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Response

Balancing: A Response to Professor Jonathan Macey, *Fair Credit Markets: Using Household Balance Sheets to Promote Consumer Welfare*

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Introduction

In *Fair Credit Markets: Using Household Balance Sheets to Promote Consumer Welfare*,[1] Professor Jonathan Macey offers a new approach to regulating consumer loans. Invoking a "hypothetical balance sheet"[2] as the centerpiece of his proposal, Macey argues that it is possible for regulators to "distinguish between harmful, abusive lending and beneficial, welfare-enhancing lending."[3] With the benefit of this sorting mechanism, Macey posits that regulators can and should apply a "light touch" to those consumer loans that have a positive economic effect on a prospective borrower's balance sheet at the time the loan is disbursed.[4] Conversely, the balance sheet approach justifies regulators in imposing a heavier hand on those loans that have a negative effect on a prospective borrower's balance sheet.[5] This

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1. Jonathan Macey, *Fair Credit Markets: Using Household Balance Sheets to Promote Consumer Welfare*, 100 TEXAS L. REV. 683 (2022).
2. *Id.* at 689.
3. *Id.* at 685.
4. *Id.* at 719, 728.
5. *Id.* at 728.

framework envisions "both less regulation and more regulation of consumer lending" depending on a loan's effect on a borrower's hypothetical balance sheet.[6] In this regard, Macey offers a third way that purports to find a meaningful middle ground between a neoclassical approach that leaves consumer well-being solely in the hands of the market and a paternalistic approach that unduly overburdens market forces in favor of consumer welfare.

Part I of this Response summarizes Macey's balance sheet approach in greater detail, including its balance sheet-based taxonomy of consumer loans and its primary focus on the effect of a consumer loan on a borrower's balance sheet. Part II then highlights several constructive aspects of the proposal, including its affirmative recognition of the asymmetrical power dynamic between lenders and disadvantaged borrowers, its willingness to extend to consumers the significant protections accorded to securities investors, and its invocation of the Federal Reserve's tremendous resources as a justifiable source of direct emergency liquidity for the most vulnerable consumers. These aspects of the proposal recognize that, at least in some contexts, unfettered private markets should not supplant the role of the state in ensuring the socioeconomic well-being of the most vulnerable members of our credit-based society.

Yet, notwithstanding these positive aspects, Part III challenges Macey's use of a balance sheet as his central sorting mechanism in the first instance. It argues that by invoking a balance sheet as the heart of his proposal, Macey invites regulators merely to think in terms of what can be meaningfully quantified. Consequently, anything else that is not readily susceptible to quantification—like the effects of decades of entrenched racism and sexism in consumer credit markets or on other intangible assets and liabilities—may then, by definition, be excluded from the calculation.[7]

In this regard, although Macey's proposal in some ways acknowledges the existence of underlying social inequalities that deeply affect how well consumers (and especially disadvantaged and marginalized consumers) fare in the credit-based economy, his balance sheet approach largely disregards the harsh realities of inequality in the American consumer credit market that defy meaningful quantification. Consequently, just as the inherent messiness of entrenched social inequality obstructs credit's ability to promote equally the welfare of disadvantaged Americans,[8] it also essentially undercuts

6. *Id.* at 744.

7. *Compare* Joseph William Singer, *Something Important in Humanity*, 37 HARV. C.R.-C.L. L. REV. 103, 104 (2002) (observing "the complexity of our values" and "that some costs and benefits are hard to measure precisely because they are not susceptible to quantitative analysis").

8. *See generally, e.g.*, Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093 (2019).

Macey's position that a balance sheet is all that regulators require to figure out how to make credit a broadly useful tool of human functioning.[9]

I. Summarizing the Balance Sheet Approach

Macey starts with the premise that in our consumer society, credit "is instrumental to ensuring other stated rights and for allowing human flourishing."[10] He notes that this is particularly true for the "least-advantaged members of society," who, Macey suggests, can use credit "to improve their situations."[11] In order to perform this alchemical feat, the credit must either be the good kind that, as a consequence of its essential positive quality, requires little regulation. Alternatively, the bad credit would be permissible so long as it is significantly regulated to limit or neutralize any harmful effects on the borrower. In other words, in Macey's view, credit is a tenable source of consumer welfare even among socially disadvantaged groups provided that, for the purposes of regulation, we can meaningfully separate the proverbial wheat from the chaff.[12]

Macey proffers a balance sheet approach in order to facilitate that division. The balance sheet approach considers the effect—either positive, neutral, or negative—that a consumer loan would have on a consumer's hypothetical balance sheet as based on the present value of the loan.[13] Macey then presents a taxonomy of three categories of consumer loans, the effects of which should be considered for regulatory purposes. First are loans for investment, which Macey views as categorically positive from a balance sheet perspective.[14] Consequently, significant regulatory intervention is both unnecessary and inefficient.[15] Second are loans "to acquire a long-term capital asset."[16] These include student loans and warrant minimal regulatory intervention because, in Macey's view, they have, at worst, a neutral effect

9. *See* AMARTYA SEN, DEVELOPMENT AS FREEDOM 75 (1999) (equating human dignity with the concept of human "capability" to be and do what one wants, and noting that functionings are the "outgrowths or realizations of capabilities"); MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 25 (2013) ("Functionings are beings and doings that are the outgrowths or realizations of capabilities."); *accord* ALAN PALMITER, FRANK PARTNOY & ELIZABETH POLLMAN, BUSINESS ORGANIZATIONS: A CONTEMPORARY APPROACH 257–75 (3d ed. 2019) (discussing various difficulties associated with balance sheet treatment of asset and liability entries).

10. Macey, *supra* note 1, at 685.

11. *Id.*

12. On this basis, Macey questions my critique of credit use as a reasonable source of broad social provision, contending that it lacks sufficient nuance. *Id.* at 691.

13. *Id.* at 686–87.

14. *Id.* at 687, 693.

15. *Id.* at 693.

16. *Id.* at 687.

from an *ex ante* balance sheet perspective.[17] Third are loans to fund current consumption.[18] These include payday loans and other small-dollar loans that consumers use to smooth income. For Macey, this third category of loans imposes a negative effect on a consumer balance sheet and thus warrants more expansive regulation.[19]

A final transcategorical loan that is crucial to the balance sheet approach is one that would have a "transformative" effect on the borrower's hypothetical balance sheet.[20] According to Macey, a loan is transformative if it "results in a change of more than 25% to the value of the liabilities on the borrower's balance sheet."[21] Because of their significant effect on the balance of assets and liabilities, transformative loans, like loans for current consumption, warrant "a heightened level of regulatory protection," regardless of the purpose of the loans (i.e., whether for investment, asset purchase, or current consumption).[22]

The appropriate level of regulation follows from this taxonomy. A consumer loan that has a positive or neutral effect on the borrower's hypothetical balance sheet would be subject merely to existing disclosure requirements, other antifraud protections, and little else.[23] In Macey's view, these are the good loans that are otherwise best regulated by the market rather than by central planning. By contrast a loan that has a negative effect on the balance sheet or is otherwise "transformative" would be subject to enhanced regulations that would impose a "fiduciary-like" duty on lenders in addition to existing disclosure requirements and other antifraud protections.[24]

In this regard, Macey would graft securities law "suitability" and "anti-churning" requirements onto consumer-protection regulations in recognition of the similarly asymmetrical positions between broker-dealers and investors, on one hand, and lenders and consumers, on the other.[25] With respect to a consumer loan suitability requirement, as in the securities laws where broker-dealers are required to recommend to investors only those securities that meet the investors' specific needs, lenders would be required to offer to a consumer borrower only those loans that "fit her needs," including loans that do not

17. *Id.* at 694 ("It is unlikely, however, that such a transaction will have a negative effect on a borrower's balance sheet because a rational lender (bank) will not agree to lend to a borrower unless it estimates that the house is worth more than the mortgage.").

18. *Id.* at 687.

19. *Id.* at 687–88.

20. *Id.* at 724–25.

21. *Id.*

22. *Id.* at 689.

23. *Id.* at 694.

24. *Id.* at 718, 725.

25. *Id.* at 730–34.

carry "excessive fees."[26] With respect to the anti-churning prohibition, which in the securities context prohibits broker-dealers from making excessive trades, lenders would be forbidden from offering loans that the consumer would be likely to roll over multiple times (i.e., payday loans).[27]

Moreover, in addition to applying increased regulation to loans for current consumption, Macey would subdivide those current consumption loans into loans for emergency consumption and loans for nonemergency consumption.[28] With respect to emergency consumption, Macey proposes that the Federal Reserve should lend directly to individuals in need of emergency capital with the individual's future income stream serving as collateral.[29] Emergencies would include sudden and unexpected health-related costs, childcare expenses, and "funding used in order to keep one's job or otherwise to retain a steady income."[30]

II. Recognizing the Most Disadvantaged

The balance sheet approach seeks to preserve access to credit for those who Macey believes would benefit from such access, while restricting credit that is likely to lead a borrower into distress. Consequently, much of the proposal is directed in explicit terms to the welfare of disadvantaged consumers who, Macey acknowledges throughout the piece, are consistently vulnerable participants in the consumer credit market based on their socioeconomic disadvantage.[31] Thus, even though in many respects Macey's balance sheet approach cleaves to neoclassical views of the superiority of market processes as a basis for social well-being,[32] it also, by its own terms, "challenges that [neoclassical] orthodoxy" with respect to certain categories of socioeconomically vulnerable borrowers who take on certain categories of loans.[33] In this regard, Macey's project helps to broaden the lens through

26. *Id.* at 732–33.

27. *Id.* at 733.

28. *Id.* at 729.

29. *Id.* at 742.

30. *Id.* at 744.

31. *See, e.g.*, *id.* at 728.

32. *See, e.g.*, GRETA R. KRIPPNER, CAPITALIZING ON CRISIS: THE POLITICAL ORIGINS OF THE RISE OF FINANCE 140–41 (2015) (summarizing "the ascendance of the market" as a site to address socioeconomic crisis); Marion Fourcade & Kieran Healy, *Classification Situations: Life-Chances in the Neoliberal Era*, 38 ACCT., ORG. & SOC'Y 559, 564 (2013) ("In the consumers' republic that flourished in the postwar period, protecting people from abuses by fettering markets ex ante was perceived as political and economic suicide, given prevailing ideologies and the fact that domestic consumption drove over two-thirds of the national economic machine.").

33. Macey, *supra* note 1, at 685–86.

which policymakers and academics alike should view the relationship between social disadvantage and credit/debt as a form of social provision.[34]

First, Macey questions whether the existing dominant disclosure-based approach to consumer loan regulation is sufficient to protect certain vulnerable borrowers.[35] He points out that the primary federal disclosure-based consumer-protection statute, the Truth in Lending Act (TILA),[36] merely discloses the price of a loan without giving consumers a metric for determining "whether they should borrow or . . . the likely effects that borrowing will have on their well-being."[37] Using payday loans as an example, Macey presents three reasons why the mandated disclosure of annual percentage rates (APR) does not meaningfully assist prospective payday loan borrowers in assessing whether they should take out the loans. First, the disproportionately disadvantaged borrowers do not understand what APR represents in the first instance. Second, APR is itself a limited representation of the impact of a loan on a borrower's overall well-being. Third, APR is not conducive to conveying the impact of a payday loan given that payday loans are short-term loan products.[38]

In taking this position, Macey acknowledges that for the disadvantaged borrowers who are confined to accessing credit in the payday loan market, there is something in their socioeconomic fragility that is relevant to understanding why they borrow and, consequently, in regulating how they borrow. As Chrystin Ondersma has observed, subprime credit use, including payday loan borrowing, is more than just a function of information asymmetry; it is often wrapped up in, and complicated by, the struggles of basic survival and human dignity.[39] Moreover, in a society that continues to

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34. *See* Rachel E. Dwyer, *Credit, Debt, and Inequality*, 44 ANN. REV. SOCIO. 237, 239 (2018) ("The reliance on credit and debt in the twenty-first-century American political economy was forged in the nineteenth and twentieth centuries, as the federal state and civil society developed a dependency on financialized solutions to social provision.").

35. Macey, *supra* note 1, at 701.

36. Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1667f).

37. Macey, *supra* note 1, at 707; *see also* Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 743 (2006) ("Congress passed the Truth-in-Lending Act (TILA) with the explicit goal of increasing price competition in the consumer credit market by giving consumers information in a form they could use to comparison price shop.") (footnote omitted).

38. Macey, *supra* note 1, at 708–09. Lauren E. Willis explains:

> Even if all borrowers met the mildly bounded decisionmaker model envisioned by [TILA], price shopping for home loans would be extremely difficult in the subprime marketplace because the timing of the disclosures is late, the information given is incomplete, and borrowers lack the financial literacy needed to use the information provided.

Willis, *supra* note 37, at 749.

39. Chrystin Ondersma, *Borrowing Equality: Dispossession and the Need for an Abolitionist Approach to Survival Debt*, 120 COLUM. L. REV. F. 299, 301 (2020).

insist that "the market is the most efficient locus of social provision" and that socioeconomically disadvantaged communities can (and should) lift themselves out of their entrenched socioeconomic distress in part "through [lightly] regulated engagement with private [market] actors" like payday lenders, regulation must do more to organize the ensuing creditor–debtor relationship.[40]

Consequently, Macey carves out loans for current consumption—including payday loans and other small-dollar, short-term loan products—as deserving of heightened regulatory protections. He proposes imposing "quasi-fiduciary" duties on these lenders, including a suitability requirement and an anti-churning prohibition, both of which exist as protections for investors in the securities context. The relative lack of sophistication and bargaining power of marginalized borrowers justifies this expansion of consumer protection and rights. Lenders would be required "to treat [borrowers] fairly" against the backdrop of the borrowers' relative socioeconomic disadvantage.[41]

Moreover, against the backdrop of systemic socioeconomic disadvantage, the balance sheet approach goes so far as to propose that the Federal Reserve should become a lender of last resort when distressed consumers are in financial crisis.[42] Relying on the Fed's lending interventions on behalf of businesses in crisis during the Great Recession and the COVID-19 pandemic, Macey argues that the Fed should similarly attend to individual citizens by lending during times of more mundane crises like unexpected medical expenses or sudden loss of childcare.[43] By Macey's own account, this aspect of his approach is "[m]ost radical[]" because it seeks to "normalize the notion that the Federal Reserve has a role in providing liquidity to U.S. households" and to "recognize that the Fed should be doing this on an ongoing basis."[44] This perspective is most at odds with existing "debtfare"

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40. Abbye Atkinson, *Rethinking Credit As Social Provision*, 71 STAN. L. REV. 1093, 1158 (2019). Macey comments on wariness surrounding critiques of consumer lending:

> [T]he standard economic analysis of consumer lending is wary of regulation that ignores the positive aspects of [payday loans] and instead "demonize[s]." Such lending fails to recognize that "[a]ny regulations that constrain payday borrowing beyond restrictions on rollovers/renewals are suspect because they remove or inhibit the use of a tool that low-income people use to smooth their income stream."

Macey, *supra* note 1, at 715 (quoting Paige Marta Skiba, *Regulation of Payday Loans: Misguided?*, 69 WASH. & LEE L. REV. 1023, 1029 (2012)) (footnotes omitted).

41. Macey, *supra* note 1, at 728–34.

42. *Id.* at 715; *cf.* John Crawford, Lev Menand & Morgan Ricks, *FedAccounts: Digital Dollars*, 89 GEO. WASH. L. REV. 113, 116 (2021) ("Congress should authorize the Fed to implement a broadly accessible, U.S. dollar-based [central bank digital currency] by giving the general public—individuals, businesses, and institutions—the option to hold accounts at the central bank, which [the authors] call[] FedAccounts.").

43. Macey, *supra* note 1, at 744.

44. *Id.* at 745.

policies that have relied on private credit markets to supplement the lack of "living wages, savings, and adequate welfare services."[45]

By invoking the Fed as a legitimate source of emergency lending for socioeconomically vulnerable consumers, Macey implicitly recognizes the underlying systemic problems that result in entrenched intergenerational working poverty and socioeconomic fragility.[46] His incorporation of the Fed as a lender of last resort to individual consumers reflects Monica Prasad's account of the "dilemma that lies at the heart of a credit-driven consumer economy: if private consumption (rather than a public welfare state) is the route towards satisfying needs, then all those who are too poor to engage in significant consumption will be left out of the economic mainstream."[47] In other words, Macey's proposal, at least in this narrow circumstance, pushes against the normative perception that the state bears little obligation to be a financial resource for persistent socioeconomic marginalization, a perception that remains a significant political barrier to proposals of this kind.[48]

III. Blurring the Rows and Columns

Macey's regulatory proposal rests on a hypothetical balance sheet. A balance sheet, of course, is a financial tool that gives a two-dimensional account of financial condition at a particular moment in time. As Macey explains, a balance sheet quantifies the value of assets owned and the value

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45. Susanne Soederberg, *The US Debtfare State and the Credit Card Industry: Forging Spaces of Dispossession*, 45 ANTIPODE 493, 493–94 (2013); *see also* KRIPPNER, *supra* note 32, at 138–39.

46. *E.g.*, Basak Kus, *Sociology of Debt: States, Credit Markets, and Indebted Citizens*, 9 SOCIO. COMPASS 212, 215 (2015) ("In nations where wages are low and income inequality is high, those at the lower tail of the income distribution may find many of their needs unattainable without loans.").

47. Monica Prasad, *The American Way of Welfare: Political-Economic Consequences of a Consumer-Oriented Growth Model*, DEMOS: NEW ECON. PARADIGMS 10 (2013) (on file with author); *see also* Anne Fleming, *The Public Interest in the Private Law of the Poor*, 14 HARV. L. & POL'Y REV. 159, 163 (2019) ("The history of the anti-pauperism argument suggests one political barrier to tax-and-transfer strategies: the enduring allure of using private law rules, rather than welfare spending, to combat poverty.").

48. *See, e.g.*, Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 2014 UTAH L. REV. 389, 400 (2014) (observing the rise in economic inequality and noting its correlation with the rise in "political polarization and partisanship," in which politically dominant "Republicans [have] favored policies that foster inequality" and that their political "dominance has also pushed Democrats rightward"). Robert Kuttner observes:

> Neoliberalism's premise is that free markets can regulate themselves; that government is inherently incompetent, captive to special interests, and an intrusion on the efficiency of the market; that in distributive terms, market outcomes are basically deserved; and that redistribution creates perverse incentives by punishing the economy's winners and rewarding its losers. So government should get out of the market's way.

Robert Kuttner, *Neoliberalism: Political Success, Economic Failure*, AM. PROSPECT (June 25, 2019), https://prospect.org/economy/neoliberalism-political-success-economic-failure/ [https://perma.cc/7V3H-TRC3].

of liabilities owed; then it subtracts the latter from the former in order to arrive at an expression of overall equity (or individual wealth).[49] It is this simple elegance that garners Macey's endorsement of the balance sheet as a useful tool to sort out which "extension[s] of credit [are] welfare-enhancing."[50] Indeed, to support the invocation of a balance sheet in the consumer loan regulatory context, he observes that balance sheets are ubiquitous across a range of institutions and entities that wish to understand and keep track of relative financial condition.[51]

Yet, the history of consumer credit and its resulting indebtedness in the United States has been anything but simple and elegant. Rather, this history has been messy and unseemly; biased and exclusionary; racist, sexist, and ugly.[52] Moreover, the American consumer credit market continues to suffer from this underlying social dysfunction that interrupts the efficacy of credit as a reliable source of long-term social well-being.[53] Against this backdrop, although the simplicity and orderliness makes a hypothetical balance sheet an attractive regulatory device, in reality, it cannot meaningfully reflect all of the pertinent information necessary to regulate consumer loans embedded in an environment of broader socioeconomic inequality.[54]

For example, it does not, and perhaps cannot, address what Professor Christopher J. Lebron has called, "the problem of social value," which "denote[s] the way narratives, power, and values coalesce around"

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49. Macey, *supra* note 1, at 689–90.

50. *Id.* at 691.

51. *Id.* at 690; *see also* Saule T. Omarova, *The People's Ledger: How to Democratize Money and Finance the Economy*, 74 VAND. L. REV. 1231, 1235 (2021) (describing the Federal Reserve's use of a balance sheet "to function as a classic 'franchisor ledger': its deposit liabilities primarily run to franchisee-banks, and its assets primarily comprise federal government-backed debt and assets acquired in the course of providing liquidity support to private financial institutions").

52. *E.g.*, Mehrsa Baradaran, *Jim Crow Credit*, 9 U.C. IRVINE L. REV. 887, 901–16, 938 (2019) (describing race-based and poverty-based credit discrimination and observing that "[t]he effects of the segregated debt market can still be felt today and have created two separate and unequal systems of banking and credit"); LOUIS HYMAN, DEBTOR NATION: THE HISTORY OF AMERICA IN RED INK 191–206 (2011) (describing gender-based credit discrimination); Felicia Kornbluh, *To Fulfill Their "Rightly Needs": Consumerism and the National Welfare Rights Movement*, RADICAL HIST. REV., Fall 1997, at 76, 82 (1997) (describing race, credit, and gender discrimination in connection with the passage of the Equal Credit Opportunity Act of 1974).

53. *E.g.*, Louise Seamster, *Black Debt, White Debt*, CONTEXTS, Winter 2019, at 30, 33 (observing that, as compared to White debt, "Black debt is harder to convert into an asset, has worse terms, and is much more likely to endure."); *see also* David Singh Grewal, *The Market Mirage*, *in* MONEY TALKS: EXPLAINING HOW MONEY REALLY WORKS 131, 132 (Nina Bandelj, Frederick F. Wherry & Viviana A. Zelizer eds., 2017) ("[I]f money is not money (as it appears in the [market] mirage), then neither should we expect 'capital,' 'labor,' 'land' or any other economic variable to exhibit the uniformity and internal consistency that is presupposed by economic theory.").

54. *See, e.g.*, Abbye Atkinson, *Borrowing Equality*, 120 COLUM. L. REV. 1403, 1447 (2020) (citing various work in economic sociology for the proposition that markets should be understood as embedded in their broader social contexts).

marginalized identities that justify "lower normative standing."[55] how would a balance sheet reflect when a student loan to attend law school should be considered to have a negative effect (just like a payday loan) because the student loan borrower is from a nontraditional family whose lack of familial wealth can be attributed to past discrimination?[56] How would it understand when and to what extent a regulator should adjust the applicable discount rate to account for a borrower who will pay more for housing, a car, and indeed for the loan itself by virtue of the borrower's race, phenotype, sex assignment at birth, gender performance, etc.? In other words, how might a regulator assign a meaningful discount rate to endemic discrimination? How would a regulator adjust its value calculation or project future cash flows as between, for example, a White cisgendered man and a Brown nonbinary person when, as a practical matter, these social categories have everything to do with both real-world determinations of value and practical projections of future income, even as they likely are not susceptible to meaningful predictive quantification for the purpose of a balance sheet analysis?[57]

If one accepts that the consumer credit market is deeply impacted by underlying social issues, then Macey's proffer of a simple two-dimensional balance sheet to sort out the regulation of consumer loans seems like a form of "cruel optimism,"[58] a concept developed by Professor Lauren Berlant to describe the phenomenon that occurs "when something you desire is actually an obstacle to your flourishing."[59] Berlant applies this concept to argue that across various dimensions of U.S. society, we continue to fixate on the promise of social and economic advancement and prosperity based on a "fantasy," namely, "the social democratic [credit-fueled] promise of the post-Second World War period in the United States" that "liberal-capitalist society will reliably provide opportunities for individuals to carve out relations of reciprocity that seem fair and that foster life as a project of adding up to something and constructing cushions for enjoyment."[60] This optimism is "cruel" to the extent that it refuses to account for "the state's [slow] withdrawal from the uneven expansion of economic opportunity, social

55. CHRISTOPHER J. LEBRON, THE COLOR OF OUR SHAME: RACE AND JUSTICE IN OUR TIME 43–44 (2013).

56. *See generally*, Darrick Hamilton & William A. Darity, Jr., *The Political Economy of Education, Financial Literacy, and the Racial Wealth Gap*, 99 FED. RES. BANK ST. LOUIS REV. 59 (2017).

57. *Id.*

58. LAUREN BERLANT, CRUEL OPTIMISM 1 (2011).

59. *Id.* Berlant is careful to establish that optimism itself is "not inherently cruel," but clarifies that it "become[s] cruel only when the object that draws your attachment actively impedes the aim you brought to it initially." *Id.*

60. *Id.* at 2–3.

norms, and legal rights that motored so much postwar optimism for democratic access to the good life."[61]

Through this lens, a hypothetical balance sheet approach might well be characterized as a kind of cruel optimism. For example, it is unduly optimistic to the extent that it assumes that for most borrowers, investment loans inherently have a net present value. Similarly, it is unduly optimistic in its assumption that only for-profit school student loans are likely to fall into the negative column of the ledger. In other words, the balance sheet approach is rooted in an optimism that turns a blind eye to the intangible socioeconomic consequences of racism, sexism, and other forms of entrenched inequality like the social devaluation of capital-assets.[62] For example, the balance sheet does not, and perhaps cannot, accurately account for the prospect that "race is a structurally given determinative variable in loan rate calculation."[63] It does not suggest an appropriate discount rate to capture the underlying intangible processes that, for example, result in women owing a whopping two-thirds of the $1.7 billion in currently outstanding student loan debt.[64] Nor does it quantify with accuracy the social dynamics of gender discrimination that cause "loan payments [to] collide with the gender pay gap [resulting in a] compounding effect [that] puts a tight squeeze on women's budgets."[65]

Thus, the balance sheet approach's cruel optimism risks merely rubber-stamping all of the past discrimination and inequality that has led to a world in which, as I have argued elsewhere, an investment loan or a loan for capital-asset consumption does not inherently have a positive effect for every borrower for reasons that have to do with underlying social hierarchies and entrenched socioeconomic subordination.[66] A consumer loan regulatory scheme that does not expressly account for this messy reality is one that tacitly sanctions these persistently unequal outcomes. It is one that sees a minimal role for consumer regulation to address real-world socioeconomic inequality along the lines referenced above (i.e., outside the world of payday lending and for-profit schools), remaining optimistic that "private-sector lenders and borrowers [regardless of their relative disadvantage] can be expected to know better than the government where to allocate capital and at

61. *Id.* at 3.

62. *See, e.g.*, KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP 3–4 (2019).

63. CHRISTOPHER J. LEBRON, THE COLOR OF OUR SHAME: RACE AND JUSTICE IN OUR TIME 44 (2013).

64. *Deeper in Debt: 2021 Update*, AM. ASS'N OF UNIV. WOMEN 1 (2021), https://www.aauw.org/app/uploads/2021/05/Deeper_In_Debt_2021.pdf [https://perma.cc/WAC6-NTMU].

65. *Id.*

66. Atkinson, *Borrowing Equality*, *supra* note 54 at 1452–57.

what price."[67] Not even pawnshop loans, one of the pillars of fringe lending,[68] would escape the "light touch" regulatory outlook under Macey's logic.[69]

To be fair, Macey's optimism is not entirely unmitigated. He acknowledges in a footnote that "a loan that might have a positive present value for many people might have a lower (or non-existent) present value for other people because of discrimination."[70] Yet, the balance sheet approach's only concession to this reality is found in its inclusion of the intercategorical "transformative" loan, any loan that causes a twenty-five percent shift in the overall liabilities on a borrower's balance sheet. Ironically, this concession risks undermining the hypothetical balance sheet approach altogether. For example, given racial and gendered disparities in wealth that limit some homebuyers from making a significant down payment, a capital-asset home purchase loan (that would otherwise categorically escape heightened regulation under Macey's proposal) would nevertheless find itself designated as "transformative." Thus, the messiness and recalcitrance of a consumer credit market embedded in a society that continues to struggle with racism, sexism, and inequality may ultimately warp the columns and rows upon which Macey's proposal relies.

Conclusion

Macey's hypothetical balance sheet moves us closer to a regulatory framework that acknowledges the extent to which many Americans struggle with credit as their primary source of survival and opportunity.[71] Nevertheless, the proposal is hampered by a set of assumptions that are not consistent with the reality of a consumer credit market embedded in a society that cannot (or will not) rid itself of discrimination, racism, sexism, and inequality. In this regard, although Macey makes clear his intention that this intervention attend to issues of inequality, his proposal's most significant challenges arise from its own undue simplification of the messy and complex society in which we live.

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67. Macey, *supra* note 1, at 693.

68. *E.g.*, GARY RIVLIN, BROKE USA: FROM PAWNSHOPS TO POVERTY, INC.: HOW THE WORKING POOR BECAME BIG BUSINESS 26 (2010) (describing pawnshops as a current feature of the "fringe financial sector"); GUNNAR TRUMBULL, CONSUMER LENDING IN FRANCE AND AMERICA 24 (2014) (noting that historically, pawnshop loans were "expensive" and "subjected the borrower to potential harassment and were often accompanied by abusive collections techniques"); Rocco d'Este, *The Effects of Stolen-Goods Markets on Crime: Pawnshops, Property Theft, and the Gold Rush of the 2000s*, 63 J. L. & ECON. 449, 451 (2020) ("[P]awnshops can raise the value of criminal opportunities by reducing the transaction costs faced by burglars when selling stolen items.").

69. Macey, *supra* note 1, at 694–95.

70. *Id.* at 694 n.32.

71. *See* Ondersma, *supra* note 39, at 304.