ARTICLES

CREDIT SCORES, LENDING, AND PSYCHOSOCIAL DISABILITY

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Credit scores have become a near-universal financial passport for Americans to meet common personal needs including employment, loans,

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insurance, and home and car purchases or leases. At the same time, Elizabeth Warren and others have documented the horrific economic, emotional, and health consequences of low creditworthiness for score-bearers and their families. Individuals with psychosocial disabilities (previously called mental disabilities or mental illnesses) can make disastrously poor financial decisions during the active phases of their conditions; during inactive phases they are as capable as others of making sound or poor financial decisions. Yet, in computing credit scores and selling credit reports, national and transnational credit-reporting agencies (like Equifax) do not account for the implications of psychosocial disability. Worse, evidence shows that businesses rely on these reports to predatorily target borrowers with psychosocial disabilities—and especially those who are also women and racial minorities—in deciding terms of lending, employment, and housing. In theory but not in practice, the Americans with Disabilities Act and the Fair Housing Act each prohibit discriminatory financial decisions arising from disability status, while also requiring reasonable accommodations to equalize opportunities for disabled persons. The United Nations Convention on the Rights of Persons with Disabilities (which the United States has signed) further mandates enabling the financial decision making of these individuals, but does not provide guidance on achieving this obligation. Further, despite the crucial and direct implications this situation also raises for vast numbers of Americans without psychosocial disabilities who likewise make poor credit decisions, it has not undergone legal analysis. We engage this significant gap by suggesting schemes drawn from historical and comparative contexts that could enable the creditworthiness of persons with psychosocial disabilities, and then critiquing the costs and benefits of each. In doing so, we proffer the first analysis of this issue in the legal literature and seek to stimulate future dialogue among academics and policymakers. The Article concludes with thoughts on the implications of its analyses for the broader issue of credit scoring.

INTRODUCTION

Many articles seek to identify the causes behind and possible remedies to the debt epidemic. Notably, Senator Elizabeth Warren's professorial scholarship empirically identifies complex socioeconomic factors that helped create the current deteriorated state of personal credit affairs in the United States.[1] In doing so, Warren and others shine light on the detrimental impact that poor creditworthiness has on members of vulnerable populations such as

[1] *See, e.g.*, ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP 6 (2003); Elizabeth Warren, *Bankrupt Children,* 86 MINN. L. REV. 1003, 1004 (2002) [hereinafter Warren, *Bankrupt Children*]; Elizabeth Warren, *The Growing Threat to Middle Class Families,* 69 BROOK. L. REV. 401, 404 (2003) [hereinafter Warren, *Growing Threat*].

women and racial minorities.[2] We contribute to this research by providing an initial inquiry into the credit situation affecting individuals with psychosocial disabilities (formerly called mental disabilities or mental illnesses) and the harmful consequences to which they are often subjected by modern commercial credit reporting systems. We also raise, for the first time in legal literature, an analysis of the costs and benefits of financial inclusion, and suggest possible solutions for resolving this important socioeconomic issue.

Credit scores have become a near-universal financial passport for meeting common personal needs such as employment, loans, insurance, and home and car purchases or leases. At the same time, horrific economic, emotional, and health consequences arise from low creditworthiness for some score-bearers and their families. Individuals with psychosocial disabilities can make disastrously poor financial decisions during the active phases of their conditions; during inactive phases they are as capable as others of making sound or poor financial decisions. Yet, in computing credit scores and selling credit reports, oligopolistic transnational credit reporting agencies (like Equifax) do not account for psychosocial disability. Worse, evidence demonstrates that businesses rely on these reports to predatorily target individuals with psychosocial disabilities—especially those who are also women and racial minorities—in deleteriously deciding terms of employment and housing.

Discrimination based on disability status is prohibited by two civil rights statutes, the Americans with Disabilities Act[3] ("ADA") and the Fair Housing Act[4] ("FHA"), but no evidence suggests they have any impact on predatory lending. The United Nations Convention on the Rights of Persons with Disabilities[5] ("CRPD"), which the United States has signed but not yet ratified, offers clues on addressing equal access to financial services, but leaves open the most crucial issues of how to empower such agency. To address this lacuna, we suggest and assess different avenues—including market approaches, government regulation, and non-governmental intervention—that could honor the discrimination-ending aspirations of these legal obligations as they relate to persons with psychosocial disabilities and their creditworthiness.

By utilizing rights-based theory in conjunction with economic analysis, the Article stakes out a unique perspective within the developing disability rights canon

[2] *See, e.g.*, Elizabeth Warren, *The Economics of Race: When Making It to the Middle Is Not Enough*, 61 WASH. & LEE L. REV. 1777, 1799 (2004) ("The economic security that comes with arrival in the middle class is divided by race, leaving Hispanic and black families at far more risk than their white counterparts."); *see also* Warren, *Bankrupt Children*, *supra* note 1, at 1017 (finding that female heads of households have a higher rate of bankruptcy than the rest of the population and that "financial stress" is an issue for women of all socioeconomic classes).

[3] 42 U.S.C. §§ 12101-12213 (2012).

[4] 42 U.S.C. §§ 3601-3631 (2012).

[5] Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD].

addressing legal capacity (also called legal personhood) that mandates recognition of an individual's right to make financial (and other) choices for herself. The Article thereby contributes to a continuing and contentious global debate over how to balance the tension between autonomy and paternalism as these dynamics relate to persons with disabilities. Finally, as the first piece of legal scholarship to address the intersection of creditworthiness and psychosocial disability, we aim to provoke debate and scholarly exploration of an unaddressed but crucial issue within the field of credit scores, bankruptcy, and predatory lending.

The Article proceeds as follows. Part I sets forth the history of commercial scoring and reporting of borrower creditworthiness. It then summarizes empirical findings on the typically harmful financial, health, and psychological consequences of low credit scores and bankruptcy on borrowers and their families. Section II.A demonstrates that persons with diagnosable psychosocial disabilities, much like other Americans, are capable of making both sound and poor financial decisions. Yet psychosocial disability is almost invariably episodic, with active and inactive phases. Unsurprisingly, some financial transactions made during the active phases of these conditions are inadvisable and have disastrous financial score consequences when data about those transactions are acquired and utilized by credit reporting agencies. Section II.B reveals that individuals with psychosocial disabilities who are also women and/or racial minorities bear the heaviest brunt of adverse reporting by credit reporting agencies and targeting by predatory creditors. Section II.C argues that the ADA and FHA shield people with psychosocial disabilities from status-based algorithmic identification and consequent stigma and exclusion in law but not in fact. It further avers that the CRPD offers abstract theoretical guidance on how to wrestle with these issues, but leaves the most difficult questions untouched.

Part III then moves from the notional to the practical by considering the costs and benefits of different approaches that might be considered to enable the creditworthiness of people with psychosocial disabilities. Sections II.A-B demonstrate the clear scientific evidence regarding psychosocially disabled financial actors and their intermittent incapacity to make sound financial judgments. Yet, as Part III demonstrates, not all jurisdictions equate sporadic medically-originated incapacity with complete legal incapacity, nor should they. The issue of legal capacity is an age-old juridical conundrum of whether and to what extent persons with psychosocial (as well as cognitive) disabilities should be held as responsible as others for the unfavorable consequences of their actions, and who should bear the attendant costs of such determinations. Contemporaneously, the issue of legal capacity raises significant civil and human rights questions as to what, if any, public and private obligations can enable individuals with psychosocial disabilities to access credit of a level comparable to non-disabled persons. Yet despite the crucial and direct implications this matter also raises for vast numbers of Americans without psychosocial disabilities who likewise make poor credit decisions, it has been given almost no legal analysis. Drawing from the scarce historical and contemporary jurisdictions that even touch on this issue, we sketch out several very different approaches, with varying levels of intrusion into the lives of persons with psychosocial disabilities, and assess the costs and benefits of each. We conclude by describing the implications of our analysis for the broader issue of credit scoring.

I. CREDIT SCORES AND THEIR FINANCIAL CONSEQUENCES

Law professor Frank Pasquale and sociologist Martha Poon have each documented the history and evolving use of credit scores and reports in the United States.[6] Their work details the increasing centrality of credit scores to aspects of American life, and exposes some of the secretive algorithms by which credit scores are computed.

Before World War II, installment credit was initiated by department stores and other mercantile establishments based on personal judgments of a customer's character.[7] After the war, systematic attempts to determine creditworthiness led to the establishment of credit bureaus and the retention of statisticians to evaluate correlations between consumer purchases and ability to pay.[8] In 1956, engineer William Fair and mathematician Earl Isaac founded the seminal credit rating agency ("CRA") of Fair, Isaac & Co. ("FICO"). The 1950s desire to estimate "creditworthiness" also precipitated a then-novel bank product from major lending institutions—the so-called "general purpose bank credit card." Subsequently, CRAs partnered with issuing banks and, utilizing combined creditworthiness recommendations, issued credit cards to "trusted" consumers for retail purchases.[9]

Until 1970, CRAs were unregulated. Complaints of abusive, opaque, and false estimations of creditworthiness which affected banks' and merchants' lending decisions were widespread, despite consumers' growing reliance upon credit to provide staples of daily life.[10] In response, the 1970 Fair Credit

[6] *See generally* FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION (2015); Martha Poon, *From New Deal Institutions to Capital Markets: Commercial Consumer Risk Scores and the Making of Subprime Mortgage Finance*, 34 ACCT., ORGS. & SOC'Y 654 (2009) [hereinafter Poon, *New Deal*]; Martha Poon, *Scorecards as Market Devices for Consumer Credit*, 55 SOC. REV. 284, (2007) [hereinafter Poon, *Scorecards*.

[7] *See* ROBERT F. MANNING, CREDIT CARD NATION 107-08 (2000).

[8] *See* Mark Furletti, *An Overview and History of Credit Reporting* 5 (Fed. Reserve Bank of Phila. Payment Cards Ctr., Discussion Paper No. 02-07, 2002), http://www.fedinprint.org/items/fedpdp/02-07.html [http://perma.cc/982S-485A] ("[T]he industry harnessed the power of computers and databases to process, organize, and report on credit data.").

[9] PASQUALE, *supra* note 6, at 23.

[10] *Id.* at 22 (contending that CRAs made "critical judgments about people" while "hiding their methods of data collection and analysis" and used "a toxic mix of prejudices" such as "messiness, poorly kept yards, and 'effeminate gestures'" as factors in creditworthiness determinations).

Reporting Act[11] ("FCRA"), enforced by the Federal Trade Commission, mandated that: (1) upon consumer request, CRAs must provide information about a consumer's credit history contained in that CRA's files;[12] (2) consumers may dispute the accuracy of CRA-retained information;[13] (3) if negative information is removed because of a consumer dispute, a CRA may not reinstate such information to the consumer's file without notifying them in writing within five days of reinsertion;[14] (4) CRAs may not keep negative consumer information (e.g., late or defaulted loan payments) for an excessive period of time (usually seven years);[15] and, significantly, (5) upon consumer request, CRAs must provide some explanation of what factors in a credit report may have resulted in a credit denial.[16] A second law, the 1974 Equal Credit Opportunity Act[17] ("ECOA"), prohibited various forms of discrimination in lending based on race, color, religion, national origin, sex, marital status, or age; the fact that all or part of the applicant's income derives from any public assistance program; or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act.[18] Pursuant to the ECOA, the Federal Reserve Board issued Regulation B requiring CRAs and lenders to offer specific and accurate reasons for denial of credit and prohibiting CRAs from omitting to divulge their true reasons.[19]

The credit reporting industry standardized and consolidated its practices following passage of the FCRA and ECOA. In the 1980s, creditors began to purchase generic credit histories about borrowers who did not hold accounts

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[11] Pub. L. No. 91-508, tit. VI, 84 Stat. 1128 (1970) (codified as amended at 15 U.S.C. §§ 1681-1681x (2012)).

[12] *See* 15 U.S.C. § 1681g(a)(1) (2012). A 2003 amendment to the FCRA, authorizes consumers to receive one free credit report per year from a CRA. *See id.*. § 1681j. A standardized government-authorized website, has been set up toward this end. *See* ANNUALCREDITREPORT.COM, http://www.annualcreditreport.com [http://perma.cc/J4FU-W48R]. Some CRAs offer their own free credit reports, but accusations of fraud are surfacing that these websites do not provide reports reflective of the credit scores actually used by lenders in making financial decisions. *See* Mary Beth Quirk, *The Credit Score Experian Is Selling You Isn't the One Lenders Consider*, CONSUMERIST (April 11, 2011), http://consumerist.com/2011/04/11/the-credit-score-experian-is-selling-you-isnt-the-one-lenders-look-at/ [http://perma.cc/F29N-CXAZ].

[13] 15 U.S.C. § 1681i (2012).

[14] *Id.* § 1681i(a)(5)(b)(ii).

[15] *Id.* § 1681c.

[16] Under the FCRA, a creditor who takes an "adverse action" against a consumer must notify the consumer of, and explain, the action. *Id.* § 1681a(k) (defining "adverse action" as including adverse employment decisions, denials, cancellations, rate increases, and various insurance policy alterations); *id.* § 1681m(a).

[17] Pub. L. No. 93-495, 88 Stat. 1500 (1974) (codified as amended at 15 U.S.C. §§1691-1691f (2012)).

[18] 15 U.S.C. § 1691(a) (2012).

[19] 12 C.F.R. § 202.9(b) (2015).

with the creditors.[20] In 1987, FICO, by then a corporate giant among credit evaluators, went public on the stock exchange and grew larger. In 1989, FICO unveiled its main current financial product—the famed "FICO score." A FICO score is a three-digit number computed by an undisclosed algorithm which in turn draws upon an undisclosed variety of consumer behaviors and financial transactions to determine creditworthiness. According to one insider's claim, more than three hundred categories of data per consumer comprise each FICO score.[21]

As previously noted, creditworthiness was originally a binary and qualitative determination—"yes, you can have credit" or "no, you cannot" explained by an articulable reason. With quantum leaps in data collection and management, as well as computing capabilities over recent decades, the desire to glean creditworthiness insights from vast sets of statistical correlations has led to dimensional, quantitative risk assessments. FICO scores of 850 (perfect credit) or 650 (exemplary credit) or 480 (average credit) result in markedly different loan interest rates and contract terms than do wholesale denial of credit for lower scores.[22]

The "control-by-risk" dynamic profoundly played out in the subprime mortgage crisis, in which banks and investors placed "leveraged bets" for and against packages of risky mortgages and mortgage-backed securities made in the American and international housing markets.[23] Credit scores are central components in financial decisions as diverse as employee hiring or federal student loan awards. Yet one prominent financial debt counselor questions reliance on credit scores as a proxy for being perceived as a good citizen or financially trustworthy person, cautioning: "Your credit bureau report score does *not* mean that you are winning with money. Not even close. It's just a measure of how good you are at spending with debt."[24] Thus, the general

[20] BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO CONGRESS ON CREDIT SCORING AND ITS EFFECTS ON THE AVAILABILITY AND AFFORDABILITY OF CREDIT, at O-5 (Aug. 2007) http://www.federalreserve.gov/boarddocs/rptcongress/creditscore/creditscore.pdf [http://perma.cc/2RP2-RP4R].

[21] Charles Duhigg, *What Does Your Credit Card Company Know About You?*, N.Y. TIMES MAG. (May 12, 2009), http://www.nytimes.com/2009/05/17/magazine/17credit-t.html ("We may look at 300 different characteristics just to predict their delinquency risk.").

[22] Frank Pasquale, *The Credit Scoring Conundrum* 26 (U. of Md. Legal Stud., Research Paper No. 2013-45, 2013) (on file with authors) ("Every card transaction can be fed into a kaleidoscopic characterization of creditworthiness, a constant grading of one's ability to generate profits for a bank."); *id.* at 3 (explaining the role of credit scores in determining interest rates).

[23] *See* Poon, *New Deal*, *supra* note 6, at 664, 670; Pasquale, *supra* note 22, at 6.

[24] *The Number-One Way to Improve Your Credit Score*, DAVE RAMSEY: BLOG, http://www.daveramsey.com/blog/the-number-one-way-credit-score [http://perma.cc/GLT4-2TD6].

presupposition of the credit scoring system is that a "good" credit score bearer is also a frequent debtor.[25]

In addition, whether this profound shift in the preference of assessing creditworthiness towards anonymous credit scoring has epistemic warrant is a debated question in academic circles. Put another way, the basic question of whether data analysis—often suitable for estimations of physical phenomena such as turbulence or building seismic resistance—is suited for analysis of human financial behavior and reputational risk assessment, remains open.[26] Significantly, the very act of quantifying creditworthiness is itself consequential to creditworthiness. Thus, "unlike the engineer, whose studies do nothing to the bridges she examines, a credit scoring system *increases the chance* of a consumer defaulting once it labels him a risk and prices a loan accordingly."[27]

Nevertheless, ongoing academic skepticism has not deterred CRAs from enticing the vast international consumer lending market from becoming overwhelmingly dependent on the newer, "risk-based," quantified-scoring conception of creditworthiness. FICO continues to supply credit scoring algorithms to the three major transnational CRAs—Equifax, Experian, and TransUnion—each of which redundantly scores approximately 1.5 billion credit accounts held by some 225 million people, thereby generating above

[25] FICO announced that it would be revamping its algorithm to less penalize infrequent borrowers' credit scores. Press Release, FICO, FICO Score 9 Introduces Refined Analysis of Medical Collections (Aug. 7, 2014), http://www.fico.com/en/about-us/newsroom/news-releases/fico-score-9-introduces-refined-analysis-medical-collections/ [http://perma.cc/3Y7Q-GJL7] ("FICO Score 9 . . . supports the desire of lenders to better assess the risk of consumers with limited credit history—so-called thin files.").

[26] *See* SERGEI BULGAKOV, PHILOSOPHY OF ECONOMY: THE WORLD AS HOUSEHOLD 223-33 (2000) (contending that there are limits on the epistemic usefulness of economic data); David Berry, *The Computational Turn: Thinking About the Digital Humanities*, 12 CULTURE MACHINE 1, 8 (July 11, 2011) (arguing that Big Data provides "destabilising amounts of knowledge and information that lack the regulating force of philosophy . . ."); Friedrich Hayek, The Pretence of Knowledge, Nobel Memorial Lecture (Dec. 11, 1974), http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1974/hayek-lecture.html [http://perma.cc/LE5S-3UQJ] (questioning the use of the traditional scientific method in economic analysis, and arguing that it is impossible to know all the factors that may causally contribute to economic outcomes); *see also* LUDWIG VON MISES, EPISTEMOLOGICAL PROBLEMS OF ECONOMICS 38 (George Reisman trans., 1976); 2 CHARLES TAYLOR, PHILOSOPHICAL PAPERS 1-12 (1985); Lawrence H. White, *Bankruptcy as an Economic Intervention*, 1 J. LIBERTARIAN STUD. 281, 284-86 (1977); Kate Crawford, *The Hidden Biases in Big Data*, HARV. BUS. REV. BLOG (April 1, 2013), http://hbr.org/2013/04/the-hidden-biases-in-big-data [http://perma.cc/BGR6-9AQX].

[27] PASQUALE, *supra* note 6, at 41; *see also* Natasha Singer, *The Scoreboards Where You Can't See Your Score*, N.Y. TIMES, Dec. 28, 2014, at BU3 ("Algorithms are used to assign consumers scores—and to recommend offering, or withholding, particular products, services or fees—based on predictions about their behavior.").

more than one billion credit reports annually.[28] These CRAs in turn sell credit reports consisting of a FICO score and their own gathered transactional information to banks and myriad other lenders.[29] While competitor algorithms exist and these three CRAs have each "tweaked" the model to their own corporate specifications, FICO and its scoring system continue to enjoy near-monopoly among lenders as the benchmark for creditworthiness.[30] Disturbingly, FICO scores often vary and to significant degrees among the three major CRAs.[31] This is because each of them independently collects consumer information, resulting in discrepancies and omissions in what are otherwise assumed to be neutral and verifiable key financial data.[32]

Despite Regulation B, ECOA, FCRA, and other regulations,[33] government expectations of transparency for CRA algorithmic credit evaluations have been poorly realized. A credit score rests upon a CRA's accrual of as many records and cross-correlations of a borrower's financial decisions as possible. CRAs then reductively collapse the entangled mass of correlations of those activities to a three-digit number, supposedly imbued with comparative social meaning. Yet, Regulation B notwithstanding, the CRA focus is on selling a credit score,

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[28] BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 20, at 14.

[29] The Federal Reserve reports that CRAs generally draw credit information from four broad source categories:

> (1) [C]reditors and some other entities such as utility companies and medical facilities, who report detailed information on the status of current and past loans, leases, and non-credit-related bills such as utility and medical bills . . . ; (2) monetary-related legal records of bankruptcy, foreclosure, tax liens (local, state, or federal), garnishments, and other civil judgments . . . ; (3) collection agencies, who report on actions associated with delinquent credit accounts and unpaid non-credit-related bills . . . ; and (4) the credit-reporting agencies' record of inquiries about an individual's credit record made by creditors and others legally entitled to the information.

Id. at 15.

[30] MYFICO, UNDERSTANDING YOUR FICO SCORE 1 (2011), http://www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf [http://perma.cc/5GWK-7YNC].

[31] *See* Carolyn Carter et al., *The Credit Card Market and Regulation: In Need of Repair*, 10 N.C. BANKING INST. 23, 41 (2006) ("A review of over 500,000 consumer credit files . . . found that twenty-nine percent of consumers have credit scores that differ by at least fifty points between credit bureaus . . . .").

[32] MYFICO, *supra* note 30, at 6 ("Each of the three credit reporting agencies probably has different information about you, and that means your scores will also be different.").

[33] The Financial Modernization Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (codified as amended in scattered sections of 12 and 15 U.S.C.), also known as the Gramm-Leach-Bliley Act ("GLBA") "is a successor in spirit to the FCRA. Narrow in its applicability like the FCRA, the GLBA is limited to financial institutions' disclosure of financial information, and relies on notice and opt-out as its main tools for regulating the relationship between the subject and the data collector." Preston N. Thomas, *Little Brother's Big Book: The Case for a Right of Audit in Private Databases*, 18 COMMLAW CONSPECTUS 155, 170 (2009).

unaccompanied by information about the process of how that score is derived.[34]

Consequently, consumers perceive systemized "reason codes"—limited numbers of standardized classifications used by the CRAs that give a justification why a consumer's credit is low or downgraded—as opaque and unhelpful for restoring good credit. For example, and quite chillingly, there is no evidence that the stated reasons are actually significant determinants of FICO scores.[35] Nor have courts and government regulators been helpful in upholding the expectations of FCRA and subsequent credit-related legislation that the credit reporting process would become clearer.[36] Further, it is highly unusual for a consumer to change an incorrect FICO score. Defamation suits against the CRAs for reporting errant credit scores are generally barred as a precondition of the FCRA's enactment.[37] And even though a recent FTC study reveals that almost one in four consumers has at least one score-affecting error in one of their three major CRA credit reports,[38] dispute agents spend on average six minutes per case and lack the power to resolve complaints.[39]

The source of nearly all problems in the credit reporting industry traces back to the black box—the inaccessible nature of FICO and related credit score-producing *algorithms* that are closely guarded trade secrets[40] and not

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[34] *See* Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 530 (2004) ("According to this 'process/product distinction,' information about the details of production processes, as opposed to information about products, is thought to constitute a presumptively illegitimate basis for regulatory or consumer differentiation.").

[35] PASQUALE, *supra* note 6, at 142 ("[W]hen a credit scorer gives 'reason codes' of a few words to justify a bad score, it's a mere façade of an explanation.").

[36] Pasquale, *supra* note 22, at 17 ("I have yet to find a case where litigation led to an auditing process that *actually demonstrated* that the listed reasons were, in fact, the most important determinants of a bad credit score.").

[37] ROBERT ELLIS SMITH, BEN FRANKLIN'S WEB SITE: PRIVACY AND CURIOSITY FROM PLYMOUTH ROCK TO THE INTERNET 320 (2004) ("Consumers would be barred from suing a credit bureau or consumer investigating company for libel or invasion of privacy over inaccuracies they discover in their files. This provision remains in the law today." (emphasis omitted)).

[38] FED. TRADE COMM'N, REPORT TO CONGRESS UNDER SECTION 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003, at 63 (2012), http://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf [https://perma.cc/XJ97-EQLR] ("We estimate that for the target population (individuals with credit histories) at least 24% of credit reports potentially contain errors and approximately 19% of reports may contain errors that are material.").

[39] PASQUALE, *supra* note 6, at 22 ("Agents said their bureau asked them to review ninety cases a day, which averages out to less than six minutes per case.").

[40] FICO gives general details about its algorithm on its website. *See* MYFICO, *What's in My FICO Scores*, http://www.myfico.com/CreditEducation/WhatsInYourScore.aspx [http://perma.cc/DQV2-NDPV] (assigning percentages to each of five "categories" in order

accessible even to government regulators.[41] Thus, despite increasing consumer awareness and attendant complaints about credit scoring, the key issue remains "the growing influence of secret credit scoring algorithms as an all-purpose reputational metric."[42]

CRA representatives insist that keeping algorithms private is important to prevent consumer "cheating" of the system,[43] and some claim that even if made available, the complexity of the algorithms would make them inscrutable.[44] But therein lies the issue because it is precisely a globally controlled system of consumerism that CRAs aspire to erect. A strong incentive exists for these for-profit corporations to seek ever-wider social and business uses for (and purchases of) credit scores and reports. In this gradually globalizing ambition, CRAs and FICO are holding out their products as an objective financial passport.[45]

However, as Gillespie cautions, algorithmically produced social indicators are more akin to "hieroglyphs" than facts: "[S]haped by the tool by which they are carved, requiring of priestly interpretation, they tell powerful but often mythological stories" in the service of their makers, with "the distinct possibility of error, bias, manipulation, laziness, commercial or political influence, or systemic failures."[46] Examples that support his characterization are numerous and include: (1) credit scorers penalizing consumers who reduce

to explain its effect on a FICO score). But it remains impossible to reverse-engineer the scoring process from the limited information that FICO reveals.

[41] *See* Eric Pitter, *The Law of Unintended Consequences: The Credit Scoring Implications of the Amended Bankruptcy Code—and How Bankruptcy Lawyers Can Help*, 61 CONSUMER FIN. L.Q. REP. 61, 65 (2007).

[42] PASQUALE, *supra* note 6, at 25; *see also* Cynthia Dwork & Deirdre K. Mulligan, *It's Not Privacy, and It's Not Fair*, 66 STAN. L. REV. ONLINE 35, 36 (2013) (explaining that most concerns about algorithms "loop back to privacy and transparency—specifically, establishing individual control over personal information, and requiring entities to provide some transparency into personal profiles and algorithms").

[43] *See* Tarleton Gillespie, *The Relevance of Algorithms*, *in* MEDIA TECHNOLOGIES: ESSAYS ON COMMUNICATION, MATERIALITY, AND SOCIETY 167, 185 (Tarleton Gillespie et al. eds., 2014) ("Legislators, who have only just begun to ask questions about the implications of algorithms for fair commerce or political discourse, have thus far been given only the most general of explanations: information providers often contend that their algorithms are trade secrets that must not be divulged in a public venue."); *id.* at 176 (stating that companies are reluctant to reveal their algorithms for fear users will "game the system").

[44] Solon Barocas, Sophie Hood & Malte Ziewitz, *Governing Algorithms: A Provocation Piece*, GOVERNING ALGORITHMS (March 29, 2013), http://governingalgorithms.org /resources/provocation-piece/ [http://perma.cc/8WLV-5LAB] ("[E]ven if these algorithms were somehow more manifest, would we find that they are nonetheless inscrutable?").

[45] Gillespie, *supra* note 43, at 179 ("The careful articulation of an algorithm as impartial . . . certifies it as a reliable socio technical actor, lends its results relevance and credibility, and maintains the provider's apparent neutrality in the face of the millions of evaluations it makes.").

[46] *Id.* at 190-91.

their own credit card ceiling because CRAs "favor those who use a smaller proportion of their existing credit over those who use more;"[47] (2) consumers not knowing that paying off debts older than sixty days will not raise their credit scores;[48] and (3) mortgage holders not being cognizant that defaulting is less harmful when many others do likewise.[49]

Indeed, there is common recognition that the oligopolistic structure of the credit reporting industry has spawned multiple market failures.[50] For CRAs and their major users (e.g., commercial lenders) to wash their hands of all market failure responsibility—when they have considerably amplified the aggregate risks of debt defaults or other financial mishaps (e.g., unproductive employees) in a credit-burdened[51] society perpetuated in considerable part by credit scoring products and the resort to easy credit that they (sometimes predatorily) induce[52]—is argued by some to be tantamount to a self-exonerating ostrich with its head in the sand. For example, Pasquale demands:

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47 Frank Pasquale, The Emperor's New Codes: Reputation and Search Algorithms in the Finance Sector 15 (April 16, 2013) (unpublished draft discussion paper), http://governingalgorithms.org/wp-content/uploads/2013/05/2-paper-pasquale.pdf [http://perma.cc/4YG9-8Y2K].

48 *Id.* at 26.

49 *Id.* ("[A] default may be much less stigmatizing in a year of mass foreclosures than in flush times.").

50 To wit, some examples of conjectured market failures of which CRAs are accused include: unaccountability for errors, politicization, conflicts of interest, opaqueness, inconsistent methodologies, inconsistent ratings, untimely downgrades, insufficient analysis, and ignoring maturity for sovereign credit ratings. Yves Smith, *Can Open Source Ratings Break the Ratings Agency Oligopoly?*, NAKED CAPITALISM (Nov. 30, 2012), http://www.nakedcapitalism.com/2012/11/can-open-source-ratings-break-the-ratings-agency-oligopoly.html [http://perma.cc/KR2K-XR4J]; *see also* John Ryan, *The Negative Impact of Credit Rating Agencies and Proposals for Better Regulation* 12 (Research Div. EU Integration, Stiftung Wissenschaft und Politik, German Inst. for Int'l & Sec. Affairs, Working Paper No. FG 1, 2012/NR. 01, Jan. 2012), http://www.swp-berlin.org/fileadmin/contents/products/arbeitspapiere/The_Negative_Impact_of_Credit_Rating_Agencies_KS.pdf [http://perma.cc/FYR2-FVSW] (arguing that CRAs contributed to the financial crisis where they "continued to give top ratings to mortgage-backed securities months after the housing market started to collapse").

51 *See* DAN ARIELY, PREDICTABLY IRRATIONAL 110 (2008) (identifying "the recent explosion in consumer credit" as a burdening issue for American households and citing high average debt amounts across an average of six credit cards per household).

52 *See generally* JESÚS HUERTA DE SOTO, MONEY, BANK CREDIT, AND ECONOMIC CYCLES (Melinda A. Stroup trans., 3d ed. 2012) (describing how banks extend artificial credit unsupported by real savings to extract additional profits and describing how that additional credit induces boom-bust economic cycles); *cf.* BENOIT MANDELBROT & RICHARD L. HUDSON, THE MISBEHAVIOR OF MARKETS: A FRACTAL VIEW OF FINANCIAL TURBULENCE 248 (2006) (contending that as volatility is injected in markets, markets tend to remain volatile far longer than standard Gaussian estimates would predict, and that volatility induces *more* volatility).

"Brandishing quasi-governmental authority to determine which individuals are worthy of financial backing, [credit reporting agencies] need to be held to a higher standard than the average firm."[53]

Concerns about privacy intrusions in the sharing or collection of credit-relevant data, as well as the lack of transparency in credit score calculations, are only compounded for those who have low credit scores, the implications of which have been evidenced to be quite damning, both personally and financially. Low credit scores are unsurprisingly correlated with higher prospects of bankruptcy. But the predictive quality of a low credit score for impending bankruptcy may be only fifty-five percent, meaning that many lenders or sellers risk being undesirably surprised by low score consumers' bankruptcy declarations, resulting in mandatory write-offs of accounts receivable.[54] Accordingly, CRAs have begun to develop, and lenders or sellers to buy and use, bankruptcy scores alongside credit scores.[55] Bankruptcy scores do not predict creditworthiness as credit scores do, but when coupled with credit scores, bankruptcy scores allegedly permit estimation of the likelihood that a delinquent borrower soon will declare bankruptcy. This theoretically permits creditors to take timely action, such as denial of additional credit, or more insistent demands for repayment of existing loans. Most CRA bankruptcy scores, unlike credit scores, are clandestine—sold only to creditors and never made available to affected debtors.[56]

More broadly, it has long been understood that American bankruptcy law's motivation has been to offer a "fresh start" to a beleaguered debtor.[57] However, recent research indicates that consumer bankruptcy may be compounding existing financial distress, as well as the aforementioned accompanying emotional, physical, and social consequences. A declarant's average debt load at the point of bankruptcy has increased 55.5% since 1981.[58] But this growth in

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[53] Pasquale, *supra* note 47, at 37.

[54] David R. Kelly & Gregg A. Weldon, *The Science of Predicting Consumer Bankruptcy*, ANALYTICS-IQ, INC., http://analytics-iq.com/white-papers/the-science-of-predicting-consumer-bankruptcy/ [http://perma.cc/XY3Y-JEBP].

[55] Jeremy M. Simon, *Are You a Bankruptcy Risk? Enigmatic Score May Tell Lenders*, CREDITCARDS.COM (Jan. 20, 2009), http://www.creditcards.com/credit-card-news/bankruptcy-risk-score-1270.php [http://perma.cc/68SW-RZA5] ("Meet the bankruptcy score, the credit score's more mysterious cousin.").

[56] *Id.* ("[B]ankruptcy scores, unlike credit scores, remain unavailable to the general public.").

[57] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) ("One of the primary purposes of the bankruptcy act is to 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh . . . .'" (quoting Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554-55 (1915))).

[58] Theresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 228 (2006) (finding increase in debt load using inflation-adjusted dollars).

the predilection of American borrowers to borrow is not one-sided. Bankrupt families have become marketing targets[59] for unprecedented, "staggering" offerings of unsecured debt.[60] Historically, lenders cut off credit when families had financial problems, but beginning in the 1990s there was a sharp increase in "easy credit" marketing to distressed families.[61] By way of example, in 2005 alone, six billion pieces of United States direct mail were sent to advertise major credit cards[62] that in turn have immensely profited commercial lenders.[63] By contrast, the Federal Reserve estimates that households and non-profits owed $13.68 trillion in the third quarter of 2013, with $3.04 trillion of that debt due to consumer credit.[64]

Ironically, people with lower credit scores, who miss payments, or who are not paying in full, counterproductively get more access to credit lines than people who pay on time.[65] Over seventy-five percent of commercial lending profits come from people who are not paying debts in full.[66] Financial incentives exist for lenders to offer even more credit, and at higher rates, to people who have been through bankruptcy because they "cannot declare bankruptcy again for six years" but may still "end up carrying a balance and making minimum monthly payments . . . ."[67] And those who have declared

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[59] *See generally* Katherine Porter, *Bankrupt Profits: The Credit Industry's Business Model For Postbankruptcy Lending*, 93 IOWA L. REV. 1369 (2008) (conducting first-ever longitudinal study of bankrupt borrowers to identify existence of predatory post-bankruptcy lending). *See also* Fumiko Hayashi & Joanna Stavins, *Effects of Credit Scores on Consumer Payment Choice* 12 (Fed. Reserve Bank of Kan. City, Research Working Paper, No. 12-03, 2012), https://www.kansascityfed.org/publicat/reswkpap/pdf/rwp12-03.pdf [http://perma.cc/X3PK-7S5U] ("We are not aware of sources providing evidence that credit card offers to lower-FICO-score consumers are more limited than those offered to higher-FICO-score individuals.").

[60] Sullivan, Warren & Westbrook, *supra* note 58, at 228 ("[D]ebtors who found their way to the bankruptcy courts had also been the recipients of staggering amounts of credit offered on an unsecured basis.").

[61] *Id*. at 251 ("Moreover, when a debtor made purchases over the credit limit, instead of cutting the debtor off as in the 1980s, lenders in the 1990s began to raise the limit and offer more credit, while imposing a hefty fee for doing it.").

[62] ARIELY, *supra* note 51, at 110.

[63] Sullivan, Warren & Westbrook, *supra*, note 58, at 252 ("[S]ubprime lenders have learned that when inflation is low, lending out at 18%, 22%, or 34% can be extraordinarily profitable . . . .").

[64] BD. OF GOVERNORS OF THE FED. RESERVE SYS., STATISTICAL RELEASE Z.1, FINANCIAL ACCOUNTS OF THE UNITED STATES: FLOW OF FUNDS, BALANCE SHEETS, AND INTEGRATED MACROECONOMIC ACCOUNTS THIRD QUARTER 2013, at 66 (Dec. 9, 2013), http://www.federalreserve.gov/releases/z1/20131209/z1.pdf [http://perma.cc/3V9R-MW59].

[65] WARREN & TYAGI, *supra* note 1, at 138 ("What [Americans] don't realize is that when a borrower makes a partial payment, when he misses a bill, and when his credit rating drops, he actually gets *more* offers for credit.").

[66] *Id.* at 139.

[67] *Id.* at 171.

bankruptcy are more heavily reliant on that additional credit. One study showed that the average bankrupt consumer uses 65.99% of their revolving credit, contrasted with 52.71% for non-bankrupt peers with comparable pre-bankruptcy credit scores.[68]

Personal consequences of bankruptcy have also worsened for declarants, their families, and their communities. As Warren and her coauthors observed, "[m]edian family incomes have declined, basic expenses have risen, and families are shouldering unprecedented debt loads."[69] This has resulted in an uptick in collection calls for late bill payments.[70] And, because of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[71] ("BAPCPA"), a reform law designed to reduce bankruptcies through means tests, families are delaying bankruptcy.[72] The supposed aim of BAPCPA was to deter the wealthy from strategic bankruptcy filings used to increase wealth.[73] The true result of the law's enactment, however, has been to block and delay filings by all filers, including middle- and lower-class individuals.[74] The consequence has been that when such people do declare bankruptcy they have increased debt and lower net worth than did pre-2005 declarants.[75] This delay benefits creditors, even as it leaves the debtors in worse straits, because creditors can rely on more payments being made at higher interest rates.[76] Total debts of bankruptcy declarants have risen considerably. Non-mortgage secured debt increased almost twenty-eight percent between 2001 and 2007.[77] Further, increased unsecured debt has the "risks of sharply increasing interest rates and multiple fees that can wreak havoc on household budgets."[78]

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[68] KELLY & WELDON, *supra* note 54 (highlighting that bankrupt consumers are in worse shape financially than equally "bad" consumers who have not yet declared bankruptcy).

[69] Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A. E. Pottow, Deborah K. Thorne & Elizabeth Warren, *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 349-50 (2008) (footnotes omitted).

[70] Sullivan, Warren & Westbrook, *supra* note 58, at 247 ("Families report an increase in debt collection calls. Currently one in every seven American families reports being pressured by creditors to pay late bills, a 26% increase in little over a decade.").

[71] Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified in scattered sections of 11 U.S.C.).

[72] *See* Lawless, Littwin, Porter, Pottow, Thorne & Warren, *supra* note 69, at 353 ("The data showing rising debt loads are consistent with the view that troubled families are delaying bankruptcy–struggling longer with their bills and building up bigger loads of debt before succumbing."). BAPCA's means test "called for a stringent and automated screen based predominately on a debtor's income." *Id.* at 356.

[73] *Id.* at 351.

[74] *Id.* at 353 ("[C]reditors gain from BAPCPA less because of any effect on carefully targeted can-pay debtors and more because they have a stronger hand to press the debtors—all debtors, regardless of income—to struggle outside the bankruptcy system.").

[75] *Id.* at 380.

[76] *Id.* at 353.

[77] *Id.* at 367.

[78] *Id.* at 372.

Lenders make significant profits off of borrowers with marginal credit scores, who are usually people with lower incomes.[79] The middle class is hit hardest, constituting ninety percent of families declaring bankruptcy.[80] Having children increases a family's odds of declaring bankruptcy by 302%.[81] This might be partially explainable because families in bankruptcy have less flexibility to cut household expenses with children present.[82]

Healthcare debts are a particularly significant concern, contributing to as many as half of all bankruptcies.[83] Often consumers incur this damning debt by using high-interest credit cards to pay medical bills.[84] Among bankruptcy declarants, one fourth of single women, almost one third of married couples, and eighteen percent of single men cite medical causes of bankruptcy when asked.[85] One fourth will cite illness/injury as a direct cause.[86] Often medical bankruptcy has been a result of not possessing medical insurance, or, if the declarant did have medical insurance, not having sufficient coverage.[87] Medical bankruptcy is more likely for the elderly,[88] and collection agencies contact eight to twenty-one percent of all American families annually to dun health-related expenses.[89] To avoid further debt encumbrance, many others

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[79] Elizabeth Warren, *Financial Collapse and Class Status: Who Goes Bankrupt?*, 41 OSGOODE HALL L.J. 115, 120 (2003) ("[I]t is a deliberate search for the borrower who cannot pay off a credit card bill in full each month: one who will make minimum monthly payments at high rates of interest and, best of all, who will miss an occasional payment, paying penalties and late fees and default rates of interest that can range as high as 36 per cent annually.").

[80] Robert M. Lawless & Elizabeth Warren, *Shrinking the Safety Net: The 2005 Changes in U.S. Bankruptcy Law* 2 (Univ. of Ill. Law and Econ. Working Papers Series, Research Paper No. LE06-031, 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=949629 [http://perma.cc/JQC7-6NEW].

[81] Warren, *Bankrupt Children*, *supra* note 1, at 1013.

[82] *Id.*

[83] Melissa B. Jacoby, Teresa A. Sullivan & Elizabeth Warren, *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 377 (2001).

[84] *See id.* at 384.

[85] *Id.* at.

[86] Melissa B. Jacoby, Teresa A. Sullivan & Elizabeth Warren, *Medical Problems and Bankruptcy Filings*, NORTON BANKR. L. ADVISER, May 2000, at 1, 2 ("[O]ne in every four debtors in the sample (25.2%) identified an illness or injury for the debtor or someone in the debtor's family as a reason for filing bankruptcy."). "Illness/injury" is not even the most expansive possible definition of medical care as it does not include death or birth. *Id.*

[87] *Id.* at 3 ("The bankruptcy courts are populated not only with the uninsured, but also with those whose insurance does not cover all the financial consequences of their medical problems.").

[88] *Id.*

[89] David U. Himmelstein, Elizabeth Warren, Deborah Thorne & Steffie Woolhandler, *MarketWatch: Illness and Injury as Contributors to Bankruptcy*, 24 HEALTH AFF., at W5-63,

will forgo needed medical services.[90] Consequences of medical debt are often indirect. In addition to forgone medical services, they can reflect lost employment and wages, and family members taking unpaid time off from employment to care for someone else.[91]

Moreover, although Warren and others have thoroughly catalogued the litany of economic consequences of bankruptcy, less research has been conducted into the psychological and social results. Researchers Christopher Davis and Janet Mantler collected and analyzed psychological and psychiatric literature about financial stress.[92] Their report summarizes empirical data on health and social consequences illustrating that "financial stress is associated with lowered self-esteem, an increasingly pessimistic outlook on life, and reduced mental health," which notably manifests as increases in depression, hostility, alcohol consumption, and suicide.[93] Their study likewise demonstrates the link between financial stress and declining health, marital breakups, parental neglect, and child abuse.[94] After demonstrating that "the effects of financial stress are largely indirect and attributable to depression," Davis and Mantler could conclude that "preventing or limiting the depression will reduce or eliminate the effects of the stress on families."[95]

Finally, having conducted unique empirical investigations, Warren confirms that bankruptcy and indebtedness take tolls on the harmony of home life.[96] Women are more likely to take over the finances when bankruptcy approaches, and marriages are adversely affected—fights and domestic violence

W5-64 (2005), http://content.healthaffairs.org/content/suppl/2005/01/28/hlthaff.w5.63.DC1 [http://perma.cc/M3UJ-XT6G].

[90] *Id.* at 68 (citing a telephone survey of debtors of which 53.6% had gone without required medical or dental care within the two years before filing for bankruptcy because of monetary concerns).

[91] *Id.* at 70 (acknowledging a survey that demonstrated a trend of bankrupt debtors taking time off from work to care for sick relatives and subsequently incurring large costs).

[92] CHRISTOPHER G. DAVIS & JANET MANTLER, THE CONSEQUENCES OF FINANCIAL STRESS FOR INDIVIDUALS, FAMILIES, AND SOCIETY (2004), http://web.archive.org/web /20120907065033/http://http-server.carleton.ca/~jmantler /pdfs/financial distress DSI.pdf [http://perma.cc/E4AE-WAZ9]. The authors define financial stress as "the subjective, unpleasant feeling that one is unable to meet financial demands, afford the necessities of life, and have sufficient funds to make ends meet (e.g., have to reduce standard of living)." *Id.* at v.

[93] *Id.* at v-vi.

[94] *Id.* at vi (explaining that financial pressure causes people to withdraw from their family members, to act less responsively to family needs, to exhibit more aggression toward others, and to engage in less nurturing behavior).

[95] *Id.* at viii.

[96] WARREN & TYAGI, *supra* note 1, at 12 ("Study after study shows that money is a source of contention in most marriages, but it is particularly problematic for couples that are financially unstable.").

increasingly occur between spouses.[97] Children from families that endured a bankruptcy are more likely to have problems with "falling test scores, low self-esteem, discipline problems, [and] depression."[98] There is a well-correlated increase in obesity among the indebted.[99] Elderly relatives may have their care reduced or changed.[100] Social costs of a personal bankruptcy also radiate out and affect the community in broad, tangible ways.[101]

II. PSYCHOSOCIAL DISABILITY

Individuals with psychosocial disabilities, much like those without such disabilities, are capable of making good or bad financial decisions.[102] When persons with psychosocial disabilities make inadvisable transactions, evidence suggests such transactions are often concurrent with active stages of their conditions. The financial score consequences are disastrous, with credit reporting agencies recording the ill-fated financial decisions and some credit score users exploiting that vulnerability.[103] Women and racial minorities who have psychosocial disabilities bear the heaviest brunt of this predatory targeting. In theory, but not in practice, the FHA and ADA ought to shield people with psychosocial disabilities from status-based algorithmic identification, stigma, and harm.[104] Similarly, the CRPD offers some notional

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[97] *Id.* at 11-12.

[98] Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 59-60 (2008).

[99] *See Link Between Over-Indebtedness and Obesity Identified*, MED. NEWS TODAY, Aug. 12, 2009, http://www.medicalnewstoday.com/releases/160430.php [http://perma.cc/5ZDL-F5GZ] (explaining that scientists attribute this increase "to the high cost of a healthy diet, lack of awareness of the availability of cheaper but nonetheless wholesome foods, but most particularly to the psychological and social stress experienced by over-indebted individuals").

[100] Bar-Gill & Warren, *supra* note 98, at 60 ("An estimated 20,000 households filing for bankruptcy in 2001 indicated they had to move an elderly relative to a cheaper care facility in order to deal with their financial problems.").

[101] *Id.* at 61-62 (indicating that financial distress can impact distant family members and friends as well as institutional actors, such as the state and lenders).

[102] *See* Joseph B. Cahill, *A Problem in Search of a Good Solution: Credit Cards Are Getting the Mentally Disabled in Trouble, but Is It Discrimination to Deny Them Access?*, CHI. TRIB., Nov. 19, 1998, § 6, at 3 (explaining that while many people with psychosocial disabilities are incapable of handling credit cards responsibly, many others are able to do so, especially with assistance from family members or friends).

[103] *See id.* at 3 (highlighting that those with mental disabilities are "some of society's most trusting and vulnerable citizens").

[104] *See* 42 U.S.C. § 3631 (2012) (prohibiting housing discrimination based on a buyer or renter's "handicap", defined as "a physical or mental impairment which substantially limits one or more of such person's major life activities"); *id.* § 12101 (2012) (outlining the ADA's purpose to eliminate discrimination against individuals with disabilities who "continually encounter various forms of discrimination, including outright intentional

guidance on how to wrestle with these issues, but leaves unanswered as many questions as it addresses.[105]

A. *Psychosocial Disability and Credit Scoring*

In any given year, over a quarter of all American adults have some form of diagnosable psychosocial disability;[106] and some six percent have a permanent psychosocial disability.[107] Individuals with certain kinds of psychosocial disabilities—because of either their disability or a comorbidity (meaning, a secondary malady that accompanies the primary disability)[108]—have been found to engage in unwise financial behavior that can adversely affect their health as well as commercial assessments of creditworthiness, employment, access to loans, homeownership or rental, or student financial aid. A non-exhaustive list of behaviors that are attributable to psychosocial disabilities and can adversely affect finances include: (1) excessive spending, sometimes financed through borrowing; (2) undertaking speculative business ventures; (3) lost or abandoned employment or educational enrollment; (4) frequent residence changes; (5) unjustifiable philanthropy; (6) significant medical costs attributable to the disability; (7) compulsive gambling; and/or (8) sexual promiscuity and its consequences, including divorce.[109]

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exclusion . . . exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities").

[105] *See* Convention on the Rights of Persons with Disabilities art. 12, Dec. 13, 2006, 2515 U.N.T.S. 3 ("States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.").

[106] Ronald C. Kessler et al., *Prevalence, Severity, and Comorbidity of 12-Month DSM-IV Disorders in the National Comorbidity Survey Replication (NCS-R)*, 62 ARCHIVES GEN. PSYCHIATRY 617, 619 (2005) ("Twelve-month prevalence of any disorder was 26.2%, with more than half of cases (14.4% of the total sample) meeting criteria for only 1 disorder and smaller proportions, for 2 (5.8%) or more (6.0%) disorders.").

[107] *Id.* at 624 (estimating the prevalence rate of both "serious mental illness" and "serious mental disorder" at roughly 5.7%).

[108] *Id.* at 617 (stating that forty-five percent of people with any form of mental disorder meet the criteria for two or more disorders, and the severity of an illness is strongly related to comorbidity).

[109] *See* Hagop S. Akiskal, *Searching for Behavioral Indicators of Bipolar II in Patients Presenting with Major Depressive Episodes: The "Red Sign," the "Rule of Three" and Other Biographic Signs of Temperamental Extravagance, Activation and Hypomania*, 84 J. AFFECTIVE DISORDERS 279, 284-86 (2005) [hereinafter Akiskal, *Behavioral Indicators*]; *see also* Hagop S. Akiskal et al., *Cyclothymic Disorder: Validating Criteria for Inclusion in the Bipolar Affective Group*, 134 AM. J. PSYCHIATRY 1227, 1229 (1977) [hereinafter Akiskal et al., *Cyclothymic Disorder*] (finding that "about 75%" of a study of 500 ambulatory psychiatric patients exhibited "[r]epeated buying sprees, financial extravagance, or financial

Striking about this list is the significant coincidence of financially consequent misbehaviors of people with psychosocial disabilities with the most prevalent general causes of bankruptcy. In a noted multi-part study examining sources of consumer debt, Warren and her colleagues discovered three major causes of family bankruptcy: (1) job loss, (2) medical problems, and (3) divorce or separation.[110] Psychosocial disabilities create heightened risk of all of these causal factors.[111]

Here, we review findings related to these disability/financial behavior associations. Based on these studies, as well as the observed experiences of author Hagop S. Akiskal, a prominent psychiatric clinician and researcher, we conclude that while psychosocially disabled individuals more frequently and commonly engage in the aforementioned behaviors than their non-disabled counterparts, such behaviors are in no way limited to those with psychosocial disabilities. Further, we conclude that those with psychosocial disabilities behave in financially risky ways intermittently, typically during active phases of their illnesses.

The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-V"), is the authoritative medical handbook for psychiatric disorders. Many illnesses described therein are legally recognized forms of disability and are protected from various kinds of intentional and inadvertent discrimination. We do not discount that other DSM-V psychosocial disabilities such as personality disorders, phobias, or those attributed to drug or alcohol usage can result in unstable financial behavior. But empirical research indicates that anxiety disorders (such as obsessive-compulsive disorder or post-traumatic stress disorder), schizophrenia, or, more often, emotional disabilities—particularly bipolar mood spectrum disorders—are the most prevalent roots of such financially unstable behavior. Mood and anxiety disorders are frequently comorbid with, or misdiagnosed as, other such kinds of psychosocial disabilities.[112] Notably, depressed individuals who have been diagnosed with

disasters"); Hagop S. Akiskal & Olavo Pinto, *The Evolving Bipolar Spectrum: Prototypes I, II, III, and IV*, 22 PSYCHIATRIC CLINICS N. AM. 517, 520 (1999).

[110] WARREN & TYAGI, *supra* note 1, at 81; *see also* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS 17-20 (1989).

[111] In a survey of 924 United Kingdom residents experiencing "mental distress," 66.2% identified their mental health problems as the primary cause of their "problem debt." MIND CHARITY, IN THE RED: DEBT AND MENTAL HEALTH 17 (2008), http://www.mind.org.uk/media/273469/in-the-red.pdf [http://perma.cc/3B42-B3RN]; *see also id.* at 5 (defining "'problem debt' as occurring when a person has been two or more consecutive payments behind with a bill in the last 12 months").

[112] For instance, depressed individuals with at least three anxiety disorder diagnoses (panic-agoraphobic, social phobic, and obsessive-compulsive) are commonly Bipolar-II sufferers. Akiskal, *Behavioral Indicators*, *supra* note 109, at 285. Those manifesting with the combination of atypical, bulimic, and seasonal depressions also appear to be Bipolar-II, particularly if there is rapid onset and offset of symptoms. *Id.*; Giulio Perugi & Hagop S. Akiskal, *The Soft Bipolar Spectrum Redefined: Focus on the Cyclothymic, Anxious-*

impulsive components (such as borderline personality, compulsive gambling, and sexual addiction) as well as individuals who habitually take extreme risks for thrills (e.g., gambling, car racing, sky diving, and wildlife safaris) should be evaluated for bipolarity because it is an unsettled question whether any of them express bona fide bipolar disorders.[113]

We likewise observe that, contrary to prevalent common thinking, evidence demonstrates that the majority of emotional illnesses, including major depression disorder ("MDD"), fall somewhere along a bipolar spectrum, with MDD commonly misdiagnosed as a bipolar disorder and bipolar disorders commonly misdiagnosed as schizophrenia.[114] Current data indicate that the Bipolar-II spectrum is much more prevalent in society than Bipolar-I[115] and may account for as much as fifty-five percent of all depressions observed in clinical practice.[116]

At the outset, we acknowledge that some will always remain skeptical about the causal linkage between psychosocial disabilities and financial "misbehavior." They might instead ascribe the cause of such misadventures to poor character, bad morals, or lack of will power.[117] No small part of the

Sensitive, Impulse-Dyscontrol and Binge-Eating Connection in Bipolar II and Related Conditions, 25 PSYCHIATRIC CLINICS N. AM. 713, 723 (2002) ("In patients with bipolar II spectrum disorders and atypical depression, lifetime comorbidity with anxiety disorders, particularly panic disorder-agoraphobia . . . , bulimia nervosa . . . , body dysmorphic disorder . . . , alcohol and substance abuse disorder . . . , and cluster C (anxious) and cluster B (dramatic) personality disorders, is the rule rather than the exception."); *see also* Akiskal et al., *Cyclothymic Disorder*, *supra* note 109, at 1228 (observing notable comorbidities among cyclothymic patients, including "the entire gamut of *DSM-II* personality labels, such as hysterical, emotionally unstable, explosive, passive-aggressive, sociopathic, inadequate, narcissistic, borderline, or obsessive-compulsive").

113 Akiskal, *Behavioral Indicators*, *supra* note 109, at 285.

114 *See* Charles L. Bowden, *Strategies to Reduce Misdiagnosis of Bipolar Depression*, 52 PSYCHIATRIC SERV. 51, 51-54 (2001) (identifying recent trends in broadening the scope of diagnoses for bipolar disorders).

115 Jules Angst, *The Emerging Epidemiology of Hypomania and Bipolar II Disorder*, 50 J. AFFECTIVE DISORDERS 143, 144 (1998) (highlighting a number of studies conducted between 1978 to 1998 that confirm greater prevalence rates of Bipolar-II disorder); Lewis L. Judd & Hagop S. Akiskal, *The Prevalence and Disability of Bipolar Spectrum Disorders in the US Population: Re-analysis of the ECA Database Taking into Account Subthreshold Cases*, 73 J. AFFECTIVE DISORDERS 123, 124 (2003) ("There is increasing international consensus based on a review of the evidence-based literature that bipolarity involves more than classical bipolar I disorder, that indeed its most common manifestations involve bipolar II and softer hypomanic expressions with various admixtures of depression . . . .").

116 Hagop S. Akiskal et al., *Re-evaluating the Prevalence of and Diagnostic Composition Within the Broad Clinical Spectrum of Bipolar Disorders*, 59 J. AFFECTIVE DISORDERS, at S5, S14 (2000) ("[F]rom 30-55% of all major depressions conform to the bipolar II or its variants . . . .").

117 Michael L. Perlin, *"Where the Winds Hit Heavy on the Borderline": Mental Disability Law, Theory and Practice, "Us" and "Them"*, 31 LOY. L.A. L. REV. 775, 785,

matter is that distinguishing "disabled" financial behavior requires identification of "normal" financial behavior. This is particularly the case when examining the excesses of Bipolar-II patients (supposedly the "saner" or "milder" expression of bipolar disorder), where there are no outright manic episodes, but only hypomania. From the point of view of financial extravagance, it may be problematic to classify such individuals' "financial outbursts," which do indeed occur, as the consequence of disease. This is because patients, who do possess diagnosable and treatable psychosocial disabilities, exhibit behavioral symptoms closer to a stereotypic concept of "normality" in America—where extroverted, joyful, loquacious, flamboyantly dressed,[118] people-seeking individuals are considered desirable in the world of success and leadership.[119] Emotionally disabled patients are most likely to be spendthrifts of big amounts of money. This usually occurs through repetitive but relatively small expenditures that add up to huge sums, often including gifts, travel, and unnecessary items. But such a behavioral pattern might equally well describe the modern cultural financially "healthy" norm in America.[120] As we have shown elsewhere, this is because *all* persons—

787 (1998) (explaining that stereotypical descriptions of the mentally ill include: "erratic, deviant, morally weak, unattractive, sexually uncontrollable, emotionally unstable, lazy, superstitious, [and] ignorant"); *cf.* Shirley Lee & Avis Mysyk, *The Medicalization of Compulsive Buying*, 58 SOC. SCI. & MED. 1709, 1710 (2004) (suggesting that compulsive buying is a cultural malady as opposed to an individual psychosocial illness). Even in cases of criminal behavior, social sentiments should perhaps become more humane and less stigmatized as greater knowledge of the nature of mental illness is uncovered. *See* Akiskal, *Behavioral Indicators, supra* note 109, at 285 (arguing that prisons are filled because of "'offenses' or felonies that can be perhaps one day understood in a broader humane perspective based on temperamental excesses—along hypomanic or cyclothymic lines—operating within a certain social context that did not provide the socialization and education to harness their energy and drive to socially desirable goals and achievement.").

118 *See* Akiskal, *Behavioral Indicators, supra*, note 109 at 286 ("[A] depressed female must be observed to have a *marked* degree of flamboyance to be considered for [Bipolar]-II; on the other hand, a pink watchband or pink socks or shoes would each alone probably suffice in raising ones diagnostic suspicion for bipolarity in a depressed *male* patient!").

119 Akiskal advises that all clinically depressed individuals "belonging to an extroverted profession" that requires qualities like "interpersonal charm and eloquence . . . should be evaluated for bipolarity." *Id.* at 283-84; *See also generally* Russell Gardner, Jr., *Mechanisms in Manic-Depressive Disorder: An Evolutionary Model*, 39 ARCHIVES GEN. PSYCHIATRY 1436 (1982).

120 Does this suggest epidemic levels of irrational behavior, even epidemic levels of mental illness, among American consumers? Some have even claimed that "most financial problems are a result of underlying mental health problems." Edie Milligan, *How Employee Assistance Counselors Can Become More Comfortable Helping Clients with Financial Problems*, 2 PERS. FIN. & WORKER PRODUCTIVITY 56, 56 (1998); *see also* Heiko Rüger et al., *Psychische Erkrankung und Überschuldung: Psychische Erkrankung, soziale Netzwerke und finanzielle Notsituation bei Überschuldung [Mental Illness and Over-Indebtedness: Mental Illness, Social Networks, and Financial Strain in Over-Indebted Persons]*, 60

including the mentally "healthy"—lie somewhere along a spectrum of temperamental mood fluctuations.[121] Most people remain functional and disability-free, while a minority tips into illness.[122]

It is important to note that mood spectrum disorders that include hypomania are often misdiagnosed. Thus, among those who *are* disabled, the origin of their poor financial choices is not always identified. This is because the manifestations of illness are usually episodic, with onsets and offsets, interspersed with periods of "healthy" behavior, including financial decision-making.[123] Patients typically do not recall this cryptic hypomanic exuberance during medical consultation because they usually seek intake evaluations while depressed.[124] In the cases of schizophrenics, studies have shown that their disability contributes to their making troublesome financial decisions because they lack basic financial competencies such as the ability to balance a checkbook, shop effectively for needed items, and carry out the basic communication necessary for negotiating with creditors.[125]

PSYCHOTHERAPIE, PSYCHOSOMATIK UND MEDIZINISCHE PSYCHOLOGIE 250, 250 (2009) (discussing the potential link between debt and mental illness). *But see* STUART VYSE, GOING BROKE 28 (2008) (disputing the view that over-indebted consumers have a mental illness and arguing against the "trend toward medicalization of every human problem").

[121] *See* Hagop S. Akiskal, Temperament, Mood Disorder and Human Nature: Toward an Integration of Psychological Medicine and Evolutionary Biology, Oral Presentation to the International Society on Brain and Behaviour: 2nd International Congress on Brain and Behaviour (Nov. 17-20, 2005), *in* 5 ANNALS GEN. PSYCHIATRY S51, S51 (2006) ("[T]emperamental foundations of affective disorders in their dilute forms are very much part of human nature.").

[122] *See* William C. Reeves et al., *Mental Illness Surveillance Among Adults in the United States*, 60 Morbidity & Mortality Wkly. Rep. (Supp.) 1 (2011), http://www.cdc.gov/mmwr/pdf/other/su6003.pdf [http://perma.cc/V37U-CM78] (explaining that in 2004 an estimated twenty-five percent of people reported having a mental illness over the previous year).

[123] Akiskal, *Behavioral Indicators*, *supra* note 109 at 280 ("There also exist unmistakable, even severe major depressions without marked personality pathology, apparently 'unipolar,' who nonetheless exhibit *intra-episodic* signs of sub-manic activation, flight of ideas, irritability, [hostility] and agitation."); *see also* Hagop S. Akiskal, *Subaffective Disorders: Dysthymic, Cyclothymic, and Bipolar II Disorders in the "Borderline" Realm*, 4 PSYCHIATRIC CLINIC. NORTH AM. 25, 37-41 (1981) (discussing the "intermittence" of chronic affective disorders); Franco Benazzi & Hagop S. Akiskal, *Delineating Bipolar II Mixed States in the Revenna-San Diego Collaborative Study: The Relative Prevalence and Diagnostic Significance of Hypomanic Features during Major Depressive Episodes*, 67 J. AFFECTIVE DISORDERS 115, 116 (2001) (discussing the "intra-episode hypomanic signs or symptoms in bipolar II disorder").

[124] Akiskal et al., *supra* note 116, at S13 (acknowledging that intake interviews take place almost entirely during a patient's "depressed state" and often patients only remember past states, manic or depressed, that correspond with their current state).

[125] *See* Joshua C. Klapow et al., *Direct Assessment of Functional Status in Older Patients with Schizophrenia*, 154 AM. J. PSYCHIATRY 1022, 1023-24 (1997) (explaining

As discussed above in Part I, the ordinary consequence of bad personal financial choices is worsening creditworthiness and debt. Yet surprisingly few commercial law publications consider the link between distressed financial status and psychosocial disabilities. Warren herself offers only glancing comments.[126] Still, there is no reason to suspect that the ever-increasing, often inescapable cycle of hardship that accompanies low credit scores should be different for those with psychosocial disabilities. If anything, their trauma in relation to credit and finances are more likely to be serious and enduring. One 2008 British survey of 8580 United Kingdom residents found that twenty-three percent of those with psychosocial disabilities had debts (broadly defined and not limited only to consumer credit) and ten percent had a household utility disconnected, whereas only eight percent of those without disabilities had debts and only three percent had had utilities disconnected.[127]

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schizophrenics' lower scores on an assessment of "higher-order domains of functioning (communication, transportation, finance, and shopping)"); Nobuyuki Niekawa et al., *Relationship Between Financial Competence and Cognitive Function in Patients with Schizophrenia*, 61 PSYCHIATRY & CLINICAL NEUROSCIENCES 455, 458-60 (2007) (explaining a study in which schizophrenics scored significantly lower on the Financial Competency Assessment Tool than those without psychiatric disorders).

[126] In a co-authored paper, Warren claimed that compulsive gambling causes 1.2% of bankruptcies. Himmelstein, Warren, Thorne & Woolhandler, *supra* note 89, at W5-67. Warren and her co-authors also conjectured that the "more-stigmatized causes of bankruptcy (such as addiction, mental illness, or profligate spending) may be underreported." *Id.* at W5-71, n.18. Surveyed families bankrupted by medical causes cited "mental disorders" as the cause of a medical bankruptcy ten percent of the time. *Id.* at W5-69. In an earlier article, Warren and co-authors acknowledged that "overspending" is recognized by some mental health professionals as a medical disorder, but suggested there is the possibility that "debtors are seeking a more acceptable reason for their bankruptcies, and are therefore exaggerating or fabricating a medical reason." Jacoby, Sullivan & Warren, *supra* note 83 at 385. Elsewhere, she and co-authors point out in a footnote discussing consequences of overspending that "[g]ambling is classified as a psychiatric disorder in the *Diagnostic and Statistical Manual of Mental Disorders*." Melissa B. Jacoby & Elizabeth Warren, *Beyond Hospital Misbehavior: An Alternative Account of Medical-Related Financial Distress*, 100 NW. L. REV. 535, 550 n.94 (2006). Finally, Warren observes that mental health treatment is "scarcely covered at all" by insurance, meaning that "a catastrophic illness" could "send a family into a financial tailspin." Warren, *Growing Threat, supra* note 1, at 417. She also explains that if one is mentally unable to return to work following injury, some states' laws prohibit the award of unemployment benefits to that individual, which presumably could result in decreased credit scores. *Id*. at 418 n.46 ("In Texas for example, an individual 'must be physically and mentally able to perform full time work' in order to qualify for unemployment benefits.").

[127] R. Jenkins et al., *Debt, Income and Mental Disorder in the General Population*, 38 PSYCHOL. MED. 1485, 1485 (2008) ("The more debts people had, the more likely they were to have some form of mental disorder, even after adjustment for income and other sociodemographic variables. People with six or more separate debts had a six-fold increase in mental disorder after adjustment for income.").

Manifestations of the deleterious disparate impacts of debt upon those with psychosocial disabilities abound. For instance, mass anonymous credit card marketing has largely displaced traditional in-person, in-bank applications for consumer credit. This switch has occurred precisely as those with psychosocial disabilities are being encouraged to live as independently as possible. The confluence of these changes is greater susceptibility of individuals with psychosocial disabilities to the rough-and-tumble, often manipulative and predatory,[128] marketing tactics of "easy credit, high-interest payment" creditors.[129] Those with psychosocial disabilities also face disproportionate collections difficulties; evidence from the United Kingdom suggests that roughly eighty-three percent of psychosocially disabled debtors who have reported their illnesses to creditors experience creditor harassment, and seventy-nine percent believe their disabilities were not considered when creditors made a pertinent decision about debts.[130]

In addition, most long-term disability insurance policies end payments after twenty-four months if the disability is psychosocial.[131] Therefore, people with psychosocial disabilities are more commonly faced with the need to turn to easy, alternative sources of finance and credit (e.g., credit cards) than their physically disabled counterparts. Moreover, non-disabled individuals with low credit scores have been shown with some frequency to *tip into* psychosocial disability as a consequence of their declining finances, thereby accelerating the downward spiral of personal and financial well-being.[132] And, although the

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[128] *See generally* Ron Harris & Einat Albin, *Bankruptcy Policy in Light of Manipulation in Credit Advertising*, 7 THEORETICAL INQUIRIES L. 431, 466 (2006).

[129] Cahill, *supra* note 102, at 3 (juxtaposing the portion of the psychosocially disabled population that successfully and responsibly manage necessary debt with the problems that arise when others acquire large amounts of credit card debt). Nor do automated lenders usually consider or take procedural steps to avoid or mitigate the possible harms of easy credit for the psychosocially disabled. *See id.* ("The [lending] industry doesn't have any broadly accepted guidelines for dealing with the mentally disabled. Nor is there any accepted industry theory on how issuers should deal with people they learn are mentally disabled after the borrowers get in trouble.").

[130] MIND CHARITY, *supra* note 111, at 24.

[131] Cathryn Miller-Wilson, *Becoming Poor: Stories of the Real "Safety Net" and the Consequences for Middle America*, 13 QUINNIPIAC HEALTH L.J., 1, 11 (2009). *See also* EEOC v. Staten Island Sav. Bank, 207 F.3d 144, 153 (2d Cir. 2000) (denying mental illness discrimination claim under the ADA against long-term disability insurer denial of benefit); *see also* Hess v. Allstate Ins. Co., No. 99-384-P-C, 2000 WL 1186262, at *9-10 (D. Me. Aug. 2, 2000) (rejecting ADA discrimination claim owing to insurance policy distinction between mental and physical illness).

[132] DAVID CAPLOVITZ, MAKING ENDS MEET: HOW FAMILIES COPE WITH INFLATION AND RECESSION 155 (1979) (reporting in a comprehensive empirical study that "[t]hose whose incomes had fallen behind rising prices were much more likely to show mental stress . . . than those whose incomes kept up with rising prices"). The effects of the financial strain on parents have been shown to result in marked declines in mental health and social function of their children. Bar-Gill & Warren, *supra* note 98, at 59 ("The catalog of damages inflicted

majority of American prison and jail inmates suffer from mental health problems,[133] many typical parolee debts are non-dischargeable in bankruptcy,[134] and the cumulative effect of unemployment and passing time during incarceration also harms creditworthiness, with disparate impact upon psychosocially disabled persons.[135]

Unemployment among individuals with psychosocial disabilities was estimated in 2007 (prior to the global economic downturn) to range from sixty to eighty percent.[136] Among those whose disability is serious, unemployment reaches a nationwide estimate of ninety percent.[137] Income-wise, one study found that between one third and one half of Americans with serious psychosocial disabilities live near or below the federal poverty level.[138]

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on children when their parents divorce—falling test scores, low self-esteem, discipline problems, [and] depression—also applies to middle-class children whose parents are in financial trouble."). Chronic financial strain is also associated with increased rates of depression and suicide. *See generally* Jukka Hintikka et al., *Debt and Suicidal Behaviour in the Finnish General Population*, 98 ACTA PSYCHIATRICA SCANDINAVICA 493 (1998).

[133] DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), http://www.bjs.gov/content/pub/pdf/mhppji.pdf [http://perma.cc/X7MM-PT8R] ("At midyear 2005 more than half of all prison and jail inmates had a mental health problem, including 705,600 inmates in State prisons, 78,800 in Federal prisons, and 479,900 in local jails. These estimates represented 56% of State prisoners, 45% of Federal prisoners, and 64% of jail inmates.").

[134] Mona Lewandoski, *Barred From Bankruptcy: Recently Incarcerated Debtors in and Outside Bankruptcy*, 34 N.Y.U. REV. L. & SOC. CHANGE 191, 203-10 (2010) ("Most debts arising from the commission of a crime are not dischargeable. Depending on the bankruptcy chapter, such debts may include criminal restitution, taxes on illegal activity, civil damages for personal injury from drunk driving, willful and malicious injury to others, larceny, court fees, and many other civil and criminal fines, penalties, and forfeitures.").

[135] *Id.* at 223-27.

[136] Nat'l Ass'n of State Mental Health Program Dirs. & Advocates for Human Potential, Inc., *Promoting Independence and Recovery through Work: Employment for People with Psychiatric Disabilities*, NAT'L GOVERNORS ASS'N (July 31, 2007), http://www.nga.org/cms/home/news-room/webcast-center/col2-content/main-content-list/webcast-series-mental-health.html [http://perma.cc/D2A5-K3UF] [hereinafter NASMHPD].

[137] NAT'L GOVERNORS ASS'N, STRATEGIES STATES CAN USE TO EMPLOY PERSONS WITH MENTAL ILLNESS 3 (2002) ("By providing treatment, supports, and employment services, many persons with mental illness can sustain employment, become more self-sufficient, contribute to society, and reduce funding in supportive services."). For those with serious disabilities who are able to hold employment, nearly seventy percent earn less than ten dollars per hour. *See* NASMHPD, *supra* note 136.

[138] Judith A. Cook, *Employment Barriers for Persons with Psychiatric Disabilities: Update of a Report for the President's Commission*, 57 PSYCHIATRIC SERVS. 1391, 1396-97 (2006) ("[W]hether they work, qualify for SSI or SSDI, or receive money from friends and relatives or other sources, income levels of people with psychiatric disabilities are inadequate to help them meet basic needs for food and shelter, let alone the requisites of

Notably, sixty-four percent of American college dropouts with a diagnosed psychosocial disability attribute their decisions to drop out to the disability.[139] In general, student loans are not forgiven for dropouts, and loans (including federal loans) are non-dischargeable in bankruptcy.[140] As shown above, those with psychosocial disabilities have substandard incomes and employment, and dropping out rarely enhances career prospects. This combination of high dropout rates and poor employment outlook leads psychosocially disabled students to disproportionate levels of debt and increased chances of incurring future debt, all without likely relief in bankruptcy.

Finally, estimates of medical billing error rates range from thirty to eighty percent (depending on which study one believes), and approximately fourteen million Americans' credit scores were consequently negatively affected in 2010.[141] A Credit.com personal finance expert indicates that "[m]edical bills sent to collection in error are becoming the single greatest threat to credit scores."[142] Because people with psychosocial disabilities may frequently rely on medical treatment,[143] their credit scores are disproportionately impacted by medical billing errors.[144]

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education, job training, and job seeking."). FICO scores do not contemplate income or unemployment in score calculations. Still, most commercial lenders weigh income and employment in loan-making decisions, usually by computing an individual's debt-to-income ratio alongside existing FICO scores. *See* MYFICO, *supra* note 40 (describing the categories of information used in determining a FICO score and their relevance).

139 Darcy Gruttadaro & Dana Crudo, *College Students Speak: A Survey Report on Mental Health*, NAT'L ALLIANCE ON MENTAL ILLNESS 8 (2012), http://www.nami.org/Content/NavigationMenu/Find_Support/NAMI_on_Campus1/collegereport.pdf [http://perma.cc/C2CH-HCZ6] (examining the mental health needs of American college students and suggesting that colleges need to provide more mental health support to students).

140 11 U.S.C. § 523(a)(8)(B) (2012) (allowing student loan discharge only in the case that the debt would "impose an undue hardship on the debtor and the debtor's dependents"). There is a federally recognized exception for student loan discharge due to "total and permanent disability." *See Total and Permanent Disability (TPD) Discharge*, U.S. DEP'T EDUC. http://www.disabilitydischarge.com/Home/ [http://perma.cc/ZM8N-AUDZ] (providing explanation and direction about the possibility of a "total and permanent disability" discharge of student loans or TEACH grant service obligations). However, qualifying for this discharge is "tough" according to a knowledgeable commentator. Steve Rhode, *My Brother Can't Pay His Student Loans Because of His Mental Illness*, HUFFINGTON POST BLOG, (Dec. 5, 2013, 12:07 PM), http://www.huffingtonpost.com/steve-rhode/my-brother-cant-pay-his-s_b_4392229.html [http://perma.cc/4HAK-A2XW].

141 Jessica Silver-Greenberg, *How to Fight a Bogus Bill*, WALL STREET J., Feb. 19, 2011, at B7, B10 ("Any unpaid debt, whether it be for $100 or $10,000, can shave up to 100 points off a person's credit score.").

142 *Id.* ("[S]ome health-care experts say that the number of errors could jump in the coming years").

143 Mental health troubles accounted for five percent of all emergency room visits in 2010, and general hospital costs related to these visits were expected to double from 2013 to

The upshot of these and other disparate impacts incurred as a result of psychosocial disability is a lower credit score than that of an otherwise equivalent non-disabled person. Those lower scores, in turn, are an assured precursor to even worse future personal and financial consequences. As noted by Pasquale:

> [I]f scores are self-fulfilling prophecies, creating the financial distress they claim merely to indicate, something far more troubling than neutral prediction of future behavior is going on. The very act of designating a certain person a likely failure raises their cost of future financing, thus increasing the likelihood of eventual insolvency. When a categorization can take on a life of its own, contributing to the situation it claims merely to predict, it becomes a *normative* matter, requiring some moral justification and rationale.[145]

Some have even gone so far as to suggest that the causal relationship between financial distress and psychosocial disability may be bidirectional: "debt may be both a cause and consequence of mental illness."[146] What we shall see below in Section II.C is that federal civil rights laws and international human rights treaties generally prohibit disadvantaging psychosocial disability and require enabling the group, yet give little consideration to the specific context of credit scoring and access.

B. *Disparate Gender and Racial Impacts*

According to 2007 Federal Reserve Bank findings, "[c]redit scores differ among subpopulations: Blacks, Hispanics, single individuals, those younger than age 30, and individuals residing in low-income or predominantly minority

2014, to around $38.5 billion annually. Julie Creswell, *E.R. Costs for Mentally Ill Soar, and Hospitals Seek a Better Way*, N.Y. TIMES Dec. 26, 2013, at A1 (discussing the possibility of reducing ER spending on mental health patients through exams carried out in the field to identify if the patient can be better served at an alternate facility in non-emergency situations). In 2009, 30.3% of those with any psychosocial disability, and 48.8% of those with serious psychosocial disability, received medical treatment specifically for their disability. U.S. DEPT. OF HEALTH & HUMAN SERVS., 2009 NATIONAL SURVEY ON DRUG USE AND HEALTH: MENTAL HEALTH DETAILED TABLES, tbls. 1.39B, 1.41B, http://www.samhsa.gov/data/sites/default/files/2k10MH_Findings/2k10MH_Findings/2k10MH_DTables/Sect1peMHtabs.htm [http://perma.cc/FAZ4-KMQS].

144 Perhaps recognizing this particularly severe impact, FICO asserted in August 2014 that it is unveiling a new version of its algorithms, "FICO Score 9," that will reduce the credit score damage caused by outstanding medical debts. Press Release, FICO, FICO Score 9 Introduces Refined Analysis of Medical Collections (Aug. 7, 2014), http://www.fico.com/en/about-us/newsroom/news-releases/fico-score-9-introduces-refined-analysis-medical-collections/ [http://perma.cc/3Y7Q-GJL7].

145 PASQUALE, *supra* note 47, at 33.

146 MARTIN RYAN, BEVERLEY KLIGER & BILL HEALY, GOOD SHEPHERD YOUTH & FAMILY SERV., SMILING FOR THE FIRST TIME: BANKRUPTCY FOR PEOPLE WITH MENTAL ILLNESS, WHAT HAPPENS WHEN CREDIT CODE REMEDIES FAIL?, at i (2010).

census tracts have lower credit scores than other subpopulations defined by race or ethnicity, marital status, age, or location."[147] Whether married or single, men and women, by contrast, have nearly equivalent credit scores.[148]

There has been a well-documented surge in consumer bankruptcies in recent decades. As Warren and her co-author pointed out, "bankruptcies for couples have grown by about 150% from 1981 to 1999, and bankruptcies by men filing alone have grown by about 375%."[149] However, the starkest rise in bankruptcy declarations has been for women. Warren and her co-author observe: "[B]ankruptcy filings for women have increased by more than nine-fold. The 'bankruptcy boom' has been widely reported. We now know, however, that it has been fueled in large part by divorced, widowed and single women streaming into the bankruptcy courts for help."[150]

But why does this gender disparity among bankruptcy filings exist, if men and women have roughly equal credit scores? It is because the same low credit score bears more heavily on women than on men. The hidden factor is the frequency with which divorced women are left to care for dependent children (with either inadequate or uncollectable child support payments). The children's needs cause financial inflexibility when familial debt pressures mount.[151] Among single-parent families, approximately eighty-three percent are headed by women.[152] Accordingly, a low credit score, on average, translates to more dire financial circumstances for women than for men. Households run by single mothers are the most likely family structure to become bankrupt.[153] Single women moved up from 22.1% of all bankruptcy

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[147] BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 20, at S5 (discussing the concern that despite the prohibition on considering "race or ethnicity, national origin, sex, and, to a limited extent, age" in determining credit score, "a credit characteristic may be included in a model not because it helps predict performance but because it is a substitute, or proxy, for a demographic characteristic that is correlated with performance").

[148] *Id.* at O-25.

[149] Teresa Sullivan & Elizabeth Warren, *Women in Bankruptcy*, AM. BANKR. INST. (July 13, 1999), http://web.archive.org/web/20140407012703/http://www.abiworld.org/Content/NavigationMenu/NewsRoom/BankruptcyResearchCenter/BankruptcyReportsResearchandTestimony/General/Women_in_Bankruptcy1.htm [http://perma.cc/4YG9-8Y2K] (analyzing the rapid increase in bankruptcies and declaring that a "silent feminization of bankruptcy may be underway").

[150] *Id.*

[151] *Id.* ("[L]ess than half of all custodial parents of minor children (46%) had support orders and were supposed to receive child support payments. Of those parents, only 51% received full payment, 24% received partial payment, and 25% got nothing.").

[152] JONATHAN VESPA ET AL., U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2012, at 1, 5, 16 (2013), http://www.census.gov/prod/2013pubs/p20-570.pdf [http://perma.cc/QCB8-N22L] (discussing the changes in familial living situations including the fifty percent decrease in "the share of households that were married couples with children under 18").

[153] Warren, *Bankrupt Children*, *supra* note 1, at 1017.

declarants in 1981 to 39.1% by 2002.[154] In those two decades, the number of single mothers declaring bankruptcy increased by over 600%.[155] Also, divorced or separated women who are supposed to receive alimony or child support from spouses or former spouses who declare bankruptcy often do not, despite the fact that such debts are not dischargeable.[156]

Minorities are also unequally impacted by financial duress. Mechele Dickerson demonstrates that the United States bankruptcy code decidedly (albeit unintentionally[157]) favors "bankruptcy relief based on unrecognized white norms."[158] She concludes that the "ideal debtor" under the code is one who is employed; has sufficient disposable income to afford a bankruptcy attorney; has "few (if any) nondischargeable debts, including student loans, alimony, or child support"; is heterosexual and married; has significant wealth but low income; has significant real and personal property holdings (including homeownership); and has a retirement fund.[159] Citing a wide-ranging suite of statistics, Dickerson demonstrates that whites, not minorities, are demographically most likely to fit this "ideal" profile.[160] Therefore, as she concludes, the Bankruptcy Code significantly disadvantages African-Americans and Hispanics.

Bankruptcy courts do not keep racial data associated with filings. However, researchers using privately acquired data and their own experimental studies observe that controlling for home ownership, financial variables, location, attorney representation, and other factors, African-American declarants are twice as likely as other races to accept a less desirable Chapter 13 bankruptcy (which requires multiple years of restitution via disposable income) as opposed to a Chapter 7 bankruptcy (which offers immediate discharge and a "fresh start" following asset surrender, even though ninety percent of Chapter 7 filers have no non-exempt assets).[161] While only associational, one possible

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[154] Elizabeth Warren, *What Is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN'S L.J. 19, 27 (2002).

[155] WARREN & TYAGI, *supra* note 1, at 160.

[156] Elizabeth Warren, *supra* note 154, at 32-33 (2002).

[157] A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725, 1772 (2004) ("It is highly unlikely that the members of Congress who enacted the Bankruptcy Code were overly bigoted or intended to discriminate against minorities.").

[158] *Id.* at 1772-76. Dickerson's paper pre-dates 2005 Congressional bankruptcy reforms, but those have not affected the thrust of her arguments.

[159] *Id.* at 1743-46 (analyzing the multitude of benefits bankruptcy laws bestow on a small group of filers based on demographic characteristics).

[160] *Id.* at 1746-71 (citing the higher rates of married couple families and employment and the higher levels of wealth and personal and real property among whites than minorities).

[161] Dov Cohen & Robert M. Lawless, *Less Forgiven: Race and Chapter 13 Bankruptcy*, *in* BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 175, 175-77 (Katherine Porter ed., 2012) (arguing for scrutiny of the effects of race on the outcomes of bankruptcy proceedings because currently "African Americans end up less forgiven than debtors of other races"); *accord* Jean Braucher, Dov Cohen & Robert M. Lawless, *Race, Attorney Influence, and*

conclusion is that African-Americans, who often lack the assets of other races, are being "steered" to accept less favorable bankruptcy terms.

Similarly, Warren confirms that Hispanic and African-American middle class families are, respectively two and three times as likely as their white counterparts to file for bankruptcy, even taking into account the most common causes of bankruptcy—family breakups, medical costs, and job loss.[162] She concludes that, besides "more trouble financing medical care" and "more pervasive job difficulties," the likely cause of this racial inequality in bankruptcy filings is that "racial minorities are singled out for predatory loans and other subprime credit that drain billions of dollars out of the pockets of these families and push them into financial collapse."[163]

In addition to the relative financial disadvantages that women and racial minorities endure, psychosocial disabilities in both mild and severe form are more common among women and minorities. In a decade-long progression of surveys, women were found to be about fifty percent more likely to complain of serious psychological distress in the past thirty days than male counterparts.[164] Women attempt suicide two to three times as often as do men (although men are more successful when attempted).[165] Women are about fifty percent more likely than men to have "any" psychosocial disability. They are equally more likely to have a "serious" one. In particular, they are sixty-one percent more likely to have Major Depressive Episode ("MDE"), which as we have already indicated, may well be a masked or misdiagnosed form of bipolarity that prompts financially unwise behavior.[166] Women are also eighty-

Bankruptcy Chapter Choice, 9 J. EMPIRICAL LEGAL STUD. 393, 425 (2012); Jean Braucher, Dov Cohen & Robert M. Lawless, *Reflections on the Responses to "Race, Attorney Influence, and Bankruptcy Chapter Choice*," 20 AM. BANKR. INST. L. REV. 725, 729-39 (2012) (providing follow-up commentary and supplemental data in response to methodological debates about original study, while arguing that the importance of empirical questions concerning the results of the law (not just the theory) must become more prevalent in introductory law school curricula).

162 Warren, *supra* note 2, at 1799 (demonstrating that minorities that arrive in middle class often lack the financial security of their white counterparts).

163 *Id.* at 1779.

164 NAT'L CTR. FOR HEALTH STATISTICS, HEALTH, UNITED STATES, 2011: WITH SPECIAL FEATURE ON SOCIOECONOMIC STATUS AND HEALTH 217 (2012), http://www.cdc.gov/nchs/data/hus/hus11.pdf [http://perma.cc/4M6R-CBHL] [hereinafter NCHS].

165 Myrna M. Weissman et al. *Prevalence of Suicide Ideation and Suicide Attempts in Nine Countries*, 29 PSYCHOL. MED. 10, 12-14 (1999).

166 SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., RESULTS FROM THE 2012 NATIONAL SURVEY ON DRUG USE AND HEALTH: MENTAL HEALTH FINDINGS 14-15 (2013), http://www.samhsa.gov/data/sites/default/files/NSDUHmhfr2012/NSDUHmhfr2012.pdf [http://perma.cc/ACT4-GUPR] [hereinafter SAMHSA]; *see also* Akiskal et al., *supra* note 116 (arguing that at least five percent of the population has bipolar disorder as opposed to previous estimates of one percent).

two percent more likely than men to seek mental health services, and nearly twice as likely to take prescription medication to treat a psychosocial disorder.[167]

As for racial disparities in psychosocial disability status, the Center for Disease Control ("CDC") estimated in 2012 that, although per capita suicide rates are higher among whites than minorities except for American-Indians,[168] African-Americans and non-Mexican Hispanics are about twenty percent more likely to suffer "serious psychological distress" than white counterparts.[169] Another CDC study of self-reported depression corroborates this evidence, reporting that members of all minority races are twenty-five to seventy percent more commonly depressed than are whites.[170] In addition, minorities are about half as likely to receive medical treatment for their psychosocial distress or disabilities than are white counterparts.[171] The leading justification for this failure to seek mental health treatment is unaffordability of care.[172] And

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[167] SAMHSA, *supra* note 166, at 20.

[168] *Mental Health and American Indians/Alaska Natives*, U.S. DEP'T OF HEALTH & HUM. SERVS. (last modified Sept. 17, 2013, 11:02 AM), http://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlID=39 [http://perma.cc/V2L5-QCCM] (explaining that while aggregate American Indian suicide rates parallel those of whites, adolescent American Indian female suicides are three times the rate of white peers.).

[169] NCHS, *supra* note 164, at 217 (demonstrating that while the rate among whites has remained stable between 1997 and 2010, the rates among African Americans and Hispanics fluctuate significantly).

[170] Reeves et al., *supra* note 122, at 17 tbl. 3 (summarizing "data from selected CDC surveillance systems that measure the prevalence and impact of mental illness in the U.S. adult population").

[171] AGENCY FOR HEALTHCARE RESEARCH & QUALITY, U.S. DEP'T OF HEALTH & HUMAN SERVS., 2010 NATIONAL HEALTHCARE DISPARITIES REPORT, online app. at tbl. 17_3_1-2a (2011), http://archive.ahrq.gov/research/findings/nhqrdr/nhqrdr10/17_utilization/T17_3_1-2a.html [http://perma.cc/7SER-6ADX] (comparing "[a]dults who received mental health treatment or counseling in the last 12 months, by race" in 2008); AGENCY FOR HEALTHCARE RESEARCH & QUALITY, U.S. DEP'T OF HEALTH & HUMAN SERVS., 2010 NATIONAL HEALTHCARE DISPARITIES REPORT, online app. at tbl. 17_3_3-2a (2011), http://archive.ahrq.gov/research/findings/nhqrdr/nhqrdr10/17_utilization/T17_3_3-2a.html [http://perma.cc/Z2EF-YYV4] (comparing "[a]dults who received prescription medications for mental health treatment in the last 12 months, by race" in 2008); AGENCY FOR HEALTHCARE RESEARCH & QUALITY, U.S. DEP'T OF HEALTH & HUMAN SERVS., 2011 NATIONAL HEALTHCARE DISPARITIES REPORT, online app. at tbl 7_1_2.2a (2012), http://archive.ahrq.gov/research/findings/nhqrdr/nhqrdr11/7_mentalhealthsubstanceabuse/T7_1_2_2a.html [http://perma.cc/MW85-VMBN] (comparing "[c]hildren ages 12-17 with a major depressive episode in the last 12 months who received treatment, by race" in 2009).

[172] SAMHSA, *supra* note 166, at 24 ("Among the 5.4 million adults aged 18 or older in 2012 who reported an unmet need for mental health care and did not receive mental health services in the past year, several reasons were reported for not receiving mental health care. These included an inability to afford the cost of care (45.7 percent), believing at the time

because poverty rates for minorities are almost two hundred percent higher than for whites,[173] it seems likely that their existing, disproportionate financial duress causes minorities to suffer worse psychosocial disabilities because they cannot afford the mental health treatment that wealthier white counterparts can.

The conjunction of being a minority and female appears to combine the worst attributes of financial duress for both disadvantaged groups. Relative levels of reported despair between African-American or Hispanic and white women are higher than those between African-American or Hispanic and white men.[174] Although we are only conjecturing, this may relate back to the fact that minority women are more than doubly likely to be heads of single or unmarried households than white women. The effect is the result of the combination of two disadvantaged conditions: race and gender.[175]

Statistics also reveal that, among African-Americans and Hispanics, complaints of severe psychosocial distress are considerably more prevalent for those earning below the poverty level than for those of the same race with higher earnings.[176] One longitudinal study found depression rates to be double among single over married mothers, with a co-existing correlation between mothers' financial duress and severe depression.[177] Some studies have identified that even among upwardly mobile, educated, middle-class minorities, depression is more common.[178] As we have mentioned previously,

that the problem could be handled without treatment (28.2 percent), not knowing where to go for services (22.8 percent), and not having the time to go for care (14.3 percent) . . . .").

[173] *See* SUZANNE MACARTNEY ET AL., U.S. CENSUS BUREAU, POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007-2011, at 13 tbl. 1 (2013), http://www.census.gov/prod/2013pubs/acsbr11-17.pdf [http://perma.cc/36J8-3CFT].

[174] *See* Robert E. Steele, *Relationship of Race, Sex, and Social Class and Social Mobility to Depression in Normal Adults*, 104 J. SOC. PSYCHOL. 37, 41 (1978) (finding that females were more depressed than males); *id.* at 41-42 (finding that blacks, while no more likely to be depressed than whites, had a greater number of "stressful life events" that are "known to correlate with depression").

[175] Dickerson, *supra* note 157, at 1749 (explaining that alimony payment "varies dramatically by race" and that "[w]hile black women had a higher divorce rate (12%) than white women (10%) and Hispanic women (8.3%), white women receive alimony in a percentage (91%) that is slightly higher relative to their percentage (89%) in the overall U.S. population").

[176] NCHS, *supra* note 164, at 217 tbl. 59.

[177] *See* Deborah Belle & Joanne Doucet, *Poverty, Inequality, and Discrimination as Sources of Depression Among U.S. Women*, 27 PSYCHOL. WOMEN Q. 101, 102 (2003) (explaining that poor women are twice as likely to experience uncontrollable life events and depression in their life); *see also* George W. Brown & Patricia M. Moran, *Single Mothers, Poverty, and Depression*, 27 PSYCHOL. MED. 21 (1997).

[178] *E.g.* David R. Williams, David T. Takeuchi & Russell K. Adair, *Socioeconomic Status and Psychiatric Disorder among Blacks and Whites*, 71 SOC. FORCES 179 (1992) (explaining a correlation between gender and disorder may be stronger than one of race and disorder); Amy Claxton, Intersecting Contexts: An Examination of Social Class, Gender,

the relationship between extant psychosocial disabilities and financial distress is most likely a feedback loop: psychosocial disabilities cause financial distress, and deepening financial distress causes more severe, longer-lasting psychosocial disability.[179] National statistics bear out that both financial distress (low credit scores and unfavorable Chapter 13 bankruptcy filings) and psychosocial disabilities are more common among minorities. Bankruptcies and psychosocial disabilities are more prevalent for women, even when they have the same credit scores as men.

Admittedly, currently available data do not permit us to confirm that those minorities and women who have psychosocial disabilities are the same ones with low credit scores who file bankruptcy; additional data collection could confirm this. If true, it would mean that the fact that the credit scoring system disadvantages the psychosocially disabled would strongly overlap with the assertion that the credit scoring system disadvantages minorities and women.

C. *Illusory Legal Protections for Credit Scoring*

The ADA and the FHA each prohibit discrimination against persons with disabilities, and so ought to bar negative creditworthiness determination of people with psychosocial disabilities based on their status. This practice of discrimination, however, has yet to be challenged or banned. Inversely, the CRPD mandates equal access to financial services for disabled people, but provides little pragmatic guidance.

1. Americans with Disabilities Act

The ADA was enacted in 1990 as an "emancipation proclamation" for Americans with disabilities[180] and was consciously directed at breaking down prejudicial barriers that had historically wrongly excluded the group from full civic, social, and economic participation.[181] In 2008, largely to correct

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Race, and Depressive Symptoms, at v (Sept. 1, 2010) (unpublished Ph.D. dissertation, University of Massachusetts, Amherst), http://scholarworks.umass.edu/open_access_dissertations/257/ [http://perma.cc/A2BA-JQJB] ("Findings indicated that income, and not occupation prestige or education, had a direct effect on mental health, in that it was related to fewer depressive symptoms.").

[179] *See supra* note 146 and accompanying text.

[180] Two legislators are credited with this description. *See* 136 CONG. REC. S9689 (daily ed. July 13, 1990) (statement of Sen. Harkin) ("The ADA is, indeed, the 20th century Emancipation Proclamation for all persons with disabilities."); 135 CONG. REC. S10,789 (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy) ("In a sense, this legislation is an emancipation proclamation for the disabled, and America will be better, fairer, and a stronger nation because of it.").

[181] *See* Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 637-39 (2004) ("Congress premised the ADA on the belief that the repercussions of having a disability are often mutable and can be relieved when the social environment accommodates physical and cognitive difference instead of excluding it.").

Supreme Court opinions that took an overly narrow view of disability rights, Congress passed the ADA Amendments Act[182] ("ADAAA", and collectively with the Americans with Disabilities Act, "ADA"). The statutory definition of disability—which was lifted whole cloth from the 1978 amendments to the earlier Rehabilitation Act[183]—remained unchanged through the emendation as "a physical or mental impairment that substantially limits one or more major life activities of such individual," the "record of such impairment," or "being regarded as having such an impairment."[184]

Throughout the ADA's history, the most contentious issue had been whom to classify as "disabled" under the statute, and thus to whom to extend legal protections against discrimination.[185] In classifying individuals as "disabled" and thus meritorious of ADA safeguards, disputes habitually arose with respect to the applications of four specific operative phrases in the statutory definition: "*impairment*," "*substantially limits*," "*major life activities*," and "*regarded as*."[186] These decisions sharply limited the number of meritorious discrimination claims surviving summary judgment because preliminary stages of litigation almost invariably involved contests about whether the plaintiff was, in fact, actually disabled under the legal definition.[187]

Moreover, and contrary to the plain language inclusion of persons with psychosocial disabilities in the statute, as well as in the implementing

182 Pub L. No. 110-325, 122 Stat. 3553 (2008) (codified in scattered sections of 42 U.S.C.) (declaring the purpose of the Act to be "to carry out the ADA's objectives" of eliminating discrimination "by reinstating a broad scope of protection").

183 Pub. L. No. 95-602, § 122, 92 Stat. 2955, 2984-85 (1978) (codified at 29 U.S.C. § 706(8)(B) (1988)). *See* Anita Silvers & Michael Ashley Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U. MICH. J.L. REFORM 81, 85 (2002) (averring that Congress "adopted without alteration" the ADA's "definition of disability from the Rehabilitation Act").

184 42 U.S.C. § 12102(1)(A)-(C) (2012).

185 Michael Ashley Stein et al., *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 690 (2014) ("Courts have struggled for more than two decades with the question of who is entitled to a reasonable accommodation under the employment provisions for the Americans with Disabilities Act of 1990 (ADA)." (footnote omitted)).

186 Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 209-10 (2008). *See also id.* at 209 (explaining that courts have narrowly construed the ADA, which means that very few people meet the specific criteria and are "disabled just right" (internal quotation marks omitted)); Michael Ashley Stein, *Foreword: Disabling* Brown, 14 WM. & MARY BILL RTS. J. 1421, 1423 n.12 (2006) (cataloguing instances of Supreme Court's narrow interpretations of the ADA).

187 *See* Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 90-96 (2003) ("As a result of the requirement that disabled individuals be 'qualified' to receive protection, ADA claimants have the burden of pleading prima facie cases of discrimination to survive defendants' summary judgment motions and proceed to trial.").

regulations,[188] commentators have documented continuing relative exclusion of those individuals from legal protection.[189] Research indicates that this disparate impact is due to social prejudices that delegitimize or minimize psychosocial disabilities. For example, finding that a plaintiff is "blue" or "sad" rather than clinically depressed and incapable of engaging in daily activities, or construing bipolar manic actions as resulting from "a lack of self-discipline" or arrogant personality.[190] Finally, although no definition of "impairment" exists under the ADA, a list was enumerated of conditions that are *not* impairments; strikingly, each "non-impairment" is mental or neurological.[191]

Two of the five titles of the ADA are most pertinent to our present considerations about unlawful credit score discrimination against those with psychosocial disabilities: Title I, which deals with discriminatory employment actions, and Title III, which addresses discriminatory public accommodation for access to goods and services, including lending. A common feature of each Title, and indeed the civil right most emblematic of the ADA, is the requirement that reasonable accommodations be provided to qualified individuals with disabilities to enable them to fully participate in social opportunities.[192]

As we saw in Section II.B, all else being equal, creditworthiness is negatively affected by psychosocial disabilities. Nevertheless, the use of credit

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[188] *See, e.g.*, 29 C.F.R. § 1630.2(j)(3)(iii) (2015) (stating that "major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia" all "substantially limit" brain function, as does "epilepsy").

[189] *See* Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J.L. REFORM 585, 651-52 (2003) ("[T]he ADA is being used to preserve the paradigm of disability as a physical one and to prolong discrimination against people with a mental illness."); *see also generally* SUSAN STEFAN, HOLLOW PROMISES: EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES (2002); SUSAN STEFAN, UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT (2001).

[190] MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL *passim* (2000) (describing systemic legal bias against persons with psychosocial disability as "sanism").

[191] 42 U.S.C. § 12211 (b)(1)-(3) (2012) ("[T]he term 'disability' shall not include . . . transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; . . . compulsive gambling, kleptomania, pyromania; or . . . psychoactive substance use disorders resulting from current illegal use of drugs."). A number of these named exceptions are DSM-V recognized disorders. Further, compulsive gambling and sexual behavioral disorders are often misdiagnosed when the true malady is a bipolar spectrum disorder. *See* Akiskal, *supra* note 109, at 285. The ADA thus makes a disability distinction not grounded in medical knowledge. *See* Korn, *supra* note 189, at 648 (calling for the abolition of these carve-outs prior to the ADAAA).

[192] Stein, *supra* note 181, at 581-83 (explaining that the ADA was passed "in large part to 'guarantee' [those] with disabilities 'a level playing field'").

checks as a factor in hiring decisions catapulted from nineteen percent of American businesses in 1996 to forty-two percent in 2006.[193] Employers relying upon credit histories are either knowingly targeting individuals with psychosocial disabilities under pretext of "neutral" credit reporting, or—less ominously but no less harmfully—disparately impacting the employment prospects of those persons.

Consistent with other civil rights acts, Title I excepts use of discriminatory screening criteria if the criteria are "job-related" or "consistent with business necessity."[194] However, if a disabled applicant or worker can be reasonably accommodated, and thereby enabled to perform the job requirements of a particular position without incurring an undue hardship,[195] discriminatory criteria cannot be used.[196] In the case of a few rare positions, one might imagine that credit scores are indicative of indispensible worker attributes. For instance, a position requiring a government security clearance may necessitate employees who cannot be easily bribed or extorted due to personal financial woes.[197] Similarly, a corporate position, such as hedge fund manager, chief financial officer, or comptroller, in which a single imprudent financial decision could devastate corporate holdings might rely on credit scores to ensure that the employee's personal finances are similarly impeccable.[198] Nevertheless,

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[193] Julie Wernau, *TransUnion Battling Attempts to Ban Unemployment Credit Checks*, CHI. TRIB. (April 28, 2010), http://articles.chicagotribune.com/2010-04-28/business/ct-biz-0429-credit-checks-transunion--20100428_1_credit-checks-transunion-credit-bureaus [http://perma.cc/Q6AE-KWSY].

[194] *See* 42 U.S.C. §§ 12112(b)(6), 12113(a) (2012).

[195] For an exhaustive account, see Stein et al., *supra* note 187, at 89-102, illustrating the range, difficulty, and ambiguity of employer-required accommodations.

[196] 42 U.S.C. §§ 12112(b)(6), 12113(a) (2012). This naturally raises the question (to which we will return in Part III, *infra*): what "reasonable accommodations" can be legally expected?

[197] However, we recall that some have cast doubt on whether creditworthiness *is* reducible to a quantified score, or instead is a qualitative, non-quantifiable risk that is partly a function of the community setting in which a person exists. *See supra* note 26.

[198] Title I also stipulates that an employer's "qualification standards" for workers may include "a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b) (2012). Common stereotyping of the psychosocially disabled as having a uniquely high propensity for violence evokes sympathy for employers allegedly seeking not to discriminate, but to protect the safety of their workers and workplaces. However, the stereotype of the psychosocially disabled posing greater or more frequent physical threats to fellow workers (mostly perpetuated by media and antiquated folklore) is empirically unfounded. The alleged correlation has been found lacking in multiple medical and scientific studies, and even for those studies confirming correlations (not causation), the reported increase in the actuarial risk of violence was at highest a miniscule, low-single-digit percentage of all workplace violence incidents. *See* Korn, *supra* note 189, at 612. Absent specific causal evidence about a particular employee, these empirical findings indicate that an employer cannot invoke §

evidence does not substantiate that any inherent risk of undue external influence can be more attributed to an individual's credit rating than it can to her history of intimate relationships or many other unrelated factors. Moreover, it seems dubious that the doubling in employer reliance on creditworthiness from 1996 to 2006 can be attributed to an economy-wide shift in need for greater worker financial competence. The far likelier source of this widespread usage is persuasive CRA marketing of credit history as a "passport" of good financial citizenship.

In sum, under Title I, credit scores' adverse use in employment contexts against persons with psychosocial disabilities is almost always discriminatory and prohibited.[199] Further, in the rare instance where good creditworthiness might be relevant, employers are obligated to first provide reasonable accommodations to ameliorate that discrepancy.

Title III addresses unlawful public accommodation discrimination.[200] Under Title III, credit score discrimination against individuals with psychosocial disabilities by lenders or purveyors of credited goods and services (e.g., banks, retail stores, adoption agencies, hotels and motels, attorneys, and accountants) is usually illegal.[201] It also appears that the practical implementation of Title III's directive encourages a future finding or directive that CRAs like Equifax, Experian, and TransUnion are themselves legally responsible under certain "reasonable accommodation" circumstances[202] for making credit score adjustments to account for psychosocial disability and/or to enable those

12113(b) to exempt discriminatory general employment actions undertaken in the name of workplace safety.

[199] Seven states have banned employers' use of credit scores in assessing job applicants unless creditworthiness is "substantially" related to the job's function and at least twenty others are considering such legislation. *Use of Credit Information in Employment 2011 Legislation*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 19, 2011), http://www.ncsl.org/research/financial-services-and-commerce/use-of-credit-information-in-employment-2011-legis.aspx [http://perma.cc/B7DB-8R2B] (listing passed and pending state bills).

[200] For the rationale underlying Title III, see generally Bradley A. Areheart & Michael Ashley Stein, *Integrating the Internet*, 83 GEO. WASH. L. REV. 449 (2015).

[201] 42 U.S.C. § 12182(a) (2012) ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of . . . any place of public accommodation . . . ."). The original 1989 ADA Senate Report expressly contemplated credit protection by Title III covered entities for those with psychosocial disabilities. It stated that the ADA would be clearly violated if "the credit application of a department store were to inquire whether an individual . . . has ever had [or] been hospitalized for mental illness." S. Rep. No. 101-116, at 62 (1989). Just as other abstract products have been considered Title III "goods or services" (e.g., contracts or insurance policies), credit and perhaps even creditworthiness estimations (i.e., credit scores) are subject to ADA strictures. *See* Areheart & Stein, *supra* note 200, at 471 ("[Some] courts have taken a slightly broader interpretation of Title III by holding that the ADA may apply to services and goods that are not physically provided to customers . . . .").

[202] *See infra* Part III.

individuals to better access their services—even though the CRAs are not presently Title III covered entities.[203] Given how few major CRAs there are, this requirement would (1) eliminate most redundancy in investigations of past financial acts and their linkages to psychosocial disability, thus reducing time and monetary costs in the aggregate;[204] (2) reduce government costs in assuring reasonable accommodation; and (3) ensure consistent access to goods, services, and credit for the disabled across all Title III covered entities.

There are some conceivable statutory defenses to Title III credit score discrimination liability that CRAs (or the covered entities that buy reports from them) might seek to invoke to avoid a "reasonable accommodation" credit score adjustment.[205] First, even for discrimination that "tend[s] to screen out"

[203] We reach this latter conclusion by logical extrapolation from the statutory requirement that, for psychosocially disabled plaintiffs in both Title I and III cases to demonstrate unlawful "discrimination" under the ADA, they must show that their low credit scores are causally attributable to their psychosocial disabilities and not simply the result of otherwise poor financial judgment. *See* Stein et al., *supra* note 185 at 723-24 (discussing ADA causation requirements). Demonstrating this fact is, under current conditions, impossible. It would require a plaintiff to gain access to the FICO-generating algorithms held by the CRAs outside government and public purview and to re-calculate her FICO score, excluding those unhappy financial events proven by medical testimony to be attributable to her illness. Insomuch as the CRAs are not themselves Title I or III covered entities, they would have no incentive under current regulatory conditions to comply with constant requests for re-computation of FICO scores for ADA litigation purposes.

One might wonder: why not simply require Title I employers or Title III covered entities *in each instance* that they transact with a disabled person to *themselves* upwardly "adjust" credit scores to account for active phases of psychosocial disabilities? The reason is that these are impossible (or at least unreliable) calculations in the absence of CRA cooperation. Moreover, this scenario would likely result in "unequal benefit" to non-disabled persons, another form of unlawful discrimination under Title III, because non-disabled or most physically disabled persons would not need to undertake such overwhelmingly duplicative and burdensome excusal of past financial behavior. *See* 42 U.S.C. § 12182(b)(1)(A)(ii) (2012). We assess a range of other alternatives *infra* in Part III.

[204] 28 C.F.R. § 36.301(c) (2015) would prohibit the credit reporting agencies from passing on reasonable investigatory costs in adjusting credit reports for the disabled to the disabled themselves.

[205] Some portions of the statute, of course, could be disingenuously used in an attempt to undercut the ADA's general intent to eradicate disability discrimination. For instance, 42 U.S.C. § 12182(b)(3) (2012) allows for covered entities to deny the disabled goods and service access if the particular person is a "direct threat," meaning "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures . . . ." However, financial risk is clearly not the type of "risk" contemplated by this exception; all of the examples proffered by the Department of Justice ("DOJ") involve cases of *physical*, bodily risk. *See* 28 C.F.R. pt. 36 app. C (2014). Or, as a second example, a CRA or a covered entity might be tempted to contend that credit score adjustments for the disabled are a "separate benefit" under Title III, and therefore impermissible. *See* 42 U.S.C. § 12182(b)(1)(A)(iii) (2012). However, Title III notes an exception to "separate benefits" discrimination: "unless such action is *necessary* to provide . . . as effective [an outcome] as

the disabled (normally unlawful), such discrimination is tolerated under Title III if shown to be "necessary" for "the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered . . . ."[206] The CRAs or covered entities could therefore contend that if they allowed customers with poor creditworthiness—brought on for whatever reason, disability-related or not—to receive goods and services, the entity would no longer be able to offer the good, service, privilege, or advantages to anyone as a consequence of lost profitability.

We might first question the veracity of this argument, insomuch as businesses already write off so much "bad debt" every day in America. In addition, the federal government appears, from a policy standpoint, to have already found this argument unconvincing.[207] Because the DOJ holds that explicit consideration of psychosocial disability in a credit application does not fall within the ambit of a "necessary" discrimination in providing goods, services, or credit, it easily stands to reason that implicit disadvantaging of the disability via credit scores rendered aberrantly low by past episodes should likewise be deemed unlawful.[208]

2. Fair Housing Act

The FHA, administered by the Department of Housing and Urban Development ("HUD"), prohibits discrimination in housing sales and rentals, including discrimination based on disability. Like the ADA, the FHA also mandates the provision of reasonable accommodations and stipulates that the

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that provided to others." *Id.* (emphasis added). DOJ has noted, for instance, "[the separate benefits provision] would not prohibit the designation of parking spaces for persons with disabilities." 28 C.F.R. pt. 36, app. C at 904 (2014). Similarly, removing the stigma of financial misadventures caused by psychosocial disability is necessary to assure credit access for individuals otherwise capable of making sound financial decisions. There is therefore no Title III "separate benefit" discrimination involved in such credit score adjustments.

[206] 42 U.S.C. § 12182(b)(2)(A)(i) (2012).

[207] In its administrative Title III regulations, the DOJ states that the ADA "prohibits attempts by a public accommodation to unnecessarily identify the existence of a disability" and provides the specific example that "it would be a violation of this section for a retail store to require an individual to state on a credit application whether the applicant has epilepsy, *mental illness*, or any other disability." 28 C.F.R. pt. 36 app. C at 914 (2015) (emphasis added).

[208] A similar rationale explains why the limited defense that it would "*fundamentally alter* the nature of goods, services, facilities, privileges, advantages, or accommodations" is not available as an escape from mandatory use of adjusted credit scores as a "reasonable modification" for psychosocial disability. 42 U.S.C. § 12182(b)(2)(A)(ii) (emphasis added). The DOJ makes clear by analogy that a disability policy can impose financial burden on covered entities (or credit agencies) without being tantamount to a "fundamental alteration" of its business practices. *See* 28 C.F.R. pt. 36 app. C at 915 (2015) (providing examples, including requiring parking lots to accommodate disabled-access vans).

denial of those accommodations constitutes illegal discrimination.[209] Most of HUD's regulatory focus for housing discrimination based on disability concentrates on two areas unrelated to credit score usage.[210] However, portions the Fair Housing Amendments Act of 1988[211] ("FHAA") prohibit discrimination because of "handicap" in housing sales or rentals.[212] Such FHAA claims can be sustained with evidence of either discriminatory impact or discriminatory intent by lenders, sellers, or renters.[213] HUD in its regulatory guidelines has specified that "handicap" includes "emotional or mental illness."[214]

Admittedly, FHA regulations generally permit a landlord to screen credit history as part of an inquiry into a prospective tenant's ability to meet tenancy expectations.[215] As best we can determine, the scant existing case law confirms that, where economic hardship is the clear result of an FHAA-covered disability, reasonable accommodation in providing housing must be made.[216] And with one non-reported exception,[217] the more particular question of

[209] 42 U.S.C. § 3604(f)(3)(B) (2012).

[210] These are: ensuring (1) "that zoning and other regulations concerning land use are not employed to hinder the residential choices of these individuals," and (2) "that newly constructed multifamily housing is built in accordance with the [FHA's] accessibility requirements." *See The Fair Housing Act*, U.S. DEP'T OF JUST., http://www.justice.gov/crt/fair-housing-act [http://perma.cc/UBZ9-A2DD].

[211] Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified as amended at 42 U.S.C. §§ 3601-3631 (2012)).

[212] 42 U.S.C. § 3605 (2012).

[213] *See* Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2518 (2015).

[214] 24 C.F.R. § 100.201(a)(2) (2014).

[215] *See* 24 C.F.R. § 982.307(a)(2)-(3) (2015) (stating that a property owner may screen tenants for factors that affect a renter's ability to pay rent and utilities).

[216] *See* Geibler v. M & B Assocs., 343 F.3d 1143, 1156-57 (9th Cir. 2003) (holding that in FHAA economic accommodation case, where plaintiff was disabled and consequently unable to work, that plaintiff's proposal to allow his mother to rent the apartment for him as a lease co-signer was "reasonable on its face," despite facts that plaintiff did not meet minimum income requirements and landlord did not permit lease co-signers); Sutton v. Freedom Square Ltd., No. 07-14897, 2008 WL 4601372, at *4 (E.D. Mich. Oct. 15, 2008) ("These 'economic accommodations' cases stand for the general proposition that an accommodation is not 'necessary' to afford a disabled person access to equal housing opportunity *when the accommodation sought does not directly ameliorate an effect of the disability*. In other words, the FHAA does not necessarily require defendants to waive generally applicable policies when such policies negatively affect disabled individuals for reasons *unrelated* to their disability." (emphases added)).

[217] *Sutton*, 2008 WL 4601372, at *4. ("Requiring defendants to overlook [a disabled unemployed low-income housing applicant's] credit history, which includes a debt to a former landlord, and offer him tenancy would certainly raise the risk of imposing a financial burden on defendants. Moreover, requiring defendants to waive credit requirements for disabled applicants would alter the essential nature of its operations particularly because [the

whether credit score *discrimination* (i.e., the adverse use of a low credit score, where the poor score is *caused by* disability, or more precisely, by psychosocial disability) is allowable under or even contemplated by the FHA apparently remains unaddressed. Still, courts have questioned similar discrimination against protected classes under the FHA, including alleged use of credit scores in a way that knowingly disadvantages race in housing insurance provision,[218] alleged placement of mortgage lending offices with differential interest rates that has a racially disparate impact,[219] and alleged intentional making of predatory home mortgage loans to African-Americans.[220]

3. Convention on the Rights of Persons with Disabilities

Internationally, the CRPD mandates enabling equal access to financial services by persons with psychosocial disabilities but provides almost no guidance on how States Parties can achieve this obligation. The CRPD is the first human rights treaty of the twenty-first century, as well as the first international instrument to enumerate legally binding protections on behalf of persons with disabilities.[221] The CRPD, which the United States has signed but not yet ratified,[222] empowers people with disabilities across the entire range of activities in which an individual might engage during their lifetime, and in

leasing entity] is a low income tax credit housing development required by law to accept high proportions of tenants who are disabled and of lower income.”). *But see* Schanz v. Vill. Apartments, 998 F. Supp. 784, 792 (E.D. Mich. 1998) (holding that FHA does not require landlord to accept financial guarantor agreement on behalf of disabled plaintiff unable to meet landlord’s credit and income requirements *because* “*[plaintiff’s] handicap is not preventing him from obtaining an apartment*” (emphasis added)).

[218] Nat’l Fair Hous. All. v. Prudential Ins. Co. Am., 208 F. Supp. 2d 46, 55-58 (D.D.C. 2002) (holding that homeowners insurance is covered by the FHA).

[219] Alleyne v. Flagstar Bank, No. 07-12128-RWZ, 2008 WL 8901271, at *5 (D. Mass. Sept. 12, 2008) (“Plaintiff’s . . . theory of disparate impact, that black borrowers are more likely to obtain mortgages through higher cost brokers than white borrowers because of [the bank’s] choice of the location of its office, does allege a causal connection between defendant’s policies and the disparate impact alleged.”).

[220] Adkins v. Morgan Stanley, No. 12-CV-7667, 2013 WL 3835198, at *8-9 (S.D.N.Y. July 25, 2013) (“Plaintiffs . . . have successfully alleged a disparate impact under the FHA. . . . Plaintiffs go on to state that [the bank’s] policies resulted in . . . [the] aggressive target[ing] [of] African American borrowers . . . .” (internal quotation marks omitted)).

[221] *See* Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 84-85 (2007) (explaining the CRPD’s enforcement elements “mandate[d] collecting statistics and submitting reports to domestic monitoring bodies, developing national policies for disabled citizens, generally promoting positive attitudes toward persons with disabilities, and establishing a treaty body similar to those of the existing seven core conventions” (footnotes omitted)).

[222] For attempted explanations by two of the treaty’s frustrated American drafters, see Janet E. Lord & Michael Ashley Stein, *The Law and Politics of U.S. Participation in the UN Convention on the Rights of Persons with Disabilities*, *in* HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM 199, 205-14 (Shareen Hertel & Kathryn Libal eds., 2011).

doing so provides a gold standard for disability rights and their content.[223] One crucially protected area—some argue the *key* area in view of the historical and contemporary treatment of persons with various disabilities[224]—is equal recognition before the law, meaning the right to be heard and acknowledged on an equal basis with others in making one's own decisions.[225]

Several of the CRPD's articles relate directly to equal legal capacity,[226] with Article 12 ("Equal recognition before the law") being directly on point. Article 12 also specifically highlights creditworthiness by requiring States Parties to use all "appropriate and effective measures to ensure" an equal right by persons with disabilities "*to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit*."[227] Article 12 ensures that persons with disabilities have this right by requiring States Parties to "take appropriate measures to provide access by persons with

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[223] *See* Michael Ashley Stein & Janet E. Lord, *Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities*, *in* THE UN CONVENTION ON THE RIGHTS OF PERSON WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES 17, 24, 28 (Gerard Quinn & Oddný Mjöll Arnardóttir eds., 2009) ("Significant for a human rights treaty, the CRPD sets forth its explicit purpose . . . to promote, protect and ensure full and equal enjoyment of all human rights and fundamental freedoms by all person with disabilities, and to promote respect for their inherent dignity." (internal quotation marks omitted)).

[224] *See* Janet E. Lord & Michael Ashley Stein, *Contingent Participation and Coercive Care: Feminist and Communitarian Theories of Disability and Legal Capacity*, *in* COERCIVE CARE: LAW AND POLICY 31, 36-40 (Bernadette McSherry & Ian Freckelton eds., 2013) ("The CRPD does offer an opportunity to trigger the social integration of a person with disabilities into society through its mandate of inclusive development."); *see also* János Fiala-Butora, *Disabling Torture: The Obligation to Investigate Ill-Treatment of Persons with Disabilities*, 45 COLUM. HUM. RTS. L. REV. 214, 219-39 (2013).

[225] *See* Michael Ashley Stein & Janet E. Lord, *Forging Effective International Agreements: Lessons from the UN Convention on the Rights of Persons with Disabilities*, *in* MAKING EQUAL RIGHTS REAL: TAKING EFFECTIVE ACTION TO OVERCOME GLOBAL CHALLENGES 27, 35-37 (Jody Heymann & Adele Cassola eds., 2012) ("Whereas disabilities rights and implementing measure were historically ignored or given low priority by government, the adoption of the CRPD has created a tremendous avenue for advocates around the globe to focus states' attention on issues [relating to] disability law and policy.").

[226] *See, e.g.*, CRPD, *supra* note 5, at arts. 3, 5, 13 (recognizing individual autonomy for persons with disabilities, a right to equality, a prohibition on discrimination, and effective access to justice). Following on the Vienna Convention's mandate that "[a]ll human rights are universal, indivisible and interdependent and interrelated," World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF. 157/23 (June 25, 1993), most human rights lawyers would assert that every article within the CRPD is inseparable and relevant.

[227] CRPD, *supra* note 5, at art. 12(5) (emphasis added).

disabilities to the support they may require in exercising their legal capacity"[228] while also laying out safeguards for its protection.[229]

Despite unequivocal language in the treaty, neither the CRPD itself nor the body of experts tasked with interpreting its provisions[230] has yet to explain in practical terms what this enablement might entail.[231] As noted above, we believe that empowering persons with psychosocial disabilities to receive and use credit on an equal basis with others may likely require reasonable accommodation in the form of supported decision-making. Hence, in Part III we suggest and critique several possible modalities—private and State-based—that might achieve this purpose.

III. ENGAGING CREDIT SCORE DISCRIMINATION

Section II.A demonstrated the relationship between psychosocial disability and poor creditworthiness. Section II.B revealed that credit scoring has a distinctly disparate impact on minorities and women who also happen to have psychosocial disabilities. Collectively, Sections II.A-B presented conclusive scientific evidence that many psychosocially disabled individuals, as a consequence of their respective impairments, intermittently lack the customary capacity to make sound financial judgments. In Section II.C, we showed how the ADA and FHA prohibit credit score targeting of persons with psychosocial disabilities for purposes unrelated to creditworthiness, such as employment or housing, even if these civil rights laws have not been so enforced. We also reviewed the CRPD, a recent human rights treaty that the United States has signed with articles directly on point, but found that little practical insight could be gleaned either from its provisions or subsequent interpretation. Hence, what remains unanswered by existing law and policy is the issue on which we seek to engender research and debate by our analysis in Part III: the highly normative question of what may be done regarding persons with

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[228] *Id.* at art. 12(3).

[229] *Id.* at art. 12(4).

[230] *Id.* at art. 34 (establishing a "Committee on the Rights of Persons with Disabilities" to carry out the CRPD's functions).

[231] In their first formal interpretation of the CRPD via a General Comment, the Committee highlighted in forceful generalities the importance of equal capacity, the deleterious impact of its deprivation, and the notion that supported decision making could take several forms, but did not make any of those facilitations concrete. Comm. on the Rights of Persons with Disabilities, Gen. Comment No. 1, ¶¶ 16-18, U.N. Doc. CRPD/C/GC/1 (2014) (defining "support" as a "broad term," the "type and intensity" of which "will vary significantly from one person to another"). Thus, when opining on the provision requiring equal access to credit that is quoted *supra* text accompanying note 227, the Committee stated that the "approach of denying persons with disabilities legal capacity for financial matters must be replaced with support to exercise legal capacity . . . ." *Id.* ¶ 23. The content, modality, parameters, and possible financial limits of that support, however, have not been defined. *See id.* (lacking specific parameters for the new "approach").

psychosocial disabilities whose low credit scores are empirically attributable to their impairments, for the purposes of creditworthiness (i.e., lending).[232]

A. *Limning the Issues*

The essential question is whether individuals with psychosocial disabilities should be treated as if they do not have psychosocial disabilities—meaning like members of the general population who also fail at times to make sensible financial decisions—or whether their disabilities should be consciously accounted for so that they can improve their credit scores or have access to and responsible use of credit despite their poor scores.[233]

Moreover, if disability is to be acknowledged, where exactly should its effects be taken into account in a process that starts from a person spending recklessly, accumulating debt, not paying that debt, receiving a consequent poor credit score that precludes access to credit and thus compels fewer and worse spending options, ultimately entering into a vicious cycle of poverty and bad credit? Laws and policies can potentially intervene at any stage, or not at all. For example, governments can mandate that reckless spending caused by disability be annulled, with the debt incurred internalized by the state; such debt could also be construed as having arisen from invalidly formed contracts, in which case private business would have to internalize the costs.[234] Another

[232] Parenthetically, we briefly raise issues regarding the implied objectivity of credit scores. If the idea that borrowers' reputational risks can be reliably quantified lacks epistemic merit, then credit scores are no more than a wide-reaching, albeit legally immunized, oligopolistic form of fraud or defamation. Even if they only partially reflect creditworthiness, modern social and business reliance on them may nevertheless mean that they are defamatory. *See* Christopher P. Guzelian, *False Speech: Quagmire?*, 51 SAN DIEGO L. REV. 19, 26-35 (2014) (reviewing court-adopted definitions of falsity in First Amendment litigation); Christopher P. Guzelian, *True and False Speech*, 51 B.C. L. REV. 669, 671 (2010) ("[D]efamation, a supposedly well-settled area of First Amendment law involving false speech, is actually unpredictable at its core."). Picking up on this potentially shaky metaphysics, Pasquale contends that even if credit score algorithms do predict creditworthiness, they also affect and alter it, thus raising a moral question of whether and how credit scores should be used. Pasquale, *supra* note 47, at 33. Similarly, what of a simple ban on the computation and use of *all* credit scores, *irrespective* of disability status? It is well beyond the purview of our article to address this issue, although some believe that current credit scoring raises constitutional due process concerns. *See* Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 20 (2014).

[233] The tension between acknowledging and ignoring difference (i.e., essentialism), also referred to in other contexts as color blindness versus race-consciousness, or formal equality versus accommodation, is a common jurisprudential trope reaching across divergent minority groups and raising parallel questions of discrimination. For a seminal work that interrogates this dynamic in several contexts, including disability, see MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990).

[234] Traditionally, the only way for a contract to be void or voidable in this context was if a party to the contract, as a result of psychosocial disability, did not understand what actions

possibility is to remove bad debt from consideration when calculating credit scores. Alternatively, an individual with a bad credit score engendered by psychosocial disability (e.g., debt accumulated due to actions while in an active state) could have that rating treated as a good credit score for the purposes of taking on new loans or other financial obligations. Conversely, governments and CRAs could turn a blind eye to individuals' psychosocial disabilities and treat them exactly of a level with non-psychosocially disabled persons and penalize their credit ratings for poor financial decisions.

The point to recall is that both the effects of active state psychosocial disabilities, as well as mitigating disability-focused accommodations, can manifest at various stages in the credit use and scoring process, in multitudinous ways, and to different degrees, and the fact that the type of schemes proposed herein are not currently under consideration does not excuse States (or academics) from thinking them through. All options should be considered and compared via a range of the following metrics: the severity of the intrusion; the autonomy and dignity of persons with psychosocial disabilities; the impact upon public funds and private businesses, respectively; the substantive allocation of resources between parties and entities and the fairness of such distributions; the full range of external costs and benefits; and possible implications for individuals in similarly poor credit straits who do not happen to possess psychosocial disabilities. This last point is worth underscoring. A universal approach would address the concerns of individuals with psychosocial disabilities as well as people without those conditions but with similarly poor credit scores arising from similarly imprudent financial decisions. That type of approach might well elicit better funding or public support, and thus have a chance at being better implemented, or at least less stigmatized.

Currently, legal research and analysis does not exist on the normative propriety and consequences of equal credit access for the psychosocially disabled. Consequently, we begin by describing the prevailing (yet implicit) binary status quo in Section III.B. Next, in Sections III.C-F, we draw upon a variety of historical and comparative sources to proffer several possible

she was taking or what the implications of signing meant. This so-called "true test" of contractual incapacity voids (or in some jurisdictions, makes voidable) a contract if a signatory, on account of psychosocial disability, either did not realize it was a contract she was signing or did not realize that a contract legally bound her to certain obligations. *E.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 15(1) (AM. LAW INST. 1981). The "true test" does not take into consideration the actual substance of the contract, and is rarely used. *See, e.g.*, Sparrow v. Demonico, 960 N.E.2d 296, 301-03 (Mass. 2012) (stating that courts have moved away from this "true test" toward an "affective test," which considers the substance of, and circumstances surrounding, the agreement made). The test was formalized by the Supreme Judicial Court of Massachusetts in *Reed v. Mattapan Deposit & Trust Co.*, as far back as 1908. 84 N.E. 469, 471 (Mass. 1908) ("[T]he true test is, was the party whose contract it is sought to avoid, in such a state of insanity at the time, as to render him incapable of transacting the business?").

options, beginning with the most interventional and ending with the least. Among these schemes, we are indifferent as to which option or combination of options is preferable. We put them forward and identify social and economic costs and benefits for each in order to provoke further research and debate. Some of these options could be construed as "reasonable accommodations" that are compatible with existing legal standards, although it remains unclear whether the ADA, FHA, and CRPD extend to credit decision making.[235] Other options would figure less plausibly as reasonable accommodations under these laws, even when interpreted generously. Contextual socio-legal norms, and the deep-seated prejudices that they either reflect or endeavor to tear down, will ultimately play a large role in guiding what course various policymakers pursue.

B. *The Binary Status Quo*

The prevailing status quo is binary and situates persons with psychosocial disabilities at opposite poles. One end of the duality discriminates against persons with psychosocial disabilities by excluding them wholesale from financial (and other) decision making through the legal mechanism of plenary guardianship. The other side of the twofold approach completely ignores the implications of individuals' psychosocial disabilities by treating them identically to other poor financial decision makers and in doing so precludes the possibility of facilitated decision making. Ironically, this either/or situation is implicit rather than recognized because legal analyses have yet to engage the issue of creditworthiness within the realm of psychosocial disability.

In a plenary guardianship jurisdiction, a society categorically rejects the concept that psychosocially disabled persons have autonomous legal capacity on a level with non-disabled persons, including the ability to make or complete financial transactions and contracts.[236] Such a jurisdiction uses judicial or administrative proceedings to place large numbers of those individuals under the supervision of guardians who will decide all aspects of their lives, including purchases and finances.[237] The mechanism of plenary guardianship for persons with psychosocial disabilities, including guardianship over financial affairs, is centuries old[238] and featured prominently in Imperial Rome

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[235] *See supra* Section II.C (discussing the application of the ADA, FHA, and CRPD to credit scoring).

[236] *See, e.g.*, Gerard Quinn & Anna Arstein-Kerslake, *Restoring the "Human" in "Human Rights": Personhood and Doctrinal Innovation in the UN Disability Convention*, *in* THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW 36, 46-47 (Conor Gearty & Costas Douzinas eds., 2012) (explaining how Article 12 of the CRPD departs from the paradigm in which "persons with disabilities have been treated more as 'objects' . . . than as 'subjects'").

[237] *See* Amita Dhanda, *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?*, 34 SYRACUSE J. INT'L L. & COM. 429, 434 (2007).

[238] Some claim guardianship to have originated during the Roman Republic with the Law of Twelve Tables. *See, e.g.*, A. Frank Johns, *Guardianship Folly: The Misgovernment of*

under the Justinian Code.[239] Plenary guardianship for the psychosocially disabled subsequently has been incorporated to varying degrees in the majority of nations, including the codes of several European states, especially ones that were members of the former Soviet Union.[240] Many American states likewise allow for plenary guardianships.[241] The practical effects of plenary guardianship have been disastrously cruel—human rights abuses termed by United Nations independent experts as rising to a level of torture[242]—and include practices such as forced institutionalization and involuntary

Parens Patriae *and the Forecast of its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century—A March of Folly? Or Just a Mask of Virtual Reality?*, 27 STETSON L. REV. 1, 10 (1997) (describing an early guardianship dictate contained in early law set out in the Roman Twelve Tables).

[239] *See* DIG. 27.10.1 (Ulpian, Sabinus 1) (Theodor Mommsen & Paul Krueger eds., Alan Watson trans., 1985) (stating that governors and praetors were accustomed to appointing "curators" over all persons "who have set neither time limit nor boundary to their expenditure" and thereby "squandered their substance by extravagance and dissipation" based "on [an] analogy [to] a lunatic"). Legal capacity was limited for other members of Roman society, for example, voiding contracts made with anyone under twenty-five years of age. DIG. 4.4.3 (Ulpian, Edict 11) (Theodor Mommsen & Paul Krueger eds., Alan Watson trans., 1985) (stating that "young men" under twenty-five "are governed by curators and under this age the administration of their own property should not be entrusted to them").

[240] EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, LEGAL CAPACITY OF PERSONS WITH INTELLECTUAL DISABILITIES AND PERSONS WITH MENTAL HEALTH PROBLEMS 27-37, 59-60 (2013), http://fra.europa.eu/sites/default/files/legal-capacity-intellectual-disabilities-mental-health-problems.pdf [http://perma.cc/A8QF-YU8N] (cataloguing guardianship legislation by nation).

[241] *See, e.g.*, THE N.Y. STATE LAW REVISION COMM'N, GUIDE TO ADULT GUARDIANSHIP: ARTICLE 81 OF THE NEW YORK STATE MENTAL HYGIENE LAW, *passim* (2005), http://www.ocfs.state.ny.us/ohrd/materials/151670.pdf [http://perma.cc/CWN6-56FW] (detailing the standard and process for appointment of guardianship in New York). On the overuse of guardianship in the U.S., see THOMAS GRISSO ET AL., EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 317 (2d ed. 2003) (detailing research showing that most guardianships are not "limited" to specific incapacities); Leslie Salzman, *Guardianship for Persons with Mental Illness—A Legal and Appropriate Alternative?*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 279, 294-98 (2011) (contending that guardianship orders are "routinely . . . overly broad or unnecessary," despite reforms).

[242] *See, e.g.*, Juan E. Méndez (Special Rapporteur), *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 19-21, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013); OFF. OF THE HIGH COMM'R FOR HUM. RTS., REPORT: EXPERT SEMINAR ON FREEDOM FROM TORTURE AND ILL TREATMENT AND PERSONS WITH DISABILITIES 14 (2007), http://www2ohehr.org/english/issues/disability/does/torture/seminartorturereportfinal.doc [http://perma.cc/9TJG-V9Z5] (concluding that "torture . . . of persons with disabilities takes place" both inside "institutions as well as . . . within the family or at the community level").

sterilization,[243] and severe levels of physical, developmental, and sexual abuse.[244]

Despite the regular use worldwide of plenary guardianships,[245] their violation of international human rights norms such as CRPD,[246] and a global movement against their application due to the effect described above,[247] post-

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[243] Méndez, *supra* note 242, at 23; *see also* Lord & Stein, *supra* note 224, at 35-38 (cataloguing abuses).

[244] János Fiala-Butora, Michael Ashley Stein & Janet E. Lord, *The Democratic Life of the Union: Toward Equal Voting Participation for Europeans with Disabilities*, 55 HARV. INT'L L.J. 71, 99 n.162 (2014) ("Disability Rights International (formerly Mental Disability Rights International) has documented egregious human rights violations against persons with disabilities in institutional settings, such as orphanages, social care homes, and psychiatric hospitals."); *see also, e.g.*, MENTAL DISABILITIES RIGHTS INT'L, BEHIND CLOSED DOORS: HUMAN RIGHTS ABUSES IN THE PSYCHIATRIC FACILITIES, ORPHANAGES AND REHABILITATION CENTERS OF TURKEY, at iii (Sept. 28, 2005), https://web.archive.org/web/20100706072154/http://www.mdri.org/PDFs/reports/turkey%20final%209-26-05.pdf [http://perma.cc/U26Q-XPND] ("Locked away and out of public view, people with psychiatric disorders as well as people with intellectual disabilities, such as mental retardation, are subjected to treatment practices that are tantamount to torture.").

[245] *See* Michael L. Perlin, *"Striking for the Guardians and Protectors of the Mind": The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 PENN. ST. L. REV. 1159, 1166 (2013) ("In many nations, such guardianship is regularly plenary and permanent.").

[246] *See, e.g.*, Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-Making*, HUMAN RIGHTS BRIEF, Winter 2012, at 1, 2 ("[Guardianship] is a mechanism that, at least in its most complete form, the CRPD, and Article 12, seeks to limit significantly."); Bernadette McSherry, *Legal Capacity Under the Convention on the Rights of Persons with Disabilities*, 20 J.L. & MED. 22, 26-27 (2012) ("Article 12 of the Convention clearly sets out that individuals with mental and intellectual impairments must be presumed by states parties to have legal standing and legal agency."); Perlin, *supra* note 245, at 1167 ("Even *prior* to the ratification of the CRPD, guardianship-as-usual violated international human rights law." (footnotes omitted)); Terry Carney, *Guardianship, Citizenship, & Theorizing Substitute Decisionmaking Law* 3 (Sydney L. Sch., Research Paper No. 12/25, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2041103 [http://perma.cc/2HBQ-UR7Q] (arguing that the CRPD and Title II of the ADA may view guardianship to be a proscribed form of discrimination). Despite much of the rhetoric surrounding guardianship, it is possible to envision a situation for a small minority of individuals who, even with facilitation, still cannot make any decisions on their own behalf or who can make such decisions but nonetheless opt for various reasons to place themselves under guardianship. *See generally* MICHAEL BACH & LANA KERZNER, LAW COMM'N OF ONTARIO, A NEW PARADIGM FOR PROTECTING AUTONOMY AND THE RIGHT TO LEGAL CAPACITY (2010), http://www.lco-cdo.org/disabilities/bach-kerzner.pdf [http://perma.cc/BC46-378Y].

[247] *See, e.g.*, Fiala-Butora, Stein & Lord, *supra* note 244, at 252 ("Where torturous practices were effectively banned, . . . it was the result of advocacy efforts of non-governmental organizations.").

Roman scholarship has not examined whether there can be a valid legal or philosophical justification for precluding the participation of psychosocially disabled individuals under guardianship from private and public credit markets and in credit scoring. However, scholars recently have begun to consider the parallel question of legal capacity in the more foregrounded context of public voting[248] as has the European Court of Human Rights[249] and the CRPD Committee.[250] The uniform conclusion drawn is that blanket restrictions on exercising legal capacity are impermissible.

The narrower and more complex issue of whether a State, after an empirically valid and individual determination of creditworthiness (such as could be provided by a FICO score)—which is also at the heart of financial guardianship under Section III.B—could legally curtail relevant financial decision making by individuals with psychosocial disabilities has not been considered in any depth.[251] As indicated in Section II.C, the ADA and FHA have not addressed the issue under the heading of whether an individual is "qualified" to engage in publicly available financial services; the CRPD Committee, as reflected in their General Comment, would very likely consider such restriction as violating the CRPD.[252] At the very least, an attempt to restrict access to credit would likely be viewed with much skepticism.

The opposite end of the binary status quo spectrum, and one that would seem to be the most commonly prevailing practice, treats persons with

[248] *See generally id.* (surveying cases and scholarship regarding equal political participation for persons with disabilities); Janet E. Lord, Michael Ashley Stein & János Fiala-Butora, *Facilitating an Equal Right to Vote for Persons with Disabilities*, 6 J. HUM. RTS. PRAC. 115 (2014) (detailing modes for including disabled persons in all states of the electoral cycle).

[249] *See* Alajos Kiss v. Hungary, App. No. 38832/06 Eur. Ct. H.R. (2010), http://hudoc.echr.coe.int/eng?i=001-98800#{%22itemid%22:[%22001-98800%22]} [http://perma.cc/DKQ7-W3PH] (holding that denial of disabled applicant's right to vote was unlawful under European law). One of this article's co-authors, and his colleagues, were responsible for bringing that case.

[250] *See* Comm. on the Rightts. of Persons with Disabilities, Views Under Article 5 of the Optional Protocol, ¶ 9.5, U.N. Doc. CRPD/C/10/D/4/2011 (Sept. 9, 2013) ("[T]he Committee is of the view that, by depriving the authors their right to vote, based on a perceived or actual intellectual disability, the State party has failed to comply with its obligations . . . .").

[251] Moreover, attempts to extrapolate from legal determinations regarding public voting rights to the private assignment of credit scores and their consequences is inexact and must be made with caution. Voting is a volitional public act. Credit scoring stems from an involuntary, passive, and private tracking of another's financial behavior. In addition, justifications of state legitimacy as a lever against voters with disabilities are a non sequitur in relation to credit scoring.

[252] *See* Comm. on the Rights of Persons with Disabilities, *supra* note 231, ¶ 23 ("[The CRPD] requires States parties to take measures, including legislative, administrative, judicial and other practical measures, to ensure the rights of persons with disabilities with respect to financial and economic affairs, on an equal basis with others.").

psychosocial disabilities who make poor financial decisions in exactly the same manner as their similarly feckless peers without disabilities. Thus, regardless of disability status, each individual within these two groups will receive a negative creditworthiness score that reflects that individual's prior ill-conceived financial history. One implication of this circumstance is that persons with psychosocial disabilities maintain privacy regarding their impairments, and thereby avoid some level of social stigma, but at the cost of their FICO scores (and also at the cost of the harms engaged by "covering").[253]

The legal posture put forward by many in the international movement of individuals with psychosocial disabilities implies that those advocates might well favor such a result to the extent that it bans both incapacitation and exculpation on the basis of disability.[254] In addition, such a scheme maintains a pure equality, in terms of social and economic cost, between individuals with and without psychosocial disabilities whose ill-fated borrowing decisions result in billions of dollars of bad debt being written off annually in the United States.[255] Put another way, all bad credit bearers are treated exactly the same

[253] *See generally* Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002) (describing the issues and harms resulting from repression of a disfavored trait). For sociological accounts of the effect that identity repression has on gay men, see JAMES D. WOODS & JAY H. LUCAS, THE CORPORATE CLOSET: THE PROFESSIONAL LIVES OF GAY MEN IN AMERICA 74-75 (1993) (telling story of a gay man's dual identities and the physical and psychological costs entailed); Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. HEALTH & SOC. BEHAV. 38, 39-42 (1995) (detailing the psychological toll "minority stress" takes on gay men).

[254] *See, e.g.*, Human Rights Council, Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, ¶ 45, U.N. Doc. A/HRC/10/48 (Jan. 26, 2009) (stating that a disabled person has a right "to make and communicate decisions with respect to personal or legal matters"). Those advocates may also press for some type of facilitation posited *infra*.

[255] Credit card companies wrote off $45 billion in bad debts annually during the 2008 crisis. *See* Eric Dash & Andrew Martin, *Banks Brace for Credit Card Write-Offs*, N.Y. TIMES (May 10, 2009), http://www.nytimes.com/2009/05/11/business/11credit.html [http://perma.cc/5BP8-Q64J]. Put into context, the proportion of credit card loans resulting in bad debts and write-offs approximately doubled from the 1970s to 1997. Donald P. Morgan & Ian Toll, *Bad Debt Rising*, CURRENT ISSUES ECON. & FIN., March 1997, at 1, http://www.newyorkfed.org/research/current_issues/ci3-4.pdf [http://perma.cc/J9EX-M58P] (finding that commercial banks' "charge-offs" rose to nearly 5% around 1997 from an average of 2.3% of credit card loans between 1971 to 1983). Bad-to-outstanding debt ratios for commercial banks are published quarterly by the Federal Reserve. *See Charge-Off and Delinquency Rates on Loans and Leases at Commercial Banks*, FED. RES. BANK (Nov. 18, 2014), http://www.federalreserve.gov/releases/chargeoff/ [http://perma.cc/Y3RH-JZR7]. Viewed from another angle, over $245 billion in mortgage-backed securities issued by Bank of America and affiliated firms between 2004 and 2008 were delinquent or in default. Tom Schoenberg, *BofA Said Nearing Up to $17 Billion Mortgage Settlement*, BLOOMBERG (Aug. 7, 2014), http://www.bloomberg.com/news/articles/2014-08-06/bofa-said-to-near-mortgage-deal-for-up-to-17-billion [http://perma.cc/WA5L-NLRX].

way—whether due to disability, poor judgment, exuberance, unrequited love, or any other factor—with the cost borne identically by society: the business sector writes off losses that are in turn borne at least in part through tax redistribution, and individuals internalize the consequences of poor credit scores. Weighing in the balance against this plan is that the consequence of not identifying individuals' psychosocial disabilities is disqualification from using potential measures for improving their credit access and scores, such as those set forth in Sections III.C-F, including those schemes that use facilitated decision making.

C. *Financial Guardianships*

Because psychosocial disability is episodic, a somewhat less restrictive alternative to compulsory plenary guardianship for psychosocially disabled persons is a form of guardianship limited in scope and duration to financial decision making.[256] This is a current practice in many countries that utilize guardianship, and often takes the form of decision making over the distribution of property.[257]

However, Australian financial guardianship is distinct in that the practice is part of an extensive national system of providing effective financial counseling system for debtors suffering from "financial stress"—a term defined as meaning that a "consumer is unable to meet financial obligations over a sustained period of time."[258] Accordingly, under the Australian system, compulsory financial guardians require their wards to engage in counseling with a goal toward learning to make, or at least having more input into, their own decisions in the future.[259] Some Australian commentators claim that their

[256] *See* Salzman, *supra* note 241, at 294 (describing how states are requiring "that the guardianship order be narrowly tailored to meet the individual's specific needs").

[257] *See, e.g.*, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *supra* note 240, at 31 (describing how the Dutch system provides for a "protective trust" that is "aimed at protecting the property and financial interests of the person").

[258] CHARLES LIVINGSTONE ET AL., COMPARING AUSTRALIAN AND INTERNATIONAL SYSTEMS TO ADDRESS CONSUMER FINANCIAL STRESS 6 (2009); *see also* RYAN, KLIGER & HEALY, *supra* note 146, at 20-27 (explaining that financial counsellors should "treat a person with mental illness[] like everyone else" and work with a person's mental health professional to "empower the person to make decisions").

[259] In 1954, Australian courts articulated a general test of legal capacity, acknowledging that no "fixed standard of sanity" is required to form a contract, but that "each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation." *Gibbons v Wright* (1954) 91 CLR 423, 437 (Austl.). Australian mental health experts have concluded that this flexible standard has provided little guidance as to when and how much attorney guardian assistance is required when a patient is medically judged to be significantly impaired in financial decision-making capacity. RYAN, KLIGER & HEALY, *supra* note 146, at 10. Indeed, even where involuntary medical treatment is permitted due to the severity of a patient's disability, Australian law

public system, while underfunded, is the world's current "best practice" with respect to enabling psychosocially disabled debtors because it affords access to impartial, certified financial counselors to assist those with psychosocial disabilities in making out financial budgets, discussing and making effective choices about existing and future debts, and mediating past-due debt conflicts with creditors.[260]

Many of the same costs inhere in financial guardianships as they do in the general plenary guardianships described in Section III.C, including their violation of civil and human rights standards due to their coercive nature and potentially over-inclusive reach. However, there is, at least in the abstract, a notable difference of degree in that a financial guardianship system is targeted toward one element of an individual's capacity. Thus, although the individual under financial guardianship cannot enter into contracts on her own behalf, she can direct her own medical care, movement, employment, living circumstances, and rhythms. However, there also is great ambiguity, legally and practically, about exactly where the financial guardian's authority over her ward begins and ends. As an illustration, could a financial guardian direct certain aspects of the ward's medical choices (such as a decision to smoke) because the direct consequence is a substantial change in the cost of health insurance? Could the financial guardian lawfully pressure the ward not to rent her own apartment, but rather to live in shared housing, because of the rent differential? Or should the compulsory financial guardianship be limited only to those times during which the disability is in its active phase? In short, the scope and duration of a limited financial guardianship—as well as the degree of administrative oversight and the nature of the guardian—determines its advantages and disadvantages. Hence, there is reason to think that compulsory financial guardianships are different only in degree and not in kind from involuntary plenary guardianships.

D. *Incentivized Advance Directives*

Another possible system contemplates persons with psychosocial disabilities creating self-imposed limits on their spending and borrowing to address poor credit scores and their consequences, and being rewarded for so doing. Ideally, an individual with a psychosocial disability would make advance financial directives while her disability is in an inactive phase, when poor financial

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does not invariably grant simultaneous custodial control over the individual's financial affairs. *Id.* at 9.

[260] LIVINGSTONE ET AL., *supra* note 258, at 18 ("[T]he emergence of a social justice focus has been described by representatives of the Australian Financial Counselling and Credit Reform Association . . . as generating the basis for a [Financial Counselling] service model which constitutes 'possibly the best practice in the world.'" (quoting J. PENTLAND, FIN. & CONSUMER RIGHTS COUNCIL, FINANCIAL COUNSELLING: THE CURRENT AND CHANGING LANDSCAPE 2 (2006))). In contrast, consider credit industry-funded counseling, such as exists in the United Kingdom. *See infra*, notes 272-80 and accompanying text.

judgments are less likely to occur.[261] Participants might also be expected to take active personal responsibility, in conjunction with medical and community-based assistance, to minimize the frequency and magnitude of poor financial behavior during their disabilities' active phases.[262]

In the envisioned form of this system, credit scoring and credit industries would participate, either voluntarily or compulsorily, in providing safeguards and creating rewards for those diligent Ulyssean individuals electing to "tie themselves to the mast." For instance, a society could architect intentionally greater difficulty for those persons getting standard access to "easy" or predatory credit, such as credit cards, payday loans, and other high-interest forms of lending. Such creditors can be barred from most forms of marketing to psychosocially disabled participants as part of the advance directive.[263] Likewise, algorithmic safeguards can be instituted to detect participants' erratic spending patterns that suggest that an active phase of disability is afoot. Trusted family, friends, or medical supporters can be notified, and freezes on access to personal funds can be engaged and/or creditors placed on notice.[264]

A drawback of a system that exclusively relies on incentivized advance directives to thwart untoward credit score and lending consequences is that it may offer little remedy for financial mishaps outside the individual's control, such as when a disability only indirectly causes the bad credit score (e.g., when a serious medical billing error follows mental health treatment).[265] Also, such a system is often only preventive—despite reasonable efforts by the participant

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[261] *See* Pasquale, *supra* note 22, at 26 ("Reduced credit limits might be more a service than a burden if marital difficulties, mental health concerns, or cheap liquor reliably forecast financial challenges.").

[262] One proponent wrote: "If a state can punish an individual for permitting his condition to become uncontrollable, socially unacceptable behavior in public, surely it can use non-criminal civil law powers to persuade mentally ill individuals, already receiving treatment in the community, to take medically acceptable steps to control their behavior." Paul F. Stavis, *The Nexum: A Modest Proposal for Self-Guardianship by Contract: A System of Advance Directives and Surrogate Committees-at-Large for the Intermittently Mentally Ill*, 16 J. CONTEMP. HEALTH L. & POL'Y 1, 16 (1999) (reviewing historical, colonial, and contemporary attitudes about persons with psychosocial disability taking responsibility for actions).

[263] *See* Zak Toomey, Note, *Changing The FCRA Opt-out into the FCRA Opt-in: A Proposal for Protecting Mentally Disabled Consumers from Manipulative Credit Card Marketing*, 12 J. GENDER RACE & JUST. 621, 641-46 (2009) (proposing to change FCRA pre-approved credit marketing from an opt-out to an opt-in system on account of predatory marketing to persons with psychosocial disabilities).

[264] ARIELY, *supra* note 51, at 122-26 (advocating for a "'self control' credit card" allowing the card holder to set limits on categories of expenses and providing options such as the rejection of the card or notification to a friend if the limit is exceeded).

[265] *See supra* notes 139-44 and accompanying text (describing how persons with psychosocial disabilities are particularly vulnerable to certain debts, such as for medical treatment).

to stay healthy, society might elect not to offer solutions for unwinding existing bad credit scores or outstanding loans.[266] Indeed, it is unlikely that the credit card industry, without regulatory impetus, would put in place a system sufficiently effectual or appealing to psychosocially disabled debtors striving to make reasonable improvements in their financial behavior.[267]

Nevertheless, one could envision a more extensive system of incentivized advance directives. Perhaps mandatory, industry-subsidized credit score repair services could be offered to participants who make reasonable efforts to stay healthy.[268] Or, instead of credit score repair privileges, perhaps a reasonably diligent individual who created advance directives who nevertheless has suffered some ill-fated credit score as the result of disability will be assigned an artificially excellent credit score to allow otherwise unattainable access to non-predatory borrowing sources (within the specified limits of the advance directive). Perhaps such individuals should also be afforded greater legal deference in voiding financial contracts made during active phases of their disabilities. Another possibility is for the market and government to collaboratively or separately subsidize and staff micro-lending and micro-insurance institutions designed to optimize credit usage for persons with psychosocial disabilities who voluntarily self-identify and take reasonable measures for optimal health.[269]

No extensive self-directed guardianship system involving cooperation with lenders and credit scorers exists. It is thus difficult to speculate about questions of discrimination and legal capacity involving such a system. Still, an

[266] Note that this system would have to be voluntary as a federal law that prohibited CRAs from assigning credit scores to Americans with psychosocial disabilities unless the disabled person freely opted in to an assignment would not pass muster.

[267] *See generally* DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA (2001) (detailing the historical opposition of creditors to increased bankruptcy protections for debtors).

[268] For instance, a trusted, third-party non-governmental organization could be given dual legal authority both to: (1) verify whether claimants' have mental health disabilities, whether they are taking adequate steps to maintain good mental health, and whether contested damaging financial behavior was indeed caused by the mental illness; and (2) have unfettered "backdoor" access to the trade secret FICO/CRA credit score algorithms and credit histories in order to delete from official computation those activities caused by mental illness that negatively affected the claimant's credit score. Two computer researchers propose this approach as a *general* remedy to Big Data algorithm opaqueness. *See* Dwork & Mulligan, *supra* note 42, at 39.

[269] A 2005 Australian study suggested that "access to equitable financial products can assist in alleviating poverty, and that microfinance [lending] . . . can reduce people's vulnerability to financial stress, reduce hardship and associated family stress, promote wealth creation and perhaps most significantly, create a solution to what appears to be burgeoning exploitation by fringe lenders." LIVINGSTONE ET AL., *supra* note 260, at 13 (citing GOOD SHEPHERD & BHD. OF ST. LAURENCE, SUBMISSION TO CONSUMER AFFAIRS VICTORIA: CONSUMER CREDIT CODE REVIEW (2005), http://www.bsl.org.au/pdfs/joint_subm_consumer_credit_code_review.pdf [http://perma.cc/H257-QJXW]).

incentivized, self-directed guardianship—unlike coerced plenary or financial guardianship—would recognize the legal capacity of persons with psychosocial disabilities to make their own decisions and to form financial contracts. An incentivized, self-directed guardianship system also recognizes comparatively greater, possibly even full, legal capacity for persons with psychosocial disabilities who elect not to become reasonable, self-directed guardians than it does for those who choose to be reasonably diligent, disclosed, self-directed guardians. The disincentive of having to bear greater (or full) weight of one's financial behavior, as opposed to the incentives of preventive assistance (and possibly *a posteriori* debt repair and relief) for sincerely attempting to mitigate the impact of one's disability, is the cost of "non-discrimination" under an incentivized, self-directed guardianship system.[270] It is not possible to abstractly assess the costs and benefits of an incentivized self-directed guardianship system beyond noting that they are directly related to the specific form that it takes, and the levels of typical cooperation that can be expected from the various stakeholders.

E. *Voluntary Assistance*

In any free market (or rational choice) system, an operative legal presumption is that financial actors who are psychosocially disabled have legal capacity to conduct their own financial affairs, even if at times poorly, and suffer the full financial consequences—much like non-disabled financial actors. Accordingly, there is no need for any type of guardianship for psychosocially disabled actors who prefer not to have those limitations. Moreover, a rational choice philosophy assumes that market-based means lead to the eradication of discriminatory practices by CRAs or credit score users and that the remaining negative outcomes affecting persons with psychosocial disabilities are permissible.[271]

Such is the state of affairs in England and Wales, which almost always disregard intermittent empirical incapacity of psychosocially disabled financial actors in examining questions of their legal incapacity.[272] By contrast, in

[270] We note, however, that the ADA Amendments explicitly rebutted the Supreme Court's requirement that disability status be assessed in a mitigated state, i.e., a person's cognitive state after taking her medication or the extent of her mobility once prosthetic devices are fastened on. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § (2)(b)(2), 122 Stat. 3553, 3554).

[271] *Cf.* GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 43-45 (1971) (finding that discrimination can incur increased costs for firms, and that profit-maximization goals in competitive labor markets could decrease discriminatory hiring).

[272] The one exception being that English and Welsh contracts can be voided on grounds of legal incapacity when the other party (usually a lender) to the transaction had prior notice of the incapacity. MIND CHARITY, *supra* note 111, at 25 ("Currently the law states that a contract is void where the other party (the lender) was aware of the incapacity."). Interestingly, Roland Behm, an American attorney filing litigation against major corporations using allegedly discriminatory employment algorithms, contends that those

Scotland "debts can be struck off where there is incapacity without the other party having notice" of any pertinent incapacity.[273] However, in many rational choice jurisdictions, private or public firms market services—sometimes even credit industry-funded—to assist with general credit score repair or creditor mediation.[274] And, consistent with the prediction that the credit industry will react to public pressure to accommodate psychosocially disabled persons, some nations' creditors and CRAs are establishing voluntary "best practices" for the credit industry in dealing with psychosocially disabled persons.[275] For example, there has been mounting recognition in the United Kingdom that the psychosocially disabled are, in medical but not legal fact, at least intermittently incapacitated in financial decision making.

This recognition prompted the formation of the Money Advice Liaison Group ("MALG"), a working group that consists of certified financial advisors, social workers, health and welfare workers, lenders, the Royal College of Psychiatrists, and representative individuals with psychosocial disabilities.[276] The MALG has created *voluntary* advisory guidelines ("Mental Health Awareness Guidelines") for creditors, debt collectors, and financial advisors consisting of "best practices" to ensure sensitivity and maximum mutual benefit to creditors and psychosocially disabled consumers in conducting transactions.[277] The MALG has urged financial corporations to formally adopt the guidelines in their private Codes of Practice.[278]

algorithms are capable with great accuracy of detecting psychosocial disabilities by asking a series of triangulating, seemingly benign questions, such as "How far do you commute to work?", "Do you rent or own your home?", and "Do you use public transportation?" Behm's allegations, if correct, would suggest that algorithms apparently unrelated to the disability *do* provide prior notice to its user about disability. *See generally*, Lauren Weber & Elizabeth Dwoskin, *Are Workplace Personality Tests Fair?*, WALL STREET J. (Sep. 29, 2014), http://www.wsj.com/articles/are-workplace-personality-tests-fair-1412044257 [http://perma.cc/D36N-F59F]

[273] MIND CHARITY, *supra* note 110, at 125.

[274] The Money Advice Liaison Group provides an example of such a program that, with collaboration from some members of the credit industry, advocates for the financial interests of psychosocially disabled persons. *See* RYAN, KLIGER & HEALY, *supra* note 146, at 14.

[275] *See, e.g.*, MONEY ADVICE LIAISON GRP., FINAL DEMAND: DEBT AND MENTAL HEALTH 5 (2d ed. 2009) (establishing voluntary guidelines for creditors dealing with consumers with mental health disabilities).

[276] RYAN, KLIGER & HEALY, *supra* note 146, at 14.

[277] *See* MONEY ADVICE LIAISON GRP., GOOD PRACTICE AWARENESS GUIDELINES FOR HELPING CONSUMERS WITH MENTAL HEALTH CONDITIONS AND DEBT 13-32 (3d ed. 2015), http://www.moneyadvicetrust.org/SiteCollectionDocuments/Research%20and%20reports/MALG_web%20based%20version%2023.3.15%20and%209.4.15.pdf [http://perma.cc/W45R-6EUX] (describing in detail fourteen guidelines for organizations dealing with debt). The first edition of these guidelines was published in 2007. *Id.* at 4.

[278] *Id.* at 10 (advocating adoption of the guidelines because they "should help firms meet obligations under statute, regulations, and their own trade association codes of practices").

In addition, the Royal College of Psychiatrists has created a Debt and Mental Health Evidence Form to enable creditors and financial advisors to request relevant, permissible information about a customer's mental health in order to determine debt repayment abilities.[279] Mental health agencies in the United Kingdom have urged creditors to write off unsecured outstanding debts, to outsource debts only to third-party creditors who likewise adopt MALG recommendations, to mitigate standard debt collection efforts when the creditor becomes aware of a debtor's disability, to undertake specialist training in mental health sensitivity, and to politically and financially support more extensive financial counseling, intervention, and support.[280] Despite private sector progress in recognizing the idiosyncratic impacts of psychosocial disability on financial wherewithal, MALG recommendations are not legally binding upon creditors.[281] Unfortunately, it appears that creditors are not interested in voluntarily submitting to these guidelines. One study concluded that nearly all British creditor and bank-funded efforts to support voluntary mental health-sensitive financial advising centered largely on efforts to encourage debtors to pay debts promptly, rather than offering services to challenge or mediate debt liabilities.[282]

To summarize: adherents, including creditors, of a voluntary guardianship system commonly applaud the idea of voluntary private sector ventures, cooperation, and workarounds as effective ways for addressing credit issues for the psychosocially disabled.[283] However, the system does not regard as

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[279] RYAN, KLIGER & HEALY, *supra* note 146, at 15.

[280] *E.g.*, MIND CHARITY, *supra* note 111, at 25-31 (encouraging creditors to put in place fair procedures for debt collections and outsourcing, build programs to advise and support debtors with mental health disabilities, and institute training programs to make financial staff aware of mental health issues).

[281] MONEY ADVICE LIAISON GRP., *supra* note 277, at 7 ("MALG is a non-policy making body and, as such, these Guidelines are voluntary.").

[282] LIVINGSTONE ET AL., *supra* note 258, at 43 (discussing a study that "identified potentially unfair practices" of creditors such as "approaches to lending that stress speed of decision . . . which may not be consistent with responsible lending").

[283] Two U.S. studies suggest that voluntary credit counseling, in contrast with mandatory pre-bankruptcy counseling, has a greater ameliorative effect on debt repayments. Gregory Elliehausen, E. Christopher Lungquist & Michael E. Staten, *The Impact of Credit Counseling on Subsequent Borrower Behavior*, 41 J. CONSUMER AFF. 1, 27 (2007) ("[T]he counseling experience provided the greatest benefit to those borrowers who had demonstrated the least ability to handle credit at the outset."); Jinhee Kim, E. Thomas Garman & Benoit Sorhaindo, *Relationships Among Credit Counseling Clients' Financial Well-being, Financial Behaviors, Financial Stressor Events, and Health*, 14 J. FIN. COUNSELING & PLAN. 75, 85 (2003), http://afcpe.org/assets/pdf/vol1427.pdf [http://perma.cc/G3BB-QSNM] ("The results [of the study] also suggest that congressional policymakers rethink the pending bankruptcy bill that will mandate credit counseling for bankruptcy petitioners . . . . It is more likely that the most effective credit counseling and financial education programs are those that occur over a long time period.").

"discriminatory" the choices of individual CRAs and credit score users to overlook the particular plight of psychosocially disabled financial actors, either as persons or a social class. The system philosophically rejects attempts by government to legally address perceived injustices in these financial affairs. Thus, while offering greater autonomy and flexibility than plenary guardianships or incentivized self-directed guardianships, voluntary guardianships offer no guarantee that psychosocially disabled actors will receive help to prevent or overcome financially distressed circumstances.

F. *Suretyships*

Another alternative is for a court or legislature to allow persons with psychosocial disabilities to locate sureties (i.e., guarantors) who voluntarily and bindingly pledge to cover general or specific debts of a psychosocially disabled person. The Old Testament counsels against the wisdom of suretyships,[284] while there are precedents in Roman law for just such a practice.[285] In any event, such contracts may allow persons with psychosocial disabilities to function with a degree of relative autonomy, although still subject to the surety's input and watchfulness, if not outright contractual limitations. For devoted family members or close friends, such a legal vehicle allows for a person better suited than the psychosocially disabled actor to negotiate or settle debts in the case of financial distress.

There are several disadvantages to this system. Many persons with disabilities may be unlikely to find sureties willing to pledge for them. Furthermore, where sureties become encumbered with the debts or obligations of individuals with a psychosocial disability, there may be hostility and damaged personal relationships that exacerbate the medical conditions of the psychosocially disabled persons. Finally, creditors may not be aware of the surety pledge, and therefore may continue to unhelpfully contact (or even harass) the person with psychosocial disability when it is the surety who should be contacted.

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[284] *Proverbs* 6:1-3 (New Living Trans.) ("My child, if you have put up security for a friend's debt or agreed to guarantee the debt of a stranger . . . follow my advice and save yourself . . . ."); *Proverbs* 11:15 (Today's New Int'l Ver.) ("Whoever puts up security for a stranger will surely suffer, but whoever refuses to shake hands in pledge is safe."); *Proverbs* 17:18 (Today's New Int'l Ver.) ("One who has no sense shakes hands in pledge and puts up security for a neighbor."); *Proverbs* 22:26 (Today's New Int'l Ver.) ("Do not be one who shakes hands in pledge or puts up security for debts.").

[285] The Roman system required the guardians to put their own assets at financial stake to ensure their effective management of the ward's affairs. DIG. 27:10:15 (Paul, Views 3). An equivalent practice in the American credit-scoring context would be to require CRAs to report the guardian's credit score whenever the ward's score is requested (or in the cases of state wards, an arbitrary but excellent credit score rating). In effect, this is an extension of the credit scoring arrangement that exists for American parents with children under the age of majority. But this would also require CRAs to algorithmically link wards' and guardians' financial activities, imposing costs on CRAs to comply with the guardianship system.

An alternative could be for the federal government, a state government, or a well-situated private actor to step in as the supporter of the entire class of psychosocially disabled borrowers (and guardians) and serve as a low-interest "lender and insurer of last resort," dealing directly with the guardians for decision making. Simultaneous with the creation of this new institution could be the mandatory forgiveness or government bailout of "unrealistically repayable" loans made to, or products or services given to, persons with psychosocial disability, knowingly or unknowingly, that have placed them in circumstances where they would qualify for this assistance. Such a government lending institution could actually function with any number of the options we present here, and need not be restricted to the case of plenary guardianships.

CONCLUSION

This Article considered for the first time in legal literature the scope and propriety of legal protection for the creditworthiness of individuals with psychosocial disabilities. There is good reason for the prior lack of analysis. CRAs' technologically advanced algorithmic credit scoring is automated and yields a tidy, socially significant three-digit score. Concealed within this black-boxed process is the algorithms' assumption that leaving credit scores unadjusted for poor behavior attributable to psychosocial disability does not amount to legal discrimination. And yet, as we showed in Sections II.A-B, the empirical reality is that credit scoring algorithms disparately condemn Americans with psychosocial disabilities, and especially those who are also women or racial minorities, to impoverished lives and health because of widespread cultural acceptance of credit scores as financial passports. In Section II.C, we demonstrated how the ADA, FHA, CRPD, and other general disability-related laws theoretically classify some computations and uses of credit scores as unlawful discrimination against Americans with psychosocial disabilities, yet do not do so in practice. Accordingly, Part III presented a range of schemes beyond the binary status quo in regard to the matter of credit score discrimination against individuals with psychosocial disabilities.

The United States has entered the age of "Big Data." It is a time when American commercial businesses scrutinize much human behavior under a guiding faith that correlation analysis of countless numerical measures of human behavior reveals creditworthiness or other financially interesting attributes. Not all nations engage in these practices.[286] Nevertheless, this

[286] Russian banks, for instance, have traditionally required full collateral to qualify for a loan, and credit scores did not exist in the country until 2008. DAVID SNYDER & TIM O'BRIEN, FIN. SERVS. VOLUNTEER CORPS, RECOMMENDATIONS ON THE USE OF CREDIT SCORING FOR MICRO AND SME LENDING IN RUSSIA 3-4 (2011), http://fsvc.org/sites/default/files/Recommendations_on_Credit_Scoring_in_Russia-_Final%20Eng.pdf [http://perma.cc/FSJ3-XBG2] (describing "several barriers to financing" for micro, small, or medium enterprises, "including bank requirements of collateral for most loan requests," and detailing the benefits of credit scoring since FICO began producing

Article is not a general assault on credit scoring or the use of credit scores in the United States. We instead suggest that the convergence of circumstances for psychosocially disabled people, the CRAs, and score users, is unique, and may merit special and different attention and treatment than it has thus far.

Psychosocial disability is singular in credit scoring for at least four reasons. As an initial matter, psychosocial disability is usually intermittent and there are thus times when those affected by it make good financial decisions and times when they do not. This episodic fluctuation in individual financial behavior is not typically an attribute of other socio-economically disadvantaged groups, such as those individuals belonging to a specific race, ethnicity, or sex, or people with cognitive or physical disabilities. Further, psychosocial disability carries exceptional social stigma and, in its active phase, causes isolation from others. Hence, during active expressions of their disabilities, persons with psychosocial disabilities cannot, do not, or are not willing to seek the type of social support or financial help that other bad financial decision makers may pursue. In addition, individuals with psychosocial disabilities may qualify for reasonable accommodations in the form of facilitated decision making to avert credit score discrimination based on the active expression of their conditions.[287] Last, the possibility exists for the psychosocially disabled to advance their financial health by improving their mental health so as to make better financial decisions. In short, psychosocially disabled financial actors are a categorically, not dimensionally, distinct empirical class.

Surely, there will always be some, often of a rational choice persuasion, who believe that the poor by definition include those who make bad financial decisions repeatedly as a consequence of any of a number of factors tracing back to a root cause of a lack of personal responsibility: cultural upbringing, divorce, use of drugs or alcohol, laziness, failure to seek education, lack of foresight, or mental illness.[288] This is a prevailing view, if uncommon, in

scores in Russia in 2008); *see also NBKI Now Provides FICO Credit Score to Russian Lenders*, REUTERS (Aug. 18, 2008), http://www.reuters.com/article/2008/08/18/idUS129704+18-Aug-2008+BW20080818 [http://perma.cc/6FP3-8UPJ] ("[FICO] today announced the immediate availability to Russian lenders of the FICO® Score from NBKI. . . . Lenders can use FICO® Scores to more confidently tailor their credit product offerings to the risk profile of individual consumers.").

287 Here a parallel exists to individuals with intellectual disabilities, with the distinction that the latter's conditions are immutable.

288 Even if partially true, such thinking disregards factors leading to poverty such as medical bankruptcy prompted by unpreventable illness or disability, physical or mental trauma brought on by crime, abuse, billing errors, or other factors. This misconception equating poverty with inherent moral shortcomings has a long lineage, and was a popular trope two centuries ago during public debates on amending the English Poor Law. *See, e.g.*, ANTHONY BRUNDAGE, THE ENGLISH POOR LAWS, 1700-1930, at 29-36 (2002) (describing various thinkers and moralists who viewed poor laws as inhibiting the market forces that would otherwise motivate the poor to develop the more upstanding character required to survive).

America. Other worldviews contend that the psychosocially disabled cannot function sufficiently as a class, and must be paternalistically and compulsorily protected against the vagaries and offenses of the unfettered market. Such an option is illegal in the United States. Still other worldviews hold both parties to the issue—individuals with psychosocial disabilities and the credit reporting/credit industries—as having distinct, yet interrelated, responsibilities to work towards improved creditworthiness of one of society's most stigmatized, financially and personally disadvantaged groups while maintaining corporate profitability. Or, alternatively, they have a responsibility to achieve a similar result by placing an onus on lenders to avoid such loans. In any number of different historical times going back to antiquity, this simple principle—that patrons and the least fortunate are interdependent, and that there is an unspoken social duty to cooperate in ensuring an equitable, yet not equal, sharing of resources—was clearly recognized in custom and law.[289] But in the current, perhaps more self-interested lending and borrowing world, that traditional worldview seems lost to many among both the financially advantaged and disadvantaged.

We do not seek to lay down dictates here for optimal legal and technological mechanisms by which CRAs and score users might respond to their portion of the social bargain, if they were to have one. We believe that the path by which this will occur should be plowed by the many for whom this discussion matters most. However, we also believe that left solely to haphazard, unreflective accidental evolution, little will change for the plight of the disabled unfortunates who suffer under the current American credit reporting system.

[289] William H. Byrnes, *The Development of Charity: Jurisprudential Lessons from History* (T. Jefferson Sch. L., Research Paper No. 2304517, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304517 [http://perma.cc/AEZ4-XMCA] ("American law has in recent times deviated from these [ancient charitable] practices to the detriment of modern charitable jurisprudence."); *see also* SKEEL, *supra* note 267, at 238-43 (discussing an international shift from "relational" corporate governance to American market capitalism values and consequent international adoption of Americanized bankruptcy laws).