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CREDIT SCORING DUALITY

PAMELA FOOHEY* & SARA STERNBERG GREENE**

I INTRODUCTION

A good credit score is said to be a ticket to financial growth and freedom.¹ Credit scoring of individuals in the United States emerged as a response to the rise of department stores, mail-in catalogues, and other mass marketed consumer goods. Merchants sought a way to predict whether someone who did not live in their neighborhood, whom they had never met, and whom they were unlikely to ever meet would renege on a loan.² Now, three main consumer credit bureaus promulgate credit reports and proprietary credit scores that rule people's lives. They sell their reports and scores to retailers, lenders, employers, utility companies, landlords, and anyone else who might be interested in assessing people's creditworthiness.³ A great credit report and score opens the door to low interest rates on consumer loans, easy access to rental housing, not having to put down money to start utility services, paying less for insurance, and praise from potential employers. Even a good credit score can unlock these benefits.⁴ In contrast, a fair or poor credit score can trap people in a cycle of paying more for credit and utilities, losing out on job opportunities, being denied housing and insurance, being unable to build any savings for emergencies, and possibly facing homelessness.⁵

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** Professor of Law, Duke Law School. The authors thank Doriane Coleman and Mitu Gulati for organizing this volume dedicated to examining the idea of “two (or multiple) Americas” and for inviting us to contribute. We also thank Nikita Aggarwal, Cassandra Havard, and participants at the Consumer Law Scholars Conference 2022 for their comments. All errors are our own.

1. *Alternative Data, Credit Scoring, and Financial Freedom*, DATA & SOC'Y (June 19, 2018), <https://listen.datasociety.net/episodes/alternative-data-credit-scoring-and-financial-freedom> [<https://perma.cc/J2P2-UM6B>].

2. Barbara Kiviat, *Credit Scoring in the United States*, 21 ECON. SOC. 33, 33–35 (2019).

3. Sara S. Greene, *Stealing (Identity) From the Poor*, 106 MINN. L. REV. 59 (2022) (describing how credit reports can affect access to employment, housing, utilities, and credit); Shawn Fremstad & Amy Traub, *Discrediting America: The Urgent Need to Reform the Nation's Credit Reporting Industry*, DEMOS 3–8 (2011), https://www.demos.org/sites/default/files/publications/Discrediting_America_Demos.pdf [<https://perma.cc/FN2H-UHRL>].

4. These benefits are discussed in popular media. See Dana George, *6 Huge Benefits of a High Credit Score*, MOTLEY FOOL (July 21, 2021), <https://www.fool.com/the-ascent/credit-cards/articles/6-huge-benefits-of-a-high-credit-score/> [<https://perma.cc/9W44-NB5G>]; Lindsay VanSomeren & Jordan Tarver, *9 Benefits Of Good Credit And How It Can Help You Financially*, FORBES (July 21, 2021), <https://www.forbes.com/advisor/credit-score/benefits-of-good-credit/> [<https://perma.cc/LB2Q-XY5D>].

5. See Emily Stewart, *Are Credit Scores a Necessary Evil?*, VOX (Oct. 29, 2021), <https://www.vox.com/the-goods/22736387/how-credit-scores-work-equifax-experian-transunion>

Credit scoring is no longer merely about accessing credit. It determines people's ability to access the fundamentals of economic citizenship. In recent years, consumer advocates and researchers have called for inclusion in, alternatives to, and regulation of the credit scoring system.⁶ Presently, the leading response to these calls is support for the use of alternative credit scoring models that rely on different data than that used to calculate traditional credit scores. Businesses, banks, lenders, and some advocates herald these alternate scores as a major breakthrough in increasing access to credit for all, particularly those individuals traditionally left out of credit markets. Although these models may open doors to credit and opportunities for some people, not enough attention has been paid to the pitfalls of alternative scores: they may replicate and entrench the social and economic disadvantages that lead some people to have fair and poor credit scores. Like traditional credit scores, alternative scores leave behind those who are most in need of help and those who have most suffered from historical discrimination. Indeed, the celebration of alternative scores as a breakthrough in equalizing access to credit can serve as a distraction to the fact that alternative scores only help a small subset of those left out of traditional credit markets, and many are *still* left behind, or even potentially worse off, in a world of alternative credit scores. Alternative scores are not the solution to equalizing access to credit.

This article leverages research regarding credit reports and scoring to draw out the potential perils of elevating alternative credit scoring as a leading solution to the socio-economic problems manifest with the current scoring system. Implementing alternative scoring models alone is unlikely to remedy traditional credit scoring's economic sorting of people and communities into have and have-nots. Instead, this article offers ideas for how non-profits and government entities can support those people who do not have the financial privileges that are often needed to succeed in the credit scoring game, whether that game includes traditional or alternative credit scoring models.

A key reality animating the examination of traditional credit reporting and scoring's role in the United States' wealth gap is racial, ethnic, and economic disparities in credit scores themselves. People with low incomes, and especially Black and Latine Americans, are disproportionately likely to have fair or poor credit scores.⁷ Credit scores rely on a handful of inputs that are largely based on prior credit decisions.⁸ These inputs reflect a legacy of discrimination, like

[<https://perma.cc/9Q7R-9CM7>] (“[A] bad credit score can make or break you, and that one bad mark can have real, lasting consequences in your life, . . .”); Fremstad & Traub, *supra* note 3, at 2–3 (discussing consequences of fair and poor credit scores); Mikella Hurley & Julius Adebayo, *Credit Scoring in the Era of Big Data*, 18 YALE J.L. & TECH. 148, 153–57 (2016) (discussing credit scoring).

6. Privacy and big data issues also are raised with traditional and alternative credit scoring. *See, e.g.*, Hurley & Adebayo, *supra* note 5; CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY (2016); FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION (2016). They are beyond this article's scope.

7. Fremstad & Traub, *supra* note 3, at 11.

8. *See infra* Part II.A.

redlining and aggressive marketing of subprime credit to people of color.⁹ People's ability to meet their debt obligations also depends on having steady, good-paying jobs and safe housing situations. But people of color face discrimination in employment and housing decisions.¹⁰

When analyzed, credit scores often do not reflect people's ability to responsibly manage their finances or show that they will be trustworthy employees and tenants. In large part, they reflect people's prior history of financial privilege or disadvantage. As discussed by Luke Herrine, credit scoring creates a cycle of wealth accumulation, on the one hand, or unemployment, homelessness, and poverty, on the other.¹¹

Nonetheless, because having a credit score has become so fundamental to accessing necessities of life like housing and utilities, consumer advocates and the Consumer Financial Protection Bureau (CFPB) have increasingly shone a light on the problems faced by people who are credit invisible or credit unscorable. Credit invisibility refers to an individual who does not appear in the three major credit bureaus' files. An individual is credit unscorable if they have credit files, but their files are too sparse or old to calculate a credit score. Per a CFPB study from 2015, one in five Americans does not have a credit score with any of the three major credit bureaus because of an insufficient credit history. Black, Latine, and lower-income individuals are more likely than other people to lack a credit history sufficient to produce a credit score.¹²

Credit invisibility is a serious issue. The credit invisible struggle with reduced access to credit, housing, cars, and basic necessities, such as the ability to purchase a cell phone without putting down hundreds of dollars.¹³ To date, the identification of this problem has led to proposals designed to bring people into some version of a credit scoring system through the use of alternative scoring models that rely on different data. Proposals for data to add to scoring models

9. Fremstad & Traub, *supra* note 3, at 11–12.

10. See, e.g., Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181 (2008) (describing “[p]ersistent racial inequality in employment, housing, and a wide range of other social domains.”).

11. Luke Herrine, *Credit Reporting's Vicious Cycle*, 40 N.Y.U. REV. L. & SOC. CHANGE 305, 344 (2016) (setting forth how credit reporting can create a “vicious cycle for borrowers with low scores.”). This article builds upon insights in that paper and adds a discussion about the utility of alternative credit scoring as a means of creating a more inclusive credit report system. It thus expands significantly on this and other prior work about credit scoring. See also *Past Imperfect: How Credit Scores and Other Analytics “Bake In” and Perpetuate Past Discrimination*, NAT'L CONSUMER L. CTR. (May 2016), https://www.nclc.org/images/pdf/credit_discrimination/Past_Imperfect050616.pdf [<https://perma.cc/47YH-ZRVK>]; *infra* Part II.

12. *Data Point: Credit Invisibles*, CONSUMER FIN. PROTECTION BUREAU 24–25 (May 2015), https://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf [<https://perma.cc/KPT2-SSQ2>].

13. See *The Credit Score Pandemic Paradox and Credit Invisibility*, NAT'L CONSUMER L. CTR. (Feb. 2021), https://www.nclc.org/images/pdf/special_projects/covid-19/IB_Pandemic_Paradox_Credit_Invisibility.pdf [<https://perma.cc/VUW9-F4RJ>]; Michele Gilman & Rebecca Green, *The Surveillance Gap: The Harms of Extreme Privacy and Data Marginalization*, 42 N.Y.U. REV. L. & SOC. CHANGE 253, 256–80 (2018).

most often include subprime credit, rental, utility, cell phone, cable payment history,¹⁴ school and work attendance,¹⁵ and online browsing history and social media information.¹⁶

Alternative scoring models may benefit some people who otherwise would have been unable to access credit or been denied services based on traditional credit scores.¹⁷ Counter-balanced against the benefit to some people, however, is the potential for alternative models to replicate the socio-economic disparities that plague traditional credit scoring—simply with more data. As evidenced by the COVID-19 pandemic, the additional information used in these models—such as rent and utility payment records—will incorporate into scoring some significant problems that low-income, Black, and Latine households are likely to disproportionately face as soon as they have money troubles. Although counter-intuitive, for some people, being credit invisible is preferable to having a fair or poor credit score.¹⁸

More importantly, calls for alternative scoring models distract from having a larger, crucial discussion about why ranking people based on factors that reflect socio-economic histories and discrimination has failed and will continue to fail many Americans, particularly people of color. Focusing on alternative credit scoring models thereby also distracts from forceful advocacy for the adoption of other ways to help people with less access to the financial privileges and family assistance that often are needed to build financial stability. Instead, the role of credit scoring, including alternative models, in contributing to the widening wealth gap and perpetuating economic inequality in the United States remains under-appreciated.

Part II of this article provides a short history of credit scoring, traversing from the advent of the credit report to the calls for augmented scoring models and regulations. Part III details how the rise in the use of the range of scoring affects the financial mobility of households. These details establish how credit scoring of

14. See *Examining the Use of Alternative Data in Underwriting and Credit Scoring to Expand Access to Credit: Hearing Before the H. Comm. on Fin. Servs.*, 116th Cong. 3 (2019) (statement of Chi Chi Wu, Staff Attorney, Nat'l Consumer L. Ctr.), https://www.nclc.org/images/pdf/credit_reports/testimony-alternative-data-credit-scoring.pdf [<https://perma.cc/R3TS-FDGC>]; *Credit Invisibility and Alternative Data: The Devil is in the Details*, NAT'L CONSUMER L. CTR. (June 2015), https://www.nclc.org/images/pdf/credit_reports/ib-credit-invisible-june2015.pdf [<https://perma.cc/8DKR-UF89>].

15. *Evaluation Rules and Alternative Methods of Determining Creditworthiness*, MD. DEPT. LAB. (Sept. 2021), <https://content.govdelivery.com/accounts/MDDLLR/bulletins/2ef8d8c> [<https://perma.cc/J6LA-EGW6>].

16. *Building a Bridge to Credit Visibility*, CONSUMER FIN. PROTECTION BUREAU (July 2019), https://files.consumerfinance.gov/f/documents/cfpb_building-a-bridge-to-credit-visibility_report.pdf [<https://perma.cc/9FK9-R772>]; see also Gillian B. White, *Can the Flaws in Credit Scoring Be Fixed?*, THE ATLANTIC (Jan. 10, 2017), <https://www.theatlantic.com/business/archive/2017/01/credit-score/512702/> [<https://perma.cc/S97C-DS7H>].

17. See Karan Kaul, *Adopting Alternative Data in Credit Scoring Would Allow Millions of Consumers to Access Credit*, URBAN INST. (Mar. 15, 2021), <https://www.urban.org/urban-wire/adopting-alternative-data-credit-scoring-would-allow-millions-consumers-access-credit> [<https://perma.cc/2QZF-UFEM>].

18. See *Credit Score Pandemic Paradox*, *supra* note 13.

any variety, including models that incorporate alternative data, gives some Americans the gift of easy access to the essentials of economic citizenship, while locking the gates to financial stability and health for other Americans. As concluded in Part IV, credit scoring supports the economic sorting of people and communities into have and have-nots.¹⁹ In response to this problem, Part IV also presents an implementable idea to support people whose financial stability may be hindered by credit scoring. Overall, this article draws needed attention to the current role of credit scoring in households' day-to-day finances and how that role makes credit scoring another cog in dividing Americans into two Americas along economic lines.

II HISTORY OF CREDIT SCORING

The 2017 Equifax credit bureau data breach in which hackers stole up to 143 million Americans' personal information spotlighted the extent to which credit reports and scoring are central to personal financial stability.²⁰ "Theft of Equifax data could lead to years of grief by home buyers and mortgage applicants," read a *Washington Post* headline.²¹ Although people now must worry about cyberattacks that steal their key personal information, credit reporting and scoring started long before there were fancy computers to process information to assess the creditworthiness of Americans. Traditional credit scoring has numerous known flaws, including being error-prone, providing limited information, and aggravating socio-economic divides. These problems have led to proposals for alternatives to traditional credit scoring.

A. Advent of Credit Scoring

As detailed by Jonathan Weinberg, credit bureaus, reports, and scoring trace back to the westward expansion through the mid-1800s. Retailers would converge on cities on the East Coast a couple of times a year to buy merchandise to bring west to sell locally. For retailers, this required a large outlay of cash, which they typically did not have. Enter the creation of mercantile credit, and, at the beginning, a predominately word-of-mouth system for assessing the creditworthiness of retailers from far away.²² This word-of-mouth system fostered the founding of the Merchantile Agency, which had a goal of "pull[ing] together

19. See Pamela Foohey & Nathalie Martin, *Fintech's Role in Exacerbating or Reducing the Wealth Gap*, 2021 U. ILL. L. REV. 459, 466–75 (detailing the disparate economy).

20. See Greene, *supra* note 3, at 2–4 (discussing the data breach); Jonathan Weinberg, "Know Everything That Can Be Known About Everybody": *The Birth of the Credit Report*, 63 VILL L. REV. 431, 431 (2018) (same).

21. Kenneth R. Harney, *Theft of Equifax Data Could Lead to Years of Grief for Home Buyers and Mortgage Applicants*, WASH. POST (Sept. 13, 2017), https://www.washingtonpost.com/realestate/theft-of-data-could-lead-to-years-of-grief-for-home-buyers-and-mortgage-applicants/2017/09/12/ed0f66fc-971a-11e7-82e4-f1076f6d6152_story.html [<https://perma.cc/6JYY-R2UV>].

22. Weinberg, *supra* note 20, at 432–33.

the local knowledge of every community in the U.S., regarding every business owner in that community, and storing it all in a gigantic, centralized, constantly updated file system, available to anyone who paid subscription fees.”²³ The Merchantile Agency soon faced competition from the Bradstreet Company, a competing credit bureau, which pioneered an algorithm that combined estimated wealth and credit into a single six-step rating, moving the industry from credit reports to credit scores.²⁴ Does this all sound familiar? Eventually the Merchantile Agency and the Bradstreet Company—by then re-named the Bradstreet Companies—merged.²⁵ Dunn & Bradstreet is still in business.²⁶

Around the same time as merchantile credit was growing, merchants themselves formed local networks to share information about customers because they increasingly did not know their customers well enough to assess whether they were good credit risks. The resulting reports passed around among retailers detailed the general reputations of potential customers.²⁷ The jump from small business owners, retailers, and local customers to scoring consumers *en masse* was two-fold.

First, large retailers expanded westward, bringing their goods to people across the country without the use of an intermediary. Sears and Spiegel became household names as their catalogues became ubiquitous in middle-class American households. Companies used information on people’s credit application to assign points, such as for occupation and income. Credit was extended to those people whose points were above a pre-set threshold. Such remained the status quo for a few decades, until personal data could be computerized on a mass scale.²⁸

Second, with computing and algorithms, companies like Fair Issac, creator of the now-pervasive FICO credit score, brought the notion of the modern credit score. Fair Issac began to convince retailers and banks to give loans based on “scorecards” that reported “standard, de-contextualized categories of data.”²⁹ The precursors of credit reports relied less on general reputational information and more on people’s financial histories, thereby becoming more standardized.³⁰ Soon after, credit bureaus emerged. They scored people based solely on data held by the bureau, making screening of people “fine-grained and precise,” and

23. *Id.* at 434.

24. *Id.* at 446; see also Josh Lauer, *From Rumor to Written Record: Credit Reporting and the Invention of Financial Identity in Nineteenth-Century America*, 49 *TECH. & CULTURE* 301 (2008) (detailing the history of mercantile credit).

25. *Our History*, DUN & BRADSTREET, <https://www.dnb.com/about-us/company/history.html> [<https://perma.cc/MBB4-MUL4>].

26. *D&B Credit Reporter*, DUN & BRADSTREET, <https://www.dnb.com/products/small-business/dnb-credit-reporter.html> [<https://perma.cc/Z2EW-XQ4D>].

27. Herrine, *supra* note 11, at 311–12.

28. Kiviat, *supra* note 2, at 34.

29. Barbara Kiviat, *The Art of Deciding With Data: Evidence From How Employers Translate Credit Reports into Hiring Decisions*, 17 *SOCIO-ECON. REV.* 283, 287 (2019).

30. Herrine, *supra* note 11, at 312.

allowing lenders to specify cut-off points for extending credit.³¹ These cut-offs transformed into risk-based pricing, first introduced for credit cards and rather soon after in auto and mortgage lending.³²

Three primary credit scoring agencies, known as credit bureaus, now dominate the credit scoring market—Equifax, Experian, and TransUnion.³³ They compile information received from credit card issuers, mortgage lenders, and other sources into credit reports, which the credit bureaus sell, and from which the credit bureaus derive credit scores.³⁴ Traditional credit scores are based on a relatively small set of data points, including history of payment, amount currently owed, mix of credit outstanding, length of credit history, and recent inquiries about credit and extension of credit.³⁵ The information also is used to rank individuals via proprietary scoring models, such as FICO, which 90 percent of lenders use to make decisions about extending credit.³⁶

Credit reports and scoring are no longer solely used for lending decisions. A range of goods and service providers use them, including insurance companies, utility, cell phone, and cable companies. A fair or poor credit score can mean that a customer must put down a large deposit to have utilities turned on or to get a cell phone service plan.³⁷ Health care providers use credit scores to make decisions about who to try to collect payment from for past-due medical expenses.³⁸ About half of American employers report sometimes considering credit history in deciding whom to hire.³⁹ And landlords use credit scores in rental housing decisions. A fair or poor credit score can result in the denial of employment or housing.⁴⁰

B. Problems with Traditional Credit Scoring

Credit scoring statistically stacks people. A credit score is a numerical “summary of a person’s apparent creditworthiness” that purports to “predict the relative likelihood of a negative financial event, such as a default on a credit

31. Kiviat, *supra* note 2, at 34–35.

32. *Id.* at 35; *see also* Sara Sternberg Greene, *The Bootstrap Trap*, 67 DUKE L.J. 233, 255–58 (2017) (detailing the history of credit reports and scores).

33. Hurley & Adebayo, *supra* note 5, at 153–54.

34. Greene, *supra* note 32, at 259–60.

35. *See id.* at 259; Hurley & Adebayo, *supra* note 5, at 156; *How Are FICO Scores Calculated?*, MYFICO, <https://www.myfico.com/credit-education/whats-in-your-credit-score> [<https://perma.cc/76FQ-J7EB>].

36. Hurley & Adebayo, *supra* note 5, at 155 (citing *Analysis of Differences Between Consumer and Creditor-Purchased Credit Scores*, CONSUMER FIN. PROTECTION BUREAU 3–4 (Sept. 2012), https://files.consumerfinance.gov/f/201209_Analysis_Differences_Consumer_Credit.pdf [<https://perma.cc/3ZP3-YUYZ>]).

37. *See* Kiviat, *supra* note 2, at 38–39 (detailing credit scores’ range of use); Fremstad & Traub, *supra* note 3, at 16–20 (same).

38. *See* Fremstad & Traub, *supra* note 3, at 21–22.

39. *See* Kiviat, *supra* note 29.

40. *See id.* at 283–84 (rental housing decisions); Fremstad & Traub, *supra* note 3, at 17–19 (employment decisions); Greene, *supra* note 32, at 261 (employment decisions); Herrine, *supra* note 11, at 339–42 (employment decisions).

obligation.”⁴¹ Credit scoring allows for risk-based pricing. Lenders can slice the stack by thresholds of riskiness. Whereas companies like Sears and Spiegel used the information reported in credit applications to create a line under which it would not extend credit to people, slicing credit scores allows for the extension of credit to almost everyone, just on different terms. In the words of Barbara Kiviat, “[a] decision that used to be about whether or not to lend a person money becomes a decision about the terms under which to lend. Instead of avoiding high-risk borrowers, lenders embrace them, albeit at a high price.”⁴²

Although slicing people in this way brings more consumers into the credit market, which may be economically productive, it also introduces problems that put credit scoring’s use across lending, employment, insurance, and housing decisions into question. Credit reports are notorious for their errors. A Federal Trade Commission study from 2012 found that twenty-six percent of people surveyed had errors in their credit reports. Five percent of people’s reports included material mistakes that potentially could result in credit denials, higher interest rates, larger down payments on utilities, and adverse employment and housing decisions. Even more concerning, individuals with lower levels of education were more likely to have errors on their credit reports.⁴³ People also face significant barriers in their quests to correct those errors, as skillfully detailed by John Oliver on *Last Week Tonight* in 2016.⁴⁴

Problems with credit reports have continued seemingly unabated in recent years, despite public scrutiny of credit reporting agencies in the wake of the Equifax data breach.⁴⁵ In 2020, credit reporting complaints constituted more than half of all the complaints received by the CFPB.⁴⁶ Households in majority Black and Latine neighborhoods are much more likely than households in white neighborhoods to have disputed inaccurate information on their credit reports, per a CFPB study released in late 2021. As detailed in this report, people in majority Black areas were more than three times as likely to have disputes about auto loans appear on their credit reports.⁴⁷ Errors on credit reports can result in

41. Robinson & Yu, *Knowing the Score: New Data, Underwriting, and Marketing in the Consumer Credit Marketplace* 15 (Oct. 2014), https://www.upturn.org/static/files/Knowing_the_Score_Oct_2014_v1_1.pdf [<https://perma.cc/DXH4-SPU2>].

42. Kiviat, *supra* note 2, at 36.

43. *Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003*, FED. TRADE COMM’N 29 (Dec. 2012), <https://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf> [<https://perma.cc/8HPE-QNBL>].

44. *Credit Reports*, LAST WEEK TONIGHT WITH JOHN OLIVER (Apr. 11, 2016), https://www.youtube.com/watch?v=aRrDsbUdY_k [<https://perma.cc/D23G-5JKS>]; see also Hurley & Adebayo, *supra* note 5, at 156 (discussing inaccuracies).

45. See Greene, *supra* note 20 and accompanying text.

46. *CFPB Annual Complaint Report Highlights More Than a Half-Million Complaints Received in 2020*, CONSUMER FIN. PROTEC. BUREAU (Mar. 24, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-annual-complaint-report-highlights-more-than-a-half-million-complaints-received-in-2020/> [<https://perma.cc/VA3Z-B8MN>].

47. *CFPB Finds Credit Report Disputes Far More Common in Majority Black and Hispanic Neighborhoods*, CONSUMER FIN. PROTECT. BUREAU (Nov. 2, 2021), <https://www.consumerfinance.gov/>

more expensive lending terms, higher down payments for utilities and cell phones, higher security deposits for rentals, denial of rental housing, and denial of employment. If minority households are more likely to have disputed information on their credit reports, they logically also will be more likely to pay more for credit and certain goods—and, in part, it may be because of the disputes on their credit reports.

Disproportionate errors on credit reports relates to another problem with credit reporting and scoring. Traditional credit scores rely on a limited set of information, most of which is based on prior credit decisions and loan payment. People who previously have been sliced into less desirable riskiness bands, discriminated against in lending decisions, or excluded from credit markets almost necessarily will have lower credit scores. In addition, people's financial behavior, such as paying every loan due on time, as required to have a good credit score, depends on their family and social support structure. Precarious work and housing situations, an inability to fall back on family for financial help, and barriers to building savings all show up in credit scores—and have much more to do with economic-social structures than people's trustworthiness.⁴⁸ Stated differently, because of their higher likelihood of prior financial insecurity, certain groups of people are more likely to have lower credit scores simply because of who they are and where they come from.

Research shows that people with lower credit scores are often from distinct socio-economic groups that are more likely to face financial insecurity. For instance, credit scores are reflective of a household's income. A Department of Housing and Urban Development study from 2000 found that thirty-three percent of households in neighborhoods with lower incomes had low credit scores, compared to seventeen percent of households in high-income neighborhoods.⁴⁹

America's history of segregation and discrimination in lending—which denied Black Americans loans to start small businesses and purchase homes, and steered minorities to high-interest and otherwise unfavorable loans⁵⁰—continues to show up in credit scoring. Per a 2007 report from the Federal Reserve System, fifty-two percent of Black Americans and thirty percent of Latine Americans had poor or fair credit scores, as compared to sixteen percent of white Americans.⁵¹ Similarly, an analysis of zip-code-level credit score data for Illinois found that in areas with a majority Black population, more than half of adults had credit scores

about-us/newsroom/cfpb-finds-credit-report-disputes-far-more-common-in-majority-black-and-hispanic-neighborhoods/ [https://perma.cc/W3H9-PTZM].

48. See Kiviat, *supra* note 2, at 37 (detailing these dynamics).

49. *An Analysis of the Effects of the GSE Affordable Goals on Low- and Moderate-Income Families*, U.S. DEPT. HOUS. & URBAN DEVELOP. 13 (May 2002), <https://www.huduser.gov/publications/pdf/gsegoals.pdf> [https://perma.cc/4B4K-7993].

50. See Kiviat, *supra* note 2, at 37.

51. *Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit*, BD. OF GOVERNORS OF FED. RES. SYS. (Aug. 2007), <https://www.federalreserve.gov/boarddocs/rptcongress/creditscore/creditscore.pdf> [https://perma.cc/4K2Z-UKXA].

below 620 and that in areas with a majority Latine population, 31 percent of adults had credit scores below 620. In comparison, only 20 percent of people in Illinois overall had credit scores below 620.⁵² Typically a score between 670 and 630, though sometimes as low as 580, is deemed a fair credit score, and anything lower is considered a poor credit score.⁵³

Credit scoring reflects, numerically, America's racial and economic divides. To reiterate, lower credit scores can result in higher interest rates and fees for loans, higher down payments for utilities and cell phones, more expensive insurance policies, higher security deposits for rentals, denial of rental housing, and denial of employment.

The racial, ethnic, and economic disparities baked into credit scores have resulted in some states banning or curtailing their use for decision-making in regard to particular products. States typically enact these laws after the publication of evidence showing that people from certain communities or socio-economic groups pay more for these products than similarly-situated people from other communities and groups. Most pervasive are laws prohibiting or restricting the use of credit scores in determining insurance rates.⁵⁴ In addition, a growing number of states and cities prohibit or restrict the use of credit scores in employment decisions.⁵⁵

These laws raise the question of alternatives: what should insurance companies and employers rely on to make these determinations? This question links with the third problem that has emerged with credit reporting and scores: credit invisibility. Based on a report published in 2016, forty-five million

52. *Bridging the Gap: Credit Scores and Economic Opportunity in Illinois Communities of Color*, WOODSTOCK INST. 5 (Sept. 2010), https://woodstockinst.org/wp-content/uploads/2013/05/bridging-thegapcreditscores_sept2010_smithduda.pdf [<https://perma.cc/P7MM-S778>].

53. See Erin El Issa & Bev O'Shea, *What Is a Fair Credit Score?*, NERDWALLET (Aug. 19, 2021), <https://www.nerdwallet.com/article/finance/fair-credit-score-good-credit> [<https://perma.cc/M29X-74DK>] (defining a fair credit score as between 630 and 689); Beverly Harzog, *What Is a Fair Credit Score?*, U.S. NEWS & WORLD REPORT (June 9, 2021), <https://creditcards.usnews.com/articles/what-is-considered-a-fair-credit-score> [<https://perma.cc/2DCG-PFMN>] (defining a fair credit score as between 580 and 669); Adam McCann, *What Is A Fair Credit Score? Learn The Meaning*, WALLETHUB (Mar. 17, 2021), <https://wallethub.com/edu/cs/what-is-a-fair-credit-score/39025> [<https://perma.cc/3AWF-TY4R>] (defining a fair credit score as "in the range of 620-659").

54. Washington is one of the most recent states to enact a ban on credit-based insurance scoring. *Credit Scoring Ban*, WASH. STATE OFF. INS. COMM'R, <https://www.insurance.wa.gov/credit-scoring-ban> [<https://perma.cc/5VUV-WS6M>]. See also Barbara Kiviat, *The Moral Limits of Predictive Practices: The Case of Credit-Based Insurance Scores*, 84 AM. SOC. REV. 1134 (2019) (discussing credit-based insurance scores); Herrine, *supra* note 11, at 337–39 (same).

55. See Nancy Gunzenhauser Popper & Amanda M. Gomez, *House Passes Bill Restricting Employer Credit Checks*, NAT. L. REV. (Feb. 15, 2020), <https://www.natlawreview.com/article/house-passes-bill-restricting-employer-credit-checks> [<https://perma.cc/FX47-NARR>]; Leora Friedberg, Richard M. Hynes, & Nathaniel Pattison, *Who Benefits from Bans on Employer Credit Checks?*, J. L. & ECON. (forthcoming), https://pattison-nate.github.io/files/CreditReportBans_Final.pdf [<https://perma.cc/URA-8KEG>]; Amy Traub & Sean McElwee, *Bad Credit Shouldn't Block Employment*, DEMOS (2016), <https://www.demos.org/sites/default/files/publications/BadCreditShouldntBlockEmployment.pdf> [<https://perma.cc/EQU5-EYSY>].

Americans, about twenty percent of the adult population at the time,⁵⁶ did not appear in the three major credit bureaus' files, or their files were too sparse or old to calculate a credit score.⁵⁷

Credit invisibility similarly reflects America's racial, ethnic, and economic divides. As noted above, Black, Latine, elderly, younger, and lower-income Americans are more likely than other Americans to lack a credit history sufficient to produce a credit score.⁵⁸ Almost thirty percent of consumers living in low-income neighborhoods are credit invisible, as compared to only about four percent of people living in higher-income neighborhoods. Black and Latine individuals are disproportionately more likely than white or Asian individuals to be credit invisible: fifteen percent versus nine percent.⁵⁹

Credit invisibility can prevent people from accessing the range of opportunities that typically require a credit check. This includes housing, mortgages, auto loans, and education loans. Indeed, access to most credit typically is dependent on a credit score. The credit invisible may be denied credit altogether or asked to pay significantly higher rates.⁶⁰ This leads people to turn to alternative, higher-cost products that stymie financial stability and growth.⁶¹ In contrast, having access to affordable credit serves as a ticket to building wealth, upward socio-economic mobility, and economic stability.

C. Rise of Alternative Credit Scoring

The increasing attention to the problems of credit invisibility in recent years has led consumer advocates, legislators, and financial regulators to press for the addition of information to credit scoring models. Proposals most typically call for the inclusion of payment records from utilities, cable television and cell phone providers, and landlords. The logic underlying adding this information is that people who lack the loan repayment history needed to calculate a traditional credit score almost always have some bill repayment histories. These histories can show lenders and providers of goods and services that the person has a history of repaying debt as agreed, which is what companies are trying to assess with a credit score and credit report.

Some proposals also call for the inclusion of work and school attendance history and a limited set of information from Internet usage, such as browsing history.⁶² The logic underlying adding this information is that since traditional credit scores consider behavioral history related to finances, if data about finances are not available, other behavioral attributes will suffice. Big data and

56. *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> [<https://perma.cc/7W72-8UF5>].

57. Kenneth P. Brevoort, Philipp Grimm, & Michelle Kambara, *Credit Invisibles and the Unscored*, 18 CITYSCAPE 9 (2016).

58. *Id.*; *Data Point: Credit Invisibles*, *supra* note 12.

59. *Data Point: Credit Invisibles*, *supra* note 12, at 24.

60. *Examining the Use of Alternative Data*, *supra* note 14.

61. *Building a Bridge to Credit Visibility*, *supra* note 16, at 7.

62. See *supra* notes 14–16 and accompanying text.

machine learning can create predictive models based on these behavioral attributes, which are traceable for almost everyone.⁶³ Theoretically, more data will increase the precision and predictiveness of alternative credit scoring models.⁶⁴

The lending and business community has expressed strong interest in adding more information into mainstream credit products. Credit scoring of all types is a multi-million-dollar enterprise for credit bureaus.⁶⁵ For instance, in 2022, Equifax will add buy now, pay later (BNPL) loans to its credit reports and scores.⁶⁶ BNPL loans typically are point-of-sale financing for the purchase of goods that allow people to pay in a series of equal installments, rather than all at once.⁶⁷ Equifax stated that adding BNPL payment history will provide lenders “a fuller picture of people’s financial commitments, like how much they owe on these plans,” which Equifax predicts may increase some people’s credit scores.⁶⁸

Beyond the money to be made from new consumer credit products themselves, some lenders think that alternative scoring will increase their profits. Lenders’ logic seems to be that providing access to appropriate credit products for those currently credit invisible may serve as an on-ramp to credit visibility, bringing more consumers to mainstream lenders.⁶⁹ Several large banks, including JP Morgan Chase, Bank of America, and Wells Fargo have agreed to launch a pilot program through which the banks share checking account information, with the goal of increasing access to credit cards for those with no credit scores. The sharing of checking account information will allow banks to identify potential customers whose checking accounts show financial responsibility.⁷⁰ Traditional credit scoring companies also have begun to offer lenders, landlords, and other businesses alternative credit scoring products.⁷¹

63. Islam Zekry, *How Alternative Credit Scoring Can Work for the Unbanked . . . and the Bottom Line*, CTR. FOR FIN. INCLUSION (Oct. 24, 2019), <https://www.centerforfinancialinclusion.org/how-alternative-credit-scoring-can-work-for-the-unbanked-and-the-bottom-line> [<https://perma.cc/MV8G-63EB>].

64. Hurley & Adebayo, *supra* note 5, at 163.

65. Ken Sweet, *Equifax Makes Money by Knowing a Lot About You*, USA TODAY (Oct. 6, 2017), <https://www.usatoday.com/story/money/personalfinance/2017/10/06/equifax-makes-money-knowing-lot-you/738824001/> [<https://perma.cc/9J4M-PT3Z>].

66. Alicia Adamczyk, *Equifax is Adding Buy Now, Pay Later Payments to Credit Reports. Here’s How it Could Affect Your Score*, CNBC (Dec. 13, 2021), <https://www.cnbc.com/2021/12/31/equifax-is-adding-buy-now-pay-later-payments-to-credit-reports.html> [<https://perma.cc/K7CG-33FR>].

67. Jason Mikula, *Buy Now, Pay Later vs POS Lending, a Crash Course*, FINTECH BUS. WEEKLY (Nov. 22, 2020), <https://fintechbusinessweekly.substack.com/p/buy-now-pay-later-vs-pos-lending> [<https://perma.cc/2FD6-CQZ9>]. One example of such a program is the company Affirm, which allows people to buy a variety of goods using the buy now, pay later scheme. See *How It Works*, AFFIRM, <https://www.affirm.com/how-it-works> [<https://perma.cc/2J99-YD4G>].

68. See Adamczyk, *supra* note 66.

69. *Building a Bridge to Credit Visibility*, *supra* note 16, at 13.

70. Elena Botella, *Will JPMorgan’s New Initiative Help “Credit Invisible” Americans Get Their First Credit Card?,”* FORBES (May 19, 2021), <https://www.forbes.com/sites/elenabotella/2021/05/19/will-jpmorgans-new-initiative-help-credit-invisible-americans-get-their-first-loan/?sh=705223c51ce5> [<https://perma.cc/84SA-VJ2B>].

71. See *Experian RentBureau*, EXPERIAN, <https://www.experian.com/rentbureau/rental-reporting>

In addition, there has been limited legislative and regulatory action regarding alternative credit scoring. Most recently, Maryland enacted a law that, as of October 1, 2021, requires financial institutions—banks, credit unions, and savings and loan associations—to consider “alternative indications of potential creditworthiness,” such as rental or mortgage payments, utility payment history, school attendance, and work attendance, as well as other indicators as requested for the consumer application.⁷² In September 2021, government-sponsored enterprise Fannie Mae announced that it will incorporate rental payments in its automated underwriting system for mortgages, with the goal of bringing home ownership opportunities to “would-be borrowers who have historically been overlooked by the traditional mortgage and banking system.”⁷³

Finally, although there is no existing federal law on alternative credit scoring, Congress has held hearings about its potential and has considered three draft bills—the Comprehensive CREDIT Act, the Protecting Your Credit Score Act of 2021, and the National Credit Reporting Agency Act.⁷⁴ The first two bills are aimed at providing people with more transparency about their credit reports and scores, including the ability to more easily dispute and correct inaccurate information. The Comprehensive CREDIT Act also calls for the exclusion of certain medical and student loan debt data, and for a study of the effects of inclusion of alternative data on the credit invisible and people with thin credit files.⁷⁵

Perhaps most significantly, the National Credit Reporting Agency Act would create a government-run credit reporting bureau administered by the CFPB. This bureau would produce a government credit score for consumers who opt in to

[<https://perma.cc/Z24K-2DVT>]; *Alternative Data*, TRANSUNION, <https://www.transunion.com/product/alternative-data> [<https://perma.cc/ZX3S-5ET8>].

72. See *Evaluation Rules and Alternative Methods of Determining Creditworthiness*, supra note 15.

73. Michele Lerner, *Fannie Mae to Include Rent Payments in Would-be Applicants' Credit History Review*, WASH. POST (Sept. 8, 2021), <https://www.washingtonpost.com/business/2021/09/08/fannie-mae-include-rent-payments-mortgage-applicants-credit-history-review/> [<https://perma.cc/G7VD-52VD>]. Loan applicants have the opportunity to opt out of this new system. *Id.*

74. *Examining the Use of Alternative Data in Underwriting and Credit Scoring to Expand Access to Credit*, Task Force on Financial Technology, U.S. HOUSE COMM. ON FIN. SERVS. (July 25, 2019), <https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=404003> [<https://perma.cc/6NCC-CAZ2>]; *Hybrid Hearing - A Biased, Broken System: Examining Proposals to Overhaul Credit Reporting to Achieve Equity*, U.S. HOUSE COMM. ON FIN. SERVS. (June 29, 2021), <https://financialservices.house.gov/events/eventsingle.aspx?EventID=407957> [<https://perma.cc/MQH9-WSWP>]. See also Jayme Deerwester, *Congress Considers Credit-reporting Overhaul, Including Putting Government in Charge of Scores*, USA TODAY (July 2, 2021), <https://www.usatoday.com/story/money/personalfinance/2021/07/02/congress-credit-score-overhaul-proposal-act/46965135/> [<https://perma.cc/KX3A-MM26>].

75. See Lindsay C. Demaree, *Comprehensive CREDIT Act Moves to Senate after Passing in House*, BALLARD SPAHR (Feb. 6, 2020), <https://www.consumerfinancemonitor.com/2020/02/06/comprehensive-credit-act-moves-to-senate-after-passing-in-house/> [<https://perma.cc/Z54T-6KEM>]; Adam S. Minsky, *New Bills Would Reshape Credit Reporting For Private Student Loan Borrowers And Other Consumers*, FORBES (July 8, 2021), <https://www.forbes.com/sites/adamminsky/2021/07/08/new-bills-would-reshape-credit-reporting-for-private-student-loan-borrowers-and-other-consumers/> [<https://perma.cc/CHT8-9WL9>].

using the government option. The Act calls for the bureau to be advised by a committee of consumer advocates, academics, lenders, and others, who will evaluate proposals for the use of alternative data in scoring models.⁷⁶

III

SOCIO-ECONOMIC ENTRENCHMENT THROUGH SCORING

Proponents of alternative credit scoring tout it as a solution to many of credit scoring's problems, from credit invisibility to the potentially detrimental effect of errors in the information reported to credit bureaus incorporated into traditional credit scores.⁷⁷ However, an intensive examination of how traditional credit scores perpetuate financial marginalization teaches that alternative credit scoring likely will do little to combat certain people's lack of access to credit and opportunities that allow them to achieve financial stability and growth. Instead, the range of scoring techniques will continue to feed socio-economic inequality in America.

A. Traditional Credit Scoring

At its core, credit scoring relies on economic inputs to predict whether people will pay their bills in the future. Traditional credit scores look to past credit experiences. Whether someone will have positive experiences with credit depends, in part, on their access to resources to meet their debt obligations, including their access to resources at the beginning of their credit journeys, potentially gifted to them by their family.

People from families with already accumulated wealth or those with prior capital are privileged in this scheme. They will be more likely to show they are worthy of credit in the first instance and then will be more likely to be able to pay back that credit. This will garner them higher credit scores, which will give them access to more credit with attractive terms, such as lower interest rates. They also will have easier access to rental housing and will not be required to put down money to start utilities or get a cell phone plan. Overall, they will save money—because, bluntly, they had some money initially.

In contrast, people from families with little or no accumulated wealth are less able to demonstrate they are worthy of credit as an initial matter and may receive less desirable credit in the first instance, which they will have more trouble paying, both because it is more expensive and because they have fewer resources to call upon during financially tight times. This will yield lower credit scores, which will require them to continue to take on higher-cost credit with less attractive terms, which, in turn, will be more difficult to pay back. As previously highlighted, they also may have to pay more for rental housing and may have to

76. *National Credit Reporting Agency Act*, H.R. ____, 117th Cong. (2021), <https://docs.house.gov/meetings/BA/BA00/20210629/112868/BILLS-117pih-NationalCreditReportingAgen-U1.pdf> [<https://perma.cc/G3BS-73QS>].

77. See Kaul, *supra* note 17; White, *supra* note 16.

put down significant sums of money to start utilities or get cable and cell phone plans. Overall, they will have trouble saving money and building good credit—because, bluntly, they did not have money initially. This outcome may happen regardless of whether someone has largely healthy records of paying day-to-day bills.

In this way, traditional credit scores create two main, distinct cycles of financial movement. Those who initially start out relatively well end up with good or excellent credit reports and scores, which aid their financial mobility and well-being. Those who initially start out with relatively little end up with fair or poor credit reports and scores, which result in financial immobility or even a downward financial spiral.⁷⁸ As Luke Herrine has noted previously, “equality in credit markets cannot be untied from equality outside of them.”⁷⁹

Existing socio-economic divisions in the United States can predict, generally, who will end up in which credit scoring cycle. Because of a history of discrimination and limited ability to grow wealth, Black, Latine, and other ethnic minorities start out with less and must take on more debt that is likely to come with high interest rates and fees. Beyond paying more for credit, in general, they also face barriers to obtaining and keeping stable, good-paying jobs, which threatens their ability to stay current with debts, which is reflected by even lower credit scores.⁸⁰

Traditional credit scoring is a fundamental part of the financial immobilization and economic disenfranchisement of communities of color. Lending discrimination now may be illegal, at least on paper,⁸¹ but credit scoring disparities reflect the structural roots of racial and ethnic economic inequality in the United States. Credit reports and scores use outside the lending context serves to exacerbate economic exclusion. As Amy Traub, then-associate director of policy and research at Demos, stated in Congressional testimony about credit reporting: “Although credit scores never formally take race into account, they draw on data about personal borrowing and payment history that is profoundly shaped by generations of discriminatory public policies and corporate practices that limited access to wealth for Black and Latine families.”⁸²

78. See Herrine, *supra* note 11, at 331–36 (describing this cycle).

79. *Id.* at 345.

80. See Pager, *supra* note 10.

81. The Equal Credit Opportunity Act prohibits discrimination in any aspect of a credit transaction based on certain characteristics, including race and national origin. *What Protections Do I Have Against Credit Discrimination?*, CONSUMER FIN. PROTECTION BUREAU, <https://www.consumerfinance.gov/fair-lending/> [https://perma.cc/TQW2-XHEY]. The Fair Housing Act prohibits discrimination in home mortgage lending on the basis of race and national origin, among other characteristics. *Fair Lending*, U.S. DEPT. HOUSING & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_lending [https://perma.cc/HF9X-3DZV].

82. *A Biased, Broken System: Examining Proposals to Overhaul Credit Reporting to Achieve Equity: Hearing Before the H. Comm. on Fin. Servs.*, 117th Cong. 1 (2021) (statement of Amy M. Traub, Associate Director of Policy and Research, Demos), <https://docs.house.gov/meetings/BA/BA00/20210629/112868/HHRG-117-BA00-Wstate-TraubA-20210629.pdf> [https://perma.cc/QP2H-3DNN].

Scholars, lawmakers, and consumer advocates have increasingly discussed the crux of these insights about the socio-economic entrenchment problems with traditional credit scoring in recent years.⁸³ The most prominent ideas coming out of these discussions are to make changes to the credit scoring model by including more data, by requiring the faster removal of negative credit information, and by overhauling the process for disputing items on credit reports.⁸⁴ Alternative credit scoring has garnered particular enthusiasm as a way to increase equity and economic opportunity.

B. Alternative Credit Scoring

Although well-intentioned, alternative methods of scoring people are likely to do little to stop or slow the credit scoring cycle. Advocates of alternative credit scoring note that there are millions of Americans who pay their bills such as rent, utilities, and phone on time, but these same people are not wealthy enough to have mortgages or other “healthy” lines of credit to garner them good or excellent credit scores.⁸⁵ As Professor Darrick Hamilton notes: “The way scores are calculated definitely privileges individuals with capital in a different way than working-class individuals.”⁸⁶ Alternative credit scores seemingly should level the playing field, placing working-class Americans on similar footing as other Americans. Similarly referencing the working-class, Grovetta Gardineer, former Senior Deputy Comptroller for Bank Supervision Policy at the Office of the Comptroller of the Currency, in supporting alternative credit scores, noted that millions of Americans who are credit invisible “may be hard-working, responsible people who regularly pay their bills on time” and may be deemed credit worthy if “their full financial record” is reflected in their credit scores.⁸⁷

Of all the variables proposed for inclusion in alternative credit scores, a few have attracted widespread enthusiasm. Adding rental payment history to scoring is perhaps the most ubiquitous proposal. On the surface, including rental payments appears to increase equity in credit scoring by adding a variable akin to regular mortgage payments for those individuals without the wealth needed to own real property. Positive rental payment history will mirror positive mortgage payment history.

However, millions of Americans struggle to pay rent each year.⁸⁸ Housing has become less affordable over time. Rent increases have far outpaced income

83. See, e.g., Kiviat, *supra* note 2 (discussing the implications of “algorithmic governance” via credit scoring); Herrine, *supra* note 11; NAT’L CONSUMER L. CTR., *supra* note 11.

84. See Stewart, *supra* note 5 (discussing the Comprehensive CREDIT Act).

85. *Building a Bridge to Credit Visibility*, *supra* note 16, at 16–18; Kaul, *supra* note 17; Abby Wemimo, *Bridging the Racial Wealth Gap Through Credit Building*, RACISM AND THE ECON. FOCUS ON FIN. SERVS. (2021), <https://www.minneapolisfed.org/~media/assets/events/2021/racism-and-the-economy-focus-on-financial-services/wemimo-proposal.pdf> [<https://perma.cc/GB3N-HQ8D>].

86. White, *supra* note 16.

87. Kaul, *supra* note 17.

88. *American Families Face a Growing Rent Burden*, THE PEW CHARITABLE TRS. (Apr. 2018), https://www.pewtrusts.org/~media/assets/2018/04/rent-burden_report_v2.pdf [<https://perma.cc/86VV->

growth, which has been stagnant for those with middle and low incomes for decades. Between 2001 and 2015, the median rent rose thirty-two percent. During the same period, income declined by an average of 0.1 percent annually.⁸⁹ In turn, a higher proportion of low-income families spent thirty percent or more of their pre-tax income on housing.⁹⁰ These households, referred to as “rent burdened,” are not uncommon; in 2017, thirty-eight percent of all renter households were rent burdened. Unsurprisingly, given the history of segregation and discrimination in lending, there are significant racial disparities in rent burdened households. In 2017, forty-six percent of Black renter households were rent burdened, compared to thirty-four percent of white renter households.⁹¹

Rent-burdened households also tend to be financially insecure. Almost two-thirds of such households had less than \$400 cash in the bank, and of those two-thirds of rent burdened households who had very low savings, eighty-four percent were Black-headed. Half of all rent burdened families had less than \$10 in savings across all liquid assets.⁹² Thus, one small financial shock, such as a needed car repair, trimmed working days, or an illness, could result in late rent.⁹³

People’s struggles to pay rent were exacerbated during the COVID-19 pandemic. The pandemic provides an example of how including rent payment history in credit scores may hurt people more than remaining credit invisible. As of February 2021, about ten million Americans, or eighteen percent of renters, were behind on rent payments.⁹⁴ Various Congressional actions, such as multiple extensions of the eviction moratorium, kept tenants from being kicked out of rental housing. Had monthly rent payments been reported to credit agencies as part of alternative credit scoring requirements, almost ten million Americans’ scores would have been impacted negatively. Although alternative credit scores that include rental payments may help some Americans, for those who are struggling the most, such scoring may worsen their financial problems—*no* credit score is better than a very *low* credit score. Verifiable low credit scores can serve as sorting mechanisms that preclude people from getting jobs, reasonable car insurance rates, and turning on utilities without fronting a hefty deposit. For many Americans who struggle in an economy reliant on credit scoring, alternative credit scores that include rental payments may be at best neutral—if people are given the choice to enroll in rent payment inclusion—or detrimental—if inclusion of rent payments is required.

7D8B]; see also Michael Karpman, Stephen Zuckerman, & Dulce Gonzalez, *Material Hardship Among Nonelderly Adults and Their Families in 2017*, URB. INST. 6 (Aug. 2018), https://www.urban.org/sites/default/files/publication/98918/material_hardship_among_nonelderly_adults_and_their_families_in_2017_0.pdf [<https://perma.cc/S9XG-4RFY>] (reporting that 10% of adults did not pay the full amount of the rent or mortgage or were late with a payment in 2017).

89. *American Families Face a Growing Rent Burden*, *supra* note 88, at 6.

90. *Id.* at 4.

91. *Id.*

92. *Id.* at 5.

93. Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 NYU L. REV. 515, 557–58 (2013).

94. NAT’L CONSUMER L. CTR., *supra* note 13.

Besides adding rent payment history, advocates for alternative credit scoring often argue for the inclusion of utility payment history. Under the current system, most utility companies only report extremely delinquent utility accounts to credit agencies. The argument for including utility payments in alternative credit scores similarly is that almost everyone has a consistent utility payment history, which can evidence financial responsibility. For people who cannot build a credit history via other indicators, utility payment history can show responsible financial behavior.

However, as with rent payments, many Americans simply do not make enough money to consistently pay utility bills on time. When people face a cash shortfall, they may be more likely to pay rent and stay housed than pay utility bills. In addition, as Chi Chi Wu, an attorney with the National Consumer Law Center has noted, paying utilities on time is particularly difficult for consumers who live paycheck to paycheck in states with weather extremes.⁹⁵ Extreme weather leads to people incurring especially high electric or natural gas charges. Customers often must defer payments during these months, but they usually eventually catch up.⁹⁶ During these periods, customers depend on state consumer protections that prohibit utility providers from shutting off services to vulnerable people during the winter.⁹⁷ Customers then use tax refunds to pay past-due utility bills or enter into pay-off plans to slowly pay for past services during months with lower utility usage and thus lower bills.

If monthly utility payments were reported to credit reporting agencies as part of an overhaul of the credit scoring rubric, the millions of Americans who face economic hardship during extreme weather months would see negative information appear on their credit reports and be incorporated into their credit scores.⁹⁸ As with the inclusion of rent payment history, the negative effect will not be as pronounced, and may actually benefit some individuals.⁹⁹ But wholesale incorporation of timely utility bill payment as an indicator of responsible financial behavior may penalize the otherwise credit invisible and people with fair or poor traditional credit scores.¹⁰⁰

95. *A Biased, Broken System: Examining Proposals to Overhaul Credit Reporting to Achieve Equity: Hearing Before the H. Comm. on Fin. Servs.* 117th Cong. 18–19 (2021) (statement of Chi Chi Wu, Staff Attorney, Nat'l Consumer L. Ctr.), https://www.nclc.org/images/pdf/credit_reports/Testimony_HFSC_credit_reporting_overhaul.pdf [<https://perma.cc/79JJ-KXQH>].

96. John Howat, *Full Utility Credit Reporting: Risks to Low Income Consumers*, NAT'L CONSUMER L. CTR. (Dec. 2009), https://www.nclc.org/images/pdf/credit_reports/credit_reports_full_utility_dec_2009.pdf [<https://perma.cc/2VKJ-72N4>].

97. NAT'L CONSUMER L. CTR., *supra* note 14.

98. *See A Biased, Broken System: Examining Proposals to Overhaul Credit Reporting to Achieve Equity*, statement of Chi Chi Wu, *supra* note 95.

99. *Id.*

100. *See* Laura M. Tach & Sara Sternberg Greene, "Robbing Peter to Pay Paul": *Economic and Cultural Explanations for How Low-Income Families Manage Debt*, 61 SOC. PROBS. 1, 13 (2014) (elucidating the juggling act performed by families using debt to finance basic necessities). As with the government-run credit reporting agency proposed by the National Credit Reporting Agency Act, people could be afforded an opt-in or opt-out option for the inclusion of alternative data. However, opting in or out itself may provide signals to those who use alternative credit scores, the effect of which could be to

Payment on subprime loans is another potential source of data for alternative credit scores. Many lower-income consumers rely on subprime credit, such as payday loans, because they cannot access traditional consumer credit. As with the incorporation of rent and utility payment history, more information does not always mean more access. Numerous studies have shown that subprime credit leads to a cycle of indebtedness; research suggests it is designed to lead to this cycle. According to the CFPB, four out of five payday loans are reborrowed within a month, and almost one-in-four initial payday loans are re-borrowed nine times or more.¹⁰¹ Since credit scoring companies have specifically stated that the use of subprime credit can negatively affect scores,¹⁰² it is likely that including such data will hurt, rather than help, most subprime credit users.¹⁰³

Beyond the alternative data of payment histories of rent, utility, and other bills, some proposals call for the integration of work and school attendance history. The perils of incorporating attendance history also may outweigh the benefits of inclusion. Good attendance depends, in part, on people's ability to consistently physically get to work and school on time. Whether people are able to do so, in turn, turns on where they live—that is, their commute. The credit invisible and people with poor or fair credit scores, who tend to be lower-income and from communities of color, disproportionately lack access to cars and are more likely to reside in areas with limited, time-consuming transportation options.¹⁰⁴ Logically, if it is difficult to get to work or school, regardless of people's reliability and responsibility, they will be more likely to have tarnished work and school attendance records. Relatedly, research shows that having a car increases people's probability of employment.¹⁰⁵ Incorporating attendance data, again, disadvantages those populations for whom the inclusion of alternative data is hoped to help foster financial inclusion.

In short, though adding alternative data to credit scores will bring some credit invisible people into the mainstream credit market, and may help those people who are credit visible improve their currently poor or fair credit scores, the harm of relying on these data to those financially struggling the most may outweigh the benefit to some.

even more negatively affect those individuals whose extra information is unlikely to improve their scores. A goal of prioritizing assisting those individuals with fair or poor traditional credit scores or the credit invisible counsels against providing an opt-in or opt-out framework for added or alternative data.

101. *CFPB Finalizes Rule To Stop Payday Debt Traps*, CONSUMER FIN. PROTECTION BUREAU, (Oct. 5, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-rule-stop-payday-debt-traps/> [<https://perma.cc/AW4P-5BLW>].

102. NAT'L CONSUMER L. CTR., *supra* note 14.

103. *A Biased, Broken System: Examining Proposals to Overhaul Credit Reporting to Achieve Equity*, statement of Chi Chi Wu, *supra* note 95, at 19.

104. See Fang Zhao & Thomas Gustafson, *Transportation Needs of Disadvantaged Populations: Where, When, and How?*, FED. TRANSIT ADMIN. 1–2 (Feb. 2013), https://www.transit.dot.gov/sites/fta.dot.gov/files/FTA_Report_No._0030.pdf [<https://perma.cc/PGH3-SGY8>] (summarizing transportation needs in disadvantaged populations).

105. Pamela Foohey, *Bursting the Auto Loan Bubble in the Wake of COVID-19*, 106 IOWA L. REV. 2215, 2216 (2021).

More broadly, to date, the idea of alternative credit scoring largely has been celebrated as increasing access to credit and other markers of economic citizenship to those populations who historically have been discriminated against and shut out of beneficial economic participation. This celebration has occurred without much scrutiny of the alternative inputs, which allows for the advancing of a convenient remedy for the uncomfortable reality of historical racism and other discrimination that traditional credit scoring helps perpetuate. Indeed, alternative credit scoring thereby gives the credit scoring industry a veil of inclusiveness. This veil distracts from the prospect that alternative credit scoring will become a mechanism for the industry to make even more profit while continuing to maintain a product that serves to separate Americans into two groups based on criteria reflective of past injustices and life situations rather than future financial prospects. Perhaps most importantly, this distraction significantly impedes discussion of how to cure the root causes of credit score disparities.

IV

CONCLUSION: COMBATING SCORING DUALITY

Credit scoring impedes the financial stability of some Americans, while boosting the financial mobility of other Americans. Which Americans benefit from credit scoring's duality is predictable. Those who start off with more resources generally succeed in the credit scoring game; those who start off lower on the socio-economic ladder generally fail in the credit scoring game. Crucially, the addition of more data to craft alternative credit scores likely will do little to affect the balance of whose financial prospects are enhanced or stunted by the use of credit scoring. The continued legacy of economic, racial, and ethnic inequality is so pervasive that almost every data point will reflect socio-economic factors beyond people's control. As such, the range of credit scoring alternatives will continue to affect the financial mobility of American households, sorting people into haves and have-nots.

Nonetheless, at present, the credit scoring system remains, and people must place their financial future in its hands. All of the recent legislative proposals will not dramatically alter the credit scoring system. The Comprehensive CREDIT Act includes some restrictions on the use of currently-included data and requires a study of how the inclusion of alternative data will impact the availability and affordability of credit for the credit invisible and others with limited credit histories.¹⁰⁶ The Protecting Your Credit Score Act seeks to establish an online web portal that will allow people to access their credit report and score and to dispute inaccurate information.¹⁰⁷ And the National Credit Reporting Agency Act's government-issued credit score may include alternative data, to be considered by an advisory committee.¹⁰⁸ Although the changes proposed by these

106. See Demaree, *supra* note 75 (listing the salient impacts of the Comprehensive CREDIT Act).

107. Minsky, *supra* note 75.

108. See *supra* note 76 and accompanying text.

three bills are needed and will help some people who struggle in a credit reporting system rife with errors and inequities, each of these proposals presumes the existence of credit reports and credit scores.¹⁰⁹

As such, what the credit invisible and those people with poor and fair credit scores need is help playing within a credit scoring system that produces outcomes largely based on prior access to credit, money, and financial privilege more generally. Those people who succeed start with a basis to build upon: they are helped by family, they have a small nest egg of cash that they can call upon during times of distress, or they have social capital that allows them to move from their adolescent years, through education, and into the workforce with minimal setbacks that impact their ability to build a good credit history.¹¹⁰ Stated succinctly, they have access to backstops.

People with backstops, of course, tend to be from white communities and upper-middle class families. They also are older, established in their careers and communities. Credit scores, in part, measure access to past opportunities and past-built wealth, which likely will continue to be true even when alternative data is added to their calculation.

The same sort of backstops can be provided to people who lack past opportunities and wealth, particularly when starting their credit journeys or after suffering a financial impediment. The most needed backstops are for products and services that are vital to people's safety and livelihoods, such as housing, car loans, utilities, and affordable emergency health care. Staying current on payments on these expenses also may build people's credit histories, especially if more data is added to credit reports and scores. Nonprofits and community organizations could provide guarantees to those who otherwise might be ineligible to rent an apartment or who otherwise might be required to make large down payments for utilities or cell phones because of their credit score or credit invisibility. Likewise, state and federal government agencies could establish programs that support people in specific situations integral to building credit histories, such as renting, taking out car loans, using credit cards, or paying medical bills.

For instance, the for-profit company Rhino provides down payments and serves as guarantor for renters who do not have family members or friends they can ask for down payment funds or to serve as guarantors for apartments.¹¹¹

109. See *supra* notes 72–76 and accompanying text.

110. See BRIAN KEELEY, HUMAN CAPITAL 103 (2007) (defining social capital, per the Organisation for Economic Co-operation and Development, as “networks together with shared norms, values and understandings that facilitate co-operation within or among groups”).

111. *How to Enroll in Rhino Security Deposit Insurance*, RHINO, <https://support.sayrhino.com/hc/en-us/articles/360054993492-How-to-enroll-in-Rhino-security-deposit-insurance> [https://perma.cc/R66Y-ZZZJ]; *What is Rhino Guarantor Coverage?*, RHINO, <https://support.sayrhino.com/hc/en-us/articles/360061185252-What-is-Rhino-guarantor-coverage-> [https://perma.cc/5LBB-MVPU]; see also Ronda Lee, *Rhino Lets Renters Avoid a Security Deposit in Exchange for a Monthly Fee*, BUS. INSIDER (Mar. 11, 2021), <https://www.businessinsider.com/personal-finance/what-is-rhino-insurance> [https://perma.cc/77P4-DL6A] (explaining how Rhino spreads out the cost of a security deposit).

Somewhat similarly, for individuals experiencing homelessness, rapid re-housing provides rental and move-in assistance to people in need of permanent housing, with the goal of keeping people in that housing.¹¹² In this context, local organizations partner with low-income housing developers or small landlords to provide guarantees for renters whom otherwise the landlord would deem as too risky.

What these programs deliver, and what nonprofits, community organizations, or government agencies should seek to offer, is the boost that those people who end up as “haves” receive by way of the socio-economic situations they find themselves in organically. The boost does not need to be big. The slips that lead to financial spirals often are small. An apartment guarantee, a waived apartment down payment, a free cell phone with a pay-as-you-go plan, or help with a medical bill can be enough to put or keep someone on a stable financial path.

At its core, this article’s specific ideas for how to support people in the credit scoring game hinge on providing resources some individuals lack because of significant, historical socio-economic barriers to savings and wealth accumulation. Credit scoring implicitly relies on those barriers to sort people. If those barriers were removed, the sorting should come out differently. Removing the barriers requires legislating a livable wage, enacting comprehensive health care reform, making public transportation a meaningful substitute to owning a car, and ensuring that housing is safe and affordable. That there likely are ways to save people from failing in the credit scoring game does not mean that the game is not seriously flawed.

Without widescale reforms of public policies, pointing to credit scoring, of any variety, as a way to help the economically disenfranchised will perpetuate the idea that merely ranking people has the potential to improve access and financial outcomes. In reality, the range of credit scoring techniques serve as another cog in wealth and economic inequality. People, more broadly, need comprehensive access to economic equality. Until then, credit scoring will continue to be a vehicle of economic exploitation and will continue to divide America in two: one of financial opportunity and growth and one of financial struggle and exclusion.

112. *Rapid Re-Housing*, NAT’L ALL. TO END HOMELESSNESS, <https://endhomelessness.org/ending-homelessness/solutions/rapid-re-housing/> [<https://perma.cc/W9LB-MLKD>].