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Of Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions

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Predatory lending, Democratization, credit, small-loan transactions, social safety net

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ARTICLES

OF PREDATORY LENDING AND THE DEMOCRATIZATION OF CREDIT: PRESERVING THE SOCIAL SAFETY NET OF INFORMALITY IN SMALL-LOAN TRANSACTIONS

REGINA AUSTIN*

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I. INTRODUCTION: PREDATORY LENDING IN CONTEXT

I have argued elsewhere that black people's money is literally a distinctive currency worth less than white people's money, both socially and materially.[1] Through blacks' historic confinement to segregated markets immune to legal attack and the operation of a culture of dealing that is permeated by economic stereotypes and practices borne of blacks' unequal material conditions, money in the hands of black Americans has come to be devalued like the currency of a "Third World" country.[2] The devaluation has taken on a life of its own. The assumption that black people's money is worth less taints commercial transactions of all sorts and perpetuates blacks' subordinate economic status. Nowhere is the adverse impact of this interaction of race, culture, law, and economics better reflected than in the area of personal finance and the lack of success that blacks encounter in transactions with financial institutions and other firms dealing in money as a commodity.

Black Americans experience a number of problems in their efforts to obtain and use credit.[3] Of particular concern is their vulnerability to so-called "predatory lenders." Predatory lending is "characterized [by] a combination of unfair loan terms [particularly high interest rates and fees] and pressure tactics that limit the information and choices available to borrowers, especially those targeted because of particular vulnerabilities."[4]

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1. *See* Regina Austin, "Black People's Money:" An Essay on the Interaction of Law, Economics, and Culture in the Context of Race (July 26, 2003) (unpublished manuscript, on file with the American University Law Review) (providing an extended discussion of this thesis). This research is grounded on the work of Princeton sociologist Viviana Zelizer. *See generally* VIVIANA A. ZELIZER, THE SOCIAL MEANING OF MONEY (1994) (exploring how people earmark money by infusing it with social significance based on, among other things, the purpose for which it is used (i.e. a gift) or the identity of the possessor (i.e. women or the welfare poor)).

2. *See* discussion *infra* Part III.C (detailing how blacks are identified with the cash economy and how their money is therefore thought to be worth less).

3. *See* Brett Williams, *Babies and Banks: The "Reproductive Underclass" and the Raced, Gendered Maskings of Debt*, *in* RACE 348, 360-61 (Steven Gregory & Roger Sanjek eds., 1994) (recognizing that blacks have greater access to credit cards than to mortgages). Blacks either experience too little credit of the right kind or too much credit of the wrong kind. The first category relates to credit discrimination as it is commonly understood. The second category includes what is considered predatory lending.

4. Deborah Goldstein, Note, *Protecting Consumers from Predatory Lenders: Defining the Problem and Moving Toward Workable Solutions*, 35 HARV. C.R.-C.L. L. REV. 225, 255 (2000).

Examples of targeted consumers include women, minorities, low-income wage earners, and senior citizens.[5] The chief objects of criticism are financial firms that conduct business in what is variously known as the subprime, secondary, fringe, or alternative market, including payday lenders, car title pawn operators, small loan and mortgage companies, rent-to-own stores, check cashing outlets, and rapid refund tax services. Not all subprime lenders behave scandalously, of course, though the financial services industry as a whole might be criticized for not adequately regulating those entities essentially engaged in credit scams.

There are many trenchant, critical legal assessments of the practices of predatory lenders. Commentators typically call for the application of usury restrictions to curb the interest charged on transactions that lenders insist are not loans[6] or suitability requirements that would compel lenders to determine if a loan is appropriate for a borrower given her or his capacity to make the required repayments.[7] Others criticize the unfairness of the arbitration clauses that make borrowers' efforts to resort to the courts impossible or decry the scarcity of publicly supported lawyers available to represent borrowers in fee-generating matters involving the more powerful and organized forces of the lending industry.[8] Rather than reiterate the arguments that others have made, I want to investigate the subject of predatory lending from a different frame of reference.

Legal discussions of predatory lending do not typically proceed from thick, rich descriptions of the contexts in which the transactions occur. The reader gets only a vague sense of the borrowers' relative socioeconomic status and the economic leverage that lending entities have over them. The analysis particularly lacks explanations of why the borrowers needed credit or what their pressing debts or obligations were, why the sources of credit available to them were limited to those in the fringe market, what the negotiations leading to the consummation of the transaction were like, and how the borrowers' resort to such credit fits into larger patterns of dealing

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5. *See* Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 98-103 (2002) (evaluating a variety of studies offering conflicting data regarding the demographic characteristics of the customers of payday loans). The Wisconsin Department of Financial Institutions found that these customers have an average income of $25,131. *Id.* at 99. Both Wisconsin and Illinois studies determined that the majority of payday customers are women. *Id.* at 100. Additionally, a study from the American Association of Retired People found that "low-income and minority households are significantly more likely to have [cash-checking outlets] located within one mile of their homes than higher-income and nonminority households." *Id.*

6. *E.g.*, Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. REV. 589, 657-66 (2000).

7. *E.g.*, Johnson, *supra* note 5, at 133-45.

8. *Id.*

with matters of personal finance. Contextual analysis might supply answers to some of these questions.

Contextual analysis in the law is a powerful tool for discerning patterns of control, coercion, subjugation, resistance, and prosperity because it allows the legal analyst to address a problem by taking its "situatedness" fully into account.[9] Contextual analysis can zoom in on the local level and scrutinize the intimate details of human or social interaction that are in the foreground of a problem. It can also take a wide angle view of the institutional setting and other structural factors that form the backdrop of the problem. Contextual analysis permits consideration of how the law can both solve a problem and exacerbate it at the same time. It allows for the formulation of legal solutions to subjugation that are multidimensional or holistic.

Closer examination of the context of ordinary, everyday local commercial transactions has the potential for revealing the discrimination embedded in segmented markets and the cultures that govern their transactions.[10] Contextual analysis is in addition likely to identify the prejudices and stereotypes that are ingrained in those cultures that silently skew the outcome of countless individual transactions that occur in such markets every single day.[11] In lieu of overt bias, contextual analysis facilitates consideration of more subtle factors such as contradictions between law on the books and the reality of these laws as enforced; the hegemonic processes by which the replication of disparities in rank and resources is made to seem like the product of the world view or consent of the subordinated; and the depoliticization of economic issues that results in the disenfranchisement of financially disadvantaged consumer-citizens.

Insofar as "predatory lending" is concerned, contextual analysis would focus on the institutional structure and culture of the market for consumer

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9. *See* Iain Ramsay, *Consumer Credit Law, Distributive Justice and the Welfare State*, 15 OXFORD J. LEGAL STUD. 177, 189 (1995) (citing Foucault's suggestion of "studying local manifestations of power, the politics of 'how things work at the level of ongoing subjugation'" and "patterning of restraint, coercion, power and opportunities" as an illustration of the need to look beyond the neo-classical approach of examining the structure of selling and lending credit in low-income credit markets); *see also* Regina Austin, *Of False Teeth and Biting Critiques:* Jones v. Fisher *in Context*, 15 TOURO L. REV. 389, 389-90 (1999) (enumerating the variety of factors that a reader should consider according to contextual/cultural studies). This Essay applied contextual analysis to an appellate decision reducing the damages awarded in a battery case involving a plaintiff who was a nursing home worker and her former employers.

10. *See* Ramsay, *supra* note 9, at 193-94 (recognizing that the supposedly race-neutral rules are still discriminatory in impact, and thus, the image of "the impersonal market mechanism coldly allocating capital and credit to the most profitable investment and borrower" regardless of race and social status is in reality misleading). Some examples of facially neutral practices include using postal codes to assess credit applications instead of formally "redlining" and giving additional weight to housing tenure and employment. *Id.*

11. *Id.*

credit. More contextual data about the sources of the borrowers' economic vulnerability, as well as the financial practices, preferences, and perceptions both they and the lenders bring to financial transactions, would be very useful in formulating legal reforms or supporting alternative sources of credit that might enable borrowers to accomplish their economic goals. Information regarding the context surrounding predatory lending might also counter untested assumptions about the ignorance and profligacy of borrowers of subprime credit, assumptions that undermine the movement to protect them. Moreover, economic success or failure is viewed as a personal matter. People do not talk about their financial difficulties because of the moral stigma attached to being in debt, even if it is caused by circumstances beyond the debtors' control.[12] Both those in debt and those not in debt discuss financial liability in terms of blame, complicity, and loss of control.[13] Contextual analysis would expose the structural predicates to what is spoken of largely as a matter of individual failure. Finally, debtors are not the only parties impacted by predatory lending. Contextual analysis would also reveal the impact of predatory lending on nonparties to the transactions, namely the families of the debtors and the communities where they live and work.[14] In sum, then, richer, more detailed and nuanced narratives about the difficulties borrowers encounter would facilitate the politicization of issues of credit availability and creditor abuse.

Only a few judicial decisions offer a glimpse of an alternative, contextually-based perspective on predatory lending in the subprime market. *Smith v. Short Term Loans, L.L.C.*,[15] for example, is a case challenging the legality of a series of payday loans.[16] A payday loan is the modern variant of salary selling or the salary advance.[17] In the typical transaction, a borrower obtains a small advance on his salary of between

12. *See* Henry J. Sommer, *Causes of the Consumer Bankruptcy Explosion: Debtor Abuse or Easy Credit?*, 27 HOFSTRA L. REV. 33, 55 (1998) (observing that the notion of indebtedness as an undesirable state dates back to Biblical times and the requirement in Deuteronomy that every seven years there shall be a release of debts).

13. *See* Williams, *supra* note 3, at 355 (describing how credit-card debt is personalized by both those who carry debt and those who do not, such that all credit-card users think that debtors are complicit and that there is some type of shameful blame associated with that debt).

14. *See, e.g.*, CHRISTOPHER L. PETERSON, TAMING THE SHARKS: TOWARDS A CURE FOR THE HIGH-COST CREDIT MARKET 205-14 (employing an economic externality analysis to describe the adverse spillover effect of high-cost lending on families, neighborhoods, and entire communities).

15. No. 99-C1288, 2001 WL 127303 (N.D. Ill. Feb. 14, 2001).

16. *Id.* at *19.

17. *See generally* Mark H. Haller & John V. Alviti, *Loansharking in American Cities: Historical Analysis of a Marginal Enterprise*, 21 AM. J. LEGAL HIST. 125, 125-26 (1977) (tracing the history of salary lending from the post-Civil War period through the early 1960s and the replacement of old-time salary lenders with modern racketeer loansharks).

$100 to $500 for a period of two weeks for a fee of between $15 and $35 which represents an effective annual interest rate of between 300 and 400%.[18] The borrower writes a check for the amount of the loan and the fee which the lender agrees to hold until the borrower's next payday. In essence, the borrower writes a post-dated check for which he has insufficient funds in the bank and receives in exchange the face amount of the loan in the form of cash or a check. Two weeks later, the borrower can redeem the check by paying the lender the full amount owed, allow the check to be cashed, or roll the loan over.

The typical two-week time frame of the payday loan leaves borrowers with little opportunity to accumulate the surplus required to pay off the debt.[19] Rollovers are quite common. The borrower can pay a fee to extend the loan which means that the lender keeps the check and the borrower has an additional two weeks to redeem it. Alternatively, the borrower can take out a new loan with the same or a different payday lender and use the proceeds of the new loan to pay off the old obligation. Sometimes the new obligation is taken out in the name of the borrower's spouse or co-accountholder. It is through rollover after rollover that payday loan customers become entrapped in what sympathetic commentators consider an "insidious downward spiral"[20] or "a vicious cycle of indebtedness"[21] from which borrowers find it very difficult to extricate themselves. Payday lenders require payment of the principal in full and do not allow for partial payment.[22] As a result, some borrowers wind up paying renewal fees in amounts significantly exceeding what was borrowed without ever reducing the principal balance.[23]

Payday loans appeal to borrowers who have "maxed out" or exhausted the limits on their credit cards, find pawning their valuables embarrassing, need a form of lending that does not demand a credit check, or realize that bouncing checks is very expensive.[24] Unfortunately, the practices of payday lenders are intended to keep borrowers in perpetual debt. The

18. *See* Peter T. Kilborn, *New Lenders with Huge Fees Thrive on Workers with Debts*, N.Y. TIMES, June 18, 1999, at A1 (describing the increased numbers of payday lending companies through the 1990s and the typical rates and fees associated with these loans).

19. *See* Drysdale & Keest, *supra* note 6, at 632-33 (demonstrating quantitatively that, at the average income levels of $25,000 and $35,000, there is a deficit of $196 and $34 respectively, after an individual pays for essential expenditures and the debt of the average payday loan). The deficit grows substantially between $396 and $407 if one factors in the maximum allowable payday loan. *Id.*

20. *Id.* at 633.

21. Johnson, *supra* note 5, at 4.

22. *Id.* at 3-4.

23. *See, e.g.*, Kilborn, *supra* note 18, at A28 (noting the case of Shari Harris, a single mother who started with one loan of $150 with a fee of $33 and, after picking up seven total loans, wound up with a debt of $1,900 for which she was paying fees of $6,006 annually).

24. *Id.*

bottom line is that payday loans may be suitable for coping with an inadequate short-term cash flow situation but not for managing long-term financial problems.[25]

One of the payday borrowers in *Short Term Loans* racked up a total of fifteen loans over an eight-month period in amounts ranging between $120 and $400, and at annual percentage rates (APRs) ranging between 342.19 and 421.54%.[26] During roughly the same period, the other borrower took out eleven loans of between $150 and $400 with APRs between 342.19 and 391.07%.[27] The borrowers executed post-dated checks with each transaction and, after a certain point, wage assignments as well.[28]

In their lawsuit, the borrowers claimed Short Term Loans and two of its agents who were attorneys charged exorbitant rates, failed to make proper disclosures with the loans, and sent collection letters that suggested an independent entity was attempting to collect the debts.[29] Plaintiffs alleged violations of the Truth in Lending Act, the Fair Debt Collection Practices Act, the Illinois Wage Assignment Act, and the Illinois Consumer Fraud Act, as well as a claim of common law unconscionability.[30] The defendants' response to the allegations is intriguing:

> The defendants argue that plaintiffs were sophisticated "Ponzi schemers" engaged in an elaborate check-kiting scheme. Specifically, the defendants argue that the plaintiffs would obtain payday loans from multiple lenders on multiple occasions, using one loan to pay off another. The defendants assert that the plaintiffs pledged their income to several lenders, borrowing more than their weekly income, and knowing that they could not repay all of the loans. The plaintiffs' intent, argue the defendants, was to defraud their creditors and to make a profit on this scheme.[31]

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25. *See* Johnson, *supra* note 5, at 72 (citing an industry trade group proposal that would warn consumers of the limited benefit of payday loans and further notify potential borrowers that payday loans are intended only "as a short-term cash-flow solution").

26. Smith v. Short Term Loans, L.L.C., No. 99-C1288, 2001 WL 127303, at *1 (N.D. Ill. Feb. 14, 2001).

27. *Id.*

28. *Id.*

29. *Id.* at *6.

30. *Id.* at *2.

31. *Id.* at *1; *see* LEE E. NORRGARD & JULIA M. NORRGARD, CONSUMER FRAUD: A REFERENCE HANDBOOK 31-32 (1998) (describing classic investment fraud schemes such as the Ponzi scheme and the pyramid scheme). A Ponzi scheme is a type of pyramid scam. *Id.* It is named after Charles Ponzi, who in 1920 enticed 30,000 to 40,000 people to buy ninety day notes at fifty percent interest. *Id.* The early "investors" in the scheme were paid with funds contributed by the later investors. *Id.* Each round of a Ponzi scheme requires an increasingly greater number of investors in order to pay both the principal and interest due to those who came before. *Id.* The scheme falls apart when the organizer can no longer con enough new participants to pay the older investors. *Id. See also* CHARLES J. WOELFEL, THE DICTIONARY OF BANKING 141 (1994) (defining check kiting as the "making use of fictitious balances by drawing against uncollected funds"); GRETCHEN MORGENSON & CAMPBELL R.

The plaintiffs in turn admitted using the proceeds of one loan to pay off another.[32] However, they asserted that they primarily used the loans "for consumer purposes, such as buying children's clothes and paying certain utility bills."[33] Plaintiffs further argued that their pattern of borrowing was a manifestation of "an unfortunate downward spiral of necessity characteristic of payday borrowers . . . . Short Term Loans was well aware of this characteristic spiral and actually facilitated it through its lending practices."[34]

Short Term Loans, then, is not a simple tale of an overreaching creditor and ignorant, helpless borrowers. Rather, the borrowers seemingly treated formally-made loans as if they were informal credit arrangements to be artfully ducked and dodged like ordinary bills. The creditor, a formal lender, for its part took profitable advantage of the informal, almost semi-illegal, habits of the borrowers' personal finance. This case essentially boils down to a contest between the formal and the informal with the creditor betting that the formal would ultimately prevail. The creditor basically represented the formal. It was a corporate entity with a fixed location, form contracts, and hired agents and lawyers.[35] Nearly everything else about the loan smacked of the informal: the amounts involved were small, the loan terms were short, the nature of the interaction between the borrowers and the creditors was frequent and face-to-face, and the course of transacting mimicked the sort of money juggling desperate people typically engage in to stretch their limited funds.[36] The formal lender got an edge over the borrowers by incorporating into the transaction informal practices of dealing with debt with which the borrowers were probably familiar, if not comfortable, like writing post-dated checks. The debt accumulated like a gigantic snowball that the borrowers eventually could not outrun. When the borrowers' juggling act finally gave out, the lender might have resorted to the criminal process which was available to it, as the references to Ponzi schemes and check-kiting suggest; payday lenders have

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HARVEY, THE NEW YORK TIMES DICTIONARY OF MONEY AND INVESTING 161 (2002) (defining check kiting as "[t]he practice of depositing and drawing checks at two or more banks and taking advantage of the time it takes for the second bank to collect funds from the first bank"). In check kiting, a depositor makes a deposit in one bank and draws on that sum by writing a check and depositing it in a second bank. The depositor thereby takes advantage of the time it takes for the second bank to collect the funds from the first. *Id.* at 161.

32. *Smith v. Short Term Loans, L.L.C.*, No. 99-C1288, 2001 WL 127303, at *1 (N.D. Ill. Feb. 14, 2001).

33. *Id.*

34. *Id.*

35. *See id.* (characterizing the defendant, Short Term Loans, LLC, as an entity located in Elk Groves Village, Illinois with several agents who are also named defendants).

36. *See supra* text accompanying notes 26-28 (detailing the character of the loans at issue in *Short Term Loans*).

prosecuted delinquent borrowers for writing "bad checks."[37] Instead Short Term Loans allegedly employed deceptive debt collection procedures (a vestige of the informal economy).[38] The borrowers, however, had the benefit of a bit of formality too; they invoked the legal remedies that are available in the formal loan sector to hold the creditor at bay.[39]

Payday loans, then, involve the interplay between the formal and the informal, both with regard to the structure of the lending entity and with regard to the mode of transacting. It is difficult to determine whether as a group small-sum borrowers, like the *Short Term Loans* plaintiffs, truly benefit from having access to loans from a formal subprime lender or whether in the end they are left with more debt and fewer options for dealing with it than if they had been initially relegated to borrowing from a more informal lending source, albeit one with less money to loan. Formal lenders would justify the extension of their financial products to debtors occupying the lowest socioeconomic tiers on the grounds that they, no less than the affluent, are deserving of the benefits of a democratization of credit, which is to say "formal credit." Nonetheless, the suitability of the options available to small-sum debtors is important because credit is an essential component of the social safety net that protects citizen-consumers from excessive financial insecurity.

In this Article, I explore the role of informality in small-sum lending. I begin with a consideration of informal credit as a component of the social safety net protecting the least well-off, small-sum borrowers.[40] Next I look at subprime lending in terms of how it fits into the overall market for small-sum loans by outlining the landscape of alternative sources of credit as characterized by various combinations of formality and informality.[41] From there, I speculate as to how individual subprime loan transactions are facilitated by cultural understandings that cause small-sum borrowers to prize both informality and cash as components of their financial dealings.[42]

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37. *See* Johnson, *supra* note 5, at 78-80 (focusing on the unfair collection practices of payday lenders and the practice of suing customers who default on loans under "bad-check" laws). For instance, in a county court in Ohio, at least twelve payday lenders filed over 365 complaints, many of which included damages for the customers' violations of laws prohibiting consumers from writing checks not backed by sufficient funds in their checking account. *Id.* at 79.

38. *See Short Term Loans*, 2001 WL 127303, at *10 (observing that the collection letter sent to the plaintiffs "presents enough ambiguity that an unsophisticated consumer might be misled"); *see also id.* at *2 (describing the letter, argued to constitute a violation of the Fair Debt Collection Practices Act, that the defendant sent to the plaintiffs in an effort to collect the outstanding loans through a lawyer).

39. *See id.* at *2-*3 (summarizing the complicated procedural history in the case whereby the borrowers sued the lenders for violations of several federal and state lending and consumer fraud laws).

40. *See* discussion *infra* Part II.A-C.

41. *See* discussion *infra* Part II.D-E.

42. *See* discussion *infra* Part III.

As suggested by my earlier discussion of the benefits of contextual analysis, the macro and micro levels of analysis together reveal a complex interaction between formality and informality that is a significant source of the exploitation of consumers of the small loans that constitute predatory lending. Fundamentally, predatory lending transactions mix the advantages of the informal and disadvantages of the formal in a particularly potent way. These transactions harm the most vulnerable consumers, those who are confined to or have been socialized in the ways of the cash economy. In the final section, I will consider the notion of the democratization of credit and suggest how the infusion of the positive values of informality into the ideal of democratized credit might help curb predatory lending.[43]

Evidence exists that blacks and Latinos are disproportionately impacted by predatory lending.[44] Throughout the discussion that follows, I will note the role that race and ethnicity play in the exploitation of debtors by predatory lenders. Rather than focus directly on racism and ethnocentrism or the legal rubrics that expressly address racial and ethnic discrimination, I hope to isolate the more subtle mechanisms of bias and victimization by concentrating on the interplay between formality and informality.

II. THE SOCIAL SAFETY NET AND INFORMALITY IN LENDING

A. Credit and the Social Safety Net

Informal small-sum lending has traditionally been a part of the social safety net protecting individuals and families from poverty and financial ruin. The social safety net consists of mechanisms aimed at mitigating the adverse effects of the "free market" on economically marginalized individuals or groups.[45] The safety net in essence provides a degree of security or protection against various life cycle contingencies (such as old age, sickness, disability, or unemployment), unforeseen catastrophic events (such as natural disasters or the premature death of a family's principal breadwinner), and the normal operations of a capitalist economy which inevitably leave some citizens impoverished or in jeopardy of being impoverished. Dislocations brought about by changes in the economy and/or the regulatory environment such as we are presently experiencing (outsourcing, growth of the low-wage service sector, escalating

43. *See* discussion *infra* Part IV.

44. *See* PETERSON, *supra* note 14, at 218 (stating that there exists "indisputable evidence suggesting minorities with comparable education and income are nevertheless disproportionately served by subprime mortgage lenders").

45. *See generally* SOCIAL SAFETY NETS: ISSUES AND RECENT EXPERIENCES 7 & n.1 (Keyoung Chu & Sanjeev Gupta eds., 1998) (analyzing the purpose of social safety nets in economic reform, particularly in the context of IMF reform packages).

bankruptcies) may prompt a need for changes in the social safety net. Of course, the safety net does more than protect economic well-being. The self-respect and dignity of individuals, the stability of families, and the cohesiveness of groups are undergirded by the floor of financial security provided by the safety net.[46]

Credit is a component of the social safety net. People borrow small sums for reasons that are related to the fulfillment of the safety net's goals.[47] They use credit to enhance or maintain their productivity (e.g., to start a business, invest in an education, or subsist until new employment is found), to consume, and to provide a measure of income security or insurance in times of enhanced risk.[48] It is morally imperative that nearly all citizens participate in the benefits of our consumer society at a certain level. Access to credit assures access to basic necessities for debtors who, because of un- or under-employment, lack an adequate income to pay for essentials like food, shelter, and medicine.[49] Beyond that, some minimal notion of the good life supports borrowing for isolated, unexpected emergencies or special occasions, like the illness of a family member or a wedding,[50] as well as cyclical borrowing, which occurs at Christmas time or just before schools open in the fall, results when a family's expenses temporarily exceed revenues.[51] Thus, consumer credit is significant not just to "finance a consumer lifestyle" but also "to ease financial hardship."[52] As a result of the role that credit plays in maintaining the social safety net, affordability (by the class constrained) and the prevention of discrimination (against racial and ethnic minorities and women) are understandable priorities for credit regulators.[53]

B. The Informal Economy and the Social Safety Net

The social safety net is not limited to entities in the formal economy. The mechanisms that compose the social safety net range from formal

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46. *See generally* Ramsay, *supra* note 9, at 181, 192, 195 (discussing the distributive values that should govern the regulation of consumer credit).

47. *See* MARY DALY & JIM WALSH, COMBAT POVERTY AGENCY, MONEYLENDING AND LOW INCOME FAMILIES 90, 99-101 (1988) (describing a study that found that low-income Irish borrowers depend on credit from door-to-door moneylenders for their most basic needs).

48. *See* Timothy H. Nourse, *The Missing Parts of Microfinance: Services for Consumption and Insurance*, 21 SAIS REV., Winter-Spring 2001, at 61, 64-65 (explaining the interconnection between the various purposes for which consumers seek financial services).

49. *See* Ramsay, *supra* note 9, at 177 (noting the use of credit in achieving mobility and status, particularly in the context of race and gender).

50. DALY & WALSH, *supra* note 47, at 99.

51. *Id.*

52. Ramsay, *supra* note 9, at 180.

53. *Id.* at 181.

programs administered by the government (such as Temporary Assistance for Needy Families or TANF)[54] to informal charity provided by private individuals or community-based organizations. For the least well-off consumers, the informal economy in general, with its informal practices and procedures, forms a vital part of the social safety net.[55] People with limited skills, expertise, money, access to credit, or ties to wide-ranging markets can survive in the informal economy when opportunities in the formal economy are foreclosed to them.[56] Informal modes of economic activity tend to be small scale, local, face-to-face, and dependent upon social relations or social capital.[57] They also tend to involve limited financial capital.[58] Furthermore, informal modes of transacting tend to be more malleable than formal modes of contracting. As a result, the informal economy has a flexible, improvisational character that makes it responsive to adverse economic circumstances and conditions.

In addition, the informal economy operates in the openings created by the gap between law on the books and actual law enforcement.[59] People living on the margins and realistically assessing whether they can afford to abide by every law exploit openings in the regulatory regime to create informal economic opportunities for themselves.[60] But as marginalized consumers seek to gain an advantage by walking the line between the formal and the informal, or the legal and the illegal or criminal, they also subject themselves to heightened exploitation from the lack of regulatory oversight of the informal actors with whom they deal. Thus, ordinary consumers in the informal economy are always vulnerable to overreaching,

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54. 42 U.S.C.A. §§ 681-687 (2004).

55. *See generally* Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1789, 1803-06 (1992) [hereinafter Austin, *The Black Community*] (describing generally a politics of identification with lawbreaking within the black community, noting specifically the role of those individuals who bridge the gap between the street "lawbreakers" and the black middle class by making everyday choices about which laws to obey); Regina Austin, *"An Honest Living": Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119, 2119-20 (1994) [hereinafter Austin, *An Honest Living*] (stating that lawbreaking in the form of informal economy activity is the only means of economic survival for many poor blacks).

56. *See* Austin, *An Honest Living*, *supra* note 55, at 2123 (explaining how informal black street vendors include sellers who are either foreclosed from or choose to opt out of formal markets).

57. *See* discussion *infra* note 146.

58. Austin, *The Black Community*, *supra* note 55, at 1804.

59. *See generally* Jared N. Day, *Credit, Capital and Community: Informal Banking in Immigrant Communities in the United States, 1880-1924*, 9 FIN. HIST. REV. 65, 70-72 (2002) (describing how legislation failed to disrupt the overall structure of "padrones," a complex system of immigrant banking within the Greek and Italian communities in New York at the turn of the century); Ivan Light, *Numbers Gambling Among Blacks: A Financial Institution*, 42 AM. SOC. REV. 892, 897 (1977) (explaining how the numbers racket was a method for individuals to "invest" small sums for a potentially large reward and a source of credit for individuals and businesses).

60. Austin, *The Black Community*, *supra* note 55, at 1769.

incompetence, and economic instability. Moreover, the informal economy works best where formal firms fail or fear to tread. Thus financial firms in the formal sector are always on the lookout for opportunities to make a profit by moving into or absorbing areas of the informal economy that have proven to be lucrative. The formal actors will move into the sector and force the informal actors out of business. Without prior notice, regulatory loopholes can be closed, strict formality demanded, and customers caught on the wrong side of the line may be left without recourse.

The workings of the informal economy are by their very nature circumspect and partially or completely hidden from the view of outsiders. As a result, it is difficult to track its dealings, measure its scope, and definitively assess who comes out ahead at the end of the day.

C. Informality of Form Versus Informality in Mode of Transacting

By providing credit outside of formal markets via informal transactions, informal lenders are part of the social safety net twice over. They are loosely organized and operate on a small scale.[61] They may specialize or cater to a discrete niche of the loan market.[62] They are physically and socially accessible, lend very small amounts of money, employ fairly simple and transparent procedures, and process requests or applications for loans rapidly.[63] Informal lenders tend to exploit "[c]ost advantages in information gathering" and "to utilize more effective enforcement mechanisms."[64] Of course, intimidation and harassment come to mind when informal lenders are mentioned. The flexibility of informal lending allows the lenders "to reach borrowers beyond the profitable reach of the formal sector, and to reduce transaction costs usually below those in the formal sector."[65] Most importantly, informal lenders operate beyond the reach of legal regulations, particularly those placing ceilings on interest rates, mandating disclosure of terms to borrowers, and limiting debt collection practices.[66] The possibility of sharp practice and abuse inheres in informal lending, but this varies with the character of the informal lender.

Formal lenders, by contrast, tend to operate on a larger scale; "the transactions are usually arms-length, and loan terms more standardized,"

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61. PRABHU GHATE, THE ASIAN DEVELOPMENT BANK, INFORMAL FINANCE: SOME FINDINGS FROM ASIA 6 (1992).
62. *Id.*
63. *Id.*
64. Sherrie L.W. Rhine & Maude Toussant-Comeau, *The Use of Formal and Informal Financial Markets Among Black Households*, 45 CONSUMER INT. ANN. 146, 146 (1999).
65. GHATE, *supra* note 61, at 6-7.
66. *Id.*

generally being reduced to writing.[67] In many cases, formal lenders are subject to a panoply of regulations that theoretically protect borrowers, but allow the creditor to make a profit on the transaction.[68]

Formality and informality do not merely describe the way in which a lending entity is structured; they may also characterize the mode or style of transacting in which the entity engages. In terms of methods of doing business, "[i]nformality is characterized by highly personalized loan transactions entailing face-to-face dealings with borrowers and flexibility in respect of loan purpose, interest rates, collateral requirements, maturity periods, and debt rescheduling."[69] A formally structured lender may employ informal lending practices. Consider the ABC Loan Co., a black-owned pawnshop located in South Central Los Angeles, which was profiled in a 1995 documentary "No Loans Today" directed by Lisanne Skylar.[70] ABC's best customers were those who fell short at the end of every month.[71] They would pawn their valuables until they received their paychecks or benefits checks, which they would cash at ABC for a one percent fee.[72] Although regulated and subject to the oversight of the police department's pawn detail, ABC operated on an informal basis.[73] Loans were limited to $25.[74] For persons without traditional identification, alternative sources, such as a traffic ticket signed in front of an officer, would suffice. When a customer tried to pawn an item of personal significance, but of little intrinsic value, the clerk could point to a sign indicating "No Loans Today" so as to avoid insulting the customer.[75] The customer was left with a bit of hope and dignity.

For the consumer seeking a loan, the choice is not an absolute one between formality and informality, but rather one of choosing the option that offers the best mix of the advantages of both. Consider the qualities consumers might want from a provider of financial services:

> . . . reliability, trustworthiness, flexible hours, outreach, physical and cultural accessibility, provision of a range of financial services, speedy procedures, understanding of clients' businesses and the ability to communicate with the clients. More specifically, for credit, clients also want discretion, transparency, seasonally sensitive products and terms, timeliness, procedures tailored to clients' needs, fair interest rates,

67. *Id.* at 7.
68. *Id.*
69. *Id.* at 6.
70. NO LOANS TODAY: SOUTH CENTRAL LOS ANGELES (First Run/Icarus Films 1995).
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*

> money available at short notice, sufficient capital for clients' needs and [the option of] repayment in cash or kind . . .[76]

From the borrower's point of view there are numerous advantages generally associated with informal lending (flexible terms, geographical accessibility, and rapid approval), but there are also disadvantages (limited range of services, insufficient capital, and high interest rates) that formality cures. At the same time, the disadvantages of formality (longer approval processes, collateral requirements, lack of transparency, and inhospitableness) may be remedied by a bit of informality. Of course, not every consumer would make the same tradeoff between the benefits of formality and the advantages of informality.

D. The Lower Income Consumer and the Continuum of Choices

The options of a lower income consumer short on money to meet current obligations can be grouped into roughly three categories: savings-like credit, external sources of credit, and do-it-yourself credit creation. The options will be discussed in order of their declining advantage to the consumer.

1. Savings-like credit

Most people confronted with financial difficulties resort to their own savings first, if they have any.[77] Their funds may be located in formal institutions like banks or credit unions and take the form of formal time-deposit savings or money market accounts, certificates of deposit, or savings bonds.[78] Alternatively, their savings may be "invested" in informal rotating savings and credit associations (ROSCAs) or savings clubs.

A ROSCA is a club or a collective of participants who make contributions, generally monetary, on a periodic basis to a common fund which is distributed in whole or in part to each contributor on a rotating basis until everyone has collected.[79] Participation in a ROSCA requires a

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76. *See* J. Howard M. Jones & Owuraka Sakyi-Dawson, *Linking Formal and Informal Financial Intermediaries in Ghana: A Way To Increase Women's Access to Financial Services?*, *in* WOMEN AND CREDIT: RESEARCHING THE PAST, REFIGURING THE FUTURE 271, 278 (Beverly Lemire et al. eds., 2001) [hereinafter WOMEN AND CREDIT].

77. *See* E. THOMAS GARMAN & RAYMOND E. FORGUE, PERSONAL FINANCE 126 (6th ed. 2000) (suggesting that maintaining a savings account can allow flexibility in times of financial hardship).

78. *Id.* at 125.

79. Shirley Ardener, *Women Making Money Go Round: ROSCAs Revisited*, *in* MONEY-GO-ROUNDS: THE IMPORTANCE OF ROTATING SAVINGS AND CREDIT ASSOCIATIONS FOR WOMEN 1 (Shirley Ardener & Sandra Burman eds., 1995). A participant receives as much from the fund as they contribute over the life of the ROSCA. ROSCAs are part credit union (particularly for those who draw their share early in the process), part savings club (particularly for those whose turn comes toward the end), and part insurance scheme (particularly for those who have emergencies and are allowed to collect out of turn). Louis

regular income and social capital.[80] ROSCAs operate on trust and peer pressure to insure that the necessary sums will be saved by the members and paid into the common fund on a timely basis.[81] Some participants need the social coercion of a ROSCA obligation to save, and ROSCAs make saving easier.[82] There is little paperwork or documentation to fill out. The payback is relatively quick. Most ROSCAs are short-lived, though a new round of collective saving may start as soon as one ends. The operations tend to be local or community-based and therefore close to home or work; some ROSCAs even extend the benefit of a traveling banker who visits participants for the purpose of collecting and paying out funds. ROSCAs also supply the economic benefits that can flow from social capital: financial information, advice, and economic opportunities to exploit.[83] The early takers from the common pot get a bit of credit in the process, while the late takers are essentially creditors who receive no interest. In addition, the credit ROSCAs extend is only for relatively short terms.[84] The biggest disadvantage of ROSCAs is that the organizers and participants may be untrustworthy and put the savings of the more reliable parties in jeopardy. That is why some ROSCAs allocate the pot based on trustworthiness (with the least reliable going last), as opposed to need, luck (as where the order is determined by lottery), or bidding (as where the pot goes to the participant who offers to make the highest contribution to the pot in the future).[85]

By contrast, a savings club pools its members' savings in a common bank account and makes emergency loans to members in need or funds those wishing to finance micro-enterprises.[86] Savings clubs require less in

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Sterling, *Partners: The Social Organization of Rotating Savings and Credit Societies Among Exilic Jamaicans*, 29 SOC. 653, 657 (1995) (describing the practices of ROSCAs known as "partners" formed by Jamaican immigrants in Manchester, England). *See also* KELLEE S. TSAI, BACK-ALLEY BANKING: PRIVATE ENTREPRENEURS IN CHINA 77-78, 104-17 (2002) (describing the operation of Chinese ROSCAs, called "huis," that were initiated by the women left behind to pay the costs of the immigration of their male relatives to America); Eda Hastick, *Susus: New Life for a Caribbean Grassroots Approach to Savings*, WADABAGEI: A JOURNAL OF THE CARIBBEAN AND ITS DIASPORA, Summer/Fall 1998, at 121, 123-26 (describing the practices of ROSCAs known as "susus," formed by Caribbean immigrants in the United States). Such associations, which are common throughout Africa, Asia, and the Caribbean and known by various names, have been formed in this country by members of immigrant groups, but are rare among indigenous blacks or other native-born poor and working class groups. *Id.*

80. Hastick, *supra* note 79, at 125, 126-27.

81. Sterling, *supra* note 79, at 662-63.

82. Hastick, *supra* note 79, at 128-29.

83. Ardener, *supra* note 79, at 9.

84. *See generally* Jones & Sakyi-Dawson, *supra* note 76, at 277 (listing a short term of less than month characteristic of advances made by collectors of informal Ghanaian ROSCAs known as "susus").

85. Ardener, *supra* note 79, at 9.

86. *See generally* Ivan Light, *Self-Help for the Urban Poor*, AM. ENT. ONLINE, July-Aug. 1996 (arguing that non-immigrant low-income communities would benefit from savings arrangements similar to ROSCAs), *at* http://www.taemag.com/issues/issue

the way of social capital and earnings and are therefore more suited to lower-income participants, like mothers receiving assistance from the state.

Unfortunately, non-immigrant, low-income Americans have no tradition of forming ROSCAs or savings clubs as alternatives to dealing with formal financial institutions.[87] The poor who would benefit most from such informal associations particularly lack the shared trust and solidarity that make such informal associations possible.

2. External sources of credit

If a debtor lacks savings and needs credit, she or he may be able to obtain a loan from a mainstream, formal institution like a bank, credit union, consumer finance company, or sales finance company, such as General Motors Acceptance Corporation or GMAC. These sources, however, are most readily available to borrowers who have preexisting relationships with the entities or good credit records.[88]

Alternatively, credit cards, which are generally issued by banks, also enable debtors to deal with financial emergencies and unexpected or uncontrollable changes in income or expenditures. Access to credit cards is widening, and lower income Americans increasingly have credit cards.[89] In fact, they are the fastest growing group of credit card holders in the country.[90] Credit cards provide borrowers with a measure of flexibility in that borrowers have some choice with regard to the amount of the loan and the rate of repayment.[91] Moreover, credit cards do not restrict where the borrowed funds are spent and may even allow the card holder to borrow cash.

Statistical evidence suggests that poorer credit card holders use their cards as a form of "consumption insurance."[92] They maintain higher

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ID.116/toc.asp (on file with the American University Law Review); Sterling, *supra* note 79, at 121 (describing how Jamaican "partners" savings clubs allow members the flexibility of withdrawing funds for unforeseen reasons).

87. *See generally* Light, *supra* note 86.

88. *See* GARMAN & FORGUE, *supra* note 77, at 187-89 (indicating that, in addition to making loans to customers with good credit records, depository institutions further reduce their risk by requiring collateral or a cosigner).

89. *See generally* Edward J. Bird et al., *Credit Card Debt of the Poor: High and Rising*, 18 J. POL'Y ANALYSIS & MGMT. 125 (1999) (speculating on the impact that the poor's credit card debt might have in the event of an economic downturn).

90. *See* TERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 24 (2000) (suggesting that credit card issuers see those with low incomes as attractive customers).

91. *See* EDWARD BIRD ET AL., INST. FOR RES. ON POVERTY, DISCUSSION PAPER NO. 1148-97, CREDIT CARDS AND THE POOR 1 (1997), *at* http://www.ssc.wisc.edu/irp/pubs/dp114897.pdf (on file with the American University Law Review).

92. *See id.* at 8-9, 11, 20 (noting that, in contrast to the "near-poor and the poor," those in higher income groups use their credit cards as a "payment vehicle"). During a recession, higher income households use their credit cards less while lower income households do the opposite. *Id.* at 9.

balances during recessions to smooth the decline in their consumption, dictated by their worsening economic condition, and pay down their balances as well as secure more cards during economic upturns.[93] Interviews conducted in a predominately Latino community in Chicago found that the residents used credit cards as a device for maintaining consumption levels in periods of financial difficulty. This occurred when their incomes declined due to death, illness, or unemployment or when their expenditures climbed due to an increase in living expenses or in the number of dependents.[94] Credit card companies find lower income borrowers attractive because their lower creditworthiness justifies charging them higher interest rates and their greater tendency to miss or make late payments generates more fees. The fees charged for merely processing applications for secured credit cards (which offer credit limits equal to the balance in linked savings accounts) are especially high; secured cards extend credit to holders who pose especially high risks.[95]

Subprime lenders represent a third type of formal external source of credit, albeit one in which informal modes of transacting are used. Predatory lending will be discussed more fully below.[96]

Some debtors are able to tap informal external sources that offer credit on very flexible terms. Family, friends, acquaintances, neighbors, and co-workers are typical sources of short-term loans and, in some cases, even gifts.[97] Small local merchants or shopkeepers also extend informal credit to customers whom they know.[98] Loans from these sources tend to be informal in that there is usually no written note or contract, the terms of repayment are not typically specified, and little or no interest is charged.[99]

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93. *See id.* (noting that while poor households use the economic booms to pay off their debts, non-poor households expand their debt during the same period).

94. *See* PHILIP BOND & ROBERT TOWNSEND, FED. RESERVE BANK OF CHICAGO, ECON. PERSP., FORMAL AND INFORMAL FINANCING IN A CHICAGO ETHNIC NEIGHBORHOOD 3, 4, 7 n.2 (1996) (reporting results of a survey of a predominately Latino community regarding the use and sources of credit), *at* http://www.chicafed.org/publications/economicperspectives/1996/epjul96.pdf (on file with the American University Law Review).

95. *See* GARMAN & FORGUE, *supra* note 77, at 164 (describing how secured credit card issuers advertise via "'900' telephone numbers" where the caller is charged a fee for the call and then charged an additional nonrefundable fee to process the application).

96. *See* discussion *infra* Part II.E (describing payday loans as a combination of formal and informal means of financing).

97. *See* Julia R. Henly, *Informal Support Networks and the Maintenance of Low-Wage Jobs*, *in* LABORING BELOW THE LINE: THE NEW ETHNOGRAPHY OF POVERTY, LOW-WAGE WORK, AND SURVIVAL IN THE GLOBAL ECONOMY 179, 182-83 (Frank Munger ed., 2002) (noting that the assistance received from informal support networks varies with the income level of members).

98. *See* GHATE, *supra* note 61, at 33 (indicating that "consumption credit" granted by small stores is widely common).

99. *See id.* at 25 (suggesting that credit extended among friends and relatives may not always be interest free). A further feature of this type of loan is often an "unwritten" reciprocity obligation. *Id.* There is an implicit assumption by the lender that the borrower

The "creditworthiness" of the borrower is a matter of the lender's personal knowledge and judgment.[100] Of course, the amounts lent are generally small because the pool of funds available is limited to the personal assets of the informal creditors.[101] Trust and affinity provide some guarantee that the loan will be repaid. The repayment may consist of the fulfillment of a reciprocal obligation of assistance in a time of need.[102] The biggest drawback to relying on personal connections for credit is that the lender is more likely to be inquisitive about the borrower's need for the loan. Privacy, confidentiality, anonymity, and freedom from embarrassment are not assured when borrowing through one's social network.

For people who are socially and economically attenuated or isolated from friends and relations, or who come from backgrounds devoid of deep pockets, the option of obtaining such informal credit may be restricted.[103] The amount of support a social network provides tends to vary with race and ethnicity.[104] Minority social networks are generally less financially able to provide assistance than white social networks because of the intergenerational impact of racial and ethnic discrimination.[105] For example, research has shown that the amounts and kinds of intergenerational support children receive typically depend on the socioeconomic and class status of their parents.[106] "[I]nteractions among markets amplify discrimination in any one market into others," while "personal discrimination in one period turns into structural discrimination in the next period."[107] Thus, the discrimination minority parents experienced in the labor market impacted their experiences in the housing

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will return the favor "should their fortunes be reversed." *Id.*

100. *See id.* at 6 (describing that the small scale of informal lenders is based on the fact that lending is generally based upon "personal knowledge of the borrower").

101. *See id.* at 23 (noting that intermittent lenders, like friends and family, make direct loans to debtors with their temporary surplus funds).

102. *See* Henly, *supra* note 97, at 184 (describing that repayment may be immediate in less intimate networks whereas the opposite is true for support networks with closer ties among the members).

103. *See* BOND & TOWNSEND, *supra* note 94, at 9-11 (reporting that the lower income residents of a Chicago Hispanic community who lacked proficiency in English tended to rely on friends more than those who were relatively well-off and who had a command of English).

104. *See* Henly, *supra* note 97, at 182-83 (noting that not just the amount but also the kind of support will vary due to the socioeconomic make-up of the social network).

105. *Id.*

106. *See* Anne Francis-Okongwu, *Looking up from the Bottom to the Ceiling of the Basement Floor: Female Single-Parent Families Surviving on $20,000 or Less a Year*, 24 URB. ANTHROPOLOGY 313, 338-39, 340-44 (attributing racial differences in the network support and housing accommodations received by single mothers to the class and socioeconomic status of their parents).

107. Gary A. Dymski, *Why Does Race Matter in Housing and Credit Markets? Current Research and Future Directions*, *in* RACE, MARKETS, AND SOCIAL OUTCOMES 157, 184 (Patrick L. Mason & Rhonda M. Williams eds., 1997).

market and vice versa.[108] The parents' experiences in those markets in turn not only impact their ability to provide money or housing assistance to their offspring, but also figure in the determination of the socioeconomic or class status of their offspring and the likelihood that the latter will need social support from their families.

Individuals are not the only potential lenders motivated by affinity or empathy. A number of organizations and institutions offer their members or individuals in the communities they serve a way out of difficult economic situations on a nonprofit basis that will not compromise the borrowers' financial futures. As contributors to the social safety net, local nonprofit organizations,[109] including churches and mosques,[110] engage in small-sum lending and charitable giving.[111] In lieu of cash, these entities sometimes provide in-kind assistance such as prescription medicines or emergency car repairs.[112]

The not-for-profit sector might be considered distinct from and a buffer between the formal and informal sectors. Like actors in the informal economy, not-for-profits may be motivated by altruism, moral or religious commitment, or the desire to enjoy the benefits of reciprocal exchanges of obligation and respect. On the other hand, the lending activities of these organizations may be as self-interested and manipulative as any for-profit's. Surely, religiously-affiliated organizations lend as an adjunct to their spiritual proselytizing. Nonprofits sustain themselves by seeking "symbolic capital," i.e., honor and prestige which creates a debt on the part of the recipients that when called upon will generate material gain. Symbolic capital entitles nonprofit concerns to raise funds by proclaiming their past "good works."[113] Moreover, the credit provided by charitable

108. *See id.* (describing that the result on the housing market appears in lower appraisals, residential segregation, and economic inequality).

109. LOCAL INDEP. CHARITIES OF AM., ABOUT US, *at* http://www.lic.org (last visited on Sept. 17, 2004) (providing a searchable database of more than six hundred local charities) (on file with the American University Law Review).

110. MUSLIM CMTY. SUPPORT SERVS., INC., ABOUT MCSS, *at* http://www.muslimsupport.org/index.html (last visited on Sept. 7, 2004) (describing the organization begun in 1999 as a support system for Muslim families in the New England area that provides for both financial and social services support based on the responsibilities dictated in the Muslim faith) (on file with the American University Law Review).

111. *See infra* notes 115-20 (providing a number of examples of the type of assistance contributors to the social safety net provide).

112. AM. RED CROSS, COMMUNITY SERVICES, *at* http://www.redcross.org/more/commserv (last visited on Sept. 17, 2004) (listing a variety of non-monetary services the organization offers including home delivery of meals and transportation to medical appointments) (on file with the American University Law Review).

113. *See generally* PIERRE BOURDIEU, THE LOGIC OF PRACTICE 112-20 (Richard Nice trans. 1990); Carolyn Betensky, *The Prestige of the Oppressed: Symbolic Capital in a Guilt Economy*, in PIERRE BOURDIEU: FIELD WORK IN CULTURE 207, 208 (Nicholas Brown & Imre Szeman eds., 2000).

sources does not necessarily satisfy the needs of the recipient as to the amount of the loan, the terms, or the timing.[114]

Many local utility companies offer assistance in the form of balanced payment options, deferred payment plans, and outright grants to help customers maintain service in times of financial hardship.[115] Municipalities may also extend emergency assistance to individuals and families already receiving government assistance.

In addition, some employers (including universities[116] and municipalities[117]) offer emergency grants to employees as a kind of fringe benefit. The programs are usually administered through the employers' human resources departments. When an employer provides such assistance, it perhaps should not be viewed as charity or disinterested largesse; rather it may indicate that the employer is not paying its employees an adequate wage. That is very likely true with regard to the military. Each branch of the armed forces has its own emergency assistance program which provides such services as emergency loans, education assistance, and community enhancement programs.[118] As of

114. *Cf.* PETER K. EISINGER, TOWARD AN END TO HUNGER IN AMERICA 120 (1998) (describing the limitations of the charitable provision of food to the hungry).

115. U.S. DEP'T OF HOUS. & URBAN DEV., HELP WITH YOUR UTILITY BILLS, *at* http://www.hud.gov.local/id/renting/energyprgms.cfm (last visited on Sept. 7, 2004); PAC. GAS AND ELEC. CO., FINANCIAL ASSISTANCE PROGRAMS, *at* www.pge.com/res/financial_assistance (last visited on Sept. 7, 2004) (outlining the availability of a number of programs that allow for low-income residents and others to receive financial assistance through Pacific Gas and Electric including Family Electric Rate Assistance (FERA), Relief for Energy Assistance through Community Help (REACH), as well as balanced payment plans) (on file with the American University Law Review); LEAVENWORTH COUNTY CHAPTER OF THE AM. RED CROSS, UTILITY ASSISTANCE, *at* http://leavenworthcounty.redcross.org/utility.htm (last visited on Sept. 7, 2004) (showing that these resources are available even in non-urban settings within the United States through a number of means including the American Red Cross) (on file with the American University Law Review).

116. UNIV. OF ALA. AT BIRMINGHAM, UAB FACULTY AND STAFF BENEVOLENT FUND: EMPLOYEE EMERGENCY ASSISTANCE PROGRAM, *at* http://main.uab.edu/show.asp?durki'25309 (last visited on Sept. 7, 2004) (describing the objective of the Employee Emergency Assistance Program and outlining the operation of the program) (on file with the American University Law Review); CORNELL UNIV., EMERGENCY GRANT FUND, *at* http://www.assembly.cornell.edu/EA/EGF.html 2001 (last visited on Sept. 7, 2004) (explaining the Emergency Grant Fund as a confidential service and listing the criteria for eligibility) (on file with the American University Law Review).

117. CITY AND COUNTY OF DENVER, DENVER EMPLOYEES EMERGENCY PROGRAM: ABOUT US, *at* http://www.denvergov.org/deep/1794aboutus.asp (last visited on Sept. 7, 2004) (outlining a program that offers grants to city and county employees requiring financial assistance and asserting that the grants need not be repaid because they are funded by employee donations) (on file with the American University Law Review); CITY OF WICHITA, BYLAWS OF THE CITY OF WICHITA EMPLOYEES' EMERGENCY ASSISTANCE FUND, *at* http://www.wichitagov.org/NR/rdonlyres/E1209A44-0B1F-468E-A030-77A41BE9D091/0/Employee_Emergency_Assistance_Fund_Bylaws_15d.pdf (last visited on Sept. 7, 2004) (authorizing the fund to provide financial assistance to city employees in need) (on file with the American University Law Review).

118. CTR. FOR RESPONSIBLE LENDING, MILITARY LOANS FROM PAYDAY LENDERS, *at*

January 2004, the Air Force Aid Society operated close to fifteen separate programs and offered $760,000 in grants and over $12 million in interest free loans.[119] The Army's program, which started in 1942, provides for emergency financial assistance to both active duty and retired soldiers based on demonstrable need.[120] The armed forces have also responded directly to the problem posed by payday lenders located near military facilities.[121] Because payday lenders use the post-dated checks given to them to support criminal prosecutions against the borrowers as a form of debt collection, the military has found itself in a position of losing troops caught in the payday loan cycle.[122] Military leaders have supported legislation regulating payday lenders or declared such lenders off limits to military personnel.[123]

If their personal network of informal lenders is nonexistent, tapped dry, or incapable of supplying sufficient funds, borrowers may be forced to resort to less savory alternatives, such as moneylenders or true loan sharks with criminal connections who operate on the wrong side of the law. The best available information suggests that moneylenders or loan sharks are most likely to be found in immigrant communities.[124] The interest charged

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http://www.responsiblelending.org/payday/military2.cfm (last visited on Sept. 8, 2004) (presenting the alternatives to payday lending and loan sharking that are exclusive to the military especially including the Army Emergency Relief Fund, the Air Force Aid Society, the Navy Marine Corps Relief Society and Coast Guard Mutual Assistance as well as small loans available through private companies) (on file with the American University Law Review).

119. AIR FORCE AID SOC'Y, AFAS GUIDE FOR ASSISTANCE, *at http://www.afas.org* (last visited on Sept. 7, 2004) (documenting the many programs offered through the aid society for the year of 2003) (on file with the American University Law Review).

120. ARMY EMERGENCY RELIEF, 2003 ANNUAL REPORT 8 (2003) (showing that Army Emergency Relief assisted a total of 53,865 individuals in 2003 with a total of assistance of $37,381,251 awarded), *available at* http://www.aerhq.org/AnnualReport2003.

121. Paul Fain, *The Few, the Proud, the Indebted*, MOTHER JONES, May/June 2004, at 19, 19 (describing how these lending institutions are mixed in with the shops and restaurants right outside military bases); *see also* Russ Bynum, *Army Launches Offensive Against Lenders*, WASH. POST, Dec. 28, 2003, at A5 (suggesting that, outside of military bases, the signs of payday lenders and check cashing establishments are as "ubiquitous as golden arches").

122. Rhonda Cook, *Misery at High Interest: Military Wants War on Payday Loans*, ATLANTA J.-CONST., Dec. 4, 2003, at A1 (indicating that members of the military may be subject to court-martial should they not honor their debts); *see also* Bynum, *supra* note 121, at A1 (asserting that military personnel who do not pay their debt may lose their security clearances).

123. *See* Fain, *supra* note 121, at 19 (noting that the Judge Advocate General's Corps declared a payday lender "off-limits to military personnel"). A Navy Captain also testified before Georgia legislators "in favor of a bill imposing tough new penalties against payday lenders." *Id. See also* Diana B. Henriques, *Seeking Quick Loans, Soldiers Race into High-Interest Traps*, N.Y. TIMES, Dec. 7, 2004, at A1, C3 (describing possible protection from a proposal for a federal cap on post-enlistment debt interest rates and a trade association military code of best practices).

124. *See* Dexter Filkins, *In Some Immigrant Enclaves, Loan Shark Is the Local Bank*, N.Y. TIMES, Apr. 23, 2001, at A1 (describing activities of Latino "prestamistas" in the Washington Heights section of New York City); *see also* Juleyka Lantigua, *The Progressive*

by such informal lenders may be quite high, the amount available for lending may be limited in time and duration, and the operation may be so localized that the lender is unable to spread the risk.[125] Their collection methods are more likely to be violent when compared to those of other informal lenders.[126]

3. Do-it-yourself credit creation

Finally, there are informal mechanisms that ordinary consumers employ to create a bit of credit for themselves when they are unable to draw on personal savings or to obtain a loan from an external source. Some of these measures are close to, if not over, the line of illegality. Figuratively, "robbing Peter to pay Paul" is a common maneuver among the cash-strapped. They juggle bills by paying one creditor and holding off the others or by taking funds earmarked to satisfy one account and using them to settle some other obligation. Thus, the rent may get paid first, while the phone company and the utility company are given the lowest priority.[127] A debtor may also write a check hoping that it will not clear before additional funds can be put in the bank account.[128] Sometimes a merchant or vendor will take a postdated check in satisfaction of an obligation.[129] The

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Media Project: Loan Sharks Prey on Immigrants, NEW PITTSBURGH COURIER, July 7, 2001, at A7 (suggesting that consumers turn to moneylenders because of the absence of formal banks in the consumers' underserved community). It is not uncommon for immigrants to finance their passage to America by borrowing from moneylenders who operate here and abroad. *See* Peter Kwong, *Poverty Despite Family Ties*, *in* THE NEW POVERTY STUDIES: THE ETHNOGRAPHY OF POWER, POLITICS, AND IMPOVERISHED PEOPLE IN THE UNITED STATES 57, 62-67 (Judith Goode & Jeff Maskovsky eds., 2001).

125. *See* Filkins, *supra* note 124, at A1 (stating that the interest on loans from loan sharks accrues at "punishing" and "illegal rates"). Furthermore, some loan sharks severely limit the amount one can borrow. *Id.* One "prestamista" stated in an interview that he does not lend more than three-thousand dollars to any one client. *Id.*

126. *See id.* (describing that the collection methods of these informal lenders include threats and forceful collection of collateral).

127. Karen Seccombe, "SO YOU THINK I DRIVE A CADILLAC?" WELFARE RECIPIENTS' PERSPECTIVES ON THE SYSTEM AND ITS REFORM 114-16 (1999).

128. The amount of time it takes for a check to clear may be substantially reduced from a matter of days to a matter of hours or minutes because of the Check Clearing for the 21st Century Act, known colloquially as the "Check 21 Act." *See* 12 U.S.C.A. § 5001 (2003). The Act authorizes the electronic processing of substitute checks, which obviates the delays caused by the necessity of physical transporting the originals between banks. The result of Check 21 is likely to be more bounced checks and more overdraft charges for consumers counting on the float to give them time to deal with a cash shortage. *See* Jennifer A. Kingston, *Float Time on Check Shortens, as of Today*, N.Y. TIMES, Oct. 28, 2004, at C1; Kathy Louise Schuit, *Personal Checks Won't Float for Long under New Rules*, ALBUQUERQUE (N.M.) J., at A5. Other customers are likely to be burned as well since the law does not require that banks post customers' deposits more expeditiously. *See Check This Out*, N.Y. TIMES, OCT. 31, 2004, § 4, at 10 (criticizing the lack of consumer protection in the law promoting the electronic processing of checks and calling for a no-hold policy regarding checks deposited by customers without a history of problems).

129. *See* GHATE, *supra* note 61, at 33 (describing the importance of the postdated check in obtaining trade credit).

"robbery" becomes more literal when the check writer knows that there are insufficient funds in her or his account to cover the amount, but writes a check anyway with the design of paying both the amount of the check and any fees the creditor and the bank might charge for handling an insufficient funds draft. Lacking explicit overdraft protection, the customers thereby informally create the equivalent form of credit for themselves. This practice places the check writer at risk of being prosecuted, sued for fraud, or blacklisted by mainstream financial institutions.[130] However, the fees charged by banks for providing bounce protection represent a source of significant profit.[131] Banks have moved into the vacuum created by the informal practice and are extending overdraft protection on a "discretionary" basis without prior notice to customers of the substantial fees or implicit interest being charged.[132]

Some informal measures to generate credit, however, are illegal. Check-kiting, of which the defendant accused the plaintiffs in *Short Term Loans*,[133] is an illegal activity. It involves drawing on funds credited to an account before the funds have actually been collected.[134] "By writing checks drawn on two or more out-of-town banks, a person temporarily short of cash can write an interest-free unauthorized bank loan or temporarily inflate his account balance to improve his chances of getting a loan."[135]

130. *See* Blackford v. Wal-Mart Stores, Inc., 912 F. Supp. 537, 540-44 (S.D. Ga. 1996) (denying a claim for malicious prosecution brought by a customer who was arrested even though she had covered the bounced check with a money order because she had made a practice of paying for merchandise with bad checks); *see also* Paul Beckett, *It's Not in the Mail: Bounce a Check, and You Might Not Write Another for 5 Years*, WALL ST. J., Aug. 1, 2000, at A1 (describing the punitive impact on low-income consumers of banks' reliance on the ChexSystems database); Katie Fairbank, *Critics Say ChexSystems Errors Hurt Consumers*, DALLAS MORNING NEWS, Aug. 16, 2000, at 1D (outlining the criticism of the ChexSystems database, noting that it includes only negative information and hurts innocent consumers improperly listed and those guilty of only minor infractions). The ChexSystems database collects information on customers who have bounced checks. Beckett, *supra*, at A1.

131. *See* Owen B. Asplundh, *Bounce Protection: Payday Lending in Sheep's Clothing?*, 8 N.C. BANKING INST. 349, 353 (2004) (indicating that the banking industry profits an estimated $31 billion from overdraft service fees).

132. *See id.* at 356-57 (comparing bounce protection to payday lending with regard to compliance with the Truth in Lending Act, state usury caps, and unfair and deceptive trade practices laws).

133. Smith v. Short Term Loans, L.L.C., No. 99-C1288, 2001 WL 127303, at *1 (N.D. Ill. Feb. 14, 2001).

134. FED. RESERVE BANK OF CHICAGO, AN OVERVIEW OF CHECK KITING, *at* http://www.chicafed.org/banking_information/check_kiting.cfm (last visited on Sept. 17, 2004) (citing check kiting as "one of the most common" examples of fraud perpetrated by bank customers) (on file with the American University Law Review).

135. THOMAS P. FITCH, DICTIONARY OF BANKING TERMS 87 (3d ed. 1997).

E. Subprime Lending as a Combination of the Formal and Informal

The formal subprime or alternative sector covers a part of the market for small personal loans that firms in the primary sector, at one time, did not want and left to informal lenders. Now formal financial institutions are buying into or building partnerships with subprime lenders to take advantage of the latter's tremendous profitability.[136] To extract profits from small-sum loans, payday lenders and other subprime firms combine elements of formal lending (standardized contracts, formal fixed locations, and resort to legal remedies in the event of default) with elements of informal lending (frequent face-to-face transactions, high interests rates for short-term loans, and quick approvals) and do-it-yourself credit creation (juggling money between several accounts, and writing post-dated checks).[137] Subprime lenders are able to make a profit in a sector long neglected by formal firms because subprimes use relatively cheap but powerful computerized credit scoring to determine the creditworthiness of their borrowers.[138] Moreover, the loans generated are bundled into securities and permit the lenders to spread the risk of default.[139]

Though subprime lenders claim that their products represent a democratization of the formal credit market, their activities might also be viewed as a commercialization of what was formerly socially-supported, local assistance. The expansion of formal firms into the informal market for small-sum loans suggests that some of the benefits of informal small-sum lending and charity may be in jeopardy. From this perspective, the firms of the subprime sector are more efficient at parting customers from their money than informal lenders because of the subprime entities' more open and aggressive marketing practices and their greater legitimacy to customers who would be reluctant to conduct business with some informal suppliers of credit. At the same time, subprime lenders employ informal modes of transacting that lull consumers into thinking that the lenders' terms and practices are more benign than they turn out to be.[140]

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136. *See* Johnson, *supra* note 5, at 4 n.14 (describing how banks and payday lenders are partnering to take advantage of loopholes in the federal law regulating the banking industry). Banks are "so eager for fee income" that they allow the payday lenders to effectively rent their charters. *Id.*

137. *See generally id.* (describing how payday lenders disguise the transactions with their customers by using a variety of "sham transactions" including fake leasing arrangements and purchases).

138. *See id.* at 61 (noting that the use of a credit reporting agency by payday lenders is surprising because many of these businesses advertise to the contrary). The majority of payday lenders use Tele-Track, a credit reporting agency that focuses on the subprime clientele the lenders seek out. *Id.* at 61 n.306.

139. *See* Kathleen C. Engel & Patricia A. McCoy, *The CRA Implications of Predatory Lending*, 29 FORDHAM URB. L.J. 1571, 1577 (2002) (indicating how banks support subprime lenders through purchasing securities backed by such institutions' loans).

140. *See* Johnson, *supra* note 5, at 25, 26, 31-33 (criticizing payday lenders for hiding

Without effective regulation, formal lenders may not take the important social safety net function of small-sum lending into account. For example, distributive justice and anti-discrimination are not as likely to be important to commercial firms engaged in extending commercial lending into the lowest rungs of the socioeconomic ladder as they might be to nonprofit community-based lenders. Regulation is particularly important to protect the poor and near-poor who have trouble meeting their debt service obligations, but stand to lose the little wealth they have accumulated through the machinations of a predatory credit market.

It may appear that all victims of predatory lending would benefit from greater formality imposed through regulation. There is a tendency to associate formal institutions and formal transacting with more fairness and less exploitation. The light shed on business dealings in the formal, "above ground" economy theoretically fosters competition. Moreover, legal regulation constrains overreaching, and mandates disclosures, both of which increase the likelihood of transactions that mimic those truly savvy consumers would enter into. But the sort of fairness that competition and regulation would produce may not be compatible with the needs or preferences of every consumer in the market for a small loan.

The focus thus far has been on the relative advantages and disadvantages of formal and informal lenders and modes of lending. Yet to be addressed are the values and preferences customers bring to credit transactions. The choices that consumers actually make from the panoply of credit alternatives laid out above are, by and large, constrained ones. The borrowers' material circumstances and their access to potential lenders play a significant role in the selection, as does the borrowers' socialization and cultural orientation regarding money and personal finance.[141] Material constraints, of course, tend to shape borrowers' financial habits. However, consumers familiar with or having a preference for informal modes of transacting would seem to be prime targets for firms operating in the subprime market. This is not a coincidence.

Informal ways of dealing with money are not exclusively an aspect of the informal or underground economy; they are also part and parcel of the legitimate cash economy which possesses a measure of visibility. Cash-basis borrowers and those socialized in the ways of the cash economy bring to transactions with subprime sector lenders a set of financial practices,

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basic information about their services from their clients). The lenders make it simple and quick for consumers to borrow through them but give false and misleading information about the cost of the loan and the credit checking procedures used to approve the consumer for the loan. *Id.* at 25-26.

141. *See* Rhine & Toussant-Comeau, *supra* note 64, at 149 (describing the use of alternative financial services by households of different socioeconomic classifications).

preferences, and perceptions that favor informality in commercial transactions.[142] Unfortunately, they also reduce the consumers' vigilance with regard to exploitation and overreaching. The cash economy generates a distrust of formal primary sector financial institutions and promotes an emphasis on the social nature of commercial transactions.[143] Furthermore, a cash-basis orientation results in consumers' underestimating the significance of relatively small amounts of money or cash.[144] The least well-off borrowers who have been the past victims of institutional exclusion and economic stereotyping would benefit from credit options that did not capitalize on their cash-basis orientation in a way that promotes their exploitation. For them, a true democratization of credit would entail liberation from the tyranny of the cash economy, not simply greater access to formal credit markets. These conclusions will be explored in the rest of this Article.

III. THE TYRANNY OF THE CASH ECONOMY

A. The Social Meaning and Economic Value of Cash

Depending upon the kind and quantity of assets and resources at its disposal, a group of people will develop a set of tastes, preferences, cultural understandings, and practices regarding money and personal finance that tend to facilitate its achievement of or accommodation to a given place or status in society.[145] The kind (cultural, social, political, or economic) and amount of capital a group possesses roughly determines the habits that the group will acquire over time and through practice.[146] The habits adopted in

142. *See* discussion *infra* Part III.B (describing the deeply embedded cultural values that give rise to the preferences of those operating in the cash economy).

143. *See* discussion *infra* Part III.B (suggesting that participants in the cash economy feel alienated from the mainstream financial world).

144. *See* discussion *infra* Part III.A (describing the low social value of cash and the stigma attached to large amounts of cash).

145. This discussion relies heavily on sociologist Pierre Bourdieu's concept of habitus. PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE 169-75 (Richard Nice trans., 1984) (1979). Bourdieu refers to the practices and preferences of a group with regard to a particular area of endeavor like personal finance and economics as its "habitus." *Id.* According to Bourdieu, a "habitus is necessity internalized and converted into a disposition that generates meaningful practices and meaning-giving perceptions." *Id.* at 170. A habitus is the relationship between the "capacity to produce classifiable practices and works, and the capacity to differentiate and appreciate these practices and products (taste)." *Id. See also* Alan Aldridge, *Habitus and Cultural Capital in the Field of Personal Finance*, 46 SOC. REV. 1, 12-21 (1998), for an application of Bourdieu's theories to the field of personal finance and an argument that product design and marketing compensate for consumers' lack of cultural and social capital in the field.

146. In Bourdieu's topology, capital is not limited to the economic. *See* BOURDIEU, *supra* note 145, at 114-15 (describing class differences as the product of different sets of the various types of capital, including cultural, social, and economic). Indeed, "capital" can be any "accumulated assets, resources, sources of strength, or advantages." WEBSTER'S THIRD

one area (such as personal finance) will bear an affinity to habits embraced in other fields of endeavor (such as work, leisure, home furnishings, and food consumption). The sum total of these habits will essentially generate a lifestyle by which the group classifies itself and is classified by others.[147]

The form of money to which a group has access has substantial bearing on the financial preferences and practices the group takes up.[148] There are many forms of money circulating in our economy—cash, checks, credit cards, debit cards, ATM cards, smart cards, and cybermoney. They vary with regard to their sophistication, the distances and speed with which they travel, the amount transactions typically involved, and the formality of the

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NEW INTERNATIONAL DICTIONARY 332 (Philip Babcock Gove et al. eds., 1993). Non-economic forms of capital, such as cultural, social, political, or symbolic capital, may be converted into economic capital although they are created through autonomous processes that are not dependent on economic capital. Pierre Bourdieu, *The Forms of Capital*, in THE HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241, 243 (John G. Richardson ed., 1986).

Cultural capital includes habits of style, taste, manners, social competence or confidence, and self-assurance, as well as the institutional mechanisms to define and to legitimate the values and standards on which all sorts of qualitative assessments of social distinction are drawn. *See generally* BOURDIEU, *supra* note 145. Cultural capital is produced by socialization and education. *See id.* at 80-96 (exploring the relationship between educational capital and cultural capital that is inherited). For example, the cultural capital imparted to the children of the petite bourgeoisie includes an understanding and appreciation of the values and practices of entrepreneurship and money management. *See, e.g.*, IVAN LIGHT & STEVEN J. GOLD, ETHNIC ECONOMIES 92-93 (2000). This gives the offspring of the petite bourgeoisie the tools with which the class can reproduce itself. *Id.*

Unlike human capital, which rather directly increases a person's productivity, cultural capital's relationship to economic well-being is more attenuated. Cultural capital generates prestige and recognition which can lead to advantageous employment, marriages, and business contacts which in turn can translate into material wealth. *Id.* at 91.

Social capital, on the other hand, is "a capital of social connections, honourability [sic] and respectability." BOURDIEU, *supra* note 145, at 122. It is created by social networks and sustained by exchanges, mutual obligations, and shared identities that in essence pay off in terms of support and access to resources. LIGHT & GOLD, *supra*, at 110-11. "Denoting the web of connections, loyalties, and mutual obligations (shared fate, solidarity, and communal membership) that develop among people as part of their regular interaction, social capital refers to the sense of commitment that induces people to extend favors, expect preferential treatment, and look out for one another's interests." *Id.* at 110.

Social capital is a much debated and contentious concept in the social sciences. *See, e.g.*, Alejandro Portes, *Social Capital: Its Origins and Application in Modern Sociology*, 24 ANN. REV. SOC. 1, 3, 21 (1998) (reviewing the spectrum of writing on the subject of social capital and its importance in discourse on "public civicness [sic]"). Portes argues that the negative consequences of social capital are often overlooked. *Id.* at 15-18, 21-22. "Social ties can bring about greater control over wayward behavior and provide privileged access to resources; they can also restrict individual freedoms and bar outsiders from gaining access to the same resources through particularistic preference." *Id.* at 21. Moreover, groups, in addition to individuals, may possess social capital. *Id.* at 18-21. Racial/ethnic and feminist solidarity or group identification are forms of group social capital. *Id.* at 9. According to Portes, however, there is a tendency on the part of some scholars to view social capital as a panacea that will cure the ills of unorganized poor and socially or politically marginalized communities. *Id.* Social capital may be evidence of the existence of civic virtue and social integration in a community and not its cause. *Id.* at 19-21.

147. BOURDIEU, *supra* note 145, at 172-73.

148. *Id.* at 173.

transactions in which they are employed. Imagine, if you will, $1, $1,000, $100,000, and $1,000,000 in each form of money listed above. The amounts might be equivalent, but the social and economic value or significance of the amounts certainly differs. It follows that the form of money in which an individual or a group commonly conducts commercial transactions both reflects and constructs its social standing. The lower the economic wealth or earnings of a person or group, the more primitive the form of money in which the person or group transacts business and the more expensive those transactions tend to be.[149] Individuals and groups possessing limited amounts of money or money of a lower social value tend to adopt more simplistic modes of transacting business or engaging in commercial dealings.[150] Furthermore, the kind of money they have at their disposal also determines how they value money and their attitudes toward money.[151]

In terms of social value, cash is the least sophisticated, least efficient, and least productive form of money. When we think of cash, we envision small amounts of money that will fit into a wallet, a cookie jar, the opening in a mattress, or a passbook savings account. When we think of cash in large amounts, we envision stacks of bills that have been illegally obtained or accumulated in the criminal or underground economies and that must be laundered or destigmatized. Cash is meant to be spent or saved; it is largely a tool of consumption, not an instrument of investment. If one has money and does not know what to do with it, it might as well be cash. The requirement that cash transactions of $10,000 or more be reported to the Treasury Department has burned into the popular imagination the tie between cash and crime.[152] This requirement, which was directed at exposing criminal activity, reduces cash's currency or capacity to circulate as a medium of exchange and accordingly its value. The decrease in

149. JACK WEATHERFORD, THE HISTORY OF MONEY: FROM SANDSTONE TO CYBERSPACE 249 (1997). *See generally* JAN PAHL, INVISIBLE MONEY: FAMILY FINANCES IN THE ELECTRONIC ECONOMY (1999) (reporting on the results of a qualitative study involving thousands of British families which revealed that the form of money used (cash, cheques, credit cards, debit cards, smart cards, loyalty cards) varied with the gender, income, and employment status of the individual family member in such a way that husbands and wives had access to different amounts of money and potentially different standards of living).

150. *See* PAHL, *supra* note 149, at vii-viii (indicating that middle income groups tend to use forms of money that are passed over by high income groups and may be unavailable to low income groups).

151. *See id.* at viii (indicating that low income groups may respond to credit in different ways, either in a carefree manner or with greater anxiety than more affluent groups).

152. Bank Secrecy Act of 1970, 31 U.S.C. §§ 5311-53 (1994). *See generally* United States v. One Lot of United States Currency Totaling $14,665, 33 F. Supp. 2d 47, 49 (D. Mass. 1998) (denying forfeiture under drug laws of a large sum of cash in small bills, wrapped in rubber bands, seized from a young Hispanic man stopped by airport security). The man claimed that he had cash because he was having trouble with his bank and intended to use the funds for a down payment on a home in his destination. *Id.* at 50-51.

efficacy impacts large amounts of cash that are lawfully acquired, even if they are too small to trigger the reporting requirement. This particularly affects the money of working class people whose savings take the form of cash because they distrust or do not understand financial institutions.[153]

B. The Cultural Orientation of Cash-Basis Consumers

We know a bit about the practices and preferences of poorer minority consumers who do most of their commercial transactions with cash. Such consumers are confined to inferior markets not only for goods and services but also for money and credit. As a result of institutional exclusion, they have developed several noteworthy predilections. First, they favor face-to-face cash transactions over those involving greater anonymity and less tangible forms of money. Second, they have limited involvement with mainstream financial institutions whose accounts are not tailored to meet their needs and whose fee structures they particularly distrust. Third, they experience a sense of powerlessness and alienation where financial matters are concerned.

The black poor's penchant for cash is revealed by a study conducted by economist John Caskey of the financial practices of eighteen low-to-moderate-income blacks in a small town in northeastern Mississippi.[154] Caskey found that many of his informants preferred to operate on what he termed a "cash-and-carry basis."[155] They cashed their pay or benefit checks, paid their bills, and carried the remainder in the form of cash until the next pay or benefits day.[156] They felt that they had more control over their money if they kept it in cash rather than put it in the bank.[157] It was easier for them to physically count their money than it was to keep track of it mentally or to balance a check book.[158] They also found banks slow in crediting deposits to their accounts.[159] Of course, there is a downside to

153. A Milwaukee consumer credit activist made this point in describing continuing barriers to credit; she stated that "some lenders still question where a minority could get money for a downpayment particularly when it is in cash . . . [I]n her culture (she is a Latina) some Mexicans do not trust banks. So they keep money at home 'in coffee cans.'" GREGORY D. SQUIRES & SALLY O'CONNOR, COLOR AND MONEY: POLITICS AND PROSPECTS FOR COMMUNITY REINVESTMENT IN URBAN AMERICA 20 (2001). In her view, though, lenders were increasingly finding such "mattress money" to be acceptable. *Id.*; *see also* Hastick, *supra* note 79, at 123, 129 (describing how susu or ROSCA funds are being accepted as down payments when supported with documentation and how susu participation is being taken as evidence of creditworthiness).

154. JOHN P. CASKEY, BEYOND CASH-AND-CARRY: FINANCIAL SAVINGS, FINANCIAL SERVICES, AND LOW-INCOME HOUSEHOLDS IN TWO COMMUNITIES ii (Report to the Consumer Federation of American and the Ford Foundation, Dec. 1997).

155. *Id.*

156. *Id.*

157. *Id.* at 15.

158. *Id.*

159. *Id.* at 17.

cash-and-carry. Protecting one's cash from burglars and thieves is a concern in some households and communities. [160] Moreover, budgeting may be difficult.[161] Accounting for expenditures is harder, and people are more cavalier about redirecting or reallocating cash from one purpose to another, as opposed to money in the bank.[162] The timing of receipt of the cash and the due date for the payment of obligations may not coincide; maintaining cash in hand to meet future obligations may be difficult.[163] Finally, cash does not earn interest like money in a savings account.

For many poorer consumers, the "choice" of a cash-and-carry existence makes good sense given the unsatisfactory alternatives (checking accounts, savings accounts, ATM cards). Caskey found that people who did not have bank accounts had little in the way of savings, could not satisfy the minimum balance requirement, and found the monthly maintenance fees problematic.[164] Losing money through bank fees and charges is a source of anxiety that makes lower income consumers wary of banks and other deposit institutions.[165] ATM cards attached to checking accounts also raise worries. It is easy to lose track of one's balance and to bounce checks as a result. Moreover, using the ATM of a bank other than one's own is expensive. Finally, someone might steal the ATM card and wipe out the depositor's balance.[166]

Responding to the inadequacies of prime sector institutions and catering to the preferences of customers socialized in the ways of the cash economy, subprime firms offer financial services that make them the institutions of choice even for some borrowers who actually have alternatives. Among the features that customers find desirable are better locations and more favorable operating hours than top-tier firms;[167] less stringent risk-

160. LINDA F. ALWITT & THOMAS D. DONLEY, THE LOW-INCOME CONSUMER: ADJUSTING THE BALANCE OF EXCHANGE 97 (1996).

161. *See id.* (explaining that people divert cash from their original purpose to extracurricular activities with few or no problems).

162. *Id.*

163. *Id.*

164. JOHN P. CASKEY, LOWER INCOME AMERICANS, HIGHER COST FINANCIAL SERVICES 21 (Report for The Center for Credit Union Research and The Filene Research Institute, 1997). Loss of privacy and the fear of having money attached to satisfy a judgment for debt or child support have also been cited as explanations by those lacking transaction accounts. Jeanne M. Hogarth & Kevin H. O'Connell, *Banking Relationships of Lower-Income Families and the Governmental Trend Toward Electronic Payment*, 85 FED. RES. BULL. 459, 463 (1999).

165. Cathleen M. Finn et al., *Assets and Financial Management Among Poor Households in Extreme Poverty Neighborhoods*, J. SOC. & SOC. WELFARE, Dec. 1994, at 75, 84.

166. CASKEY, *supra* note 164, at 18-19.

167. *See* SQUIRES & O'CONNOR, *supra* note 153, at 153-56 (indicating that a survey conducted in Milwaukee's Community Development Block Grant neighborhoods revealed that, while the banks were open forty-four hours per week, including 2.7 hours on the weekend and 0.5 hours in the evening, the check cashing businesses were open sixty-eight

screening procedures;[168] and swifter approvals.[169] All of these factors increase the cost of the credit. Limited credit evaluations and the cash basis on which the firms conduct business reduce the paper trail and limit intrusions into the customers' privacy. The firms, for their part, insure their profitability by delivering narrowly specialized services, concentrating their marketing efforts on attracting prior users, scheduling payments to coincide with the customer's cash flow to assure that they will be paid before the customer has a chance to spend the money, structuring the deals to facilitate the transfer of collateral, monitoring payments closely, and responding to nonpayment swiftly and aggressively.[170]

The lenders' informal operations are deceptive. Many are corporate entities connected to larger banks and financial institutions. As one commentator noted regarding a check-cashing outlet in a Washington, D.C. neighborhood, "[t]he primitive hands-on processing and tawdry exterior of the outlets both exude welcome to poor customers and mask [the firm's] close ties to and substantial financing from large corporations and big banks, as well as the fact that it is part of a large corporate chain."[171] The firms' chief advantage, of course, may be that their customers are unaware of the greater expenses entailed in the frequent small payments such firms require over an extended period of time.[172] This myopia is a result of a cash-basis orientation.

It is significant to consumers that firms in the alternative sector tend to operate on a cash-basis. Poorer consumers are most comfortable transacting with cash. Cash fosters intimate or personal social relations. Handling cash and exchanging it with others creates social connections that are a significant aspect of their lifestyle.[173] Cash is tangible evidence of one's contribution to one's family and community, and to the economy in general; direct deposit schemes that eliminate the need for face-to-face transacting do not have the same testimonial impact. Going to the check

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hours per week, including 13.1 hours on the weekend and 2.5 hours in the evening making such firms more attractive for customers despite their holding accounts at other institutions).

168. CASKEY, *supra* note 164, at 19. In lieu of formal credit reports, these institutions may rely on the word of community references or trade information among themselves. *Id.* at 33.

169. *Id.* These include friendly personal service, informal settings, and faster approval. Also, all transactions are in cash which does not leave a paper or an electronic trail. *Id.* at 23, 52-53.

170. *Id.* at 51-52.

171. Brett Williams, *What's Debt Got to Do with It?*, *in* THE NEW POVERTY STUDIES: THE ETHNOGRAPHY OF POWER, POLITICS, AND IMPOVERISHED PEOPLE IN THE UNITED STATES 79, 87 (Judith Goode & Jeff Maskovsky eds., 2001).

172. CASKEY, *supra* note 164, at 19, 53.

173. *See* TAD CRAWFORD, THE SECRET LIFE OF MONEY: TEACHING TALES OF SPENDING, RECEIVING, SAVING, AND OWNING 221 (1994) (finding in tangible money a connection to other people and the divine, as well as a sign of "what is fertile in our world and in ourselves").

casher or dropping into the rent-to-own store represents a social occasion. "Fictive friendships" between customers and staff bring the customers back again and again.[174] The cash economy is ideal for people with more time than money, or to put it more crassly, for people whose time is not worth much on the labor market.

The resort of poorer consumers to the firms of the alternative market is consistent with reports that they feel manipulated, angry, powerless, and alienated when it comes to dealing with financial institutions.[175] This leaves them susceptible to manipulation and abuse.[176] Snubbed by the primary sector, some poorer consumers are more pride-conscious than price-conscious and are therefore susceptible to the appeal of the secondary sector's "merchandising of respect."[177] Though there is minimal difference between the "merchandising of respect" and the "marketing of relationship banking" which is directed at the more desirable consumers of top tier services, the latter start out with more choices.[178] Moreover, because poorer consumers generally possess limited financial literacy and tend to simplify or ignore incongruous details where the overall terms of the transaction are likely to be unfavorable,[179] they often have little understanding of the contracts they sign.[180] They are more concerned with whether their periodic payments are manageable than with the actual interest rate charged. But their options are limited and doing business with the institutions of the subprime market may offer these consumers "their only opportunity to enjoy the consumer fruits of the longest economic expansion in American history."[181]

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174. *See* Ramsey, *supra* note 9, at 188 (indicating that sales techniques and patterns of social power distribution rather than the socio-economic risk factors become the primary cause of higher prices in lower income markets).

175. *See* ALWITT & DONLEY, *supra* note 160, at 67 (describing how poor people perceive themselves and their financial position particularly with respect to outside aid and assistance); *see also* Ronald Paul Hill & Debra Lynn Stephens, *Impoverished Consumers and Consumer Behavior: The Case of AFDC Mothers*, J. MACROMARKETING, Fall 1997, at 32, 34, 40-41 (finding that female welfare recipients experience a loss of control and feelings of alienation and humiliation when their position is exposed through the use of stigmatized forms of money such as food stamps and vouchers).

176. ALWITT & DONLEY, *supra* note 160, at 69.

177. ROBERT C. MANNING, CREDIT CARD NATION: THE CONSEQUENCES OF AMERICA'S ADDICTION TO CREDIT 200-02 (2000). *See generally* Hill & Stephens, *supra* note 175, at 41 (relating the consequences of social stigmatization of lower income individuals).

178. MANNING, *supra* note 177, at 202.

179. ALWITT & THOMAS D. DONLEY, *supra* note 160, at 120.

180. *See* Ronald P. Hill et al., *The Rent-to-Own Industry and Pricing Disclosure Tactics*, 17 J. PUB. POL'Y & MARKETING 3, 4-6 (1998) (explaining the difficulty that some consumers have in understanding the intricacies of rent-to-own contracts and the higher prices of such contracts versus the direct purchase of the goods from first-tier retailers).

181. MANNING, *supra* note 177, at 209.

C. The Association Between Blacks and Cash

The habits and assumptions of poorer minority consumers described above are not necessarily shared by all of those who use check cashers or take out payday loans. Payday loan customers are certainly not among the poorest consumers of financial services because they must have checking accounts even to be eligible for a loan.[182] The habits learned in the cash economy though may outlive the material conditions that gave birth to them if institutional exclusion persists or if the social and cultural capital required to support a more sophisticated orientation to credit and money are not allowed to develop.

For example, black people in general tend to be associated with cash.[183] This is a legacy of their historic exclusion from full participation in the economy.[184] Blacks have long been stereotyped as being "impulsive, fun-loving, indulgent, and wasteful consumers"[185] "who could not have money without spending it immediately."[186] Blacks are accordingly assumed not to know the value of money or how to deal with financial matters in a knowledgeable way. Such notions about blacks and their money facilitate efforts to confine their commercial transactions to the cash economy. Moreover, the association between blacks and cash makes it more difficult for blacks to establish credibility and trust with regard to transactions involving substantial sums of money or necessitating credit. Credit is thus harder for them to obtain.[187] Conversely, it is easier for others to negotiate or bargain successfully with blacks if black people's money is treated like cash or its equivalents. The money would obviously be put to a better,

182. *See* Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121, 123 (2004) (describing payday loan consumers as "underbanked" because they lack the knowledge to avoid subprime or fringe credit).

183. *See* Sheila D. Ards & Samuel L. Myers, Jr., *The Color of Money: Bad Credit, Wealth, and Race*, 45 AM. BEHAV. SCI. 223, 224 (2001) (describing that a "common misconception within the social science community" regarding the cause of lower incomes, home ownership rates, access to credit, and higher credit denial rates of African Americans is attributable solely to poor credit).

184. *See* Ards & Myers, Jr., *supra* note 183, at 227-28, 233 (noting that blacks have historically been denied credit because lenders deem them untrustworthy). The exclusion of blacks has led to "an environment of poor credit habits" for blacks. *Id.*

185. TED OWNBY, AMERICAN DREAMS IN MISSISSIPPI: CONSUMERS, POVERTY & CULTURE 1830-1998 4-5 (1999).

186. *Id.* at 5.

187. *See generally* Austin, *supra* note 1 (arguing that the social conceptualization of "black people's money" in terms of the quality (mostly cash) and quantity of funds available to black negatively impacts their ability to obtain credit); *see also* Regina Austin, *"A Nation of Thieves:" Securing Black People's Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147, 149 (describing difficulties blacks encounter in making purchases with checks); Ards & Myers, Jr., *supra* note 183, at 225 (arguing that the erroneous perception that blacks have poor credit limits their access to loans). *But see* Ards & Myers, Jr., *id.*, at 234 (discussing research that suggests that blacks have less difficulty obtaining credit cards than maintaining good credit).

higher use in the hands of a nonblack person who can amass it and turn it into capital. Add to this the impact of the association between blacks and crime or dishonesty[188] and it becomes clear why black people's money is treated as tainted, and, as with a fetish subject to a taboo, is considered sanitized or restored to full value only when it passes into the hands of whites.[189]

If the notion that discrimination inheres in the very way we think about black people's money is unconvincing, the subject might be approached in terms of general racist stereotyping. A belief in black intellectual inferiority makes investments in black people, their property, and their communities seem riskier than comparable investments in whites.[190] A belief that black borrowers are stupid or incompetent will lead to more refusals to lend, higher interest rates, demands for more information, and higher transaction costs in credit transactions involving blacks.[191] Some blacks have internalized these notions.[192] Others have accommodated their financial practices and preferences to them.[193] Fear of being denied credit, for example, drives some creditworthy blacks to seek loans in the fringe or subprime sector where they receive money on less favorable terms than comparably situated whites.[194] Yet a third group has eschewed full participation in the market for financial services.[195] It does not matter; through any of these responses, the economic subjugation of a substantial number of blacks is assured.

Blacks' exclusion from full participation in the market for financial services is a byproduct of their historical confinement to the cash economy. That exclusion and confinement have produced, via socialization, patterns of financial behavior that facilitate the continued economic marginalization of black people. The cash-basis orientation is cultural. Culture is created by, as well as being manifested in, the workings of families, communities,

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188. *See* Austin, *supra* note 1 (exploring the impact of stereotypes linking blacks to crime in lowering the social and material value of their money); *see also* Austin, *supra* note 187, at 151-52 (noting that those tasked with security surveillance in retail establishments engage in racial profiling under the assumption that the majority of lawbreakers are black); Dorothy E. Roberts, *Crime, Race and Reproduction*, 67 TUL. L. REV. 1945, 1952-54 (1993) (noting that race is not only used to identify criminals but also the crimes they commit).

189. *See generally* Austin, *supra* note 1 (propounding a cultural theory of black people's money as being the equivalent of a fetish subject to a taboo).

190. MARCELLUS ANDREWS, THE POLITICAL ECONOMY OF HOPE AND FEAR: CAPITALISM AND THE BLACK CONDITION IN AMERICA 77 (1999).

191. *Id.* at 77-78.

192. Ards & Myers, Jr., *supra* note 183, at 238.

193. *See id.* at 229 (noting that blacks, excluded from prime credit opportunities, have historically resorted to increased savings behavior).

194. *Id.* at 229-30, 238.

195. *See id.* at 233-34 (discussing focus group research that observed the common lack of participation in credit and lending among blacks, especially with regard to merchant credit cards).

markets, and governments. Of course, impoverished material conditions spawn an impoverished or impoverishing culture. Both material conditions and the culture must change for the cycle to be broken.

D. Ending the Tyranny of the Cash Economy

Small-sum borrowers who deal with predatory lenders should not be viewed as totally "cash-dazzled, payment-myopic borrower[s]."[196] A wad of borrowed cash does not cause them to forget where the money is coming from and how much it is costing them. They are not overcome by an immediate urge to spend because they suddenly have cash in hand. Moreover, their cash-basis orientation and the preference for informality that it generates would appear to have some positive aspects from the perspective of the borrowers. For example, focusing solely on consumer abuse tends to underestimate the benefits of the expanded credit offered by firms in the alternative market. Purchasers who shop at rent-to-own stores, for example, pay several times the cost of an item, but rent-to-own stores may provide them with their only opportunity to participate in consumer culture by obtaining access to products that nearly everyone else enjoys. Moreover, flexibility is a valuable attribute of rent-to-own contracts; the purchaser can walk away from the debt at any time.[197]

The important point here is that cash-basis consumers and those socialized in the ways of the cash economy possess certain constraints and certain mindsets and habits that affect their ability to negotiate successfully in the market for credit, especially the sector populated by subprime lenders. A possible solution to their woes lies in either increasing their access to financial services supplied by firms in the primary sector or regulating the subprime sector to produce behavior more like that exhibited by firms in the primary sector. Breaking the hold of the tyranny of the values of the cash economy through consumer education and exposure to alternatives might also facilitate their economic well-being. There is a further possibility: expanding small-sum borrowers' credit options by taking into account their preferences, infusing the values of informality into the notion of the democratization of credit (a concept that the lenders like to invoke), and creating new hybrid sources of credit that deliver a better mix of the advantages of the formal and the informal.

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196. PETERSON, *supra* note 14, at 171.

197. *See generally* Brian J. Zikmun-Fisher & Andrew M. Parker, *Demand for Rent-to-Own Contracts: A Behavorial Economic Explanation*, 38 J. ECON. BEHAV. & ORG. 199 (1999) (discussing escapability and structured payments as factors explaining households' use of rent-to-own transactions); Hill et al., *supra* note 180, at 6-8 (noting that accessibility of retailers and terminability of contracts are seen as benefits of shopping at rent-to-own retailers).

As the next section makes clear, the benefits of informality are not limited to fast approvals and face-to-face contracting. The benefits of informality also include the embeddedness of the lender in the local community and in the social relationships that promote financial decisions which acknowledge the value of the reciprocity of respect and responsibility; flexibility (as to lender structure and the mode of transacting) that compensates for and corrects, rather than exploits, the borrowers' lack of financial sophistication; and involvement of creditors or intermediaries representing debtors in activities that link borrowing for consumption to the generation and control of income and wealth for and by the community and its citizen-consumers.

IV. REINTERPRETING THE "DEMOCRATIZATION OF CREDIT" TO INCLUDE THE INFORMAL

Firms in the subprime or fringe credit market assert that they are promoting the democratization of credit.[198] This, however, is a disputable proposition. At a minimum, the democratization of credit should provide "credit-constrained" consumers with "access to previously unavailable credit on more competitive and attractive terms."[199] The industry's critics charge that the credit being offered by subprime lenders is "destructive," not "productive," and therefore not consistent with the democratization of credit as properly understood.[200]

The concept of the "democratization of credit" is not new.[201] Regrettably, its contemporary manifestation departs from the ideals with

198. *See, e.g.*, Cathy Lesser Mansfield, *Predatory Mortgage Lending: Summary of Legislative and Regulatory Activity, Including Testimony on Subprime Mortgage Lending Before the House Banking Committee*, 1242 PRACTICING L. INST. 9, 40 (2001) (recounting testimony before the United States House of Representatives Committee on Banking and Financial Services that the subprime home equity market has not met the needs of low-income and minority borrowers).

199. Todd J. Zywicki, *The Economics of Credit Cards*, 3 CHAP. L. REV. 79, 98 (2000) (noting the increased use of credit cards over other forms of short term borrowing).

200. Drysdale & Keest, *supra* note 6, at 665; *see also* Mansfield, *supra* note 198, at 41.

201. For example, an article in the April 1914 issue of the journal, *Current Opinion*, linked the democratization of credit in America to the creation of formal institutions and instruments like savings banks or Morris Plans, which extended money to honest working "people of little means" or "men of small, if not the smallest, account financially . . . on terms virtually as easy and as dignified as those on which the man of property borrows money at an ordinary commercial bank." *The Democratization of Credit*, CURRENT OPINION, Apr. 1914, at 313-14. Democratized credit, a phenomenon already a half century old in Europe at this point, was a device for thwarting predatory, informal loan-sharking. *Id.* at 314-15. Under the Morris Plans, a borrower needed two responsible persons to endorse the transaction and to guarantee the repayment of the loan. CHARLES CORZELLE, THE SMALL LOAN RACKETT 20 (1934). This requirement "discourage[d] promiscuous and habitual borrowing." *Id.* at 21. Furthermore, repayment could be made in installments. *Id.* at 20. The interest was assessed when the loan was made, which "prevented the charging of high interest when loans were not repaid upon the due date." *Id.*

which the term was originally associated. An analysis of the grassroots campaign waged by the National Welfare Rights Organization (NWRO) in the 1970s to obtain access to store credit for its members provides a good illustration of this.[202] Though the material benefits generated by the NWRO campaign were local and sporadic, it nonetheless achieved an important symbolic victory.[203] The NWRO conceptualized consumer credit as "a right of American citizenship."[204] The welfare mothers it represented wanted to be treated like anyone else; to them buying with credit should have been "normal" even for welfare recipients.[205] In its quest for credit, the NWRO targeted low-end retailers including Sears, Montgomery Ward, and Lerner Shops, and local department stores like Wanamaker's and Filene's.[206] It sought credit from large merchants so that welfare mothers could bypass small local or neighborhood merchants who charged high prices and delivered poor quality goods.[207] As a feature of its national campaign, the NWRO proposed that local chapters would serve as informal credit intermediaries between merchants and its members for whom the NWRO would supply letters of reference that would suffice as proof of the applicants' creditworthiness.[208]

The goals of the NWRO credit campaign were not limited to the economic. "[I]n advocating that poor people had the right to credit—even if it meant risking debt—welfare rights activists distinguished themselves from the more paternalistic experts dedicated to safeguarding low-income consumers from exploitative retailers as well as their own appetites as consumers."[209] According to historian Felicia Kornbluh, "for middle and working class people, access to credit (and the denial of credit to others) was part of their sense of respectability. When NWRO members demanded Sears credit cards they asked to be included among the respectable."[210] Moreover, the "[w]elfare rights activists saw themselves as entitled to credit because they were entitled to social recognition [as

202. *See generally* Felicia Kornbluh, *Black Buying Power: Welfare Rights, Consumerism, and Northern Protest, in* FREEDOM NORTH: BLACK FREEDOM STRUGGLES OUTSIDE THE SOUTH, 1940-1980 199 (Jeanne Theoharis & Komozi Woodward eds., 2003). The activists of the NWRO resorted to traditional movement tactics like leafleting, business-disrupting shop-ins, and credit card burning by wealthier supporters to support their claims for credit. *Id.* at 207.

203. *Id.* at 205-08.

204. *Id.* at 210.

205. *Id.* at 209.

206. *Id.* at 205-06.

207. *Id.* at 205.

208. *Id.* at 206.

209. LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 381 (2003).

210. Kornbluh, *supra* note 202, at 209.

women and mothers] in a consumer society."[211] The campaign for credit expressed their "deep yearning for social inclusion in post-war society."[212]

The democratization of credit is generally spoken of in terms of uplift and advancement, or so it should be. It calls for an infusion of democratic values into the private market and a broader sharing of the benefits of the society's economic endowments by a wider spectrum of consumers. This is one of the reasons why access to credit is considered part of the social safety net. Ideally, democratized credit should leave those who use it in a better position to negotiate the formal market and to improve their ability to save, acquire assets, invest, and otherwise amass wealth.

The democratization of credit is an essential component of a modern economic regime. It is required to produce citizens who are economically modern. "[S]kills in money management and access, plus knowledge of financial products and systems, are fast becoming part of a necessary financial literacy essential for full social participation and survival."[213] The democratization of credit should accordingly dismantle or challenge economic stereotypes and make access to money easier for groups whose lack of creditworthiness stems from past racial and gender discrimination in the allocation of material resources.

Payday loans, for example, as we have seen, are not an assured mechanism for lifting borrowers above the disadvantages of the informal devices they would otherwise employ to deal with debt; moreover, payday loans seem to add to borrowers' troubles the disadvantages of formal lending. Payday loans simply do not guarantee that borrowers can advance to the next level of financial advantage, security, or sophistication. Rather, they too often exacerbate borrowers' desperation and economic marginality, and exploit borrowers' sometimes rudimentary or simplistic orientation to money and credit. Those debtors who successfully satisfy their obligations under payday loans do not even get credit for their reliability, as their success in extinguishing their debts is not reflected on their credit records. This fact stems from the informal nature of payday borrowing.[214]

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211. *Id.* at 211.

212. *Id.* at 214.

213. Ruth Pearson, *Micro-credit as a Path from Welfare to Work: The Experience of the Full Circle Project, UK*, in WOMEN AND CREDIT, *supra* note 76, at 167, 175. Jones & Sakyi-Dawson, *supra* note 76, at 167, 175 (emphasis deleted).

214. *See* Richard Brooks, *Credit Where It's Due*, FORBES, Apr. 12, 2004, at 52 (arguing that payday lenders deny their customers "access to the traditional credit markets" by not reporting favorable dispositions of their debts which would allow the borrowers to build a positive credit history). *But see* Michelle Singletary, *Earning Credit for Paying Rent*, WASH. POST, Feb. 22, 2004, at F1 (describing Pay Rent, Build Credit, Inc., a credit bureau that allows consumers to build a credit history based on the timely payment of obligations like rent and utility bills).

If the democratization of credit were truly the goal, the reform agenda would extend beyond usury regulation and suitability requirements. It would include alternatives that acknowledge the orientations that consumers bring to financial transactions and work to change them by drawing upon what is positive about them. Black people's exclusion from full participation in the financial services market has resulted in the absence of the material conditions that give rise to and sustain the cultural and social capital needed to facilitate greater financial literacy, sophistication, and security among blacks of all classes.[215] Many poor and/or minority communities lack access to reliable and trustworthy formal external sources of credit, information, and expertise and are accordingly vulnerable to overreaching, underdevelopment, and depreciation of the value of their money. This is not the result of their choice or their deficiencies, but rather a consequence of the material conditions in which they acquired their financial habits. Promoting savings and strengthening pro-debtor sources of credit that preserve the benefits of informality would reduce the demand for credit from formal entities like payday lenders and car title pawnbrokers. Linking formal sector firms with informal local intermediaries would allow the firms to achieve greater penetration in minority markets and give borrowers the benefit of knowledgeable sources of protection.[216] The poor and working class might benefit from "innovative lending schemes that use community monitoring and enforcement to mimic the [benefits and advantages of the] informal lending sector."[217] Of course, the market for credit, like many other commodities, cannot truly be democratized without changing existing power relations, particularly with regard to production.[218] The local financial intermediaries might prove useful in pursuing

> a strategy of coalition building that enables those on the economic or social margins to strike an enforceable bargain with better-off economic players. Such bargains exchange the untapped resources and ability of marginal consumers or workers for the means needed to develop their productivity and a safety net that makes sustained participation possible.[219]

Cultural mechanisms need to be fostered to encourage consumers socialized in the ways of the cash economy to think of their money as being

215. ANDREWS, *supra* note 190, at 3.
216. Jones & Sakyi-Dawson, *supra* note 76, at 167, 175.
217. BOND & TOWNSEND, *supra* note 94, at 19.
218. *See* COHEN, *supra* note 209, at 309 (noting that, although advertisers and marketers began to recognize diversity and segment the market in the 1960s and 1970s, leading to market democratization, ownership remained concentrated in large manufacturers).
219. Frank Munger, *How Can We Save the Safety Net?*, 69 BROOKLYN L. REV. 543, 581 (2004).

significant, even if it is only cash. Blacks are not alone in having a lower value attached to their money. Other minorities, including women and the poor, are essentially in the same boat. To elevate their money's social significance, all of us must begin to think and talk about money in the hands of members of these groups in a different way. It is impossible for a group to build cultural and social capital in regard to its money if we dissociate them from money; harbor stereotypes about their money, its sources, or its uses; or denounce money with "righteous indignation" in the mistaken belief that their cause will be advanced thereby. It is better to think of money as a complex social invention and a cultural artifact not totally unresponsive to collective agency. Money might be viewed as, in the words of Carl Sandberg, "power, freedom, a cushion, the root of all evil, the sum of blessings."[220]

V. CONCLUSION

This Article makes three points. First, predatory lenders thrive by taking advantage of their customers' familiarity and comfort with, and resulting preference for, informal modes of transacting. Of course, there is deception involved in this because in many cases the corporate identity of the real party in interest is not disclosed to the borrower and the formality of the transaction becomes clear only after the customer defaults. Second, in the case of minority customers in particular, the preference for informality in financial transactions is an aspect of the powerful socialization of the cash economy to which these customers and their parents and grandparents have been confined because of racial and class discrimination. The preference will theoretically be affected by a change in the material circumstances of the customers, particularly by greater access to trustworthy sources of credit. Because the habits and practices will outlive the material conditions that spawned them, however, it is important that the positive aspects of informality be employed to stop the exploitation and to begin the economic integration of such small-sum borrowers. Furthermore, initiatives for ending the devaluation of minority customers' money should also enhance their financial advancement. Third, the true democratization of credit, which predatory lending does not represent, should foster the enhanced well-being for the least-well off borrowers. Those borrowers very likely need the protection of informality to become full citizen-consumers in the modern economy in which credit plays an important role in contributing to the social safety net protecting the most vulnerable debtors and thereby assuring a good life for ever more Americans.

220. CARL SANDBURG, THE PEOPLE, YES 167 (1936).