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Recommended Citation
Krivinskas Shepard, Lea, Toward a Stronger Financial History Antidiscrimination Norm 53 B.C.L. Rev. 1695(2012).

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TOWARD A STRONGER FINANCIAL HISTORY ANTIDISCRIMINATION NORM

LEA SHEPARD*

Abstract: This Article examines a topic at the intersection of consumer protection and antidiscrimination law: the use by employers and licensing organizations of applicants' credit reports and financial histories in the hiring and licensing processes. The Article begins with a broad normative assessment of the merits of the practice by examining applicable "logics of personhood," categories of a framework of antidiscrimination analysis that assesses whether traditionally unprotected groups are entitled to formal antidiscrimination safeguards. Thus, the Article considers whether financial histories validly and reliably reflect personality traits relevant to job performance. It then examines to what extent the use of financial history in the employment and licensing settings is a necessary and helpful deterrent to debt default—long regarded as a socially undesirable practice. Next, the Article evaluates the practice's impact on traditionally disadvantaged groups by assessing its relationship to racial equality and social mobility. Finally, in a novel application of behavioral economics to the area of credit reports and financial history, this Article suggests that, in spite of the difficult conceptual distinctions between consumer debtors and traditional Title VII categories like race, sex, and national origin, the findings of behavioral economists suggest that an adverse financial status is more immutable than neoclassical economists have been willing to concede. These observations lend critical normative support to legislative efforts to establish a stronger financial history antidiscrimination norm.

* © 2012, Lea Shepard, Assistant Professor, Loyola University Chicago School of Law; J.D., Harvard Law School; A.B., Duke University. I thank Elizabeth Glazer, Cynthia Ho, Dan Krivinskas, Donna Krivinskas, Nancy Ota, Geoffrey Rapp, Alan White, and all attendees of the 2011 Central States Law Schools Association Conference, the LatCrit XVI Conference, and the Symposium on Credit Scoring and Credit Reporting for their very helpful comments and suggestions. My library liaison, Patricia Scott, and my research assistants, Patrick Gleeson, Leigh Kelly, and Ashley Koenen, provided excellent research support. I thank my family for their kindness and guidance. As always, I owe Spencer Shepard IV, my wonderful husband, my deepest gratitude for his patience, helpful feedback, and encouragement.

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[History is] the most difficult of all the sciences.

—Numa Denis Fustel de Coulanges

Introduction

An individual's financial past—the amount of debt that she has accumulated, the payments that she has failed to make, the judgments that creditors have recovered against her, and any bankruptcy protection that she has sought—has a formidable impact on her life. Credit scores and credit history impact whether and at what cost she can borrow money to purchase a home and a car.[1] They influence the prices businesses charge for products like credit cards and auto insurance.[2] A growing number of employers consider financial history in scrutinizing job applicants.[3] Bar examiners and other licensing organizations consider applicants' repayment histories in assessing their fitness to join particular professions.[4] Landlords look at financial histories in evaluating prospective renters.[5] An increasing number of utilities and cell phone carriers use credit reports and scores to price deposits for their services.[6] Additionally, debt burdens and bankruptcy filings can affect an employee's ability to secure or retain her security clearance.[7] For

[1] Matt Fellowes, Brookings Inst., Credit Scores, Reports, and Getting Ahead in America 2 (2006), http://www.brookings.edu/~/media/research/files/reports/2006/5/childrenfamilies%20fellowes/20060501_creditscores.pdf.

[2] *Id.*

[3] *Id.*

[4] *See, e.g.*, Hoke v. Retail Credit Corp., 521 F.2d 1079, 1084 (4th Cir. 1975) (discussing the use of credit history by medical boards); Niles Jackson, *Bankruptcy as It Affects Character and Fitness*, 72 B. Examiner, no. 4, 2003 at 6, 12 (discussing bar examiners' consideration of law school graduates' bankruptcy filings when evaluating applications for admission to the bar).

[5] Fellowes, *supra* note 1, at 2.

[6] *Id.*; Baynes v. Alltel Wireless of Ala., Inc., 322 F. Supp. 2d 1307, 1313–14 (M.D. Ala. 2004) (discussing a scenario in which a consumer was required to pay a higher security deposit to a wireless telecommunications provider because of adverse information in her credit report).

[7] *See, e.g.*, *Bankruptcy*, U.S. Air Force Acad., http://www.usafa.edu/superintendent/ja/bankruptcy.cfm?catname (last visited Oct. 9, 2012) (explaining that whether a bankruptcy filing can affect one's security clearance depends on various factors, including "whether the bankruptcy was caused primarily by an unexpected event . . . or by financial irresponsibility"). The effect of a bankruptcy filing on an individual's ability to secure or retain a job, however, is complex. While a bankruptcy filing may signal to a current or prospective employer that an individual is financially irresponsible, *see infra* notes 116–136 and accompanying text, it may alternatively be interpreted as a positive path toward rehabilitation of the debtor's financial status because it combines debt forgiveness with debt collection. *See, e.g.*, *Legal Office: Bankruptcy*, *supra* (noting that filing for bankruptcy "may actually be viewed as an indication of financial responsibility," because someone with size-

these reasons, financial histories—including credit reports and scores—have been described as some of "the most powerful determinants of modern American consumer life."[8]

In recent years, one widespread use of financial histories—employers' and licensing organizations' consideration of applicants' financial backgrounds—has attracted significant scrutiny. Legislators and policymakers have questioned the logic and ethics of employers' and licensing organizations' two primary uses of financial histories: (1) to gauge an applicant's propensity to steal from customers or clients,[9] and (2) to use an applicant's financial history as a barometer of financial responsibility, which employers interpret as a reflection of her capacity to serve as a responsible employee or licensee.[10] Some federal and state legislators have sought to limit employers' consideration of applicants' credit histories absent a reasonably clear relationship between the applicant's financial transgression and his or her ability to perform the responsibilities demanded by the position.[11] Legal commentators have

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able outstanding debts may pose a higher security risk than someone who has filed for bankruptcy); *see also* Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 140 (2011) (citing an interview with a debtor who pursued a Chapter 13 bankruptcy hoping to retain a security clearance). One bankruptcy judge opined on the extent to which a bankruptcy filing could interfere with a debtor's future employment prospects:

> Bankruptcy is a serious step; it holds its stigmas still. It is a unique judicial process where one is laid bare, financially. And remember this—it results in a court record for future employers, creditors, friends, relatives and the public to see. Would you grant a security clearance to one who cannot manage his financial affairs and files bankruptcy? I only ask the question. Some would and some would not.

In re Raymond, 12 B.R. 906, 907 (Bankr. E.D. Va. 1981).

[8] FELLOWES, *supra* note 1, at 2.

[9] *See infra* notes 101–115 and accompanying text.

[10] *See infra* notes 116–136 and accompanying text.

[11] Several states, including California, Connecticut, Hawaii, Illinois, Maryland, Oregon, and Washington, have passed laws limiting employers' consideration of credit reports. CAL. LAB. CODE § 1024.5 (West Supp. 2012); CONN. GEN. STAT. ANN. § 31-51tt (West Supp. 2012); HAW. REV. STAT. ANN. § 378-2(a)(8) (LexisNexis Supp. 2011); 820 ILL. COMP. STAT. 70/10 (2010); MD. CODE ANN., LAB. & EMPL. § 3-711 (West Supp. 2011); OR. REV. STAT. § 659A.320 (2011); WASH. REV. CODE § 19.182.020 (2007); *see also Use of Credit Information in Employment 2011 Legislation*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/issues-research/banking/use-of-credit-information-in-employment-2011-legis.aspx (last updated Dec. 19, 2011) (outlining 2011 legislation in twenty-nine states limiting the use of credit reports and credit history by employers). In 2009, federal legislators introduced the Equal Employment for All Act, which proposed to amend the Fair Credit Reporting Act to restrict employers' use of credit reports. H.R. 3149, 111th Cong. (2009). As I subsequently discuss, however, existing and proposed laws that restrict employers' use of

voiced concerns about bar examiners' consideration of applicants' student loan debt levels and repayment capabilities in determining applicants' professional fitness.[12] Some bankruptcy practitioners have suggested that the Bankruptcy Code's prohibition of public employers' refusal to hire bankruptcy filers should be likewise applied to private sector employers.[13] In response, employers have defended their right to consider financial histories in the hiring process, arguing that they can glean meaningful information about the merits and employability of job applicants from applicants' credit reports.[14]

In this Article, I consider whether, and to what extent, the law should more rigorously limit employers' and licensing organizations' consideration of individuals' financial histories. Should the law prevent individuals with adverse credit histories, high debt loads, debt defaults, or bankruptcies from being treated differently by employers or licensing organizations? What valid distinctions, if any, can be made among members of these groups? In exploring these questions, I assess how debtors' financial histories have become inextricable from their individual identities, whether the practice is a necessary and effective supplement to norms and laws encouraging debt repayment, the lack of clarity surrounding consumers' ability to enter into financial transactions that maximize their welfare, and the importance of a robust financial history antidiscrimination norm to racial and economic equality. To traverse "the complex, shifting, and often muddy terrain"[15] of

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credit reports actually embrace—rather than reject—prevailing preconceptions about debtors. *See infra* note 115 and accompanying text.

[12] *See, e.g.*, John Zulkey, *Character & Fitness & Credit History: Failing the Character and Fitness Review over Student Loan Debt*, 21 PROF. LAW., no. 1, 2011 at 4, 4–5 (arguing that law students who have defaulted on their student loan obligations should not be disqualified from practice and recommending that the American Bar Association adopt measures to encourage law schools to reduce tuition and increase loan-repayment assistance).

[13] Michael R. Herz, *The Scarlet D: Bankruptcy Filing and Employment Discrimination*, AM. BANKR. INST. J., Apr. 16, 2011, at 16, 89; *see* 11 U.S.C. § 525 (2006).

[14] *See* U.S. Equal Emp't Opportunity Comm'n, *Meeting of Oct. 20, 2010—Employer Use of Credit History as a Screening Tool* [hereinafter EEOC, *Oct. 20 Meeting Record*] (statement of Pamela Quigley Devata), http://www.eeoc.gov/eeoc/meetings/10-20-10/ (last visited Oct. 9, 2012); Kathy Gurchiek, *SHRM: Credit Checks Are Legitimate Screening Tool*, SOC'Y FOR HUMAN RES. MGMT. (Nov. 2, 2010), http://www.shrm.org/about/news/Pages/LegitimateScreening Tool.aspx; *see also* EEOC v. United Va. Bank/Seaboard Nat'l, No. 75-166-N, 1977 WL 15340, at *15 (E.D. Va. Oct. 7, 1977) (finding that the use of preemployment credit reports by an employer in the bank industry was permissible so long as it was not racially discriminatory on its face).

[15] ANNA KIRKLAND, FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD 2 (2008).

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antidiscrimination law, I examine applicable "logics of personhood,"[16] a phrase that refers to a framework of antidiscrimination analysis that can be used to assess whether particular groups are entitled to antidiscrimination protection.

After examining the empirical rationales for using financial history in employment and licensing as well as the practice's adverse impact on racial equality and social mobility, I recommend a significant expansion in existing financial history antidiscrimination laws. In a novel application of behavioral economics to the area of credit reports and financial history, I argue that the findings of behavioral economists suggest that a stronger financial history antidiscrimination norm is necessary to protect individuals from the consequences of decisions that increasingly appear more analogous to immutable characteristics that receive more substantial protection under current antidiscrimination laws.

This Article is the first to conduct a broad normative analysis of financial-history discrimination.[17] The Article considers not only employers' and licensing organizations' use of credit reports, but also their use of other reports of financial histories, including, for example, bankruptcy filings reflected in public records. As legislators continue to consider whether or not to restrict employers' use of credit histories, it is critical to engage in a more comprehensive analytical inquiry—one that will inform legislators' and policymakers' conclusions about how and to what extent to limit employers' access to information that has for decades been perceived as relevant and helpful. The Article's objective is to generate a more nuanced and comprehensive debate about the merits of reducing the role of financial history in an individual's

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[16] *Id.* at 2–3 (describing the logics of personhood as "forms of reasoning about what persons are—specifically, ways we explain to each other how and why someone's traits should or should not matter for judging what is really important about her").

[17] Existing scholarship has focused on discrete dimensions of financial history discrimination. *See, e.g.*, Loren W. Brown, *Credit Report: An Acceptable Aid to the Hiring Decision?*, 39 W. St. U. L. Rev. 1 (2011); John C. Chobot, *Anti-Discrimination Under the Bankruptcy Laws*, 60 Am. Bankr. L.J. 185 (1986); Roberto Concepción, Jr., *Pre-Employment Credit Checks: Effectuating Disparate Impact on Racial Minorities Under the Guise of Job-Relatedness and Business Necessity*, 12 Scholar 523 (2010); Deborah Thorne, *Personal Bankruptcy and the Credit Report: Conflicting Mechanisms of Social Mobility*, J. Poverty, Oct. 17, 2008, at 23; Ruth Desmond, Comment, *Consumer Credit Reports and Privacy in the Employment Context: The Fair Credit Reporting Act and the Equal Employment for All Act*, 44 U.S.F. L. Rev. 907 (2010); Kelly Gallagher, Note, *Rethinking the Fair Credit Reporting Act: When Requesting Credit Reports for "Employment Purposes" Goes Too Far*, 91 Iowa L. Rev. 1593 (2006).

pursuit of a job, which is a resource that philosopher Anthony Appiah has described as "essential to a dignified autonomous life."[18]

Part I of this Article juxtaposes creditors' traditional use of credit reports—to assess credit applicants' "creditworthiness"—and employers' and licensing organizations' non-credit uses of credit reports and financial histories. It reviews the findings of several social science studies that attempt to measure the relationship between an adverse financial history and specific personality traits relevant to job performance.[19] Part II considers various arguments for and against establishing a stronger antidiscrimination norm in the area of financial history. It considers a critical question insufficiently explored in the legal literature: how and whether policies embracing empirical observations about individuals with adverse financial backgrounds can be reconciled with other important social goals, including the promotion of racial equality and social mobility.[20] Part III explains why a stronger financial history antidiscrimination norm is necessary to overcome key deficiencies in current laws and is preferable to alternatives.[21]

I. THE INCREASING IMPORTANCE OF FINANCIAL HISTORY IN THE PURSUIT OF CREDIT AND CAREER

A. *Creditors' Use of Financial History*

Traditionally, an individual's financial background has been used primarily by creditors to decide whether and under what terms a consumer will receive a mortgage or other loan. Creditors have long used consumer reports (more informally known as "credit reports")[22] to evaluate consumers' eligibility for mortgages, credit cards, and other credit products. Consumer reports contain a wealth of information

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[18] K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, 88 CALIF. L. REV. 41, 46 (2000).

[19] *See infra* notes 22–153 and accompanying text.

[20] *See infra* notes 154–279 and accompanying text.

[21] *See infra* notes 280–418 and accompanying text.

[22] The term "consumer report" encompasses "credit reports" as well as reports issued to non-creditor users of reports, including prospective insurers, employers, and landlords. *See* Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Protecting Consumers' Data: Policy Issues Raised by ChoicePoint, Statement Before the Subcommittee on Commerce, Trade, and Consumer Protection, Committee on Energy and Commerce, U.S. House of Representatives 6–7 (Mar. 15, 2005), http://www.ftc.gov/os/2005/03/050315protecting consumerdata.pdf.

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about American consumers, including personal information,[23] payment history,[24] inquiry history,[25] and public record information.[26] Some consumer reports include credit scores, which are a numeral rating of a consumer's "creditworthiness."[27] Creditors purchase consumer reports from consumer reporting agencies (commonly known as "credit reporting agencies" or credit bureaus"),[28] organizations that create and maintain such records on virtually every American adult.[29]

Economists view credit reports as a critical risk-mitigation tool since credit reports can help a credit grantor assess a prospective borrower's likelihood of repaying a particular loan.[30] When a consumer applies for credit, a creditor can analyze the applicant's financial history to reduce adverse selection problems.[31] Credit products—like insurance policies[32]—may be more likely to attract riskier borrowers be-

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[23] Personal information includes a consumer's name, address, Social Security number, date of birth, previous address, employer, and phone number. EVAN HENDRICKS, CREDIT SCORES & CREDIT REPORTS: HOW THE SYSTEM REALLY WORKS, WHAT YOU CAN DO 81–82 (2005).

[24] Payment history details a consumer's record of repayment on her mortgage, auto loans, installment loans, credit cards, and department store cards. *Id.* at 19.

[25] A consumer report lists which employers and creditors requested the report within the last two years. CHI CHI WU & ELIZABETH DE ARMOND, NAT'L CONSUMER LAW CTR., FAIR CREDIT REPORTING § 3.2.3.2 (7th ed. 2010).

[26] Public record information includes tax liens, bankruptcies, court judgments, and foreclosures. *Id.*

[27] *Id.* As I note below, however, employers do not have access to credit scores; rather, consumer reporting agencies provide employers only with the raw data in consumer reports. *See infra* note 65 and accompanying text.

[28] The term "consumer reporting agency" is broader than the term "credit bureau." A consumer reporting agency encompasses "credit bureaus" as well as many other entities whose primary focus does not involve reporting consumer credit information to prospective creditors. *See* WU & DE ARMOND, *supra* note 25, § 1.2.1. Examples of these consumer reporting agencies include tenant screening bureaus and employment screening agencies. *Id.*

[29] ANTHONY RODRIGUEZ ET AL., NAT'L CONSUMER LAW CTR., FAIR CREDIT REPORTING § 4.1 (5th ed. 2002) ("The three major agencies will have a file on virtually every adult American . . . .").

[30] Robert M. Hunt, *The Development and Regulation of Consumer Credit Reporting in America* 4–5 (Fed. Reserve Bank of Phila., Working Paper No. 02-21, 2002), *available at* http://www.phil.frb.org/research-and-data/publications/working-papers/2002/wp02-21.pdf ("The availability of data on a universe of credit users . . . makes it possible to develop sophisticated models to select and price credit risk for unsecured consumer loans.").

[31] *See Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Fin. Insts. of the S. Comm. on Banking and Currency*, 91st Cong. 66 (1969) [hereinafter *Hearings, Fair Credit Reporting*] (statement of Lewis B. Stone, Assistant Counsel to Governor Rockefeller, State of New York) (explaining that credit reports allow "the costs of bad credit risks [to] be apportioned to those that are bad credit risks"); Hunt, *supra* note 30, at 4–5.

[32] *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 47–48 (6th ed. 2012).

cause any given credit applicant generally has more information than do prospective creditors about that applicant's likelihood of defaulting on a particular debt.[33] To minimize these information asymmetries and reduce the risk that any given group of credit applicants will contain a disproportionate number of individuals who are more likely to default, creditors can use an applicant's credit history to differentiate between more and less "creditworthy" individuals.[34] For example, a creditor might decide not to lend to an applicant lacking a sufficiently long and regular record of prompt debt repayment, or one whose outstanding loan balances exhaust a relatively high percentage of her total credit limits.[35] Alternatively or additionally, a creditor can reduce anticipated losses by charging higher fees or interest rates to borrowers who appear more likely to default.[36]

Creditors utilizing credit reports also attempt to shape borrower behavior by reducing moral hazard problems.[37] After a creditor has extended credit to a borrower, that creditor can deter the debtor from defaulting by threatening to report any delinquency to one or more credit bureaus.[38] The more accurate and the more comprehensive the

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[33] *See* WORLD BANK & INT'L MONETARY FUND, FINANCIAL SECTOR ASSESSMENT: A HANDBOOK 256–57 (2005), *available at* http://www.imf.org/external/pubs/ft/fsa/eng/pdf/ch10.pdf ("Credit reporting addresses a fundamental problem of credit markets: asymmetric information between borrowers and lenders, which leads to adverse selection and moral hazard."); John M. Barron & Michael Staten, *The Value of Comprehensive Credit Reports: Lessons from the U.S. Experience*, *in* CREDIT REPORTING SYSTEMS AND THE INTERNATIONAL ECONOMY 273, 276 (Margaret J. Miller ed., 2003) ("Lending markets almost always display some degree of information asymmetry between borrowers and lenders. Borrowers typically have more accurate information than lenders about their willingness and ability to repay a loan.").

[34] *See* Hunt, *supra* note 30, at 3–4.

[35] *What's in My FICO Score, How My FICO Score Is Calculated*, MYFICO, http://www.myfico.com/CreditEducation/WhatsInYourScore.aspx (last visited Oct. 9, 2012) (describing the extent to which certain categories of information are used in calculating a consumer's credit score).

[36] The practice of charging riskier borrowers higher fees and interest rates is known as "risk-based pricing." *See, e.g.*, Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided "Reform" of Bankruptcy Law*, 84 TEX. L. REV. 1481, 1516 (2006) (discussing how creditors can maximize profitability through risk-based pricing and sub-prime lending); Patricia A. McCoy, *Rethinking Disclosure in a World of Risk-Based Pricing*, 44 HARV. J. ON LEGIS. 123, 126–27 (2007) (discussing risk-based pricing in the home mortgage market).

[37] *See* WORLD BANK & INT'L MONETARY FUND, *supra* note 33, at 257 ("[C]redit-reporting mechanisms strengthen incentives for borrowers to repay and thus reduce moral hazard because late or nonpayment with one institution can result in sanctions from many others."); Hunt, *supra* note 30, at 4.

[38] *See, e.g.*, WORLD BANK, GENERAL PRINCIPLES FOR CREDIT REPORTING 8 (2011), http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Credit_Reporting_text.pdf

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information in a consumer's credit report, and the greater the number of creditors and other entities who use credit reports in rendering meaningful decisions about consumers, the more likely that (1) past defaults will affect a borrower's future eligibility for loans, and that (2) creditors' threats to report defaults to credit bureaus will shape consumers' behavior.[39]

Because they provide data with which creditors can develop models to predict and price credit risk, credit reports and credit scores have been lauded for reducing delinquency rates,[40] dramatically increasing the speed of the loan application process,[41] and contributing to a significant expansion of unsecured credit.[42] Credit reports have thus increased creditor profits, expanded consumers' access to credit, and helped keep credit prices down. For these reasons, credit reports have been interpreted (at least conceptually) as a win-win, benefitting consumers and creditors alike.[43]

(describing how credit reporting systems, databases of information on debtors, can "[s]erve to discipline debtor behavior").

[39] *See* Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CALIF. L. REV. 479, 483 (1998). In other words, "network effects" are present in the credit reporting industry because consumer reports become more useful and effective as both the coverage of consumers and the number of participating creditors increase. Hunt, *supra* note 30, at 6.

[40] *See* Peter L. McCorkell, *The Impact of Credit Scoring and Automated Underwriting on Credit Availability*, *in* THE IMPACT OF PUBLIC POLICY ON CONSUMER CREDIT 209, 213 (Thomas A. Durkin & Michael E. Staten eds., 2002) (concluding that credit reports, compared to judgmental evaluation methods, reduce delinquency rates by twenty to thirty percent).

[41] *See* WORLD BANK & INT'L MONETARY FUND, *supra* note 33, at 257 (explaining that credit reporting can increase efficiency by reducing the loan processing time, thereby lowering costs); WU & DE ARMOND, *supra* note 25, § 1.2.2 (noting that consumer reports increase the speed of credit transactions because creditors have nearly instantaneous access to consumer reports).

[42] *See* Barron & Staten, *supra* note 33, at 273 ("[C]redit bureau data have made a wide range of credit products available to millions of households that would have been turned down as too risky just a generation ago."); *see also Use of Credit Information Beyond Lending: Issues and Reform Proposals: Hearing Before the Subcomm. on Fin. Insts. and Consumer Credit of the H. Comm. on Fin. Servs.*, 111th Cong. 125 (2010) [hereinafter *Hearings, Beyond Lending*] (statement of Stuart K. Pratt, Consumer Data Industry Association) (noting that if creditors are forced to remove accurate data, consumer credit costs may increase, reducing the availability of credit).

[43] *See* WU & DE ARMOND, *supra* note 25, § 1.2.2 ("Consumer credit reporting can benefit both credit grantors and consumers."). This sentiment was also expressed in the legislative history of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681t (2006), the federal statute that regulates the consumer reporting industry. *Hearings, Fair Credit Reporting*, *supra* note 31, at 1 (statement of Sen. William Proxmire, Chairman, S. Subcomm. on Fin. Insts. & Consumer Credit) (explaining that "[t]here is no argument with the proposition that both consumers and industry need an efficient and accurate credit reporting system").

Many consider creditors' use of credit reports essential to the fair and democratic distribution and pricing of credit. Credit reports seemingly impose a meritocratic system whereby those consumers who regularly repay their debts are eligible for the cheapest future loans. Before credit scores were widely used, higher-risk borrowers (most notably, communities of color) were more likely to be denied loans altogether,[44] and lenders used more subjective measures to evaluate prospective borrowers.[45] Credit reports have thus been perceived as instrumental to social mobility (both internationally and domestically) and to the creation and viability of a strong middle class.[46]

Creditors' use of consumers' financial histories has not been without controversy. Many argue that consumer reports are error-ridden, a problem that can cause creditors and employers to make serious mistakes in rendering decisions about consumers and prospective employees.[47] Commentators also note that consumer reporting agencies inadequately protect consumers' privacy,[48] which can contribute to identity theft.[49] And others argue that the specific criteria used by creditors to calculate credit scores have a disparate impact on minority communities.[50]

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[44] FELLOWES, *supra* note 1, at 17 n.5 (explaining that the "high risk" market was largely ignored before credit scores were invented).

[45] Before the introduction of credit scoring, credit decisions were made "manually" by a loan officer. BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON CREDIT SCORING AND ITS EFFECTS ON THE AVAILABILITY AND AFFORDABILITY OF CREDIT O-4 (2007) [hereinafter FED. RESERVE BD., CREDIT SCORING], http://www.federalreserve.gov/boarddocs/rptcongress/creditscore/creditscore.pdf. This decision method, known as "judgmental" underwriting, was subjective, inconsistent, and costly. *Id.*

[46] WORLD BANK, *supra* note 38, at v ("Poor financial infrastructure [including a lack of effective credit reporting systems] in many developing countries poses a considerable constraint upon financial institutions to expand their offering of financial services to underserved segments of the population and the economy.").

[47] *See infra* notes 140–142 and accompanying text.

[48] *See, e.g.*, *Hearings, Fair Credit Reporting*, *supra* note 31, at 1–2 (statement of Sen. Proxmire) (describing how the computerization of credit reports "opens the way toward a gigantic national data bank which could include extremely personal information on every American citizen").

[49] WU & DE ARMOND, *supra* note 25, § 1.2.2 (explaining that credit reporting agencies' "extensive collection of information, and the vast numbers of consumers on whom they report, creates serious concerns about the accuracy of information they keep and about the adequacy of their measures designed to protect consumer privacy, including protection from identity theft").

[50] *See, e.g.*, FED. RESERVE BD., CREDIT SCORING, *supra* note 45, at 51 ("Others have expressed the view that the credit-scoring process itself and some of the factors within credit-scoring models may disadvantage minorities or other segments of the population protected by fair lending laws.").

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Few, however, have questioned the central rationale underlying creditors' consideration of financial histories: assuming that creditors' methodologies are reliable, valid, and nondiscriminatory,[51] it is reasonable for a creditor to consider a consumer's borrowing history in deciding whether and under what terms to grant a consumer a future loan. The nexus between a creditor's economic role—lending money to consumer borrowers—and its primary evaluative tool—reviewing a consumer's record of debt repayment—has been perceived as intuitively logical and as robust.[52] Commentators have thus generally questioned how—not whether—creditors should consider applicants' financial histories in deciding whether or not to extend credit.[53]

Credit reports are designed to differentiate. They help creditors draw relevant distinctions between otherwise anonymous debtors whose relationship with current and former creditors is ambiguous or unknown.[54] What is less clear, however, is to what extent a consumer's financial history is relevant in assessing a prospective employee's merits, a topic that I will explore in the following section.

B. *Employers' and Licensing Organizations' Use of Financial History*

Over the past several decades, the use of credit reports and financial histories has expanded beyond the financial domain, as financial histories have been adopted as predictive and evaluative tools in various non-credit settings. Insurance companies, for example, use consumer reports in deciding whether to issue or cancel policies, determining the terms of such policies, and pricing insurance rates.[55] Government agencies use consumer reports to evaluate consumers' eligibility for public assistance benefits.[56] Some professional licensing organizations,

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[51] This is, of course, a critical assumption, and one that many have challenged. *See infra* notes 52–53 and accompanying text.

[52] *See* DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER CREDIT AND THE LAW § 2:1 (2011) (explaining that when the "consumer applies for a car loan or a new credit card, the consumer will normally fill out a credit application that requests a great deal of personal information" and that most consumers "accept this as necessary for the creditor to determine whether or not they will be a good risk").

[53] *See id.*; Edwin J. Griffith, *Credit Reporting, Prescreened Lists, and Adverse Action: The Impact of the Fair Credit Reporting Act and the Equal Credit Opportunity Act*, 46 CAL. W. L. REV. 1, 62–63 (2009).

[54] Hunt, *supra* note 30, at 4–5 ("[C]redit bureaus enable the maintenance of reputation effects in a market consisting of millions of otherwise anonymous borrowers." (citation omitted)).

[55] WU & DE ARMOND, *supra* note 25, § 7.2.5.

[56] *Id.* § 7.2.6.

like bar examiners, scrutinize applicants' financial histories in assessing applicants' fitness to join certain professions.[57]

Significantly, all of these groups utilize financial histories not to assess a consumer's likelihood of repaying particular debts,[58] but to predict or assess some *other* quality or behavior. In other words, with non-credit uses of financial history, the intuitive link between the evaluative tool—review of a consumer's relationships with current and former creditors—and these organizations' assessment goals is more tenuous, or at least not immediately obvious. As a result, non-credit uses of financial history merit independent scrutiny.

The use of credit reports in the employment sector has become commonplace.[59] An increasing percentage of employers consider applicants' credit reports in filling part- and full-time positions, treating financial history as predictive of the personality traits that make an individual a good or bad employee. Employer surveys indicate that 60% of employers utilized credit reports in 2010,[60] compared to 35% of employers in 2003,[61] and 13% in 1996.[62] Employers' and licensing organizations' use of financial histories may increase in leaner job markets, when employers and licensing organizations search for additional ways to differentiate efficiently between larger numbers of candidates.[63]

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[57] *Id.* (discussing the permissible use of credit histories in the fields of law and medicine).

[58] *See infra* notes 79–95 and accompanying text (discussing how some licensing organizations may evaluate prospective licensees' financial histories to assess applicants' standing, not to make substantive predictions about applicants' personality traits).

[59] Financial histories may be used at any stage of the employment process. For instance, they may be used to assess the merits of job applicants or new entrants to a particular profession or even to evaluate current employees for promotion or retention. *See* 15 U.S.C. § 1681b(b) (2006) (defining "consumer reports" to include those used for "employment purposes"); *id.* § 1681a(h) (defining "employment purposes" as the use of a consumer report to evaluate a consumer for employment, promotion, reassignment, or retention). This Article focuses primarily on the former use: scrutiny of the financial histories of those seeking to obtain a new job or enter a particular profession. *See infra* notes 60–99 and accompanying text.

[60] Soc'y for Human Res. Mgmt., Background Checking: Conducting Credit Background Checks SHRM Poll 3 (Jan. 22, 2010) [hereinafter Background Checking], http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundChecking.aspx.

[61] Evren Esen, Soc'y for Human Res. Mgmt., Workplace Violence Survey 19 (2004), *available at* http://www.shrm.org/Research/SurveyFindings/Documents/Workplace%20Violence%20Survey.pdf (reporting that 35% of employers used credit checks in 2003, compared to 19% in 1996).

[62] *Id.*

[63] *See, e.g.*, Desmond, *supra* note 17, at 907–08 (explaining that the recent increase in employers' use of credit reports might be a result of the recession and the high demand for jobs).

Significantly, although an increasing number of employers use credit report data, employers generally do not utilize credit scores.[64] The three nationwide credit bureaus refuse to provide employers with access to credit scores.[65] In reviewing an applicant's credit history and assessing his or her relative merits, employers instead scrutinize particular pieces of adverse information, including bankruptcy filings and collection actions.[66] Although employers' interpretations of these raw data may be idiosyncratic, surveys reveal some commonalities among employers. Approximately two-thirds of employers report that they are likely to consider current outstanding judgments when determining whether to extend a job offer.[67] Approximately half of employers report that they are influenced by debts in collection.[68] One-quarter of employers consider bankruptcy.[69] Less than one in five employers report that they consider high debt-to-income ratios, foreclosures, tax liens, education-related debt, and medical debt.[70]

Employers and employer advocates downplay the importance of credit reports in the evaluation process. They contend that credit reports are used in a relatively small percentage of total credit evaluations.[71] According to some sources, only about 13%[72] to 19%[73] of employers routinely perform credit checks on all job candidates.

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[64] *See* Leslie Callaway & Mark Kruhm, *Servicemember Disclosure a Must on All Mortgages*, A.B.A. BANKING J., Oct. 2010, at 64, 64 (reporting that Equifax, Experian, and TransUnion decline to provide credit scores to employers for hiring purposes).

[65] *Id.* Credit bureaus do not share credit scores with employers, presumably because credit-scoring algorithms are designed specifically for lending and not for other purposes. One could make the same argument, however, about the raw data on credit reports. This Article questions the logic and ethics of the importation to the employment setting of all variations of a tool designed specifically for creditor use.

[66] *See infra* notes 69–70 and accompanying text.

[67] Maureen Minehan, *Could a Credit Check Land You in Court?*, 28 EMP. ALERT 1 (Feb. 8, 2011) (citing survey conducted by the Society for Human Resource Management).

[68] *Id.*

[69] *Id.* Courts have interpreted the Bankruptcy Code's antidiscrimination provisions, 11 U.S.C. § 525(a)–(b) (2006), to authorize private, but not public, employers to deny employment to a current or former bankruptcy filer. *See infra* notes 325–402 and accompanying text.

[70] Minehan, *supra* note 67.

[71] *See, e.g.*, *Hearings, Beyond Lending*, *supra* note 42, at 43–44 (statement of Stuart K. Pratt) (testifying that credit reports are consulted in approximately 15% of all background checks).

[72] EEOC, *Oct. 20 Meeting Record*, *supra* note 14 (statement of Christine V. Walters) (testifying that only 13% of organizations conduct credit checks on all job candidates).

[73] WU & DE ARMOND, *supra* note 25, § 7.2.4.1.2 (stating that only 19% of employers checked credit reports of all applicants in 1996, but that 47% of employers checked credit reports of *some* applicants in 2009).

Those who defend employers' use of credit reports also point out that in most cases, credit reports are used only in the final stages of hiring and not to prescreen job applicants.[74] Likewise, employers do not use credit reports in filling every position—only specific ones.[75] According to the Society for Human Resource Management (SHRM), employers generally conduct credit checks only for certain positions involving financial or fiduciary responsibilities, senior executive positions, and positions where employees will have access to highly confidential employee information.[76] As I discuss later, however, employers' use of financial histories to fill positions involving sensitive job responsibilities rests on strong, unsupported preconceptions about debtor behavior, including a belief that consumers with adverse financial backgrounds are more likely to commit theft.[77] In addition, the use of financial histories to fill highly compensated and prestigious senior executive positions may have a negative impact on racial equality and social mobility.[78]

Employers are not the only groups that consider applicants' financial histories. In addition, certain licensing organizations evaluate applicants' debt repayment histories in determining whether applicants have satisfied specific professional membership qualifications. For example, state bar examiners consider applicants' debt levels and relationships with current and former creditors as part of character and fitness evaluations.[79] Many states request a copy of or reserve the right to pull a bar applicant's credit report.[80] In questionnaires sent to applicants' references as part of background investigations, some bar exam-

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[74] EEOC, *Oct. 20 Meeting Record*, *supra* note 14 (statement of Christine V. Walters) (testifying that 57% of organizations initiate credit checks only after granting a contingent offer, and 30% of organizations do so after a job interview).

[75] *Id.*

[76] *Id.*

[77] *See infra* notes 101–115 and accompanying text.

[78] *See infra* notes 191–246 and accompanying text.

[79] *See* NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS viii (2012), *available at* http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf (describing "neglect of financial responsibilities" as "relevant conduct" in the assessment of an applicant's character and fitness).

[80] *See, e.g.*, ILL. ATTORNEY REGISTRATION & DISCIPLINARY COMM'N, RULES GOVERNING THE LEGAL PROFESSION AND JUDICIARY IN ILLINOIS r. 5 (2007), http://www.iardc.org/rulesadmissions.html (explaining that a character investigation and report will be prepared with information received from employers, former employers, colleges and universities, law schools, other bar admitting authorities, courts, law enforcement agencies, creditors, credit reporting agencies, former spouses and character references); Va. Bd. of Bar Exam'rs, Applicant's Character & Fitness Questionnaire 15 (n.d.), http://www.vbbe.state.va.us/pdf/LRC&FQuestion.pdf (requiring that applicants submit a recent credit report with their Character and Fitness Questionnaires).

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iners ask employers, friends, colleagues, and professors whether or not the applicant has ever filed for bankruptcy.[81]

In one very controversial case, *In re Application of Griffin*, the Ohio Supreme Court rejected a law school graduate's application to sit for the bar exam because the applicant had neglected his financial obligations.[82] The applicant, who worked part-time at a public defender's office, owed $170,000 in student loan debt and $16,500 in credit card debt at the time of his law school graduation.[83] The court concluded that the applicant had exhibited financial irresponsibility in choosing to remain in his part-time position in the hope that it would lead to a full-time position following the applicant's passage of the bar exam.[84] The court indicated that, had the applicant instead sought a full-time position, he could have more easily paid down his debts and could have qualified for additional deferment of his student loan obligations.[85]

Several months prior to the examining board's decision, the applicant had indicated that he intended to file for Chapter 13 bankruptcy, but, by the date of the hearing, he had not yet filed.[86] The court suggested that, even if the applicant had filed for bankruptcy, the outcome of the case would not have been different.[87] A bankruptcy filing, according to the court, would not have significantly improved the applicant's financial status because his student loan debt was nondischargeable.[88]

In re Griffin may be an outlier. Many applicants who are denied admission to the bar for exercising financial irresponsibility exhibit additional complicating problems, including, for example, criminal misconduct.[89] *In re Griffin* nonetheless reflects the dramatic ability of a licensing organization to scrutinize and second-guess not only an

[81] *See, e.g.*, Letter from Tara Henrikson, Ill. Bd. of Admissions to the Bar, to author (July 1, 2010) (on file with author).

[82] 943 N.E.2d 1008, 1010 (Ohio 2011) (per curiam).

[83] *Id.* at 1009.

[84] *Id.* at 1010.

[85] *Id.*

[86] *Id.* at 1009.

[87] *See id.*

[88] *In re Griffin*, 943 N.E.2d at 1009.

[89] *See, e.g.*, *In re* Application of Hyland, 663 A.2d 1309, 1316 (Md. 1995) (denying the state bar application of a candidate who had failed both to file federal income taxes and to honor his other financial obligations); *see also In re* Application of Stern, 943 A.2d 1247, 1257–59 (Md. 2008) (holding that a state bar applicant did not satisfy character and fitness requirements because the applicant had (1) demonstrated financial irresponsibility (but not criminal misconduct) by failing to disclose all adverse information on his bar application and (2) engaged in an inappropriate relationship with an underage female).

applicant's financial decisions, but also his or her life choices.[90] As a result, an applicant who has incurred tens of thousands of dollars in debt and the opportunity cost of a law school education may potentially be deprived entry into his or her chosen profession. Such an applicant faces an economic catch-22: improvement in his or her financial standing is necessary to secure the license he or she needs to advance in the profession, but meaningful improvement in his or her financial status requires access to a job within his or her chosen field. While such policies may encourage debt repayment,[91] they may discourage the necessary risk-taking that is often required to improve one's life standing.[92]

In other professions—including medicine, dentistry, and teaching—some state licensing authorities consider whether or not applicants and existing licensees have defaulted on certain debts.[93] These licensing organizations focus primarily, if not exclusively, on applicants' records of repayment of three categories of debts: (1) student loans, (2) taxes, and (3) familial support obligations, like alimony and child support.[94] If an applicant has defaulted on one of these debts, some licensing authorities will refuse to grant the candidate entry into the profession until the applicant has promised to repay the loan.[95]

In 2008, Congress passed a law, the Secure and Fair Enforcement for Mortgage Licensing Act ("SAFE Act"), which establishes heightened registration requirements for mortgage loan originators.[96] The statute requires mortgage loan originators to "demonstrate[ ] financial responsibility, character, and general fitness such as to command the confidence of the community and to warrant a determination that the loan

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[90] *See In re Griffin*, 945 N.E.2d at 1010.

[91] *See infra* notes 156–190 and accompanying text.

[92] *See infra* notes 228–246 and accompanying text.

[93] *See, e.g.*, Hoke v. Retail Credit Corp., 521 F.2d 1079, 1084 (4th Cir. 1975) (holding that a physician's consumer report, which was issued to the state board of medical examiners after the physician applied for a license to practice medicine, was a "consumer report" subject to the requirements of the Fair Credit Reporting Act (FCRA)); Jay Greene, *Debt Deadbeats Risk Losing Medical Licenses*, AM. MED. NEWS, Aug. 13, 2001, at 1–2, 4.

[94] *See infra* notes 178–180 and accompanying text.

[95] Telephone Interview with Dr. Eileen Lewalski, Prof'l Affairs Manager, Nat'l Ass'n of Bds. of Pharmacy (Feb. 29, 2012) (explaining that in Illinois and other states, a prospective licensee's failure to pay child support and/or student loans can impact licensure); Telephone Interview with Dr. Alex Siegel, Former President, Ass'n of State & Provincial Psychology Bds. (Feb. 29, 2012) (explaining that some licensing boards may consider child support repayment history; however, this rule is not universal).

[96] S.A.F.E. Mortgage Licensing Act, Title V of the Housing and Economic Recovery Act of 2008, Pub. L. 110-289, 122 Stat. 2654 (codified as amended at 12 U.S.C. §§ 5101–5116 (Supp. IV 2010)).

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originator will operate honestly, fairly, and efficiently."[97] To fulfill these goals, all applicants must submit a credit report to a nationwide mortgage licensing and registration system.[98] State authorities may consider these reports in assessing applicants' financial responsibility.[99]

In subsequent sections, I explore whether employers' and licensing organizations' uses of financial histories are supported empirically or whether the practice reflects more uninformed, stereotypical judgments about consumer behavior. I also consider to what extent this practice may encourage debt repayment but have a deleterious impact on social mobility and racial equality.

C. *Empirical Realities: What Makes an Individual with an Adverse Financial History Different*

What does a consumer's financial history reveal? How are those with adverse financial histories different from the rest of the population, both as individuals and as employees? Employers and licensing organizations articulate two primary justifications for considering applicants' financial histories: (1) they help employers gauge an applicant's propensity to steal from customers or clients (which I will refer to as the "Fraud Hypothesis"), and (2) they reflect an applicant's level of financial responsibility, which can help employers and others predict how responsible he or she will be as an employee or licensee (which I will refer to as the "Responsibility Hypothesis").[100]

As I discuss below, there is little to no evidence to support the Fraud Hypothesis. There is, however, some evidence to support the Responsibility Hypothesis. The challenge for lawmakers and academics is to fashion legal rules and antidiscrimination policies that sufficiently take into account empirical realities (including their known and unknown limitations) without neglecting important countervailing normative policies.

1. The Fraud Hypothesis

Employers most frequently consult applicants' financial histories to attempt to identify those who are more likely to commit theft or fraud

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[97] 12 U.S.C. § 5104(b)(3).

[98] *Id.* § 5104(a)(2)(A).

[99] *See* Heather Hill Cernoch, *NMLS Adds Credit Report Functionality for SAFE Act Compliance*, DsNews.com (Nov. 3, 2010), http://www.dsnews.com/articles/nmls-adds-credit-report-functionality-for-safe-act-compliance-2010-11-03.

[100] *See infra* notes 101–136 and accompanying text.

or to accept bribes.[101] Some employers, for example, have expressed concern that an employee with financial problems is more likely to embezzle money.[102] Additionally, some employers are apprehensive that an overextended employee might be tempted to commit identity theft by stealing customers' and others' personal and financial information.[103] Employers frequently consult the financial histories of applicants who, in their jobs, would have access to cash or credit card information.[104] Similarly, bar examiners have suggested that applicants with adverse financial histories are, as lawyers, more likely to steal from clients.[105] The federal government, in granting security clearances, considers those with adverse financial backgrounds to pose a higher security risk because they are presumed to be more susceptible to blackmail and bribery.[106] Consistent with these perceived risks, credit reporting agencies market credit reports to businesses as prudent, money-saving risk-mitigation tools.[107] Because the Fraud Hypothesis is widely em-

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[101] EEOC, *Oct. 20 Meeting Record*, *supra* note 14 (statement of Michael Aamodt).

[102] Drew DeSilver, *Too Good a Look? Credit Histories Are Being Used for a Lot More Than Deciding Who Gets a Loan*, CHI. TRIB., Sept. 27, 2000, at D1 ("Employers often justify checking credit histories by citing the need to protect themselves from pilfering or embezzlement.").

[103] *See Hearings, Beyond Lending*, *supra* note 42, at 44 (statement of Stuart K. Pratt) (explaining that a prohibition on employer use of credit reports would render employers, other employees, and customers more vulnerable to fraud and identity theft).

[104] *See* Background Checking, *supra* note 60, at 5 (reporting that ninety-one percent of employers conduct credit background checks on employees charged with fiduciary and financial tasks, including the responsibility of handling cash).

[105] Lori E. Shaw, *What Does It Take to Satisfy Character and Fitness Requirements?*, STUDENT LAW., Oct. 2008, at 12. One bar examiner has stated:

> I think the concern ultimately centers around the issue of protection of the public. Before admitting someone to the bar, I believe that the members of Character and Fitness Committees want to be sure that the financial pressures on a new lawyer will not be such that the lawyer will be tempted to take advantage of a client . . . .

Id. at 14.

[106] Sean Reilly, *Personal Debt Sinks More Clearances*, FED. TIMES, Nov. 14, 2011, at 18 (explaining that a high debt load "could heighten someone's vulnerability to bribery or blackmail"). Additionally, many federal government and federal contractor positions *require* employees to obtain a security clearance as a condition of employment. Genevieve Loutinsky, Comment, *The Needs of War and the Right to Fair Process in Seeking a Security Clearance*, 19 TEMP. POL. & CIV. RTS. L. REV. 543, 543 (2010).

[107] *See, e.g.*, *Qualify Employees*, SARMA, http://www.sarma.com/solutions/qualify-employees (last visited Oct. 26, 2012) ("Experts have suggested the cost of even one bad hiring decision can be as much as $100,000 taking into account the time spent recruiting, hiring, and training, as well as the amount of time the job is left incomplete or performed poorly by an unqualified applicant. In addition, the financial cost from theft, violence, etc., can be enormous, not to mention the risk of damaging employee morale and the entity's reputation.").

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braced, employment attorneys have encouraged employers who use consumer reports to include "sensitive responsibilities in job descriptions" to avert possible discrimination claims.[108]

As others have argued, though, the Fraud Hypothesis lacks meaningful empirical support.[109] Employers and employer advocates have pointed to studies indicating that individuals who have committed financial crimes have experienced financial stress.[110] These studies, however, do not establish a general correlation between financial stress and propensity to commit financial crimes because researchers lack a representative sample of job applicants.[111] Thus, it is unclear what percentage of all employees experiencing financial stress refrain from committing theft or fraud. In addition, a 2011 study published in the *Journal of Applied Psychology* indicated that an employee's credit score was unrelated to workplace deviance (e.g., theft).[112]

The Fraud Hypothesis poses a significant challenge, because it is widely entrenched in popular and legal culture. Because credit scores

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These claims have gained traction during the recent recession because employers—eager to cut costs and avoid unnecessary losses—may have embraced credit reports as an indispensable screening tool. *See* Heather Huhman, *When Employers Look into Your Credit History*, U.S. NEWS & WORLD REP. (July 22, 2011), http://money.usnews.com/money/blogs/outside-voices-careers/2011/07/22/when-employers-look-into-your-credit-history ("Some employers believe people with large debts or credit problems could be more likely to steal or commit fraud, which organizations can't afford, especially in today's down economy."); Jim Sanders, *Ban on Checking Credit of Job Applicants Clears Assembly*, SACRAMENTO BEE (May 19, 2011, 4:49 PM), http://blogs.sacbee.com/capitolalertlatest/2011/05/ban-on-checking-credit-of-job.html (citing one state legislator as saying that credit reports can help employers reduce future litigation and loss, and "[i]n small business, every little bit counts").

[108] Mary Swanton, *Employers Can Deny Jobs Based on Bankruptcy*, INSIDECOUNSEL, Mar. 1, 2011, at 56, 57, *available at* http://www.insidecounsel.com/2011/03/01/employers-can-deny-job-based-on-bankruptcy.

[109] *See, e.g.*, U.S. Equal Emp't Opportunity Comm'n, *Meeting of May 16, 2007—On Employment Testing and Screening*, [hereinafter EEOC, *May 16 Hearing Record*] (statement of Adam T. Klein), http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/ ("To our knowledge, credit checks as a basis for employment decisions is a practice validated by *no* studies . . . .").

[110] *See, e.g.*, EEOC, *Oct. 20 Meeting Record*, *supra* note 14 (statement of Christine V. Walters).

[111] *See id.*

[112] Jeremy B. Bernerth et al., *An Empirical Investigation of Dispositional Antecedents and Performance-Related Outcomes of Credit Scores*, 97 J. APPLIED PSYCHOL. 469, 474 (2012). Because employers do not use credit scores, *see supra* note 64 and accompanying text, study results on credit scores may not be easily extrapolated to the employment setting. Nevertheless, there is good reason to believe that employers' use of the raw data in credit reports has a disparate impact on minorities. For example, minority groups file for bankruptcy more often than do non-minorities. *See* TERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 234 fig.7.4 (2000) (showing a greater percentage of minority homeowners in bankruptcy compared to non-minority homeowners in 1997).

are strongly correlated with race,[113] the Fraud Hypothesis may perpetuate an insidious stereotype that minorities are more likely to commit crimes.[114] Even those states that have passed laws limiting employers' use of credit reports permit employers to consult financial histories if the position involves (1) access to an expense account or corporate debit or credit cards, (2) the exercise of fiduciary responsibility (e.g., the power to issue payments, collect debts, transfer money, or enter into contracts), (3) access to third parties' personal or financial information, (4) access to confidential information, including trade secrets, or (5) access to valuable assets, including, for example, library or museum collections or prescription drugs.[115] These categories can be interpreted broadly to encompass a large percentage of jobs. Thus, existing financial history antidiscrimination laws embrace—rather than reject—the Fraud Hypothesis.

2. The Responsibility Hypothesis

Many employers have long believed that an applicant's financial history contains clues that can help employers determine whether an applicant possesses key traits related to responsibility and job productivity. These employers might attribute excessive indebtedness and default to poor financial planning, an inability to control one's impulses, or apathy toward fulfilling one's financial obligations or promises.[116] Some employers have concluded that financial weakness may make an appli-

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[113] *See infra* notes 191–223 and accompanying text.

[114] EEOC, *May 16 Hearing Record*, *supra* note 109 (statement of Adam T. Klein) ("[G]iven that African American applicants are more likely to have bad credit, this notion of risk of theft also fosters a shameful racial stereotype.").

[115] *See, e.g.*, CONN. GEN. STAT. ANN. § 31-51tt (West Supp. 2012) (excluding positions that involve access to personal or financial information other than information commonly provided in a retail position; fiduciary responsibilities; access to an expense account or corporate cards; access to confidential business information, including trade secrets; or access to the employer's nonfinancial assets valued at $2500 or more, including museum and library collections and prescription drugs); 820 ILL. COMP. STAT. 70/10 (2011) (excluding from the general ban on employers' use of credit history positions that involve access to cash or marketable assets valued at $2500 or more and positions that involve access to confidential information); MD. CODE ANN., LAB. & EMPL. § 3-711 (LexisNexis Supp. 2011) (exempting positions that involve access to personal information; fiduciary responsibility to the employer (including the power to issue payments, collect debts, transfer money, or enter into contracts); access to an expense account or corporate debit or credit cards; or access to other confidential business information, including trade secrets).

[116] *See* Huhman, *supra* note 107, at 99 ("Your credit report gives employers a sense of your responsibility level in your personal life. If you haven't done anything to improve your credit or [if you] continue to be irresponsible with money, it's a bad sign for employers looking to hire you.").

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cant a less reliable employee (i.e., one who shows up to work less frequently or fails to fulfill job obligations).[117] As one executive articulated, "[i]f you cannot organize your finances, how are you going to responsibly organize yourself for a company?"[118]

This view—which I describe as the "Responsibility Hypothesis"—presupposes that

> individuals who have a habit of not following through on previous promises (as represented by unpaid balances or late payments) or not having the foresight to plan ahead (as represented by recent financial activity that requires borrowing of money) would be reasonably expected to continue such behavior in the future, including in the workplace.[119]

Until quite recently, employers relied primarily on anecdotal evidence to support this claim.[120] In the aftermath of the recent recession, however, which has been marked by protracted high unemployment, employers' use of financial histories has come under increasing scrutiny.[121] This has triggered calls for additional empirical analyses of the validity of the practice.[122]

Employers have long relied on personality tests and other assessment tools to help deduce whether or not an applicant possesses certain traits that will help a firm or organization reach its stated goals.[123] The question presently posed to social scientists is whether financial histories, like personality tests, validly and consistently predict the likelihood that applicants will exhibit important work-related qualities and behaviors, like conscientiousness, agreeableness, and discipline.

Few studies directly address this question. A 2011 study published in the *Journal of Applied Psychology* attempted to measure the correlation between credit scores and specific personality traits relevant to job performance.[124] Using supervisor assessments, credit (FICO) scores, and

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[117] *See* EEOC, *Oct. 20 Meeting Record*, *supra* note 14 (statement of Richard Tonowski).

[118] Diane E. Lewis, *Qualification: Must Have a Good Credit History*, Bos. GLOBE, Sept. 5, 2006, at E1.

[119] Bernerth et al., *supra* note 112, at 470.

[120] *Id.* at 469.

[121] *See, e.g.*, Brown, *supra* note 17, at 2–3; Concepción, *supra* note 17, at 524; Desmond, *supra* note 17, at 907.

[122] *See, e.g.*, Bernerth et al., *supra* note 112, at 470 ("Despite the claims of practitioners and credit reporting agencies, there exists virtually no empirical evidence to confirm or refute the proposed antecedents and outcomes of credit scores.").

[123] *See* Gregory M. Hurtz & John J. Donovan, *Personality and Job Performance: The Big Five Revisited*, 85 J. APPLIED PSYCHOL. 869, 869 (2000).

[124] Bernerth et al., *supra* note 112, at 470.

personality data collected from employees, researchers concluded that conscientiousness, task performance, and citizenship behaviors were positively correlated with credit scores.[125] These findings might lend limited support to the idea that credit scores and responsibility are linked.

This study has noteworthy limitations, though. For example, the researchers in this study observed a correlation between certain personality traits and credit scores.[126] Employers, however, do not use credit scores in the assessment process.[127] They have access only to specific lists of financial events, like defaults, collection actions, and bankruptcy filings.[128] As a result, employers might process these raw data very differently (and far less consistently) than do consumer reporting agencies' algorithms.[129] Thus, the tentative conclusions of this study are not necessarily applicable to real-world uses of credit reports by employers and licensing organizations.[130]

Likewise, this study's sample may have been insufficiently representative because it measured only the personality traits of individuals who were currently employed. The study (presumably for feasibility reasons) did not measure the conscientiousness levels of individuals who were currently seeking a job or who were otherwise unemployed.[131] As a result, the study might have overstated the connection between credit score and conscientiousness, since presently employed individuals may inherently be more likely to be evaluated positively by their supervisors.

Various commentators have responded to similar studies by arguing that employees should be judged primarily, if not exclusively, by their ability to perform a given job, and not by any other metrics. One consumer advocate who testified before the Equal Employment Opportunity Commission (EEOC) posed the following dichotomy: "Funda-

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[125] *Id.* at 472–73. Employees who exhibit "organizational citizenship behavior" might, for example, give advance notice when they are unable to work and assist other employees who have heavy workloads. *Id.*

[126] *Id.*

[127] *See supra* notes 64 and accompanying text.

[128] *See supra* notes 64–70 and accompanying text.

[129] In this way, employers' use of the raw data in credit reports resembles judgmental underwriting, a subjective and inconsistent assessment method that creditors utilized before credit scores were introduced. *See* FED. RESERVE BD., CREDIT SCORING, *supra* note 45, at O-4.

[130] For example, employers appear to focus primarily—if not exclusively—on specific adverse information (e.g., bankruptcy filings or collection actions). Unlike creditors, employers may not necessarily consider the length of a consumers' credit history or the lack of a credit history. *See* Background Checking, *supra* note 60, at 7.

[131] *See* Bernerth et al., *supra* note 112, at 472.

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mentally, the issue at stake is whether workers are fairly judged based on their ability to perform a job *or* whether they're discriminated against because of their credit history."[132] The difficult and unexplored question that lawmakers and social scientists must address is whether financial histories are, in fact, valid measures of crucial qualities—like conscientiousness—that are manifested in both credit reports and in the workplace. In other words, can credit histories—used by approximately sixty percent of employers[133] and an increasing number of licensing organizations—reflect personality traits that are *part and parcel* of that set of skills and qualities that prospective employees market to employers? If so, how should the law (particularly antidiscrimination law) respond?

Likewise, even if key traits like conscientiousness are manifested in financial histories, and even if these traits have some predictive validity in the employment setting, it is crucial to assess to what extent these qualities are within an individual's control. Questions about the extent to which an adverse financial history should be considered in assessing a prospective employee's merits implicates a central and often intractable question in many antidiscrimination debates: whether or not the quality that makes a group different is immutable (i.e., outside of the group's control) or mutable (i.e., capable of being avoided, or at least minimized, through different life choices). The law affords greater protection against discrimination to those who cannot strip themselves of those characteristics that make them unique.[134] Some might interpret financial misfortune as more analogous to traditional Title VII categories like race and sex. Those at the opposite end of the spectrum, in contrast, would perceive many—if not most—consumers who have experienced financial misfortune as more comparable to other groups who have struggled to convince policymakers and the public that those essential qualities that make them different cannot be controlled—or can be controlled only with great difficulty.[135] Later in the Article, I

[132] EEOC, *Oct. 20 Meeting Record*, *supra* note 14 (statement of Chi Chi Wu) (emphasis added).

[133] *See supra* note 60 and accompanying text.

[134] *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (citing Korematsu v. United States, 323 U.S. 214, 216 (1944) (explaining that racial classifications deserve heightened scrutiny); Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 Wm. & Mary L. Rev. 1483, 1487 (2011).

[135] *See, e.g.*, White v. Kentuckiana Livestock Mkt., Inc., 397 F.3d 420, 426 (6th Cir. 2005) (holding that an individual who has filed for bankruptcy is different from one who seeks protection under Title VII of the Civil Rights Act of 1964 because of her race or sex or, under the Age Discrimination Act, because of her age).

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consider to what extent behavioral economists' findings suggest that consumer choices are predictably and systematically irrational, and thus more analogous to traditional immutable characteristics.[136]

3. Additional Rationales

Employers and licensing organizations consult applicants' financial histories for a variety of secondary reasons, in addition to fraud and irresponsibility risk-detection.[137] To assess the potential direct discriminatory impact of these additional practices, one may consider to what extent employers or licensing organizations are using applicants' financial histories to make substantive predictions about applicants' propensity to exhibit deviant behavior or job irresponsibility. In other words, it is helpful to consider to what extent these rationales rely on the Fraud or Responsibility Hypotheses.

Some of employers' additional uses of financial history are less dependent on the Fraud and Responsibility Hypotheses and, for this reason, may pose less significant normative complications. Others, however, are closely intertwined with these rationales and reflect the extent to which the Fraud and Responsibility Hypotheses have, even in the absence of conclusive empirical evidence, become entrenched in societal views and narratives about consumer behavior.

a. *Credit Reports as an Information-Verification Tool*

Some employers use credit reports for a seemingly innocuous administrative purpose: to help verify applicants' identities or other information listed on job candidates' application forms or resumes.[138] Employers have, for example, used credit reports to confirm applicants' Social Security numbers, current and former residences, and employment history.[139]

Employers' use of credit reports as an information-verification method is arguably less problematic from a discrimination standpoint, since this use is not substantially premised on either the Fraud or Responsibility Hypothesis. It is possible that employers who identify discrepancies between applicants' credit reports and applications or resumes may make negative inferences about candidates' honesty or trustworthiness. Employers using credit reports primarily or exclusively

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[136] *See infra* notes 247–279 and accompanying text.
[137] *See infra* notes 138–153 and accompanying text.
[138] EEOC, *Oct. 20 Meeting Record*, *supra* note 14 (statement of Richard Tonowski).
[139] *Id.*

as an information-verification tool, however, are not necessarily also using an applicant's financial history to make substantive judgments and predictions about whether applicants possess certain favorable or unfavorable personality traits. As a result, this use of financial history, in and of itself, does not implicate the antidiscrimination issues addressed in this Article.

Nonetheless, using credit reports as a routine information-verification tool is ill-advised. Consumer reports are replete with errors.[140] Inaccuracies are common because consumer reporting agencies are compensated by users of reports, like creditors and employers, and not by consumers themselves.[141] As a result, apart from concerns about litigation or regulatory enforcement, consumer reporting agencies do not have a significant direct financial incentive to limit inaccuracies. Because consumer reporting agencies often erroneously report both a consumer's biographical information and her payment history, employers should instead use other methods, like background screening, to verify basic information supplied by applicants.[142]

Although employers' use of credit reports as an information-verification method does not directly and substantially implicate either the Fraud or Responsibility Hypothesis, employers' administrative use of credit reports may nonetheless raise ancillary discrimination concerns. Employers' use of biographical information contained in credit reports increases the likelihood that employers, if only out of perceived convenience or a desire to maximize the value of their expenditures on reports, will also consult applicants' payment histories to make inferences about applicants' personality traits. Thus, employers' use of consumer reports as an information-verification mechanism may, by facilitating the predictive use of reports, legitimize and entrench consumer reports as a useful substantive assessment tool in the employment set-

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[140] *See* ALISON CASSADY & EDMUND MIERZWINSKI, U.S. PUB. INTEREST RES. GRP., MISTAKES DO HAPPEN: A LOOK AT ERRORS IN CONSUMER CREDIT REPORTS, (2004), http://cdn.publicinterestnetwork.org/assets/BEevuv19a3KzsATRbZMZlw/MistakesDoHappen2004.pdf (concluding in a study of 154 consumers in thirty states that 79% of credit reports contained one or more errors, and that 25% of the reports contained an error serious enough to cause a denial of credit).

[141] *See* Marcy E. Peek, *Beyond Contract: Utilizing Restitution to Reach Shadow Offenders and Safeguard Information Privacy*, *in* SECURING PRIVACY IN THE INTERNET AGE 137, 139 (Anupam Chander et al. eds., 2008) (describing third-party data brokers, like consumer reporting agencies, as "shadow offenders," because they lack privity of contract with consumers and therefore often escape liability for mishandling consumers' data).

[142] *See* EEOC, *Oct. 20 Meeting Record*, *supra* note 14 (statement of Richard Tonowski) ("[Basic biographical information] might be obtained from background screening providers without the applicant's financial details.").

ting. For this reason, even the seemingly benign administrative use of credit reports is relevant to an antidiscrimination analysis.

b. *Debtor-Creditor Relationship Between Employer and Applicant*

In addition, some employers may refuse to hire an applicant who has defaulted on one or more debts owed to the employer or to a related corporate entity.[143] It is possible that these decisions rest heavily on the Fraud or Responsibility Hypothesis, since the employer, upon consultation of an applicant's financial background, may have made certain adverse predictions about the applicant's likelihood of committing fraud or theft or about his or her ability to serve as a responsible employee. Additionally or alternatively, such decisions may be perceived as an attempt to punish debt default, a justification I examine later in this Article.[144]

c. *Negligent Hiring*

Some employers and credit reporting agencies argue that, without a thorough review of a candidate's financial background, an employer might be exposing itself to claims of negligent hiring.[145] If an employee ultimately commits fraud or theft, the victim might sue the employer, claiming that the employer was negligent in failing to conduct a more thorough review of the applicant's criminal or financial history.[146] A more comprehensive background check, a plaintiff might argue, might have reflected noteworthy "red flags" that could have suggested that closer supervision of the employee was necessary.

As I discuss later, however, there are few to no cases in which employers have been successfully sued for failure to scrutinize an employee's *financial* background, suggesting that an antidiscrimination rule is crucial not only to protect debtors from adverse actions that rest

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[143] Such a situation may arise when an employee of a large institution, like a hospital or a university, incurs a debt at that institution (i.e., as a patient or a student, respectively). *See, e.g.*, Leonard v. St. Rose Dominican Hosp. (*In re* Majewski), 310 F.3d 653, 654 (9th Cir. 2002) (ruling on an antidiscrimination claim of a hospital employee, who was fired after he defaulted on debts owed to the hospital and after the hospital learned that the employee intended to file for bankruptcy).

[144] *See infra* notes 156–190 and accompanying text.

[145] Background Checking, *supra* note 60, at 10 (reporting that twenty-seven percent of employers indicated that their primary reason for conducting credit background checks is to reduce liability for negligent hiring).

[146] *See* Hansen v. Bd. of Trs. of Hamilton Se. Sch. Corp., 551 F.3d 599, 609–10 (10th Cir. 2008) (discussing the torts of negligent hiring, retention, or supervision); RESTATEMENT (SECOND) OF TORTS § 317 (1965) (discussing the negligent hiring theory).

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on incorrect assumptions about debtor behavior, but also to protect employers from the perceived necessity of reviewing information that, in spite of its tenuous connection to an employee's merits, is commonly perceived as indispensable to a thorough risk-mitigation review.[147]

d. *Licensing Organizations Qua Creditors*

Some licensing organizations that consult the credit histories of licensing applicants are not necessarily using them to assess the candidate's capacity to be responsible or his or her propensity to commit theft. Rather, some licensing organizations' evaluative role is more analogous to that of (1) a creditor assessing a prospective borrower's financial standing, or of (2) state or federal regulators seeking to ensure that the banks they charter can meet safety and soundness requirements.[148]

For example, some states require prospective contractors, as a condition to the award of a contractor's license, to submit personal credit reports to licensing bodies.[149] The objective of this financial assessment is to ensure that the contractor will be able to secure necessary contract bonds, obtain necessary financing for construction or installation projects, and pay all subcontractors.[150] In addition, some medical board examiners may consult applicants' credit reports to ensure that applicants will be able to secure liability insurance.[151]

Licensing organizations have a broader mandate than do employers. They can regulate certain professions to ensure the public's health,

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[147] *See infra* notes 411–413 and accompanying text.

[148] For example, the Office of the Comptroller of Currency must certify that it has considered the following factors in deciding whether to approve an application for a national bank charter: (1) the financial history and condition of the bank, (2) the adequacy of its capital structure, (3) the bank's future earnings prospects, (4) the general character and fitness of its management, (5) the risk presented by the bank, (6) the convenience and needs of the community to be served by the bank, and (7) whether or not the bank has complied with all provisions of the National Bank Act and whether or not its corporate powers are consistent with the purposes of the Federal Deposit Insurance Act. 12 U.S.C. § 1816 (2006).

[149] *See, e.g.*, FLA. STAT. ANN. § 489.115(5)(b) (West Supp. 2012) (requiring an applicant for a contracting certificate to submit a credit report "that reflects the financial responsibility of the applicant and evidence of financial responsibility, credit, and business reputation of either himself or herself or the business organization he or she desires to qualify").

[150] *See id.* ("The board shall adopt rules defining financial responsibility based upon the applicant's credit history, ability to be bonded, and any history of bankruptcy or assignment of receivers.").

[151] *See* COLO. REV. STAT. § 13-64-301 (2011) (requiring, as a condition of licensure, that every physician or dentist establish financial responsibility, which requires maintaining commercial professional liability insurance coverage).

safety, and welfare.[152] As a result, it may be reasonable for licensing bodies to scrutinize applicants' financial histories—not to make predictions about an applicant's conscientiousness or likelihood of committing fraud or theft, but to ensure that the prospective licensee will satisfy the financial prerequisites necessary for him or her to succeed in the venture. In such cases, because the licensing organization is not primarily using an applicant's financial history to make substantive assessments about the applicant's non-credit behaviors, this use of financial histories may not necessarily directly implicate the antidiscrimination questions considered in this Article.[153]

II. Justifications for and Against Expansion of a Financial History Antidiscrimination Norm

Social science has played a significant role in helping shape legal policy, and it will continue to play a meaningful role in determining the proper scope of employers' and licensing organizations' right to consult applicants' financial histories. The task of antidiscrimination law, however, is to balance empirical realities—including their known and unknown limitations—with various other factors, including the role employment practices have on systematically disadvantaged populations. In this Part, I consider to what extent an expanded financial history antidiscrimination norm affects other social goals, including the promotion of debt repayment, racial equality, and social mobility.[154] I also consider to what extent the findings of behavioral economists suggest that the underlying traits reflected in financial histories may be more immutable than neoclassical theorists have been willing to concede, thereby rendering individuals with adverse financial histories more deserving of antidiscrimination protection.[155]

A. *Discrimination as Deterrence: Promoting Debt Repayment*

As Professor Anna Kirkland has explained, the distinctions that employers make between employees are often justified by reference to

[152] *See, e.g.*, Fla. Stat. Ann. § 489.101 (West 2006) ("The Legislature deems it necessary in the interest of the public health, safety, and welfare to regulate the construction industry.").

[153] There may exist, however, a false dichotomy between business and consumer financial ventures. For example, many individuals file for bankruptcy after their small businesses fail. *See* Elizabeth Warren & Jay Lawrence Westbrook, *Financial Characteristics of Businesses in Bankruptcy*, 73 Am. Bankr. L.J. 499, 535 (1999).

[154] *See infra* notes 156–246 and accompanying text.

[155] *See infra* notes 247–279 and accompanying text.

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a goal of deterrence.[156] Employers may differentiate among applicants to promote certain traits and behaviors perceived as beneficial to the organization and to the surrounding community.[157] Many employers and licensing organizations that scrutinize applicants' financial histories may choose not to hire applicants who have filed for bankruptcy or who have defaulted on a certain type of financial obligation, because this is conduct that they or others may view as harmful or reprehensible.[158] Employers' and licensing organizations' use of financial histories thus functions as an extralegal deterrent to debt default—a sanction that can serve to supplement and enhance existing legal penalties.[159]

One may point to several examples of how employers' and licensing organizations' use of financial histories directly encourages and enforces debt repayment. In the legal profession, for example, state bar examiners conduct "character and fitness" assessments of law school graduates to determine whether applicants are sufficiently ethical to serve the public as attorneys.[160] As part of this inquiry, some bar examiners evaluate applicants' credit reports, income tax returns, past-due debts, and litigation histories.[161] A candidate's failure to demonstrate a sufficient level of financial responsibility may bar her from joining the legal profession.[162] In preparation for the character and fitness review,

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[156] KIRKLAND, *supra* note 15, at 10.

[157] *Id.* (discussing the role of deterrence in the context of employing overweight people and explaining, "[i]f fatness is unhealthy and comes from eating too much, then it is behavior that could be deterred and we would all be better off").

[158] *See infra* notes 160–163, 173–180 and accompanying text (discussing licensing organizations' consideration of familial support obligation, tax, and student loan defaults).

[159] *See* Dan M. Kahan, *Signaling or Reciprocating? A Response to Eric Posner's Law and Social Norms*, 36 U. RICH. L. REV. 367, 367–68 (2002) (arguing that normative behavioral standards are superior to legal regulation).

[160] *See* Michael K. McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67, 92–96 (1984) (discussing the role of financial malfeasance on admission to the bar and arguing that courts and bar admission boards should be wary of denying admission on that basis).

[161] *E.g.*, ILL. ATTORNEY REGISTRATION & DISCIPLINARY COMM'N, *supra* note 80 (explaining that a character investigation will be conducted with information received from employers, former employers, colleges and universities, law schools, other bar admitting authorities, courts, law enforcement agencies, creditors, credit reporting agencies, former spouses, and character references); *Bar Examination Instructions*, W. VA. JUDICIARY, BOARD OF L. EXAMINERS, http://www.courtswv.gov/legal-community/Bd-of-Law/exam-instructions.html (last visited Oct. 9, 2012) (requiring applicants to submit a current credit report); *Utah State Bar Admissions-Frequently Asked Questions*, OFFICE OF BAR ADMISSIONS, http://www.utahbar.org/admissions/admissions_faq.html (last visited Oct. 9, 2012) ("As part of the background investigation the Utah State Bar will obtain a credit report for every Applicant."); Va. Bd. of Bar Exam'rs, *supra* note 80, at 10 (requiring applicants to the Virginia bar to submit a current credit report and driving record with all Character & Fitness Questionnaires).

[162] *See, e.g.*, *In re* Application of Griffin, 943 N.E.2d 1008, 1010 (Ohio 2011) (per curiam).

law students have thus been encouraged to live frugally, to set up payment plans with creditors, and generally to "rehabilitate" their financial images as early as possible.[163]

Employers' debt-enforcement function is also manifested in those facts and circumstances that employers view as mitigating factors in assessing various flaws in applicants' financial histories. For example, in scrutinizing candidates' financial backgrounds, some employers claim to give some applicants an opportunity to explain or justify bankruptcy filings or collection actions that appear on applicants' reports.[164] If an applicant who has been the subject of one or more collection actions reports that he or she has instituted repayment plans with these creditors, the applicant's defaults are more likely to be pardoned.[165] These repayment attempts are more likely to be interpreted as acts of conciliation. If the applicant has attempted to redeem him or herself, some employers claim that the applicant's default is more likely to be forgiven.

The Fair Credit Reporting Act (FCRA), the federal statute that governs employers' use of credit reports, institutionalizes employers' debt-enforcement function by allowing employers—like creditors—to scrutinize applicants' financial histories.[166] Employers, like creditors, are described as "permissible users" of consumer reports.[167] Significantly, the statute requires employers to share with applicants disclosure notices that serve as "teachable moments" for consumers.[168] Under the FCRA, an employer who intends to deny employment to an applicant based in whole or in part on information in a credit report must first disclose that fact to the applicant in a pre-adverse action notice that includes a copy of the credit report.[169] The goal of the adverse action requirement is to provide job candidates with an opportunity to correct any consequential errors in the report, but it also has a strong

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[163] Shaw, *supra* note 105, at 14.

[164] Bill Roberts, *Close-Up on Screening: Use of Criminal Records and Credit Histories in Hiring Decisions Is Coming Squarely Under the Legislative and Policy-Making Microscope*, HR MAG., Feb. 2011, at 23, 26 ("Most [employers] discuss unfavorable reports with candidates to check accuracy and understand the context . . . .").

[165] *See* U.S. Equal Emp't Opportunity Comm'n, Meeting of Oct. 20, 2010—Employer Use of Credit History as a Screening Tool, Transcript of Meeting at 32 [hereinafter EEOC, Oct. 20 Meeting Tr.] (Devata), http://www.eeoc.gov/eeoc/meetings/10-20-10/transcript.cfm (last visited Oct. 9, 2012) ("If applicants are attempting to repay debt, that's a positive.").

[166] 15 U.S.C. §§ 1681–1681t (2006).

[167] 15 U.S.C. § 1681a(d)(1)(c) (incorporating § 1681b(a)(3)(B)).

[168] *See* WU & DE ARMOND, *supra* note 25, § 8.5.1.1 (explaining that "teachable moments" are those that might prompt consumers to improve their credit history).

[169] 15 U.S.C. § 1681b(b)(3)(A)(i)–(ii).

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deterrent effect.[170] The statute, in effect, mandates that employers directly associate in an applicant's mind a potential job rejection and his or her financial transgression.

Supporters of employers' use of financial histories might contend that the practice serves a salutary economic function. Frequently, the costs of default are borne by society as a whole, externalized in the form of increased interest rates, a decreased availability of credit, and higher prices for consumer products and services.[171] Because default is an infraction against the community, it is arguably economically and socially beneficial for employers to help enforce debts indirectly by serving, in effect, as creditors' proxies. In the distribution of a critical resource like a job, one might argue that employers thus have every right to reward those who live within their means. Job applicants have an incentive to comply with such a nonlegal sanction, since doing so enhances their attractiveness to employers.[172]

One might argue that employers can exercise their debt-enforcement functions in a nuanced way, thereby mitigating the potentially harsh consequences of a strict application of the rule. Presumably, employers can be logical, reasoned, and empathetic in their consideration of applicants' financial backgrounds. Employers can also scrutinize financial histories in a way that advances specific normative goals. In assessing a particular debt default, some employers and licensing organizations consider specific factors, including (1) the apparent mutability or immutability of the consumer's predicament, (2) the degree of leverage a creditor can assert in debt collection, and (3) other social values.[173]

In assessing the immutability of the consumer's default, debt load, or bankruptcy filing, a creditor may consider to what extent the consumer was capable of avoiding the status or situation that triggered her adverse financial situation. Some employers, for example, claim to dis-

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[170] *See* Wu & De Armond, *supra* note 25, § 8.5.1.1 ("If any of the information about the consumer is inaccurate or misleading, the consumer may try to reverse the adverse action by correcting or explaining the third party information.").

[171] *See* Block-Lieb & Janger, *supra* note 36, at 1484 (explaining that rational choice economists argue that lenders in competitive credit markets cannot pass on the costs of default and bankruptcy to high-risk borrowers, a problem that triggers either credit rationing or an increase in the cost of credit).

[172] Alex Geisinger, *Are Norms Efficient? Pluralistic Ignorance, Heuristics, and the Use of Norms as Private Regulation*, 57 Ala. L. Rev. 1, 19 (2005) ("The general model of rational norm formation describes individuals as being attracted to one another because they associate positive outcomes with those with whom they cooperate.").

[173] *See infra* notes 174–180 and accompanying text.

regard any defaults on medical debt.[174] These breaches may be considered less objectionable, since consumers cannot necessarily easily avoid the health problems that trigger their need to borrow money to pay for medical expenses. Employers may also take a more forgiving view of financial problems triggered by divorces, separations, and job layoffs—circumstances that employers are less likely to associate with irresponsibility and profligacy.[175]

An employer may likewise consider a creditor's leverage over a particular debtor. If a creditor is perceived to be more powerless in collecting a particular debt, an employer (or, more likely, bar examiner or other member of a professional licensing organization) may be more sympathetic toward the creditor and thus more inclined to enforce the obligation indirectly by scrutinizing an applicant's financial history. For example, a debtor's default on a student loan may be considered particularly problematic because student loans are very large unsecured debt obligations. A student does not pledge any collateral to secure her repayment of a loan used to pay for tuition. One may argue that, without a strong debt repayment norm, defaults would increase.[176]

Finally, an employer or licensing organization might consider other social values that affect the relative status of a particular debt.[177] For example, many professional licensing organizations appear to regard certain debts—like income taxes[178] and familial support obligations[179]—as sacrosanct. This perspective reflects the favored or privi-

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[174] Legislative Position, Md. Chamber of Commerce, SB 132, Job Fairness Act 1 (Feb. 2, 2011), http://www.mdchamber.org/legislative/bills/pdfs/SB132.pdf (explaining that most employers disregard information about medical bills).

[175] EEOC, Oct. 20 Meeting Tr., *supra* note 165, at 32 (Devata).

[176] *See* Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 180–81 (2009) (explaining that in 1976, Congress, based on evidence of perceived abuses, amended the bankruptcy laws to make student loans dischargeable in only limited circumstances). In effect, however, lenders' leverage over student borrowers is significant, since, among other things, student loans are generally nondischargeable in bankruptcy, 11 U.S.C. §§ 523(a)(8)(A)–(B) (2006), and tax refunds may be intercepted to pay defaulted federal loans, 31 U.S.C. § 3720A (2006).

[177] These normative judgments about the relative merits of particular debts may loosely parallel those reflected in the rules by which the Bankruptcy Code distributes limited assets to a debtor's creditors. *See* 11 U.S.C. § 507(a)(1)–(10) (listing the relative priorities of specific creditor claims).

[178] Press Release, Iowa Bd. of Med. (Apr. 19, 2011), http://medicalboard.iowa.gov/Press/2011/04_19_2011.pdf (suspending the medical license of an Iowa physician who had defaulted on his taxes).

[179] *Child Support Enforcement Mandate*, MD. BOARD PHYSICIANS, http://www.mbp.state.md.us/pages/child_support.htm (last visited Oct. 3, 2012) (explaining that the Maryland Board of Physicians is required to suspend the license of any licensee or to deny a license to any applicant who has defaulted on child support obligations).

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leged status of particular creditors. Familial support claimants are provided with more protection because of the "social primacy of family welfare" and because these claimants are "unable effectively to pass on the loss."[180] Tax obligations enjoy a privileged status because state and local governments have significant leverage in debt collection.

It is critical, however, to assess whether—and to what extent—employers' and others' use of financial histories actually promotes debt repayment.[181] That is not an easy question to answer. Some may argue that employers' use of financial histories, in penalizing applicants who have defaulted on their debts, encourages debtors to work harder to reconcile with their creditors. For example, it is possible that Congress's inclusion of an antidiscrimination provision in the Bankruptcy Code contributed to the relaxation of the "stigma" consumers attach to bankruptcy filings.[182] The relaxation of the bankruptcy stigma, some argued, in turn resulted in a dramatic increase in the number of bankruptcy filings between the 1970s and early 2000s.[183] Thus, many might contend that the ability of employers to discriminate against debtors enhances debt repayment by discouraging debt default.

It is possible, however, that the practice may have the opposite effect. A debtor who faces too great of a burden to repay his or her creditors may have an incentive to work less and to consume more leisure—an item that a creditor cannot attach, and that an employer cannot pressure the employee to repay.[184] Employers' and licensing organizations' consideration of financial histories may thus create incentives for

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[180] Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1057 (1987).

[181] *See* Geisinger, *supra* note 172, at 26 (arguing that "optimism regarding norm efficiency is greatly exaggerated").

[182] *See, e.g.*, Rafael Efrat, *Bankruptcy Stigma: Plausible Causes for Shifting Norms*, 22 EMORY BANKR. DEV. J. 481, 496–97 (2006); Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 WM. & MARY L. REV. 1933, 1946–49 (2011) (describing the debate about whether a reduction in the bankruptcy "stigma" contributed to a historic and dramatic increase in the number of bankruptcy filers).

[183] Todd J. Zywicki, *Institutions, Incentives, and Consumer Bankruptcy Reform*, 62 WASH. & LEE L. REV. 1071, 1108 (2005) (explaining that several changes made in the 1978 Bankruptcy Code, including the adoption of § 525 (the antidiscrimination provision), may have triggered "[a] change in social norms regarding bankruptcy"). Significantly, however, the Bankruptcy Code's antidiscrimination provision is extremely weak, belying the notion that it contributed to a relaxation of the bankruptcy stigma. *See infra* notes 325–380 and accompanying text.

[184] *See* Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1420 (1985) (explaining that forcing individuals to pay debts out of future income can have perverse effects by encouraging individuals to pursue leisure instead of productive activity).

applicants to reduce their productivity levels, which can trigger externalities borne by taxpayers, dependents, and others.[185]

Commentators have made similar arguments in analyzing coercive creditor remedies (like garnishment) and the bankruptcy discharge. Because excessive garnishment and strict restrictions on access to bankruptcy may decrease debtors' productivity, at least one commentator has argued that restricting garnishment and preserving debtors' access to a nonwaivable bankruptcy discharge may have a salutary economic effect.[186] Similarly, reducing employers' ability to enforce debts strictly through an antidiscrimination rule may actually increase economic productivity.[187]

The most compelling argument against the debt-enforcement rationale is that it conflicts with the "functional individualist" framework that dominates employment law.[188] Pursuant to this normative framework, employees should be judged by their ability to perform their jobs, and not by any other metrics.[189] Employers' implicit focus on debt enforcement seemingly expands and redefines the requirements of a given position, requiring prospective employees to shape their behavior in a way that, in most cases, appears to do little to enhance or improve their job skills. A good credit history is arguably unrelated to one's abil-

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[185] *Cf. id.* at 1418–24 (describing the externalities that would result from imposing limitations on the right to discharge personal debts in bankruptcy).

[186] *Id.* at 1424.

[187] The argument that discrimination against debtors by employers may reduce economic productivity does not by itself, however, justify a complete prohibition on employer discrimination. Rather, it suggests that limitations on indirect debt enforcement by employers (through discrimination) may be necessary to reduce the risk that externalities will result. In the context of creditor remedies,

> [o]ne might argue . . . that coercive remedies will exacerbate the externality problem if the effect of enforcing the remedy (such as wage garnishment) is to cause debtors to quit their jobs. This might occur if the difference between the level of public welfare benefits and the allowable exemption from garnishment were so small that it was not worth it for debtors to work for the difference. This point, however, does not argue for prohibiting wage assignments altogether. Rather, it implies that wage exemptions must be set sufficiently above the relevant welfare entitlements so that a significant incentive to work remains.

Cf. Robert E. Scott, *Rethinking the Regulation of Coercive Creditor Remedies*, 89 COLUM. L. REV. 730, 772 n.139 (1989).

[188] *See* KIRKLAND, *supra* note 15, at 7.

[189] *Id.*

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ity to wait on customers, to drive a taxi, or to practice law.[190] A rationale concerned with debt enforcement seems tangential to the discrete goal of producing stronger, more qualified applicants. Placing pressure on job applicants to present a healthy financial image requires them to reallocate a portion of their time and resources to ends that do not produce a more efficient, more educated, or more skilled employee. In this way, allowing employers and licensing organizations to consider financial histories may ultimately impede—not enhance—the normative goal of promoting debt repayment.

B. *Curtailing Racial Inequality*

Financial viability and independence require access to credit as well as affordable loan terms. Throughout much of U.S. history, however, many racial and ethnic minorities have been denied one or both of these critical components of a healthy, stable financial life. Depending upon market forces, social pressures, and applicable laws, lending practices have often operated, for reasons frequently unrelated to creditworthiness, either to deny credit to minorities,[191] or to grant credit to minorities on more unfavorable terms.[192]

In light of the importance of access to credit to basic functioning in society, the law prohibits creditors from discriminating against racial and ethnic minorities and other protected groups. Based on evidence that various groups—particularly women—had long faced difficulty accessing credit,[193] in 1974 Congress passed the Equal Credit Opportunity Act (ECOA).[194] The ECOA prohibits creditors from discriminating against applicants on the basis of sex, marital status, race, color, religion, na-

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[190] *But see supra* notes 116–136 (describing claims that credit reports are valid measures of traits like conscientiousness. I collectively refer to such claims as the "Responsibility Hypothesis").

[191] PRIDGEN & ALDERMAN, *supra* note 52, § 3:10 (describing how minorities have been denied mortgages at a rate higher than that of similarly situated non-minority applicants).

[192] For example, in the years preceding the subprime mortgage crisis, minorities received mortgages that were more likely to end up in default. *See, e.g.*, Charlie Savage, *Countrywide Will Settle a Bias Suit*, N.Y. TIMES, Dec. 22, 2011, at B1. In December 2011, the U.S. Department of Justice settled a discrimination suit against Countrywide, a mortgage lender that charged higher fees and interest rates to minority borrowers than to white borrowers who posed the same credit risk. *Id.* Countrywide also steered minority borrowers into costly subprime mortgages when white borrowers with similar credit profiles received regular loans. *Id.*

[193] NAT'L COMM'N ON CONSUMER FIN., CONSUMER CREDIT IN THE UNITED STATES 152–53 (1972).

[194] Pub. L. No. 93-495, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. §§ 1691 *et seq.* (2006)).

tional origin, age, receipt of public assistance income, or the good-faith exercise of any right under other consumer credit protection laws.[195] The ECOA's success rate has been mixed, primarily because of the challenges plaintiffs face in proving discrimination.[196] Nonetheless, in passing the ECOA, Congress has recognized both (1) how indispensable access to credit is in modern America, and (2) how creditors' consideration of impermissible criteria can serve to financially disenfranchise a large segment of the American population.

Access to a job is even more important to one's financial welfare than is access to mortgages and other loans, since a steady income is required to fulfill one's basic needs and is a prerequisite to access to credit. Because of a strong correlation between race and credit score,[197] employers' use of financial histories in the employment setting has thus triggered a problem similar to the one addressed by Congress in the ECOA. Although creditors under the ECOA are barred from discriminating against individuals because of race and other factors, employers and licensing organizations—who control access to jobs—are generally authorized to consider credit reports—directly correlated with race—in the licensing and employment process.[198]

Various studies on credit scores have revealed stark disparities between minorities and non-minorities. A 2000 study by Freddie Mac, for example, revealed a strong correlation between race and credit score.[199] A 2007 study by the Federal Reserve Board found that blacks and Hispanics have lower credit scores than do non-Hispanic whites and Asians.[200] Likewise, a 2006 Brookings Institute study showed that the higher the concentration of racial or ethnic minorities in a county, the more likely the county's average credit score will be low.[201] The

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[195] 15 U.S.C. § 1691(a).

[196] PRIDGEN & ALDERMAN, *supra* note 52, §§ 3.1, 3.7.

[197] *See infra* notes 199–206 and accompanying text.

[198] Applicants, however, may sue under the ECOA if facially neutral creditor practices had a disparate impact on one or more protected groups. *See* Cherry v. Amoco Oil Co., 490 F. Supp. 1026, 1030 (N.D. Ga. 1980) (holding that ECOA plaintiffs may seek relief under the "effects test"). Although employers do not use credit scores, there is good reason to believe that employers' use of the raw data in credit reports has a disparate impact on minorities. *See supra* note 112.

[199] *See* EEOC, *May 16 Hearing Record*, *supra* note 109 (statement of Adam T. Klein) (citing the 2000 Freddie Mac National Consumer Credit Survey).

[200] BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON CREDIT SCORING AND ITS EFFECTS ON THE AVAILABILITY AND AFFORDABILITY OF CREDIT 80–81 (2007), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/creditscore/creditscore.pdf.

[201] FELLOWES, *supra* note 1, at 9.

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Brookings Institute study does not suggest that racial differences between counties cause these differences in scores, nor does it not control for important variables—including income—that may contribute to the association between race and credit score.[202] Rather, this correlation more broadly reflects the many historical disparities between whites and minorities in access to high-quality education, well-paying jobs, and affordable loans.[203] Disparities in income and education may also affect consumers' ability to understand and compare loan terms.[204] Additionally, the large gap in scores may be attributable to credit bureaus' historic failure to incorporate in their credit scoring algorithms nontraditional sources of credit history information—including payday loan histories, utility payments, and rental payments.[205] Although the Brookings Institute study did not control for income, other studies that have done so have identified race as the single most robust predictor of credit scores.[206]

The racial impact of employers' use of financial histories may be partially ameliorated by Title VII of the Civil Rights Act of 1964. Under Title VII, employers' use of credit history—a seemingly neutral practice—is prohibited if the practice has a disparate impact on a protected group.[207] As the Supreme Court explained in 1971 in *Griggs v. Duke Power Co.*, seemingly neutral practices are discriminatory "if they operate to 'freeze' the status quo of prior discriminatory employment practices."[208]

The EEOC has long recognized that employers' use of credit reports can have a disparate impact on minority applicants. Beginning in the 1970s, the EEOC issued several decisions finding that employers violated Title VII by using credit reports as tools in the employee-screening process.[209] In a 1971 case, a bank chose not to hire an African

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[202] *See id.* at 9–10, 18 n.31.

[203] *Id.* at 10.

[204] *Id.*

[205] WU & DE ARMOND, *supra* note 25, § 14.9.1 (6th ed. 2006). In recent years, however, more creditors have begun including nontraditional sources of credit information in alternative credit scoring models. *See, e.g.*, *Lenders Across Industries Validate FICO Expansion Score's Power*, FICO (Feb. 2012), http://www.fico.com/en/FIResourcesLibrary/Lenders_Success_2249CS.pdf.

[206] *See, e.g.*, BRENT KABLER, MO. DEP'T. OF INS., INSURANCE-BASED CREDIT SCORES: IMPACT ON MINORITY AND LOW INCOME POPULATIONS IN MISSOURI 1–2 (2004), http://insurance.mo.gov/reports/credscore.pdf.

[207] Title VII describes as "an unlawful employment practice" an employer's (1) failure or refusal to hire, or (2) discharge of any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1) (2006).

[208] 401 U.S. 424, 430 (1971).

[209] Concepción, *supra* note 17, at 533.

American male as a computer operator "in part because of a relatively poor credit record."[210] More recently, the EEOC filed a lawsuit against Kaplan Higher Education Corporation, claiming that the company's use of credit histories in the hiring process had a disparate impact on African Americans.[211]

Under Title VII, proof of a disparate impact on a protected group is insufficient to enjoin the challenged practice or procedure.[212] An employer may continue its challenged practice if the employer can establish that the practice is job-related and consistent with business necessity.[213] To utilize this defense successfully, the employer must show that the challenged practice relates to an important business need or to the employee's ability to do the job.[214] Even if the employer satisfies this burden, liability can still be imposed if the plaintiff can establish the existence of a less discriminatory alternative.[215]

Employers have successfully persuaded courts that the use of credit reports in employment may be necessary if employees have access to cash—a use of the business necessity defense that rests heavily on the largely unsupported Fraud Hypothesis.[216] In *EEOC v. United Virginia Bank*, decided in 1977, the U.S. District Court for the Eastern District of Virginia concluded that a bank was justified in conducting pre-employment credit checks, since "the banking business is a fiduciary business . . . where there is a good deal of cash openly handled."[217] In *Bailey v. DeBard*, a 1975 case, the U.S. District Court for the Southern District of Indiana ruled that it was appropriate for the Indiana State Police Department to make hiring decisions based on character investigations that included a review of credit histories.[218] The court concluded that such a review was relevant to a police officer's job performance because an adverse financial status might trigger a greater attraction to

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[210] EEOC Decision No. 72-427, 1971 WL 3943, at *1 (Aug. 31, 1971).

[211] Complaint at 2–3, EEOC v. Kaplan Higher Educ., Inc., No. 1:10-cv-02882-PAG, 2010 WL 5157837 (N.D. Ohio Dec. 21, 2010).

[212] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (codifying the disparate impact theory articulated in *Griggs*); *see Griggs*, 401 U.S. at 430–32.

[213] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006); *see Griggs*, 401 U.S. at 431 ("The touchstone is business necessity.").

[214] Charles A. Sullivan & Lauren M. Walter, Employment Discrimination Law and Practice § 4.01 (2009); *see* Ricci v. DeStefano, 557 U.S. 557, 587–88 (2009); *Griggs*, 401 U.S. at 431.

[215] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

[216] *See supra* notes 101–115 and accompanying text.

[217] No. 75-166-N, 1977 WL 15340, at *15 (E.D. Va. Oct. 7, 1977).

[218] No. IP 74-458-C, 1975 WL 227, at *17 (S.D. Ind. July 31, 1975).

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"the criminal element."[219] Even those states that have recently passed laws limiting employers' use of credit reports have codified as business necessities the use of financial histories to vet applicants for positions involving access to money, the exercise of fiduciary responsibilities, or access to confidential information.[220]

For these and other reasons, Title VII has failed to fully protect individuals from the discriminatory effects of the use of credit reports in hiring. Although courts generally recognize that employers' use of financial histories may be challenged on a disparate impact theory, relatively few courts have dealt directly with such actions.[221] The relative rarity of Title VII claims may be attributable to the fact that applicants may be rejected for undisclosed reasons.[222] Specifically, it is unclear to what extent employers comply with a requirement under the FCRA that they notify applicants if credit reports played a role in the employers' decision not to hire the applicant.[223] In other words, it is possible that employers use credit reports as a factor in the hiring process, but fail to so acknowledge, thereby making it harder for plaintiffs to prove that the use of credit reports resulted in discrimination.

The inadequacies of Title VII claims highlight the need for a stronger financial history antidiscrimination norm to protect the interests of traditionally disadvantaged groups, including racial minorities. The currently very competitive marketplace has triggered a game of "musical chairs" whereby workers must compete with others for a limited number of positions. It is critical to ensure that limited social goods like jobs are not reallocated pursuant to criteria shown to perpetuate inequality and to be tenuously related to job performance.

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[219] *Id.*

[220] *See supra* note 115 and accompanying text.

[221] Donna M. Malin, *Use of Credit History in Employment Decisions*, Nat'l Conference on Equal Emp't Opportunity Law (Mar. 2008), http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2008/2008_eeo_malin.authcheckdam.pdf. Although no federal court has held that pre-employment credit checks have a disparate impact on racial minorities, some have held that the use of general background investigations that include inquiries into the applicant's financial history does violate Title VII. Concepción, *supra* note 17, at 534–35 (citing United States v. City of Chi., 549 F.2d 415, 432 (7th Cir. 1977); Dozier v. Chupka, 395 F. Supp. 836, 851–52 (S.D. Ohio 1975)).

[222] EEOC, *May 16 Hearing Record*, *supra* note 109 (statement of Adam T. Klein) ("[A]n applicant rejected for having an insufficiently positive credit record typically will not know that a never-disclosed employer credit-history check is the reason.").

[223] *See infra* notes 287–295 and accompanying text (discussing the adverse action notice requirements imposed by the FCRA).

C. *Promoting Social Mobility and Financial Recovery*

Closely related to the concern that employers' and licensing organizations' use of financial histories can perpetuate racial inequality is the risk that the practice poses an affront to social mobility. Employers' and licensing organizations' consideration of financial histories, as I discuss below, may impact social mobility in three general ways.[224] First, the practice may impact the distribution of particular jobs among individuals of lower socioeconomic backgrounds.[225] Second, it may place downward pressure on these individuals' wages.[226] Third, the practice may represent a more symbolic affront to social mobility by signaling to consumers that the effects of their financial decisions have serious collateral consequences—ones that extend beyond the realm of access to and cost of credit.[227]

1. The Effects of Credit History on Socioeconomic Status

Employers' use of financial histories in the hiring process may have a disproportionate impact on individuals of a lower socioeconomic status, since there exists a correlation (albeit imperfect) between income and credit history.[228] Thus, employers who use credit reports as a selection tool may be adversely impacting poorer individuals' ability to ascend to positions of greater status and wealth. Although credit reports are commonly used in filling low-level retail positions,[229] they are also frequently used to help fill management roles, including, for example,

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[224] *See infra* notes 228–246 and accompanying text.

[225] *See infra* notes 228–233 and accompanying text.

[226] *See infra* note 234 and accompanying text.

[227] *See infra* notes 235–246 and accompanying text.

[228] Fumiko Hayashi & Joanna Stavins, *Effects of Credit Scores on Consumer Payment Choice* 13 (Fed. Reserve Bank of Bos., Discussion Paper No. 12-1, 2012), *available at* http://www.bos.frb.org/economic/ppdp/2012/ppdp1201.pdf ("Demographic characteristics are highly correlated with credit score even after controlling for financial difficulty variables and card status. Older consumers and higher-income earners tend to have a higher credit score."). *But cf.* Kurt Eggert, *The Great Collapse: How Securitization Caused the Subprime Meltdown*, 41 CONN. L. REV. 1257, 1271 (2009) ("Credit scores do not exactly correlate with income, in that high-income borrowers may have low credit scores, and vice versa, depending on their payment histories.").

[229] *See, e.g.*, Credit Builders Alliance, Credit Builders Toolkit, Employers and Credit Fact Sheet 1 (n.d.), http://www.creditbuildersalliance.org/files/employers_and_credit_fact_sheet.pdf ("According to the 2003 National Retail Security Survey, conducted by the University of Florida, 41% of retailers used pre-screening credit checks, with another 10% of retailers are [sic] planning to start.").

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CEO and CFO positions.[230] In hiring faculty members and administrators, some universities consult candidates' credit reports.[231] Even several state laws that limit employers' uses of credit reports nonetheless authorize employers to use credit reports to fill certain leadership or management roles.[232] These are all positions of consequence—ones that reward successful applicants with meaningful remunerative or symbolic benefits. Thus, to the extent that poorer applicants may have worse financial histories, they may be penalized in the assessment process. The practice may also deter poorer applicants from applying for such positions, thereby reducing the representation of individuals of a lower socioeconomic status in the management ranks.

Employers might argue that even if their use of financial histories reduces social mobility, its independent effect may not be quantitatively significant. It seems likely that other factors—including access to education and race—play a more substantial role in impacting, both over time and at the application stage, which candidates receive which positions. Although the poor ineluctably face greater challenges in ascending to more prestigious or more highly compensated positions,[233] it seems probable that this impact takes place gradually. In other words, employers' and licensing organizations' consideration of financial histories may pose only a marginal or incremental barrier to upward social mobility. While this would not be a reason to enjoin antidiscrimination efforts, it might reduce the relative urgency of promoting antidiscrimination reform.

2. Suppression of Wages

Even if employers' use of financial histories has a de minimis independent effect on the distribution of specific jobs, the practice may more generally and insidiously impair social mobility by suppressing

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[230] *See* Background Checking, *supra* note 60, at 5 (reporting that forty-six percent of employers surveyed conducted background checks to evaluate job candidates for senior executive positions).

[231] *See* David Evans, *Criminal-Background Checks*, CHRON. HIGHER EDUC. (May 28, 2008, 1:42 PM), http://chronicle.com/blogs/onhiring/criminal-background-checks/570.

[232] *See, e.g.*, MD. CODE ANN., LAB. & EMPL. § 3-711 (LexisNexis Supp. 2011) (authorizing employers to use credit reports to fill a position that "is managerial and involves setting the direction or control of a business, or a department, division, unit, or agency of a business").

[233] *See* GARTH L. MANGUM ET AL., THE PERSISTENCE OF POVERTY IN THE UNITED STATES 14 (2003) (discussing how children who grow up in poverty experience adverse long-term consequences in academic achievement, educational attainment, health, criminal justice behavior, and social behavior long into their adult lives).

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the wages of those with adverse financial histories.[234] Employers recognize that applicants with poor financial histories may be more likely to accept lower salaries, since these individuals (1) suffer a competitive disadvantage in the application process, and (2) depending on their specific financial circumstances, may more urgently require a steady income source. As a result, job applicants with adverse financial histories—regardless of their precise socioeconomic status—may find it more difficult to recover from financial upheaval.

3. Symbolic Affront to Social Mobility

It is also possible that the practice's most direct affront to social mobility stems from its deterrent and symbolic role, suggesting that the goals of debt repayment and social mobility are in tension with one another.[235] Philosopher Michael Walzer's description of "complex equality" illustrates how the use of credit scores—correlated heavily with wealth[236] and race[237]—poses a philosophical challenge to equality and fairness.[238] Walzer contends that in a society, "[n]o social good *x* should be distributed to men and women who possess some other good *y* merely because they possess *y* and without regard to the meaning of *x*."[239] Walzer describes social goods as membership, security and welfare, money and commodities, office, hard work, free time, education, kinship and love, divine grace, recognition, and political power.[240] Thus, to facilitate complex equality, it would be unjust to allocate a social good like a job or membership in a particular profession based upon individuals' possession of positive financial histories—which are heavily correlated with income and race.

To prospective job applicants, the use of financial histories is densely symbolic. A credit report—designed specifically by and for creditors—has been transplanted to numerous noncredit settings, raising concerns—particularly during a weak economy—that the effects of calamity and financial distress are being unfairly and unnecessarily

[234] *See* Hayashi & Stavins, *supra* note 228, at 13 (discussing how higher-income individuals tend to have higher credit scores).

[235] *See supra* notes 156–190 and accompanying text; *infra* notes 236–246 and accompanying text.

[236] Hayashi & Stavins, *supra* note 228, at 13.

[237] *See supra* notes 191–223 and accompanying text.

[238] *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 3–4 (1983).

[239] *Id.* at 20.

[240] *See generally id.* (dedicating a chapter to each of these social goods).

compounded. Applicants may perceive this practice to "kick them when they're down," thereby perpetuating income inequality and slowing down financial rehabilitation following a financial shock. To a job applicant, the consequences of financial lapses are seemingly amplified, having consequences above and beyond their immediate "sphere."[241]

The practice may be perceived not only to compound financial misfortune, but also to penalize lower- and middle-class consumers for unsuccessful entrepreneurial and other ventures. When an employer or licensing organization reviews an applicant's credit history, that employer or licensing organization is retrospectively and bluntly assessing the risk-taking that is sometimes required to improve one's life standing. Particularly during periods of high unemployment, individuals with dim job prospects make consequential entrepreneurial wagers in their lives—including, for example, starting small businesses[242] or assuming significant educational debt.[243] A sizeable proportion of these bets will fail.[244] If employers and licensing organizations can consider financial history in the hiring process, the consequences of these past entrepreneurial wagers become broader and more enduring than an individual could likely have predicted at the moment he or she originally assumed the financial risk.

Employers' consideration of financial histories may serve to magnify and compound the effects of financial decisions and events, making it more difficult for individuals to escape the effects of bankruptcies, collection actions, and other adverse financial circumstances. Without the application of a robust financial antidiscrimination norm, the promise of social mobility—an American ethos—is undermined. At least one commentator has suggested that social mobility is overrated as a policy

[241] *See id.* at 20.

[242] *See* Laura Petrecca, *Recession, Layoffs Fuel Many to Start Small Businesses*, USA TODAY, (Sept. 18, 2009, 12:25 PM), http://www.usatoday.com/money/smallbusiness/startup/week1-exploring-small-business-options.htm (describing that approximately ten percent of job-seekers who gained employment during one recessionary period did so by launching their own businesses, and describing that the failure rate for small businesses is exceptionally high even during non-recessionary periods); *see also* A. Roy Thurik et al., *Does Self-Employment Reduce Unemployment?*, 23 J. BUS. VENTURING 673, 674 (2008) (discussing whether an increase in unemployment leads to an increase in startup activity because the opportunity cost of starting a firm has decreased).

[243] *See, e.g.*, Catherine Rampell, *Instead of Work, Younger Women Head to School*, N.Y. TIMES, Dec. 28, 2011, at A4 (reporting that young women in school outnumber those in the workforce, and describing the risks associated with resultant student loan debt).

[244] *See* Tamar Lewin, *Student Loan Default Rates Rise Sharply in Past Year*, N.Y. TIMES, Sept. 13, 2011 (reporting an 8.8% default rate on student loans); Katherine Meyer, *Little Guys Tough It Out*, WALL ST. J., Oct. 6, 2011, at B4 (reporting that only forty-seven percent of businesses launched in 2005 survived at least five years).

goal.[245] Nonetheless, social mobility has been linked to a stronger middle class, greater economic opportunity, and political stability.[246] It has a moderating impact on society. Employers' use of financial histories reflects only one of many barriers to social mobility, but, even as an incremental barrier, the practice poses significant policy concerns.

D. *Addressing Defects in Consumers' Decision-Making Abilities*

Employers frequently scrutinize applicants' financial backgrounds to learn about these individuals' capacity to be responsible: to complete tasks and assignments promptly; to defer, when appropriate, to their superiors; and to play by the rules of a particular organization.[247] In the process, however, employers are relying on two important assumptions: (1) that credit reports and financial histories are valid measures of an individual's capacity to be responsible or conscientious, and (2) that there is a meaningful relationship between an individual's responsibility levels and his or her capacity to be a responsible employee. The failure of either one of these assumptions casts significant doubt on the logic of using financial histories in the employment and licensing settings. Elsewhere in this Article, I discuss the empirical relationship between credit reports and key personality traits like conscientiousness.[248] In this Section, I address to what extent behavioral economics has redefined what it means for a consumer to exhibit "responsibility" or "conscientiousness" in his or her financial life.[249]

Pursuant to neoclassical economic theory, laws that would bar employers and licensing organizations from considering applicants' credit reports or financial histories are ill-advised because these prohibitions conflict with sacrosanct principles of individual autonomy.[250] Antidis-

[245] *E.g.*, Reihan Salam, *Should We Care About Relative Mobility?*, NAT'L REV. ONLINE, (Nov. 29, 2011, 3:50 PM), http://www.nationalreview.com/agenda/284379/should-we-care-about-relative-mobility-reihan-salam.

[246] *See* PETER M. BLAU & OTIS DUDLEY DUNCAN, THE AMERICAN OCCUPATIONAL STRUCTURE 439 (1978) ("The stability of American democracy is undoubtedly related to the superior chances of upward mobility in this country, its high standard of living, and the low degree of status deference between social strata."); *see also* Sabrina Tavernise, *Middle-Class Areas Shrink as Income Gap Grows, New Study Finds*, N.Y. TIMES, Nov. 16, 2011, at A16 (discussing a new study that indicates that the number of American families living in middle-class neighborhoods is declining, suggesting a new "prosperity map" in the United States with a shrinking middle-class and a "growing concern about inequality").

[247] *See supra* notes 116–136 and accompanying text (discussing the Responsibility Hypothesis).

[248] *See supra* notes 116–136 and accompanying text.

[249] *See supra* notes 250–279 and accompanying text.

[250] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 3–27 (2011).

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crimination laws, as one commentator has argued, reflect "a dramatic rejection of classical liberal notions of freedom of contract."[251] Individual applicants theoretically have the freedom to limit, through negotiation, employers' access to applicants' financial histories. Indeed, the FCRA—the federal law that governs creditors' and others' use of credit reports—codifies this principle.[252] Under the FCRA, employers must secure applicants' permission to access applicants' consumer reports.[253] Because an applicant can safeguard the contents of her credit report by refusing to sign the employer's authorization form, a blanket prohibition on employers' use of applicants' financial histories is arguably unnecessary.[254]

If one subscribes to the rule that interference with freedom of contract should be limited, restrictions on employers' and applicants' freedom to negotiate the terms of the evaluation process must have substantial countervailing benefits. I argue that the lessons of behavioral economics, when applied to credit reporting, help justify a prohibition on employers' consideration of applicants' financial histories.

In concluding that a consumer's financial history reveals a certain level of financial responsibility, employers are relying on several important neoclassical economic assumptions about the contracting process and consumers' decision-making abilities. A consumer who is deemed to be "responsible" for a given default is attributed with a considerable amount of power and autonomy.[255] A consumer, for example, is presumed not to have suffered from material disadvantages in the contracting process. He or she is presumed to have been capable of maximizing his or her own self-interest in deciding whether to enter into a contract and under what terms.[256] In the event that a consumer filed for bankruptcy or defaulted on a particular debt, his or her decision is

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[251] *See* John J. Donohue, *Antidiscrimination Law*, *in* 2 HANDBOOK OF LAW AND ECONOMICS 1387, 1390 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

[252] 15 U.S.C. § 1681–1681t (2006).

[253] *Id.* § 1681b(b)(2).

[254] *But see infra* notes 314–315 and accompanying text (explaining that these contracts are functionally adhesive because employers may be unwilling or unable to deviate from standardized assessment procedures).

[255] *See* POSNER, *supra* note 250, at 23–25 (discussing conventional rational choice theory and game theory in evaluating how a rational person will react in various situations).

[256] Law and economics scholars presume that individuals exhibit rational choice: they are "self-interested utility maximizers with stable preferences and the capacity to optimally accumulate and assess information." *See* Jennifer Arlen, *Comment: The Future of Behavioral Economic Analysis of Law*, 51 VAND. L. REV. 1765, 1766 (1998). Neoclassical economists acknowledge that certain deviations from the rational choice model occur, but contend that these deviations are not systematic. *See id.* at 1767.

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presumed to be the result of an opportunistic cost-benefit calculation: the consumer concluded that repaying the debt would be more costly than defaulting on it.[257]

Over the past several decades, behavioral economists have cast serious doubt on the assumptions underlying rational choice theory. Individuals exhibit bounded rationality, bounded willpower, and bounded self-interest.[258] Behavioral economists have shown, for example, that individuals systematically make poor decisions that are inconsistent with their preferences. Individuals use incomplete heuristics—or rules of thumb—that cause them to make bad decisions.[259] Consumers tend to be overly optimistic about the future.[260] They exercise poor impulse control.[261] Individuals' preferences for and valuations of certain goods and services are affected by how those goods and services are framed.[262] Scholars have observed the effects of cognitive biases in the housing market,[263] and in credit card transactions.[264] Competitive forces compel sophisticated sellers to capitalize on these cognitive biases in drafting contract terms.[265] The implications of behavioral economists' findings are stark and disconcerting: individuals systematically and predictably

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[257] *See* Block-Lieb & Janger, *supra* note 36, at 1493–95 (explaining that, pursuant to the ex ante incentive analysis of consumer default, "the lure of the discharge proves irresistible to strategically minded consumer borrowers").

[258] HERBERT A. SIMON, MODELS OF MAN: SOCIAL AND RATIONAL 198–99 (1957); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476 (1998); *see also* Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1449 (2003) (discussing research that "attempted to obtain a map of bounded rationality, by exploring the systematic biases that separate the beliefs that people have and the choices they make").

[259] *See* Jackson, *supra* note 184, at 1411–12.

[260] *Id.* at 1414.

[261] *Id.* at 1408.

[262] *See* Samuel Issacharoff, *Can There Be a Behavioral Law and Economics?*, 51 VAND. L. REV. 1729, 1735 (1998); Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228–29 (2003) (discussing the "endowment effect," which refers to "the principle that people tend to value goods more when they own them than when they do not," and its role in law and economics).

[263] In his analysis of subprime mortgages, Professor Oren Bar-Gill has examined why so many consumers entered into subprime mortgages that were not, in fact, welfare-maximizing, and which frequently resulted in foreclosures. *See* Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073, 1075 (2009). Professor Bar-Gill explains that many consumers were harmed by mortgages with a small monthly payment and a small down payment because many borrowers overestimated both their ability to afford future high payments and the likelihood that home prices would rise. *Id.* at 1079. In addition, because the true cost of a mortgage was difficult to ascertain, consumers may have been unable to adequately gauge their ability to afford the loan. *Id.*

[264] *See* Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1375 (2004).

[265] *Id.* at 1373.

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make choices that they themselves—*if only they possessed complete information*—would perceive as wrong.[266]

Behavioral economists' conclusions have called into question rational choice theorists' principle of nonintervention. If consumers are unable to maximize their welfare in the contracting process, it may be appropriate for regulators to intervene. Some have suggested how regulators can improve financial disclosures to better enable consumers to overcome myopia and the optimism bias.[267] Regulators can also restructure default rules—ones that consumers tend not to change—and other laws to better reflect consumers' subjective preferences.[268] Preserving consumers' access to a bankruptcy discharge, for example, may compensate for consumers' frequent inability to make decisions that "accurately reflect their own subjective preferences for consumption versus savings."[269]

The conclusions of behavioral economists yield a related conclusion in the context of employers' and licensing organizations' consideration of applicants' financial histories. Employers' and licensing organizations' consideration of credit reports in the employment context are an implicit attempt to punish and deter certain conduct (to encourage debt repayment) or to allocate a crucial social good—a job—based upon the wisdom of consumers' financial decisions. To the extent that consumers' choices are fueled less by a scientific, cost-benefit analysis, and more by imperfect decision-making shortcuts, use of financial histories in the employment setting may miss the mark. Given ambiguities about the merits of enforcing particular consumer contracts that are the products of systematic cognitive errors, it is arguably unjust to allow an employer—an uneducated third party—to make consequential inferences about a debtor based upon his or her record of bankruptcies and defaults. Default is less probative of an applicant's level of "financial responsibility" than traditional models suggest.

Thus, just as legal scholars have suggested that the *legal* rules and sanctions governing debt default must be reconsidered to account for weaknesses in the neoclassical model, the *nonlegal* sanctions of debt de-

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[266] Jackson, *supra* note 184, at 1414 n.65.

[267] Bar-Gill, *supra* note 263, at 1086 (recommending that regulators require lenders to incorporate the prepayment option in required disclosures of the annual percentage rate).

[268] *See* Ian Ayres, *Menus Matter*, 73 U. Chi. L. Rev. 3, 4 (2006) ("[T]he default rule revolution in part has been an attempt to show lawmakers that they can move the world without restricting contractual freedom. Merely by changing the default, lawmakers—courts and legislators—can affect the equilibrium.").

[269] Jackson, *supra* note 184, at 1412.

fault—including employers' ability to refuse to hire applicants with adverse financial backgrounds—must likewise be reevaluated. Behavioral economists' findings suggest that it may be appropriate for states and municipalities to impose limits on this practice, even though doing so reduces consumers' power to decide for themselves—through contracting—whether or not to grant employers or licensing organizations access to their financial histories.

Employers may argue that imposing a mandatory financial antidiscrimination rule may be overbroad, since employers themselves may be able to distinguish between applicants on the basis of those factors that contributed to applicants' financial adversity. Presumably, employers have no interest in penalizing applicants whose financial transgressions are attributable to cognitive defects unrelated to job performance.[270] Indeed, employers who scrutinize applicants' credit reports contend that they often provide applicants with an opportunity to "explain" those factors that triggered their bankruptcies or financial lapses.[271] Employers claim not to penalize applicants whose financial problems were triggered by a divorce, a job loss, a health problem, or some other unavoidable life problem.[272] In the aftermath of the subprime mortgage crisis in which millions of Americans lost their homes,[273] employers also claim to discount foreclosures.[274] Foreclosures may have been destigmatized because they have struck consumers frequently and seemingly capriciously. Alternatively or additionally, the extent of a consumer's responsibility for a given foreclosure may be too difficult to assess, since the recent foreclosure crisis implicated numerous groups,

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[270] *See supra* notes 263–266 and accompanying text. Alternatively, however, employers may presume that individuals who suffer from cognitive limitations in their personal lives may make poorer decisions in the workplace. Thus, if employers were capable of distinguishing between applicants who suffer from cognitive impairments and those who do not, employers' preference might be to favor the latter group.

[271] Background Checking, *supra* note 60, at 9 (reporting that 87% of employers claim to give job applicants, in certain circumstances, an opportunity to explain certain adverse information in their consumer reports, 65% of employers claim to provide this opportunity during the pre-offer period, and 22% claim to provide it during the post-offer period).

[272] *See* EEOC, Oct. 20 Meeting Tr., *supra* note 165, at 32 (Devata).

[273] *See* Press Release, CoreLogic Reports Almost 65,000 Completed Foreclosures Nationally in February, CoreLogic (Mar. 29, 2012), http://www.corelogic.com/about-us/news/corelogic-reports-almost-65,000-completed-foreclosures-nationally-in-february.aspx (reporting nearly 3.4 million completed foreclosures from the start of the financial crisis in September 2008).

[274] *See* Background Checking, *supra* note 60, at 7 (reporting that only eleven percent of employers surveyed said that a job applicant's foreclosure status would likely impact their hiring decision).

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including government regulators, securitization participants, mortgage servicers, and consumers.[275]

Providing applicants with an opportunity to explain the causes of defaults and bankruptcies, however, cannot sufficiently address the problems raised by behavioral economists. Several of the factors that employers claim to discount—a divorce, a job loss, or a health problem—are intervening life events that are commonly understood to affect many individuals somewhat indiscriminately.[276] These do not, in and of themselves, reflect cognitive biases. Indeed, it is likely very difficult or impossible for employers to deduce which consumer contracts are the products of cognitive irrationality and which are not. Applicants themselves may be unconscious of these biases or the role they played in the applicant's default.[277] Thus, a prohibition on employers' consideration of financial histories is justified, since it is likely too difficult or too costly to distinguish effectively between those consumers whose financial problems resulted from cognitive biases and those whose financial problems truly might signify more acute, "rational" financial irresponsibility.

Many might argue that the findings of behavioral economists cannot justify a wholesale ban on employers' and licensing organizations' consideration of financial histories. The prescriptive and normative implications of behavioral economics remain tentative because behavioral economists do not yet have a "coherent, robust, tractable model of human behavior," making it difficult to make policy recommendations based on these findings.[278] Likewise, cognitive biases are reduced as individuals learn by experience, work within organizations, or obtain advice from experts.[279] Observations about the systematic and predictable defects in consumers' decision-making abilities, however, coupled with concerns about social mobility and racial equality, suggest, at the very least, that the decades-old presumption that financial histories are useful and helpful sources of information about an employee's merits should be more rigorously challenged.

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[275] MARK JICKLING, CONG. RESEARCH SERV., R40173, CAUSES OF THE FINANCIAL CRISIS 5–10 (2010) (identifying, among other factors, imprudent mortgage lending, risky financial activities, securitization, and deregulation as possible causes of the financial crisis).

[276] *See* SULLIVAN ET AL., *supra* note 112, at 2 (explaining that bankruptcies are, in large part, caused by job volatility, separations and divorces, and medical problems).

[277] *See* Claire B. Steinberger, *Persistence and Change in the Life of the Law: Can Therapeutic Jurisprudence Make a Difference?*, 27 LAW & PSYCHOL. REV. 55, 57 (2003) ("Cognitive limitation and distortion operate at primarily unconscious and latent levels.").

[278] Arlen, *supra* note 256, at 1768.

[279] *Id.* at 1769.

III. Why an Antidiscrimination Norm Is Necessary and Preferable to Alternative Solutions

This Part explains why a significant expansion in financial history antidiscrimination laws is both necessary and preferable to alternative solutions.[280] It first describes how the FCRA and the Bankruptcy Code's antidiscrimination provisions provide inadequate protection to applicants.[281] It then explains the limitations of an alternative solution: codifying employers' current practice of allowing some applicants to explain what mitigating factors contributed to problems with their credit history.[282] Next, this Part describes how a new antidiscrimination norm can protect employers from the consequences of false stereotypes and the threat of some negligent hiring suits.[283] Finally, this Part concludes by explaining that, although antidiscriminatory sentiments have gained traction during the Great Recession, genuine reform efforts must be unconstrained by majoritarian pressures and timing.[284]

A. *Why Current Legal Protections Are Inadequate*

1. The Fair Credit Reporting Act Emphasizes Access and Accuracy, Not Relevancy

How did consumers' financial history become a widely utilized tool in the employment process? In large part, a 1970 statute designed to increase accuracy and privacy in the credit reporting industry—the Fair Credit Reporting Act (FCRA)[285]—is responsible for legitimizing employers' use of financial histories.[286]

In passing the FCRA, Congress sought to correct key defects in the procedures by which the previously unregulated credit reporting indus-

[280] *See infra* notes 281–418 and accompanying text.

[281] *See infra* notes 285–402 and accompanying text.

[282] *See infra* notes 403–410 and accompanying text.

[283] *See infra* notes 411–413 and accompanying text.

[284] *See infra* notes 414–418 and accompanying text.

[285] Pub. L. No. 91-508, 84 Stat. 1128 (codified as amended at 15 U.S.C. §§ 1681–1681t (2006)).

[286] 15 U.S.C. § 1681(b) (stating that the purpose of the FCRA is to "require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information").

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try operated. The industry was secretive and enigmatic.[287] Consumers did not know when and by whom their credit reports were being utilized.[288] Consumers had no access to their consumer reports.[289] In addition, they could not correct incomplete, irrelevant, or obsolete information.[290] Simultaneously, however, consumer reports were often issued to outsiders for "dubious purposes."[291] Congressional witnesses cited reports of individuals accessing consumer reports to evaluate prospective husbands and sons-in-law.[292] Indeed, some consumer reporting agencies would, for an additional fee, also perform private investigative work for customers.[293] When employers used an applicant's consumer report in deciding not to hire the applicant, the employer was prohibited by its contract with the consumer reporting agency from disclosing to the applicant that the consumer report played any role in the decision.[294] As a result, job applicants had no idea that adverse and frequently erroneous or subjective information in their consumer reports might be "controlling [their] troubled careers."[295] Even if job applicants discovered that consumer reporting agencies were disseminating inaccurate information, they had virtually no legal recourse. Because consumer reporting agencies were largely insulated from defamation claims,[296] agencies en-

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[287] *See Hearings, Fair Credit Reporting, supra* note 31, at 33 (statement of Paul Rand Dixon, Chairman, Federal Trade Commission) (discussing how few individuals know where a major credit reporting agency is physically located).

[288] *See id.* at 92 (statement of Alan F. Westin, Prof. of Public Law and Government, Columbia University) (describing privacy breaches by consumer reporting agencies and the "great ease" with which non-creditors can access consumers' reports).

[289] *See id.* at 66 (statement of Lewis B. Stone, Assistant Counsel to Governor Rockefeller, State of New York) ("Under the present law if you did go to a credit bureau and told them something awful about me, there would be no way I could find out, subpoena the records or know anything about it.").

[290] *See id.* at 33 (statement of Paul Rand Dixon) (explaining the lack of effective remedies for inaccuracies in consumer reports).

[291] *See id.* at 67 (statement of William F. Willier, Director, National Consumer Law Center, Boston College).

[292] *See id.* at 92 (statement of Alan F. Westin).

[293] *See Hearings, Fair Credit Reporting, supra* note 31, at 56 (statement of John D. Caemmerer, State Sen., State of New York) (describing contents of credit reporting agencies' advertising brochures).

[294] *See id.* at 88 (statement of Alan F. Westin) ("The basic contract between the investigator and the employer states that information from the reports and the identity of the investigative agency may not be revealed to the person reported on.").

[295] *See id.* at 88–89.

[296] The common law provided (and continues to provide) little protection to consumers who suffered damages from inaccurate credit reports, because credit bureaus have a "qualified privilege to disseminate inaccurate and even defamatory information so long as they act without malice." *See* PRIDGEN & ALDERMAN, *supra* note 52, § 2:2. Today, common law actions have largely been superseded by the FCRA's less demanding negligence stan-

joyed "virtual immunity from judicial accountability."[297] According to one witness, a "veil of secrecy" surrounded these agencies; many perceived the credit reporting industry to hold the "power of life and death" over consumers and their financial futures.[298]

The defects in the procedures by which the industry operated are precisely those described by Professor Dan Solove in his examination of the "database problem": the privacy problems triggered by the collection and use of information by computer databases and the Internet.[299] Professor Solove argues that, in conceptualizing the issue, commentators can compare the database problem to Franz Kafka's depiction of "bureaucracy" in *The Trial*.[300] Like the protagonist in *The Trial*, consumers confronting consumer reporting agencies faced "bureaucratic indifference, arbitrary errors, and dehumanization."[301] The legislative history of the FCRA reveals that credit reporting agencies created an atmosphere in which "people fe[lt] powerless and vulnerable, without any meaningful form of participation in the collection and use of their information."[302]

Indeed, Congress seized on the metaphor of a broken trial in framing the essential problems plaguing the credit reporting industry. Senator William Proxmire, a leading sponsor of the FCRA,[303] complained that "the consumer is confronted with an organized conspiracy of silence when he attempts to learn the contents of his credit report."[304] Senator Proxmire argued that in a fair society, "standards of justice require that the individual be confronted with the charges raised against him and be given full opportunity to refute them."[305] Thus, in crafting credit reporting industry regulations, Congress's primary objective was to give consumers a meaningful participatory role in an otherwise ex parte "trial" that had the potential to deprive a consumer of credit, insurance, and employment.

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dard. *See* 15 U.S.C. § 1681e(b) (2006) (requiring consumer reporting agencies to maintain "reasonable procedures to assure maximum possible accuracy" of the information in consumer reports).

[297] *See Hearings, Fair Credit Reporting*, *supra* note 31, at 87 (statement of Alan F. Westin).

[298] *See id.* at 19 (statement of Virginia H. Knauer, Special Assistant to the President for Consumer Affairs).

[299] Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1394–95 (2001).

[300] *Id.* at 1398; *see* FRANZ KAFKA, THE TRIAL (Schocken Books 1998) (1925).

[301] Solove, *supra* note 299, at 1398.

[302] *See id.*

[303] WU & DE ARMOND, *supra* note 25, § 1.4.3.

[304] *See Hearings, Fair Credit Reporting*, *supra* note 31, at 2 (statement of Sen. Proxmire).

[305] *Id.*

The obligations that the FCRA imposes on employers are consistent with this metaphor and message. The FCRA imposes responsibilities on employers at three major stages of the evaluation process. First, before pulling an applicant's credit report, an employer must clearly disclose that it may obtain a report for employment purposes.[306] Additionally, the employer must obtain the applicant's consent to access the report.[307] Second, if an employer intends to deny employment to the applicant based in whole or in part on information in a credit report, the employer must first provide the applicant with a pre-adverse action disclosure that includes a copy of the credit report.[308] Third, if the employer ultimately decides not to hire the applicant based on information in her credit report, the employer must provide the applicant with an adverse action notice (1) informing the applicant that such action was taken based in whole or in part on information in the consumer report, (2) listing the contact information of the credit reporting agency that supplied the report to the employer, and (3) describing the consumer's right to dispute the accuracy or completeness of any information in the report and his or her right to receive a free credit report from the credit reporting agency.[309] In imposing these requirements, Congress envisioned that job applicants, armed with employers' disclosures, could monitor the contents of their credit reports and, when necessary, correct any errors or explain any adverse credit information that might otherwise impact applicants' job eligibility.[310]

Requiring employers to secure applicants' permission before accessing applicants' credit reports seemingly gives individuals control over the information in their credit reports.[311] Prospective employees and licensees ostensibly hold a key to the database containing their personal information—a key that they may withhold for any reason. This is consistent with a normative principle embedded within Samuel Warren and Louis Brandeis's traditional conceptions of privacy: that an

[306] 15 U.S.C. § 1681b(b)(2)(A)(i) (2006).

[307] *Id.* § 1681b(b)(2)(A)(ii).

[308] *Id.* § 1681b(b)(3). The FCRA defines an "adverse action" in the employment context as "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee." *Id.* § 1681a(k)(1)(B)(ii).

[309] *Id.* § 1681b(b)(3)(B)(i)(I)–(IV).

[310] *See id.* § 1681b(b).

[311] *See id.* § 1681b(b)(2)(A)(ii).

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individual should have the right to control the release of information about his or her person.[312]

The requirement that employers secure applicants' permission is intended to alert job applicants that credit histories may be used in connection with the hiring process and give them an opportunity to opt out of the process.[313] In reality, however, job applicants likely have little real choice in the matter.[314] An applicant who refuses to submit to a financial history screening likely effectively removes him or herself from consideration for the position, because the employer may be unable or unwilling to deviate from its standardized vetting process.[315] The contract is functionally adhesive. An individual's choice is to "take or leave" the employer's terms—and, thus, her chance at a job.

Congress's use of a "broken trial" metaphor to describe the problems plaguing consumers was not incorrect, but it presupposed that the decisionmaker—an employer—is justified in using a consumer's credit report in rendering a meaningful decision about a consumer. In other words, the FCRA glosses over the fundamental and threshold question of whether employers' consideration of applicants' financial histories is itself appropriate.

In the FCRA, Congress did address some important questions of relevancy. For example, it limited creditors' and employers' access to old—or "obsolete"—information in credit reports.[316] Credit reporting agencies may not report most adverse information more than seven years old.[317] Witnesses also objected to the very sensitive and personal information contained in some reports, triggering some reform within the industry.[318] At the time the FCRA was passed, however, the industry was already quite large, and Congress recognized that credit reporting

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[312] Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1832 (2010); *see* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198–99 (1890).

[313] *See* EEOC, *Oct. 20 Meeting Record*, *supra* note 14 (statement of Maneesha Mithal) (explaining that the FCRA's notification requirement "serves an important role by alerting job applicants and employees to the fact that the employer may consider consumer report information in connection with the consumer's application or employment").

[314] Desmond, *supra* note 17, at 909 ("[J]ob seekers and employees have little real choice about whether or not to allow employers to obtain credit reports.").

[315] With as many as sixty percent of employers utilizing credit reports in the hiring process, applicants have little leverage in influencing employers' screening methods. *See* Background Checking, *supra* note 60, at 3, 9.

[316] 15 U.S.C. § 1681c(a) (2006).

[317] *Id.* Bankruptcies, however, may be reported for as long as ten years. *Id.* § 1681c(a)(1); WU & DE ARMOND, *supra* note 25, § 5.2.1.

[318] *See Hearings, Fair Credit Reporting*, *supra* note 31, at 75 (statement of Alan F. Westin) (describing the "overly intrusive" information contained in consumer reports).

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was indispensable to the fair allocation and pricing of credit.[319] In apparent deference to the industry's critical economic role, Congress left intact the default credit and non-credit uses of credit reports, addressing only the procedures governing the industry.[320]

The legislative history does not suggest that Congress specifically endorsed the view that financial histories were necessarily relevant to employers' scrutiny of employees. By designating employers and licensing organizations as permissible users of credit reports,[321] Congress appears to have intended to subject insurance companies and employers to government oversight.[322] Its desire was to limit abuses by the credit reporting industry and to ensure that basic privacy controls were observed.[323] In deferring to the default uses of credit reporting agencies and failing to question the wisdom of employers' use of financial information, however, Congress implicitly sanctioned and legitimized employers' use of financial histories.

Because the statute's protections emphasize consumer access and neglect questions of the relevancy of the information provided to employers, employers regularly consider bankruptcies and debt histories in assessing job candidates' relative merits.[324] An antidiscrimination rule—one that makes a prima facie assessment of the relevancy of this information—is thus a necessary supplement to the gaps within the FCRA.

2. The Bankruptcy Code Inadequately Protects Filers from Extralegal Sanctions for Debt Default

a. *Courts' Narrow Interpretations of the Bankruptcy Code's Antidiscrimination Provisions Dilute the Fresh Start*

In the American legal system, consumers with excessive debts can seek a financial "fresh start" by filing for bankruptcy. The Bankruptcy Code establishes a collective forum in which all of a consumer's debts—secured and unsecured—are categorized and satisfied either through a

[319] *See id.* at 13 (statement of Virginia H. Knauer) (describing the vast size of the credit reporting industry).

[320] *See* 15 U.S.C. § 1681b.

[321] *Id.* § 1681a(d)(1)(c) (incorporating § 1681b(a)(3)(B)).

[322] *See Hearings, Fair Credit Reporting, supra* note 31, at 65 (statement of Sen. Proxmire) (explaining that legislators included in the definition of "credit rating" a reference to "character and general reputation" to enable Congress to regulate insurers and employers, entities that committed "a large proportion of . . . abuses").

[323] *See id.*

[324] *See supra* notes 55–99 and accompanying text.

sale of all of the debtor's non-exempt[325] assets (i.e., a Chapter 7 liquidation)[326] or through the creation of a plan under which the debtor agrees to pay creditors' claims from future income over a three-year or five-year period (i.e., a Chapter 13 rehabilitation).[327] To preserve debtors' right to file for bankruptcy and to ensure debtors' unimpeded access to the "fresh start" that it promises, two sections of the Bankruptcy Code—525(a) and 525(b)—provide limited antidiscrimination protection to bankruptcy filers in the employment context.[328] Although bankruptcy is an institutionalized form of debt-forgiveness available to every debtor, its "fresh start" is noticeably circumscribed because courts have interpreted these antidiscrimination provisions very narrowly.[329] Consequently, most employers can refuse to hire those who have sought bankruptcy relief.[330] Courts' narrow interpretations of the Bankruptcy Code's antidiscrimination provisions represent a key weakness in current financial history antidiscrimination policies.

Section 525(a) codifies[331] *Perez v. Campbell*, the 1971 Supreme Court case that invalidated, under the Supremacy Clause, a provision of an Arizona state law requiring state officials to suspend the drivers' licenses of motorists who failed to satisfy judgments resulting from car accidents.[332] The Court concluded that this state law, which expressly provided that the tortfeasor's obligations were unaffected by a bankruptcy filing, interfered with a debtor's right to a fresh start.[333]

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[325] Chapter 7 debtors may retain certain property that they already owned at the time they filed for bankruptcy. *See* 11 U.S.C. § 522(d) (2006) (listing as partially exempt the debtor's residence, one motor vehicle, and tools of the debtor's trade (among other items)).

[326] CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY § 1.23, at 92 (2009).

[327] *Id.* § 1.25, at 105.

[328] 11 U.S.C. § 525(a)–(b). A third provision prohibits discrimination against debtor-borrowers on the basis of discharged, unrepaid loans by governmental units operating a student loan or grant program. *Id.* § 525(c).

[329] Although debtors need not be insolvent to file for bankruptcy, Congress in 2005 enacted the Bankruptcy Abuse Prevention and Consumer Protection Act, which instituted a "means test" that excludes from Chapter 7 those consumers deemed to have sufficient projected future repayment capacity. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 22, 119 Stat. 23, 29 (codified as amended at 11 U.S.C. 707(b) (2006)); *see* TABB, *supra* note 326, § 2.15, at 180. These consumers may instead file for Chapter 13 bankruptcy. *See* 11 U.S.C. § 707(b)(1).

[330] *See infra* notes 331–347 and accompanying text.

[331] S. REP. No. 95-989, at 81 (1978).

[332] 402 U.S. 637, 656 (1971); *see* 11 U.S.C. § 525. The Constitution gives Congress the power "[t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

[333] *See Perez*, 402 U.S. at 649.

In the legislative history of § 525(a), lawmakers indicated that courts should interpret the antidiscrimination provisions expansively, describing the new legislation as a mere first step in protecting individuals' right to file for bankruptcy and to seek a fresh financial start:

> [This] section is not exhaustive. The enumeration of various forms of discrimination against former bankrupts is not intended to permit other forms of discrimination. The courts have been developing the *Perez* rule. This section permits further development to prohibit actions by governmental or quasi-governmental organizations that perform licensing functions, such as a State bar association or a medical society, or by other organizations that can seriously affect the debtors' livelihood or fresh start, such as exclusion from a union on the basis of discharge of a debt to the union's credit union. . . . The courts will continue to mark the contours of the antidiscrimination provision in pursuit of sound bankruptcy policy.[334]

In spite of this invitation to courts to interpret the antidiscrimination provisions broadly, courts have been reluctant to do so.[335] Instead, courts have narrowly interpreted these provisions in three major ways. First, private employers may refuse employment to bankruptcy filers.[336] Second, any employer—private or public—may discriminate against a future bankruptcy filer.[337] Future bankruptcy filers include those who may have articulated a good faith intention to pursue bankruptcy relief but who have not yet formally filed a petition. Third, any employer may discriminate against a bankruptcy filer, so long as the bankruptcy filing was not the sole factor in the employer's decision.[338] I discuss each limitation in turn.

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[334] S. Rep. No. 95-989, at 81. Section 525(a), prohibiting discrimination against debtors by government entities, was passed six years prior to § 525(b)'s enactment. Because, however, the provisions of § 525(b) are nearly identical to those of § 525(a), courts have consulted the legislative history of § 525(a) in assessing Congress's intent in passing § 525(b). *See, e.g.*, Leonard v. St. Rose Dominican Hosp. (*In re* Majewski), 310 F.3d 653, 658–59 n.2 (9th Cir. 2002).

[335] *See, e.g.*, Rea v. Federated Investors, 627 F.3d 937, 941 (3d Cir. 2010); Stinson v. BB&T Inv. Servs. (*In re* Stinson), 285 B.R. 239, 250 (Bankr. W.D. Va. 2002).

[336] *See infra* notes 339–347 and accompanying text.

[337] *See infra* notes 348–371 and accompanying text.

[338] *See infra* notes 372–380 and accompanying text.

i. Private Employers' Right to Deny Employment to Bankruptcy Filers

Under § 525(a) of the Bankruptcy Code, a public employer may not "deny employment to, terminate the employment of, or discriminate with respect to employment against" a current or former debtor under the Bankruptcy Code.[339] Section 525(b), in contrast, provides that a private employer may not "terminate the employment of, or discriminate with respect to employment against" a current or former debtor.[340]

These provisions are noticeably different from one another. Congress included the phrase "deny employment" from the list of actions that public employers are prohibited from taking, but it omitted the phrase in the provision governing private employers. Applying the *expressio unius est exclusio alterius* canon of statutory interpretation, almost all courts have thus concluded that Congress intended to permit private—but not public—employers to refuse to hire bankruptcy filers.[341] Courts have maintained this opinion in cases in which the refusal is motivated exclusively by the fact that the applicant has sought bankruptcy protection.[342]

One court has deviated from this interpretation. In a heavily criticized decision, the U.S. District Court for the Southern District of New York in *Leary v. Warnaco, Inc.* held that § 525(b) does, in fact, prohibit

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[339] Section 525(a) provides in relevant part:

> [A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. § 525(a) (2006).

[340] *Id.* § 525(b).

[341] *See Rea*, 627 F.3d at 941; Fiorani v. Caci, 192 B.R. 401, 407 (E.D. Va. 1996); *Pastore*, 186 B.R. at 555.

[342] *See Rea*, 627 F.3d at 941; *Fiorani*, 192 B.R. at 407.

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private employers from refusing to hire current or former debtors.[343] The court implied that Congress's omission of the phrase "deny employment" from § 525(b) was a scrivener's error.[344] It concluded that the phrase "may not . . . discriminate with respect to employment"—a prohibition applicable to both private and public employers—encompasses all aspects of employment, including hiring, firing, and material changes in job conditions.[345] The court had difficulty reconciling the stark inconsistency between the two provisions with the rehabilitative functions of bankruptcy law, concluding that the Bankruptcy Code's "fresh start" policy mandated that the longer list of prohibited activities apply to both private and public employers.[346] The court thus concluded that the plaintiff, whose offer of employment for an executive assistant position had been rescinded following the employer's review of the plaintiff's credit report, had stated a valid claim.[347]

ii. Discrimination Against Future Bankruptcy Filers

Section 525 prevents employers from discriminating against an individual who "is or has been a debtor" under the Bankruptcy Code.[348] In interpreting this provision, some courts have held that both public and private employers may discriminate against future filers: individuals who have not yet sought bankruptcy relief.[349] Even those individuals who have expressed a good faith intention to file for bankruptcy receive no protection.[350]

In the only appellate case to address this issue, the U.S. Court of Appeals for the Ninth Circuit in *In re Majewski* held that an employer did not violate the Bankruptcy Code's antidiscrimination provisions

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[343] 251 B.R. 656, 658 (S.D.N.Y. 2000). Other courts have declined to follow *Leary*. *See, e.g.*, *In re Stinson*, 285 B.R. at 250 ("Section 525(b) prohibits discrimination with respect to employment, but this prohibition does not include hiring decisions.").

[344] *See Leary*, 251 B.R. at 658 ("A Court should not go out of its way to place such an absurd gloss on a remedial statute, simply because the scrivener was more verbose in writing § 525(a).").

[345] *Id.*

[346] *Id.* ("The evil being legislated against is no different when an employer fires a debtor simply for seeking refuge in bankruptcy, as contrasted with refusing to hire a person who does so. The 'fresh start' policy is impaired in either case.").

[347] *Id.* at 657, 659.

[348] 11 U.S.C. § 525(b)(1) (2006).

[349] *In re Majewski*, 310 F.3d at 656. *But see* Mayo v. Union Bank (*In re* Mayo), 322 B.R. 712, 717 (Bankr. D. Vt. 2005) (holding that an adverse action taken against a prospective bankruptcy filer may be actionable under § 525); Tinker v. Sturgeon State Bank (*In re* Tinker), 99 B.R. 957, 960 (Bankr. W.D. Mo. 1989) (same).

[350] *See In re Majewski*, 310 F.3d at 656.

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when it fired an employee after the employee informed the employer that he intended to file for bankruptcy.[351] The court held that, because the employee had not yet filed for bankruptcy and had never previously filed (the employee was thus neither a current nor a former debtor under the Bankruptcy Code), § 525 did not prohibit the employer from terminating the employee.[352]

The Ninth Circuit declined the debtor's invitation to interpret § 525 broadly, consistent with courts' interpretations of anti-retaliation provisions of remedial statutes like Title VII and the Fair Labor Standards Act.[353] The majority conceded that these anti-retaliation provisions protect employees who express a clear intent to exercise one or more rights under these statutes.[354] They do not merely protect those individuals who have formally asserted their rights by, for example, filing a complaint or instituting a proceeding against an employer.[355]

The majority explained, however, that courts' broad interpretation of anti-retaliation provisions in these whistle-blower statutes is critical to their effectiveness, since the government relies on employees to report employer misconduct.[356] In contrast, a similarly broad interpretation of the Bankruptcy Code's antidiscrimination provisions is unnecessary to give full effect to the Bankruptcy Code's policies.[357] Although the court wanted to encourage debtors to report employers' violations of the antidiscrimination provisions and to protect individuals who had formally sought bankruptcy protection, the court "[did] not wish to encourage persons to file for bankruptcy or to threaten bankruptcy."[358]

According to the majority, individuals who have filed for bankruptcy are more deserving of protection than those who have not yet formally filed, since bankruptcy involves a quid pro quo.[359] In exchange for the protections triggered by a formal bankruptcy filing (including antidiscrimination protection and a temporary suspension of creditors' collection efforts through the imposition of the automatic stay[360]), the

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[351] *Id.*

[352] *Id.*; *see* 11 U.S.C. § 525(b)(1).

[353] *In re Majewski*, 310 F.3d at 655; *see, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2006); Fair Labor Standards Act, 29 U.S.C. § 215 (2006).

[354] *In re Majewski*, 310 F.3d at 655.

[355] *Id.*

[356] *Id.* at 655.

[357] *See id.* ("While we encourage reporting of statutory violations, we do not wish to encourage persons to file for bankruptcy or to threaten bankruptcy. We wish only to protect those persons who have invoked the bankruptcy law's protections to obtain a fresh start.").

[358] *Id.*

[359] *See id.* at 656.

[360] 11 U.S.C. § 362 (2006 & Supp. IV 2010).

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debtor, according to the majority, turns over assets to the bankruptcy estate and "repay[s] debts that can be paid."[361]

The dissent described the majority's construction of § 525 as excessively formalistic and inconsistent with Congress's clear intent in the Bankruptcy Code to provide debtors with an unhampered fresh start.[362] The dissent explained that § 525, which prohibits certain types of discrimination against one "who is or has been a debtor," is ambiguous.[363] The phrase, as the majority contended, may mean that a debtor must file for bankruptcy before he or she can be the subject of "discrimination."[364] Under this view, the provision provides no protection to an employee who is terminated moments before he or she formally files the bankruptcy petition—an interpretation that, the dissent argued, sets up an absurd footrace between an employer and a prospective bankruptcy filer.[365]

Alternatively, as the dissent explained, the phrase "who is or has been a debtor" may be more circumscribed—referring only to a requirement that an individual have attained the status of "debtor" (by filing a formal bankruptcy petition) before he or she sues a former employer under § 525.[366] It is not clear, the dissent claimed, that the individual is protected under the provision only if the employer's discrimination occurred after he or she formally filed for bankruptcy relief.[367]

The dissent argued that interpreting § 525 to permit an employer to terminate an employee after the employer has learned of the employee's intention to file for bankruptcy would create a result inconsistent with the intentions of the Bankruptcy Code's drafters, who passed § 525 to ensure that employers could not frustrate the congressional policy of providing debtors with a fresh start.[368] Courts broadly interpret anti-retaliation provisions of remedial statutes like Title VII not merely to encourage whistle-blowing, but also to prevent employers from discouraging employees from exercising individual statutory rights.[369] According to the dissent, the majority's decision, which provided no protection to future bankruptcy filers, encouraged the precise

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[361] *In re Majewski*, 310 F.3d at 656; *see* 11 U.S.C. § 542 (2006).
[362] *In re Majewski*, 310 F.3d at 656–57 (Reinhardt, J., dissenting).
[363] *Id.* at 657.
[364] *Id.*
[365] *Id.* at 660.
[366] *Id.* at 658–59.
[367] *Id.* at 658–59.
[368] *In re Majewski*, 310 F.3d at 658 (citing S. Rep. No. 95-989, at 81 (1978)).
[369] *Id.* at 661–62.

result that the majority sought to avoid.[370] By providing limited employment protection only to those who have formally filed for bankruptcy, employees have an incentive to "file first and talk later."[371]

iii. Mixed Motive Cases

Section 525 provides that employers may not discriminate against a current or former bankruptcy filer "solely because" such an individual has filed for bankruptcy, has been insolvent before or during the bankruptcy case, or has failed to pay a debt that was discharged or is dischargeable in the case.[372] The vast majority of courts have interpreted this phrase narrowly, requiring aggrieved claimants to establish that the prohibited factor was the exclusive reason for the employer's discriminatory treatment.[373]

A minority of courts have argued that the same burden of proof used in Title VII discrimination claims should be applied to Bankruptcy Code discrimination cases.[374] According to these courts, it is too burdensome to require employees to prove that no other factors weighed in the employer's decision to terminate the employee's position.[375] These courts argue that an employer's discrimination against a bankruptcy filer is unlawful under § 525 if the bankruptcy filing, insolvency, or failure to pay a dischargeable debt played a "significant role" in the employer's decision,[376] or if the employer would not have discriminated against the employee "but for" the employee's bankruptcy filing.[377]

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[370] *Id.* at 663–64 n.10.

[371] *Id.*

[372] 11 U.S.C. § 525 (2006).

[373] *See, e.g.*, White v. Kentuckiana Livestock Market, Inc., 397 F.3d 420, 426 (6th Cir. 2005); Laracuente v. Chase Manhattan Bank, 891 F.2d 17, 23 (1st Cir. 1989).

[374] *See, e.g.*, Bell v. Sanford-Corbitt-Bruker, Inc., No. CV186-201, 1987 WL 60286, at *4 (S.D. Ga. Sept. 14, 1987) (applying the burden shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973), to a § 525 claim); Pa. Pub. Util. Comm'n v. Metro Transp. Co. (*In re* Metro Transp. Co.), 64 B.R. 968, 975 (Bankr. E.D. Pa. 1986) ("We further believe that the burden of proof in a discrimination charge under 11 U.S.C. § 525(a) should be approached precisely as in a charge of discrimination in employment, housing, or public accommodations due to race, color, religion, sex, or national origin.").

[375] *See Bell*, 1987 WL 60286, at *3 ("It would be virtually impossible for a bankrupt to prove that her employer fired her due only to bankruptcy . . . . To interpret 'solely' as requiring a bankrupt to prove this scenario would conflict with the policies of the Bankruptcy Act.").

[376] *See In re* Metro Transp. Co., 64 B.R. at 975.

[377] *See Bell*, 1987 WL 60286, at *4; *cf.* Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. Rev. 279, 310 (2010) (noting that the "concept of mixed motives provides an apt description of many instances of discrimination").

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One court acknowledged that requiring employees to prove that no other factors triggered the discrimination makes it more difficult for bankruptcy filers to seek relief, but argued that an individual's bankrupt status is different from the Title VII and Age Discrimination Act categories of race, sex, and age.[378] The court stated that "there is not much one can do about his race, or sex, or age . . . but bankruptcy, while sometimes the result of catastrophic events over which the bankrupt has no control, often results from conduct as to which the bankrupt had a measure of choice."[379] Congress, according to the court, may have had in mind the mutability of one's financial status in imposing a higher standard of proof to bankruptcy discrimination cases than in Title VII or Age Discrimination Act cases.[380]

b. *Bankruptcy as a Critical Component of a Financial History Antidiscrimination Norm*

As a result of courts' narrow interpretations of the Bankruptcy Code's antidiscrimination provisions, it is tremendously difficult for bankruptcy filers to successfully deter and counter discriminatory treatment by employers. According to a 2008 study, forty-five percent of debtors who were denied employment following bankruptcy reported that the employer's decision was attributable to the bankruptcy filing.[381] The stark inconsistency between the Bankruptcy Code's "fresh start" policy and its limited antidiscrimination protections underscores the need for legislative action: policymakers must clarify to what extent employers and licensing organizations can consider financial histories—including bankruptcy filings—in the employment and licensing process.

The normative factors I consider above provide helpful guidance about the merits of including bankruptcy within the scope of a stronger financial history antidiscrimination norm. First, the Fraud Hypothesis—a frequently cited empirical justification for the use of financial histories in the employment setting[382]—may be less applicable to bankruptcy filers than to individuals who have accumulated significant debts but who have not sought bankruptcy relief. Because bankruptcy results in a substantial decrease in an individual's indebtedness, a bankruptcy filer might pose a decreased security risk to a given institution.[383] Thus,

[378] *White*, 397 F.3d at 426.
[379] *Id.*
[380] *See id.*
[381] Thorne, *supra* note 17, at 36.
[382] *See supra* notes 101–115 and accompanying text.
[383] *See supra* note 7 and accompanying text.

in spite of the tenuous connection between credit scores and an employee's propensity to commit theft,[384] those who subscribe to the Fraud Hypothesis may not necessarily oppose the application of an antidiscrimination rule to protect bankruptcy filers.

Second, although some may argue that bankruptcy promotes debt default, others contend that bankruptcy can increase economic productivity. According to one commentator, the most compelling rationale in support of bankruptcy is the ability of the bankruptcy discharge to restore the debtor to economic productivity and viable participation in the open credit economy.[385] Consistent with this rationale, there may be appropriate reasons to limit the discharge (and, consequently, antidiscrimination protection) in some cases.[386] Although bankruptcy may ultimately increase the cost of credit, one may conceptualize these added costs as an "insurance premium" necessary to protect all debtors against the risk of default.[387]

Third, behavioral economists' observations about financial decision making suggest that courts' reluctance to construe the Bankruptcy Code's antidiscrimination provisions as broadly as they interpret other anti-retaliation provisions may be misplaced. Many courts and employers seem willing to concede that certain "innocent" events like job losses, medical problems, and separations or divorces are deserving of antidiscrimination protection.[388] The implication is that these innocent events, to the extent that they trigger an adverse financial status, are more analogous to immutable characteristics (e.g., race, age, and sex) that have traditionally received antidiscrimination protection. At the same time, other financial events (e.g., overspending) are perceived as mutable and products of rational choice. Behavioral economists' findings, however, demonstrate that most individuals predictably and systematically make cognitive errors that can trigger an adverse financial status.[389] Thus, there may be reason to relax a seemingly tenuous dichotomy between events perceived to be "uncontrollable" and other adverse financial circumstances, like foreclosures or overspending, that trigger bankruptcies.

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[384] *See supra* notes 109–112 and accompanying text.

[385] Howard, *supra* note 180, at 1069.

[386] *Id.* at 1070 (arguing that, consistent with the economic functions of discharge, discharge should be denied to those debtors who, for example, knowingly hindered the bankruptcy proceedings or engaged in dishonesty).

[387] *See id.* at 1063.

[388] *See* EEOC, Oct. 20 Meeting Tr., *supra* note 165, at 32 (Devata).

[389] *See supra* notes 247–279 and accompanying text.

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Fourth, pursuing stronger bankruptcy protections as part of a broader antidiscrimination reform effort may have a favorable impact on social mobility. As one commentator has explained, the bankruptcy discharge suspends or reverses the downward social mobility consumers encounter in the months or years preceding bankruptcy.[390] Before bankruptcy, individuals suffer from a decline in wealth from (1) the compounding of existing debt through fees and interest, and (2) the loss of assets through foreclosure and repossession.[391] A bankruptcy discharge alone, however, may be inadequate to prevent bankruptcy filers from experiencing subsequent financial distress. Scholars have established that sustained relief requires not only the forgiveness of past debts through the bankruptcy discharge, but also a stable and sufficient post-bankruptcy income.[392] To the extent that debtors' pursuit of new jobs and careers is impaired by employers' review of financial histories, a fortified bankruptcy antidiscrimination rule may reinforce bankruptcy's promised "fresh start." Although the application of a stronger antidiscrimination rule will not ensure debtors' access to the income that some identify as indispensable to post-bankruptcy financial viability, antidiscrimination can reduce those barriers that may inevitably complicate the search for a new job or career.

Finally, a comprehensive financial history antidiscrimination norm requires more than a prohibition on employers' use of credit reports—a medium of information about applicants' financial histories. The antidiscriminatory goal of such a prohibition could be easily circumvented, since employers may learn about financial events, like bankruptcy filings, through other means, including from public records or from the existence of a debtor-creditor relationship between the employer and the applicant.[393] Comprehensive protection for debtors thus requires that employers be prohibited from considering specific financial events—like bankruptcy filings—that they discover from sources other than credit reports.

Some may argue that antidiscrimination protection should be limited to bankruptcy filers, either for normative or pragmatic reasons. Bankruptcy is a preexisting, standardized form of debt-forgiveness. It is

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[390] Thorne, *supra* note 17, at 24.

[391] *Id.*

[392] Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 93 (2006).

[393] *See supra* notes 26, 143 and accompanying text.

widely available and pursued by millions of Americans every year.[394] While the Bankruptcy Code makes key distinctions between different types of debts in its distribution of limited assets to creditors,[395] all debtors—whether seemingly profligate spenders or the victims of downsizing—can seek refuge under the Bankruptcy Code.[396] Likewise, bankruptcy's collection functions and the repayment obligations it imposes on debtors in exchange for a discharge of debts[397]—part of an economic quid pro quo—may make a fortified bankruptcy antidiscrimination rule more palatable to those who might otherwise tolerate discrimination by employers or licensing organizations to deter debt default. In addition, mandating that employers not discriminate against bankruptcy filers reorients the conversation from the more divisive topic of employers' freedom to treat a debt-defaulter differently to a more philosophical debate about the importance of ensuring, pursuant to the Supremacy Clause, an individual's full and unimpaired access to a discharge of debt and a fresh start.[398]

While an effective financial history antidiscrimination norm must fully shield bankruptcy filers from employers' extra-legal sanctions for debt default, comprehensive reform requires also that non-filers receive full antidiscrimination protection. Bankruptcy is standardized and broadly available, but, for several reasons, it may be underutilized. First, bankruptcy is a limited right. The Bankruptcy Code imposes various restrictions on a debtor's right to discharge commonly held debts like student loans and home mortgage loans, limitations that can impact a debtor's decision about whether to file for bankruptcy.[399] Likewise, bankruptcy is very much a tool of middle class debtors, as many consumers cannot afford to file.[400] Some debtors who do not file for bank-

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[394] *See* John Hartgen, *Total Bankruptcy Filings Decrease 12 Percent in 2011, Commercial Filings Fall 19 Percent*, AM. BANKR. INST. (Jan. 4, 2012), http://www.abiworld.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=64959.

[395] *See* 11 U.S.C. § 507(a)(1)–(10) (2006 & Supp. IV 2010) (listing the relative priorities of specific creditor claims).

[396] In other words, debtors need not be insolvent in order to seek refuge under the Bankruptcy Code. 2 COLLIER ON BANKRUPTCY ¶ 109.03[2] (Alan N. Resnick et al. eds., 15th ed. rev. 2009).

[397] *See, e.g.*, Howard, *supra* note 180, at 1049–50 (discussing how bankruptcy operates as a collective distribution mechanism).

[398] Any state law that interferes with or is contrary to federal law (including federal bankruptcy law) violates the Supremacy Clause. U.S. CONST. art. VI, cl. 2.

[399] 11 U.S.C. § 523(a)(8) (2006) (excepting student loans from discharge, unless the debtor can demonstrate undue hardship); *id.* § 1322(b)(2) (prohibiting the strip down of an unsecured lien on the debtor's principal residence).

[400] *See* Richard M. Hynes, *Broke but Not Bankrupt: Consumer Debt Collection in State Courts*, 60 FLA. L. REV. 1, 4–5 (2008) (finding that less than twenty percent of Virginia consumers

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ruptcy instead pursue "informal bankruptcy."[401] Such debtors may not have any assets to forfeit to creditors and therefore may not derive any direct economic benefits from a bankruptcy discharge.[402] Because, however, these individuals' financial histories reveal various adverse events (e.g., collection actions or creditor lawsuits), non-filers nonetheless may require antidiscrimination protection in the employment setting. Consequently, bankruptcy antidiscrimination protection is a necessary—but not sufficient—component of an effective and comprehensive financial history antidiscrimination norm.

B. *The Limitations of Consumer Empowerment*

To address some of the problems triggered by the use of financial histories in the employment process, legislators could enhance the procedural protections available to prospective employees and licensees. Currently, some employers contend that they sometimes give applicants an opportunity to "explain" adverse information in their credit reports.[403] Instead of adopting a wholesale ban on employers' consideration of financial histories, legislators could require employers who consult candidates' credit reports to give candidates an opportunity to discuss any problematic items in their financial histories. This discussion would provide applicants with an opportunity to correct any consequential misperceptions. For example, applicants could identify significant errors in credit reports, or explain what unavoidable circumstances contributed to a bankruptcy or a collection action. Applicants could also explain to prospective employers that a lawsuit or collection action is a result of a legitimate billing dispute rather than an attempted evasion of financial obligations.

On the one hand, increasing applicants' participation in the assessment process could help to reduce the rote and depersonalized nature of employers' review of credit histories. The reform would seem-

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sued in 2001 filed for bankruptcy by 2006). Professor Richard Hynes explains that these non-filing debtors tend to be poorer than most bankruptcy filers, suggesting that non-filers may be too poor to file for bankruptcy. *See id.* at 6; *see also* Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289, 292 (2010) (finding that debtors tend to file for bankruptcy once they have saved up enough money to pay for bankruptcy attorneys' fees and court costs).

[401] *See* Hynes, *supra* note 400, at 3.

[402] Debtors with no nonexempt or unencumbered assets are called "judgment proof." William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 WIS. L. REV. 1047, 1055.

[403] *See supra* note 271 and accompanying text (describing the percentage of employers that claim to provide applicants with such an explanatory opportunity).

ingly humanize the process by providing applicants with the opportunity to respond to "charges" leveled against them.[404] In addition, an individualized inquiry could reduce the unfairness that could otherwise result if an organization presumptively disqualified a candidate based upon adverse information in his or her credit report. In other words, allowing applicants to participate in the evaluation process could reduce the imprecision triggered by a third party's power to make probabilistic inferences about a given individual based upon that individual's possession of a particular trait.[405]

At the same time, however, increasing applicants' participation in prospective employers' review of financial histories unfairly places applicants on the defensive. The practice—similar to the FCRA approach toward employers' use of financial histories—too readily presumes the existence of a link between an adverse financial history and a prospective employee's merits.[406] Institutionalizing candidates' opportunity to respond to employer concerns could entrench and calcify existing stereotypes about individuals who encounter financial calamity.[407] It effectively establishes a rebuttable presumption that errors in applicants' financial histories constitute bona fide "red flags." As a result, the reform could strengthen the debt-enforcement function of employers' use of financial histories because it institutionalizes employers' scrutiny of adverse financial events like bankruptcies or debt defaults.[408]

Such a reform is, at best, an incomplete solution. It is likely to be expensive and administratively onerous. Compliance would be difficult to monitor. It also presumes that employers would be able to distinguish effectively between "forgivable" adverse debt problems and more problematic ones.[409] In addition, requiring employers to ask employees about adverse financial circumstances might require applicants to disclose information about their marital status or underlying medical con-

[404] This could alleviate many of the privacy concerns cited by Professor Solove in his examination of the "database problem" (the privacy problems caused by the collection of personal information by computer databases). *See* Solove *supra* note 299, at 1394–95; *see supra* notes 299–302 and accompanying text.

[405] *See, e.g.*, KIRKLAND, *supra* note 15, at 21.

[406] *See supra* notes 285–324 and accompanying text.

[407] *Cf.* Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 2 (1991) (arguing that "color-blind" policies—ones that seek to ignore or sanitize difference—in effect perpetuate racism). Similarly, although mandated employer discussions about consumer reports might attempt to "correct" for stereotypes, these employer reviews might instead entrench them.

[408] *See supra* notes 156–190 and accompanying text.

[409] EEOC, Oct. 20 Meeting Tr., *supra* note 165, at 32 (Devata).

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ditions, which may raise other discrimination problems.[410] Applying a heightened financial antidiscrimination norm to the employment setting is a more blunt reform, but it would represent an informed societal and legal judgment about the wisdom and ethics of employers' and licensing organizations' consideration of candidates' financial histories.

C. *Protecting Employers from the Consequences of False Stereotypes*

Employers and licensing organizations face tremendous pressure to consult various sources of information about applicants. Licensing organizations, for example, may feel compelled to consult candidates' backgrounds in order to prevent scandals and to limit legislatures from encroaching on their self-regulatory authority. Employers and employer advocates, in addition, contend that employers must conduct thorough background checks on applicants in order to forestall negligent hiring claims.[411]

A survey of cases, however, reveals few—if any—successful negligent hiring claims brought against employers for failure to consult credit reports or some other aspect of an employee's financial history.[412] This dearth of cases might suggest that employers are utilizing this rationale as a pretext. Alternatively or additionally, it may indicate that credit reporting agencies have successfully capitalized on a combination of (1) widely held preconceptions about those with adverse financial histories, and (2) employers' fear of liability. Indeed, credit reporting agencies regularly market consumer reports as prudent, money-saving risk-mitigation tools.[413]

The negligent hiring rationale demonstrates the extent to which preconceptions about the relevancy and validity of financial histories have been embraced by a risk-averse legal and administrative culture. When a preconception about a group is entrenched, antidiscrimination laws may be necessary not only to prevent the application of a stereotype against an individual, but also to protect the employer from concerns about liability and loss that are fueled by third parties' embrace

[410] For example, the Americans with Disabilities Act prohibits employers from asking questions during the pre-offer period that are likely to reveal the existence of a disability. 42 U.S.C. § 12112 (2006 & Supp. II 2008); *see also* Job Applicants and the Americans with Disabilities Act, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/facts/jobapplicant.html (last updated Mar. 21, 2005) (describing the questions that an employer may not ask in an application or during an interview).

[411] *See supra* notes 145–147 and accompanying text.

[412] *See supra* notes 145–147 and accompanying text.

[413] *See supra* note 107 and accompanying text.

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of the stereotype. Employers themselves may need robust financial history antidiscrimination laws to successfully reduce the real or perceived threat of lawsuits that are grounded in inaccurate narratives about debtors and debtor behavior.

D. *A Cautionary Note: Antidiscrimination's Anti-Majoritarian Directive*

The post-recession recovery period—marked by high unemployment[414]—has highlighted the normative and logical weaknesses of employers' use of candidates' financial histories in the evaluation process. Foreclosures and job losses have seemingly stricken households somewhat capriciously, and there is a widespread sense that "Main Street" consumers—relative to the "Wall Street" elite—have been systematically disadvantaged. Public officials have responded with various proposals to help ensure that consumers—particularly the long-term unemployed—are not treated differently by employers.[415]

In the current tumultuous political and economic climate, a financial antidiscrimination norm caters to majoritarian and populist sympathies. As a result, proposals to reduce the role of financial history in the employment process have gained traction. As of the time of this writing, seven states have passed laws that limit employers' consideration of credit histories.[416]

In the aftermath of the Great Recession—a period of significant financial upheaval for millions of Americans—proposals advancing a stronger financial history antidiscrimination norm are more likely to induce change. At the same time, however, the timing of this movement may, by oversimplifying its message, pose a philosophical dilemma. By promoting an enhanced antidiscrimination norm during a weak economy, policymakers may be sending a message that the harms of employers' and licensing organizations' use of financial histories are most acute and problematic during periods of high unemployment or widespread economic stress. While this message is not necessarily incorrect, it is incomplete and reductionist.

The harms of financial history discrimination in the employment or licensing setting may be felt or perceived by the largest number of

[414] Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor 1 fig.1 (Oct. 5, 2012), http://www.bls.gov/news.release/pdf/empsit.pdf (showing unemployment above eight percent from August 2010 to August 2012).

[415] President Barack Obama, for example, has proposed to ban employers from discriminating against job applicants because they are unemployed. Robert Pear, *Obama Seeks to Prohibit 'No Jobless Need Apply,'* N.Y. TIMES, Sept. 27, 2011, at A14.

[416] *See supra* note 11 and accompanying text.

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people during a weak economy. In part, this may be because employers increase their scrutiny of financial histories during a competitive market in which larger numbers of workers vie for a limited number of positions.[417] It would be a mistake, however, for policymakers, employers, and judges to conclude that the need for antidiscrimination reform is transitory, or that job candidates' need for greater antidiscrimination protections will predictably decline as economic conditions improve.

The normative harms of employers' use of financial histories—most notably, threats to social mobility and to racial equality—are not unique to weak economies. Minority communities, for instance, take much longer to emerge from recessions.[418] As a result, applicants' need for financial history antidiscrimination protection will persist long after unemployment numbers decline. In addition, the empirical strengths and weaknesses of the practice—the ability of employers to make valid statistical deductions about employees' personality traits—are unrelated to underlying economic conditions.

Thus, the timing of the financial history antidiscrimination reform movement is a double-edged sword. The currently weak economy and high unemployment numbers cause the issue to resonate with a large segment of the population, but genuine antidiscrimination reform efforts must be unconstrained by prevailing majoritarian sentiments.

Conclusion

Financial histories have an expansive and seemingly indelible impact on individuals' lives, extending far beyond the domain of access to credit. In recent years, an increasing number of employers and licensing organizations have used credit reports and financial histories in assessing a prospective employee's or licensee's merits. The recent recession has caused many to question the logic and ethics of that practice.

This Article examined the normative justifications of the use of financial histories in the employment and licensing settings. Although consideration of financial history may have a moderate economic benefit by deterring debt default, important countervailing factors—including the practice's adverse impact on racial equality and social mobility,

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[417] *See* Desmond, *supra* note 17, at 907–08.

[418] Alcee L. Hastings, *Inequality in Unemployment*, Cong. Black Caucus, http://thecongressional blackcaucus.com/2011/07/25/inequity-in-unemployment/ (last visited Oct. 9, 2012) ("Black Americans experience longer stretches of unemployment than the general population, and minority-owned businesses have been hit particularly hard. The sad fact is that while our national unemployment rate has dropped to around nine percent, unemployment for black Americans still remains at 16 percent.").

and ambiguities about its empirical validity—justify the adoption of a more robust financial history antidiscrimination norm. Current laws, including the Fair Credit Reporting Act and state laws limiting employers' use of financial histories, function to entrench prevailing stereotypes about debtor behavior and to legitimize employers' right to access applicants' financial histories. Likewise, the Bankruptcy Code's antidiscrimination provisions provide only nominal protection to debtors—an omission that functions to erode the "fresh start" necessary to improve debtors' financial futures. Research by behavioral economists suggests that it may be reasonable to analogize consumers' adverse financial statuses to more traditional "immutable" categories (e.g., race, age, and sex) that receive more robust antidiscrimination protection under existing laws.

An enhanced financial history antidiscrimination norm will require employers and policymakers to question the usefulness of information that for decades has been embraced as relevant and helpful. Adoption of fortified financial history antidiscrimination protections can promote racial and economic equality, give employers the freedom to focus on those qualities that have a demonstrated relationship to job success, and reduce the impact of dubious preconceptions about job applicants' adverse financial backgrounds.

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