Escaping Battered Credit: A Proposal for Repairing Credit Reports Damaged by Domestic Violence

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ABSTRACT

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.

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 in screening. 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 enable 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 decision makers already making determinations about issues related to coerced debt and the credit reports that victims need reformed in order to move beyond the abuse.

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I. 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 a preliminary empirical account of coerced debt, the first to be published.³ Although further empirical work is needed to answer questions about coerced debt’s scope and severity, the existing 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. These range 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.⁵ As wide-ranging as these tactics can be, one consequence consistently emerged: 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 enable family courts handling the divorces of abusive marriages 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 (CRAs), which would block the reporting of the coerced debt to the extent that the block would not unduly harm future creditors. The family court’s decision would not affect a domestic violence victim’s underlying

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¹ Angela Littwin, Coerced Debt: The Role of Consumer Credit in Domestic Violence, 100 CALIF. L. REV. (forthcoming 2012) (manuscript at 101) (on file with author).
² Littwin, supra note 1, at 103.
³ Littwin, supra note 1. 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. Id. 109–10. 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. NAT’L CONSUMER LAW CENTER, DOMESTIC VIOLENCE SURVIVORS (2010).
⁴ Littwin, supra note 1, at 108–21.
⁵ Id. at 134–39.
⁶ Id. at 148.
liability for the coerced debt, 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. Because I am still identifying the prevalence and consequences of coerced debt, this Article explores just one part of the problem and one approach to a solution.

Coerced debt wreaks havoc on credit scores. Victims of coerced debt often do not discover the debt until they attempt to leave an abusive relationship. In my previously-reported study, several divorce lawyers stated that most of their clients were unaware of the coerced debt in their names until the lawyers ran credit checks. By that time, much of the debt was delinquent or in danger of becoming so. Delinquency occurs in several situations: when the debt is still outstanding; when the abuser has already repaid the debt, but repaid it 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. All of these scenarios can tar a victim’s credit rating at precisely the point when she needs a clean bill of credit health.

The situation would not be so 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 screening potential employees, tenants, and 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.

The lawyers and other advocates I interviewed for the coerced debt study reported that credit ratings tarnished by coerced debt resulted in longer

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8 Liability for coerced debt—as well as preventative measures that could reduce its incidence—are issues 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 to these issues would almost certainly have greater costs to creditors 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, something that 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 Littwin, supra note 1, at 148.

11 Id. at 139–40.

12 Id.

13 Id. at 140.

14 Id.

15 See infra Part IV.B.2.

16 Littwin, supra note 1, at 140.
shelter stays, victims returning to their abusers, or victims making financial calculations that resulted in them not leaving their abusers in the first place. In other words, the relationship between coerced debt and bad credit may be an important link in the chain that binds many abusive relationships.

The 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. This is because the credit reporting agencies (CRAs) that collect and distribute consumer credit data use a dispute-resolution process that is deeply flawed.

The most fundamental defect of the CRA system for investigating alleged errors is that it is almost entirely automated. Shockingly, nobody at a CRA ever sits down to examine a consumer dispute and evaluate its merits. When a CRA receives notice of a potential error, its automatic response is to have its computer system contact the creditor who provided the disputed information. The computer program used to initiate this contact essentially asks the creditor to confirm only that the consumer has an account with that creditor and that the consumer’s basic information is correct. If the creditor verifies the existence of the account in the consumer’s name, the CRA considers the investigation closed and the consumer’s dispute to be without merit – regardless of the type of error the consumer alleged. There are no employees with the discretion to make more sophisticated corrections. If the dispute is more complex than a mistaken name or address, it is simply not addressed.

Not surprisingly, the process for resolving disputes has been the subject of intensive litigation, which is how this information about it was obtained. But despite a mixed record in court and the signing of several consent

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17 Id. at 148.
19 Id.
20 Id.
21 See, e.g. Johnson v. MBNA Am. Bank, 357 F.3d 426, 429 (4th Cir. 2004); Complaint, United States v. Credit Bureau Collection Serv., Case No. 2:10-cv-169, FTC File No. 062 3226 (S.D Ohio Feb. 24, 2010).
23 See generally Automated Injustice, supra note 18.
24 Thomas, supra note 23.
decrees with the FTC and state attorneys general,27 these procedures have not changed.

The second major problem with the dispute mechanism for credit report errors is that the CRAs essentially keep two sets of books.28 For a variety of reasons discussed below, the credit reports provided to consumers do not completely match the reports that potential creditors see – and neither do the credit scores.29 The CRAs use two sets of algorithms when generating reports and scores for these two audiences.30 The CRAs refer to the scores consumers receive as “educational”; consumer advocate Evan Hendricks refers to them as “FAKO” scores, in a pun on FICO, a major provider of credit ratings.31

One interesting indication of the dysfunction of the CRA system for correcting alleged errors is that the agencies maintain a separate process for addressing complaints by “VIP” consumers, such as lawyers, judges, politicians, and celebrities. This suggests awareness on the part of the CRAs that their regular process would not be acceptable to those whose complaints about it would have to be taken seriously.32

Because the CRAs have been so ineffective at resolving comparatively simple consumer disputes, I largely bypass them in my remedy for the more complex problem of coerced debt. My proposal takes an alternate tack and leverages the fact that a segment of coerced debt victims already encounter a decision maker 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.33 For example, they value assets, review budgets, and order sales.34 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.35 Thus, they are ideally positioned to examine a matter that is at once financial and deeply personal.

28 See infra text accompanying notes 121-127.
30 See infra text accompanying notes 121-127.
32 See infra note 159.
34 Id.
35 See, e.g., Dodson v. Dodson, 904 S.W.2d 3 (Mo. Ct. App. 1995); see generally infra note 226.
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, 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.

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 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 the divorce that some or all of the debt in her name or in both spouses’ names was acquired without her knowledge and/or consent. The judge would 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 consequence would be that any debt deemed coerced that was no longer outstanding would simply be blocked from her report. The goal here is to prevent negative payment history from 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. The thinking is that consumers have payment tendencies that remain relatively stable over time, so that a consumer who paid promptly in

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36 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.

37 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 living in poverty (53 percent) than other children (36 percent). Diana B. Elliott & Tavia Simmons, Marital Events of Americans: 2009, available at http://www.census.gov/prod/2011pubs/acs-13.pdf, at 12.
the past is likely to pay promptly in the future. But this predictive power is diminished when the consumer did not acquire the debt voluntarily and may not have been the person managing its payment. One’s payment tendencies on such debt are less likely to be indicative of one’s payment tendencies on future debt acquired voluntarily, and thus the creditor’s interest in obtaining that information is significantly diminished.

Blocking credit data about past coerced debt would have a major impact on victims’ credit ratings. Although the CRAs’ credit-scoring algorithms are proprietary, it is likely that payment history heavily influences credit scores. FICO releases a breakdown of the relative weight it assigns each element of a consumer’s credit record, and payment history is the most important, comprising 35 percent of the total, superseding even the amount of debt the consumer currently has outstanding.

However, data about outstanding debt are still very important to creditors. Without it, a potential creditor has no ability to assess the claims on a consumer’s income and assets. It cannot determine how many other creditors it will compete with each month for payment or 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. Even though a victim of coerced debt was not bound consensually to her coerced liabilities, if she is bound legally, potential creditors need access to information about them.

There are, however, competing concerns. Certain users of credit reports—namely employers, landlords, and basic utility companies—provide services and benefits that are so essential to recently divorced victims of domestic violence that, on balance, victims’ needs outweigh these parties’

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38 See, e.g., Experian, http://www.protectmyid.com/Message.aspx?PageTypeID=AboutPlusScore&SiteVersionID=815&SiteID=100302&sc=668893&bcd= (“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.”).
39 See infra Part IV.A.
42 Id. Outstanding debt comprises 30% of a FICO score.
43 These reasons include expiration of the statute of limitations or discharge in bankruptcy.
44 Insurers also use credit report data. See, e.g., ALLSTATE.COM, ALLSTATE’S USE OF CREDIT INFORMATION TO EVALUATE INSURANCE POLICIES, available at http://www.allstate.com/about/credit.aspx. 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.
current liabilities interest. 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 it was still outstanding. The equities for these entities balance differently than they do 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. Their interest in a potential employee’s credit report is in the possible relationship between a negative credit history and certain negative job-performance traits. But for a judicially-certified victim of coerced debt, the negative credit history is not of her own making and thus largely irrelevant to her future job performance. The only way in which the history of a coerced debt victim could be related is if the fact of having debt in one’s name, no matter how it was generated, negatively affected job performance. For example, some employers have suggested that the presence of debt could lead an employee to steal from the company. But there is no empirical support for this proposition.

Landlords and utilities are, in fact, creditors, but their regulatory treatment is so different than that of lenders in all other areas of law that it is reasonable to treat them differently in this case as well. Landlords and utilities are regulated heavily in recognition of the essential services they provide, which is exactly why I am proposing blocking their access to information about outstanding certified coerced debts.

In the case of landlords, they have other ways of determining payment risk. They tend to require large upfront deposits, and the size of the deposits is correlated to the rental price, rather than to credit risk. A consumer’s ability to provide these sums upfront may be a better indication of her financial fitness as a tenant than the amount of coerced debt she has outstanding.

45 See infra Part IV.B.2.
46 In fact, employers are debtors of their employees because wages are not paid until some period after they have been earned. See, e.g., 11 U.S.C. § 507(a)(4) (providing bankruptcy priority for employees of the debtor).
47 This relationship is controversial. For a detailed discussion, see infra Part IV.B.2.
48 See id. for a discussion of the claim that debt is related to job performance.
49 See id.
50 See id.
51 See id.
Basic utility companies, on the other hand, do use credit risk to determine deposit size and the need for requiring a deposit at all. Utilities, however, are even more closely regulated than landlords. They are typically local monopolies or quasi-governmental units that must negotiate prices with their regulatory authorities. These price negotiations include assessments of default rates, so if utilities were to suffer any losses as a result of my proposal, these would be spread widely across all utility customers.

In addition, in the cases of both landlords and utilities, preliminary empirical evidence and logic suggest that financially struggling households are likely to pay their bills for these essential services before general unsecured debt. Credit card issuers, in fact, encourage the deferral of substantive debt payment by emphasizing the minimum-payment option. A consumer may be especially likely to prioritize rental and utility payments when the outstanding debt is coerced and therefore is debt for which she may not consider herself morally responsible.

My proposal could be implemented by amending the Fair Credit Reporting Act (FCRA) or by promulgating new regulations under the Equal Credit Opportunity Act (ECOA). 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. The relative success of this blocking mechanism demonstrates that it is possible to provide consumers with an effective error-reduction process within the current system, as long as the remedy incorporates a non-CRA decision maker and eliminates CRA discretion.

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

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52 See id.
53 See id.
55 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.
60 See infra Part III.B.
61 See id.
Alternatively, implementation could occur under the ECOA. The ECOA regulations already contain a provision that can be read to cover coerced debt.\textsuperscript{62} I would amend this regulation to make it clear that coerced debt is included and to make it easier for consumers to use.\textsuperscript{63}

This Article proceeds in five Parts. Part II briefly reviews the evidence of coerced debt. Part III 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 IV considers my policy proposal, explaining its application to traditional lenders as well as to employers, landlords and utility companies. Part V concludes.

II. Evidence of 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.”\textsuperscript{64} This Part will summarize briefly that evidence in order to enable the reader to evaluate my policy proposals more effectively.

\textit{Coerced Debt: The Role of Consumer Credit in Domestic Violence}\textsuperscript{65} presents a preliminary, empirical study I conducted on the phenomenon. I interviewed 55 lawyers and other advocates who worked with victims of domestic violence about the credit problems of their clients.\textsuperscript{66} Although a wide variety of credit difficulties emerged – ranging from the scarcity problems common to all people living in poverty to mistakes made because of financial illiteracy – the overarching theme that emerged was coerced debt.\textsuperscript{67} My interviewees discussed cases of batterers engaging in a seemingly limitless number of credit-related abusive behaviors.\textsuperscript{68} These included: applying for credit cards in their partners' names without their knowledge, using physical duress to force their partners to apply for credit cards, using threats (such as hurting the children) for the same ends, forging victims’ signatures on home mortgage documentation for purposes such as withdrawing equity from the family home, using a combination of fraud and duress to induce victims to sign quit-claim deeds for the family home, not allowing victims to have access

\textsuperscript{62} 12 C.F.R. § 202.6(b)(6)(ii).
\textsuperscript{63} See infra Part III.C.3.
\textsuperscript{64} Littwin, \textit{supra} note 1, at 106.
\textsuperscript{65} Littwin, \textit{supra} note 1.
\textsuperscript{66} Littwin, \textit{supra} note 1, at 106.
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} Littwin, \textit{supra} note 1, at 110.
to family bank accounts, and prohibiting the victim from becoming literate about the household’s finances.69

The advocates I interviewed explained that batterers engaged in these behaviors partly for economic enrichment, but also partly in order to maintain control within the abusive relationship.70 Many of my interviewees argued that, in many of these cases, the goal of the credit abuse was to limit victims’ options and make it more difficult for them to leave the relationships.71 If victims cannot start economically viable households on their own, that creates a major barrier to leaving. As one psychologist I interviewed stated, the objective is “to keep [the victim] from having alternatives to the relationship.”72

To be fair, only the most sophisticated batterers probably thought of this in terms of credit ratings. Their immediate concerns may have been issues such as keeping victims financially illiterate73 and arranging the family’s affairs so that all the assets were in the abuser’s name and all the debts in the victim’s name.74 Victims would have difficulty leaving the relationship because they would be financially naive and would owe hundreds or thousands of dollars in unanticipated debt.

But my study indicated that credit reporting became the largest barrier to leaving and remaining free of abusive relationships. More than half the lawyers and other advocates I interviewed discussed credit reporting or its consequences as barriers for victims.75 As I reported previously:

[O]ne lawyer who staffs a family law hotline stated, “My major concern is her credit report.” Another [lawyer] 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.”76

My interviewees proceeded to described how these poor credit ratings directly interfered with victims’ attempts to establish self-sufficiency. More than a dozen of the interviewees reported that negative credit scores prevented their clients from obtaining housing, employment, and basic

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69 Id.
70 Littwin, supra note 1, at 131–32.
71 Littwin, supra note 1, at 145, 155.
72 Littwin, supra note 1, at note 325.
73 Littwin, supra note 1, at 110.
74 Littwin, supra note 1, at 130.
75 Littwin, supra note 1, at notes 335, 342.
76 Littwin, supra note 1, at notes 336–41.
One legal clinical professor characterized the intersection of landlord and employer use of credit reports with coerced debt as “really hurting DV survivors.”

Several of the lawyers and other advocates I interviewed stated that the inability to obtain employment and housing resulted in longer shelter stays, with one lay advocate explaining: “Often the emotional crisis issues and physical safety issues are in better shape after 30-90 days. But then she’s left 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.”

Of even greater concern is the fact that several advocates had become convinced that bad credit was a major reason that many victims were unable to leave and remain free of abusive relationships. The 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. The following section explores one such option.

III. Who Decides? Credit Reporting’s Decision-Making Deficit

When one examines our credit reporting system closely, its most striking feature is the absence of a decision maker at the heart of the process. Despite the power that credit reports have over consumers’ financial lives, the system is so automated that there is no person with the authority to make individuated decisions about exactly which pieces of information do and do not belong in a given person’s report.

In 2003, Congress decided that this was unacceptable with respect to identity theft and enacted the Fair and Accurate Credit Transactions Act (FACTA) as an amendment to the FCRA. The new congressionally-mandated system is still semi-automated, but it provides for some decision-making authority by relying on law enforcement agencies to screen claims of

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77 Littwin, supra note 1, at note 342.
78 Littwin, supra note 1, at note 343.
79 Littwin, supra note 1, at notes 358–60.
80 Littwin, supra note 1, at note 361.
81 Littwin, supra note 1, at note 362–67.
82 Littwin, supra note 1, at note 364.
83 Littwin, supra note 1, at note 363.
84 See generally Automated Injustice, supra note 18.
identity theft. While this is an improvement, using law enforcement authorities as de facto decision makers is unworkable when the issue is coerced debt. Thus, my proposal builds upon the identity theft procedure but incorporates family courts as more appropriate decision makers.

The CRAs do, of course, have rules which determine how data are selected for inclusion on credit reports, but once these parameters are in place, the system becomes automated. The CRAs use computer programs to process incoming information from current creditors and other furnishers and then repackage it for viewing by consumers and future creditors without any human supervision over the generated content.

Given the massive amounts of data that circulate in our consumer credit system, this is a reasonable, and indeed necessary, way for the process to begin. But two problems emerge. First, the rules the CRAs use for selecting data for inclusion on credit reports virtually guarantee that there will be a high error rate. Second, there is no decision maker with 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 without discretion. This lack of decision maker means that there is no authority to which victims of coerced debt can explain the situation and argue that the fraudulent or duress-generated debt should be excluded from their credit reports.

FACTA improved the process by adding a new procedure that enables victims of identity theft to correct their credit reports by blocking fraudulent data. This process currently is unavailing for many victims of coerced debt, even though coerced debt is in part a form of identity theft. But the blocking provision lays the groundwork upon which I build my proposal. It also provides an example of how to intervene in a system as mechanized as credit reporting. I would broaden the statute to include all forms of coerced debt and substitute a decision maker with better institutional capacity for reviewing coerced debt allegations.

The FCRA essentially deputizes law enforcement authorities into determining whether identity theft has occurred, but law enforcement agencies do not have the expertise in finances or family relations necessary

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87 *Id.*
88 See infra text accompanying notes 201–206.
89 See, e.g., *Automated Injustice*, supra note 18.
90 See, e.g., *id*.
91 A few quick statistics about credit cards can illustrate the scope of the consumer credit system. As of 2008, there were 176 million credit card holders in the United States and nearly 1.5 billion credit cards. Credit card purchases totaled $2.15 trillion, and the total U.S. credit card debt was $976 billion. [CENSUS BUREAU, TABLE 1185, PERCENT OF U.S. HOUSEHOLDS THAT USE SELECTED PAYMENT INSTRUMENTS: 2001 AND 2007, available at http://www.census.gov/compendia/statab/2011/tables/11s1187.pdf (last visited Mar. 19, 2012)].
93 See 16 C.F.R. § 603.3(a)(2).
for handling coerced debt. Family courts, on the other hand, are equipped to adjudicate complex transactions that occur among family members. They already make determinations about both domestic violence and family finances. Indeed, many family courts already make decisions about something very close to coerced debt. In the states that allow courts to balance the equities of the case when distributing assets and debts, many judges consider domestic violence. The only difference is that family courts’ current debt distributions have no effect on credit reports. My proposal would build a bridge between the decision makers already making difficult determinations about issues related to coerced debt and the credit reports that victims need reformed 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 that plague credit reports are not a consequence of any type of fraud, but rather a foreseeable result 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.” In 2009, more than 11 million consumers experienced some form of identity theft, and that statistic does not include the additional errors introduced by the CRAs who collect credit data and the furnishers who provide them.

A brief sampling of statistics indicates the magnitude of the problem. Four small-scale studies have found a percentage of credit reports containing...
errors that range from 31%\textsuperscript{100} to 53%\textsuperscript{101} to 70%\textsuperscript{102} to 79%.\textsuperscript{103} Three of these studies also reported the percentage of credit reports containing errors significant enough to result in a denial of credit. They found serious-error rates ranging from 12%\textsuperscript{104} to 25%\textsuperscript{105} to 29%\textsuperscript{106} 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. A 2002 study of 1,704 credit reports generated by mortgage applications found that 10% of them contained one specific error: data from at least one additional consumer.\textsuperscript{107}

A 2005 GAO report found that 18% of the consumers it studied had filed a dispute about their credit reports at some point.\textsuperscript{108} Even a report to the FTC by the CDIA, the CRAs’ trade association, found that 21% of consumers who ordered their credit reports in 2003 filed a dispute that led to an investigation by a CRA.\textsuperscript{109} More startling is the statistic that, 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.\textsuperscript{110}

\textsuperscript{100}FED. TRADE COMM’N, REPORT TO CONGRESS UNDER SECTION 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTION ACT OF 2003 at 2 (Dec. 2008), available at http://www.ftc.gov/os/2008/12/P044804factartpcongress.pdf [hereinafter 2008 FTC REPORT] (studying the reports of 128 consumers, although there appears to be an overrepresentation of higher-income, higher-score participants, which could have resulted in an under-reporting of errors).


\textsuperscript{102}Jon Golinger, Mistakes Do Happen: Credit Report Errors Mean Consumer Lose, U.S. PIRG (Mar. 1998) (studying the reports of 133 consumers).

\textsuperscript{103}Alison Cassidy & Edmund Mierzwinski, Mistakes Do Happen: A Look at Errors in Consumer Credit Reports, U.S. PIRG (June 2004) (studying the reports of 154 consumers).

\textsuperscript{104}2008 FTC REPORT, supra note 100.

\textsuperscript{105}Cassidy & Mierzwinski, supra note103.

\textsuperscript{106}Golinger, supra note102.


\textsuperscript{109}2008 FTC REPORT, supra note 10 at 12.

An industry-financed study did find an error rate of just 3%, 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. This error rate thus excludes consumers who receive higher-priced credit as the result of errors, those who choose not to file disputes, those who lose their disputes with the CRAs, and those who are able to correct their reports but fail to obtain credit from the original source.

Understanding why there are so many inaccuracies requires a brief explanation of how credit reports are generated. The first step is that the CRAs regularly download large quantities of data from “furnishers,” a group that includes lenders and other entities that report on consumer financial behavior. CRA algorithms then match each downloaded record to a consumer in their database. This matching process can be designed to be stricter or looser, depending on how closely a downloaded record must match an existing consumer file in order to merge them. 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, which ensure that they see all potential negative information about consumers applying for credit, and this approach appears to be the one the CRAs take. The National Consumer Law Center (NCLC), which has compiled a thousand-page manual on credit reporting, 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.” Privacy expert Evan Hendricks has described how this works in practice:


112 Id.


114 Id.


116 2004 FTC REPORT, supra note 82.

117 See, e.g., Evan Hendricks, Testimony before the Financial Services Committee (July 29, 2008), available at http://archives.financialservices.house.gov/hearing110/hendricks072908.pdf at 4. (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.”)

118 FAIR CREDIT REPORTING, supra note 27.

119 FAIR CREDIT REPORTING, supra note 27, at 121.
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.\textsuperscript{120}

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 set when generating them for users of credit reports.\textsuperscript{121} The CRAs use relatively complete matching algorithms with consumers and partial matching with users, which means that users may see negative or erroneous data not available to consumers ordering their own credit reports.\textsuperscript{122} Hendricks refers to the scores consumers can purchase with their reports as “FAKO” scores in a play on words on FICO credit scores.\textsuperscript{123} This discrepancy means that the credit reports used to determine credit-worthiness are even less accurate than surveys of consumers indicate. It also means that consumers have no opportunity to dispute information provided only to users before it results in a denial of credit.\textsuperscript{124}

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 lender versions of their credit reports,\textsuperscript{125} and the formulas the CRAs use to calculate the scores they send to lenders are proprietary and protected as trade secrets.\textsuperscript{126} The only way for a consumer to obtain the user versions of her credit report is to apply for credit, be denied that credit, and then use a FACTA provision that allows

\textsuperscript{120} See Hendricks, \textit{supra} note 117, at 4. See also Bennett, \textit{supra} note 110, at 11 (“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.”).

\textsuperscript{121} See Hendricks, \textit{supra} note 117.

\textsuperscript{122} One reason that this type of loose matching occurs is because users are not required to submit complete consumer information to obtain consumer reports. 2004 FTC REPORT \textit{supra} note 82 at 38. As the NCLC reports, “[A]s many as 10% of all inquiries [from users] do not include a valid Social Security number.” \textit{FAIR CREDIT REPORTING}, \textit{supra} note 27, at 125.

\textsuperscript{123} See Hendricks, \textit{supra} note 117, at 3.

\textsuperscript{124} \textit{FAIR CREDIT REPORTING}, \textit{supra} note 27, at 99 (“[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.”). See also Hendricks, \textit{supra} note 117, at 5.

\textsuperscript{125} Hendricks, \textit{supra} note 117, at 2.

\textsuperscript{126} Howat, \textit{supra} note 40, at 8.
consumers to request the report the lender obtained during the credit check.127 It is rational for the CRAs to prioritize creditor interests over consumer interests in generating credit reports. 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,128 so CRAs have limited incentives to compete for consumer business.129 The one area in which the CRAs do compete for consumer business is in providing credit report monitoring services, but the opportunity to sell services that consumers can use to improve the accuracy of their reports may actually decrease CRA incentives to ensure the accuracy of the reports of consumers who have not purchased these services.130

Instead, the CRAs’ main revenue source is the users who purchase credit reports.131 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.”132

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 process133 and are often unsuccessful.134 The judicial opinions in this area show that consumers

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129 Bennett, supra note 110, at 30.
130 Id.
131 See, e.g., id. (“And despite the growing profits in credit monitoring services, the CRAs make most of their money from these collecting creditors.”).
132 2004 FTC REPORT supra note 82 at 47.
133 A 2010 study found that, on average, victims of identity theft spent 21 hours and $373 resolving the issue. FAIR CREDIT REPORTING, supra note 27 at 371, n. 7. Another study found that victims of identity theft spent a median of 100 and a mean of 330 hours resolving its effects. IDENTITY THEFT RESOURCE CENTER, IDENTITY THEFT: THE AFTERMATH 2004, available at http://www.idtheftcenter.org/artman2/publish/lib_survey/Press_Release_The_Aftermath_2004_Study.shtml. An older study of complaints to the FTC found that, before contacting the FTC, consumers with errors in their credit reports contacted the CRAs more than three times and waited an average of twenty-three to thirty-one weeks. FAIR CREDIT REPORTING, supra note 27, at 156 (citing U.S. PIRG, Credit Bureaus: Public Enemy #1 at the FTC (Oct. 1993)).
134 A 2007 Zogby report found that 37% of consumers who ordered their credit reports discovered errors and that half of them had difficulty correcting these inaccuracies. FAIR CREDIT REPORTING, supra note 25, at 108 (citing ZOGBY INT’L, ZOGBY POLL: MOST AMERICANS FEAR IDENTITY
attempting to fix their credit reports frequently file multiple complaints with CRAs before resorting to litigation.\textsuperscript{135}

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,\textsuperscript{136} but rather refer each disputed item to the furnisher who supplied it.\textsuperscript{137} This process is almost entirely automated.\textsuperscript{138}

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.\textsuperscript{139} This condensation occurs regardless of how much information the consumer has provided about the alleged inaccuracy. The standardized electronic form does contain a one-line field that employees can use to add more information,\textsuperscript{140} but they do so in only 30\% of cases.\textsuperscript{141}

Although the system contains twenty-six dispute codes, often listed in a drop-down menu,\textsuperscript{142} most of them are rarely used. According to furnisher reports, 30-40 percent of disputes arrive with “generic or catch-all dispute codes.”\textsuperscript{143} A high-profile consumer attorney claims that the same four codes are used more than 75 percent of the time.\textsuperscript{144} The most frequently-used codes are quite general: “Not his/hers” (30.5 percent); “Disputes present/previous Account Status/History” (21.2 percent); “Claims Inaccurate Information, Did not provide specific dispute” (16.8 percent); “Disputes THEFT, ZOGBY’S AMERICAN CONSUMER NEWSLETTER, Apr. 2007, at 3). See also Jeff Sovern, \textit{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.”).

\textsuperscript{135} “Consumers are often forced to file multiple disputes, then file litigation, before their credit reports are corrected.” FAIR CREDIT REPORTING, \textit{supra} note 27 at 156. \textit{See, e.g.} Konter v. CSC Credit Serv., Inc., 606 F.Supp.2d 960 (W.D. Wis. Apr. 6, 2009) (plaintiff and lawyer filed five disputes before twin sister’s information was removed from his credit report); Saenz v. TransUnion, L.L.C., 621 F.Supp.2d 1074 (D. Or. Aug. 15, 2007) (plaintiff filed two disputes and a lawsuit before false information was corrected).

\textsuperscript{136} \textit{See, e.g.}, Gorman Experian Info. Solutions, Inc., 2008 WL 4934047, at *6 (quoting the deposition of an Experian official).

\textsuperscript{137} Furnishers are entities that report consumer financial behavior to the CRAs. \textit{See} 15 U.S.C. § 1681s-2. The term includes past creditors and public records keepers. \textit{See} FED. TRADE COMM’N, REPORT TO CONGRESS ON THE FAIR CREDIT REPORTING ACT DISPUTE PROCESS SUBMITTED TO THE CONGRESS PURSUANT TO SECTION 313(B) OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003 (2006), \textit{available at} http://www.ftc.gov/os/comments/fcredispute/[hereinafter 2006 FTC REPORT].

\textsuperscript{138} \textit{See} 2006 FTC REPORT, \textit{supra} note 135.

\textsuperscript{139} For a sample form, \textit{see} FED. TRADE COMM’N, REPORT TO CONGRESS, \textit{supra} note 109, at 42.

\textsuperscript{140} \textit{Id.} at 17.

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} FAIR CREDIT REPORTING, \textit{supra} note 27, at 180.

\textsuperscript{143} FED. TRADE COMM’N, REPORT TO CONGRESS, \textit{supra} note 109, at 17.

\textsuperscript{144} Bennett, \textit{supra} note 110.
Amounts” (8.8 percent); and “Claims account closed by consumer” (7.0 percent).145

The CRAs do not forward any documentation to furnishers. The CRAs advise consumers submitting disputes to include documentation such as billing statements or letter from their creditors.146 But the “Big Three” CRAs actually have a policy of not forwarding these documents to the furnishers evaluating the accuracy of consumer disputes.147 In fact, the CRAs' electronic system is not even capable of transmitting a consumer's documentation.148 However, Equifax states that it sometimes faxes documentation and that furnishers can request it.149

Furnishers, in turn, have blamed the CRA system for not giving them enough information to conduct more than perfunctory investigations.150 As a 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.151 This does nothing to address the issue of whether, for example, the account in the consumer's name was fraudulently obtained. In addition, furnishers do not have the ability to write comments back to the CRA, so if a feature of the account seems odd or suspicious, they have no ability to communicate that fact.152 When a CRA receives a response from a furnisher that verifies the existence of an account, it considers the investigation complete and the consumer's complaint to be without merit, even if the response does not address the point that the consumer is disputing.153

Throughout this process, the CRA employees who handle the disputes have virtually no discretion. Two of the “Big Three” CRAs outsource their

145 Id.
147 FED. TRADE COMM’N, REPORT TO CONGRESS, supra note 109, at 18.
148 See Dixon-Rollins v. Experian Info. Solutions, Inc., 2010 WL 3749454 at *4 (E.D. Pa. Sept. 23, 2010) (citing the testimony of a TransUnion team leader who stated that TransUnion, as a matter of policy, never forwards material submitted by consumers to the original source.”) See also Bennett, supra note 110, at 22-23 (quoting a deposition with a vice president at Equifax).
149 FED. TRADE COMM’N, REPORT TO CONGRESS, supra note 109, at 18.
152 Comments of Mortgage Bankers Association re: Interagency Advanced 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 (May 22, 2006).
153 See generally FAIR CREDIT REPORTING, supra note 27, at 177.
dispute processes internationally, with Equifax using vendors in the Philippines, Jamaica and Costa Rica and TransUnion using one in India.\textsuperscript{154} Employees are evaluated on meeting “quality” and “production” targets, with “quality” defined as following the steps in the employee manuals\textsuperscript{155} and “production” meaning the number of disputes they process.\textsuperscript{156} The CRAs generally do not allow their employees to contact any live human beings, such as the consumers or the furnisher, in conducting their investigations.\textsuperscript{157} Further, the only changes these employees are usually authorized to make to consumer credit reports are those that proceed directly from furnisher responses.\textsuperscript{158}

In a sign that the CRAs may realize that their investigation process is compromised, the agencies maintain lists of “VIPs,” such as celebrities, lawyers, and politicians, whose reports are investigated through a more thorough process when they report inaccuracies.\textsuperscript{159} For Equifax and TransUnion, this appears to mean using U.S.-based employees to conduct the investigations, rather than outsourcing them abroad.\textsuperscript{160}

Even in the rare case that a consumer does manage to have an inaccuracy corrected, there is significant chance that the erroneous information will be reinserted at a later date. Despite the FCRA requirement that the CRA correct or delete inaccurate information,\textsuperscript{161} when the change to be made is the deletion of an account, “the CRA will only ‘soft-delete’ the account invoking a function that suppresses the information while still leaving it in the database.”\textsuperscript{162} So if the creditor changes the account number or the account is sold, the suppression will no longer hold.\textsuperscript{163}

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. The CRA must insert it in the credit report.\textsuperscript{164} Approximately 30% of consumers who have been unsuccessful in challenging their credit

\begin{itemize}
\item \textsuperscript{154} See \textit{Fair Credit Reporting, supra} note 27, at 181. (“Equifax pays its outsource vendor in the Philippines between $.41 and $.57 to process each consumer dispute letter it receives.”); Bennett, \textit{supra} note 110, at 22.
\item \textsuperscript{155} \textit{Fair Credit Reporting, supra} note 27, at 182 (citing The Equifax Indicating Manual, The Experian Participant Guide and The TransUnion CRS Manual).
\item \textsuperscript{156} \textit{Fair Credit Reporting, supra} note 27, at 182.
\item \textsuperscript{157} \textit{Fair Credit Reporting, supra} note 27, at 182.
\item \textsuperscript{158} \textit{Fair Credit Reporting, supra} note 27, at 182 (“Each of the ‘Big Three’ CRAs also concedes that their employees are not permitted to exercise any personal discretion.”).
\item \textsuperscript{159} Bennett, \textit{supra} note 110, at 5-6.
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} 15 USC §1681(a)(5).
\item \textsuperscript{162} \textit{Fair Credit Reporting, supra} note 27, at 184 (citing \textit{Cousin v. TransUnion Corp.}, 246 F.3d 359 (5th Cir. 2001)).
\item \textsuperscript{164} 15 USC § 1681i(b).
\end{itemize}
reports use this remedy, but it is largely ineffective. The statement of dispute is usually inserted at the bottom of the report and often not seen by creditors. In addition, most creditors do not give these statements much weight.

The main benefit of automation is that it generates revenue for the CRAs. The CRAs spend well under $1.00 per dispute on processing, so each dispute costs the CRAs less than what the CRAs charge creditors each time a consumer submits a dispute about data that a given creditor provided. In fact, the CRAs’ online processing system has become so profitable that the CRAs moved it from their non-profit trade association, where it was created, to a for-profit company of which the major three CRAs each own a share. 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.

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 realize any benefits of credit price or 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 are almost certainly not benefitting on net. 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. There are volumes of case law on the
issue, much of which has found CRA procedures to be in violation of the FCRA,\(^{174}\) and the CRAs have entered into consent decrees with the FTC and state attorneys general.\(^ {175}\) 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.\(^ {176}\) Another issue is that the FTC did not have adequate tools to change CRA practices. According to one advocate, this was a matter of both resources and enforcement authority.\(^ {177}\) The Dodd-Frank Act relocated regulatory responsibility for the FCRA to the newly-created Consumer Financial Protection Bureau (CFPB), which will have 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,"\(^ {178}\) and the agency has already moved to encompass credit reporting agencies within this provision. One of its first acts after the appointment of its director\(^ {179}\) was to issue a proposed rule that would define CRAs as larger market participants.\(^ {180}\) This authority would enable the CFPB

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\(^{174}\) See id.


\(^{176}\) 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, National Consumer Law Center, (Aug. 19, 2011).

\(^{177}\) Id.


\(^{180}\) The CFPB has issued a proposed rule that would cover CRAs under this provision. Defining Larger Participants in Certain Consumer Financial Products and Services Markets, 76 Fed. Reg. 38059 at 38060–61 (proposed June 29, 2011).
to implement my policy proposal more effectively than the FTC would have been able to do.

**B. Blocking Data Generated by Identity Theft**

In 2003, Congress passed the Fair and Accurate Credit Transactions Act (FACTA)\(^{181}\) partly as a response to identity theft.\(^{182}\) One way to read the passage of FACTA is as a referendum on CRA practices regarding the matter.\(^{183}\) The statute, which was incorporated into the FCRA,\(^{184}\) provides a procedure for victims of identity theft that places significant limits on the CRAs’ discretion. The new provisions limit the CRAs’ role in determining whether identity theft occurred primarily to receiving reports from law enforcement authorities and set short, mandatory deadlines for all CRA actions in identity theft cases. The FACTA definition of identity theft, however, excludes much coerced debt, 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 decision maker who can more reliably determine the coerced or fraudulent nature of a 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.\(^{185}\) 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.

Aside from the fact that 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.\(^{186}\) This means that future potential creditors would be unable to see the negative items generated by identity theft. Unlike the

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\(^{182}\) Fair and Accurate Credit Transactions Act of 2003, H.R. 2622, 108th Cong. (2003) (introducing the act as “An Act To amend the Fair Credit Reporting Act, to prevent identity theft, improve resolution of consumer disputes, improve the accuracy of consumer records, make improvements in the use of, and consumer access to, credit information, and for other purposes.”).

\(^{183}\) Id. (citing the “improve the accuracy of consumer records” as one of FACTA’s purposes).

\(^{184}\) FACTA included six substantive titles, one of which was “Enhancing the Accuracy of Consumer Report Information.” Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159 (2003), Title 3.

\(^{185}\) 15 U.S.C. §§ 1681 et seq.

\(^{186}\) The FCRA defines it as “a fraud committed using the identifying information of another person.” 15 U.S.C. § 1681a(q)(3).

FCRA provision for investigating inaccuracies,\(^\text{187}\) 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.\(^\text{188}\) There is one fifteen day extension available if the CRA needs more time.\(^\text{189}\) This default structure should make it significantly more accessible to consumers.

The blocking remedy is relatively new; it did not take effect until December, 2004.\(^\text{190}\) There is virtually no case law\(^\text{191}\) or academic literature on how well it works.\(^\text{192}\) 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 as “FCRA Lawyer” states that many of his clients have found blocking to be ineffective.\(^\text{193}\) 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.\(^\text{194}\) A third lawyer, who I interviewed, has also found the blocking mechanism to be moderately effective.\(^\text{195}\)

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 proof of the identity of the consumer; (2) a copy of an identity

\(^{187}\) The FCRA’s investigation procedure does give the CRAs a 30-day deadline, but it does not set a pro-consumer default if the deadline is not met. 15 USCS § 1681i(a)(1)(A).

\(^{188}\) 16 C.F.R. § 603.3(a)(3)(ii)–(iii).

\(^{189}\) 16 C.F.R. § 603.3(a)(3)(ii).


\(^{191}\) In the course of my research, I was able to find only one case that dealt with 15 U.S.C. 1681c-2, which was Drew v. Equifax Info. Servs., LLC, 2010 U.S. Dist. LEXIS 131643 (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, so this opinion provides no lens through which to assess the effectiveness of the blocking remedy outside the context of litigation.


\(^{193}\) “This section was added in the most recent amendments to the FCRA and, upon first glance, seems to solve the identity theft problem as it relates to credit reporting. Unfortunately, nothing is that easy when dealing with the credit bureaus. I have had clients do the above but still not have the identity theft fraud accounts removed from their credit report. And many consumers do not know about this option, as it is not well advertised by the credit bureaus. And many consumers cannot get a police report about the theft of their identity for whatever reason (i.e. because the crime occurred in a far away jurisdiction that requires police reports to be made in person) and do not know that police reports are just one kind of identity theft report.” 15 U.S.C. 1681c-2 - part 2, FAIR CREDIT REPORTING ACT BLOG, (July 12, 2009), http://fcralawyer.blogspot.com/search/label/15%20U.S.C.%201681c-2.

\(^{194}\) E-mail from Rick Kornis, Attorney, to author (Nov. 14, 2011, 14:33 CST).

\(^{195}\) Telephone Interview with Robert Sola, Attorney (Oct. 27, 2011).
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.196 The identity theft report and the statement required by part (4) 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.”197 Although the statute states that this law enforcement agency can be the Postal Inspection Service,198 the CRAs have discretion to require additional information,199 and anecdotal evidence suggests that they will often not credit a consumer’s allegations of identity theft unless the victim files a police report.200

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,201 especially considering that successful identity theft is difficult to trace, and criminal penalties are too low to offset the minimal risk of prosecution.202 In addition, more than half of victims of identity theft never contact a law enforcement agency about the matter.203

The relationship between police and victims of domestic violence has an even more difficult history. It took significant advocacy and high-profile litigation for police departments to take domestic violence seriously,204 and even now, the effectiveness of police response to DV 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

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197 16 C.F.R. § 603.3(a)(2).
198 16 C.F.R. § 603.3(a)(2).
199 16 C.F.R. § 603.3(a)(3)(i).
200 See, e.g., Schatten v. Sallie Mae, Inc., 2009 U.S. Dist. LEXIS 42801 (N.D. Ga. Mar. 4, 2009) (quoting the affidavit Sallie Mae uses as saying, “Failure to enclose a copy of a police report will result in us taking no further action on your claim of Identity Theft.”)
safety. 205 DV victims may not want police assistance for reasons that range from a distrust of police that stems from their historic non-responsiveness to fears that police involvement will anger the abuser and fail to keep the victim safe. 206 Finally, there is anecdotal evidence that many police departments will not accept identity theft reports in which the thief is a family member. 207

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.” 208 If the victim of coerced debt was forced to seek a loan under duress or if the abuser used 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 plausible 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 may not solve the problem. Such a standard would raise concerns that it was subject to abuse, especially since the parties’ intimate relationship could suggest collusion. 209 The current statutory framework essentially relies on law enforcement agencies to screen out fraudulent claims of identity theft. 210 But given law enforcement authorities’ checkered history with crimes of both identity theft and domestic violence, they may not have the institutional 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. As 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 Decision Maker

My proposal for addressing the credit-reporting effects of coerced debt builds on the FCRA’s blocking remedy, 211 replacing the law enforcement

205 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 3 (2009) (providing a history of mandatory arrest laws).
206 See, e.g., EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 257–63 (2007) (stating that the chances that a batterer will go to jail as a result of any given incidence of abuse are approximately one in ten-thousand).
207 Wu, supra note 176.
209 Collusion is unlikely to occur under my proposal because of the required finding of domestic violence. See infra text accompanying notes 241-42 (discussing this possibility).
210 See 16 C.F.R. § 603.3(a)(2).
approach taken by the current statute with a family court approach.212 Because credit reporting is so automatized, it is important to preserve the procedural shape of the FCRA process: leveraging a decision maker 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 a ruling from the family court stating which, if 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 was already dividing the spouses’ debts and assets, it could also issue a determination about whether any of the debts in victim’s name were generated by the abuser 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 IV 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 yields at least three major advantages. First, using any type of court procedure avoids the identification problems that plague the resolution of identity-theft cases. 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, because the only tool by which he can do so is through verification of his personal information, which may be inaccurate as a result of the identity theft.213 In the case of “traditional” identity theft, this has resulted in victims being required to provide substantially more documentation than

212 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.

provided by the people who stole their identities. Often, victims cannot make this case successfully.\textsuperscript{214}

Even when this specific problem is not present, ramifications of it exist in the question of fraud. Allegations of financial identity theft invite suspicion because the victim is typically trying to avoid obligations that are 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 are in the position of proving a negative. Victims must prove that they did not incur a given financial obligation and often have limited access to information that can show that someone else did.\textsuperscript{215} 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.\textsuperscript{216}

Having a court rule on identity theft can reduce these types of problems. It is relatively easy for a victim of identity theft to show that he is who he says he is because it is more difficult to perpetrate a fraud on a court than on a financial company with whom 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,\textsuperscript{217} and in-person appearances. Impersonation would be particularly difficult in a family court that is handling the parties' divorce because the parties would already before the court for other reasons.

Adjudication can also lower the risk of certification of fraudulent coerced-debt claims and, equally important, 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 type of fear. Courts can engage in extensive fact-finding, which could include subpoenaing financial records and taking

\textsuperscript{214} “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. The problem may be exacerbated because credit 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.” \textit{Id. See also FAIR CREDIT REPORTING, supra} note 27 at 158 (stating that the CRAs will usually decline an investigation request when the consumer fails to provide a social security number, but regularly provide reports to users who don’t provide one); \textit{Anderson v. TransUnion}, 405 F.Supp.2d 977, 983 (agency admitting that it can obtain a credit report without a social security number).

\textsuperscript{215} \textit{See Sovern, supra} note 213.

\textsuperscript{216} \textit{Id.}

\textsuperscript{217} \textit{See, e.g., Rules Governing Proceedings Under D.C. Code § 23-110, Rule 2(b)(specifying that motions must be filed under penalty of perjury).}
testimony if necessary. A court that has thoroughly vetted the matter is more likely to arrive at an accurate result than the CRAs or law-enforcement officers who currently make decisions about the validity of identity-theft claims.

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. Family courts have acquired substantial experience in making financial decisions through their handling of divorces and child support 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.218

Financial issues abound in divorce. Divorcing spouses and their attorneys create detailed spreadsheets of the family’s assets and liabilities.219 Child support formulas involve complex calculations in which courts manipulates financial variables such as “the obligor’s preliminary assessment,” “the reduction fraction,” and the “harmonizing factor” used in the American Law Institute’s (ALI) recommended formula.220 The ALI rubric also includes specific factors, such as medical and daycare expenses, that are used in the means test that bankruptcy courts apply.221 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.222 As the Westlaw compilation on property division states: “The trial really becomes a battleground over vigorously contested matters dealing with the worth of the varied marital assets.”223 Family courts must value not only traditional assets such as family homes, but also more complex assets like carry-back notes,224 interests in businesses,225 shareholder distributions from “S” corporations,226 and commercial buildings owned by the spouses.227

219 Legal guides for divorcing spouses include pages of sample spreadsheets to be used in compiling a detailed list of the family’s assets and liabilities. See, e.g., id.
220 “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.” ALI-FAMDISS §3.05, Principles of the Law of Family Dissolution § 3.05(5) (2002) (current through April 2011), The Child-Support Formula.
221 Compare ALI-FAMDISS § 3.05(6) and (7) with 11 U.S.C. § 707(b).
223 Barth Goldberg, *Valuation of Divorce Assets* §1:20 *The court’s role in valuation.*
226 See *Boone v. Boone*, 39,5444 La.App. 2 Cir. 4/5/05.
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.\textsuperscript{228} And in at least ten states, family courts even have experience applying judgments about domestic abuse to financial determinations, usually to property divisions.\textsuperscript{229}

A few cases from these states illustrate the ways in which family courts have made finely-tuned judgments in which they balance financial factors.

\textsuperscript{228} The laws of every state provide family courts with some jurisdiction over domestic violence. \textit{See, e.g.}, Elizabeth M. Schneider, Cheryl Hanna, Judith G. Greenberg, and Clare Dalton, \textit{DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE} 210 (2nd ed., 2008) (“At this point every state in the union offers customized relief to victims of partner abuse.”).

\textsuperscript{229} Several states consider domestic violence in dividing marital assets. \textit{See, e.g.}, Alabama (\textit{Crowe v. Crowe}, 602 So.2d 441, 443 (AL 1992) (court upheld a generous division of property in part because “the husband physically abused the wife and that he abused alcohol throughout most of the children's childhood [up to the] time of separation.”); Massachusetts (\textit{Handrahan v. Handrahan}, 547 N.E.2d 1141 (MA 1989) (“the husband's drinking, which was frequent, was wont to degenerate into violence-verbal and physical. That violence was punctuated by use of knives, firearms, and a poker, all of which he used at various times in drunken rage to terrorize his wife and her children by a former marriage.” \textit{Id.} at 1142. It was error to award “twenty-five percent of the equity value of the marital home” to the husband.” \textit{Id.} at 1141; Comins v. Comins, 595 N.E.2d 804 (MA 1992) (Although physical abuse was three decades in the past and resulted in relatively minor physical injuries to the wife, the admitted existence of abuse and the economic help the wife’s family contributed to the marriage upheld a generous property division. \textit{Id.} at 805, fn. 8)); Missouri (\textit{Dodson v. Dodson}, 904 S.W.2d 3 (Mo. Ct. App. 1995) (Marital misconduct, including numerous extramarital affairs and several instances of physical abuse, and other factors, supported trial court's exercise of discretion in unequal division; testimony that husband dragged wife across floor by her hair on one occasion, put a loaded pistol in her mouth and threatened to kill her on two occasions, and locked her in a dog house on one occasion justified awarding wife the marital home. \textit{Id.} at 5)); Rhode Island (\textit{Moran v. Moran}, 612 A.2d 26 (R.I. 1992) (court upheld open-ended alimony award when husband drank heavily and physically abused his pregnant wife and children. \textit{Id.} at 28–29.); Texas (\textit{Ohendalski v. Ohendalski}, 203 S.W.3d 910 (2006) (upholding an award giving wife 81% of the estate in part because husband had engaged in physical abuse); \textit{Awad v. Rasmussen-Awad}, 2004 WL 744234 (Tex. App. Houston 14th Dist. 2004) (approving unspecified 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 Suleiman's [physical] abuse.” \textit{Id.} at 7)). The District of Columbia considers the economic effects of abuse when marital property is being distributed. \textit{See, e.g.}, D.C. (\textit{Burwell v. Burwell}, 700 A.2d 219, 224–25 (D.C. App. 1997) (overturning a district court for failure to consider the effects of the husband’s abuse and manipulation in worsening the couple’s economic health, despite presumption of an equitable distribution in divorce). Another minority of states will consider domestic abuse only when it is extreme. \textit{See, e.g.}, New York (\textit{Wenzel v. Wenzel}, 472 N.Y.S.2d 830, 833 (upholding an unequal distribution of assets where the policeman husband stabbed the wife multiple times without provocation and was convicted of attempted murder)); Arkansas (\textit{Stover v. Stover}, 696 S.W.2d 750, 752 (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)); Michigan (\textit{McDougal v. Mc Dougal}, 545 N.W.2d 357, 361–62 (allowing for fault to be considered in the distribution of assets if conduct is “shockingly unforeseeable”)); and Kansas (\textit{Matter of Marriage of Sommers}, 792 P.2d 1005, 1010 (declining to set up a framework to consider matters of marital fault, but instructing courts to consider extreme cases, “The only exception would be some rare and unusual situation where a party's conduct is so gross and extreme that failure to penalize therefor would, itself, be inequitable.”))
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.\footnote{Dodson v. Dodson, 904 S.W.2d 3 (Mo. Ct. App. 1995).} Another example is a case in which a Texas appeals court upheld an award of 81 percent of the family's estate to the wife because of the husband's physical abuse, including kicking the wife in front of one of the couple's children.\footnote{Ohendalski v. Ohendalski, 203 S.W.3d 910 (Tex. App. Beaumont 2006).} Experience with cases that bridge the financial with 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 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.\footnote{See, e.g., Woodhouse & Fetherling, supra note 218.} In cases in which there are restraining orders or in which child custody is an issue, courts already make determinations about domestic violence.\footnote{See, e.g., Tex. Fam. Code §153.004 (establishing a rebuttable presumption that an abuser will not receive custody of any children).} In state 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 the criteria would be more explicit and the court 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,\footnote{See, e.g., Uncontested Divorce Information, Wake County, available at http://www.ncsu.edu/stud_affairs/legal_services/legaldocs/Divorce%20Inform.htm (providing for a $90 uncontested divorce in Wake County, North Carolina in which there is no consideration of property divisions, alimony or fault).} and many victims of coerced debt would 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 decision makers and train them in domestic violence issues or than training law enforcement officers to understand the complex financial arrangements involved in coerced debt.

\footnotetext[230]{Dodson v. Dodson, 904 S.W.2d 3 (Mo. Ct. App. 1995).}
\footnotetext[232]{See, e.g., Woodhouse & Fetherling, supra note 218.}
\footnotetext[233]{See, e.g., Tex. Fam. Code §153.004 (establishing a rebuttable presumption that an abuser will not receive custody of any children).}
\footnotetext[234]{See, e.g., Uncontested Divorce Information, Wake County, available at http://www.ncsu.edu/stud_affairs/legal_services/legaldocs/Divorce%20Inform.htm (providing for a $90 uncontested divorce in Wake County, North Carolina in which there is no consideration of property divisions, alimony or fault).}
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 determination of domestic violence can borrow from or incorporate existing state law. Every state already has a definition of domestic abuse in its code, usually for the purpose of granting protective orders and making child-custody determinations. 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, 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 distributions, 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 these determinations are based on a long-term range of conduct. 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 provide legitimacy for 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, and a background understanding of this pattern is essential for evaluating coercion.

235 24A Am. Jur. 2d Divorce § 854. See, e.g. N.D. Cent. Code Ann. § 14-09-06.2(1)(j) (setting up an rebuttable statutory presumption against child custody for a parent who has engaged in domestic abuse); Tex. Fam. Code Ann. § 153.004 (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 who is appointed as a possessory conservator,” and not to allow 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”); N.Y. Dom. Rel. Law § 240 ("Where either party to an action concerning custody of or a right to visitation with a child alleges … that the other party has committed an act of domestic violence … and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant ….").
236 Littwin, supra note 1, at 122.
238 Littwin, supra note 1, at 131.
claims about specific debts. This determination 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 non-abusive spouses from colluding in order to obtain a determination of coerced debt. Having a finding of domestic violence on one’s legal record seems like an unacceptable price\textsuperscript{239} for helping one’s ex-spouse block certain debts from her credit report.\textsuperscript{240} 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 be based on an analysis of 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 benefitted 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 included: restricting victim’s access to

\textsuperscript{239} 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 abusers’ resistance to motions for certifying coerced debt.

\textsuperscript{240} In addition, the spouse 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. See, e.g., Lawrence M. Friedman, \textit{A Dead Language: Divorce Law and Practice Before No-Fault}, 86 VA. L. REV. 1497, 1504 (2000). In those cases, both spouses received the benefit of obtaining a divorce.
the family’s mail;\textsuperscript{241} putting the victim on an allowance so that she had no
direct interaction with the family’s finances;\textsuperscript{242} forbidding the victim from
asking about financial matters;\textsuperscript{243} and having the victim sign documents with
no opportunity to read them.\textsuperscript{244} 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.\textsuperscript{245} 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 that do not necessarily relate to specific transactions.\textsuperscript{246}
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 determine whether a given debt was
predominately coerced, and a debt that was more than fifty percent coerced
would be blocked. 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, 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 Subpart B of
this Section.\textsuperscript{247} Alternatively, the Equal Credit Opportunity Act (ECOA)
already has one regulation that can be read to disallow the consideration of
coerced debt in lending decisions,\textsuperscript{248} and this provision could be expanded to
make it clearer and easier to use. In both cases, the certifications of coerced
debt generated by state family courts would become evidence used by the
CRAs to block coerced debts in accordance with my proposal.

\textsuperscript{241} Littwin, supra note 1, at 146.
\textsuperscript{242} Littwin, supra note 1, at 132.
\textsuperscript{243} Littwin, supra note 1, at 134.
\textsuperscript{244} Littwin, supra note 1, at 139.
\textsuperscript{245} See, e.g., supra note 1, at 146.
\textsuperscript{246} See, e.g., supra note 1, at 139.
\textsuperscript{248} 12 C.F.R. § 202.6(b)(6)(ii).
a. Alternative Implementation through the ECOA

Instead of amending the FCRA’s blocking provision,249 it would also be possible to implement my policy proposal through the ECOA.250 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,251 and under the Dodd-Frank Act, power to implement the statute was transferred from the Federal Reserve to the CFPB.252 This means that the CFPB may be able to implement this part of the 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.253

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.”254

There appears to be only one written judicial opinion interpreting this provision, and the court’s opinion in that case suggests that its scope is fairly broad.255 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 credit-worthiness.256 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.257 The court rejected the creditor’s argument,258 citing the plain language of the provision. The creditor’s argument that the regulation covered only spousal debts suggests that applying it to these debts would be relatively uncontroversial.

251 15 U.S.C. § 1691b(a) (directing the regulatory body to “prescribe regulations to carry out the purposes of this title. These regulations may contain but are not limited to such classifications, differentiation, or other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.”).
253 See Wu, supra note 180.
254 12 CFR §202.6(b)(6)(ii).
256 Id. at 1.
257 Id. at 5.
258 The court ultimately granted the creditor’s motion to dismiss on other unrelated grounds. Id. at 6-7.
This regulation would, however, be significantly more effective for coerced-debt cases if it were to specify explicitly that coerced debt was covered. Much like my proposed blocking mechanism under the FCRA, the regulation could state that a certification of coerced debt by a family court required the exclusion of that debt from credit-granting decisions. It 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.” 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, because the ECOA bans creditors from ever considering these factors. If the regulation prohibited creditors from considering coerced debt in all cases – rather than in only when consumers protested its inclusion – the CRAs would provide reports that excluded 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 and another on the effects of usury laws. 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 to prevent lenders from discriminating against women. The 1970s were a time of consumer credit scarcity, and before the ECOA, many women had

259 See, e.g., Equifax
https://help.equifax.com/app/answers/detail/a_id/138/noIntercept/1/kw/race/session/L3RpbWUvMzMzMjAzNzUyMy9zaWQvVDNQQjhtVGs%3D (“Information NOT used in calculating your score: Your race, color, religion, national origin, sex, or marital status”).
261 12 CFR §202.6(b)(4) (“Telephone listing. 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.”)
262 15 U.S.C.A. § 1691d(d) (“Combining credit accounts of husband and wife with same creditor to determine permissible finance charges or loan ceilings under Federal or State laws[:] 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.”).
264 See, e.g., Anderson v. United Financial 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.”). It 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 (1976), codified at 15 U.S.C. § 1691(a).
265 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,
been unable to obtain credit in their own names. Accordingly, the ECOA focused on issues like discriminatory denials of credit and helping women build their credit histories. The regulation discussed above sits between two regulations that point in the opposite direction; they require lenders to include certain positive spousal credit transactions when considering a credit application rather than to exclude negative spousal transactions.

The case for updating the ECOA’s regulations becomes even clearer upon closer examination of one of these provisions. Under this regulation, creditors are required to include spousal authorized user transactions in their credit determinations. 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. This provision applies only to spousal credit accounts. It was designed as a prophylactic to bolster the credit reports of married women who, before the ECOA, had been unable to obtain credit under their own names.

But since the 1970s, consumer lending has undergone a massive transformation. Credit is widely available, 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 negative credit-scoring events that disproportionately affect women, and coerced debt may be such an event.

The authorized user provision may now be exacerbating the effects of coerced debt. The problem is that, 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 make payments. When coerced debt is involved, the unauthorized user situation can quickly become untenable. Even if the victim

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266 See, e.g., Anderson, 666 F.2d at 1277.
267 12 C.F.R. §202.6(b)(i).
269 See, e.g., 1-12 Anderson’s Ohio Consumer Law § 12.10 (explaining briefly the history of this section of the ECOA regulations).
270 See, e.g., Moss & Johnson supra n. 265.
271 See, e.g., Card Hub, Card Hub’s 6 Credit Predictions for 2012, available at http://www.cardhub.com/edu/credit-predictions/ (“As we all know, available credit withered during the Great Recession but has since bounced back.”).
272 See, e.g., Littwin supra note 1, at 128 (arguing that the phenomenon underlying coerced debt – coercive control – is gendered).
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.273

What is needed is an update of the ECOA regulations that brings 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 for broader applicability 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
probably falls on the permissible side of the anti-commandeering line drawn
by the Supreme Court in Printz v. United States274 and New York v. United
States275 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 direct the actions of the states’ executive and legislative
branches, respectively. The Printz Court specifically distinguished 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 had
been similarly bound.276

Nonetheless, my proposal might be considered more intrusive than the
pricing statute at issue in Testa v. Katt277 the case on which the Printz Court
relied for the principle that state courts must enforce federal law. Testa
addressed the relatively simple situation of a federal statute that could be
enforced in either state or federal court.278 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 directly incorporated state law

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273 See Telephone Interview with Laura Russell (Sep. 15, 2011).
276 Printz at 912 (“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.”)
(emphasis in original).
278 Id.
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 their own initiative or as directed by supplemental state statutes or judicial rules. The federal statute or regulation could use 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 enforcement would be to target the domestic violence trainings that many states require for their judiciaries. In some states, divorcing parties are already required to submit financial disclosure forms, and these could be modified to encompass coerced debt.

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, 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, thus enabling coerced debt certification to take place even in divorces with no judicial hearings or legal representation.

IV. Blocking Coerced Debt

This Part addresses the legal effects of the coerced debt certification proposed in Part III. Because my proposal alters only the reporting of coerced debt, not a consumer’s liability for it, I have separated my reforms


283 See, e.g., LexisNexis database entitled TX Family Law Premium LexisNexis Forms (“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 derived from established and respected Matthew Bender publications.”).

284 See, e.g., John Ventura & Mary Reed, DIVORCE FOR DUMMIES, (3rd Ed. 2009).
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
can be held liable for fraudulent use of their credit and debit cards. Policy
makers 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.

This means that a debt that is blocked under the FCRA is also likely to be
invalidated under TILA or the EFTA, which is important for future potential
creditors of consumers. Otherwise, a consumer’s legal liability might not
match 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 the
unauthorized use remedies as well as the FCRA block, or she might not win.
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
and 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 that
she no longer owed. These debts present a relatively easy case. Blocking

285 15 U.S.C. § 1643(a) (TILA section limiting consumer liability for unauthorized credit card
charges to $50); 15 U.S.C. § 1693g(a) (EFTA section limiting consumer liability for unauthorized
debit card charges to $50 once the consumer has contacted her financial institution).
286 Federal Trade Commission, Identity Theft Victim’s Complaint and Affidavit, available at
http://www.ftc.gov/bcp/edu/resources/forms/affidavit.pdf. The affidavit contains three
“declarations,” which consumers can confirm or disaffirm. One of the declarations (whether the
consumer is willing to work with law enforcement) targets a FCRA requirement (15 U.S.C. §
1681c-2(a)(2). A second (whether the consumer authorized the transactions) targets both. The
third (whether the consumer derived any benefit from the transaction) addresses a TILA
unauthorized use provision (15 U.S.C. § 1602 (o)).
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. These data enable creditors to answer questions about consumer behavioral tendencies – such as promptness and willingness to make payments under a 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 than usual 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 the victim learns of a coerced debt, it may have already been paid off or rendered uncollectible 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 a consumer’s credit rating. Although the CRAs do not release the precise details of their credit scoring algorithms, FICO, which claims to promulgate the most commonly-used formula, 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. This weighting is higher even than that of a consumer’s current amount owed, which comprises 30% of the score. So blocking past coerced debt could significantly improve victims’ credit scores.

Excluding coerced debt that is no longer outstanding should not negatively affect future creditors, because the purpose of including past debt on a credit report is predictive. In the case of payment history, its usefulness is predicated on the belief that consumers’ track records are

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287 See, e.g., Experian, available at http://www.protectmyid.com/Message.aspx?PageTypeID=AboutPlusScore&SiteVersionID=815&SiteID=100302&sc=668893&bcd= (“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.”).

288 See, e.g., The Simple Dollar: Financial Talk for the Rest of Us, Review: Your Credit Score (Dec. 18, 2011), available at http://www.thesimpledollar.com/category/credit-reports/ (“Part of the challenge of credit scores is that the exact formulas for calculating them remain trade secrets.”).

289 FICO web site, available at http://www.myfico.com/crediteducation/scoringhelps.aspx (“Credit scores – especially FICO scores, the most widely used credit bureau scores – have made big improvements in the credit process.”).

290 Id.

291 Id.

292 Because of this, any cost-of-credit concerns about my proposal are likely to have limited applicability.
predictive of their future payment behavior. But in the case of a victim of coerced debt who has divorced her abuser, this inference is no longer true. The payment history on coerced debts will reflect the abuser’s willingness and ability to make prompt payments, not the victim’s. A court of law will have determined that the victim did not voluntarily create the debt, so its existence should have little bearing on the likelihood that she will generate similar debt in the future. She may have some payment history – positive or negative – generated by debts she voluntarily incurred, or she may have none at all.

The main counterargument to these points is that past coerced debt may be predictive 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. 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 divorcing her abuser, which is indicative of a permanent break in the relationship. Secondarily, there may be concerns that even a former abusive spouse could generate coerced debt, for example, by applying pressure via stalking or by using personal identification information acquired during the marriage. This scenario may very well be plausible, but 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 DV, 70.8 percent had had only one abusive partner over the course of their lifetimes. Thus, fewer than 30 percent of DV survivors are victimized by future partners. In comparison, the same study found that 35.6 percent of females in the general U.S. populations had experienced domestic violence at some point during their lives. So past

293 See, e.g., Experian web site, supra note 287.
294 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., Domestic Abuse Shelter of the Florida Keys, Information on Domestic Violence, available at http://www.domesticabuse.shelter.org/InfoDomesticViolence.htm; Julie Baumgardner, First Things First, available at http://firstthings.org/page/media/the-family-column/domestic-violence; University of California, Irvine, Domestic Violence, available at http://www.wellness.uci.edu/domesticviolence.pdf. I was not, however, able to identify any scholarly research either supporting or refuting this claim.
295 See supra note 1, at 149.
297 Id. at 2.
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 DV, 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, if allowed, would probably improve the predictive power of credit-scoring formulas, and DV status is a particularly important classification to protect.

The Equal Credit Opportunity Act (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. The statute and its regulations have since been broadened to cover additional classifications such as race, religion, and age.

Many of these characteristics, however, do have statistically predictive power in determinations of credit worthiness. The regulations promulgated by the Federal Reserve state that even statistically sound formulas cannot be used if they negatively impact certain groups. 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. The regulations also specifically prohibit using aggregate statistics about child bearing in evaluating credit-worthiness. The modern reader may be startled to learn that questions regarding birth-control were common on pre-ECOA loan applications, 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.

Even the 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. Use of this classification was restricted nonetheless. On this issue, the regulations have had to walk a particularly fine line in weighing anti-discrimination goals against lenders' data needs. On one hand, one major purpose of the law was to change creditor practices involving women of different marital statuses. On the other hand, state marriage law does impact creditors' collection rights, and the ECOA preserves access to certain marital information.

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 policy makers want to ensure. These two interests conflict frequently, and in many cases, policy makers have chosen discrimination prevention. If there is in fact a relationship between past coerced debt and credit risk, victims of domestic violence would have a particularly strong claim to this kind of anti-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 abuse. 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 a process for determining whether a debt is still collectable. Despite their poor performance in maintaining consumer credit files generally, the CRAs are the logical entity 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 in this respect.

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

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306 See National Commission on Consumer Finance on May 22-23, 1972, which made findings about the barriers that single and married women faced in obtaining credit. This Commission was influential in the ECOA's passage. See Smith, *supra* note 305, at 609.
307 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).
308 CRAs are required to report a consumer's voluntary closing of an account. 15 U.S.C. § 1681c(e).
As for bankruptcies, the CRAs have procedures for obtaining notification of them, because a bankruptcy is an important credit event in and of itself. 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 positive track record here. They frequently report debts discharged by bankruptcy as currently outstanding. 309

Debts that are uncollectible for other reasons would 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 enough to trump a furnisher’s continued reporting of a debt. 310 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, 311 and the law makes no exception for limitations running. 312 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. 313

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.

309 Matter of Sommersdorf, 139 B.R. 700 (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.”).
310 See Wu, supra note 18 at 174-75.
312 Id.
313 See, e.g. R.I. GEN. LAWS ANN. § 6A-2-275 (setting a fifteen year statute of limitations on the collection of debt); N.C. GEN. STAT. § 1-52 (requiring an action be brought within three years); and MINN. STAT. § 541.05 (requiring an action to be commenced within six years).
B. Outstanding Debt

Blocking outstanding coerced debt on victims’ credit reports presents a more complex case. Because I am not proposing altering liability for coerced debt, any blocking of outstanding debt would result in credit reports that are 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 usually would be. In addition, knowledge of current liabilities enables a creditor to predict 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, and on balance, the needs of victims leaving abusive relationships to establish independent households apart from their abusers weighs more heavily. This Subpart 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 are allowed access to consumer credit reports in a section entitled “Permissible purposes of consumer reports.”314 This provision includes one subsection that covers lenders,315 another that covers employers,316 and a catch-all subsection that covers landlords and utilities.317 The FCRA could provide a separate subsection for landlords and utilities, as it already does for employers, and state that all three types of entities have more limited rights with respect to 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.318

318 15 U.S.C. § 1681e(b) (“Accuracy of report. 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.”).
The CRAs have the technical ability to provide credit reporting containing different types of 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 certain items may remain on a consumer’s credit report. For example, records of accounts placed for collections expire after seven years, while the record of a bankruptcy expiring after ten. 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. The CRAs must provide these parties with versions of credit reports that contain consumers’ lifetime credit history. In addition, as discussed in Part III, supra, 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. Somebody who may have been forcibly kept out of the workforce or kept financially illiterate is faced with the formidable challenge of starting a self-sufficient household. If she fails at this task, she and her children may end up back with the abuser. Thus, the moment someone attempts to leave an abusive relationship presents a critical time period during which society at large can affect the rate of domestic violence. Making it possible for victims to obtain jobs and housing may very well reduce DV.

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 – from 25 percent in 1998 to 60 percent in 2010.

a. Employers

Employers are the most straightforward case of the three. They are not creditors of their employees,\footnote{Employers are actually debtors of their employees. See, e.g., 15 U.S.C. § 507(a)(4).} which makes their interest in credit data more limited than that of other entities. Employers' access to credit reports is controversial, even without adding coerced debt into the mix. And employers are already covered separately from creditors under the FCRA,\footnote{15 U.S.C. § 1681b(a)(3)(B).} which imposes additional restrictions on them.\footnote{The most important provision requires that employers obtain written releases from employees before ordering credit checks. 15 U.S.C. §1681b(b)(2)(A)(ii). They must certify to the CRA that they have obtained this permission. §1681b(b)(1). They are also required to give employees notice both before and after taking adverse action. 15 U.S.C. §1681b(b)(3) & §1681m(a). See, e.g., Jeremy Simon, \textit{TransUnion Asked to Stop Selling Credit Reports to Employers}, available at http://www.creditcards.com/credit-card-news/transunion-credit-report-employment-hiring-decision-1270.php#ixzz1d7vOWcf4 (last visited Nov. 8, 2011), citing petition at http://www.creditcatch22.org/transunion_civil_rights_sign-on_letter.pdf (last visited Nov. 8, 2011); see also Kelly Gallagher, \textit{Note, Rethinking the Fair Credit Reporting Act: When Requesting Credit Reports for Employment Purposes*Goes Too Far}, 91 IOWA L. REV. 1593 (2006); Chi Chi Wu testimony before Congress (2010), http://www.nclc.org/images/pdf/credit_reports/testimony-credit-report-use-05-10.pdf.} There is an active debate over whether employers should have access to credit reports at all.\footnote{Karen Aho, \textit{Does Bad Credit Make You a Bad Person?}, MSN Money, available at http://articles.moneycen...
been in reaction to the economic downturn that began in 2008. Policy makers 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 they were unemployed.337 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.”338 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,339 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.340

To the extent that employers do have a legitimate interest in potential employee credit histories, it is entirely predictive. They have no current liabilities interest, because their employees do not owe them money. This means that data about outstanding debt provide them with little value beyond what they can learn from past debt, and thus that the impact of

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339 10 Board of Governors of the Federal Reserve System, Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit 80-81 (Aug. 2007); Matt Fellowes, Brookings Inst., Credit Scores, Reports, and Getting Ahead in America 9-10 (May 2006); Robert B. Avery, Paul S. Calem, & Glenn B. Canner, Credit Report Accuracy and Access to Credit, Fed. Res. Bull. (Summer 2004); Raphael W. Bostic, Paul S. Calem, & Susan M. Wachter, Joint Ctr. for Hous. Studies of Harvard Univ., Hitting the Wall: Credit As an Impediment to Homeownership (Feb. 2004); Fair, Isaac & Co., The Effectiveness of Scoring on Low-to-Moderate Income and High-Minority Area Populations 22, Fig. 9 (Aug. 1997); Wu, supra note 334, at 4-5.  
restricting their access to information about outstanding coerced debt would be minimal.

Among the reasons that 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 little empirical research in this area.

In a recent survey by the Society of Human Resources Managers (SHRM), more than half of polled human resources representatives said that the reason they performed credit checks was to “reduce/prevent theft[,] embezzlement [and] other criminal activity.” The logic is that an “employee who is heavily burdened by debt could be more likely to embezzle or steal” 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 the motivation to steal to pay one’s liabilities were to exist, it would do so no matter how the debts were created.

The problem with this theory is that there is no research supporting it. 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.” The other, conducted in 2003, found “no correlation between employee credit reports and theft.”

341 SOCIETY FOR HUMAN RES. MGMT., BACKGROUND CHECKING (2010), supra note 328, at 10 (54 percent); SOCIETY FOR HUMAN RES. MGMT., BACKGROUND CHECKS (2011), supra note 328.
343 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 and no empirical support for this recommendation. Gallagher, supra note 334, at 1595 (2006) (“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, these articles rarely state explicitly that reason and 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 Wu, supra note 339, at 6 (“There is no evidence showing that people with weak credit are more likely to be bad employees or to steal from their bosses.”).
344 “Despite extensive anecdotal supporting evidence, John Clark and I concluded in our 1983 book, Theft by Employees, that most incidents of employee pilferage were unrelated to an employee’s particular economic situation….. [E]mployees who reported having personal economic problems were no more theft-prone that those who did not. This research study conducted two decades ago concluded that most employees do not steal from the company as a way of resolving their personal debts and external pressures.” Charles A. Sennewald & John H. Christman, RETAIL CRIME, SECURITY, AND LOSS PREVENTION: AN ENCYCLOPEDIC REFERENCE 608. The authors also developed a model of employee theft, and “motivation” was only one of three contributing factors. The other two were opportunity and deterrence. Of the three, deterrence was considered the most important. Id. at 613.
and negative performance or termination for dishonesty.”\textsuperscript{345} Even a CRA spokesperson recently conceded in legislative testimony that there was not any evidence for this link.\textsuperscript{346} There is also a more general version of this theory, but it is not implicated by my policy proposal. Approximately 12 percent of the hiring managers in the SHRM poll said that they used credit reports to evaluate “overall trustworthiness.”\textsuperscript{347} 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\textsuperscript{348} – and stated as the proposition that a person who has successfully managed his own finances is more likely to have success managing a business’.\textsuperscript{349} 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.\textsuperscript{350} 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.

The remaining reasons employers use credit checks have to do with potential liability for torts such as negligent hiring\textsuperscript{351} and checking for employee misrepresentation of credentials,\textsuperscript{352} but my proposal would not harm employers on either of these grounds. An employer could not very well be held liable for information to 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.

\textsuperscript{345} Ben Arnoldy, The Spread of Credit Checks as a Civil Rights Issue, CHRISTIAN SCIENCE MONITOR, Jan. 18, 2007, available at http://www.csmonitor.com/2007/0118/p01s03-ussc.html/%28page%29/2 (describing a study by Palmer and Koppes, which is widely cited but does not appear to have been published in an academic journal).

\textsuperscript{346} Liz Pulliam Weston, Could You Be Fired for Bad Credit?, MSN Money, available at http://articles.moneycentral.msn.com/Banking/YourCreditRating/weston-could-you-be-fired-for-bad-credit.aspx (quoting 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.”).

\textsuperscript{347} SOCIETY FOR HUMAN RES. MGMT., BACKGROUND CHECKING (2010), supra note 328.

\textsuperscript{348} Id. at 5.

\textsuperscript{349} 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, BOST. GLOBE, Sept. 5, 2006, at E1.

\textsuperscript{350} See, e.g., Wu, supra note 339; Arnoldy, supra note 345.

\textsuperscript{351} In the SHRM poll, reducing risk to actions for negligent hiring was the second most common reason human resources managers gave for using credit checks. SOCIETY FOR HUMAN RES. MGMT., BACKGROUND CHECKING (2010), supra note 328. See also Gallagher, supra note 334.

b. Utilities

Unlike employers, utility providers and landlords are creditors; their customers and tenants owe them money. This means that these entities have a strong available-funds interest in their applicants’ credit reports. 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 to financial-sector creditors, and on balance, it is reasonable to ask them to bear the risk of not seeing coerced debts on the credit reports they order.

In addition to providing fundamental services, basic utilities, such as gas and electric companies, are natural monopolies. These two factors combine to make the public utility industry among the most highly regulated in the U.S. 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.

Utility companies’ ability to adjust for the riskiness of individual customers is already correspondingly compromised. They are, for the most part, not allowed to select their customers or charge different customers.

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353 This is 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?, 7 COMPETITION POL’Y INT’L 58, 66 (2011).

354 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, 811 (1994) (discussing usury rates for creditors) (“There are two distinct approaches to usury--setting a ceiling consistent with industry risks and costs, as a public utilities commission would do….’’); Epstein, supra note 353, at 66 (debit card rates) (“The first is that, traditionally, the public utility has a natural monopoly in the geographical region in which it operates. The 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. The key assumption that supports this view is that over the relevant range of output, the incumbent has declining marginal costs that allow it to price additional units of service below those which the new entrant must charge in order to cover the heavy costs to set up his initial system. Put otherwise, the industry operates at a lower cost with one firm than it does with two. The level of monopoly power is only entrenched further if the public utility commission is vested with the power to deny a license to any new entrant that might decide to brave entry. Rate regulation is one permissible means to combat the use of this monopoly power.”). See also Jarret C. Oeltjen, Usury: Utilitarian or Useless?, 3 FLA. ST. U. L. REV. 167, 780-83 (1975).

355 This is what is known as their “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.” National Consumer Law Center, Dealing With Utility Companies: Disputes, Making Payments Affordable, Bills, Deposits, and Service Shut-Offs, FACTS FOR OLDER CONSUMERS, available at
different prices. They must follow frequently-elaborate procedures before terminating existing customers, and in many states, they must regularly notify their customers of their rights to fight disconnection. Thus, utility providers already engage in massive cross-subsidization – from the financially stable customers to the poor, from the urban to the rural, and even from the winter customers to the summer. Adding victims of coerced debt to this 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, and it is in the process of determining deposits that utility companies run credit checks. In my preliminary study of coerced debt, the DV advocates I interviewed pointed to high deposits as an important barrier to their clients’ economic self-sufficiency. But even here, utilities’ freedom is not absolute. In most states, they have discretion to determine whether to require a deposit, but not to determine the amount. Because utility deposit-setting practices are already so constrained, removing one piece of information from their


357 See National Consumer Law Center, supra note 355.


359 “Th[e] obligation to serve prevents utility companies from choosing to serve only the most profitable customers and geographic areas.” Id.

360 In Massachusetts, for example, utilities are prohibited from disconnecting service between November 15 and April 15. See id.

361 See, e.g., Warren & Westbrook, supra note 356, 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.”).

362 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 PUCs 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 358, at 11. See also Robert W. Seifert, Home Sick: How Medical Debt Undermines Housing Security, 51 ST. LOUIS L.J. 325, 343 (“In some cases, people with low credit scores have been required to pay higher utility deposits.”).

363 See Littwin, supra note 1, at 158.

364 Howat & Devanthary, supra note 358, 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.”).
purview would not make a major difference in what they requested. 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 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 has been recognized by the national and state laws that prohibit property managers from discriminating on the basis of DV.

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.” 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. Or if they do find housing, they often have to pay application fees to several landlords before obtaining it. This problem has become more prevalent as background screening has become increasingly accessible, and it is important to remove victims of coerced debt from this category.

The legal system has already recognized the crucial role of access to housing for DV victims by preventing landlords from discriminating against victims and survivors in many circumstances. My proposal simply fills an important gap in this protection. Recently, lawyers have been bringing claims arguing that housing discrimination against DV victims violates the Fair Housing Act’s (FHA) ban on gender discrimination, although this use of the

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

366 Id.


368 This is a relatively new problem made possible by “technological advances [that] 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, available at http://www.housinglink.org/Files/Tenant_Screening.pdf.

369 42 U.S.C. § 3604 (b) (“[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
FHA is still relatively novel, and there is currently only one federal case on point. Additional coverage is provided by the Violence Against Women Act (VAWA), which since 2005 has provided unambiguous anti-discrimination protection for DV victims and survivors living in federally-subsidized housing. In addition, six states and the District of Columbia have enacted provisions that explicitly prevent discrimination against victims of domestic violence in all types of housing. An overlapping group of twelve states and Washington, D.C. have also enacted provisions that allow DV victims to break their leases without penalty in order to escape the abuse. These statutes may indeed cause landlords some economic harm, but policy makers have determined that DV victims’ need for housing 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. 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. Consumers are particularly likely to prioritize rent over credit card debt.

facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

Bouley v. Young-Sabourin, 394 F. Supp. 2d 675 (D. Vt. 2005) (allowing the 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, after which the landlord attempted to discuss Christianity with the victim).

This part of VAWA covers all Section 8 units and most public housing projects. See HUD Programs: Violence Against Women Act Conforming Amendments, 73 Fed. Reg. 72,336 (Nov. 28, 2008).


For example, former abusive partners of survivors who have obtained housing under the anti-discrimination 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.

See, e.g., Littwin, Beyond Usury, supra note 54 (describing how low-income women in a small study prioritized their rent payments above other expenses).

Id.
In addition, property managers typically require one- to three-months’ rent upfront, 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. This means that 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.

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, 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 attempting to start new households apart from the abuse.

V. Conclusion

When one considers how important credit reports have become, the state of the current system for compiling them and overseeing their accuracy is somewhat shocking. The CRAs use loose matching algorithms that virtually

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377 Moreover, these amounts are usually predetermined rather than calculated in response to a rental applicant’s credit history. The typical up-front requirement is first month’s rent, last month’s rent, and a fee equal to one month’s rent for a security deposit. See, e.g., Michelle Gibson, *How much money do I need to Rent a Home in Wellington FL?*, available at http://wellingtonhometeam.com/how-much-money-do-i-need-to-rent-a-home-in-wellington-fl/ (“If you are looking to rent a home in Wellington Florida from a private owner on average you will need 3 month’s rent up front.”).

378 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).

379 A 2004 Minnesota study of tenant screening practices in that state found that 72 percent of property managers used a specialized service. Housing Link, *supra* note 368, at 6.
ensure errors and enable fraud, and they have no meaningful process for correcting inaccuracies once they occur. At some point, these conditions may become unacceptable, and there will be a demand for reform, although the “VIP” system that provides higher quality service to people with a better ability to insist on change probably 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 the CRAs. Since they cannot meaningfully evaluate a consumer’s claim that she is not the same person as someone with seven overlapping Social Security Number digits and the same first initial, they cannot meaningfully evaluate the much more complex factual assertions that surround coerced debt.

Moving decision making about coerced debt to family courts does place more pressure on the existing processes for addressing domestic violence, but these systems present grounds for optimism. In a relatively short period of time, the modern domestic violence movement has successfully created a “paradigmatic shift”380 that has changed the terms of the discussion and brought vast improvements to nearly every type of institution that serves victims and survivors.381 If change can come to a system that was shielded by centuries of common law,382 it can come to our credit reporting system, which is – no matter how ubiquitous it may seem now – only a few decades old.383

381 See id.
382 See, e.g., William Blackstone, Commentaries on the Law of England 442 (W. Lewis ed., 1897) (“[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.”); 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).
383 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, available at http://www.bargaineering.com/articles/history-of-credit-bureaus-equifax-experian-transunion-innovis.html. Credit reporting did not become widespread until the 1990s. See Hendricks, supra note 31 at 2.