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

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The COVID-19 economic crisis has brought to light something very broken in the American banking system—that banks prioritize their own profits over the interests of those they serve and over the 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 U.S. 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 this massive distribution of liquidity on an expedited basis, the government relied on big banks. But instead of prioritizing the public welfare, the banks focused on their bottom lines and, thus, did not carry out the true intent of the stimulus. For example, with respect to the PPP, while the Small Business Administration was required to process the loans on a first-come, first-served basis, the banks were not. 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 that had been deposited into consumer accounts before the consumers that actually needed those funds ever 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.

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INTRODUCTION

During the COVID-19 crisis, something has proven to be very broken in the American banking system. The government needed and trusted the big banks to provide liquidity by distributing funds to individuals and small businesses, but the banks failed to do so. Instead, the banks prioritized profit-making by giving preference to the needs of bigger, richer customers.[1] They also seized government relief funds to cover customers' late banking fees[2] and chose to tighten lending standards—all at the expense of those who needed liquidity most.[3] In the process, the banks discriminated against minorities, women, and other underserved populations.[4] Unfortunately, banks do not prioritize goals such as financial equality, and relatedly, do not owe their customers fiduciary duty.[5]

Banks, like other businesses, are for-profit entities meant to generate revenues for their shareholders in both bull and bear markets.[6] Although

1. Emily Flitter & Stacy Cowley, *Banks Gave Richest Clients 'Concierge Treatment' for Pandemic Aid*, N.Y. TIMES (Apr. 22, 2020), https://nyti.ms/34ZDiit [https://perma.cc/UB4R-9DPD].

2. David Dayden, *Your Coronavirus Check Is Coming. Your Bank Can Grab It.*, THE AM. PROSPECT (Apr. 14, 2020), https://prospect.org/coronavirus/banks-can-grab-stimulus-check-pay-debts/ [https://perma.cc/8PR7-JXPC].

3. 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 [https://perma.cc/VZ6K-TBAH].

4. Sarah Kolinovsky, *For Minority-Owned Businesses Shut Out of Coronavirus Loans, an Ongoing Push for Access*, ABC NEWS (May 20, 2020, 3:05 AM), https://abcnews.go.com/Business/minority-owned-businesses-shut-coronavirus-loans-ongoing-push/story?id=70655015 [https://perma.cc/KTY3-ZX5R].

5. Cassandra Jones Havard, *U.S. Must Prioritize Financial Inclusion*, THE BALT. SUN (Dec. 06, 2016, 10:53 AM), https://www.baltimoresun.com/opinion/op-ed/bs-ed-banking-all-20161206-story.html; Isabel Peres, *The Evolution of Banking: A Flexible Fiduciary Duties Approach Will Help Better Protect Mobile Banking Consumers*, 2015 U. ILL. J.L., TECH. & POL'Y 211, 226.

6. 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), and 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).

banks' main goal is to be profitable,[7] there are certain duties that banks, like all businesses, owe to society.[8] For example, whether they like it or not, banks must obey the law and comply with regulations.[9] Additionally, banks are subject to cultural norms, which can also deter "unwarranted social obligations" on businesses.[10] However, as the years following the 2008 financial crisis have demonstrated, cultural norms have not made banks take action for any purpose other than to profit.[11]

But still, banks could 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,[12] similar to how other sorts of businesses are legally required to contribute to societal wellbeing.[13] Utilities and essential infrastructure providers, for example, must offer internet connectivity or enable customers to get hooked-up to electricity, cable, phone, or gas services at fair prices, even if some of those consumers would otherwise be unprofitable.[14]

The business environment in which banks operate today is one in which the government trusts them to develop and voluntarily exhibit

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7. *See* Saule T. Omarova, *Bank Governance and Systemic Stability: The "Golden Share" Approach*, 68 ALA. L. REV. 1029, 1037–38 (2017).

8. *See, e.g.*, Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467, 473–74 (2020) ("In 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.").

9. *Id.* at 485–88.

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

11. *See, e.g.*, Dan Awrey, William Blair & David Kershaw, *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.").

12. 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 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.").

13. *See* K. Sabeel Rahman, *Infrastructural Regulation and the New Utilities*, 35 YALE J. ON REGUL. 911, 914 (2018).

14. *See id.* at 917–20 (examining the different duties of various utilities and infrastructure providers).

ethical cultural norms.[15] But as the COVID-19 crisis has demonstrated, actually having banks develop and exhibit these norms is more challenging than it might seem. Nevertheless, this Essay argues that society should not give up on banks. Instead, there are several techniques that different actors—from regulators to the judiciary to everyday citizens—can employ to modify the ethical behavior of banks and their cultural norms. First, regulators can utilize a top-down regulatory approach and create legal standards governing bank activities, size, and operations to modify their business conduct. Second, the creation of market-led initiatives, which characterize the American financial industry, could also prove useful in altering business norms. Third, we can hope for an interpretive fix—pragmatically speaking, a judicial interpretation that reads existing regulations provision to require a fiduciary or ethical representation duty. Finally, public criticism and shaming could also 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 blamed big bank greed for causing much of the financial storm.[16] In contrast, when the COVID-19 crisis began, the perception of big banks was very different.[17] As the financial impact of the health crisis started hitting every single sector of the U.S. economy fast and hard, everyone, including the U.S. government, turned to big banks as safe, trusted institutions.[18] For example, commentators reported a

15. Awrey, Blair & Kershaw, *supra* note 11, at 193–94.

16. *See, e.g.*, DAVID FABER, AND THEN THE ROOF CAVED IN: HOW WALL STREET'S GREED AND STUPIDITY BROUGHT CAPITALISM TO ITS KNEES xviii (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 [https://perma.cc/5H44-E33X]; *see* David Wessel, *In Exit Interview, Geithner Muses on Crisis*, *Era*, WALL ST. J. (Jan. 17, 2013, 6:07 PM), https://www.wsj.com/articles/SB10001424127887323783704578247981375751520 [https://perma.cc/R3BP-Z9GC] ("[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.").

17. Andrew Osterland, *Here Are Key Ways the Coronavirus Crisis Differs from the Great Recession*, CNBC (May 27, 2020, 9:00 AM), https://www.cnbc.com/2020/05/27/here-are-key-ways-coronavirus-crisis-differs-from-the-great-recession.html [https://perma.cc/GTK7-854D].

18. Hugh Son, *U.S. Banks Are 'Swimming in Money' as Deposits Increase by $2 Trillion Amid the Coronavirus*, CNBC (June 21, 2020, 8:29 AM), https://www.cnbc.com/2020/06/21/banks-have-grown-by-2-trillion-in-deposits-since-coronavirus-first-hit.html [https://perma.cc/W2XE-GB96].

phenomenon described as a "reverse run" on the banks: U.S. banks grew by approximately $2.4 trillion between January and June of 2020,[19] and as of August 2020, JPMorgan Chase, Bank of America, Citigroup, and Wells Fargo have taken in $900 billion of the year's gains.[20] Most of that growth in deposits went to the ten largest banks, which received $1.2 trillion in the first three months of 2020.[21] In particular, JPMorgan brought in more cash than most other banks and grew by approximately 20% in the first quarter, turning into the first American bank with $3 trillion in assets.[22] Because of these gains, banks increased their hiring efforts;[23] notably, the largest U.S. and European banks hired an additional 19,000 employees in the first half of 2020 as demand for loans and other services surged during the COVID-19 crisis and planned staff cuts were largely estopped.[24] These numbers demonstrate that consumers and businesses have trusted big banks to help weather this recession. The government has done the same.

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)[25]—that included, *inter alia,* loans to small businesses under the Paycheck Protection Program (PPP)[26] and relief checks to individuals.[27] Then, in late April 2020, an additional package was

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19. *Id.* ("[I]n April alone, deposits grew by $865 billion, more than the previous record for an entire year.").

20. David Benoit, *Coronavirus Has Left Banks with Lots of Cash and Little to Do with It*, WALL ST. J. (Aug. 30, 2020), https://www.wsj.com/articles/the-coronavirus-is-doing-weird-things-to-the-banking-industry-11598779800 [https://perma.cc/U5YB-TN3V]. Unfortunately, despite being flooded with more deposits than they had ever seen, and the fee income hitting a record high, banks' profits went down, as they have braced themselves in the second half of 2020 for a wave of soured loans. *Id*.

21. 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 [https://perma.cc/K3V2-N8VU].

22. *Id.*

23. *Big Banks Hire 19,000 with Pandemic Boosting Demand for Services*, AM. BANKER (Aug. 12, 2020, 4:59 PM), https://www.americanbanker.com/articles/big-banks-hire-19-000-with-pandemic-boosting-demand-for-services [https://perma.cc/PD2Q-GSDL].

24. *Id.*

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

26. *Paycheck Protection Program*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program [https://perma.cc/Z7SA-MTW9] (last visited May 3, 2020).

27. *See generally* Richard Rubin, *Coronavirus Stimulus Payments: When Will They Be Sent and Who Is Eligible?*, WALL ST. J. (May 11, 2020, 1:07 PM),

approved,[28] and in August 2020, the program closed and banks shifted into the forgiveness period.[29]

So far, however, the government has failed to distribute any of those funds in a successful way and has been unable to get the funds directly to those that need them the most.[30] Why? Because of the government's reliance on big banking—an industry oriented toward profit-maximization, not the maximization of social welfare.

Wanting to distribute the different stimulus funds as quickly as possible, the Trump Administration sought the advice and cooperation of the familiar too-big-to-fail banks.[31] But while the Federal Reserve maximizes social welfare,[32] big banks are profit-maximizing institutions.[33] In the absence of legal instruments designed to guarantee ethics in their activities, they operate to maximize profits.[34] In 2006,

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https://www.wsj.com/articles/everything-you-need-to-know-about-the-payments-from-the-government-11585229988 [https://perma.cc/54R6-JAF5].

28. 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 [https://perma.cc/3W5Y-KA64].

29. Caroline Hudson, *Big Banks, Including Bank of America and Wells Fargo, Move Past Early PPP Complaints as Forgiveness Begins*, CHARLOTTE BUS. J. (Sept. 2, 2020, 9:00 AM), https://www.bizjournals.com/charlotte/news/2020/09/02/big-banks-bank-of-america-wells-fargo-ppp-lawsuits.html [https://perma.cc/586D-BT3B] (explaining that banks have shifted into the forgiveness period, hoping to leave behind them some of the initial criticism they faced).

30. *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-disbursement-up-to-banks (describing how the U.S.'s reliance on bank lenders to deliver financial assistance to employers and employees "mean[t] that assistance must come in the forms of 'loans'" and "exposes how frequently the government's policy goals conflict with lenders' economic goals and incentives.").

31. 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 [https://perma.cc/8Q6A-BLS6].

32. *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," and the Federal Reserve "supports commercial banks facing distressed liquidity conditions" by mitigating destabilizing bank runs. Additionally, "lender-of-last-resort powers also influence the distribution of credit among different groups in society and therefore have high stakes in economic inequality.").

33. 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).

34. 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

testifying 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" and the public's interests.[35] Because of that tension, so long as "overall social welfare is not sufficiently negative," regulators will not intervene in the banks' activities.[36]

This is alarming for several reasons. Among the fundamental policy objectives that underlie the concept of banking is the objective of "maintaining a fair and efficient flow of credit in the economy" and protecting market integrity.[37] 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[38] or real estate properties[39] in order to get liquidity and credit from banks. During severe crises, when banks are concerned about being overly exposed,[40] and choose to greatly limit their lending,[41] they fail the system they are meant to serve and consequently harm social welfare.[42] That only demonstrates that banks do not prioritize goals like financial equality and do not otherwise owe their customers a fiduciary duty.

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).

35. *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).

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

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

38. *See, e.g.*, Nakita Q. Cuttino, *The Rise of "Fringetech": Regulatory Risks in Early Wage Access*, 115 NW. L. REV. (forthcoming 2020) (manuscript at 7–8) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3531798#) [https://perma.cc/2PQ2-5L54] (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).

39. *See* Klein, *supra* note 3 ("[I]t'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.").

40. *See generally* Nada Mora, *Can Banks Provide Liquidity in a Financial Crisis?*, ECON. REV., FED. RES. BANK OF KAN. CITY, Third Quarter 2010, at 31, 36–37, https://www.kansascityfed.org/publicat/econrev/pdf/10q3Mora.pdf [https://perma.cc/9XVM-KQY3].

41. Klein, *supra* note 3.

42. It is understandable, of course, why banks would not want to lend to borrowers who could be losing their jobs and find themselves overly exposed to bad loans, but this is a problem, especially when banks have trillions of federal dollars to lend, as they did in 2020. *See* Sink & Niquette, *supra* note 31.

II. NO FIDUCIARY DUTY TOWARDS CUSTOMERS

A fiduciary relationship requires a special relationship of confidence or trust.[43] 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."[44] 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."[45] Some relationships give rise to a fiduciary duty as a matter of law, including attorney-client or trustee-beneficiary relationships.[46] Otherwise, without this sort of trust, there is no fiduciary duty.[47]

As noted above, during the COVID-19 pandemic, although the government has wanted to provide money to those who need it the most, the financial institutions that the government has relied on to help them do so do not prioritize financial equality.[48] Banks also do not prioritize financial inclusion,[49] which is why commentators, in addition to industry participants, have argued that financial technology (FinTech) could play a greater role in increasing access to financial services for underserved populations.[50]

Therefore, it is no surprise that banks did not, and frankly could not, distribute the money in the way that Congress had intended. This is because financial institutions do not owe their customers a fiduciary

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43. *See Fiduciary Relationship*, BLACK'S LAW DICTIONARY (11th ed. 2019).

44. HOWARD W. BRILL & CHRISTIAN H. BRILL, 1 ARKANSAS LAW OF DAMAGES § 15:3, Westlaw (database updated Nov. 2019).

45. *Id.*

46. *City of Prescott v. Sw. Elec. Power Co.*, 438 F. Supp. 3d 943, 953 (W.D. Ark. 2020).

47. BRILL & BRILL, *supra* note 44, §15:3.

48. *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 U.S. postal banking could help low-income populations); *see* 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, 1161–62 (2019) (explaining how "access to credit" talk pervades the contemporary conversation regarding financial rights and equality for low-income populations).

49. *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).

50. *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 49, at 1186, 1194–98.

duty.[51] Simply put, banks and other financial service providers have no legally imposed responsibility that prohibits them from competing with customer interests or taking advantage of customer opportunities.[52]

A. Failures During the COVID-19 Crisis

Without a fiduciary duty, banks will continue to prioritize maximizing profit. In short, the role of banks in the government's response to the COVID-19 pandemic demonstrated that banks cannot be trusted to act in a way that maximizes social welfare instead of profit.

First, banks were entrusted with the relief checks that were directly deposited into taxpayers' checking accounts.[53] Because the money was not designated as exempt from garnishment, many banks froze or seized the funds before consumers could access them.[54] In other words, the banks were taking stimulus money from the Americans who needed it

51. *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."); *Sallee v. Fort Knox Nat'l Bank, N.A.*, 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. Pa. Higher Educ. Assistance Agency*, 411 F. Supp. 3d 1070, 1091 (C.D. Cal. 2019) ("The principle that a financial institution owes no duty to a borrower has been extended to loan servicers.") (quoting *Ruiz v. Cent. Mortg. Co.*, No. CV 14-08627 MMM (SSx), 2015 WL 12683873, at *11 (C.D. Cal. Apr. 2, 2015).

52. *See 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.").

53. *Economic Impact Payments: What You Need to Know*, IRS (Mar. 30, 2020), https://www.irs.gov/newsroom/economic-impact-payments-what-you-need-to-know [https://perma.cc/ZFZ7-4FZS].

54. *See Consumer, Banking Groups to Congress: Exempt Economic Impact Payments from Garnishment*, AM. BANKERS ASS'N (Apr. 21, 2020), https://www.aba.com/about-us/press-room/press-releases/consumer-banking-groups-to-congress-exempt-economic-impact-payments-from-garnishment [https://perma.cc/2EMM-7285] ("While financial institutions and even many debt collectors and debt buyers believe that the payments should be exempt from garnishment orders, some creditors have continued to attempt to garnish and freeze bank accounts.").

most and using it to repay their bank debt.[55] Scholars,[56] commentators,[57] and politicians[58] have expressed concerns about that practice. Several states stepped in to help: Attorneys General from Massachusetts,[59] Ohio,[60] Nebraska,[61] and New York[62] issued guidance to correct the designation and prohibit banks from garnishing stimulus funds. Certain

55. *See, e.g.*, McKenzie Sadeghi, *Fact Check: Can Banks Keep Stimulus Payments to Collect on Outstanding Feeds and Debts?*, USA TODAY (Apr. 20, 2020, 8:21 AM), https://www.usatoday.com/story/news/factcheck/2020/04/20/fact-check-can-banks-keep-covid-19-stimulus-checks-collect-debts/5156033002/ [https://perma.cc/MP83-QPQP]; Aimee Picchi, *Debt Collectors Can Garnish Coronavirus Stimulus Checks Because of a Loophole, Legal Advocates Say*, USA TODAY (Apr. 15, 2020, 12:58 PM) https://www.usatoday.com/story/money/personalfinance/2020/04/15/coronavirus-stimulus-checks-debt-collectors-can-garnish-money/5136596002/ [https://perma.cc/J9JB-R9WW].

56. *See* Pamela Foohey, Dalié Jiménez & Christopher K. Odinet, *CARES Act Gimmicks: How Not to Give People Money During a Pandemic and What to Do Instead*, 2020 U. ILL. L. REV. ONLINE 81, 82.

57. *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/ [https://perma.cc/Z2MA-LLUT].

58. *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/ [https://perma.cc/W5CV-PEKP]; *see also* 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 [https://perma.cc/Q8ME-888E].

59. 940 MASS. CODE REGS. 35.00 (2020).

60. News Release, Dave Yost, Ohio Attorney Gen., Notice of Applicapbility [sic] 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 [https://perma.cc/N89Q-RS3B].

61. News Release, Doug Peterson, Neb. Attorney Gen., Attorney Gen. Peterson Warns: Proceed with Caution When Garnishing Stimulus Payments (Apr. 15, 2020), https://ago.nebraska.gov/sites/ago.nebraska.gov/files/doc/2020-04-15%20Caution%20Garnishing%20Stimulus.pdf [https://perma.cc/6E34-BVLA].

62. 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 [https://perma.cc/86LK-BJTC].

governors, including those of Illinois,[63] Oregon,[64] Washington,[65] and California[66] issued executive orders to prevent garnishments of bank accounts. Various courts also issued orders aimed to protect the payments.[67] Some courts explained that the freezing and seizure of stimulus funds violated laws and even state constitutions, as the checks were intended to be used for food, utility bills, and shelter.[68] And that interpretation aligns with legislative intent: the funds were not meant to pay off overdraft and non-sufficient funds fees[69] or cover debts[70] processed by debt collectors.[71] But, that aside, if banks had a fiduciary duty, the question would not even be up for interpretation—the banks would have been required to provide more relief to customers by deferring their repayment dates and extending loan periods.[72]

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63. Ill. Exec. Order No. 2020-25 (Apr. 14, 2020), https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-25.pdf [https://perma.cc/24PF-LRTF].

64. Or. Exec. Order No. 20-18 (Apr. 17, 2020), https://www.oregon.gov/gov/Documents/executive_orders/eo_20-18.pdf [https://perma.cc/J4W5-GMZY].

65. 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 [https://perma.cc/32L5-5C3A].

66. 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 [https://perma.cc/7JCL-ETJM].

67. *See, e.g.*, *Tenth Emergency Order Regarding the COVID-19 State of Disaster*, 597 S.W.3d 846 (Tex. 2020); *In re Petition to the Ind. Supreme Court to Engage in Emergency Rulemaking to Protect CARES Act Stimulus Payments from Attachment or Garnishment from Creditors*, 142 N.E.3d 907 (Ind. 2020).

68. *Court Halts Debt Collection During Crisis*, DOMINION POST (Apr. 17, 2020), https://www.dominionpost.com/2020/04/17/court-halts-debt-collection-during-crisis [https://perma.cc/K4EC-MBTA].

69. *See* Corey Stone, *Why Banks Should Waive Overdraft and NSF Fees to Support Covid-19 Jobless*, FIN. HEALTH NETWORK, https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2020/03/13163725/Why-Banks-Should-Waive-Overdraft-Fees-Covid-19-1.pdf [https://perma.cc/GE3K-XLSU] (last visited Sept. 29, 2020).

70. *See* 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 [https://perma.cc/GX34-2QVL].

71. *See* 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 [https://perma.cc/U7X8-5ZKL].

72. *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).

Banks also demonstrated their profit-maximizing culture when they prioritized larger customers in processing PPP loans.[73] This bias proved harmful to many of the 30 million small American businesses,[74] which employ about half of the private workforce.[75] The PPP funds ran out in less than two weeks,[76] and many small businesses did not get access to the funds.[77] This was partly because loans of more than $1 million, which represented 4% of the loans approved, used up 45% of the distributed funds.[78] Livid about their mistreatment, small business owners are now suing Bank of America, JPMorgan, US Bank and Wells Fargo,[79] claiming that they wrongly favored companies seeking higher loan amounts over them.[80]

Alarmingly enough, putting big banks at the center of the PPP processing only exacerbated the unfair treatment of minority-owned businesses, compounding the already disparate effect of the pandemic on those communities.[81] It is well-reported that pre-existing financial

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73. Flitter & Cowley, *supra* note 1.

74. *Id.*; Sally Lauckner, *How Many Small Businesses Are In the U.S.? (And Other Employment Stats)*, FUNDERA: DATA & REP. (Sept. 9, 2020), https://www.fundera.com/blog/small-business-employment-and-growth-statistics [https://perma.cc/42PZ-T4LP].

75. 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 [https://perma.cc/HSF8-F8DJ].

76. Emily Flitter, *Loan Money Runs Out While Small-Business Owners Wait in Line*, N.Y. TIMES (Apr. 16, 2020), https://www.nytimes.com/2020/04/16/business/coronavirus-sba-loans-out-of-money.html [https://perma.cc/WM6W-MYLJ]; *see also* U.S. DEP'T OF THE TREASURY, SMALL BUSINESS PAYCHECK PROTECTION PROGRAM (2020), https://home.treasury.gov/system/files/136/PPP%20--%20Overview.pdf [https://perma.cc/VZW8-3LAF].

77. *See* Jordain Carney & Sylvan Lane, *Small Business Loan Program Out of Money Amid Impasse over New Funds*, THE 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 [https://perma.cc/DSJ2-GPCZ].

78. U.S. SMALL BUS. ADMIN., PAYCHECK PROTECTION PROGRAM (PPP) REPORT (2020), https://www.sba.gov/sites/default/files/2020-04/PPP%20Deck%20copy.pdf [https://perma.cc/CUF8-DZ5C].

79. *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/ [https://perma.cc/NLU9-V9FQ].

80. *Id.*; *see* Jon Hill, *Wells Fargo's Virus Relief Loans 'Gating' Policy Under Fire*, LAW360 (Apr. 23, 2020, 9:03 PM), https://www.law360.com/banking/articles/1266818 [https://perma.cc/VJH4-KPMH].

81. *See COVID-19 in Racial and Ethnic Minority Groups*, CDC: HEALTH EQUITY MATTERS NEWSL. (June 16, 2020), https://www.cdc.gov/minorityhealth/newsletter/2020/summer/news.html

disparities,[82] among other types of systemic racial injustice, played out in the PPP administration and created more barriers for minority-owners of small businesses to get loans.[83] So rather than helping the smallest businesses that got hit the hardest,[84] banks used the PPP money to improve their relationships with their larger, more profitable and more sophisticated (and so, more important) customers.[85] In essence, the banks used the legislative mandate for this government program to maximize profit and even possibly reshape the economic landscape of American small businesses.[86]

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 potentially used substandard digital solutions to meet the urgent demand.[87] Because banks profited nicely from this clerical processing task,[88] they may not have been sufficiently motivated to

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[https://perma.cc/CGL3-EW52] ("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.").

82. For a discussion on some types of pre-existing financial disparities, see Pooja Shethji, *Credit Checks Under Title VII: Learning from the Criminal Background Check Context*, 91 N.Y.U. L. REV. 989, 1000–01 (2016) ("[I]ntentional 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.").

83. *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-securing-small-business-disaster-relief-loans-harm-minority-owned-small-businesses-wid [https://perma.cc/A8P6-2QWP].

84. *See* Curtis Black, *Minority-Owned Businesses Largely Miss Out on Federal Relief*, CHI. REP. (April 22, 2020), https://www.chicagoreporter.com/minority-owned-businesses-largely-miss-out-on-federal-relief/ [https://perma.cc/JWM8-HS2T].

85. *Id.*

86. *See* Brian Knight, Opinion, *The Fed's Loan Relief Must Be Non-Political*, WALL ST. J. (Apr. 12, 2020,1:23 PM), https://www.wsj.com/articles/the-feds-loan-relief-must-be-non-political-11586712221 [https://perma.cc/J8GF-PNV9].

87. See Hinchliffe, *supra* note 79 for an inquiry on how well banks maintained appropriate banking protocol during the COVID-19 crisis.

88. For a discussion on how banks profited from clerical fees, see 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 [https://perma.cc/7NK2-U9LK] ("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

properly inspect the borrowing entities.[89] Hopefully, government efforts to get the money into the hands of businesses quickly did not incentivize the banks to blindly lend.[90] But, that remains to be seen.

III. Closing the Gap

The COVID-19 pandemic has demonstrated the problems that come with banks being profit-maximizing entities that owe no fiduciary duty to their customers. But not all is lost. There are several methods that could modify banks' professional conduct, business behavior, and cultural norms.

A. Top-Down Regulatory Approach

Regulating the professional behavior of banks is the most direct method to address the failures discussed above, but it is also the most challenging.[91] Indeed:

> In 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. . . . [R]egulators 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.[92]

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.").

89. *See* Hinchliffe, *supra* note 79; Bebchuk & Spamann, *supra* note 33.

90. *Id.* 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 33, at 249–52. 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. *Id.* 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. *Id.*

91. *See, e.g.*, David Zaring, *Regulating Banking Ethics: A Toolkit*, 43 Seattle U. L. Rev. 555 (2020).

92. *Id.* at 555.

Beyond trying to directly create laws regarding banks' cultural norms, another way to regulate banks is to limit the types of financial activities certain financial institutions can be involved in, or otherwise limit the size of banks that can participate in certain activities, and then have these impact the economic landscape.[93] This was somewhat what happened 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.[94] On April 29, 2020, the government agencies announced some PPP updates, such as different filing requirements, temporarily limiting bigger banks' ability to submit applications,[95] and planned audits of big loans.[96] And while this has frustrated many bankers,[97] it represented the government's attempt to impact the banks' behavior in the crisis, in the absence of broader professional conduct regulation.

B. Market-Led Initiatives

Another tool that can help that bank behavior is consistent with societal goals is collaborative market-based initiatives, which are characteristic of the American financial sector's landscape and vary in their makeup.[98] For example, to address the discriminatory effect of the PPP's fund distribution towards minorities, banking industry groups have formed a strategic partnerships meant to support minority-run banks.[99]

Similarly, market-led initiatives, suggested and promoted by industry players, can lead to the development of relevant professional conduct and ethics standards.[100] For example, since 2001, Citibank has

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93. *Id.* at 563.

94. John Reosti & Paul Davis, *Tilt Toward 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 [https://perma.cc/2Y94-FS8E].

95. *Id.* 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." *Id.*

96. *Id.*

97. *Id.*

98. 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).

99. 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 [https://perma.cc/6U5L-CD9N]. As part of this initiative, the American Bankers Association and the National Bankers Association will collaborate on advocacy efforts. *Id.*

100. *See* Karen Bartleson, *Market-Driven Standards and the IEEE-SA*, 18 IEEE INTERNET COMPUTING 58, 58 (2014) (defining the market-driven model as a "model by

published its annual Environmental, Social and Governance (ESG) Reports.[101] On April 29, 2020, Citibank released its 2019 Report, which highlighted the methods it was using to facilitate growth in various global communities.[102] The Report also demonstrated how the bank prioritizes certain goals, such as reducing economic inequality.[103] The 2019 Report was, of course, prepared prior to the pandemic, and it is not clear how much it actually promotes the reduction of economic inequality, but the fact that the Report stated reducing economic inequality as one of Citibank's biggest goals is a step in the right direction.

Additionally, corporate America, including the financial sector, responded to the Black Lives Matter movement and the push for racial equality in certain ways.[104] Most business entities released somewhat performative statements against systemic racism,[105] but also made significant donations to civil rights organizations and looked for other ways to make a lasting impact in fighting systemic racism.[106] For instance, Bank of America declared a $1 billion donation in the form of a four-year commitment to strengthen economic opportunities for minority communities.[107] Likewise, FinTech giant PayPal committed $530 million to supporting minority-owned businesses in the U.S.,[108] while another FinTech giant, Square, joined many other American corporations in declaring Juneteenth as a paid holiday.[109]

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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").

101. *Citi Releases First Environmental, Social and Governance (ESG) Report*, CITI (Apr. 29, 2020), https://www.citigroup.com/citi/news/2020/200429a.htm [https://perma.cc/9GB2-5A7K].

102. *Id.*

103. *Id.*

104. Richard Feloni & Yusuf George, *These Are the Corporate Responses to the George Floyd Protests that Stand Out*, JUST Cap. (June 30, 2020), https://justcapital.com/news/notable-corporate-responses-to-the-george-floyd-protests/ [https://perma.cc/K5FB-UMBG].

105. *Id.*

106. *Id.*

107. *See Bank of America Announces $1 Billion/4-Year Commitment to Support Economic Opportunity Initiatives*, BANK AM.: NEWSROOM (June 2, 2020, 7:16 AM), https://newsroom.bankofamerica.com/press-releases/bank-america-announces-four-year-1-billion-commitment-supporting-economic [https://perma.cc/EZ52-EJM6].

108. *See PayPal Announces $530 Million Commitment to Support Black Businesses, Strengthen Minority Communities and Fight Economic Inequality*, PAYPAL: NEWSROOM (June 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 [https://perma.cc/DP94-LDT6].

109. *Id.*; Clare Duffy, *Nike Joins the Companies Making Juneteenth an Annual Paid Holiday*, CNN BUS. (June 13, 2020),

C. Judicial System—The Interpretative Fix

Pragmatically, the preferred method of reform may be a judicial interpretation that reads existing legal norms and standards to require banks to treat their customers equally and fairly. Or, put another way, to read a fiduciary duty into banking. Courts can examine and decide to enforce compliance with existing bank obligations and customer expectations in connection with the behavior of financial institutions.[110] Typically, cases against banks and financial institutions arise when they, as lenders, violate a duty of good faith or fair dealing to their customer[111] or when these entities assume such a degree of control over their customers that the customers expect a fiduciary duty-type of a relationship.[112] Examples of such types of situations include: wrongfully failing to honor a loan commitment;[113] wrongfully failing to renew loans;[114] improper default notices;[115] and breaching a fiduciary duty that the lender may have assumed in connection with the borrower.[116]

Since April 2020, multiple law firms have filed class action lawsuits against banks in connection with their administration of funds and loans under the CARES Act, seeking monetary damages and injunctive and declaratory relief.[117] These firms, representing businesses that sought PPP funds during the pandemic, are arguing, among other things, that the banks failed to address their customers' interests and financial needs

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https://edition.cnn.com/2020/06/11/business/nike-juneteenth-holiday-trnd/index.html [https://perma.cc/MY62-R6CN].

110. *See* Hill, *supra* note 80.

111. *Was Your Company Victimized by a Bank, Loan Servicer or Fiduciary?*, JUDGE, LANG & KATERS & MAHANY L., https://www.lenderliabilitylawyer.com/ [https://perma.cc/Z4HD-J7TU] (last visited Sept. 26, 2020).

112. *Id.*

113. *Cases We Handle—Lender Liability Lawyers*, JUDGE, LANG & KATERS & MAHANY L., https://www.lenderliabilitylawyer.com/cases-we-handle/ (last visited Sept. 26, 2020).

114. *Id.*

115. *Id.*

116. *Id.*

117. Such cases include *JEK Servs., Inc. v. Simmons Bank*, No. 4:20-cv-00836 (E.D. Ark. filed July 14, 2020); *Fahmia, Inc. v. Bank of America Corp.*, No. 1:20-cv-00642 (M.D.N.C. filed July 13, 2020); *Fahmia, Inc. v. Comerica, Inc.*, No. 3:20-cv-01536-B (N.D. Tex. filed June 11, 2020); *Fahmia, Inc. v. Zions Bancorporation*, No. 2:20-cv-05104 (C.D. Cal. dismissed Aug. 27, 2020); *Manoloff v. Bank of America*, No. 4:20-cv-02451 (S.D. Tex. filed July 13, 2020); *Guerriero v. Bank of America*, No. 1:20-cv-11267-RWZ (D. Mass. filed July 6, 2020); *Lopez v. Bank of America*, No. 4:20-cv-04172 (N.D. Cal. filed June 24, 2020); *E-Dealer Direct, LLC v. Bank of America Corp.*, No. 3:20-cv-00139 (W.D. Tex. filed May 19, 2020); *Panda Group, PC v. Bank of America Corp.*, No. 4:20-cv-00045 (D. Utah filed May 11, 2020); *Studio 1220, Inc. v. Bank of America*, No. 3:20-cv-03081 (N.D. Cal. filed May 5, 2020); and *Profiles, Inc. v. Bank of America Corp.*, No. 1:20-cv-00894 (N.D. Md. dismissed July 9, 2020).

and did not help them survive the COVID-19 crisis.[118] One such firm, Kennard LLP, argued on behalf of itself and its clients that the banks breached a fiduciary duty over their administration of the loans.[119] 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."[120] Interestingly, in one of the responses to the lawsuit, Wells Fargo urged a Texas court to throw out the proposed class action that accused the bank of having given improper preferential treatment to bigger borrowers, not because of the ethical and preferences issue, but, because according to the bank, the customer behind the suit cannot slip past its prior arbitration agreement with the bank.[121] Somewhat similarly, a different class action lawsuit alleging PPP loan deception, filed in the Central District of California against four banks, argued that small business owners "were passed over in the loan process for larger companies."[122] 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

118. *See e.g.*, *Kennard Law, P.C. v. Frost Bank*, No. 2020-24432 (Tex. Harris Co. Dist. Ct. filed Apr. 18, 2020).

119. Brenda Sapino Jeffreys, *Houston Law Firm Sues Its Bank Over Small Business Loan Process*, LAW.COM (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/ [https://perma.cc/R9JT-L5T3] ("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.").

120. *See* Aebra Coe, *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 [https://perma.cc/JT3Y-Y6S2].

121. Jon Hill, *Wells Fargo Cites Arbitration Deals in Bids to Exit PPP Suits*, LAW360, (Aug. 31, 2020), https://www.law360.com/articles/1305765 [https://perma.cc/P5FN-J9KW].

122. Clyde Hughes & Sommer Brokaw, *Law Firm Sues Four Banks in Class-Action Lawsuits Over Paycheck Program*, UPI, https://www.upi.com/Top_News/US/2020/04/20/Law-firm-sues-four-banks-in-class-action-lawsuits-over-paycheck-program/8021587401241/ [https://perma.cc/V79B-K3VV] (updated Apr. 20, 2020, 3:53 PM); *see also Stalwart Law Group Files Class Actions Against Nation's Biggest Banks for Alleged PPP Loan Deception*, BUSINESSWIRE (April 20, 2020 6:05 AM), https://www.businesswire.com/news/home/20200420005266/en/Stalwart-Law-Group-Files-Class-Actions-Nation%E2%80%99s [https://perma.cc/58X4-9JNQ] (referring to and providing a link to the complaints filed in case numbers 20-3591, 20-3589, 20-3590, and 20-3588).

businesses."[123] Additionally, businesses filed lawsuits against financial institutions seeking the suspension of loan repayment, debt collection, and foreclosure.[124]

It is unlikely, however, that courts will create new legal principles and go so far as to read a fiduciary duty into banking, even though that is what many of these plaintiffs are seeking in these cases. 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.[125]

D. Public Criticism and Shaming

Finally, banks can be kept in check through public criticism and shaming.[126] Public criticism, which includes public shaming in media

123. Hughes & Brokaw, *supra* note 122. 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. *Id.* 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. *Id.* 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. *Stalwart Law Group Files Class Actions Against Nation's Biggest Banks for Alleged PPP Loan Deception*, *supra* note 122.

124. *See, e.g.*, *Fisher v. Dovenmuehle Mortg., Inc.*, No. 2:20-cv-01222 (E.D. Cal. filed June 17, 2020); *Sass v. Great Lakes Educ. Loan Servs., Inc.*, No. 3:20-cv-03424 (N.D. Cal. dismissed Aug. 28, 2020); and *Oksenendler v. Northstar Educ. Fin., Inc.*, No. 0:20-cv-00805 (D. Minn. dismissed July 16, 2020).

125. *See, e.g.*, John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance,* 49 AM. BAR ASS'N. 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. 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/WU67-BW5S] (explaining that the pragmatic interpretative approach could be more acceptable in a 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; the COVID-19 crisis goal was to give it to all those that need it, which is different from other, regular, situations.).

126. *See, e.g.*, Franz Wohlgezogen & Melissa A. Wheeler, *Naming and Shaming Bankers May Be Satisfying, but Could Backfire*, THE CONVERSATION (Mar. 15, 2017 3:15 PM), 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

outlets, various social circles, and social networks, can prove useful in pressuring individuals, as well as entities, to act more ethically.[127] Indeed, shaming is a promising enforcement tool that can help advance the importance of corporate social responsibility norms and civic accountability.[128] The impact of shaming is so powerful that even the government has engaged in public shaming to advance desired policy goals—a phenomenon referred to as "regulatory shaming"—and includes the publication of negative information by government agencies concerning private entities, mainly business organizations, in order to promote public-interest goals.[129] The government has criticized entities that sought and received government financial aid when it was clear that they were not the intended recipients under the CARES Act. For example, Treasury Secretary Steven Mnuchin condemned the NBA's Los Angeles Lakers in April 2020 for taking $4.6 million from the PPP meant to enable small businesses to pay employees during the COVID-19 pandemic.[130] As a result of the shaming, the sports team ended up returning the funds.[131] Similarly, President Trump claimed that Harvard University was receiving money via PPP, and, in part because of that pressure, the university rejected the funds.[132]

Australian Securities and Investments Commission's—ASIC's] license obligations within five business days.").

127. *See, e.g.*, Kate Klonick, *Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age*, 75 MD. L. REV. 1029, 1055–57 (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, 723, 727 (2017).

128. *See generally* Sharon Yadin, *Regulatory Shaming*, 49 ENV'T. L. 407 (2019).

129. *See, e.g.*, Sharon Yadin, *Shaming Big Pharma*, 36 YALE J. REGUL. BULL. 131, 131–33 (2019) (discussing the Food and Drug Administration's publication of an online "black list" 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).

130. *See, e.g.*, Zachary Zagger, *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 [https://perma.cc/Y4AD-KK8Z] ("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.").

131. *Id.*

132. *See* Colin Dwyer, *Harvard and Other Universities Turn Down Relief Funds Amid Swell of Criticism*, NPR (Apr. 23, 2020, 1:38 PM),

Public criticism and shaming have already proven valuable in putting banks in check and making them modify their behavior during the pandemic.[133] 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 was apparently not an isolated incident.[134] Public criticism and shaming have proven to be so efficient that customers who were unfairly prioritized by their banks in receiving their loans have been pressured into giving up the benefits resulting from the preference they received.[135]

These findings are also grounded in scholarship. Scholars have argued that shaming is a legitimate, useful, and democratic regulatory approach.[136] Regulatory shaming is intended to "communicate an external moral judgment about corporate activities rather than causing internal feelings of shame."[137] Similarly to other types of regulation, "regulatory shaming is aimed at correcting market failures . . . as well as advancing desired social goals."[138] In the case of the banking industry, information asymmetry is a known market failure[139] that financial regulation aims to correct[140] by making information more accessible, available, and accurate to consumers.[141] In the absence of appropriate regulation on the professional conduct of banks, a culture in which the media, business entities, individuals, and the government raise attention to and shame

https://www.npr.org/sections/coronavirus-live-updates/2020/04/23/842454705/harvard-and-other-universities-turn-down-relief-funds-amid-swell-of-criticism [https://perma.cc/8G8D-YGSM].

133. *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/ [https://perma.cc/C9HM-6CLC].

134. *See id.*

135. *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 [https://perma.cc/UF2L-PS93].

136. *See generally* Yadin, *supra* note 128.

137. *Id.* at 420.

138. *Id.*

139. Steven L. Schwarcz, *Systematic Regulation of Systemic Risk*, 2019 WIS. L. REV. 1, 25 n.146 ("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).").

140. *Id.* at 25 n.145; DAVID GOWLAND, THE REGULATION OF FINANCIAL MARKETS IN THE 1990S 21 (1990) (characterizing regulating markets to correct market failure as the "public interest theory").

141. *See* ROBERT BALDWIN, MARTIN CAVE & MARTIN LODGE, UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE 18–19 (2d ed. 2012).

banks that act unethically can therefore serve as a stand-in. This is especially important in times of crises, such as the COVID-19 pandemic.

CONCLUSION

Society should be wary of placing big banks at the center of major economic and social government programs, such as the COVID-19 stimulus packages have demonstrated. Unlike the Federal Reserve and its role as the lender of last resort,[142] banks are not entities that strive to maximize social welfare or promote a desired 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. Society needs to be proactive, not reactive, in attempting to make banks conduct their businesses in a way that benefits society, especially during crises. While a top-down regulatory approach that enforces increased ethical standards and liabilities could be highly effective, there are other tools that can fix market failure and to ensure that banks act more ethically, including market-based initiatives and media-led public shaming and criticism.

142. Kathryn Judge, *Guarantor of Last Resort*, 97 TEX. L. REV. 707, 721 (2019) ("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."). 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.