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ARTICLE

ESCAPING BATTERED CREDIT: A PROPOSAL FOR REPAIRING CREDIT REPORTS DAMAGED BY DOMESTIC VIOLENCE

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Debt and domestic violence are connected in ways not previously imagined. A new type of debt—which I have labeled "coerced debt"—is emerging from abusive relationships. Coerced debt occurs when the abuser in a violent relationship obtains credit in the victim's name via fraud or coercion. It ranges from secretly taking out credit cards in victims' names to coercing victims into signing loan documents to tricking victims into relinquishing their rights to the family home. As wide ranging as these tactics can be, one consequence consistently emerges: ruined credit ratings.

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Coerced debt wreaks havoc on credit scores, which is particularly problematic because the use of credit reports is no longer confined to traditional lenders. Employers, landlords, and utility companies all make extensive use of credit scores when screening potential customers. Thus, a credit score that has been damaged by coerced debt can make it prohibitively difficult for victims to obtain employment, housing, or basic utilities—all of which are requirements for establishing an independent household.

In this Article, I propose amending the Fair Credit Reporting Act to allow victims of coerced debt to repair their credit reports. My proposal would enable family courts to rule on whether alleged coerced debt is, in fact, coerced. The victim could then submit the court's certification to the credit reporting agencies, which would block the coerced debt from her credit report to the extent that the block did not unduly harm her creditors. My proposal would build a bridge between the decisionmakers already determining issues related to coerced debt and the credit reports that victims need to have reformed in order to move beyond the abuse.

INTRODUCTION

Debt and domestic violence are connected in ways not previously imagined. A new type of debt—which I have labeled "coerced debt"—is emerging from abusive relationships.[1] Coerced debt occurs when the abuser in a violent relationship obtains credit in the victim's name via fraud or duress. This is a new problem, one enabled by the tremendous growth of consumer credit markets in recent decades and by the corresponding depersonalization of the credit system.[2] In a previous article, I provided the first published account of coerced debt.[3] Although my work was preliminary and further study is needed to determine coerced debt's scope and severity, my research provides enough evidence to suggest that it is a real problem with a significant impact on its victims.[4]

Coerced debt is a complex phenomenon with multiple facets and no easy solutions. My research revealed that batterers engage in an extensive array of damaging credit transactions, including secretly taking out credit cards in victims' names, coercing victims into signing loan documents, and tricking victims into relinquishing their rights to the family home, among many others.[5] As wide-ranging as these tactics can be, one consequence consistently emerges: ruined credit ratings.[6]

Thus, in this Article, I propose amending the Fair Credit Reporting Act (FCRA)[7] to enable victims of coerced debt to repair their credit reports. My proposal would allow family courts handling the divorces of abusive

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[1] *See* Angela Littwin, *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 CALIF. L. REV. 951, 954-55 (2012) (surveying professionals who work with victims and survivors of domestic abuse who had been coerced into debt).

[2] *See, e.g.*, *id.* at 986-87 (detailing banks' transition from face-to-face lending to the mass mailing of credit cards).

[3] *See id.* at 959-72. There are no other academic articles on coerced debt, and there do not appear to be any articles on coerced debt in the popular media either. *See id.* at 959-60 (noting that "research on coerced debt is almost nonexistent"). The one organization that has reported on this problem is the National Consumer Law Center (NCLC), which has developed advocacy materials on the consumer rights of domestic violence survivors. *See Domestic Violence Survivors*, NAT'L CONSUMER L. CTR., http://www.nclc.org/special-projects/domestic-violence-survivors.html (last visited Nov. 16, 2012) (offering various resources to address the "serious financial concerns" that confront survivors of domestic violence).

[4] Littwin, *supra* note 1, at 959-72.

[5] *Id*. at 986-91.

[6] *See id*. at 997 (noting that victims often do not discover their coerced debt until it is delinquent).

[7] Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x (2006).

marriages to rule on whether alleged coerced debt is, in fact, coerced. The victim could then submit the court's certification to credit reporting agencies (CRAs), which would block the reporting of coerced debt to the extent that this would not unduly harm future creditors. The family court's decision would not affect a domestic violence victim's underlying liability for the coerced debt,[8] but it would enable her to move forward with a credit report that better reflected her risk profile.

The most important limitation of my proposal is that it applies only to victims who are divorcing their abusers. It does not help unmarried victims or those who do not have the means to obtain a divorce. These populations will require separate remedies, which I will propose after further empirical study. This Article explores one part of the problem and one possible solution.[9]

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Coerced debt wreaks havoc on credit scores.[10] Victims of coerced debt often do not discover the debt until they attempt to leave an abusive relationship, when much of the debt is delinquent or in danger of becoming so.[11] Delinquency occurs in several situations: when the debt is still outstanding; when the abuser has already repaid the debt, but only after it was in default, thus leaving a negative mark on the victim's credit report; or when the debt is so large that the victim is unable to pay it in a timely manner.[12] All of these scenarios can mar a victim's credit rating at precisely the point when she most needs a clean bill of credit health.[13]

The situation would not be as problematic if credit reports were used only by traditional lenders. The more significant issue is that employers, landlords, and utility companies make extensive use of credit scores in

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8 Liability for coerced debt—as well as preventive measures that could reduce its incidence—are issues that I plan to explore in future research. I am delaying their consideration until after I have gathered more definitive empirical data for two primary reasons. First, policy solutions that remove liability altogether would almost certainly increase costs for creditors more than the proposal I make in this Article and thus would have correspondingly greater chances of increasing the cost of credit. Second, coerced debt is so complex that it is especially important to analyze thoroughly the potential unintended consequences of any policy proposals, which is difficult to do with preliminary data.

9 The question of whether to give family courts jurisdiction over the financial affairs of unmarried couples is an interesting one that will benefit from future study.

10 *See* Littwin, *supra* note 1, at 1001 (noting that advocates for victims of coerced debt "overwhelmingly reported damage to their clients' credit scores").

11 In my earlier study, several divorce lawyers stated that most of their clients were unaware of the coerced debt in their names until their lawyers ran credit checks. *Id.* at 997-98.

12 *Id.*

13 *See, e.g.*, *id.* at 998 (relating the story of one victim who did not know of the loans in her name until she attempted to take out student loans).

screening potential employees, tenants, and customers.[14] Thus, a credit score that has been damaged by coerced debt can make it prohibitively difficult for victims to obtain employment, housing, or basic utilities, all of which are requirements for establishing an independent household.[15]

The lawyers and other advocates I interviewed for the coerced debt study reported that credit ratings tarnished by coerced debt resulted in longer shelter stays, victims returning to their abusers, or victims making financial calculations that resulted in them not leaving their abusers in the first place.[16] In other words, the relationship between coerced debt and bad credit may be an important link in the chain that binds many abusive relationships.

One major challenge in crafting policy solutions to fix the credit reports of coerced debt victims is that the process of repairing credit reports is generally ineffective. Even consumers with less complicated problems than coerced debt face significant hurdles when attempting to fix their credit reports.[17] This is because the CRAs that collect and distribute consumer credit data use a dispute-resolution process that is deeply flawed. The CRA system for investigating alleged errors is almost entirely automated, providing no meaningful review of consumer disputes.[18] Consumer claims of errors are processed through a series of mechanized steps in which no decisionmaker ever actually evaluates the dispute on its merits. To make matters worse, the CRAs essentially keep two sets of books.[19] The credit reports provided to consumers do not completely match the reports that potential creditors see—and neither do the credit scores. The CRAs use two sets of algorithms when generating reports and scores for these two audiences.[20]

Because the CRAs have been so ineffective at resolving comparatively simple consumer disputes, I largely bypass them in my remedy for the more

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14 *See infra* subsection III.B.2.

15 Littwin, *supra* note 1, at 1001-02.

16 *Id.* at 1002-03. Empirical research bears out these professionals' intuition that financial factors play an important role in a woman's ability to leave an abusive relationship. *See* Deborah K. Anderson & Daniel G. Saunders, *Leaving an Abusive Partner: An Empirical Review of Predictors, the Process of Leaving, and Psychological Well-Being*, 4 TRAUMA, VIOLENCE & ABUSE 163, 171 (2003) (concluding that "[i]ncome variables were not only among the most consistently related but possibly the most powerful predictors of the stay/leave decision overall, even when controlling for a variety of psychological and other variables").

17 *See infra* subsection III.A.2. *See generally* Chi Chi Wu, *Automated Injustice*, 14 N.C. BANKING INST. 139 (2010) (collecting narratives of the hurdles that consumers must jump over to fix their credit reports).

18 *See infra* subsection III.A.2.

19 *See infra* text accompanying notes 120-28.

20 *See infra* text accompanying notes 120-28.

complex problem of coerced debt. My proposal takes an alternate approach and leverages the fact that a segment of coerced debt victims already encounters a decisionmaker with financial expertise and extensive knowledge of both parties to the credit abuse: the judges who handle their divorces. Family courts examine a family's finances in great detail, engaging in decisions that we think of as the province of bankruptcy and other financial courts.[21] Divorce courts also make decisions about the most intimate details of family life, assigning custody and in some states assigning fault for the divorce itself.[22] Thus, they are ideally positioned to examine a matter that is at once financial and deeply personal.

Although family courts regularly divide divorcing families' assets and debts, their distribution of debt between two ex-spouses is not binding on a family's creditors. Creditors are not part of the divorce proceedings, so their rights continue to be governed by their contracts with individual or multiple family members. If a family court decrees that a debt in Spouse *A*'s name should be the responsibility of Spouse *B*, that gives Spouse *A* a claim against Spouse *B* for the amount of the debt,[23] but it does not change Spouse *A*'s contract with the creditor. If a family has assets, the court can achieve a meaningful distribution of debt by awarding Spouse *A* enough assets to compensate for the debt, but many divorcing families do not have significant assets.[24]

Thus, family courts have limited power to change the distribution of debt between spouses upon divorce. A proposal to give family courts such authority would be an immense change that would require a significantly greater empirical understanding of coerced debt. However, a system in

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21 *See infra* notes 215-25 and accompanying text; *see also, e.g.*, Reynolds v. Reynolds, 109 S.W.3d 258, 271-77 (Mo. Ct. App. 2003) (reviewing in detail a trial court's valuation of a couple's assets).

22 *See, e.g.*, Dodson v. Dodson, 904 S.W.2d 3, 8 (Mo. Ct. App. 1995) (placing fault on the husband).

23 Nothing in my proposal would prevent family courts from continuing to allocate debt this way. Although redistributing a couple's debt has little practical effect on most consumers, some victims of coerced debt may have the resources to sue their abusers. In addition, it may be particularly important for family courts in coerced debt cases to make specific findings that the abuser incurred the debt via duress or fraud. Otherwise, a creditor that later sues a victim may try to argue that the certification of coerced debt validates the debt's existence and estops the victim from asserting claims of duress or fraud.

24 Divorce is frequently associated with negative financial outcomes. For example, a recent Census survey found that children living with parents who had divorced within the previous year were more likely to be living in poverty (28%) than other children (19%). DIANA B. ELLIOTT & TAVIA SIMMONS, U.S. CENSUS BUREAU, MARITAL EVENTS OF AMERICANS: 2009, AT 12 (2011), *available at* http://www.census.gov/prod/2011pubs/acs-13.pdf.

which a family court could certify that certain debts were coerced for purposes of adjusting a victim's credit report is more feasible.

Under such a system, a victim of domestic violence could submit a claim during her divorce that some or all of the debt in her name (or in both spouses' names) was acquired without her knowledge or consent. The judge would then rule on the coerced status of each debt, just as she would on an allegation that one spouse was entitled to certain property. A victim who successfully obtained a certification of coerced debt could then submit the court document to the CRAs, where it would have two effects.

The first effect would be that any debt deemed coerced and that was no longer outstanding would simply be blocked from the victim's credit report. The goal here is to prevent negative payment history about previous coerced debt from painting the victim as a worse credit risk than she actually is. Creditors value information about payment history on past debt because of its predictive power. In this Article, I label this a creditor's "predictive interest" in access to credit data. Creditors believe that consumers' payment tendencies remain relatively stable over time, so that a consumer who paid promptly in the past is likely to pay promptly in the future.[25] But this predictive power is reduced when the consumer did not acquire the debt voluntarily and may not have been the person managing its payment. As a result, the creditor's interest in obtaining that information is significantly diminished.[26]

Blocking credit data about past coerced debt would have a major impact on victims' credit ratings. Although the CRAs' credit-scoring algorithms are proprietary,[27] it is likely that payment history heavily influences credit scores. According to FICO, a major provider of credit scores, payment history is the most important element of a consumer's credit record, comprising 35% of the total, superseding even the amount of debt the consumer currently has outstanding.[28]

[25] *See, e.g.*, *About PLUS Score*, EXPERIAN, http://www.protectmyid.com/Message.aspx?PageTypeID=AboutPlusScore&SiteVersionID=815&SiteID=100302&sc=668893&bcd= (last visited Nov. 16, 2012) ("Higher scores represent a greater likelihood that you'll pay back your debts so you are viewed as being a lower credit risk to lenders. A lower score indicates to lenders that you may be a higher credit risk.").

[26] *See infra* Section III.A.

[27] *See* JOHN HOWAT, NAT'L CONSUMER LAW CTR., FULL UTILITY CREDIT REPORTING: RISKS TO LOW INCOME CONSUMERS 8 (2009), *available at* http://www.nclc.org/images/pdf/credit_reports/credit_reports_full_utility_dec2009.pdf (noting criticism against CRAs for the proprietary nature of credit score calculation formulae).

[28] *What's in My FICO Score*, MYFICO, http://www.myfico.com/crediteducation/whatsinyourscore.aspx (last visited Nov. 16, 2012).

However, data on outstanding debt are still very important to creditors.[29] Without it, a potential creditor cannot assess the claims on a consumer's income and assets to determine how many other creditors it will compete with each month for payment or to evaluate these other creditors' collection rights in the event of a default. I refer to this as a creditor's "current liabilities" interest in a consumer's credit report. Creditors have a current liabilities interest in data about all of a consumer's outstanding debts, even those not acquired voluntarily. Thus, I limit my proposal for a complete block of coerced debt to debts that have already been paid off or are no longer legally binding for other reasons.[30] Even though a victim of coerced debt was not bound consensually to her coerced liabilities, potential creditors nevertheless need access to information about them if she is bound legally.

There are, however, competing concerns. Certain users of credit reports—namely employers, landlords, and basic utility companies[31]—provide services and benefits that are so essential to recently divorced victims of domestic violence that, on balance, victims' needs outweigh the current liabilities interest of such providers.[32] Thus, the second effect of submitting the coerced debt certification would be that potential employers, landlords, and basic utility companies would have no access to data about coerced debt, regardless of whether the debt was still outstanding. The equities for these entities balance differently than for traditional lenders. A victim of domestic violence leaving an abusive relationship and starting an independent household can live without a credit card or a mortgage. But without a job, rental housing, or gas and electricity, she is simply not an economically viable unit.

In addition, the equities on the other side of the transaction balance differently as well. Employers, landlords, and utilities have different expectations when entering an economic relationship than professional lenders do. Employers are the easiest case since they are not creditors at all.[33] Their interest in a potential employee's credit report is in the possible relationship

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29 Outstanding debt comprises 30% of a FICO score. *Id.*

30 These reasons include expiration of the statute of limitations or discharge in bankruptcy.

31 Insurers also use credit report data. *E.g.*, *Allstate's Use of Credit Information to Evaluate Insurance Policies*, ALLSTATE, http://www.allstate.com/about/credit.aspx (last visited Nov. 16, 2012). However, the advocates I interviewed for my preliminary study did not mention insurance as a major concern, so I have not included an analysis of it in this Article. This is a topic I will explore in future empirical research on coerced debt.

32 *See infra* subsection III.B.2.

33 In fact, employers are debtors of their employees because wages are not paid until some period after they have been earned. *See* 11 U.S.C. § 507(a)(4) (2006) (providing bankruptcy priority for employees of debtors).

between a negative credit history and certain negative job-performance traits.[34] But for a judicially certified victim of coerced debt, the negative credit history is not of her own making and thus much less relevant to her future job performance.

Landlords and utilities are, in fact, creditors, but their regulatory treatment in all other areas of law is so different than that of lenders that it is reasonable to treat them differently in this case as well.[35] Landlords and utilities are regulated heavily in recognition of the essential services they provide, which is exactly why I propose blocking their access to information about outstanding certified coerced debts. These two types of creditors also compensate for risk differently than financial-sector creditors, and their risk management strategies make them less likely than lenders to suffer economic harm due to a coerced debt block.[36]

In addition, preliminary empirical evidence[37] and logic suggest that financially struggling households are likely to pay their rent and utility bills before paying down general unsecured debt.[38] Credit card issuers, in fact, encourage the deferral of substantive debt payment by emphasizing the minimum-payment option.[39] Plus, a consumer may be especially likely to prioritize rental and utility payments over outstanding coerced debt because she may not consider herself morally responsible for the latter.

My proposal could be implemented by amending the Fair Credit Reporting Act or by promulgating new regulations under the Equal Credit Opportunity Act (ECOA).[40] My ideas build on a current FCRA provision that allows consumers who have obtained police reports verifying their identity thefts to compel the CRAs to block records of these transactions from their credit reports.[41] The relative success of this blocking mechanism demonstrates that it is possible to provide consumers with an effective

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34 This relationship is controversial. For a detailed discussion, see *infra* subsection III.B.2.

35 *See infra* subsection III.B.2.

36 *See infra* subsection III.B.2.

37 *See, e.g.*, Angela Littwin, *Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers*, 86 TEX. L. REV 451, 458 n.20 (2008) (discussing how many financially struggling households triage certain bills, paying them late or negotiating for later payment dates, in order to pay other bills, including rent, on time).

38 Even if a coerced debt was secured originally, it is unlikely to be *relevantly* secured from the victim's point of view because it will often be for a home in which she no longer lives or a car to which she no longer has access.

39 *See* Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 387-88 (describing how a 2003 regulator-mandated increase in minimum payments disrupted many credit card issuers' business models).

40 15 U.S.C. §§ 1691–1691f (2006).

41 15 U.S.C. § 1681c-2(a).

error-reduction process within the current system, as long as the remedy incorporates a non-CRA decisionmaker and eliminates CRA discretion.[42]

In its current form, however, the FCRA provision excludes many claims of coerced debt,[43] despite the fact that, in many ways, coerced debt is a form of identity theft.[44] In addition, law enforcement officers are not the ideal decisionmakers for coerced debt claims. My proposal would broaden the definition of identity theft in coercion cases and replace law enforcement officers with family courts as the decisionmakers.

Alternatively, implementation could occur under the ECOA. The ECOA regulations already contain a provision that can be read to cover coerced debt.[45] I propose amending this regulation to make it clear that coerced debt is included and to make the regulation easier for consumers to use.[46]

This Article proceeds in three Parts. Part I situates coerced debt within the domestic violence literature and briefly reviews the evidence of the phenomenon. Part II describes the current, ineffective process the CRAs use to resolve consumer credit-report disputes and argues that leveraging the competencies of family courts could improve this process for victims of coerced debt. Part III considers my policy proposal, explaining its application to traditional lenders as well as to employers, landlords, and utility companies.

I. COERCIVE CONTROL AND COERCED DEBT

In a recent article, I documented the current evidence for coerced debt, which I defined to include "all non-consensual, credit-related transactions that occur in a violent relationship."[47] I presented a preliminary empirical study in which I interviewed fifty-five lawyers and other advocates who worked with victims of domestic violence about their clients' credit problems. Although a wide variety of credit difficulties emerged—ranging from the scarcity problems common to people living in poverty to mistakes made because of financial illiteracy—the overarching theme that emerged was

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42 *See infra* notes 185-90 and accompanying text.

43 *See infra* subsection III.B.1.

44 *See infra* Section II.B.

45 *See* 12 C.F.R. § 202.6(b)(6)(ii) (2012) ("[I]n evaluating an applicant's creditworthiness a creditor shall consider . . . any information the applicant may present that tends to indicate the credit history being considered by the creditor does not accurately reflect the applicant's creditworthiness.").

46 *See infra* subsection II.C.3.

47 Littwin, *supra* note 1, at 954.

coerced debt.[48] This Part contextualizes coerced debt within the broader framework of domestic violence and briefly summarizes the evidence from my preliminary study.

Coerced debt appears to be part of a broader pattern of abuse that occurs within one type of abusive intimate relationships.[49] Recent empirical work suggests that there are two major kinds of domestic abuse: (1) common couple violence, in which both parties engage in violence as a problem-solving strategy[50]; and (2) coercive control, in which the abuser asserts complete dominance over the victim, essentially seeking to undermine the victim's free will.[51] According to current research, this dominance is typically established by the abuser's implementation of "regulations" that govern every aspect of the victim's behavior and are enforced by frequent and severe violence.[52]

Three examples from the leading work on this type of abuse, Evan Stark's *Coercive Control*, illustrate this phenomenon. Professor Stark, a therapist, documents coercive control with both empirical research and anecdotal evidence from his own practice.[53] In one such anecdote, the abusive husband required his wife to record her daily activities in fifteen-minute increments and then violently interrogated her about her activity log every night.[54] In another case, the husband required his wife to wear thin, cotton saris at all times.[55] Because they lived in a cold climate, this essentially restricted her to the house for much of the year. In the third example, the abuser confined his wife in their bedroom suite whenever he

48 *See id.* at 958 (describing research documenting coerced debt).

49 I recently applied to the National Science Foundation for funding for a study that would, inter alia, test this hypothesis. I am collaborating in this work with Adrienne Adams, a psychologist at Michigan State University.

50 *See* Michael P. Johnson, *Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence*, 12 VIOLENCE AGAINST WOMEN 1003, 1006 (2006) (identifying "situational couple violence" as a type of domestic relationship in which both parties may use violence and neither party is controlling); Michael P. Johnson, *Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women*, 57 J. MARRIAGE & FAM. 283, 284-85 (1995) [hereinafter Johnson, *Patriarchal Terrorism*] (differentiating common couple violence from one-sided, control-oriented abuse).

51 *See* EVAN STARK, COERCIVE CONTROL 257-63 (2007) (stating that controlling partners view relationships as "zero-sum" games in which the controlled partner's independence should be eliminated); Johnson, *Patriarchal Terrorism*, *supra* note 50, at 284 (defining one-sided abuse that involves controlling behaviors as "patriarchal terrorism").

52 *See* STARK, *supra* note 51, at 228-88 (documenting the various methods by which abusers exercise control).

53 *See id.* at 4 (listing Professor Stark's professional roles, in which he gathered the examples he uses in the book).

54 *Id.* at 294-95.

55 *Id.* at 239.

left home.[56] It is within this type of control-oriented relationships that coerced debt can exist.[57]

Research has also begun to document the role that economic tactics play in coercive control. These tactics fall into two broad categories: preventing victims from earning money and controlling their access to money the family has earned. In the first category, some abusers forbid victims from working outside the home.[58] Others interfere with victims' employment through tactics such as inflicting visible injuries,[59] hiding their work clothes,[60] or harassing their coworkers or bosses.[61]

Coerced debt falls within the second category of economic abuse: the establishment of control over household finances. Financial control is often seized using abusive methods, such as preventing the victim's access to joint bank accounts; forcing the victim to deposit income into accounts controlled solely by the abuser; putting the victim on an allowance; and preventing the victim from accessing financial information—both about her household's finances and about personal finances generally.[62] My preliminary research suggests that financial control can have some striking results: wives who do not know their husbands' incomes, their husbands' occupations, or whether their families' residences are rented or owned.[63] This control—the ability to limit the victims' access to knowledge of the household's finances—is the

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56 *Id.* at 268.

57 *See* Littwin, *supra* note 1, at 981-86 (viewing financial control as the foundation on which coerced debt can develop).

58 *See* Rudy J. Aguilar & Narina Nunez Nightingale, *The Impact of Specific Battering Experiences on the Self-Esteem of Abused Women*, 9 J. FAM. VIOLENCE 35, 40 (1994) (categorizing prevention of working as a type of emotional/controlling abuse); Mary P. Brewster, *Power and Control Dynamics in Prestalking and Stalking Situations*, 18 J. FAM. VIOLENCE 207, 210 (2003) (listing a prohibition on working outside the home as one type of financial control); *see also* Susan Lloyd, *The Effects of Domestic Violence on Women's Employment*, 19 LAW & POL'Y 139, 150-51 tbls.3 & 4 (1997) (documenting the frequency with which partners restricted access to money or made working outside the home difficult).

59 *E.g.*, Angela M. Moe & Myrtle P. Bell, *Abject Economics: The Effects of Battering and Violence on Women's Work and Employability*, 10 VIOLENCE AGAINST WOMEN 29, 40 (2004) (documenting one woman's difficulty keeping a job because she missed work due to frequent injuries).

60 *E.g.*, Ruth A. Brandwein & Diana M. Filiano, *Toward Real Welfare Reform: The Voices of Battered Women*, 15 AFFLIA 224, 233 (2000).

61 *See, e.g.*, *id.* (recounting how some women leave their jobs out of fear of what their husbands would do to their employers); Melanie Shepard & Ellen Pence, *The Effect of Battering on the Employment Status of Women*, AFFLIA, Summer 1988, at 55, 58 (reporting that 24% of victims claimed that abuse led, in part, to a loss of employment).

62 *See* Littwin, *supra* note 1, at 981-86.

63 *Id.* at 985-86.

foundation that underlies coerced debt,[64] enabling abusers to perpetuate long-term financial fraud and coercion.

There appear to be limitless tactics by which abusers generate coerced debt. These include applying for credit cards in a partner's name without the partner's knowledge; using physical duress to force a partner to apply for credit cards; threatening violence against the partner or her children toward the same end; forging a partner's signature on home mortgage documentation to, for example, withdraw equity from the family home; employing a combination of fraud and force to induce a partner to sign a quitclaim deed for the family home; arranging the household's secured transactions so that the debt is in the victim's name while the collateral asset is in the abuser's; and impersonating a partner to obtain a car loan.[65]

I include within the term "coerced debt" behavior that falls under the traditional legal definition of fraud[66] as well as behavior more properly characterized as duress.[67] The role duress plays in coerced debt is easy to see. If an abuser holds a gun to a victim's head and instructs her to fill out a credit application, that is clearly coercive. But in relationships permeated with coercive control, fraud also plays a role in coerced debt. For example, an abuser might hold a gun to a victim's head and instruct her to sign a loan application without permitting her to read it. Alternatively, an abuser might borrow in the victim's name without her knowledge. When she discovers the debt and asks the abuser about it, he might then put the gun to her head and instruct her to leave it alone. A third possibility is that the victim discovers the debt but is too afraid to ask the abuser about it. In all of these hypothetical situations, the abuser sustains the fraud by using elements of duress. Even in cases without direct financial coercion, much fraud in abusive relationships likely evades detection through other abusive tactics, such as controlling the victim's access to financial records, stealing the victim's mail, or monitoring the victim's telephone calls.[68]

The advocates I interviewed explained that batterers engaged in this behavior partly to gain economic enrichment, but also to maintain control within the abusive relationship. Several of my interviewees noted that, in many of these cases, abusers intended to limit their victims' options and

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64 *Id.* at 981-86.

65 *See id.* at 986-97.

66 "A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." BLACK'S LAW DICTIONARY 731 (9th ed. 2009).

67 "Broadly, a threat of harm made to compel a person to do something against his or her will or judgment . . . ." *Id.* at 578.

68 Littwin, *supra* note 1, at 973-78.

make it more difficult for them to leave.[69] A victim's inability to start an economically viable household on her own creates a major barrier to leaving. As one psychologist I interviewed stated, the abuser's objective is "to keep [the victim] from having alternatives to the relationship."[70]

To be fair, only the most sophisticated batterers probably thought of financial abuse in terms of negative credit ratings. Their immediate concerns may have been issues such as keeping victims financially illiterate and arranging their families' affairs so that all of the assets are in their names and the debts in the names of their victims.[71] Victims would have difficulty leaving the relationship because they would be financially naïve and would owe hundreds or thousands of dollars in unanticipated debt.

But my research suggests that credit reporting is, indeed, a major barrier to leaving and remaining free of abusive relationships. Many of the lawyers and other advocates I interviewed discussed credit reporting and its consequences as barriers for victims.[72] As I reported previously:

> [O]ne lawyer who staffs a family law hotline stated, "My major concern is her credit report." Another said, "Oh yeah, that's really common. There's no good way around it." Other advocates said that it "absolutely" was an issue and that they see it "over and over again" or "all the time." One social worker stated that her clients' credit ratings were ruined "almost across the board."[73]

My interviewees described how these poor credit ratings directly interfered with victims' attempts to establish self-sufficiency. More than a dozen reported that negative credit scores prevented their clients from obtaining housing, employment, and basic utilities.[74] One legal clinical professor characterized the intersection of coerced debt with landlord and employer use of credit reports as "really hurt[ing] DV survivors."[75]

Several of the lawyers and other advocates I interviewed stated that the inability to obtain employment and housing resulted in longer shelter stays.[76] One lay advocate explained, "Often the emotional crisis issues and physical safety issues are in better shape after 30-90 days. But then she's left

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69 *Id.* at 999.

70 *Id.* (alteration in original).

71 *See id.* at 961 tbl.1 (listing several methods of establishing coerced debt).

72 *Id.* at 998.

73 *Id.* at 1001 (footnotes omitted).

74 *Id.*

75 *Id.*

76 *Id.* at 1002 (attributing overcrowding in domestic violence (DV) shelters in part to victims' inability to find housing on account of their poor credit scores).

living in this shelter situation longer than she needs it. Nobody will rent to her and her children, and nobody will open utilities in her name."[77]

Of even greater concern is the fact that, according to several advocates, bad credit is a major reason why many victims remain in abusive relationships.[78] They made statements such as, "[H]aving a bad credit score . . . creates even more barriers to her being able to successfully extract herself from that relationship;" and, "If there were options for women getting their credit back, I think it would go a long way toward helping" them leave.[79] The following Parts explore one such option.

II. WHO DECIDES? CREDIT REPORTING'S DECISIONMAKING DEFICIT

On close examination, the most striking feature of our credit reporting system is the absence of a decisionmaker at the heart of the process. Although credit reports play a crucial role in consumers' financial lives, the system is so automated that no person has the authority to decide exactly which pieces of information belong in an individual consumer's report.[80]

In 2003, Congress decided that this automation was unacceptable with respect to identity theft and enacted the Fair and Accurate Credit Transactions Act (FACTA)[81] as an amendment to the FCRA. The new congressionally mandated system is still semiautomated, but it provides for some decisionmaking authority by relying on law enforcement agencies to screen claims of identity theft.[82] In the area of coerced debt, however, law enforcement authorities are unsuited for their roles as de facto decisionmakers.[83] Thus, my proposal builds upon the identity theft procedure but designates family court as the appropriate decisionmaking forum.

The CRAs do, of course, have rules that determine how data are selected for inclusion in credit reports; beyond these parameters, however, the system is fully automated.[84] The CRAs use computer programs to process

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77 *Id.*

78 *Id.* at 1002-03.

79 *Id.* at 1002.

80 *See generally* Wu, *supra* note 17 (providing an overview of the credit reporting system and detailing the failings of its credit dispute process).

81 Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (codified as amended in scattered sections of 15 and 20 U.S.C.).

82 15 U.S.C. § 1681g(e) (2006).

83 *See infra* text accompanying notes 196-99.

84 *See generally* Wu, *supra* note 17.

information from current creditors and other furnishers[85] and repackage it for viewing by consumers and future creditors—all without any human supervision over the generated content.[86]

Given the massive amounts of data that circulate in our consumer credit system,[87] this is a reasonable, and indeed necessary, way for the process to begin. But two problems emerge. First, the rules used by the CRAs for selecting data for inclusion on credit reports virtually guarantee that there will be a high error rate.[88] Second, no decisionmaker has authority to review and fix credit reports in which errors are found. The CRA internal error investigation process relies on a combination of automated computer processes and low-level employees lacking discretion. The absence of a decisionmaker means no authority exists to which victims of coerced debt can appeal to argue that fraudulent or duress-generated debt should be excluded from their credit reports.[89]

FACTA improved the process by adding a procedure that enables victims of identity theft to correct their credit reports by blocking fraudulent data.[90] This process has been unavailing for many victims of coerced debt, even though coerced debt is in part a form of identity theft. Nevertheless, the blocking provision lays the groundwork upon which I build my proposal. It demonstrates successful intervention in a system as mechanized as credit reporting. I would broaden the statute to include all forms of coerced debt and substitute a decisionmaker with better institutional capacity for reviewing coerced debt allegations.

The FCRA essentially deputizes law enforcement authorities to determine whether identity theft has occurred,[91] but law enforcement agencies lack the expertise in finances or family relations to handle coerced debt.

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85 Furnishers are entities that report consumer financial behavior to the CRAs. The term includes past creditors and public records keepers. FTC, REPORT TO CONGRESS ON THE FAIR CREDIT REPORTING ACT DISPUTE PROCESS 4 (2006) [hereinafter 2006 FTC REPORT], *available at* http://www.ftc.gov/os/comments/fcradispute/P044808fcradisputeprocessreporttocongress.pdf (listing examples of entities considered "furnishers").

86 *See id.* at 150-53 (documenting CRAs' reliance on furnisher-provided information).

87 A few brief statistics about credit cards illustrate the scope of the consumer credit system in the United States. As of 2009, there were 156 million credit card holders and over 1.2 billion credit cards. That year, credit card purchases totaled $1.94 trillion and the outstanding credit card debt reached $886 billion. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 740 tbl.1188 (131st ed. 2011), *available at* http://www.census.gov/compendia/statab/2012/tables/12s1188.pdf.

88 *See infra* subsection II.A.1.

89 *See infra* subsection II.A.2.

90 15 U.S.C. § 1681c-2 (2006).

91 *See* 15 U.S.C. § 1681a(q)(4) (requiring an identity theft report to be filed with the appropriate law enforcement agency).

Family courts, on the other hand, are equipped to adjudicate complex transactions that occur among family members. Indeed, they already make determinations about both domestic violence and family finances,[92] and, in doing so, consider an issue closely related to coerced debt. In the states that allow courts to balance the equities of the case when distributing assets and debts,[93] many judges consider whether domestic violence has occurred.[94] The only difference is that family courts' current debt distributions have no effect on credit reports. My proposal would build a bridge between those already making difficult determinations about issues related to coerced debt and the reformation of credit reports victims need in order to move beyond the abuse.

A. *The Credit Reporting Agencies' Failings*

The CRAs have done such a poor job of producing accurate credit reports that they cannot be trusted with the complex and sensitive matter of coerced debt. Many of the errors plaguing credit reports are consequences not of any type of fraud, but rather of the standard CRA system for generating reports. The CRAs have equally inadequate procedures for rectifying mistakes, which indicates that they do not have the capacity to make decisions about errors resulting from coerced debt.

1. Inaccurate Credit Reporting

It is virtually indisputable that consumer credit reports contain a large number of errors. As Professor Lynn LoPucki wrote in 2001, "The number of errors in the system are acceptable from the standpoint of lending creditors, but generally appalling from the standpoint of the individual consumer."[95] In 2009, more than eleven million consumers experienced some form of identity theft.[96] That number does not include additional

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92 *See infra* subsection II.C.1.

93 *See, e.g.*, OHIO REV. CODE ANN. § 3105.171 (West 2012); 23 PA. CONS. STAT. § 3502 (2008) (allowing the equitable division of marital property in an action for divorce); TEX. FAM. CODE ANN. § 7.001 (West 2006) ("[T]he court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.").

94 *See infra* note 225.

95 Lynn M. LoPucki, *Human Identification Theory and the Identity Theft Problem*, 80 TEX. L. REV. 89, 102 (2001).

96 CHI CHI WU & ELIZABETH DE ARMOND, NAT'L CONSUMER LAW CTR., FAIR CREDIT REPORTING § 9.1 (7th ed. 2010).

errors introduced by the CRAs who collect credit data and the furnishers who provide them.[97]

A brief sampling of statistics indicates the magnitude of the problem. Four small-scale studies yielded credit report error percentages ranging from 31%[98] to 53%[99] to 70%[100] to 79%.[101] Three of these studies also reported the percentage of credit reports containing errors significant enough to result in a denial of credit. These serious-error rates ranged from 12%[102] to 25%[103] to 29%.[104] Moreover, all of these studies used credit reports ordered by consumers, which, as explained below, are more likely to be accurate than the ones produced for lenders and other users of credit data.[105] A 2002 study of credit reports generated by mortgage applications found that 10% contained one specific error: data from at least one additional consumer.[106]

A 2005 U.S. Government Accountability Office (GAO) report found that 18% of surveyed consumers had filed a dispute about their credit reports at some point.[107] Even a report to the FTC by the Consumer Data Industry Association (CDIA), the CRAs' trade association, found that 21.8% of consumers who ordered their credit reports in 2003 filed a dispute that led to an investigation by a CRA.[108] More startling is the statistic that,

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97 *See id.* at 121-22 (detailing how CRA credit files are built and how errors arise).

98 *See* FTC, REPORT TO CONGRESS UNDER SECTION 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003, at 7 tbl.2 (2008) [hereinafter 2008 FTC REPORT], *available at* http://www.ftc.gov/os/2008/12/P044804factarptcongress.pdf (studying the reports of 128 consumers, although possible overrepresentation of higher-income, higher-score participants could have resulted in an underreporting of errors).

99 *See* L. DOUGLAS SMITH ET AL., PROCESSES FOR DETERMINING ACCURACY OF CREDIT BUREAU INFORMATION 14 (2006), *available at* http://www.ftc.gov/reports/FACTACT/FACT_Act_Report_2006_Exhibits_1-12.pdf (reporting on a preliminary study of thirty consumers conducted for the FTC's 2006 Report to Congress).

100 *See* JON GOLINGER WITH EDMUND MIERZWINSKI, MISTAKES DO HAPPEN: CREDIT REPORT ERRORS MEAN CONSUMERS LOSE 7 (1998), *available at* http://cdn.publicinterestnetwork.org/assets/UDV-IZWNPfc9VDuHy9q4wA/mistakesdohappen3_98.pdf (studying the reports of 133 consumers).

101 *See* ALISON CASSADY & EDMUND MIERZWINSKI, MISTAKES DO HAPPEN: A LOOK AT ERRORS IN CONSUMER CREDIT REPORTS 13 (2004), *available at* http://georgiapirg.org/sites/pirg/files/reports/MistakesDoHappen2004-1.pdf (studying the reports of 154 consumers).

102 2008 FTC REPORT, *supra* note 98, at 7 tbl.2.

103 CASSADY & MIERZWINSKI, *supra* note 101, at 11.

104 GOLINGER WITH MIERZWINSKI, *supra* note 100, at 5.

105 *See infra* text accompanying notes 116-26.

106 *See* CONSUMER FED'N OF AM. & NAT'L CREDIT REPORTING ASS'N, CREDIT SCORE ACCURACY AND IMPLICATIONS FOR CONSUMERS 21 (2002), *available at* http://www.consumerfed.org/pdfs/121702CFA_NCRA_Credit_Score_Report_Final.pdf.

107 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-223, CREDIT REPORTING LITERACY: CONSUMERS UNDERSTOOD THE BASICS BUT COULD BENEFIT FROM TARGETED EDUCATIONAL EFFORTS 28 (2005).

108 2006 FTC REPORT, *supra* note 85, at 12 (2006).

in 2009, reports of identity theft comprised 21% of all complaints to the FTC, a greater percentage than that of such seedy items as shop-at-home sales, foreign-currency scams, and sweepstakes.[109]

One industry-financed study did find an error rate under 3%,[110] but this research is flawed. It counted a data point as inaccurate only if the consumer was denied credit on the basis of the error, filed a dispute with the CRA, won that dispute, and succeeded in persuading the lender or other entity to reverse its earlier denial of credit.[111] This error rate thus excluded consumers who received higher-priced credit as the result of errors, those who chose not to file disputes, those who lost their disputes with the CRAs, and those who were able to correct their reports but failed to obtain credit from the original source.

An understanding of why there are so many inaccuracies requires a brief explanation of how credit reports are generated. The first step is the CRAs regularly downloading large quantities of data from "furnishers,"[112] a group that includes lenders and other entities that report on consumer financial behavior.[113] CRA algorithms then match each downloaded record to a consumer in their database.[114] This matching process can be designed to be stricter or looser, by adjusting how closely a downloaded record must match an existing consumer file for the files to be merged.[115] A strict system would require, for example, identical names, addresses, and social security numbers before two records could be merged.

Creditors, however, tend to prefer looser algorithms—thus ensuring that they see all potential negative information about consumers applying for credit[116]—and this approach appears to be the one that CRAs take. The

109 FTC, CONSUMER SENTINEL NETWORK DATA BOOK FOR JANUARY–DECEMBER 2009, at 6 (2010), *available at* http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2009.pdf. In 2006, this figure was 36%. *Credit Reports: Consumers' Ability to Dispute and Change Inaccurate Information: Hearing Before the H. Comm. on Fin. Servs.*, 100th Cong. app. 57-58 (2007) [hereinafter *Consumers' Ability to Dispute*] (testimony of Leonard A. Bennett).

110 FTC, REPORT TO CONGRESS UNDER SECTIONS 318 AND 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003, at 25-26 (2004) [hereinafter 2004 FTC REPORT], *available at* http://www.ftc.gov/reports/facta/041209factarpt.pdf.

111 WU & DE ARMOND, *supra* note 96, § 4.1.3.5.

112 *See* 15 U.S.C. § 1681s-2 (2006) (detailing the responsibilities of furnishers in providing information to CRAs).

113 *See infra* note 135.

114 *See* WU & DE ARMOND, *supra* note 96, § 4.3.3.2 (describing the process by which CRAs build their files); *see also* County Vanlines, Inc. v. Experian Info. Solutions, Inc., 317 F. Supp. 2d 383, 388-89 (S.D.N.Y. 2004) (describing matching procedures to generate business credit reports), *aff'd,* No. 04-2982, 2005 WL 3117211 (2d Cir. Nov. 22, 2005).

115 *See* 2004 FTC REPORT, *supra* note 110, at 35-55.

116 *See, e.g.*, *What Borrowers Need to Know About Credit Scoring Models and Credit Scores: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Servs.*, 110th Cong.

National Consumer Law Center (NCLC), which has compiled a thousand-page manual on credit reporting,[117] directly attributes the high error rate in consumer reports to loose computer algorithms. "Mismerged files occur largely because the CRAs' computers do not use sufficiently rigorous score or scale thresholds to match consumer data precisely, even when such unique identifiers as Social Security numbers are present."[118] Privacy expert Evan Hendricks has described how this works in practice:

> The general rule is if seven out of the nine digits [of two consumers' Social Security numbers] match, they consider that a partial match, provided that some of the name information will match up as well. So, people who have only one or two digits different in their Social Security numbers and have enough common letters in their names and live in the same geographic region could be considered to be the same person by the computers, and that causes a mixed file.[119]

Loose algorithms introduce even more errors when lenders order reports for the purpose of deciding whether to extend credit. The problem is that the CRAs use one set of parameters when generating reports for consumers and another when generating them for users.[120] The CRAs use relatively complete matching algorithms with consumers but partial matching with users, which means that users may see negative or erroneous data not available to consumers ordering their own credit reports.[121] Hendricks refers to the scores consumers can purchase with their reports as "FAKO" scores—a play on words on FICO credit scores.[122] This discrepancy means that the credit reports used to determine creditworthiness are even less

app. 122 (2008) [hereinafter *What Borrowers Need to Know*] (testimony of Evan Hendricks, Editor, Privacy Times) (stating that user versions of credit reports often have more information because "the CRAs attempt to include in them the maximum possible information that *might* relate to the consumer—in essence, so no negative item is missed").

117 WU & DE ARMOND, *supra* note 96.

118 *Id.* at 121.

119 Leslie McFadden, *The Dark Side of Credit Reports and Scores*, BANKRATE.COM (Jul. 17, 2007, 3:00 AM), *available at* http://finance.yahoo.com/news/pf_article_103239.html (interview with Evan Hendricks); *see also Consumers' Ability to Dispute*, *supra* note 109, at app. 65 (testimony of Leonard A. Bennett) ("If two consumers have a similar name, even if not exact, and also share either an address or a social security number matching seven of nine digits, the CRAs will very often combine the two files.").

120 *What Borrowers Need to Know*, *supra* note 116, at app. 122-23 (testimony of Evan Hendricks).

121 One reason that this type of loose matching occurs is because users are not required to submit social security numbers to obtain consumer reports. 2004 FTC REPORT, *supra* note 110, at 38. As the NCLC reports, "as many as 10% of all inquiries [from users] do not include a valid Social Security number." WU & DE ARMOND, *supra* note 96, § 4.3.4.

122 *What Borrowers Need to Know*, *supra* note 116, at app. 121 (testimony of Evan Hendricks).

accurate than consumer surveys would indicate. Furthermore, consumers have no opportunity to dispute information provided only to users before it results in a denial of credit.[123]

The difference in the reports that consumers and users receive may reflect an understanding that the partial matching system the CRAs use for creditors would not be acceptable to the general public. The CRAs ban resellers from providing consumers with the user versions of their credit reports,[124] and the formulas the CRAs use to calculate scores are proprietary and protected as trade secrets.[125] As such, the only way for a consumer to obtain the user version of her credit report is to apply for credit, be denied that credit, and then invoke a FACTA provision that allows consumers to request the report obtained by the lender during the credit check.[126]

It is rational for the CRAs to prioritize creditor interests over consumer interests in generating credit reports because consumers are not the CRAs' customer base. Since FACTA's implementation, consumers have been able to obtain their credit reports without charge annually and in certain other circumstances,[127] so CRAs have limited incentives to compete for consumer business. The one area in which the CRAs do compete for consumer business is in providing credit report monitoring services,[128] but selling services consumers can use to correct their reports may actually decrease CRA incentives to ensure the accuracy of reports before consumers purchase these services.

Instead, the CRAs' main revenue source is the users who purchase credit reports.[129] The FTC has explained how competition for creditor business might result in high error rates:

> [L]enders may prefer to see all potentially derogatory information about a potential borrower, even if it cannot all be matched to the borrower with certainty. This preference could give the CRAs an incentive to design algorithms that are tolerant of mixed files, which could harm consumers to whom the derogatory information is mistakenly assigned.[130]

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123 WU & DE ARMOND, *supra* note 96, § 3.7.2.1 ("[P]ractitioners report that CRAs will hide information in the report to the consumer by truncating or deleting account numbers, or deleting subscriber addresses, which hinders a consumer in directly disputing an account with a creditor.").

124 *What Borrowers Need to Know*, *supra* note 116, at app. 120 (testimony of Evan Hendricks).

125 HOWAT, *supra* note 27, at 1.

126 15 U.S.C. § 1681m(h) (2006).

127 *Id.*

128 *See Consumers' Ability to Dispute*, *supra* note 109, at app. 84 (testimony of Leonard A. Bennett).

129 *See id.* ("And despite the growing profits in credit monitoring services, the CRAs make most of their money from these collecting creditors.").

130 2004 FTC REPORT, *supra* note 110, at 47.

2. Flawed Credit Report Repair

Once a consumer discovers an error, the process does not improve. There is ample evidence that many consumers have an excruciating time restoring their credit reports after discovering inaccuracies. Victims of identity theft and other errors can spend hundreds of hours in this process[131] and are often unsuccessful.[132] The judicial opinions in this area show that consumers who attempt to fix their credit reports frequently file multiple complaints with CRAs before resorting to litigation.[133]

This difficulty is a direct result of the flawed process the CRAs employ to investigate disputes. The CRAs do not appear to conduct investigations of consumer error complaints,[134] but rather refer each disputed item to the furnisher who supplied it.[135] This process is almost entirely automated.[136]

Upon receipt of a consumer dispute, the CRA will condense it to fit on a one-page form, where it is represented by a two-digit code.[137] This condensation occurs regardless of how much information the consumer has provided about the alleged inaccuracy. The standardized electronic form

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[131] A 2010 study found that, on average, victims of identity theft spent 21 hours and $373 resolving the issue. JAVELIN STRATEGY & RESEARCH, 2010 IDENTITY FRAUD SURVEY REPORT 5 (2010), *available at* https://www.javelinstrategy.com/uploads/files/1004.R_2010IdentityFraudSurveyConsumer.pdf. Another study found that victims of identity theft spent an average of 68 hours resolving its effects. IDENTITY THEFT RES. CTR., IDENTITY THEFT: THE AFTERMATH 2009, AT 20 (2010), *available at* http://www.idtheftcenter.org/artman2/uploads/1/Aftermath_2009_20100520.pdf.

[132] In their book, Wu and De Armond report the results of a 2007 Zogby poll finding that 37% of consumers who ordered their credit reports discovered errors and that half of them had difficulty correcting these inaccuracies. *See* WU & DE ARMOND, *supra* note 96, § 4.1.3.5 ; *see also* Jeff Sovern, *The Jewel of Their Souls: Preventing Identity Theft Through Loss Allocation Rules*, 64 U. PITT. L. REV. 343, 359-60 (2003) ("Victims report that even after they demonstrate that fraud occurred, lenders refuse to take steps to prevent further damage from occurring, and persist in attributing the thieves' transactions to the victims. Consumer reporting agencies are said to be particularly uncooperative." (citation omitted)).

[133] *See, e.g.*, Konter v. CSC Credit Servs., Inc., 606 F. Supp. 2d 960, 965 (W.D. Wis. 2009) (describing how the plaintiff and his lawyer filed five dispute letters before his twin sister's information was removed from his credit report); Saenz v. TransUnion, L.L.C., 621 F. Supp. 2d 1074, 1078-79 (D. Or. 2007) (noting that the plaintiff filed two disputes and a lawsuit before false information was corrected); *see also* WU & DE ARMOND, *supra* note 96, § 4.5.1.1 ("Consumers often are forced to file multiple disputes, then file litigation, before their credit reports are corrected.").

[134] *See, e.g.*, Gorman v. Experian Info. Solutions, Inc., No. 07-1846, 2008 WL 4934047, at *6 (S.D.N.Y. Nov. 19, 2008) (quoting the deposition of an Experian official who stated "we don't do any other independent investigations" besides relying upon the furnisher).

[135] *See supra* note 85.

[136] *See* 2006 FTC REPORT, *supra* note 85, at 15 n.87 (noting that FACTA requires CRAs to offer an automated system for furnishers to report the results of their investigations).

[137] For a sample form, see *id.* at appendix C.

does contain a one-line field that employees can use to add more information, but this field is used in only 30% of cases.[138]

Although the system contains twenty-six dispute codes, often listed in a drop-down menu,[139] most of them are rarely used. According to furnisher reports, 30-40% of disputes arrive with "generic or catch-all dispute codes."[140] A high-profile consumer attorney claims that the same five generic codes are used nearly 90% of the time: "Not his/hers" (30.5%); "Disputes present/previous Account Status/History" (21.2%); "Claims Inaccurate Information, Did not provide specific dispute" (16.8%); "Disputes Amounts" (8.8%); and "Claims account closed by consumer" (7.0%).[141]

The CRAs do not forward any documentation to furnishers, even though they advise consumers submitting disputes to include documentation such as billing statements or letters from their creditors.[142] The "Big Three" CRAs (Experian, Equifax, and TransUnion) actually have a policy of not forwarding these documents to the furnishers evaluating the accuracy of consumer disputes.[143] In fact, the CRAs' electronic system is not even capable of transmitting a consumer's documentation.[144] Equifax states, however, that it sometimes faxes documentation and that furnishers can request it.[145]

Furnishers, in turn, have blamed the CRA system for not giving them enough information to conduct more than superficial investigations.[146] As a

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138 *Id.* at 17.

139 WU & DE ARMOND, *supra* note 96, § 4.5.6.2.

140 2006 FTC REPORT, *supra* note 85, at 17.

141 *Consumers' Ability to Dispute*, *supra* note 109, at app. 82 (testimony of Leonard A. Bennett).

142 *See, e.g.*, EXPERIAN, http://www.experian.com/disputes/how-to-dispute.html (last visited Nov. 16, 2012) (explaining how to request an investigation); *Dispute Information on Your Credit Report*, (same); *Online Dispute*, EQUIFAX, https://www.ai.equifax.com/CreditInvestigation (last visited Nov. 16, 2012) (same); *Request for Investigation*, TRANSUNION, http://www.transunion.com/docs/personal/InvestigationRequest_Chester.pdf (last visited Nov. 16, 2012) (same).

143 *See, e.g.*, Dixon-Rollins v. Experian Info. Solutions, Inc., No. 09-0646, 2010 WL 3749454, at *4 (E.D. Pa. Sept. 23, 2010) (citing the testimony of a TransUnion team leader who stated that "Trans Union, as a matter of policy, never forwards material submitted by consumers to the original source"); 2006 FTC REPORT, *supra* note 85, at 18 (stating that TransUnion typically does not forward consumer-supplied documentation to furnishers).

144 *See Consumers' Ability to Dispute*, *supra* note 109, at app. 76-77 (testimony of Leonard A. Bennett) (quoting a deposition from a vice president at Equifax).

145 2006 FTC REPORT, *supra* note 85, at 18.

146 *E.g.*, Letter from Christopher T. Curtis, Assoc. Gen. Counsel, Capital One, to Office of the Comptroller of the Currency, et al. (May 22, 2006), *available at* http://www.ftc.gov/os/comments/FACTA-furnishers/522110-00083.pdf, *commenting on* Interagency Advance Notice of Proposed Rulemaking: Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act, 71 Fed. Reg. 14,419 (Mar. 22, 2006); *see also* Westra v. Credit Control of Pinellas, 409 F.3d 825, 827 (7th Cir. 2005) (holding that furnisher-defendant's investigation "was

result, the standard furnisher practice is to verify that the relevant consumer does, in fact, have an account and that the consumer's basic information is correct.[147] But this practice does nothing to address whether, for example, the account in the consumer's name was fraudulently obtained. When a CRA receives verification from the furnisher of the existence of an account, it considers the consumer's complaint meritless, even if the response does not address the point that the consumer is disputing.[148]

Throughout this process, the CRA employees who handle the disputes have virtually no discretion. Two of the "Big Three" CRAs outsource their dispute processes internationally.[149] Employees are evaluated on meeting "quality" and "production" targets, with "quality" defined as following the steps in the employee manuals and "production" meaning the number of disputes they process.[150] The CRAs generally do not allow their employees to contact any live human beings, such as the consumers or the furnishers, in conducting their investigations.[151] The only changes these employees are usually authorized to make to consumer credit reports are those that proceed directly from furnisher responses.[152]

In a sign that the CRAs may realize that their investigation processes are compromised, the agencies maintain lists of "VIPs," such as celebrities, lawyers, and politicians, whose reports of inaccuracies are investigated through a more thorough process.[153] For Equifax and TransUnion, this special treatment appears to mean using U.S.-based employees to conduct the investigations, rather than outsourcing these disputes.[154]

Even in the rare case that a consumer does manage to have an inaccuracy corrected, there is still a significant chance that the erroneous information will be reinserted at a later date. Despite the FCRA requirement that the

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reasonable given the scant information it received" from the CRA); Malm v. Household Bank, No. 03-4340, 2004 WL 1559370, at *4 (D. Minn. July 7, 2004) (finding a furnisher's investigation sufficient given its limited information).

147 *See, e.g.*, Johnson v. MBNA Am. Bank, 357 F.3d 426, 429 (4th Cir. 2004) (describing a cursory review conducted by a furnisher to verify information); Plaintiff's Complaint at 4-5, United States v. Credit Bureau Collection Servs., No. 10-169 (S.D. Ohio Feb. 24, 2010) (describing a furnisher's procedures for processing disputes).

148 WU & DE ARMOND, *supra* note 96, § 4.5.4.2.

149 *See id.* at 181 (describing Equifax's and TransUnion's outsourcing); *Consumers' Ability to Dispute*, *supra* note 109, at 42 (statement of Leonard A. Bennett) (stating that TransUnion uses a vendor in India).

150 WU & DE ARMOND, *supra* note 96, § 4.5.6.4.

151 *Id.*

152 *Id.; see also id.* ("Each of the 'Big Three' CRAs also concedes that their employees are not permitted to exercise any personal discretion.").

153 *Consumers' Ability to Dispute*, *supra* note 109, at app. 59-60 (testimony of Leonard A. Bennett).

154 *Id.*

CRA correct or delete inaccurate information,[155] when the change to be made is the deletion of an account, "the CRAs will only 'soft-delete' the account, invoking a function that suppresses or cloaks the information while still leaving it in the database."[156] So if the creditor changes the account number or the account is sold, the suppression will no longer hold.[157]

If all else fails, a consumer does have the right to file a statement of dispute explaining that she believes certain information in her report to be inaccurate.[158] The CRA must then insert it in the credit report. Approximately 30% of consumers who have been unsuccessful in challenging their credit reports use this remedy.[159] But it is largely ineffective. The statement of dispute is usually inserted at the bottom of the report, and creditors often do not see it or give it much weight.[160]

The main benefit of automation is that it generates revenue for the CRAs. The CRAs spend well under $1.00 per dispute on processing,[161] less than what the CRAs charge creditors each time a consumer submits a dispute about data that a creditor provided.[162] In fact, the CRAs' online processing system has become so profitable that the CRAs moved it from their nonprofit trade association, where it was created, to a for-profit company of which the three major CRAs each own a share.[163] The revenue generation function of credit report errors undoubtedly enables the CRAs to keep their prices low. Charges for initial credit checks range from $1.25 to $3.00 per credit check, along with a $500 annual fee.[164]

The savings to creditors may be passed on to some consumers in the form of lower credit costs and higher credit availability, but the sacrifice in accuracy means that these benefits will not be distributed appropriately. Consumers who are denied credit because of errors in their reports do not

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155 15 U.S.C. § 1681i(a)(5)(A) (2006).

156 WU & DE ARMOND, *supra* note 96, § 4.6.2.

157 *Id.*

158 15 U.S.C. § 1681i(b).

159 2006 FTC REPORT, *supra* note 85, at 22.

160 *See, e.g.*, WU & DE ARMOND, *supra* note 96, § 14.7.4.

161 WU & DE ARMOND, *supra* note 96, § 4.5.6.4 n.918. *See also*, *Consumers' Ability to Dispute*, *supra* note 109, at 42 (statement of Leonard A. Bennet) ("Equifax outsources all of its reinvestigation to a company in the Philippines that is paid 57 cents per dispute . . . .").

162 *See id.* § 4.5.6.1 (explaining that the e-Oscar electronic system handles consumer disputes).

163 *Id.*

164 *See* Shelby Grad, *Trans Union Wins Credit Report Contract*, L.A. TIMES, Sept. 13, 1995, at B2 (reporting that TransUnion won the bid to provide Orange County with credit-reporting services for one year with a price of $1.25 per credit check); Ed Sacks, *Landlords Go High-Tech to Check Credit*, CHI. SUN-TIMES, Mar. 12, 1995, at 16 (reporting that larger property management firms can get credit reports for $3.00 each from national providers by paying an annual membership fee of $500).

benefit from lower credit prices or greater credit availability. And any pricing benefits that emerge are cancelled out for consumers who are charged higher prices due to credit reporting errors. In addition, the consumers who spend extraordinary amounts of time and money repairing damage to their credit reports[165] are almost certainly not receiving any net benefit. In many ways, these unlucky few are cross-subsidizing any lower prices or increased credit availability experienced by the rest of the consumer population.

These CRA investigation practices persist despite a legal regime that would appear to require much more. Under the FCRA, the CRAs are required to conduct "reasonable" investigations of all consumer disputes.[166] When conducting these investigations, CRAs must do more than blindly defer to the furnisher; they have three main sub-duties. First, they must provide the furnisher with "all relevant information regarding the dispute that the agency has received from the consumer."[167] Second, the CRAs must reasonably investigate the matter.[168] Third, the CRAs must "promptly delete [inaccurate] information from the file of the consumer, or modify that item of information, as appropriate, based on the results of the reinvestigation."[169] Once inaccurate information has been deleted, "the information may not be reinserted in the file by the consumer reporting agency

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165 *See supra* note 131.

166 15 U.S.C. § 1681i(a)(1)(A) (2006).

167 *Id.* § 1681i(a)(2)(A). It is an open question whether the CRAs' policy of not forwarding consumer-provided documents to the furnishers violates this provision. *Compare* Dixon-Rollins v. Experian Info. Solutions, Inc., No. 09-0646, 2010 WL 3749454, at *1 (E.D. Pa. Sept. 23, 2010) (affirming liability for TransUnion for failing to re-investigate plaintiff's dispute), *and* Mullins v. Equifax Info. Servs., L.L.C., 305-888, 2007 WL 2471080, at *2 (E.D. Va. Aug. 27, 2007) (upholding judgment against TransUnion for willfully violating the FCRA by failing to investigate), *with* Morris v. Trans Union, 420 F. Supp. 2d 733, 740-41 (S.D. Tex. 2006) (holding that TransUnion's failure to develop policies and procedures for verifying creditor information did not amount to "willfulness"), *and* Konter v. CSC Credit Servs., Inc., 606 F. Supp. 2d 960, 971-72 (W.D. Wis. 2009) (finding no violation and holding that the FCRA requires CRAs to forward only relevant information).

168 15 U.S.C. § 1681i(a)(1)(A). In determining what constitutes a "reasonable" investigation, courts use a balancing test. *See, e.g.*, Cushman v. Trans Union Corp., 115 F.3d 220, 225-26 (3d Cir. 1997) (weighing the extent of information the defendant had against the cost of investigation). Even the most CRA-friendly cases use this balancing test. *See, e.g.*, Lee v. Experian Info. Solutions, No. 02-8424, 2003 WL 22287351, at *6 (N.D. Ill. Oct. 2, 2003) (using the balancing test to uphold summary judgment for defendant). Despite these tests, the CRAs publicly maintain that they have no duty to look beyond the automated verifications they receive from furnishers. WU & DE ARMOND, *supra* note 96, § 4.5.3.4.5.

169 15 U.S.C. § 1681i(a)(5)(A)(i).

unless the person who furnishes the information certifies that the information is complete and accurate."[170]

There are volumes of case law on the issue, much of it finding CRA procedures to violate the FCRA,[171] and the CRAs have entered into consent decrees with the FTC and state attorneys general.[172] Yet these remedies have proven ineffective in generating change.

Part of the problem appears to be that there are not enough lawyers practicing in this area to enable a density of lawsuits that would change CRA incentives.[173] Another issue is that the FTC did not have adequate tools to change CRA practices, both in terms of resources and enforcement authority.[174] The Dodd-Frank Act relocated regulatory responsibility for the FCRA to the newly created Consumer Financial Protection Bureau (CFPB), which has more direct enforcement powers than the FTC did. The CFPB has the authority to supervise "larger participant[s] of a market for other consumer financial products or services,"[175] and one of its first acts after the appointment of its director was to issue a proposed rule that would define CRAs as larger market participants.[176] This authority would enable the CFPB to implement my policy proposal more effectively than the FTC would have been able to do.

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170 *Id.* § 1681i(a)(5)(B)(i). The "soft-delete" system that the CRAs use arguably violates these requirements, and two courts have found this procedure unreasonable or potentially unreasonable. Cousin v. Trans Union, Corp., 246 F.3d 359, 368 (5th Cir. 2001) (holding the practice of soft-deleting unreasonable); Jordan v. Equifax Info. Servs., L.L.C., 410 F. Supp. 2d 1349, 1358 (N.D. Ga. 2006) (categorizing the soft-delete at issue as an "unexplained 'glitch'"—not defendant's practice—and thus finding the CRA's procedure reasonable).

171 *See Cousin*, 246 F.3d at 368 (holding that the defendant knew about the problems with its cloaking procedure and was negligent in not fixing them).

172 WU & DE ARMOND, *supra* note 96, app. K (summarizing enforcement orders secured by law enforcement agencies against CRAs); *see also The Consumer Reporting Act of 1993: Hearing on H.R. 1015 Before the Subcomm. on Consumer Credit and Ins. of the H. Comm. on Banking, Fin., and Urban Affairs*, 103d Cong. 316 n.1 (1993) (statement of Oakley Orser, Vice President of Credit, Belk Ctr., Inc.) (referencing an Equifax agreement with eighteen state attorneys general).

173 The NCLC's Chi Chi Wu estimates that there are somewhere between a few dozen and a couple hundred U.S. lawyers practicing in this area. Telephone Interview with Chi Chi Wu, Staff Att'y, Nat'l Consumer Law Ctr. (Aug. 19, 2011).

174 *Id.*

175 12 U.S.C. § 5514(a)(1)(B) (Supp. IV 2011).

176 Defining Larger Participants in Certain Consumer Financial Products and Services Markets, 76 Fed. Reg. 38,059 (proposed June 29, 2011) (to be codified at 12 C.F.R. ch. X) [hereinafter CFPB Proposed Rule] (proposing to cover CRAs).

B. *Blocking Data Generated by Identity Theft*

In 2003, Congress passed FACTA partly as a response to identity theft.[177] One way to read the passage of FACTA is as a referendum on CRA practices regarding the matter.[178] The statute, which was incorporated into the FCRA, provides a procedure for victims of identity theft that significantly limits the CRAs' discretion. The new provisions limit the CRAs' role in identity theft cases to receiving reports from law enforcement authorities. In addition, the provisions set short, mandatory deadlines for all CRA actions in identity theft cases.[179] The FACTA definition of identity theft, however, excludes much coerced debt,[180] and law enforcement agencies would be a poor choice for screening coerced debt reports. Thus, my proposal broadens the current provisions to include coerced debt and imports a decisionmaker who can more reliably determine the coerced or fraudulent nature of debt within a family.

The FACTA provisions are a logical place to look for coerced debt remedies, because in many ways, coerced debt is a subtype of identity theft. Identity theft can be broadly defined as a crime in which one person makes unauthorized use of another person's identity, usually for financial gain.[181] Coerced debt meets these general criteria. It nevertheless fails to meet FACTA's criteria for identity theft, because that crime is seen as one of fraud committed by strangers.

Although it is inaccessible to many victims of coerced debt, FACTA's blocking mechanism appears to be fairly effective, especially when compared with the investigation procedures discussed in the previous subsection. The remedy enables consumers to block fraudulent transactions from their credit reports.[182] This means that future potential creditors would be unable to see the negative items generated by identity theft. Unlike the

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177 *See* Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952, 1952 (codified as amended in scattered sections of 15 and 20 U.S.C.) (noting that one of the Act's purposes is "to prevent identity theft").

178 FACTA included six substantive titles, one of which was "Enhancing the Accuracy of Consumer Report Information." *Id.*

179 15 U.S.C. §§ 1681–1681x (2006).

180 *See infra* text accompanying notes 203-07.

181 FCRA defines identity theft as "a fraud committed using the identifying information of another person." 15 U.S.C. § 1681a(q)(3).

182 *See id.* § 1681c-2(a) (describing how a reporting agency "shall block the reporting of any information in the file of a consumer that the consumer identifies as information that resulted from an alleged identity theft" upon the receipt of certain materials).

FCRA provision for investigating inaccuracies,[183] the blocking provision establishes a default that favors the consumer. Under this FCRA section, the disputed information is automatically blocked unless the CRA can verify it within fifteen days, with one fifteen-day extension available if the CRA needs more information and documentation.[184] This default structure should make the blocking mechanism significantly more accessible to consumers.

The blocking remedy is relatively new; it did not take effect until December 2004.[185] There is virtually no case law[186] or academic literature[187] on how well the remedy works. The few anecdotal reports I could compile suggest that the remedy is far from perfect, although superior to the investigation process. Christopher Kittell, who blogs under the name "FCRA Lawyer," states that many of his clients have either been unaware of the blocking mechanism or found blocking to be ineffective.[188] However, lawyer Rick Kornis reports that he has found that this provision has worked for his clients, although he also believes that many unrepresented consumers' blocking requests fall through the cracks.[189] A third lawyer whom I interviewed has also found the blocking mechanism to be moderately effective.[190]

If FACTA's blocking provision could be broadened to encompass more coerced debt, it might provide an effective remedy. This potential solution, however, presents both substantive and procedural challenges that I ultimately address by leveraging the expertise of family courts to inform its enforcement.

The requirements for accessing the identity-theft block pose two difficulties for victims of coerced debt. The four requirements are "(1) appropriate

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183 FRCA's investigation procedure gives the CRAs a thirty-day deadline to determine whether disputed information is inaccurate, but does not set a pro-consumer default if the deadline is not met. *Id.* § 1681i(a)(1)(A).

184 16 C.F.R. § 603.3(a)(3)(i)–(ii) (2012).

185 *See* Pub. L. No. 108-159 § 3(1)–(2), 117 Stat. 1952, 1953 (stating that FACTA would take effect twelve months after enactment).

186 I was able to find only one case that dealt with 15 U.S.C. § 1681c-2, *Drew v. Equifax Information Services*, LLC, No. 07-00726, 2010 WL 5022466, at *2 (N.D. Cal. Dec. 3, 2010). However, in this case, the plaintiff added the § 1681c-2 claim during the middle of the case at the request of the court, *id.* at *2, so this opinion provides no lens through which to assess the effectiveness of the blocking remedy outside the context of litigation.

187 A Westlaw search revealed no law review citations for 15 U.S.C. § 1681c-2.

188 Christopher Kittell, *15 U.S.C. 1681c-2*, FAIR CREDIT REPORTING ACT BLOG (July 11, 2009 9:37 AM), http://fcralawyer.blogspot.com/2009/07/15-usc-1681c-2.html.

189 E-mail from Rick Kornis, Att'y, Kornis & Assocs., P.C., to author (Nov. 14, 2011, 14:33 CST) (on file with author).

190 Telephone Interview with Robert Sola, Att'y (Oct. 27, 2011).

proof of the identity of the consumer; (2) a copy of an identity theft report; (3) the identification of [the fraudulent information] by the consumer; and (4) a statement by the consumer that the information is not information relating to any transaction by the consumer."[191] The identity theft report and the consumer statement present barriers for many victims of coerced debt.

The chief problem with the identity theft report is that it may require police involvement. The FCRA requires that the report be filed with a law enforcement agency, "the filing of which subjects the person filing the report to criminal penalties relating to the filing of false information, if, in fact, the information in the report is false."[192] Although the statute states that this law enforcement agency can be the United States Postal Inspection Service,[193] the CRAs have discretion to request additional information,[194] and anecdotal evidence suggests that they will often not credit a consumer's allegations of identity theft unless the victim files a police report.[195]

But requiring law enforcement involvement in coerced debt is problematic. Coerced debt exists at the intersection of two crimes, identity theft and domestic violence, that have a history of victim underreporting and police neglect. Law enforcement identity theft units are frequently underfunded,[196] especially considering that successful identity theft is difficult to trace and criminal penalties are too low to offset the minimal risk of prosecution.[197] In addition, more than half of victims of identity theft never contact a law enforcement agency about the matter.[198] Finally, there is anecdotal evidence that many police departments will not accept identity theft reports in which the thief is a family member.[199]

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191 15 U.S.C. § 1681c-2(a)(1)–(4) (2006).

192 16 C.F.R. § 603.3(a)(2) (2012).

193 *Id.*

194 *Id.* § 603.3(a)(3).

195 *See, e.g.*, Schatten v. Sallie Mae, Inc., No. 08-0322, 2009 U.S. Dist. LEXIS 42801, at *6 (N.D. Ga. Mar. 4, 2009) (noting that Sallie Mae's ID Theft Affidavit requires the consumer to submit a police report).

196 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-766, IDENTITY THEFT: GREATER AWARENESS AND USE OF EXISTING DATA ARE NEEDED 17-18 (2002).

197 *See Identify Theft Surveys and Studies: How Many Identity Theft Victims Are There? What Is the Impact on Victims?*, PRIVACY RTS. CLEARINGHOUSE, https://www.privacyrights.org/print/ar/idtheftsurveys.htm (last visited Nov. 16, 2012) (reporting on research finding that identity thieves "have just one in 700 chance of being caught by federal authorities").

198 *See* FTC, CONSUMER FRAUD AND IDENTITY THEFT COMPLAINT DATA, JANUARY–DECEMBER 2007, at 14 (2008), *available at* http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2007.pdf (finding that 35%-40% of identity theft victims contacted the police in fiscal years 2005–2007).

199 Interview with Chi Chi Wu, *supra* note 173.

The relationship between police and victims of domestic violence has a difficult history. It took significant advocacy and high-profile litigation for police departments to take seriously domestic violence,[200] and even now, the effectiveness of police response to domestic violence is controversial. Mandatory arrest statutes were passed beginning in the 1980s to address the historical unresponsiveness of police departments to domestic violence, but these laws have, in turn, raised the concern that they can imperil victim safety.[201] DV victims may not want police assistance for reasons that range from a distrust of police that stems from their historic nonresponsiveness to fears that police involvement will anger the abuser and fail to keep the victim safe.[202]

The second issue that blocks coerced debt victims from using the FACTA identity theft procedure is that identity theft is currently defined exclusively as a crime of fraud, not duress. This understanding is codified in the FACTA requirement that the identity theft victim provide "a statement by the consumer that the information is not information relating to any transaction by the consumer."[203] If the victim of coerced debt was forced to seek a loan under duress or under a combination of fraud and duress, she will have been personally involved in the transaction and therefore will not be able to meet this test. Even when the coerced debt was generated exclusively by fraud, authorities may find it less believable that the consumer did not participate in the transaction when the perpetrator is her spouse or long-term partner.

Simply rewriting FACTA to include identity theft based on duress, however, may not solve the problem. Such a standard would raise concerns about the potential for abuse, especially since the parties' intimate relationship could suggest collusion.[204] The current statutory framework essentially relies on law enforcement agencies to screen out fraudulent claims of identity theft.[205] But given law enforcement authorities' checkered history with identity theft and domestic violence, they may not have the institutional

200 *See* Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 53 (1992) (describing the growth of court cases requiring police to enforce DV laws).

201 *See, e.g.*, Jean Ferguson, *Professional Discretion and the Use of Restorative Justice Programs in Appropriate Domestic Violence Cases: An Effective Innovation*, 4 CRIM. L. BRIEF, no. 2, Summer 2009 at 3, 5 (recounting the history of mandatory arrest laws).

202 *See, e.g.*, STARK, *supra* note 51, at 63 (stating that, at best, the chances that a batterer will go to jail as a result of any given incidence of abuse are approximately one in 10,000).

203 15 U.S.C. § 1681c-2(a)(4) (2006).

204 Collusion is unlikely to occur under my proposal because of the required finding of domestic violence. *See infra* text accompanying note 235.

205 *See supra* note 192 and accompanying text.

capability to judge cases of coerced debt. That is why my policy proposal recommends moving this determination to family courts, which have more relevant expertise. At its most basic, my reform substitutes a divorce procedure for the criminal procedure as the underlying legal mechanism on which CRAs must rely in making blocking determinations.

C. *Family Courts: A New Decisionmaker*

My proposal for addressing the credit-reporting effects of coerced debt builds on FCRA's blocking remedy,[206] replacing the law enforcement approach taken by the current statute with a family court approach.[207] Because credit reporting is so automated,[208] it is important to preserve the procedural shape of the FCRA process: leveraging a decisionmaker outside of the credit reporting system whose determination is then mechanically applied by the CRAs. Under my proposal, a victim of coerced debt who was obtaining a divorce could request from the family court a ruling determining whether any of the debts that she owed were coerced.

This could be done as part of the division of the family's property. While the court is dividing the spouses' debts and assets, it could also determine whether the abuser generated any of the debts in the victim's name through fraud or duress. The victim could then use this certification to obtain the identity theft blocking remedy under the FCRA. My proposal would act as a substitute for the FACTA requirements of an identity theft report and a statement that the victim did not initiate any of the transactions. The coerced debt block would function as the identity theft block does now, preventing users of consumer data from viewing records of the involuntary debt. As discussed in Part III of this Article, the block would apply to all creditors with respect to debts that were no longer outstanding and to employers, landlords, and basic utilities with respect to debts that the victim still owed.

1. The Advantages of Using Family Courts

Using family courts as the certification mechanism for coerced debt produces at least three major advantages. First, court procedures avoid the identification problems that plague the resolution of identity-theft cases.

206 *See supra* text accompanying note 191.

207 Alternatively, a proposal could incorporate both law enforcement and family courts, leaving the law enforcement option available for victims who found it more comfortable or wanted to avoid the costs of a disputed divorce.

208 *See supra* subsection II.A.1.

Second, family courts have substantial expertise in making decisions about family finances. Third, using family courts is administratively efficient because, in many cases, they will already be deciding related issues.

With respect to the first point, any procedure designed to address identity-related crime must develop a means of accurately determining identity. This is an inherent and difficult problem. Once an identity thief has substituted her own personal information for that of the victim, it becomes difficult for the victim to demonstrate that he is the real owner of that identity—the only way he can do so is by verifying his personal information, which may be inaccurate as a result of the identity theft.[209] In the case of "traditional" identity theft, victims have been required to provide substantially more documentation than were those who stole their identities. Often, victims cannot make this case successfully.[210]

Even when this specific problem is not present, the question of fraud may persist. Allegations of financial identity theft invite suspicion, because the victim is typically trying to avoid obligations in her name. Assertions of coerced debt are likely to be met with particular skepticism, because the person the victim will be blaming is her significant other, and it is easy to imagine two spouses colluding on this issue or the victim benefiting from the theft. In addition, victims of both traditional identity theft and coerced debt must prove a negative: that they did not incur a given financial obligation, although they often have limited access to information that can

209 *See* Sovern, *supra* note 132, at 361 ("[C]redit bureaus sometimes change a consumer's file to reflect false information submitted by the thief, and so victims attempting to prove their bona fides are met with the response that their proof does not conform to their existing file."); *see also* James Grimmelmann, *Known and Unknown, Property and Contract: Comments on Hoofnagle and Moringiello*, 5 BROOK. J. CORP., FIN. & COM. L. 85, 88 (2010) ("[Identity theft] victims thus find themselves trapped in the Kafkaesque position of being unable to prove that they really are themselves . . . ."). I have first-hand experience with this problem. I had my identity stolen in March 2012. As part of the theft, the perpetrator changed the telephone number on my credit card account to her telephone number. When I tried to rectify the situation, the creditor would not speak to me because I failed its security test by giving the "wrong" telephone number. The creditor eventually identified me as the real Angela Littwin by matching my voice to the voice in recordings of earlier conversations I had had with the creditor. It was lucky for me that the creditor had saved those recordings.

210 *See* Sovern, *supra* note 132, at 361 ("The minimal scrutiny given to identity thieves contrasts dramatically with the experiences of those trying to prove that their identity has been stolen. . . . While applicants for credit need not prove their bona fides, identity theft victims may be required to submit numerous documents to prove their claims."); *see also* Anderson v. Trans Union, 405 F. Supp. 2d 977, 983 (summarizing a CRA's statement that it could "match" a plaintiff with his credit report even without his social security number); WU & DE ARMOND, *supra* note 96, § 4.5.2.3 (stating that CRAs will usually decline an investigation request when a consumer fails to provide a social security number, even though they regularly provide reports to users who do not do so).

show that someone else did.[211] Because it is the perpetrators who actually entered into the transactions, they are the ones who received the records, and the victims often do not have access to them.[212]

Having a court rule on identity theft can reduce these types of problems. In court, it is relatively easy for a victim of identity theft to show that he is who he claims to be because it is more difficult to perpetrate a fraud on a court than on a financial company with which one has little face-to-face contact. Standard court procedures reduce the risk of impersonation through processes such as strict verification of identity, the filing of records under penalty of perjury,[213] and in-person appearances. Impersonation would be particularly difficult in a family court that is handling the parties' divorce because the parties would already be before the court for other reasons.

Adjudication can also lower the risk of certification of fraudulent coerced-debt claims and, of equal importance, of the perception that fraudulent claims are being certified. One of the largest obstacles to achieving recognition for coerced debt is the concern that consumers will use fraudulent claims of coercion to avoid paying legitimate debts. Using a process as thorough as adjudication can alleviate this fear. Courts can engage in extensive fact-finding, which could include subpoenaing financial records and taking testimony if necessary. A neutral court that has thoroughly vetted the matter is more likely to arrive at an accurate result than the parties that currently make decisions about the validity of identity-theft claims: the CRAs and law enforcement officers.

In addition to the general benefits of courts, family courts in particular have expertise in adjudicating both financial issues and matters related to domestic violence, often in the same cases. In determining child support, alimony, and property distributions, they frequently use complicated mathematical formulas that incorporate a variety of financial and non-financial factors.[214]

Financial issues abound in divorce. Divorcing spouses and their attorneys often create detailed spreadsheets of the family's assets and liabilities.[215] Child support formulas involve complex calculations in which courts manipulate financial variables such as "the obligor's preliminary assessment,"

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211 *See* Sovern, *supra* note 132, at 361.

212 *See supra* notes 209-12.

213 *E.g.*, 28 U.S.C. § 1746 (requiring unsworn declarations under penalty of perjury).

214 *See infra* notes 215-25 and accompanying text.

215 *E.g.*, VIOLET WOODHOUSE WITH DALE FETHERLING, DIVORCE & MONEY: HOW TO MAKE THE BEST FINANCIAL DECISIONS DURING DIVORCE, 174-80 (Emily Doskow ed., 10th ed. 2011).

"the reduction fraction," and the "harmonizing factor" used in the American Law Institute's (ALI) recommended formula.[216] The ALI rubric also includes specific factors, such as medical and daycare expenses, that are used in the means test that bankruptcy courts apply.[217] In addition, family courts also engage in the valuation of assets, one of the most challenging tasks undertaken by financial courts such as bankruptcy courts.[218] "[T]he trial really becomes a battleground over vigorously contested matters dealing with the worth of the varied marital assets."[219] Family courts must value not only traditional assets such as family homes, but also more complex assets like carry-back notes,[220] interests in businesses,[221] shareholder distributions from "S" corporations,[222] and commercial buildings.[223]

For purposes of adjudicating matters related to coerced debt, family courts also have an obvious advantage over other courts with financial expertise: they have experience adjudicating matters related to domestic violence.[224] And in at least ten states, family courts even have experience applying judgments about domestic abuse to financial determinations, usually in property divisions.[225]

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216 The ALI formula reads:

> To establish the basic child-support obligation, the child-support formula should determine the dollar amount of the obligor's preliminary assessment; multiply it by the reduction fraction to establish a preliminary reduction; multiply the preliminary reduction by the harmonizing factor to establish a final reduction; and then subtract the final reduction from the preliminary assessment.

PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, § 3.05(5) (2002).

217 *Compare id.* § 3.05(6)–(7) (calculating the amount of child support based on the child's educational and medical needs), *with* 11 U.S.C. § 707(b)(2)(A)–(C) (providing a means test to determine whether a debtor is eligible to file for bankruptcy under Chapter 7).

218 *See, e.g.*, Assocs. Commercial Corp. v. Rash, 520 U.S. 953, 959 (1997) (describing the circuit split over the proper method for valuing consumer assets for "cram down" purposes in Chapter 13 bankruptcy).

219 BARTH H. GOLDBERG, VALUATION OF DIVORCE ASSETS § 1.14 (1984).

220 *E.g.*, *Reynolds v. Reynolds*, 109 S.W.3d 258, 273-74 (Mo. Ct. App. 2003).

221 *E.g.*, Fenstermaker v. Fenstermaker, No. 2004-T-0097, 2005 WL 2709571, at *1-2 (Ohio Ct. App. Oct. 21, 2005).

222 *E.g.*, Boone v. Boone, 899 So. 2d 823, 826 (La. Ct. App. 2005).

223 *E.g.*, *In re* Marriage of Romey, No. 02-1539, 2004 WL 57566, at *2 (Iowa Ct. App. Jan. 14, 2004).

224 The laws of every state provide family courts with some jurisdiction over domestic violence. ELIZABETH M. SCHNEIDER ET AL., DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE 210 (2d ed. 2008).

225 Several states consider domestic violence in dividing marital assets. *See, e.g.*, Crowe v. Crowe, 602 So. 2d 441, 443 (Ala. Civ. App. 1992) (upholding a lopsided division of property in part because "the husband physically abused the wife and . . . abused alcohol throughout most of the children's childhood [up to the] time of separation"); Comins v. Comins, 595 N.E.2d 804, 805

A few cases from these states illustrate the ways in which family courts have made finely tuned judgments in which they balance financial factors against the severity of the abuse. For example, in one Missouri divorce case, the court awarded the wife the marital home based on the husband's twice putting a loaded gun in her mouth and awarded her a disproportionate share of the rest of the family's assets because of his other physical abuse and infidelity.[226] Another example is a case in which a Texas appeals court upheld an award of 81% of the family's estate to the wife because of the husband's physical abuse, including kicking his wife in front of one of their children.[227] Experience with cases that bridge the financial and the deeply personal makes the family courts of these states uniquely well suited to rule on coerced debt. It also suggests that even in the other states' family courts, institutional learning about these issues is possible.

Family courts would also be an efficient actor in which to invest authority to adjudicate matters of coerced debt, because they already make some of

(Mass. App. Ct. 1992) (upholding an uneven property division because of the admitted existence of abuse and the economic help the wife's family contributed to the marriage, although the physical abuse occurred thirty years before the divorce and resulted in relatively minor physical injuries); Handrahan v. Handrahan, 547 N.E.2d 1141, 1142-43 (Mass. App. Ct. 1989) (finding that the wife did not owe the husband 25% of the marital home because "the husband's drinking, which was frequent, was wont to degenerate into violence"); Dodson v. Dodson, 904 S.W.2d 3, 5, 10 (Mo. Ct. App. 1995) (awarding wife a larger share of the marital estate partially due to the husband's misconduct, which included numerous extramarital affairs and several instances of physical abuse); Moran v. Moran, 612 A.2d 26, 28, 31 (R.I. 1992) (awarding permanent alimony because husband drank heavily and physically abused his pregnant wife and children); Ohendalski v. Ohendalski, 203 S.W.3d 910, 914 (Tex. App. 2006) (upholding an award giving wife 81% of the estate in part because husband had engaged in physical abuse); Awad v. Rasmussen-Awad, No. 14-02-01142, 2004 WL 744234, at *7 (Tex. App. Apr. 8, 2004) (approving unequal division to wife, where she "had health problems both before and after the parties separated—some, such as anxiety and emotional problems, due all or in part to" husband's physical abuse). The District of Columbia also considers the economic effects of abuse when marital property is being distributed. *See, e.g.*, Burwell v. Burwell, 700 A.2d 219, 224-25 (D.C. 1997) (overturning a district court's decision for failure to consider the effects of the husband's abuse and manipulation in worsening the couple's economic health, despite presumption of equitable distribution in divorce). However, a minority of states will consider domestic abuse only when it is extreme. *See, e.g.*, Stover v. Stover, 696 S.W.2d 750, 751-52 (Ark. 1985) (allowing consideration of the fact that the wife had been convicted of conspiracy to kill her husband to affect property division, but cautioning that the facts of the case before them were "bizarre"); *In re* Marriage of Sommers, 792 P.2d 1005, 1010 (Kan. 1990) (declining to consider marital fault except in extreme cases, "where a party's conduct is so gross and extreme that failure to penalize therefor would, itself, be inequitable"); McDougal v. McDougal, 545 N.W.2d 357, 361 n.7 (Mich. 1996) (disallowing the element of fault in the distribution of assets because husband's behavior was not "outrageous"); Wenzel v. Wenzel, 472 N.Y.S.2d 830, 833 (Sup. Ct. 1984) (upholding an unequal distribution of assets where the husband stabbed the wife multiple times without provocation and was convicted of attempted murder).

226 *Dodson*, 904 S.W.2d at 5, 9-10.

227 *Ohendalski*, 203 S.W.3d at 914.

the findings necessary to coerced debt determinations. In divorces in which the distribution of property is at issue, courts already compile detailed lists of the parties' debts.[228] In cases in which there are restraining orders or in which child custody is an issue, courts already make determinations about domestic violence.[229] In states that consider domestic violence in property distributions, courts already generate the precise findings necessary to rule on whether a debt was coerced. The only differences between this type of property distribution and my proposals are that, under court direction, the criteria would be more explicit and the rulings would have the ability to affect credit reports.

One problem with the framework I just presented is that some states and localities have separate, cheaper provisions for simple divorces that do not involve property divisions,[230] so many victims of coerced debt could be obtaining their divorces without receiving a formal property division. This would disproportionately affect lower-income families because they are less likely to be able to afford the more expensive forms of divorce. However, even when the divorce does not include a property distribution, family courts may still be making factual findings about domestic violence. And even in simple divorces, the courts may have relevant expertise from adjudicating similar cases, which creates some administrative savings. Certainly, using family courts is more efficient than having CRAs hire additional decisionmakers and train them in domestic violence issues or than training law enforcement officers to understand the complex financial arrangements involved in coerced debt.

2. The Test for Coerced Debt

The precise contours of a test for coerced debt will undoubtedly need refining as more empirical work on the subject is conducted, but the outlines can be sketched now. There would be two major elements to the test: a pattern of domestic abuse and control as well as a finding that each debt was not generated voluntarily.

The finding of domestic violence can borrow from or incorporate existing state law. Every state already has a definition of domestic abuse in its

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228 *See supra* notes 215-25 and accompanying text.

229 *See, e.g.*, TEX. FAM. CODE ANN. § 153.004(d) (West 2008) (establishing a rebuttable presumption that an abuser will not receive custody of or access to any children).

230 *See, e.g.*, SELF-HELP DIVORCE INFORMATION, WAKE COUNTY CLERK CT., *available at* http://web.co.wake.nc.us/courts/documents/Divorce_Packet.pdf (providing for a $167 uncontested divorce in Wake County, North Carolina, in which there is no consideration of property divisions, alimony, or fault).

code, usually for the purpose of granting protective orders and making child-custody determinations.[231] The FCRA should incorporate state definitions of domestic violence used in deciding issues whose factual underpinnings span the course of the marriage. Because pervasive control is the foundation of coerced debt,[232] it is important that the abuse be a long-term issue. The key is identifying a pattern of coercive behavior that prevented the victim from exercising free will with respect to financial matters.

For states that already incorporate domestic violence into property distribution laws, the definitions of abuse in these laws are the logical place to begin. For other states, child custody rules might be an appropriate source of law, because custody determinations are based on a long-term range of conduct.[233] Further empirical research is needed to determine whether relief should be restricted to cases in which the abuse has a physical component, including threats, or whether to use a broader definition of domestic abuse. In the meantime, existing state law on domestic violence provides a starting point that would legitimize coerced debt determinations.

The separate finding of domestic violence is necessary because it provides crucial context for the court. The underlying climate of fear and control in an abusive relationship is what enables coerced debt,[234] and a background understanding of this pattern is essential for evaluating coercion claims about specific debts. A finding of domestic violence can prevent both the false positives and false negatives that might occur if each debt were judged without reference to the overall tenor of the relationship. It helps reduce false positives by decreasing the likelihood that parties will bring claims of coerced debt in cases in which particular credit transactions might look suspicious out of context, but in which there is no history of coercion. It may also discourage nonabusive spouses from colluding in order to obtain a determination of coerced debt. A finding of domestic violence on one's

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231 *See* 24A AM. JUR. 2D *Divorce and Separation* § 854 (2012) (listing purposes for which courts may consider abuse); *see, e.g.*, N.D. CENT. CODE § 14-09-06.2(1)(j) (2012) (setting up a rebuttable statutory presumption against child custody for a parent who has engaged in domestic abuse); N.Y. DOM. REL. LAW § 240 (McKinney Supp. 2012) (stating that in any action concerning custody or visitation rights, "court[s] must consider the effect of [any proven] domestic violence upon the best interests of the child"); FAM. § 153.004(c), (e) (directing courts to "consider the commission of family violence in determining whether to deny, restrict, or limit the possession of a child by a parent" and not to allow unsupervised visitation with parents whose behavior exhibits a "pattern of past or present child neglect or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child").

232 Littwin, *supra* note 1, at 973.

233 *Cf.* DOM. REL. § 240 (requiring courts, when considering the effects of domestic violence on the best interests of the child, also to consider "other facts and circumstances as the court deems relevant").

234 Littwin, *supra* note 1, at 982.

legal record seems like an unacceptable price for helping one's ex-spouse block certain debts from her credit report.[235] Conversely, requiring an initial determination of domestic violence can help victims of coerced debt make their case. A finding that a given relationship is steeped in coercion can enable courts to see the menace behind transactions that might otherwise appear innocent.

The second element of the test would be a determination about whether the victim entered a given transaction voluntarily. In practice, this decision would probably require analyzing whether the victim entered the transaction through fraud or duress. Factual questions to consider might include whether the victim was aware of the transaction as it was taking place; whether it was, in fact, the abuser who completed the credit application or made the relevant purchases; whether the abuser hid information about the transaction from the victim; whether the victim, upon discovery of a fraudulent transaction, felt safe asking the abuser about it; whether the abuser threatened the victim in connection with the transaction; and whether the transaction was conducted in coercive circumstances, such as after a physical assault. Judicial findings about who benefited from any purchases would also inform this analysis. For example, a purchase of household goods would be less likely to be coerced than a purchase of items related to an abuser's extramarital affair.

It is important to include debt generated by fraud as well as duress in the definition of coerced debt because in an abusive relationship, the dynamics of coercion can be a critical factor in enabling fraud. In my preliminary study of coerced debt, advocates reported that abusers engaged in a range of behaviors that prevented victims from discovering fraudulent debt or from taking action upon discovery. These behaviors included restricting victim's access to the family's mail;[236] putting the victim on an allowance so that she had no direct interaction with the family's finances;[237]

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[235] One way to further discourage collusion would be to have the coerced debt appear as a negative item on the abuser's credit report. I would be concerned, however, that this approach would move too far in the opposite direction by dramatically increasing an abuser's resistance to motions for certifying coerced debt. In addition, under my proposal, the abuser whose record was tarred would not benefit from the finding of coerced debt. This characteristic distinguishes the risk of collusion under my proposal from historical collusion between spouses seeking divorces in fault-only jurisdictions. In those cases, both spouses received the benefit of obtaining a divorce. *See, e.g.*, Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1504 (2000) (noting that historically in fault-only jurisdictions, spouses wishing to divorce would collude to have one party file a sham lawsuit alleging statutory violations to obtain a divorce decree from the court).

[236] Littwin, *supra* note 1, at 998.

[237] *Id.* at 983-84.

forbidding the victim from asking about financial matters;[238] and having the victim sign documents with no opportunity to read them.[239] All of these actions rely on duress, but enable the abuser to engage in fraud.

The voluntariness test would apply to each debt separately. If a victim alleged duress or fraud in a number of debts, the court could make a positive finding for some and a negative finding for others. In many cases, a debt may be partially coerced. This is especially likely for credit card debt, which is usually composed of multiple transactions made over an extended period of time.[240] Dividing such debts could quickly become complicated, because when a credit card loan is in default, much of the balance is composed of fees and interest unrelated to specific transactions.[241] Unfortunately, it may not be possible for courts to label debts as partially coerced, because my proposal relies on blocking the existence of each debt on credit reports, and a debt cannot be partially blocked. The best a court could do in such circumstances would be to reduce the reported balance to the extent that the debt was coerced. Alternatively, if this process became unworkable, courts could block any debt that they determined was more than 50% coerced. In such cases, courts should look at the balance of the transactions with a special emphasis on how the credit card was obtained.

After determining that one or more debts were, in fact, coerced, the court would issue a certification of coercion that would list the relevant debts. The victim could then submit this certification to the CRAs, where it would have one of two effects described in Part III, depending on the repayment status of the debt.

3. Implementation

My proposal could be implemented by amending the FCRA to provide an additional means of obtaining the blocking remedy discussed in Section II.B.[242] Alternatively, the ECOA already has one regulation that can be read to disallow the consideration of coerced debt in lending decisions,[243] and this provision could be expanded to make its protections clearer and

238 *Id.* at 985-86.

239 *Id.* at 990.

240 *Cf.* Mann, *supra* note 39, at 384 (noting that transaction-based issuers of credit cards profit from customers with a high volume of transactions).

241 *See id.* at 386 ("[T]he decision to carry a balance [on a credit card] leads immediately to interest charges on the cardholder's account, which accrue at a [high] rate. . . . Moreover, once the borrower begins to carry a balance, the likelihood of late and over-limit fees can increase substantially.").

242 *See supra* text accompanying notes 177-205.

243 *See supra* note 45 and accompanying text.

more user-friendly. In both cases, the certifications of coerced debt generated by state family courts would become evidence submitted to the CRAs to block coerced debts in accordance with my proposal.

a. *Alternative Implementation Through the ECOA*

Instead of amending the FCRA's blocking provision, it would also be possible to implement my policy proposal through the ECOA.[244] The advantage to using the ECOA is that the changes could take place at the regulatory, rather than the statutory, level. ECOA regulatory authority has always been broad,[245] and under the Dodd-Frank Act, power to implement the statute was transferred from the Federal Reserve to the CFPB.[246] This transfer allows the CFPB to implement this part of my proposal on its own, without waiting for Congress. As discussed above, the CFPB has already strongly signaled its intent to regulate the credit reporting industry.[247]

There is already an ECOA regulation that can be read to require creditors to exclude coerced debt from their consideration of an applicant's credit history. The provision currently requires creditors to consider, "[o]n the applicant's request, any information the applicant may present that tends to indicate the credit history being considered by the creditor does not accurately reflect the applicant's creditworthiness."[248]

Research revealed only one written judicial opinion interpreting this provision, and the court's opinion in that case suggests that the provision's scope is fairly broad.[249] In that case, the consumer-plaintiff was trying to exclude from consideration some bankruptcy-related credit history that should not have been included in the creditor's assessment of her creditworthiness.[250] Interestingly, the creditor-defendant argued that the provision applied only to "problems arising in connection with joint accounts with a spouse or former spouse," because it appeared in a subsection with two regulations addressing spousal credit issues.[251] The court rejected the

244 15 U.S.C. §§ 1691–1691f (2006).

245 *See id.* § 1691b(a) (directing the regulatory body to "prescribe regulations . . . as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter [Equal Credit Opportunity], to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith").

246 *Id.* § 1691b.

247 *See* CFPB Proposed Rule, *supra* note 176.

248 12 C.F.R. § 202.6(b)(6)(ii) (2012).

249 *See* Jones v. Keycorp Bank, No. 07-12383, 2008 WL 324126, at *2 (E.D. Mich. Feb. 6, 2008) (holding that the regulation was meant to allow applicants to correct any information in a faulty credit report, not only misinformation for joint accounts).

250 *Id.* at *1.

251 *Id.* at *2.

creditor's argument, citing the plain language of the provision.[252] The creditor's argument that the regulation covered only spousal debts suggests that applying it to these debts would be relatively uncontroversial.

This regulation would, however, be significantly more effective for coerced-debt cases if it were to explicitly cover coerced debt. Much like my proposed blocking mechanism under the FCRA, the regulation could be changed to state that a certification of coerced debt by a family court requires the exclusion of that debt from credit-granting decisions. The regulation could then provide guidelines for family courts, and the CFPB could promulgate forms to be used in the certification process.

The regulation could also be strengthened by deleting the phrase "on the applicant's request."[253] Because the ECOA covers creditors rather than CRAs, only rules that apply in all circumstances become incorporated into CRA practice. For example, the CRAs currently do not report race or marital status,[254] because the ECOA bans creditors from ever considering these factors.[255] If the regulation prohibited creditors from considering coerced debt in all cases—rather than only when consumers protested its inclusion—the CRA reports would exclude this information. This would thus enable consumers to contact the CRAs about coerced debt instead of having to approach each potential creditor individually.

The ECOA regulations are due for an update. The statute and its regulations contain anachronisms, such as one provision addressing the status of consumers who do not have telephones in their homes[256] and another on the effects of usury laws.[257] More importantly, the ECOA does not take into account the changing nature of credit discrimination, of which the advent of coerced debt is one part. The ECOA was passed in 1974[258] to prevent

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252 *Id.* The court ultimately granted the creditor's motion to dismiss on other unrelated grounds. *Id.* at *3.

253 12 C.F.R. § 202.6(b)(6)(ii).

254 *See, e.g.*, *Information Factored in Score*, EQUIFAX (May 31, 2012, 3:03 PM), https://help.equifax.com/app/answers/detail/a_id/138/~/information-factored-in-score (listing "race, color, religion, national origin, sex, or marital status" as factors not considered in calculating a credit score).

255 15 U.S.C. § 1691(a) (2006).

256 *See* 12 C.F.R. § 202.6(b)(4) ("A creditor shall not take into account whether there is a telephone listing in the name of an applicant for consumer credit but may take into account whether there is a telephone in the applicant's residence.").

257 *See* 15 U.S.C. § 1691d(d) ("When each party to a marriage separately and voluntarily applies for and obtains separate credit accounts with the same creditor, those accounts shall not be aggregated or otherwise combined for purposes of determining permissible finance charges or permissible loan ceilings under the laws of any State or of the United States.").

258 Pub. L. No. 93-495, 88 Stat. 1500 (1974).

lenders from discriminating against women.[259] The 1970s were a time of consumer credit scarcity,[260] and before the ECOA, many women had been unable to obtain credit in their own names.[261] Accordingly, the ECOA focused on issues like ending discriminatory denials of credit and helping women build their credit histories.

The case for updating the ECOA's regulations becomes even clearer upon closer examination of the provision that immediately precedes the one discussed above. Under this regulation, creditors are required to include spousal authorized user transactions in their credit determinations.[262] This means that when Spouse *A* is an authorized user on Spouse *B*'s credit account, any transactions associated with the account become part of Spouse *A*'s credit report, even though Spouse *B* is the only person liable for any resulting debt.[263] This provision applies only to spousal credit accounts. It was designed as a prophylactic measure to bolster the credit reports of married women.[264]

But since the 1970s, consumer lending has undergone a massive transformation.[265] Credit is widely available,[266] and excluding negative credit transactions from one's credit report has become as important as incorporating positive transactions. It is difficult to imagine today's lenders engaging in the type of per se gender discrimination that took place before the ECOA. Any different treatment that remains is likely to be an effect of

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259 *See, e.g.*, Anderson v. United Fin. Co., 666 F.2d 1274, 1277 (9th Cir. 1982) ("The purpose of the ECOA is to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider for individual credit."). The ECOA was amended in 1976 to include race, ethnicity, age, and other prohibited classifications. Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251.

260 For a history of the rapid expansion of consumer lending in the late twentieth century, see David A. Moss and Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?*, 73 AM. BANKR. L.J. 311, 327-46 (1999).

261 *See, e.g.*, *Anderson*, 666 F.2d at 1277.

262 12 C.F.R. § 202.6(b)(6)(i) (2012).

263 *See, e.g.*, Johnson v. MBNA Am. Bank, 357 F.3d 426, 431 (4th Cir. 2004) (requiring creditors to conduct a reasonable investigation into whether the ex-husband's credit account was factored into the wife's credit report); Alabran v. Capital One Bank, No. 04-935, 2005 WL 3338663, at *8 (E.D. Va. Dec. 8, 2005) (holding that although plaintiff was an authorized user on the spouse's account, he was not responsible for the debt of the account).

264 *See, e.g.*, GREGORY M. TRAVALIO, ANDERSON'S OHIO CONSUMER LAW MANUAL § 12.10 (MB rev. ed. 2012) (explaining in brief the history of this section of the ECOA regulations).

265 *See supra* note 260.

266 *See, e.g.*, John Kiernan, *Card Hub's 6 Credit Predictions for 2012*, CARD HUB (Dec. 5, 2011), http://www.cardhub.com/edu/credit-predictions ("As we all know, available credit withered during the Great Recession but has since bounced back.").

negative credit-scoring events that disproportionately affect women, and coerced debt may be such an event.[267]

Today, the authorized user provision may be exacerbating the effects of coerced debt. In a time when credit may be too easy to obtain—especially in someone else's name—the regulation may be inclusive to a fault, because it mandates the credit reporting of an account over which the authorized user has no control. In an authorized use account, only the debtor receives and pays billing statements. If the debtor spouse is uncooperative, it is difficult for the authorized user spouse to obtain information about account balances and to make payments. When coerced debt is involved, the authorized user situation can quickly become untenable. Even if the victim knows or finds out about the account, she will be unable to close the account and may have difficulty making payments, because she will not be the debtor. She may be able to have her name removed as an authorized user, but some of the professionals I interviewed for the coerced debt study said that even this could be difficult.[268]

An update of the ECOA regulations is needed to bring them into alignment with the realities of today's credit market. The authorized user regulation should be amended to make the exclusion of authorized use data the default, although it could provide an exception for consumers who can show that certain authorized use information is relevant. In addition, the provision that allows for the exclusion of certain negative credit data should be amended to apply broadly and to include coerced debt.

b. *State Court Enforcement*

My proposal may raise federalism concerns in that it involves the federal government directing state governments to take certain actions. However, it likely falls on the permissible side of the anticommandeering line drawn by the Supreme Court in *Printz v. United States*[269] and *New York v. United States*,[270] because it applies to state judicial officers rather than to executive or legislative officers. In *Printz* and *New York*, the Court held that the federal government cannot compel the actions of the states' executive and legislative branches, respectively. The *Printz* Court specifically distinguished

267 *See, e.g.*, Littwin, *supra* note 1, at 978-81 (arguing that the phenomenon underlying coerced debt—coercive control—is gendered).

268 Telephone Interview with Laura Russell, Supervising Att'y, Legal Aid Soc'y (Sep. 15, 2011).

269 *See* 521 U.S. 898, 907-09 (1997) (explaining the difference, in constitutional terms, between commandeering state judges and commandeering state executive or legislative officers).

270 *See* 505 U.S. 144, 178-79 (1992) (explaining that federal "direction" of state judges is "mandated" by the Supremacy Clause).

state executive officers from state judicial officers, finding that the existence of historical evidence that the early federal government compelled state judicial officers to enforce federal law did not mean that state executive officers could be similarly bound.[271]

Nonetheless, my proposal might be considered more intrusive than the pricing statute at issue in *Testa v. Katt*, the case on which the *Printz* Court relied for the principle that state courts must enforce federal law.[272] *Testa* addressed the relatively simple situation of a federal statute that could be enforced in either state or federal court.[273] In contrast, my reform would be implemented as part of a proceeding that is entirely a creature of state law. It thus might be perceived as an attempt to augment state family codes. This would be especially true if the reform incorporated state law definitions of domestic abuse. On the other hand, my proposal would not change the rights or duties of any parties to a divorce; its only effect would be on credit reporting, which is governed by federal law.

Alternatively, even if the federal government could not require state courts to implement my policy, it could still enable them to do so, either on the courts' own initiative or as directed by supplemental state statutes or judicial rules. The federal statute or regulation could use conditional language stating that *if* a state family court makes a finding of coerced debt, that finding would be binding on the CRAs.

Federal law could be supplemented with efforts to amend state statutes or judicial rules and to lobby state judicial organizations that disseminate best practices information to courts. Another way to increase state court use of the certification option would be to target the domestic violence trainings that many states require for their judiciaries.[274] In some states, divorcing

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271 *See Printz*, 521 U.S. at 907 ("These early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power. That assumption was perhaps implicit in one of the provisions of the Constitution, and was explicit in another. . . . It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time.").

272 *See id.* at 928-29 ("*Testa* stands for the proposition that state courts cannot refuse to apply federal law . . . .").

273 *See* 330 U.S. 386, 387 (1947) ("[The statute] provides that federal district courts shall have jurisdiction of such suits 'concurrently with State and Territorial courts.'").

274 *See, e.g.*, ROBERT A. FALL, NAT'L CTR. ON DOMESTIC AND SEXUAL VIOLENCE, DOMESTIC VIOLENCE JUDICIAL EDUCATION—COMPONENTS OF AN EFFECTIVE PROGRAM 1-2, *available at* http://www.ncdsv.org/images/Components%20of%20an%20Effective%20Prgrm%20for%20DV%20Judicial%20Education.pdf (describing New Jersey's judicial education program on domestic violence).

parties are already required to submit financial disclosure forms; these could be modified to encompass coerced debt.[275]

In either the mandatory or the optional scenario, the CFPB, which now has jurisdiction over the FCRA and the ECOA, could promulgate a form for family courts to use. Family court practice already relies heavily on forms and language from standardized templates,[276] so it would not be burdensome for divorcing parties to submit such forms to the court or for courts to sign off on them. The use of forms has the additional advantage that they could be incorporated into the books and web sites used by family court mediators and pro se parties,[277] thus enabling coerced debt certification to take place even in divorces with no judicial hearings or legal representation.

III. BLOCKING COERCED DEBT

This Part addresses the legal effects of the coerced debt certification proposed in Part II. Because my proposal alters only the reporting of coerced debt, not the consumer's liability for it, I have separated my reforms into two sub-proposals: one for debt that is already no longer legally binding and one for debt that is still outstanding. Creditors have different reasons for valuing information about these two types of debt. Data on past debt are useful only for their predictive power, while data about outstanding debt also provide creditors with information about a consumer's current and future available funds. The "predictive interest" can be preserved when blocking coerced debt from a credit report, but the "current liabilities" interest cannot.

There is a crucial difference between the FCRA's identity-theft blocking mechanism and my proposal: the treatment of liability. The FCRA is supplemented by other federal statutes that alter legal responsibility for fraudulent debt. While a consumer is seeking to block a fraudulent debt under the FCRA, she may also be seeking to discharge her liability for it under another federal statute. The Truth in Lending Act (TILA) and the Electronic Fund Transfer Act (EFTA) limit the amount for which consumers

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275 *E.g.*, FORM FL-155, CAL. CTS. (2004), *available at* http://www.courts.ca.gov/documents/fl155.pdf.

276 *See, e.g.*, *TX Family Law Premium LexisNexis Forms*, LEXISNEXIS, http://w3.nexis.com/sources/scripts/info.pl?FRAMES=Data&301121&GCC=true (last visited Nov. 16, 2012) ("With more than 1,600 family law forms online, TX Family Law Premium LexisNexis Forms contains a comprehensive collection of forms for family law practice in Texas . . . .").

277 *E.g.*, JOHN VENTURA & MARY REED, DIVORCE FOR DUMMIES (3d ed. 2009).

can be held liable for fraudulent use of their credit and debit cards.[278] Policymakers appear to expect consumers to simultaneously seek protection under the FCRA and these unauthorized use provisions. For example, the FTC provides a single identity theft affidavit that solicits information consumers need to meet the requirements for both statutory regimes.[279]

This overlap means that a debt blocked under the FCRA is also likely to be invalidated under the TILA or the EFTA, which is important for future potential creditors of consumers. Otherwise, a consumer's legal liability could exceed the liabilities listed on her credit report, which would compromise the current liabilities interest of potential creditors. Even under the current system, there is some risk of this problem. A consumer might not pursue or attain the unauthorized use remedies in addition to the FCRA block. But the risk is significantly greater when there is no liability relief provision available. Thus, I propose a complete coerced debt block on past liabilities but a narrower block for debts a consumer still owes.

A. *The Predictive Power of Past Debt*

The first effect of submitting a certification of coerced debt to the CRAs would be to block from the consumer's credit report all coerced debts she no longer owed. These debts present a relatively easy case. Blocking them does not mislead creditors about the extent of a consumer's current indebtedness, and the coerced nature of the debts means that their initial accumulation does not accurately reflect a consumer's risk profile.

Records of past obligations are important for their predictive power. The idea is that consumers maintain consistent approaches to debt payment such that payment history will be relevant to future payment behavior.[280] These data enable creditors to answer questions about consumer behavioral tendencies—such as promptness and willingness to make payments under a

278 *See* Truth in Lending Act, 15 U.S.C. § 1643(a) (2006) (limiting consumer liability for unauthorized credit card charges to fifty dollars); Electronic Fund Transfer Act, 15 U.S.C. § 1693g(a) (2006) (limiting consumer liability for unauthorized debit card charges to fifty dollars or the money used before the financial institution had constructive notice, whichever is less).

279 *See* FTC, IDENTITY THEFT VICTIM'S COMPLAINT AND AFFIDAVIT, *available at* http://www.ftc.gov/bcp/edu/resources/forms/affidavit.pdf ("A voluntary form for filing a report with law enforcement, and disputes with credit reporting agencies and creditors about identify theft-related problems."). The affidavit contains three "declarations," which consumers can confirm or disaffirm. *Id.* One of the declarations (whether the consumer is willing to work with law enforcement) targets an FCRA requirement in 15 U.S.C. § 1681c-2(a)(2). A second (whether the consumer authorized the transactions) targets various provisions of the FCRA and TILA. The third (whether the consumer derived any benefit from the transaction) addresses a TILA unauthorized use provision in 15 U.S.C. § 1602(o).

280 *See supra* note 25 and accompanying text.

variety of financial circumstances—that would be otherwise difficult to determine. But when a debt is incurred involuntarily, a consumer's payment history is less likely to be representative. This is especially true when the consumer was not even aware of the debt's existence.

1. Treatment of Past Debt Under My Proposal

In many cases, by the time a victim learns of a coerced debt, it may have been paid off already or rendered uncollectable for other reasons, such as bankruptcy or the expiration of the statute of limitations. But if such a debt were ever delinquent, it would still have a significant negative impact on the victim's credit rating. Although the CRAs do not release the precise details of their credit scoring algorithms,[281] FICO, which claims to promulgate the most commonly used formula,[282] publishes a list of the factors it considers. Under the FICO model, payment history is the most important variable, counting for 35% of a score.[283] Payment history is even weighted more heavily than a consumer's current amount owed, which comprises 30% of the score.[284] So blocking past coerced debt could significantly improve victims' credit scores.

Excluding coerced debt that is no longer outstanding should not have a major negative effect on future creditors, because the purpose of including past debt on a credit report is predictive.[285] The usefulness of one's payment history is predicated on the belief that consumers' track records are predictive of their future payment behavior.[286] But in the case of a victim of coerced debt who has divorced her abuser, this inference may no longer be justified. A court of law will have determined that the victim did not voluntarily create the debt, so its existence should have less predictive value. The payment history on coerced debts may very well reflect the abuser's willingness and ability to make prompt payments, not the victim's.

The exact relationship between past coerced debt and victims' future payment tendencies is an empirical question that will require further research,[287] but it is still useful to think through some of the plausible

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281 *See supra* text accompanying note 27.

282 *See How Credit Scoring Helps Me*, MYFICO, http://www.myfico.com/crediteducation/scoringhelps.aspx (last visited Nov. 16, 2012) ("Credit scores—especially FICO® scores, the most widely used credit bureau scores—have made big improvements in the credit process.").

283 *What's in my FICO Score*, *supra* note 28.

284 *Id.*

285 Thus, any cost-of-credit concerns about my proposal are likely to have limited applicability.

286 *See supra* note 25 and accompanying text.

287 Answering this question would require a large, controlled study comparing the credit histories of past victims of coerced debt with those of the general population. The feasibility of

scenarios now. In situations in which the victim was not aware of the coerced debt, the payment history (or lack thereof) will be entirely attributable to the abuser. In circumstances in which the victim knew of the debt but incurred it under duress, her ability to make payments could easily be compromised and thus not reflect her payment tendencies under noncoercive conditions. Even when the victim is able to make payments without interference, one can imagine that she might prioritize "her" debts over those generated by the abuser.

The above points examine the predictive potential of past coerced debt on the payment of future voluntary debt, but my proposal also implicates questions about the effect of past coerced debt on the likelihood of future coerced debt, generated either by the current abuser or a future abusive partner. In the case of the current abuser, the primary argument would be that victims of domestic violence may return to the abuser multiple times before leaving for good.[288] This would give the abuser additional opportunities to incur coerced debt in the victim's name. However, in order to access the coerced debt–blocking remedy, a victim must be in the process of divorcing her abuser, a step that is indicative of a permanent break in the relationship. There are never any guarantees that a given relationship—abusive or not—is fully terminated, but divorce is a generally accepted end point. In addition, a divorce may represent a victim's best chance of establishing herself as an independent financial unit.[289] Though there may be plausible concerns that even a former abusive partner could generate coerced debt, for example, by applying pressure via stalking or by using

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such a study is undermined by the fact that consumers can obtain only their current credit reports, not past credit reports. Time-series credit report data would be essential to tracking consumer payment histories over time. In general, too little is known about the extent of credit scores' predictive power because the CRAs refuse to release their scoring formulas. It seems reasonable to speculate that the predictive power of credit scores is generally high because CRAs have strong incentives to meet creditors' needs, and creditors want predictive scores. But it is difficult for policymakers to evaluate proposals to include or exclude different types of information—such as coerced debt—from credit reports when researchers outside the CRA industry cannot measure the predictive value of various types of data.

288 For example, there is a widely referenced statistic that DV victims attempt to leave abusive relationships an average of seven times before succeeding. *See, e.g.*, CASCADE CTRS., INC., DOMESTIC VIOLENCE 2, *available at* http://www.wellness.uci.edu/domesticviolence.pdf; Julie Baumgardner, *Domestic Violence*, FIRST THINGS FIRST, http://firstthings.org/domestic-violence (last visited Nov. 16, 2012); *Information on Domestic Violence*, DOMESTIC ABUSE SHELTER OF THE FLA. KEYS, http://www.domesticabuseshelter.org/InfoDomesticViolence.htm (last visited Nov. 16, 2012). I was not, however, able to identify any scholarly research either supporting or refuting this claim.

289 However, much more work is needed on this topic. *See generally* Michael A. Anderson et al., *"Why Doesn't She Just Leave?": A Descriptive Study of Victim Reported Impediments to Her Safety*, 18 J. FAM. VIOLENCE 151, 155 (2003).

personal identification information acquired during marriage, the policy considerations discussed below still militate in favor of blocking coerced debt.

With respect to concerns about potential future abusive partners, the vast majority of DV survivors are not repeat victims. The most recent, major national survey of domestic violence found that, among female respondents who had experienced domestic violence, 70.8% had had only one abusive partner over the course of their lifetimes.[290] Thus, fewer than 30% of DV survivors are victimized by future partners. In comparison, the same study found that 35.6% of females in the general U.S. population had experienced domestic violence at some point during their lives.[291] Therefore, past domestic violence does not appear to be correlated with future domestic violence by new partners, and because my definition of coerced debt depends on a finding of domestic violence, past victims of coerced debt are equally unlikely to be future victims of coerced debt at the hands of a new partner.

Finally, even if there are some situations in which past coerced debt predicts future coerced debt, that does not necessarily mean that creditors should have access to this information. Federal law already prohibits credit discrimination on the basis of several classifications that would probably improve the predictive power of credit-scoring formulas, and DV status is a particularly important classification to protect. The ECOA prohibits many forms of credit discrimination. It was originally passed in 1974 to address an issue related to the topic of this Article, lending discrimination on the basis of gender and marital status.[292] The statute and its regulations have since been broadened to cover additional classifications such as race, religion, and age.[293]

Many of these characteristics are statistically significant in predicting creditworthiness. The regulations promulgated by the Federal Reserve state that even statistically sound formulas cannot be used if they negatively impact certain groups. For example, creditors may not include age as a variable if a credit-scoring formula has a negative impact on elderly consumers, but may use it if senior citizens are affected positively.[294] The

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290 MICHELE C. BLACK ET AL, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 48 (2011), *available at* http://www.cdc.gov/violenceprevention/pdf/nisvs_executive_summary-a.pdf.

291 *Id.* at 39.

292 *See supra* notes 258-64 and accompanying text.

293 *See supra* note 259.

294 *See* 12 C.F.R. § 202.6(b)(2)(ii) (2012) ("[A] creditor may use an applicant's age as a predictive variable provided that the age of an elderly applicant is not assigned a negative factor or

regulations also specifically prohibit using aggregate statistics about child bearing in evaluating creditworthiness.[295] The modern reader may be startled to learn that questions regarding birth control were common on pre-ECOA loan applications,[296] but from a statistical perspective, this practice may have been surprisingly sound. Empirical bankruptcy research since that time has suggested that there may be a correlation between supporting children and financial distress.[297]

Even the very classification that motivated the original passage of the ECOA is not exempt. A contemporary study analyzed data from several creditors' applicant pools and found that including marital status in credit-scoring models did improve their accuracy.[298] Use of this classification was restricted nonetheless. On this issue, regulators have had to walk a particularly fine line in weighing antidiscrimination goals against lenders' data needs. On the one hand, one major purpose of the law was to change the creditor practice of differentiating among women of different marital statuses.[299] On the other hand, state marriage law does impact creditors' collection rights, and the ECOA preserves access to certain marital information.[300]

In general, this is an area of law that requires careful balancing of the benefits of more accurate credit scoring with the harms caused by mathematically penalizing certain groups whose access to credit policymakers want to ensure. These two interests conflict frequently, and in many cases, policymakers have chosen discrimination prevention. If there is in fact a relationship between past coerced debt and credit risk, victims of domestic violence

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value."); *id.* § 202.6(b)(2)(iv) ("In any system of evaluating creditworthiness, a creditor may consider the age of an elderly applicant when such age is used to favor the elderly applicant in extending credit.").

295 *Id.* § 202.6(b)(3).

296 *See* Susan Smith Blakely, *Credit Opportunity for Women: The ECOA and Its Effects*, 1981 WIS. L. REV. 655, 659-60 (discussing a Senate report naming creditors' requests for information about birth control use as one of thirteen common types of credit discrimination based on sex and marital status).

297 *See* Elizabeth Warren, *Bankrupt Children*, 86 MINN. L. REV. 1003, 1013 (2002) (finding that "[t]he presence of children in a household—with nothing more—increases the likelihood that the household will be in bankruptcy by three-fold").

298 James F. Smith, *The Equal Credit Opportunity Act of 1974: A Cost/Benefit Analysis*, 32 J. FIN. 609, 618 (1977).

299 The National Commission on Consumer Finance made findings about the barriers that single and married women faced in obtaining credit that were influential in the ECOA's passage. *See id.* at 609 ("The public record on the issue of the availability of credit to women, which led to the Act, goes back to hearings held by the National Commission on Consumer Finance on May 22-23, 1972.").

300 For example, creditors may ask about an applicant's spouse or former spouse when the applicant lives in a community-property state. 12 C.F.R. § 202.5(c)(2)(iv).

would have a particularly strong claim to this kind of discrimination protection. The moment of leaving an abusive relationship is critical; it determines whether victims and their children can establish independent households apart from the abuser. Access to the mainstream of American financial life, through credit, employment, and housing, is crucial to their success.

2. Determining What Debt Is Past

An important component of a system that separates past and present debt is the process for determining whether a debt is still collectable. Despite their poor performance in maintaining consumer credit files generally, the CRAs are the logical entities to make this classification. They have the best access to the relevant information, and indeed already provide much of it on current credit reports. The main statutory amendments needed on this point would be those designed to ensure that the CRAs labeled debts correctly.

There are three main ways in which a consumer ceases to be liable for a debt: payment in full, bankruptcy, or other legal defenses to collection. CRAs already report full payment and account closures on credit reports.[301] It would be administratively simple for CRAs to block any certified coerced debt that would have otherwise been listed as paid.

As for bankruptcies, the CRAs have procedures for being notified of them.[302] It should also be simple for CRAs to determine which debts were discharged by a bankruptcy, to block those debts when they were coerced, and to list the bankruptcy on the consumer's report instead. However, the CRAs do not have a good track record here. They frequently report debts discharged by bankruptcy as currently outstanding.[303]

Debts that are uncollectable for other reasons present the most difficult case. This category consists of debts such as those for which the statute of limitations has run or which a court has found invalid. When a court of law has ruled on a debt, the CRAs should receive notification through their existing procedures for downloading public records, although there is some anecdotal evidence that even this type of court record is sometimes not

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301 CRAs are required to report a consumer's voluntary closure of an account. 15 U.S.C. § 1681c(e) (2006).

302 *See* WU & DE ARMOND, *supra* note 96, § 4.3.2.5.1 (discussing CRA procedures for obtaining public records).

303 *See, e.g.*, *In re* Sommersdorf, 139 B.R. 700, 701 (Bankr. S.D. Ohio 1991) ("Such a notation on a credit report is, in fact, just the type of creditor shenanigans intended to be prohibited by the automatic stay.").

enough to trump a furnisher's continued reporting of a debt.[304] The statute of limitations scenario is trickier, because the CRAs currently have no system for tracking these expirations. The CRAs are in fact allowed to report all debts for a period of seven years,[305] and the law makes no exception for limitations running.[306] This makes sense, because expired debts are still useful as evidence of payment history even after they cease to be relevant to the question of current indebtedness. Requiring the CRAs to track this information might be burdensome because limitations periods vary widely from state to state.[307]

To facilitate the proper handling of these issues, it might be necessary for the CFPB to promulgate a form through which consumers could communicate the legal status of their coerced debts. This could be part of the document that certified the debts as coerced. After the family court had listed all the debts that it determined were coerced, the consumer would mark which ones were no longer legally binding. The CRAs would be required to accept the consumer's classifications unless they specifically determined otherwise. Setting the consumer's categorization as the default would prevent the CRAs from making haphazard decisions without examining the evidence, but would enable them to correct the record in cases in which the consumer designations were inaccurate.

B. *Outstanding Debt*

Blocking outstanding coerced debt on victims' credit reports presents a more complex case. Because I do not propose altering liability for coerced debt, any blocking of outstanding debt would result in credit reports that were inaccurate as to the consumer's outstanding obligations. Information about current debt is important because it tells the potential creditor whether the consumer is likely to have funds available to pay the proposed debt. A consumer who already owes large sums may not be able to pay back the potential creditor, no matter how strong a debtor she otherwise would be. In addition, knowledge of current liabilities enables a creditor to predict

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304 *See* Wu, *supra* note 17, at 174-75 (discussing the credit bureaus' failure to forward documents to furnishers, which can lead to incorrect outcomes).

305 15 U.S.C. § 1681c(a)(4).

306 *Compare id.* § 1681c(a)(2) (allowing credit reporting agencies to include information about "civil suits, civil judgments, and records of arrest" until the governing statute of limitations has expired, if this period is longer than seven years), *with id.* § 1681c(a)(4) (making no such exception for the statute of limitations).

307 *See, e.g.*, MINN. STAT. § 541.05 (2012) (requiring an action to be commenced within six years); N.C. GEN. STAT. § 1-52 (2011) (three years); R.I. GEN. LAWS ANN. § 6A-2-725 (West 2012) (fifteen years).

how many other creditors would be vying for a debtor's assets and income in the event of default.

Thus, I am narrowly tailoring this proposal to cover the credit report users whose services victims of coerced debt most urgently need: employers, landlords, and basic utility companies. These users have different needs and expectations regarding credit reporting, which, on balance, are outweighed by the needs of victims leaving abusive relationships to establish independent households. This Section will discuss, first, the statutory changes necessary to effect this reform, and second, a policy analysis that balances the interests and needs of employers, landlords, and utilities with those of victims of coerced debt.

1. Statutory Changes

The statutory implementation of this change would be straightforward. The FCRA defines what types of parties may access consumer credit reports in a section entitled "Permissible purposes of consumer reports."[308] This provision includes one subsection that covers lenders,[309] another that covers employers,[310] and a catch-all subsection that covers landlords and utilities.[311] The FCRA could provide a separate subsection for landlords and utilities, as it already does for employers. The subsection might state that all three types of entities have more limited rights vis-à-vis those consumers who have submitted a certification for the blocking of coerced debt. The statute would also likely need to state that credit reports blocked in accordance with that section would still be considered "accurate" under other parts of the statute.[312]

The CRAs have the technical ability to provide credit reports containing different information to different types of creditors. They are already required by law to do so in another situation: when relatively large amounts of money are at stake. Normally, there is a designated period during which

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308 15 U.S.C. § 1681b.

309 *Id.* § 1681b(a)(3)(A).

310 *Id.* § 1681b(a)(3)(B).

311 *Id.* § 1681b(a)(3)(F)(i). Some courts have also considered landlords to be covered as creditors under 15 U.S.C. § 1681b(a)(3)(A). *See, e.g.*, Ferguson v. Park City Mobile Homes, No. 89-1909, 1989 WL 111916, at *3 (N.D. Ill. Sept. 18, 1989) (concluding that a lease was a "credit transaction within the meaning of the FCRA"); Cotto v. Jenney, 721 F. Supp. 5, 6 (D. Mass. 1989) (finding that the FCRA applied to a report that a landlord's association prepared on the plaintiff).

312 *See* 15 U.S.C. § 1681e(b) ("Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.").

certain items may remain on a consumer's credit report. For example, records of accounts placed for collections expire after seven years,[313] while the record of a bankruptcy expires after ten.[314] However, if the user is a potential creditor or insurer considering a transaction reasonably expected to involve at least $150,000, or a potential employer hiring for a position with a salary of at least $75,000, these expiration periods do not apply.[315] In addition, as discussed in Part II, the CRAs already provide two different sets of reports to consumers and potential creditors.

2. Policy Considerations for Employers, Landlords, and Utilities

The use of credit reports by employers, landlords, and basic utility companies is the most urgent issue facing victims of coerced debt. Leaving an abusive relationship is a make-or-break situation. Someone who may have been forcibly kept out of the workforce[316] or kept financially illiterate[317] is faced with the formidable challenge of starting a self-sufficient household.[318] If she fails at this task, she and her children may end up back with the abuser.[319] Thus, the moment when someone attempts to leave an abusive relationship is the critical time for society at large to affect the rate of domestic violence. Making it possible for victims to obtain jobs and housing at that moment may very well reduce domestic violence.

Good credit has become an increasingly important component of basic economic citizenship, as more employers, landlords, and basic utility companies have incorporated credit reports into their standard practices. Employer use of credit reports has risen dramatically in the past several years—60% of employers conducted credit background checks on at least some job applicants in 2010.[320] Services that provide credit checks specifically to landlords[321] and utilities[322] have also proliferated. Each of these three

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313 *Id.* § 1681c(a)(4).

314 *Id.* § 1681c(a)(1).

315 *Id.* § 1681c(b)(1)–(3).

316 *See* Littwin, *supra* note 1, at 953 n.3 (citing reports and articles on the negative effect domestic violence has on victims' employment).

317 *See id.* at 981-86 (discussing the abuser's financial control as the foundation of coerced debt).

318 *See id.* at 1000 (stating that domestic violence can "interfere with [the victim's] ability to obtain jobs and housing and thus to become economically self-sufficient").

319 *See id.* ("[A]n inability to establish a financially viable household apart from the abuser . . . increases the risk that survivors who have left will return.").

320 SOC'Y FOR HUMAN RES. MGMT., RESEARCH SPOTLIGHT: CREDIT BACKGROUND CHECKS 1 (2010), *available at* http://www.shrm.org/Research/SurveyFindings/Articles/Documents/CCFlier_FINAL.pdf.

321 *See, e.g.*, Tara Siegel Bernard, *A Credit Score That Tracks You More Closely*, N.Y. TIMES, Dec. 3, 2011, at B1 (describing a new company that offers rental payment history in credit checks);

types of institutions has different needs for credit data and different expectations regarding regulation. I address them in turn.

a. *Employers*

Employers are the most straightforward case of the three. They are not creditors of their employees,[323] which makes their interest in credit data more limited than that of other entities. Employers' access to credit reports is already controversial, even without adding coerced debt into the mix. And employers are already covered separately from creditors under the FCRA, which imposes additional restrictions on them.[324]

There is an active debate over whether employers should have access to credit reports at all.[325] Eight states have banned employers from running credit checks in at least some situations,[326] and several more have had bills

Landlord Credit Check–FAQs, AAA CREDIT SCREENING SERVICES, http://www.aaacredit.net/landlord-credit-check.html (last visited Nov. 16, 2012) (offering credit and background screening particularly to landlords); *Welcome*, DONOTRENTTO.COM, http://www.donotrentto.com (last visited Nov. 16, 2012) (allowing landlords to determine the suitability of potential renters); *Quality Tenant Screening Center*, LANDLORD.COM, http://www.landlord.com/qts_faqs.htm (last visited Nov. 16, 2012) (offering screening services to help landlords fill their vacancies).

322 *See, e.g.*, *About Us*, NAT'L CONSUMER TELECOM & UTIL. EXCHANGE, http://www.nctue.com/about-us (last visited Nov. 16, 2012) (describing itself as a "credit data exchange service" for the telecommunications and utility industries).

323 Employers are actually debtors of their employees. *See supra* note 33 and accompanying text.

324 The most important FCRA provision requires that employers obtain written releases from employees before ordering credit checks. 15 U.S.C. § 1681b(b)(2)(A)(ii) (2006). Employers must certify to the CRA that they have obtained this permission. *Id.* § 1681b(b)(1)(A). They are also required to give employees notice both before and after taking adverse action. *Id.* §§ 1681b(3)(A) & 1681m(a).

325 *See, e.g.*, Jeremy M. Simon, *TransUnion Asked to Stop Selling Credit Reports to Employers*, CREDITCARDS.COM (Oct. 28, 2011), http://www.creditcards.com/credit-card-news/transunion-credit-report-employment-hiring-decision-1270.php (discussing an online petition asking TransUnion to end its sale of credit reports to employers); *see also Use of Credit Information Beyond Lending: Issues and Reform Proposals: Hearing Before the Subcomm. on Fin. Insts. and Consumer Credit of the H. Comm. on Fin. Servs.*, 111th Cong. app. 187-88 (2010) [hereinafter *Use of Credit Information*] (testimony of Chi Chi Wu, Staff Att'y, Nat'l Consumer Law Ctr.) (discussing the problems with allowing employers access to credit information); Kelly Gallagher, Note, *Rethinking the Fair Credit Reporting Act: When Requesting Credit Reports for "Employment Purposes" Goes Too Far*, 91 IOWA L. REV. 1593, 1617 (2006) (proposing that Congress limit employers' ability to use personal credit information in hiring decisions).

326 *Use of Credit Information in Employment 2012 Legislation*, NAT'L CONF. OF ST. LEGISLATURES (Sept. 21, 2012), http://www.ncsl.org/issues-research/banking/use-of-credit-info-in-employ-2012-legis.aspx; *see also, e.g.*, 820 ILL. COMP. STAT. ANN. 70/10 (West 2011); OR. REV. STAT. § 659A.320 (2011); WASH. REV. CODE § 19.182.020 (2007).

under consideration in recent years.[327] Much of this legislative activity has been in reaction to the economic downturn that began in 2008. Policymakers are concerned that consumers forced out of work by the recession will become unemployable because their credit reports will reflect their inability to pay their bills while unemployed.[328] As a union policy report put it, American consumers are "behind on their bills because they don't have a job, but they can't get a job because they're behind on their bills."[329] Widespread use of credit reports in employment decisions could lead to a class of consumers who are permanently unemployable. In addition, there is a civil rights issue. People of color are disproportionately likely to have low credit scores,[330] so civil rights officials worry that employer use of credit scores has a disparate impact on these populations, or could even be used as a pretext for discriminatory hiring decisions.[331]

To the extent that employers do have a legitimate interest in potential employee credit histories, it is almost entirely predictive. They have a

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327 *See Use of Credit Information*, *supra* note 325, at app. 188 (testimony of Chi Chi Wu) (noting that eighteen states and the District of Columbia have bills pending that would limit employers' access to credit information).

328 *See* Byron Acohido, *Credit Checks Used in Hiring*, USA TODAY, Apr. 8, 2011, at B1 (stating that the legislative activity in this area is in response to the recession).

329 UNITE HERE, EMPLOYMENT CREDIT CHECKS: A CATCH-22 FOR AMERICAN WORKERS 1, *available at* http://www.creditcatch22.org/CreditCatch-22Report.pdf.

330 *See, e.g.*, *Use of Credit Information*, *supra* note 325, at app. 189-90 (testimony of Chi Chi Wu) (noting racial disparities); BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON CREDIT SCORING AND ITS EFFECTS ON THE AVAILABILITY AND AFFORDABILITY OF CREDIT 80-81 (2007), *available at* http://www.federalreserve.gov/boarddocs/RptCongress/creditscore/creditscore.pdf (tracking the variations in scores among ethnic groups); MATT FELLOWES, BROOKINGS INST., CREDIT SCORES, REPORTS, AND GETTING AHEAD IN AMERICA 9 (2006) *available at* http://www.brookings.edu/~/media/research/files/reports/2006/5/childrenfamilies%20fellowes/20060501_creditscores ("Counties with relatively high proportions of racial and ethnic minorities are more likely to have lower average credit scores."); Robert B. Avery et al., *Credit Report Accuracy and Access to Credit*, 2004 FED. RES. BULL. 297, 321, *available at* http://www.federalreserve.gov/pubs/bulletin/2004/summer04_credit.pdf (finding an increased incidence of errors in minority credit reports); Raphael W. Bostic et al., *Hitting the Wall: Credit As an Impediment to Homeownership* 13 (Joint Ctr. for Hous. Studies, Harvard Univ., Working Paper No. 482, 2004), *available at* http://realestate.wharton.upenn.edu/research/papers/full/482.pdf (finding that ethnic minorities had lower estimated credit scores).

331 *See* Acohido, *supra* note 328 (reporting allegations that "employers are unfairly using credit histories to weed out the down and out, especially people of color"); Dianna B. Johnston, Assistant Legal Counsel, EEOC, *Informal Discussion Letter re Title VII: Employer Use of Credit Checks*, Mar. 9, 2010, *available at* http://www.eeoc.gov/eeoc/foia/letters/2010/titlevii-employer-creditck.html (noting that, because Title VII prohibits practices that disproportionately screen out racial minorities, if use of credit information does so, it would be illegal); *Pre-Employment Inquiries and Credit Rating or Economic Status*, EEOC, http://www.eeoc.gov/laws/practices/inquiries_credit.cfm (last visited Nov. 16, 2012) (stating that such inquiries "generally should be avoided" because of their disparate impact on women and minorities).

limited current liabilities interest, because their employees do not owe them money. This means that data about outstanding debt provide employees with little value beyond what they can learn from past debt, so the impact of restricting their access to information about outstanding coerced debt would be minimal.

Among the reasons why employers seek employee credit data, the only one that would be affected by my proposal is the belief that employees with high levels of unpaid debt are more likely to steal from their employers. This idea, however, rests on assumptions that are not supported by the scant empirical research in this area. In a recent survey by the Society for Human Resource Management (SHRM), 45% of polled human resources representatives said that the reason they performed credit checks was to "reduce/prevent theft[,] embezzlement[, and] other criminal activity."[332] The logic is that an "employee who is heavily burdened by debt could be more likely to embezzle or steal"[333] in order to make up the shortfall on her personal balance sheet. This reason would apply to victims of coerced debt because, even though they were not the ones who incurred a blocked debt, they would still be liable for paying it. If one were motivated to steal to pay one's liabilities, it would not matter how the debts were created.

The problem with this theory is that there is no research supporting it.[334] There appear to have been only two studies ever conducted on the matter, and neither found a link between debt and theft. The first was a 1983 study, which found that "employees who reported having personal economic problems were no more theft-prone that those who did not."[335] The other, conducted in 2003, found "no benefit from using credit history to

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332 SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING—THE USE OF CREDIT BACKGROUND CHECKS IN HIRING DECISIONS 10 (2012), *available at* http://www.shrm.org/Research/SurveyFindings/Articles/Pages/CriminalBackgroundCheck.aspx (click on "click here").

333 David Lorango, *Why Do New Employers Need Your Credit Score?*, EHOW, http://www.ehow.com/facts_5748998_do-employers-need-credit-score_.html (last visited Nov. 16, 2012).

334 A 2006 law review note did a similar search and obtained the same results that I did: a plethora of popular-press and trade articles advising employers to run credit checks to prevent employee theft but no empirical support for this recommendation. *See* Gallagher, *supra* note 325, at 1595 n.3 ("Despite articles in business and trade journals stating that 'there is obviously a reason' to perform a credit check on bookkeepers and other individuals handling cash, . . . none that I have found reference any data suggesting any correlation between credit score and job performance or likelihood to steal from an employer."); *see also Use of Credit Information*, *supra* note 325, at app. 191 (testimony of Chi Chi Wu) ("There is no evidence showing that people with weak credit are more likely to be bad employees or to steal from their bosses.").

335 Richard C. Hollinger, *Why Do Our Employees Steal?*, *in* RETAIL CRIME, SECURITY, AND LOSS PREVENTION: AN ENCYCLOPEDIC REFERENCE 608, 608 (Charles A. Sennewald & John H. Christman eds., 2008). Social scientists have developed a model of employee theft, and "motivation" is only one of three contributing factors. The other two are "opportunity" and "deterrence." Of the three, deterrence is the most important. *Id.*

predict employee performance or turnover."[336] Even a CRA spokesperson recently conceded in legislative testimony that there was not any evidence for this link.[337]

There is also a more general version of this theory, but it is not implicated by my policy proposal. Approximately 12% of the hiring managers in the SHRM poll said that they used credit reports to evaluate "overall trustworthiness."[338] The theory is that if a person is responsible in one sector of her life, she will be responsible in another. Or it can be framed more specifically for finance-oriented jobs—the category for which employers are most likely to run credit checks[339]—and stated as the proposition that a person who has successfully managed his own finances is more likely to have success managing a business's.[340] But as many commentators have pointed out in the general debate over employer access to credit data, factors beyond an individual's control can lower her credit rating.[341] This reasoning applies even more strongly to coerced debt, which will have been certified by a court as not belonging to the person on whose credit report it appears.

Employers also use credit checks to avoid potential liability for torts such as negligent hiring[342] and to check for misrepresentation of employee credentials,[343] but my proposal would not harm employers on either of these grounds. An employer likely would not be held liable for information to

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336 Laura Koppes Bryan & Jerry K. Palmer, *Do Job Applicant Credit Histories Predict Performance Appraisal Ratings or Termination Decisions?*, 15 PSYCHOLOGIST-MANAGER J. 106, 123 (2012).

337 Liz Weston, *Could You Be Fired for Bad Credit?*, MSN MONEY (Sept. 24, 2010 9:00 AM), http://money.msn.com/Credit-Rating/could-you-be-fired-for-bad-credit-weston.aspx (quoting the testimony of Eric Rosenberg, state government liaison for TransUnion, to Oregon legislators, "At this point we don't have any research to show any statistical correlation between what's in somebody's credit report and their job performance or their likelihood to commit fraud.").

338 SOC'Y FOR HUMAN RES. MGMT., *supra* note 332, at 10.

339 *Id.* at 16.

340 As one industrial psychologist put it, "If you cannot organize your finances, how are you going to responsibly organize yourself for a company?" Diane E. Lewis, *Qualification: Must Have a Good Credit History*, BOS. GLOBE, Sept. 5, 2006, at E1.

341 *See, e.g.*, *Use of Credit Information*, *supra* note 325, at app. 191 (testimony of Chi Chi Wu) (noting that "many people end up with a negative credit rating for reasons they can't control").

342 In the 2012 SHRM poll, 22% of human resource managers listed reducing liability for negligent hiring as the primary reason for using credit checks. SOC'Y FOR HUMAN RES. MGMT., *supra* note 332, at 10; *see also* Gallagher, *supra* note 325, at 1599 (listing liability concerns as one motivating factor in employers' decisions to obtain credit reports for potential employees).

343 *See* John E. Matejkovic & Margaret E. Matejkovic, *Whom To Hire: Rampant Misrepresentations of Credentials Mandate the Prudent Employer Make Informed Hiring Decisions*, 39 CREIGHTON L. REV. 827, 828 (2006) (characterizing employees' misrepresentation of credentials as an "epidemic").

which it was denied access on an employee's credit report, and blocking coerced debt would not interfere with employers' verification of items on job applicant resumes.

Interestingly, the one current liabilities interest that employers may have in knowing about employees' current coerced debt is not among the reasons that employers give for ordering employee credit reports.[344] The issue is the potential effect of collection attempts and financial stress on the job performance of heavily indebted employees. When a debt is in default, creditors can and do call the debtor at work to increase their leverage and thereby increase their odds of repayment.[345] In addition, defaulting debtors may have their cars repossessed[346] or find themselves unable to concentrate on their work.[347] These factors can therefore have negative effects on debtors' employers.

However, just as in the credit context,[348] there are already many other factors that could negatively affect a person's job performance about which employers are prohibited from inquiring. For example, employers are denied access to information about health diagnoses,[349] mental health issues,[350] and child-bearing intentions,[351] despite these conditions' potential effects on future job performance. These policies were enacted because our society prioritizes a level playing field in the job market over certain employer interests. Policymakers have determined that society as a whole benefits from a work force that does not discriminate against, for example, diabetics, people who have suffered from depression, and women of child-

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344 *See* SOC'Y FOR HUMAN RES. MGMT., *supra* note 332, at 10 (not listing financial stress).

345 The Fair Debt Collection Practices Act prohibits "debt collectors" from calling debtors at work, but "debt collectors" is defined to include only third-party collections, not collections by the creditor itself. *See* 15 U.S.C. § 1692a(6) (2006) (defining "debt collector" to include only an entity that "collects . . . debts owed or due or asserted to be owed or due another"); *id.* § 1692c(a)(3) (prohibiting a "debt collector" from contacting a consumer at his or her workplace if the debt collector has reason to know that the employer prohibits such communication).

346 *See* U.C.C. § 9-609 (2012) (allowing secured creditors to repossess their collateral as long as the repossession does not involve a breach of the peace).

347 *See, e.g.*, Deborah Thorne, *Women's Work, Women's Worry? Debt Management in Financially Distressed Families*, *in* BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 136, 151 (Katherine Porter ed., 2012) (linking financial hardship to increased stress, insomnia, and depression).

348 *See supra* subsection III.A.1.

349 *See* 42 U.S.C. § 12112(d)(2)(A) (Supp. 2008) ("[A] covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.").

350 *Id.*

351 *See* Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2006) (amending Title VII of the Civil Rights Act to state that the prohibition of discrimination "because of sex" or "on the basis of sex" "include[s], but [is] not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions").

bearing age. Victims of coerced debt need this same protection. Otherwise, barriers to entering the work force could make it prohibitively difficult for them to become sufficiently financially independent to remain free of abusive relationships.

b. *Utilities*

Unlike employers, utility providers and landlords are creditors; their customers and tenants owe them money. These entities therefore have a strong interest in viewing their applicants' credit reports because other outstanding debts could affect their ability to pay. If an applicant is paying down a large coerced debt, the money she uses for these payments will not be available for her utility bills or rent. Thus, an outstanding coerced debt that is blocked from the consumer's credit report could have a negative impact on her utility company or landlord. Nevertheless, because of the essential nature of the services they provide, these entities already have reduced rights and expectations when compared with financial-sector creditors, and on balance, it is reasonable to ask them to bear the risk of remaining ignorant of applicants' coerced debts.

In addition to providing fundamental services, basic utilities, such as gas and electric companies, are natural monopolies.[352] These two factors combine to make the public utility industry among the most highly regulated in the United States. The heavy governance of utility providers is so normalized that commentators discussing financial institutions frequently contrast them with utilities to show why regulation should not apply in the financial sector.[353]

Utility companies' ability to adjust for the riskiness of individual customers is already correspondingly compromised. They are, for the most

352 Public utility monopolies survive because "[t]he high fixed costs of building a plant are such that no second company can enter the market at a cost below that which the incumbent can charge for its services, even if allowed to do so as a matter of law." Richard A. Epstein, *Durbin's Folly: The Erratic Course of Debit Card Markets?*, COMPETITION POL'Y INT'L, Autumn 2011, at 58, 66.

353 *See, e.g.*, Steven W. Bender, *Rate Regulation at the Crossroads of Usury and Unconscionability: The Case for Regulating Abusive Commercial and Consumer Interest Rates Under the Unconscionability Standard*, 31 HOUS. L. REV. 721, 789 n.343 (1994) (rejecting for lenders one approach to setting usury rates, that of "setting a ceiling consistent with industry risks and costs, as a public utilities commission would do"); Epstein, *supra* note 352, at 67 ("[T]here are . . . major differences between the debit interchange market and standard public utility regulation . . . . [R]ate regulation here is imposed on what is a virtual competitive industry, where any pocket of monopoly power is tiny relative to the systemic long-term territorial monopoly of the standard public utility."); *see also* Jarret C. Oeltjen, *Usury: Utilitarian or Useless?*, 3 FLA. ST. U. L. REV. 167, 222 (1975) ("To attempt to regulate credit as a public utility would be a major error . . . ." (internal citations omitted) (quoting Milton Friedman, *Defense of Usury*, NEWSWEEK, Apr. 6, 1970, at 79)).

part, not allowed to select their customers[354] or to price discriminate.[355] They must follow frequently elaborate procedures before terminating existing customers,[356] and in many states, they must regularly notify their customers of their rights to fight disconnection.[357] Thus, utility providers already engage in massive cross-subsidization—from the financially stable customers to the poor, from the urban to the rural,[358] and even from the winter customers to the summer.[359] Adding victims of coerced debt to the mix would not disrupt this business model.

Utilities would, however, experience some harm from the blocking of outstanding coerced debt. One of the few tools utilities may use to manage customer risk is demanding upfront deposits,[360] and it is in the process of determining deposit requirements that utility companies run credit checks.[361] In my preliminary study of coerced debt, the DV advocates I interviewed pointed to high deposits as an important barrier to their clients'

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354 Public utilities have a "duty to serve," which "means that utilities must provide service to any member of the public living within the utility's service area who has applied for service and is willing to pay for the service and comply with the utility's rules and regulations." NAT'L CONSUMER LAW CTR., DEALING WITH UTILITY COMPANIES 1 (2010), *available at* http://www.nclc.org/images/pdf/older_consumers/consumer_facts/cf_dealing_with_utility_companies.pdf.

355 For this reason, Elizabeth Warren and Jay Westbrook refer to them as "maladjusting" or "quasi-involuntary" creditors in their study of the ability of different types of creditors to risk-adjust under proposals for private, corporate bankruptcy regimes. Elizabeth Warren & Jay Lawrence Westbrook, *Contracting Out of Bankruptcy: An Empirical Intervention*, 118 HARV. L. REV. 1197, 1216, 1230 (2005).

356 *See* NAT'L CONSUMER LAW CTR., *supra* note 354, at 2 (outlining the many steps a utility must take before terminating service).

357 JOHN HOWAT & JULIA DEVANTHARY, NAT'L CONSUMER LAW CTR., PUBLIC SERVICE COMMISSION CONSUMER PROTECTION RULES AND REGULATIONS 5 (2006), *available at* http://www.nclc.org/images/pdf/energy_utility_telecom/additional_resources/resource_guide.pdf ("Some states require companies to regularly provide information to consumers regarding payment assistance and the right to file a consumer complaint or dispute billing amounts.").

358 *See id.* ("Th[e] obligation to serve prevents utility companies from choosing to serve only the most profitable customers and geographic areas.").

359 In Massachusetts, for example, "utilities are prohibited from terminating service between November 15 and April 15 in households were [sic] there is financial hardship." *Id.* at 7.

360 *See, e.g.*, Warren & Westbrook, *supra* note 355, at 1230 ("Most public utilities make some effort to protect themselves from risk of loss by requiring deposits prior to initiating service and by threatening to cut off service if the debtor becomes delinquent.").

361 The NCLC conducted a study with regulatory officials from ten states to learn about their utilities' written rules and informal practices. One finding was that "[t]he common theme that state [public utility companies] reported was that utilities tend to use payment history with past providers as a basis for evaluating whether to impose a security deposit." HOWAT & DEVANTHARY, *supra* note 357, at 11; *see also* Robert W. Seifert, *Home Sick: How Medical Debt Undermines Housing Security*, 51 ST. LOUIS U. L.J. 325, 343 (2007) ("In some cases, people with low credit scores have been required to pay higher utility deposits.").

economic self-sufficiency.[362] But even in determining deposit requirements, utilities' freedom is not absolute. In several states, they have discretion to determine whether to require a deposit, but not to determine the amount.[363] Because utility deposit-setting practices are already so constrained, removing one piece of information from utilities' purview would not make a major difference in deposit requests. If blocking coerced debt were to become costly for utilities, they could use that as an argument for small rate increases and spread the loss across the entire body of utility customers.

c. *Landlords*

Landlords present the most difficult case of the three actors because, like utilities, they are creditors, but unlike utilities, they cannot compensate for potential losses through the power of monopoly status. Landlords do, however, control access to an essential resource without which survivors of domestic violence cannot establish independence. This issue has been recognized by the national and state laws that prohibit property managers from discriminating on the basis of domestic violence history.

The main reason to apply a full credit-reporting block to landlords is to prevent victims of coerced debt from becoming part of the class of "unhouseables."[364] This refers to an emerging category of people who cannot obtain rental housing because of a disqualifying event, such as an eviction, criminal record, or period of homelessness.[365] If they do find housing, they often have to pay application fees to several landlords before obtaining it.[366] Since this problem has become more prevalent as background screening has

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362 *See* Littwin, *supra* note 1, at 1001 (describing an interview with a lawyer whose client was required to pay a $1500 deposit to turn on utilities in her apartment).

363 *See* HOWAT & DEVANTHARY, *supra* note 357, at 11 ("Unlike the unencumbered decisions made about whether to demand security deposits, states in the sample reported rather narrow parameters for determining the amount that a 'risky' customer must pay. The upper limits on deposits did not exceed twice the highest bill at the address and hovered more often around twice the average bill.").

364 This term appears to have been coined by Eric Dunn and Marina Grabchuk. Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 SEATTLE J. SOC. JUST. 319, 337 (2010).

365 *See id*.

366 *See* Jonathan Grant, *Tenant Screening: A Housing Barrier for the 21st Century*, SOLID GROUND BLOG (Jan. 21, 2010), http://solidgroundblog.wordpress.com/2010/01/21/tenant-screening-a-housing-barrier-for-the-21st-century ("Currently residents in Washington State are hit with repeated fees in background checks for housing applications, often paying hundreds of dollars . . . .").

become increasingly accessible,[367] it is important to remove victims of coerced debt from this category.

The legal system has already recognized the crucial role of providing access to housing for DV victims and survivors by preventing landlords from discriminating against them in many circumstances. My proposal simply fills an important gap in this protection. Recently, lawyers have argued that housing discrimination against DV survivors violates the Fair Housing Act's (FHA) ban on gender discrimination.[368] This use of the FHA is still relatively novel, and there is currently only one federal case on point.[369] Additionally, since 2005, the Violence Against Women Act (VAWA) has provided unambiguous antidiscrimination protection for DV victims and survivors living in federally subsidized housing.[370] Moreover, six states and the District of Columbia have enacted provisions that explicitly prevent discrimination against victims of domestic violence in all types of housing.[371] An overlapping group of twelve states and the District of Columbia have also enacted provisions that allow DV victims to break their leases without penalty in order to escape abuse.[372] These statutes may

[367] "[T]echnological advances gave rise to the tenant screening industry, revolutionizing the largely manual business of gathering public and financial records into one that is now primarily automated." HOUSING LINK, TENANT SCREENING AGENCIES IN THE TWIN CITIES: AN OVERVIEW OF TENANT SCREENING PRACTICES AND THEIR IMPACT ON RENTERS 9 (2004), *available at* http://www.housinglink.org/Files/Tenant_Screening.pdf.

[368] 42 U.S.C. § 3604(b) (2006) ("[I]t shall be unlawful . . . [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.").

[369] *See* Bouley v. Young-Sabourin, 394 F. Supp. 2d 675, 678 (D. Vt. 2005) (allowing a case to proceed to a jury on grounds of alleged discrimination on the basis of religion and gender when the landlord evicted a tenant following an incident of domestic violence).

[370] This part of VAWA covers all Section 8 units and most public housing projects. HUD Programs: Violence Against Women Act Conforming Amendments, 73 Fed. Reg. 72,336 (Nov. 28, 2008) (to be codified in scattered sections of 24 C.F.R).

[371] *See, e.g.*, COLO. REV. STAT. § 13-40-107.5(5)(c)(I) (2011); IOWA CODE §§ 562A.27A, 562B.25A (2012); N.M. STAT. ANN. § 47-8-33 (2012); R.I. GEN. LAWS § 34-37-1, *et. seq.* (2012); WASH. REV. CODE § 59.18.130 (2010); WIS. STAT. ANN. § 106.50 (West 2012). *See also* NAT'L COALITION AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE AND HOUSING 2, *available at* http://www.ncadv.org/files/Housing_.pdf (collecting state law provisions that protect DV survivors' access to housing).

[372] *E.g.*, CAL. CIV. CODE § 1946.7 (West 2012); OR. REV. STAT. § 90.453 (2011); WASH. REV. CODE ANN. § 59.18.352 (West 2012); *see also* SANDRA PARK, FAIR HOUSING FOR DOMESTIC VIOLENCE SURVIVORS 22 (2008), *available at* http://www.nlchp.org/content/pubs/ACLU_Park_Webinar_Gender_Discrimination.pdf (listing the laws of Arizona, California, Colorado, Delaware, District of Columbia, Illinois, Indiana, North Carolina, New York, Oregon, Texas, Washington, and Wisconsin as jurisdictions that allow early lease terminations by DV victims).

indeed cause landlords some economic harm,[373] but policymakers have determined that DV victims' need for housing and safety outweighs that risk. The same policy considerations apply to victims of coerced debt.

It is important, however, to put this potential harm to landlords in perspective. Consumers tend to prioritize their rental payments,[374] and they are particularly likely to prioritize rent over credit card debt.[375] Therefore, landlords are likely to fare well in payment competitions with financial-sector creditors, many of whom will be collecting on past debt rather than offering future credit by the time a consumer is in the position of having to choose. For current tenants, landlords are always offering future benefits in the form of continued residence on the property.

Property managers also typically require one- to three-months' rent up-front,[376] which has the effect of forcing tenants to immediately internalize their rental costs. If a consumer could not afford the rent—for example because she was making payments on a coerced debt that was blocked on her credit report—she would likely not be able to afford the large initial payments required to sign a lease. Accordingly, there is a relatively limited set of circumstances in which a landlord would initially rent to a victim of coerced debt and then later be harmed by her inability to pay. This would occur only when the consumer was not paying a coerced debt at the time she began the lease but became required to pay it—for example by a lawsuit or garnishment—during the course of the tenancy. Nevertheless, there could be an exception for small landlords who cannot spread potential losses among a large number of tenants, perhaps modeled on the exception in the FHA.[377]

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373 For example, former abusive partners of survivors who have obtained housing under the antidiscrimination laws may stalk victims and cause property damage or disturb neighbors. The early lease termination provisions may cause landlords some economic harm when they cannot easily replace the former tenant.

374 *See, e.g.*, Littwin, *supra* note 37, at 478 (describing how low-income women in a small study prioritized their rent payments above other expenses).

375 *Id.*

376 Moreover, these amounts are usually predetermined rather than calculated in response to a rental applicant's credit history. *See, e.g.*, *How Much Security Deposit Can a Landlord Charge? What Can It Be Used for?*, NOLO (Oct. 7, 2012), http://www.nolo.com/legal-encyclopedia/leases-rental-agreements-faq-29104-4.html (noting that landlords may ask for one or two month's rent just for the security deposit).

377 The FHA exception applies to "any single-family house sold or rented by an owner: *Provided*, That such private individual owner does not own more than three such single-family houses at any one time" and "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence." 42 U.S.C. § 3603(b)(1)–(2) (2006).

In addition to potential nonpayment of rent, there are other harms that landlords may experience as a result of renting to victims of coerced debt. As victims of domestic violence, they may be subject to stalking and harassment, which may result in damage to property or disturb other tenants. However, these concerns apply to all victims of domestic violence, not just to victims of coerced debt, and the decision about whether to allow landlords access to information about rental applicants' DV histories should be made on its own merits. Otherwise, some victims of domestic violence (those with coerced debt) will have less access to housing than others (those without coerced debt) for reasons unrelated to the concerns that landlords may have about them as tenants. My view is that the equities balance in favor of DV victims. Constraining victims' access to housing—which in cities with tight housing markets may mean eliminating their access to housing—creates barriers for victims attempting to establish independent households, which in turn, increases the difficulty of leaving abusive relationships. But here, too, I would not object to an exception for small landlords who may not be able to bear these risks.

Finally, the administrative implementation of this proposal would not be difficult for property managers. Rather than ordering credit reports directly, most landlords use specialized tenant-screening services,[378] which provide additional information and recommendations. As specialists, these services are very familiar with credit reporting law and could easily adjust.

In sum, employers, utility companies, and landlords have characteristics that distinguish them from financial-sector creditors and make the removal of current liabilities information from their purview less problematic than it would be for lenders. On the other side of the equation, the jobs and services they provide are essential for victims of coerced debt who are attempting to start new households apart from the abuse.

CONCLUSION

When one considers how important credit reports have become, the state of the current system for compiling them and overseeing their accuracy is shocking. The CRAs use loose matching algorithms that virtually ensure errors and enable fraud, and they have no meaningful process for correcting the inaccuracies that occur. At some point, these conditions may lead to demands for reform, although the "VIP" system that provides higher quality service to people with a better ability to insist on change probably

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[378] A 2004 study of tenant-screening practices in Minnesota found that 72% of property managers used tenant-screening agencies. HOUSING LINK, *supra* note 367, at 6.

acts as a brake on any such calls. If and when reform happens, victims of coerced debt will benefit.

In the meantime, the best approach is to remove decisions about coerced debt from CRAs. Since CRAs cannot meaningfully evaluate a consumer's claim that she is not the same person as someone with a similar address and the same first initial, they cannot possibly evaluate the much more complex factual assertions that surround coerced debt.

Moving decisionmaking about coerced debt to family courts does place more pressure on the existing processes for addressing domestic violence, but these systems also provide grounds for optimism. In a relatively short period of time, the modern domestic violence movement has successfully created a paradigmatic shift[379] that has changed the terms of the discussion and brought vast improvements to nearly every type of institution that serves victims and survivors.[380] If change can come to a system that was shielded by centuries of common law,[381] it can come to our credit reporting system, which is—no matter how ubiquitous it may seem now—only a few decades old.[382]

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379 *See* Patricia Tjaden, *Defining and Measuring Violence Against Women: Background, Issues, and Recommendations*, 22 STAT. J. UN 217, 218 (2005) (explaining shifts in the "violence against women paradigm").

380 *Id.*

381 *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *442 ("[T]he husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband."); *see also* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 10 (1999) (tracing state approval of domestic violence back to British common law, through the American colonial period, and into the twentieth century).

382 Equifax, the oldest of the three major credit bureaus, began in 1899, but the other two did not emerge until 1968 (TransUnion) and 1980 (Experian). *See* Jim Wang, *History of Credit Bureaus: Equifax, Experian, TransUnion & Innovis*, BARGAINEERING, http://www.bargaineering.com/articles/history-of-credit-bureaus-equifax-experian-transunion-innovis.html (last visited Nov. 16, 2012). Credit reporting did not become widespread until the 1990s. Hendricks, *supra* note 116, at 42.