

PAYDAY LENDING REGULATIONS AND THE IMPACT ON WOMEN OF COLOR

Lara Sofia Romero, New York University School of Law
Rafael Romero, SUNY Polytechnic Institute
Sim Jonathan Covington, Jr., Finger Lakes Community College

ABSTRACT

Payday loans, or small short-term loans that carry high fees, may provide a much-needed safety net for some consumers in need of quick cash for emergencies. However, data suggest that most payday loan borrowers become repeat users caught in a cycle of high-cost debt. Furthermore, empirical evidence suggests consistent overrepresentation of women of color, including many single mothers, among payday loan borrowers. Based on international human rights law, the U.S. has an obligation to remedy predatory economic practices such as a payday lending that have a disproportionately negative economic effect on women of color. Posing the issue of payday lending as a human rights issue can make an important contribution to public action on how to address the aftermath of the financial crisis and its impact on women of color.

JEL: K1, K4

KEYWORDS: Payday Loans, Women of Color, Human Rights

INTRODUCTION

A large number of Americans are literally living paycheck to paycheck (Johnson, 2003). They're one unplanned expense away from being in financial distress (Johnson, 2003). Twenty-six percent of Americans have no emergency savings and forty-one percent say their top financial priority is simply staying current with their expenses or getting caught up on their bills (Cox, 2014). While Americans continue through a long economic recovery process, trying to rebuild from the impact of the recession, women of color face an especially arduous battle as their economic futures have been undermined by inequality (NWLC, 2011). Despite expansion in the availability of credit, evidence suggests that women of color are disproportionately affected by predatory lending practices (NCRW, 2008). Women of color are particularly at risk for abuse presented by payday loans: short-term advances carrying extremely high interest rates that are expected to be paid from the borrower's next payroll check. Based on international human rights law, the U.S. has an obligation to remedy predatory economic practices such as a payday lending that have a disproportionately negative economic effect on women of color. Not only do international treaties call on the U.S. to address women's access to and control over economic and financial resources (ICESR, 1966; CEDAW, 1979; CERD, n.d.), but they also call the U.S. to address instances of multiple discrimination, where the interaction of multiple grounds or factors, such as race and gender, adversely impact a set of people. This document is organized into distinct sections, with evidentiary support and a logical progression of ideas for a clear transition of information. Sections include why payday lending is problematic, existing state regulations, existing federal regulation, Women of Color at risk, the United States duty to protect, and a conclusion.

WHY PAYDAY LENDING IS PROBLEMATIC

Lenders advertise payday loans as small-dollar, short-term means for obtaining fast cash to get through a financial emergency. These lenders cater to consumers with little to no borrowing alternatives by offering quick cash without asking for the same proof of ability to repay that banks require. Under such circumstances, payday lenders can certainly serve individuals in real financial distress who may not be adequately served by more traditional sources of consumer lending (Elliehausen, 2009). For those living paycheck to paycheck, access to quick, short-term credit could make the difference between staying financially afloat and having one's heat turned off (Elliehausen, 2009). In fact, in the face of financial or economic shocks, payday loans allow households to smooth their income and consumption (Morse, 2011). Payday loan debt is of course problematic for all consumers, but is particularly troubling for women of color. Debt impacts not only women of color's finances, but also their physical (Associated Press, 2008) and emotional health (Kuchar, 2014), which in turn has an impact on their children and families. Communities also bear burdens from short-term fringe lending. One researcher testing the effects of payday loans found that households with local access to payday loans experience a 16% increase in economic hardship related to utilities, rent, and medical bills (Melzer, 2014). This has a spillover effect on taxpayers who indirectly fund such households through government sponsored assistance programs (Melzer, 2014).

Existing State Regulation

Other than restrictions to military borrowers (Consumer Finance Protection Bureau, 2014; Department of Defense, 2006) and certain fee disclosure requirements, there are few federal guidelines regulating the payday lending industry, leaving payday lending laws mainly to the states. States take various approaches to payday lending regulation (The Pew Charitable Trust, 2014). Some require all licensed short-term lenders to comply with state usury laws—the same laws that regulate banks (Morgan-Cross & Klawitter, 2011). These rates are often under 30% APR, which effectively bans payday lenders from operating (Morgan-Cross & Klawitter, 2011). Other states allow exemptions from usury laws for short-term lenders, but cap interest rates at a point that makes it unprofitable for payday lenders to operate (Morgan-Cross & Klawitter, 2011). A remaining 33 states have implemented a variety of regulations on short-term lenders. All of these states limit maximum loan amounts (\$300–\$1,000); additional regulations include term requirements, interest rate and fee limits, and loan rollover restrictions (Morgan-Cross & Klawitter, 2011). Six states (Delaware, Idaho, Nevada, South Dakota, Utah, and Wisconsin) do not limit interest rates or fees for short-term loans (Morgan-Cross & Klawitter, 2011). Although states may prohibit or regulate payday lending, internet lending and lenders' collaboration with sovereign tribes has created difficulties for state regulators (Kieler, 2014). The Internet allows payday lenders to reach people living in cities or states where their loans are illegal (Wagner, 2013). Many online lenders are located on Indian reservations to avoid complying with consumer protection laws (Lifsher, 2009).

The rent-a-bank practice has also thwarted state attempts to regulate payday lending. Rent-a-bank refers to partnerships between Federal Deposit Insurance Corporation (FDIC) banks and payday lenders to offer agent-assisted loan programs. Payday lenders partner with national banks charged in states that do not cap interest rates on small loans. They then export rates to other states, regardless of whether those other states have usury laws or rate ceilings that apply to payday lending (Karger, 2005). Rent-a bank is highly effective and the most significant barrier to effective regulation at the state level; it operates across the nation to circumvent state rate capping legislation (Tanoue, 2000). In response, states have implemented reform measures with varying degrees of success (Johnson, 2003). In the 2014 legislative session to date, 24 states have pending legislation regarding payday lending (Cheek, 2014), while California, Florida, Idaho, Louisiana, Maine, Oklahoma, Rhode Island, Utah and Wyoming enacted payday lending legislation (Cheek, 2014).

Existing Federal Regulation

While federal regulation has tried to guard consumers where state legislation has fallen short (U.S. Congress, 2009), the CFPB has attempted to educate and protect consumers in their dealings with financial service providers (Consumer Finance Protection Bureau, 2018). President Obama nominated Richard Cordray as the director of the CFPB on July 18, 2011 (The White House, 2011). In a statement, the president said: "American families and consumers bore the brunt of the financial crisis and are still struggling in its aftermath to find jobs, stay in their homes, and make ends meet. That is why I fought so hard to pass reforms to fix the financial system and put in place the strongest consumer protections in our nation's history. Richard Cordray has spent his career advocating for middle class families, from his tenure as Ohio's Attorney General, to his most recent role as heading up the enforcement division at the CFPB and looking out for ordinary people in our financial system (The White House, 2011). The CFPB examines nonbanks in the same way it examines banks, using a combination of required reports, document reviews and on-site examinations (Consumer Finance Protection Bureau, 2018). In a January 5th, 2010 speech at Brookings Institution, Cordray said that nonbank activities are important markets, providing valuable services to customers who lack access to other forms of credit (Corday, 2012). He has noted that nearly 20 million U.S. households use payday lenders, paying about \$7.4 billion in annual fees (Corday, 2012). Cordray has said since most of these nonbank businesses are not used to any federal oversight, the new supervision program may be a challenge for them, "but we must establish clear standards of conduct so that all financial providers play by the rules" (Clarke, 2012).

The CFPB has made clear its interest in curbing payday loans (Cocheo, 2013). Codray has explicitly considered economic rights as civil rights: "If we are to attain a true and full understanding of civil rights in this country, it must encompass not only political and legal rights, but also economic rights...The movement and aspiration toward equality in American life was almost as fundamentally economic as it was political and legal. This was well understood in the African American community, as reflected in Dr. King's 1963 March on Washington for Jobs and Freedom and his later involvement in the "Poor People's Campaign" for economic justice. In the end, it seems to me that these three categories of rights – political, legal, and economic – are inextricably intertwined in our society. Because we chose to build our political structure around a free market economy, we inevitably found it necessary to supplement our bare political and legal equality with some more robust measures of economic equality and economic rights as well. And I have also sought to locate the work of our new federal agency against the backdrop of the kind of financial oversight needed to vindicate those rights in today's economic and social climate. At the Consumer Bureau, we are keenly aware of our responsibility to do whatever we can, within our authority, to combat the persistent evil of discrimination, and we understand the importance of doing this work steadily and tenaciously" (Corday, 2014). The CFPB may also restrict "unfair, deceptive, or abusive acts," that are likely to cause substantial injury to consumers where this injury is not outweighed by countervailing benefits to consumers or competition (Consumer Finance Protection Bureau, 2010). Dodd-Frank defines abusive to include a subjective dimension, which allows for contextual considerations that may include race and gender (White and Williams, 2018). Some groups have challenged the CFPB's constitutionality (Scarcella, 2013), the appointment of Richard Cordray (Scarcella, 2013), and Dodd-Frank as favoring large lenders over smaller business that cannot shoulder the cost of increased regulation. This evidences the pushback the CFPB will encounter as it seeks to regulate payday lending. Nonetheless, the CFPB may issue regulations under The Truth in Lending Act (TILA). TILA was enacted for the purpose of "assuring a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit (Cornell Law, 2018). It is deemed the "cornerstone of consumer credit legislation" (Nehrf, 1991). TILA does not generally regulate what terms a creditor must offer, but requires that those terms be uniformly disclosed to the consumer and tries to help consumers make intelligent choices from available sources of credit (Cornell Law, 2018). For example, payday loan employees are not required to orally volunteer the applicable APR for a loan, but if a customer requests this information, the employee is required to disclose the correct APR (Cronell Law,

2018). Before the loan is consummated, payday lenders must provide written information about the loan, including fees, repayment due date, and APR (Cornell, Law 2018). Payday lenders are also required to disclose their fees as an APR if they choose to advertise their rates (Cornell Law, 2018). The CFPB has also issued regulations under Equal Credit Opportunity Act (ECOA) (CFPB, 2018), which prohibits creditors from discriminating against an applicant on the basis of race, color, sex or marital status (Cornell Law, 2018). These regulations, known as Regulation B, provide the substantive and procedural framework for fair lending (Cornell Law, 2018). The ECOA has two principal theories of liability: disparate treatment and disparate impact. Disparate treatment occurs when a creditor treats an applicant differently based on a prohibited basis such as race or national origin (Consumer Finance Protection Bureau, 2018). Disparate impact occurs when a creditor employs facially neutral policies or practices that have an adverse effect or impact on a member of a protected class unless it meets a legitimate business need that cannot reasonably be achieved by means that are less disparate in their impact (Consumer Finance Protection Bureau, 2018).

WOMEN OF COLOR AT RISK FOR ABUSE PRESENTED BY THE PAYDAY LOAN INDUSTRY

Women of color are particularly at risk for abuse presented by the lending industry, predatory loans, and more specifically, payday lending, as economic insecurity disproportionately affects their race and gender (Kerby, 2013). These disparities do not just affect them, but their families and communities as well. As a result of the deep penetration into these vulnerable markets by some predatory payday lenders, the consumer credit market has become so deeply bifurcated along racial lines that some critics have described it as a modern form of financial apartheid (Drysdale & Keest, 1999).

The U.S. Has a Duty to Protect Against Human Rights Abuses by Payday Lenders

Human rights treaties, mechanisms and instruments have addressed the issue of women's access to and control over economic and financial resources. By either signing or ratifying these treaties, the U.S. has acknowledged that policies and programs should be formulated to promote equal access to and control over financial and economic resources (United Nations, 2000). The International Covenant on Economic, Social and Cultural Rights (ICESR) states that parties to the Convention must ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights (ICESR, 1966). The ICESR also recognizes the right of everyone to "the continuous improvement of living conditions" (ICESR, 1996). CEDAW requires parties to take all appropriate measures to eliminate discrimination against women and ensure the practical realization of the principle of the equality of women and men in the economic field, among other fields (CEDAW, 1979). States are obligated not only to refrain from engaging in acts of discrimination, but also to eliminate discrimination against women by any person, organization or enterprise (CEDAW, 1979). While the U.S. has not ratified either treaty, as a signatory to the ICESCR and CEDAW, the U.S. is obliged to "refrain from acts which would defeat the object and purpose" of the treaty (United Nations, 1980). In addition, the U.S. has signed and ratified CERD and has agreed to be bound by its requirements (CERD, 1966). CERD requires the U.S. to eliminate both intentional discrimination and discrimination in effect (CERD, 1966). Article 2(2) provides that:

"State parties shall, when circumstances so warrant, take, in the social...economic...special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms (CERD, 1966). Thus, the language of the Convention and the governing comment depict economic development as a positive right (Weissbordt & de la Vega, 2007) owed to all groups and which should be protected for groups that experience systematic discrimination. The international community has made strong commitment to gender equality, further implicating the U.S.'s obligation to curb the predatory economic practices that place women of color at risk of economic harm. The Platform for Action of the Fourth World Conference on Women highlighted the differences in women's and men's access to, and opportunities to exert power over, economic structures in their societies (United Nations,

1995). The Platform recommended that Governments and the international community analyze policies and promote from a gender perspective more equitable distribution of productive assets, wealth, opportunities, income, and services (United Nations, 1995).

The Commission on the Status of Women called on Member States, including the U.S., to facilitate the further development of the financial sector to increase women's access to and control over savings, credit and other financial services, through incentives and the development of intermediaries that serve the needs of women (United Nations, 2005a). At the 2005 World Summit, global leaders resolved to promote gender equality and eliminate pervasive gender discrimination by, inter alia, ensuring equal access of women to productive assets and resources, including credit (United Nations, 2005b). The Post 2015 Global Development Goals sub-goal (2c) calls for equal rights for women to open bank account (United Nations, 2018a) implying that financial services and financial inclusion are a necessary part of empowerment of women. Finally, in the Doha Declaration on Financing for Development, adopted in 2008, global leaders reaffirmed their commitment to eliminating gender-based discrimination in all forms, including in the financial markets. Member States resolved to promote women's rights, including their economic empowerment; effectively mainstream gender perspectives in law reforms, economic programs; and give women full and equal access to economic resources (United Nations, 2018b).

In addition to addressing gender discrimination, the U.S. also has an obligation to adopt and implement appropriate measures to address multiple discrimination (CEDAW, 2006). Multiple discrimination broadly refers to discrimination based on the interaction of multiple grounds or factors. Under Article 2 of CEDAW States are called upon to eliminate and protect against discrimination "in all its forms," a phrase which "anticipates the emergence of new forms of discrimination." New forms include those resulting from the compounding or intersection of established grounds and factors. Compounded discrimination refers to the layering of analytically separable grounds or factors to aggravate or add to the risks or burdens of discrimination (CEDAW, 2010). Intersectional discrimination refers to multiple grounds or factors interacting to create a unique or distinct risk or burden of discrimination.

The Committee on Economic, Social and Cultural Rights has noted the importance of addressing intersectional discrimination in its general comment No. 16 (2005): "Many women experience distinct forms of discrimination, due to the intersection of sex with such factors as race, color, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status, resulting in compounded disadvantage" (Committee on Economic, Social and Cultural Rights, 2005). Human rights instruments' recognition of the existence of multiple, compound and intersectional discrimination provides thus one more argument in favor of developing the U.S.' obligation to help place women of color on equal footing in economic life in the U.S.

Compliance with international human rights treaties is not merely a normative nudge on the executive branch to address the discriminatory impact of payday lending. Rather the U.S. has a duty to affirmatively address the issue. The human rights approach under CERD, for example, requires the CFPB to move past the dilemma of proving intent to discriminate, to focusing on remedial action to address discriminatory impacts (CERD, 1966). As recognized by CERD in its Concluding Observations on the state report of the U.S., the U.S. has a legal obligation to take measures of "positive action": "The Committee emphasizes that the adoption of special measures by State parties when the circumstances so warrant, such as in the case of persistent disparities, is an obligation stemming from article 2, paragraph 2, of the Convention (CERD, 2001).

Where racial disparities exist, CERD unequivocally requires the U.S. to take actions that produce visible results (CERD, 1966). Once a violation is identified, CERD allocates responsibility to "amend, rescind, or nullify the policies" to the government (CERD, 2001). Furthermore, it creates a duty for governments at the federal, state, and local levels to take appropriate legislative action to bring to an end discrimination

(CERD, 2001). The statutory definition of discrimination under civil rights law in the U.S. are not in full alignment with CERD obligations, but policy initiatives by the CFPB could provide opportunities to harmonize the doctrines and bring the U.S. into full compliance with CERD and other international human rights norms.

CONCLUSION

Data suggest that most payday loan borrowers become repeat users caught in a cycle of high-cost debt. Furthermore, evidence indicates consistent overrepresentation of women of color, including many single mothers, among payday loan borrowers. This takes a toll not only on these women and their family, but all society. Despite improvements to federal and state policies in the wake of the financial crisis, including the establishment of the CFPB and the recently increased attention by other financial industry regulators to the importance of adequate consumer protections, and despite the hope that most financial service providers would heed the lessons of the financial crisis, women of color and other economically vulnerable populations are still being subjected, on a widespread basis, to predatory and deceptive lending practices, including in the market for payday lending. As dictated by its international human rights law obligations, the U.S. must continue to regulate the payday loan industry and seize the opportunity to legislate offered by the CFPB. Foundational is the U.S.' obligation to address double discrimination and disparate impact discrimination, which payday loans arguably encourage. The U.S must continue to monitor and collect data on the industry and women of color as consumers. Regulation must work to provide low-income women of color with access to a fair form of micro-finance, and more broadly, to help them to become full economic participants in the U.S.

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BIOGRAPHY

Dr. Rafael Romero serves as an Associate Professor of Finance and Economics and Chair of the Department of Business Management at SUNY Polytechnic Institute in Utica, New York

Lara Sofia Romero is an Associate in McKool Smith's New York office. One Bryant Park, New York, NY.

Dr. Sim J. Covington, Jr. serves as the Chief Diversity Officer and Adjunct Professor at Finger Lakes Community College in Canandaigua, New York.