

RESEARCH ARTICLE

# Analysing legal responses to coerced debt

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## Abstract

This paper analyses legal responses to the problem of debt taken out due to coercion within an intimate relationship. Coerced debt differs from other forms of domestic abuse, as it involves a contractual relationship between the victim and a third-party lender. Legal responses must consider whether the victim should be released from her contractual obligation. The paper employs a theoretical lens of vulnerability and relationality, examining lenders' duties to combat coerced debt, as well as contractual doctrines of undue influence and duress, which allow victims to have transactions set aside under certain circumstances. The paper argues that victims are being failed by an inadequate legal response. The law views vulnerability as an exceptional state and relationality as a constraint, rather than inherent features of the human condition. Through the social construct of the 'free market', lenders are consistently favoured by the law, with little obligation to ensure that transactions are free from coercion. The paper concludes with a call for the state to take greater responsibility for coerced debt and to allocate the risk differently than it currently does. This will promote higher levels of resilience for victims and allow them to escape abusive relational contexts.

**Keywords:** family law; domestic abuse; coerced debt; economic abuse; vulnerability; relationality

## Introduction

It is increasingly recognised in law and policy that economically and financially abusive behaviour constitutes a stand-alone category of intimate partner violence that deserves separate attention and analysis.<sup>1</sup> Economic abuse is a significant societal problem, causing harm to victims<sup>2</sup> and trapping them in abusive relationships.<sup>3</sup> It is also a widespread phenomenon, with 16% of UK adults reporting that they have experienced it at some point during their lives.<sup>4</sup> The Domestic Abuse Act 2021 specifically includes economic abuse in its broad definition of abuse, defining it as 'any behaviour [by A] that has a substantial adverse effect on B's ability to a) acquire, use or maintain money or other property; or b) obtain goods or services'.<sup>5</sup> However, despite this recognition, economic abuse largely remains an under-researched and under-theorised topic.<sup>6</sup>

<sup>1</sup>See A Adams et al 'Development of the scale of economic abuse' (2008) 14 *Violence Against Women* 563; N Sharp-Jeffs *A Review of Research and Policy on Financial Abuse Within Intimate Partner Relationships* (CWASU, 2015). Although there have been attempts in some of the literature to differentiate between the terms 'economic abuse' and 'financial abuse', these are used interchangeably in this paper.

<sup>2</sup>The term 'victim' is used throughout this paper, but it is recognised that there exists a debate over terminology, with some preferring the term 'survivor' or 'victim-survivor'.

<sup>3</sup>J Postmus et al 'Understanding economic abuse in the lives of survivors' (2012) 27 *Journal of Interpersonal Violence* 411.

<sup>4</sup>Refuge and the Co-operative Bank 'Know Economic Abuse' (2020) <https://refuge.org.uk/wp-content/uploads/2020/10/Know-Economic-Abuse-Report-2020.pdf> (last accessed 18 January 2024).

<sup>5</sup>Domestic Abuse Act 2021, s 1(4)(a)–(b).

<sup>6</sup>See A Stylianou et al 'Measuring abusive behaviors: is economic abuse a unique form of abuse?' (2013) 28 *Journal of Interpersonal Violence* 3186; J Postmus et al 'Economic abuse as an invisible form of domestic violence: a multicountry review' (2020) 21 *Trauma, Violence & Abuse* 261; Sharp-Jeffs, above n 1.

This paper focuses on how the law deals with a particular species of economic abuse, namely what Littwin has labelled ‘coerced debt’.<sup>7</sup> Coerced debt is defined as ‘all nonconsensual, credit-related transactions that occur in a violent relationship, not just matters that depend on the express application of force’.<sup>8</sup> Coerced debt presents a pernicious and urgent social issue in an era where consumer credit is readily available and levels of individual debt are high.<sup>9</sup> The limited research that exists on the topic suggests that coerced debt is a common form of economic abuse, with the Economic Justice Project finding that 60% of victims of economic abuse have been coerced into taking on debt.<sup>10</sup> Coerced debt raises unique issues that cannot be resolved through ‘traditional’ responses to domestic abuse and requires a different theoretical approach in order to move towards a more satisfactory legal response than currently exists. The main reason is that coerced debt cannot simply be analysed as a harmful dynamic between two individuals. It inevitably involves a contractual relationship between the victim and a third-party lender, with the victim experiencing harm through the ongoing financial liability. In responding to coerced debt, it is therefore necessary to consider the extent to which the lender should be required to bear some of the burden of the abusive dynamic between the victim and her partner. Currently (and problematically), the law places very limited liability on lenders in this area and victims of coerced debt are left without effective means of recovering from the abuse.

Using a theoretical framework of vulnerability and relationality based on Martha Fineman’s theory of universal vulnerability,<sup>11</sup> this paper critically interrogates the problem of coerced debt and the current legal responses to it, including both the statutory duties of lenders and the general law of contract that governs loan agreements. This theoretical frame draws on key insights from theories of universal human vulnerability and relationality. It advances the argument that the law fails to acknowledge or address the core of the problem, namely the *state’s* instrumental role in structuring relationships between individuals and institutions, as well as in creating conditions in which coercive and abusive behaviour is likely to flourish. It argues that the state (and law) is systematically choosing to prioritise the interests of commercial institutions over individuals while hiding behind illusory concepts such as family privacy and the free market.

The paper begins by outlining the problem of coerced debt, including the temporality of its effects on victims. It makes the point that coerced debt has considerable and long-lasting adverse consequences for victims, even after the abusive relationship ends, resulting in reduced access to essential resources. The paper then examines the limited ways that the law currently responds to coerced debt, through consumer protection law and the vitiating contractual doctrines of undue influence and duress. It goes on to set out the theoretical frame of analysis, drawing on the key elements of Fineman’s theory of vulnerability and Jennifer Nedelsky’s theory of relationality. Through this lens, the paper examines the law’s response to coerced debt, making three arguments: first, that the law is failing victims of coerced debt by ignoring realities of universal vulnerability and relationality in favour of promoting autonomy and individualism; secondly, that the law obscures the state’s influence over the ostensibly free market and thirdly, that the state’s promotion of illusions such as family privacy and state restraint create conditions in which coerced debt and other economic abuse can flourish. Finally, the paper argues for the need for a response that provides victims of coerced debt with greater resilience than they currently have, and which emphasises the state’s responsibility towards them.

<sup>7</sup>A Littwin ‘Coerced debt: the role of consumer credit in domestic violence’ (2012) 100 *California Law Review* 951.

<sup>8</sup>*Ibid.*, at 954.

<sup>9</sup><https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/incomeandwealth/bulletins/householddebtgreatbritain/april2016tomarch2018> (last accessed 18 January 2024).

<sup>10</sup>See Surviving Economic Abuse ‘Recognising and responding to the scale of coerced debt’ [https://survivingeconomicabuse.org/wp-content/uploads/2020/11/SEA-EJP-Evaluation-Framework\\_112020-2-2.pdf](https://survivingeconomicabuse.org/wp-content/uploads/2020/11/SEA-EJP-Evaluation-Framework_112020-2-2.pdf) (last accessed 18 January 2024).

<sup>11</sup>In particular see M Fineman ‘The vulnerable subject: anchoring equality in the human condition’ (2008) 20 *Yale Journal of Law and Feminism* 1; M Fineman ‘The vulnerable subject and the responsive state’ (2010) 60 *Emory Law Journal* 251.

## 1. The impact of coerced debt

Coerced debt is a form of economic abuse. It involves the abuser putting pressure, whether directly or indirectly, on the victim to take out or guarantee debts. It also includes exploitation of the victim's credit rating, such as requiring the victim to take on debt in her name (without benefiting from the funds) because her abuser does not have sufficient credit rating to do so. The harmful impacts and the widespread nature of economic abuse are gradually becoming better understood. Postmus et al have described economic abuse as a hidden form of abuse, as studies on domestic abuse to date have tended to focus on physical violence or threats.<sup>12</sup> The historic lack of attention given to economic abuse may in part be explained by an aversion to law interfering with how couples manage their finances while the relationship remains intact.<sup>13</sup> This reflects the notion within the liberal legal and philosophical tradition that the family unit and its workings lie beyond legal control and that the state should not encroach on family privacy.<sup>14</sup> Additionally, economic abuse can often be difficult to identify due to common patterns of financial dependency within the family. As Postmus et al argue, 'victims may have difficulty distinguishing economically abusive patterns from the economic insecurity they experience as women'.<sup>15</sup> Nonetheless, the research that has been carried out suggests that it is a widespread problem and a key way that abusers seek to coercively control victims.<sup>16</sup> As with other forms of domestic abuse, economic abuse and coerced debt is gendered, affecting women at a higher rate than men and having more severe impacts.<sup>17</sup>

Like all forms of domestic abuse, economic abuse has significant negative effects on victims, both during the relationship and upon its breakdown. In particular, economic abuse reduces the victim's access to resources, including food, clothing, accommodation, and utilities, and can cut her off from various opportunities, including employment.<sup>18</sup> It affects the extent to which the victim feels able to leave the relationship.<sup>19</sup> The effects are substantial, with Sharp finding that the majority of victims of economic abuse reported a long-term negative impact on their lives.<sup>20</sup>

Coerced debt is a form of economic abuse that has serious additional detrimental effects on the victim that extend into the future. This is because it does not merely impact on the victim's interactions with her abusive partner but also affects her wider status within society and directly shapes her relationship with the state and its institutions. While ending an abusive relationship can remove the victim from the immediate harmful environment, coerced debt involves an enduring legacy of the abuse in the form of the victim's continuing contractual liability towards the lender. Even where the victim and abuser are married or in a civil partnership, the court's powers on divorce and dissolution are limited to redistributing net assets rather than being able to transfer liabilities between the parties or to relieve a party from debt.<sup>21</sup> In cases where there are sufficient assets, the family court could account for the impact of coerced debt in a financial award, by awarding the victim a greater share of the assets to enable the debt to be paid off, but, in many cases, this will not be possible as there are insufficient assets. Where the victim and abuser were not married or in a civil partnership, there exist no discretionary powers of redistribution.

<sup>12</sup>Postmus et al, above n 6.

<sup>13</sup>C Burgoyne et al "All my worldly goods I share with you"? Managing money at the transition to heterosexual marriage' (2006) 54 *The Sociological Review* 619.

<sup>14</sup>See K Bartlett 'Feminism and family law' (1999) 33 *Family Law Quarterly* 475.

<sup>15</sup>Postmus et al, above n 6, at 262.

<sup>16</sup>N Sharp-Jeffs *Money Matters: Research into the Extent and Nature of Financial Abuse within Intimate Relationships in the UK* (The Cooperative Bank, 2015).

<sup>17</sup>Ibid.

<sup>18</sup>See N Sharp-Jeffs *Understanding and Responding to Economic Abuse* (Bingley: Emerald Publishing, 2022).

<sup>19</sup>C Kim 'Credit cards: weapons for domestic violence' (2014) 22 *Duke Journal of Gender Law & Policy* 281.

<sup>20</sup>N Sharp *What's Yours is Mine: The Different Forms of Economic Abuse and its Impact on Women and children Experiencing Domestic Violence* (London: Refuge, 2008) p 29.

<sup>21</sup>Matrimonial Causes Act 1973. Under Part II of the Act, the court has power to make a range of income and capital orders, including lump sum order, property transfer orders, and periodical payments orders. It is therefore possible for a court to make a capital order in favour of a victim to offset debt in her name that has been obtained by coercion.

Coerced debt severely restricts the victim's ability to recover from the impacts of the abusive relationship and to move on with her life. In some cases, the victim will have been coerced into lending that is secured against her home and she may lose this if she (or the abuser) is unable to keep up with repayments. In the case of both secured and unsecured lending, the victim may be burdened by unaffordable repayments, affecting her ability to meet her (or her children's) immediate needs such as buying food or clothing or paying for transport. Failure to keep up with repayments will negatively impact the victim's credit rating and consequently her ability to access various services. Both mortgage lenders and private landlords routinely make use of credit checks to assess suitability, meaning that a victim with a damaged credit rating due to coerced debt may struggle to secure adequate accommodation, both on relationship breakdown and potentially relatively far into the future. In extreme cases, an inability to keep up with repayments can lead to the victim's bankruptcy, which carries substantial social stigma and restricts ability to pursue certain professions during the period of bankruptcy.<sup>22</sup> Access to credit is often necessary for day-to-day living, such as being able to obtain car financing or gain favourable rates on utility payments. Those deemed to have poor credit are often forced to have resort to punitive interest rates, such as payday lending.<sup>23</sup> The impact of poor credit has a strong public element, shaping the way that the victim is viewed by wider society. As Littwin has argued 'without a job, rental housing, or gas and electricity, [the victim] is simply not an economically viable unit'.<sup>24</sup>

The impacts of coerced debt are also psychological, both during and after the abusive relationship. Debt struggles are generally understood as having negative effects on physical and mental health and wellbeing.<sup>25</sup> Victims of coerced debt often feel a sense of shame and a fear of being judged, even where the debt was incurred as a result of domestic abuse.<sup>26</sup> Within neoliberal discourse, dependency on personal debt is often regarded as a sign of individual failure and irresponsible citizenship. For instance, Pathak points to a tendency within governmental and policy discourses to believe that it is 'immoral, reckless and indulgent choices which result in a dependency upon debt and a consequent vulnerability to overindebtedness'.<sup>27</sup>

## 2. Legal responses to coerced debt

This section focuses specifically on how the law currently determines liability for a debt that has been procured through coercion within the context of an intimate relationship. It does not examine in detail legal responses to domestic abuse more generally. It is recognised that coerced debt is a form of intimate partner violence and that victims can seek recourse through the civil and criminal law.<sup>28</sup> However, these courses of action do not involve the lender and will not impact on the victim's liability for the debt and therefore lie beyond the scope of this paper.

### (a) *The lender's statutory duties*

Lenders, including credit card lenders, banks, building societies, and insurers in the UK are regulated by the Financial Conduct Authority (FCA). The FCA sets out obligations that lenders must comply with when issuing any financial products. Lender obligations are also contained in the Consumer

<sup>22</sup>For example, being a company director.

<sup>23</sup>Littwin, above n 7.

<sup>24</sup>A Littwin 'Escaping battered credit: a proposal for repairing credit reports damaged by domestic violence' (2012) 161 *University of Pennsylvania Law Review* 363 at 370.

<sup>25</sup>See M Clayton et al 'Does debt affect health? Cross country evidence on the debt-health nexus' (2015) 130 *Social Science & Medicine* 51.

<sup>26</sup>See K Purdam and J Prattley 'Financial debt amongst older women in the United Kingdom – shame, abuse and resilience' (2021) 41 *Ageing & Society* 1810.

<sup>27</sup>P Pathak 'Ethopolitics and the financial citizen' (2014) 62 *The Sociological Review* 90.

<sup>28</sup>Relevant remedies would include injunctive relief under the Family Law Act 1996 and the Domestic Abuse Act 2021. Coercive and controlling behaviour is also criminalised under the Serious Crime Act 2015, s 76.

Credit Act 1974.<sup>29</sup> Obligations are intended to ensure that contracts entered into are fair and that lenders suitably assess the affordability of the product before issuing it. The statutory framework is confined to the immediate relationship between the lender and the borrower. There are no specific statutory duties on lenders to fully satisfy themselves that the product is not being taken out as a result of coercion (unless the circumstances are such that they are deemed to have notice of the coercion, as discussed below in the context of the vitiating doctrines). Therefore, the victim would only be able to challenge the validity of the loan if it could be shown that her own relationship with the lender was unfair or coercive in some manner. As the majority of lending is carried out on standard terms, it is unlikely that this will be the case but there may be remedies available if it can be shown that the lender had failed to fully consider issues such as affordability.

There is some evidence of increasing lender awareness of the risk of coerced debt and a perceived need for lenders to address this. In 2018 (updated in 2021), UK Finance (previously the British Banking Association) launched a voluntary Financial Abuse Code of Practice<sup>30</sup> that seeks to govern its dealings with potential victims of economic abuse and aims to provide support for victims to regain control of their finances and their independence. The Code also requires members to provide staff training that allows the identification of potential abuse. The FCA has also issued Guidance on the Fair Treatment of Vulnerable Customers, where a vulnerable customer is defined as ‘someone who, due to their personal circumstances is especially susceptible to harm, particularly when a firm is not acting with appropriate levels of care’.<sup>31</sup> The guidance mentions domestic abuse, including economic control as one factor that operates to make an individual especially vulnerable. It explains that ‘if a firm has doubts about a customer’s ability to understand a product or service, suspects they do not have capacity to make decisions or that they are acting as a result of fraud or coercion, it should assess whether it should allow the customer to proceed’.<sup>32</sup> The recognition of the possibility of coercion is to be welcomed here. However, a significant number of credit transactions are applied for and approved entirely online, with no requirement for the customer to even speak to a member of the lender’s staff over the telephone during the process. The proliferation of online loan applications means that it is extremely difficult, if not impossible, for a lender to find out whether a loan is being taken out in circumstances where the customer is subject to coercion. Therefore, while the guidance aims to protect victims of coerced debt, the lender’s lack of scrutiny of the customer’s circumstances means that this is of limited assistance in many cases.

### **(b) The vitiating contractual doctrines**

There is some (albeit limited) potential for victims of coerced debt to seek to set aside the agreement against the lender. The law presumes that the parties have capacity to contract and should therefore be held to their bargains. It is certainly not for the law to intervene in cases where an individual regrets a contract and the law is relatively hesitant to intervene where the terms of the agreement are objectively unfair, as long as it was freely entered into.<sup>33</sup> However, particularly under the principles of equity, it is recognised that in some cases, the contract was not entered into freely and is therefore voidable, ie it can be set aside at the claimant’s request.<sup>34</sup> In the case of coerced debt, the common law doctrine of duress and the equitable doctrine of undue influence are particularly relevant in terms of offering a potential remedy for victims.

<sup>29</sup>Note that the majority of mortgage lending is now exempt from the Consumer Credit Act 1974 but it continues to apply to some aspects, including the prevention of extortionate credit bargains.

<sup>30</sup>[https://www.ukfinance.org.uk/system/files/2022-12/Financial-Abuse-Code-2021\\_Updated\\_2022.pdf](https://www.ukfinance.org.uk/system/files/2022-12/Financial-Abuse-Code-2021_Updated_2022.pdf) (last accessed 18 January 2024).

<sup>31</sup>FG 21/1 Guidance for Firms on the Fair Treatment of Vulnerable Customers (FCA 2021), para 1.1.

<sup>32</sup>*Ibid*, para 4.54.

<sup>33</sup>For discussion see S Enman ‘Doctrines of unconscionability in Canadian, English and Commonwealth contract law’ (1987) 16 *Anglo-American Law Review* 191.

<sup>34</sup>See eg *Lloyds Bank v Bundy* [1975] QB 326.

A victim seeking to rely on one of the vitiating doctrines will need to show not only that the abuser engaged in the relevant conduct but also that the lender, due to the circumstances, should be considered tainted by this conduct and it would therefore be appropriate for the loan to be set aside.<sup>35</sup>

### (c) *The doctrine of undue influence*

The equitable doctrine of undue influence renders a transaction voidable if it can be shown (or presumed) that it was procured through one party exerting influence over the other or taking advantage of an imbalance of power in a relationship.<sup>36</sup> While the courts have been hesitant to put forward a substantive definition of undue influence,<sup>37</sup> in broad terms it concerns the exploitation of one party by the other, in the context of a relationship that is characterised by trust and confidence, or where one party is considered particularly vulnerable or dependent. While there has been academic debate over the doctrine's normative justification,<sup>38</sup> Chen-Wishart has argued that it concerns transactions that are harmful to the relationship of dependency between the claimant and defendant, preventing the former from being able to lead an autonomous life.<sup>39</sup>

Undue influence can be either actual or presumed. Actual undue influence refers to instances where the claimant can prove that undue influence took place. This covers not only overt threats and pressure but also more subtle behaviour such as taking advantage of another's lack of financial acumen, or their trust and reliance.<sup>40</sup> In the case of coerced debt and economic abuse more generally, acts such as pressuring a partner to take out or guarantee debts would be likely to meet the threshold for actual undue influence. However, the often-concealed nature of domestic abuse and coercive control means that victims may struggle to adduce sufficient evidence of actual undue influence in respect of a specific transaction, and it may be more appropriate to argue that the undue influence should be *presumed* due to the nature of the relationship between the parties.

Undue influence can be presumed in circumstances where the relationship between the parties is such that, coupled with the requirement that the transaction calls for an explanation (discussed below), it gives rise to a presumption that one party exerted improper power over the other. A presumption of undue influence shifts the burden of proof to the defendant to show that the claimant did freely enter the transaction. This can usually be done through showing that the claimant received independent legal advice before signing, although, depending on the nature and circumstances of the transaction, this by itself may not be sufficient.<sup>41</sup> Certain relationships (the main ones being doctor and patient, trustee and beneficiary, and solicitor and client) are automatically considered to be ones of trust and confidence, where influence will be presumed.<sup>42</sup> The relationship between spouses (or cohabiting partners) does not fall into the category of automatic relationships of trust and confidence.<sup>43</sup> Instead, a

<sup>35</sup>*Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449.

<sup>36</sup>See *BCCI v Aboody* [1992] All ER 955.

<sup>37</sup>*Etridge* above n 35, at [920] per Lord Clyde.

<sup>38</sup>This has largely focused on whether the doctrine targets the claimant's lack of consent or the defendant's reprehensible conduct. See R Bigwood 'Undue influence: impaired consent or wicked exploitation?' (1996) 16 *Oxford Journal of Legal Studies* 503.

<sup>39</sup>M Chen-Wishart 'Undue influence: vindicating relationships of Influence' (2006) 59 *Current Legal Problems* 231. Chen-Wishart argues that neither the claimant's absent consent, nor the defendant's conduct offer satisfactory explanations for the doctrine.

<sup>40</sup>See eg *BCCI v Aboody*, above n 36, and *Drew v Daniel* [2005] EWCA Civ 507.

<sup>41</sup>See *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 and *Allcard v Skinner* (1887) 36 Ch D 145 for an example of where the transaction was so disadvantageous as to suggest that not even the presence of legal advice would have sufficed to rebut the presumption.

<sup>42</sup>See eg *Markham v Karsten* [2007] EWHC 1509 (Ch).

<sup>43</sup>Interestingly, engaged couples have historically been included in the class of relationships of presumed influence, as in *Re Lloyds Bank* [1931] 1 Ch 289 and more recently in *Leeder v Stevens* [2005] EWCA Civ 50. There has been no case in the English courts directly overruling this anomaly, which is inconsistent with spouses and cohabitants being excluded from the category. However, it was confirmed by the High Court of Australia in *Thorne v Kennedy* [2017] HCA 49 that the presumption no longer exists in Australian law (at [36]).

claimant will need to show that the relationship was *in fact* one characterised by either trust and confidence or vulnerability and dependency. Where the relationship is abusive, including coercive and controlling behaviour by one of the parties, this would be likely to constitute evidence of a *de facto* relationship of influence.

It is insufficient merely to show evidence of an unequal relationship to trigger the presumption of undue influence. The transaction in question must also be one that ‘calls for an explanation’,<sup>44</sup> meaning that it cannot be explained through other motives, such as friendship or generosity. The previous language of ‘manifest disadvantage’ to the claimant used in *NatWest v Morgan*<sup>45</sup> has been displaced, meaning that the transaction is instead analysed in the context of the relationship. In the case of coerced debt, the debt in question is used predominantly for the benefit of the abuser, even if it is acquired in the victim’s name. Therefore, the requirement that the transaction calls for an explanation should be capable of being satisfied here (although, as discussed below, many cases of coerced debt will not be sufficient to put a lender on inquiry because the loan monies are advanced to both parties).

While cases of coerced debt would likely satisfy the test for actual or presumed undue influence, this by itself does not provide the victim with a remedy against the lender. To do this, the victim must show that the lender is in some way tainted by the abuser’s actions. This is governed by the doctrine of notice, whereby the lender will be liable if it knew or should have known that the victim was subject to undue influence. It will be rare that the lender will have actual notice of coercion (unless directly informed of this by the victim), so the question is then whether there is constructive notice, ie that the lender should have realised that the transaction was procured through coercive means.

The threshold for the lender being placed on inquiry in cases of undue influence is fairly low. As per *RBS v Etridge*, a bank will be placed on inquiry where the parties are in a non-commercial relationship with one another and the transaction calls for an explanation (ie that it is not to the obvious advantage of the claimant). This requirement means that only instances where the victim is asked to guarantee the abuser’s debts are likely to be covered, as a situation where the loan monies were advanced to both parties (regardless of whether they are in fact shared equally) will normally not call for an explanation.<sup>46</sup> Nor, of course, will the lender be placed on inquiry if the loan is taken out in the victim’s sole name.

Where the lender is alerted to the risk of undue influence, it must take reasonable steps to satisfy itself that the transaction is freely entered into. It was confirmed in *Etridge* that the lender’s duty will be considered discharged by ensuring that the surety receives independent legal advice on the transaction. If the lender complies with this, it will not be deemed to have had constructive notice of undue influence and the transaction will therefore be binding against the surety.

As shown in this section, while it can provide relief in some instances, most commonly where the victim has guaranteed the abuser’s debts, the doctrine of undue influence is of relatively limited assistance to victims of coerced debt. The requirement that a transaction needs to call for an explanation means that instances where mortgages and other loans are taken out in the parties’ joint names are not covered, even where the claimant is not given equal access to the loan funds (unless it can be shown that the lender knew that the money would only be used by one party and was therefore not to the claimant’s advantage). Nor, of course, does the doctrine cover cases where the victim is pressured to take on loans in her sole name, where the funds are used for the abuser’s benefit.

#### **(d) The doctrine of duress**

Duress operates to allow a claimant to have a contract set aside on the basis that she was subjected to illegitimate pressure or threats to enter it. Unlike undue influence, duress is a common law doctrine. Duress can consist of duress to the person (threats of violence),<sup>47</sup> or economic duress (threats to retain

<sup>44</sup>*Etridge*, above n 35, at [14] per Lord Nicholls.

<sup>45</sup>[1985] AC 686.

<sup>46</sup>*CIBC Mortgages plc v Pitt* [1994] AC 200.

<sup>47</sup>*Barton v Armstrong* [1976] AC 104.

or damage the claimant's property or to otherwise harm her economic interests).<sup>48</sup> In the context of coerced debt, the most relevant of these categories is likely to be duress to the person. If the abuser issues direct threats to use violence against the victim, this would meet the requirements for duress to the person.

There is a degree of overlap between duress and actual undue influence, as discussed above. However, while undue influence is based on the existence of an unequal relationship, duress concerns contracts that were procured by way of illegitimate threats. It is therefore substantially narrower than the doctrine of undue influence. As is the case for undue influence, the justification for allowing the contract to be set aside is that the claimant's free will was impaired as a result of the threats, as well as the threats themselves being illegitimate.<sup>49</sup>

One problem that the victim may face in relying on the doctrine of duress is that the abuser often does not make specific overt threats of violence that relate directly to taking out the debt. Rather, the debt is taken out in the context of a relationship that is marked by abuse and coercive control, but the behaviour is substantially more subtle than that for duress. On the other hand, where the victim *is* able to show evidence of direct threats, invoking the doctrine of duress may be an option (subject to the survivor being able to prove that the lender should be liable), even if it cannot be shown that the relationship was one of trust and confidence.

As with undue influence, the victim of coerced debt is seeking a remedy against the third-party lender rather than her abuser. In contrast to the well-developed case law on undue influence in third-party cases, there exists no reported authority on third-party liability for duress. However, *Chitty on Contracts* suggests that a remedy may lie against a third party such as a lender, provided that the latter had actual or constructive notice of the threats in question.<sup>50</sup> Given the circumstances in which most loans are agreed (online and without the need for an interview with the lender), it appears unlikely that a lender would have notice of direct threats made by abuser, so the doctrine is of limited relevance to victims of coerced debt.

### 3. A new theoretical analysis

This paper argues that legal responses to coerced debt are in need of fundamental reconceptualisation in order for the state to meet its obligations to victims of intimate partner violence and abuse. This involves re-examining the law on coerced debt through a framework that recognises humans as fundamentally vulnerable and relational, as well as acknowledging the state's consistent failure, through reliance on theories and policies of liberal individualism and state restraint, to take account of vulnerability and relationality. The theoretical lens set out in this section draws on key elements of Fineman's theory of universal vulnerability<sup>51</sup> and Jennifer Nedelsky's theory of relationality.<sup>52</sup> It reinterprets the law from the perspective of the vulnerable and relational legal subject. The lens illuminates the state's failure towards victims of coerced debt, as well as its creation of conditions in which coerced debt and other forms of economic abuse are permitted to flourish.

#### (a) Vulnerability

The theoretical lens used in this paper draws on key elements of the theory of universal vulnerability developed by Martha Fineman, which critiques tendencies of law and other state institutions to adhere to 'liberal' theories of personhood and to ignore the reality of human vulnerability. Where vulnerability *is* mentioned in liberal discourse, this is usually in a narrow sense, with the imagined legal subject being a rational and self-serving individual with the capacity to make choices and to enter into

<sup>48</sup> *Atlas Express Ltd v Kafco* [1989] QB 833.

<sup>49</sup> See *Universe Tankships Inc of Monrovia v International Transport Workers' Federation* [1982] 2 All ER 67.

<sup>50</sup> *Chitty on Contracts* (Westlaw, 34<sup>th</sup> edn) para 10.067.

<sup>51</sup> See Fineman (2008) and Fineman (2010), above n 11.

<sup>52</sup> J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011).



bargains that are then enforced by law.<sup>53</sup> Vulnerability is seen as a condition or affliction that deviates from the norm and is usually considered to affect only a narrow section of the population, such as the elderly or very young. This view of vulnerability is particularly evident in English contract law, which has a tradition of promoting freedom of contract, whereby the law will uphold bargains between individuals on the basis that they were freely entered into rather than on the basis that they are substantively fair.<sup>54</sup> Narrow exceptions operate to take account of perceived vulnerability, seen for instance in the rule that contracts are not enforceable against minors or those that lack mental capacity. Additionally, vitiating doctrines such as undue influence and duress operate to protect those who are deemed unable to exercise free will in entering a contract.

Fineman's theory of vulnerability makes two key claims that it argues should form the foundation of law and policy, and which are drawn upon in this paper. The first is that vulnerability is a universal, inevitable, and lifelong condition that arises from human embodiment. Bodies are fragile and constantly susceptible to various harms that can cause hardship and suffering. The effects of embodiment are inescapable, even if the individual in question occupies a relatively privileged position in society. Embodiment also brings about dependency, which is episodic and fluctuates throughout the human life course, necessitating caregiving by others. For instance, all humans are completely dependent on care in infancy and may become so on further occasions during life. While there may be periods of time during an individual's life that they are more self-sufficient, this is not a permanent state and may change if the individual experiences accident or injury, or the inevitable bodily decline of old age. While Fineman would refute claims that certain people are more (or less) vulnerable than others, she argues that individuals possess varying levels of *resilience* to their vulnerability.<sup>55</sup> Resilience consists of access to material resources, as well as societal and institutional networks that mitigate and counteract the adverse impacts of inherent vulnerability. Fineman emphasises that the state controls how resilience is distributed across populations and is therefore responsible for existing inequalities.<sup>56</sup>

The second claim is that, as a consequence of universal embodied vulnerability, all individuals are embedded within a network of relationships with other individuals and with the state and its institutions. While liberal theories view the state as ideally minimal and restrained, and existing separately from the private family and the marketplace, these binaries are disputed by vulnerability theorists. Instead, they argue, the state has power and influence over all aspects of human existence, even those areas where it claims to be absent.<sup>57</sup> The state's various institutions, of which law is one, directly affect how individuals experience their own vulnerability. The way that institutions are structured and the access that individuals are given to them can operate to promote resilience, enabling flourishing in the face of inherent vulnerability. Conversely, institutions may be structured in a way that generates substantial hardships for some individuals or sectors of the population.

Vulnerability theorists not only point to the fallacy of state restraint but also critique the various harmful impacts of a state that refuses to take responsibility for vulnerability.<sup>58</sup> Under liberal accounts, state power is potentially harmful and encroaches on individual liberty and autonomy. The individual is depicted as having freedom to shape her life in such a way that she chooses, taking advantage of opportunities provided by the state to all its subjects. The ideal promoted is one of economic self-sufficiency, with the private family unit expected to be self-supporting. Where this does not occur and where the individual or the family displays evidence of vulnerability or state dependency, this is stigmatised and labelled as a failure to attain self-sufficiency rather than a failure on the part of

<sup>53</sup>See M Fineman *The Autonomy Myth: A Theory of Dependency* (New York: The New Press, 2004).

<sup>54</sup>P Atiyah *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979).

<sup>55</sup>M Fineman 'Vulnerability and inevitable inequality' (2017) 4 Oslo Law Review 133.

<sup>56</sup>Ibid.

<sup>57</sup>See F Garland and M Travis 'Making the state responsible: intersex embodiment, medical jurisdiction and state responsibility' (2020) 47 Journal of Law & Society 298.

<sup>58</sup>See eg D Newman et al 'Vulnerability, legal need and technology in England and Wales' (2021) 21 International Journal of Discrimination and the Law 230; Garland and Travis, *ibid.*

the state to ensure equitable distribution of resilience-promoting resources.<sup>59</sup> The state will acknowledge vulnerability only in the sense that it is a condition affecting certain groups, where the legal response tends to be based around non-discrimination; seeking to remove or neutralise obstacles to exercising autonomy.<sup>60</sup> Where the law does make special provision for those it labels as vulnerable, Fineman argues that this is framed as being a deviation from the norm, with vulnerability contrasted with the expectations of autonomy and rationality.<sup>61</sup>

### (b) Relationality

The second element of the theoretical lens argues that all relationships, even those that are regarded as private, are shaped by various wider forces, including law and other state institutions. Just as liberal theories ignore and deny human embodiment, they also overlook the complex networks of relationships within which all individuals exist and the extent to which these networks are shaped by law and other institutions. In fact, liberal accounts often view relationships as a potential threat to individual autonomy and choice-making.<sup>62</sup> Relational theorists argue that ‘persons are socially embedded and that agents’ identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender and ethnicity’.<sup>63</sup> Thus, autonomy is viewed not as inborn, but as a condition that can only exist if we are treated as autonomous agents by those around us. As Nedelsky, one of the key proponents of relational theory, argues, ‘autonomy is made possible by constructive relationships – including intimate, cultural, institutional – all of which interact’.<sup>64</sup> Rather than the restrained ‘night-watchman’ state preferred by liberal theorists, the relational account sees the state as playing a pivotal role, both in recognising the individual as being autonomous and having the capacity to make choices, and in providing the material conditions necessary for autonomy.<sup>65</sup>

In analysing legal responses to coerced debt, relational theory complements vulnerability theory. While Fineman’s theory recognises inherent relationality through the notion of social embeddedness, her analysis tends to dismiss autonomy as a marker of positive relational networks. However, relational autonomy bears very little in common with its individualistic counterpart promoted by liberal theories. As explored further below, by recognising that relational autonomy can serve as a way to measure resilience to inherent vulnerability, the vulnerability account can be enhanced and deepened.<sup>66</sup>

Recognising relationships as being shaped by wider forces, including the way that state institutions are structured, is particularly important in an analysis of domestic abuse that seeks to locate the state’s responsibility for abusive relationships. It allows the harmful interpersonal relationship to be set in a broader context by examining how the state either fosters or inhibits the conditions that lead some relationships to become abusive. Abusive relationships are undoubtedly unequal but, under the vulnerability analysis, the state should be seen as playing a key role in creating conditions in which inequalities can thrive. Key to this is an understanding of the illusory nature of the division that is made between the public and private, especially regarding the role played by the family and the relationships and roles within it. Liberal theoretical accounts would suggest that the family is an organic entity, entirely separate from the state. There is a strong policy that law should not intrude in the family realm, something that feminists have frequently noted places women and children at risk of

<sup>59</sup>Fineman, above n 53.

<sup>60</sup>See M Fineman ‘Beyond identities: the limits of an anti-discrimination approach to equality’ (2012) 92 Boston University Law Review 1713.

<sup>61</sup>Ibid.

<sup>62</sup>C Mackenzie et al *New Essays in Ethics and Feminist Philosophy* (Oxford: Oxford University Press, 2014).

<sup>63</sup>Ibid, p 4.

<sup>64</sup>Nedelsky, above n 52, p 118.

<sup>65</sup>See J Nedelsky ‘Reconceiving rights as relationship’ (1993) 1 Review of Constitutional Studies 1; J Herring *Relational Autonomy and Family Law* (London: Springer, 2014).

<sup>66</sup>See also E Gordon-Bouvier *Relational Vulnerability: Theory, Law and the Private Family* (Basingstoke: Palgrave, 2020).

harm.<sup>67</sup> The ‘private’ family plays a significant role under the restrained state. It assumes the main responsibility for carrying out the caring and socially reproductive labour that is necessitated by the inherently vulnerable human condition.<sup>68</sup> The family is socially constructed, consisting of gendered relational roles, which divide caregiving labour unequally between the sexes, with women performing significantly more caring work than men, even in an era where workplace equality has improved. This is no accident – these roles are closely woven into social norms and expectations and children are socialised into them at an early age. By delegating liability for caregiving to the family, the state reaps an enormous benefit and is able to distance itself from responsibility for vulnerability. However, because caregiving within a liberal and neoliberal society is deemed incompatible with paid work, women tend to have less economic power than men, creating a relational imbalance. This does not mean that all economically unequal relationships are abusive ones. However, it can render women more susceptible to abuse and it has been pointed out that economic power often entails power in other aspects of the relationship too.<sup>69</sup>

#### 4. Rethinking coerced debt

This section analyses the current legal response to coerced debt through the vulnerability and relationality framework outlined above. The aim of doing so is to identify how the current response fails to address victim vulnerability and allows the state to avoid responsibility. The following section identifies three features of the current legal approach that demonstrate the state’s failure of victims of coerced debt. These will now be explored in more detail.

##### (a) *The hypothetical liberal subject*

Law, despite its frequent claims of neutrality, is constructed around a hypothetical legal subject.<sup>70</sup> This imagined person influences how law is drafted and how it is interpreted, setting various norms and expectations of individuals. Those who fail to live up to these expectations are marginalised and excluded.<sup>71</sup> Vulnerability theorists argue that the hypothetical subject in Western legal systems is inevitably an individual who lacks embodied vulnerability and is able to make choices free of relational and situational constraints. It is also an individual that exists outside of the human life course that is marked by episodic dependency on care from others and support from the state. As Grear describes, the autonomous subject imagined in liberal theories ‘is always, in paradigmatic terms, a human adult (male) standing in a highly selective relation to developmental time and processes – always paradigmatically fully-formed and functional’.<sup>72</sup> Those who demonstrate evidence of their inherent vulnerability and do not behave ‘as expected’ become stigmatised, either as lacking full personhood, or as being the author of their own misfortune through irresponsibility.

The legal response to coerced debt is anchored in an understanding of the individual as autonomous and able to enter rationally into bargains. Contract law is constructed around an invulnerable and disembodied individual who is free from relational constraints and inequalities. As Fehlberg noted in her study of wives who stood surety for their husbands’ business debts, ‘while contract law assumes an equal and agreed bargain between the parties, the reality of the conjugal relationship does not align with this’.<sup>73</sup> There are thought to be strong policy reasons in favour of certainty and of

<sup>67</sup>See Bartlett, above n 14.

<sup>68</sup>See Gordon-Bouvier, above n 66.

<sup>69</sup>V Zelizer *The Social Meaning of Money* (Princeton: Princeton University Press, 1997).

<sup>70</sup>N Naffine ‘Who are law’s persons? From Cheshire Cats to responsible subjects’ (2003) 66 *Modern Law Review* 346.

<sup>71</sup>L Fox-O’Mahony ‘Property outsiders and the hidden politics of doctrinalism’ (2014) 62 *Current Legal Problems* 409.

<sup>72</sup>A Grear ‘Vulnerability, advanced global capitalism and co-symptomatic injustice: locating the vulnerable subject’ in M Fineman and A Grear (eds) *Vulnerability: Reflections on a New Ethical Foundations for Law and Politics* (Farnham: Ashgate, 2013) p 44.

<sup>73</sup>B Fehlberg *Sexually Transmitted Debt: Surety Experience and English Law* (Oxford: Clarendon Press, 1997) p 90.

protecting the other contracting party (ie the lender), leading to a reluctance on the part of the state to intervene to set aside coerced loan agreements.<sup>74</sup> This is emblematic of the tendency for liberal theory to promote private ordering as representative of individual moral and political freedom, as well as symbolising the limits of state power.<sup>75</sup> The state is depicted as occupying merely a background role, ensuring that agreements are upheld, thus ostensibly displaying respect for the autonomy of its subjects. The limited duties placed on lenders to ensure that transactions are not coerced mean that individual freedoms are not unnecessarily encroached upon. At common law, an agreement will only be set aside if the circumstances are fairly extreme, as shown in the above discussion of the doctrine of duress. It is only if the claimant's will is overborne, judged according to the standard of a reasonable person, that the law will intervene. In equity, the position is more nuanced and there is considerably more awareness of the more subtle power imbalances that can arise in relationships that mean that the choice to enter a contract cannot be described as free. However, the standard used to assess whether undue influence has occurred remains the liberal autonomous subject and vulnerability is regarded as exceptional rather than an inherent part of the human condition. Claimants may struggle to obtain relief if they do not adequately conform to victimhood, as the court is less inclined to believe that they could be unduly influenced.<sup>76</sup> Where the court does find evidence of undue influence, the claimant is often pathologised and labelled as lacking in the essential features of personhood that the law expects. In terms of relationality, the relationship is characterised as a constraint on individual autonomy, preventing the claimant from acting in a way that promotes her own interests. The doctrine of undue influence only acknowledges those unequal relational contexts that are deemed out of the ordinary. As feminist critics have noted, socially accepted and normalised inequalities such as those that continue to exist between men and women do not feature in the doctrine, even though these will undoubtedly impact on the claimant's bargaining position.<sup>77</sup> The tendency to infantilise and pathologise those subjected to undue influence is why there has been a reluctance to extend the categories of relationships of presumed trust and confidence to married and unmarried couples, on the basis that this might promote undesirable levels of paternalism.<sup>78</sup>

Because the majority of credit applications are carried out online, there is limited scope for lenders to have any interactions with potential victims of economic abuse, whereby support or guidance could be offered. Instead, it is assumed that the borrower is making a rational and self-promoting decision by applying for lending. The FCA's Guidance on the Fair Treatment of Vulnerable Customers, as well as UK Finance's Code of Practice, discussed above, are to be welcomed here but do not place duties on lenders to carry out checks to ensure that the transaction is free of coercion. Nonetheless, it is encouraging that the recommendation is that suspicion of abuse should lead to cancellation of the transaction. It is also a positive development that the FCA Guidance makes mention of the myriad factors that could render someone vulnerable rather than simply confining vulnerability to a particular class of person. As the research shows, domestic abuse – including economic abuse – cuts across social classes. It can affect those who outwardly present as educated and articulate. Drawing limits around perceived vulnerability means that the full extent of domestic abuse remains hidden and that those who fall outside the narrow categories of victimhood are failed. The FCA seeks to embrace a wider definition, describing 'vulnerability as a spectrum', on which customers can move up and down, dependent on their circumstances and expects firms to be flexible in its approach to vulnerable

<sup>74</sup>See R Honey 'Renovating the concept of consent in contract and property law' in R Levy et al (eds) *New Directions for Law in Australia: Essays in Contemporary Law Reform* (Canberra: ANU Press, 2017).

<sup>75</sup>See R Craswell 'Remedies when contracts lack consent: autonomy and institutional competence' (1995) 33 *Osgoode Hall Law Journal* 209.

<sup>76</sup>M Durovic and F Lech 'The serpent under the flower: equity's tenderness towards married women in the doctrine of undue influence' (2022) 33 *King's Law Journal* 493.

<sup>77</sup>R Auchmuty 'Men behaving badly: an analysis of English undue influence cases' (2002) 11 *Social & Legal Studies* 257.

<sup>78</sup>See M Richardson 'Protecting women who provide security for a husband's, partner's or child's debts: the value and limits of an economic perspective' (1996) 16 *LS* 368; S Cretney 'The little woman and the big bad bank' (1992) 109 *Law Quarterly Review* 534.

customers as they move through the stages of vulnerability rather than having a catch-all approach for any customer categorised as ‘vulnerable’.<sup>79</sup> While the Guidance has limited impact in addressing coerced debt, its approach is encouraging.

In the case of coerced debt, the victim will be seeking to employ the vitiating doctrines – not to seek a remedy against her abuser, but to have the debt set aside against an ‘innocent’ third-party lender. The restrictive application of the duress and undue influence doctrines demonstrates a reluctance to place too much responsibility on lenders, reinforcing notions of state restraint and individual responsibility. This is particularly evident in the role played by independent legal advice in surety transactions. As discussed above, the lender’s duty to ensure that a surety transaction is free of undue influence is usually considered to be discharged if it can be shown that the surety received independent legal advice. This demonstrates a distinct absence of understanding of the nature of coercive control and economic abuse, as well as ignoring the wider relational context in which choices are made. While the doctrine of undue influence claims not to be premised on the victim’s lack of understanding of the transaction,<sup>80</sup> the remedying effect of independent legal advice presumes that once the advice is received, the victim is able to make a rational and self-interested choice. This assumption does not fit with the narratives of sureties who have signed under pressure. Belinda Fehlberg found that the majority of the sureties in her study understood the nature of the transaction and its risks, yet nonetheless felt compelled to enter into it.<sup>81</sup> Fehlberg also found that broader societal expectations were influential when making decisions, with married sureties being ‘particularly inclined to emphasize their perception ... that marriage was for life, and that, as a result they felt bound to support their spouse’.<sup>82</sup> Liberal theory obscures analysis of relational contexts by presuming that the legal subject is free from relational constraint or can *become* free by obtaining advice.

A more nuanced approach can be seen in *Thorne v Kennedy*<sup>83</sup> by the High Court of Australia. The case concerned a claim by Ms Thorne that a prenuptial agreement entered into between the parties prior to their marriage should be set aside for undue influence and unconscionable conduct by the defendant, Mr Kennedy.<sup>84</sup> The decision is notable because it displays awareness of wider relational contexts, as well as recognising the limitations of independent legal advice as a protective mechanism. Mr Kennedy was 30 years older than Ms Thorne, an Eastern European immigrant in her 30s, who had moved to Australia in order to get married to him. Mr Kennedy had considerable wealth, whereas Ms Thorne had very limited assets. Shortly before the wedding, Mr Kennedy presented Ms Thorne with a prenuptial agreement that would severely limit her entitlement to financial provision should the marriage break down. Ms Kennedy received legal advice on the terms of the agreement and was informed by her solicitor that it was one of the most unfair agreements the latter had encountered. She was advised that it was not in her interests to sign. Despite this, she did sign, and the wedding went ahead. She also signed a further, almost identical, post-nuptial agreement shortly after the wedding. When the marriage subsequently broke down, Ms Thorne sought to have the agreement set aside. In holding that the agreement had been tainted by undue influence, the High Court emphasised that the receipt of legal advice does not by itself vitiate claims of undue influence and that the court needs to consider a range of factors, including ‘the emotional circumstance in which the agreement was entered’ and ‘the nature of the Parties’ relationship’.<sup>85</sup> Notably, the High Court judgment also cites the work of Sharon Thompson, which criticises the presumption within contract law that parties are rational and self-interested, and instead advances a feminist relational theoretical

<sup>79</sup>FCA, above n 31.

<sup>80</sup>See eg *Leeder v Stevens*, above n 43, at [19] per Jacob LJ.

<sup>81</sup>B Fehlberg ‘Money and marriage: sexually transmitted debt in England’ (1997) 11 *International Journal of Law Policy and the Family* 320 at 332.

<sup>82</sup>*Ibid.*

<sup>83</sup>Above n 43.

<sup>84</sup>Note that in English law, nuptial agreements are not treated as ordinary contracts and are subject to separate rules. See *Radmacher v Granatino* [2010] UKSC 42.

<sup>85</sup>*Thorne v Kennedy*, above n 43, para 60.

approach.<sup>86</sup> While the Australian approach to undue influence is to be encouraged as being more progressive than the English one, it is noted that *Thorne* is a case concerning entry into a prenuptial agreement and therefore does not involve a third-party lender. It is unknown whether the court's approach to receiving legal advice would be the same if it were dealing with the issue of a lender's constructive notice. While the court was not willing to allow Mr Kennedy to rely on Ms Thorne's receipt of legal advice, it may take the view that a lender should be able to do so. However, the explicit consideration of relational context represents a welcome change of direction.

**(b) 'Playing favourites': the myth of the restrained state**

The vulnerability and relationality lens exposes the myth of the restrained state and the ways that this is used by the state to avoid taking responsibility for inevitable vulnerability. Liberal theory views both family and market as existing independently of the state and sees the two as emblematic of individual autonomy. Vulnerability theory notes the fallacy of this depiction, which simply serves to obscure the state's instrumental role in creating and sustaining these apparently natural and organic entities. Even where it claims to be absent, it is important to remember that the state directly shapes, regulates, and gives legitimacy through law to institutions such as the family and the market, determining whether they promote resilience for individuals or exacerbate the impact of their inherent vulnerability.<sup>87</sup>

Vulnerability theory recognises not only that the human condition is inherently vulnerable but that state institutions are also vulnerable, at risk from factors such as 'decay, manipulation, corruption, and decline'.<sup>88</sup> The vulnerability of the banking sector was rendered particularly visible during the 2008 global financial crisis, in several circumstances necessitating government bailout to shore up precarious financial institutions who were seeing the impact of years of irresponsible lending practices. The bailouts were justified on the basis of preventing further catastrophic harm to the economy, failing to acknowledge that the state, through promoting laissez-faire policies and failing to adequately regulate lending, had been instrumental in causing the crisis. There is a stark difference between the state's approach to vulnerable institutions and the one it takes towards vulnerable individuals. Fineman has accused the state of having 'blatantly played favorites, choosing vulnerable institutions over vulnerable individuals'.<sup>89</sup> While institutions such as the banking sector are provided with resources and assistance in times of crisis, individuals who require state subsidy are often blamed for their failure to be economically self-sufficient.<sup>90</sup>

The restrained state displays an unwillingness to interfere with the workings of the free market, lest this cause undesirable consequences and impede economic growth.<sup>91</sup> While the state has the power to ensure greater equality of access to resources among its population, it makes an active choice not to do so by promoting policies of restraint.<sup>92</sup> This tendency is evident in how the law responds to coerced debt. There is a general reluctance to interfere in contracts where the terms have been clearly explained, even if the relational circumstances were such that the borrower could not have resisted entering the agreement. The case law on third-party undue influence explains the need to balance the needs of the vulnerable claimant against those of the lender. There is acknowledgement that there may be wider societal economic impacts should the lender be placed under too onerous a duty. In *Etridge*, Lord Nicholls explained that 'a bank must be able to have confidence that a wife's signature ... will be as binding upon her as is the signature of anyone else on documents which he

<sup>86</sup>S Thompson *Prenuptial Agreements and the Presumption of Free Choice* (Oxford: Hart Publishing, 2015).

<sup>87</sup>See M Roark and L Fox-O'Mahoney 'Comparative property law and the pandemic: vulnerability theory and resilient property in an age of crises' (2021) 82 *Louisiana Law Review* 789.

<sup>88</sup>M Fineman 'Afterword: vulnerability and resilience' (2013) 36 *Retaerd Argang* 84 at 88.

<sup>89</sup>M Fineman 'Equality, autonomy, and the vulnerable subject in law and politics' in M Fineman and A Gear (eds) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Abingdon: Routledge, 2013) p 27.

<sup>90</sup>Fineman, above n 53.

<sup>91</sup>See Fineman, above n 11.

<sup>92</sup>See M Fineman 'Beyond equality and discrimination' (2020) 73 *SMU Law Review Forum* 51.

or she may sign. Otherwise, banks will not be willing to lend money on the security of a jointly owned house of flat'.<sup>93</sup> He also stressed that it is important that the ability to borrow money against the family home is not frustrated and notes that 'their home is their property. The law should not restrict them in the use they may make of it'.<sup>94</sup>

In the case law, the lender is described as an 'innocent' party, which is true insofar that the lender is not the party that is alleged to have engaged in undue influence or duress. However, this overlooks the wider context in which lending takes place. As discussed, the market is controlled by the state, with the latter determining and enforcing its parameters and upholding its legitimacy through law. Within the market, there are enormous power imbalances and lenders are much better able to absorb the risks of the loan transaction than the individual. Even where lenders take on risk by lending to those with a greater likelihood of defaulting, they are still able to make considerable profit through higher interest rates. That is not to say that the lenders' interests are irrelevant or that lenders should entirely bear responsibility for coerced debt. It is making the point that a choice is made by the state through the legal framework to actively prioritise the interests of the free market over the vulnerable individual. However, this choice and the state's evident priorities are not explained. Instead, the apparent detrimental economic impact for society of giving more protection to vulnerable individuals is presented as an inevitability, even though the state undoubtedly has the power and resources to prevent this from occurring.

### (c) State responsibility for unequal relational contexts

The third aspect highlighted by the vulnerability and relationality lens is that the state, through the way it structures interpersonal and institutional relationships, bears direct responsibility for creating the conditions in which economic abuse and coerced debt can operate. This section draws on Nedelsky's concept of 'nested relations', in which she explores the ways that interpersonal relationships are inevitably shaped by wider state-controlled structures, such as education, employment, health care, and law. These relational structures, Nedelsky explains, can either operate to foster autonomy (understood in a relational sense) and equality, or they can impede them.<sup>95</sup>

Policies of state restraint and hesitation to get involved in the workings of the family unit mean that victims of coerced debt are being failed. The family, while defined as private, is heavily socially constructed, governed by norms and societal standards, many of which are also reinforced through law.<sup>96</sup> Within the restrained state, the family unit is expected to be economically self-sufficient, as well as assuming responsibility for social reproduction and dependency (the latter two being an inevitable consequence of universal vulnerability).<sup>97</sup> Yet, despite this dual expectation, the state does not facilitate family members to perform both functions. Instead, its institutions, including employment laws and childcare provision, are structured in such a way as to promote role specialisation, with dominant discourses continuing to view caregiving as women's domain.<sup>98</sup>

It is important to stress that role specialisation and economic dependencies between intimate partners do not by themselves constitute abusive relationships and a relationship can be unequal without being abusive. However, where one party to an intimate relationship occupies an economically inferior position to her partner, this creates conditions in which abusive behaviours can take root and the lack of resources means that the victim is less likely to be able to leave the relationship.<sup>99</sup> An imbalance of economic resources gives an abuser an additional level of power over the victim. Yet, liberal theory,

<sup>93</sup>*Etridge*, above n 35, at [35] per Lord Nicholls.

<sup>94</sup>*Ibid.*

<sup>95</sup>Nedelsky, above n 52.

<sup>96</sup>See A Brown *What is the Family of Law? The Influence of the Nuclear Family* (Oxford: Hart Publishing, 2019).

<sup>97</sup>Fineman, above n 53.

<sup>98</sup>See N Busby and G James *A History of Regulating Working Families: Strains, Stereotypes, Strategies and Solutions* (Oxford: Hart Publishing, 2020).

<sup>99</sup>Stylianou et al, above n 6.

where it engages with the family at all, presumes an egalitarian unit in which resources are shared to the equal benefit of all its members.<sup>100</sup> This presumption is also evident in the legal framework. Generally, law will not intervene to ensure fair distribution of assets unless the relationship has broken down and even then, only where the parties were married or in a civil partnership.<sup>101</sup> During the course of the relationship, there is little interest in ensuring that both parties have adequate access to resources.

While liberal accounts view domestic abuse as primarily an individual and privatised problem, confined to the particular relationship, the nested relations approach recognises the impact of wider forces. Currently, intimate relationships are located within a broader network of relations that operate to impede rather than promote equality and autonomy. The state draws considerable economic benefit from this. Confining caregiving to the private family unit means that the state's obligation to address inherent vulnerability is reduced. Caregiving within the family is largely unpaid and its value for wider society dismissed.

As the above illustrates, the state owes a duty to actively respond to the conditions that it has created. It has, through its continuous effort to deny the reality of human vulnerability, constructed a society where it is easy for certain individuals to exert their power in harmful manner over others. In responding to economic abuse such as coerced debt, the state must promote broader goals than it currently does, such as ensuring equality of access to resources and reducing unhealthy dependencies in interpersonal relationships.

## 5. The need for a resilience-based approach

The previous section has outlined the significant obstacles faced by victims of coerced debt within a legal system that seeks to promote individualism and state restraint. A different approach is necessary if the state is to take its duty towards victims seriously. Here again, the vulnerability and relationality framework can provide guidance as to how to better respond to the problem of coerced debt. There is insufficient space in this paper to fully explore the specific measures that may be employed to tackle coerced debt. Instead, the focus is on identifying the underlying goals that any law reform should strive to achieve.

A legal system constructed around an unrealistic vision of disembodied and individualistic personhood creates considerable injustice for those who are unable to conform to these expectations and ideals. Instead, as Fineman has advocated, the state should structure its institutions, including law, around an imagined vulnerable and embodied subject. This requires the state to acknowledge and support, rather than stigmatise, the condition of being vulnerable. While state institutions cannot eliminate vulnerability, it can mitigate its potentially harmful consequences by providing the individual with the resilience, through material resources and institutional relationships, to thrive in the face of risks of harm. Currently, the state's institutions and their response to coerced debt do not do this. Only in limited circumstances will the victim be released from liability for the debt and there exist no mechanisms to compel a lender to transfer debt from one former partner to the other, even if abuse and coercion is shown. Despite recognition by lenders of the problem of coerced debt, there exist almost no safeguards to reduce the risk of coercion where the debt is applied for online. While it is unlikely to offer a substantial solution to the problem, links to relevant support services when applying for a loan online may at least raise awareness for some victims and prompt them to seek help.

As discussed, a significant problem is that credit records are used to deny victims access to essential resources such as housing and utilities, often for many years, generating long-lasting harm and preventing the victim from moving on from an abusive relationship. There exists no court power to order that a credit record be restored for a victim of coerced debt, which is one of the proposals

<sup>100</sup>See S Wong 'Would you "care" to share your home?' (2007) 58 Northern Ireland Legal Quarterly 268.

<sup>101</sup>See A Barlow 'Configuration(s) of unpaid caregiving in current legal discourse in and around the family' (2007) 58 Northern Ireland Legal Quarterly 251.



put forward by Littwin for addressing coerced debt and which merits serious consideration.<sup>102</sup> Restoration of an individual's credit record following the end of an economically abusive relationship would help victims to recover from the impact of coerced debt.

The state also has a duty to create relational structures that promote rather than thwart autonomy and equality. This needs to operate on a broader level rather than merely tackling individual abusive relationships. Economic abuse is inextricably linked to women's inferior economic status within society, providing scope for abusive patterns of dependency to form in some relationships.<sup>103</sup> Economic and labour inequality within interpersonal relationships is normalised through gendered discourses of caregiving and other socially reproductive work. There needs to a greater commitment to ensuring equality of access to resources and to tackling inequality in caregiving and household labour, which in turn could reduce the prevalence of economic abuse by placing the parties on a more equal footing. Potential ways in which current gendered inequalities can be addressed include ensuring affordable childcare, stronger flexible workplace policies, and financial subsidy payments for those undertaking childcare in the home.

Law, like all institutions, is constructed and maintained by the state. While law frequently makes claims of being apolitical and objective, this is a myth that seeks to obscure law's policies and choices in terms of how it regulates its subjects. The state has chosen to favour the market and lending institutions over individuals when responding to coerced debt. This is not an inevitability and a different approach would be possible if the state were committed to responding to vulnerability and to fostering resilience among its subjects.

## Conclusion

While there is growing awareness of economic abuse, it remains an under-researched and under-theorised area of law. In an attempt to address this gap, this paper has focused on the phenomenon of coerced debt, a form of economic abuse that involves particularly complex questions when determining the appropriate legal response. Coerced debt is a pressing social problem and causes considerable harm to victims, who often live with its effects long after the abusive relationship has ended. The legal response is more complex than other forms of abuse because, in order to be free of the harmful effects of the abuse, the victim's contractual liability for the debt may need to be set aside.

The legal analysis has predominantly focused on the vitiating contractual doctrines of undue influence and duress. There is no statutory provision placing direct obligations on lenders to ensure that loan transactions are free of coercion, although it is encouraging that financial institutions are now becoming more aware of the impacts of economic abuse on their customers. This is not the first critical analysis of undue influence, with several feminist scholars critiquing the law's treatment of women in this area. However, this paper used a new theoretical lens through which to examine not only the undue influence cases but law's broader response (or lack thereof) to coerced debt. This theoretical framework has sought to locate the state's abdication of responsibility towards victims of coerced debt, as well as its instrumental role in creating relational conditions in which abusive behaviours and coercive control can thrive. This recognition allows the debate to move beyond its existing parameters that have tended to focus on a balance between the competing interests of the lender (understood as an innocent third party) and the vulnerable victim of undue influence. The paper has highlighted the state's blatant favouritism of its institutions, including the market, at the expense of vulnerable individuals. It has also noted that the problem of coerced debt extends beyond surety transactions to cover joint loans and loans in the victim's sole name. However, these do not attract protection, as the transaction does not call for an explanation.

The legal response to coerced debt is currently framed around two fallacious and harmful concepts: the individualistic, rational legal subject, and the restrained state. Both concepts seek to marginalise

<sup>102</sup>Littwin, above n 24.

<sup>103</sup>See eg D Anderberg and H Rainer 'Economic abuse: a theory of intrahousehold sabotage' (2013) 97 *Journal of Public Economics* 282.

and ignore vulnerability and relationality as inevitable features of the human condition. For victims of coerced debt, it means that their interests are subordinated to those of the market and, in the rare cases that they are granted relief, they are stigmatised and labelled as lacking autonomy. The law's treatment of coerced debt exacerbates the effects of inherent vulnerability and creates harmful relational contexts in which victims lack control and choice.

The paper has stressed the need for the state to shift from a position that is restrained, to one that is responsive and aims to provide its vulnerable subjects with resilience. The state must create relational frameworks that seek to empower victims and to address broader issues of gendered economic inequalities. A holistic approach is needed – the victim should be given the tools to gain freedom from oppressive debt and poor credit scores. However, change needs to take place on several levels, including within the family and in the workplace, to move towards a position of substantive equality.