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Seeking Solutions to Financial History Discrimination

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Employers' use of credit reports to evaluate prospective job applicants has generated considerable scrutiny in the popular press and academic literature, but few proposals for reform. This Article explores three possible ways of reducing the risk of financial history discrimination in the employment setting.

First, imposing inquiry limits on employers' use of credit reports, a policy recently adopted or under consideration in the majority of states, is unlikely to be effective, since states' inquiry limits are currently narrowly drafted and therefore advance few anti-discriminatory objectives. In addition, inquiry limits cannot prevent self-interested individuals from voluntarily revealing their credit histories and other financial history information, a shortcoming that triggers the game-theoretic "unraveling" process. Second, most attempts to improve consumers' participatory role in employers' evaluation processes can only superficially combat financial history discrimination, since these efforts are likely to produce unreliable information, and they may have a regressive impact.

Given the limitations of these options, the Article considers to what extent a third approach—encouraging employers to use an empirically derived, statistically sound evaluation method to scrutinize applicants—can combat discrimination. Although an empirical method—an adaptation of credit scoring methodologies for use by employers—is imperfect, it can help to reduce the likelihood of implicit bias and stereotyping that is inherent in employers' current subjective analyses of the raw data in credit reports. While antidiscrimination initiatives have traditionally focused on withholding information from decision-makers, where suppression of information is impracticable, the contrary approach may be more likely to advance sustained reform efforts.

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LEA SHEPARD*

I. INTRODUCTION

A job seeker's to-do list is extensive and laborious. He must complete formal and informal education and job training programs, earning the credentials necessary to achieve threshold competency in a given position. He must research suitable job openings. He must update his résumé and submit required paperwork, which highlight his strengths and communicate succinctly to a prospective employer why the applicant is a desirable candidate for a given position. He must prepare adequately for one or more interviews. He must submit favorable references or letters of recommendation to employers, which provide important endorsements from the applicant's past life.

A prudent job applicant must also complete an important step in financial hygiene that he might otherwise overlook: a credit report[1] check. Because approximately sixty percent of employers consult applicants' credit reports in making hiring decisions,[2] a job applicant would be wise to scrutinize his report in advance of an employer's formal vetting process to ensure that no information in the report is incomplete or inaccurate.[3] An

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[1] Although this Article uses the terms "credit report" and "consumer report" interchangeably, the former term is narrower than the latter. *Protecting Consumers' Data: Policy Issues Raised by ChoicePoint, Statement Before the Subcomm. on Commerce, Trade & Consumer Prot. of the H. Comm. on Energy & Commerce*, 109th Cong. 6–7 (2005) (statement of Deborah Platt Majoras, Chairman of the Federal Trade Commission), *available at* http://www.ftc.gov/os/2005/03/050315protectingconsumerdata.pdf. The term "consumer report" refers collectively to all reports issued to both creditors and non-creditors (e.g., insurers, employers, and landlords). *Id.* at 7 n.11.

[2] *Background Checking: Conducting Credit Background Checks*, SOC'Y FOR HUMAN RESOURCES MGMT. slide 3 (Jan. 22, 2010), http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundChecking.aspx [hereinafter *Background Checking*].

[3] Under the Fair Credit Reporting Act (FCRA), the federal statute that governs the use of credit reports by creditors, employers, and insurers, consumers are entitled to a free copy of their consumer report from each of the three nationwide consumer reporting agencies (Experian, Equifax, and Trans Union) once every twelve months. 15 U.S.C. § 1681j(a)(1)(A) (2012); *see also* Chereen Zaki, *Want a Job? Raise Your Credit Score*, FORBES (Mar. 16, 2012), http://www.forbes.com/sites/chereenzaki/2012/03/16/want-a-job-raise-your-credit-score (listing the three companies that provide the reports).

applicant whose credit report reveals financial problems may seek to improve his credit profile by correcting errors, paying down debts, or settling delinquencies.[4]

Job applicants with adverse credit histories—those that reflect collection actions, bankruptcies, or high debt-to-income ratios—are at a competitive disadvantage. Employers are prone to make a multitude of negative assumptions about such individuals: they are more likely to be irresponsible,[5] more likely to commit fraud or theft on the job,[6] more susceptible to bribery and blackmail,[7] or more likely to be distracted by financial worries or collection activity.[8]

Employers' consideration of applicants' financial histories has generated significant doubts among scholars and legislators.[9] These

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[4] *See, e.g.*, Zaki, *supra* note 3 (describing ways to increase one's credit score in order to improve job prospects).

[5] *See, e.g.*, *Vicious Cycle*, BUCKS CTY. COURIER TIMES, Nov. 21, 2012, at A12 ("Ballooning credit card balances, missed loan and bill payments, late charges and other penalties can make anybody look like an irresponsible deadbeat. And, consequently, a risky hire."); 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 ("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 continue to be irresponsible with money, it's a bad sign for employers looking to hire you.").

[6] *See, e.g.*, Huhman, *supra* note 5 ("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."); *Why Filing Bankruptcy Might Be the Worst Thing You Could Do for Your Career*, BUS. INSIDER (May 13, 2012), http://www.businessinsider.com/why-filing-bankruptcy-might-be-the-worst-thing-you-could-do-for-your-career-2012-5 (explaining that employers consult applicants' credit histories in part because credit checks "allow[] them to identify potential theft risks: Employees with debts are among the most likely to steal from their employers").

[7] Sean Reilly, *Personal Debt Sinks More Clearances*, FED. TIMES, Nov. 14, 2011, at 1 (reporting that many prospective federal employees with adverse financial backgrounds have been denied security clearances, because a large debt load "could heighten someone's vulnerability to bribery or blackmail").

[8] *See* Brian M. Kalish, *Freed from Financial Burden: Noninsurance Offerings Provide a Way to Help Ease Employees' Financial Stressors and Improve Workplace Productivity*, EMP. BENEFIT NEWS, Feb. 2013, at 28, 28 (citing study that concludes that financial difficulties increase employee absenteeism and decrease employee productivity).

[9] *See, e.g.*, Loren W. Brown, *Credit Report: An Acceptable Aid to the Hiring Decision?*, 39 W. ST. U. L. REV. 1, 2–5 (2011) (discussing the effectiveness of credit report use in the employment setting and observing that although reports may seem useful to employers, no definitive studies establish that they predict employee behavior); 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, 535–41 (2010) (questioning whether credit histories reflect traits relevant to job success); Lea Shepard, *Toward a Stronger Financial History Antidiscrimination Norm*, 53 B.C. L. REV. 1695, 1722–43 (2012) (conducting a normative assessment of the merits of credit report use by employers); Deborah Thorne, *Personal Bankruptcy and the Credit Report: Conflicting Mechanisms of Social Mobility*, 11 J. POVERTY, No. 4, 2008, at 23, 27–28, 41–42 (describing credit reports as impeding the upward social mobility otherwise triggered by a bankruptcy filing); 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, 910–13 (2010)

commentators have questioned whether a valid correlation exists between adverse financial histories and employees' job performance.[10] Some have also expressed concerns that the practice, although intended to promote debt-repayment, may have an adverse effect on social mobility and racial equality.[11] Others have populist misgivings that the use of credit reports in the employment setting compounds the economic pain of consumers recovering from a financial crisis for which many disparate actors share blame.[12]

Although employers' use of consumer reports has generated helpful normative critiques, few have critically evaluated possible solutions to the problems triggered by the practice. In this timely companion piece to my normative analysis of financial history discrimination,[13] I address this important gap in the scholarly literature. I evaluate three divergent ways of reducing the risk of financial history discrimination in the employment setting: (1) banning the use of consumer reports; (2) giving applicants a greater voice in employers' assessment processes, consistent with rights afforded to consumers in analogous settings; and (3) encouraging employers to use an empirically derived, statistically sound method to evaluate applicants' credit histories.

States' primary response to the threat of financial history discrimination has been to attempt to ban the use of credit reports in the hiring process.[14] I argue that although bans reflect a seemingly robust

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(describing how credit reports both benefit employers and contribute to discrimination); Kelly Gallagher, Note, *Rethinking the Fair Credit Reporting Act: When Requesting Credit Reports for "Employment Purposes" Goes Too Far*, 91 IOWA L. REV. 1593, 1604–07 (2006) (detailing how employers' use of credit reports perpetuate discrimination and harm poorer applicants).

[10] *See, e.g.*, AMY TRAUB, DĒMOS, DISCREDITED: HOW EMPLOYMENT CREDIT CHECKS KEEP QUALIFIED WORKERS OUT OF A JOB 14 (2013) *available at* http://www.demos.org/sites/default/files/publications/Discredited-Demos.pdf ("[T]here is little or no evidence that *any* data on personal credit history is relevant to employment . . . .").

[11] *See, e.g.*, *id.* at Executive Summary ("African American and Latino households have worse credit, on average, than white households. As a result, employment credit checks may disproportionately screen people of color out of jobs, leading to discriminatory hiring.").

[12] *See, e.g.*, Saki Knafo, *How Bad Credit Reports Keep People Unemployed*, HUFFINGTON POST (Mar. 6, 2013), http://www.huffingtonpost.com/2013/03/04/bad-credit-reports-unemployment_n_2807939.html ("[T]he debts incurred during the recession have prevented people from getting back on their feet and paying back what they owe, trapping them in a vicious cycle of debt and unemployment.").

[13] *See generally* Shepard, *supra* note 9, at 1722–38 (discussing how employers' consideration of financial histories impacts debt-repayment incentives, social mobility, and racial equality).

[14] At the time of this writing, eight states—California, Connecticut, Hawaii, Illinois, Maryland, Oregon, Vermont, and Washington—have passed laws restricting employers' use of consumer reports. CAL. LAB. CODE § 1024.5 (West Supp. 2013); CONN. GEN. STAT. § 31-51tt (2013); HAW. REV. STAT. ANN. § 378-2(a)(8) (2011); 820 ILL. COMP. STAT. ANN. 70/10 (West Supp. 2013); MD. CODE ANN., LAB. & EMPL. § 3-711 (LexisNexis Supp. 2012); OR. REV. STAT. § 659A.320 (2011); 21 VT. STAT. ANN. tit. 21, § 495i (LexisNexis Supp. 2012); WASH. REV. CODE ANN. § 19.182.020 (West 2013). Seventeen more states and the District of Columbia are considering adopting similar legislation. *Use of*

response to the risk of financial history discrimination, they are unlikely to be effective. First, state laws in their current form are narrowly drafted and, as a result, make few changes to the status quo. Thus, these restrictions advance few anti-discriminatory objectives. Second, even if these laws were more broadly drafted and vigorously enforced, they could not easily prevent individuals from voluntarily disclosing their financial histories to employers, a shortcoming that triggers the game-theoretic "unraveling" process.

As Douglas Baird, Scott Peppet, and other scholars of game theory have observed, in situations in which asymmetric information exists between two parties, an individual who holds favorable verifiable information has an incentive to reveal that information to an uninformed party.[15] In the employment setting, those applicants with the strongest financial histories—those that reflect no adverse events like bankruptcy filings or debt-collection actions—are likely to reveal their financial history information to employers in order to gain a competitive advantage. If these self-interested actors disclose their financial history information for personal or economic gain, other applicants—including those with less favorable financial histories—in turn will be compelled to make similar disclosures, since those who fail to disclose will be penalized.[16] If an applicant fails to reveal her credit score or credit history, either overtly or through information "signaling,"[17] an employer will infer that the applicant is withholding negative information.[18] Faced with the choice between disclosure and the stigma associated with failure to disclose, an applicant will choose to reveal her financial history. This Article argues that the strong likelihood of unraveling—made more acute by rights afforded to applicants under consumer-protection laws and by developments in information technology—promises to disrupt states' enforcement of financial history bans.

Credit Information in Employment 2012 Legislation, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/issues-research/banking/use-of-credit-info-in-employ-2012-legis.aspx (last updated Mar. 6, 2013).

[15] *E.g.*, DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW 90–91 (1994); Scott R. Peppet, *Unraveling Privacy: The Personal Prospectus and the Threat of a Full-Disclosure Future*, 105 NW. U. L. REV. 1153, 1177 (2011).

[16] *See* Peppet, *supra* note 15, at 1176–77 ("Eventually, even those with the worst private information . . . may realize that they have little choice but to disclose to avoid the stigma of keeping information secret.").

[17] Applicants can "signal" the strength of their financial backgrounds to prospective employers through various proxies instead of formally disclosing their credit histories. *Id.* at 1162. For example, an applicant could signal the absence of student loan debt (and, therefore, the likely absence of any student loan delinquencies) by disclosing that she received a scholarship that covered all or the vast majority of her educational expenses. *See infra* notes 149–54 and accompanying text.

[18] *See* Peppet, *supra* note 15, at 1176 (stating that as disclosure becomes the norm, "keeping one's personal prospectus private may become suspect").

As an alternative to restricting employers' use of applicants' credit histories, policymakers could pursue a more nuanced approach and attempt to give applicants a greater participatory role in employers' assessment processes. Policymakers could institutionalize and expand a right that some employers already claim to give select applicants: the right to explain to an employer the circumstances that may have contributed to an adverse financial event like a bankruptcy filing or a debt-collection action.[19] I refer to this right as the "Mitigation Opportunity." I consider how the Mitigation Opportunity could be enhanced consistent with similar rights consumers enjoy in analogous settings: in the context of creditors' and insurers' consideration of credit histories.[20]

Expanding the Mitigation Opportunity seemingly provides an individualized approach to an otherwise bureaucratic and impersonal assessment method. It gives some credence to the "situationist" account of human behavior endorsed by behavioral realists—an approach that recognizes that "unseen or unappreciated influences" within individuals and in society heavily influence individuals' actions and circumstances.[21]

I argue, however, that most attempts to improve consumers' participatory role in employers' evaluation processes can only superficially combat financial history discrimination. Because applicants' explanations for adverse financial events are largely subjective and not easily verified, they would likely have little impact on employers' decision-making processes. Likewise, even if employers were *required* to consider applicants' explanations,[22] those applicants who can provide the most convincing explanations to employers are not necessarily more deserving of special treatment. Rather, those individuals are more likely to be financially literate and financially sophisticated. In other words, requiring employers to consider candidates' explanations can have a regressive impact on employers' evaluation processes.[23]

While increasing consumers' participatory role will not benefit applicants, such a reform would likely benefit employers in a pragmatic sense. By taking steps to increase the perceived legitimacy and procedural fairness of using credit histories, employers can opportunistically forestall

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[19] *See infra* Part IV.A.

[20] Creditors use credit scores to quantify the credit risk posed by a prospective or current borrower. *See infra* note 37 and accompanying text. Insurers use insurance scores (which are derived from credit reporting data) to estimate the number or total cost of insurance claims that prospective policyholders are likely to file. *See infra* note 50 and accompanying text.

[21] Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 314 (2008).

[22] Some insurers who use credit data in setting insurance rates must consider whether prospective policyholders' credit histories were influenced by extraordinary life events. *See infra* notes 179–80 and accompanying text.

[23] *See infra* note 181 and accompanying text.

regulation by reducing the likelihood that lawmakers would, in response to public complaints, ban the practice altogether.[24]

Given the limitations of banning employers' consideration of applicants' financial histories and of increasing applicants' participatory role in employers' assessment processes, this Article considers an alternative. It explores the possibility that a third, somewhat counterintuitive approach—encouraging employers to use an empirically derived, statistically sound evaluation method—can more realistically combat discrimination.

Currently, employers use only the raw data in consumer reports to make assessments about applicants. They do not use credit scores.[25] In other words, employers infer from applicants' personal information, payment history, and public record information whether applicants possess certain personality traits important to success in the workplace.[26] Likewise, employers do not commit in advance to the criteria by which applicants' credit reports will be measured. As a result, employers' current assessment methods can yield idiosyncratic and subjective decisions about applicants. Indeed, employers' current evaluation techniques, I argue, are analogous to the "judgmental" underwriting techniques used by creditors before the widespread adoption of credit scores in the 1970s and 1980s.[27] Judgmental underwriting has been known to generate inaccurate, inconsistent, and discriminatory decision making.[28]

Some of the problems caused by employers' current assessment methods could be alleviated if employers instead adopted an empirical approach—one analogous to creditors' use of credit scores and insurers' use of credit-based insurance scores. In other words, just as creditors use credit data to evaluate an applicant's creditworthiness and insurers use credit histories to price insurance policies, employers could use applicants' credit information to measure whether, in fact, financial histories are predictive of personality traits relevant to job performance (including, for example, conscientiousness and responsibility).

An employment scoring model will not eliminate discrimination; indeed, the practice could have a disproportionately adverse impact on

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[24] *See infra* notes 182–84 and accompanying text.

[25] *See infra* notes 54–55 and accompanying text.

[26] *See Background Checking*, *supra* note 2, slide 7 (presenting results of employer poll on credit report use and describing the information that is most likely to affect an employer's decision to not extend a job offer).

[27] *See* 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, at O-4 (2007) [hereinafter FED. RESERVE BD., CREDIT SCORING] ("Before the introduction of credit scoring, the evaluation of creditworthiness was conducted manually and judgmentally by loan officers relying primarily on experience and subjective assessments of credit risk.").

[28] *See, e.g.*, *id.* at 36 (noting that judgmental underwriting "offers opportunities for discriminatory behavior").

racial minorities.[29] In spite of these problems, the practice has several distinct advantages that legislators should consider in assessing the threat of financial history discrimination in the employment setting. First, it would reduce the likelihood of implicit bias and stereotyping that psychological research demonstrates is inherent in employers' current subjective analyses of the raw data in consumer reports. Because employers would be required to commit to those criteria by which they measure an applicant's employment "risk," an empirical approach can increase consistency and reduce the likelihood that employers would deviate—consciously or unconsciously—from the statistically validated results generated by an employment scoring algorithm.

Most importantly, adoption of an employment scoring system can address the most compelling criticism of employers' current evaluation methods: there exists inadequate evidence establishing a correlation between applicants' credit history and traits relevant to job performance. As I discuss in my earlier article on the normative implications of employers' use of credit reports, existing research fails to persuasively establish that financial histories are, in fact, predictive of behaviors important to success in the workplace.[30] A statistical scoring method would help ensure that employers consider only those credit history variables that are correlated at a statistically significant level with observable, discrete traits, like conscientiousness and responsibility.[31]

A statistical approach, at first blush, seems to conflict with the goals of antidiscrimination law, since it promotes, rather than restricts, access to a controversial source of data. Many efforts to reduce the risk of discrimination in the employment setting have attempted to deprive decision-makers of certain types of information.[32] This Article argues, however, that to the extent suppression of information is impracticable, an empirical method may be a more realistic way to advance key anti-discriminatory objectives.

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[29] In other words, because minorities and other protected groups have lower credit scores than non-minorities, an employment scoring model—which would likely incorporate some of the same credit scoring variables—could have a "disparate impact" on racial minorities, a violation of Title VII of the Civil Rights Act of 1964. *See infra* Part V.B.3.

[30] *See* Shepard, *supra* note 9, at 1711–18 (discussing the merits, or lack thereof, of the Fraud Hypothesis and Responsibility Hypothesis).

[31] *See infra* Part V.B.1.

[32] *See, e.g.*, Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 14–16 (2000) (describing how American orchestras have required auditioning musicians to play behind opaque screens to reduce sex discrimination); *Employer Access to Social Media Usernames and Passwords 2013*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords-2013.aspx (last updated Sept. 12, 2013) (reporting that thirty-six states are considering adopting legislation that would prevent employers from requesting passwords to personal Internet accounts).

This Article proceeds in five parts. Part II describes employers' rationales for consulting applicants' credit reports and summarizes the normative complications posed by this practice.[33] Part III discusses the limitations of states' predominant approach to the risk of financial history discrimination: banning employers' consideration of credit histories. Part IV explores the benefits of giving consumers a greater voice in employers' assessment processes. Finally, Part V evaluates the merits of an alternative solution: encouraging employers to adopt a statistical method of evaluating applicants, analogous to creditors' use of credit scores and insurers' use of credit-based insurance scores. While employment screening methods have long been a subject of focus in the academic literature,[34] this Article contributes to the burgeoning scholarship on the effects of "Big Data" on the future of antidiscrimination policy.[35]

This Article acknowledges that an endorsement of an empirical decision-making process rests on completely different normative assumptions from those underlying states' attempts to ban the use of financial history information in the employment setting. Bans on the use of credit reports and other financial history information presume that employers' consultation of credit reports either cannot achieve its predictive objective, or that the merits of the practice are outweighed by important countervailing considerations. The adoption of a statistical

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[33] *See* Shepard, *supra* note 9, at 1722–38 (noting that serious complications include continuing racial inequality, social immobility, and the suppression of wages).

[34] *See, e.g.*, Thomas O. McGarity & Elinor P. Schroeder, *Risk-Oriented Employment Screening*, 59 TEX. L. REV. 999, 1003–04 (1981) (investigating the problems related to employment discrimination that occur when employers adopt "novel risk-oriented hiring screens"); Stewart Schwab, *Is Statistical Discrimination Efficient?*, 76 AM. ECON. REV. 228, 233 (1986) (arguing that statistical discrimination may not be very efficient); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1619 (1991) (discussing whether changes in society's view of race should affect understanding of federal employment discrimination laws); Barbara D. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1409 (1979) (examining "the tangled objections and ambivalent reactions to particular prediction methods, and to the process of" predicting an applicant's future behavior); Nathan J. Ebnet, Note, *It Can Do More than Protect Your Credit Score: Regulating Social Media Pre-Employment Screening with the Fair Credit Reporting Act*, 97 MINN. L. REV. 306, 308–09 (2012) (arguing "that FCRA compliant third-party social media screening appropriately balances the privacy interests of job applicants with the information appetite of employers," and recommending "that all social media screening should be formalized").

[35] *See, e.g.*, SURVEILLANCE AS SOCIAL SORTING: PRIVACY, RISK, AND DIGITAL DISCRIMINATION 26–27 (David Lyon ed., 2003) (describing the potential for harm when individuals' personal information is used to sort them into categories); Jerry Kang et al., *Self-Surveillance Privacy*, 97 IOWA L. REV. 809, 847 (2012) (recommending the creation of a new profession of Privacy Data Guardians who would manage Privacy Data Vaults); Peppet, *supra* note 15, at 1153–56 (listing and then discussing the impact of technology on individuals' lives, including the availability of a service that allows individuals to "digitally divulge pre-verified information" to potential employers); Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667, 1668–70 (2008) (examining the changes in information economics and suggesting that the law should respond to those changes).

evaluation method, in contrast, presumes the precise opposite: credit reports can, in fact, be used to predict counterproductive work behaviors, and the merits of the practice are not overshadowed by political or ethical complications. This Article does not claim to reconcile this tension or to resolve these normative uncertainties.

The dilemma this Article explores is different. This Article argues that legislative efforts to restrict the use of credit reporting information may fail, regardless of whether financial histories are a valid measurement of important personality traits, and regardless of whether countervailing normative considerations justify the suppression of this information. Thus, this Article considers the information-management tensions that legislators must address in the nascent "Big Data" economy. It attempts to elucidate the benefits and drawbacks of a variety of prescriptive solutions to the risk of financial history discrimination, given the acute risk that what may be perceived as the most robust and risk-averse solution cannot in practice provide the antidiscrimination protection that advocates seek. This analysis does not reflect a normative concession, so much as a pragmatic recognition that laws often do not achieve their desired objectives and that policymakers must frequently act in spite of normative ambiguity.

II. THE INCREASE IN "OFF-LABEL" USE OF CREDIT REPORTS BY EMPLOYERS, INSURERS, AND LICENSING ORGANIZATIONS

The most common and traditional use of credit reports has been by creditors, who consult these databases to decide whether applicants are qualified for mortgages, credit cards, and other credit products.[36] Credit reports reduce the information asymmetries between consumers and creditors by allowing creditors to assess an otherwise anonymous consumer's "creditworthiness" and to price credit products accordingly.[37] Creditors' longstanding use of credit reports is an example of the nation's increasing reliance on "Big Data"—an evolution in data aggregation and assimilation that is changing the way economic actors process and respond to information.[38]

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[36] *See* Loretta J. Mester, *What's the Point of Credit Scoring?*, BUS. REV., Sept.–Oct. 1997, at 3, 3–4 (providing background information on what credit scoring is and describing its primary use in helping lenders make better informed decisions).

[37] 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.

[38] *See* Tom C.W. Lin, *The New Investor*, 60 UCLA L. REV. 678, 686 (2013) ("Data aggregation, analysis, retrieval, and transmission by computers on grand scales, collectively and colloquially referred to as Big Data, are changing the way we process information, what we learn from that information, and how we behave based on that information.").

Consumer reports contain abundant information about every American adult's personal and financial background.[39] Reports list an individual's (1) personal information (e.g., address and employment history);[40] (2) payment history (i.e., record of loan repayment);[41] (3) inquiry history (i.e., a list of those who have recently accessed a consumer's report);[42] and (4) public record information (e.g., bankruptcies and foreclosures).[43] Credit reporting agencies—more commonly known as "credit bureaus"[44]—use these raw data to generate an applicant's "credit score"—a quantification of the credit risk posed by a prospective or current borrower.[45]

Over the last several decades, however, credit reports have increasingly been used for many "off-label" purposes.[46] Today, insurers, employers, landlords, and licensing organizations regularly access individuals' credit histories.[47] Unlike creditors, these entities generally use credit data to make inferences not about these individuals' likelihood of repaying particular debts,[48] but about their personal behaviors and propensities.[49] Insurers, for example, use credit histories to generate credit-based insurance scores, which they in turn use as a factor in

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[39] ANTHONY RODRIGUEZ ET AL., NAT'L CONSUMER LAW CTR., FAIR CREDIT REPORTING § 4.1, at 83 (5th ed. 2002) ("The three major agencies will have a file on virtually every adult American . . . .").

[40] 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 (2d ed. 2005).

[41] 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.

[42] "Inquiries" refer to those employers and creditors who have requested a consumer's credit report within the last two years for employment purposes and within the last year for any other purpose. CHI CHI WU & ELIZABETH DE ARMOND, NAT'L CONSUMER LAW CTR., FAIR CREDIT REPORTING § 3.2.3.2, at 75 (7th ed. 2010).

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

[44] The term "consumer reporting agency" is broader than the term "credit bureau." A consumer reporting agency encompasses "credit bureaus" and other entities that do not specialize in reporting consumer credit information to prospective creditors. *Id.* § 1.2.1, at 4. "Consumer reporting agencies" include tenant screening bureaus and employment screening agencies. *Id.*

[45] FED. RESERVE BD., CREDIT SCORING, *supra* note 27, at S-1.

[46] *See* Katie Porter, *More Supreme Court Action on Credit Issues*, CREDIT SLIPS (Sept. 28, 2006) http://www.creditslips.org/creditslips/2006/09/more_supreme_co.html (discussing how insurance companies use credit reports to make underwriting decisions).

[47] *See* Shepard, *supra* note 9, at 1696, 1705–06 (providing examples of non-credit uses of consumer reports).

[48] *E.g.*, FED. TRADE COMM'N, CREDIT-BASED INSURANCE SCORES: IMPACTS ON CONSUMERS OF AUTOMOBILE INSURANCE 2 (2007) [hereinafter FED. TRADE COMM'N, INSURANCE], *available at* http://www.ftc.gov/os/2007/07/P044804FACTA_Report_Credit-Based_Insurance_Scores.pdf (explaining that insurers do not use credit-based insurance scores to predict payment behavior, such as whether premiums will be paid).

[49] Landlords may, however, use credit reports in part to determine if a prospective tenant is financially stable. Trinise L. Castro, *What Do Landlords Look for on a Credit Check?*, SFGATE.COM, http://homeguides.sfgate.com/landlords-look-credit-check-2732.html (last visited Oct. 30, 2013).

estimating the number or total cost of insurance claims that prospective policyholders may file.[50] Likewise, some licensing organizations attempt to infer from credit reports whether prospective licensees are likely to exhibit self-restraint and observe the law. For example, a state bar examiner might attempt to deduce whether an applicant who has significant student loan debt and who is the subject of numerous collection actions is likely to steal a client's property.[51]

It is now standard practice for employers to consult applicants' credit histories in making hiring decisions. Employer surveys indicate that sixty percent of employers used credit reports in 2010, compared to thirty-five percent of employers in 2003, and nineteen percent in 1996.[52] Employers and licensing organizations use applicants' consumer reports for two primary reasons: (1) to predict whether an applicant is likely to steal from customers, co-workers, or clients (which I refer to as the "Fraud Hypothesis"); and (2) to measure an applicant's level of financial responsibility, which employers in turn interpret as an indication of his or her capacity to serve as a responsible employee or licensee (which I refer to as the "Responsibility Hypothesis").[53]

Significantly, employers do not have access to the credit scores generated by credit reporting agencies.[54] Because credit reporting agencies use credit scoring algorithms for specific *credit*-related purposes (to predict, for example, an applicant's likelihood of repaying a thirty-year fixed mortgage), credit reporting agencies refuse to provide employers with credit scores, which are not necessarily reflective of the risks posed by a job applicant.[55] Instead, employers—like licensing organizations—

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[50] FED. TRADE COMM'N, INSURANCE, *supra* note 48, at 2.

[51] *See* Lori E. Shaw, *What Does It Take to Satisfy Character and Fitness Requirements?*, 37 STUDENT L. 12, 14 (2008) (discussing debt as a general issue for bar examiners). One bar examiner articulated this concern as follows:

> 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.

[52] SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CREDIT BACKGROUND CHECKS SHRM POLL 3 (Jan. 22, 2010), http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundChecking.aspx.

[53] *See* Shepard, *supra* note 9, at 1711–18 (defining the two hypotheses and describing their use by employers).

[54] *See* Leslie Callaway & Mark Kruhm, *Servicemember Disclosure a Must on All Mortgages*, 102 AM. BANKERS ASS'N BANKING J. 64, 64 (2010) ("Equifax, Experian, and TransUnion all decline to provide credit scores to employers for employment screening.").

[55] *See id.* (explaining that consumer reporting agencies refuse to provide credit reports to employers because employers lack a "legitimate business need" for accessing this information). As I have previously argued, however, both credit scores as well as raw credit history data may be insufficiently predictive of personality traits that are relevant to workplace performance. *See* Shepard,

attempt to infer from the raw data on credit reports whether a given applicant reflects a good employment "risk." For example, an employer might presume that a candidate's spotty repayment history and her recent bankruptcy filing predispose her to fraud, absenteeism, or distractedness.

Employers' increased interest in consumer reports as a vetting tool has been fueled by several factors. In competitive job markets, when large numbers of applicants vie for limited positions, employers seek additional ways to sort through applications efficiently.[56] Employers can cull large numbers of applicants based on the presence of a bankruptcy, a collection action, or evidence of excessive debt on a consumer report.[57]

Likewise, employers' use of consumer reports has been fueled by prospective and former employers' fear of tort liability. Prospective employers are concerned that if they fail to carefully consider applicants' backgrounds, then they will expose themselves to negligent hiring lawsuits.[58] Employers are frequently admonished that failure to conduct a thorough background check on a prospective employee—including a credit report check—can have serious legal and financial ramifications.[59] Those who defend employers' use of credit reports claim, for example, that one-third of all corporate bankruptcies are a direct result of employee theft—a problem that could be averted through a proper background review.[60]

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supra note 9, at 1707 n.65 (explaining that credit bureaus do not share scores because they are "designed specifically for lending and not for other purposes").

[56] *See* Desmond, *supra* note 9, at 907–08 (stating that the recent recession has created a job market favoring employers and that employers are using credit checks as part of a "pre-employment screening" process); *Why Filing Bankruptcy Might Be the Worst Thing You Could Do for Your Career*, *supra* note 6 (explaining that employers' use of credit reports "helps companies weed through huge application pools with relative quickness").

[57] Employers claim not to use credit reports to pre-screen job applicants. *See* Christine V. Walters, Soc'y for Human Res. Mgmt., Statement at the U.S. Equal Employment Opportunity Commission Meeting: Employer Use of Credit History as a Screening Tool (Oct. 20, 2010), *available at* http://www.eeoc.gov/eeoc/meetings/10-20-10/walter.cfm (citing a survey in which a majority of employers reported that they used credit checks selectively at the end of the hiring process—not to screen early-stage applicants). One recruiter, however, recalls the experience differently. *See* Trevor Hughes, *Shaky Credit Reports Could Hurt Job Applicants; Seven State Legislatures Act to Limit Hiring Requirement*, USA TODAY, Mar. 6, 2012, at 2B (reporting that companies' hiring managers would request that the recruiter exclude from consideration those applicants who had recently filed for bankruptcy).

[58] Shepard, *supra* note 9, at 1720–21.

[59] *See* Tom Ahearn, *Avoiding Negligent Hiring with Background Checks Explained in Interactive Webinar on February 6*, EMP. SCREENING RES. (Jan. 28, 2013), http://www.esrcheck.com/wordpress/2013/01/28/avoiding-negligent-hiring-with-background-checks-explained-in-interactive-webinar-on-february-6/ ("Even after the most diligent candidate selection process, hiring someone without conducting a thorough background check can lead to major legal and financial ramifications for a company. If new hires are dishonest about education, employment or criminal history, employers could face the burden of having unqualified workers or even violent employees in their offices." (quoting Lester S. Rosen, Founder and CEO of Employment Screening Resources) (internal quotation marks omitted)).

[60] *"Job Killer" Bill Banning Credit Report Use for Employment Passes Senate Fiscal Committee*,

Former employers' concerns about tort exposure may also indirectly place pressure on prospective employers to consult applicants' credit reports. Prospective employers frequently seek background information about a job applicant by contacting the applicant's references—a seemingly high quality source of information about an applicant's performance in previous positions. Because, however, former employers are fearful of defamation suits, they are frequently reluctant to make candid evaluations of previous employees.[61] Instead, many previous employers provide only cursory and superficial assessments.[62] Thus, because prospective employers may be unable to acquire more relevant information from applicants' references, they feel forced to resort to less accurate, but more easily accessible, information.[63] Employers, for example, may more readily consult consumer reports, Facebook profiles, and other websites revealed in Google searches.[64] This development is consistent with screening theory, which posits that if a "desired characteristic is unobservable, an uninformed party will filter counterparties based on what observable characteristics or information *is* available."[65]

Finally, as I discuss below, credit reports have grown more appealing to employers as a result of developments in consumer protection laws and advances in information technology.[66] Both have increased consumers' access to and control over the information in their reports, thereby increasing credit reports' real or perceived accuracy.[67] Although consumer

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CALCHAMBER (Aug. 17, 2011), http://www.calchamber.com/headlines/pages/08172011-jobkillerbillbanningcreditreportuseforemploymentpassessenatefiscalcommittee.aspx ("The U.S. Chamber of Commerce estimates that a third of all corporate bankruptcies are a direct result of employee theft. Accordingly, all employers need the ability to obtain and review the objective information provided in an employee credit report . . . .").

[61] *See, e.g.*, Natalie A. Simon, *Long-Term Care at Home: Employing Caregivers*, *in* 1 ESTATE PLANNING FOR THE AGING OR INCAPACITATED CLIENT IN MASSACHUSETTS 10-1, 10-3 (Donald N. Freedman & Emily S. Starr eds., 2012) (explaining that prospective employers cannot trust most references, since former employers—fearful of defamation or breach of privacy suits—are likely to provide only a perfunctory assessment and may even conceal negative information about the former employee).

[62] *Id.*

[63] *See id.* (explaining that, absent reliable references, prospective employers must resort to publicly available information about the job applicant, credit checks, and other sources).

[64] *See Thirty-Seven Percent of Companies Use Social Networks to Research Potential Job Candidates, According to New CareerBuilder Survey*, PR NEWSWIRE (Apr. 18, 2012), http://www.prnewswire.com/news-releases/thirty-seven-percent-of-companies-use-social-networks-to-research-potential-job-candidates-according-to-new-careerbuilder-survey-147885445.html ("Employers [who reported using social networking screening] are primarily using Facebook (65 percent) and LinkedIn (63 percent) to research candidates; 16 percent use Twitter.").

[65] Peppet, *supra* note 15, at 1161.

[66] *See infra* notes 123–29 and accompanying text.

[67] *See* 15 U.S.C. § 1681(b) (2012) ("It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit

reporting agencies continue to report a significant amount of erroneous information,[68] consumers' increased access to their credit reports—coupled with laws that allow consumers to correct errors and omissions—have substantially shifted the onus of information-verification to consumers.[69] As a result of consumers' participation in this vetting process, employers may feel more comfortable relying on credit histories as evaluative tools.

In my earlier article, I examine the normative considerations underlying employers' use of credit reports. I briefly summarize these political, ethical, and economic arguments below. Although this Article's emphasis is on the information-management implications of various policy proposals, the utility of these prescriptions can be measured, at least in part, by how well they negotiate these competing considerations. I discuss three important normative issues here: (1) the promotion of debt repayment; (2) the empirical validity of employers' use of financial histories; and (3) the effect of the practice on racial equality and social mobility.

First, it is possible that employers' consideration of financial histories serves a useful deterrent function. Debt default—especially bankruptcy—is perceived by many as an evasion of one's financial obligations, the costs of which are externalized in the form of increased interest rates and a decreased availability of credit.[70] For this reason, many employers who use credit reports as a vetting tool may choose not to hire applicants who have filed for bankruptcy or defaulted on a certain type of financial obligation. In this way, employers' use of credit reports operates as a deterrent to debt default—one that supplements existing legal penalties.[71]

It is possible that employers' use of financial histories, by penalizing candidates who have failed to repay their debts, serves a salutary economic function by encouraging debtors to reconcile with their creditors.[72] Alternatively, however, employers' and licensing organizations' consideration of financial histories may create incentives for applicants to

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. . . in a manner which is fair and equitable to the consumer, with regard to the . . . accuracy . . . of such information in accordance with the requirements of this subchapter.").

[68] *See, e.g.*, FED. TRADE COMM'N, REPORT TO CONGRESS UNDER SECTION 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003, at i (2012) [hereinafter FED. TRADE COMM'N, FACTA], *available at* http://www.ftc.gov/os/2013/02/130211factareport.pdf (reporting that twenty-six percent of consumers in a study found one or more "potentially material error[s]" on at least one of their credit reports).

[69] *See infra* note 136 and accompanying text.

[70] *See* Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. 129, 171 (2005) ("Voluntary creditors presumably pass most, if not all, of [the initial burden of bankruptcy relief] along to current or future debtors in the form of higher interest rates. To the extent that they do, the effect of bankruptcy protection is to increase the cost of credit to individuals and/or reduce its availability in the economy in general.").

[71] Shepard, *supra* note 9, at 1723.

[72] *Id.* at 1727.

reduce their productivity levels, which can trigger costs borne by taxpayers, dependents, and others.[73]

Second, many who question the wisdom and ethics of employers' use of credit reports contend that the practice lacks empirical support.[74] In other words, it is unclear whether or to what extent credit reports are, in fact, predictive of personality traits relevant to job performance. I have previously argued that there is little to no evidence to support the Fraud Hypothesis and only limited evidence to support the Responsibility Hypothesis.[75] For instance, many of the studies that have been used to justify the Fraud Hypothesis employ flawed methodologies. These studies report that individuals who have committed financial crimes have experienced financial stress.[76] Because, however, it is unclear what percentage of *all* employees experiencing financial stress refrain from committing theft or fraud, these studies do not establish a general correlation between financial stress and propensity to commit financial crimes.[77] In other words, researchers lack a representative sample of employees or job applicants.

While additional studies attempt to assess the relationship between financial history and counterproductive work behaviors, none persuasively demonstrate a correlation between the two variables.[78] For example, in attempting to measure the correlation between certain negative work habits and adverse financial histories, many studies have relied on self-reported data,[79] which may or may not be reflective of an applicant's credit history as interpreted by an employer.[80] Studies that rely on applicants' credit scores are likewise problematic, since employers do not use credit scores in

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[73] *Id.* at 1727–28.

[74] *See, e.g.*, Jeremy B. Bernerth et al., *An Empirical Investigation of Dispositional Antecedents and Performance-Related Outcomes of Credit Scores*, 97 J. APPLIED PSYCHOL. 469, 469 (2012) ("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. Such a lack of evidence presents a problem for organizations using credit scores to screen employees . . . .").

[75] *See* Shepard, *supra* note 9, at 1711–18 (discussing the evidence supporting the two hypotheses).

[76] ASS'N OF CERTIFIED FRAUD EXAM., REPORT TO THE NATIONS ON OCCUPATIONAL FRAUD AND ABUSE 5 (2010), *available at* http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/rttn-2010.pdf (reporting that in forty-three percent of occupational fraud cases studied, perpetrators were "living beyond their means," and in thirty-six percent of these cases, perpetrators were experiencing financial difficulties).

[77] Shepard, *supra* note 9, at 1713.

[78] *Id.*

[79] *See, e.g.*, Edward S. Oppler et al., *The Relationship Between Financial History and Counterproductive Work Behavior*, 16 INT'L J. SELECTION & ASSESSMENT 417 (2008) (relying on a questionnaire in which job applicants self-report certain adverse financial events).

[80] *See* Shepard, supra note 9, at 1716 ("[Employers] have access only to specific lists of financial events . . . . As a result, employers might process these raw data very differently (and far less consistently) than do consumer reporting agencies' algorithms.").

their evaluation processes.[81] As a result, these studies' outcomes are not necessarily applicable to real-world uses of credit reports by employers.

Even if employers' use of credit reports lacks empirical support, however, some might question why, in effect, employers should bear the onus of establishing the practice's predictive validity. Under this view, applicants—and not employers—should bear the burden of proving that credit reports do not predict one's likelihood of serving as a responsible employee or engaging in fraud or theft. Absent evidence negating the practice's validity, and absent successful Title VII challenges, employers arguably should have the right to consider all facially relevant information.

Third, many contend that, even if credit reports can validly and reliably predict a prospective employee's merits, the benefits of employers' use of credit reports are outweighed by important countervailing considerations. Specifically, the use of credit reports in the employment setting may have a deleterious impact on racial and economic equality.[82]

Although the practice is facially neutral and appears to affect all applicants even-handedly, employers' use of credit reports likely has a disparate impact on racial minorities.[83] Because there is a strong correlation between race and credit score,[84] the practice may perpetuate discrimination by reinforcing racial disparities in the allocation of jobs—resources that are indispensable to an individual's identity, personal dignity, and financial independence.[85]

Relatedly, many have expressed concern that the use of credit histories can adversely affect social mobility.[86] Because income and credit history are positively correlated, employers who scrutinize applicants' financial backgrounds may be unwittingly impairing poorer individuals' ability to ascend to positions of higher status and wealth.[87] Similarly, because applicants with adverse financial histories suffer a competitive disadvantage in the hiring process, the practice may place downward pressure on poorer applicants' wages, thereby perpetuating income disparities.[88] The practice may also present a more symbolic challenge to social mobility by signaling to consumers that their financial decisions

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[81] *Id.*

[82] *See id.* at 1729–33 (discussing the disparities between the credit scores of minorities and non-minorities and the impact on minorities when employers make hiring decisions based in part on the financial histories of applicants).

[83] *Id.* at 1730.

[84] *Id.* at 1730–31.

[85] *See id.* at 1700 (noting that philosopher Anthony Appiah described the pursuit of a career as "a resource that [is] . . . 'essential to a dignified autonomous life'" (quoting K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, 88 CALIF. L. REV. 41, 46 (2000))).

[86] *See id.* at 1734–38 ("[E]mployers' and licensing organizations' use of financial histories [prompts concerns] that the practice poses an affront to social mobility.").

[87] *Id.* at 1734–35.

[88] *Id.* at 1735–36.

have serious collateral ramifications—ones that extend far beyond the realm of access to and cost of credit.[89] Employers' use of credit reports teaches consumers that late payments or debt-collection actions can result in far more than a mere increase in a consumer's interest rate or the imposition of various fees. Significantly, these adverse financial events can complicate a consumer's pursuit of a job or a profession.[90]

In the next Part, I examine how legislators have overwhelmingly responded to these normative and empirical uncertainties: by attempting to ban employers' use of credit reports in the evaluation process. While this approach may appear especially politically palatable in the aftermath of the Great Recession, and while it seemingly reflects the most risk-averse solution, I argue that suppression of information may be infeasible in a society and era in which data aggregation and dissemination pose unprecedented challenges to consumer privacy and to antidiscrimination policy.

III. STATES' PREVAILING RESPONSE TO THE RISK OF FINANCIAL HISTORY DISCRIMINATION: INQUIRY LIMITS

Legislators' primary response to the risk of financial history discrimination has been to restrict employers' inquiry into and use of applicants' credit history.[91] Currently, eight states—California, Connecticut, Hawaii, Illinois, Maryland, Oregon, Vermont, and Washington—and several major cities have passed laws restricting employers' use of consumer reports.[92] Other states are considering similar legislation.[93]

Conceptually, inquiry limits may provide the most politically palatable and logical response to many normative concerns about employers' use of financial histories in the hiring process. Because of the empirical uncertainty about credit reports' ability to validly predict either

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[89] *See id.* at 1736–38 ("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.").

[90] *See id.* at 1759 (noting that a stronger antidiscrimination rule "can reduce those barriers that may inevitably complicate the search for a new job or career").

[91] *See id.* at 1697–98 ("Legislators and policymakers have questioned the logic and ethics of employers' and licensing organizations' two primary uses of financial histories . . . . 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.").

[92] *See supra* note 14 and accompanying text. Bans are also either in effect or are being considered in Chicago, Illinois; Hartford, Connecticut; New York, New York; and Washington, D.C. CHI., ILL. MUN. CODE § 2-160-053 (2012); HARTFORD, CONN. MUN. CODE § 2-346 (2013); N.Y. CITY COUNCIL INT. NO. 0857-2012 (as laid over by the Comm. on Civ. Rights, Apr. 11, 2013); WASH. D.C., H.R. 645 (as presented to the House Fin. Servs. Comm. on Feb. 13, 2013).

[93] *See supra* note 14 and accompanying text.

counterproductive work behaviors or applicants' propensity to commit fraud or theft,[94] suspension of the practice may be warranted. Although this policy response is blunt, it reflects the public's and policymakers' significant ambivalence about the merits of the practice.

In the long term, however, inquiry limits may be a suboptimal response to the risk that employers will unfairly discriminate against applicants with adverse financial histories. First, in their current form, state laws are narrowly drafted and, as a result, make few changes to the status quo. Thus, they advance few anti-discriminatory objectives. Even if, however, state laws were drafted more broadly and were vigorously enforced, inquiry limits cannot stem the flow of financial history information to employers. As a result, inquiry limits cannot provide a sustained solution to the threat of financial history discrimination in the employment setting.

A. *Current Laws Advance Few Antidiscriminatory Objectives*

A number of state laws restricting employers' consideration of financial history follow a similar template. The laws prohibit employers from using credit reports to evaluate prospective employees[95] unless one of several exceptions applies. Employers may consult credit reports when, for example, the employer is seeking to fill a position involving: (1) managerial responsibility;[96] (2) state government employment;[97] (3) law enforcement;[98] (4) access to third parties' personal or financial information (e.g., social security numbers or credit card account information);[99] (5) the exercise of fiduciary responsibility (e.g., the power to issue payments, collect debts, transfer money, or enter into contracts);[100] (6) access to confidential or proprietary information, including trade secrets;[101] or (7) access to cash.[102]

In their current form, these laws do not substantially change the status quo or advance many normative goals articulated by legislators. First, the

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[94] *See supra* notes 74–81 and accompanying text.

[95] These state laws also generally prohibit employers from using credit reports to evaluate current employees for promotion or retention. *See, e.g.*, VT. STAT. ANN. tit. 21, § 495i(b)(1) (2012) ("An employer shall not: (1) Fail or refuse to hire or recruit; discharge; or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment because of the individual's credit report or credit history."). The focus of this Article, however, is on employers' use of credit reports to evaluate those seeking to obtain a new job or enter a particular profession.

[96] *See, e.g.*, 820 ILL. COMP. STAT. ANN. 70/10(b)(4) (West Supp. 2013).

[97] *See, e.g.*, CAL. LAB. CODE § 1024.5(a)(2) (West Supp. 2013).

[98] *See, e.g.*, OR. REV. STAT. § 659A.320(2)(c)(A)–(C) (2011).

[99] *See, e.g.*, CONN. GEN. STAT. § 31-51tt(a)(4)(B) (2013).

[100] *See, e.g.*, MD. CODE ANN., LAB. & EMPL. § 3-711(c)(2)(iii) (LexisNexis Supp. 2012).

[101] *See, e.g.*, CAL. LAB. CODE § 1024.5(a)(7) (West Supp. 2013).

[102] *See, e.g.*, 820 ILL. COMP. STAT. ANN. 70/10(b)(2) (West Supp. 2013) (permitting employers to check a candidate's credit history when the candidate would have access to more than $2,500 in cash).

carveouts in the state statutes can be interpreted to encompass a large percentage of jobs.[103] In this way, state laws that restrict an employers' use of consumer reports merely codify existing Title VII disparate impact jurisprudence.[104] The bans prevent employers from using credit reports—a practice that many have argued results in a disparate impact on protected groups[105]—unless employers can establish that the practice is consistent with business necessity. Just as courts have broadly interpreted "business necessity" in plaintiffs' Title VII challenges to employers' consultation of financial histories,[106] state legislators have exempted broad categories of jobs from the credit reporting restriction.

Second, in addition to the exemptions already in place, all of the state laws (rather hypocritically) authorize employers to consider applicants' credit reports when existing federal or state laws so require.[107] As a result, restrictions on credit report use can be easily circumvented.

Finally, these laws may be unable to effectively restrict employers' access to financial history information, since the majority of these bans attempt to suppress employers' access to *credit reports* specifically, rather than impose a general ban on employers' access to all sources of financial history information.[108] Although credit reports are usually the primary source from which employers learn about applicants' financial histories, employers may learn about applicants' financial background through other means. For example, information about bankruptcies, mortgage liens, foreclosures, and tax liens appears in the public records.[109] This adverse

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[103] *See* Shepard, *supra* note 9, at 1714 (citing the broad interpretation of exempt categories in state statutes).

[104] *See id.* at 1766 (discussing state laws' function of "entrench[ing] prevailing stereotypes" and the legitimization of employer's rights to access financial histories).

[105] *See, e.g.*, TRAUB, *supra* note 10, at Executive Summary (arguing that people of color are more likely than others to report poor credit).

[106] *See, e.g.*, Equal Emp't Opportunity Comm'n v. United Va. Bank, No. 75-166-N, 1977 U.S. Dist. LEXIS 13687, at *39 (E.D. Va. Oct. 7, 1977) (holding that a bank appropriately conducted preemployment credit checks, since "the banking business is a fiduciary business . . . where there is a good deal of cash openly handled"), *aff'd*, 615 F.2d 147 (4th Cir. 1980); Bailey v. DeBard, No. IP 74–458–C, 1975 WL 227, at *17 (S.D. Ind. July 31, 1975) (holding that a state police department was justified in using character investigations and credit checks to screen prospective police officers, since a poor financial history might render police officers more vulnerable to the "criminal element").

[107] *See, e.g.*, HAW. REV. STAT. ANN. § 378-2(a)(2) (LexisNexis 2011) (prohibiting employers from discriminating against an individual who has opposed a forbidden practice in which the employer has engaged); 21 VT. STAT. ANN. tit. 21, § 495i(c)(1)(A) (Supp. 2012) (exempting employers from prohibitions on credit history reports if federal or state law requires the reports).

[108] For example, California's law prohibits employers or prospective employers from consulting applicants' "consumer credit report" for employment purposes. CAL. LAB. CODE § 1024.5(a) (West Supp. 2013). It defines "[c]onsumer credit report" as a communication by a consumer credit reporting agency of credit worthiness. *Id.* § 1024.5(c)(1).

[109] *See* WU & DE ARMOND, *supra* note 42, § 3.2.3.2, at 75 (discussing the location of the public record information in consumer files); *see also* 11 U.S.C. § 107(a) (2012) (indicating that documents filed in a bankruptcy case are public records). A court can seal bankruptcy documents containing trade

information may also be revealed in local newspapers[110] or via Google searches, since some third-party websites include references to the public records.[111] Even search engines' "autocomplete" functions may suggest—correctly or incorrectly—that an applicant has filed for bankruptcy.[112] An employer might also learn about a job applicant's bankruptcy or past-due debts from the existence of a debtor-creditor relationship between the employer and the applicant.[113] In short, financial history information—like other forms of personal information—has the capacity to infiltrate these porous, legislatively-erected barriers.

These defects are a product of political compromises and narrow drafting, but they may be correctible. For example, the laws could be amended to encompass a larger array of positions and sources of financial history information. In addition, legislators could increase these laws' deterrent effect by providing applicants with a private right of action, although it would be difficult for applicants to detect and prove violations. Even if these laws were increased in breadth, however, the unraveling problem, as I discuss below, poses a more serious challenge to states' enforcement of financial history information bans.

B. *A More Intractable Problem: The Risk of Game Theoretic Unraveling*

Even if state bans were drafted more broadly to encompass a larger percentage of jobs and more sources of financial history information, attempts to restrict employers' use of consumer reports face a more intractable problem. Because the bans cannot prevent individuals from voluntarily revealing their own financial history information, the bans may trigger an "unraveling" of privacy.

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secrets, defamatory information, or confidential information. *Id.* § 107(b)(1)–(2). Courts have only sealed records in cases in which "'the interest in secrecy outweighs the presumption' in favor of access." *In re* Cont'l Airlines v. Cont'l Airlines, Inc., 150 B.R. 334, 340 (Bankr. D. Del. 1993) (quoting *In re* Revco D.S., Inc., 1990 WL 269887, at *2 (Bankr. N.D. Ohio Dec. 31, 1990)).

[110] *If I File Bankruptcy, Will My Name Be in the Newspaper?*, BRETT NASON: ATT'Y AT L., http://nasonlawfirm.com/archives/618 (last visited Sept. 27, 2013) (explaining that local newspapers could print the names of consumer bankruptcy filers).

[111] *See, e.g.*, Ryan C. Wood, *If I File Bankruptcy Will Everyone Find Out?*, BAY AREA BANKR. BUZZ, http://www.westcoastbk.com/blog/2012/02/if-i-file-bankruptcy-will-everyone-find-out/org (last visited Sept. 27, 2013) (describing how Section 341 meetings of creditors may be disclosed by search engines); DIRTSEARCH.ORG, http://www.dirtsearch.org (last visited Oct. 28, 2013) (offering "One Stop Free Public Records & Background Checking").

[112] Asher Moses, *Australian Surgeon Sues Google over "Bankrupt" Auto-Complete*, SYDNEY MORNING HERALD (Jan. 22, 2013), http://www.smh.com.au/technology/technology-news/australian-surgeon-sues-google-over-bankrupt-autocomplete-20130122-2d480.html.

[113] *See* Shepard, *supra* note 9, at 1720 n.143 (citing *In re Majewski*, 310 F.3d 653 (9th Cir. 2002) as an example of a hospital employee who was fired after he defaulted on his debts owed to the hospital). Although *In re Majewski* addressed the firing of an existing employee rather than a refusal to hire a new employee, an adverse financial history can conceivably reduce one's appeal to employers at any stage of the employment relationship.

As Douglas Baird and Scott Peppet have argued, in situations where asymmetric information exists between two parties, an individual who holds favorable verifiable information has an incentive to reveal that information to the uninformed party.[114] In the employment setting, those with the strongest financial histories—those that reflect no adverse events like bankruptcy filings or debt-collection actions—will likely reveal their financial history information to employers in order to gain a competitive advantage.[115] Because many employers regard financial history problems as a reflection of irresponsibility or propensity to commit theft, an applicant who discloses her strong financial history is more likely (particularly in a lean job market) to secure a position and to command a higher salary.[116]

If self-interested actors disclose their financial history information for personal or economic gain, other applicants—including those with less favorable financial histories—will in turn be compelled to make similar disclosures, since those who fail to disclose will be penalized.[117] If an applicant fails to reveal her credit score or credit history, an employer will infer that the applicant is withholding negative information.[118] Faced with the choice between disclosure and the stigma associated with failure to disclose, an applicant will likely choose to reveal her financial history. This chain of events is what scholars have referred to as "unraveling."[119]

Evidence of unraveling is longstanding in the credit reporting context. For decades, credit reporting agencies have collected and sorted individuals' personal financial information and made it easily accessible to employers, insurers, and creditors. Employers, however, are subject to an important inquiry restriction: they must secure applicants' permission to access consumer reports.[120] Notwithstanding this limitation, job candidates readily grant employers permission to view candidates' reports,[121] as

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[114] *See* BAIRD ET AL., *supra* note 15, at 91 ("Because the person who holds favorable verifiable information has an incentive to reveal it, the allocation of the right or duty to inquire or disclose should not affect whether verifiable information is revealed.").

[115] *See* Peppet, *supra* note 15, at 1177 ("Simple self-interest will drive self-disclosure by those with favorable private information.").

[116] *See* Glenn Curtis, *Why Bad Credit Is Bad for Financial Careers*, INVESTOPEDIA (May 27, 2012), http://www.investopedia.com/articles/financialcareers/07/broker_credit.asp (discussing four reasons why poor credit history may negatively impact a job applicant).

[117] *See* Peppet, *supra* note 15, at 1177 ("As signaling becomes more pervasive . . . disclosure may become the norm across the economy. Keeping one's personal prospectus private may become suspect.").

[118] *See id.* at 1176–77 (discussing why someone with an adverse financial history may feel compelled to disclose this information).

[119] *See, e.g.*, BAIRD ET AL., *supra* note 15, at 91 (discussing the principle of unraveling).

[120] 15 U.S.C. § 1681b(b)(2)(A)(ii) (2012).

[121] *See* Desmond, *supra* note 9, at 909 ("[J]ob seekers and employees have little real choice about whether or not to allow employers to obtain credit reports.").

failure to disclose this information may foreclose or complicate applicants' pursuit of business and employment opportunities.[122]

I argue that as a result of two developments, the potential for unraveling in the employment setting is growing more acute. First, consumer-protection laws have gradually provided individuals with increased access to the information in their credit reports, a shift that has rendered financial history information more transferrable. Second, credit reporting information has grown more accurate. I discuss each development in turn.

In 1970, in response to concerns that creditors, insurers, and employers were using credit reporting information to make consequential, ex parte decisions about consumers, Congress passed the Fair Credit Reporting Act (FCRA).[123] The FCRA provided consumers with a window into a previously secretive, enigmatic credit reporting industry.[124] As a result of requirements imposed on credit reporting agencies, the contents of credit reports—previously inaccessible to consumers—have become increasingly transparent. For example, under the FCRA, consumers may request a copy of their credit reports at any time and for any reason.[125] In addition, consumers who have suffered an adverse action (e.g., a denial of credit) by an employer, insurer, or creditor are entitled to a free copy of their report.[126]

In 2003, Congress expanded consumers' right of access to their credit reporting information. The FACTA amendments to the FCRA gave consumers the right to request a free annual copy of their consumer report from each of the three nationwide credit reporting agencies.[127] Consumers now can easily scrutinize their credit reports free of charge at annualcreditreport.com, a website established by the Federal Trade Commission.[128] In the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress further increased the transparency of

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[122] Shepard, *supra* note 9, at 1748 ("An applicant who refuses to submit to a financial history screening likely effectively removes him or herself from consideration for the position . . . . 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."); Gallagher, *supra* note 9, at 1595 (arguing that requiring applicants to authorize a credit report check is "virtually meaningless," since employers can refuse to hire those who fail to consent).

[123] Pub. L. No. 91-508, tit. VI, 84 Stat. 1127 (1970) (codified as amended at 15 U.S.C. §§ 1681–1681x); *see* Shepard, *supra* note 9, at 1744–46 (discussing Congress's reasons for passing the FCRA).

[124] *See* Shepard, *supra* note 9, at 1744–48 (discussing how the FCRA makes the credit reporting process more transparent).

[125] 15 U.S.C. § 1681g(a)(1).

[126] *Id.* § 1681j(b).

[127] *Id.* § 1681j(a)(1)(A).

[128] *See* WU & DE ARMOND, *supra* note 42, § 3.4.2.1, at 88 (outlining the process by which a person can obtain his credit report).

creditors' decision-making processes and mandated that adverse action notices include credit scores.[129]

Successfully suppressing unraveling in the employment context would be challenging because these consumer protection laws have fostered consumers' access to their financial history information. Even if employers were barred from viewing or using individuals' credit histories, consumers would still be expected to vet the contents of their reports for *credit* purposes (for example, before applying for a mortgage). It would be challenging to compartmentalize consumers' access to their credit reporting information, such that consumers are encouraged to access these data in one context (credit) but discouraged from using this information in another (employment).

Similarly, as long as legislators authorize the use of credit reports for some positions but not others,[130] attempts to restrict unraveling might be ineffective, since applicants often apply for (or are considered for) more than one position. An applicant could furnish his or her credit report for one position, but, based in whole or in part on the strength of that report, ultimately be hired for a position for which an employer is barred from considering financial histories.

As Scott Peppet has noted, it is ironic that traditional initiatives to increase individuals' privacy—ones that have sought to provide individuals with increased control over their personal information—are in fact contributing to an *erosion* of individual privacy through the unraveling process.[131] By providing consumers with the "key" to their consumer reports, consumer-protection laws have increased the likelihood that consumers will very rationally share that key with employers, either to (1) capitalize on positive credit histories, or (2) avoid the risk that employers will penalize applicants for failing to disclose this information.[132]

A second change is increasing the likelihood that, notwithstanding a ban on employers' use of credit reports, consumers will disclose their financial history information to employers. Credit reporting information has grown not only more accessible (and therefore more transferable), but also more accurate.[133]

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[129] 15 U.S.C. § 1681m(a)(2)(A), *amended by* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1100F, 124 Stat. 1376, 2112 (2010).

[130] *See supra* notes 96–103 and accompanying text.

[131] *See* Peppet, *supra* note 15, at 1158 ("[I]f individuals have control over their personal information, that control is itself the undoing of their privacy." (emphasis omitted)).

[132] *See, e.g.*, *id.* at 1158–59 (stating that individuals can be asked to "unlock the door to their personal information," and those who do not will "face new forms of economic discrimination").

[133] *See* Michael E. Staten & Fred H. Cate, Does the Fair Credit Reporting Act Promote Accurate Credit Reporting? 3 (JOINT CTR. FOR HOUSING STUDIES, HARV. U., 3 BABC 04-14, 2004), *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/babc_04-14.pdf (concluding that it would

Disclosure of personal information is only valuable to an uninformed party to the extent that the information is verifiable.[134] Thus, unraveling is more likely to occur in situations in which employers can readily verify the information that applicants disclose. Although consumer reporting agencies like Equifax, Experian, and TransUnion continue to report a large amount of inaccurate information,[135] consumer reports' overall legitimacy is increasing, since consumers are now expected to play a greater role in verifying the accuracy and completeness of the information in their consumer reports.[136] The same legal developments that have increased consumers' access to their consumer reports are, in effect, placing pressure on consumers to regularly scrutinize their reports for errors and omissions. Indeed, the task of verifying the accuracy and completeness of one's credit report is evolving into a routine component of a responsible adult's financial hygiene rituals, much like shredding one's sensitive financial documents, balancing one's checkbook, or reviewing one's monthly credit card statement for errors.

A recent Federal Trade Commission study concluded that a significant percentage of consumers identified errors on at least one of their three credit reports.[137] A portion of this group suffered a credit score decrease that could affect the price of products like automobile loans and automobile insurance.[138] The subtitle of the FTC press release, however, contained an important reminder and admonition: "Consumers Should Check Their Credit Reports for Free Using AnnualCreditReport.com."[139]

These two developments in credit reporting—increased accessibility and increased legitimacy—are reflected in advances in information

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"seem[] highly improbable" that Americans would be able to obtain "1) widespread access to credit across the age and income spectrum, 2) relatively low interest rates on secured loans . . . , 3) exceptionally broad access to open-end, unsecured credit card products, and 4) relatively low default rates across all types of loans" if "the underlying credit reporting system was fraught with serious errors").

[134] *See* Peppet, *supra* note 15, at 1162 (explaining the costs borne by an economic actor seeking to verify information).

[135] *See* FED. TRADE COMM'N, FACTA, *supra* note 68, at i ("[W]e find that 26% of the 1,001 participants in the study [of credit report accuracy] identified at least one potentially material error on at least one of their three credit reports.").

[136] *See* Zaki, *supra* note 3 (encouraging young job candidates to maximize their job prospects by accessing their credit reports and improving their credit profiles). The author observes that "[o]nce upon a time (when our parents were young), consumers didn't have such easy access to information about their own credit scores. What's our excuse, now?" *Id.*

[137] FED. TRADE COMM'N, FACTA, *supra* note 68, at i.

[138] *Id.* at v.

[139] *In FTC Study, Five Percent of Consumers Had Errors on Their Credit Reports that Could Result in Less Favorable Terms for Loans*, FED. TRADE COMM'N (Feb. 11, 2013), http://www.ftc.gov/opa/2013/02/creditreport.shtm.

technology.[140] In recent years, consumers have increasingly begun to voluntarily share personal information—including financial history information—through new business models and social media devices. For example, Experian Connect, a credit reporting agency service, encourages consumers to "[g]rant access [to consumer reports] to the people [they] trust—like [their] landlord, [employer,] doctor, lawyer or financial adviser."[141] Likewise, job applicants can voluntarily disclose verified personal information to prospective employers using services like MyBackgroundCheck.com.[142] In competitive job markets, some applicants have considered listing their favorable credit scores on their resumes.[143] In light of these trends, it is possible that candidates may eventually share their credit scores on Facebook or LinkedIn profiles. Indeed, one company, Credit Sesame, encourages creditworthy individuals to embed a financial responsibility "badge" in their email signatures, on social media websites, and on personal websites and profiles.[144] Applicants could also disclose to employers information that they have collected themselves via Mint.com, Quicken, smartphone applications, or other financial management tools.[145]

Thus, from the 1970s to the present, as a result of technological and legal developments, credit reports have evolved from depersonalized, error-ridden dossiers to more accessible, verifiable, and transferable

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[140] *See* Peppet, *supra* note 15, at 1156 (discussing how "Big Data" developments reduce the transaction costs associated with unraveling, since "individuals and firms can extract verified, high-quality, low-cost data from each other directly rather than searching through [large quantities] of unverified, low-quality information").

[141] *See The Benefits of Experian Connect*, EXPERIAN, https://connect.experian.com/index.html?utm_expid=67468160-63.8ZtNjEX3RNaUrDNeMPACTg.1 (last visited Oct. 28, 2013) (stating that a person can "grant access" to anyone they choose); *see also Employment and Credit: Employer Access to Your Credit Report*, EXPERIAN, http://www.experian.com/credit-education/employment.html (last visited Oct. 28, 2013) ("Federal law allows potential and current employers to view a modified version of your credit report for employment purposes such as hiring and promoting.").

[142] Peppet, *supra* note 15, at 1155; *Employment Background Checks*, MYBACKGROUNDCHECK.COM, http://mybackgroundcheck.com/employment_background_checks.aspx (last visited Jan. 25, 2014). This verification service assures job applicants that "[they are] in control," because they can "look at [their] background check," "make sure it's correct," and "decide what information to share with employers." *Employment Background Checks*, *supra*.

[143] *See* Samantha Nolan, *Revisit Your Résumé to Ensure It Is "Cutting-Edge*,*"* LADYBUG DESIGN (Mar. 18, 2012), http://ladybug-design.com/blog/?p=495 (responding to "Dear Sam" letter in which older employee asks whether he should include credit score on resume to improve his chances of finding a job "in this dire economy").

[144] *Press Release: Credit Sesame, Credit Sesame Launches Web's First Credit Badge™ Program,* CREDIT SESAME (Sept. 20, 2011), http://www.creditsesame.com/about/press/credit-sesame-launches-webs-first-credit-badge-program/.

[145] This problem, known as "self-surveillance," has triggered novel privacy dilemmas. *See generally* Kang et al., *supra* note 35, at 812, 823, 847 (recommending the creation of the Personal Data Guardian, which would manage Privacy Data Vaults that store self-surveillance data, to counter the novel privacy dilemmas created by self-surveillance).

records that, as a result of consumers' vetting processes, appear to bear consumers' imprimatur.[146] These developments are decreasing the transaction costs associated with unraveling.[147]

None of the current bans on employers' use of consumer reports can easily prevent individuals from sharing their personal financial information. Likewise, it would be challenging to redraft the laws to prevent unraveling, since prohibitions on individuals' disclosure of their credit reporting information might not withstand constitutional scrutiny.[148]

Even if applicants could be barred from sharing consumer reporting information directly with employers (or even if employers could be trusted not to *use* any formal credit reporting information), it would be more difficult to prevent the disclosure and use of more subtle forms of financial history data. Applicants can "signal" to employers the strength of their financial backgrounds without formally revealing their actual credit histories.[149]

For example, graduates of educational institutions could signal the absence of student loan debt (and, therefore, the absence of any student loan delinquencies) by disclosing that they received scholarships or other subsidies that covered all or the vast majority of their educational expenses. Without considering formal credit histories, employers could rely on even more imprecise proxies for financial status, including (1) race (minority applicants are more likely to have worse credit histories than are non-minority applicants),[150] (2) length of time at a particular address (a recent move is more likely to indicate that the applicant has been evicted or has suffered a foreclosure),[151] (3) employment status (applicants who have experienced a long period of unemployment are more likely to exhibit

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[146] *Compare* Shepard, *supra* note 9, at 1744, 1745 (explaining that the 1970 Fair Credit Reporting Act was "designed to increase accuracy and privacy in the credit reporting industry" partly because "[c]onsumers had [neither] access to their consumer reports" nor the ability to "correct incomplete, irrelevant, or obsolete information"), *with* FED. TRADE COMM'N, FACTA, *supra* note 68, at 2 (discussing the consolidation of about 200 million consumers "into consumer reports and credit reports" which can be analyzed and, thus, "enabl[ing] credit grantors" to quickly make "generally reliable decisions" on whether to grant consumers credit).

[147] *See* Peppet, *supra* note 15, at 1191–92 (discussing how unraveling is limited by transactional costs).

[148] *See id.* at 1198–99 (finding it difficult to overcome the "constitutional and social objections" raised to "prohibit individuals from sharing their personal information").

[149] *See id.* at 1162 (discussing that borrowers can simply state "I am a good credit risk—I will repay my loans" without necessarily proving their credit worthiness as a signal to lenders).

[150] *See* Shepard, *supra* note 9, at 1730–31 (citing studies on credit scores that reveal disparities between minorities and non-minorities).

[151] *See, e.g.*, *id.* at 1700–01 nn.23 & 26 (stating that consumer reports provide personal information such as previous address and public record information including foreclosures).

financial problems),[152] (4) appearance (expensive clothing or accessories might suggest that the applicant does not lack money),[153] or (5) membership in exclusive organizations (participation in particular alumni groups, country clubs, fraternities or sororities, or even religious organizations can signal wealth).[154] While these criteria can serve as signals for other, more obviously legitimate qualifications, they could be used to make rough inferences about an applicant's financial status.

Although unraveling may not be inevitable, it remains an acute risk in an economy and society in which data analysis and aggregation complicate traditional information-suppression initiatives.[155] For this reason, legislators must consider alternative methods to reduce the potential for discrimination in the employment setting.

IV. INCREASING CONSUMERS' PARTICIPATORY ROLE IN EMPLOYERS' ASSESSMENT PROCESSES

Currently, the processes by which employers use applicants' credit histories to make employment decisions is depersonalized and opaque. Applicants may be aware that employers are utilizing their credit reports,[156] but have little opportunity to respond to employers' concerns about problems revealed in those reports. Applicants may be unable to explain to employers the complex circumstances that may have contributed to, for example, a bankruptcy filing or a debt-collection action. Thus, as an alternative to limiting employers' inquiry into applicants' credit history, policymakers could take a more nuanced approach and mandate that employers provide applicants with a greater participatory role in employers' assessment processes.

In this Part, I first evaluate employers' ad hoc, informal attempts to provide applicants with a greater voice in their evaluation processes:

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[152] *See* Knafo, *supra* note 12 (describing the "vicious cycle of debt and unemployment" in which a bad credit report keeps a person unemployed, causing the person to incur greater debt during the unemployment).

[153] Expensive clothing or accessories could instead suggest profligacy, however.

[154] Although there exists a correlation between income and credit history, the correlation is imperfect. *Compare* Fumiko Hayashi & Joanna Stavins, Effects of Credit Scores on Consumer Payment Choice 13 (Fed. Reserve Bank of Bos., Public Policy Discussion Paper No. 12-1, 2012), *available at* http://www.bos.frb.org/economic/ppdp/2012/ppdp1201.pdf ("Older consumers and higher-income earners tend to have a higher credit score."), *with* 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.").

[155] *See* Peppet, *supra* note 15, at 1176–77 (defining the "unraveling threat to privacy" concept as the pervasiveness of signaling, creating circumstances in which people must disclose private information to "avoid the stigma of keeping information secret").

[156] Before accessing an applicant's credit report, an employer must clearly disclose that it has the right to obtain a report for employment purposes. 15 U.S.C. § 1681b(b)(2)(A)(i) (2012).

employers' current practice of providing certain applicants with the opportunity to "explain" what factors contributed to their adverse financial statuses (a right that I refer to as the "Mitigation Opportunity"). I then consider how the Mitigation Opportunity could be formalized and expanded, consistent with analogous rights consumers enjoy (1) under the Fair Credit Reporting Act and (2) in the insurance scoring context.

A. *Employers' Current Practice: An Informal, Ad Hoc Mitigation Opportunity*

Currently, some employers claim to provide select applicants with the opportunity to "explain" adverse information in their consumer reports.[157] As part of this "Mitigation Opportunity," these employers claim to give applicants a chance to describe what factors caused their financial problems. These employers maintain that they take a more forgiving view of financial problems triggered by divorces, separations, job layoffs, and medical problems.[158] In the aftermath of the 2008 financial crisis, many employers also claim to discount foreclosures.[159]

The Mitigation Opportunity seemingly allows employers to provide, at least in limited cases, an individualized approach to an otherwise bureaucratic and impersonal assessment method.[160] By giving applicants a chance to describe what circumstances contributed to their financial plights, employers appear to treat applicants more as autonomous, unique individuals, and recognize that applicants' financial problems may have been precipitated by unforeseeable, external factors. Applicants' opportunity to participate in and (ostensibly) to influence employers' decision-making processes may enhance the perceived legitimacy and

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[157] *See Background Checking*, *supra* note 2, slide 9 (reporting that sixty-five percent of employers surveyed indicated that they would allow job candidates the opportunity to explain the results of their consumer reports prior to making the decision of whether to hire them).

[158] *See* Michael Eastman, Exec. Dir., Labor Law Policy, U.S. Chamber of Commerce, Statement at the Meeting of the U.S. Equal Emp't Opportunity Comm'n 23 (Oct. 20, 2010) [hereinafter EEOC, Oct. 20 Meeting Tr.], *available at* http://www.eeoc.gov/eeoc/meetings/10-20-10/transcript.cfm ("Employers are much less likely to be concerned with a debt that arose as a result of a medical issue, a period of unemployment or a divorce. On the other hand, some types of debt might raise red flags more quickly such as gambling debt.").

[159] *See Background Checking*, *supra* note 2, slide 7 (reporting that only eleven percent of employers surveyed indicated that a foreclosure would significantly impact their hiring decision).

[160] In contrast, many perceive statistical evaluation methods—like credit scoring methodologies—as impersonal and callous. *See* R.W. Johnson, *Legal, Social, and Economic Issues in Implementing Scoring in the United States*, *in* READINGS IN CREDIT SCORING: FOUNDATIONS, DEVELOPMENTS, AND AIMS 5, 7 (Lyn C. Thomas, David B. Edelman & Jonathan N. Crook eds., 2004) ("As numerical rating systems, credit scoring strikes consumers as dispassionate and highly impersonal. 'Treat me as an individual', is the cry. Another aspect of the same, very natural concern is the admonition: 'Don't treat me as just another member of a group'.").

fairness of the processes.[161] As Barbara Underwood has explained, "By giving the applicant the opportunity to make a claim on the personal attention of the decision-maker, [a decision-making] process demonstrates a certain respect for the personal dignity of each applicant."[162] This practice lends some credence to the "situationist" account of human behavior endorsed by behavioral realists—an approach that recognizes that "unseen or unappreciated influences within [individuals] and [in society]" heavily influence individuals' actions and circumstances.[163]

In its current form, however, this practice provides little protection to applicants. Although it is unclear exactly how often and in what contexts employers provide applicants with the right to explain the circumstances that triggered their adverse financial statuses, this explanatory right is likely provided relatively infrequently and on an ad hoc basis. Few employers have the time or resources to scrutinize many applicants' credit histories in a one-on-one interview or conversation.[164] Indeed, the greater the number of applicants who are provided with this explanatory opportunity, the less likely that employers can meaningfully and thoughtfully consider each individual applicant's explanations.[165]

B. *An Option for Legislators: Expanding the Mitigation Opportunity*

These deficiencies could be addressed legislatively. To increase the number of applicants who are given the opportunity to provide explanatory statements to employers, policymakers could formalize and expand the Mitigation Opportunity, consistent with analogous rights consumers currently enjoy under the FCRA and in the insurance scoring context.

Currently, only select applicants are given the right to describe mitigating factors to employers.[166] This exchange of information occurs in

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[161] *See* Underwood, *supra* note 34, at 1427 ("Even if special pleading seldom affects the decision, and even if it may slightly impair the accuracy of aggregate decisionmaking, it may nevertheless enhance the perceived legitimacy of the process.").

[162] *Id.* at 1428.

[163] Benforado & Hanson, *supra* note 21, at 314.

[164] *See* Underwood, *supra* note 34, at 1424–25 ("A clinical system requires the careful exercise of skilled judgment for the evaluation of each individual applicant, and therefore the marginal cost of evaluating additional applicants tends to be high."). Analogously, individualized assessment of applicants in the lending setting is impractical and too costly. *See* Johnson, *supra* note 160, at 7 ("[I]ndividual treatment is unavailable, given the volume of applicants and scarcity of skilled analysts. Even if such talent were available, it would be uneconomical for the credit grantor to provide the service because the cost would be unacceptable to consumers.").

[165] *See* Underwood, *supra* note 34, at 1425 (noting that as the number of applicants increase, the accuracy decreases due to the high marginal cost); *cf.* Gary G. Chandler & John Y. Coffman, *A Comparative Analysis of Empirical vs. Judgmental Credit Evaluation*, J. RETAIL BANKING, Sept. 1979, at 15, 26 ("When dealing with large numbers of applicants, it is unlikely that judgmental evaluation is able to deal with applicants as 'individuals' any better than can empirical evaluation.").

[166] *See* Shepard, *supra* note 9, at 1724 ("[S]ome employers claim to give some applicants an opportunity to explain or justify bankruptcy filings or collection actions that appear on applicants'

a potentially time-consuming, one-on-one interview or conversation with an employer following the employer's initial review of the applicant's file.[167] If the Mitigation Opportunity were expanded consistent with consumers' existing rights under the FCRA, the timing, the form, and the number of applicants provided an explanatory opportunity would change. All applicants would have the opportunity to describe ex ante, in a brief statement on consumer reports purchased by employers, what factors contributed to applicants' adverse financial statuses.

Under the FCRA, consumers are afforded numerous procedural rights intended to increase credit reports' accuracy and completeness.[168] At any time, a consumer may dispute the accuracy or completeness of information in her consumer report.[169] For example, a consumer might assert that an account included on her report belongs to someone else[170] or claim that a payment listed as late was, in fact, paid on time.[171] If, following an investigation[172] by the consumer reporting agency, the agency disagrees with the consumer, and the dispute is not resolved to the consumer's satisfaction, a consumer who maintains her "innocence" has the opportunity to insert in her credit report a brief statement explaining her side of the story.[173] This explanatory statement must be included in all subsequent credit reports furnished to insurers, employers, and creditors.[174]

The investigation process—coupled with consumers' right to insert explanatory statements in their reports—attempts to strike a balance between the competing interests of credit reporting agencies and

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reports.").

[167] *See* Daniel Bortz, *How to Convince a Prospective Employer to Overlook Poor Credit*, U.S. NEWS & WORLD REP. (Dec. 14, 2012), http://www.money.usnews.com/money/personal-finance/articles/2012/12/14how-to-convince-a-prospective-employer-to-overlook-poor-credit (providing tips for applicants on how to explain bad credit during conversations with prospective employers).

[168] *See* 15 U.S.C. § 1681e(b) (2012) (requiring consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy"); *id.* § 1681i (providing mechanisms for a consumer to dispute the accuracy of information contained in a credit report).

[169] *Id.* § 1681i(a)(1). After a consumer institutes a dispute, a consumer reporting agency must conduct a "reasonable reinvestigation" to determine whether the disputed information is accurate. *Id.* This process is known as a "reinvestigation" (rather than an "investigation") because the consumer reporting agency presumably observed quality-control procedures when it initially decided to include the disputed information in the consumer's report. WU & DE ARMOND, *supra* note 42, § 4.5.3.1, at 167.

[170] *See, e.g.*, Boggio v. USAA Fed. Sav. Bank, 696 F.3d 611, 613 (6th Cir. 2012) (outlining facts of a dispute in which a consumer disputed a car loan on his report and argued that his wife, from whom he was separated, was solely responsible for repayment).

[171] *See, e.g.*, Paul v. Experian Info. Solutions, Inc., 793 F. Supp. 2d 1098, 1099 (D. Minn. 2011) (presenting a situation in which a consumer disputed late payments in her credit report).

[172] *See supra* note 169 (explaining that this process by which a consumer reporting agency reviews disputed information is known as a "reinvestigation").

[173] 15 U.S.C. § 1681i(b).

[174] *Id.* § 1681i(c).

consumers. Congress recognized that credit reporting agencies, which process vast amounts of information,[175] will inevitably make some errors, yet they cannot be exposed to excessive liability for inaccuracies. At the same time, however, the FCRA's drafters recognized that consumers must have a meaningful participatory role in a decision-making process that can heavily influence their access to employment, credit, and insurance. These are resources that are indispensable to meaningful participation in the American economy. The explanatory statement provides a relatively efficient, inexpensive means by which consumers can highlight unresolved problems in their reports.

Under the FCRA, however, consumers may dispute only discrete objective facts on their consumer reports, like the precise balance of an account or the accuracy of personal information (e.g., an inaccurate address or employment history). Consumers do not have the right to explain what extenuating circumstances contributed to a default or a bankruptcy.[176] Thus, because employers scrutinizing an applicant's financial history claim to treat certain factors—like a job loss—as an extenuating circumstance, the FCRA could be amended to allow all applicants to insert these mitigating explanations in the employment reports purchased by employers. Such a reform would provide all applicants—not just a privileged few—with a participatory role in employers' assessment processes, without imposing excessive costs or constraints on employers.

This reform, however, is unlikely to benefit applicants. Regardless of whether employers provide applicants with the opportunity to "explain" their adverse financial histories in a one-on-one conversation or interview or in a brief statement on their employment reports, this opportunity likely constitutes a mere formality. Although many extenuating circumstances cited by an applicant (e.g., a bankruptcy, a divorce, or a job loss) may be verifiable, an employer may suspect that financial profligacy or poor financial planning exacerbated the applicant's financial difficulties. For example, it may be unclear to an employer whether a bankruptcy or a debt-collection action triggered by a medical problem or a natural disaster was precipitated by poor budgeting that left the applicant with too small of a safety net.[177] Thus, because applicants' overall explanations are largely

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[175] *See, e.g.*, WU & DE ARMOND, *supra* note 42, § 1.2.2, at 4–5 ("[Consumer reporting agencies] receive from data furnishers approximately 4.5 billion updates on about 1.5 billion accounts for more than 200 million consumer files each month.").

[176] 16 C.F.R. § 611, item 4 (2011). The FTC's Official Staff Commentary explains that a credit reporting agency may—but need not—include such an explanation. *Id.* According to the FTC, "Most creditors are aware that a variety of circumstances may render consumers unable to repay credit obligations." *Id.*

[177] Melissa B. Jacoby, *Collecting Debts from the Ill and Injured: The Rhetorical Significance, but Practical Irrelevance, of Culpability and Ability to Pay*, 51 AM. U. L. REV. 229, 245–46 (2001). Professor Jacoby explains this problem in the context of medical debt as follows:

subjective and are not easily verified, they would likely carry little weight. Rather, if an employer hires an applicant after considering the applicant's proffered explanations, the employer likely places little credence in credit histories as an evaluative tool or the applicant has significant skills or attributes that compensate for his or her suboptimal financial history.

In the latter case, the employer's interpretation of an adverse financial event may be influenced by confirmation bias. Confirmation bias causes individuals to "frame newly acquired ambiguous or even contradictory information . . . so as to make it consistent with information they acquired earlier."[178] Because an applicant's explanation for an adverse financial event may be ambiguous, an employer may interpret the explanation in a way that reinforces the employer's expectations. As a result, the explanatory opportunity will most likely not significantly impact an employer's decision-making process.

Policymakers could address the risk that employers might not seriously heed candidates' explanations by mandating that employers consider applicants' articulated mitigating factors. A similar reform was adopted in the insurance industry. In some states, insurers—who use consumer reports in the process of granting and pricing insurance policies[179]—are statutorily required to consider whether debtors' adverse financial circumstances were caused by certain extraordinary life events, including catastrophic illness, the death of a close family member, the involuntary loss of employment, identity theft, or dissolution of marriage.[180]

> One might challenge the assumption that medical-related filers are less culpable and thus risky chapter 13 filers. After all, people with health problems are not necessarily innocent victims of bad luck and insufficient safety nets. Putting aside sensitive questions of whether these individuals engaged in activities or behavior that increased their risk of illness or injury, American families tend to spend a lot and save little. They generally fail to plan for the possibility of disability and income interruption as well as they might, considering the probability of experiencing these setbacks. Indeed, some might assert that the availability of generous bankruptcy relief encourages consumers to under-insure. One could argue, therefore, that the vulnerability of these families to medical-related financial distress is partly self-inflicted and is simply a consequence of other spending and saving decisions similar to those that debtors like Mr. Plastic made.

Id. (footnotes omitted).

[178] RICHARD O. YOUNG, HOW AUDIENCES DECIDE: A COGNITIVE APPROACH TO BUSINESS COMMUNICATION 207–08 (2011).

[179] FED. TRADE COMM'N, INSURANCE, *supra* note 48, at 2.

[180] *Model Act Regarding Use of Credit Information in Personal Insurance*, NAT'L CONF. INS. LEGISLATORS 4–5 (2009), http://www.ncoil.org/Docs/CreditScoringModel.pdf (last visited Jan. 25, 2014). This Model Act—including the "extraordinary life circumstances" exception—has been adopted by several states, including Indiana, Illinois, Kansas, New Hampshire, and Connecticut. Sheila Coolidge, *Credit Scoring Use: Extraordinary Life Circumstances Exception Creates Added Consumer Protection*, WOLTERS KLUWER COMPLIANCE CORNER,

Forcing employers to consider applicants' explanations, however, may be problematic. As discussed above, because applicants' explanations may not, in fact, be verifiable, employers may have difficulty making objective distinctions among candidates. As a result, employers' assessments may decrease in accuracy.

Likewise, requiring employers to consider applicants' explanations might have a regressive impact. Because applicants' explanations cannot be easily or meaningfully differentiated on the merits, individuals who furnish the most convincing explanations to employers are not necessarily more deserving of an employer's compassion. Rather, these individuals may simply be more affluent, sophisticated, and financially literate. A consumer who convincingly describes in her consumer report those extenuating factors that contributed to her financial problems likely enjoys several advantages that are correlated with wealth and education: she possesses knowledge of her rights; enjoys ready access to her credit report (and/or can afford a subscription to a credit-monitoring service); and has the wherewithal to present a forceful, articulate explanation to a prospective employer.[181]

Thus, expanding the Mitigation Opportunity would probably not significantly benefit applicants, since such a reform is unlikely to change the outcome of employment decisions. This reform, however, might substantially advance employers' interests. Giving applicants a greater participatory role in employers' evaluation processes functions to forestall more stringent forms of regulation.

In recent years, employers' consideration of financial histories in the hiring process has generated vociferous protest. Indeed, consumers' and commentators' opposition to the practice has triggered bans in several states. Employers and employer advocates presumably recognize that this regulatory shift—prompted by the public's reservations about the practice—can be delayed or forestalled if (1) employers can be portrayed as empathetic and flexible, (2) consumers are told that they have a "voice" in an otherwise depersonalized assessment process, and (3) it is clear that only truly "undeserving" debtors will likely suffer discrimination.[182] If

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http://www.insurancecompliancecorner.com/credit-scoring-use-extraordinary-life-circumstances-exception-creates-added-consumer-protection/ (last visited Jan. 26, 2014).

[181] *Cf.* Omri Ben-Shahar, *Mandatory Arbitration and Distributive Equity: An Essay on Access to Justice* 14–16 (Univ. of Chi. Law Sch. Coase-Sandor Inst. for Law & Econ., Working Paper No. 628, Jan. 2013), *available at* http://www.law.uchicago.edu/files/file/628.obs_.access-revised.pdf (arguing that mandatory disclosures create a regressive wealth transfer, since better-off and more sophisticated consumers make better use of the information disclosed).

[182] *Cf.* Elizabeth Warren, *The Over-Consumption Myth and Other Tales of Economics, Law, and Morality*, 82 WASH. U. L.Q. 1485, 1507 (2004) (arguing that the "Over-Consumption Myth"—which suggests that consumers' financial distress is caused by their own profligacy—serves to forestall regulation of creditors, because "if only the stupid or the venal are caught in a tangle of credit, then there is no reason to restrict the lenders").

consumer anxieties are assuaged, consumers are less likely to complain to legislators, and legislators are less likely to seek to fully enjoin the use of credit reports in the hiring process.

A similar trend can be seen in the insurance scoring context. The requirement in some states that insurers consider whether debtors' adverse financial circumstances were caused by certain extraordinary life events[183] may have been prompted by insurers' concerns that consumer discomfort with the use of insurance scores would likely result in additional state bans on the practice.[184]

For these reasons, expanding the Mitigation Opportunity would only provide applicants with superficial protection against discrimination and inequitable treatment. In addition, this reform would not improve the accuracy of employers' assessment procedures. Ironically, although giving applicants a greater participatory role in employers' evaluation processes seemingly humanizes a bureaucratic and inflexible assessment method, it may, in fact, increase the likelihood that applicants will be treated unfairly. As a result, this Article considers whether an alternative approach—encouraging employers to use financial history information as part of a statistically sound evaluation method—can better address these important shortcomings.

V. THE PROSPECT OF REDUCING DISCRIMINATION THROUGH AN EMPIRICAL EVALUATION METHOD

Due to the deficiencies of the options discussed above—imposing limits on employers' inquiry into applicants' credit history and increasing consumers' participatory role in employers' assessment processes—this Article considers an alternative approach. Although antidiscrimination efforts have traditionally focused on suppressing consideration of information, because bans may be impracticable, anti-discriminatory objectives may be more readily advanced if employers adopted an empirically derived, statistically sound evaluation method to scrutinize applicants.

In Section A, I describe employers' current subjective evaluation method. Employers presently scrutinize the raw data on applicants' reports (i.e., lists of financial events, such as collection actions, defaults, and

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[183] *See supra* note 180 (outlining the states that adopted this requirement).

[184] *See, e.g.*, *Property-Casualty Insurance Trades Support NCOIL Amendment to Its Model Law on Credit*, PROP. CASUALTY INSURERS ASS'N AM. (July 14, 2009), http://www.pciaa.net/publish/web/webpress.nsf/lookupwebcontent/71d4a6041319c96e862575f30077282?opendocument ("Insurers believe that [the 'extraordinary life circumstances' amendment] will provide necessary consumer protections during a challenging economic climate while preserving insurers' use of credit-based insurance scoring, which remains a well-established underwriting and rating tool that continues to benefit consumers.").

bankruptcy filings), from which they infer, based on intuition and past experience, whether an applicant is likely to be a responsible, law-abiding employee. I argue that this approach, which I analogize to the "judgmental" evaluation methods used by most creditors before the widespread adoption of credit scoring technologies, promotes discrimination and stereotyping.

In Section B, I consider whether and to what extent policymakers can reduce the potential for discrimination by adopting an empirical evaluation method analogous to creditors' use of credit scores and insurers' use of credit-based insurance scores. While this approach may perpetuate some forms of discrimination (most notably disparate impact), it has the potential to advance certain anti-discriminatory objectives not likely to be achieved by bans on the use of financial history information, consumer-empowerment techniques, or employers' current assessment methods.

A. *Employers' Current Approach Promotes Discrimination*

Currently, employers use only the raw data in consumer reports to make assessments about job candidates. They consider applicants' personal information, payment history, and public record information to infer whether applicants possess certain personality traits relevant to work performance.[185] Employers do not use credit scores or any other statistical evaluation methods.[186]

Employers' assessments share a few commonalities. A recent survey indicated that sixty-four percent of employers consider current outstanding judgments when determining whether to extend a job offer.[187] In addition, less than three percent of employers claim to seriously consider education-related debt and medical debt.[188]

Excluding these categories, however, there are few consistencies among employers in those criteria identified as most likely to impact employment decisions. Half of employers consider accounts in debt collection, one-quarter consider bankruptcy filings,[189] and approximately

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185 *See Background Checking*, *supra* note 2, slide 7 (illustrating the factors that employers consider when making hiring decisions).

186 *See supra* notes 54–55 and accompanying text (explaining that credit reporting agencies do not provide employers with credit scores or raw credit history data).

187 *Background Checking*, *supra* note 2, slide 7. Employers were asked, "In general, if a credit background check revealed information that presented the job candidate's financial situation negatively, what types of information are MOST likely to affect your decision to NOT extend a job offer?" *Id.*

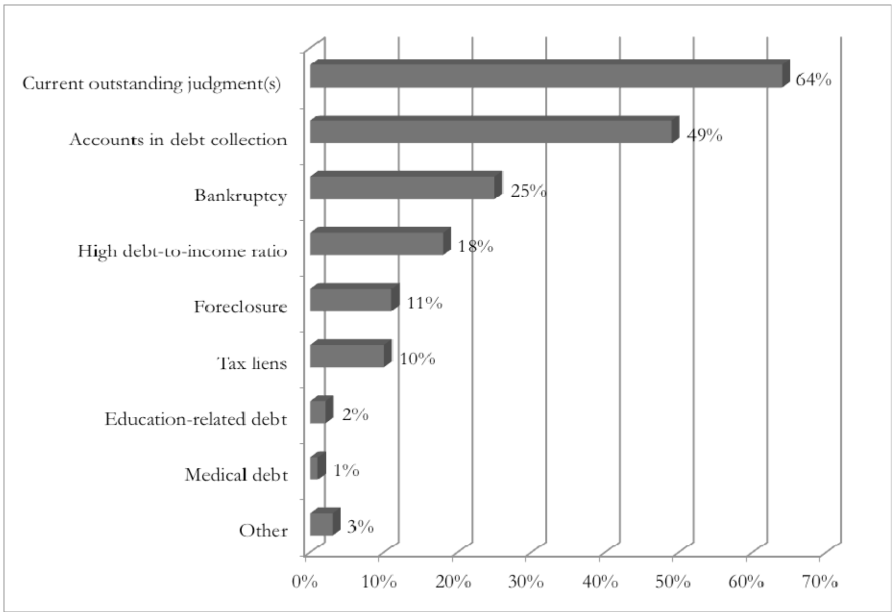
188 *Id.*

189 *Id.* Although the Bankruptcy Code contains several antidiscrimination provisions intended to protect applicants and employees, 11 U.S.C. § 525(a)–(b) (2012), almost all courts have interpreted these provisions to authorize private—but not public—employers to refuse to hire bankruptcy filers. *See, e.g.*, Fiorani v. Caci, 192 B.R. 401, 407 (Bankr. E.D. Va. 1996) ("If a private employer is to be

one-fifth of employers consider a high debt-to-income ratio very important in scrutinizing applicants.[190] These statistics are reproduced in Figure 1 below.

FIGURE 1

TYPES OF CREDIT REPORTING INFORMATION MOST LIKELY TO AFFECT AN EMPLOYER'S DECISION NOT TO EXTEND A JOB OFFER[191]



These data suggest that employers' conclusions may have a tendency to be idiosyncratic.[192] Employers are not necessarily consistent in assessing outstanding judgments, collection actions, bankruptcy filings, debt-to-income ratios, foreclosures, tax liens, education debt, and medical debt. This observation reinforces the Vermont General Legislature's

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prohibited from refusing to hire an applicant because that person has filed for bankruptcy, Congress must say so, which it as [sic] not yet done.").

190 *Background Checking*, *supra* note 2, slide 7.

191 This figure is a reproduction based on information provided by the SHRM. *Background Checking*, *supra* note 2, slide 7. Because employers were asked to select their top two choices, the total percentage is greater than 100%. *Id.*

192 In the SHRM survey, employers were permitted to select the top two items of adverse information that would most likely impact their decision not to hire a job candidate. *Id.* The imposition of this restriction suggests that employers' responses should reflect a greater degree of convergence or overlap. As I discuss below, however, it is possible that the significant divergence in employers' responses reflects reasonable distinctions different employers make when filling different positions.

conclusion that "[t]here is no common standard among employers as to how to interpret credit reports."[193]

As a result, although employers appear generally to favor applicants who are likely to have higher credit scores,[194] employers probably weigh the specific raw data in consumer reports differently. Some employers may be more troubled about an applicant's total debt load, based on a concern that a larger debt-to-income ratio suggests that the applicant is more likely to commit fraud or theft. Other employers may be more apprehensive about an applicant's record of debt repayment, regardless of her overall debt load. For example, an applicant may have little debt (as a result of a bankruptcy discharge or some other out-of-court settlement with creditors), but the employer may nevertheless be concerned that the applicant failed to fulfill his or her financial promises. In other words, some employers may use financial history as a predictive tool, whereas others may reward applicants on the basis of financial or ethical "merit."[195] There may be a fundamental tension between these two uses.

These data do not conclusively establish that these disparities in employers' approaches reflect irrational inconsistencies. It is possible that employers' emphasis on different adverse financial data is necessitated by employers' specific needs and the responsibilities involved in varying positions. For example, an employer who recently suffered significant embezzlement by an employee may be more attentive to an applicant's likelihood of committing fraud or theft, whereas another employer may be more interested in screening for candidates' overall responsibility levels. The variables on which employers place the most weight need not necessarily be consistent from employer to employer in order for the methodology to be valid. The degree of variance in the criteria that employers' identify as the most important factors, however, coupled with the dearth of empirical evidence supporting consideration of any *particular* factor or factors,[196] suggests that employers' disparate approaches may be more arbitrary than logical.

In many ways, employers' seemingly idiosyncratic assessment methods are analogous to the judgmental underwriting systems used by

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[193] 2012 Vt. Acts & Resolves 556.

[194] *What's in My FICO Score: How My FICO Score Is Calculated*, MYFICO, http://www.myfico.com/CreditEducation/WhatsInYourScore.aspx (last visited Jan. 25, 2014) (describing the extent to which certain categories of information are used in calculating a consumer's credit score). Consumers can improve their credit scores by, for example, reducing their debt loads and paying their bills on time. *How to Repair My Credit and Improve My FICO Credit Score*, MYFICO, http://www.myfico.com/CreditEducation/ImproveYourScore.aspx (last visited Jan. 25, 2014).

[195] *See* Underwood, *supra* note 34, at 1418 (comparing "criteria that purport to punish fault and reward merit" with "predictive criteria" in the context of school admission and the release of convicted criminals).

[196] *See supra* notes 76–81 and accompanying text (describing flaws in the available studies of employees' financial situations).

creditors before the widespread adoption of credit scores. Before advances in credit scoring technologies in the 1970s and 1980s,[197] credit decisions were made "manually" by a loan officer at a financial institution.[198] After gathering certain financial information from a prospective borrower, a loan officer would conclude whether an applicant possessed both the ability and willingness to repay a loan based on the officer's own prior experience and the financial institution's guidelines.[199]

Historically, creditors have lauded the judgmental approach for being both personal and flexible.[200] Like the Mitigation Opportunity that some employers claim to provide to certain applicants, judgmental evaluation methods appear to demonstrate a degree of respect for the personal dignity of each applicant.[201] A judgmental approach likewise maximizes creditor autonomy by respecting a loan officer's ability to make seemingly logical distinctions among candidates, consistent with the financial institution's underlying goals and the loan officer's experience with other borrowers.[202]

Judgmental underwriting, however, is inherently subjective. Decisions rely on the "experience and human judgment of the individual [credit] analyst."[203] According to one lender, judgmental underwriting reflects "how [the decision-maker] feel[s] that day."[204] One bank president using such an evaluation method explained that credit decisions could be based in part on first impressions received from personally conversing with prospective customers.[205]

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[197] FED. RESERVE BD., CREDIT SCORING, *supra* note 27, at O-4.

[198] *Id*.

[199] *See, e.g.*, David C. Hsia, *Credit Scoring and the Equal Credit Opportunity Act*, 30 HASTINGS L.J. 371, 373 (1978) (stating that credit officers look to an applicant's ability and willingness to repay a loan); Winnie F. Taylor, *Meeting the Equal Credit Opportunity Act's Specificity Requirement: Judgmental and Statistical Scoring Systems*, 29 BUFF. L. REV. 73, 86 (1980) (discussing the subjective evaluation system for deciding whether or not to grant credit).

[200] *See* Taylor, *supra* note 199, at 102 ("Many creditors who use judgmental systems consider informality and flexibility to be the system's major assets.").

[201] *See* Underwood, *supra* note 34, at 1428 ("By giving the applicant the opportunity to make a claim on the personal attention of the decisionmaker, a clinical decision process demonstrates a certain respect for the personal dignity of each applicant.").

[202] *See* Taylor, *supra* note 199, at 86 ("The credit manager evaluates the character, capacity and collateral of the applicant . . . [and] makes a professional judgment to grant or deny credit, relying in part on his past experience . . . .").

[203] Chandler & Coffman, *supra* note 165, at 17; *see* Hsia, *supra* note 199, at 372 ("Traditional credit analysis uses human judgment to evaluate creditworthiness. Credit officers analyze incoming applications in light of their own prior experience and their employer's institutional guidelines.").

[204] Janet Sonntag, *The Debate over Credit Scoring*, MORTGAGE BANKING, Nov. 1995, at 46, 47 (quoting Ken Sacknoff, Director of Corporate Risk for GMAC Residential Funding Corporation).

[205] Taylor, *supra* note 199, at 102.

The subjective nature of the judgmental underwriting process contributes to imprecise, inaccurate, and inconsistent decision making.[206] Credit decisions may be affected by the loan officer's "imperfect recollection of past experience."[207] Likewise, one very negative or troublesome incident may distort the loan officer's future perception of a particular applicant group.[208] Even judgmental underwriting decisions made within the same financial institution may be inconsistent, since different loan officers may interpret the same credit risks differently.[209] In a judgmental underwriting system, it is difficult to institute clear guidelines that can address many factual differences in consumers' credit profiles.[210]

These defects are shared by employers' current assessment methods. Because employers—like loan officers relying on a judgmental underwriting system—are permitted to act on hunches,[211] employers may be influenced less by analytical judgments than by heuristics, memories, and past experience. The "availability heuristic," for example, might distort an employer's recollection of past events. Pursuant to this mental shortcut, individuals assess the probability of an event by the ease with which such instances can be brought to mind.[212] If, for example, an employer attempts to predict whether a given applicant who has filed for bankruptcy is likely to exhibit counterproductive work behaviors, her conclusion may be unduly influenced by one salient past experience: memories of one particular bankruptcy filer whom the employer had to terminate on performance grounds.[213] In other words, an employer's past "baggage" can diminish any predictive force of a judgmental evaluation method.[214]

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[206] *See, e.g.*, FED. RESERVE BD., CREDIT SCORING, *supra* note 27, at O-4 ("Both credit scoring and judgmental underwriting tend to be opaque processes. . . . [M]ethods are not likely consistent . . . .").

[207] Hsia, *supra* note 199, at 373.

[208] *Id.*

[209] *See, e.g.*, FED. RESERVE BD., CREDIT SCORING, *supra* note 27, at O-4 ("In the case of judgmental underwriting, methods are not likely consistent, even within a firm, because evaluators differ in their experience and judgment about credit risk . . . .").

[210] *Id.*

[211] *See* Taylor, *supra* note 199, at 102 (describing how credit managers can deny or grant credit based on a "hunch," even when the applicant would have been otherwise denied or accepted).

[212] *See, e.g.*, Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1127 (1974) ("There are situations in which people assess the frequency of a class or the probability of an event by the ease with which instances or occurrences can be brought to mind.").

[213] *Cf.* Chandler & Coffman, *supra* note 165, at 19 (explaining that "generally, the focus of information [in judgmental underwriting systems] is biased heavily toward *bad* accounts that have been approved in the past as these are the exceptions brought to the attention of the lender").

[214] Commentators have made analogous arguments about law enforcement officers' decision-making processes. *See, e.g.*, Harold Baer, Jr., *Got a Bad Feeling? Is that Enough? The Irrationality of Police Hunches*, 4 J.L. ECON. & POL'Y 91, 91–92, 100 (2007) (arguing that "hunch-based investigative approaches" used in the law enforcement setting may often be inaccurate, since police officers "face

Furthermore, both judgmental underwriting systems and employers' current subjective financial history assessment methods are problematic from an antidiscrimination perspective, since both are likely to encourage stereotyping by decision-makers. A significant body of psychological research demonstrates that stereotyping is most likely to occur when the evaluative criteria are ambiguous.[215] This problem is exacerbated when the information being interpreted is also open to interpretation.[216]

Under employers' current assessment methods, decision-makers are not required to commit in advance to any particular evaluative criteria or method of weighing those criteria.[217] Instead, the employer "is free to respond to individual differences whose relevance was not anticipated by any rule."[218] Although this flexibility may at times seem beneficial, since it permits employers to give some borderline applicants the "benefit of the doubt," there is a significant risk that employers will act on negative stereotypes about various protected groups. An employer, for example, might be more inclined to reject the application of a minority applicant with an adverse credit history based on stereotypes that African-Americans or other minorities are more likely to default on loans,[219] commit crimes,[220] or exhibit irresponsibility.[221] Recent research on implicit bias suggests that

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hostile and frightening situations daily and consequently fall easy victim to unconscious feelings of bias, prejudice, and the availability heuristic").

[215] Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in* Price Waterhouse v. Hopkins, 46 AM. PSYCHOL. 1049, 1050 (1991); Bertram Gawronski et al., *Implicit Bias in Impression Formation: Associations Influence the Construal of Individuating Information*, 33 EUR. J. SOC. PSYCHOL. 573, 586 (2003); Ziva Kunda & Bonnie Sherman-Williams, *Stereotypes and the Construal of Individuating Information*, 19 PERSONALITY & SOC. PYCHOL. BULL. 90, 91 (1993).

[216] Fiske et al., *supra* note 215, at 1050.

[217] *See* Underwood, *supra* note 34, at 1423 ("A clinical decisionmaker is not committed in advance of decision to the factors that will be considered and the rule for combining them.").

[218] *Id.*

[219] *See* Sara T. DeLoughy, *Risk Versus Demographics in Subprime Mortgage Lending: Evidence from Three Connecticut Cities*, 45 J. REAL EST. FIN. ECON. 569, 585–86 (2012) (presenting evidence of a positive association between subprime lending and minority borrowers); Debbie Gruenstein Bocian et al., *Race, Ethnicity and Subprime Home Loan Pricing*, 60 J. ECON. & BUS. 110, 123 (2008) ("African-American and Latino borrowers are more likely to receive higher-priced subprime credit than similarly situated white borrowers.").

[220] *See* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 398–99 (2007) (reporting that study participants consistently recalled more facts suggestive of aggressiveness in fact patterns involving a character named "Tyronne" than in fact patterns involving a character named "William"); Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. MARSHALL L. REV. 439, 447–49 (2004) ("Racial profiling due to stereotypical biases also has a direct correlation to the high incarceration rate of African-American males . . . .").

[221] *See* James R. Kluegel, *Trends in Whites' Explanations of the Black-White Gap in Socioeconomic Status*, 55 AM. SOC. REV. 512, 523 (1990) (stating that whites believe the black-white socioeconomic gap to be due to lack of education, ability, and motivation); Mark Peffley et al., *Racial Stereotypes and Whites' Political Views of Blacks in the Context of Welfare and Crime*, 41 AM. J. POL.

employers may render these assessments subconsciously, in the absence of any affirmative discriminatory intent.[222]

B. *How a Statistical Scoring System Could Reduce the Potential for Discrimination*

Instead of using the raw data in consumer reports to make subjective assessments about applicants, employers could adopt an empirically based, statistically sound evaluation method by applying existing credit-scoring methodologies to employers' assessment processes. Currently, creditors use the raw data in credit reports to generate credit scores, or numeral ratings of credit applicants' creditworthiness.[223] Similarly, insurers use credit data to generate credit-based insurance scores, which they use to predict the number or total cost of insurance claims that prospective customers are likely to file.[224] Employers could likewise apply a similar methodology to the hiring process to predict the probability that an applicant will, for example, commit theft or fraud in the workplace or exhibit certain counterproductive work behaviors. In other words, employers—like insurers and creditors—can use empirical methods to measure their likelihood of suffering specific financial losses.

If employers used an empirically derived, statistically sound evaluation method to scrutinize applicants, employers' use of credit histories might yield more consistent, less discriminatory results than they do presently. In the subsections that follow, I examine the benefits and the drawbacks of adopting a statistical method.

1. *An Employment Scoring Method Could Maximize Empirical Soundness*

An employment scoring system has the potential to counter the most powerful critique of employers' current evaluation methods: there exists insufficient evidence establishing a correlation between applicants' credit history and traits relevant to job performance.[225] Employers have long

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SCI. 30, 35 (1997) ("[A] substantial proportion of whites agree[] that most blacks are lazy (31%), irresponsible (20%), aggressive (50%), and lacking in discipline (60%).").

222 *See generally* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 750–59 (1995) (describing the psychological literature on unconscious bias); Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 145–46 (2004) (examining a study that began research on implicit racial biases); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 969–72 (2006) (discussing the Implicit Association Test for measuring implicit bias); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1493–94 (2005) (evaluating the literature on implicit bias).

223 FED. RESERVE BD., CREDIT SCORING, *supra* note 27, at S-1.

224 FED. TRADE COMM'N, INSURANCE, *supra* note 48, at 2.

225 *See supra* notes 74–81 and accompanying text (examining how studies do not establish a correlation between applicants who have committed financial crimes and financial stress).

relied primarily on anecdotal evidence to support their use of credit histories.[226] Consequently, employers remain vulnerable to criticisms that they have been prematurely ejecting many qualified individuals from the labor market, thereby undermining their own interests and prompting an unfair post-recessionary reallocation of jobs.

A statistical scoring method would help ensure that employers consider only those credit history variables that are related to characteristics relevant to success in the workplace. Unlike employers' current "judgmental" assessment methods, a statistical approach would incorporate only those credit history variables that are correlated at a statistically significant level with certain discrete characteristics related to an applicant's (1) responsibility levels, or (2) propensity to commit theft.[227] It would exclude other irrelevant factors.

While it is difficult to predict what statistical correlations, if any, would be revealed by an employment scoring model, a statistical approach could test important hypotheses relevant to the normative debate about employers' use of financial history information. It is possible, for example, that applicants with significant student loan debt may be more—rather than less—likely to exhibit responsibility in the employment setting. The acquisition of student loan debt can be perceived as a positive (albeit increasingly precarious[228]) step that reflects a job applicant's initiative and a desire to improve his or her life standing. Indeed, a certain amount of student loan debt may motivate prospective employees to be productive members of society, thereby increasing their dependence on (and loyalty to) particular employers. This theory—which might seem counterintuitive to those employers concerned that any significant accumulation of debt increases an applicant's likelihood of committing fraud or theft[229]—could be tested by a statistical evaluation method.

Likewise, a statistical approach could test whether an applicant who has discharged a sizeable amount of debt in bankruptcy would be more or less likely to exhibit irresponsibility or to commit fraud or theft than would a similarly indebted applicant who has not filed for bankruptcy. A bankruptcy discharge—by reducing an applicant's overall debt load—could conceivably reduce an applicant's stress or distractedness level, thereby permitting him to focus more diligently on his job responsibilities.

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[226] *See* Bernerth et al., *supra* note 74, at 469 ("Existing evidence in this regard is largely anecdotal in nature, as practitioners contend that credit scores offer insight into an applicant's character.").

[227] *See* Chandler & Coffman, *supra* note 165, at 20 ("[E]mpirically derived scoring systems use only information that is statistically related to credit risk.").

[228] *See* Tamar Lewin, *Student Loan Default Rates Rise Sharply in Past Year*, N.Y. TIMES, Sept. 13, 2011, at A14 (reporting an 8.8% default rate on student loans).

[229] *Why Filing Bankruptcy Might Be the Worst Thing You Could Do for Your Career*, *supra* note 6.

Similarly, an employment scoring model could measure whether a bankruptcy filer's successful fulfillment of the terms of a Chapter 13 plan increases his or her responsibility levels. Because completion of a Chapter 13 plan requires three to five years of diligent budgeting and repayment to creditors,[230] a statistical analysis might reveal that a successful Chapter 13 filer has learned important financial management skills that could translate to success in the employment setting. Through statistical inference, an employer could deduce that such an applicant has overcome adversity—a trait that employers might covet in an employee.

It is, of course, unrealistic to suggest that the correlations revealed by an employment scoring system would favor the opinions only of those who support a reduced or more nuanced consideration of credit history information by employers. Nevertheless, any counterintuitive findings would require employers to adjust their current assumptions about the relationship between financial distress and job performance—a development that would, at the very least, increase the practice's facial validity and its accuracy.

These hypotheticals are oversimplified and reflect an analysis of only one independent variable (one aspect of an applicant's credit history, like a bankruptcy filing) and one dependent variable (a particular adverse outcome, like an increase in an applicant's likelihood of stealing customers' personal or financial information). In reality, a statistical system would allow employers, through multivariate analysis, to consider the intercorrelation of many pieces of information.[231] Thus, an employment scoring method can interpret data more powerfully than can employers using existing assessment methods.[232] Employers who roughly analyze the raw data in an applicant's credit history to identify possible correlations are substantially constrained, since they are limited in their

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[230] *See, e.g.*, CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY § 1.25, at 105 (2009) ("In chapter 13 the debtor retains his property and pays creditors pursuant to a court-approved plan over three to five years."); *see also* Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy, 4th Edition, § 4.17*, CH13ONLINE.COM, http://www.ch13online.com (last visited Jan. 26, 2014) (arguing that some debtors require "the control, regularity, and supervision of a Chapter 13 case," because, among other things, a Chapter 13 debtor "must learn to live within a budget and to make regular payments to fund a plan," an educational experience that often constitutes "the debtor's first experience with control of earning and spending habits").

[231] *See* Chandler & Coffman, *supra* note 165, at 21 (explaining how multivariate analysis allows for the simultaneous consideration of a number of predictive factors, including age, income, residence, and job tenure).

[232] *See id.* (showing that an employment scoring model is more powerful than traditional assessment methods because of the use of multivariate analysis, which more accurately weighs the relevant factors in an employment decision).

ability to simultaneously process many individual pieces of relevant information.[233]

A statistical scoring method would impose on employers a more rigorous standard than that applied by courts in Title VII challenges to the use of credit scores in the hiring process.[234] In several lawsuits, plaintiffs have argued that employers' use of credit scores—although a facially neutral, seemingly benign practice—has a disproportionate adverse impact on protected groups, including minorities.[235] Employers, however, have successfully averted these challenges, since courts have agreed that credit report checks, although disproportionately affecting protected classes, are both job-related and consistent with business necessity.[236] For example, according to one court, credit checks are justified in filling banking positions, which involve the exercise of fiduciary responsibility and access to substantial amounts of cash.[237] Courts have not mandated, however, that employers rely on known correlations between credit histories and those personality traits relevant to job performance.[238] Instead, courts have effectively rubber-stamped employers' unsubstantiated assessments of business necessity.[239] A statistical approach, in contrast, would help ensure that employers consider credit histories only to the extent justified by validated algorithms.

2. *A Statistical Method Could Reduce the Likelihood of Intentional Discrimination*

Plaintiffs can successfully challenge an employment practice under Title VII if they "demonstrate that the employer was motivated by racial or

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[233] *See id.* (explaining that a loan analyst cannot simultaneously analyze all information related to creditworthiness because human decision-making powers are limited).

[234] It has been relatively easy for employers to overcome Title VII challenges by asserting that the use of a credit reports is consistent with business necessity. An employment scoring model, in contrast, would require employers to show that a demonstrated correlation exists between adverse financial histories and personality traits relevant to job performance. *Compare* Equal Emp't Opportunity Comm'n v. United Va. Bank, No. 75-166-N, 1977 U.S. Dist. LEXIS 13587, at *39–40 (E.D. Va. Oct. 7, 1977) (holding that consideration of credit checks in filling bank positions is job related as business necessity because the job involves handling money), *aff'd*, 615 F.2d 147 (4th Cir. 1980), *with* Chandler & Coffman, *supra* note 165, at 20 (explaining that employment scoring models only consider characteristics that are statistically related to credit risk, while a judgmental evaluation method might cause individuals to subconsciously consider prohibited characteristics).

[235] *See, e.g.*, *United Va. Bank*, 1977 U.S. Dist. LEXIS 13587, at *39–40 (evaluating a claim that banks' use of credit reports "disproportionately excluded blacks from [the] work force").

[236] *See supra* note 106 and accompanying text (explaining that courts have broadly interpreted business necessity to include the practice of using credit reports in hiring decisions).

[237] *United Va. Bank*, 1977 U.S. Dist. LEXIS 13587, at *39–40.

[238] *See, e.g.*, *id.* (upholding the use of a credit check in the hiring of a bank employee absent any showing of the statistical relevance of the practice).

[239] *See, e.g.*, *id.* ("It is not improper for a bank to check into the financial background of anyone they are considering hiring . . . .").

other animus at the precise moment the adverse employment action was taken."[240] In other words, employers are prohibited from deliberately discriminating against an applicant because of his or her race, color, sex, religion, or national origin.[241] The likelihood of intentional discrimination (known as "disparate treatment")[242] could be substantially reduced in a statistical scoring system.

Under employers' existing "judgmental" evaluation methods,[243] it is difficult to determine whether employers discriminated intentionally against applicants, since it is difficult to deduce whether an employer consciously or unconsciously considered a prohibited characteristic.[244] As I discuss above, stereotyping and subjectivity may impact employers' decision-making processes because employers are free at any time to alter the criteria by which they evaluate candidates' financial histories, and it may be difficult for employers to interpret the significance of certain adverse financial events.[245]

If employers formally excluded prohibited criteria—like sex and race—from an employment scoring model,[246] then the likelihood of employers discriminating against applicants because of applicants' membership in a protected category would be substantially reduced. Indeed, historically, some credit scoring advocates presumed that banks' adoption of credit scoring methodologies would automatically insulate these financial institutions from challenges under various antidiscrimination and fair lending laws.[247] They presumed that, at least in

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[240] Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 482 (2005).

[241] Title VII describes "an unlawful employment practice" as an employer's (1) failure or refusal to hire, or (2) discharge of any individual "with respect to his 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).

[242] *See* John Valery White, *The Irrational Turn in Employment Discrimination Law: Slouching Toward a Unified Approach to Civil Rights Law*, 53 MERCER L. REV. 709, 718 n.43 (2002) (explaining how the disparate treatment proof structure is used to prove cases of intentional discrimination).

[243] *See supra* Part V.A.

[244] *See* Chandler & Coffman, *supra* note 165, at 20 (discussing how difficult it is for loan officers to eliminate biased decisions when they may consider prohibited characteristics either consciously or unconsciously).

[245] *See supra* notes 216–19 and accompanying text (explaining that stereotyping occurs when employers are free to alter the evaluative criteria and as a result there is a "risk that employers will act on negative stereotypes about various protected groups").

[246] *See* Chandler & Coffman, *supra* note 165, at 20 (explaining that an employer can comply with restrictions against considering race or sex in employment decisions by simply excluding these prohibited characteristics from an employment scoring model).

[247] *See* Warren L. Dennis, *Fair Lending and Credit Scoring*, MORTGAGE BANKING, Nov. 1995, at 55, 56 ("[C]redit-scoring advocates point to credit-scoring systems as helpful to defend against discrimination charges . . . ."). The same argument has been expressed more recently. *See, e.g.*, FED. RESERVE BD., CREDIT SCORING, *supra* note 27, at O-7 ("Some observers maintain that reliance on automated credit-evaluation systems such as credit scoring serves to reduce the potential for

theory, a statistical system is "'blind' to overt or subtle preconceptions about racial or lifestyle factors."[248] Because the race and gender of an applicant are "unknown to the personnel in a remote data processing center," decision-makers using credit scoring technologies appear incapable of considering prohibited factors, like an applicant's gender or race.[249]

This perspective, however, is too sanguine and lacks nuance. Even if a statistical method could reduce the risk of intentional discrimination by employers, these benefits could easily be eclipsed by residual discriminatory treatment in the hiring process. For example, any non-discriminatory impact of an employment-scoring model could be negated by an employer's manual "override" of the preliminary decisions suggested by an algorithm.[250] If an employer's algorithm were to yield a negative employment "score," thus suggesting that an applicant may pose a substantial fraud or irresponsibility risk, an employer might discount these results by providing certain applicants—or members of select groups—with the "benefit of the doubt." If an employer could selectively discount the results of a statistical evaluation method, goals of accuracy and nondiscrimination would be undermined. At that juncture, employers' biases could easily be injected into the decision-making process. And these biases, as cognitive psychologists have shown, are difficult to suppress.[251] Implicit biases may not even be known to the decision-maker,[252] and the effects of implicit bias are not currently actionable under existing employment discrimination tests.[253]

The anti-discriminatory effects of a statistical methodology may be compromised for another, related reason. Even if a statistical approach could reduce the likelihood of deliberate discrimination by employers,

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discrimination in lending because the automated nature of the process reduces the potential for bias to influence lending outcomes.").

[248] Dennis, *supra* note 247, at 56.

[249] *Id.* at 56–57.

[250] *Cf.* FED. RESERVE BD., CREDIT SCORING, *supra* note 27, at O-7 (explaining that disparate treatment could arise in an otherwise nondiscriminatory credit scoring model if lenders "exercise 'overrides' for some populations or in some circumstances").

[251] *See* Jonathan St. B.T. Evans, *In Two Minds: Dual-Process Accounts of Reasoning*, 7 TRENDS IN COGNITIVE SCI. 454, 455 (2003) ("[T]he influence of prior beliefs is extremely difficult to suppress . . . .").

[252] Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1239 (1995) ("[There is a] faulty assumption that disparate treatment discrimination necessarily manifests discriminatory motive or intent . . . .").

[253] *See, e.g.*, Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 3 (2006) ("Unconscious bias . . . generates inequalities that our current antidiscrimination law is not well equipped to solve."); Krieger, *supra* note 252, at 1164 (arguing that existing Title VII jurisprudence "is inadequate to address the subtle, often unconscious forms of bias that Title VII was also intended to remedy").

credit histories are only one of several factors considered by employers.[254] As a result, the anti-discriminatory impact of a statistical method may be naturally limited by the strong probability that bias and animus may infiltrate other aspects of an employer's evaluation process.

Indeed, although the credit and insurance industries may have reduced discrimination through the adoption of an empirical method,[255] these same gains may not be as achievable in the employment setting. In evaluating applicants, insurers and creditors may rely on fewer non-credit criteria than do employers.[256] Employers rely heavily on various amorphous qualifications, like a job candidate's creativity, ambition, and amiability.[257] As a result, it may be easier to maximize the anti-discriminatory benefits of an empirical method in the insurance and credit settings than in the employment market. The hiring process remains an imperfect science, subject to decision-makers' cognitive limitations. Because it is impossible to sanitize all employment evaluation procedures, applicants must continue to rely on rigorous enforcement of antidiscrimination laws to reduce the risk of suffering inequitable treatment in the employment setting.

3. *A Statistical Method Could Have a Disparate Impact, but Adverse Effects Could Be Mitigated*

While an employment scoring model is likely to reduce the risk that an employer will deliberately discriminate against an applicant because of his or her membership in a protected group, a statistical method may nevertheless unintentionally discriminate against these individuals. If the predictiveness of particular variables in the employment scoring model

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[254] *See* Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 228 (explaining that subjective factors also contribute to hiring decisions such as "interviewing presence" or "the strength of a candidate's references").

[255] *See, e.g.*, Peter Zorn et al., *Automated Underwriting and Lending Outcomes: The Effect of Improved Mortgage Risk Assessment on Under-served Populations* 15 (U.C. Berkeley Program on Hous. & Urban Policy Conference Paper Series, Paper No. C01-008 2001), *available at* http://urbanpolicy.berkeley.edu/pdf/zorn.pdf (showing that manual underwriting approved only fifty-one percent of a sample of minority applicants for affordable loans, but Freddie Mac's Loan Prospector system approved seventy-nine percent); Letter from Nat'l Credit Union Admin. to Credit Unions (Aug. 1995), *available at* http://www.ncua.gov/Resources/Documents/LCU1995-174.pdf ("In general, the use of a properly derived credit scoring system reduces the possibility that loan policies may be discriminatory.").

[256] *See* Stanley D. Longhofer, *Mortgage Scoring and the Myth of Overrides*, COMMUNITIES & BANKING, Fall 2002, at 18, 21, *available at* http://www.bos.frb.org/commdev/c&b/2002/fall/CS5.pdf (explaining that an applicant's credit score is often the only factor considered in the underwriting of credit card loans and other personal loans, but mortgage lenders typically rely on more than just a credit score).

[257] Judith Bartnoff, Note, *Title VII and Employment Discrimination in "Upper Level" Jobs*, 73 COLUM. L. REV. 1614, 1630 (1973) (asserting that employers often consider "amorphous" qualifications when filling positions for upper level employees).

stems from the fact that they are serving as proxies for applicants' membership in protected populations,[258] a statistical method may have a disparate impact on these groups.

Various studies, for example, have established that minorities are more likely to have lower credit scores and insurance scores than non-minorities.[259] Because employers' algorithms would incorporate many of the same variables utilized in creditors' and insurers' models, these adverse outcomes are likely to persist in the employment setting.

The risk that an employment scoring model would disproportionately impact minority or other groups is problematic, since employment scores—like insurance scores or credit scores—impact the price and availability of resources indispensable to meaningful participation in the American economy. The purchase of insurance is necessary (and is often legally mandated) to minimize liability and protect one's financial interests.[260] Similarly, access to credit is required for wealth accumulation.

There are ways, however, to mitigate any adverse effect of employment scores on protected groups. For example, the significant disparity between minorities and non-minorities in credit scores may be caused by credit bureaus' historic failure to include in their credit scoring algorithms "non-standard" sources of credit history information, including utility payments, payday loan histories, and rental payments.[261] Because minorities are more likely to rent their homes[262] and to use payday loans instead of other credit products,[263] the construction of the credit scoring model may itself perpetuate racial inequality. If a statistical employment

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[258] FED. RESERVE BD., CREDIT SCORING, *supra* note 27, at O-7 to O-8.

[259] *See id.* at S-2 ("[O]n average, blacks and Hispanics have lower credit scores than non-Hispanic whites and Asians . . . .").

[260] It is not uncommon that state laws require owners of cars to obtain car insurance. *See* John Fund, *HillaryCare Flops in California*, WALL ST. J., Sept. 22, 2007, at A10 ("California has had a law mandating that drivers have car insurance since 1970 and has required physical proof of insurance to register a car for a decade.").

[261] *See, e.g.*, ALYS COHEN ET AL., NAT'L CONSUMER LAW CTR., CREDIT DISCRIMINATION § 6.4.2.2, at 137 (5th ed. 2009) ("Credit Scoring models often fail to include rent, utility, and other non-standard payment histories . . . ."). Recently, however, some credit reporting agencies have begun incorporating nontraditional sources of credit information in alternative credit scoring models. *See, e.g.*, *id.* ("[T]here have been several initiatives to establish 'alternative' credit profiles for populations without a credit history . . . ."); *Lenders Across Industries Validate FICO Expansion Score's Power*, FICO (Feb. 2012), http://www.fico.com/en/FIResourcesLibrary/Lenders_Success_2249CS.pdf. (describing the new Expansion Score and how it takes into account non-traditional credit data).

[262] WILLIAM APGAR, JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., RETHINKING RENTAL HOUSING: EXPANDING THE ABILITY OF RENTAL HOUSING TO SERVE AS A PATHWAY TO ECONOMIC AND SOCIAL OPPORTUNITY 3 (2004), *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w04-11.pdf (indicating that renters tend to be younger, tend to have lower incomes, and are more likely to be minorities or immigrants).

[263] AMANDA LOGAN & CHRISTIAN E. WELLER, CTR. FOR AM. PROGRESS, WHO BORROWS FROM PAYDAY LENDERS?: AN ANALYSIS OF NEWLY AVAILABLE DATA 7 (2009), *available at* http://www.americanprogress.org/issues/2009/03/pdf/payday_lending.pdf.

model were constructed to incorporate these nontraditional sources of data, employers' consideration of employment scores would be less likely to have a disparate impact on traditionally disadvantaged populations.

Thus, while a statistical evaluation method cannot eliminate discrimination, it can more easily detect (and ameliorate) unsound statistical disparities among various groups. In contrast, judgmental evaluation methods—in spite of their "flexible" façade[264]—cannot easily be adjusted to minimize discriminatory outcomes.

VI. CONCLUSION

This Article highlighted an imminent problem facing state legislators, who have sought to reduce the risk of inequitable, discriminatory treatment in the employment setting by banning employers' use of credit reports. This Article argues that, even if bans reflect the most normatively palatable solution to the risk of financial history discrimination, they are unlikely to achieve their desired objectives. Because state bans contain exemptions that can be broadly interpreted to encompass a large percentage of jobs, these laws do little to advance anti-discriminatory policies. Likewise, even if these bans were more expansively drafted and robustly enforced, the game-theoretic "unraveling" problem would likely trigger a cascade of information breaches that would thwart legislators' efforts to suppress the disclosure and use of credit-history information by employers.

Because the bans that the majority of states have adopted or are considering adopting are likely to be ineffective, legislators must consider other options. Policymakers could give consumers a greater participatory role in employers' assessment processes by giving consumers the opportunity to insert explanatory statements in their consumer reports. In these statements, consumers could explain any unforeseeable factors that may have contributed to their financial predicaments. This approach, however, elevates form over substance. It may serve to pacify consumers by appearing to give them a greater say in an evaluation process that lacks transparency and flexibility, but it is unlikely to have a significant impact on employers' decision-making processes.

Because of the shortcomings of these approaches, this Article considers an alternative. Cognitive research suggests that employers' current use of credit histories is likely to produce inconsistent and subjective decision making—much like the "judgmental" underwriting techniques used by creditors before the widespread adoption of credit scores.[265] If employers instead adopted an empirically derived, statistically sound evaluation method—one analogous to creditors' use of credit scores

[264] *See* text accompanying *supra* note 200.

[265] FED. RESERVE BD., CREDIT SCORING, *supra* note 27, at O-4.

and insurers' use of credit-based insurance scores—employers' decision-making processes may grow less discriminatory, more accurate, and more consistent. This approach would help ensure that employers consider credit histories only to the extent justified by validated algorithms. In addition, it would substantially reduce the risk that employers would discriminate—consciously or subconsciously—against applicants because of their membership in protected groups. While a statistical approach may still have a disparate impact on minority communities, that adverse effect could be mitigated through the proper construction of an employment scoring model—one that incorporates "nontraditional" financial history data that better reflect trends in minority groups' financial practices.

A statistical evaluation method is not a panacea. Its anti-discriminatory impact might be blunted by residual discriminatory elements of employers' evaluation processes. In addition, implementing and constructing a valid and reliable algorithm (which requires significant capital outlays and large, representative data sets) may be challenging. The broader premise of this Article, however, is that a statistical approach better addresses the realities of information diffusion and the inevitable, disconcerting limitations of human decision-making. If credit reporting information cannot be fully suppressed, legislators must be conscious of how that data—notwithstanding the existence or the justifiability of bans—is likely to be utilized by decision-makers, and how this information infiltration may impair the fairness of hiring outcomes.

Promoting the adoption of a statistical approach may, at first glance, seem counterintuitive to antidiscrimination advocates, since it fosters employers' access to information that advocates have dismissed as either inadequately predictive or as patently unfair to use in the employment setting.[266] This Article argues, however, that the normative debate surrounding employers' use of credit histories is necessarily informed by informational and cognitive realities and by the unprecedented challenges that the burgeoning "Big Data" economy poses to antidiscrimination initiatives.

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[266] *See, e.g.*, Brown, *supra* note 9, at 3 (citing employee advocacy groups as opposing employers' use of credit reports based on a lack of conclusive studies).