IN TOO-BIG-TO-FAIL WE TRUST: ETHICS AND BANKING IN THE ERA OF COVID-19

NIZAN GESLEVICH PACKIN†

ABSTRACT

The COVID-19 economic crisis has brought to light something very broken in the American banking system—banks prioritize their own profits over the interests of those they serve and interests of social justice. And they are permitted to do so because they do not owe a fiduciary duty to their customers and are not social welfare maximizing entities.

In an effort to support the economy, the US government passed numerous stimulus acts, which included, among other things, a Paycheck Protection Program (PPP), and the distribution of relief checks to consumers. To effectuate the massive distribution of liquidity on an expedited basis, the government relied on big banks. But instead of prioritizing the public welfare, the banks were focused on their bottom lines and thus did not carry out the true intent of the stimulus. For example, with respect to the PPP, although the Small Business Administration was required to process the loans on a first-come, first-served basis, the banks were not. And absent that requirement, the banks prioritized richer and bigger customers. As a result, women and minority-owned small businesses, as well as peripheral area-based small businesses, found themselves facing more barriers to getting loans. Similarly, with respect to the direct distribution of relief checks to consumers, banks prioritized their own interests over those of their customers. For example, in an effort to collect bank debt, banks froze and seized the funds from government relief checks deposited into consumer accounts before the consumers that needed those funds received them. Consequently, various state attorney generals and courts had to intervene, and mandate that the consumers be permitted to use the funds as the government had intended—for necessities like food and shelter.

There are several techniques we can employ to modify banks' ethical behavior and cultural norms. This Essay discusses such methods, which include (i) a top-down regulatory approach; (ii) the creation of market-led initiatives; (iii) an interpretive fix, offered by the judicial system; and (iv) a public criticism and shaming semi-regulatory approach.

INTRODUCTION

During the COVID-19 crisis, something has proven to be very broken in the American banking system. The government needed and trusted the

†Nizan Packin is an Associate Professor of Law at Baruch College, City University of New York, and an Affiliated Faculty at Indiana University Bloomington's Program on Governance of the Internet & Cybersecurity.

big banks to provide liquidity by distributing funds to individuals and small businesses, but the banks failed in doing so. Instead, the banks prioritized profit-making by giving preference to the needs of bigger, richer customers. They also seized government relief funds to cover for customers' late banking fees, and they chose to tighten lending standards—all on the expense of those who needed liquidity most. In the process, the banks discriminated against minorities, women, and other underserved populations. Unfortunately, banks do not care about goals such as financial equality and do not owe their customers fiduciary duty.

Banks, like other businesses, are for-profit entities meant to generate revenues for their shareholders[1] in bull and bear markets. But although banks' main goal is to be profitable, there are certain duties that banks, like all businesses, owe to society.[2] For example, like it or not, banks must obey the law and comply with regulation. Additionally, banks are subject to cultural norms, which can also deter "unwarranted social obligations" on businesses.[3] However, as the years following the 2008 financial crisis have demonstrated, cultural norms have not made banks take actions for purposes other than profits.[4]

We can make banks can do so much more for society. The Community Reinvestment Act, for instance, was an attempt to force banks to offer credit to populations residing in underserved neighborhoods,[5]

1. For discussion of the shareholder primacy doctrine, which has become widely accepted in U.S. business, *see* Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 713–14 (2002) (outlining the popular view of corporations as entities with no particular social responsibilities beyond maximizing their shareholders benefits and profits); Gerlinde Berger-Walliser & Inara Scott, *Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening*, 55 AM. BUS. L.J. 167, 218 (2018).

2. *See, e.g.*, Rory Van Loo, *The New Gatekeepers: Private Firms As Public Enforcers*, 106 VA. L. REV. 467, 473–74 (2020) (explaining that "[i]n the highest legislative circles and corporate boardrooms, debates are unfolding about what duties corporations owe to society, with some taking particular aim at the idea that shareholders should come above all other stakeholders").

3. Morgan Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV. 757, 833 (2018) (internal quotation marks omitted).

4. *See, e.g.*, Dan Awrey et al., *Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation?*, 38 DEL. J. CORP. L. 191, 205–07 (2013) ("Framing policy debates around seemingly inchoate concepts like culture and ethics is thus often, and understandably, viewed as somewhat impractical.").

5. Michael S. Barr, *Credit Where It Counts: Maintaining A Strong Community Reinvestment Act*, 29 W. NEW ENG. L. REV. 11, 12 (2006) ("The Community Reinvestment Act of 1977 (CRA) encourages federally insured banks and thrifts to meet the credit needs of the communities that they serve, including low- and moderate-income areas, consistent with safe and sound banking practices. Federal banking agencies examine banks periodically on their CRA performance and rate the institutions. Regulators consider a bank's CRA record in determining whether to approve that institution's application for mergers with, or acquisitions of, other depository institutions. Banks and thrifts must have

much like how other businesses are legally required to do more for society. For instance, utilities and essential infrastructure providers must offer internet connectivity or enable consumers to get hooked-up to services such as electricity, cable, phone or gas at fair prices, even if some of those consumers would be unprofitable.[6]

The business environment in which banks operate today is one in which the government trusts them to develop and exhibit voluntarily ethical cultural norms. But as the COVID-19 crisis has demonstrated, doing so is more challenging than it might seem. This Essay argues that we should not give up on banks. Instead, there are several techniques we can employ to modify the ethical behavior of banks and their cultural norms. First, we can utilize a top-down regulatory approach and create legal standards regarding bank activities, size, and operations that would result in modifying their business conduct. Second, the creation of market-led initiatives, which characterize the American financial industry, can prove useful in altering business norms. Third, we can hope for an interpretive fix–pragmatically speaking, a judicial interpretation that reads an existing regulation provision to require a fiduciary or ethical representation duty. Finally, public criticism and shaming could impact banks' behavior and cause them to behave more ethically for fear of losing customers.

I. BANKING GONE WRONG?

During the 2008 financial crisis, the media, scholars, and even some regulators[7] blamed the big banks for being too greedy and as a result causing much of the financial storm.[8] In contrast, the perception of big banks was very different when the COVID-19 crisis started unfolding. As the financial impact of the health crisis started hitting—fast and hard—every single sector of the U.S. economy, everyone turned to big banks as safe, trusted institutions. For example, commentators have reported a

---

a satisfactory CRA record if they, or their holding companies, are to engage in newly authorized financial activities, such as certain insurance and securities functions.").

6. *See* K. Sabeel Rahman, *Infrastructure Regulation and the New Utilities*, 35 YALE J. REG. 911, 917–20 (2018) (examining the different duties of various utilities and infrastructure providers).

7. *See, e.g.*, DAVID FABER, AND THEN THE ROOF CAVED IN: HOW WALL STREET'S GREED AND STUPIDITY BROUGHT CAPITALISM TO ITS KNEES (2010); Sewell Chan, *Financial Crisis Was Avoidable, Inquiry Finds*, N.Y. TIMES (Jan. 25, 2011), https://www.nytimes.com/2011/01/26/business/economy/26inquiry.html.

8. *See* David Wessel, *In Exit Interview, Geithner Muses on Crisis Era*, WALL STREET J. (Jan. 17, 2013, 6:07 PM), https://www.wsj.com/articles/SB10001424127887323783704578247981375751520 ("[A] huge part of what happened across the system was just a mixture of ignorance and greed. . . . Most financial crises are not caused by fraud or abuse. They're caused by people taking on risks they don't understand, too much risk.").

phenomenon described as a reverse run on the banks. U.S. banks grew by more than $2 trillion between January and June of 2020.[9] Most of that growth in deposits went into the biggest banks, which received $1.2 trillion in the first three months of 2020.[10] In particular, JPMorgan brought in more cash than most other bank, and in the first quarter of 2020 it grew by approximately 20 percent, turning into the first American bank with $3 trillion in assets.[11]

It is not only consumers and business that have trusted big banks to help us weather this recession. The government turned to big banks as well. In March 2020, as unemployment rates started to rise, and the depth of the crisis became clear, the government put together a stimulus package—the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)[12]—that included, *inter alia,* loans to small businesses under the Paycheck Protection Program (PPP)[13] and relief checks to individuals.[14] Then, in late April, an additional package was approved.[15]

While the government wanted to provide financial aid to as many businesses and individuals in need as possible during the 2020 crisis, it became clear very quickly that operationally speaking, doing so was not working out. The government failed to distribute the funds in a successful way. It has not been able to get the funds directly to those that need them the most.[16] Banks were largely at fault. Wanting to distribute the different

9. U.S. Banks Are 'Swimming In Money' As Deposits Increase By $2 Trillion Amid The Coronavirus, CNBC (June 21, 2020), https://www.cnbc.com/2020/06/21/banks-have-grown-by-2-trillion-in-deposits-since-coronavirus-first-hit.html ("in April alone, deposits grew by $865 billion, more than the previous record for an entire year.")

10. Jeremy Kress, *Big Banks Are Growing Due to Coronavirus — That's an Ominous Sign*, THE HILL (May 1, 2020, 7:30 PM), https://thehill.com/opinion/finance/495719-big-banks-are-growing-due-to-coronavirus-thats-an-ominous-sign.

11. David Benoit, *Coronavirus Made America's Biggest Banks Even Bigger*, WALL STREET J. (Apr. 23, 2020), https://www.wsj.com/articles/coronavirus-made-america-s-biggest-banks-even-bigger-11587639602.

12. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

13. *Paycheck Protection Plan*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program (last visited May 3, 2020).

14. *See generally* Richard Rubin, *Coronavirus Stimulus Payments: When Will They Be Sent and Who Is Eligible?*, WALL STREET J. (May 11, 2020, 1:07 PM), https://www.wsj.com/articles/everything-you-need-to-know-about-the-payments-from-the-government-11585229988.

15. Jacob Pramuk, *Senate passes $484 billion coronavirus bill for small business and hospital relief, testing*, CNBC (Apr. 21, 2020, 8:18 PM), https://www.cnbc.com/2020/04/21/coronavirus-senate-passes-484-billion-small-business-relief-bill.html.

16. *See, e.g.*, Todd H. Baker, *Congress was wrong to leave PPP disbursement up to banks*, AM. BANKER (Apr. 28, 2020, 4:30 PM), https://www.americanbanker.com/opinion/congress-was-wrong-to-leave-ppp-

stimulus funds as quickly as possible, the Administration sought the advice and cooperation of the comforting too-big-to-fail banks.[17] But while the Federal Reserve (the "Fed") maximizes social welfare,[18] banks are profit-maximizing institutions,[19] and in the absence of legal instruments designed to guarantee ethics in their activities, they operate to maximize profits.[20] In 2006, during a testimony before the Senate Committee on Banking, Housing, and Urban Affairs, Governor Susan Schmidt Bies of the Federal Reserve System discussed this "natural tension between the private interests of banks in maximizing shareholder profits"[21] and the public interest. Therefore, as scholars have explained, as long as "overall social welfare is not sufficiently negative,"[22] the regulators will not intervene in the banks' activities. This is very alarming. Among of the fundamental policy objectives that underlie the concept of banking are maintaining a fair and efficient flow of credit in the economy

---

disbursement-up-to-banks ("Instead of providing quick, efficient and fair employee retention assistance directly through employers — like the method used in the European Union and elsewhere globally — the U.S. relies on bank lenders as the primary conduit for delivery of assistance to employers and their employees. This reliance on lender intermediaries means that assistance must come in the form of 'loans' rather than direct support payments. It also exposes how frequently the government's policy goals conflict with lenders' economic goals and incentives. This is an inefficient and ineffective solution for the problem it intended to solve.").

17. Justin Sink & Mark Niquette, *Trump Praises Banks for Small Firm Aid Amid Loan Fund Issues*, WASH. POST (Apr. 8, 2020, 7:40 AM), https://www.washingtonpost.com/business/on-small-business/trump-praises-banks-for-small-firm-aid-amid-loan-fund-issues/2020/04/07/ff7c6196-790d-11ea-a311-adb1344719a9_story.html.

18. *See, e.g.*, Nadav Orian Peer, *Negotiating the Lender of Last Resort: The 1913 Federal Reserve Act As A Debate over Credit Distribution*, 15 N.Y.U. J.L. & BUS. 367, 367 (2019) ("'Lending of last resort' is one of the key powers of central banks. As a lender of last resort, the Federal Reserve . . . famously supports commercial banks facing distressed liquidity conditions, thereby mitigating destabilizing bank runs. Less famously, lender-of-last-resort powers also influence the distribution of credit among different groups in society and therefore have high stakes for economic inequality.").

19. Not to mention that banks' compensation structures have also produced incentives for excessive risk-taking. *See generally* Lucian A. Bebchuk & Holger Spamann, *Regulating Bankers' Pay*, 98 GEO. L.J. 247 (2010).

20. Some scholars have attempted to address this by suggesting various regulatory models that will minimize risk to social welfare and customers. *See, e.g.*, Eric A. Posner & E. Glen Weyl, *An FDA for Financial Innovation: Applying the Insurable Interest Doctrine to Twenty-First-Century Financial Markets*, 107 NW. U. L. REV. 1307 (2013) (advocating for a regulatory agency that would operate like the FDA in a sense, and would preapprove new financial tools and transaction-models prior to enabling financial entities to use those or offer them to the public).

21. *An Update on the New Basel Capital Accord: Testimony Before the S. Comm. on Banking, Hous. & Urban Affairs, 109th Cong. 194 (2006) (statement of Susan S. Bies, Governor, Federal Reserve Board of Governors, Federal Reserve).*

22. M. Todd Henderson & James C. Spindler, *Taking Systemic Risk Seriously in Financial Regulation*, 92 IND. L.J. 1559, 1566 (2017).

and protecting market integrity.[23] Accordingly, banks are supposed to provide liquidity smoothing by providing credit to businesses and individuals, who should be able to use assets like future earnings[24] or real estate properties[25] in order to get liquidity and credit from banks. When banks choose basically not to lend during severe crises,[26] because they are concerned about being overly exposed, they fail the system they are meant to serve and harm social welfare.[27] Moreover, there is another reason this is very alarming: banks do not prioritize goals such as financial equality and do not owe their customers fiduciary duty.

II. NO FIDUCIARY DUTY TOWARDS CUSTOMERS

A fiduciary relationship requires a special relationship of confidence or trust. It exists between two or more people, "one of whom has a duty to act for the benefit of another and owes the other duties of good faith, trust, confidence, and candor."[28] Whether a fiduciary relationship exists is a question of law, and whoever is "claiming the existence of a fiduciary or confidential relationship has the burden of establishing the facts supporting such a relationship."[29] There are types of relationships that give rise to a fiduciary duty as a matter of law, including attorney-client or trustee-beneficiary relationships.[30] Otherwise, without some level of entrustment among people, there is no fiduciary duty.[31]

We are currently in a world where we are merely trusting banks to do the right thing. Although the government is clearly aimed at providing

---

23. *See* Saule T. Omarova, *The Merchants of Wall Street: Banking, Commerce, and Commodities*, 98 MINN. L. REV. 265, 269 (2013).

24. *See, e.g.*, Nakita Q. Cuttino, *The Rise of "Fringetech": Regulatory Risks in Early Wage Access*,
115 NW. L. REV. (forthcoming 2020) (explaining that "[e]arly-wage programs . . . enable users instantly to access cash from their earned, but unpaid, wages" and that such programs provide small-sum liquidity solutions.).

25. Matthew C. Klein, *Banks Are Tightening Lending Standards Like It Was 2008 Again*, BARRON'S (May 7, 2020, 3:55 PM), https://www.barrons.com/articles/banks-are-tightening-lending-standards-like-it-was-2008-again-51588881348 (explaining that "it's also a sign that the supposed insurance value of owning a home is overrated if it can't be used as collateral to get cash when needed.").

26. *Id.*

27. It is understandable, of course, why banks would not want to get lend to borrowers who could be losing their jobs and find themselves overly exposed to bad loans, but this is a problem, especially when they have trillions of federal dollars to lend, as they did in 2020. *See* Sink & Niquette, *supra* note 17.

28. 1 HOWARD W. BRILL & CHRISTIAN H. BRILL, ARKANSAS LAW OF DAMAGES § 15:3 (6th ed. 2015).

29. *Id.*

30. *See, e.g.*, *City of Prescott v. Sw. Elec. Power Co.*, No. 4:19-CV-4036, 2020 WL 607128, at *6 (W.D. Ark. Feb. 7, 2020).

31. BRILL & BRILL, *supra* note 28.

money to those who need it the most, financial institutions do not prioritize goals such as financial equality.[32] Banks also do not prioritize financial inclusion,[33] which is why commentators,[34] in addition to industry participants, have argued that FinTech could play a great role in increasing access to financial services for underserved, underbanked, and unbanked populations.[35]

Therefore, it is no surprise that banks did not, and frankly could not, distribute the money in the way that Congress had intended. Financial institutions do not owe their customers a fiduciary duty.[36] Simply put, banks and other financial service providers have no legal requirement that imposes strict responsibilities upon them and prohibits them from competing with customer interests or taking advantage of customer opportunities.[37] That must change.

FAILURES DURING THE COVID-19 CRISIS

The COVID-19 crisis has demonstrated in various ways that we can no longer trust big banks to do what is right. Otherwise, they will, and business-wise rightfully so, continue to prioritize profit maximizing.

---

32. *See, e.g.*, MEHRSA BARADARAN, HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY 210–25 (2015) (emphasizing the importance of access to regular bank loans and explaining how the revival of the U.S. postal banking could help low-income populations); Jacob Hale Russell, *Misbehavioral Law and Economics*, 51 U. MICH. J.L. REFORM 549, 562–64 (2018) (explaining the costs and benefits of payday loans); Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1162 (2019) (explaining how "access to credit" talk pervades the contemporary conversation regarding financial rights and equality for low-income populations).

33. *See* Aaron Chou, Note, *What's in the "Black Box"? Balancing Financial Inclusion and Privacy in Digital Consumer Lending*, 69 DUKE L.J. 1183, 1194 (2020).

34. *See, e.g.*, Nizan Geslevich Packin, *Let FinTech Help Jumpstart The Economy*, FORBES (Apr. 8, 2020, 9:55 AM), https://www.forbes.com/sites/nizangpackin/2020/04/08/let-fintech-help-jumpstart-the-economy/#693c2ff06c24.

35. *See, e.g.*, EXEC. OFFICE OF THE PRESIDENT, BIG DATA: A REPORT ON ALGORITHMIC SYSTEMS, OPPORTUNITY, AND CIVIL RIGHTS 11–12 (2016); Chou, *supra* note 33.

36. *See, e.g.*, *FAMM Steel, Inc. v. Sovereign Bank*, 571 F.3d 93, 102 (1st Cir. 2009) ("[T]he relationship between a lender and a borrower, without more, does not establish a fiduciary relationship."); *In re Sallee*, 286 F.3d 878, 893 (6th Cir. 2002) ("Except in special circumstances, a bank does not have a fiduciary relationship with its borrowers."); *Winebarger v. Pennsylvania Higher Educ. Assistance Agency*, 411 F. Supp. 3d 1070, 1091 (C.D. Cal. 2019) "([T]he principle that a financial institution owes no duty to a borrower has been extended to loan servicers.").

37. *In re Sallee*, 286 F.3d at 893 ("Without a great deal more, a mere confidence that a bank will act fairly does not create a fiduciary relationship obligating the bank to act in the borrower's interest ahead of its own interest.").

First, banks were trusted with the relief checks that were direct deposited into tax-payers' checking accounts. Because the money was not designated as exempt from garnishment under the CARES Act, many banks froze or seized the funds before consumers got them. In other words, the banks were taking stimulus money from the Americans who needed it most to repay bank debt. Scholars[38], commentators[39] and politicians[40] have expressed concerns about that practice. Several states have stepped in to help. Attorney generals from Massachusetts[41], Ohio[42], Nebraska[43], and New York[44] issued guidance to correct the designation and prohibit banks from garnishing stimulus funds. Certain governors, including those of Illinois[45], Oregon[46], Washington,[47] and California[48], issued executive orders to prevent garnishments of bank accounts.

---

38. *See* Pamela Foohey et al., *CARES Act Gimmick: How Not to Give People Money During a Pandemic and What To Do Instead*, 2020 U. ILL. L. REV. ONLINE 81, 82 (2020).

39. *See* Kiah Collier & Ren Larson, *Coronavirus put her out of work, then debt collectors froze her savings account*, TEX. TRIB. (Apr. 22, 2020, 1:00 PM), https://www.texastribune.org/2020/04/22/texas-coronavirus-debt-collectors/.

40. *See* Jeff Stein & Renae Merle, *Amid bipartisan criticism, Treasury Dept. attorneys review bank seizures of $1,200 stimulus checks*, WASH. POST (Apr. 20, 2020, 1:57 PM), https://www.washingtonpost.com/business/2020/04/20/amid-bipartisan-criticism-treasury-department-attorneys-review-bank-seizures-1200-stimulus-checks; Emily Stewart, *Exclusive: Elizabeth Warren and Sherrod Brown's plan to protect consumers from financial ruin*, VOX (Apr. 21, 2020, 12:00 PM), https://www.vox.com/policy-and-politics/2020/4/21/21229412/elizabeth-warren-sherrod-brown-cares-act-consumer-proposals.

41. 940 MASS. CODE REGS. 35.00 (2020).

42. Press Release, Dave Yost, Ohio Attorney Gen., Notice of Applicability of State Law Exemption to Payments under the Federal CARES Act (Apr. 13, 2020), https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/STATE_LAW_EXEMPTION_FOR_WEB.aspx.

43. Press Release, Attorney Gen. Doug Peterson, Neb. Dep't of Justice, Attorney Gen. Peterson Warns: Proceed With Caution When Garnishing Stimulus Payments (Apr. 15, 2020), https://ago.nebraska.gov/news/attorney-general-peterson-warns-proceed-caution-when-garnishing-stimulus-payments.

44. N.Y. STATE OFFICE OF THE ATTORNEY GEN., GUIDANCE ON CARES ACT PAYMENTS (2020), https://ag.ny.gov/sites/default/files/cares_act_guidance.pdf.

45. Ill. Exec. Order No. 2020-25 (Apr. 14, 2020), https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-25.pdf.

46. Or. Exec. Order No. 20-18 (Apr. 17, 2020), https://www.oregon.gov/gov/Documents/executive_orders/eo_20-18.pdf.

47. Wash. Exec. Order No. 20-49 (Apr. 14, 2020), https://www.governor.wa.gov/sites/default/files/20-49%20-%20COVID-19%20Garnishment%20%28tmp%29.pdf?utm_medium=email&utm_source=govdelivery.

48. Cal. Exec. Order No. N-57-20 (Apr. 23, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/04/4.23.20-EO-N-57-20.pdf.

Similarly, various courts issued orders aiming to protect the payments.[49] Some explained that the freezing and seizure of stimulus funds violate laws and even state constitutions, as the checks were intended to be used for food, utility bills, and shelter.[50] They are right. The funds were not meant to pay off overdraft and non-sufficient funds ("NSF") fees[51] or cover debts[52] processed by debt collectors.[53] If we had imposed on banks a fiduciary duty and made them be more flexible with those facing financial difficulties, they would have been required to provide more relief to customers by deferring their repayment dates and extending loan periods.[54]

Second, banks have demonstrated their profit-maximizing culture by prioritizing larger customers in processing PPP loans.[55] This bias proved harmful to many of the 30 million small American businesses,[56] which employ 60 million people[57]—about half of the private workforce. The PPP funds ran out in less than two weeks, and many small businesses did not get access to the funds.[58] This was partly because loans of more than $1 million, which represented 4 percent of the loans approved, used up 45

---

49. *See, e.g.*, Tenth Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-9054 (Tex. 2020); In re Petition to the Indiana Supreme Court to Engage in Emergency Rulemaking to Protect CARES Act Stimulus Payments From Attachment or Garnishment From Creditors, Nos. 20S-MS-258, 20S-CB-123 (Ind. 2020).

50. *Court halts debt collection during crisis*, DOMINION POST (Apr. 17, 2020), https://www.dominionpost.com/2020/04/17/court-halts-debt-collection-during-crisis.

51. Corey Stone, *Why Banks Should Waive Overdraft and NSF Fees to Support Covid-19 Jobless*, FIN. HEALTH NETWORK (2020), https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2020/03/13163725/Why-Banks-Should-Waive-Overdraft-Fees-Covid-19-1.pdf.

52. Lauren Saunders & Margot Saunders, *Protecting Against Creditor Seizure of Stimulus Checks*, NAT'L CONSUMER L. CTR. (May 1, 2020), https://library.nclc.org/protecting-against-creditor-seizure-stimulus-checks.

53. Cat Reid, *Debt collectors could take your stimulus check*, 41KSHB KAN. CITY (Apr. 27, 2020, 10:31 AM), https://www.kshb.com/rebound/debt-collectors-could-take-your-stimulus-check.

54. *See generally* Ruth Plato-Shinar, *Law and Ethics: The Bank's Fiduciary Duty towards Retail Customers, in* RESEARCH HANDBOOK ON LAW AND ETHICS IN BANKING AND FINANCE 214–36 (Costanza Russo, Rosa Lastra & William Blair eds., 2019).

55. Emily Flitter & Stacy Cowley, *Banks Steered Richest Clients To Federal Aid*, N.Y. TIMES (Apr. 23, 2020), at A1.

56. *See* Sally Lauckner, *How Many Small Businesses Are in the U.S.*, FUNDERA (Sept. 5, 2019), https://www.fundera.com/blog/small-business-employment-and-growth-statistics.

57. Jo Ann Barefoot, *How fintech can save small businesses on the brink*, AM. BANKER (Apr. 1, 2020, 10:59 AM), https://www.americanbanker.com/opinion/how-fintech-can-save-small-businesses-on-the-brink.

58. Jordain Carney & Sylvan Lane, *Small business loan program out of money amid impasse over new funds*, HILL (Apr. 16, 2020, 10:45 AM), https://thehill.com/policy/finance/492919-small-business-loan-program-runs-out-of-funds-amid-debate-over-new-bill.

percent of the distributed funds.[59] Livid about their mistreatment, small business owners are now suing Bank of America, JP Morgan, US Bank and Wells Fargo[60], claiming that they favored companies seeking higher loan amounts over them.[61]

Alarmingly enough, just like pre-existing health disparities have caused minorities to be more susceptible to contract COVID-19,[62] putting big banks at the center of the PPP processing exacerbated unfair treatment of minority-owned business. It was well-reported that pre-existing financial disparity,[63] to which global attention was drawn, among other types of racial injustice, following the George Floyd protests,[64] played out in the PPP administration and created more barriers for minority-owners of small businesses to get loans.[65] So rather than helping the smallest

---

59. U.S. SMALL BUS. ADMIN., PAYCHECK PROTECTION PROGRAM (PPP) REPORT (2020).

60. *See* Ruby Hinchliffe, *Will America's second round of PPP avoid mistakes of the first?*, FINTECH FUTURES (Apr. 23, 2020), https://www.fintechfutures.com/2020/04/will-americas-second-round-of-ppp-avoid-mistakes-of-the-first/.

61. *See* Jay Jackson, *Wells Fargo's Virus Relief Loans 'Gating' Policy Under Fire*, LAW360 (Apr. 23, 2020, 9:03 PM), https://www.law360.com/banking/articles/1266818/wells-fargo-s-virus-relief-loans-gating-policy-under-fire?nl_pk=18f9af10-2414-4f18-ab6b-2742114d8ef3&utm_source=newsletter&utm_medium=email&utm_campaign=banking.

62. See COVID-19 in Racial and Ethnic Minority Groups, CDC's Coronavirus Disease 2019 (COVID-19) – People Who Need Extra Precautions, (June 4, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html, 2019 ("The effects of COVID-19 on the health of racial and ethnic minority groups is still emerging; however, current data suggest a disproportionate burden of illness and death among racial and ethnic minority groups.")

63. Pooja Shethji, Credit Checks Under Title VII: Learning from the Criminal Background Check Context, 91 N.Y.U. L. Rev. 989, 1000–01 (2016) ("intentional discrimination may explain some disparities in credit scores. Large lenders have drawn ire for targeting and steering Black and Hispanic borrowers toward risky subprime loans: Wells Fargo recently settled with the Justice Department over fair lending claims, and Morgan Stanley is in the midst of litigation brought by the American Civil Liberties Union under the Fair Housing Act. Burdened with loans linked to greater default risks, Black and Hispanic homeowners have been more likely to fall behind on mortgage payments and/or enter foreclosure than have White homeowners, contributing to racial disparities in credit. . . Payday lenders, who couple short-term loans with exorbitant interest rates, tend to concentrate their operations in minority neighborhoods as well.")

64. According to the Brookings Institute, the average American white family earns $171,000 per year – an amount that is nearly ten times more than the average Black family, which only earns $17,150 per year. Kriston McIntosh, Emily Moss, Ryan Nunn, and Jay Shambaugh, Examining the Black-White Wealth Gap, Brookings (Feb. 27, 2020), https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/

65. *See Barriers to Securing Small Business Disaster Relief Loans Harm Minority-Owned Small Businesses, Widens Racial Wealth Inequality*, BENZIGA (Apr. 15, 2020, 6:35 AM), https://www.benzinga.com/pressreleases/20/04/n15805637/barriers-to-

businesses that got hit the hardest,[66] banks used the PPP money to improve their relationships with their larger, sophisticated (and probably more important and profitable) customers. In essence, the banks used the legislative mandate for this government program to profit maximize and even possibly reshape of the economic landscape of American small businesses.[67]

Third, because the processing of PPP loans is a volume business that is limited primarily by a bank's capacity to quickly process applications, many banks used substandard digital solutions to meet the urgent demand. Because banks profited nicely from this clerical processing task[68] (but know that they will probably end up putting most of the loans into the government program), they may not have been sufficiently motivated to properly inspect the borrowing entities. Hopefully, government efforts to get the money into the hands of businesses quickly did not incentivize the banks to blindly lend.[69]

I. CLOSING THE GAP

There are several methods that can be very useful in modifying banks' professional conduct, business behavior, and even cultural norms.

---

securing-small-business-disaster-relief-loans-harm-minority-owned-small-businesses-wid.

66. *See* Curtis Black, *Minority-owned businesses largely miss out on federal relief*, CHI. REP. (Apr. 22, 2020), https://www.chicagoreporter.com/minority-owned-businesses-largely-miss-out-on-federal-relief/.

67. *See* Brian Knight, Opinion, *The Fed's Loan Relief Must Be Non-Political*, WALL STREET J. (Apr. 12, 2020,1:23 PM), https://www.wsj.com/articles/the-feds-loan-relief-must-be-non-political-11586712221?emailToken=198fca11f79506841a28a826e6640399oC/WPBENZX/k4zTufGYymdQmHXozxHDC/w15uXlQI9ybYtmNzAylHA3ZeO70v+tpJ+FTblYl7np0G7vxo1gDIhh3q841eYXS7PwNyoXCwI8%3D&reflink=a.

68. Bram Berkowitz, *Banks Rake In $10B in Fees in Phase 1 of PPP*, MOTLEY FOOL (Apr. 23, 2020, 4:31 PM), https://www.fool.com/investing/2020/04/23/banks-rake-in-10b-in-fees-in-phase-1-of-ppp-progra.aspx ("Banks brought in a whopping $10 billion in fees from the government's $350 billion emergency lending small business Paycheck Protection Program (PPP). That's a good amount when you consider that all banks in the country in the first quarter of 2019 brought in roughly $65 billion in non-interest income, which includes almost all fee income at banks. And the $10 billion was made in a two-week time period.").

69. This is a major problem as bankers expect to share in any profits that flow to shareholders but are protected from losses that the realization of risks could impose on all stakeholders, including taxpayers. Bankers have incentives to give insufficient weight to the possibility of risky strategies, such as blind lending. *See, e.g.*, Bebchuk & Spamann, *supra* note 19. In the PPP case, the risk of giving bad loans would be rolled over to the government so bankers have, more than ever, incentives to give insufficient weight to the potential risk. This also serves the interests of bank shareholders, who now are incentivized to process as many loans of the biggest clients' as possible and collect the fees for this clerical work even when it is many more loans than is socially desirable.

A. Top-Down Regulatory Approach

Regulating the professional behavior of banks is the most direct and desirable method to address the failures discussed above, but it is the most challenging one as well.[70] Indeed, "[i]n the wake of the financial crisis, a dizzying array of new tools were given to regulators to prevent the next disaster from happening, or at least from happening in quite as destabilizing a way . . . regulators also announced that there would be some softer initiatives. The most prominent of these has been the effort to make banks more ethical through government oversight. Often this has been characterized as an effort to change the culture of financial institutions, and frequently neither ethics nor culture has been well defined."

Other ways to regulate, beyond trying to directly create laws regarding banks' cultural norms, is to limit the types of financial activities certain financial institutions can be involved in, or, similarly, limit the size of banks that can participate in certain activities, and have these changes impact the economic landscape. This was somewhat the case after the Small Business Administration and the Treasury Department were faced with criticism about the PPP's failure to cater to the smaller businesses that needed funds the most. On April 29, 2020, the government agencies announced some PPP updates, such as different filing requirements, a decision to temporarily limit bigger banks' ability to submit applications,[71] and, planned audits of big loans, which should keep bankers on their toes more.[72] And while this has frustrated many bankers, since the goal of the PPP "was to get assistance in the hands of as many qualified small businesses and their employees as quickly as possible,"[73] it was the government's attempt to impact the banks' behavior in the crisis, in the absence of professional conduct regulation.

B. Market-Led Initiatives

Another tool that can help us ensure bank behavior is consistent with our social agenda and goals is collaborative market-based initiatives, which can take various shapes and forms and are characteristic of the

---

70. *See, e.g.*, David Zaring, *Regulating Banking Ethics: A Toolkit*, 43 SEATTLE U. L. REV. 555 (2020).

71. In particular, the decision was to "block lenders with more than $1 billion in assets from using the SBA's E-Tran portal over an eight-hour period." John Reosti & Paul Davis, *Tilt towards smallest lenders is latest PPP wrinkle to confound banks*, AM. BANKER (Apr. 29, 2020, 3:01 PM), https://www.americanbanker.com/news/tilt-toward-smallest-lenders-is-latest-ppp-wrinkle-to-confound-banks.

72. *Id.*

73. *Id.*

American financial sector's landscape.[74] For example, to address the discriminatory effect of the PPP's fund distribution towards minorities, banking industry groups have formed a strategic partnership meant to support minority-run banks.[75]

Similarly, market-led initiatives, suggested and promoted by industry players, can lead to the development of relevant professional conduct and ethics standards.[76] For example, Citibank prides itself for publishing annually since 2001 the Environmental, Social and Governance (ESG) Reports. On April 29, 2020, Citibank released its 2019 report, which highlights the methods in which it is facilitating progress and workable growth in various global communities, and stated that the report shows how the bank prioritizes certain goals, such as reducing economic inequality.[77] The 2019 was prepared prior to the pandemic crisis, and it is not clear how much it actually promotes the reduction of economic inequality, yet publicizing that this is one of the biggest goals of the bank is alone a step in the right direction. Additionally, aligned with the George Floyd protests and supporting the calls for racial equality, corporate America, including the financial sector, felt obligated to respond in a certain way. Most business entities released statements against racism, but very quickly many started to make donations towards civil rights organizations, and even took actions that had a longer lasting impact in fighting systemic racism.[78] For example, Bank of America declared a $1 billion, in the form of a four-year commitment, to strengthen economic opportunities for minority communities.[79] Likewise, FinTech giant PayPal also committed $530 million to supporting minority-owned businesses in

74. For a discussion about the EU's top-down approach versus the American approach, see Nizan Geslevich Packin, *Show Me the (Data About the) Money!*, UTAH L. REV. (forthcoming 2020).

75. Jim Dobbs, *Industry Groups Form Partnership to Promote Minority-Run Banks*, AM. BANKER (Apr. 30, 2020,10:48 AM), https://www.americanbanker.com/news/industry-associations-form-partnership-to-promote-minority-run-banks. As part of this initiative, the American Bankers Association and the National Bankers Association will collaborate on advocacy efforts.

76. *See* Karen Bartleson, *Market-Driven Standards and the IEEE-SA*, 18 IEEE INTERNET COMPUTING 58 (2014) (defining the market-driven model as "a model by which global standards are created, adopted, and recognized worldwide . . . [whereby] the very developers and users . . . as opposed to a centralized body . . . drive the development and adoption of the standards").

77. *Citi Releases First Environmental, Social and Governance (ESG) Report*, CITI, https://www.citigroup.com/citi/news/2020/200429a.htm (last visited May 3, 2020).

78. Richard Feloni and Yusuf George, These Are the Corporate Responses to the George Floyd Protests That Stand Out, JUST Capital (June 17, 2020), https://justcapital.com/news/notable-corporate-responses-to-the-george-floyd-protests/

79. See Bank of America Press Release, Bank of America Announces $1 Billion/4-Year Commitment to Support Economic Opportunity Initiatives, (June 2, 2020), https://newsroom.bankofamerica.com/press-releases/bank-america-announces-four-year-1-billion-commitment-supporting-economic.

the U.S., and bolstering its diversity practices, while another FinTech giant, Square, joined many other American corporations that instated Juneteenth as a paid holiday.[80]

Regardless of whether such a bottom-up, market-led regulatory approach is the preferred approach, it is especially relevant to note that the American financial market is characterized by a market-led approach.[81]

C. Judicial System – the Interpretative Fix

Pragmatically speaking, the preferred method to address the issue in the interim may be a judicial interpretation that reads existing legal norms and standards as such that require banks to treat their customers equally and fairly. Courts can examine and decide to reinforce compliance with existing bank obligations and customer expectations in connection with the behavior of financial institutions. Typically, cases against banks and financial institutions arise when they, as lenders, violate a duty of good faith or fair dealing to their customer, or when these entities assume such a degree of control over their customers that the customers expect a fiduciary duty-type of a relationship. Examples of such types of situations include, *inter alia*, wrongfully failing to honor a loan commitment; wrongfully failing to renew loans; improper default notices; and breaching a fiduciary duty that the lender may have assumed in connection with the borrower.

In April 2020, several U.S. law firms filed class action lawsuits[82] against banks.[83] The firm, which represent small businesses that sought PPP funds during the pandemic, argue that the banks they are suing failed to address their customers' interests and financial needs and did not help them survive the COVID-19 crisis. One such firm, Kennard LLP, argued on behalf of itself and its clients that the banks breached a fiduciary duty

---

80. See PayPal Press Release, PayPal Announces $530 Million Commitment to Support Black Businesses, Strengthen Minority Communities and Fight Economic Inequality (Jun 11, 2020), https://newsroom.paypal-corp.com/2020-06-11-PayPal-Announces-530-Million-Commitment-to-Support-Black-Businesses-Strengthen-Minority-Communities-and-Fight-Economic-Inequality; Clare Duffy, Nike Joins the Companies Making Juneteenth an Annual Paid Holiday, CNN Business (June 13, 2020), https://edition.cnn.com/2020/06/11/business/nike-juneteenth-holiday-trnd/index.html.

81. *See, e.g.*, Kevin S. Haeberle & M. Todd Henderson, *A New Market-Based Approach to Securities Law*, 85 U. CHI. L. REV. 1313 (2018) (arguing for an intermediate market-based approach towards achieving the optimal level of corporate disclosure rather than a pure market-based approach).

82. Brenda Sapino Jeffreys, *Houston Law Firm Sues Its Bank Over Small Business Loan Process*, TEX. LAWYER (Apr. 21, 2020, 9:35 PM), https://www.law.com/texaslawyer/2020/04/21/houston-law-firm-sues-its-bank-over-small-business-loan-process/.

83. Br. for Pet'r, *Kennard Law P.C. v. Frost Bank*, No. 2020-24432 (Tex. Harris Co. Dist. Ct. Apr. 18, 2020).

over their administration of the loans.[84] In its public statement, the firm wrote that "[t]his is not a time for more greed. . . . It is a time to fairly distribute taxpayer money for the companies that need it most."[85] Similarly, a different class-action lawsuit, for alleged PPP loan deception, was filed by Stalwart Law Group, a Los Angeles consumer firm, in the Central District of California against four banks. The lawsuit argued that small business owners "were passed over in the loan process for larger companies."[86] The lawsuit, which named Bank of America, JPMorgan, US Bank, and Wells Fargo in separate cases, stated that the banks' clients were "denied loans because of a 'rigged' process that penalized small businesses."[87]

It is unlikely, however, that courts will create new legal principles. Judges are not likely to exhibit judicial activism in interpreting the responsibility of banks towards their customers for fear of being criticized for fashioning remedies beyond the scope of what is deemed to be appropriate under the law.[88]

---

84. "According to the firm's petition, filed in State District Court in Harris County, it applied for $160,000 in funding through the PPP on April 3, the first day applications were accepted by the Small Business Administration. But, the firm alleged, Frost Bank has not provided any information about the loan's status. Kennard said in an interview on Tuesday that he knows his 15-employee firm isn't alone. Contacted by other small businesses in Texas also wondering about the status of their loan applications, Kennard filed two similar class actions in state district courts on Monday—one against Chase Bank in Dallas County and against BBVA in Bexar County." Jeffreys, *supra* note 82.

85. *See* Jill Coffey & Alanna Weissman, *Law Firms Scramble For Federal Money With Mixed Results*, LAW360 (Apr. 28, 2020, 7:20 PM), https://www.law360.com/articles/1268389/law-firms-scramble-for-federal-money-with-mixed-results.

86. *Stalwart Law Group Files Class Actions against Nation's Biggest Banks for Alleged PPP Loan Deception*, BUS. WIRE (Apr. 20, 2020, 6:05 AM), https://www.businesswire.com/news/home/20200420005266/en/Stalwart-Law-Group-Files-Class-Actions-Nation%E2%80%99s (citing case numbers 20-3591, 20-3589, 20-3590, and 2-3588).

87. Clyde Hughes & Sommer Brokaw, *Law Firm Sues Four Banks in Class-Action Lawsuits Over Paycheck Program*, UNITED PRESS INT'L (Apr. 20, 2020, 3:53 PM), https://www.upi.com/Top_News/US/2020/04/20/Law-firm-sues-four-banks-in-class-action-lawsuits-over-paycheck-program/8021587401241/. Based on the complaints, rather than on a "first-come, first-served basis," the banks processed the largest loan amounts first, as doing so increased their origination fees which lenders receive for processing new applications. However, such prioritization led banks to serve less than 10% of the small businesses owners who applied for loans, and left more than 90% out of luck once the funds were exhausted. Banks hid from the public the fact that they were reshuffling the PPP applications they received, and prioritizing applications in such a way that would make them earn the most money.

88. *See, e.g.*, John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance,* 49 AM. BAR ASSN. J. 943, 944 (1963) (discussing the fear of "a substantial transfer of legislative power to the courts," if we let judges essentially write or re-write laws, instead of the representatives people elect for that purpose); Keenan D.

D. Public Criticism and Shaming

Finally, we can keep banks in check by using public criticism and shaming.[89] Public criticism, which includes public shaming in media outlets, various social circles, and social networks,[90] can prove to be useful in pressuring individuals as well as entities to act more ethically.

Indeed, shaming is a promising enforcement tool that can help advance the importance of corporate social responsibility norms and civic accountability.[91] The impact of shaming is so powerful that even the government has started engaging in public shaming to advance desired policy goals—a phenomenon that has been referred to as "regulatory shaming," or the publication of negative information by government agencies concerning private entities, mainly business organizations, in order to promote public-interest goals.[92] The government has criticized entities that sought and received government financial aid, when it was clear that they were not the CARES Act target audience for receiving urgent financial support. For example, Treasury Secretary Steven Mnuchin condemned the NBA's Los Angeles Lakers in April 2020 for

---

Kmiec, The Origin and Current Meanings of "Judicial Activism", 92 CAL. L. REV. 1441, 1477 (2004)(mentioning Judge Easterbrook's observation of the label "judicial activism," which is often, *de facto,* a name-calling, or euphemism for "Judges Behaving Badly."). *But see*, Nizan Geslevich Packin & Benjamin P. Edwards, *Regulating Culture: Improving Corporate Governance with Anti-Arbitration Provisions for Whistleblowers,* 58 WM. & MARY L. REV. ONLINE 41 (2016), http://wmlawreview.org/sites/default/files/Packin%20%26%20Edwards-Final.pdf [https://perma.cc/Q9Q5-3RU3 (explaining that the pragmatic interpretative approach could be more acceptable in situation where courts face especially challenging interpretative tasks, such as an inconsistent regulation or laws for banks as to how to handle loan giving to customers, as in the COVID19 crisis the goal was to give it to all those that need it, which is different from other, regular, situations.)

89. *See, e.g.*, Franz Wohlgezogen & Melissa A. Wheeler, *Naming and Shaming Bankers May Be Satisfying, But Could Backfire*, CONVERSATION (Mar. 15, 2017), https://theconversation.com/naming-and-shaming-bankers-may-be-satisfying-but-could-backfire-74307 (discussing the suggested Australian policy of shaming which would impact banks and require them to "publicly report on any significant breaches of [the Australian Securities and Investments Commission's] license obligations within five business days").

90. *See, e.g.*, Kate Klonick, *Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age*, 75 MD. L. REV. 1029, 1034 (2016); Kristine Gallardo, *Taming the Internet Pitchfork Mob: Online Public Shaming, the Viral Media Age, and the Communications Decency Act*, 19 VAND. J. ENT. & TECH. L. 721, 727 (2017).

91. *See generally* Sharon Yadin, *Regulatory Shaming*, 49 ENVTL. L. 407 (2019).

92. *See, e.g.*, Sharon Yadin, *Shaming Big Pharma*, 36 YALE J. REG. BULL. 131, 131–33 (2019) ("[The] Food and Drug Administration's (FDA) publication of 'black lists,' periodically updated on its website, of pharmaceutical companies that act unethically in the markets or fail to meet regulatory requirements. Along with other regulatory agencies, such as the Consumer Financial Protection Bureau (CFPB), the FDA also posts on its website numerous documents exposing company misconduct, such as warning letters and notices of violation addressed to those companies.").

taking $4.6 million from the PPP meant to enable small businesses pay employees during the COVID-19 pandemic.[93] As a result of the shaming, the sports team ended up returning the funds.[94] Similarly, President Trump claimed that Harvard University was receiving money via PPP, and under pressure, the university has decided to turn down the emergency coronavirus financial aid.[95]

Public criticism and shaming have also proven valuable in connection with putting banks in check and making them modify their behavior during the pandemic crisis.[96] For example, after the "USAA, the veteran-serving financial institution, took $3,400 in CARES Act payments from the family of a disabled veteran to offset an existing debt, denying the family emergency funds during a time of personal economic stress," public pressure helped bring justice to the customer, whose case, apparently was not an isolated incident.[97] Moreover, public criticism and shaming proved so efficient that they even pressured customers, which applied and got aid funds but received an unfair prioritizing from their banks, to give up the benefits resulting from the preference they received.[98]

Scholars have argued that shaming is a legitimate, useful, and democratic regulatory approach.[99] Regulatory shaming is intended to "communicate an external moral judgment about corporate activities, rather than causing internal feelings of shame. Similarly to other types of regulation, regulatory shaming is aimed at correcting market failures . . . as well as advancing desired social goals.[100] In the case of the banking

---

93. *See, e.g.*, Peter Rozovsky, *Mnuchin Calls COVID-19 Loan For LA Lakers 'Outrageous'*, LAW360 (Apr. 28, 2020, 3:31 PM), https://www.law360.com/banking/articles/1268238/mnuchin-calls-covid-19-loan-for-la-lakers-outrageous-?nl_pk=18f9af10-2414-4f18-ab6b-2742114d8ef3&utm_source=newsletter&utm_medium=email&utm_campaign=banking ("U.S. Treasury Secretary Steven Mnuchin blasted the NBA's Los Angeles Lakers on Tuesday for taking $4.6 million from the federal forgivable loan program meant to help small businesses pay workers during the coronavirus pandemic, though the team has returned the money amid criticism that deep-pocketed companies were gobbling up the funds.").

94. *Id.*

95. *See* Colin Dwyer, *Harvard and Other Universities Turn Down Relief Funds Amid Swell of Criticism*, NPR (Apr. 23, 2020, 1:38 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/04/23/842454705/harvard-and-other-universities-turn-down-relief-funds-amid-swell-of-criticism.

96. *See* David Dayen, *USAA Grabs Coronavirus Checks From Military Families*, AM. PROSPECT (Apr. 16, 2020), https://prospect.org/coronavirus/usaa-bank-grabs-stimulus-checks-from-military-families/.

97. *Id.*

98. *See* Rich Duprey, *Shake Shack Returns $10 Million Paycheck Protection Loan After Securing Funding Elsewhere*, NASDAQ (Apr. 20, 2020, 9:22 AM), https://www.nasdaq.com/articles/shake-shack-returns-%2410-million-paycheck-protection-loan-after-securing-funding-elsewhere.

99. *See generally* Yadin, *supra* note 91.

100. *Id.* at 420.

industry, information asymmetry is a known market failure,[101] which financial regulation aims to correct[102] by making information more accessible, available, and accurate to consumers.[103] In the absence of appropriate regulation on the professional conduct of banks, we must create a culture in which the media, business entities, individuals, and the government raise attention to and shame banks that act unethically. This is especially important in times of crises, such as the COVID-19 pandemic, but also in calmer times. It is our moral imperative to bring unethical practices into the public eye.

CONCLUSION

We should be wary of placing big banks at the center of major economic and social government programs, such as the COVID-19 resulting stimulus packages, which included distributing relief check funs, other financial aid, and loans to small businesses under the PPP. Unlike the Fed and its role as the lender of last resort,[104] banks are not entities that strive to maximize social welfare, or promote desire social agenda. Instead, absent laws that clearly require banks to prioritize customer interests or social welfare—at least in critical time junctures, if not always—banks will gravitate towards striving for profit maximization. We need to be proactive, not reactive, in attempting to make banks conduct their businesses in a way that is beneficial to us as a country, especially during crises. While a top-down regulatory approach enforcing increased ethical standards and liabilities could be highly effective, there are other tools that we can use to fix market failure and to ensure that banks act more

101. Steven L. Schwarcz, *Systematic Regulation of Systemic Risk*, 2019 WIS. L. REV. 1, 25 n.146 (2019) ("Economists define market failure as a 'situation' in which there is an economic inefficiency. Traditionally, market failures are often associated with imperfect information (such as information asymmetries).").

102. *Id.* at 25 n.145; PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 322 (15th ed. 1995) (observing that the primary goal of financial regulation should be to correct market failures); DAVID GOWLAND, THE REGULATION OF FINANCIAL MARKETS IN THE 1990S, at 21 (1990) (characterizing regulating markets to correct market failure as the "public interest theory").

103. *See* ROBERT BALDWIN ET AL., UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE 18–19 (2d ed. 2012).

104. "A number of highly respected academics, such as Hal Scott and Eric Posner . . . are troubled by the post-crisis reforms that pull back, rather than expand, the Fed's authority to intervene to contain a growing crisis. In their analyses, however, this is reason to provide the Fed greater authority to provide guarantees and potentially even to take more drastic and obviously fiscal steps to stabilize fragile firms in the midst of a panic." See Kathryn Judge, Guarantor of Last Resort, 97 Tex. L. Rev. 707, 721 (2019). Judge rejects such an approach because while it offers benefits over the status quo, it "could exacerbate the challenge of trying to protect central bank independence with respect to monetary policy and may well increase the probability of political backlash following a crisis." Id. at 727.

ethically, including market-based initiatives and media-led public shaming and criticism.