

CREDITORS' USE OF CONSUMER DEBT CRIMINALIZATION PRACTICES AND THEIR FINANCIAL ABUSE OF WOMEN

CREOLA JOHNSON*

“Hospitals . . . [send you] a \$100,000 bill on something, [but] they are not calling up the sheriff’s department to go in and arrest the person because the bill wasn’t paid.”

—Jana Dinatale, charged with and arrested for the felony of failing to return rental property.¹

INTRODUCTION

In 1998, while a practicing attorney, I helped a legal aid client file for Chapter 7 bankruptcy relief because she was no longer able to manage her debts. As required under bankruptcy law, I had to help her file a list of all her creditors, as well as a statement of intention, which provides a snapshot as to how certain debts will be treated. My client, “Brenda,” a single mother, became fearful as I discussed with her the possibility of not paying a rent-to-own (“RTO”) company from which she had obtained a living room set. She told me that we had to pay the company because, as she said, “I don’t want them to put me in jail.” I was completely dumbfounded that she thought that could really happen to her. I explained to her that the RTO company could not put her in jail for failing to pay a

© 2016 Johnson. This is an open access article distributed under the terms of the Creative Commons Attribution License, which permits the user to copy, distribute, and transmit the work provided that the original author(s) and source are credited.

* Creola Johnson (johnson.1904@osu.edu), Professor of Law, The Ohio State University, Michael E. Moritz College of Law. Thanks to Professors Patrick Bauer and Deborah Merritt for their encouragement and input. Thanks also to my research assistant Hayden Capace (a 2017 candidate for graduation from law school).

¹ Ms. Dinatale was arrested after Z-Best Rentals of Palm Coast, Florida filed a criminal complaint claiming that she made only a few rent-to-own payments on a television and mattress. See Frank Fernandez, *Rent-to-own Debt May Lead to Arrest*, DAYTONA NEWS-J. (July 10, 2011) (quoting a Z-Best representative, who stated that “the company bends over backward to help customers pay and only resorts to criminal charges when people are stealing from them.”).

civil debt. But she insisted we had to pay because, “I’m not going to jail.” Little did I know I was really the ignorant one.

Debtors’ prison is viewed by most as an archaic system revealed to the world in a Charles Dickens novel, and abolished in the 1800s in the United States. To many cash-strapped consumers, however, the debtors’ prison is alive and well in the twenty-first century. My research has uncovered routine abuse of the criminal justice system by not only rent-to-own companies,² but payday lenders,³ car title lenders,⁴ and auto dealerships.⁵ Over the years, advocates and academics have exposed these creditors for perpetrating unfair and deceptive practices as well as charging usurious interest rates.⁶ Moreover, lawmakers have passed laws and regulators have filed enforcement actions to curb abuses by RTO dealers, car title lenders, auto dealerships, and payday lenders, collectively referred to hereafter as the “lenders.”⁷ Federal regulators and state lawmakers are continuing their efforts to protect

2 See *infra* notes 22–45 and accompanying text (discussing criminalization tactics employed by RTO companies against women).

3 See *infra* notes 46–75 and accompanying text (describing several ways payday lenders successfully manipulate criminal laws to force consumers to pay).

4 See, e.g., *infra* notes 212–246 and accompanying text (describing a car title lender’s criminalization tactics used against a female borrower as similar to domestic violence abuse).

5 An in-depth discussion of consumer debt criminalization tactics used by car dealerships is beyond the scope of this Article. However, the following news story has an example of such tactics: Catherine Dunn, *Hell on Wheels: A Lawsuit against a Texas Car Dealership Sheds Light on a Common Practice that Takes Advantage of Low Income Borrowers*, INT’L BUS. TIMES NEWS (Nov. 24, 2014) (describing the story of Jesus Soria, who alleges that after signing a car purchase agreement and refusing the dealership’s demands, the dealership filed a false police report, which accused Mr. Soria of auto theft and fraud).

6 See, e.g., Ralph Bryant, Jr., *Spot Delivery in the North Carolina Automobile Industry—A Framework for Legal Analysis*, 67 CONSUMER FIN. L.Q. REP. 65 (2013); Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today’s Society*, 51 S.C. L. REV. 589, 610–11 (2000); Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 87–90 (2002) [hereinafter Johnson, *Payday Loans*].

7 See, e.g., Meredith Covington & Jennifer Johnson, *Into the Light: A Survey of Arkansas Borrowers Seven Years after State Supreme Court Bans Usury Payday Lending Rates*, 43 POL’Y POINTS 1, 2 (2016) (discussing findings of a survey showing that Arkansas families are “better off” since the state capped the interest rates on payday loans at 17%); Creola Johnson, *Congress Protected the Troops: Can the New CFPB Protect Civilians from Payday Lending*, 69 WASH. & LEE L. REV. 649 (2012) (analyzing a federal law passed to protect military personnel from payday loans and other costly credit transactions and arguing that a similar law should be passed to protect all consumers from the negative consequences of payday loans).

consumers from high-cost lenders;⁸ however, little attention has been paid to the need for additional legislation to protect consumers from abusive debt collection practices that terrorize consumers with arrests.⁹ While male and female consumers can both be subjected to abusive debt collection practices, this Article focuses on women.

This Article posits that consumer debt criminalization tactics, i.e., initiating or threatening to initiate criminal action against consumers, appears to be more effective in coercing women into paying debts, sometimes even paying “phantom debts” (e.g., debts they do not owe).¹⁰ Various types of companies involved in issuing consumer credit resort to criminalization tactics to coerce payments from consumers.¹¹ This Article, however, focuses

8 For example, in June of 2016, the Consumer Financial Protection Bureau (“CFPB”) proposed new rules to curb the abuses of payday loans, auto title loans, and other forms of short term credit. *CFPB Proposal Looks to End Payday Loan Debt Traps*, FED. BANKING L. REP. ¶¶ 154–379 (June 2, 2016). See also Richard Cordray, *Prepared Remarks of Richard Cordray, Director of the Consumer Financial Protection Bureau*, CONSUMER FIN. PROTECTION BUREAU (June 2, 2016), <http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-richard-cordray-director-consumer-financial-protection-bureau/> [https://perma.cc/6NXV-Q2XU] (calling for the enactment of “common-sense protections,” including the requirement that payday lenders assess a consumer’s ability to pay before lending). See *Payday, Vehicle Title, and Certain High-Cost Installment Loans* (proposed June 2, 2016) (to be codified at 12 C.F.R. pt. 1041), http://files.consumerfinance.gov/f/documents/Rulemaking_Payday_Vehicle_Title_Certain_High-Cost_Installment_Loans.pdf [https://perma.cc/V9ZK-Y493] [hereinafter CFPB’s Proposed Rules]. Generally speaking, numerous consumer advocacy groups support the CFPB’s proposed rules, but they identify loopholes that exist in the current proposal and urge that they be closed. See, e.g., Press Release, Nat’l Consumer Law Ctr., *CFPB Proposes Strong Rules to Protect Payday Borrowers Yet Worrisome Loopholes Need Tightening* (June 2, 2016), <http://www.nclc.org/media-center/nclc-advocates-cfpb-proposes-strong-rules-to-protect-payday-borrowers-yet-worrisome-loopholes-need-tightening.html> [https://perma.cc/YU49-GVDY] (identifying several loopholes, including the proposed rule allowing a consumer to borrow again only thirty-one days after the initial loan and stating that “reborrowing in only 31 days indicates a debt trap”).

9 Federal and state authorities regularly take action against companies engaged in unlawful debt collection practices. See, e.g., CONSUMER FIN. PROTECTION BUREAU, *FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2016* (2016), http://files.consumerfinance.gov/f/201603_cfpb-fair-debt-collection-practices-act.pdf [https://perma.cc/EK8Q-ZVRP] [hereinafter CFPB ANNUAL REPORT 2016] (reporting enforcement actions taken against companies for violations of federal law).

10 “Phantom debt is debt consumers do not actually owe or debt that is not payable to those attempting to collect it.” *Id.* at 29.

11 For example, after a consumer defaulted on loan payments to a car title lender in Tennessee, and the lender could not find the consumer’s vehicle that was used as collateral to obtain the loan, the lender filed a police report against the consumer and he was arrested. *JCPD Officers Arrest Man on Hindering Secured Creditor Charges*, WJHL (Sept. 17, 2105), <http://wjhl.com/2015/09/17/jcpd-officers-arrest-man-on-hindering-secured-creditor-charges/> [https://perma.cc/2JCY-EFQ6] (reporting that the consumer was arrested for “hindering a secured creditor”). Under Article 9 of the Uniform Commercial Code, it is unlawful for a secured creditor

on two—RTO dealers and payday lenders—because one can find numerous instances of their alleged manipulation of criminal laws to intimidate consumers into paying debts.¹² Part I describes criminalization tactics used by some RTO companies to falsely accuse their customers of essentially stealing merchandise when they can no longer make payments.¹³ Such criminalization tactics belie the RTO industry’s claims that consumers can enter into RTO contracts to buy household items but later get out of them without suffering penalties.¹⁴ Part I then shifts to lenders and debt collection companies that exploit criminal laws (e.g., bad-check statutes) to falsely accuse consumers of stealing money when they stop making payments on payday loans.¹⁵ Companies that only threaten consumers with arrests nevertheless terrorize them by painting a portrait of consumers immediately experiencing horrific consequences, including losing custody of their children, suffering the humiliation of being arrested in front of relatives, and eventually losing their jobs.

Part II of this Article analyzes several factors that may explain why some women, burdened with the stress of financial hardships, feel compelled to pay debts, even phantom debts, to get out of or avoid going to jail.¹⁶ For instance, getting arrested is an untenable position for cash-strapped mothers of young children because single mothers are

to obtain the aid of police officers to facilitate repossession. *See* U.C.C. § 9-601; *infra* notes 212–246 and accompanying text (discussing abusive debt collection practices perpetrated by a car title lender against a single mother). Consumers who default on car title loans often lose their cars to repossession and, unfortunately, can also be injured or suffer a worse fate during the repossession. *See, e.g., Woman Dies after Repossession Agent Drives Her Car off Road*, WASH. TIMES (May 17, 2016), <http://www.washingtontimes.com/news/2016/may/17/woman-speeding-away-from-repossession-agent-killed/> [<https://perma.cc/VX6E-UZ39>] (reporting that a repossession agent for a title lender was arrested after he allegedly killed Ashleigh Best, the owner of the car and the borrower who defaulted on the title loan).

12 As a result of extensive research, I was able to uncover numerous private lawsuits and governmental enforcement actions that indicate RTO companies and payday lenders, unlike other creditors, regularly rely on criminal laws and law enforcement to intimidate consumers into paying debts arising from transactions deemed by some to be predatory forms of consumer credit. *See infra* Part I and accompanying text.

13 *See infra* Part I.A and accompanying text.

14 *See* Ashlee Kieler, *What You Should Know About Rent-to-Own Retail Models: Extra Costs, High Interest Rates*, CONSUMERIST (July 1, 2015), <https://consumerist.com/2015/07/01/what-you-should-know-about-rent-to-own-retail-models-extra-costs-high-interest-rates/> [<https://perma.cc/KD4Q-G7ZK>] (quoting a representative for the Association of Progressive Rental Organizations, the national trade association for RTO dealers, as claiming RTO companies offer the “only debt-free transaction that allows the customer to return the product at any time for any reason without legal penalty and affecting the consumer’s credit”).

15 *See infra* Part I.A and accompanying text.

16 *See infra* notes 124–127 and accompanying text.

responsible for almost all, if not all, childcare and household chores, and married or cohabiting mothers do the majority of childcare activities and household chores.¹⁷ Part II also argues that companies that resort to abusive debt collection practices engage in behavior that is parallel to the behavior of domestic violence abusers.¹⁸

Part III discusses how existing criminal laws are being twisted and law enforcement and prosecutors are being manipulated into acting as debt collectors and repossession agents for companies that rely on consumer debt criminalization tactics.¹⁹ As a result, consumers not only make payments on non-existent debt, but on debts that have been inflated due to companies adding unlawful fees and penalties.

I. Creditors and Debt Collection Companies Subject Women to Consumer Debt Criminalization Tactics

To maintain order in communities, police serve a multi-faceted role in which they act as agents of the state to uphold criminal laws. In this Section, I demonstrate how lenders and other creditors are using police officers to abuse women and, thereby, disrupt families for the sole purpose of collecting civil debts. Prosecutors and judges are also being used to facilitate the profitable business model of extending predatory credit to consumers and then criminalizing them when they can no longer make payments. As a result, the criminal justice system is being manipulated, and such manipulation has a deleterious impact on women. This Article illuminates for the reader consumer debt criminalization tactics employed by the RTO and payday loan²⁰ industries because such tactics by these industries are commonplace. Companies that act as collectors of payday loan debts are highlighted because their criminalization tactics are so egregious that federal and state regulators regularly seek to shut down their operations.²¹

17 See *infra* note 138–143 and accompanying text.

18 See *infra* Part II.C and accompanying text.

19 See *infra* notes 247–273 and accompanying text.

20 See *infra* Part I.B (describing payday loans, which are exorbitantly-priced, short-term loans).

21 See, e.g., Press Release, Office of Ind. Attorney Gen., Indiana Joins Operation Collection Protection, A Joint Federal-State Sweep against Debt Collection Abuse (Nov. 5, 2015), [<https://perma.cc/3342-JXLW>] (stating that complaints about unlawful debt collection practices are among the top consumer complaints submitted by Indiana residents, and announcing Indiana's involvement in a federal initiative that led it to sue several companies, including a Virginia-based business engaged in numerous allegedly illegal practices, including making threats to consumers to collect on time-barred payday loan debts).

A. RTO Dealers Exploiting Criminal Laws to Coerce Women into Paying and Turning Over Assets

As indicated in the Introduction, Brenda, my former bankruptcy client, was the person who made me aware of the first form of consumer debt criminalization—exploiting existing criminal laws to coerce consumers into paying or turning over property. Brenda, a minority and a single mother, fits the profile of many RTO customers with credit-access problems.²² In an RTO transaction, consumers, with the goal of ownership,²³ sign a written contract agreeing to make weekly payments to buy appliances, furniture, and other merchandise, and if the consumers complete the payments, they obtain ownership of the merchandise—often at more than triple the retail cost.²⁴ What most RTO customers do not realize is that they could end up having criminal charges filed against them if they stop making payments or fail to return the RTO property. MultiState Associates works with lobbyists of numerous businesses seeking passage of industry-friendly laws,²⁵ and it has compiled a fifty-state survey of theft-related crimes for the American Rental Association.²⁶ This survey reveals

22 See Linda R. Crane, *Checking Out of the Exception to 3-104: Why Parties Should Be Able to Negotiate Whether Checks Should Be Payable on Demand*, 3 COLUM. J. RACE & L. 73, 88 (2013).

23 The majority of customers enter into RTO contracts with the goal of actually owning, not merely renting, consumer goods. See JAMES M. LACKO ET AL., FED. TRADE COMM’N BUREAU OF ECON., SURVEY OF RENT-TO-OWN CUSTOMERS ES-2 (2000), <https://www.ftc.gov/sites/default/files/documents/reports/survey-rent-own-customers/renttoownr.pdf> [<https://perma.cc/HG27-T32J>] [hereinafter LACKO ET AL., SURVEY OF RENT-TO-OWN CUSTOMERS] (finding that 67% of customers intend to complete all payments to purchase the merchandise at the time they enter into the RTO contract). See also Michael Anderson & Raymond Jackson, *Rent-to-Own Agreements: Purchases or Rentals?*, 20 J. APPLIED. BUS. RES. 13, 14 (2004).

24 See, e.g., Tim Sheehan, *Rent-to-Own Products, Enticing—and Costly*, FRESNO BEE (June 12, 2011), <http://www.fresnobee.com/news/local/community/clovis-news/article19511394.html> [<https://perma.cc/H8BZ-CMUT>] (finding a 42-inch plasma television selling for \$538 at retail stores but finding one RTO store with a television of the same make and model costing over \$1,700, more than three times the retail price, under a contract requiring sixty-one weekly payments of \$27.99); Jim Hawkins, *Renting the Good Life*, 49 WM. & MARY L. REV. 2041 (2008); *The Rent to Own Ripoff*, WISPIRG (May 13, 2013), <http://www.wispirg.org/reports/wip/rent-own-rip> [<https://perma.cc/M4WL-G2UD>] (finding that although the RTO industry denies its RTO contracts are simply extensions of credit, the average APR to buy merchandise via RTO was 221%).

25 See *Services*, MULTISTATE ASSOCIATES, <https://www.multistate.com/content/services> [<https://perma.cc/9P7A-VWK8>] (last visited June 26, 2016) (“Assisting companies, trade associations, coalitions and other entities, MultiState’s extensive network of local lobbyists and skilled local government relations professional staff are ready to help you with your state and local public policy, government affairs, or procurement needs.”).

26 See MULTISTATE ASSOCS., THEFT OF RENTAL SERVICES 50-STATE SURVEY (2007), https://www.bipac.net/arental/Theft_of_Rental_Services.pdf [<https://perma.cc/A9W3-Z6BK>] [hereinafter RTO INDUSTRY’S 50-STATE THEFT SURVEY].

that most states have enacted criminal theft laws, such as fraudulent leasing or failing to return rental property.²⁷

Consider Florida law as an example.²⁸ Florida resident Alexis Sanders was charged with the crime of failing to return RTO property after she stopped making payments on an RTO agreement she signed to obtain a lamp, sofa, and chair from Buddy's Home Furnishings.²⁹ After she defaulted, Buddy's sent her a certified letter demanding that she return the furnishings, but the letter was returned, apparently because Ms. Sanders had moved without providing a forwarding address.³⁰ Buddy's then filed against her a criminal complaint that led to her arrest and eventual criminal prosecution under Florida law for failing to return RTO property.³¹

In addition to the crime of failing to return RTO property, several states make it a crime to fraudulently lease RTO property. For instance, Laquetta Hall, a college student living in Jefferson County, Alabama, was arrested for fraudulently leasing a computer.³² After two months of timely payments on her purchase rental agreement with a local RTO dealer, Bestway Rental, Ms. Hall was laid off from her job and could no longer make the weekly payments on her computer.³³ According to Ms. Hall, Bestway never tried to repossess the

27 *Id.*

28 See FLA. STAT. ANN. § 812.155(3) (West 2006), *amended by* ch. 2006-51, § 3, 2006 Fla. Laws 884–85 and ch. 2012-210, § 1, 2012 Fla. Laws 2873. From 2001 to 2006, the Florida statute provided in relevant part (emphasis added):

Failure to redeliver hired or leased personal property.—Whoever, after hiring or leasing any personal property or equipment under an agreement to redeliver the same to the person letting such personal property or equipment or his or her agent at the termination of the period for which it was let, shall, without the consent of such person or persons and *with the intent to defraud, abandon or willfully refuse* to redeliver such personal property or equipment as agreed, shall, upon conviction, be guilty of a misdemeanor of the second degree . . . unless the value of the personal property or equipment is of a value of \$300 or more; in that event the violation constitutes a felony of the third degree

29 *State v. Sanders*, 905 So.2d 241, 242 (Fla. Dist. Ct. App. 2005) (Altenbernd, C.J., concurring).

30 *Id.*

31 *Id.*

32 Amended Complaint at ¶ 17, *Hall v. Bestway Rental*, No. 2:06-cv-02285, (N.D. Ala. Apr. 19, 2007), 2007 WL 2252227 [hereinafter *Hall Complaint*] (suing two other defendants, Phillip Mitchell and Comerica Bank).

33 *Id.* at ¶ 8.

computer or sue her in civil court, but instead filed criminal charges against her.³⁴ She was charged under Alabama law with the crime of “theft by fraudulent leasing” and, after being arrested, she spent several hours in jail.³⁵ Terrified of being re-arrested, convicted, and serving a long prison sentence, she found a way to pay the \$2,136 that Bestway claimed she owed.³⁶ That was much more than the price of a decent computer at a retail store such as Walmart.³⁷ After Ms. Hall paid the amount it demanded, Bestway dropped the criminal charges against her.³⁸ Feeling she had been unjustly treated, Ms. Hall sued Bestway in civil court for violating several consumer protection laws and for committing the tort of malicious prosecution, that is, for Bestway’s wrongful criminal prosecution of her.³⁹ Without admitting wrongdoing, Bestway settled the case filed by Ms. Hall.⁴⁰

The examples above demonstrate how women who obtain RTO merchandise are subjected to actual criminalization. Some RTO companies do not file criminal charges, but only threaten to have customers arrested to get them to pay or surrender merchandise. For example, in defense of a 2009 lawsuit filed by Rent-A-Center against the State of Washington, James Sugarman, then-Attorney General for the state, obtained several written sworn statements from several RTO customers, the majority of whom were women, accusing the company of numerous abusive debt collection practices, including

34 *Id.*

35 *Id.* at ¶ 19 (“As a proximate consequence of Defendants’ intentional, reckless, and malicious conduct, the Plaintiff was caused to suffer severe mental anguish; she had her freedom curtailed by arrest and custody; she had her reputation impaired; she was caused to incur legal expenses in defeating these improper charges and prosecution, and she has been permanently injured.”).

36 *Id.* at ¶ 9.

37 By doing a search on Amazon, one can find a low-end model of the Apple MacBook selling for under \$1,000 and several other models for under \$1,800. *See, e.g.*, Jonathan Epstein & Rod Watson, *Rent-to-Own Buys Misery For The Poor*, in BUFFALO NEWS SPECIAL REPORT: THE HIGH COST OF BEING POOR 9 (2006), <http://www.law.unc.edu/documents/poverty/conference/highcostofbeingpoor.pdf> [<https://perma.cc/T6LE-7HLK>] (investigating the cost of RTO merchandise and finding a Dell computer with an online selling price of \$559 but costing nearly \$3,500 on a twenty-one-month plan at Rent-A-Center).

38 Hall Complaint, *supra* note 32, at ¶¶ 16–17.

39 *See id.* at ¶¶ 13–20. Ms. Hall also alleged the following: “Defendant, Comerica Bank, (Comerica) is one of the defendants to whom this ‘loan’ was assigned and who had an active role in the events above described more definitively, i.e., who committed usury, malicious prosecution, abuse of process, false arrest, and violated the Federal Truth in Lending Act in conjunction with BESTWAY RENT-TO-OWN.” *Id.* at ¶ 4.

40 *See* Order of Dismissal, Hall v. Bestway Rental, No. 2:06-cv-02285 (N.D. Ala. Sept. 27, 2007).

threats of arrest.⁴¹ For instance, Lori Ann Chadsey, in her affidavit, stated that Rent-A-Center employees made numerous calls to her home and her work about her RTO washer, dryer, and living room set.⁴² Ms. Chadsey stated that a Rent-A-Center employee then left messages calling her a thief and threatening to file criminal charges against her for refusing to come to the store to make a payment.⁴³ Such a threat would carry weight in Washington, as the state has actually made theft of rental property a crime,⁴⁴ and some local papers include arrests for that crime in their weekly reports.⁴⁵

B. Women Who Default on Payday Loans Are Terrorized by Fear of Arrests

Similar to RTO companies, payday lenders also exploit criminal laws to coerce women into paying. Obtaining a payday loan is quick and easy,⁴⁶ but a customer could wind up in jail if she fails to repay the loan. In a typical payday loan transaction, the customer (1) signs a written loan contract, (2) receives cash equal to the amount lent (e.g., \$300), (3) gives the lender a post-dated check⁴⁷ totaling the loan amount plus interest (e.g., \$300 + \$50 =

41 See Appendix D, *Rent-A-Center West, Inc v. Washington*, No. 08-2-32502-4 SEA (Wash. Super. Ct. Feb. 26, 2010).

42 Declaration of Lori Ann Chadsey, *Rent-A-Center West, Inc. v. Washington*, No. 08-2-32502-4 SEA (Wash. Super. Ct. Feb. 26, 2010) [hereinafter Declaration of Lori Ann Chadsey]. The company eventually settled the lawsuit and agreed to pay a fine but without admitting wrongdoing. See Consent Decree, *Rent-A-Center West, Inc. v. Washington*, No. 08-2-32502-4 SEA (Wash. Super. Ct. Feb. 26, 2010), 2010 WL 2572150.

43 Declaration of Lori Ann Chadsey, *supra* note 42, at ¶ 9. Due to RAC's repeated calls to her workplace, Ms. Chadsey was forced to admit to her coworkers that she was having financial problems and, therefore, had filed for bankruptcy relief. As a result, RAC's alleged practices caused Ms. Chadsey to be humiliated before her coworkers. *Id.*

44 See WASH. REV. CODE ANN. § 9A.56.096(1) (West 2012) ("A person who, with intent to deprive the owner or owner's agent, wrongfully obtains, or exerts unauthorized control over, or by color or aid of deception gains control of personal property that is rented, leased, or loaned by written agreement to the person, is guilty of theft of rental, leased, lease-purchased, or loaned property."). See also RTO INDUSTRY'S 50-STATE THEFT SURVEY, *supra* note 26 (describing theft statutes in all fifty states).

45 See, e.g., *Whatcom County Jail Report for Dec. 8*, BELLINGHAM HERALD (Dec. 9, 2015), <http://www.bellinghamherald.com/news/local/crime/article48919380.html> [<https://perma.cc/XA83-NRUC>] (identifying by name a woman arrested by the Whatcom County Sheriff's Office for committing theft of rental property).

46 See *Thompson v. Cunningham*, No. 3:14-CV-00751, 2015 WL 4610193, at *1 (W.D. Ky. July 30, 2015) (granting borrowers' motion to file an amended complaint against payday lender and stating that "[t]he [payday loan] application process is convenient by design, with few questions asked and minimal paperwork required: even a consumer with shaky financial footing must provide only basic information and a postdated check to obtain cash, often within minutes of applying.").

47 A typical payday loan contract also contains a provision giving the lender authority to debit the consumer's

\$350), and (4) promises to repay that total by the customer's next payday, usually within two weeks.⁴⁸ While this may sound like a simple transaction, payday loans are considered predatory for numerous reasons, including the following: lenders issue payday loans to cash-strapped and credit-challenged consumers without any assessment of their ability to repay; loan terms carry triple-digit interest rates, short maturity dates, and single balloon payments; and lenders market payday loans as a short-term solution even though the majority of borrowers end up in long-term debt.⁴⁹ As discussed fully below, some payday lenders seek to have consumers arrested after they stop making payments.

1. Payday Lenders File Criminal Complaints or Threaten to Do So

After Christina McHan failed to repay a \$200 loan she obtained from a local payday lender, Cash Biz, it filed a criminal complaint against her for passing a bad check. She was

bank account to facilitate payment of the loan. *See Payday/Deposit Advance Loans Study Released*, FED. BANKING. L. REP. ¶¶ 152–384 (Apr. 24, 2013). Payday loans are usually issued by non-bank lenders and are known by several other names, including payday advances, cash advances, and deferred deposit loans. *See Johnson, Payday Loans*, *supra* note 6, at 9.

48 *See generally* Creola Johnson, *America's First Consumer Financial Watchdog is on a Leash: Can the CFPB Use its Authority to Declare Payday-Loan Practices Unfair, Abusive, and Deceptive?*, 61 *CATH. U. L. REV.* 381, 385 (2012) [hereinafter Johnson, *America's First Consumer Financial Watchdog*]. Payday lenders not only charge triple-digit interest rates but they also partner with banks and non-banks in an attempt to circumvent interest-rate caps and other restrictions imposed by state laws. For example, during the early 2000s, payday lenders were evading state usury laws by partnering with national banks, which are not subject to interest-rate caps, but the Federal Deposit Insurance Corporation ("FDIC") issued guidelines to stop "rent-a-bank" partnerships and abuses flowing from it. Fed. Deposit Ins. Corp., *Payday Lending Programs Revised Examination Guidance, Financial Institution Letter 14-2005*, FED. BANKING L. REP. ¶¶ 64–103 (Mar. 1, 2005) (stating that the FDIC required bank examinations to focus on "the practice of threatening, and in some cases pursuing, criminal bad-check charges, despite the payment of offsetting fees by the consumer and the lender's knowledge at the time the check was accepted that there were insufficient funds to pay it"). *See also* Johnson, *America's First Consumer Financial Watchdog*, *supra* at 399–401 (discussing partnerships created between payday lenders and members of Native American tribes to skirt state law); *Smith v. Western Sky Fin., LLC*, No. 15-3639, 2016 WL 1212697 (E.D. Pa. Mar. 4, 2016) (stating that "[t]his case presents an unusual and disconcerting collision between federal consumer protection laws and the sovereignty of Native American tribes" and holding unenforceable an arbitration clause that made any dispute arising from the payday loan contract subject to exclusive jurisdiction of Cheyenne River Sioux Tribe).

49 A recent report by the CFPB contains numerous findings, including a finding that "[o]ver 80% of payday loans are reborrowed within 14 days from the same lender, 85% are reborrowed within 30 days, and 88% are reborrowed within 60 days." CONSUMER FIN. PROTECTION BUREAU, SUPPLEMENTAL FINDINGS ON PAYDAY, PAYDAY INSTALLMENT, AND VEHICLE TITLE LOANS, AND DEPOSIT ADVANCE PRODUCTS 111 (2016), http://files.consumerfinance.gov/f/documents/Supplemental_Report_060116.pdf [<https://perma.cc/CLR3-8ZDH>] [hereinafter CFPB's 2016 SUPPLEMENTAL FINDINGS] (reporting that data collection included over twelve million payday loans issued in thirty states within a twelve-month period).

arrested and assessed \$230 in additional fines and court costs.⁵⁰ Because she had no money to pay, Ms. McHan had to spend a night in a Texas jail to “pay off” the debt and costs.⁵¹ In Texas, after a payday lender files a criminal complaint, the consumer will typically receive a letter from the relevant city or county attorney’s office notifying the consumer that a criminal charge has been filed against the consumer and that in order to avoid criminal prosecution the consumer must immediately pay off the balance of the “bad check” debt.⁵² The relevant letter from the Potter County Attorney’s Office in Texas concludes with the following text: “TO AVOID HAVING A CRIMINAL CASE FILED AGAINST YOU[,] [YOU] MUST CONTACT THIS OFFICE IMMEDIATELY AND PAY OFF YOUR BAD CHECKS.”⁵³ This language has the impact of scaring many consumers into repaying,⁵⁴ despite the fact that the lender has not presented any evidence of forgery, fraud, theft, or other criminal conduct as required under Texas law.⁵⁵

50 See, e.g., Forest Wilder, *Fast Cash: How Taking out a Payday Loan Could Land You in Jail*, TEX. OBSERVER (July 16, 2013), <https://www.texasobserver.org/cash-fast-how-taking-out-a-payday-loan-could-land-you-in-jail/> [<https://perma.cc/GTP9-M2LZ>] [hereinafter Wilder, *Fast Cash*].

51 See *id.*

52 Ben Walsh, *Texas is Throwing People in Jail for Failing to Pay Back Predatory Loans*, HUFFINGTON POST (Dec. 29, 2014), http://www.huffingtonpost.com/2014/12/29/texas-payday-lending_n_6355602.html [<https://perma.cc/96EW-KJ6V>].

53 *Id.* (emphasis in original).

54 See, e.g., Wilder, *Fast Cash*, *supra* note 50 (describing one borrower who was fearful after learning that a payday lender had filed criminal charges against him for passing a bad check and quoting Jeff Ross, a criminal defense attorney, as stating that payday lenders are using the criminal court “as muscle to collect their money”).

55 The Texas Finance Code states: “a person may not threaten or pursue criminal charges against a consumer related to a check or other debit authorization provided by the consumer as security for a transaction in the absence of forgery, fraud, theft, or other criminal conduct.” TEX. FIN. CODE ANN. § 393.201I(3) (West). Payday lenders know that some of their customers not only lack the sophistication to understand the loan they agreed to pay, but also lack the legal sophistication to understand a criminal complaint and will choose to pay to avoid incarceration. See generally Annamaria Lusardi & Carlo de Bassa Scheresberg, *Financial Literacy and High-Cost Borrowing in the United States* 22 (Nat’l Bureau of Econ. Research, Working Paper No. 18969, 2013), <https://www.fdic.gov/news/conferences/consumersymposium/2013/Papers/Lusardi.pdf> [<https://perma.cc/XY5U-4RUW>] (conducting a study using data from the 2009 National Financial Capability Study and finding that, after controlling for several variables, consumers who obtain payday loans, RTO merchandise, and other forms of high-cost credit possessed “strikingly low” levels of financial literacy and that the large majority lacked an understanding of basic financial concepts).

The experiences of Belinda Cinque, the clerk for Justice of the Peace Tom Lawrence in Humble, Texas, are informative on this point. She told the *Texas Observer* that she started getting calls from consumers who had been charged with passing bad checks based on criminal complaints filed by Cash Biz. As the frontline for the

As explained more fully in Part III.B, payday lenders in Texas and in a few other states violate state law when they seek prosecution based solely on the fact that a consumer's post-dated check was returned due to insufficient funds.⁵⁶ Because the lender knows when it accepts the check that the consumer's account lacks sufficient funds, the lender is not the victim of a crime⁵⁷ and, therefore, only has a claim for breach of contract.⁵⁸

Cash Biz is an example of a payday lender⁵⁹ successfully operating in Texas and exploiting the ignorance or inattentiveness of police officers and district attorneys ("DAs") to criminalize its customers.⁶⁰ In 2012, consumers in Texas began complaining that Cash Biz and other payday lenders were illegally filing criminal charges against their customers to collect civil debts.⁶¹ Texas Appleseed, a non-profit organization, concluded its investigation in 2014 having found more than 1,500 cases where payday loan companies, including Cash Biz, filed criminal charges against consumers to further its collection of civil debts.⁶² Similarly, the *Texas Observer's* investigation in 2013 uncovered at least 1,700 instances where payday lenders, such as Cash Biz, had filed criminal complaints in Amarillo, Houston, and San Antonio against their customers. In Bexar County alone, Cash Biz had filed 189 out of the 191 criminal complaints accusing individuals of passing bad

Justice of the Peace, Cinque confessed feeling guilty after receiving calls from many consumers who were in tears. Even though she felt Cash Biz's practice of filing complaints was wrong, she nevertheless took payments from consumers who wanted to avoid going to jail. Wilder, *Fast Cash*, *supra* note 50.

56 See *infra* Part III.B.

57 See *Turner v. E-Z Check Cashing of Cookeville, Tenn., Inc.*, 35 F. Supp. 2d 1042, 1051 (M.D. Tenn. 1999) (explaining why a payday loan borrower cannot be prosecuted for passing a bad check under Tennessee law and stating "criminal prosecution is the state's remedy, not that of a private citizen").

58 See *infra* Part III.B.

59 Note that payday lenders in Texas are called Credit Access Businesses, pursuant to Texas statutes. TEX. FIN. CODE ANN. § 393.221 (West 2012).

60 Based on its investigation, the *Observer* found "payday loan companies have used Texas courts and prosecutors as de facto collection agencies." Wilder, *Fast Cash*, *supra* note 50.

61 A representative of the Texas Office of Consumer Credit Commissioner ("OCCC"), the agency typically responsible for consumer debt issues, stated that criminal prosecution of payday loan borrowers would usually not be appropriate, but the OCCC lacks the authority to stop local justice of the peace courts from prosecuting borrowers. *Id.*

62 The non-profit Texas Appleseed collected this data via open records requests sent to twenty-one different DA offices. Texas Appleseed Letter to Consumer Financial Protection Bureau 3 (Dec. 17, 2014), <https://www.texasappleseed.org/sites/default/files/Complaint-CriminalCharges-PaydayBusinesses-Final2014.pdf> [<https://perma.cc/AT6H-FXRD>] [hereinafter Texas Appleseed Letter].

checks, and in 46% of the cases, consumers made at least a partial payment to avoid going to jail.⁶³

Because Cash Biz filed almost all of its criminal complaints in only a few jurisdictions, it has been accused of shopping for jurisdictions with inexperienced or inattentive DAs.⁶⁴ The impact of this criminalization tactic cannot be overlooked given that in one precinct alone, arrest warrants were issued against consumers in 42% of the 107 criminal complaints Cash Biz filed, and six individuals actually ended up serving jail time.⁶⁵ DA offices that take complaints from payday lenders send out warning letters to the consumers as a “service.”⁶⁶ The DAs are benefitting directly from this service because, after receiving a letter from the DA’s office about the criminal charges, the majority of customers make payments on outstanding debt, which by then includes a \$140 “District Attorney Fee.”⁶⁷ This high yield of payments allows the DA to earn money with very little effort, despite the fact that these DA’s letters may facilitate unlawful debt collection practices.⁶⁸ After receiving complaints from consumers and conducting its own investigation, the Texas Office of Consumer Credit Commissioner (the Texas “OCCC”) ordered Cash Biz to pay a \$10,000 fine and provide

63 *Id.* at Appendix A. Cash Biz, unlike the typical payday lender, had its customers fill out the current date on the checks and would then hold them to deposit, thereby circumventing the explicit exemption of post-dated checks from the Texas bad-check statute. Wilder, *Fast Cash*, *supra* note 50.

64 Appellee’s Response Brief at 20, *Cash Biz v. Henry*, No. 2015-CI-01545 (Tex. Ct. App. Oct. 5, 2015), 2015 WL 6107799, at *20 (discussing findings by Texas Applesseed and others regarding Cash Biz’s filing practices and asserting that the company was illegally filing criminal complaints for the sole purpose of collecting civil debts); Wilder, *Fast Cash*, *supra* note 50 (stating that almost all of the criminal complaints filed with Justice of the Peace Tom Lawrence in a Harris County court were filed by Cash Biz and describing how this filing practice appears to be an evasion of state law).

65 Texas Applesseed Letter, *supra* note 62, at Appendix A.

66 Wilder, *Fast Cash*, *supra* note 50.

67 *See id.* The ability of prosecuting attorneys to add a fee to the debt allegedly owed by a criminal defendant is a common practice that funds a prosecutor’s office. *See, e.g.*, John Simerman, *DA May Get Windfall from Collecting Gambling Debt: Car Dealer’s Lawyer Says Game is Rigged*, TIMES PICAYUNE, Nov. 12, 2011, at A1. *See generally* Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1188–94 (2014) (describing numerous fees that are imposed on the accused at various phases of the criminal justice system).

68 The Bexar County First Assistant District Attorney, Cliff Herberg, describes the quick payments his office receives as an “assembly line process . . . [in which] the vast majority of [cases] don’t get prosecuted.” However, Belinda Cinque, a clerk and member of this assembly line, expressed her discomfort at this practice by saying, “Correct me if I’m wrong, but they sound like sharks.” Wilder, *Fast Cash*, *supra* note 50.

restitution to the consumers against whom it had filed criminal complaints.⁶⁹

Instead of filing criminal complaints, some payday lenders use only threats of incarceration to coerce payments from consumers. Consider the criminalization tactics allegedly employed by ACE Cash Express, the second largest payday lender.⁷⁰ According to an investigation conducted by the Consumer Financial Protection Bureau (“CFPB”), ACE’s debt collection practices violated federal consumer protection law because they were unfair, deceptive, and abusive.⁷¹ During its investigation, the CFPB found a training manual⁷² with a graphic image that demonstrated how ACE employees were expected to

69 Agreed Order, In Matter of Cash Zone LLC d/b/a Cash Biz, No. L15-048 (Dec. 15, 2014). The restitution that Cash Biz was ordered to provide is as follows:

- any money Respondent received from Texas district attorneys’ offices as payments made by consumers in connection with the prosecution or collection of the debt by the district attorney’s office;
- any fines and court costs paid by consumers in connection with the criminal prosecution of Respondent’s complaints filed with Texas district attorney’s offices; and
- \$300.00 per day for the time consumers spent in jail as a result of prosecution on the criminal complaints submitted by Respondent.

70 ACE Cash Express is among the top three payday lenders in the country and is headquartered in Texas. See Dan Primack, *Public Pensions Own Payday Lender That is Illegal in Their Own States*, FORTUNE (Apr. 20, 2015), <http://fortune.com/2015/04/20/public-pensions-payday-loans/> [https://perma.cc/ECQ6-EQP9] (stating that ACE is the second largest payday lender and describing as unethical state pension programs that have invested in ACE).

71 Press Release, Consumer Fin. Protection Bureau, CFPB Takes Action Against ACE Case Express for Pushing Payday Borrowers Into a Cycle of Debt (July 10, 2014), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-ace-cash-express-for-pushing-payday-borrowers-into-cycle-of-debt/> [https://perma.cc/HA6K-E7LX] [hereinafter Press Release, CFPB Takes Action]. See Consent Order, In the Matter of ACE Cash Express, Inc., No. 2014-CFPB-0008 (July 10, 2014), 2014 WL 4472891 [hereinafter ACE Consent Order]. In the ACE Consent Order at ¶ 21, the CFPB accused ACE’s in-house employees and third-party debt collectors of doing the following:

- a. Making an excessive number of calls to consumers’ home, work, and cell phone numbers;
- b. Disclosing the existence of consumers’ debts to non-liaible third parties;
- c. Continuing to call consumers at work after being told that such calls were prohibited;
- d. Continuing to call consumers directly after being told that they were represented by counsel; and
- e. Continuing to call consumers with no relation to the debt after being told that ACE had the wrong person.

72 See ACE Consent Order, *supra* note 71, at ¶ 15 (identifying the manual as “Foundations of Collections New Hire Training Manual,” which ACE used for training purposes from September 2010 to September 2011).

entrap consumers in a cycle of debt by creating a “sense of urgency” in order to squeeze every penny from them.⁷³ Although the CFPB found evidence of numerous violations of federal law, the alleged violations that are relevant here are that ACE’s own in-house employees, as well as ACE’s third-party debt collection companies, “falsely threatened delinquent borrowers with litigation or criminal prosecution, including by referencing or alluding to attorneys, clerks, legal departments, filings, formal complaints, and ‘immediate proceedings based on the law.’”⁷⁴ To settle with the CFPB, ACE agreed to pay \$5 million in refunds to its customers and to pay another \$5 million penalty for its alleged violations.⁷⁵

73 *Id.* at ¶¶ 16–17 (alleging that ACE’s in-house employee “contacts the customer for payment or offers the option to refinance or extend the loan” and that “some of ACE’s in-house debt collectors suggested to consumers in default that they take out a new loan to pay off their existing obligation”). It is well-documented that the “renewal” or “rollover” practice—repeatedly charging consumers a fee to extend the loan’s due date—is how payday lenders trap consumers in long-term debt. *See, e.g.*, Nathalie Martin, *1000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 573–74 (2010) (discussing several reports and studies regarding the frequency of rollovers and the profitability of the rollover practice).

74 ACE Consent Order, *supra* note 71, at ¶ 14. The debt collection industry is a billion-dollar industry comprised of two main groups: debt collector companies and debt buyers. In this Article, when I use the term “debt collection companies,” I am including companies that buy consumer debts, unless otherwise indicated. Unfair, deceptive, and abusive debt collection practices are pervasive throughout the debt collection industry. Collection practices by debt buyers are the target of numerous state and federal enforcement actions for perpetrating unlawful practices, which are rooted in the fact that debt buyers typically “obtained very few documents related to the purchased debts at the time of sale or after purchase.” FED. TRADE COMM’N, THE STRUCTURES AND PRACTICES OF THE DEBT BUYING INDUSTRY iii (2013), <https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf> [<https://perma.cc/F4W8-TP2S>]. The FTC also found that debt buyers only receive documentation for approximately 12% of the debts they attempt to collect. *Id.* at 35. This creates an environment that is ripe for abuse. *See* Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259 (2011) (describing how debt buyers aggressively use small claims courts to procure default judgments without adequate documentation); Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41, 76–83 (2015) (explaining how the limited documentation in the typical consumer debt sale transaction results in violations of the federally-enacted Fair Debt Collection Practices Act). *See, e.g.*, Jake Halpern, *Paper Boys: Inside the Dark, Labyrinthine, and Extremely Lucrative World of Consumer Debt Collection*, N.Y. TIMES (Aug. 15, 2014), <http://www.nytimes.com/interactive/2014/08/15/magazine/bad-paper-debt-collector.html> [<https://perma.cc/7PL4-C9WT>].

75 ACE Consent Order, *supra* note 71, at ¶ 14 (ACE did not admit to wrongdoing). While the reader may be aware of the Fair Debt Collection Practices Act (“FDCPA”), this act applies only to debt collection companies, not actual creditors, like Cash Biz and ACE, when collecting their own debts. *See* 15 U.S.C. § 1692e(4) (West 1996) (prohibiting debt collectors from representing that nonpayment of debts will lead to arrest or imprisonment). Therefore, the CFPB could not base its case on the FDCPA. The CFPB instead alleged that ACE violated various provisions of the Consumer Financial Protection Act of 2010, which prohibits companies that extend consumer credit from committing unfair, deceptive, or abusive acts or practices. *See* 12 U.S.C.A.

2. Companies that Collect Payday Loan Debt Create an Illusion of Imminent Incarceration

Unlike payday lenders, which may choose to actually file a criminal complaint against consumers or only threaten to do so, shady debt collection companies typically only make threats to have consumers arrested. For instance, in the above-mentioned enforcement action filed against ACE, the CFPB alleged that National Attorney Collection Services, Inc. (“National Attorney”), one of the debt collection companies retained by ACE, made statements to payday loan customers that were likely to mislead them into thinking that they would be sued by an attorney on behalf of ACE.⁷⁶ In a separate enforcement action filed against National Attorney, the United States Federal Trade Commission (“FTC”) obtained an injunction, shutting the company down for numerous violations, including falsely representing that it was a law firm and threatening to have consumers arrested via text messages.⁷⁷

Debt collection practices are number one on the list of complaints the FTC receives annually,⁷⁸ and, as a result, a top priority of the FTC is to pursue enforcement actions against

§§ 5531, 5536 (West 2010). Some states have laws that are broader than the FDCPA and, therefore, state regulators can hold payday lenders liable for threatening arrests. Due to the lack of uniformity of protection for consumers, state and federal regulation is necessary to severely penalize creditors who use threats of arrest or incarceration to collect payday loan debts.

76 See ACE Consent Order, *supra* note 71, at ¶ 14. The CFPB also alleged that another third-party debt collector hired by ACE misrepresented that ACE had hired it to conduct “mediations” before the case would be turned over to law enforcement. *Id.*

77 See Press Release, Fed. Trade Comm’n, FTC Brings First Case Alleging Text Messages Were Used in Illegal Debt Collection Scheme, Defendants Will Pay \$1 Million to Settle Charges (Sept. 25, 2013), <https://www.ftc.gov/news-events/press-releases/2013/09/ftc-brings-first-case-alleging-text-messages-were-used-illegal> [<https://perma.cc/2EEK-G5BP>]. Notably, National Attorney mailed debt collection letters in envelopes that displayed a large arm shaking money from a man who was hanging upside down. The arm was clothed in a sleeve with red, white, and blue stripes. *Id.* This may mislead consumers into thinking the collectors were a literal arm of the government with the symbolic stamp.

78 See *Shining a Light on the Consumer Debt Industry: Hearing Before the S. Banking, Hous., & Urban Affairs Subcomm. on Fin. Insts. & Consumer Protection*, 113th Cong. 113–75 (2013) (prepared testimony of James Reilly Dolan, the Acting Associate Director for the FTC’s Division of Financial Practices), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-shining-light-consumer-debt-industry/130717debtcollectionindustry.pdf [<https://perma.cc/6BHU-93M2>] (describing consumer complaints about unlawful debt collection practices, whether done in-house or by a separate debt collection company, and stating that “complaints most frequently reported are that collectors falsely represented the character, amount, or status of a debt (38.9%); made repeated or continuous calls (36.5%); falsely threatened to sue consumers or take other unintended actions (29.6%); failed to send a written

companies engaged in unlawful practices, and it has partnerships with dozens of federal, state, and local agencies to accomplish that.⁷⁹ A review of enforcement actions brought against debt collection companies reveals an extremely disturbing pattern of terrorizing consumers with threats of arrests. This Section provides examples of criminalization tactics that are effective in getting women to sometimes make payments on payday loan debts not actually owed. The success of these tactics hinges on the debt collector being able to plant in the woman's mind the illusion that she has committed a crime (e.g., passing a bad check) and that her arrest for that crime is imminent. A recent civil lawsuit filed against John Williams and his company, Williams, Scott & Associates ("WSA"), as well as his manager Chris Lenyszyn, demonstrates an egregious example of a corporation conjuring illusions of imminent incarceration to successfully obtain payments.⁸⁰

Kathleen Jacobi received a call from a man calling himself "Investigator Willis McDowell,"⁸¹ who was later identified as Titus McDowell, a WSA employee criminally

notice of the debt to the debtor (25.4%); and *falsely threatened to arrest* a consumer or seize a consumer's property (23.4%)" (emphasis added). Debt collectors also top the list of consumer complaints received by the CFPB. *See also* Kelly Cochran, *Spring 2016 Rulemaking Agenda*, CONSUMER FIN. PROTECTION BUREAU (May 18, 2016), <http://www.consumerfinance.gov/about-us/blog/spring-2016-rulemaking-agenda/> [<https://perma.cc/N6S8-RCTF>] (stating that the "federal government for many years has received more consumer complaints about debt collectors than about any other single industry").

79 In 2015, the FTC announced a nationwide initiative, called Operation Collection Protection, which is a partnership with federal, state, and local enforcement authorities that combats unlawful debt collection practices. *See* Press Release, Fed. Trade Comm'n, FTC and Federal, State and Local Law Enforcement Partners Announce Nationwide Crackdown against Abusive Debt Collectors (Nov. 4, 2015), <https://www.ftc.gov/news-events/press-releases/2015/11/ftc-federal-state-local-law-enforcement-partners-announce> [<https://perma.cc/2D4F-LKBB>] (announcing that the FTC, in collaboration with seventy-one enforcement partners, as of that date, had filed 115 cases and had shut down some companies, including companies that used threats to coerce consumers into making payments on phantom payday loan debts (i.e., debts not owed or making payments to companies lacking the authority to collect such debts).).

80 *See* Order & Opinion, Fed. Trade Comm'n v. Williams, Scott & Assocs. et al., No. 1:14-cv-01599-HLM (N.D. Ga. Nov. 4, 2015), <https://www.ftc.gov/system/files/documents/cases/160107wsaorder.pdf> [<https://perma.cc/GP8F-BLQW>] [hereinafter FTC Order]; Press Release, Fed. Trade Comm'n, At the FTC's Request, Court Halts Collection of Allegedly Fake Payday Debts (July 1, 2014); Press Release, Fed. Trade Comm'n, FTC and State Law Enforcement Partners Announce More Actions and Results in Continuing Crackdown Against Abusive Debt Collectors (Jan. 7, 2016), <https://www.ftc.gov/news-events/press-releases/2016/01/ftc-state-law-enforcement-partners-announce-more-actions-results> [<https://perma.cc/4WUD-B98C>] (describing the results of various enforcement actions filed by the FTC and stating that the WSA companies had been permanently shut down and ordered to pay \$3.9 million).

81 Complaint at PX11-1, Fed. Trade Comm'n v. Williams, Scott & Assocs. et al., No. 1:14-cv-01599-HLM (N.D. Ga. Nov. 4, 2015) [hereinafter WSA Civil Complaint] (Declaration of Kathleen Jacobi).

indicted for wire fraud.⁸² Mr. McDowell, claiming to work at a law firm in Georgia,⁸³ told Ms. Jacobi that she had an outstanding payday loan debt of \$77, which had increased to \$200 due to “fines and court fees.”⁸⁴ Mr. McDowell claimed Ms. Jacobi was being investigated for two felonies, check fraud and theft by deception, and that a warrant issued for her arrest would be executed unless she paid the full \$200.⁸⁵

Ms. Jacobi was skeptical at first.⁸⁶ Although she had obtained a payday loan several years earlier, she had repaid the debt.⁸⁷ When she questioned Mr. McDowell further, he denied being a debt collector, and, as proof that he was investigating her for criminal activity, he read from the “file” Ms. Jacobi’s date of birth, social security number, driver’s license number, and parents’ address.⁸⁸ Troubled by the fact that he had so much information about her, Ms. Jacobi asked to be transferred to Mr. McDowell’s supervisor.⁸⁹ Ms. Jacobi was put on hold several times and eventually transferred three different times, not to actual investigators, but to WSA employees whose words made her fear imminent arrest.⁹⁰ By the end of the ordeal, Ms. Jacobi was told that she would be charged with one count of felonious check fraud and three counts of fraud, deception and forgery, and that the outstanding debt was now \$2,890.⁹¹ “Mr. Blackwell” told her that she was a “flight risk” and that a King County police officer was currently on his way to her place of employment to serve her with a bench warrant.⁹² At this point, Ms. Jacobi was “scared to death” and did not want to

82 See Complaint, *United States v. Williams, Scott & Assocs. et al., LLC*, No. 14-MAG-2546 (S.D.N.Y. filed Nov. 12, 2014), <https://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/US%20v.%20WSA,%20et%20al%20Complaint.pdf> [<https://perma.cc/2MKY-DQJD>] [hereinafter WSA Criminal Complaint].

83 WSA Civil Complaint, *supra* note 81.

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.* at PX11-2.

89 WSA Civil Complaint, *supra* note 81.

90 *Id.* While Ms. Jacobi was on hold several times, a WSA employee calling himself Mr. Blackwell pretended to switch back and forth to the King County police department to verify that an arrest warrant was pending against her. *Id.*

91 *Id.*

92 *Id.* at PX11-5.

be arrested in front of her coworkers. So she gave Mr. Blackwell her bank information to allow him to make a \$500 debit to her account.⁹³ Shortly thereafter, she remembered that she knew a retired police detective and contacted him about the ordeal.⁹⁴ He eventually verified that no warrant for her arrest existed.⁹⁵ That is when Ms. Jacobi realized that she had been scammed into making a \$500 payment on debt she did not even owe.⁹⁶

Notably, four of the seven WSA employees criminally indicted for their involvement in the company have pled guilty.⁹⁷ In the civil case, the FTC obtained an order finding that nearly all of the actions and representations⁹⁸ of the WSA employees violated the Fair Debt Collection Practices Act (“FDCPA”).⁹⁹ In 2015, the FTC secured an injunction

93 *Id.*

94 *Id.*

95 WSA Civil Complaint, *supra* note 81 at PX11-5.

96 *Id.*

97 John Williams, the owner of WSA, along with six WSA employees, was originally indicted on a charge of conspiracy to commit wire fraud. *See* Press Release, S.D.N.Y., U.S. Attorney’s Office, Manhattan U.S. Attorney and FBI Assistant Director Announce Charges and Arrests in Multimillion-Dollar Debt Collection Scam that Targeted More than 6,000 Victims in All 50 States (Nov. 18, 2014), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-and-fbi-assistant-director-announce-charges-and-arrests> [<https://perma.cc/S2NE-NVSN>]. The aforementioned criminalization tactics amounted to wire fraud because the defendants used telephone and email systems to commit widespread fraud when they collected payments based on numerous false representations, including representations that the debts were owed and/or that WSA had the authority to collect such debts. In the press release, which touted charges and arrests stemming from a “Multimillion-Dollar Debt Collection Scam,” the FBI announced indictments against the following defendants: John Williams, Benita Cannedy, Rudy James, Arthur Cook, Christopher Lenyszyn, Clark Smith, and Titus McDowell. According to a news report, Lenyszyn, McDowell, Cannedy, and Smith have pled guilty. *See, e.g.*, Max Stendahl, *Debt Collector Can’t Shake \$4M Fraud Indictment*, LAW360 (Mar. 21, 2016), <http://www.law360.com/articles/774430/debt-collector-can-t-shake-4m-fraud-indictment> [<https://perma.cc/8MFU-N8EL>].

98 In summary, these actions and representations included: falsely representing to consumers that they would be arrested for crimes or would lose their driver’s licenses for failure to pay off payday loan debts; falsely representing themselves as law enforcement, lawyers, or someone affiliated with law enforcement agencies or law firms; repeatedly calling consumers at their homes and workplaces; repeatedly making harassing calls to consumers; and repeatedly using profane language to abuse consumers. *See* FTC Order, *supra* note 80, at 56–64. These tactics were employed to bully consumers into paying debts they were not legally obligated to pay, and many consumers did exactly that in the hopes that they would be left alone and/or not sent to jail. *Id.*

99 *See* FTC Order, *supra* note 80. In the civil case, the FTC filed a motion for summary judgement against the manager of WSA, Chris Lenyszyn, who managed the nuts and bolts of WSA, for violation of the FTC Act and the FDCPA by trying, among other things, to collect from consumers either (1) debts they did not owe, or (2) debts WSA had no authority to collect. The court granted summary judgement in favor of the

permanently shutting down WSA's operations.¹⁰⁰ Unfortunately, before ceasing operations, the criminalization tactics of the WSA employees enabled them to collect, within a five-year period, "approximately \$4.1 million dollars from over 6,000 victims contacted in all 50 states."¹⁰¹

After reading the sworn statements of WSA victims as well as statements in cases filed against other debt collection companies, I have discovered that a successful collection strategy based on creating the illusion of imminent incarceration has four major steps. First, the debt collector leaves a voicemail that forebodes the consumer's arrest if she fails to return the message immediately to arrange payment on a payday loan debt. Note that the debt collector has to convey knowledge of sensitive personal information (e.g., social security number) so that the consumer will take the message seriously.¹⁰² Second, the debt collector cherry-picks the sensitive information about the consumer and combines that information with references to criminal laws to make the consumer believe she has

FTC and found that Chris Lenyszyn and the other WSA collectors violated Section 5 of the FTC Act by misrepresenting the following: (1) the defendants' authority to collect; (2) the consumers' legal obligation to pay; (3) the defendants' affiliation with local, state and federal governments; (4) the consumers' criminal liability and possible punishments for refusing to pay; (5) the defendants' affiliation with law firms and law enforcement; and (6) the defendants' ability to suspend driver's licenses of consumers who refuse to pay. *Id.* The court determined that Chris Lenyszyn, the manager at WSA, was personally liable, and his liability was "abundantly clear" as a result of his authority and control over the WSA corporation and his direct participation in the foregoing illegal actions. *Id.* at 58.

100 *See id.*

101 *See* WSA Criminal Complaint, *supra* note 82, at ¶ 8.

102 In the criminal cases against the WSA employees, the FBI obtained secretly recorded telephone conversations that reveal foreboding voicemail messages left for consumers by WSA employees. *See id.* at ¶ 19. Moreover, the FBI searched the WSA premises located in Georgia and uncovered several scripts, including the following:

This is _____. This call is in regards to case # _____. The US Dept. of Justice has received notice from the National Crime Information Center to issue an alert on a SSN ending in _____, of _____ has 2 affidavits of fraud due to be expedited today as a result of the statute of limitations expiring. At 4pm [E]astern [T]ime felony warrants will be activated and any existing drivers license [sic] will be suspended effective immediately. For an opportunity to resolve this matter outside of court contact Williams Scott Bureau of Investigations [phone number] ext 134.

Id. Observe that this script instructs WSA employees to fraudulently claim they are part of the Justice Department and then make empty threats of arrest and license suspension. Such a claim allows debt collection employees to cloak themselves in governmental authority to make the threats appear credible.

committed a crime.¹⁰³ Third, the debt collector obtains from the consumer a partial or full payment before the consumer realizes a scam is afoot.¹⁰⁴ Lastly, the debt collector sends to the consumer an email or similar correspondence to confirm receipt of payment and a dismissal of the criminal charges.¹⁰⁵ This step serves the purpose of making the consumer feel like she did the right thing by paying and hopefully will not give the matter another thought.¹⁰⁶

The FTC and the CFPB accuse companies like WSA of collecting “phantom debts,” which are (1) debts the company has no authority to collect, or (2) debts the consumer does not owe (e.g., the consumer had already repaid the loan).¹⁰⁷ The root of the problem of phantom debt collection is the routine transfer of consumers’ personal data either to collection companies retained by creditors or to debt buyers that purchase consumer debts.¹⁰⁸

103 For instance, Jacqueline Vallair, a victim of WSA who actually owed a payday loan debt to the previously-mentioned ACE Cash Express, was told by a WSA employee that she had committed theft by deception and that an arrest warrant would be issued within seventy-two hours if she failed to pay. *See, e.g.*, WSA Civil Complaint, *supra* note 81, at PX15-1–PX15-2 (Declaration of Jaqueline Vallair). Because the WSA employee knew details about that loan, Ms. Vallair was persuaded that the threats of arrest were credible and was terrified by the prospect of serving a two-to-four-year jail sentence. *Id.* Ms. Vallair stated, “I was too intimidated by the threat of arrests and criminal charges to refuse to pay Williams Scott.” *Id.*

104 The WSA employee completed step three because his threats coerced Ms. Vallair into using her debit card to make a \$300 payment to WSA. *Id.* at PX15-3.

105 The WSA employee completed step four of the criminalization scam used against Ms. Vallair when he sent her a “thank you” message confirming her payment with the following message: “We appreciate the opportunity to serve you.” *Id.* at PX15-14. The search of WSA premises also uncovered a stock letter confirming payment and purportedly indicating that the criminal charges had been dismissed and/or expunged after the consumer made the payment(s) demanded. These letters created the false impression of governmental affiliation because they contained the seal for the Department of State for the United States of America and contained the following words or something similar: “WSA, LLC, SERVING THE USDOJ FOR 15 YEAR [sic] STRONG.” WSA Criminal Complaint, *supra* note 82, at ¶ 7. This gave the entire process a stamp of pseudo-legitimacy.

106 Some victims, even after paying, still have the sense they have been duped and make additional inquires. For example, after making the payment, Ms. Vallair contacted the police and others and discovered the truth that WSA had no authority to collect the payday loan debt she owed to ACE and that no criminal charges were ever pending against her. WSA Civil Complaint, *supra* note 81, at PX15-2.

107 *See* CFPB ANNUAL REPORT 2016, *supra* note 9, at 29.

108 *See, e.g.*, David C. Vladeck, *Charting the Course: The Federal Trade Commission’s Second Hundred Years*, 83 GEO. WASH. L. REV. 2101, 2108 (2015) (reflecting on his experience as a former Director of the FTC’s Bureau of Consumer Protection, Professor Vladeck stated “[p]ersonal data has become the grist for the deceptive and unfair practices mill”). *See also* CFPB ANNUAL REPORT 2016, *supra* note 9, at 10–11 (raising serious concerns about the buying and selling of consumer debts and data and stating that, in recent

It is well-documented that consumer data files and spreadsheets, especially those sold to debt buyers, are riddled with incomplete, incorrect, and inaccurate information, which in turn sometimes leads to consumers paying phantom debts.¹⁰⁹ Moreover, consumer data files are frequently illegally obtained or unlawfully sold to debt buyers,¹¹⁰ and some files

enforcement actions, the CFPB has “discovered examples of how consumers are harmed by the ineffective flow of information through the collections lifecycle”). The massive amounts of consumer financial data is merely a subset of the much bigger problem of the mass accumulation of data about individuals, and federal regulators recognize the fact that data brokers regularly collect, store, and sell billions of data files about consumers and all of this is done without the consumer’s knowledge or express consent. *See, e.g.,* FED. TRADE COMM’N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY iv (2014), <https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf> [<https://perma.cc/VJ9G-EFKX>] [hereinafter FED. TRADE COMM’N, DATA BROKERS] (reporting the findings of a study of nine data brokers and finding that one data broker alone “has 3000 data segments for nearly every U.S. consumer”).

Lenders and collectors will often combine multiple sources of personal information, and use it as a weapon to coerce payments from clients. Companies can buy both the information itself, in the form of spreadsheets, or obtain it by using software, which may or may not be legal or legally used. This “people search” software can uncover a long list of information, such as age, date of birth, address history, education information, relatives’ names, employment history, marriage records, civil records, property ownership, and loan activity. By combining all these bits of information, companies can create a large profile on a consumer. *Id.* at 34–35. Consumers are often unaware how easily accessible this information is to companies and can be intimidated when confronted with this information. Even a stalker can buy personal information for as little as \$154 and use it to perpetrate violence. *See, e.g.,* Alexis A. Moore, *When Stalking Goes Online—Examples of Cyberstalking*, ABOUT.COM, <http://womensissues.about.com/od/violenceagainstwomen/a/StalkingOnline.htm> [<https://perma.cc/5CJK-F9AN>] (last visited July 8, 2016).

109 *See, e.g.,* CFPB ANNUAL REPORT 2016, *supra* note 9 (describing results of numerous enforcement actions, including settlement of enforcement actions filed by the CFPB against Encore Capital Group and Portfolio Recovery Associates, LLC, both publicly-traded companies and the nation’s two largest debt buyers, for numerous alleged violations). Creditors collecting their own debts have been sued for collecting phantom debt or selling debts that facilitated unlawful debt collections. *See, e.g., id.* (describing a \$90 million settlement of an enforcement action filed by the CFPB against Chase, which allegedly sold to debt buyers credit card accounts that included not only phantom debts, but also debts that were overstated or no longer legally enforceable—e.g., time-barred under the statute of limitations).

110 Both the FTC and CFPB have neglected to explicitly state whether companies like WSA obtain such personal information by illegal means. *See, e.g.,* FTC Order, *supra* note 80 (finding that WSA employees obtained a software license from TransUnion to access consumers’ personal information but never stating whether this access was illegal). It is fair to conclude that some companies are illegally obtaining personal information about consumers in order to frighten them into making payments. *See, e.g.,* Press Release, N.Y. State Dep’t. of Fin. Servs., DFS Announces Settlement with Two Debt Buyers Resulting in \$3 Million of Restitution to Thousands of New York Consumers (May 18, 2016), <http://www.dfs.ny.gov/about/press/pr1605181.htm> [<https://perma.cc/9LJY-H7G5>] (announcing a multi-million dollar settlement with National Credit Adjusters, LLC and Webcollex LLC, after alleging that the companies illegally purchased payday loan

are compiled from consumers who only submit an online payday loan inquiry/application (i.e., never receive a payday loan).¹¹¹ As a result, companies such as WSA exploit sensitive personal data to terrorize consumers into believing they will be arrested for committing a crime (e.g., passing a bad check) if they fail to pay phantom debts.

Exploitation of sensitive personal data is also at the root of unlawful collection tactics used against consumers who owe *real* debt—outstanding payday loan debts. By exploiting the consumers' personal data, companies regularly collect amounts in excess of what is owed or collect on loans that are illegal under state law.¹¹² That is due in part to the fact that, although the collection companies have sensitive personal data on each consumer, the purported debts are often inaccurate, and the collection companies rarely have any of the consumer's underlying loan and/or account documentation to substantiate the amounts purportedly owed.¹¹³ As a result, companies, either mistakenly or deliberately, use personal

debts and unlawfully collected payments from New York residents by using numerous illegal tactics, including threatening to call consumers' employers, and calling consumers' relatives to pressure them into paying off payday loan debts).

111 See Julie Brill, U.S. Fed. Trade Comm'r, *The Intersection of Privacy and Consumer Protection: Some Thoughts from FTC Commissioner Julie Brill* (Apr. 15, 2015), https://www.ftc.gov/system/files/documents/public_statements/636911/150414icpen.pdf [<https://perma.cc/RB7N-9RMD>] (stating that "data brokers, data analytics companies, lead generators, payday lenders, and debt collectors" are major players in amassing "big data" about consumers and describing some of the harm they can cause). Companies commonly known as lead generators amass a wealth of information from consumers who apply online for loans, including payday loans, and then sell that information to others. In 2016, the FTC announced that it had permanently shut down a business that received online payday loan applications that included sensitive information, such as social security numbers and bank account information, and sold 95% of that information to non-lenders that used it to illegally take millions from consumers' bank accounts without their consent. Press Release, Fed. Trade Comm'n, *Data Broker Defendants Settle FTC Charges They Sold Sensitive Personal Information to Scammers* (Feb. 18, 2016) (announcing also that the FTC had obtained a \$4.1 million judgment against another company that sold consumers' information).

112 Some egregious scams involve the bad actors making it appear that a consumer has obtained a payday loan by using the consumer's bank account information to deposit into the account a small loan amount (e.g., \$200), and then withdrawing bi-weekly a finance charge of as much as \$90. See, e.g., Press Release, Fed. Trade Comm'n, *FTC Action Halts Payday Loan Scheme That Bilked Tens of Millions from Consumers by Trapping Them into Supposed "Loans" They Never Authorized* (Sept. 17, 2014) (announcing the imposition of a temporary restraining order against several defendants that allegedly "issued \$28 million in payday 'loans' to consumers, and, in return, extracted more than \$46.5 million from their bank accounts"); Press Release, Fed. Trade Comm'n, *FTC Action Stops Massive Payday Loan Fraud Scheme* (July 7, 2015), <https://www.ftc.gov/es/node/679871> [<https://perma.cc/G6U2-X9Y2>] (The FTC subsequently obtained a permanent injunction that, among other things, bans the defendants from consumer lending and bans them from any business activity related to consumer lending.).

113 See, e.g., Julie Brill, U.S. Fed. Trade Comm'r, *Life of a Debt: Data Integrity in Debt Collection* (June

data against consumers to regularly (1) collect amounts in excess of what is owed; (2) collect purported debts that have been re-paid;¹¹⁴ or (3) collect on debts no longer lawful under state law.¹¹⁵ For example, an informant in a case filed against Goldman Schwartz, Inc., a collection company retained by ACE Cash Express and other payday lenders, testified that she was instructed to “juice” each consumer file by adding fees, such as up to \$200 as attorneys’ fees and up to \$100 as late fees.¹¹⁶ These excess amounts collected were not sent to the payday lender but were kept by Goldman Schwartz, which used threats of arrests to coerce consumers into paying.¹¹⁷

Based on the foregoing, the reader now sees the ugly picture, which shows a pervasive problem of companies collecting *real or phantom* payday loan debts by exploiting consumers’ personal information to conjure up the illusion of imminent incarceration if they do not pay. The phantasmal imagery combines the illusion of incarceration with horrific consequences (e.g., the consumer losing custody of her children after the arrest). The fear of arrest is thus intensified and leads some consumers to pay not only unlawfully inflated debts but phantom and zombie debts as well.¹¹⁸

6, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/life-debt-data-integrity-debt-collection/130606debtcollectionroundtable.pdf [<https://perma.cc/7KPX-ZM4Y>] (explaining the various reasons why debt collectors have inaccurate information and lack documentation of underlying debts purportedly owed and describing the resulting harm inflicted on consumers).

114 See, e.g., CFPB ANNUAL REPORT 2016, *supra* note 9. Because consumer debts are often transferred (e.g., bought and sold) multiple times, consumers are frequently subjected to repeated lawsuits attempting to collect the paid-off debt, and this problem is commonly referred to as “zombie debt.” See, e.g., Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 266–67 (2011). In these lawsuits, debt buyers often obtain default judgments against consumers and then use those judgments to subject consumers to garnishments. *Id.* (finding that in 39.46% of collection cases filed by debt buyers in Dallas County, the companies obtained default judgments).

115 See, e.g., CFPB ANNUAL REPORT 2016, *supra* note 9 (summarizing numerous lawsuits involving companies collecting debts no longer enforceable and collecting amounts in excess of debts owed).

116 See Plaintiff Fed. Trade Comm’n’s Memorandum in Support of Its Ex Parte Motion for Temporary Restraining Order at 17, Fed. Trade Comm’n v. Goldman Schwartz, et al., No. 4:13-cv-00106 (S.D. Tex. Jan. 14, 2013) [hereinafter FTC Motion for TRO] (identifying eight consumers whose debts were inflated, including one payday loan debt increased, without explanation, from \$300 to \$1,800).

117 *Id.* For an in-depth discussion of Gerald Wright’s operation of Goldman Schwartz, see *infra* notes 190–205 and accompanying text.

118 Zombie debts are debts that have been transferred from the original creditor, but are not legitimately owed. Debt collectors and buyers still, however, relentlessly pursue consumers to pay those debts so that, similar to zombie persons, zombie debts keep resurfacing to wreak havoc in the lives of consumers. See, e.g., Neil Sobol, *Protecting Consumers from Zombie-Debt Collectors*, 44 N.M. L. REV. 327, 327–28 (2014) (stating

II. Reasons Criminalization Tactics Appear to be More Effective on Women

At this time, no one has analyzed to what extent debt criminalization tactics used against women are substantially different from those used against men, or whether such tactics have a disparate impact on women.¹¹⁹ Social science studies have documented gender differences that are relevant to this Article and may support the assertion that criminalization tactics used against women may be especially effective. For example, several studies show that women in general are more averse to risk than men¹²⁰ and less inclined to negotiate.¹²¹ This research, therefore, may explain why women who are being harassed by criminalization tactics often choose to pay the purported debt owed. Payment is seen as a less risky solution to the woman's perceived dilemma of imminent incarceration. A recent study found that women experience more stress from debts than men even though women may actually carry a lower amount in comparison to men.¹²² RTO companies, payday lenders, and other

that zombie debt may not be legitimately owed for several reasons, including that the debt has already been paid to the original creditor, the debt is barred by the statute of limitations, or the debt has been discharged in a consumer's bankruptcy case). Again, the illusion of incarceration sticks because companies like WSA are in possession of sensitive personal information, not only from victims who had previously obtained a payday loan, a credit card, or some other consumer credit, but also from victims who supplied such information when they submitted applications online for payday loans and did not actually obtain those loans.

119 Based on my research, I suspect that some debt collectors are using harsher criminalization tactics on women than on men. For example, I did not come across any affidavit or complaint in which a man was threatened with the removal of his children by Child Protective Services if he refused to pay the debt purportedly owed. As will be explained further in this Section, profanity such as the word "b*tch" seem to be used only against women based on the complaints and affidavits that I have read. One explanation is that the use of the word is particularly more offensive to women than to men. See generally Elizabeth L. Cralley & Janet B. Ruscher, *Lady, Girl, Female, or Woman: Sexism and Cognitive Busyness Predict Use of Gender-Biased Nouns*, 24 J. LANGUAGE & SOC. PSYCHOL. 300 (2005) (discussing two studies addressing whether sexism can influence stereotypical notions of gender in language and stating that "hostile sexist individuals might be more likely to use sexually hostile terms such as slut, or terms referencing conflict such as femi-nazi or bitch").

120 See Rachel Croson & Uri Gneezy, *Gender Differences in Preferences*, 47 J. ECON. LITERATURE 448 (2009); Catherine C. Eckel & Philip J. Grossman, *Men, Women and Risk Aversion: Experimental Evidence*, in HANDBOOK OF EXPERIMENTAL ECONOMICS RESULTS 510 (Charles R. Plott & Vernon L. Smith eds., 2008).

121 See, e.g., Hannah Riley Bowles et al., *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes it Does Hurt to Ask*, 103 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84 (2007) (finding that women experience a backlash from male evaluators and that women are less willing to negotiate when the evaluator is a man); Madeline E. Heilman et al., *Penalties for Success: Reactions to Women Who Succeed at Male Gender-Typed Tasks*, 89 J. APPLIED PSYCHOL. 416, 426 (2004) (describing research experiments in which women were disliked after displaying aggressive behavior as disapproval for engaging in behavior that is inconsistent with gender-norm prescriptions (e.g., being service-oriented)).

122 See Lucia Dunn & Ida Mirzaie, *Consumer Debt Stress, Changes in Household Debt, and the Great*

companies exacerbate the stress women are already experiencing by terrorizing them via the criminalization tactics described previously.

After reading news stories about, and the sworn affidavits of consumers victimized by, abusive debt collection tactics, I discovered that women were substantially more likely to express being afraid.¹²³ The fear ranged from being extremely afraid of going to jail to being worried about who would care for their children. For example, Ms. Thelma Begay's sworn statement indicated that a WSA employee, using "Kelly Saunders" as a false identity, claimed to work for a law firm and told Ms. Begay that she would be arrested if she failed to repay an outstanding payday loan.¹²⁴ In response, Ms. Begay stated: "I was frightened by Ms. Saunders' threats and decided I had better pay Williams Scott to avoid the criminal charges. Since I am a single parent with two young children, I was especially worried about who would care for my children if Williams Scott pursued criminal charges against me."¹²⁵ Even though Ms. Begay believed she did not owe any payday loan debt, she used her debit card to make payments totaling a little over \$900 to WSA in order to avoid being arrested.¹²⁶ Unsurprisingly, this woman's fear for the well-being of her children was a factor in her deciding to pay a non-existent debt to avoid incarceration for a crime she did not commit.¹²⁷

Debt criminalization tactics are likely more effective on women due to a confluence

Recession (Ohio State Univ. Econ. Dep't Working Paper, 2013).

123 For example, I looked for the words "fear," "afraid," "fearful," "scared," "terror," and "frightened" in exhibits, such as sworn declarations, attached to court documents in the case filed against WSA. After reviewing sworn declarations and accompanying supporting documents submitted by nineteen different victims of WSA, none of the statements, declarations, and supporting documents submitted by male victims contained any words indicating any type of fear. WSA Civil Complaint, *supra* note 81, at PX02-1–PX20-8. I found sworn statements from both men and women who made payments to WSA. As a result of such payments, some male victims may have been afraid but simply failed to articulate that fear in the documents submitted to the court. Also, none of the men indicated that WSA made threats to them regarding losing custody of their kids and none of the male victims indicated a concern over who would take care of the children if they were arrested. *Id.*

124 *See, e.g., id.* at PX05-1 (Declaration of Thelma Begay). Four years earlier, Ms. Begay had paid off a payday loan and, therefore, did not initially believe Saunders. However, because Saunders was knowledgeable about Ms. Begay's personal information, including her hometown, she eventually believed Saunders' threats of arrest.

125 *Id.* According to Ms. Begay, Saunders, in addition to threatening arrest, yelled at Ms. Begay and used profanity. *See id.* at ¶ 7.

126 *Id.*

127 *Id.*

of factors arising from the role of women in the home. Such factors may lead women, in comparison to men, to be more inclined to act and, therefore, more likely to pursue any course of action, including paying debts they do not owe, in order to avoid jail time. As explained more fully below, women like Ms. Begay—single mothers of young children—are essential to the economic and physical well-being of others and, therefore, will do anything legally possible to avoid going to jail.¹²⁸

A. Children and Other Loved Ones are Dependent on the Woman's Income and Other Contributions

Women are (1) earning income as the sole, primary, or secondary breadwinner in the home; (2) performing the majority of household chores; (3) managing the household's finances; (4) providing the majority of childcare to underage children; and (5) acting as the primary caregiver to elderly, sick parents and adult children with special needs.

Women are the heads of households in the vast majority of single-parent families with children.¹²⁹ The majority of single-parent households are low-income families and have the lowest income among families with children.¹³⁰ That means that if single mothers go

128 In her initial complaint to the FTC, Ms. Begay stated: "Being a single parent and not having anyone to care for my 2 children, I complied with the company's arrangement." *Id.* at PX05-6. See J.J. Xiao et al., *Consumer Debt Delinquency by Family Life Cycle Categories*, 34 INT'L J. BANK MARKETING 43, 43 (2014) ("The results [of a study of data from Surveys of Consumer Finances] show that among the 15 household lifecycle categories, the top three most likely to be delinquent are young couples with children aged seven or older, middle-aged singles with children aged 15 or older, and middle-aged singles with children under 15. Younger households are more financially distressed than their older counterparts. Presence of children increases the probability of debt delinquency.").

129 LEGAL MOMENTUM, SINGLE PARENTHOOD IN THE UNITED STATES—A SNAPSHOT (2014), <https://www.legalmomentum.org/sites/default/files/reports/SingleParentSnapshot2014.pdf> [<https://perma.cc/E54W-9ZL9>] (stating that, in 2013, "85% of the children living with a single parent were living with their mother"). See also Gretchen Livingston, *Fewer than Half of U.S. Kids Today Live in a 'Traditional' Family*, PEW RES. CTR.: FACT TANK (Dec. 22, 2014), <http://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/> [<https://perma.cc/U4HY-E53J>].

130 SHAWN FREMSTAD, CTR FOR AM. PROGRESS, PARTNERED BUT POOR (2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/03/10123038/PartneredButPoor.pdf> [<https://perma.cc/AEQ8-RRJS>] (stating that 60% of single-parent households with children were low-income families); KIM PARKER & WENDY WANG, PEW RESEARCH CTR., MODERN PARENTHOOD: ROLES OF MOMS AND DADS CONVERGE AS THEY BALANCE WORK AND FAMILY (2013), http://www.pewsocialtrends.org/files/2013/03/FINAL_modern_parenthood_03-2013.pdf [<https://perma.cc/BH4F-YJUJ>] [hereinafter PARKER & WANG, MODERN PARENTHOOD]. Wendy Wang et al., *Chapter 4: Single Mothers*, PEW RES. CTR. (May 29, 2013), <http://www.pewsocialtrends.org/2013/05/29/chapter-4-single-mothers> [<https://perma.cc/UUC4-4YX9>] (stating that single-mother households have the lowest income among all family groups with children and stating never-married mothers have the lowest

to jail, their loss of income would lead to a major financial crisis in the overwhelming majority of single-parent homes headed by women.¹³¹ Moreover, married mothers are the primary or co-breadwinners in 40% of families with underage children.¹³² While married or co-habiting women with children are in families that have higher income than single mothers, the majority of two-parent families with children are also low-income families.¹³³ Accordingly, the majority of two-parent families will also endure a major financial crisis if the mother is arrested.¹³⁴

In addition to triggering a major financial crisis arising from the woman's loss of income, most families would suffer substantial disruptions and instability if the woman

income among all single mothers with children).

131 See Karen Z. Kramer, *Comparison of Poverty and Income Disparity of Single Mothers and Fathers Across Three Decades: 1990–2010*, 33 GENDER ISSUES 22, 36–37 (2016) (using data from the United States Department of Labor and describing the huge income disparity between single moms and single dads).

132 PARKER & WANG, MODERN PARENTHOOD, *supra* note 130 (stating that among women who are mothers, 37% of those mothers are married and have incomes higher than their husbands).

133 FREMSTAD, *supra* note 130 (stating that in two-parent families consisting of a married couple, 26% of those families have low income and in two-parent families consisting of a co-habiting couple, 55% have low income); LEGAL MOMENTUM, *supra* note 129 (reporting that the majority of children living in poverty live in two-parent families headed by married or co-habiting parents or with a single parent who is divorced or separated).

134 The majority of Americans are financially fragile in that they are able to financially survive because they are recipients benefiting from one or more of eight federal means-tested programs and/or they lack sufficient savings to cover an unexpected expense. FREMSTAD, *supra* note 130 (stating that among all families with children, the families that benefit the most from a means-tested federal program (e.g., food stamps) are two-parent families consisting of a married couple); Annamaria Lusardi et al., *Financially Fragile Households: Evidence and Implications*, BROOKINGS PAPERS ON ECON. ACTIVITY 83 (Spring 2011), http://www.brookings.edu/~media/Projects/BPEA/Spring-2011/2011a_bpea_lusardi.PDF [<https://perma.cc/NS96-5VGU>] (finding, among other things, “one-quarter of U.S. households surveyed report that they are certain they could not come up with \$2,000 within 30 days, and an additional 19 percent of all respondents would cope at least in part by selling or pawning possessions or taking payday loans”); Hunter Schwarz, *Nearly Half of Americans Say They Can't Afford an Unexpected \$400 Expense*, WASH. POST (June 3, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/06/03/nearly-half-of-americans-say-they-cant-afford-an-unexpected-400-expense/> [<https://perma.cc/45TM-JUE8>] (relying on federal data and reporting that 47% of Americans cannot “pay for an unexpected \$400 expense through savings or credit cards, without selling something or borrowing money”); Neal Gabler, *The Secret Shame of Middle-Class Americans*, ATLANTIC (May 2016), <http://www.theatlantic.com/magazine/archive/2016/05/my-secret-shame/476415/> [<https://perma.cc/B46Y-EQXQ>] (citing various studies that support the conclusion that about half of Americans lack savings to cover a relatively small-dollar expense and confessing that he is one of these Americans).

were arrested. Two-parent families¹³⁵ are dependent on the woman to manage the household finances by doing such tasks as budgeting, paying bills, and shopping for groceries.¹³⁶ As one news story indicates, the woman in most households is the “chief financial officer” who actually knows how much money it takes to handle the financial needs of those in the home.¹³⁷ Therefore, when a debt collector calls, she is more likely than the male partner in the home to be acutely aware of the family’s inability to both repay that debt and remain current on other recurring financial obligations.

Besides managing the household finances as the chief financial officer, women perform the majority of caregiving and household chores, even though men do more housework and childcare than they did a half-century ago.¹³⁸ The results of a 2015 survey conducted by the Bureau of Labor Statistics indicated that only 22% of fathers did housework like cleaning or laundry on an average day, compared to 50% of mothers.¹³⁹ Moreover, mothers of young

135 The research in this Section addresses the division of work and child-care duties by heterosexual couples living together in a two-parent family, and this research pre-dates the decision by the United States Supreme Court in *Obergefell v. Hodges*, which legalized same-sex marriages. 135 S. Ct. 2584 (2015). Therefore, when I refer to two-parent families, I am referring to heterosexual couples with underage children. Very little research exists regarding the division of work in families headed by same-sex couples. See generally Abbie E. Goldberg et al., *Division of Labor in Lesbian, Gay, and Heterosexual New Adoptive Parents*, J. FAM. & MARRIAGE (2013). Moreover, this research may be of limited application due to a number of factors, including the fact that same-sex couples tend to be more highly educated and, therefore, have higher incomes and are thus not likely to be in financial trouble like the women discussed in this Article. See generally Lauren Barron & Michelle Hebl, *The Force of Law: The Effects of Sexual Orientation Antidiscrimination Legislation on Interpersonal Discrimination in Employment* 19 PSYCHOL. PUB. POL’Y & L. 191, 193 (2013) (stating that “representative surveys have found that lesbian women earn more than heterosexual women, with partnered lesbians earning more than both single and heterosexually partnered women”).

136 See Rich Morin & D’Vera Cohn, *Women Call the Shots at Home; Public Mixed on Gender Roles in Jobs*, PEW RES. CTR. (Sept. 25, 2008), <http://www.pewsocialtrends.org/2008/09/25/women-call-the-shots-at-home-public-mixed-on-gender-roles-in-jobs/> [<https://perma.cc/A7W2-G7G4>].

137 Pamela Yip, *More Women Take Financial Lead in Household*, DALL. MORNING NEWS (Apr. 22, 2011).

138 PARKER & WANG, MODERN PARENTHOOD, *supra* note 130, at 1.

139 Press Release, Bureau of Lab. Statistics, American Time Use Survey—2015 Results 2 (June 24, 2016), <http://www.bls.gov/news.release/pdf/atus.pdf> [<https://perma.cc/W9HH-MAHP>]. See also Suzanne Bianchi et al., *Gender and Time Allocation of Cohabiting and Married Women and Men in France, Italy, and the United States*, 31 DEMOGRAPHIC RES. 183 (2014), <http://www.demographic-research.org/volumes/vol31/8/31-8.pdf> [<https://perma.cc/Z996-85CT>] (“Cohabiting men with children allocate significantly less time to childcare than married men, but only in the United States”); Kathleen Wu, *Out of Order: Unequal Household Chores Hinder Women’s Workplace Success*, TEX. LAWYER (Apr. 30, 2012), <https://www.andrewskurth.com/assets/htmldocuments/651051201%20Andrews.pdf> [<https://perma.cc/593N-PW8T>] (“[S]imply getting married adds seven hours of housework a week to a woman’s life, but subtracts an hour of housework a week from a man’s

children perform the majority of childcare functions.¹⁴⁰ For example, one study found that women living in households with children under six spent one hour per day feeding or bathing the children, amounting to over twice as much time as men living in the same situation.¹⁴¹ Moms are also the parent most likely to take time off from work to take the child to the doctor and handle other matters related to the child.¹⁴² In single-parent homes headed by women, the mother has almost no help from non-residential fathers with typical daily activities involving the child.¹⁴³

Finally, regardless of marital status, women are usually the primary caregivers to their elderly parents and other adult loved ones in need of care. In the United States, the “typical” caregiver is a “forty-nine-year-old woman who works outside the home and spends nearly twenty hours per week providing *unpaid* care to her mother for nearly five years.”¹⁴⁴ Keep in mind that this same caregiver is likely to also be a primary caregiver to her underage child.¹⁴⁵ Not surprisingly, studies have found that a significant number of caregivers get less sleep than non-caregivers and suffer from their own health problems as a result of

life.”).

140 See Wu, *supra* note 139, at 1 (“Once children enter the picture, the numbers get even worse [M]arried women with more than three kids do about 28 hours of housework a week, while men logged about 10 hours.”).

141 American Time Use Survey—2015 Results, *supra* note 139, at 9 (“On an average day, among adults living in households with children under age 6, women spent 1.0 hour providing physical care (such as bathing or feeding a child) to household children; by contrast, men spent 25 minutes providing physical care.”).

142 Kim Parker, *Women More Than Men Adjust Their Careers For Family Life*, PEW RES. CTR. (Oct. 1, 2015), <http://www.pewresearch.org/fact-tank/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life/> [https://perma.cc/T2RM-MAJ3] (stating that 42% of women indicated they took time off from work to care for a family member compared to only 28% of men).

143 GRETCHEN LIVINGSTON & KIM PARKER, PEW RESEARCH CTR., *A TALE OF TWO FATHERS: MORE ARE ACTIVE BUT MORE ARE ABSENT* (2011), <http://www.pewsocialtrends.org/2011/06/15/a-tale-of-two-fathers/> [http://perma.cc/MEZ5-5M73] (reporting that only 10% of non-residential dads help their children with homework several times a week or more, and only 11% transport their children to activities).

144 LYNN FEINBERG ET AL., AARP PUB. POLICY INST., *VALUING THE INVALUABLE: 2011 UPDATE: THE GROWING CONTRIBUTIONS AND COSTS OF FAMILY CAREGIVING 1* (2011), <http://assets.aarp.org/rgcenter/ppi/ltc/i51-caregiving.pdf> [https://perma.cc/92GG-NY72] (“Almost two-thirds of family caregivers are female (65 percent). More than eight in ten are caring for a relative or friend age 50 or older.”) (emphasis added).

145 See, e.g., *id.* at 25 (“About one-third of caregivers provide assistance to more than one person, and about one in ten to three or more people.”).

neglecting themselves.¹⁴⁶ Therefore, women feeling the weight of the responsibilities for themselves and others are likely to be frightened by threats of arrest for failing to pay debts.

B. Women May Face Situations that Make Them More Vulnerable to Debt Criminalization Tactics

Generally, women are already the target of some payday lenders and other businesses known for offering exorbitantly-priced consumer credit¹⁴⁷ and, therefore, may be overrepresented in the population of consumers who struggle to pay their debts.¹⁴⁸ Moreover, some women struggling to pay debts may simultaneously be experiencing circumstances that make them even more vulnerable to threats of arrest.

1. Elderly, Infirm Women May be More Susceptible to Threats of Arrests

Some women may be victims who are vulnerable to malicious threats of arrest due to their age and physical condition. The majority of elderly women in the United States are widows, and therefore single due to the fact that women live longer than men.¹⁴⁹ Moreover, 87% of older persons have at least one chronic condition, 68% have multiple conditions, and 19% have had cost-related healthcare access problems in the past year.¹⁵⁰ Consider the example of Marlies Sanders, an elderly, retired woman suffering from osteoarthritis, two ruptured discs, fibromyalgia, and high blood pressure. She had obtained a payday

146 *Id.* at 8.

147 *See, e.g.,* Amy J. Schmitz, *Females on the Fringe: Considering Gender in Payday Lending Policy*, 89 CHI. KENT L. REV. 65, 74–75, 84 (2014) (discussing studies which indicate that female consumers are “overrepresented among payday loan borrowers” and analyzing factors that explain “why 72% of CashOne’s payday loan customers are females”).

148 As one article describes it, “women are told from a young age to be conscious of the dangers of being found alone . . . [and] how they appear to others—[which] is surely likely to heighten the sense of alarm . . .” Sarah E. Moore & Simon Breeze, *Spaces of Male Fear: The Sexual Politics of Being Watched*, BRIT. J. CRIMINOLOGY 1172, 1179 (2012).

149 *Administration on Aging: Health and Health Care*, ADMIN. FOR COMMUNITY LIVING, http://www.aoa.acl.gov/Aging_Statistics/Profile/2014/14.aspx [<https://perma.cc/TC3K-4BNZ>] (last visited July 10, 2016) (“In 2011–2013, the most frequently occurring conditions among older persons were: diagnosed arthritis (49%), all types of heart disease (31%), any cancer (25%), diagnosed diabetes (21% in 2009–2012), and hypertension (high blood pressure or taking antihypertensive medication) (71% in 2009–2012).”).

150 Robin Osborn et al., *International Survey of Older Adults Finds Shortcomings in Access, Coordination, and Patient-Centered Care*, HEALTH AFF. 3–4 (2014).

loan from Allied Cash Advance (“ACA”) to make her car payment.¹⁵¹ Her monthly social security check and small pension payment were often not enough for her to pay all her bills,¹⁵² and eventually employees from ACA began calling her and her friends about her loans.¹⁵³ According to Ms. Sanders, a woman claiming to be “Ms. Medley” from the local sheriff’s department first called her friend to tell her that Ms. Sanders would be arrested that day if she failed to repay the loan, then called Ms. Sanders and left a voicemail message claiming to be an employee in the legal department of the Spotsylvania Sheriff’s Department.¹⁵⁴ In the message, Ms. Medley informed Ms. Sanders that she had committed a felony by not repaying the payday loan and that a warrant for her arrest would be issued if she did not contact her that day to make arrangements to pay the debt.¹⁵⁵ During the conversation, Ms. Medley rebuffed Ms. Sanders’ explanation that she could not make a payment or else she would lack any money to live on for four weeks until she got her next social security check.¹⁵⁶ Ms. Sanders was so afraid of being arrested that she was on her way to the sheriff’s department to give “literally everything that she had” to avoid being arrested.¹⁵⁷ En route, she stopped and spoke to a friend and was eventually put in contact

151 Chris Flores, *Arrest Threat over Loan Leads to Lawsuit*, DAILY PRESS (Sept. 6, 2007), http://articles.dailypress.com/2007-09-06/news/0709060237_1_payday-loan-post-dated-loan-debt [<https://perma.cc/BF2A-8C32>].

152 The median income for an elderly woman is around \$16,300, and households headed by the elderly are likely to earn under or around \$50,000 a year. This means single elderly women are especially at financial risk. *Administration on Aging: Income*, ADMIN. FOR COMMUNITY LIVING, http://www.aoa.acl.gov/Aging_Statistics/Profile/2014/9.aspx [<https://perma.cc/EJ87-HKKC>] (last visited July 10, 2016). Nearly 10% of the elderly population is in poverty, and another 5.6% is described as “near-poor.” *Administration on Aging: Poverty*, ADMIN. FOR COMMUNITY LIVING, http://www.aoa.acl.gov/Aging_Statistics/Profile/2014/10.aspx [<https://perma.cc/3G8E->] (last visited July 10, 2016). Social security payments are protected under federal law and, therefore, exempt from attachment by lenders and debt collection companies. See *infra* notes 162–164 and accompanying text. Depending on the applicable law, pensions are often exempted from attachment as well.

153 *Payday Lending Victims: Marlies Sanders Tells Her Story*, YOUTUBE.COM (Sept. 25, 2007), <https://www.youtube.com/watch?v=e4HnNXaamD8> [<https://perma.cc/J8ZG-TQ3S>].

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

with a legal aid attorney.¹⁵⁸ A reverse number search led to the discovery that Ms. Medley was calling from an ACA store, not the Sheriff's Department.¹⁵⁹

Future research is necessary to assess the frequency and extent of criminalization tactics used against elderly women in dire financial straits.¹⁶⁰ What is noteworthy is that criminalization tactics that are successful against elderly women are truly an injustice because their payments are likely to be from exempt income sources, especially social security payments.¹⁶¹ Over eighty years ago, the Social Security system was created to "save men and women from the rigors of the poor house" and to protect them from "the hardships of existence."¹⁶² To make sure such payments are used for that purpose, Congress exempted such payments from seizure by creditors,¹⁶³ even after the payments have been received by the recipient.¹⁶⁴ Payday lenders and other creditors are able to use the threat of

158 *Id.*

159 Ms. Sanders subsequently sued ACA for allegedly violating numerous laws, including impersonating a police officer. The parties thereafter settled. According to her attorney, Dale Pittman, Ms. Sanders' story is similar to many other cases. *See Flores, supra* note 151. Note that companies that fraudulently collect payday loan debt may practice "spoofing" to make it appear that the company is calling from a law enforcement office. *See, e.g.,* Press Release, Office of Attorney Gen. for the State of Fla., Attorney General Pam Bondi Warns Consumers of Imposter Scam (Feb. 9, 2015), <http://www.myfloridalegal.com/newsrel.nsf/newsreleases/6DFC1AF1D6C2054085257DE7006CDF0A> [<https://perma.cc/W7Z4-4YL8>] (warning consumers about a collection scam involving phantom payday loan debt and stating that "scammers remain anonymous by altering the caller identification, a process known as spoofing, to display the [Office of Attorney General] fraud hotline number or another legal authority, such as 911").

160 The CFPB could embark on such an endeavor because it has the authority to collect and analyze data. *See, e.g.,* Kelly Cochran, *CFPB Lays Out Fall Rulemaking Agenda*, FED. BANKING L. REP. ¶¶ 153–480 (2014); CFPB'S 2016 SUPPLEMENTAL FINDINGS, *supra* note 49 (collecting, analyzing, and reporting data about payday loans, payday installment loans, car title loans, and deposit advance products).

161 Lea Shepard, *Creditors' Contempt*, 2011 BYU L. REV. 1509, 1536 (2011) (emphasis added) ("[A] debtor facing imprisonment is more likely to feel pressure to settle with the creditor or post bond through any available means: for example, by turning over exempt property, taking out a payday loan or cash advance on her credit card, or borrowing money from friends or family.").

162 *Helvering v. Davis*, 301 U.S. 619, 641 (1937); *Mazza v. Sec'y of Dep't of Health and Human Servs.*, 903 F.2d 953, 960 (3d Cir. 1990) (quoting *U.S. v. Silk*, 331 U.S. 704, 711 (1947)).

163 *See* 42 U.S.C. § 407(a) (2006) ("The right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.").

164 *See, e.g.,* *Philpott v. Essex Cty. Welfare Bd.*, 409 U.S. 413, 417 (1973) (The Supreme Court has made clear that the wording in § 407 "imposes a broad bar against the use of any legal process to reach all social

arrest to get women to turn over social security payments even though the creditors could never legally get a court order to seize such payments.¹⁶⁵ The burden is then shifted to government programs and non-profit organizations to help elderly women struggling to eat and make ends meet.¹⁶⁶

2. Pregnant Women and Young Mothers Are Vulnerable Targets

In addition to targeting elderly women, companies may intensify their criminalization tactics against pregnant women and young mothers to extract payments.¹⁶⁷ Presumably, these companies realize that such women are experiencing more stress and problems that may cause them to be more susceptible to threats of arrest.¹⁶⁸ For instance, in 2005, then-Florida Attorney General Charlie Crist filed suit against Ellis Crosby & Associates, Inc., a debt collection company, and its owner Ted Ellis Crosby, for victimizing more than 120

security benefits [and] [t]hat is broad enough to include all claimants, including a State.”).

165 See, e.g., *Thompson v. Cunningham*, No. 3:14-cv-00751 (W.D. Ky. 2015), 2015 WL 4610193 (“[Geneva] Thompson, whose monthly Social Security payments constitute her only source of income, alleges that she remained indebted to ColorTyme for over two years and has paid over \$2,000.00 on a \$500.00 [payday] loan.”) (granting plaintiffs’ motion to amend their complaint filed against ColorTyme). See also Schmitz, *supra* note 147.

166 See, e.g., Brian T. Melzer, *Spillovers from Costly Credit 2* (U.S. Census Bureau Ctr. for Econ. Studies No. CES-WP-11, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235766 [https://perma.cc/V2LL-JNSG] (finding that families living in areas that have local access to payday loans were 20% more likely to use food stamps and confirming “that the effect of payday lending on food stamp receipt grows through time, as does payday loan availability.”).

167 Most people who take payday loans are young, typically between the ages of twenty-five to forty-four, and female. They are also disproportionately divorced and African American. PEW CHARITABLE TRUSTS, *HOW BORROWERS CHOOSE AND REPAY PAYDAY LOANS* 8 (2013), http://www.pewtrusts.org/~media/assets/2013/02/20/pew_choosing_borrowing_payday_feb2013-%281%29.pdf [https://perma.cc/43U6-XNED].

168 All pregnancies can be a “stressful life event and can require the making of significant life decisions”, and “unplanned pregnancies cause even more stress.” See Pamela A. Geller, *Pregnancy as a Stressful Life Event*, 9 CNS SPECTRUMS 188, 188, 190–92 (2004) (unplanned pregnancies can affect “academic, career or other life plans” which is further exacerbated by lack of committed partners and lack of preparedness to parent effectively, as well as the stress of medical testing such as prenatal screenings and other medical complications that may ensue). Parents with young children are typically more vulnerable due to the effects child rearing can have on normal sleep schedules. See Erika W. Hagen et al., *The Sleep-Time Cost of Parenting: Sleep Duration and Sleepiness Among Employed Parents in the Wisconsin Sleep Cohort Study*, 117 AM. J. EPIDEMIOLOGY 394, 396–400 (2013) (detailing the effects of child rearing on normal sleeping patterns, and how lack of sleep can lead to poor health, learning and memory issues, and day-time fatigue, and noting that parents of young children have “significantly shorter sleep duration” than other groups).

consumers.¹⁶⁹ Crosby's company violated the FDCPA and Florida's Consumer Collections Practices Act when it repeatedly threatened consumers and imposed illegal fees on them for unpaid debts. Crist's investigation began after the Better Business Bureau received many complaints of "aggressive and illegal tactics" used by the company.¹⁷⁰ Specifically, the company impersonated law enforcement and attorneys and threatened consumers with arrest. Ted Crosby allegedly trained his employees to use these "malicious tactics" to collect payments.¹⁷¹ One victim, who was eight months pregnant, was told "they don't give very good prenatal care in jail."¹⁷² The woman was so afraid of being arrested that she refused to go home until the local police assured her that there was no outstanding warrant for her arrest.¹⁷³

Although men dominate the debt collection industry,¹⁷⁴ the few women involved in debt collection may be very adept at using criminalization tactics against women who are pregnant or have young children. For instance, an employee of the aforementioned WSA, pretending to be "Agent Jennifer Scott," repeatedly made the usual threats of arrest to Cathy McLaughlin, a single mother of two children.¹⁷⁵ However, when Ms. McLaughlin, pleading for mercy, revealed that she had two children, the WSA employee told the mother that she would lose custody of her children and serve two to five years in prison.¹⁷⁶ Terrified of losing her children, Ms. McLaughlin gave the WSA employee her debit card information to make a payment.¹⁷⁷

169 See *Florida AG Nails a Collections Firm*, CARDNEWS.COM (Aug. 29, 2005), <http://cardnews.com/2005/08/29/florida-ag-nails-a-collections-firm/> [<https://perma.cc/TRK6-DMS8>].

170 See *id.*

171 *Id.*

172 *Id.*

173 *Id.* This woman originally borrowed only \$200, but a Crosby employee told her that she needed to pay \$989.42 to avoid arrest. *Id.*

174 See generally Darren Waggoner, *Top 5 Women in Collections*, 13 COLLECTIONS & CREDIT RISK 24 (2008) (discussing the top five women doing collection work in a male-dominated industry).

175 WSA Civil Complaint, *supra* note 81, at PX13-1 (Declaration of Cathy McLaughlin).

176 Waggoner, *supra* note 174. Women, although greatly outnumbered in the debt collection world, might have better insight into what tactics will work against women. Female debt collectors know that women's concern for their children's well-being can be paramount in their decision-making process.

177 See WSA Civil Complaint, *supra* note 81, at PX13-2 (Declaration of Cathy McLaughlin) ("When Ms. Scott told me I would lose my children[,] I really became frightened."). Ms. Laughlin, thereafter, checked with the payday loan companies that she had previously borrowed money from and verified that she did not owe

Benita Cannedy, the only woman criminally indicted for her role in WSA, used the alias “Chief Investigator Sharon Wright” to convey that she was a government official when threatening women and their families.¹⁷⁸ In one week, Benita Cannedy made nearly 300 of these calls, repeatedly lying and making fraudulent threats against them and their families.¹⁷⁹ In one example, Cannedy told a woman she was going to jail, and when the woman responded that she was eight months pregnant, Cannedy said, “I don’t care if you are 9 months pregnant. I have a job to do here.”¹⁸⁰ Cannedy told the woman that she had two hours to pay, or else her case would be forwarded to local law enforcement for an arrest warrant to be issued; thus, Cannedy was completely unconcerned with the woman’s welfare or the welfare of her soon-to-be born child.¹⁸¹ Such behavior is especially egregious as pregnant women are under more stress than non-pregnant women.¹⁸² In the government’s sentencing, it acknowledged that this treatment caused “serious financial difficulties” for the victims and “profound and sometimes life-altering emotional distress on the victims and their families.”¹⁸³

The stories above highlight the fact that some companies will attempt to use a woman’s vulnerability in order to get paid or gain possession of their assets. Similar to elderly women who are recipients of social security benefits, pregnant women and young mothers are often recipients of income sources (e.g., child support payments)¹⁸⁴ that are protected

outstanding balances to them. *Id.* at PX13-3.

178 Sentencing Memorandum for Benita Cannedy at 4, 10, *United States v. Williams, Scott & Assocs. et al.*, No. 1:14-cr-00784-AT (S.D.N.Y. Nov. 12, 2014) [hereinafter *Cannedy Sentencing Memorandum*].

179 *Id.* at 10. Ironically, during her sentencing, Benita Cannedy brought up the fact that she was a single mother to a child in hopes of gaining leniency from the court, and the court acknowledged the extra burdens facing single women raising children. *Id.* at 11.

180 *Id.* at 5. For an audio recording of this conversation, see Ben Rooney, *Federal Agents Arrest Debt Collectors in Collection*, CNN MONEY (Nov. 18, 2014), <http://money.cnn.com/2014/11/18/news/debt-collectors-arrest/> [<https://perma.cc/S86U-43ZK>].

181 *Cannedy Sentencing Memorandum*, *supra* note 178, at 5.

182 *See Geller*, *supra* note 168, at 190–92.

183 *Cannedy Sentencing Memo*, *supra* note 178, at 8.

184 *See* 50 STATE STATUTORY SURVEYS: FINANCIAL SERVICES: COLLECTION LAWS, PROPERTY EXEMPTIONS FROM DEBT COLLECTION (Oct. 2015), 0090 SURVEYS 14 (describing exemption laws in all fifty states and identifying many protected income sources, such as child support, welfare benefits, and unemployment benefits).

under state and federal laws and are sometimes coerced into turning over these sources of income to get out of jail or to avoid going to jail.

Given the totality of circumstances faced by some women and the burdens placed on them as income earners and childcare providers, the fear of arrests weighs heavily in their decision to pay creditors and debt collectors. Again, I am not asserting that women are more fearful or that men are less fearful. It could be that men who owe consumer debts may be less likely to express that they are afraid (or may be less likely to act) due to the male ego as acculturated in adolescent boys in the United States.¹⁸⁵

Making payments to avoid imminent arrest is harmful to families because such payments then take priority over paying for actual necessities, and as a result, taxpayers and community-based organizations are relied on to cover necessities.¹⁸⁶ A significant number of women who are custodial parents already have to struggle to survive because of the failure of non-custodial parents to make child support payments.¹⁸⁷ Payday lenders and RTO companies should not be able to exacerbate that struggle by extracting payments from women via criminalization tactics. Legislative action is necessary to stop the criminalization of women who cannot pay, because as long as creditors and debt collectors get a slap on the wrist, they will continue to engage in the most abusive tactics, which can be very harmful to women and their families.¹⁸⁸

185 Men, in general, have continuing anxiety over being “unmask[ed] . . . as insufficiently manly,” which would likely include reporting feelings of fear or being intimidated. Frank Rudy Cooper, “*Who’s the Man?*”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 688 (2009).

186 See, e.g., Melzer, *supra* note 166, at 3 (finding that “as borrowers accommodate interest and principal payments on payday loan debt, they prioritize loan payments over other liabilities like child support payments and they turn to transfer programs like food stamps to supplement the household’s resources”). See generally ALISHA COLEMAN-JENSEN ET AL., U.S. DEP’T OF AGRIC., HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2014 4–8 (2015), <http://www.ers.usda.gov/media/1896841/err194.pdf> [<https://perma.cc/DW44-7EV2>] (reporting statistical data about the frequency of use of food pantries and soup kitchens by families experiencing food insecurity); LEGAL MOMENTUM, *supra* note 129, at 2 (finding that single-parent families with children had the highest level of food insecurity, meaning they lacked sufficient food due to limited cash and other resources, and that “13% used a food pantry” to meet their needs).

187 Women comprise the vast majority of custodial parents to whom child support is owed, and this income source is critically necessary. See TIMOTHY GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT 9–10 (2016), <https://www.census.gov/content/dam/Census/library/publications/2016/demo/P60-255.pdf> [<https://perma.cc/M2XG-VBJS>] (reporting that in 2013, over one quarter of custodial parents who were due child support did not receive any payments from the noncustodial parents); LEGAL MOMENTUM, *supra* note 129.

188 Another woman, Gail Storer, who was battling cancer, had a similar experience of being terrorized by

C. Consumer Debt Criminalization of Women is Akin to Domestic Violence Abuse

Consumer debt criminalization tactics used against women are similar to actions of domestic violence abusers. Note that I am not suggesting that the severity of harm in domestic violence and debt collection is the same; there are nevertheless many similarities in the tactics used, which exploit the same power differentials. To explain the pattern of domestic violence, scholars and advocates often refer to a “power and control” diagram that visually portrays actions by the abuser that are at the core of domestic violence. The diagram is a wheel with spokes showing the interrelated dimensions of the abuser, and the spokes are segmented into the following eight categories: “(1) using intimidation; (2) using coercion and threats; (3) using emotional abuse; (4) using economic abuse; (5) using isolation; (6) using minimization, denial, and blame; (7) using children; and (8) using male privilege.”¹⁸⁹ One can probably call to mind an abusive husband or intimate partner and recognize how his behavior fits the above categories of power and control.

1. Power and Control in Abusive Debt Collection

A recent federal enforcement action against a debt collector provides an example of how abusive debt collection tactics are parallel to actions of a domestic violence abuser. In 2013, the FTC shut down Texas-based debt collectors for violating the Fair Debt Collection Practices Act. Gerald Wright, using the alias Barry Schwartz, was the owner and chief executive officer of the several Texas-based companies, including Goldman Schwartz, Inc., Debtcom, Inc., and Harris County Check Recovery, Inc. (the “Wright Defendants”).¹⁹⁰ According to the FTC complaint, the Wright Defendants operated nationwide as debt

a payday lender’s debt collection tactics, which included calling her up to five times each day. Chris Flores, *When Lenders Cross the Line*, DAILY PRESS (Sept. 16, 2007), http://articles.dailypress.com/2007-09-16/news/0709160024_1_payday-lenders-loans-breast-cancer [<https://perma.cc/UKE7-CNMV>]. She stated that these tactics caused her to suffer anxiety and depression, and she described her experience as follows: “To hear the phone just constantly ringing—*your heart stops beating for a second.*” *Id.* (emphasis added).

189 See Jane K. Stoeber, *Transforming Domestic Violence Representation*, 101 KY. L.J. 483, 511–12 (2013) (“The Power and Control Wheel is the other widely accepted tool for understanding the dynamics of domestic violence. This model was developed by the Domestic Abuse Intervention Project . . .”).

190 See Complaint, Fed. Trade Comm’n v. Goldman Schwartz, Inc., No. 4:13-cv-00106 (S.D. Tex. Jan. 14, 2013), <https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130131goldmanschwartzcmpt.pdf> [<https://perma.cc/KDR3-C3BR>] [hereinafter Wright Complaint].

collectors for several payday loan companies,¹⁹¹ including some of the nation's largest payday lenders such as Ace Cash Express¹⁹² and Advance America.¹⁹³

The FTC's complaint alleged practices by the Wright Defendants that comport with the power and control diagram. First, the Wright Defendants wielded weapons of intimidation and male privilege by falsely claiming to be lawyers in the law firm called Goldman Schwartz¹⁹⁴ and pretending to be detectives and other workers employed by or working with law enforcement, including the Houston District Attorney's Office (no such office existed).¹⁹⁵ Second, the Wright Defendants used threats and coercion by telling consumer debtors that their failure to pay would result in their arrest. Specific threats included "we'll send the sheriff's department to your job and take care of this the hard way."¹⁹⁶

Besides threats of arrests to coerce payments, the Wright Defendants used abusive language to inflict emotional harm. During telephone communications with consumer debtors, the Wright Defendants accused consumers of being "criminals" and deadbeats and accused them of stealing money and committing check fraud for failing to pay. The initial complaint filed by the FTC described the victims as "consumers" and left the impression that the abusive and accusatory language was used equally against male and female consumers. However, affidavits and other documents filed by the FTC in support of an injunction reveal that the Wright Defendants directed profane language to female

191 See *id.* at ¶ 18 (stating that the Wright Defendants were debt collectors for "Ace Cash Express [sic], Advance America, Allied Cash Advance, Checkmate, First Cash Advance, and MoneyMart.").

192 See Danielle Douglas, *Payday Lender Ace Cash Express to Pay \$10 Million Over Debt-Collection Practices*, WASH. POST (July 10, 2014), https://www.washingtonpost.com/business/economy/payday-lender-ace-cash-express-fined-over-abusive-debt-collection-practices/2014/07/10/04e9fa08-0858-11e4-8a6a-19355c7e870a_story.html [<https://perma.cc/EM7V-P3KE>].

193 See Jim Puzzanghera, *Regulators Launch Major Crackdown on Payday Lenders*, L.A. TIMES (Mar. 26, 2015), <http://www.latimes.com/business/la-fi-payday-lender-rules-20150326-story.html> [<https://perma.cc/9QXS-WJCM>].

194 See Wright Complaint, *supra* note 190, at ¶ 21 ("[Gerald] Wright, himself, tells consumers he is an attorney. Wright uses the alias Barry Schwartz when he claims to be an attorney working for Goldman Schwartz. In truth and in fact, Wright is not an attorney, and Defendants neither have a legal department, nor have employed persons to work as attorneys.").

195 See *id.* at ¶ 22 (alleging that the Wright Defendants "claimed to work 'hand-in-hand' with local sheriff's offices, police departments, and a district attorney's office's hot check division").

196 See *id.*

consumers that included calling them a “b*tch” and telling them that needed to make a “f***ing payment.”¹⁹⁷

The Wright Defendants also wanted to make consumers fear losing financial control by threatening economic harm. For instance, Darci Davis stated that one of the Defendants told her that she would receive a three-year prison sentence and lose her disability income if she did not pay a \$980 debt.¹⁹⁸ The Defendants routinely told consumer debtors that they would be sued and would end up losing their property and paying hefty legal fees. Moreover, the Defendants told consumers that their driver’s licenses would be “flagged” or “suspended.”¹⁹⁹ This meant not only that the consumers ran the risk of being arrested if stopped by the police for a traffic violation, but also ran the risk of being denied employment by potential employers and denied a place to stay by landlords who check consumers’ credit histories. The Wright Defendants, of course, did not have the ability to flag or suspend a driver’s license, but the consumers who believed that they could were coerced into making payments.

Similar to domestic violence abusers, the Wright Defendants engaged in collection tactics designed to isolate and humiliate consumers.²⁰⁰ For instance, they regularly made collection calls early in the morning (before eight a.m.) and late at night in violation of the FDCPA. They not only called the consumers at home, but they called their employers and their relatives. One female consumer stated that the Wright Defendants not only called her incessantly, sometimes pretending to be a law firm and other times pretending to be a law enforcement agency, but they called her workplace and told her coworkers that she would be arrested and told the coworkers that they would have to identify her out of a lineup of suspects.²⁰¹

197 See *id.* at ¶ 33. See also FTC Motion for TRO, *supra* note 116, at 19 (stating that one collector “yelled at a Missouri consumer, repeatedly called her a ‘b*tch,’ said other ‘very obscene things,’ and then hung up on her” and other “collectors yelled at a Texas consumer, repeatedly calling her stupid and a deadbeat”).

198 See FTC Motion for TRO, *supra* note 116, at 10–11.

199 See Wright Complaint, *supra* note 190, at 10–11. See also FTC Order, *supra* note 80 (finding that some WSA employees falsely threatened that consumers who failed to pay would have their driver’s licenses revoked or suspended).

200 Elderly women are nearly twice as likely to live alone as their male counterparts, making them easier to isolate. *Administration on Aging: Living Arrangements*, ADMIN. FOR COMMUNITY LIVING, http://www.aoa.acl.gov/Aging_Statistics/Profile/2014/6.aspx [https://perma.cc/4PLD-JHSV] (last visited July 10, 2016).

201 See Blake Ellis, *Debt Collection Horror Stories*, CNN MONEY (Feb. 6, 2013), <http://money.cnn.com/2013/02/06/pf/debt-collection> [https://perma.cc/LJH2-49PT].

Finally, the Wright Defendants told female debtors that the police or child protective services (“CPS”) would take custody of their children.²⁰² Because mothers generally are the primary caregivers for minor children,²⁰³ such threats would strike terror in the hearts of female debtors, especially those who are also minorities or are low-income earners.²⁰⁴ Tashira Alexander’s affidavit stated that the Wright Defendants told her that if she were stopped for any reason by the police while driving, her child, if sitting in the car, would be taken by CPS.²⁰⁵ Ms. Lou Seely was apparently so disturbed by the CPS threat that she called her local police department after the Wright Defendants told her that she would be arrested and her great-granddaughter would be taken by CPS.²⁰⁶

In support of a temporary restraining order that was eventually granted, the FTC provided numerous exhibits that demonstrate a pervasive pattern of debt collection practices; such practices were particularly abusive towards female debtors. Monique Smith, a former assistant to Mr. Wright, became an informant for the FTC. Her testimony

202 Appendix to Plaintiff Federal Trade Commission’s Memorandum in Support of Its *Ex Parte* Motion for Temporary Restraining Order at 112–34, 167–68, Fed. Trade Comm’n v. Goldman Schwartz, Inc., No. 4:13-cv-00106 (S.D. Tex. Jan. 14, 2013) [hereinafter App’x to FTC Motion for TRO].

203 See PARKER & WANG, MODERN PARENTHOOD, *supra* note 130, at 5 (reporting that fathers, since 1965, have increased the number of hours spent providing childcare and doing chores, but indicating that the majority of hours spent providing childcare and doing chores is done by mothers).

204 It is well-documented that communities comprised of mostly low-income and minority families are subject to over-policing by law enforcement. Similarly, children from minority and low-income families are disproportionately taken by child protective agencies. See, e.g., Karen Zilberstein, *Parenting in Families of Low Socioeconomic Status: A Review with Implications for Child Welfare Practice*, 54 FAM. CT. REV. 221, 222 (2016) (citing to work of researchers that suggests “[low-income] families are inappropriately referred to child welfare due to factors associated with poverty, such as a lack of resources, rather than intentional maltreatment or neglect, per se”); Lisa Johnson et al., *Addressing Disproportionality and Disparity in Child Welfare: Evaluation of an Anti-Racism Training for Community Service Providers*, 31 CHILDREN & YOUTH SERVS. REV. 688, 688 (2009) (reporting that “in 2006, 15% of children in this country were Black, while 32% of the children in foster care were Black” and discussing research showing that “children of color and their families who are involved with the child welfare system often experience different treatment and more negative trajectories than White children and families”). Moreover, similar to the distrust of law enforcement, minorities do not trust child protective services. Johnson et al., *supra*, at 688. Therefore, it would be reasonable for a woman who is a minority and unable to pay her debts to take seriously a threat that an arrest could lead to the loss of custody of her children.

205 App’x to FTC Motion for TRO, *supra* note 202, at 112–34.

206 *Id.* at 167–68. A study exploring fear negotiation differences between the sexes determined that in public places men were more likely to flee, whereas women were more likely to think of alternative solutions. Karen A. Snedker, *Neighborhood Conditions and Fear of Crime: A Reconsideration of Sex Differences*, SAGE CRIME & DELINQUENCY J., 45, 63 (2011). This may make women more willing to pay to avoid threats.

indicated that among the Wright Defendants were eight long-term collectors who abused female consumers by: (1) calling them b*tches; (2) accusing them of committing crimes; (3) threatening to have them arrested; (4) claiming their driver's licenses would be suspended; and (5) claiming their children would be taken from them.²⁰⁷ Such actions were intended to make female consumers fear not only losing their freedom, but losing their ability to get to work, to earn a living, and to care for their children.²⁰⁸ In short, the Wright Defendants, similar to domestic violence abusers, claimed to have the power to cause female debtors to lose control of their lives.

Charisma Anderson, one of the victims of the Wright Defendants, stated that she suffered anxiety, fear, and other negative emotions after they accused her of committing a crime and threatened to have her arrested if she failed to pay \$785 immediately on an outstanding payday loan debt of \$1,400.²⁰⁹ Nearly two years after receiving telephone calls from the Wright Defendants, Ms. Anderson cried during an interview by a local television reporter as she recalled feeling "very threatened" and distressed by their calls. She further stated: "I couldn't get out of my head what this man [Gerald Wright] said he could do."²¹⁰

207 See, e.g., FTC Motion for TRO, *supra* note 116; Appendix to Plaintiff Fed. Trade Comm'n's Memorandum, Vol. 1, at 39, Fed. Trade Comm'n v. Goldman Schwartz et al., No. 4:13-cv-00106 (S.D. Tex. Jan. 14, 2013) (Investigation Hearing Transcript of Monique Smith) (containing a complaint submitted by Brandi Morgan who stated that Defendant's employee called her a b*tch repeatedly).

208 Women tend to have a greater awareness of danger, which suggests women react to the same level of risk with more fear than men. Snedker, *supra* note 204, at 65.

209 See Amy Davis, *Houston-based Debt Collector Shutdown*, KPRC (Feb. 1, 2013), <http://www.click2houston.com/news/Houston-based-debt-collector-shut-down/18377900> [<https://perma.cc/HRF7-JDPA>].

210 *Id.* Telling, among the dozens of consumer complaints supplied by the FTC, is the fact that almost all of the consumers who stated that they were afraid, fearful, or scared were women. Women often report higher levels of fear of issues like crime, feel less in control of fearful situations, and perceive consequences of crime to be worse than men, leading women to experience a generally "higher level of fear." Diederik Cops & Stefaan Pleysier, 'Going Gender' In Fear of Crime, *BRIT. J. CRIMINOLOGY* 58, 66, 71–72 (2010). I am not suggesting that the men were not frightened by the Wright Defendants' threats. Men in our society have been taught at an early age not to show any signs of fear, and that may explain the absence of statements regarding fear from the complaints submitted by male consumers. See Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in *THE GENDER OF DESIRE: ESSAYS ON MALE SEXUALITY* 25, 119, 128 (2005) (describing the never-ending obligation for men to prove their masculinity and stating that "[t]o admit weakness, to admit frailty or fragility, is to be seen as a wimp, a sissy, not a real man"). Men are often seen as "stoic, unemotional, and unperturbed by life's difficulty," which often pressures men into "not disclos[ing] to others the psychological and emotional turmoil they experience" in order to fit the stereotype of the "'normal' man." Joseph R. Schwab et al., *Silence and (In)Visibility in Men's Accounts of Coping with Stressful Life Events*, 30 *GENDER & SOC'Y* 289, 290, 298 (2016) (stating that this pressure to appear stoic and unemotional seems to be exacerbated when men talk to people in whom they do not have faith or trust).

The bottom line is that the Wright Defendants, along with other abusive debt collectors, use egregious debt collection tactics on women because they are likely to be effective—to result in actual payments. The FTC obtained a permanent injunction shutting down the Wright Defendants and a judgment of \$1,412,888 against them.²¹¹ The FTC alleged that the Wright Defendants took in on average \$100,000 per month over a thirty-month period just in debit and credit card transactions alone. Unfortunately, the FTC did not break down the percentage of payments that came from male and female consumers, but it revealed that sometimes consumers made payments on debts they did not actually owe.

2. Power and Control Exerted to Accomplish Unlawful Repossessions

The comparison of domestic violence tactics with unlawful repossession tactics is perhaps even stronger than the comparison with unlawful debt collection. Patricia Haase's horrific experience with repossession agents (hereafter "repo men") hired by U.S. Auto Title Lenders, Inc. ("U.S. Auto") provides a glaring example. In need of cash immediately, Ms. Haase went to U.S. Auto in Chicago, Illinois, and signed a loan agreement pledging her already paid-off car as collateral to borrow \$770 at annual percentage rate ("APR") of 300%.²¹² This type of loan is called a car title loan because it is secured by title to the consumer's vehicle.²¹³ Car title loans have triple-digit interest rates and are equal to only a fraction—between one-fourth and one-half—of the value of the consumer's vehicle. The consumer is then obligated to repay the loan, usually thirty days later, by making a few payments or one single balloon payment.²¹⁴ Like payday loans, car title loans can lead to consumers being trapped in a cycle of debt and are, therefore, considered predatory and even worse than payday loans because some consumers end up losing ownership of their

211 See Press Release, Fed. Trade Comm'n, FTC Puts Texas-based Operation Permanently out of the Debt Collection Business After It Allegedly Used Deception, Insults, and False Threats against Consumers (May 19, 2014), <http://www.ftc.gov/news-events/press-releases/2014/05/ftc-puts-texas-based-operation-permanently-out-debt-collection> [<https://perma.cc/8RTA-ZKV2>] (named as defendants were Goldman, Schwartz Inc, doing business as Goldman, Schwartz, Lieberman & Stein; Debtcom, Inc., doing business as Cole, Tanner, & Wright; Harris County Check Recovery Inc.; and The G. Wright Group Inc., doing business as The Wright Group.).

212 Defendant Patricia Haase's Trial Memorandum, U.S. Auto Title Lenders, Inc. v. Haase, No. 05-CH-21585 (Ill. Cir. Ct. 2013) [hereinafter Haase's Trial Memorandum].

213 CTR FOR RESPONSIBLE LENDING & CONSUMER FED'N OF AM., CAR TITLE LENDING: DRIVING BORROWERS TO FINANCIAL RUIN 4 (2005), http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/rr008-Car_Title_Lending-0405.pdf [<https://perma.cc/K93X-MGDP>]. Car title loans are sometimes referred to as auto title loans, car title pawns, title pledge loans, motor equity lines of credit, and sales and leasebacks, and are marketed as small emergency loans to cash-strapped, credit-challenged consumers. *Id.*

214 *Id.*

cars.²¹⁵ In fact, in one state enforcement action against two car title lenders, an investigation uncovered at least 218 repossessions of vehicles by these lenders.²¹⁶

After struggling to make payments, Ms. Haase endured the first repossession of her vehicle by U.S. Auto, but she was able to make the necessary payment to regain possession. Unfortunately, after finding herself again unable to make the payment, Ms. Haase called U.S. Auto to request additional time to pay off her loan.²¹⁷ According to Ms. Haase, a U.S. Auto employee informed her that the company would not repossess her car if the loan was paid off by the next day.²¹⁸

Instead of getting an extra day to pay, Ms. Haase was startled by the sound of loud banging on her front door at 10:30 that night, and eventually succumbed to unlawful repossession tactics comparable to the power and control wielded by domestic violence abusers.²¹⁹ When Ms. Haase cracked open her door, standing in front of her were two of U.S. Auto's repo men wearing badges resembling police badges, and yelling at her to give them the keys to her car.²²⁰ One of the primary tactics employed by domestic violence abusers is intimidation based on the knowledge they have about the victims. The repo men, as the agents for U.S. Auto, would have received detailed information

215 See CFPB: *Auto Title Loans Steer Borrowers into 'Cycle of Debt'*, FED. BANKING L. REP. ¶¶ 154–361 (May 18, 2016) (describing the similarities between payday loans and car title loans, summarizing the CFPB's analysis of over 3.5 million car title loans, and finding most borrowers wind up in a cycle of debt); Leah A. Plunkett & Ana Lucía Hurtado, *Small-Dollar Loans, Big Problems: How States Protect Consumers from Abuses and How the Federal Government Can Help*, 44 SUFFOLK U. L. REV. 31, 34–35 (2011) (stating that some states allow car title lenders to keep any surplus funds remaining after repossessing and selling the consumer's car and, thereby, allow these lenders "to reap a windfall"); Christopher Peterson, "Warning: Predatory Lender"—A Proposal for Candid Predatory Small Loan Ordinances, 69 WASH. & LEE L. REV. 893, 908 (2012) (discussing, among other things, consumers' unrealistic optimism about being able to repay their debts and proposing a model ordinance that mandates any lender who charges interest rates in excess of 45% must post signs warning the public that it is a "Predatory Lender").

216 See Chris Dickerson, *AG's Office Reaches \$1.2M Settlement in Auto Title Lender Case*, W. VA. REC. (Apr. 9, 2014), <http://wvrecord.com/stories/510586931-ag-s-office-reaches-1-2m-settlement-in-auto-title-lender-case> [<https://perma.cc/R6V6-N8UP>]. See also CFPB: *Auto Title Loans Steer Borrowers into 'Cycle of Debt'*, *supra* note 215 (finding that "about a third of [auto title] loan sequences experience a default and one-in-five result in the repossession of the borrower's vehicle").

217 Haase's Trial Memorandum, *supra* note 212, at 1.

218 *Id.*

219 *Id.* at 2.

220 *Id.*

about Ms. Haase in order to attempt a successful repossession of her car. Showing up at her house at 10:30 p.m. demonstrates that the men very likely knew she was a single woman and were not afraid that she would react violently to their presence.²²¹

The repo men then used the second tactic from the matrix of domestic violence markers by making threats to coerce her into turning over the vehicle.²²² The men threatened to damage her car unless she handed them the keys.²²³ As she opened the door, one of the repo men actually pushed his way into her home without her permission.²²⁴ Like a domestic violence abuser, the repo men's behavior contained the implicit threat of physical violence to her.²²⁵

The repo men inflicted emotional abuse as a third tactic of domestic violence. By showing up late at night, a time when most people expect peace and quiet, and yelling loudly and banging on her door, the repo men disturbed and attracted the attention of Ms. Haase's neighbors and woke her child.²²⁶ Creating witnesses to the verbal abuse caused Ms. Haase to suffer embarrassment and humiliation and, therefore, the repo men inflicted emotional abuse.

The repo men's threat to damage Ms. Haase's car was also an attempt to economically abuse her. As a single mother, Ms. Haase depended completely on this vehicle as her means of transportation. If they damaged her car, her financial predicament would be even worse due to costly repairs. She already lacked the money U.S. Auto demanded to pay the car title loan off, and she definitely did not have any money to pay for car repairs. Ms. Haase, nevertheless, continued to resist the repossession because she needed the car for transportation.²²⁷

221 Had Ms. Haase had a husband or boyfriend living in the home, the repo men would not have attempted such an arrival because it would have likely led to a physical altercation. Because the overwhelming majority of women do not own guns, the repo men most likely did not fear that Ms. Haase might react to their appearance by getting a gun. See *Major Survey Shows Gun Ownership Declining*, N.Y. TIMES (Mar. 9, 2015), https://web.archive.org/web/20150711132304/http://www.nytimes.com/aponline/2015/03/09/us/politics/ap-us-poll-gun-ownership.html?_r=0 [<https://perma.cc/G6LJ-UJZN>] (stating that gun ownership by women has consistently remained at 12% since 1980).

222 Haase's Trial Memorandum, *supra* note 212, at 2.

223 *Id.*

224 *Id.*

225 *Id.* at 8 (The presence of the armed officers "represented implicit force.").

226 *Id.* at 2.

227 Like Ms. Haase, many consumers who obtain car title loans cannot afford to lose their vehicles to

These same tactics also function to make her feel isolated and, therefore, helpless. Again, the repo men not only appeared late at night but also made threats to take away her car, her main source of transportation. One of them barged into her home while the other stood at the doorway. They hoped that Ms. Haase would feel trapped, and thereby, coerce her into giving them the keys to her car.

Recognizing that she was outnumbered, Ms. Haase then called U.S. Auto to get an employee to confirm that she had an extra day to pay and instruct the repo men to leave.²²⁸ Instead, the U.S. Auto employee engaged in another abusive tactic via denial and blaming. The employee told Ms. Haase that she had to pay then or the employee would call the police if Ms. Haase continued to fight the repossession.²²⁹

Next, the repo men used the fact that Ms. Haase had a child against her, another spoke in the domestic violence wheel of abuse. After being awakened by the commotion, the seven-year-old girl came downstairs and started crying as she observed the men yelling at her mother. Instead of the repo men lowering their voices or making attempts to assure the child that no harm would ensue, one of the repo men took a step towards or near the child as he demanded the car keys from Ms. Haase.²³⁰ Because of the commotion, the child could have felt that her physical well-being was also in jeopardy.

Ms. Haase then decided to call 911.²³¹ When the police arrived, rather than assisting Ms. Haase, the repo men took advantage of their male privilege. They told the police that because Ms. Haase had defaulted on the car payments, they had the right to take the

repossession and are completely dependent on their vehicles for transportation because they do not have the ability to simply buy another car. *See generally* Natalie Martin & Ozymandias Adams, *Grand Theft Auto Loans: Repossession and Demographic Realities in Title Lending*, 77 Mo. L. REV. 41 (2012) (finding that while consumers who obtain car title loans own their vehicles outright, most earn income at or near the poverty line). Car title lenders have been sued for violating state law for unlawful repossessions. For example, in North Carolina one online title lender charged interest rates at 257%, even though interest rates are capped under state law at 16% for loans issued by unlicensed lenders. *See* Press Release, N.C. Dep't. of Justice, Online Car Title Lender Banned from NC for Unlawful Loans, AG Says (May 2, 2016), <http://www.ncdoj.gov/News-and-Alerts/News-Releases-and-Advisories/Press-Releases/Online-car-title-lender-banned-from-NC-for-unlawfu.aspx> [<https://perma.cc/76R6-KRYL>] (stating that a vehicle was repossessed by the unlicensed lender while the consumers were taking their daughter to school).

228 Haase's Trial Memorandum, *supra* note 212, at 2.

229 *Id.*

230 *Id.*

231 *Id.*

car.²³² The police officers then sided with the repo men and told Ms. Haase that she should comply.²³³ Dismayed, Ms. Haase let the repo men take her car.²³⁴ Although the police officers sided against her, the law was fortunately on her side, and Ms. Haase eventually obtained a judgment against U.S. Auto and the repo company for this unlawful repossession.²³⁵

Notably, Ms. Haase's lack of help from the police officers is consistent with early research data indicating a lack of response from law enforcement when responding to a 911 call about domestic violence.²³⁶ Like many victims of domestic violence, Ms. Haase was

232 *Id.*

233 *Id.*

234 Haase's Trial Memorandum, *supra* note 212, at 2.

235 See Docket for U.S. Auto Title Lenders, Inc. v. Haase, No. 05-CH 21585, Entry Nos. 169 and 170 (indicating that two judgments were entered in favor of Ms. Haase, who alleged that U.S. Auto and its repossession agents violated the Uniform Commercial Code ("UCC") by breaching the peace in several ways, including the use of police officers to facilitate the repossession). After Ms. Haase obtained a default judgment against the repossession company, she collected \$20,000, of which \$15,000 was for punitive damages. See Haase's Trial Memorandum, *supra* note 212, at 4 (alleging several ways the defendants breached the peace).

Under Article 9 of the UCC, a secured party, such as U.S. Auto, can use self-help to repossess "without judicial process, if it proceeds without breach of the peace." See U.C.C. § 9-609. However, a secured party and its repossession agent violate the UCC if they disturb the peace, for example, by creating a ruckus or trespassing on a debtor's private property and refusing a debtor's demand to depart. See, e.g., *Duke v. Garcia*, No. 11-CV-784-BRB/RHS 2014, WL 1318646, at *2-3 (D.N.M. Feb. 28, 2014) (holding liable a repossession company and its owner for breaching the peace when they remained on the debtor's property after she became irate, called 911, and screamed repeatedly "I want them off my property!"). Moreover, if the secured party or its repossession agent uses law enforcement to accomplish repossession, this amounts to an unlawful repossession because it constitutes a breach of the peace. See, e.g., *id.* at *5 (finding, among other things, that the company's owner admitted that the police officers "controlled" the repossession, and holding liable the owner and his company for breaching the peace by using the police officers to accomplish the repossession); *Id.* at *10-11 (relying on official UCC commentary and case law to hold the lender, as the secured party, liable for the actions of the repossession company, which used the assistance of police officers to repossess the debtor's vehicle). See U.C.C. § 9-609, Comment 3 (stating that "courts should hold the secured party responsible for the actions of others taken on the secured party's behalf, including independent contractors engaged by the secured party to take possession of collateral").

236 See, e.g., Johanna R. Shargel, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 YALE L.J. 1849, 1873-74 (1997) ("Congressional hearings on the VAWA Remedy showed that gender bias contaminates every level of the state system, and that insensitive and unresponsive treatment by police, prosecutors, and judges often results in low reporting and conviction rates. Police, responsible for the initial screening of cases, are notorious for not responding to situations involving violence against women, particularly domestic violence."). Current research shows that the police are more responsive, and there are concerns that the police's response may be too harsh on the accused, partly due to laws that require an arrest

then isolated, helpless and hopeless in a lose-lose situation. Rather than remaining neutral, the police officers' presence had a coercive impact on her via their order that she turn over the car.²³⁷ If she had fought repossession, she was surrounded by a group of men, all wearing badges and telling her to give up her vehicle.²³⁸ They had the physical strength to force her to the ground and make her comply. Feeling overwhelmed, mentally, emotionally, and physically, Ms. Haase felt coerced into finally giving up her keys.²³⁹ The police, often the only authority that is legitimately able to afford the victim some protection, had instead led her to fear that she could be arrested for fighting the repossession.²⁴⁰ If she had fought it and gotten arrested, she would have still lost the car and would have also lost, at least temporarily, custody of her daughter.

Ms. Haase faced a choice akin to the choice faced by young mothers who are victims of domestic violence. As the mother of a minor child, Ms. Haase adhered to the abuser's demands after enduring escalating threats and after realizing that the police would not

when the police are called. *See What are the State Laws that Mandate Arrest for DV Assault*, STOP ABUSIVE & VIOLENT ENVIRONMENTS, <http://www.saveservices.org/dvlp/policy-briefings/what-are-the-state-laws-that-mandate-arrest-for-dv-assault> [<https://perma.cc/6KEM-XQXZ>] (last visited Sept. 8, 2016).

237 In the context of unlawful repossessions, courts have held that the police's presence can have a coercive or intimidating effect. *See, e.g., Stone Machinery Co. v. Kessler*, 463 P.2d 651, 655 (Wash. Ct. App. 1970) (holding that sheriff's arrival and words—"We come over to pick up this tractor"—were alone sufficient evidence of "constructive force, intimidation and oppression constituting breach of the peace").

238 Haase's Trial Memorandum, *supra* note 212, at 2.

239 *Id.* Ms. Haase did not sue the police officers for their role in the unlawful repossession. However, law enforcement officers can sometimes be held personally liable for their role in unlawful repossessions. *See* 42 U.S.C. § 1983, which, as interpreted by case law, imposes liability on state actors, and private individuals participating as cohorts with the state actors, for using a "badge of authority" to deprive individuals of federal civil rights. *See, e.g., Mitchell v. Gieda*, 215 F. App'x 163, 165 (3d Cir. 2007) ("[A]n officer's presence at the scene of, and acquiescence in, a private repossession is not state action unless accompanied by affirmative intervention, aid, intimidation, or other use of power which converts him from a neutral third party to, in effect, an assistant of the repossessing party.").

240 Cases have been filed against several car title lenders for allegedly making threats of arrests against consumers and unlawfully repossessing their cars. *See, e.g., Complaint at* ¶¶ 14–16, *Shelton v. U.S. Auto Title Lenders*, No. 07 M1 145187 (Ill. Cir. May 30, 2007), 2007 WL 6079307. The Attorney General of West Virginia sued two car title lenders for numerous alleged violations of state law, including threatening to have consumers arrested for failure to repay their loans and for challenging repossessions. *See Second Amended Complaint for Injunction, Consumer Restitution, Civil Penalties, & Other Appropriate Relief at* ¶¶ 41, *West Virginia v. Fast Auto Loans, Inc.*, No. 12-C-231 (W.Va. Cir. Ct. Dec. 24, 2013), 2013 WL 8539987. Without admitting liability, the title lenders agreed to refrain from numerous practices, including "making false threats of arrest, criminal prosecution or other prohibited actions." *See Dickerson, supra* note 216.

offer help.²⁴¹ Moreover, as is the case with victims of domestic violence, Ms. Haase's fear of being arrested was not unfounded. As documented by domestic violence research, it is not uncommon for women to be arrested along with their abusive husbands or intimate partners even though the women have done nothing wrong.²⁴² Consequently, calling the police may not afford the female consumer debtor any protection from unlawful collection practices designed to control and coerce just as it often does not afford protection to women victimized by domestic violence. In the end, like women who are the victims of domestic violence, female debtors are sometimes forced into submission through coercive tactics.²⁴³

As depicted above, debt collection tactics employed by car title lenders and their repossession agents can inflict terror that is beyond the pale of any reasonable collection practice.²⁴⁴ The consumer not only is at risk of losing her only reliable means of transportation, but is terrorized by threats of arrest and harm until repossession is accomplished. Title lenders that have allegedly engaged in such behavior have been sued and occasionally fined.²⁴⁵ However, such fines may be insufficient to deter lenders from using criminalization

241 See Nina W. Tarr, *The Cost to Children When Batterers Misuse Order for Protection Statutes in Child Custody Cases*, 13 S. CAL. REV. L. & WOMEN'S STUD. 35, 62 (2003) ("Women postpone leaving battering relationships because they fear losing custody of their children, especially when they have no documentation of the abuse.").

242 See Daniel G. Saunders, *The Tendency to Arrest Victims of Domestic Violence: A Preliminary Analysis of Officer Characteristics*, 10 J. INTERPERSONAL VIOLENCE 147, 149 (1995) (reporting the results of a qualitative empirical analysis of police officer responses to domestic violence calls); Rona Kaufman Kitchen, *Constrained Choice: Mothers, the State, and Domestic Violence*, 24 TEMPLE POL. & C.R. L. REV. 375 (2015); Ida M. Johnson, *Victims' Perceptions of Police Response to Domestic Violence Incidents*, 35 J. CRIM. JUST. 498, 507 (2007) (studying whether women would call the police to deal with a subsequent incident with the abuser and finding that the large majority of women would not call the police due to fear of being arrested under a dual arrest policy of arresting both the alleged victim and perpetrator).

243 Women are more likely to develop stress-related disorders such as PTSD. Sabra S. Inslicht et al., *Sex Differences in Fear Conditioning in Posttraumatic Stress*, 47 J. PSYCHIATRIC RES. 64 (2013).

244 Ms. Haase obtained a judgment against the title lender and the repossession company. See Docket for U.S. Auto Title Lenders, Inc. v. Haase, *supra* note 233. Repossession companies retained by car title lenders have also come under the scrutiny of New York's attorney general. See *New York Attorney General Issues a Warning to Repossessors*, AM. RECOVERY ASSOC., INC. (Jan. 6, 2014), <http://repo.org/recovery-industry-news/new-york-attorney-general-issues-a-warning-to-repossessors/#.VYClJWh3IV> [<https://perma.cc/Q6H8-232T>]. In addition to a letter warning repo companies to comply with New York law, Attorney General Schneiderman obtained a settlement with ten repo businesses, which agreed not to repossess vehicles at the request of title-loan companies. See Press Release, Office of N.Y. Attorney Gen., A.G. Schneiderman Announces Major Agreements to Stop Marketing of Title Loans in NYS (Apr. 1, 2014), <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-major-agreements-stop-marketing-title-loans-nys> [<https://perma.cc/6YNG-C9S4>].

245 See Dickerson, *supra* note 216 (reporting settlement with two title lenders that allegedly charged illegal

tactics, especially when lenders earn billions issuing loans that charge triple-digit interest rates.²⁴⁶

In summary, in light of the apparent disparate treatment of women by lenders and debt collection companies, state and federal lawmakers should consider passing legislation to protect women and their families from criminalization tactics. Unfortunately, the legal landscape, as explained in the next Section, makes it fairly easy for bad actors to profit from criminalization tactics.

III. Existing Laws that Enable Criminalization

State laws currently on the books are being used to criminalize consumers for failure to return RTO property and for failing to repay various consumer loans. One category of these laws is theft-related statutes that are either worded vaguely or interpreted broadly to minimize mens rea requirements. These laws do not have consumer protections and are more likely to lead to actual arrests and the imposition of fines. The second category of criminal laws used against consumers is bad-check or fraud statutes, which, although they may have exemptions for consumers, are nonetheless used to pressure consumers into paying or pleading guilty.

A. An Analysis of Theft-Related Crimes that Enable RTO Companies to Criminalize their Customers

As revealed in the fifty-state survey prepared by MultiState Associates, the RTO

interest rates and threatened consumers with arrests and criminal prosecution). Other states have sued title lenders for violating state consumer protection laws. *See, e.g.*, Joint News Release, Wisc. Dep't. of Justice & Wisc. Dep't. of Fin. Insts., Department of Financial Institutions and Department of Justice, Along with Legal Aid Society of Milwaukee, Inc., Reach a Preliminary Multi-Million-Dollar Settlement with Wisconsin Auto Loans, Inc. (Sept. 16, 2013), <https://www.wdfi.org/newsroom/press/2013/WisconsinAutoTitleLoansSettlement.pdf> [<https://perma.cc/DA48-52B2>].

246 *See* CTR. FOR RESPONSIBLE LENDING, CAR TITLE LENDING: DISREGARD FOR BORROWERS' ABILITY TO REPAY (2014), <http://www.responsiblelending.org/other-consumer-loans/car-title-loans/research-analysis/Car-Title-Policy-Brief-Ability-to-Repay-May-12-2014.pdf> [<https://perma.cc/246U-P6K4>] (stating that title lending takes in \$4.3 billion annually by charging excessive fees, and that John Robinson, the President of TitleMax, admitted that most of the company's profits are earned from consumers' being indebted long-term and stating that the typical car title loan is refinanced eight times). One online title lender stopped doing business in the state of Vermont after it was sued and settled the case. Press Release, Office of the Attorney Gen. of Vt., Attorney General Settles with Vehicle Title Lender, Office of the Attorney General of Vermont (Sept. 23, 2015), <http://ago.vermont.gov/focus/news/attorney-general-settles-with-vehicle-title-lender.php> [<https://perma.cc/6CZY-7QC9>]. The fines imposed may cause a lender to cease doing business in one state, but such fines do not stop that same car title lender from operating in other states where they may skirt state laws with impunity.

industry has no shortage of criminal laws that they employ to coerce the customers into paying or turning over RTO merchandise.²⁴⁷ Laquetta Hall's case demonstrates how the existence of criminal laws is manipulated by creditors to abuse and gain the greatest financial control of consumer debtors.²⁴⁸ After Bestway filed a police report against her, a deputy from the Jefferson County Sheriff's Department arrested Ms. Hall for the criminal offense of "theft by fraudulent leasing."²⁴⁹ The relevant criminal statute reads as follows:

The crime of theft by fraudulent leasing or rental of property is committed *if a person, herein called "lessee", signs a written lease or rental contract with a person licensed to rent or lease tangible personal property . . . and obtains or exerts control over tangible personal property by reason of such rental contract, with the intent, knowledge or expectation that he will not perform the terms, covenants and agreements of the lessee provided in such rental contract.*²⁵⁰

The sheriff's deputy must have taken the Bestway employee's word that Ms. Hall signed the agreement with no intent to repay.²⁵¹ I contend that because she made payments for a period of time, she actually had the intent to fulfill the contract when she signed it. Instead of basing his decision to arrest Ms. Hall on any real evidence, the deputy acted, I contend, under an assumption that the businessperson is honest, and therefore credible, and that Ms. Hall, a low-income consumer, must be dishonest, and therefore a criminal. This fraudulent rental criminal statute is, therefore, perfect for RTO companies and debt collectors in Alabama to exploit.

Similarly, the statute criminalizing the failure to return rental property is being used against RTO customers in Florida.²⁵² In fact, Florida's RTO industry has actively sought the expansion of criminal laws to use against their customers.²⁵³ Consider again the criminal case against Alexis Sanders, who defaulted on RTO payments owed to Buddy's

247 RTO INDUSTRY'S 50-STATE THEFT SURVEY, *supra* note 26.

248 Hall Complaint, *supra* note 32; *see also supra* Part I.A of this Article.

249 Hall Complaint, *supra* note 32, at ¶ 8.

250 ALA. CODE § 13A-8-140 (2014) (emphasis added).

251 Other than the statement of the Bestway employee, nothing in the record indicates any independent corroborating evidence that Ms. Hall lacked the intent to repay at the time she rented the computer.

252 *See* FLA. STAT. ANN. § 812.155 (West 2012).

253 *Infra* note 263.

Furnishing.²⁵⁴ Her case is noteworthy because it appears to be the only reported Florida case discussing in detail the crime of failing to return rental property.²⁵⁵

In a pre-trial certiorari proceeding, a Florida appellate court addressed whether the prosecutor could obtain a conviction against Ms. Sanders merely by showing that she (1) signed a contract mentioning the crime, (2) stopped making payments, and (3) failed to maintain an address where she could receive certified mail.²⁵⁶ The court concluded that such evidence would be a showing of mere circumstantial evidence and would not be prima facie evidence of “intent” to secure Ms. Sanders’ conviction of the crime.²⁵⁷

In a concurring opinion, Chief Judge Altenbernd further explained why Ms. Sanders’ intent to commit the theft crime could not hinge on the fact that she failed to return the property after Buddy’s sent a demand letter:

Maybe Ms. Sanders’ husband or boyfriend ran off with the furniture, and she cannot return it. Maybe her house burned down, and the furniture was destroyed. Maybe the landlord evicted her and kept the furniture. Maybe the furniture was destroyed in a hurricane. The point is that under the law established . . . mere proof that the certified letter was returned undeliverable would not actually be sufficient to establish . . . the intent for this crime of theft. *Being poor and unable to pay your debts is still not a crime in Florida.*²⁵⁸

254 Sanders v. Florida, 905 So.2d 241 (2d. Dist. Ct. App. 2005).

255 From 2001 to 2006, the Florida statute provided in relevant part:

(3) Failure to redeliver hired or leased personal property.—Whoever, after hiring or leasing any personal property or equipment under an agreement to redeliver the same to the person letting such personal property or equipment or his or her agent at the termination of the period for which it was let, shall, without the consent of such person or persons and *with the intent to defraud, abandon or willfully refuse* to redeliver such personal property or equipment as agreed, shall, upon conviction, be guilty of a misdemeanor of the second degree . . . unless the value of the personal property or equipment is of a value of \$300 or more; in that event the violation constitutes a felony of the third degree

FLA. STAT. ANN. § 812.155(3) (West 2001) (emphasis added).

256 Sanders, 905 So.2d at 242–43.

257 Id.

258 Id. at 242–43 (emphasis added).

Judge Altenbernd also revealed his astonishment that Florida lawmakers passed a law that facilitates the business model of RTO companies by criminalizing RTO customers: “Why the legislature would want to do this, essentially encouraging the state attorney to become Buddy’s [Home Furnishings] repossession and debt collection agent at state expense, is a mystery to me, but that appears to be the intent behind this statute.”²⁵⁹

Although Judge Altenbernd did not discuss Ms. Sanders’ payment history as it relates to intent, one could argue that the fact that a customer has made some payments should be evidence of intent to own, not steal. The RTO industry promotes its RTO business model as an alternative path to ownership for customers with bad credit.²⁶⁰ In fact, research shows that the majority of customers sign an RTO contract with the intent of eventually owning by completing all the payments.²⁶¹ However, because many (if not most) RTO customers are likely living paycheck-to-paycheck, a relatively small, unexpected expense (e.g., \$500 for a car repair) would be enough to derail a customer’s plan of completing all the RTO payments.²⁶²

Some RTO companies in Florida were very unhappy with the *Sanders* decision and lobbied for the statute to be amended to make it easier to convict consumers who fail to return RTO property.²⁶³ Passed in 2006, the amendment expanded criminalization by making it less difficult for a prosecutor to secure a conviction because it eliminated key words, such as “willfully” and “intent to defraud” from § 812.155,²⁶⁴ the same criminal statute used to

259 *See id.* (Altenbernd, C.J., concurring).

260 Creola Johnson, *Welfare Reform and Asset Accumulation: First We Need a Car and a Bed*, 2000 Wis. L. REV. 1221, n.172 (2000) [hereinafter Johnson, *Welfare Reform*]; LACKO ET. AL., SURVEY OF RENT-TO-OWN CUSTOMERS, *supra* note 23, at ES-2 (discussing data showing that the majority of people who sign RTO contracts intend to become owners by completing the required payments).

261 *See, e.g.*, LACKO ET. AL., SURVEY OF RENT-TO-OWN CUSTOMERS, *supra* note 23, at ES-2.

262 Johnson, *Welfare Reform*, *supra* note 260, at 1277.

263 Proof of such action comes from Rental Dealers Associations themselves. *Florida’s 6th Annual Legislative Conference in March a Huge Success*, FLA. RENTAL DEALERS ASS’N (Mar. 25, 2005), http://www.frda-rto.com/news_archives/03-25-05_conference_success.html [<https://perma.cc/83CA-DPQQ>].

264 The current version of the criminal statute now reads as follows:

(3) Failure to return hired or leased personal property.—Whoever, after hiring or leasing personal property or equipment under an agreement to return the personal property to the person letting the personal property or equipment or his or her agent at the termination of the period for which it was let, shall, without the consent of the person or persons knowingly abandon or refuse to return the personal property or equipment as agreed,

prosecute Ms. Sanders. Chris Kale, president of the Florida Rental Dealers Association (“FRDA”), celebrated in a letter to its members the good news that “legislators and Rent-To-Own companies are working together on reducing the theft of its merchandise.”²⁶⁵ His letter supported the expanded criminalization interpretation of the amendment, stating: “The Rent-To-Own Businesses have successfully reached an understanding of this law with legislators and would now like to work just as hard with all of those in law enforcement who would be involved with Florida Statute 812.155.”²⁶⁶

Since the amendment, no one knows how many customers have been arrested, but news reports demonstrate that RTO companies have used the statute to have their customers arrested for failing to turn over rental property.²⁶⁷ For example, in 2011, a story in the *Daytona Beach News-Journal* featured Jana Dinatale, a woman arrested for committing a felony by failing to return a television and a mattress she obtained from Z-Best Rentals of

commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, unless the value of the personal property or equipment is of a value of \$300 or more; in that case the person commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

FLA. STAT. ANN. § 812.155(3) (West 2012).

The comparison of the 2001 and 2006 versions reveal the following (additions indicated by *text*, deletions indicated by ~~text~~):

(3) Failure to redeliver hired or leased personal property.—Whoever, after hiring or leasing any personal property or equipment under an agreement to redeliver the same to the person letting such personal property or equipment or his or her agent at the termination of the period for which it was let, shall, without the consent of such person or persons *knowingly* ~~and with the intent to defraud~~, abandon or ~~willfully~~ refuse to redeliver ~~the such~~ personal property or equipment as agreed, shall, upon conviction, be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, unless the value of the personal property or equipment is of a value of \$300 or more; in that event the violation constitutes a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084

265 Press Release, Fla. Rental Dealers Ass’n, Gov. Bush: Signs Rent-to-Own Legislation (June 1, 2006), <http://www.frda-rto.com/docs/Amendment06.pdf> [<https://perma.cc/U8QZ-TCCU>].

266 *Id.*

267 A similar story arose more recently in Georgia. *Woman Upset After They Said Aaron’s Had Them Arrested*, WSB-TV (May 13, 2013), <http://www.wsbtv.com/news/local/women-upset-after-they-said-aarons-had-them-arrest/242475102> [<https://perma.cc/HTG5-QDEP>].

Palm Coast, Florida.²⁶⁸ Expressing disbelief at her arrest over RTO furniture, she told the reporter, “Hospitals . . . [send you] a \$100,000 bill on something, [but] they are not calling up the sheriff’s department to go in and arrest the person because the bill wasn’t paid.”²⁶⁹

Failing to return RTO property is a crime in many states, according to the previously-mentioned survey conducted by Multistate Associates; therefore, the arrests of Ms. Sanders and Ms. Dinatale represent a real possibility of RTO customers being arrested when they cannot continue their payments.²⁷⁰ Richard Shelton, a detective in the Financial Crimes Unit of St. Joseph Police Department in Missouri, told a reporter that he gets about “six to eight cases” per month involving RTO customers.²⁷¹ Carrie Bogart, a manager of an RTO company told the same reporter: “There would be no reason to do that legal action if they just cooperated.”²⁷² Note that she did not use the word “arrested”—that’s the legal action that she is pursuing against her customers! She could not recall a single case in which the RTO property was actually returned, but she stated that the customers paid “restitution.”²⁷³ That is code for the fact that the customers had to pay the outstanding debt in order to get the charges dropped or to get out of jail. Return of the rental property evidently was not the true motive for the company seeking criminal prosecution. It should be clear by now that these criminal laws are being exploited to get consumers to pay civil debts.

In light of the above-mentioned theft-related criminal statutes, RTO companies can subject their customers to actual criminalization by filing criminal complaints against them. The existence of these laws allows other companies to simply threaten criminalization to strike fear into the hearts of customers, such as my client Brenda, to coerce them into paying.

268 See Fernandez, *Rent-to-Own Debt May Lead to Arrest*, *supra* note 1 (speaking for Z-Best Rentals of Palm Coast, Florida, a representative stated that “the company bends over backward to help customers pay and only resorts to criminal charges when people are stealing from them.”).

269 *Id.*

270 See RTO INDUSTRY’S 50-STATE THEFT SURVEY, *supra* note 26.

271 See Kim Norvell, *Lessees Could Face Criminal, Felony Charges*, ST. JOSEPH NEWS-PRESS (Aug. 15, 2011), 2011 WLNR 16124394. In an apparent attempt to justify the use of law enforcement in this manner, Mr. Shelton emphasized for the reporter that “[t]he rent- or lease-to-own companies give customers a way to fill their homes with furniture and electronics, something they can’t otherwise do with bad or no credit.” *Id.*

272 *Id.*

273 *Id.*

B. Bad-Check and Theft Statutes Facilitate the Criminalization Tactics Used against Payday Loan Customers

Like RTO companies, payday lenders also rely on state criminal laws to threaten their customers with arrests. In the early days of payday lending, companies filed criminal complaints alleging that consumers had passed bad checks.²⁷⁴ When payday loans arrived on the scene over twenty years ago, a customer had to give the lender a post-dated check in order to receive a loan.²⁷⁵ The customer was then supposed to come back to the lender's store in two weeks to repay the loan. If that did not occur, the lender would then present the check to the customer's bank in order to get paid. Nowadays, many lenders, especially online lenders, require the consumer to authorize debits to the consumer's bank account to accomplish payment of the debt.²⁷⁶

Because payday lenders require a post-dated check or a debit authorization, payday lenders accuse customers of committing the crime of check fraud or passing a bad check if their checks bounce or if the account debits are denied due to insufficient funds ("NSF").²⁷⁷ For example, under Ohio law, a person commits the crime of passing a bad check if "with purpose to defraud, [the person] shall issue or transfer or cause to be issued or transferred a check or other negotiable instrument, knowing that it will be dishonored or knowing that a person has ordered or will order stop payment on the check or other negotiable instrument."²⁷⁸ In the early years of payday lending, court cases came to light in which

274 See Johnson, *Payday Loans*, *supra* note 6, at 71.

275 See Johnson, *America's First Consumer Financial Watchdog*, *supra* note 48, at 389. With the emergence of online payday lending, companies do not require a post-dated check, but instead require the consumer to electronically sign an online agreement that authorizes the lender to debit the bank account in order to facilitate repayment of the loan. *Id.*; Consumer Fin. Protection Bureau, *Payday/Deposit Advance Loans Study Released*, *supra* note 47 (stating that in addition to debit authorization clauses, online lenders use "remotely-created checks or wire transfers" as other forms of re-payment).

276 A common debt collection tactic is for payday lenders to submit the post-dated check multiple times for payment and to attempt several debits to the consumer's bank account. See *CFPB Highlights 2015 Consumer Response Accomplishments*, FED. BANKING L. REP. ¶¶ 154–289 (Apr. 1, 2016) ("Consumers frequently report that they are not aware that the payday contracts sometimes authorize the lender to withdraw funds electronically. Additionally, consumers complain that payday lenders re-present a check several times, causing the consumer to incur multiple nonsufficient funds or overdraft fees.").

277 See Drysdale & Keest, *supra* note 6, at 610–11 (2000); Johnson, *Payday Loans*, *supra* note 6, at 87–90 (describing several instances where consumers had been arrested, and sometimes prosecuted, for committing crimes related to post-dated checks that were used to obtain payday loans).

278 See Johnson, *Payday Loans*, *supra* note 6, at 90 (quoting OHIO REV. CODE ANN. § 2913.11(A) (Anderson 1995)).

prosecutors were using statutes like this to charge payday loan customers with crimes, despite the fact that the lender, as the payee, took the check knowing that the individual's bank account lacked sufficient funds to cover the check.²⁷⁹ Media outlets also then reported news stories about consumers getting arrested for such crimes after payday lenders filed criminal complaints against them.²⁸⁰ Consumer advocates and others worked to stop payday lenders from using laws like Ohio's to have consumers prosecuted.²⁸¹ For a while, news stories about consumers being arrested were rare, and it appeared consumers no longer needed to fear prosecution under bad-check statutes.²⁸²

Unfortunately, in various localities, some payday lenders continue to file criminal complaints alleging consumers have committed crimes to coerce them into paying.²⁸³ As discussed previously in Part I.B.1 of this Article, Cash Biz and several other payday lenders operating in Texas have filed criminal complaints under the state's bad-check statute relying solely on the fact that consumers have given them a post-dated check.²⁸⁴ However, state law requires payday lenders to file complaints based on proof of forgery, fraud, or

279 See, e.g., *id.* at 92–93 (analyzing an Ohio case upholding a guilty plea made by payday loan customer in Morrow County, Ohio).

280 See, e.g., Dean Foust et al., *Easy Money: Subprime Lenders Make a Killing Catering to Poorer Americans*, BUS. WK. 107, 114 (Apr. 24, 2000) (describing the plight of a young mother who was arrested after her post-dated check bounced).

281 See Johnson, *Payday Loans*, *supra* note 6, at 87–90 (describing how payday lenders pursue criminal prosecution and arguing that such prosecutions are an injustice because the lenders not only know the consumer does not have money in the account, but the lenders actually require the consumer to give a post-dated check or agree to a debit authorization as a condition to obtaining a payday loan).

282 See, e.g., Rich Tomlinson, *Payday Loans*, 71 TEX. B.J. 248, 248 (2008) (practicing attorney in Houston stating that “criminal hot check or theft prosecutions arising out of a payday loan transaction are rare, to the extent they occur at all”).

283 See *supra* Part I.B.1 (discussing investigations by Texas Appleseed and the Texas Observer regarding consumers being charged with crimes at the behest of payday lenders). See also Melanie Hicken, *In Texas, Payday Lenders Are Getting Borrowers Arrested*, CNN MONEY (Jan. 8, 2015), <http://money.cnn.com/2015/01/08/pf/payday-lenders-texas/> [<https://perma.cc/WSL7-PTNV>].

284 *Supra* Part I.B.1. Texas Appleseed, a nonprofit organization, has documented the fact that Cash Biz and other lenders have engaged in a pattern of filing criminal complaints against consumers simply because their checks bounced. See also Press Release, Office of Consumer Credit, Commissioner Filing Criminal Charges against Consumers (Oct. 14, 2013) (on file with author); Forrest Wilder, *State Punishes Payday Lender for Criminalizing Debt*, TEX. OBSERVER (Apr. 22, 2015), <https://www.texasobserver.org/state-punishes-illegal-payday-loan-lender/> [<https://perma.cc/YAC4-RU9V>].

other additional evidence of intentional criminal conduct.²⁸⁵ In other words, a criminal complaint cannot be predicated solely on the fact that a post-dated check (or a debit to bank account) could not be satisfied due to insufficient funds in the consumer's account. Once it came to light that some prosecutors and judges were ignoring this additional proof requirement,²⁸⁶ the Texas OCCC had to issue a bulletin to remind payday lenders about the proof requirement under the bad-check statute.²⁸⁷

In addition to being prosecuted in Texas, payday loan borrowers still have to worry about being prosecuted in the rural parts of other states, like Ohio. For example, Kasey B. Widener from Darke County,²⁸⁸ Ohio was successfully prosecuted for "theft by deception" after being unable to pay her loan by the due date.²⁸⁹ Ohio Cash Advance required her to submit two post-dated checks to obtain the loan.²⁹⁰ After Ms. Widener realized she would be unable to cover the checks, she called her bank. Ms. Widener stated that she took her bank's advice that she order a stop payment on the checks to avoid triggering high fees from

285 Wilder, *Fast Cash*, *supra* note 50.

286 *See id.* (reporting that Rudy Aguilar, the director of consumer protection at the Texas OCCC, stated that he cannot control how local judges interpret the bad-check statute and that his office may not realize a payday lender is violating the law in the absence of consumer complaints).

287 Press Release, Tex. Office of Consumer Credit Comm'n, Credit Access Business Advisory Bulletin, Filing Criminal Charges Against Consumers, (Oct. 14, 2013), <http://occc.texas.gov/sites/default/files/uploads/disclosures/b13-9-cab-criminal-charges.pdf> [<https://perma.cc/WT2J-B3A9>]. In the Bulletin, payday lenders, which are registered to operate as credit access businesses ("CABs"), are warned that a post-dated check or debit authorization alone cannot be the basis for prosecution, and that lenders should not pursue prosecution of consumers "unless it has specific evidence" of forgery, fraud, theft, or other criminal conduct. *Id.* ("Before threatening or pursuing a criminal charge, a CAB should have specific evidence that the state can use to prove—beyond a reasonable doubt—that a consumer knowingly violated a criminal law when entering the transaction.").

288 Darke County is located on the border of Ohio and Indiana, has a total population of just over 52,000, and contains just over 21,000 households. *Quick Facts: Darke County, Ohio*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/39037> [<https://perma.cc/63S2-6RU9>].

289 *See State v. Widener*, No. 2007-Ohio-429, 2007 WL 293133 (2d Dist. Ct. App. 2007).

290 Requiring more than one check is actually illegal in some states. *See, e.g.*, 10 VA. ADMIN. CODE § 5-200-20(L); N.M. STAT. ANN. § 58-15-34(J) (West 2007) (prohibiting payday lenders from requiring multiple checks or debit authorizations). In essence, this tactic is an easy way for payday lenders to charge multiple processing fees to issue a loan or circumvent state law caps on the amount that can be lent. *See Johnson, Payday Loans*, *supra* note 6, at 93 (describing a case involving a payday lender requiring the customer to issue two checks for \$250 each to obtain a \$500 payday loan).

the checks bouncing due to insufficient funds in her account.²⁹¹ Subsequently, Ohio Cash Advance filed a police report against Ms. Widener, and she was later charged with theft by deception.²⁹² After Ms. Widener entered a “no contest” guilty plea, she was sentenced to ten days in jail, which was suspended, as well as a \$750 fine, \$250 of which was suspended, and was ordered to pay restitution to Ohio Cash Advance.²⁹³ Ms. Widener originally owed only \$287 and was unable to pay even that amount back.²⁹⁴ She appealed her guilty plea, presumably because she could not pay both restitution and the additional fine levied against her.²⁹⁵

Ohio’s theft-by-deception statute states that “no person, with the purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services . . . by deception.”²⁹⁶ Case law has determined “deception” to mean

knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.²⁹⁷

Rather than discussing specific acts of deception that Ms. Widener may have committed at the time she obtained the loan, the appellate court seemed to infer deception from lack of payment due to her stopping payment on the checks.²⁹⁸ The court never discussed Article

291 *Widener*, No. 2007-Ohio-429, 2007 WL 293133. Although she stated that she contacted Ohio Cash Advance about the matter to persuade the company to not cash the check, Ohio Cash Advance ignored her and chose to attempt to cash the checks.

292 *Id.*

293 *Id.*

294 *Id.*

295 Other likely associated costs include court fees and attorneys’ fees if she hired a lawyer.

296 OHIO REV. CODE ANN. § 2913.02 (West 2014).

297 *State v. Boyd*, No. 2003-Ohio-2406, 2003 WL 21060863, at *2 (2d Dist. Ct. App. 2008).

298 Note that she pled guilty to theft by deception, not the crime of passing a bad check. *See* OHIO REV. CODE ANN. § 2913.11(B) (West 2011) (“No person, with purpose to defraud, shall issue or transfer or cause to be issued or transferred a check or other negotiable instrument, knowing that it will be dishonored or knowing that a person has ordered or will order stop payment on the check or other negotiable instrument.”).

3 of the Uniform Commercial Code, which gives the owner of a bank account the right to stop payment on a check.²⁹⁹ The court never discussed the requisite mens rea for the prosecutor to obtain a conviction when the accused is a consumer who has defaulted on a payday loan.

Typically, the mens rea of a crime must be proven to exist at the time of the offense.³⁰⁰ This means the prosecution should have to prove that at the time Ms. Widener took out the loan, she deliberately acted in a manner to deceive the party issuing the loan. Her decision to follow her bank's advice to stop payment was interpreted as a guilty state of mind even though it occurred days after she had already obtained the loan.³⁰¹ No incriminating facts, such as her bank account being closed or her submitting fake pay stubs as proof of employment, existed at the time Ohio Cash Advance issued her the loan.³⁰² However, because she pled no contest, the prosecutor never had to actually prove acts of deception at the time she obtained the loan,³⁰³ and the appellate court precluded her from challenging that finding from the trial court.³⁰⁴

Analogous cases from other jurisdictions, however, support the conclusion that theft by deception was not evident at the time Ms. Widener obtained the loan, because she did not engage in any overt act to deceive the payday lender into lending her money.³⁰⁵ For

299 See U.C.C. § 4-403(a).

300 Criminal law scholars describe this mens rea concept as the "concurrency" requirement, which requires a concurrence of the actus reus of an offense and the mens rea. See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW §§ 15.01-15.02 (7th ed. 2015) (stating that the concurrence requirement is satisfied "if the *voluntary act* that causes the social harm occurs with the mens rea") (emphasis in original).

301 The court inconveniently, or perhaps conveniently for the lenders, leaves the timeline broad, so there is no way of knowing how long the lender waited before bringing criminal action.

302 There was no representation that Ms. Widener lied about relevant information, such as her name, address, employment status or income, to deceive the payday lender into issuing her the loan. *State v. Widener*, No. 2007-Ohio-429, 2007 WL 293133, at *1 (2d Dist. Ct. App. 2007).

303 Ms. Widener apparently had no, or inadequate, counsel, and may have made the decision to plead no contest at the behest of prosecutorial pressure.

304 *Widener*, No. 2007-Ohio-429, 2007 WL 293133, at *1. Ms. Widener also argued that the tactics used against her violated the FDCPA, which the court rejected in both its application and its relevance. As acknowledged by the court, the FDCPA applies to debt collectors, not lenders, such as Ohio Cash Advance, that collect their own debts. *Id.*

305 The court distinguished Ms. Widener's case from *State v. Boyd*, in which a man successfully challenged a conviction under the bad-check statute. No. 19158, 2003 WL 21060863, at *2-3 (2d Dist. Ct. App. 2008). The court found no deception but a breach of contract because the victim knew the defendant did not have sufficient

example, in *Payday Today, Inc. v. McCullough*, the payday lender contended that it was entitled to treble damages under Indiana law, by arguing that the borrowers had committed criminal fraud when they stopped payment on post-dated checks given to the lender to obtain the loans.³⁰⁶ The court held that the lender had failed to show an intent to commit fraud because it failed to present “evidence that the McCulloughs [the borrowers], in order to obtain [the payday] loans, executed their [post-dated] checks ‘knowing’ that they were going to stop payment on them.”³⁰⁷ Similarly, the prosecutor in Ms. Widener’s case presented no evidence that she knew she would stop payment at the time she obtained the loan.³⁰⁸ Because payday lenders issue loans to consumers who do not have enough money to make it until their next payday, a reasonable interpretation of Ms. Widener’s decision to stop payment is that she could not afford to repay the loan and, therefore, followed the

funds in his account when he issued the bad check. The court in *Widener* could have viewed *Boyd* as analogous because, like Mr. Boyd, Ms. Widener tried to inform the “victim”—the payday lender—that the check would not be honored and that warning occurred several days after the lender had already received the post-dated checks and knew she had insufficient funds in the account to cover the checks. Perhaps Mr. Boyd had better representation than Ms. Widener, if she even had representation at all.

A Texas case, *Daugherty v. State*, is also instructive. 387 S.W.3d 654 (Tex. Crim. App. 2013). In that case, the defendant was charged with the crime of a theft by deception after he paid for a contractor’s services with a bad check. The court held that deception is an essential element of the statute and that the mere submission of a worthless check, later returned for insufficient funds, is not enough to establish deception. The court stated that the prosecutor needs to prove the defendant committed an overt act of deception before obtaining the person’s services. Such acts of deception must demonstrate that at the time the services were performed, or the property was turned over to the defendant, the defendant had no intent to pay. “Criminal liability depends on a person’s culpable mental state at the time the person performs some criminal act and is the convergence of a bad act and a guilty mind.” *Id.* at 658–59.

306 841 N.E.2d 638 (Ind. Ct. App. 2006). To collect treble damages under the bad-check statute (IND. CODE § 34-24-3-1 (2011)), the payday lender had to show the borrowers committed fraud by violating IND. CODE § 35-43-5-8 (2014), which provides in pertinent part:

- (a) A person who knowingly executes, or attempts to execute, a scheme or artifice:
 - ...
 - (2) to obtain any of the money, funds, credits, assets, securities, or other property owned by or under the custody or control of a state or federally chartered or federally insured financial institution by means of false or fraudulent pretenses, representations, or promises; commits a Class C felony.

307 *Payday Today*, 841 N.E.2d at 642.

308 The concurrence of actus reus with mens rea is essentially codified in the Model Penal Code. *See* Model Penal Code § 1.13(5) (defining “conduct” as “an action or omission *and* its accompanying state of mind”) (emphasis added).

advice of her bank to avoid triggering NSF fees.³⁰⁹

Because several states have changed their bad-check laws to specifically exempt payday loan customers from prosecution, payday lenders should not be able to circumvent those exemptions by relying instead on theft-by-deception statutes like the one in Ohio to criminalize consumers who cannot pay.³¹⁰ Moreover, rather than simply upholding guilty pleas, courts should be concerned that vulnerable consumers are being pressured by prosecutors into pleading guilty and should proceed with caution to make sure payday lenders are not manipulating prosecutors into acting as debt collection agents, wielding governmental authority to put consumers who cannot pay in jail.³¹¹ Unless something is done to stop payday lenders from using criminal laws to arrest consumers, payday lenders have every incentive to shift the cost of debt collection to the criminal justice system because it facilitates the quick repayment of payday loan debts by terrorizing consumers who fear imprisonment.³¹²

309 *Widener*, No. 2007-Ohio-429, 2007 WL 293133, at *1.

310 In Tennessee, payday loan customers are exempt from prosecution for passing a bad check. *See, e.g.*, TENN. CODE ANN. § 39-14-121(a)(2) (West 2014) (“This [bad-check provision under] subsection (a) shall not apply to a post-dated check or to a check or similar sight order where the payee or holder knows or has good and sufficient reason to believe the drawer did not have sufficient funds on deposit to the drawer’s credit with the drawee to ensure payment.”).

311 Individuals accused of crimes in rural places like Darke County, Ohio may experience greater pressure to plead guilty than those accused in urban areas. Darke County’s population is roughly 52,000, with only 11.6% graduating from college and over 12% of the population living in poverty. *Quick Facts: Darke County, Ohio*, *supra* note 288. *See generally* SUE TITUS REID, CRIMINAL JUSTICE ESSENTIALS 230 (9th ed. 2012) (“In rural areas, most cases are settled by guilty pleas. Since rural judges and juries tend to give harsher sentences, defense attorneys are less likely to advise their clients to go to trial, and more defendants are willing to plead guilty without a trial.”); DAVID W. NEUBAUER & HENRY F. FRADELLA, AMERICA’S COURTS AND THE CRIMINAL JUSTICE SYSTEM 99 (2017) (discussing the lack of resources being problematic in rural courts and noting that few attorneys practice law in rural areas and that the pool of defense lawyers is limited).

312 The Community Financial Services Association of America, the national trade association, has created a list of “best practices” to encourage payday lenders to follow responsible lending and debt collection practices, including the practice of not pursuing criminal action against borrowers. *CFSA Member Best Practices*, COMMUNITY FIN. SERVS. ASSOC. AM., <http://cfsaa.com/cfsa-member-best-practices.aspx#sthash.DZx2UiyP.dpu> [<https://perma.cc/NU6R-B2AF>] (last visited Aug. 4, 2016) (including a “No Criminal Action” practice, which states that “[a] member will not threaten or pursue criminal action against a customer as a result of the customer’s check being returned unpaid or the customer’s account not being paid”). However, it is clear that some lenders are not following this best practice. Over 1,500 criminal complaints have been brought in Texas alone, and 42% of those complaints have resulted in arrest warrants being issued, and 5.6% of the time consumers served jail time or jail-time credit was applied to the debt. Catherine Dunn, *Payday Lenders Threaten Borrowers with Jail: Report an Investigation by the Nonprofit Texas Appleseed Finds Payday Lenders Filing Criminal Charges against Borrowers*, INT’L BUS. TIMES NEWS (Dec. 19, 2014).

Although some payday lenders and virtually all debt collection companies do not actually file criminal complaints, they nevertheless rely on the existence of bad-check and theft laws to create an illusion of imminent incarceration to essentially steal from consumers by collecting payments on phantom debts or by collecting amounts far in excess of the debts actually owed.³¹³ Recall Ms. Jacobi's predicament as she tried to determine whether WSA's threats of arrest were real under Washington law. Washington's theft-by-deception statute is worded broadly enough that if Ms. Jacobi had read it online, she could have drawn the incorrect conclusion that she would be arrested if she did not pay.³¹⁴ Without legal knowledge that theft by deception is a specific intent crime that requires a prosecutor to prove, beyond a reasonable doubt, the defendant's guilty state of mind at the time of the alleged theft, the typical consumer could be persuaded into thinking they had committed the crime.³¹⁵ In the information age, news stories about consumers being arrested can be quickly found online.³¹⁶ Likewise, criminal statutes are easily accessible

313 See *supra* notes 107–111 and accompanying text (discussing criminalization tactics that companies use to frighten consumers into making payments on phantom debts).

314 See WASH. REV. CODE ANN. § 9A.56.020(b) (West 2004) (stating that a person commits theft when “[b]y color or aid of deception . . . [the person] obtain[s] control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services”).

315 See generally Michael A. DiSabatino, Annotation, *Modern Status of Rule that Crime of False Pretenses Cannot be Predicated Upon Present Intention not to Comply with Promise or Statement as to Future Act*, 19 AM. L. REPS. 959 (1983) (explaining various theft-related crimes and the culpable state of mind necessary for a prosecutor to obtain a conviction for those crimes).

316 This belief could be strengthened depending on what type of online search a consumer conducts. For example, by doing a Google search of the words “arrested” and “credit card debt,” a searcher would be led to a results page that includes a link to an article with the title “The New Bill Collector Tactic: Jail Time,” at the website for Nolo, a publisher of do-it-yourself legal books and software. See Stephanie Lane, *The New Bill Collector Tactic: Jail Time*, NOLO, <http://www.nolo.com/legal-encyclopedia/the-new-bill-collector-tactic-jail-time.html> [<https://perma.cc/539N-YPJQ>] (last visited Mar. 17, 2016) (“When you owe money on a debt but can’t afford to pay it, a creditor has the right to sue you and get a judgment. If this happens to you, you should be aware of a growing trend used by some bill collectors to make you pay—jail time.”). On that same results page, the searcher would uncover a link to a *Star Tribune* story about Joy Uhlmeier, a Minnesota resident who was stopped by the police while driving home after visiting with her elderly mother. See Chris Serres & Glenn Howatt, *In Jail for Being in Debt*, STAR TRIB. (Mar. 17, 2011), <http://www.startribune.com/in-jail-for-being-in-debt/95692619/> [<https://perma.cc/7GK5-BFJV>]. The police officer arrested her, but she was not told for several hours the reason for her arrest. *Id.* She was astonished to discover that her arrest stemmed from failing to appear for a civil contempt hearing regarding a judgment against her for unpaid credit card debt. *Id.* (reporting that “after 16 hours in limbo, jail officials fingerprinted Uhlmeier and explained her offense—missing a court hearing over an unpaid debt” and quoting her as saying “[t]hey have no right to do this to me . . . [n]ot for a stupid credit card”). The reality is that companies that conjure up illusions of incarceration are engaged in unlawful debt collection practices. An uninformed consumer who is only threatened with an arrest would likely not be able to distinguish his or her own situation from Ms. Uhlmeier’s case, where she had in fact been sued and

online but are not easy to understand. Most consumers do not have the ability to simply call an attorney and immediately get correct legal advice, and the majority cannot afford an attorney to represent them if they are sued by a debt collector.³¹⁷ Thus, the consumer's lack of understanding of the law and lack of access to competent legal advice makes the consumer easy prey for debt collectors to mislead into making payments to avoid arrest.³¹⁸

had a default judgment entered against her. The uninformed consumer, after reading the news story about Ms. Uhlmeier, could easily jump to the wrong conclusion and believe WSA had the ability to immediately get an arrest warrant and, thereby, coerce the consumer into paying.

317 See APRIL KUEHNHOFF & CHERIE CHING, NAT'L CONSUMER LAW CTR., DEFUSING DEBT: A SURVEY OF DEBT-RELATED CIVIL LEGAL AID PROGRAMS IN THE UNITED STATES (2016), http://www.nclc.org/images/pdf/debt_collection/debt-defense-survey-2016.pdf [<https://perma.cc/R7NY-H6AC>] (stating that the debt collection industry makes over a billion contacts with consumers annually and files lawsuits against millions and finding that companies obtain default judgments against consumers in the vast majority of those cases). The majority of consumers who have income low enough to qualify for free legal aid services have to be turned away due to reduced funding available to legal aid organizations. *Id.* See also Debra Cassens Weiss, *Middle-Class Dilemma: Can't Afford Lawyers, Can't Qualify for Legal Aid*, AM. B. ASS'N J. (July 22, 2010), http://www.abajournal.com/news/article/middle-class_dilemma_cant_afford_lawyers_cant_qualify_for_legal_aid [<https://perma.cc/6HTP-K2H8>].

Although there are lawyers who specialize in consumer financial protection, consumers who are contacted by debt collectors are usually given a ticking clock to respond to the collector's threats. Without the ability to immediately talk to legal counsel, many consumers simply make payments, then are convinced by the lender or collector that they made the right decision. For example, if one were to Google search "debt collection harassment," one can find numerous websites that offer some advice, but not enough for a consumer to make a fully-informed decision. Calls are often made late at night when contact with a lawyer would be nearly impossible or during hours of employment when the consumer is working and, therefore, does not have the ability to call an attorney.

318 Even if a specific crime has not been mentioned, a consumer could nevertheless fall for the illusion of incarceration based on a crime not actually committed. See Motion for Temporary Restraining Order, Fed. Trade Comm'n v. Lenyszyn, No. 1:14-cv-01599-HLM (N.D. Ga. May 27, 2014). For example, in her sworn affidavit, Kristina Koepfel reported receiving a voicemail message from someone claiming to be a WSA paralegal. In the message, the WSA employee stated, in relevant part: "A criminal complaint has been filed under your name and social [security number] here in [our] office that will lead to a suspension of your driver's license. . . . Failure to respond will lead to criminal charges being pursued against you." WSA Criminal Complaint, *supra* note 82, at PX19-1. Ms. Koepfel was convinced that she should pay because of the personal information the WSA knew about her:

The fact that she knew my social security number made me believe that the call was legitimate. Sharon was really rude and told me that I was stealing because I had not paid my credit card balance . . . I became really anxious and scared thinking I was going to be arrested. I was fearful WSA could and would arrest me because they knew some of my personal information.

The bottom line is that many consumers will not realize they have been scammed until after they have paid. In fact, Ms. Jacobi, after paying, only learned the truth because she was able to contact a former police officer and get the correct information. Thus, unlawful debt collections tactics, whether used by payday lenders or debt collection companies, terrorize consumers and drain money from them.

When payday lenders and debt collectors are caught engaging in these unlawful practices, the fines and restitution they end up paying may be insignificant compared to the profits earned from using these tactics.³¹⁹ As a result, state and federal lawmakers need to draft legislation to protect consumers from debt criminalization tactics.

WSA Criminal Complaint, *supra* note 82, at PX19-2.

319 This problem goes beyond the cases I discussed in this Article. For example, six companies in Chicago alone scammed consumers out of over \$1 million, and, in one egregious case, a single business network scammed over \$3.8 million from American consumers across the country. Becky Yerak, *Westmont-based Companies Accused in \$3.8 Million Debt-Collection Scam*, CHI. TRIB. (Mar. 30, 2016), <http://www.chicagotribune.com/business/ct-payday-loan-scam-0331-biz-20160330-story.html> [<https://perma.cc/CE28-3TNS>]. Criminal legal action was threatened in many of these cases. *Id.*

CONCLUSION

Payday lenders,³²⁰ RTO companies,³²¹ car title lenders, and others annually earn billions peddling high-cost credit to cash-strapped consumers with bad credit and lacking other alternatives.³²² These companies claim to serve consumers. However, private lawsuits

320 See, e.g., Victor D. Lopez, *When Lenders Can Legally Provide Loans with Effective Interest Rates Above 1,000 Percent, Is It Time for Congress to Consider a Federal Interest Cap on Consumer Loans*, 42 J. LEGIS. 35, 61 (2016) (“Fringe banking is certainly a profitable business that has grown from nearly nothing to a \$100 billion dollar industry over a period of two decades with more check cashing and payday businesses in the U.S. today than McDonald’s, Burger King, Target, Sears, JCPenney, and Wal-Mart locations combined.”). For a recent report summarizing five major ways the payday loan industry circumvents laws enacted to curb payday lending, see DEMOCRATIC STAFF, 114TH CONG., *SKIRTING THE LAW: FIVE TACTICS PAYDAY LENDERS USE TO EVADE CONSUMER PROTECTION LAWS* (2016), http://democrats.financialservices.house.gov/uploadedfiles/06.15.2016_committee_report_skirtingthelaw_final.pdf [<https://perma.cc/98AZ-GMXW>].

321 See, e.g., Michael Hudson, *Just a Few Bucks a Week: The Rent-to-Own Industry*, in *MERCHANTS OF MISERY: HOW CORPORATE AMERICA PROFITS FROM POVERTY* 145 (Michael Hudson ed., 1996); Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to Target Communities of Color*, 17 GEO. J. ON POVERTY L. & POL’Y 165, 175 (2010) (criticizing retired NBA Hall of Fame Star Magic Johnson for being a spokesman for Rent-A-Center in television commercials, given that RTO deals are considered very expensive and exploitative of customers, particularly minorities); *About*, ASS’N PROGRESSIVE RENTAL ORGS., <http://www.rtohq.org/about-rent-to-own> [<https://perma.cc/N789-RK3U>] (last visited May 20, 2016) (claiming that the RTO industry has nearly 9,000 stores in all fifty states, Mexico and Canada, and that the \$8.5 billion industry serves 4.8 million households); *The Rent to Own Ripoff*, *supra* note 24 (according to a study conducted by the WISPIRG Foundation, “[p]urchasing items via rent-to-own at RTO stores costs 2–7 times as much as purchasing the same items at major appliance and electronics retailers”).

322 The Community Financial Services Association of America, the national trade association for payday lenders, argues that if the CFPB’s proposed rules go into effect, their consumers will be “forced into painful alternatives.” Dennis Shaul, *New Federal Rules Hurt Consumers: Opposing View*, USA TODAY (June 2, 2016), <http://www.usatoday.com/story/opinion/2016/06/02/new-federal-rules-hurt-consumers-opposing-view/85318914/> [<https://perma.cc/QAP7-J7FR>]. He fails to mention that “Payday Alternative Loans” (commonly known as “PALS”) are exempted from these new rules, which are largely offered by credit unions and are far less costly than payday loans. See *CFPB Payday Proposal Has NAFCU-Sought PALS Carve-Out*, NAT’L ASSOC. FED. CREDIT UNIONS (June 2, 2016), https://www.nafcu.org/News/2016_News/June/CFPB_payday_proposal_has_NAFCU-sought_PALS_carve-out/ [<https://perma.cc/QTD5-A2QL>] (stating that PALS, unlike payday loans, are currently capped at 28% and include other restrictions, such as application fees being limited to \$20). Religious organizations have also been involved in the movement to offer low-cost loans to cash-strapped consumers with bad credit. See, e.g., Bob Allen, *Faith Groups Back Payday Lending Reform*, BAPTIST NEWS (Feb. 12 2016), <https://baptistnews.com/article/faith-groups-back-payday-lending-reform/> [<https://perma.cc/9PZK-M39C>] (reporting that Friendship-West Baptist Church in Dallas, Texas, established a federally-chartered credit union making “Liberty Loans,” which have an APR cap of 28% and other restrictions, and reporting that after several years of offering such loans, none of the borrowers defaulted on the loan).

filed by consumer attorneys,³²³ consumer complaints submitted to governmental agencies,³²⁴ and enforcement actions filed by state and federal regulators³²⁵ all show one thing: the pervasive criminalization of consumers who cannot repay civil debts.

Some companies,³²⁶ especially RTO dealers³²⁷ and payday loan lenders,³²⁸ actually exploit theft-related state laws by filing criminal complaints against consumers even in states where such complaints are technically precluded.³²⁹ Other companies only make terrifying

323 See, e.g., Revised Court Order, *Gilbert v. MoneyMutual*, No. CV-13-01171-JSW (N.D. Cal. Dist. Ct. 2015), 2015 WL 6452328 (alleging that defendant lenders sold consumer's personal information (including their Social Security numbers) to criminal enterprises, sometimes operating from foreign countries, that falsely claimed to be affiliated with law enforcement agencies and threatened to have consumers arrested if they failed to pay money on payday loan debts they supposedly owed).

324 See, e.g., *supra* Part I.B.2 (describing consumer complaints submitted by the FTC in a case filed against the Wright Defendants).

325 See, e.g., *Florida AG Nails a Collections Firm*, *supra* note 169; Dickerson, *supra* note 214 (stating that the West Virginia Attorney General settled a case against car title lenders for \$1.2 million). The FTC has also filed a case against AMG Services of Overland Park, a tribal payday lender who has made more than \$165 million from 800% interest loans. David Heath, *Impact: Tribal Payday Lender Sued by Federal Trade Commission*, CTR. FOR PUB. INTEGRITY (Apr. 2, 2012), <https://www.publicintegrity.org/2012/04/02/8581/impact-tribal-payday-lender-sued-federal-trade-commission> [<https://perma.cc/WXZ2-XKP3>]; Press Release, CFPB Takes Action, *supra* note 71 (announcing that the CFPB accused ACE, the nation's second largest payday lender, of illegal aggressive collection practices).

326 While not specifically addressed in this Article, car dealerships have also exploited criminal laws to have customers arrested. See, e.g., First Amended Complaint, *Hayes v. Todd Wenzel Buick GMC*, No. 1:11-cv-1017 (W.D. Mich. filed Oct. 3, 2011) 2011 WL 6092267 (alleging that after Ms. Hayes' loan agreement with a car dealership went sideways due to a "yo-yo scam," the dealership filed criminal charges against her, and she was arrested a few days later.). For further discussion of yo-yo scams, see Delvin Davis, *Deal or No Deal: How Yo-Yo Scams Rig the Game against Car Buyers*, CTR. FOR RESPONSIBLE LENDING (Apr. 2012), <http://www.responsiblelending.org/other-consumer-loans/auto-financing/research-analysis/Deal-or-No-Deal-How-Yo-Yo-Scams-Rig-the-Game.pdf> [<https://perma.cc/X8WA-S8HR>].

327 See, e.g., *supra* Part I.A. (Laquetta Hall was arrested for fraudulent leasing and eventually paid \$2,136 to the RTO company out fear of being re-arrested for defaulting on a RTO contract she signed to buy a computer for college).

328 See, e.g., *supra* Part I.B.1.

329 See, e.g., Wilder, *Fast Cash*, *supra* note 50 (discussing the limited circumstances under which a lender can file criminal complaints against individual borrowers in Texas). Post-dated checks, unlike other checks, cannot be presumptive evidence of intent to commit the crime of passing a bad check. See TEX. PENAL CODE ANN. § 32.41 (West).

threats to have consumers arrested.³³⁰ Both lenders and debt collection companies have a secret weapon that is the key to terrifying consumers into paying. That weapon is access to billions of consumer files containing sensitive personal information, such as social security numbers and parents' addresses, and that information is then cherry-picked and intertwined with terms plucked out of criminal statutes to make consumers fear imminent arrest.³³¹ The result is that some consumers are financially harmed because they end up paying phantom debts³³² or paying amounts far in excess of debts owed. Moreover, unscrupulous debt collection companies are constantly developing new ways to use this personal information to make consumers fear arrests and, thereby, coerce them into handing over their money.³³³

The above consumer criminalization tactics appear to be especially effective against women who cannot pay and have a particularly deleterious impact on them.³³⁴ For instance,

330 See, e.g., Part I.B.2 of this Article (discussing the case of Kathleen Jacobi); Part I.C.2 (discussing the case of Ms. Haase); and Part I.A (discussing the story of Lori Ann Chadsey), as well as countless debt collection companies not mentioned.

331 Many scholars and other groups argue that consumer information should be better protected by, among other things, prohibiting companies from buying personal information from original lenders or other debt collectors. See, e.g., M. MAUREEN MURPHY, CONG. RESEARCH SERV., PRIVACY PROTECTION FOR CUSTOMER FINANCIAL INFORMATION (2014), <http://fas.org/sgp/crs/misc/RS20185.pdf> [<https://perma.cc/CL6Y-EPHY>].

332 See, e.g., Complaint at 2, Fed. Trade Comm'n v. Sequoia One, LLC, No. 2:15-cv-01512-JCM-CWH (D. Nev. filed Aug. 12, 2015), <https://www.ftc.gov/system/files/documents/cases/150812sequoiaonecmpt.pdf> [<https://perma.cc/P3MT-LDRP>] (holding that concurrent civil and criminal cases can proceed against a defendant who operated a data broker company that allegedly collected and sold sensitive personal information about consumers who had submitted online applications for payday loans, which in turn led to non-lenders using that information to defraud consumers by taking money directly from their bank accounts). See generally FED. TRADE COMM'N, DATA BROKERS, *supra* note 108.

333 For example, according to the CFPB, some debt collectors are misleading consumers into believing they must attend mandatory "financial education programs" to avoid criminal charges. Press Release, Consumer Fin. Protection Bureau, CFPB Takes Action Against "Bad Check" Debt Collector (Mar. 30, 2015), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-bad-check-debt-collector/> [<https://perma.cc/TA4S-JG62>] (reporting that the cost of these "financial education programs" was typically around \$200, which was often more than the amount on the alleged bad check).

334 Arrests can be socially stigmatizing and burden a person's life, even when consumers are never charged with or convicted of an actual crime. An arrest alone can damage a person's self-perception and change a person's behavior, especially in future encounters with the police. Actual criminalization, i.e., getting arrested, even without a conviction, has real consequences, including delayed or denied employment and housing to consumers, or delay or denial of occupational licensing, due to the fact that employers and landlords routinely consult databases of arrests. Christopher Uggen et al., *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627, 628–30, 647–50 (2014). Moreover, child protective services can use a person's arrest as a basis for taking custody of the person's children. *Id.*

in response to finding out a payday lender had filed a bad-check complaint against her, Margaret Jones, a seventy-one-year-old barely surviving on her monthly social security checks, said, “I was just terrified to the point that I couldn’t eat, my blood pressure went up . . . I was just nervous, scared.”³³⁵ Ms. Sherry Clime, after defaulting on her car title loan, was terrified of losing ownership of her van: “[I]f you can’t move then it’s like being closed up in a prison.”³³⁶

As suggested by Ms. Clime’s comment, companies that claim to offer consumers access to credit not only lead consumers into a cycle of debt but make them fear what is, in essence, a modern-day debtor’s prison for consumers who cannot pay. Unfortunately, if criminalization tactics continue to go unregulated, our country will have allowed companies to circumvent consumer protection laws passed to curb abusive debt collection tactics and evade state constitutions that prohibit imprisonment of individuals simply because they cannot repay civil debts.³³⁷

Although the CFPB recently announced proposed rules, spanning more than 1,300 pages, to put restrictions on payday loans, car title loans, and certain high-cost installment loans, the proposed rules do not have any provisions to address criminalization tactics used by lenders that issue these exorbitantly-priced loans.³³⁸ Without addressing such tactics,

(stating that prior arrests appear in police databanks and records and that a person who has been arrested often suffers a variety of consequences, including worsened peer interactions and damage to self-perception). Although data files consisting of dismissed charges (and arrests without charges) are less detrimental than convictions, such files can still have a significant effect on hiring decisions. *Id.* See also Issa Kohler-Hausmann, *Misdemeanor Justice: Control without Conviction*, 119 AM. J. SOC. 351, 366–67, 374–76 (2013) (describing how even misdemeanor offenses can “mark” the accused, entangling them in the procedural hassles of the justice system resulting in a “ceremony of degradation”).

335 See Forrest Wilder, *Texas Payday Lenders and Prosecutors Team Up to Criminally Pursue Borrowers*, TEX. OBSERVER (Dec. 17, 2014), <https://www.texasobserver.org/report-texas-payday-lenders-prosecutors-team-criminally-pursue-borrowers/> [<https://perma.cc/9BD8-7U63>].

336 See Gwyneth Donald, *The New Normal: Short-Term Loans Become Second-Nature to the Struggling Poor*, N.M. IN DEPTH (July 6, 2015), <http://nminddepth.com/2015/07/06/the-new-normal-short-term-loans-become-second-nature-to-the-struggling-poor/> [<https://perma.cc/7B22-7VFZ>].

337 See, e.g., TEX. CONST. art. 1, § 18 (“No person shall ever be imprisoned for debt.”). The Supreme Court has also noted that imprisonment of a person who fails to repay a fine or restitution, if they made a good faith effort to do so, violates the 14th Amendment. *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983).

338 See CFPB’s Proposed Rules, *supra* note 8. In the proposal, the CFPB briefly summarizes an enforcement action it brought against NDG Financial Corp., a Canadian-based company, and several other foreign corporations for several alleged violations of United States law, including collecting on payday loans that were void under various state laws, and for threatening consumers with arrests. *Id.* at 47, n.124.

consumers will continue to be victimized, and companies will use women's inclination to care for others against them and terrify them into making payments to avoid jail.³³⁹ When Aziza Gary, a woman who had actually worked in the payday loan industry, got trapped in a payday loan debt treadmill, she panicked.³⁴⁰ Unable to afford food, she began relying on family to feed her and her daughter.³⁴¹ In her own words, Ms. Gary said, "I panicked . . . I cried, I prayed," hoping to find a way out of the debt treadmill.³⁴² Shouldn't state and federal regulators answer her prayer, and implement stronger regulations and continue strong enforcement actions to stop our country from sliding further back into an era of debtor's prisons?³⁴³

339 The proposed rules contain many helpful regulations and have garnered support from several consumer watchdog groups, such as the Center for Responsible Lending. Scott Horsley & Chris Arnold, *New Rules to Ban Payday Lending 'Debt Traps'*, NAT'L PUB. RADIO (June 2, 2016), <http://www.npr.org/sections/thetwo-way/2016/06/02/480329986/new-rules-to-ban-payday-lending-debt-traps> [<https://perma.cc/3S8H-DDPW>] (Mike Calhoun, president of the Center for Responsible Lending, noted that while he supported the proposed rules, he is concerned about the industry finding loopholes).

340 Eileen Ambrose, *Payday Loan Gap*, BALT. SUN (Aug. 12, 2007), http://articles.baltimoresun.com/2007-08-12/business/0708120129_1_payday-loans-payday-lender-revolving-loans [<https://perma.cc/AM22-EJLY>].

341 *Id.*

342 *Id.*

343 The author's next article on consumer debt criminalization tactics will propose legislative solutions to protect vulnerable individuals who cannot pay their civil debts. Under the Federal Sentencing Guidelines, crimes can be punished more severely if they are specifically targeted towards "vulnerable victims." *See, e.g.*, 18 U.S.C.A. § 3A1.1 (West 2016) (stating that the guidelines allow "vulnerable victim" classification to be based on "age, physical or mental condition, or someone who is otherwise particularly susceptible to the criminal conduct," allowing a broad understanding of who is vulnerable). One suggestion is that there should be enhanced damages available under a similar standard in consumer protection law as well. Stiffer economic penalties may deter these companies from unfair and deceptive practices and could put repeat bad actors out of business. Evidently, companies must be netting a profit given that they continue to break and bend consumer protection laws even after paying fines and penalties.