are home mortgages.[16] Auto loans are the second most common driver of accumulated bad debt, with credit cards coming in third.[17] Finally, student loan debt has quadrupled in the past three decades. True, more students have gone to college, but comparatively the person by person cost of an individual education has outpaced all other consumer cost increases.

Debt reduces spending, particularly when wages are down.[18] It has taken a long time for consumer spending to bounce back after the Great Recession, in part because millions of people went back to school to find new careers, which cut down on available income and also resulted in these high student loan debt amounts. During the crisis, Americans racked up so much still-unpaid mortgage debt and credit card debt that some say consumer spending may never recover to pre-recession levels.[19] The spending may have slowed but growth in that debt has not.[20]

Writing about the 2001 recession in 2004, Professor David Lander explained that "[c]onsumer spending and borrowing patterns during and after the 2001 recession departed significantly from historic norms. United States households in 2002 continued to spend and borrow at a record pace even as personal bankruptcy filings reached record levels."[21] He further noted that according to

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14 *See* Aaron Unterman, *Innovative Destruction-Structured Finance and Credit Market Reform in the Bubble Era*, 5 HASTINGS BUS. L.J. 53, 53–54 (2009).

15 *Id.* at 53–54.

16 Tina Rosenberg, *Out of Prison, Into a Vicious Circle of Debt*, N.Y. TIMES BLOG (June 9, 2011), https://opinionator.blogs.nytimes.com/2011/06/09/out-of-prison-into-a-vicious-circle-of-debt/.

17 Credit cards in particular are a more dangerous form of loan, as they are often used to pay off other debts, like auto loans, when people do not have enough money for those payments. Amy Traub and Catherine Ruetschlin, DEMOS, *The Plastic Safety Net: Findings from the 2012 National Survey on Credit Card Debt of Low- and Middle-Income Households* 1, 9 (2012) (Forty percent of low- and middle-income households use credit cards "to pay for basic living expenses such as rent, mortgage payments, groceries, utilities, or insurance . . . because they did not have enough money in their checking or savings accounts.").

18 Amadeo, *supra* note 3.

19 *See* Bruce Drake, *Fed Report Says Household Borrowing is Rebounding from Great Recession*, PEW RESEARCH CTR. (Feb. 19, 2014), https://www.pewresearch.org/fact-tank/2014/02/19/fed-report-says-household-borrowing-is-rebounding-from-great-recession/; *see also* Paul Taylor et al., *A Balance Sheet at 20 Months How the Great Recession Has Changed Life in America*, PEW RESEARCH CTR. 26–30 (June 30, 2010), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2010/11/759-recession.pdf.

20 *See* Paul Taylor et al., *supra* note 19, at 26–30.

21 David A. Lander, *"It 'is' The Best of Times, It 'is' The Worst of Times": A Short Essay on Consumer*

the Federal Deposit Insurance Corporation (FDIC), a revolution in consumer lending and a new lending culture has provided consumers much greater access to credit and banking services than ever before.[22] He asked whether the increased costs of survival forced consumers to use increased access to credit to plug the holes in their safety net, or whether instead consumers were choosing to purchase luxuries they cannot afford and ought not to buy. He mostly noted the astronomical amount of debt.[23]

Regarding changes since the 1978 Code was enacted, Lander noted that in the twenty-five years since that Code was enacted, growth in consumer credit in the United States was staggering:

> Consumer debt increased from $288,044 billion to $1,977,824 billion from 1980 to 2003; revolving consumer debt, which consists mainly of credit card debt, increased from $58,506 billion to $728,429 billion in that same period. This explosive growth in consumer credit has had massive economic and sociological consequences on individual households, on the health of financial institutions and on the American economy and American society. These consequences range from extraordinarily positive to inordinately negative.[24]

Lander further noted that the elimination of price controls that historically existed regarding the extension of credit has created profit opportunities for lenders but has not always been helpful to consumers. Often the resulting products, which typically are subject to no usury caps, have radically changed the nature of consumer lending and consumer borrowing by providing an extraordinary profit opportunity to financial institutions but left consumers with extremely expensive credit options. [25]

Lander eerily portended that "the United States economy and the current system of consumer lending intentionally put credit in the hands of large numbers of people who are certain to default," noting that this was a significant change from the system as it functioned twenty-five years ago when the 1978 Code was enacted.[26] He then discussed the effects of the consumer lending revolution on the consumer bankruptcy system, suggesting that bankruptcy policy must be adjusted to provide a partial substitute for the withdrawn protection in the consumer credit world. While his article is primarily a plea

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Bankruptcy after the Revolution, 78 AM. BANKR. L.J. 201 (2004) (citation omitted).

22 *Id.* at 201 (citation omitted).

23 *Id.* at 202.

24 *Id.* at 202.

25 *Id.*

26 *Id.* at 203.

against the proposed 2005 Amendments, it considered the identical concerns addressed here, but fifteen years ago. The situation for consumers as a whole, and particularly for consumers of color, has only gotten worse in those fifteen years.[27]

B. The Growing Wage and Income Gap

Income inequality is growing faster in the U.S. than ever before.[28] Between 1963 and 2016, families in the bottom ten percent of the wealth distribution went from having no wealth and no debt to owing an average of $1,000 each.[29] Those in the middle income group more than doubled their wealth, but families in the top ten percent saw wealth increase sevenfold. In 1963, families near the top had six times the wealth of families in the middle but by 2016, these top earners had twelve times the wealth of families in the middle.[30] Stated another way, since the 1980s, the top ten percent has amassed roughly forty-three percent of the total income and economic growth in our economy.[31] Since the Code was enacted, income inequality has transformed our country from a land of economic promise to one of diminished opportunity for most Americans.[32]

The rich are getting richer and the poor, poorer, but people of color in all income ranges are losing ground more quickly than other Americans.[33] Both the income gap and the wealth gap between black and white Americans has increased since the Great Recession.[34] In 2016, the median income for white

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27 *See id.* at 202. Discussing home mortgage, Lander notes that mortgage debt twenty-five years ago constituted the overwhelming majority of all consumer debt, due to increasing levels of home ownership, a rise in home values, low interest rates, and a proliferation in refinancing loans and home equity loans. *Id.* at 206–07.

28 Urban Institute, *Nine Charts about Wealth Inequality in America (Updated)* (Oct. 5, 2017), https://apps.urban.org/features/wealth-inequality-charts/.

29 *Id.*

30 *Id.* I hesitate to call them "earners" since most are wealthy due to family money rather than hard work.

31 Liu Baodong, *Social Capital, Race, and Income Inequality in the United States*, 9 SUSTAINABILITY 248, 1 (2017).

32 *See generally* RONALD P. FORMISANO, PLUTOCRACY IN AMERICA: HOW INCREASING INEQUALITY DESTROYS THE MIDDLE CLASS AND EXPLOITS THE POOR (2015).

33 Rodney E. Hero & Morris E. Levy, *The Racial Structure of Economic Inequality in the United States: Understanding Change and Continuity in an Era of "Great Divergence,"* 97 SOC. SCI. QUARTERLY 491, 498 (2016).

34 *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, PEW RESEARCH CTR. 4, 21–24 (2016), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2016/06/ST_2016.06.27_Race-Inequality-Final.pdf. Professor Robert Manduca tells a slightly more nuanced story. *See* Robert Manduca, *Income Inequality and the Persistence of Racial Economic Disparities*, 5 SOCIOLOGICAL SCI. 182 (2018). According to Manduca, more than fifty years after the Civil Rights Act, family income disparities between African Americans and white Americans are not growing but are the same today as they were in 1968. He claims that from 1968 to 2016, these disparities in family income narrowed by almost one-third, but that this relative gain was negated by changes to the national income distribution that resulted in rapid income growth for the richest and whitest

Americans was $48,000, while the median income for black Americans was $31,100, meaning black Americans make about sixty-five percent of what white Americans make,[35] a gap that has remained the same, or worsened, since 1976.[36] Income gaps among Hispanics are similar. In 2014, the median income of households headed by Hispanic Americans was approximately the same as households headed by black Americans.[37] Since 1970, the median income of households headed by Hispanic Americans has been a little over half of the median income of households headed by white Americans.[38] In 1970, the median income of households headed by Hispanic Americans was sixty-seven percent of the median income of white households and in 2014, the median income of households headed by Hispanic Americans was sixty-one percent of the median income of white households.[39]

While income inequality relates to wages, wealth inequality relates to net worth. Compared to *income* disparities, racial *wealth* disparities are far larger and generationally persistent.[40] Black Americans' net wealth is one-tenth of that of white Americans, and over recent decades, white families have accumulated wealth at three times the rate of black families.[41] Home ownership is one proxy for wealth given that the more one has, the more likely one is to own a home. The racial homeownership gap contributes to the wealth gap because home ownership often represents the lion's share of a family's wealth.[42] As of 2014, seventy-two percent of white Americans owned their home, compared to forty-

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Americans. *Id.* at 182.

[35] Rakesh Kochhar & Anthony Cilluffo, *Income of Whites, Blacks, Hispanics and Asians in the U.S., 1970 and 2016*, PEW RESEARCH CTR., (July 21, 2018), https://www.pewsocialtrends.org/2018/07/12/incomes-of-whites-blacks-hispanics-and-asians-in-the-u-s-1970-and-2016/.

[36] *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart,* PEW RESEARCH CTR., SOCIAL AND DEMOGRAPHIC TRENDS 21 (2016), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2016/06/ST_2016.06.27_Race-Inequality-Final.pdf. This is seventy-seven percent.

[37] *Id.* at 21–22.

[38] *Id.*

[39] *Id.* Since 1987, the median income of households headed by Asian Americans has either been the same or more then the median income of households headed by white Americans. People of color are also more likely, over all time periods, to be unemployed. Valerie Wilson, *State Unemployment by Race and Ethnicity*, ECON. POLICY INST. (May 2019), https://www.epi.org/indicators/state-unemployment-by-race-and-ethnicity/.

[40] Darrick Hamilton & Michael Linden, *Hidden Rules of Race Are Embedded in the New Tax Law*, ROOSEVELT INST. 1 (2018), https://rooseveltinstitute.org/wp-content/uploads/2018/05/Hidden-Rules-of-Race-and-Trump-Tax-Law.pdf; THOMAS M. SHAPIRO, TOXIC INEQUALITY: HOW AMERICA'S WEALTH GAP DESTROYS MOBILITY, DEEPENS THE RACIAL DIVIDE, AND THREATENS OUR FUTURE (2017). The reasons for these disparities in wealth include everything from neighborhoods to employment to tax laws.

[41] SHAPIRO, *supra* note 40.

[42] Amy Traub et al., *The Racial Wealth Gap: Why Policy Matters*, DEMOS 1, 9 (2016), https://www.demos.org/sites/default/files/publications/RacialWealthGap_2.pdf [hereinafter Traub et al., *Racial Wealth Gap*]. The report defines the racial wealth gap "as the absolute difference in wealth holdings between the median household among populations grouped by race or ethnicity." *Id.* at 7.

three of black Americans.[43] While the percent of black Americans who own their home has stayed approximately the same since 1970,[44] white American homeownership increased from sixty-nine percent to seventy-two percent over the same period.[45] As with education, the homeownership gap persists when adjusted for income levels.[46] Sixty-seven percent of upper middle class black Americans owned their home compared to eighty-four percent of upper middle class white Americans, and fifty-eight percent of black Americans with college degrees own their home compared to seventy-six percent of white Americans with college degrees.[47] In summary, income, wealth, and home ownership gaps persist over all time periods, despite antidiscrimination laws and increased education levels among people of color. Below we explore why.

C. Growing Debt Inequality and Race

While debt has increased overall in the system, the bottom ninety-five percent have seen debt increase significantly while income has remained flat.[48] More specifically, thirty-five years ago in 1983, the bottom ninety-five percent had $.62 of debt for every dollar earned. By 2007, this ratio of debt to earnings had risen to $1.48 of debt for every dollar of earnings.[49] Today, in 2019, the debt levels are higher and growing. While credit is more available to the bottom ninety-five percent now than ever before, this debt is also being used to try to close the wealth gap.[50] High debt levels among the general population exacerbate the wealth gap, but also have implications for the overall economy. The only times we have seen this level of debt in our economy were just before the Great Depression and just before the Great Recession.[51]

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43 *Id.* The report found that as of 2011, seventy-three percent of white families owned their home, forty-five percent of black families owned their home, and forty-seven percent of Latino families owned their home. *Id.* at 9.

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.* A gap between white American homeownership and Hispanic homeownership also exists. In 2014, forty-five percent of Hispanic Americans owned their home.

48 Tami Lubby, *Debt Inequality is the New Income Inequality*, CNN MONEY (May 2, 2012), https://money.cnn.com/2012/05/02/news/economy/income-debt-inequality/index.htm.

49 *Id.* The top five percent of earners saw the opposite phenomenon. This cohort's debt was $.76 per dollar of earnings in 1983, but just $.64 per dollar in 2007. *Id.*

50 *Id.* According to Robert Reich, former labor secretary under President Clinton and an author who writes about income inequality, "as their wages have dropped, some Americans were forced to take on more debt just to stay in place . . . ." *Id.*

51 *Id.*

On an individual basis, a steady diet of the most expensive forms of credit can create an unsurmountable barrier to wealth creation.[52] Credit terms for people of color are worse than for white people, even when controlling for income. Part of the reason ethnic minorities were so hard hit by the Great Recession was because of the type of debt many carry. Many are unbanked, which creates less opportunities to build wealth, as well as fewer opportunities to borrow money at competitive rates.[53] Many minorities also face racial discrimination in credit markets[54] and are more likely than white people to think lenders have their best interests in mind.[55]

D. The Fall of the CFPB

While debt has grown and made debt relief more necessary, policing credit products has become a thing of the past, at least on a national level. As it stands, in 2020, the CFPB is no longer in the enforcement business. Although CFPB successfully brought steady enforcement actions during the Obama Administration, the CFPB has slowed its enforcement in every part of the credit world under the Trump Administration, in monthly rate of actions, industry type, and settlement or penalty amounts, all in direct contradiction to then-presidential candidate Trump's promises to crack down on Wall Street in favor of the middle class.[56]

For example, under Director Richard Cordray, the CFPB recovered $12 billion in financial relief for consumers.[57] Mr. Cordray's CFPB averaged 3.2

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[52] *Id.*

[53] Michelle Maroto, *Growing Farther Apart: Racial and Ethnic Inequality in Household Wealth Across the Distribution*, 3 SOCIOLOGICAL SCI. 801, 804 (2016).

[54] Even in 2020, even middle- and higher-income minority populations still deal with racism and discrimination in credit markets, which affects the credit rates for which they qualify. Professor Andrea Freeman has shown that, unrelated to risk, credit card companies charge more fees, higher interest rates, and other conditions on black and Latino customers. Andrea Freeman, *Racism in the Credit Card Industry*, 195 N. C. L. REV. 1071, 1098–1102 (2017).

[55] Elizabeth Warren & Oren Bar-Gill, *Making Credit Safer*, 157 U. PA. L. REV. 1, 132 (2008), stating that:

> [t]he 2002 Fannie Mae National Housing Survey found that over half of all African-American and Hispanic borrowers erroneously believed that lenders are required by law to provide the best possible loan rates. They might know that they did not fully understand mortgage rates, but their misplaced trust in lenders and mortgage brokers gave them false confidence that their lack of knowledge did not harm them. In such cases, market imperfections are magnified.

[56] *See* Collin Gillespie, *The Consumer Financial Protection Bureau is Failing*, draft on file with author (citing Presidential Candidate Donald Trump, Campaign Speech in Ottumwa, Iowa (Jan. 9, 2016) ("I'm not gonna let Wall Street get away with murder . . . .")).

[57] *See* Collin Gillespie, *The Consumer Financial Protection Bureau is Failing*, draft on file with author (citing CFPB Director Richard Corday, Prepared Remarks at the National Community Reinvestment Coalition

cases per month over his five-year directorship,[58] and these actions led to an average return of $43 million in restitution to consumers per week.[59] Under Director Mick Mulvaney, this figure declined to $6.4 million per week.[60] When Mr. Mulvaney became director of the CFPB, his organization brought only one case in his first four months.[61] Although the case was against one of the biggest banks in the country, Wells Fargo, the enforcement action was largely seen as unavoidable as President Trump had previously tweeted his outrage upon learning about Wells Fargo's various infractions.[62] Under the agreement between the CFPB and Wells Fargo, consumers did not see a dime returned to them unless they were individually able to prove direct financial harm to the dollar.[63]

Additionally, many of the types of enforcement actions brought during the Obama Administration have simply stopped under the Trump Administration. Student loan lending abuses have fallen from a total of fifteen cases securing $47.5 million in restitution under Director Cordray to zero cases under Mulvaney.[64] Equal Opportunity Credit Reporting Act cases, which are designed to prevent discrimination in connection with lending, has similarly fallen from over half a billion dollars over eleven cases to zero dollars from zero cases.[65]

This decline has continued under the new leadership of Director Kathleen Kraninger. The CFPB has averaged one case per month under Director Kraninger and the weekly return in restitution to the consumer under Kraninger has fallen to all-time low of $925,000 per week.[66] There have been no enforcement actions taken against the large banks or credit card companies.

Conference (Mar. 29, 2017), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpbdirector-richard-cordray-national-community-reinvestment-coalition-conference/).

[58] *See* Collin Gillespie, *The Consumer Financial Protection Bureau is Failing*, draft on file with author (citing Jesse Eisinger, *The CFPB's Declaration of Independence*, PROPUBLICA (Feb. 15, 2018), https://www.propublica.org/article/consumer-financial-protection-bureau-declaration-of-dependence).

[59] *See* Collin Gillespie, *The Consumer Financial Protection Bureau is Failing*, draft on file with author (citing Christopher L. Peterson et al., *Response Regarding Bureau Enforcement Processes* (Docket No. CFPB-2018-0003) (2018)).

[60] Peterson, *supra* note 59, at 5.

[61] *Id.*

[62] *See* Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 8, 2017, 7:18 AM), https://twitter.com/realDonaldTrump/status/939152197090148352.

[63] *See id.* (citing *Mick Mulvaney's Wells Fargo Settlement Lets the Bank Decide How Consumers Are Paid Back*, THE INTERCEPT (Apr. 26, 2018), https://theintercept.com/2018/04/26/wells-fargo-cfpb-mick-mulvaney/ (last accessed Nov. 25, 2019)).

[64] *See* Collin Gillespie, *The Consumer Financial Protection Bureau is Failing*, draft on file with author (citing Peterson, *supra* note 59).

[65] *Id.*

[66] *Id.*

Instead, the CFPB has concentrated on a handful of small payday loan companies, student loan servicers, and illegal debt collectors, with the lone exception of the credit reporting company, Equifax.[67] The Equifax case, like the Wells Fargo case, was too large to ignore once in the public eye and that one very public enforcement action alone is responsible for eighty-five percent of the financial relief secured on behalf of consumers under Kraninger's watch, a total of $674 million.[68] Although Kraninger has brought three enforcement actions in connection with deceptive or misleading practices, the Director settled each case without any monetary restitution, in contrast to Cordray, who secured $94 million *per case* over a total of 116 cases.[69] Overall, the number of cases announced in 2018 was down eighty percent from its all-time high in 2015.[70] Additionally, the average amount *per case* returned to consumers is down ninety-six percent.[71] Now more than ever, consumers need the CFPB's help.

II. POSSIBLE SOLUTIONS TO BANKRUPTCY IRRELEVANCE

Moving now to how bankruptcy might assist with these racial inequities, scholars have suggested promising ways to make consumer bankruptcy more relevant. For example, as a solution to the fact that consumer bankruptcy was losing its relevance even twenty-five years ago, David Lander offered the following suggestions prior to the enactment of the 2005 Amendments and prior to the Great Recession:

1. Regulate sub-prime lending in order to establish an upper limit on the cost of credit and restrictions or prohibitions on the most nefarious lending products and practices;
2. Provide a floor on exemptions;
3. Implement and evaluate kindergarten through college and adult financial literacy programs, as well as savings incentive programs such as the individual development account;
4. If the recent spate of home equity withdrawals results in a cycle of massive home foreclosures that current Chapter 13 cannot ameliorate, amend the Bankruptcy Code to help forestall the tragedy caused by such massive foreclosures; and

67 *See* Collin Gillespie, *The Consumer Financial Protection Bureau is Failing*, draft on file with author; *see also* data publicly available at the CFPB's official website, https://www.consumerfinance.gov.

68 *Id.*

69 *See id.* (citing Peterson, *supra* note 59).

70 *See id.* (citing Peterson, *supra* note 59).

71 *Id.*

5. Withstand the current pressure to make bankruptcy more restrictive and leave the consumer provisions of the Code alone.[72]

While we know Lander's fifth suggestion fell on deaf ears, and that suggestions one and four might have helped stave off the foreclosure crisis to some degree, it is time to revisit these and other solutions.[73] Around the same time, Professor David Skeel suggested allowing the strip down of home mortgages, primarily to address racial inequalities in credit systems.[74] Katie Porter and Deborah Thorne call for replacement of the means test, job training, broadened unemployment benefits, better insurance, health care, social programs that encourage savings, and early financial literacy training, which are all also excellent solutions.[75]

In Part II, I focus on two changes that would appear to have the biggest impact on improving consumer financial health, particularly the financial health of consumers of color, who have fallen even further behind economically in the past four decades. First, allowing the strip down of all secured debt in chapter 13, and second, allowing for the discharge of all student loans. While these suggestions are not new, the rationales for them have become stronger over the past decade.

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[72] Lander, *supra* note 21, at 217–18.

[73] Everyone knows the 2005 Amendments increased consumer costs to file for bankruptcy. Lander notes that if the costs of bankruptcy increase, which they have under the 2005 Amendments, fewer will file. *Id.* at 217. Collections will intensify and debtors might jeopardize her home or car as a result of trying to pay her unsecured creditors in full. Consumers may never file at all, and there may be an:

> uptick in collections and a significant increase in stress, family violence, mental illness, divorce and suicide. If we assume that many borrowers are making unwise decisions, then it is possible that in the long run, in the face of a higher bankruptcy bar, with better education they will make wiser decisions and borrow less. If we assume that most consumers get in trouble without making unwise decisions, then they will continue to borrow at about the same rate.
>
> If the bar to filing bankruptcy is lowered, then marginal potential debtors will opt into bankruptcy and debts that may have been uncollectible as well as debts that might have been collectible will be written off officially. The set of those borrowers that would file if it were easier but not if it were harder are likely to be difficult candidates for collection even if they do not file. The battle between the most credit risky borrower and her creditors (or the purchasers of her debt) is a saga of calls, letters, and sometimes lawsuits, judgments and collection efforts. The stronger the case for bankruptcy the less leverage the collector has.

Id.

[74] David A. Skeel, Jr., *Racial Dimensions of Credit and Bankruptcy*, 61 WASH. & LEE L. REV. 1694, 1723 (2004). In 2004, legal historian David Skeel explored the racial dimensions of credit and bankruptcy in Philadelphia, and credit bankruptcy and race in general from the 1800s to the present. He describes the legal practice of two prominent Black Philadelphia lawyers in the mid-1900s, noting that bankruptcy was not part of their legal practice. He chronicles the importance of social capital in obtaining credit, which was true for all Americans but particularly for middle class black Americans, and ultimately discusses the ways in which the black community ends up taking out less desirable credit. *Id.* at 1713–14.

[75] Porter & Thorne, *supra* note 8, at 118–121.

A. Allow all Secured Debt to Be Stripped Down in Chapter 13

Since homes and cars are typically a consumer's most valuable assets, and since keeping these assets could make the difference between working and not working, and living in a home versus experiencing homelessness, allowing consumers to more easily save these assets could greatly increase their quality of life and thus improve society. It also does not appear that mortgage and auto loan pricing are sensitive to possible bankruptcy losses, meaning that while borrowers would benefit, lenders would not suffer in a way they themselves deem financially meaningful. [76]

1. Allowing Strip Down of Home Mortgages in Chapter 13

In the mortgage arena, ethnic minorities are more likely to carry subprime mortgages even when they qualify for better ones.[77] For example, black American and Latino borrowers are five times more likely to take out high-interest (sub-prime) mortgage loans than white people.[78] Stated differently, in 2002, over forty percent of subprime purchase mortgages and twenty-five percent of refinanced loans went to black Americans, despite that they made up just thirteen percent of the population.[79] These statistics were from before the Great Recession.

Once subprime lending practices were in full swing, even higher percentages of high-interest mortgage loans went to minorities.[80] In terms of the mechanics of how this happened, Chris Odinet explains it well in his book, *Foreclosed*.[81] Wells Fargo and other lenders targeted black borrowers for refinancing.[82] Lenders referred to subprime loans made in minority communities as "ghetto loans" and to borrowers as mud people, people who do not pay their bills, and

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[76] This would also make life simpler for bankruptcy attorneys and cheaper for bankruptcy debtors. I noticed the complexity of all these different strip down rules in my introductory bankruptcy class this semester, which creates a perverse system in which chapter 13 becomes more complex on this issue than chapter 11. While strip down was once a major feature of chapter 13, with all the current exceptions it is far less important.

[77] Maroto, *supra* note 53, at 804; *see also* Warren & Bar-Gill, *supra* note 55, at 66 (noting that "minority borrowers are incurring prices on their loans that are higher than is warranted by their credit characteristics.").

[78] Creola Johnson, *The Magic of Groups Identity: How Predatory Lenders Use Minorities to Target Communities of Color*, 17 GEO. J. ON POVERTY L. & POL'Y 165, 178 (2010).

[79] *Id.*; *see also The Black Population in the United States: March 2002*, U.S. CENSUS BUREAU (2003), https://www.census.gov/prod/2003pubs/p20-541.pdf.

[80] Johnson, *supra* note 78, at 177; *see also* Abbye Atkinson, *Modifying Mortgage Discrimination in Consumer Bankruptcy*, 57 ARIZ. L. REV. 1041, 1044 (2015) [hereinafter Atkinson, *Modifying Mortgage Discrimination*].

[81] CHRISTOPHER ODINET, FORECLOSED: MORTGAGE SERVING AND THE HIDDEN ARCHITECTURE OF HOMEOWNERSHIP IN AMERICA 21 (2019).

[82] *Id.*

people with bad credit.[83] Some lenders targeted religious borrowers by holding events at black churches.[84]

By the time the financial crisis hit in 2008, fifty percent of all loans made to black borrowers were subprime and black borrowers were 2.4 times as likely as white people to be in a subprime loan,[85] despite how many qualified for less expensive loans.[86] The negative effects of the crisis on acquired wealth fell disproportionately on families of color.[87] While the average white family saw an eleven percent drop in wealth as a result of the crisis, in the same period black families saw wealth decline by thirty-one percent and Hispanic families, by forty-five percent.[88] In short, persons of color suffered more and not by a small margin.

The foreclosure crisis crushed the entire economy, but also upset hundreds of thousands of individual lives, upending entire communities and disrupting friendships, religious congregations, schools, childcare, medical care, transportation, and even employment.[89]

Following the 2008 financial crisis, it became clear that lenders had become less careful, if not downright reckless, in their freewheeling lending. Some specifically targeted the poor with high-interest loans. Indeed, the Dodd Frank Act and the resulting CFPB were created and implemented in large part to correct what went wrong in the financial crisis.[90] While it was clear following the crisis that much greater care more and diligent underwriting was needed to avoid another crisis, very little actually changed.[91]

Moreover, non-banks or shadow banks, such as many mortgage servicers, are not well regulated yet and are servicing more and more mortgages.[92] Shadow banks escape most forms of consumer protections, including the Truth in Lending Act, the Fair Debt Collection Practices Act, and pretty much every law that protects consumers. Shortly after Dodd-Frank was passed, shadow banks

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83 *Id.*

84 *Id.*

85 *Id.* at 22.

86 *Id.*

87 *Id.* at 37.

88 *Id.*

89 Adam Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WIS. L. REV. 565, 569 (2009) [hereinafter Levitin, *Resolving the Foreclosure Crisis*].

90 *Creating the Consumer Bureau*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/about-us/the-bureau/creatingthebureau/ (last visited Dec. 12, 2019).

91 ODINET, *supra* note 81, at 158.

92 *Id.* at 7–8, 123–26.

held just 6.8% of the mortgage servicing rights in the United States.[93] The other 93.4% of mortgages were serviced by banks. By 2015, this percentage had increased to about twenty-five percent with some estimates as high as thirty-one percent of all mortgages.[94] Shadow banks also are not required to retain reserves for their future obligations and most non-bank servicers are still undercapitalized.[95] These firms are on no way ready to deal with another downturn. If we have one, things will likely roll out in exactly the same way.[96] The vulnerability of the economy and of borrowers remain. [97] Moreover, in the past, the CFPB did crack down on failures to properly underwrite mortgage loans but is no longer doing so, leaving the economy vulnerable to another financial crisis similar to the one experienced ten years ago.

When the 1978 Code was enacted, it allowed debtors to strip down secured debts that were in amounts greater than the value of the collateral in a chapter 13. This ability remains part of the Code today and is consistent with the reality that under a state court execution, lenders only recover the value of their collateral and are unsecured creditors as to any remaining debt. The protection given to home mortgages in bankruptcy is unique. While debtors can modify all other types of debts in bankruptcy, by reducing interest rates, stretching out loan terms, changing amortization schedules, and limiting secured claims to the value of collateral, the Code forbids the modification of mortgage loans secured solely by the debtor's principal residence.[98]

The drafters excepted home mortgages from the strip down provisions, requiring chapter 13 debtors to pay their entire mortgage regardless of the value of the home collateral.[99]

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93 *Id.* at 8.

94 Indeed, among the mostly subprime, private label mortgages, shadow banks service an alarming seventy-four percent of loans. *Id.* This means that banks are slowly moving their mortgage servicing off-site. This makes some degree of economic sense. Banks are more heavily regulated and thus it is more costly for them to service loans than for unregulated servicers. *Id.* It does however leave us vulnerable to another crisis unless servicers become more regulated.

95 *Id.* at 122–23.

96 Nathalie Martin, *Future Financial Crisis Not Foreclosed: Book Review of FORECLOSED: MORTGAGE SERVICING AND THE HIDDEN ARCHITECTURE OF HOMEOWNERSHIP IN AMERICA*, 28 J. AFFORDABLE HOUS. 329, 332 (2019).

97 *Id.*

98 Levitin, *Resolving the Foreclosure Crisis*, *supra* note 89, at 571; 11 U.S.C. §§ 1322(b)(2), 1123(b)(5) (2019).

99 §§ 1322(b)(2), 1123(b)(5). For most of my life as a bankruptcy attorney, this provision was of little consequence. Borrowers were required to put down at least ten percent and often twenty percent of their purchase price, creating immediate equity. Moreover, real estate values generally went up, rarely down.

The presumptive reason for the exception to the strip down rule was that home lenders provided a valuable service to society and deserved special protection. More specially, as explained by Chief Justice Stevens in 1993, "favorable treatment of residential mortgagees was intended to encourage the flow of capital into the home lending market."[100]

There also may have been a sense that if a large number of bankruptcy debtors stripped down their mortgages, this could destabilize the home lending market and perhaps the economy as a whole. Without question, one fear was that lending might dry up for some, due to the possibility of being stripped down in bankruptcy.[101]

As chronicled by Professor Adam Levitin, the anti-strip down provision was a compromise between House and Senate bills. The House bill, H.R. 8200, permitted modification of all secured claims, but the Senate bill, S.B. 2266, did not. The bills were reconciled through a series of floor amendments, which resulted in a ban on modification of loans secured solely by the debtor's principal residence.[102]

There was no discussion on the issue in the Congressional Record, and the one conversation about this issue sheds little light on this provision's real purpose.[103] One insurance industry person noted that allowing strip down could cause residential lenders to be "extraordinarily conservative in making loans in cases where the general financial resources of the individual borrower are not particularly strong."[104] Being conservative in lending was mentioned several times in the discussion but as Professor Levitin notes, there was no evidence in the legislative history that section 1322(b)(2) was intended to lower the cost of mortgage credit or increase its availability.[105] The provision disallowing strip down of home mortgages was just a compromise that gave a subset of mortgage lenders a more favorable position relative to other creditors than they had under the 1898 Act.[106]

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[100] Nobelman v. Am. Sav. Bank, 508 U.S. 324, 332 (1993) (Stevens, J., concurring).

[101] *See* Skeel, *supra* note 74, at 1710–1711. Skeel explains that if strip down was permitted, there was a fear that lenders would have to pass their losses on to the next round of borrowers, which would reduce access to credit for future borrow.

[102] Levitin, *Resolving the Foreclosure Crisis*, *supra* note 89, at 573–76.

[103] *Id.* at 573–74. This conversation was between Edward J. Kulik, Senior Vice President, Real Estate Division, Massachusetts Mutual Life Insurance Co., his counsel, Robert E. O'Malley, of Covington & Burling; and Senator Dennis DiConcini (D-Ariz.) *Id.* at 573–74.

[104] *Id.* (comments of Edward J. Kulik, Senior Vice President, Real Estate Division, Massachusetts Mutual Life Insurance Co.).

[105] *Id*. at 615–16.

[106] *Id.* at 573–74.

The issue of lender losses, however, seems to be a nonissue. Through empirical data, Professor Levitin shows that lenders actually incur greater losses on a greater percentage of mortgages in foreclosure than they would in a chapter 13 strip down and that that mortgage markets are indifferent to strip down risk because the number of mortgages that could be modified at any given time is small in magnitude.[107] Even in the worst real estate markets, and Professor Levitin studied one of them in Riverside, California, mortgage lenders would not be exposed to substantial losses as a result of strip down.[108] The resulting losses would be too inconsequential for lenders to care about, and are in any case not figured into pricing models. [109]

Turning to the stability of the economy, Professor Levitin argues that allowing strip down could provide an effective, fair, immediate, and taxpayer-cost-free tool for resolving the home mortgage crisis.[110] He notes that lenders foreclosed even when doing so was financially harmful to them, primarily because of contractual impediments, agency costs, practical impediments, and other transaction costs. Permitting bankruptcy modification, on the other hand, would give homeowners the option to force a workout of the mortgage, subject to the limitations provided by the Code, and would encourage voluntary modifications, as mortgage lenders would prefer to exercise more control over the shape of the modification.[111] This would help foster voluntary, private solutions to the mortgage crisis. Moreover, this solution is immediately available.[112] As we know, the HOPE for Homeowners Program, the Making Home Affordable Plan, and the other programs designed to stem the tide failed.[113]

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[107] *Id.* at 611.

[108] *Id.* at 611–16.

[109] Levitin further explains that:

> [T]he key to explaining the mortgage market's relative insensitivity to bankruptcy-modification risk lies in mortgage-market sensitivity to foreclosure costs. The market's indifference to bankruptcy-modification risk is because losses due to modification (including strip-down) would generally be smaller than those incurred in foreclosure. There is no reason for the market to price against bankruptcy modification if bankruptcy modification would result in smaller losses than foreclosure. Instead, modification (be it voluntary or in bankruptcy) represents the best realistic outcome for a defaulted loan. Moreover, bankruptcy-modification risk is small in likelihood and magnitude relative to all the other risk factors that determine mortgage interest rates above the cost of funds.

Id. at 617–18.

[110] *Id.* at 576.

[111] *Id.*

[112] *Id.*

[113] Susan E. Hauser, *Cutting the Gordian Knot: The Case for Allowing Modification of Home Mortgages in Bankruptcy*, 5 J. BUS. & TECH. L. 207, 208–09 (2010).

Virtually all of the original rationales for not allowing strip down suggest that, given what has changed in credit markets, we should instead *allow* strip down. First, as to macro-economic concerns, we need to find a way to make lending more responsible. Everything that has been tried has failed to change the fact that risky loans still occur. Despite Dodd-Frank, lending standards have eased almost to their pre-crisis levels. In other words, we could be heading for another crisis. Assuming that markets respond at all to bankruptcy debtors' ability to strip down, allowing strip down could help our economy. Bankruptcy modification could force lenders to internalize the costs of making poor lending decisions through limited recoveries.[114] One fear in disallowing strip down was that it could dry up lending, which at this point could be a good thing. If it had any effect at all, it would be to dry up lending on risker loans, the very loans that crashed the economy the last time. Allowing strip down could encourage lenders to make safer loans and to do a better job of underwriting the risk.

Finally, allowing modification would correct two particular problems from the last financial crisis, "payment-reset shock from resetting adjustable rate mortgages (ARMs), and negative equity from rapidly depreciating home prices . . . ."[115] This in turn would help stabilize the housing market. As Professor Levitin argues, making bankruptcy a forum for distressed homeowners to restructure their mortgage debts is both the most moderate and the best method for resolving the foreclosure crisis and stabilizing mortgage markets.[116]

For many of these reasons, scholars have suggested we allow home mortgage strip down and many bills have been drafted and have failed[117] but might succeed now. We have no CFPB enforcement. We have more mortgage

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[114] Levitin, *Helping Homeowners*, *supra* note 9, at 7.

[115] Levitin, *Resolving the Foreclosure Crisis*, *supra* note 89, at 648.

[116] One added benefit of this solution is that windfalls would not go to housing speculators and second home purchasers because modification could only happen in the context of a chapter 13 repayment plan. Levitin, *Helping Homeowners*, *supra* note 9, at 7.

[117] Levitin, *Resolving the Foreclosure Crisis*, *supra* note 89, at 649–50, stating that:

> At the time this Article went to press, Congress was considering legislation to permit modification of single-family, principal-residence mortgages in chapter 13 bankruptcy. On March 5, 2009, the Helping Families Save Their Homes Act of 2009 passed the House of Representatives; a companion bill, the Helping Families Save Their Homes in Bankruptcy Act of 2009 is still in committee in the Senate. The Obama administration has endorsed bankruptcy modification with some qualifications, but it is uncertain whether the legislation will gain the requisite support to pass the Senate absent compromises that would seriously reduce its effectiveness for dealing with the foreclosure crisis; in 2008 similar legislation passed the House, and was reported out of the Senate Judiciary Committee, but never came to a floor vote.

Id.

debt in the system, and we have credit systems that are more stratified by class and race than ever before.

For individual bankruptcy debtors as a whole, it now makes little sense to forbid strip down. Many mortgages are under water now and the home is the most valuable asset for most families. Homeownership is a proxy for wealth, as well as equity and opportunity,[118] and homeownership is consistently associated lower neighborhood crime rates, more stable neighborhoods, better outcomes for children, and a better economy overall.[119] Homes also play a role in upward mobility, beyond just the wealth they represent. They represent purpose, belonging, and a sense of community beyond one's self and one's family.[120]

Additionally, borrowers would not get off scot-free or be encouraged to engage in moral hazard. To the contrary, they would face the shame of bankruptcy, subject themselves to the huge disclosures required by bankruptcy, and be subject to a court-supervised budget for three to five years.[121]

Allowing strip down has the potential to ameliorate one of the worst effects of the financial crisis, the high level of wealth lost in communities of color.[122] The 2008 financial crisis devastated communities of color. For example, middle class black families now have less than fifty percent of the wealth they had

[118] The racial homeownership gap contributes to the wealth gap because home ownership often represents the lion's share of a family's wealth. Traub et al., *Racial Wealth Gap, supra* note 42, at 9. Home ownership also influences broader disparities in net worth. Maroto, *supra* note 53, at 820. White families are more likely to receive inheritance and assistance from family to put down a deposit on a home and can thus own a home earlier, and discriminatory practices in lending such as redlining or giving people of color higher interest rate mortgages also contribute to the homeownership gap. Traub et al., *Racial Wealth Gap*, *supra* note 42, at 9 (defining the wealth gap as "the absolute difference in wealth holdings between the median household among populations grouped by race or ethnicity."). *Id.* at 10; *see also* Jeffrey P. Thompson & Gustavo Suarez, *Updating the Racial Wealth Gap* (Fin. and Econ. Discussion Series, Working Paper No. 2015-76, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3072923 (describing the role of inheritance and family wealth across racial lines and the role of this family money in perpetuating the wealth gap). These researchers claim that wealth differences between black and white families derive 100% from different asset holdings, while wealth differences between black and Hispanic families result mostly from different debt holdings. *Id.* at 1.

[119] *Id.* The racial homeownership gap also contributes to the wealth gap because home ownership often represents the lion's share of a family's wealth. *Id.* at 9. Home ownership also influences broader disparities in net worth. Maroto, *supra* note 53, at 820. White families are more likely to receive inheritance and assistance from family to put down a deposit on a home and can thus own a home earlier, and discriminatory practices in lending such as redlining or giving people of color higher interest rate mortgages also contribute to the homeownership gap. Traub et al., *Racial Wealth Gap, supra* note 42, at 9.

[120] Joseph M. Harkness & Sandra J. Newman, *Effects of Homeownership on Children: The Role of Neighborhood Characteristics and Family Income*, ECON. POL'Y REV., FED. RES. BANK OF N.Y. 78, 89 (2003).

[121] Levitin, *Resolving the Foreclosure Crisis*, *supra* note 89, at 577.

[122] Atkinson, *Modifying Mortgage Discrimination*, *supra* note 80, at 1044.

accumulated prior to the crisis[123] and sixty-six percent for Latino families.[124] By comparison, white families' wealth declined by just 14.5% over the same period.[125] This occurred because black and Latino households held more of their wealth in their homes, and also because of massive discrimination in home lending, that led more persons of color to be steered into subprime mortgages even if they qualified for cheaper ones.[126] According to Abbye Atkinson, this means middle-class-ascendant minorities paid more for their homes, diverting money from retirement savings, college savings, and other wealth-building products.[127] When the financial crisis dust settled, middle-class black Americans and Latinos had lost their homes to foreclosure twice as often as white people.[128]

Assuming lenders are at all sensitive to being stripped down, mortgage modification has the potential to reverse these discriminatory practices through the threat of strip down. Black Americans are more likely to have underwater mortgages or live in communities with more underwater homes.[129] Allowing strip down for this reason is particularly critical and necessary given the persistence of discrimination in many credit markets despite laws against these practices.[130]

Finally, the right of debtors to modify their underwater home loans in bankruptcy might finally incentivize lenders to curtail and police discriminatory lending practices that decades of anti-discrimination legislation and policy have failed to stamp out.[131] Modifying the outdated anti-strip down provision could help police lender behavior, while enabling economically disenfranchised and financially distressed homeowners, many of whom are subject to discriminatory lending practices, to hang on to their homes through financial crises. This one

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123 *Id.* at 1043–44.

124 *Id.*

125 *Id.* at 1043.

126 *Id.* at 1044.

127 *Id.*

128 *Id.*

129 *Id.* at 1046–47.

130 *Id.* at 1049 (citing Lea Deutsch, Note, *Collateral Damage: Mitigating The Effects Of Foreclosure In Communities*, 22 TEMP. POL. & CIV. RTS. L. REV. 203, 207–09 (2012)) (describing community problems that follow in the wake of mass foreclosures including blight, increased crime, depressed property values, and depressed tax base); Michael A. Fletcher, *A Shattered Foundation: African Americans Who Bought Homes in Prince George's Have Watched Their Wealth Vanish*, WASH. POST (Jan. 24, 2015), http://www.washingtonpost.com/sf/investigative/2015/01/24/the-americandream-shatters-in-prince-georges-county/ (citing the 2013 Federal Reserve's Survey of Consumer Finances) (describing a federal survey, which showed that in 2013, one in seven black Americans had underwater mortgages as compared to one in eighteen white homeowners).

131 As Atkinson notes, "[r]ecent agreements between mortgage lenders and the DOJ and CFPB to settle charges of unlawful discriminatory lending practices support this reality." Atkinson, *Modifying Mortgage Discrimination*, *supra* note 80, at 1046–47.

change could help ameliorate the "perverse incentives of lenders who continue to target these vulnerable borrowers and vulnerable communities for predatory and unlawful loan products."[132]

Additionally, looking at benefits to society of another kind, the foreclosure crisis wiped out equity in entire neighborhoods and communities. Giving members of these communities another option for saving their homes could stabilize neighborhoods and communities in the event of another crash.[133] This would also save taxpayers a bundle on bureaucratic programs that while designed to fix the program, do not work.[134]

Presumably this strip down would occur by writing the principal of the loan down to the value of the home and then resetting the interest rate to the Till rate and then, presuming a debtor could finish his or her chapter 13 plan, allowing the debtor to pay the reduced amount at the reduced rate for the rest of the loan term.[135] This is admittedly different than the way other debts get stripped down in chapter 13. Stripped down debt in chapter 13 are typically paid over the life of the three to five-year plan whereas, here, the loan would carry a reduced principal and interest rate for its entire original term which will likely last far longer than the plan. In this way, this solution would mirror treatment of secured claims in chapter 11, which are often crammed down and stretched out over the life of the collateral, in the case of real estate for ten, twenty years or more.

2. *Allow all Vehicles to Be Stripped Down*

Like high-cost mortgages, black Americans and Latinos take out more high-cost auto loans.[136] In addition to taking out loans with very high interest rates, the loans are packed with fees like yield-spread premiums,[137] added "service contracts," and other mark-ups.[138] These types of abuses have been particularly concentrated in Native American communities,[139] where one group of car

[132] *Id.* at 1083.

[133] *See* Hauser, *supra* note 113, at 226.

[134] *Id.* at 227.

[135] *Id.* at 235.

[136] *Id.*; *see also* Johnson, *supra* note 78, at 182–84.

[137] Hauser, *supra* note 113, at 208.

[138] *Id.* at 183–84.

[139] Megan Horning, *Border Town Bullies: The Bad Auto Deal and Subprime Lending Problem among Navajo Nation Car Buyers*, 73 NAT'L LAWS. GUILD J. 197–98 (2016), https://www.nlg.org/nlg-review/article/border-town-bullies-the-bad-auto-deal-and-subprime-lending-problem-among-navajo-nation-car-buyers/; *see also* Editor's Preface, stating that:

> "Border Town Bullies: The Bad Auto Deal and Subprime Lending Problem among Navajo Nation Car Buyers" by Megan Horning examines a particularly reprehensible example of the kind

dealers is now being investigated by the Federal Trade Commission, which seeks injunctive relief, rescission or reformation of contracts, restitution, the refund of monies paid, disgorgement of ill-gotten funds, and other equitable relief for acts or practices in violation of Section 5(a) of the FTC Act, TILA and its implementing Regulation Z, and CLA and its implementing Regulation M.[140]

Under the 2005 Amendments, the hanging paragraph forbids the strip down of auto loans taken out during the 910 days before the filing. No good reason for this change has been articulated and it appears to be a carrot to the auto finance industry with no further rationale.[141]

For nearly all Americans, cars are important assets.[142] They are typically the most expensive things consumers buy other than homes and Americans rely on them to get to work and support themselves.[143] Not surprisingly then, one reason Americans seek bankruptcy protection is to help save their cars.[144] Data from the Consumer Bankruptcy Project show that over eighty-five percent of chapter 7 debtors want to use bankruptcy to keep their most valuable car and over seventy-five percent want to use bankruptcy to save a second car.[145] Debtors are literally driven to bankruptcy by a motivation to save cars, particularly the large subset of debtors who own cars but little else and those who own negative equity in their cars.[146] In some ways bankruptcy plays a larger role in saving cars than in saving homes, making the hanging paragraph's prohibition against stripping down auto loans more pernicious than the prohibition from stripping down home loans.[147]

> of predatory lending. It explores the crushing effects predatory car loans continue to have on Navajo people. Horning explains the numerous social, cultural, economic, and geographical factors that combine to make the Navajo community uniquely susceptible to the profit-maximizing machinations of car dealerships. It comprehensively maps out the fraud, trickery, and coercion used against borrowers for whom a car is a necessity due to the remote and sparsely populated region in which they live. After diagnosing the problem, Horning goes on to suggest a list of remedies that might help protect the Navajo from continued exploitation.

Editor's Preface to Winter 2016 Edition, available at https://www.nlg.org/nlg-review/article/editors-preface-winter-2016/.

140 FTC v. Tate's Auto Ctr. of Winslow Incorporation, No. CV-18-08176-PCT-DJH, 2019 U.S. Dist. LEXIS 39477 (D. Ariz. Mar. 12, 2019).

141 David Gray Carlson, *Cars in Chapter 13: Does Negative Equity Destroy the Jurisdiction of the Hanging Paragraph?* 20 AM. BANK. L. REV. 535, 536 (2012).

142 Pamela Foohey et al., *Driven to Bankruptcy*, 55 WAKE FOREST L. REV. 1, 2–5 (2020) (forthcoming).

143 *Id.* at 2.

144 *Id.* at 21.

145 *Id.* at 35.

146 *Id*.

147 *Id.* at 37–39.

Once again, black American debtors are more likely than white debtors to be driven to file bankruptcy to save cars.[148] They are also more likely to have high-interest auto loans, and stripping down those interest rates in chapter 13 could be disproportionately more valuable for these often predatory loans.[149] While bankruptcy cannot close racial disparities in car prices, auto loan interest rates, and repossession rates, it can help close these gaps by making strip down more available for all filers.[150] Thus, repealing the hanging paragraph could go a long way toward making consumer bankruptcy more relevant and more racially neutral as well.

B. Allow the Discharge of All Student Loans and Particularly Private Student Loans

A big step toward making consumer bankruptcy more relevant to the needs of the people is to reconsider the treatment of student loans in the bankruptcy system.[151] While this is particularly important for leveling the economic playing field for people of color, who on average, pay higher interest rates on student loans and receive lower quality educations, the issue is important to all Americans given the size of the current student loan debt. High educational debts with low value can literally cause poverty, rather than alleviating poverty as much student loan debt might.[152]

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[148] *Id.*

[149] *Id.*

[150] *Id.* at 39.

[151] Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 336 (2013); Abbye Atkinson, *Race, Educational Loans, and Bankruptcy*, 16 MICH. J. RACE & L. 1, 31–40 [hereinafter Atkinson, *Race, Educational Loans, and Bankruptcy*] (explaining that removing student loans from the list of nondischargeable debts, going back to the time-lapse strategy of discharging student loan debt, having Congress define “undue hardship” or making college more affordable).

[152] This issue is of local as well as national interest to me. According to the New Mexico Center on Law and Poverty:

> New Mexico has the second highest rate of default on student loan debt in the country. Recent research has shown that student loan servicing companies have systemically steered borrowers away from the affordable repayment plans they have the right to under federal law, often leaving borrowers in even greater debt and contributing to high rates of defaults.
>
> One potential solution for New Mexico borrowers that came up at the Fall convening and in conversations since is developing outreach and know your rights trainings for student borrowers around our state. Because there aren’t a whole lot a resources to help student loan borrowers troubleshoot and navigate their repayment options, we wanted to pull everyone together to discuss the ways that we can collaborate to provide trainings for borrowers around New Mexico.

Email from Lindsay Cutler, staff attorney for New Mexico Center for Law and Poverty (Dec. 17, 2019). *Id.*

1. *The Debt is Huge and the Percentage of Income Going to Student Loans is Even Larger for Persons of Color*

Minorities pay more for student loans and have more student loan debt.[153] These higher debt rates resulted in part from differences in wealth, family background, postsecondary educational differences, and family contributions to college among black and white students, but this does not explain the entire disparity. Young adults' net worth explains a portion of the black-white disparity in debt, suggesting that both differences in accumulation of debt and ability to repay debt in young adulthood explain racial disparities in debt, but also that the black-white disparity was greatest at the highest levels of parents' net worth. Somehow, the black students were not insulated by their parents' wealth, even when that wealth was equal to the wealth of the white students.[154] Thus, a larger than proportionate share of the increasing costs of a higher education is being carried by black students.[155] This reinforces existing social stratification and allows racial economic disparities to be inherited across generations.[156]

A survey of consumer finances similarly found that racial inequalities were more prevalent for student loans than any other debt and that this growth in debt was not attributable to differences in educational attainment across racial groups.[157] Rather, it resulted from "predatory inclusion" in which lenders offered exploitive loans that limited or eliminate the long-term benefits of getting the education in the first place.[158]

153 Atkinson, *supra* note 151, at 24–31. Atkinson discusses how student loan debt can be particularly harmful to black Americans because black Americans are more likely to borrow money for school, have less family resources, and are given worse credit terms. *Id.*; *see also* Fenaba R. Addo, Jason N. Houle & Daniel Simon, *Young, Black, and (Still) in the Red: Parental Wealth, Race, and Student Loan Debt*, 8 RACE AND SOCIAL PROBLEMS 64 (2016). Atkinson also explains that since student loan debt has a disproportionately harmful impact on black Americans, educational achievement alone is not enough to justify the special protection student loans are given in the bankruptcy system. Atkinson, *supra* note 151, at 26–28.

154 *Id.*

155 Richard Fry et al., *Young Adults, Student Debt, and Economic Well-being*, PEW RESEARCH CTR. 19–20 (2014), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2014/05/ST_2014.05.14_student-debt_complete-report.pdf.

156 *Id.*

157 Louise Seamster & Raphaël Charron-Chénier, *Predatory Inclusion and Education Debt: Rethinking the Racial Wealth Gap*, 4 SOC. CURRENTS 199, 6–7 (2017).

158 *Id.* at 2. Similarly, Scott-Clayton and Li found that after earning their bachelor's degrees, black college graduates owe $7,400 more on average than their white peers. Judith Scott-Clayton & Jing Li, *Black-White Disparity in Student Loan Debt More Than Triples After Graduation* (2016), https://vtechworks.lib.vt.edu/bitstream/handle/10919/83265/BlackWhiteDisparity.pdf?sequence=1&isAllowed=y. Black students owe an average of $23,400 compared to $16,000 for white students. After a few years, the black-white debt gap more than triples to over $25,000. Differences in interest accrual and graduate school borrowing lead to black graduates holding nearly $53,000 in student loan debt four years after graduation, which is nearly twice as much as their white counterparts. These data show far greater debt gaps than previous research.

While there is debate about whether the massive student loan debt in America could create another financial crisis,[159] no one denies that this debt is as large as it has ever been.[160] It is the second largest amount of consumer debt in the U.S. economy after mortgages.[161] Student loan debt has grown more than any other category of consumer spending, at three times the rate of inflation.[162] In 2011, 37 million Americans owed a total of one trillion[163] and by 2019, this amount had risen to $1.6 trillion.[164] Calling this generation the indentured generation, one scholar notes that tuition ballooned from twenty-three percent of annual earnings in 2001 to thirty-eight percent of annual earnings in 2010.[165] As of 2019, this percentage is no doubt even higher. [166]

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[159] *See* Jonathan D. Glater, *Student Debt and the Siren Song of Systemic Risk*, 53 HARV. J. ON LEG. 99 (2016) (arguing against a bubble); *but see also* NAT'L ASS'N OF CONSUMER BANKR. ATT'YS, STUDENT LOAN DEBT CRISES SURVEY (2012), http://nacba.org/Portals /0/Documents/Student%20Loan%20Debt/020712%20NACBA%20ststude%20loa n%20survey.pdf (finding that eighty-one percent of consumer bankruptcy attorneys say that clients with student loan debt have increased noticeably within the past four years, and that the effective lack of bankruptcy discharge for these debts prevents debtors from obtaining a financial fresh start); Daniel Wagner, *CFPB: Private Student Loans Parallel Subprime Mortgage Lending*, HUFF. POST (July 20, 2012), http://www.huffingtonpost.com/2012/07/20/cfpb-private-student-loans-subprimemortgage_n_1688771.html (stating that private student loan lenders gave loans without regard to whether students could pay, then bundled and resold the loans, though federal government loans are not underwritten).

[160] Austin, *supra* note 151, at 336.

[161] Clifford, Robert, *Student-Loan Debt, Delinquency, and Default: A New England Perspective* (Sept. 1, 2016), https://ssrn.com/abstract=3031192. In 2009, student-loan debt became the largest non-housing-related consumer debt in the United States. By 2013, outstanding student debt balances had grown to exceed $1 trillion, and by the end of 2015, had reached $1.23 trillion.

[162] Austin, *supra* note 151, at 336. Austin's article about the student loan crisis deals with a national debt crisis that has been covered extensively by news outlets. It builds upon the work of Professor Rafael Pardo and notes that student loan debt has now outgrown all other forms of consumer debt and that an education is the most expensive thing most of us will purchase other than a house. He includes provides a detailed description of how the Bankruptcy Code treats student loan debt, concluding that such debt is generally non-dischargeable despite that most other non-dischargeable debt involves either debt resulting from a nefarious act like fraud or driving drunk, or is deeply needed for survival by the recipient, such as child support. He makes a strong case that making student loan debt non-dischargeable is an outlier, in the sense that it neither results from a terrible act, nor is that critical to the recipient. *Id.*

[163] Austin, *supra* note 151, at 330.

[164] Ellen Paris, *Student Loan Debt Still Impacting Millennial Homebuyers*, FORBES **(**Mar. 31, 2019), https://www.forbes.com/sites/ellenparis/2019/03/31/student-loan-debt-still-impacting-millennial-homebuyers/#4233ecac3e78.

[165] Austin, *supra* note 151, at 357.

[166] *See* Alison Doyle, *Average Salary Information for US Workers*, THE BALANCE CAREERS (May 10, 2019), https://www.thebalancecareers.com/average-salary-information-for-us-workers-2060808 (last visited Feb. 6, 2020); The median wage in the United States in the first quarter of 2019 was $47,060. *Id.* Jaleesa Bustamante, *Average Cost of College & Tuition*, EDUCATIONDATA.ORG (June 7, 2019), https://educationdata.org/average-cost-of-college/ (last visited Feb. 6, 2020). For the 2018–2019 academic year, the average cost of a public college is $10,230 and the average cost of a private college is $35,839, seemingly showing that the cost of public college was approximately twenty-two percent of annual earnings and the cost of private college was approximately seventy-six percent of annual earnings. *Id.*

While these increases have resulted in more students gaining access to higher education, which would seem to benefit persons of color in particular, wages for that group have been even flatter than for other Americans, making tuition an even larger percentage of annual earnings for those groups.[167] Moreover, a large part of the increased access has been access to low-value educations, characterized by higher tuition, lower graduation rates, and even lower job placements rates.[168] Low graduation rates create the ultimate no-value student loans—those students must pay despite little access to a better life.[169]

While for-profit universities and colleges are to blame for some of the increases in tuition costs and student loan debt, for-profit universities are by no means alone in increasing tuition costs.[170] These increases in tuition costs may be fueled by the increase in availability of student loans,[171] a theory known as the Bennett Principle after President Reagan's Secretary of Education, William J. Bennett.[172] Bennett wrote a scathing New York Times op-ed accusing colleges of greedily raising tuition, confident that Federal Loan subsidies would expand to make up the difference.[173] The availability of student loan credit has spurred building booms at colleges across the nation, for which current and future students pay.[174] Additionally, high student loan debt and persistently low wages likely discourage students from taking jobs as teachers or in other public service jobs.[175]

Making more student loans available was originally thought to have the capacity to create parity among different socio-economic groups. In reality, this increase in credit availability and the concurrent increase in tuition has had the exact opposite effect.[176] The growth in federal student loan programs and bloated college costs has led to a growth in socio-economic disparity between races, classes, and ethnic groups.[177]

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[167] *Usual Weekly Earnings of Wage and Salary Workers Fourth Quarter 2019*, BUREAU OF LABOR STATISTICS U.S. DEP'T OF LABOR (2020), https://www.bls.gov/news.release/pdf/wkyeng.pdf.

[168] Austin, *supra* note 151, at 336.

[169] *Id.* at 335–36.

[170] *Id.* at 405–06.

[171] Glater, *supra* note 159, at 112; Austin, *supra* note 151, at 346.

[172] Glater, *supra* note 159, at 112.

[173] *Id.*

[174] Austin, *supra* note 151, at 345–46.

[175] *Id.* at 402–403.

[176] *Id.* at 346.

[177] *Id.* at 346 n.128.

2. Special Problems for Students For-Profit Universities

The largest and fastest growth in student loans is for students at for-profit schools, even though students at these schools have a lower graduation rate, higher debt, and higher tendency to default on loans.[178] Similar to payday and title loans and subprime mortgages, some of this debt is low-value debt, meaning that the education results in little increase in future income.[179] There is no doubt that the Bennett Principle has resulted in far more for-profit colleges and thus far more no-value and low-value educations. The schools are expensive for the value they provide and virtually all of the students at these schools take out student loans compared to a fraction at other colleges and universities.[180] They are also attended by higher percentages of students of color.

3. How to Pay When the Time Comes

For all student loans, when it comes time to pay them, student have choices. Unfortunately, none are very good choices. One choice is to pay as originally indicated. Another is to enter into one of many income-based repayment plans, which can result in zero payment for at least a while. Another choice is to take a public service job, pay as indicated or under an income-based plan for five or ten years and then get the debt forgiven. Yet another, a choice of last resort for most, is to file for bankruptcy and try to discharge the debts. Considering the non-bankruptcy options first, paying as indicated can be hard to say the least. Daniel Austin provides some examples of astronomically high average debt.[181] Income-based repayment plans can be handy at the time and can get a borrower through hard times, but they lead to future hard times as the debt continues to earn interest and mushroom.[182]

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[178] *Id.* at 335 (citing STANDARD & POOR'S, *US Student Loan ABS Issuances Ticking Up, But the Future Is Uncertain Say Conference Speakers* 2 (2012), http://www.standardandpoors.com/spf/upload/Events_US/US_SF_Event_619abs 10.pdf); Chris Kirkham, *For-Profit College Students Face Higher Debt, More Unemployment, Report Finds*, HUFF. POST (Jan. 4, 2012), http://www.huffingtonpost.com/2012/01/03/for-profit-colleges-unemploymentdebt_n_1182164.html.

[179] There are many ways some of this debt has become no value or low value debt because educational opportunities have been extent expanded greatly, including expanding no-value and low-value education. No-value and low-value education is provided primarily by for-profit universities that charge high tuition for degrees that result in low pay and low job placement.

[180] Austin, *supra* note 151, at 405–06.

[181] Before entering academia, I paid my own debts off from September of 1986 to 1996, ten years to the month from my first payment. I worked at a large private law firm and also had the support of a debt-free spouse. My debts were also a fraction of the debts of those graduating today.

[182] 34 C.F.R. §§ 685.204(a)(1), (h), 682.210(a)(1), (8) (2014).

A few student loan forgiveness programs seem to work well,[183] but most are turning into unfulfilled promises. In 2008, the Obama Administration started a program through which professionals could work at public interest jobs for ten years and then be forgiven for the rest of their student debt. As of September 2018, 28,000 borrowers submitted their applications to have their student loan debts forgiven.[184] However, only ninety-six applications were approved, less than a half of one percent.[185] Borrowers have been unable to communicate with FedLoan Servicing because FedLoan Servicing itself is confused about the exact requirements of the Public Service Loan Forgiveness program.[186]

In 2016, four attorneys and the American Bar Association (ABA) sued the Department of Education because they believed the Department of Education changed the terms of the Public Service Loan Forgiveness program.[187] According to the ABA, the ABA itself was considered a public service job prior to the new regulations, but the Department of Education changed its interpretation in 2016.[188] The program seems to have been changed not just for new applicants but for those who had already applied and been accepted.[189] In February 2019, U.S. District Judge Timothy Kelly ruled that the Department of Education acted arbitrarily and capriciously when it changed its interpretation of the Public Service Loan Forgiveness regulation.[190] In other words, the Department of Education is not voluntarily complying with loan forgiveness programs.

4. *History and Rationale Behind the Nondischargeability of Student Loans*

Moving on to the bankruptcy options, these options are not relevant for many consumers. These options have also been chipped away over the years with little evidence of any need to do so. Prior to the enactment of the modern Bankruptcy Code in 1978, student loans were dischargeable in bankruptcy and thus treated

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183 *See* Austin, *supra* note 151, 347–51.

184 Stacey Cowley, *28,000 Public Servants Sought Student Loan Forgiveness. 96 Got It*, N.Y. TIMES (Sept. 27, 2018), https://www.nytimes.com/2018/09/27/business/student-loan-forgiveness.html.

185 *Id.*

186 *Id.*

187 ABA v. United States Dep't of Educ., 370 F. Supp. 3d 1, 10 (D.D.C. 2019).

188 Debra Cassens Weiss, *In About-face, Several ABA Employees Are Told They Qualify for Public Service Loan Forgiveness*, ABA JOURNAL (Aug. 27, 2019), https://www.abajournal.com/news/article/in-about-face-several-aba-employees-are-told-they-qualify-for-public-service-loan-forgiveness (last visited on Dec. 2, 2019).

189 *Id.* For example, some of the attorneys who had already been told they would qualify began receiving notices that year that they no longer qualified for the program.

190 *ABA*, 370 F. Supp. 3d at 10.

no differently than other unsecured debt.[191] When the 1978 Code was enacted, student loans were only dischargeable in bankruptcy under two conditions.[192] First, if the loans originated before five years before the bankruptcy filing, they were discharged. Second, the loan could be discharged after a court hearing if the debtor could prove that the "student loan would impose an undue hardship on the debtor and the debtor's dependents . . . ."[193] Courts and commentators have struggled for years over the meaning of this amorphous phrase and while results vary from jurisdiction to jurisdiction, all agree that getting an undue hardship discharge is difficult enough that few bankruptcy debtors bother trying.[194] This is true despite an obvious inability to pay these debts in many cases.[195]

The original rationale for making student loans not dischargeable in 1978 was that lenders were lending to borrowers without underwriting, meaning without determining the borrowers' ability to pay, so they were taking on additional risk.[196] Moreover, as a society, we needed to ensure a steady stream of future funds for future student borrowers.[197] Third, there was a fear that students would knowingly take on the debt and then plan to discharge it later in bankruptcy, a form of moral hazard. Finally, because students voluntarily took on the debt, there was a feeling that they should pay it no matter what, rather than shifting the loss to the creditor.[198] We will look at these rationales again, but these last two clearly apply to any debt.

From this original treatment of student loans in the 1978 Code, Congress has tightened the standard bit by bit, all while extending the nondischargeability of student loans to more and more lenders.[199] With no evidence suggesting abuse

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191 11 U.S.C. § 523(a)(8) (1978).

192 Ryan Freeman, Comment, *Student-Loan Discharge—An Empirical Study of the Undue Hardship Provision of § 523(A)(8) Under Appellate Review* 30 EMORY BANKR. DEV. J. 147, 150 (2013); 11 U.S.C. § 523(a)(8).

193 11 U.S.C. § 523(a)(8); *see also* Austin, *supra* note 151, at 376 (citing Rafael Pardo & Michelle Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation* 83 AM. BANKR. L.J. 180, 185–90 (2009)).

194 Austin, *supra* note 151, at 338–400. There are numerous studies showing that it is hard to discharge student loan debt under the undue hardship test. *See id.* (citing Pardo & Lacey, *supra* note 193, at 205). One study shows the likely of discharge by federal appellate court, and also shows that the presence of a medical condition can improve chances. Freeman, *supra* note 192, at 181. It also shows that a debtor has a better chance of success if he or she is pro se. *Id.*

195 Austin, *supra* note 151, at 400 (citing Pardo & Lacey, *supra* note 193 at 479–86).

196 Austin, *supra* note 151, at 368.

197 *Id.* at 369; Atkinson, *supra* note 151, at 22.

198 Austin, *supra* note 151, at 369–370.

199 Freeman, *supra* note 192, at 150 n.11, 155; 11 U.S.C. § 523(a)(8); Pardo & Lacey, *supra* note 193, at 180–81.

on the part of debtors wishing to discharge student loans, in 1990, Congress extended the five-year period for discharging a student loan without undue hardship, to seven years.[200] Again with no evidence of abuse, Congress in 1998 eliminated the seven-year option entirely, leaving only "undue hardship" as grounds to discharge a student loan.[201] Finally, in 2005, in connection with The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA),[202] Congress handed private student loan lenders, which generally charge higher interest than the federal government even though they do underwrite loans, a huge carrot. Unlike all other private lenders, these lenders now get the same protections as Federal Loan providers, namely nondischargeabilty.[203]

5. *Unjustified Special Treatment for Private Student Loans*

The justification for not discharging private student loans was that this would reduce the cost of these private loans and make these loans more affordable and available to more people, including people who would otherwise have difficulty getting credit such as students from communities of color.[204] As it turns out, the theory that making private student loans nondischargeable would reduce their costs turned out to be untrue. The loans have not decreased in cost,[205] nor are borrowers particularly sensitive to incremental price differentials at the time they take out these loans.[206] Moreover, the loans themselves are not subject to interest rate caps, and are thus much more expensive than federal student loans.[207] Some carry interest rates of fifteen percent or more and some even carry adjustable interest rates. They often offer no deferments, income-contingent repayment plans, or any of the other relief provided for federal loans.[208] Like subprime mortgage loans,[209] more than half of the students who take out these loans do so before maxing out on cheaper federal loans.[210]

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[200] 11 U.S.C. § 523(a)(8).

[201] Freeman, *supra* note 192, at 155. Perhaps this is obvious, but the debtor has to prove undue hardship. Pardo & Lacey, *supra* note 193, at 185–90. This proof is hard to accomplish and the substance and the procedure undermines the fresh start. The resulting burden on courts has also been significant. Moreover, many debtors do not bother trying.

[202] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §418, 199 Stat. 23 (2005).

[203] Alexei Alexandrov & Dalié Jiménez, *Lessons from Bankruptcy Reform in the Private Student Loan Market*, 11 HARV. L. & P'LY REV. 177, 180–81.

[204] *Id.* at 178.

[205] *Id.* at 202–06.

[206] *Id.* at 206–08.

[207] Austin, *supra* note 151, at 343.

[208] *Id.*

[209] Bar-Gill & Warren, *Making Credit Safer*, *supra* note 55, at 32.

[210] Austin, *supra* note 151, at 344.

Despite all of these unfavorable (for students) terms, we are now we are left with remarkable protection for private student loans. These lenders enjoy protection no other private lenders enjoy, including mortgage lenders, whose deficiencies still get discharged. All other unsecured creditors get their loans discharged regardless of how the loans are incurred. This is the primary function of consumer bankruptcy and the mechanism for providing the fresh start. [211]

6. *Rationale for Reversal of Student Loan Nondischargeability*

The outlier treatment for private student loan lenders described above was a net loss for students and an unjustifiable net gain for one sector of the private lending community. Since people of color take out more expensive private loans than others, the loss gain falls on them, further perpetuating the debt gap between them and other Americans, which in turn furthers the income and wealth gap.[212] As explained by Jimenez and Alexandrov:

> [p]oor and minority students are disproportionately affected by our system of student loans. Minority students are more likely to enroll in for-profit schools, borrow more than their white counterparts for the same degrees, more likely to fail to graduate, and more likely to default on student loans in general . . . while white college graduates seem to enjoy an "economic cushion" from their college education, African American college graduates do not. Unlike their white counterparts, 'African American college graduates are equally likely to file for bankruptcy as African Americans without a college diploma.' Most recently, researchers at the Brookings Institution found that [f]our years after graduation, black graduates have nearly $25,000 more student loan debt than white graduates: $52,726 on average, compared to $28,006 for the typical white graduate.[213]

As Professor Abbye Atkinson explains in *Race, Educational Loans, and Bankruptcy*, black students may be more significantly affected by student loan nondischargeability than white students due to the costliness of their loans, lower wages post-education, fewer family resources to support educational cost, and a likelihood of more legal and other dependents to support.[214] Professor Atkinson's work is unique in that it comes from the 2007 Consumer Bankruptcy Project dataset.[215] These data also show that higher education acts as a buffer to financial distress in white students but not necessarily for black students, perhaps

211 Grogan v. Garner, 498 U.S. 279, 287 (1991).
212 Seamster & Charron-Chénier, *supra* note 157, at 6–7.
213 Alexandrov & Jiminez, *supra* note 203, at 181–82 (internal quotations omitted).
214 Atkinson, *supra* note 151, at 26–29.
215 Alexandrov & Jiminez, *supra* note 203, at 181–82.

because of the relatively high cost of this credit, among the other factors noted above.[216] Whatever the reason, forbidding the discharge of student loans disproportionately harms persons of color.

If all of this were not enough, private student loan lenders also now use fintech companies (online financial technology firms), to screen borrowers for various types of consumer loans and connect them with third-party lenders.[217] These new technologies exacerbate racial inequalities in credit. Rather than relying entirely on FICO scores to assess creditworthiness, fintech companies use artificial intelligence algorithms that study "where borrowers live, what clubs they belong to, their text messaging habits, their health records, and even their social media activity."[218] Fintech companies also use more traditional data like transcripts, standardized test scores, college majors, the prestige of their degree, parents' level of educational attainment, whether a student worked during high school, and the number of colleges a student visited with a parent.[219]

While this sounds promising given that it is harmful to lend to people who cannot repay,[220] the on-the-ground applications of these data points are more pernicious. While the companies claim their goal is to "include those who have been left out of the financial space in innovative, profitable ways,"[221] many of these innovative data points reinforce "preexisting income, class, racial, and ethnic barriers in the credit economy, as well as produce effective discrimination toward legally protected classes."[222]

However, reform is justified for all student loans, not just private ones. High student loan balances limit people's access to the credit economy.[223] For those who do get credit, those with defaults on student loans will pay more for the credit they do get.[224] Excessive debt also causes adverse health outcomes,[225]

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[216] Atkinson, *supra* note 151, at 2–3.

[217] This is highly simplified. For a more sophisticated description, *see* Christopher K. Odinet, *The New Data of Student Debt*, 92 S. CAL. L. REV. 1617, 1635–40 (2019).

[218] *Id*. at 1645. According to one credit it industry executive, "how many times a person says 'wasted' in their [social media] profile . . . has some value in predicting whether they're going to repay their debt . . . ." *Id.* at 1645.

[219] *Id*. at 1645 n.214.

[220] Alexandrov & Jiminez, *supra* note 203, at 212–13 (recommending underwriting for private student loans).

[221] Odinet, *supra* note 217, at 1651.

[222] Odinet, *supra* note 217, at 1621; Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 13 (2014).

[223] Austin, *supra* note 151, at 331.

[224] *Id.* at 406.

[225] *Id.* at 333, 400–02.

which cost the public more in increased insurance costs and health care for the indigent. These problems affect entire families[226] and society as a whole.[227] Additionally, the CFPB was at one time very active in policing bad student loan providers. Since the CFPB no longer monitors these providers, discharge of student loans is even more justified.

7. *Some Law Student Thoughts on Student Loan Dischargeability*

Admittedly, the quotes below do not come from rigorous empirical research nor are they random. They were generated from my Fall 2019 bankruptcy exam, on which I offered extra credit to those who wished to weigh in on the pros and cons on discharging student loans in bankruptcy. I did not cover this topic in detail in class nor did I express any particular opinion on the subject. Most students understood that allowing student loan debt to be discharged would allow students to shirk responsibility and perhaps make a bankruptcy discharge too common and easy for the common good. Most, though, felt that times were sufficiently different today than a decade ago, expressing these types of sentiments:

> Discharging student loan debt in bankruptcy would allow graduates who are either under-employed or unemployed to free themselves of financial obligations that are otherwise not allowing them to live freely. In other words, allowing them to spend money on things like real property or consumer goods that they cannot otherwise buy. From a broader policy view, disallowing discharge of student loan debt may have a chilling effect on individuals who would otherwise seek a post-secondary education, but cannot afford the price tag.
>
> Letting individuals discharge student loan debt in bankruptcy may increase the number of applicants and graduates, and then increase the overall skilled workforce. More skilled workers means more people with money to spend, which means a healthier economy.
>
> Crippling student debt is holding a whole generation down from having financial flexibility and spending. In the long run, it hurts the economy and society because there is no way it will be paid back in full. We are missing out on a lot because people have to get paid well right away with hopes of paying back the loans.
>
> College has become stinking expensive and the job market is not all it used to be. These debts are causing significant burdens for some

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[226] *Id.* at 337–38.
[227] *Id.* at 399.

> people. On a societal level, this huge debt is a serious weight on our national economy.
>
> So many colleges have moved to an essentially profit model. Most state schools, while carrying the name of the state, receive little or no funding. Thus, tuition and fees have been steadily increasing and the burden on students grows. While the preclusion on discharge made sense historically, with the current state of college tuition and expenses, the debt should now be dischargeable.
>
> The whole purpose of chapter 7 is to give debtors a fresh start. If the debtor has thousands of dollars of nondischargeable student loan debt, it takes away the main benefit of chapter 7. The debtor is still in debt, and is still going to struggle to pay back the loans. Also, the undue hardship test seems allows judges to make decisions based on values and not the law. I understand the purpose of the test. If people can pay back their loans they probably should, but the actual implementation of the test seems to come down to the judge's values and morals as we saw in Educational Credit Management Corp. vs. Jespersen where the Court made judgments about whether the debtor should keep living in his brother's basement and whether he should be allowed to buy cigarettes. If student loans are not fully dischargeable, maybe they could be partially dischargeable, or at the very least courts need a better test to determine dischargeability.

A couple of students suggested middle grounds:

> I believe that student debt to the extent of payment of the education, including books and required schooling items like a laptop and reasonable living expenses, should be discharged. I didn't know people who take out large loans so they are able to live lavishly. This was mostly at colleges like USC, UCLA, or CU where image is everything. Those expenses I would not discharge.
>
> I believe that the debt should be stripped down to the equivalent of the value of the degree and the future earning potential it represents. Universities and colleges in the United States charge large amounts for the same education that is offered at lower prices. Also, universities need more money to educate students about the loans. Allowing a discharge of student loans from universities where the degree is never going to make a person enough money to support themselves causes people to go through hardships and makes not just individuals suffer but the overall economy as well. When I was looking for a law school I was told that unless you were getting into the top five, go to the cheapest one because you're going to get the same education and you shouldn't pay more if you do not have to.

And one student, who presumably knows nothing about the history of student loan dischargeability, suggested that, like the old adage, what is old is new again:

> I feel that there should be a middle ground where people have to show that they made a real effort to not fall behind on their student loans over a period of time, maybe five years, and then after that point, if it is shown that they made an effort to eliminate the loans, the loans should be discharged at that point.

8. How to Amend the Code to Address the Student Loan Issue

There are many ways the Bankruptcy Code could be amended to address these issues. Austin suggests we reevaluate the fair market value of the student loan, and do a student loan cram down or strip down of sorts.[228] Alexandrov and Jiménez suggest either a roll-back to the old dischargeability rules or a court-applied underwriting standard.[229] While these are both excellent suggestions, they seem like a lot of work for courts with little reward. I would recommend returning to the rule in which the student loans also are dischargeable after seven years or upon a showing of undue hardship.

The way to address the for-profit contribution to this problem with the finest point would be to limit the supply side of these educations, by limiting access to federal student loans for for-profit universities that cannot prove value to students though job placement and other indicators. This would be easy to accomplish because these schools get the vast majority of their funding from student loans. Almost no one goes to these institutions who can afford to pay. While the process of doing this began under Obama and the CFPB, the current administration likely has little appetite for this supply-side correction.[230] An overall standard that allowed discharge would work for these loans as well.

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[228] *Id.* at 414.

[229] Alexandrov & Jiminez, *supra* note 203, at 221–22. They suggest:

> borrowing from the Dodd-Frank Act and subsequent CFPB mortgage regulations, we suggest that a lender should incur liability if it did not verify the student's potential to repay the loan by comparing the loan amount with the student's choice of school and major's expected graduation rates and earnings post-graduation (if student even graduates) . . . [and creating] safe harbors for the ease of administrability: high graduation rates at the school that student chose, high salaries after graduating with a given major from this particular school, and an income-based repayment plan . . . .

[230] Erik Ortiz, *Trump University Lawsuit Will Go to Trial, NY Judge Rules*, NBC NEWS (Apr. 26, 2016), https://www.nbcnews.com/politics/2016-election/trump-university-lawsuit-will-go-trial-ny-judge-rules-n562816 (last visited on Mar. 23, 2020). Because Trump had his own for-profit university, he is not as enthusiastic about regulating them as other presidents might.

III. DEFINING OURSELVES THROUGH OUR BANKRUPTCY SYSTEM

This section asks what we might do, now that we have so much income, wealth, and debt inequality in our society, recognizing that the situation is harmful for all of us but particularly for individuals and communities of color, who pay more for credit and have worse outcomes in bankruptcy.[231] Are we motivated to use the bankruptcy system to attempt to solve some of these problems, and if so how? If not, why not? Our answers reflect the kind of society we wish to be or to become, now that so much in the world of consumer credit has changed. The sections above provide some justification for the two major changes suggested. Here we consider some broader societal issues and in light of them, suggest a third amendment.

One principal common to all commercial law is that the systems are not punitive. Rather, it is all about the money. We do not to take from one party economically without benefitting another. For example, bankruptcy trustees and executing creditors do not routinely take possession of a debtor's assets unless doing so will generate a return for creditors. To do so would harm the debtor without helping anyone else.

With regard to home mortgages, Professor Levitin has shown that lenders actually incur greater losses on a greater percentage of mortgages in foreclosure than they would in a chapter 13 strip down and also that that mortgage markets are indifferent to strip down risk because the number of mortgages that could be modified at any given time is small in magnitude compared to the overall loans in the system.[232] Student loan markets similarly appear mostly insensitive to bankruptcy discharge.[233] If lenders are not underwriting for bankruptcy risks like strip down and discharge, they are not financially weighing these concerns, meaning they do not consider these risks to be significant. For the same reason that a trustee cannot take a debtor's used clothes, even though the trustee might be entitled to them, these lenders should not be able to injure debtors without significantly helping themselves. We should not protect banks from strip down when they have chosen not to protect themselves from bad loans. The same is true of private student loan lenders.

Bankruptcy is for the honest but unfortunate debtor.[234] Some assistance to the debtor is always contemplated and this benefits society too. This assistance

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231 Rory Van Loo, *A Tale of Two Bankruptcy Debtors*, 72 ALB. L. REV. 231, 233 (2009).
232 Levitin, *Resolving the Foreclosure Crisis*, *supra* note 89, at 611.
233 Alexandrov & Jiminez, *supra* note 203, at 220–28.
234 Local Loan v. Hunt, 292 U.S. 234, 244 (1923).

is the basis of the fresh start. Conversely, a person trapped in perpetual insolvency is a burden to both him or herself and society as well.[235] Generally speaking, forgiving debts is better for society than allowing a cycle of impoverishment to continue. As the First Circuit explained in 2015: "Our nation's bankruptcy system was built on the principle that sometimes, honest people fall on hard times. While the bankruptcy code has naturally gone through revisions and updates since its inception, that foundational philosophy has always laid at its root."[236]

Our debtor-creditor laws, including exemption laws but others as well, demonstrate a clear public policy that "exemption from personal pauperism is of greater concern than the rights of creditors."[237] Indeed, the "very purpose" of the Bankruptcy Code "is to protect debtors from pauperism."[238] In other words, bankruptcy law is here to help, which it does for two broad categories of policy reasons. First, these laws return debtors to productive economic participation, so they can earn wages, support themselves, pay taxes, and fuel the economy by buying things.[239] Second, the system is here to soften financial blows and be kind. While this second reason is sometimes described in terms of providing social insurance,[240] and at other times as humanitarian assistance worthy of a civilized society,[241] many courts and scholars embrace the idea that forgiving debts builds character, is virtuous, and thus helps build a just society.[242] In other words, to forgive debts is humane and human.[243]

While sometimes stated as a third theory, utilitarianism supports both economic and humanitarian reasons for bankruptcy relief, as both individuals

[235] Nicholas J. Huffmon, Note, *Putting the Hanging Paragraph Out to Pasture: Reconciling the Mandates of Bankruptcy and Tax Law*, 103 IOWA L. REV. 1729 (2018).

[236] Fahey v. Mass. Dep't of Revenue (*In re* Fahey), 779 F.3d 1, 11 (1st Cir. 2015) (Thompson, J., dissenting).

[237] Sligh v. First Nat'l Bank of Holmes Cty., 704 So. 2d 1020, 1025 (Miss. 1997) (quoting Leigh v. Harrison, 11 So. 604, 606 (Miss. 1892)).

[238] *Id.* at 1028.

[239] Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1079 (1987) (articulating theory that reallocation of assets is needed to "assure the greatest probability that economic function can be restored after bankruptcy"); Ronald J. Mann, *Making Sense of Nation-Level Bankruptcy Filing Rates*, in CONSUMER CREDIT, DEBT AND BANKRUPTCY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES 225, 242 (2009); John Pottow, *Private Liability for Reckless Consumer Lending*, 2007 U. ILL. L. REV. 405, 12 (2007).

[240] Alan Schwartz, *Regulating Consumer Bankruptcy: A Theoretical Inquiry*, 291 LEGAL STUDIES 585, 592–93 (2000); SULLIVAN, WARREN & WESTBROOK, *supra* note 1.

[241] KAREN GROSS, FAILURE AND FORGIVENESS 102–03 (1999).

[242] Heidi Hurd, *The Virtue of Consumer Bankruptcy*, in A DEBTOR'S WORLD: INTERDISCIPLINARY PERSPECTIVES ON DEBT 221–22 (2012).

[243] Michael Sousa, *The Principle of Consumer Utility: A Contemporary Theory of Bankruptcy Discharge*, 58 U. KAN. L. REV. 553 (2010).

and societies benefit from providing broad bankruptcy relief.[244] Stated in the negative, financial problems cause endless forms of human agony and indignity, including shame, embarrassment, guilt,[245] poor health, depression, hopelessness, loneliness, marital difficulties, mentally ill and scared children, difficulty concentrating at work, and so on. As Professor Michael Sousa recounts:

> Children of financially stressed parents tend to be more prone to mental health problems, depression, loneliness, and are more emotionally sensitive. They are less sociable, and more distrustful, and are more likely to feel excluded by their peers, especially if they are girls. Boys of financially stressed parents are likely to exhibit low self-esteem, to show behaviour problems in school, and be susceptible to negative peer pressure and alcohol and drug problems. Financial stress is related to poorer academic performance in both boys and girls.[246]

Education and home ownership on the other hand, are associated with supportive outcomes for individuals, families, and society as a whole.[247] These facts make it hard to deny that broader consumer bankruptcy laws, particularly those that support education and home ownership, make for a better society.

One of the negative outcomes of indebtedness is shame. Shame is particularly harmful, individually and collectively.[248] The shame of excessive debt is exacerbated for those who come from disadvantaged groups and who perhaps feel as if they have no right to credit, however bad, in the first place.[249] Thus, reducing bankruptcy shame could help level the playing field for disenfranchised groups, who bear more of the burden of bad credit, and more of the shame burden as well.[250] Reducing shame could also help every bankruptcy

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[244] *Id.* at 600–01.

[245] Pamela Foohey, *Debt's Emotional Encumbrances*, in EDWARD EDGAR RESEARCH HANDBOOK ON LAW AND EMOTION 7–8 (2019); Pamela Foohey, *Life in the Sweatbox*, 94 NOTRE DAME L. REV. 119, 242–46 (discussing the many emotional consequences of financial failure); *id.* at 247–49 (discussing why people do not file for bankruptcy because of shame even when filing for bankruptcy would benefit them).

[246] Sousa, *supra* note 243, at 601.

[247] *See* Richard Green, *Do Kids of Homeowners Do Better Than Kids of Renters*, 15 CITYSCAPE: A J. OF POL'Y DEV. AND RES. 223 (2013), https://www.huduser.gov/portal/periodicals/cityscpe/vol15num2/ch17.pdf; *see also* Joseph M. Harkness & Sandra J. Newman, *Effects of Homeownership on Children: The Role of Neighborhood Characteristics and Family Income*, FRBNY ECON. POL'Y REV. 78, 89 (June 2003) (stating the obvious, namely that moving is hard on children).

[248] Pamela Foohey, *Debt's Emotional Encumbrances in* Susan A. Bandes, Jody Lynee Madeira, Kathryn Temple & Emily Kidd White, EDWARD ELGAR RESEARCH HANDBOOK ON LAW AND EMOTION (forthcoming 2020), https://ssrn.com/abstract=3471406.

[249] *See* Ian Ayers & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304, 304 (1995); *see also* Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817–72 (1991).

[250] *See* Rory Van Loo, *supra* note 231, at 232–33.

debtor and as such make bankruptcy law more relevant and meaningful. Society is of course made up of individuals so helping debtors one by one is beneficial individually and collectively.

While poor financial condition causes shame, bankruptcy itself may also causes shame.[251] Knowing this is the case, we can help in two ways. First, we can make it more worthwhile to endure the shame by taking steps to make more debts dischargeable and by helping people keep their homes. This is particularly justified given that human beings and their communities will benefit without hurting lenders much. We can also make bankruptcy less shame-inducing, by providing debtors an opportunity to tell their stories, an opportunity to feel that they have been heard, and a chance to feel that they are not alone. As Professor Pamela Foohey notes in *A New Deal for Debtors: Providing Procedural Justice in Consumer Bankruptcy*, procedural justice helps individuals accept legal outcomes.[252] In bankruptcy, procedural justice can help people make the most of their "fresh start."[253]

All people using the legal system want to be heard, to feel like someone cares. Some care more about being heard than about winning.[254] When we do a listening exercise in law school classes, some students report feeling that they are being truly heard to for the first time in their lives. Pamela Foohey provides extensive data on how much people in the bankruptcy system long to be heard, and also how providing this opportunity can help alleviate shame.[255] Providing a place to share these stories can help debtors work through their negative emotions and feel that they are taking control of their financial lives.[256] Depending on how this opportunity to be heard was structured, it could also create an environment in which being forgiven from debt feels more like other forms of forgiveness.[257] It is possible that the section 341 hearing could be used to share these stories, but a less formal setting might be even better.

I also suggest a return to discharge hearings and I fear that I might be the only one in the room to recall that bankruptcy courts used to hold hearings on a debtor's discharge, before signing the discharge order. While these were quite *pro forma* in the past and were done *en mass*, there is no reason why a court's

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[251] *See generally* Pamela Foohey, *A New Deal for Debtors: Providing Procedural Justice in Consumer Bankruptcy*, 60 B.C. L. REV. 2298, 2324–335 (2019).

[252] *See generally id.*

[253] *See generally id.*

[254] *See generally id.*

[255] *See generally id.*

[256] *See id.* at 2331.

[257] *See id.* (explaining that the hearing could acknowledge that the debtors are worthy of forgiveness).

order forgiving debts, and a hearing accompanying that event, could not be designed to heal. This hearing could lead to feelings of exoneration, of a return to wholeness, of a referendum on a person's return to social standing in society.[258]

While Professor Foohey suggests an individual hearing in which each debtor is questioned by the judge, it may not be necessary to go quite that far. Indeed, we could simply return to the days in which there were mass discharge hearings, which were known to be somewhat celebratory. Courts could express gratitude for our system and for the people who have used it and who have found ways to rehabilitate themselves financially. This reconstructed vision of a discharge hearing could make the system more humane. Since this costs the system very little,[259] why not be more humane? What does this really cost us? What does it cost us *not* to do this?

CONCLUSION

The changes suggested in this essay are not new, but given the radical changes we have seen in the debtor-creditor world in the past two decades, these changes are more necessary than ever. These changes could make the bankruptcy system more relevant to modern consumers and help make the world a better place.

For centuries, we have enacted laws to reduce or eliminate bias and outright discrimination in all segments of society. In the credit world, however, bias and discriminatory practices persist despite laws forbidding these practices. Persons of credit continue to take out more costly and more harmful mortgages, student loans, and other loans than other Americans, even when adjusted for income and education. We can modify the bankruptcy system to try to level the playing field and ameliorate some of the harm. At the very least, we can work to ensure that the bankruptcy system does not create discriminatory results.

As it stands now, the system is broken for all consumers. Fixing it will help all consumers but will help consumers of color more because they carry less favorable credit overall. The changes suggested will relieve them of some of this low-value credit through discharge or modification of loans.

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[258] *See id.* at 2332.

[259] This would cost the system very little, particularly if the court no longer had to hear as many student loan undue hardship claims.

Though we hope the law in general makes the world a better place, it rarely does so in the abstract. If we are going to have a personal bankruptcy system, we should make it worth people's efforts. We should not as a society be okay with hurting some people without benefiting others. Perhaps we should not be okay with hurting people at all.