# Race Equity at the Core of Consumer Law

Shriver Center on Poverty Law

Legal Impact Network

# Race Equity at the Core of Consumer Law

**Nolan Downey,** Editor

**Marie Claire Tran-Leung,** Contributing Editor

**Michelle Nicolet,** Copy Editor

July 2021

This report was made possible by the generous support of the **JPB Foundation.**

Legal Impact Network

Shriver Center on Poverty Law

# About the Shriver Center on Poverty Law

The Shriver Center on Poverty Law fights for economic and racial justice. Over the past 50 years, we have secured hundreds of law and policy victories with and for people experiencing economic instability in Illinois and across the country.

Everything we do is powered by communities most affected by poverty. We litigate, shape local policy, and train and convene multi-state networks of lawyers, community leaders, and activists to advance opportunity for all—not just the few.

Our country is rife with laws and policies that systematically disadvantage certain groups while advantaging others based on their race, gender, and other facets of their identities. We believe laws and policies—and the institutions that apply them—should be designed to support people. Together, we're turning this ideal into reality.

We are building a future where all people, families, and future generations have equal dignity, respect, and power under the law. Join the fight at **povertylaw.org**

# About the Legal Impact Network

The Shriver Center's Legal Impact Network is a dynamic collaborative of advocacy organizations from across the country working with communities to end poverty and achieve racial justice at the federal, state, and local levels.

The Legal Impact Network brings together strong legal and policy advocates from throughout the country who are using innovative, coordinated strategies to address poverty and advance racial justice. Our advocacy helps people meet their basic human needs, supports working families, promotes the well-being of children, and advances opportunity and justice for all. The network currently reaches 36 organizations in 33 states and the District of Columbia.

Through working groups and convenings, advocates working in member programs share victories and expertise, and develop resources, strategies, model policies and legal tools to maximize impact across the country.

For more information, contact Marie Claire Tran-Leung, Director of the Legal Impact Network, **marieclairetran@povertylaw.org**

# Table of contents

# Authors


## Nolan Downey

**Staff Attorney**, Legal Impact Network
Shriver Center on Poverty Law


Nolan Downey began his career at the Shriver Center specializing in public benefits programs—particularly the Supplemental Nutrition Assistance Program (SNAP)—and advocating for expanded access to these critical supports. Nolan directly represented SNAP recipients whose benefits had been erroneously terminated and engaged in administrative and legislative advocacy to strengthen the SNAP program. As a staff attorney for the Legal Impact Network, Nolan manages multistate projects in collaboration with members of the network, and convenes members to share resources, advocacy strategies, and information while identifying opportunities for joint advocacy. Nolan received his J.D. from DePaul University College of Law where he graduated summa cum laude and received the Senior Service Award for students who have made substantial contributions to the College of Law. Since his first year of law school, Nolan has coordinated DePaul's Neighborhood Legal Assistance Project (NLAP)—a legal help desk assisting people experiencing homelessness in sealing and expunging their criminal records and obtaining state IDs. To this day, Nolan continues to volunteer at NLAP as a supervising attorney.


## Ben Carter

**Senior Litigation and Advocacy Counsel**,
Kentucky Equal Justice Center


After growing up in Lexington and Russell, Kentucky, Ben Carter attended Davidson College and UK College of Law. Before joining KEJC in the fall of 2018, Ben litigated individual and consumer class actions at Ben Carter Law, PLLC. From 2008-2010, he worked at Louisville's Legal Aid Society and helped Jefferson County build an innovative, county-wide response to its foreclosure crisis. At KEJC, he litigates cases, lobbies policymakers, and works with communities, organizations, and government agencies to ensure all Kentuckians live within fair systems that are open to all. Get all of his dad, politics, and podcast tweets at @notbencarter.

## Lindsay Cutler

**Attorney**, Economic Inequality
New Mexico Center on Law and Poverty

Lindsay Cutler is an attorney on NMCLP's Economic Equity team, where she focuses on predatory lending and debt collection reform. Cutler joined the Center in 2017 as a Public Service Law Fellow focused on addressing high-cost lending in New Mexico. Prior to attending law school, she worked in the Laguna Pueblo and Albuquerque Public Schools as a family engagement coordinator. During law school, she externed with the Navajo Nation and DNA-People's Legal Services and worked with the National Domestic Workers Alliance through the Community Economic Development Clinic.

## Melisa Laelan

**Executive Director**, Arkansas Coalition of Marshall Islanders

Melisa Laelan is a native of the Marshall Islands, born and raised in the capital city of Majuro. At age 17, she decided to leave the Islands to enlist in the U.S. Armed Forces. Her career in the Army required her to travel globally, which fostered her interest in working with people from different walks of life. After ten years of service, Melisa left the armed forces to attend University of Arkansas. In 2013, she became the first certified interpreter in the nation for Marshall Islanders in the court system. Subsequently, she was appointed to serve on the Arkansas Minority Health Commission, making her the first Marshall Islander to serve on a state agency capacity. Laelan is the founder and Chief Executive Director of Arkansas Coalition of Marshall Islanders (ACOM), a not-for-profit Marshall Islanders-operated organization that focuses on health, leadership, education and culture. Her daily work puts her in the middle of social services and policy advocacy, especially around Marshall Islanders issues. Her relentless advocacy work has led to victory in a 25-year battle in restoring the COFA Medicaid, extending the Medicaid program to over 56,000 COFA migrants living in the United States. Melisa currently lives in Springdale, Arkansas. In her free time, she enjoys spending time with her family.

## Charles O. Lee

Director of Consumer Protection, Mississippi Center for Justice

Charles O. Lee leads the economic justice work as consumer protection director. Prior to joining the Center, Charles practiced commercial litigation, insurance defense, and personal injury litigation on the Mississippi Gulf Coast and in Georgia. Charles was the founding board president of the Gulf Coast Fair Housing Center in Gulfport, Mississippi, and also served as interim executive director immediately following Hurricane Katrina. He earned a Bachelor of Arts degree in English from Rust College in 1995 and received his Juris Doctorate in 1998 from the University of Mississippi School of Law. Charles lives in Jackson and is an active member of Epiphany Lutheran Church.

## Susan Purtle

Staff Attorney, Legal Aid of Arkansas

Susan Purtle is a staff attorney for Legal Aid of Arkansas in Springdale, Arkansas. She specializes in consumer and debt issues and has helped thousands of low-income persons since she became a staff attorney in 1990. As workgroup leader for the Consumer Protection group at Legal Aid of Arkansas from 2012 to 2020, she identified the important role race occupies in the consumer marketplace in Northwest Arkansas and the Arkansas Delta. As leader, she was instrumental in establishing a race-centered practice as part of the group's workplan for 2020. She received a Bachelor of Arts in History from Hendrix College and a law degree from the University of Arkansas School of Law. She currently serves on the Board of the Washington County Law Library and is a member of the Washington County and Arkansas Bar Associations and the National Association of Consumer Advocates. She is a member of the Northwest Arkansas Jazz Society and the proud mother of a son, Alexander Abel.

## Dr. Sherry Thompson

**Director**, Parricide Prevention Institute

Dr. Sherry Thompson is currently the Director of the Parricide Prevention Institute. She received her Doctorate, as well as her Master of Public Administration, from the University of Utah. She worked for the 10th District Courts for three years conducting research and providing expertise in Performance Management. Over the past two years, Dr. Thompson has assisted Legal Aid with a variety of research projects, many of them involving the Marshall Islanders community. For example, she researched alleged disparate treatment and furtherance of housing discrimination against Arkansas' Marshall Islanders and appeared as an expert witness to report her findings. She is the Executive Director of the Parricide Podcast. You can contact her at sherry@parricide.org.

## Odette Williamson

**Staff Attorney**, National Consumer Law Center

Odette Williamson is a staff attorney at the National Consumer Law Center (NCLC) where she focuses on foreclosure prevention and housing sustainability and issues affecting older adults. She also leads NCLC's Racial Justice and Equal Economic Opportunity project. Prior to joining NCLC she was an Assistant Attorney General in the Massachusetts Office of the Attorney General where she concentrated on civil enforcement actions against individuals and businesses for violation of consumer protection and other laws. She is a co-author of NCLC's manuals focused on foreclosure and mortgage servicing practices.

# Foreword

*By Nolan Downey*

Consideration of racial justice is central to the practice of consumer law on behalf of low-income people. Consumer law is an important area of legal services practice because, very simply put, people experiencing poverty pay more for less. Moreover, Black, Latino/a/x, Indigenous, and other people of color face greater burdens and greater costs when accessing the consumer marketplace, thus adding to the layers of structural barriers they face when trying to achieve financial and economic stability.

> Advocates should be open to changing their practice—even radically—to **confront racism more directly** and to meet the specific needs of the communities of color they serve.

Legal organizations working for economic, social, and racial justice frequently practice consumer law in some form because unfair practices and higher costs for low-income communities create tangible and readily identifiable barriers to eliminating poverty. Consumer law advocates seek to eliminate harmful practices that hurt consumers and, in the process, to create a fairer and more accessible marketplace.

But too often consumer law advocates focus only on the harmful practices affecting their clients instead of who specifically is affected. Often times we observe that people of color are more frequently impacted by consumer issues—even when controlling for income level—but neglect to interrogate why those patterns exist or how to structure consumer law practice to address more directly the racial disparities that the market continues to produce.

This report assesses the tools available to consumer advocates in pursuing racial justice, and documents how some advocates across the country have used a racial justice lens to focus their practice and better support people of color in their communities.

Over the past several years, consumer advocates have observed the ways in which economic crises have weighed more heavily on people of color and compounded racial inequity. This report was initially intended to arm consumer advocates with alternative strategies to center race in anticipation of the next crisis. Yet, that crisis was soon upon us.

The last year has been marked by a global COVID-19 pandemic and a racial reckoning following the deaths of George Floyd, Breonna Taylor, and Ahmaud Arbery. These events have laid bare the racial inequities that continue to permeate every aspect of our society from treatment by law enforcement to access to healthcare and affordable housing.

Black, Latino/a/x, and Indigenous people in the United States have been more likely than non-Hispanic white people to get infected with COVID-19, be hospitalized, and die from the virus.[1] A March 2021 report by APM Research Lab found that of the 520,000 COVID-19 deaths in the United States, 42.3% (220,085) were people of color[2] , despite making up only 23.7% of the total U.S. population.[3] These statistics are a direct consequence of the structural racism and racial discrimination that define our country. Because of the impact of systemic racism, people of color, particularly Black people, are less likely to have health insurance[4] or be stably housed[5] and are more likely to be essential workers with a greater risk of exposure to COVID-19.[6]

In 2021, there is no doubt that racism is still a preeminent force in America, and in the consumer marketplace. Racism in the consumer space can manifest in many ways. Across the nation payday lenders, auto-title loan businesses, and other types of high-cost, high-risk loan servicers target Black, Latino/a/x, Indigenous, and other people of color, who have lacked access to traditional financial institutions, and ensnare them in a cycle of debt.[7] People of color, particularly Black people, face higher rates of eviction[8] and foreclosure[9] and continue to struggle to find fair financing for homes that would allow them to build generational wealth.[10] And while the racism of the criminal court system is increasingly well-documented, racism and bias also persists in the civil court system that adjudicates claims brought by creditors and consumers—and more often fails to protect the rights of consumers of color over white consumers.[11]

The pandemic and its economic impacts have only worsened these divides. In the middle of the pandemic, the majority of Black (60%), Latino/a/x (72%), and Indigenous (55%) households faced severe financial hardship compared to only 36% of white households.[12] More often, these households of color struggled to pay bills for basic needs.[13] Financial burdens also increased in communities of color, who were more likely to lose income and struggle to pay debts.[14] According to the Congressional Research Service, utilization of loan forbearance increased for mortgages, consumer credit products, and car loans, with payment assistance more likely to be requested in areas with majority Black or Hispanic populations.[15] Even where structural racism has translated to fewer savings for Black families, the economic stress of the pandemic has caused more Black people to borrow against their retirement savings, with 14% of Black people under age 35 (compared to 4% of white people) and 22% of Black people over age 55 (compared to 10% of white people) borrowing from or cashing out their retirement savings.[16]

In the midst of the current crisis, it is essential to apply a racial lens to legal advocacy—and consumer advocacy is no exception. Racialized impacts of the pandemic should motivate legal advocates to grapple with the ways in which advocacy and traditional legal services have failed to address racism. Without acknowledging racist history, and specifically accounting for race in advocacy efforts, overcoming racism and creating true racial equity will not be possible.

The report highlights consumer advocates who are seeking to actively acknowledge and directly confront the ways in which racism impacts their consumer clients and consumer advocacy. Odette Williamson of the National Consumer Law Center frames the broad history of how racism has been injected into consumer laws and practices—particularly those related to high-cost lending, housing, and criminal and civil fines and fees. Her piece, along with a piece from Ben Carter of the Kentucky Equal Justice Center, offer both legal tools available to advocates seeking to address racism in the consumer space and a potential change in approach to traditional legal institutions—like the courts—that have an opportunity, even a duty, to shirk rigid and formulaic application of consumer law in favor of more equitable approaches.

It is essential to **apply a racial lens to legal advocacy**—and consumer advocacy is no exception.

Lindsay Cutler of the New Mexico Center on Law and Poverty and Charles O. Lee of the Mississippi Center for Justice write about their work to address the impacts of high-cost lending on communities of color in their states. Though they work in different geographies and political climates with communities who hold different identities, both have deep appreciation of the ways in which specific regional histories—be it the exploitation of Indigenous people or sharecropping—have led to racial inequity in the consumer issues before them today. Both can offer a perspective on how to reframe consumer advocacy to more directly addresses the racial roots of the problem.

And Susan Purtle of Legal Aid of Arkansas describes how truly addressing racial inequity requires deliberate and targeted investment in and partnership with communities of color. She and her colleagues have worked over years to restructure their consumer practice to better serve a hard-to-reach group of in-migrants from the Marshall Islands. Through this investment, commitment to building trust and cultural competence, and flexibility to address specific needs, Legal Aid of Arkansas has fostered a strong relationship with the Marshall Islanders, built community power, and achieved positive outcomes, thus providing an important model for working with Pacific Islander communities

Through this report, readers will see that addressing racism in the present requires a historical understanding of the structures and systems that produced the racial disparities visible in the consumer issues facing their clients today. Advocates must act intentionally to dismantle these vestiges of intentional racism. In pursuit of racial equity, advocates should be open to changing their practice—even radically—to confront racism more directly, to meet the specific needs of the communities of color they serve, and to build a more stable foundation upon which real power can be built and bolder ambitions pursued.

This collection of writings does not have all the answers. These issues are fraught, and the structural racism built over generations will not be undone swiftly. However, in sharing their experiences, these authors hope to assist consumer advocates who are considering how to better confront racism in their practice and pursue racial equity

[1] Centers For Disease Control & Prevention, Risk For Covid-19 Infection, Hospitalization, And Death By Race/Ethnicity (updated May 26, 2021), available at https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html.

[2] APM Research Lab, The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the United States (Mar. 5, 2021), available at https://www.apmresearchlab.org/covid/deaths-by-race.

[3] U.S. Census Bureau, Population Estimates, July 1, 2019, at https://www.census.gov/quickfacts/fact/table/US/PST045219.

[4] Heju Sohn, *Racial and Ethnic Disparities in Health Insurance Coverage: Dynamics of Gaining and Losing Coverage over the Life-Course,* 36 Population Research & Policy Rev. 181 (2017), at https://link.springer.com/article/10.1007/s11113-016-9416-y.

[5] Urban Inst., New Data Suggest COVID-19 Is Widening Housing Disparities by Race & Income, May 29, 2020, at https://www.urban.org/urban-wire/new-data-suggest-covid-19-widening-housing-disparities-race-and-income.

[6] Economic Policy Inst., Black workers face two of the most lethal preexisting conditions for coronavirus: racism and economic inequality, June 1, 2020, at https://www.epi.org/publication/black-workers-covid/; *see also* ABC News, Heroes or hostages?: Communities of color bear the burden of essential work in coronavirus crisis, May 22, 2020, at https://abcnews.go.com/Business/heroes-hostages-communities-color-bear-burden-essential-work/story?id=70662472; Chicago Metro. Agency for Planning, Metropolitan Chicago's essential workers disproportionately low-income, people of color, at https://www.cmap.illinois.gov/updates/all/-/asset_publisher/UIMfSLnFfMB6/content/metropolitan-chicago-s-essential-workers-disproportionately-low-income-people-of-color.

[7] The Pew Charitable Trusts, Payday Lending In America: Who Borrows, Where They Borrow, And Why (July 2012), available at https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf. *See also* National Fair Hous. Alliance, Discrimination When Buying A Car: How The Color Of Your Skin Can Affect Your Car Shopping Experience (2018), at https://nationalfairhousing.org/2018/01/11/new-report-reveals-racial-discrimination-by-auto-dealerships/.

[8] Peter Hepburn, et al., *Racial and Gender Disparities Among Evicted Americans,* 7 Sociological Science 649 (2020), at https://sociologicalscience.com/download/vol-7/december/SocSci_v7_649to662.pdf.

[9] Center for Responsible Lending, Foreclosures by Race and Ethnicity: The Demographics of a Crisis (June 18, 2010), at https://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf.

[10] National Bureau of Economic Research, Race, Ethnicity, and High-Cost Mortgage Lending, Dec. 2014, at https://www.nber.org/papers/w20762. *See also* WBEZ, Where Banks Don't Lend, June 3, 2020, at https://interactive.wbez.org/2020/banking/disparity/.

[11] Annie Waldman & Paul Kiel, *Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas,* ProPublica, Oct. 8, 2015, at https://static.propublica.org/projects/race-and-debt/assets/pdf/ProPublica-garnishments-whitepaper.pdf.

[12] Kelly Anne Smith, *Covid and Race: Households of Color Suffer Most from Pandemic's Financial Consequences Despite Trillions in Aid,* Forbes, Sept. 17, 2020, at https://www.forbes.com/advisor/personal-finance/covid-and-race-households-of-color-suffer-biggest-pandemic-consequences/. This rate was even higher among Black families with children (66%) and Latino/a/x families with children (86%). Michelle Fox, *For families of color, the pandemic brings an outsized financial hit,* CNBC, Nov. 18, 2020, at https://www.cnbc.com/2020/11/18/families-of-color-are-the-hardest-hit-financially-in-covid-pandemic.html.

[13] Dena Bunis, *Blacks, Hispanics Struggle to Pay Bills as Pandemic Persists,* AARP, Mar. 3, 2021, at https://www.aarp.org/money/credit-loans-debt/info-2021/blacks-hispanics-struggle-to-pay-bills-as-pandemic-persists.html.

[14] Black workers continued to face higher rates of unemployment with a national rate 5.6 percentage points greater than the pre-pandemic economic peak, and over 10% in 16 of the 22 states for which unemployment data for Black workers was available. Economic Policy Inst., State unemployment by race and ethnicity, Mar. 2021, at https://www.epi.org/indicators/state-unemployment-race-ethnicity/.

[15] Congressional Research Serv., Covid-19: Household Debt During The Pandemic (May 6, 2021), at https://fas.org/sgp/crs/misc/R46578.pdf.

[16] Brookings Inst., The Black-white wealth gap left Black households more vulnerable, Dec. 8, 2020, at https://www.brookings.edu/blog/up-front/2020/12/08/the-black-white-wealth-gap-left-black-households-more-vulnerable/.

# Consumer Law and Racial Justice in the COVID-19 Era

*By Odette Williamson*

## Introduction

Structural racism embedded in American laws and institutions has resulted in deep and enduring disparities in health, employment, housing, and economic opportunity for Black, Latino/a/x, Indigenous, Asian, and other consumers of color. The COVID-19 pandemic has deepened these inequities as individuals and hard-hit communities struggle to recover from the health and economic challenges caused by the pandemic. Consumers who have endured the worst of the pandemic will experience the lion's share of unemployment, evictions, foreclosures, bankruptcies and economic distress going forward.

Consumers who have endured the worst of the COVID-19 pandemic will experience the **lion's share of economic distress** going forward.

Centuries-old policies and practices that intentionally segregated communities through redlining and other racially exclusionary housing policies paved the way for discriminatory credit and market practices. Redlined, immigrant, Indigenous and other geographically and ethnically segregated communities experience higher rates of poverty, lower wages, disinvestment, and higher costs for basic living expenses. Unfair and predatory lending practices took hold and continue to flourish in these communities, stripping wealth and resources from economically distressed consumers and families.

After the onset of the pandemic, many households experienced a significant decline in income due to layoffs, pay cuts or reductions in work hours for wage earners. While the economic devastation is widespread, households of color are less able to weather a financial crisis than white households due to disparities in wealth and resources. Loss of household income in the near and long term will increase financial instability for consumers of color. An eviction filing, for example will affect a consumer's rental record, ability to gain new housing, and creditworthiness, making her vulnerable to high-cost payday lenders and other fringe financial services.

Discrimination in the housing and credit markets, including predatory high-cost lending, and the abusive imposition of fees and fines are a few of the issues people of color face in the financial marketplace that make it difficult to survive the challenges brought on by the COVID-19 pandemic.

## Housing Discrimination

Decades of racist practices by government and financial institutions denied Black, Latino/a/x, Asian, Native American, and other communities access to safe and affordable housing and sustainable credit. Housing segregation seeded long-standing disparities in employment, education, health outcomes, and other measures and contributed to predatory policing practices in Black and Brown communities.


American communities were segregated by design. Following Reconstruction, Black families endured a long campaign by federal and state governments to separate residential communities by race.[1] Discrimination in public housing, by zoning, through financing, by law, and by government inaction in the face of often violent resistance to racial integration left Black families cut off from housing in well-resourced communities. Those seeking to purchase homes were denied affordable financing backed by the federal government. Color-coded maps created in the 1930s by Home Owners Loan Corporation (HOLC), an agency born in the wake of the Great Depression to purchase and issue new mortgages on affordable terms, redlined Black communities. The maps, created under the guise of assessing risk for lending across neighborhoods, had an enduring impact on real estate financing and put the federal government on record as assessing Black communities as poor risks.

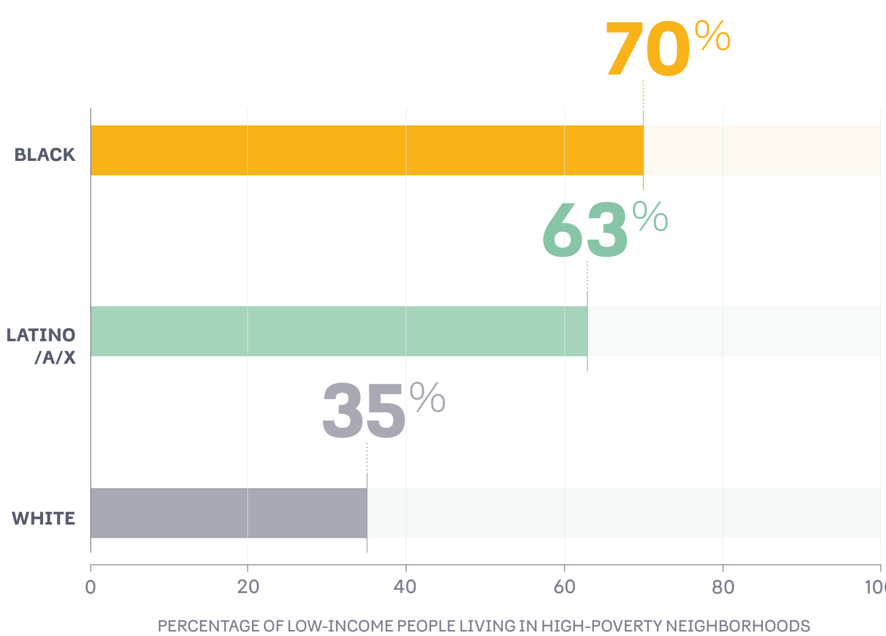
The Federal Housing Administration (FHA), which insures loans made by private lenders, further enshrined this discriminatory practice in its appraisal and underwriting guidelines. Its discriminatory enforcement of its policies meant that Black and other applicants seeking to finance homes in redlined neighborhoods were denied affordable loans. In withholding federally backed loans, the FHA all but ensured that Black borrowers would not fully benefit from the wealth building opportunities of homeownership for generations. By one estimate, from 1934 to 1968, 98% of FHA-backed loans were made to white applicants.[2]

Redlined communities experienced reduced homeownership rates and housing values, increased racial and economic segregation, and significant disinvestment.[3] Subprime lenders and brokers targeted these credit-starved communities and steered borrowers to high-cost mortgages, even if they qualified for conventional loans. High fees and interest rates, oppressive loan terms, and exotic and poorly understood options characterized these mortgages.

The legacy of redlining and hyper-segregation of communities by race and ethnicity contributed to the rise of **predatory subprime lending**.

Between 2007 and 2010, these thinly underwritten loans exploded, resulting in high rates of default, foreclosure, and economic distress. Latino/a/x borrowers were particularly hit hard by the collapse of the housing market and experienced a significant loss of homes to foreclosure and decimation of wealth held in the form of home equity.[4] Loss of a home to foreclosure was not just devastating for borrowers but represented a substantial transfer of wealth from individuals and communities of color to investors and others, contributing to the widening of the racial wealth gap.

Another result of the collapse of homeownership in communities of color was that large companies with private equity backing bought foreclosed properties in bulk and resurrected an old form of predatory lending prevalent during the 1930s. The companies now sell the properties to would-be homeowners through land installment contracts, otherwise known as contracts for deed. Land contract buyers are often obligated to repair dilapidated properties to make them habitable. In many states, default on contract payments due to the financial strain of making repairs means a quick forfeiture of the home, loss of payments and the value of any investments made in the property. This form of seller financing is structurally unfair as it shifts the burdens of homeownership to the buyer with none of the corresponding rights or protections. In Black communities where conventional financing is scarce, and in some rural and immigrant communities, borrowers are offered this form of financing.




**The geographic concentration of poverty differs by race and ethnicity.**

Discrimination raises the cost of housing, limits housing options for homeowners and renters of color, and perpetuates segregation of low-income people. According to the Joint Center for Housing Studies at Harvard University, fully 70% of poor Black people and 63% of the poor Latino/a/x population live in high-poverty neighborhoods, compared with 35% of poor white people.[5] These communities are likely to bear the brunt of the anticipated wave of evictions.[6]

## Abusive Lending Practices

The history of discriminatory financing extends well beyond the housing sector to other forms of high-cost predatory lending. Fringe banking services, including check cashing stores, payday lenders, auto title lenders, rent-to-own stores, and wire transfer and remittance operators ring low-income communities. These thinly regulated companies profit by providing financing with high fees and abusive terms. About a third of the states cap the annual percentage rate for a short-term (14-day) payday loan at 36% or less, but in the remaining states typical payday loan annual percentage rates (APRs) can range as high as 664%.[7]

Black neighborhoods have **three times as many payday loan stores** per capita as white neighborhoods.

Companies offering short-term high-cost loans (such as payday and auto title loans) target borrowers of color by setting up shop in their communities and aggressively marketing to financially strapped consumers. One study in North Carolina, for example, noted that Black neighborhoods have three times as many payday loan stores per capita as white neighborhoods, a concentration that increased as the proportion of Black people in the neighborhood increased.[8] Payday lenders in California and Florida are concentrated in Latino/a/x and Black communities, even controlling for income and other factors.[9] Some affluent communities of color were more likely to have payday loan stores than less affluent predominantly white communities.[10] Not to be overlooked is the explosive growth of predatory high-cost lending in Native American communities, where geographic and cultural isolation, absence of mainstream financial institutions, and lack of resources play a role.[11]

Community members use these companies rather than banks because they cannot afford the fees or minimum balances required for bank accounts, may have privacy concerns, or fear having their funds attached by creditors. Banks may not be as welcoming as the local check casher or payday lender, who likely sponsors community events or festivals. Payday loans, whether made by storefront lenders or internet payday websites, trap consumers in a cycle of debt. When borrowers cannot afford repayment, lenders encourage them to roll the loan over or reborrow, paying a new fee and putting the borrower deeper in a financial hole. Money and assets are drained from the household, and families cannot get ahead to save for financial emergencies.

## Criminal Justice Debt

Compounding these financial problems for residents in Black communities and other communities of color is the imposition of excessive fines, fees, costs, and surcharges in the legal system.[12] Criminal justice debts are financial obligations resulting from interaction with the criminal justice system and include court-imposed costs, traffic infractions, and other monetary sanctions. Many local governments use revenue from fees and fines to fund a significant portion of their budget. Police in these municipalities are incentivized to aggressively stop and fine residents for a host of infractions. After a Ferguson, Missouri, police officer killed teenager Michael Brown for walking in the street, the Department of Justice found that, despite making up only 67% of the population, African Americans accounted for 85% of the Ferguson Police Department's traffic stops, 90% of citations, and 93% of arrests from 2012 to 2014.[13] Further, formal and informal quotas that required police officers to issue a certain number of tickets or make a particular number of arrests within a specific time period disparately impacted people of color. The Justice Department's report also described how Ferguson used its court system to generate revenue in a way that disproportionately impacted its African American residents. The report noted that African Americans "are disproportionately represented at nearly every stage of Ferguson law enforcement from initial police contact to final disposition of a case in municipal court."[14]

COVID-19 relief has **failed to reach many low-income households** that need help.

Like Ferguson, many local governments rely on fees, fines, and forfeitures for more than 10% of their budget revenue; for some governments, fines account for more than 20% of the general fund.[15] Data from the Census also suggest a correlation between the cities that are most dependent on fines and fees for revenue and a high Black population.[16] Reliance on this source of revenue will likely increase as governments seek to make up for budget shortfalls due to the COVID-19 pandemic.

Nonpayment of criminal justice debt has serious consequences, including the possibility of incarceration and suspension of driver's or professional licenses. The ability to drive is of particular concern for low-wage workers of color who are likely essential employees and do not have the option to work at home. Lack of a driver's license also affects the ability to go to school or receive health care, including drive-through COVID-19 testing. The debt undermines a family's financial stability as it is often paid by family members, often women, on behalf of their loved ones.

## The COVID-19 Economy for Households of Color

The economic downturn caused by the COVID-19 crisis has disproportionately harmed consumers of color. In April 2020, the unemployment rate rose to its highest level since the Great Depression.[17] Workers of color make up a disproportionate share of workers in the industries where layoffs, pay cuts or a reduction in work hours occurred early in the pandemic.


Between February and April 2020,
more than one in six Black workers lost their jobs.

Asian-owned small restaurants, for example, sharply reduced hours or closed early in the pandemic, displacing a workforce of limited English proficient workers.[18] The unemployment rate among Asian-Americans increased by more than 450 percent from February to June 2020, a rate of increase greater than that of other racial groups.[19] The Latino/a/x unemployment rate reached historic levels in the spring of 2020.[20] A PEW Research Center poll during that period recorded that approximately half of Latino/a/x respondents stated that someone in their household had lost a job or has taken a pay cut—or both—because of the COVID-19 outbreak, compared with 33% of all U.S. adults.[21] The Black unemployment rate, consistently significantly higher than the white unemployment rate, soared during this period.[22] Between February and April 2020 more than one in six Black workers lost their jobs; as of April 2020, less than half of the adult Black population was employed.[23]

Unemployment rates have decreased since their pandemic peak. However, low-wage workers of color struggle to find work in the service sector and other portions of the economy hit hardest by the pandemic.[24] Black workers in particular experienced a steep rise in unemployment and a slow rate of return to pre-pandemic levels of employment.[25] This trend is consistent with the experience of Black workers after the Great Recession.[26] Unemployment among Latina and Black women remains relatively high and may be undercounted in official numbers as some women are not seeking employment for family caregiving (including remote schooling) or health reasons.[27]

As the economy reopens, workers will return to jobs that due to the nature of the work may put their health at risk. Jobs that require person-to-person interactions, such as health care, retail, construction, service and leisure, disproportionately employ Black, Asian, and Latino/a/x workers.[28] During the height of the pandemic Black and Latino/a/x people were infected, hospitalized, and died at a rate that was consistently three to five time higher than white people.[29] Aside from the loss of income, workers who are infected and sick accrue significantly higher expenses, including medical expenses. Loss of employment during the pandemic may result in loss of health insurance coverage, which could lead to significant medical debt.

With the cost of housing increasing, household incomes falling due to the COVID-19 pandemic, and limited government assistance, low-income households will spend more than half of their income on housing, with little resources left over to meet other essential needs.[30] The percentage of cost-burdened rental households—defined as those households dedicating more than 30% of their income to housing costs—rose substantially before the onset of the pandemic.[31] In 2018, 55% of Black renter households were cost-burdened, and 53% of Latino/a/x renter households and 45% of Asian/other renter households were cost-burdened, compared to just 43% of white renter households.[32] This additional strain on finances puts many renters at risk of utility shutoffs or otherwise having inadequate water, electricity, or other services to heat or cool their homes.

Without resources to withstand an economic downturn, and with ongoing discrimination in the labor market, households of color are likely to experience long-term financial insecurity. Loss of income due to unemployment or the illness or death of wage earners will severely affect households already living paycheck to paycheck. The high concentration of predatory lenders in the community offering high-cost loans with abusive terms will trap borrowers in loans they often cannot afford to repay. Other expected challenges include the following:

- **A steep rise in evictions, foreclosures, and homelessness.** Once the moratoria on evictions and foreclosures expire, tenants and homeowners are at risk of displacement. Overall, Black and Latino/a/x households were significantly less likely than white homeowners to access home savings relief options, including those provided under federal law, when they missed a mortgage payment, putting them at greater risk for foreclosure once the moratoria are lifted.[33]

- **Overwhelming debt and aggressive, abusive, and illegal collection of debt.** Consumer debt, including credit card debt, medical debt, and student loan and criminal justice debt, will increase. Debt collectors will aggressively pursue efforts to collect private or government debt through garnishments, setoffs, repossessions, and other methods. Consumers of color are more likely to be contacted by debt collectors and sued on a debt.[34] Successful collection efforts will deprive consumers of wages and other essential income, cars, and household assets.

- **An increase in high-cost predatory lending.** Financially stressed consumers will be more vulnerable to exploitative high-cost loans. Abusive lenders, already a presence in the community, will increase their outreach to cash-strapped consumers. Household resources will be diverted to pay exorbitant rates and fees.

- **Lack of access to energy and utility services and broadband.** Debt-burdened consumers will face shutoff of essential services including the electricity, gas, and water they need to shelter in place safely. Access to high-speed broadband service, now essential for employment, schooling, finding affordable housing and accessing health care and benefits, will also be at risk.

- **Lack of access to reliable, safe, and affordable cars.** Access to a reliable car is essential to obtain and keep a job, especially for low-wage workers who cannot work from home. Even before the start of the pandemic, consumers were struggling with car loans. The cost to purchase, finance, and use a car varies widely by race and ethnicity.[35] Abusive sales and financing tactics, including discriminatory pricing, sale of cars with dangerous defects, and abusive repossession practices, have made cars expensive to purchase and own.

- **Lack of resources for immigrants and people with limited English proficiency.** Consumers with limited English proficiency (LEP) had limited access to the information and resources provided under federal law in response to the COVID-19 pandemic.[36] Future economic relief measures may bypass these consumers unless governments and private industry make a concerted effort to include these consumers in programs and provide information in their native languages.

## Legal Tools to Address Discrimination and Protect Consumers' Rights

Advocates pursuing justice for consumers of color can use a variety of federal and state credit discrimination and consumer protection laws. The Equal Credit Opportunity Act (ECOA) outlaws discrimination with respect to any aspect of a credit transaction, including the marketing of credit, the application process, credit evaluation, credit terms, credit reporting, loan servicing, debt collection, foreclosures, garnishment, and other post-judgment creditor remedies.[37]

More narrow in its scope, the Fair Housing Act prohibits housing discrimination, including in mortgage lending and tenancy.[38] Both statutes prohibit discrimination based on race, color, religion, national origin, and sex. Additionally, the ECOA outlaws discrimination based on marital status, age, receipt of public benefits, and exercise of rights under federal consumer credit statutes. The FHA also outlaws discrimination based on familial status and disability.

The ECOA and the Fair Housing Act have been used to challenge a wide range of discriminatory practices, including redlining and targeting consumers to offer credit that is predatory, unfair, or high-priced (called “reverse redlining”). Actions have been brought against lenders and other creditors, brokers, car dealers, pawnbrokers, and others. Recently, the Fair Housing Act was used to challenge water shutoffs that were discriminatorily concentrated in poor Black communities.[39] In the wake of the foreclosure crisis, Congress imposed greater regulation on the mortgage market by passing the Dodd-Frank Wall Street Reform and Consumer Protection Act, and some states also passed laws specifically to address predatory mortgage lending.[40]

Every state and the District of Columbia has a consumer protection statute, also referred to as unfair and deceptive acts and practices (UDAP) statutes.[41] These laws can be used to challenge abusive, deceptive, and unfair financial transactions. Many of these laws are very broad and allow consumers to challenge a wide range of abusive behavior that may or may not violate other federal or state statutes. Consumers can seek many different types of relief in UDAP claims, including actual, treble, minimum and/or punitive damages, injunctive relief to stop abusive practices, class actions, and in most states, attorney fees as well. The type of relief available varies by state.

For consumers mired in overwhelming debt, the Fair Debt Collection Practices Act (FDCPA) regulates and restricts debt collectors’ efforts to collect debt.[42] The FDCPA restricts abusive collection methods and provides specific rights for consumers. Abuses include harassment, false or deceptive representations, and other unfair or unconscionable collection methods. Consumers have the right to stop all collection contacts. In addition, a collector is required to verify the existence, legality, or amount of the debt it is attempting to collect. A debt collector who violates the FDCPA while collecting a consumer debt is subject to suit by any person adversely affected by the violation. A successful plaintiff may recover actual damages, additional statutory damages, attorney fees, and costs.[43] Many states have laws similar to the FDCPA that apply to all collectors of debts.[44]

Consumers mired in overwhelming debt can seek relief by filing for bankruptcy.[45] At the end of the bankruptcy case, the debtor receives a discharge from personal liability on most debts, as well as other protections.[46] State and federal exemption laws also provide protections for the income and assets of debt-burdened consumers.[47] Every state has a general exemption law that protects a variety of income and property from judgment creditors. In addition, federal and state statutes carve out protections for specific types of income or assets, such as Social Security benefits or state employees’ pensions. Special exemption rules are also sometimes found in statutes dealing with certain types of debt, such as tax debts. Homestead exemptions are designed to protect debtors’ homes; the amount of the homestead exemption varies from state to state. States also protect at least some of a debtor’s basic personal possessions from the reach of creditors, and generally list specific items or categories of household goods that are exempt. These exemptions may include motor vehicles. Finally, a number of states provide a specific exemption for a certain amount of money in a bank account. Others make a wildcard exemption available for this purpose. However, even in the absence of a specific exemption for bank accounts or a wildcard exemption, money on deposit in a bank account such as wages or benefits may retain its exempt status. Regardless of whether the funds in a bank account are exempt, a creditor can reach the money only if it belongs to the debtor.[48]

## Conclusion

Systemically racist practices in the financial services industry and in government have depleted the wealth and resources of Black, Latino/a/x, Asian, Native American, and other consumers of color. The financial instability created by these practices has undermined the ability of consumers to deal with the economic fallout of the COVID-19 pandemic. Consumer protection laws can ameliorate some of the effects of these deep and long-standing practices. Structural economic changes however, are ultimately necessary to protect individuals and household from discriminatory and abusive practices in the marketplace, and to preserve wealth and income ■

---

[1] Richard Rothstein, The Color Of Law: A Forgotten History Of How Our Government Segregated America 75 (2017).

[2] Sam Fulwood, *The United States' History of Segregated Housing Continues to Limit Affordable Housing,* Center For American Progress, Dec. 2016, at 69, available at https://www.americanprogress.org/issues/race/reports/2016/12/15/294374/the-united-states-history-of-segregated-housing-continues-to-limit-affordable-housing/.

[3] Daniel Aronson, et al., *The Effects of the 1930s HOLC Redlining Maps,* Working Paper No. 2017-12 2017, Federal Reserve Bank of Chicago, at 27 (rev. Aug. 2020.

[4] Paul Taylor, *et al., Latinos and Homeownership,* PEW, 2012, available at https://www.pewresearch.org/hispanic/2012/01/26/iii-latinos-and-homeownership/.

[5] Joint Center For Housing Studies Of Harvard University, The State Of The Nation's Housing 2019, at 16 (2019), available at https://www.jchs.harvard.edu/state-nations-housing-2019.

[6] See Center for American Progress, The Pandemic Has Exacerbated Housing Instability for Renters of Color, Oct. 2020, available at https://www.americanprogress.org/issues/poverty/reports/2020/10/30/492606/pandemic-exacerbated-housing-instability-renters-color.

[7] Center for Responsible Lending, Map of U.S. Payday Interest Rates, Center for Responsible Lending, Mar. 2021, available at https://www.responsiblelending.org/research-publication/map-us-payday-interest-rates.

[8] Uriah King, *et al., Race Matters: The Concentration of Payday Lenders in African American Neighborhoods in North Carolina,* Center for Responsible Lending, 2005.

[9] Li, *et al., Predatory Profiling: The Role of Race and Ethnicity in the Location of Payday Lenders in California,* Center for Responsible Lending, 2009; Brandon Coleman & Delvin Davis, *Perfect Storm: Payday Lenders Harm Florida Consumers Despite State Law,* Center for Responsible Lending at 7, Chart 2 (Mar. 2016).

[10] Delvin Davis, *Mile High Money: Payday Stores Target Colorado Communities of Color,* Center for Responsible Lending (Aug. 2017; amended Feb. 2018).

[11] First Nation Development Inst., Borrowing Trouble: Predatory Lending in Native American Communities, 2008.

[12] Matthew Impelli, *In Minneapolis, Where George Floyd Was Killed, Black Drivers Are Five Times More Likely to be Stopped by Police Than White Drivers: Analysis,* Newsweek (Sept. 9, 2020) (study showing Black drivers are much more likely to be searched when stopped by police than white Americans); Shaun Ossei-Owusu, *Race and the Tragedy of Quota-Based Policing Arrest targets compound the risk of racially biased stop-and-frisk,* American Prospect (Nov. 3, 2016).

[13] United States Dep't Of Justice, Investigation Of The Ferguson Police Department, Mar. 4, 2015, at 4, available at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

[14] *Id*. at 63.

[15] Mike Maciag, *Addicted to Fines,* Governing (Aug. 21, 2019); see also Sharon Brett, Reforming Monetary Sanctions, Reducing Police Violence, 4 UCLA Crim. Just. L. Rev. 17 (2020).

[16] *See* Abby Shafroth, *et al., Confronting Criminal Justice Debt: A Guide for Litigation,* National Consumer Law Center (2016), available at https://www.nclc.org/images/pdf/criminal-justice/confronting-criminal-justice-debt-2.pdf

[17] U.S. Bureau of Labor Statistics, Unemployment Rates Rise to a Record High 14.7 Percent in April 2020, May 13, 2020, available at https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm.

[18] McKinsey & Company, COVID-19 and Advancing Asian American Recovery, August 2020, at 8, available at https://www.mckinsey.com/~/media/McKinsey/Industries/Public%20and%20Social%20Sector/Our%20Insights/COVID%2019%20and%20advancing%20Asian%20American%20recovery/COVID-19-and-advancing-Asian-American-recovery-v3.pdf.

[19] *See id.*

[20] U.S. Bureau of Labor Statistics, Unemployment Rates Rise to a Record High 14.7 Percent in April 2020, May 13, 2020, available at https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm.

[21] Jens Manuel Krogstad, et al., U.S. Latinos Among Hardest Hit by Pay Cuts, Job Losses due to Coronovirus, PEW Research Center, April 3, 2020. Survey conducted March 19-24, 2020.

[22] Elise Gould & Valerie Wilson, *Black Workers Face Two of the Most Lethal Preexisting Conditions for Coronavirus – Racism and Economic Inequality,* Economic Policy Institute, June 2020, at https://www.epi.org/publication/black-workers-covid.

[23] *Id.*

[24] Elise Gould & Melat Kassa, Low-wage, *Low Hour Workers were Hit Hardest During the COVID-19 Recession*, Economic Policy Institute, May 20, 2021 available at https://www.epi.org/publication/swa-2020-employment-report. *See also* Neil Irwin, *The Upshot: The economy is (almost) back but it is looking different than it used to,* N.Y. TIMES, Apr. 29, 2021; Harvard Opportunity Insight Tracker, data from March 10, 2021, available at https://www.tracktherecovery.org/.

[25] *Black Workers, Hammered by the Pandemic, Now Being Left Behind in the Recovery*, Politico, Mar. 23, 2021, available at https://www.politico.com/news/2021/03/23/black-workers-pandemic-recovery-477640.

[26] *Id.*

[27] *Id. See also* Chad Stone, *et al., Labor Market Weaker than Headline Numbers Suggest*, Center on Budget and Policy Priorities, Mar. 1, 2021, available at https://www.cbpp.org/research/economy/labor-market-weaker-than-headline-numbers-suggest; Jeanna Smialek, Why Top Economists Are Citing Higher than Reported Jobless Rate, N.Y. TIMES, Feb. 22, 2021.

[28] Keith Wardrip & Anna Tranfalgia, Fed. Reserve Bank of Phila., *COVID-19: Which Workers Will Be Most Impacted?* (2020); ***see*** Kim Parker, *et al., About Half of Lower-Income Americans Report Household Job or Wage Loss Due to COVID-19*, Pew Research Center (2020).

[29] Mark W. Tenforde, et al., Characteristics of Adult Outpatients and Inpatients with COVID-19 — 11 Academic Medical Centers, United States, March–May 2020, 69 Morbidity & Mortality Weekly Rep. 841 (2020), available at https://www.cdc.gov/mmwr/volumes/69/wr/mm6926e3.htm; Shikha Garg, *et al., Hospitalization Rates and Characteristics of Patients Hospitalized with Laboratory-Confirmed Coronavirus Disease 2019--COVID-NET, 14 States, March 1-30, 2020*, 69 Morbidity & Mortality Weekly Rep. 458 (2020), ***available at*** https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e3.htm?s_cid=mm6915e3_w.

[30] Even before the pandemic American households were cost burdened, with 47.4% of renter households paying more than 30% of their income for housing. More than half of this population is severely cost burdened, paying more than 50% of income for housing. See Joint Center For Housing Studies Of Harvard University, America's Rental Housing 2020 at 4-5, 26 (2020), available at https://www.jchs.harvard.edu/state-nations-housing-2020.

[31] *Id*. at 26 (the overall share of cost-burdened renters was 6.9 percentage points higher in 2018 than in 2001, while the share of severely cost-burdened renters was 4.6 percentage points higher).

[32] *Id*. at 29.

[33] National Consumer Law Center, A Looming Crisis: Black Communities at Greater Risk of COVID-19 Foreclosure, July 2020, available at https://www.nclc.org/images/pdf/special_projects/covid-19/IB_Covid_Black_Forbearance_Foreclosure.pdf.

[34] Paul Keil & Annie Waldman, The Color of Debt: *How Collection Suits Squeeze Black Neighborhoods*, ProPublica, 2015, available at https://www.

propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods.

[35] National Consumer Law Center, Time To Stop Racing Cars: The Role Of Race And Ethnicity In Buying And Using A Car (Apr. 2019), available at https://www.nclc.org/images/pdf/car_sales/report-time-to-stop-racing-cars-april2019.pdf.

[36] *See, e.g.*, Lopez-Villafana, *Language, cultural barriers limit San Diego Somali residents access to COVID-19 resources*, San Diego Union Tribune, Apr. 2, 2020; Americans for Financial Reform, Barriers to Language Access in the Housing Market: Stories from the Field (May 2016), at https://ourfinancialsecurity.org/wp-content/uploads/2016/05/AFR_LEP_Narratives_05.26.2016.pdf.

[37] 15 U.S.C. §§ 1691 *et seq.; see* National Consumer Law Center, Credit Discrimination (7th ed. 2018), updated at www.nclc.org/library.

[38] 42 U.S.C. §§ 3601 *et seq.; see* National Consumer Law Center, Credit Discrimination (7th ed. 2018), updated at www.nclc.org/library.

[39] NAACP-LDF filed a class action lawsuit against the City of Cleveland on behalf of the city's Black residents who are disproportionately affected by the city water department's practices. The lawsuit, which brings claims under the Fair Housing Act, the Due Process and Equal Protection Clauses of the 14th Amendment, the Ohio Constitution, and the Ohio Civil Rights Act, challenges Cleveland Water's racially discriminatory and unfair policies that not only leave Black residents without water but can also lead to the loss of their homes. *See also* Coty Montag, *Water/Color: A Study of Race & the Water Affordability Crisis in America's Cities*, LDF, 2019.

[40] *See* National Consumer Law Center, Mortgage Lending (3d ed. 2019), updated at www.nclc.org/library.

[41] *See* National Consumer Law Center, Unfair And Deceptive Acts And Practices (9th ed. 2016), updated at www.nclc.org/library.

[42] 15 U.S.C. §§ 1692 *et seq.*

[43] 15 U.S.C. § 1692k. For more information, see National Consumer Law Center, Fair Debt Collection (9th ed. 2018), updated at www.nclc.org/library.

[44] *See* National Consumer Law Center, Fair Debt Collection Ch. 16, Appx. D (9th ed. 2018), updated at www.nclc.org/library.

[45] 11 U.S.C. §§ 101 *et seq.*

[46] The discharge by itself does not protect the debtor's property from creditors with valid liens on property. However, the bankruptcy code offers a number of ways for debtors to obtain full or partial relief from secured claims in most cases. *See* National Consumer Law Center, Consumer Bankruptcy Law And Practice (12th ed. 2020), updated at www.nclc.org/library.

[47] *See* National Consumer Law Center, Collection Actions Chs. 13-16, Appx. H (5th ed. 2020), updated at www.nclc.org/library; National Consumer Law Center, No Fresh Start in 2020: Will States Let Debt Collectors Push Families into Poverty in the Wake of a Pandemic? (Oct. 2020), available at https://www.nclc.org/issues/report-still-no-fresh-start.html.

[48] A rule imposed by the U.S. Department of Treasury limits creditors' ability to garnish bank accounts that contain Social Security, Supplemental Security Income (SSI), VA, and certain other federal benefits. The rule requires all banks to determine whether certain exempt federal benefits have been electronically deposited within the preceding two months. If they have, the bank must protect whatever amount was deposited during that period. 31 C.F.R. §§ 212.1 through 212.12. *See also* U.S. Dep't of Treasury, Fin. Mgmt. Serv., Guidelines for Garnishment of Accounts Containing Federal Benefit Payments (Mar. 2013), available at www.fms.treas.

# Using Equity to Confront and Correct Individual and Systemic Racism

To Do Justice, Judges Must Do What Is Fair, Not What Is Merely Legal

*By Ben Carter*

## Introduction

I'm on video call with legal aid attorneys to learn how judges across Kentucky's 120 counties are handling evictions. "Ben, I can't find a landlord that will accept rental assistance," says one of my colleagues.

Six months into the COVID-19 pandemic, the money for rental assistance from the CARES Act is now—finally—available to landlords in rural Kentucky. Are judges suspending cases until the Centers for Disease Control (CDC)'s eviction protections expire?[1] Are judges interrogating renters about the truth of the statements the renters made in sworn declarations pursuant to the CDC moratorium? Will judges postpone a set-out if a renter signs and delivers a declaration to their landlord after a judgment of eviction is entered?

Although the state's rental assistance program would pay landlords 90% of the balance on past-due rent, landlords are using all sorts of excuses to refuse the assistance. Some landlords don't want to waive late fees or lose 10% of the past-due balance. Others are refusing to provide the federal government with the required W-9—an indication that they may be perpetrating tax fraud. Some just want the homerenters[2] gone.

The role of the courts in sustaining a **false notion of justice** while perpetuating housing insecurity in communities of color cannot be overlooked.

All across the state—from Louisville (where landlords file two-thirds of all eviction actions in Kentucky each year[3] and where landlords receive 100% of past-due rent under the city's rental assistance program) to Kentucky's smallest towns—the story is the same. Landlords are refusing to accept rental assistance for which homerenters have applied and been approved. Or landlords are refusing to participate in rental assistance programs available only to landlords. People across Kentucky and the rest of America are struggling to pay their rent, and yet many landlords are terminating the month-to-month term[4] of leases, filing evictions when their homerenters overstay the lease term, and then claiming the "reason for eviction" is not nonpayment (prohibited by the CDC moratorium), but rather the lease "violation" of overstaying (holding over) the lease term.[5]

Landlords are ruthlessly pursuing evictions and engaging in bad-faith and abusive tactics during a still-escalating global pandemic during which many of the nation's lowest-paid workers remain unemployed. In fact, research has already demonstrated the correlation between housing instability and the spread of COVID-19. According to one study, "[l]ifting [eviction] moratoriums translated to a total of 433,700 excess cases and 10,700 excess deaths between March 1 and September 3, 2020."[6]

Nonetheless, courts across Kentucky are granting landlords' requests to evict people despite both the availability of rental assistance that landlords are refusing to accept and the mounting evidence that evictions are literally killing people. It's reckless. It's inhumane.

But judges need not be bound by the absurdities and abject cruelty that rigid application of the law will produce in these cases. In these extraordinary times, judges could withhold from landlords the extreme remedy they seek and use the court's equitable powers[7] to ensure that judgments are both lawful and fair. I say "could" because judges are not currently exercising these important powers, just as they neglected them during the last catastrophe—the foreclosure crisis a decade ago—by failing to protect homeowners and communities from unnecessary foreclosures.

Now, it's happening again. Through the lens of racial justice, the current housing crisis looks a lot like the last crisis. Too little, too late from the federal government; powerful people and companies pursuing their perverse, short-term financial interests; no institution (including the courts) attempting to balance those interests against the costs of pursuing those interests, and all of it hitting Black, Latino/a/x, and other communities of color harder than white communities.[8]

It's long past time we break free of this repeating cycle of racial injustice. The role of the courts in sustaining a false notion of justice while perpetuating housing insecurity in communities of color cannot be overlooked.

This article will (1) describe parallels between the COVID-19 and foreclosure crises; (2) describe the historical origins of the courts' expansive equitable powers; (3) envision what a court committed to rigorously interrogating the equities in consumer cases would look like and how such a court would refrain from compounding historically racial injustices; and (4) propose a path toward reclaiming a place for equity in the courtroom through consistent, zealous advocacy and greater public scrutiny of judicial candidates.

## Parallels Between the COVID-19 and Foreclosure Crises

I first became interested in encouraging judges to use their equitable powers to prevent harm and do justice when I was a legal aid attorney serving hundreds of people facing foreclosure in the last housing crisis only a decade ago. The power imbalances in housing and consumer law can be extraordinary, the parties' incentives are often distorted, and the consequences to vulnerable people, their children, their neighbors, and communities are dire. At that time, I had the misfortune of watching many people lose their homes, file bankruptcies, and accept unfair loan modifications as judges repeatedly refused and/or failed to consider equities in foreclosure cases.

In the years before the last housing crisis, mortgage lenders went door-to-door in areas of town that had been historically starved of credit, happy to originate risky, expensive loans to people who—I heard it a hundred times—"didn't think the bank would lend me money if I couldn't afford to pay it back." Although loan officers had historically cared about a homebuyer's ability to afford a home loan, no one told hopeful homebuyers—many of whom were Black—that the mortgage originators offering them credit in the early 2000s no longer cared whether they could pay it back. The mortgage originators were going to take their fees up front and sell their loans to Wall Street to be bundled into a residential mortgage-backed securities and later sold to investors like so many ticking time-bombs.

**The courts' equitable powers can blunt the traumas** of both system-level crises and individual, quotidian traumas.

Legal aid attorneys in Kentucky saw Black and Latino/a/x homeowners hit disproportionately hard by the onslaught of foreclosure actions.[9] During the foreclosure crisis, I began asking courts to order loan modifications as part of the courts' natural, traditional exercise of its equitable powers.[10] No court ever did. Judges were unprepared for arguments asking the court to use its equitable power to (1) mitigate harm and (2) ensure the outcome of a dispute was not just lawful, but also fair—to the parties and the communities who would be affected by but were not parties to the litigation.

These same failures exist in eviction actions, of course, and evictions were a quiet, quotidian crisis long before the twin crises of a global pandemic and economic upheaval of the past year placed millions of Americans at risk of eviction. In evictions, the judgments fall faster than in foreclosure—weeks, not months or years—and fall on people whose ability to find housing is even more precarious. The pandemic has amplified the already devastating consequences of eviction. Now, housing isn't just a home. It's school. It's the office. It's a sanctuary. It's the one safe place people have from a virus—a place where their state and local governments are often pleading with them to stay.

## Equitable Powers of the Courts

Our judicial system, in which courts sit in both law and equity, is based on a foundational belief that justice is the combination of law *and* fairness. The courts' equitable powers can blunt the traumas of both system-level crises and individual, traumas inflicted onto consumers in evictions, debt collections, auto fraud, student lending, etc. For an outcome to be just, it must be both lawful *and* fair. Judges must incorporate equitable considerations into any action in which historical racist systems of oppression, current power imbalances, and the particular warped incentives of a party mean that enforcing one party's legal rights means impoverishing the other party or innocent third parties.

Though there is historical context for equity in foreclosure actions, a righteous justification exists for insisting courts engage in deeper considerations of equity in a wide variety of consumer cases courts commonly treat as routine, rote, open-and-shut.[11] As Georgetown Law Professor David Super explained,

> **Equity took on recognizable form in fifteenth-century England as a response to problems that the increasingly rigid common law system could not address. At that time, the law courts viewed common law's clarity and rigidity as its great virtues. An example of that rigidity was the willingness to deny meritorious claims or defenses for procedural missteps. The law courts were loathe to sacrifice that absolutism, leaving those who made innocent procedural errors subject to unconscionable abuses. By contrast the chancellor and his assistants who presided over equitable proceedings saw themselves as "making sure justice was done in cases where shortcomings in the regular procedure, or human failings, rendered its attainment [through the law courts] unlikely." Freedom from the law courts' procedural limitations "enabled the chancellor to provide swift and inexpensive justice for the poor and oppressed. … He could enforce the dictates of conscience and protect the foolish" without changing the usual rules of law. Where a statute or the common law has a gap or produces an improvident result, equity may intervene.[12]**

It is important to recognize that lenders or mortgage servicers filing foreclosure actions are "foreclosing" the equitable remedy of redemption. According to Super, the English equity court's traditional abhorrence of forfeitures caused it conclusively to presume unequal bargaining power in all mortgages.

> **The threat of forfeiture of the mortgaged property "puts the borrower too much in the power of the lender, who, being distressed at the time, is too inclinable to submit to any terms proposed on the part of the lender." Equity thus made redemption available without any special showing, declaring that the "right of redemption could not be clogged or fettered in any way; any agreement which had this effect was void." The modern foreclosure action arose to give mortgagees the means to cut off this equity of redemption.[13]**

In other words, modern foreclosure actions have joined the legal questions and equitable considerations into one action. So, if courts are not considering the equities in foreclosures, they are only doing half their job. Indeed, "[f]oreclosure is peculiarly an equitable action, and the court may entertain such questions as are necessary to be determined in order that complete justice may be done."[14]

But, while mortgage foreclosures are a fertile ground for arguments based in equity, there's nothing particularly unique about mortgage foreclosures. Under our merged system of law and equity, a court has the ancient opportunity (and duty) to weigh the equities present in each case that comes before it.[15]

Creating a robust culture in which our judges (1) understand their equitable powers and (2) feel empowered and expected to "do equity" will benefit low-income people across a wide spectrum of litigation that they commonly face. And empowering the courts to consider equitable factors will especially benefit people of color because "doing equity" requires courts to grapple with our country's racist past and acknowledge the systemic racism still metastasized within our institutions.[16]

## Judicial Exercise of Equitable Power Can Correct Systemic Racism

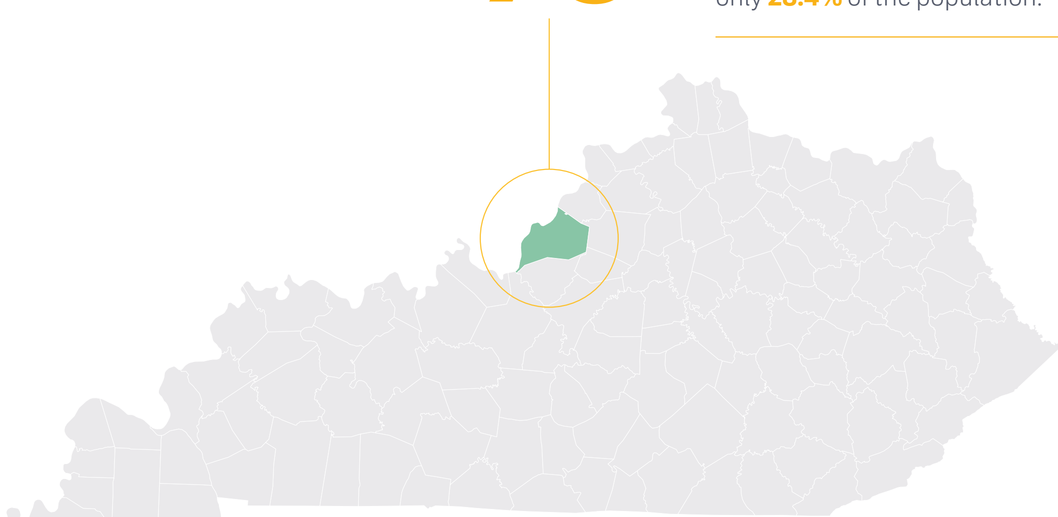
An inquiry into equity requires a court to make a searching inventory of both the equitable position of the parties before the court, as well as the larger societal and historical contexts in which this individual case exists. As David Super explains, equity involves larger questions of fairness and morality:

> **Equity is not just an elaborate means for cross-referencing one law to another…Instead, equity provides relief from rules of law based on principles of conscience and public policy. It may draw guidance from other laws as to contemporary moral sensibilities and public policy, but as equity is not a literalistic system, the textual limits of those laws have never constrained it.[17]**

Equity allows us to bring into many types of cases—eviction, foreclosure, debt collection, auto fraud, etc.—all of the sociological, psychological, economic data that supports what we know, qualitatively and quantitatively, to be true. Powerful people and corporations target people of color, particularly Black people, for unequal and unfair treatment. This unfair treatment, predictably, leads to results like evictions and foreclosures at grossly disproportionate rates, due in part to a disturbing history of segregation, redlining, restrictive covenants, and starving Black communities of opportunities to build wealth.

As of 2017, the national gap between homeownership rates for white people and Black people was 30.1%.[18] This is a wider margin than when race-based discrimination against homebuyers was legal.[19] Despite its illegality, housing discrimination continues. According to 2020 data from the Home Mortgage Disclosure Act, lenders deny mortgages for Black applicants at a rate 80% higher than that of white applicants[20] —with more than half of these Black applicants having no reason listed for their denial.[21] In Kentucky, only 36.5% of Black households own their homes compared to 70.7% of white households.[22]

**70%** of the debt in collections in Jefferson County, Kentucky, is held by communities of color, who make up only **28.4%** of the population.



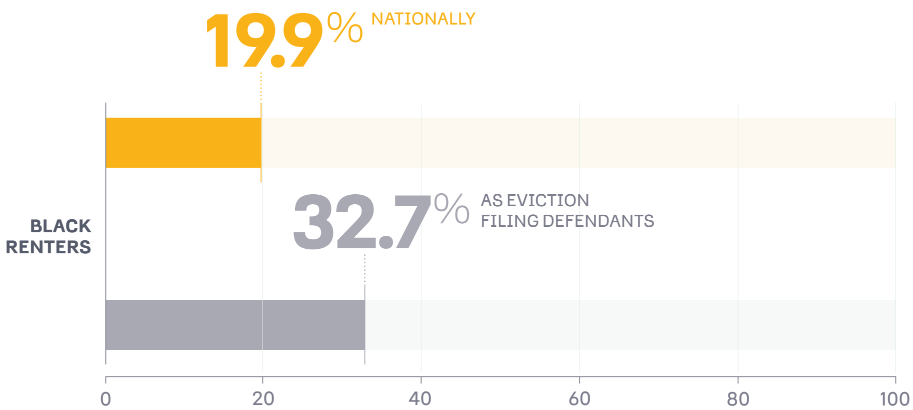
These disparities track in all manner of consumer cases. According to data collected by the Eviction Lab, in Jefferson County, Kentucky (home to Louisville), seven of the ten census tracts with the highest eviction rates have Black populations of at least 50% (with five of them having Black populations above 75%).[23] Relatedly, the ten census tracts with the highest percentage of Black residents (all above 90%) all have eviction rates higher than 5.18%—the 2016 average among census tracts in Jefferson county—with some rates being as much as double.[24]

Debt disproportionately burdens Black Kentuckians and other communities of color as well. In Jefferson County, 70%[25] of the debt in collections is held by communities of color who make up only 28.4%[26] of the population. And, 73% of Kentuckians in nonwhite areas face some sort of debt collection while statewide 40% of Kentuckians have some form of debt in collections.[27] 49% of Kentuckians living in predominantly nonwhite areas have medical debt while statewide the average is 27%. None of this is an accident, but rather the logical, predictable outcome of generations of racist policy decisions and divestment. Equity allows us the opportunity to bring that information to bear on our individual cases.

While the specific considerations will vary among various substantive practice areas, the larger questions that demand answers in equity will remain the same:

- **Who is the plaintiff/business?** What has the plaintiff done to try to resolve this matter? What is the plaintiff's business model? What good is the plaintiff contributing to society? Does the plaintiff have clean hands?
- **What incentives do each party have in this case?** Are those incentives causing a party to behave in a way that either imposes externalized costs on innocent third parties or creates an outsized burden on the other party relative to the benefit conferred on the "winning" party?
- **What are the power dynamics between the two parties?** Who has more money? Sophistication? Privilege? What historical or cultural facts have created that power dynamic? Are systems of oppression present either overtly or covertly in this case?
- **What is the broader social and economic context in which this case exists?**

Equity allows advocates to bring policymakers failure to grapple adequately with rising housing prices into cases involving landlords and homerenters. Nationally, Black renters make up 19.9% of all adult renters, but they make up 32.7% of all eviction filing defendants.[28] If evictions disproportionately affect people of color in your




**Eviction disproportionately affects black renters.**

jurisdiction (like they do here in Louisville),[29] a court interrogating the equities of these evictions would consider the disproportionate impact on people of color and the jurisdiction's historical housing policies that generate this disproportionate impact. Our systems have been designed to control, dispossess, and impoverish Black people, and we can trace the origins of these systems to explicitly racist motives and moments in history.

With the backdrop of a global pandemic in 2021, an eviction court committed to equity today would:

- consider the tremendous power imbalances present in landlord-homerenter relationships (especially in a pandemic),
- consider the known threat to public health that evictions pose,
- view a landlord's claim that the eviction is not for nonpayment of rent but for "holding over" past the term of the lease (that the landlord decided to terminate) with a lot more skepticism.

None of that is happening now.

## Reclaiming a Place for Equity in the Courts

Equity involves larger questions of fairness and morality. I know how difficult it is to get judges to engage in these kinds of sticky questions. Especially when we are often asking them to dig deeper into areas of their docket like evictions, debt collection, and foreclosure that they currently have on "cruise control." Equitable arguments ask judges to make the easy, routine parts of their jobs more complex. But for advocates who represent people of color without a lot of financial resources, restoring and broadening our courts' commitment to equity—insisting that courts consider the various equities in each case—is core to the work before us.

There are no quick fixes, of course.[30] Renewing our justice system's ancient commitment to equity will require both immediate action and decades-long commitment not unlike the commitment conservatives have made to reshape the judiciary over the last forty years.

In the short term, lawyers have to make the arguments. We have got to continue to lift up the many inequities and power imbalances that permeate the most routine eviction, foreclosure, or other consumer case. We have to argue that evictions deepen racial inequities created by a racist history and harm (even threaten the lives of) Black people, other innocent third parties such as the children and family members of those being evicted, and Black communities that can suffer downstream effects such as falling property values and lower community investment.

We have to argue that foreclosures create waste and harm the economy. In contract cases, well-settled law assumes that consumers read every word of a contract. We have to argue that equity allows a court to acknowledge that reading every word of the contracts a modern American is expected to sign would consume weeks of their lives each year.[31] Above all, we have to lay bare the racial inequities that cause our clients to be before the court.

**Equitable arguments** ask judges to make the easy, routine parts of their jobs more complex.

We have to make these arguments to condition our judiciary to be attentive to equity. And, in the case of elected judges, we should demand it. Let's begin asking judicial candidates what they think about equity while we are electing/nominating them.[32] Let's ask the people who want to be judges whether and how they would use their authority to administer their courtrooms and decide cases in ways that fulfill the court's obligation to both follow the law and ensure the outcomes of court proceedings are also equitable.

We should insist that individuals aspiring to be judges answer questions[33] about their approaches to, for example:

- incorporating equitable principles into their jurisprudence;
- explaining their understanding and experience of systemic racism;
- articulating how equitable[34] principles and their understanding of systemic racism might affect the way they run their courtrooms, award default judgments (including post-judgment interest), expunge (either upon motion or *sua sponte*) an eviction from a homerenter's record, or allow landlords to evict people who cannot pay rent.

These questions would not be intended to commit judicial candidates to a particular result in a certain case or kind of case. Instead, these questions can serve as a tool for educating judicial candidates about their power and responsibility to sit in both law *and equity*. Moreover, the answers can help voters distinguish between candidates in judicial races that are often characterized by little information.

Law schools do not prepare students to consider equity. That needs to change. In the meantime, because equity currently occupies such a small plot of jurisprudential real estate, asking people before they become judges about the role equity will play in their judicial decision-making will invite candidates to begin thinking about those issues. Hopefully these questions will mean arguments based on equitable principles won't sound like a foreign language to judges in the future.

Judges could even be asked to sign an equity pledge. The pledge could read something like this:

> *If elected, I pledge to include equitable considerations, where appropriate, into the decisions I make and in the processes my Court uses to administer justice.*

Asking candidates[35] to pledge to include equitable considerations, where appropriate, in their judicial decision-making is not controversial. Nor does it evince a prejudice regarding a particular case or kind of case. In practice, I expect most judicial candidates would sign such a broad statement regardless of the sincerity of their conviction.

But, there may be races where a candidate refuses. For those who value equity and understand its potential in crafting outcomes that resemble racial justice as opposed to compounding historical wrongs, refusal to sign should be disqualifying.

Because of the historical proscriptions of "judicial canons of ethics" and the inertia of those traditions, judicial races (with a few notable exceptions) are usually "low information" races. In this low-information environment, the equity pledge (and the candidates' answers to more specific questions) could become a resource that could guide voters who may otherwise skip the race on their ballots. Community organizations that are already surveying candidates for local or statewide races should incorporate questions about equity into the surveys they send (or begin to send) to candidates who want to be judges.

## Conclusion

We cannot ignore the damage done to people at the most local levels of our justice system. Failing to recognize the trauma inflicted and damage done daily from evictions, from wage garnishments, from default judgments granting exorbitant post-judgment interest to car finance companies—and how it perpetuates racial injustice—is also failing to recognize the opportunity we have to fix it.

Judges can make or break a private market for attorneys representing consumers and low-income individuals. A judiciary that regularly shifts attorney fees because equity requires it would allow private attorneys to gain confidence that they can be paid for remedying small-dollar[36] injustices.

A judiciary that refuses to grant landlords the extreme remedy of eviction when landlords refuse to participate in rental assistance programs would be completely correct and create a fair market for landlords trying to do the right thing. Landlords might quickly modify their shady, unfair conduct in such a jurisdiction.

Advocates in this fight have an obligation to vigorously pursue racial justice—complete justice. We have to have the courage and conviction to persuade judges to do more than half of their jobs. For justice to be achieved in many consumer cases, courts must use their equitable powers to insist that outcomes be not merely legal, but also fair.

As hard as it may be to find a foothold in the middle of our current pandemic, we have no choice but to begin where we are. Where I'm from, we would look at the task ahead and say we have "a long row to hoe." But I know two things are simultaneously true: while the inertia of the status quo can make progress seem impossible, courage is contagious ■

---

[1] After a surprise announcement on September 1, the CDC's eviction protections went into effect on September 4, 2020. At the time of writing, Congress and then President Biden extended the original December 31 expiration date for the protections from December 31 to January 31 and now March 31, respectively. The CDC's eviction protections only prohibit evictions for nonpayment of rent, and currently landlords are terminating leases and evicting people who overstay their (landlord-shortened) lease terms. See Letter from Diane Yentel, President, National Low Income Housing Coalition, and Shamus Roller, Executive Director, National Housing Law Project, to the Honorable Dr. Rochelle Walensky, Director, Centers for Disease Control and Prevention (Jan. 21, 2021), www.nlihc.org/sites/default/files/Letter-CDC-Requesting-Mtg_01212021.pdf; and Letter from Ben Carter, Senior Litigation and Advocacy Counsel, Kentucky Equal Justice Center, to Gov. Andy Beshear, Kentucky Governor (Dec. 14, 2020), www.bit.ly/Beshear-Eviction-Letter.

[2] I use the term "homerenter" instead of "tenant" or "renter" because I believe both terms fail to adequately state the reality of what's at stake for people who rent their homes: home. If we call people who own their homes "homeowners" (we do), people who rent their homes are "homerenters." Everyone gets a home, whether it's rented or owned. The terms "tenant" or "renter" seem to me to dehumanize the person, describe their existence in purely economic terms, or imply a kind of transience that minimizes the tremendous—immediate and long-lasting—stakes for a homerenter facing eviction.

[3] *See* Metropolitan Hous. Coalition, Involuntary Displacement: 2018 State Of Metropolitan Housing Report, Metropolitan Housing Coalition (2018) at 6, at https://metropolitanhousing.org/wp-content/uploads/2020/10/2018_SMHR_FINAL2_LoRes.pdf. "Louisville/Jefferson County evictions were, on average, more than half (54.0 percent) of all evictions statewide, and Louisville/Jefferson County eviction filings accounted for about two-thirds (66.9 percent) of the state total. Yet, Jefferson County contains only 21.1 percent of the state's renter-occupied housing units."

[4] In Kentucky, leases convert to month-to-month leases after the expiration of the original lease term. So, many Kentuckians live in rental property where the term of the lease is month-to-month, terminable with 30 days' notice (sometimes less).

[5] Judges in Kentucky are allowing landlords to evict people on this pretext. The primary thrust of this article is exploring how we can get judges—current judges and future judges—who will not indulge the landlords' legal pretexts to "justify" a dangerous, unnecessary eviction. Because judges are reifying landlords' legerdemain, KEJC has written to both Louisville Mayor Greg Fischer and Kentucky Governor Andy Beshear to (1) explain the loophole and (2) ask them to close the loophole landlords are using to drive evictions through court and people from their homes in a pandemic. See Letter from Ben Carter, Senior Litigation and Advocacy Counsel, Kentucky Equal Justice Center, to Mayor Greg Fischer, Mayor of Louisville, KY, and Mike O'Connell, Jefferson County Attorney (Nov. 30, 2020), www.bit.ly/Louisville-Eviction-Moratorium, and Letter to Beshear, ***supra*** note 1.

[6] Emily A. Benfer, *et al. Pandemic Housing Policy: Examining the Relationship Among Eviction, Housing Instability, Health Inequity, and COVID-19 Transmission*, J. Of Urban Health, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3736457. Losing 10,700 people as a product of our nation's policymakers' decisions to cherish property over lives is obviously an infuriating tragedy. While mourning those thousands who died unnecessarily, we also cannot forget the human and economic costs of *almost half a million* (and counting) additional cases of COVID-19 as a result of our unwillingness to protect everyone from eviction. These known costs are already enormous, and the unknown costs will only become clear in the coming decades as we discover the long-haul health consequences that people infected with SARS CoV-2. experience.

[7] Courts in Kentucky sit in both law and equity. Ford v. Gilbert, 397 S.W.2d 41 (Ky. Ct. App. 1965). The Kentucky Constitution "imbues the circuit courts with the general power to determine all matters of controversy arising under common law or equity." Hisle v. Lexington-Fayette Urban County Government, 258 S.W.3d 422, 432 (Ky. Ct. App. 2008). And, in cities and counties that have adopted the Uniform Residential Landlord Tenant Act (URLTA), equitable principles are explicitly incorporated into the text of the statute. Homerenter advocates and judges have the opportunity and obligation to inquire into those equitable principles in all moments, but especially in extraordinary moments like the one in which we find ourselves:

"Unless displaced by the provisions of KRS 383.505 to 383.715, the principles of law and equity, including the law relating to capacity to contract, mutuality of obligations, principal and agent, real property, public health, safety and fire prevention, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause supplement its provisions." KRS 383.510 (emphasis added).

[8] As we said in KEJC's letter to Governor Andy Beshear, "Because of our nation's racist history (Jim Crow, redlining, and the predatory lending that led up to the foreclosure crisis), the gap in homeownership between White and Black Americans is 30% (72% v. 42%, respectively). This means that Black and Brown Kentuckians are disproportionately impacted by our state's antiquated, unfair, and cruel eviction processes. It is morally, economically, and epidemiologically imperative that you *act now* to protect people in Kentucky from the personal and systemic catastrophes caused by a wave of evictions that you have the power to prevent."

[9] ***See, e.g***., this CityLab article from 2013 summarizing a study finding that Black and Hispanic borrowers were (after adjusting for income, credit score, geography) 2.4 times as likely to receive subprime (more expensive) home loans in the years leading up to the foreclosure crisis. Emily Badger, *The Dramatic Rise Racial Bias of Subprime Lending During the Housing Boom,* CityLab (Aug. 16, 2013), at www.bloomberg.com/news/articles/2013-08-16/the-dramatic-racial-bias-of-subprime-lending-during-the-housing-boom. *See also* Justin P. Steil, *et al*., The Social Structure of Mortgage Discrimination, 33 Hous. Studies 759-76 (2018), at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6084476/, which collects the quantitative data on racist lending practices and analyzes the specific strategies lenders use to target Black and Hispanic borrowers for subprime loans.

[10] I was inspired in this work by David Super's tremendous article, ***Defending Mortgage Foreclosures: Seeking a Role for Equity,*** 43 Clearinghouse Rev. 104 (July-Aug. 2009), at https://www.povertylaw.org/wp-content/uploads/2021/06/43ClearinghouseRev104-super.pdf.

[11] *Id*.

[12] *Id*.

[13] *Id*.

[14] Morgera v. Chiappardi, 813 A.2d 89, 98 (Conn. Ct. App. 2003) (quoting Hartford Federal Savings & Loan Assn. v. Lenczyk, 217 A.2d 694 (Ct. 1966)).

[15] For example, modern practice in Kentucky merges the two systems of law and equity. ***Ford***, 397 S.W.2d 41. The Kentucky Constitution "imbues the circuit courts with the general power to determine all matters of controversy arising under common law or equity." ***Hisle***, 258 S.W.3d at 432.

[16] See, e.g., Alexander W. Butler, et al., Racial Discrimination in the Auto Loan Market (last revised Apr. 1, 2021), at https://ssrn.com/abstract=3301009 or

http://dx.doi.org/10.2139/ssrn.3301009. This study finds that creditors approve car loans for Black and Hispanic applicants 1.5% less frequently than white applicants (after controlling for creditworthiness), resulting in 80,000 minority loans nationwide each year.

[17] Super, *supra* note 10, at 108.

[18] 71.9% homeownership for white people, 41.8% homeownership for Black people. Jung Hun Choi, Breaking Down the Black-White Homeownership Gap, URBAN INST. (Feb. 21, 2020), at https://www.urban.org/urban-wire/breaking-down-black-white-homeownership-gap

[19] *Id*.

[20] Diana Olick, *A troubling tale of a Black man trying to refinance his mortgage,* CNBC, Aug. 19, 2020, at www.cnbc.com/2020/08/19/lenders-deny-mortgages-for-blacks-at-a-rate-80percent-higher-than-whites.html.

[21] Eylul Tekin, *Exploring Racial Discrimination in Mortgage Lending: A Call for Greater Transparency*, Clever, June 25, 2020.

[22] Metropolitan Hous. Coalition, *supra* note 3.

[23] *Louisville/Jefferson County*, Eviction Lab, https://evictionlab.org/map/ - /2016?geography=tracts&bounds=-86.298,37.98,-85.26,38.377&type=er&choropleth=paa (last visited Apr. 8, 2021).

[24] *Id*.

[25] *Debt Delinquency*, URBAN INST., at https://apps.urban.org/features/debt-interactive-map/?type=overall&variable=pct_debt_collections (last visited Apr. 8, 2021).

[26] Jefferson County, Kentucky, U.S. CENSUS, www.data.census.gov/cedsci/profile?g=0500000US21111 (last visited Apr. 8, 2021)

[27] National Consumer Law Center, Kentucky Debt Collection Fact Sheet, 2018, available at https://www.nclc.org/images/pdf/debt_collection/fact-sheets/Kentucky.pdf.

[28] Peter Hepburn, et al., Racial and Gender Disparities among Evicted Americans, Eviction Lab Updates, Dec. 16, 2020, at https://evictionlab.org/demographics-of-eviction/.

[29] *See, e.g.*, "the north-central section of Russell, a largely African-American part of the city in west Louisville where 30 percent of residents live in poverty. The eviction rate in 2016 was nearly 8.5%. And 25% of the 186 rental households in that area had an eviction filed against them, though not all of those filings ended with a set-out." Anne Marshall, Evicted in Louisville, Louisville Magazine (July 2018) available at https://www.louisville.com/evictions.

[30] If it were easy, it would be done already.

[31] In 2016, the Norwegian Consumer Council read the terms of service of 33 common phone apps aloud. It took the group 33 hours, 49 minutes, and 11 seconds. *See Norway consumer body stages live app terms reading*, BBC News, May 25, 2016, at https://www.bbc.com/news/world-europe-36378215.

[32] In jurisdictions where judges are appointed, or nominated and then confirmed, or whatever, we can include questions about equity in judicial decisionmaking in candidate questionnaires for the elected officials or nominating committee who will do the appointing or confirming of judges.

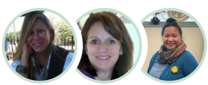
[33] Decisions in recent decades in cases challenging the strictures imposed by judicial "Canons of Ethics" have elevated the free speech rights of judicial candidates over ethical prohibitions on making statements that might show bias or prejudice. *See generally* Bill Kenworthy, *Judicial Campaign Speech*, Freedom Forum Inst., Feb. 2007, at https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/campaign-finance-overview/judicial-campaign-speech/. Here in Kentucky, while judicial candidates are prohibited from "mak[ing] pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office," the comments make clear: "This Rule does not prohibit a judge or judicial candidate from expressing, during a campaign, general legal principles, so long as those statements would not reasonably be expected to affect the outcome or impair the fairness of a pending matter or to constitute a commitment to reach a particular result in pending or future matters." *See* SCR 4.1, Comment 18. Furthermore, organizations surveying judicial candidates can ask judges to offer their personal views on legal or political issues and those candidates are "not prohibited" from offering those personal views. *Id*.

[34] Judges can ensure equity by, for example, providing remote access to the court, ensuring notices are provided to pro se litigants, implementing data tracking and reporting, etc.

[35] Again, in jurisdictions where judges are appointed, we would be asking the elected officials doing the appointing to commit to appointing judges based in part on their responses to questions regarding what role they anticipated equity to have in their judicial decisionmaking and administration of their courts' dockets.

[36] Obviously, these "small-dollar" injustices are regularly "large-dollar" injustices for our clients. And we know that these "small-dollar" injustices can have cascading, escalating consequences for our clients. Like my client who had her car wrongfully repossessed and, as a result, lost her second job, which caused her to lose her housing, which left her sleeping on her minister's couch for months. When someone is on the edge, even a "small-dollar" injustice can push them off the cliff.

# Centering Race and Culture in Consumer Law: a Marshallese Case Study



*By Susan Purtle, Dr. Sherry Thompson, and Melisa Laelan*

## Introduction

Springdale, Arkansas, is home to over 12,000 former inhabitants of the Marshall Islands, a remote area in the South Pacific made up of a small chain of volcanic islands. Marshall Islanders have relocated to Arkansas in search of opportunity and stability. The Marshall Islanders who have settled in Arkansas are not U.S. citizens or legally permanent residents, nor are they considered refugees or asylees. As eligible citizens from the Freely Associated States, they can migrate to the United States and its territories without visa and labor certification requirements.[1]

The ambiguity of their status, the language barriers, and vast cultural differences make life difficult for Marshall Islanders as they struggle to navigate the consumer marketplace for medical care, automobiles and housing in Arkansas. In the Marshall Islands, trading goods and services predominated instead of exchanging money. After World War II, the dollar became the predominate currency for global trade.[2] There was no alphabet that was consistent and closely represented the sounds of the Marshall Islanders language until after World War II.[3] Secured transactions did not begin in the islands until 2007,[4] and consumer transactions are limited. Unsecured personal loans, which carry high interest rates with payment through wage withholding known as allotments, comprise the limited experience most Marshall Islanders have with consumer lending in the islands. An abhorrence by Marshall Islanders consumers stateside to negotiate for consumer goods and a lack of understanding that negotiation is expected has left them vulnerable to predatory and abusive practices that rob them of cash and access to credit. The technical and practical challenges to address the legal needs that result require advocates to make race a central part of their practice at Legal Aid of Arkansas.

At Legal Aid of Arkansas, we realized that, in order to address the needs of this unique community in our state, we had to change our approach to traditional civil legal aid, center race in our work, and invest in building trust and cultural competence with a community in desperate need of support. This case study describes the history of the Marshall Islanders during the Cold War, their eventual migration to Arkansas, and how Legal Aid of Arkansas shifted from its race-neutral practices to combat discrimination against the Marshall Islanders who live in Arkansas.

## The Marshall Islanders

The Marshall Islands are located in the equatorial Pacific, midway between Australia and Hawaii. The Marshall Islanders, largely of Micronesian decent, settled in the islands and peacefully resided there for approximately 3,000 years. In 1944, the U.S. won military control over the Marshall Islands from Japan and occupied the Bucholz Army Airfield located on the Kwajalein Atoll. The U.S. assumed administrative control over the Marshall Islands shortly after World War II under the United Nations' Trust Territory of the Pacific Islands.[5]

Between 1946 and 1958, the U.S. staged a series of 67 atmospheric nuclear tests on and near the Bikini and Enewetak atolls. These two atolls remain uninhabitable as a result.[6] The thermonuclear bomb, Castle Bravo (March 1, 1954) was the most notorious detonation; at 15 megatons, it was 1,000 times more powerful than Little Boy, the bomb dropped on Hiroshima. The Bikini and Enewetak atolls were evacuated prior to the detonation, but surrounding islands were not. Radioactive fallout dropped ashy snowflakes on the inhabitants of many islands, including Rongelap and Utirik. Although the local Americans fled rather than be exposed to 175 rems of gamma radiation (a lethal dose starts at 300 rems), it would be several days before the U.S. military would arrive to relocate the islanders away from danger.[7] Only three months later, the people of Utirik were returned to their homes and falsely informed that their island was now completely safe for habitation.[8]

> U.S. officials did not warn the Marshall Islanders of the **potential effects of radiation** on themselves, their children, and their unborn children.

In June 1957, American officials moved forward with resettlement of the Enewetak Atoll so that researchers could embark on top-secret studies to (1) document the effects of lingering radiation on human subjects, and (2) study how human beings absorb radiation from contaminated lands.[9]

U.S. officials did not advise the Marshall Islanders that the islands were still contaminated with radiation. They did not warn them of the potential effects of radiation on themselves, their children, and their unborn children. Nor did they later admit that radiation was the most likely cause for many of the maladies suffered by the Marshall Islanders. They did provide some medical care, although this appears to have mostly been for surveillance purposes. Cancer cases, thyroid disorders, stillbirths and miscarriages (more than twice that of women who had never been exposed to such high levels of radiation), and congenital deformities multiplied throughout the community and continue to this day.[10]

In the aftermath of this nuclear testing, the Marshall Islanders worked toward two desired outcomes: (1) reparations from the U.S. to heal their islands and people, and (2) becoming an independent republic. Sources vary in reports of the amount of reparations made to reverse the destruction wrought upon the Marshall Islands. According to the U.S. Embassy in Majuro, the United States has provided a total of more than $604 million to the affected atolls and communities. Adjusting for inflation, this is equal to $1.05 billion (2010 dollars) and includes medical treatment, healthcare costs, resettlement funds, and island rehabilitation efforts and investments. However, many believe much more is owed. America still pays $147 each quarter to 5,258 Bikinians and their descendants from a trust fund established as reparations for rendering their specific island uninhabitable.[11]

## Compact of Free Association

The desire to be independent came as people were displaced and disconnected from their lands. Marshall Islanders fought to survive after their food sources, fish and plants, were killed and destroyed.[12] Marshall Islanders won the right to independent governance when their voters approved their Constitution in 1979. In 1986, they negotiated a Compact of Free Association (COFA) with the United States. Under this bilateral agreement. Marshallese citizens would be free to enter the U.S. as legal non-immigrants (i.e., no visa or labor certification requirements) and to work and reside here indefinitely; the U.S. retained responsibility for defending the islands and was granted the right to maintain the U.S. army base (as well as the Ronald Reagan Ballistic Missile Defense site) on the Kwajalein atoll.[13] COFA also included an agreement that constituted a full and final settlement of all claims resulting from the nuclear tests conducted in the Marshall Islands from 1946–1958 and created the Nuclear Claims Tribunal to establish financial settlements for illness and loss of land. The economic provisions of the compact are up for renewal in 2023.[14]

In the Marshall Islands and in the Marshall Islander culture, **wealth is defined as the number of meaningful relationships you have**.

Marshall Islanders began to exercise their COFA privileges in search of a life that would provide better employment opportunities, enhanced health care, education, and social services for their families. As they began emigrating, many found homes in Arkansas and work with companies like Tyson, Simmons, and Cargill. As they began to find new ways to survive, they were hopeful that new opportunities in a new country would bring them happy, successful lives.

No one was truly prepared for the changes this migration would bring, but the Marshall Islanders replicated the social infrastructure they had used at home (e.g., matrilineal society, clan status, communal family care, etc.) to promote community sustainability. They quickly rebuilt close-knit systems of community support—similar to those that had served them well in the past—and they relied on clanship and the American government to create connections to housing and employment for new immigrants. Their infrastructure ensured strong clan associations and social support in a new world that was foreign to them.

Although this new infrastructure served to create a sustainable community for the Marshall Islanders who moved to Arkansas, the close-knit community also tended to leave them socially isolated and unfamiliar with the new culture in which they lived. In the Marshall Islands and in the Marshallese culture, wealth is defined as the number of meaningful relationships you have. In America, a bootstraps mentality[15] creates an emphasis on personal responsibility, financial stability, and economics. American monetary culture is conditioning the Marshall Islanders to save as a way to achieve wealth rather than share money with extended family. The shift has been a struggle.

More than 12,000 Marshall Islanders settled in Northwestern Arkansas, finding homes in Springdale.[16] Organizations within the community sprung up to support them. The Jones Center for Families (built with the vision and support of the Harvey and Bernice Jones Trust) is a center for activities and a popular gathering place. The Marshall Islanders Educational Initiative was designed to capture the culture and history of the Marshall Islanders through oral histories, a digital musical archive, and collaborative work focused on reminding communities of the importance of the history of the Marshall Islands.[17] The Arkansas Coalition of Marshall Islanders (ACOM) opened in 2011 and was granted nonprofit status in 2015. This was the first organization founded and directed by a Marshall Islander that was established to advocate for a variety of their needs. In 2008, a Consulate for the Republic of the Marshall Islands was established, and in 2012 a health clinic that caters specifically to Marshall Islanders was opened with a Marshallese doctor at its helm.


Arkansas Coalition of Marshall Islanders Board of Directors training, Springdale, Arkansas, November 2020.

Although COFA allowed the Marshall Islanders to live, study, and work in the U.S. without a visa, they are not considered U.S. citizens or legal permanent residents. Nor are they immigrants or refugees. This left them in the gray-area status of Legal Non-Immigrant and vulnerable to discrimination.

Along with new services designed especially for the Marshall Islanders came businesses intent on taking advantage of them. The Marshall Islanders quickly found themselves in need of civil legal assistance. Program administrators at Legal Aid of Arkansas initially struggled to devise a strategy that would adequately serve this budding community. A change in approach was required.

## Eligibility for Legal Assistance

Our first step in serving the Marshall Islanders was to remove formal legal barriers to their access to Legal Services Corporation-funded services. The importance of this work was heightened in 1997 when we became aware of an urgent consumer issue specifically affecting Marshall Islanders in Springdale. Tax preparers were charging the Marshall Islanders exorbitant amounts for services and fraudulently preparing their returns.

Taxation was a new and foreign concept to the in-migrating Marshall Islanders. They were not opposed to it, but they also did not understand it. The tax preparers who approached them, offering assistance, were often predatory—demanding entire tax returns as payment for services rendered. Even worse, some tax preparers began to illegally boost the amount of Earned Income Tax Credit (EITC) by knowingly adding the names of non-qualified children as household members, thereby increasing the amount of money they extorted from their unwary clientele and leaving their clients in peril of prosecution for tax fraud.

We needed to stop this fraudulent practice, but our hands were tied. A recent rule change had made the Marshall Islander community ineligible for legal services funded by the Legal Services Corporation (LSC).

While the Marshall Islands were Trust Territories of the U.S., the Marshall Islanders were deemed eligible for free civil legal services "to the same extent provided to residents of any other State of the United States."[18] When the Republic of the Marshall Islands became a sovereign state under COFA (1986), the Compact expressly authorized continued provision of LSC-funded legal services. In 1997, upon further analysis and recommendations of the LSC Office of the Inspector General, 45 C.F.R. § 1626.10 (a) was revised to preclude LSC services to people living in the U.S. under COFA unless they were otherwise deemed eligible as per the alien eligibility requirements of Section 1626.5. However, the Marshall Islanders were still eligible for services if they were residing in the Marshall Islands.[19]

The 1997 rule change indicated the Arkansas Marshall Islanders were no longer a group covered for free civil legal services unless they could qualify as aliens. Legal Aid of Arkansas joined with Legal Aid of Hawaii to remedy this matter. It took approximately 10 years to effect the change.

On June 2, 2007, David Cohen, Deputy Assistant Secretary for Insular Affairs at the Department of the Interior wrote a letter stating:

> **I can assure you that it is consistent with Federal policy under the Compacts and the [implementing] public laws to allow [Marshall Islanders] citizens lawfully resident in the United States to receive LSC services. We are not aware of any intention to permit the extension of LSC benefits to Free Associated States citizens in the FAS but to prevent the extension of those benefits to FAS citizens during their lawful residence in the United States.**

The Legal Services Corporation was permitted to again revise the rule to be inclusive of the Marshall Islanders residing in United States, and we were again able to provide free civil legal services to our Marshall Islanders population.[20]

With technical barriers removed, our task now was to reach a community we knew was being targeted with abusive consumer practices. At every turn, the Marshall Islanders' interactions with the consumer marketplace led to harm—from outright fraud and predatory practices, to dealing with large amounts of medical debt resulting from failure to provide insurance information, to health care providers' failure to transform the local health care system to accommodate Marshall Islander families in their new community. Building trust required time, cultural understanding, and deliberate investment.

## Reorganizing Legal Aid to Better Meet the Needs of the Marshall Islander Community

Legal Aid of Arkansas is one of two not-for-profit law firms offering free civil legal services to low-income Arkansans. We take pride in serving the individuals and communities of Arkansas and work hard to remedy life-essential matters, such as discrimination, that burden and marginalize Arkansans. In 2008, our organization reorganized to better serve our clients through a focus on up-stream management and synergism in service.

Our activities were streamlined into four workgroups; Consumer Protection, Domestic Violence, Housing, and Economic Justice. I became the Consumer Protection Workgroup Leader. We created a mission statement[21] and a strategic plan that placed our clients at the center of our practice, and we built a network of services to support their civil legal needs.


Former Legal Aid of Arkansas staff attorney Casey Trzcinski, Senator John Boozman, Spanish interpreter Neyra Galvez, and Marshall Islanders liaison Molina Bien at Legal Aid of Arkansas' Low Income Taxpayer Clinic Free File briefing, Bentonville Public Library, Bentonville, Arkansas, March 2017.

As we implemented our new strategic plan, we realized that providing services utilizing a race-neutral focus is not enough to ensure inclusive service. We needed to consider the racial injustices that are perpetuated when the unique needs and cultures of specific communities are not closely considered. We had a history of helping to change policies and practices that impeded access to assistance for our Marshall Islander clients; now we needed to deepen our investment in that community to build trust.

We were excited to again provide free civil legal services to the Marshall Islander community. However, we found ourselves at a crossroads when the rule change and subsequent community outreach did not result in the Marshall Islander community accepting Legal Aid of Arkansas and contacting us for assistance. We recognized that there was more work to do if we did not want to allow the Marshall Islanders to continue to experience vulnerabilities to predatory practices. We believed that if the Marshall Islanders were not approaching Legal Aid of Arkansas for services, we had not fully developed a path to service that was accessible and safe for them to pursue and we were not meeting the spirit of our mission statement. We began the task of identifying the unacknowledged, and often invisible, barriers that kept our Marshall Islanders neighbors from approaching us for services.

## Elements of Organizational Transformation

High-quality leadership is a key condition for organizing and implementing strategic transformational change within an organization.[22] We were fortunate to have a supportive executive director who was well-versed in setting an organizational tone conducive to change.

He often reminds staff that we must fight complacency and orthodoxy in the workplace if we are to succeed in providing civil legal services to some of Arkansas' most needy residents.[23]

Under our executive director's leadership, we created a strategic plan designed to set a clear path to organizational success by setting concise, measurable goals that support our deliberate work processes while maximizing resources. This plan, developed with the help of Melisa Laelen, the Marshall Islanders liaison, and Carmen Chong, the Marshallese consulate, guided us toward our goal of creating a welcoming pathway to services for the

Marshall Islanders. The outreach part of the plan focused on the message that legal aid helped with legal issues that were important to the Marshall Islander community like adoption, car cases and medical debt. We then used that plan (and our mission) to scrutinize, and subsequently change, our current practice to correct identified disparate impacts. During this process, we changed several aspects of our program.

***Physical access.*** We realized our current service location was difficult to access by public transportation and not located in Springdale, where the majority of our clients resided. We closed our office in Fayetteville and opened an office in Springdale. This new location was convenient to Marshall Islander clients and on an active bus line to accommodate transportation issues. Prior to the change in office location, a staff member suggested we open a temporary office in the JTL shop, near the Jones Center so that we could meet the Marshall Islanders where they lived. We staffed the temporary office until the Springdale office was up and running. We were careful to alert everyone to our upcoming location change and invited them to visit our new office once it was open.

May Day event, Jones Center for Families, Springdale, Arkansas, May 1, 2017. Pictured left to right: Forefather and Republic of Marshall Islands Founder Ajlok Beasa; Kelani Kanako, Senator to Republic of Marshall Islands; Loraine Kanako, wife of Senator Kanako; Melisa Lalaen, Director, Arkansas Coalition of Marshall Islanders.

***Staffing.*** We lacked Marshall Islander staff, and no one in our office spoke Marshallese. Since most Marshall Islanders do not speak fluent English, we hired Melisa Laelan as our on-staff Marshallese interpreter to bridge the language gap. We were fortunate in our hiring, as Melisa is enthusiastic in advocating for her people. She quickly assumed a deeper role as a liaison to the Marshall Islander community. A liaison can help to build trust by helping everyone understand differences in culture. Our Interpreter/Liaison provided in-service training to staff to increase cultural competencies and collaborated with us to identify and alter practices and policies that created barriers for our potential Marshall Islander clientele. As a Marshall Islander community leader (Melisa later founded the Arkansas Coalition of Marshall Islanders), she also worked hard to help her community better understand our purpose and to garner trust. Given their history with American government, the Marshall Islanders' distrust in our willingness to serve was understandable and something that had to be overcome. As we worked to develop trust, we recognized the roles communication and culture would play in this change.

***Staff focus.*** We encouraged staff who demonstrated interest and leadership to be informal leaders in this change. Most ideas for change are generated by staff who are client facing,[24] and we believed our informal leaders would establish our efforts while helping to guide this change in a meaningful and substantive way. Interoffice collaboration is important when making deep change. Line staff are at a different vantage point and can provide valuable input during transformational changes.[25] For example, our line staff quickly realized that the dedicated Marshall Islanders Help Line we had created was not the best use of resources because the Marshall Islanders are most typically walk-in clients and rarely call in. After conferring with staff, we closed the dedicated Help Line and used staff flextime to enhance office hours—accommodating our Marshall Islander clients before and after their working hours. We found the involvement of upper management, middle management, and client-facing staff energizes efforts and creates a strong positive background for change.

## Collaboration with the Community

We used appreciative inquiry, a strengths-focused approach, to learn how to honor and accommodate our Marshall Islander clients' unique culture and evaluate needed change.[26] Consultations with Legal Aid of Arkansas' Marshall Islanders liaison, representatives from the Marshall Islander community, and the Marshallese consulate identified areas for change that included the following:

***Historical sensitivity.*** We found that when our Marshall Islander clients visited us outside of their community, they were reserved. It takes time for Marshall Islanders to warm up to and be able to trust people. One-on-one communication is important to build interpersonal relationships. As a people, the Marshall Islanders are not vocal and have their own ways to deal with things. To serve them well, our attorneys and administrative support team were trained to be especially sensitive to our Marshall Islander clients' needs. Attorneys and administrative staff were educated regarding the history of the Marshall Islanders so they would be prepared to be patient and kind (rather than authoritative), as we recognized that a stern approach would hinder services.

Christmas at Arkansas Coalition of Marshall Islanders (ACOM) Iakwe Gift Project, Springdale, Arkansas, December 2020.

***Flexibility with time.*** The Marshall Islanders live a self-paced lifestyle. Dealing with time structure is challenging for many Marshall Islanders due to transportation and family responsibilities. Family is considered more important than other things in life. In the Marshall Islands, it is considered rude to start a meeting without everyone, which is the opposite of American norms. Staff agreed to differentiate with the Marshall Islander clientele based on this cultural trait. Typically, a case at Legal Aid of Arkansas is closed if a client is a no-show and does not contact the attorney. With the Marshall Islanders, a no-show results in the attorney contacting the Liaison, who will reach out to the client, attempt to reestablish contact, and reassure the client that we are here only to help and support them.

***Know your rights.*** The Marshall Islanders are agreeable to authority figures and those they perceive as authoritative figures. They often avoid conflict when dealing with authority figures. Marshall Islanders are intimidated by the American court system and its complexity. Many Marshall Islanders come from the outer islands where they have never interacted with a structured court system. Language access is a problem. Notices are sent in English, and Marshall Islanders do not understand what the notices say. Marshall Islanders do not understand the consequences of not showing up to court. Legal Aid of Arkansas staff often found that Marshall Islanders struggled to understand the difference between criminal and civil court—and feared that civil disputes could result in jail time. Without access to immediate help, resources, and advice as they interact with the courts, they do not know anything about it.

When a Marshall Islander client is faced with a confrontative situation he or she may not follow the attorney's advice. Attorneys have been trained to ensure the client has a firm understanding of all rights under the law. Knowing their rights prior to a conflict may support clients in taking their attorney's advice. When a client goes against the attorney's advice despite being advised of their rights, attorneys have been trained to be understanding and address potential remedies rather than chastise the client.


ACOM food distribution to Marshall Islander families. Thanksgiving, November 2020.

***Supporting court appearances.*** If a Marshall Islander client anticipates trouble ahead, that client will disappear. This is a relatively simple feat because households in the Marshall Islander community are very fluid and the community is very private. Some fraudsters depend on this and will work to induce anxiety in clients prior to court. Attorneys and staff at Legal Aid of Arkansas work closely with the Liaison to keep tabs on their clients as court dates approach. The Liaison often reaches out to clients in concert with the attorney. If a client fails to appear in court, attorneys ask for a continuance as they continue to work to locate the client.

***Respecting preference for verbal communication.*** The Marshall Islander culture primarily depends on oral communication, and word of mouth is very powerful. Facebook is influential in the community because it allows members to talk with people in the islands in real time at little cost. Historically, stories of Marshallese history were saved and stored orally. There was never a written system in the Marshallese language. Since there was no Marshallese alphabet, they adopted the English alphabet. Written communication began when the United States military arrived in the Marshall Islands.

Marshall Islanders clients do not view fact sheets as helpful, but rather as an insult or as an attempt to brush them off. Our staff are carefully instructed to verbally confer information that would typically be passed to a client in a fact sheet and to refrain from sending Marshall Islander clients fact sheets. Despite their aversion to written information, we recognize the legal requirement of providing written documentation. We worked with community members to ensure all legally required documents were properly translated.

***Supporting the community and each other.*** The Marshall Islanders are a closed, tight-knit community. They tend to socialize within their clans, rely on their religious communities, and marry within the Marshall Islanders community. The Arkansas Coalition of Marshall Islanders (ACOM) serves as a resource and pillar of support for the Marshall Islander community. They depend on their families and community for everything social, and they gather for celebrations. The support system they have for each other is one of the strengths of the Marshall Islander community. They are happy to have outsiders attend fun events such as baseball games, sports ceremonies, and festive parties. They are welcoming to outsiders who are interested in attending consulate meetings and other advocate events.

Our staff are encouraged to attend Marshall Islander community events and become known by the community. When a name can be paired to a face, trust is more easily built. So far, this has not been a strength of our firm, but we are working to improve in this area.

## Successful Advocacy

The investments Legal Aid of Arkansas has made in building trust and meeting the specific needs of the Marshall Islander community have improved the effectiveness of our advocacy and led to positive outcomes for the Marshall Islander community. The abuses we discovered being committed against them in Springdale were egregious and provided us a new way to view consumer cases. The fraudulent and predatory practices unveiled through these cases lent insight into similar practices perpetrated against other communities of color. After the rule change to authorize provision of legal services to Marshall Islanders living in Arkansas, the organizational changes we made at Legal Aid of Arkansas allowed us to assist Marshall Islander clients in protecting their rights.


Susan Purtle, staff attorney for Legal Aid of Arkansas presents a settlement check from Automatic Auto Finance to Resmond Banke, June 7, 2021, in Springdale, Arkansas.

***Tax preparation.*** To date, we have assisted at least 196 Marshall Islander clients with tax issues. These clients have obtained a recovery or avoidance of approximately $4,898 per client assisted, bringing over $960,000 into the Marshall Islander community.

***Auto loans.*** In 2014, we noticed that many of our Marshall Islander clients were seeking assistance with legal issues related to their automobiles and auto purchases. The majority of these issues could be traced to two local companies, Vancurens Auto Sales, Inc., and Automatic Auto Finance, et al. Both companies were engaging in practices that violated the Arkansas Deceptive Trade Practices Act (ADTPA).

The deceptions perpetrated by Vancurens Auto Sales, Inc., included:

1. offering and advertising vehicles for sale to the public without possessing title;
2. promising consumers that automobiles were free of liens when they were not;
3. failing to disclose salvage title automobiles to purchasers;
4. taking advantage of consumers who could not protect their interests due to known language barriers;
5. accepting returned automobiles and promising to pay off loans but failing to do so;
6. reporting fake liens to governmental authorities in order to prevent ownership conveyance to purchasers;
7. securing multiple loans for the same vehicle and for the same consumer while failing to disclose that fact to purchasers;
8. utilizing small claims courts to collect sums from consumers who don't owe any money; and
9. utilizing their towing business in order to unlawfully demand payments from unwary consumers.[27]



Legal Impact Network

Shriver Center on Poverty Law

We worked with the Arkansas Attorney General to file suit seeking redress for these violations. We supported our clients in deposition participation, document signing, testifying in court, and considering settlement offers. The court enjoined the defendants from continuing their deceptive/fraudulent practices and ordered $73,002 in restitution to consumers, titles to cars that had been purchased, and $590,000 in civil penalties ($10,000 per each incident of deceptive practice).

Automatic Auto Finance, et al., presented itself to consumers as an automobile dealer when, in fact, it was a finance company that was profiting from a complex defaulted loan scheme. All used cars were sold for an average of $12,000 each and, as a whole, were mechanically deficient. Many of the cars became inoperable shortly after the point of sale. Returns were not allowed, and customers were left with loans, but no cars. The defendant's contracts contained deceptive terms, and the payment schedules were set to require balloon payments in February or March, so as to capitalize on customers' anticipated tax refunds. Some customers went to refund anticipation loan companies to secure money for their balloon payments in advance receiving a tax refund, while other customers simply defaulted on the loans.

Racial justice often required advocates to **reject traditional approaches**.

All defaulted loans were aggressively pursued after repossession by the defendant's in-house collection agency. Taking advantage of the customers' lack of understanding, the company would offer to make settlement by letter to defaulting customers, accept the settlement payment, and then refuse the accord and satisfaction. After default, they would purchase the car back and sell it to the next unwary customer. The state's amended complaint shows sales of the same cars five and six times within a two- to three-year year period. They would sue consumers in small claims court for the deficiency balance, in violation of Arkansas court rules, and they would garnish wages. Adding to the egregiousness of their practice, defendants had a policy of requiring all Marshall Islander customers to have a co-buyer, thereby pulling two families into the deception and debt each time.

We worked with the Arkansas Attorney General to bring action seeking redress for these violations.[28] We supported our clients in preparation of affidavits, preparation of testimony, secured their agreement to testify in court. The court enjoined the defendants from continuing in their deceptive/fraudulent practices and ordered $1,575,300 as restitution to consumers. Additionally, the defendants were ordered to pay $238,593 in reimbursement of costs.

***Community support for the Marshall Islanders.*** Melisa Laelan, the founder of the Arkansas Coalition of Marshall Islanders (ACOM), indicates that without legal aid, ACOM would never have been established. Her work as an Interpreter/Liaison with Legal Aid of Arkansas allowed her to develop advocacy skills that would later benefit everyone in the Marshall Islander community. Additionally, two legal aid attorneys were instrumental in encouraging her to open a nonprofit to provide help and advocacy for the Marshall Islanders.

Our efforts to remove obstacles to services for the Marshall Islanders actually resulted in a strong alternative pathway that was facilitated and supported by our firm.[29] Racial justice often required advocates to reject traditional approaches in favor of targeted investment and accommodation of the specific needs of people of color in our communities. Without an organizational commitment to build this foundation, these victories for Marshall Islanders in Springdale would not have been possible.

## Ensuring Sustainable Change

As with any organizational change, sustainability is predicated upon management working hard to stabilize changes made to facilitate and maintain the trust of our Marshall Islander clients. This requires keeping all our employees engaged in the process of serving our Marshall Islander clients and honoring their cultural differences.[30]

In 2019, Legal Aid of Arkansas's Consumer Work Group adopted a Racial Justice Statement[31] that reiterates our commitment to eradicating both disparate treatment and disparate impact found in the consumer marketplace and within our own workgroup. My workgroup continues to create a genuine, sustainable practice aimed at stopping discriminatory sales practices, defending our clients' rights under the Fair Credit Reporting Act, empowering minority clients within the marketplace, ensuring all clients are afforded the consumer benefits that many people take for granted, and sealing records to allow clients entry into the marketplace.

By identifying these principles in our practice, we are creating opportunities to end racial injustice in the marketplace. Our advocacy goal is to reach a threshold where sellers and lenders no longer discriminate and commit fraudulent practices against consumers based on their race. Literacy and language barriers create opportunities for predatory treatment (e.g., fraudulent actions, unfair contracts, unethical activities that separate consumers from their hard-earned money, etc.) and work to disenfranchise consumers who speak limited English. Employing a Marshallese Interpreter/Liaison helps everyone remain focused on how our cultures and lived experiences differ.

Organizational change is often difficult to implement and then sustain. It must be woven into the organization's work processes, and employees must maintain that change until they have a chance to realize its benefits. The most effective ways to engage employees in this process is to educate them on the need for change, produce a written commitment to that change, find substantive ways to measure it, and incorporate these efforts into employees' annual review.[32]

## Conclusion

The Marshall Islanders are beginning to trust that our organization will help them resolve their civil legal conflicts. Although we still rely on our Interpreter/Liaison to encourage Marshallese community members to visit us and come to appointments, they are more open to approaching us for assistance.

Sometimes organizations marginalize community members by excluding them. Sometimes the community members exclude themselves, and it is our responsibility to create connections and to identify and eliminate racial injustice. We are proud of the steps Legal Aid of Arkansas has taken to ensure our Marshall Islander community is comfortable accessing our services, and we look forward to continuing to build trust and hope with them in the future ■

[1] Government Accountability Office, Compact Of Free Association: Populations In U.s. Areas Have Grown With Varying Reported Effects (2020) (GAO Publication No. 20-491), available at https://www.gao.gov/assets/gao-20-491.pdf.

[2] Interview with Melisa Laelan (May 14, 2021.); "Episode 553: The Dollar at the Center of the World." Planet Money from NPR, 16 June 2014, https://www.npr.org/sections/money/2014/07/16/331743569/episode-552-the-dollar-at-the-center-of-the-world

[3] Interview with Melisa Laelan (May 14, 2021.); Rudiak-Gould, Peter, *Practical Marshall Islanders*, (2004), p. 6, last visited June 11, 2021, at http://www.peterrg.com/Practical%20Marshall Islanders.pdf

[4] Secured Transactions Law Reform Project, Pacific Islands, last visited June 7, 2021, at https://securedtransactionslawreformproject.org/reform-in-other-jurisdictions/australasia/pacific-islands/#:~:text=The%20Republic%20of%20the%20Marshall,%2C%20monetary%20or%20non%2Dmonetary.

[5] U.S. Dep't Of State, U.s. Relations With Marshall Islands: Bilateral Relations Fact Sheet (July 15, 2018), at https://www.state.gov/u-s-relations-with-marshall-islands/.

[6] Comprehensive Nuclear-Test-Ban Treaty Organization, The United States Nuclear Testing Programme, retrieved Feb. 1, 2021, from https://www.ctbto.org/nuclear-testing/the-effects-of-nuclear-testing/the-united-states-nuclear-testing-programme/); Central Intelligence Agency, Cia World Factbook - Marshall Islands, retrieved Feb. 1, 2021, from https://www.cia.gov/the-world-factbook/countries/marshall-islands/.

[7] E.T. Lessard, Review of Marshall Islands Fallout Study, Upton, NY: Brookhaven National Laboratory (DOE #448) (undated), at https://www.osti.gov/opennet/servlets/purl/16376973-tHM7cx/16376973.pdf.

[8] Ann C. Deines, Et Al., Marshall Islands Chronology: 1994–1990 (1991).

[9] Holly M. Johnson, *et al., Seeking Compensation for Radiation Survivors in the Marshall Islands: The Contribution of Anthropology,* Cultural Survival Quarterly, Mar. 2000, at https://www.culturalsurvival.org/publications/cultural-survival-quarterly/seeking-compensation-radiation-survivors-marshall-islands; Jessica A. Schwartz, *Matters of Empathy and Nuclear Colonialism: Marshall Islanders Voices Marked in Story, Song, and Illustration,* X Music & Politics 2 (Summer 2016) (available at https://doi.org/10.3998/mp.9460447.0010.206).

[10] Suzanne Rust, How the U.S. betrayed the Marshall Islands, kindling the next nuclear disaster, Los Angeles Times, Nov. 10, 2019, at https://www.latimes.com/projects/marshall-islands-nuclear-testing-sea-level-rise/.

[11] Holly M. Barker, Collisions of History and Language: Nuclear Weapons Testing, Human Environmental Rights Abuses, and Cover-Up in the Republic of the Marshall Islands (doctoral dissertation, American University, 2002) at 1-315 (available at https://dra.american.edu/islandora/object/thesesdissertations%3A2964); Dan Zak, *A Ground Zero Forgotten: The Marshall Islands, once a nuclear test site, face oblivion again,* The Washington Post, Nov. 27, 2015.

[12] Interview with Melisa Laelan (May 14, 2021.)

[13] Central Intelligence Agency, supra note 6.

[14] Rust, *supra* note 10.

[15] Nicholas Kristof, *Pull Yourself Up by Bootstraps? Go Ahead, Try It,* N.Y. Times, Feb. 19, 2020, at https://www.nytimes.com/2020/02/19/opinion/economic-mobility.html.

[16] Pearl Anna McElfish, *Marshall Islanders COFA Migrants in Arkansas,* 112 J. ARK. MED. SOC. 259–262 (May 2106).

[17] Holly M. Johnson, et al., *Seeking Compensation for Radiation Survivors in the Marshall Islands: The Contribution of Anthropology,* CULTURAL Survival Quarterly Magazine, Mar. 2000, available at https://www.culturalsurvival.org/publications/cultural-survival-quarterly/seeking-compensation-radiation-survivors-marshall-islands); Jessica A. Schwartz, Matters of *Empathy and Nuclear Colonialism: Marshall Islanders Voices Marked in Story, Song, and Illustration,* X MUSIC & POLITICS 2 (Summer 2016) (available at https://doi.org/10.3998/mp.9460447.0010.206).

[18] Section 1002(8) of the Legal Services Corporation Act, 42 U.S.C. § 2996a(8).

[19] Letter from Mattie C. Condray & Victor M. Fortuno to Deborah Perluss, Eligibility of Marshall Islanders for Legal Services (May 7, 2001); Legal Servs. Corp. Office of Legal Affairs, Restrictions on Legal Assistance to Aliens. 72 Fed. Reg. 52488 (Sept. 14, 2007).

[20] *Id*

[21] See the Legal Aid of Arkansas mission statement at https://arlegalaid.org/who-we-are/mission.html.

[22] Lotta Dellve & Andrea Eriksson, *Health-Promoting Managerial Work: A Theoretical Framework for a Leadership Program that Supports Knowledge and Capability to Craft Sustainable Work Practices in Daily Practice and During Organizational Change,* Societies, 2017.

[23] No, we did not undertake this change in a vacuum. Many of these changes would synergistically work to remove disparate impacts for many of our marginalized clients. However, their stories are unique to their circumstances and culture, so our focus for this case is solely upon the Marshall Islanders.

[24] Edgar H. Schein, Organizational Culture And Leadership (2010).

[25] Aoife M. Mcdermott, *et al., Hybrid Healthcare Governance for Improvement? Combining Top-Down and Bottom-Up Approaches to Public Sector Regulation,* 93 Pub. Admin. 324 (June 2015) (available at https://onlinelibrary.wiley.com/doi/abs/10.1111/padm.12118).

[26] David Cooperrider & Diana D. Whitney, Appreciative Inquiry: A Positive Revolution In Change (2005).

[27] State of Arkansas v. Vancurens Auto Sales, Inc., *et al,* No. 60CV-16-6962 (Pulaski County, Arkansas, Circuit Ct. filed Dec. 2016).

[28] State of Arkansas v. Automatic Auto Finance, Inc., No. 72CV-16-1188-4 (Washington County, Arkansas, Circuit Ct. Sept. 2019) (consent judgment).

[29] Interview with Melisa Laelan (Feb. 15, 2021).

[30] Schein, *supra* note 24.

[31] Susan Purtle and Consumer Protection Practice Group, Racial Justice Statement, Newsroom (Feb. 19, 2019); https://arlegalaid.org/news-events/newsroom.html/article/2019/02/19/consumer-protection-racial-justice-statement

[32] *Id.*

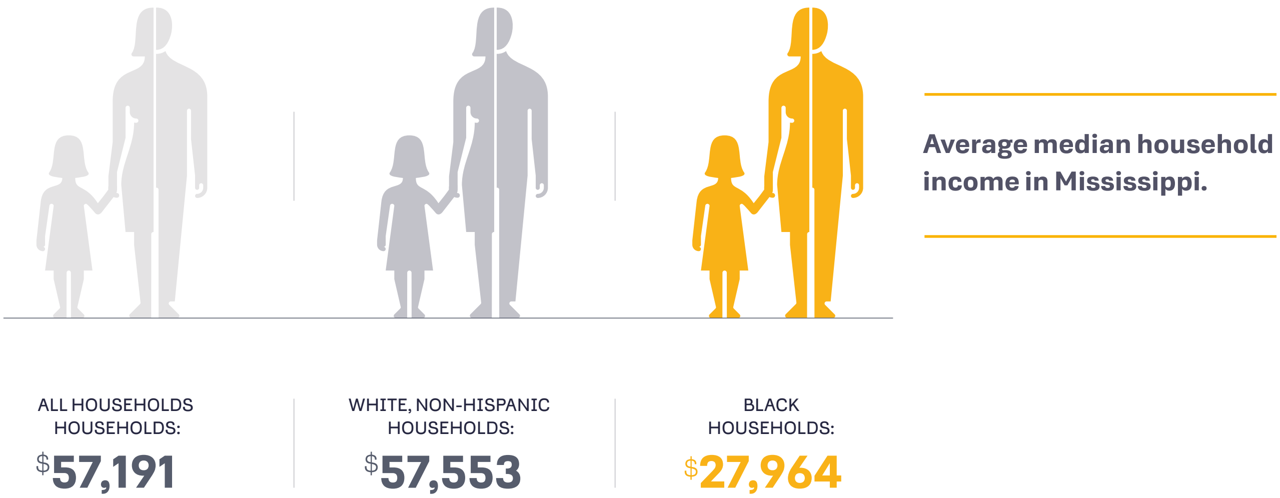
# How Payday Lending in Mississippi Is Rooted in the History of Sharecropping

*By Charles O. Lee*

## Introduction

In 2020, the residents of Mississippi faced some of the highest rates of poverty and lowest rates of financial security and stability in our nation. Mississippi ranks 51st in overall poverty rate, 51st in child poverty rate, and 45th in the rate of state residents that have to rely on high-cost and high-risk forms of credit—such as payday loans—to meet their basic needs.[1] These rankings offer a glimpse of how dire the circumstances are in Mississippi for consumers—particularly Black consumers. Deep racial disparities persist in the state. The average median household income for all households in the state is $57,191, but for white, non-Hispanic households it is $57,553, while for Black households it is only $27,964.[2]

Without access to the opportunities necessary to achieve economic mobility, financial stability remains elusive for many Mississippians. The gaps that exist between white and Black people in educational opportunity, employment, and wages are wider than almost any other place in the country. Many Black Mississippians are forced to rely on predatory lending institutions for the cash they need to eat, remain housed, and survive *today*, without having the luxury to think about how these exploitative loans could lead to significant and persistent financial troubles.




As a result, one of the most powerful forces operating against the economic security and mobility of Black families in Mississippi is the prevalence of payday loan servicers. The culture of debt and siphoning of wages from Black families perpetuated by the payday lending industry harkens back to the region's history of sharecropping. This article uses the frame of this historical linkage to describe the proliferation and power of payday lending institutions in Mississippi. From there, the article will discuss the racial justice efforts of the Mississippi Center for Justice to create alternative low-cost micro-loan opportunities while engaging in other supportive work to assist Black consumers in Mississippi.

## The Parallels Between the Payday Lending Model and Sharecropping

Payday lending is ubiquitous in Mississippi. The state has one of the highest densities of payday lenders per capita in the country, with approximately 38 stores per 100,000 people (or one loan store for every 2,600 people).[3] Payday lenders place many of these stores in Black communities and specifically target their products toward Black people.

These predatory institutions understand that Black consumers in the state experience poverty at higher rates because of a history of racism and discrimination that entrenched inequitable access to education, employment, housing, and financial resources. As such, Black people are 105 times more likely to turn to payday lending

products for support, regardless of the strings attached.[4] These payday loans are marketed as small-dollar loans—typically $100 to $500—that will tide over a worker facing a cash crunch until the next paycheck. The entire loan, including interest or fees, is then due on the next payday. Few borrowers have the resources to pay these loans back in full when due, borrowers almost always require a new loan immediately, and the costs compound quickly and lead to absurd and usurious results. This isn't by accident. This is the business model.

Historically, Black Mississippians' relationship with lenders has been fraught and rife with distrust. Under Jim Crow, mainstream financial institutions routinely discriminated against Black people, and that racist legacy remains. Today, more than 15.8 percent of the state's residents lack a checking or savings account—the worst such rate in the nation—and 27.2 percent of Mississippi households of color are unbanked.[5] However, the prevalence of payday lending in Mississippi and the culture of debt that it perpetuates is probably best contextualized as an outgrowth from the vestiges of sharecropping.

> The prevalence of payday lending in Mississippi is an outgrowth from the **vestiges of sharecropping**.

When the Civil War ended, Southern landlords tried to establish a system of labor similar to slavery that bound the formerly enslaved to the land. Former slaves, on the other hand, advocated for the distribution of plantation lands to Black families who would be free to farm the land and reap the profits of their labor, but the federal government refused to support this proposal. "Sharecropping" emerged as an alternative arrangement.[6] Under this system, the "sharecropper" rented a plot of land from a plantation owner and paid for it with a percentage of the crop, usually 30 to 50 percent.[7] Sharecroppers would have to buy all the supplies they needed—including tools, livestock, fertilizer, seeds and food—from stores owned by former slaveowners who would demand incredibly high interest rates. Black sharecroppers retained little agency over their land. White landlords would choose which crop the sharecropper was to grow, supervise production, and control the weighing, marketing, and sale of the crop as well as the record-keeping.[8] Landlords who supplied the goods necessary for farming charged high prices and interest rates both to increase their profits and extract as much potential wealth from Black farmers as they possibly could. As a result, few Black farmers were able to build wealth—often ending the crop year in debt, thus preventing them from moving to find better terms of labor.

In Mississippi, sharecropping lasted until the Great Depression of the 1930s, when New Deal agriculture relief programs fundamentally undermined the system.[9] The federal government gave New Deal subsidies to Southern cotton planters to encourage crop reductions and achieve higher crop prices, but neither the government nor the landlords passed these subsidies on to sharecroppers. Instead, landlords simply evicted sharecroppers from the land and used the federal subsidy dollars to mechanize cotton picking and planting. In addition, minimum wage laws after World War II further motivated the owners of large-scale plantations to abandon what little sharecropping still existed and even to reduce the use of fixed-wage employees. By 1965, a century after the Civil War, few Southern farmers worked as sharecroppers.[10]

Nevertheless, the culture of debt and the extraction of wealth from Black communities persisted. During the sharecropping era, wealthy white landowners extracted the income that Black workers had earned with their labor. Like the white planter class of old, today's payday lenders ensnare financially unstable consumers in a cycle of debt, and before long, the paychecks that were inadequate to pay their bills in the first place are being almost entirely depleted by high interest rates and exorbitant fees, or being garnished once the consumer is in default.

Just like sharecropping, Black workers end up having the fruits of their labor seized by predators. Troublingly, the payday industry's power is only growing in Mississippi.

In recent years, the Mississippi legislature has deregulated the industry and given payday lenders free rein in their efforts to extract profit from low-income Black families. In 2013, the legislature functionally granted permanent authorization for payday loans after repealing the portion of Mississippi law that required the legislature to periodically renew legislation that governs payday lending.[11] Additionally, in 2016, in response to industry concern that the Consumer Financial Protection Bureau would hamper payday lenders' profits, the legislature created a new type of loan—the installment loan—by passing the Mississippi Credit Availability Act (MCAA).[12] The MCAA allows licensed lenders to loan up to $2,500—an amount six times higher than any payday loan previously allowed under state law—and charge nearly 300% annual interest on the loans, greatly increasing potential profits. As of 2018, more than 385 lenders are licensed to offer installment loans,[13] many of whom are payday lenders who own multiple check cashing stores across Mississippi.[14]

**Powerful political forces** in Mississippi are invested in the proliferation of payday lending.

The Mississippi legislature remains hostile to any attempts to rein in the predatory behavior of the industry, such as providing broader consumer protections or capping interest rates, all while legislators continue to receive political contributions from the industry.[15] Powerful political forces in Mississippi are invested in the proliferation of payday lending. With this power deeply entrenched, consumer advocates like those at the Mississippi Center for Justice have had to look to alternative solutions to protect consumers from exploitative payday loans—such as creating alternative low-cost loan products.

## Racial Justice Work at the Mississippi Center for Justice

The Mississippi Center for Justice (MCJ) is a non-profit, public interest law firm that is committed to advancing racial and economic justice. MCJ's work focuses on six campaigns: Healthcare and Public Benefits, Educational Opportunities, Housing, Immigration, Consumer Protection, and Impact Litigation. In the Consumer Protection division, MCJ works to improve the financial well-being of Mississippians, particularly Black Mississippians. For years, our team has worked with individual clients, other advocates and partners, community groups, and organizations who have sought our assistance with providing information for consumer financial issues. We have conducted workshops, made presentations, served on boards of statewide consumer non-profit organizations, and worked in partnership with national organizations to bring products and projects to Mississippi for the benefit of Black consumers who have been locked out of opportunities for upward financial mobility for too long.

To combat the influence of payday lenders and the impacts of their loan products on Black consumers, MCJ has been actively trying to find an alternative that would be useful to people who are in need of small dollar loans. We established a program called New Roots Credit Partnership (NRCP), which matches employers with financial institutions to offer small dollar loans at favorable terms to employees who need them. The banks within the New Roots Credit Partnership place half the loan amount into a checking account and the other half into a savings account. The funds in the checking account are immediately accessible. All funds in the savings account will be placed on hold until the loan is fully repaid. Borrowers have up to two years to pay back the loan, as opposed to mere weeks to pay back a payday loan, and they pay 5% interest for loans of either $500 or $1,000 with no additional fees—a sharp contrast to the products offered by payday lenders. Since financial literacy is crucial to changing the economic outcomes for people experiencing poverty, it is incorporated as a requirement of the program. The New Roots Credit Partnership allows employees to access mainstream banking with fair lending and fair credit and helps consumers avoid the debt spiral caused by predatory lending practices. It also acts as a bridge between unbanked Mississippians and the mainstream banking industry by opening a checking and savings account as a part of the financial wellness benefit to the employees who complete the financial literacy course. This program has the potential of decreasing the number of payday loans, increasing credit scores for participants, and decreasing the number of unbanked Mississippians. Therefore, we have focused program partnerships in majority Black areas of the state in the hopes that Black Mississippians will be able to access these alternatives and avoid financially ruinous payday loans.

The New Roots Credit Partnership allows employees to access mainstream banking with **fair lending and fair credit** and helps consumers avoid the debt spiral caused by predatory lending practices.

It is not a perfect solution. It is well documented that traditional financial institutions played a large part in creating the massive wealth gap between white and Black households in Mississippi by refusing credit and mortgages to Black families. There is a limit to how much these profit-motivated institutions can be persuaded to participate in creating true racial justice. The work of building power in Black communities and changing the political climate in Mississippi is a long-term objective, but in the immediate term we have worked to address directly the immense harm that payday lenders are inflicting upon Black people in our community. To avoid this harm, we have tried to design a program that is a "win-win-win" for consumers, employers, and traditional lenders. Consumers have access to loans that are fair, and they establish a bank account and receive training in financial literacy; banks establish relationships with sections of their potential customer base who were previously unbanked; and employers provide a benefit that some of their employees desperately need, reduce stress for employees under financial strain, and process fewer garnishments.

Creating alternatives to payday lenders for Black consumers is a critical step toward creating financial stability, but what about folks who are already caught in a spiral of debt? The Mississippi Center for Justice has spent the last two years observing justice courts around the state to see how debt collection cases unfold in practice. Some justice court judges require creditors to prove the legitimacy and accuracy of the debt before awarding judgment, but many accept the creditors' claims at face value and leave the unrepresented debtors defenseless. In response to this disparity in treatment, MCJ established a court navigator project in Hinds County (where the capitol city of Jackson is located) and five counties in the impoverished Mississippi Delta, where volunteer navigators in the courthouse help to ensure that debtors are aware of their right to examine the debt and assess whether the amount sought is correct. We know borrowers in majority Black areas are less likely to have their debt discharged,[16] and that Black borrowers are more likely to be harassed by collectors—even where white borrowers have similar rates of default and late payments.[17] The navigator project has allowed advocates to witness and quantify these disparities firsthand. Now MCJ is advocating for uniformity in justice court practices and fairness in debt collection proceedings—a necessary step toward our mission to overcome racial and economic injustice.

## Foreclosure Prevention in Mississippi

Payday lending is not the only issue devastating Black consumers and perpetuating racial injustice in Mississippi. Foreclosures have also been wreaking havoc on Black communities in the state. As of April 2020, Mississippi has the 5th highest mortgage delinquency rate in the nation.[18] High rates of mortgage delinquency can be driven by a prevalence of high-cost, subprime mortgages. Mississippi has had the highest average percentage in the nation of subprime borrowers—49.2 percent during the fourth quarter of 2018, which was down 1 percent compared with the fourth quarter of 2017.[19] Black people in Mississippi are more likely to receive a subprime mortgage loan than any other group, even when factors like income and credit score are taken into account. Spillover effects from the housing crisis in Mississippi hit Black households particularly hard. A 2012 study showed that Black people in Mississippi were twice as likely as white people to have their foreclosures completed, and 2.5 times more likely to be at imminent risk of foreclosure. Approximately 32.5 percent of all the lost wealth from foreclosure spillover effects in Mississippi came from predominantly Black census tracts, where the lost wealth per affected household was just under $2,000, resulting in an average home equity loss of 2.5%.[20]

Foreclosures have tremendous implications for Black families' ability to build generational wealth. A house is the largest single asset of most individuals. Each foreclosure strips wealth from a family and its community. The racial wealth gap widens for every Black family that is locked out of the opportunity to build this generational wealth by losing their home to the bank. In light of the severe racialized harms of foreclosures, MCJ's commitment to racial and economic justice required that we devote resources to fighting foreclosures on the individual and systemic level to keep Black people in their homes and to keep Black communities intact.

When foreclosure prevention works in tandem with an understanding of basic financial management, real and positive changes can take hold. The foreclosure prevention services we provide range from the initial request for a modification, to providing counsel and advice, to client referrals to other resources, and court intervention/litigation when required. Services include addressing foreclosure sale dates and mortgage delinquency issues, and negotiating loan modifications on behalf of clients. As with payday loans, financial literacy is one of the important keys to avoiding foreclosure. This has led to MCJ's decision to offer basic financial literacy education to those we serve.

The Consumer Protection division of the Mississippi Center for Justice was selected to participate in the Consumer Financial Protection Bureau's Your Money, Your Goals 2020 program, a comprehensive suite of resources and training geared to help non-profit and government agencies integrate financial empowerment into their existing service models. The members of the MCJ's Consumer Protection team have received training and technical assistance on how to effectively use the Your Money, Your Goals tools with those we serve. In June 2020, we began conducting trainings with various sororities, fraternities, community organizations, and job training programs. We will begin offering financial literacy training to our foreclosure clients in the second quarter of 2021. Through this work, we can both help clients combat an imminent foreclosure and empower people with financial knowledge that they could not previously access.

## Conclusion

For the Consumer Protection division at the Mississippi Center for Justice, working toward racial and economic justice requires recognizing that the racist systems that exploit Black families and contribute to the massive wealth gap between Black and white people is directly derived from our history. In Mississippi, the work to build power in Black communities and create systemic change is a long-term journey. Today, with the payday industry firmly entrenched with considerable political power in the state, we work to address the immense harm these lenders cause the Black community and provide lending alternatives to the predatory loans that ensnare Black workers in a cycle of debt. We also share vital knowledge so that financial stability becomes possible and sustainable. We will continue to develop new ways and resources to combat old problems that persist related to race and consumer protections ■

---

[1] Talk Poverty, Poverty Data by State: Mississippi, available at https://talkpoverty.org/state-year-report/mississippi-2020-report/.

[2] Census Bureau, Median Income In The Past 12 Months (In 2019 Inflation-Adjusted Dollars) (2019), available at https://data.census.gov/cedsci/table?t=Income%20and%20Poverty&g=0400000US28&tid=ACSST1Y2019.S1903&hidePreview=false.

[3] Steven M. Graves, Payday Lending Maps, available at https://www.csun.edu/~sg4002/research/research_home.html.

[4] The Pew Charitable Trusts, Payday Lending in America: Who Borrows, Where They Borrow, and Why (July 2012), available at https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf.

[5] Prosperity Now Scorecard, Mississippi: Outcome Measures (2020), available at https://scorecard.prosperitynow.org/data-by-location#state/ms.

[6] Mississippi Encyclopedia, Sharecropping (last updated Apr. 15, 2018), available at https://mississippiencyclopedia.org/entries/sharecropping/.

[7] American Experience, The Murder of Emmett Till: Sharecropping in Mississippi, Jan. 20, 2003, available at https://www.pbs.org/wgbh/americanexperience/features/emmett-sharecropping-mississippi/.

[8] *Id.*

[9] Mississippi Encyclopedia, *supra* note 6.

[10] *Id.*

[11] *Bryant Gets Bill Permanently Allowing Payday Loans,* Jackson Free Press, Mar. 9, 2013, available at https://www.jacksonfreepress.com/news/2013/mar/09/bryant-gets-bill-permanently-allowing-payday-loans/.

[12] Mississippi Credit Availability Act, S.B. 2409 (2016), available at http://billstatus.ls.state.ms.us/documents/2016/html/SB/2400-2499/SB2409PS.htm.

[13] Anna Wolfe, *As payday loans thrive in Mississippi, neighboring states move to cap high interest rates,* Mississippi Today, Oct. 15, 2018, available at https://mississippitoday.org/2018/10/15/as-payday-loans-thrive-in-mississippi-neighboring-states-move-to-cap-high-interest-rates/.

[14] *Id.*

[15] *Id.*

[16] Paul Kiel & Hannah Fresques, *Data Analysis: Bankruptcy and Race in America, An in-depth discussion of racial patterns in bankruptcy filings and outcomes*, ProPublica, Sept. 27, 2017, available at https://projects.propublica.org/graphics/bankruptcy-data-analysis.

[17] Finra Investor Education Foundation, Financial Capability In The United States 2016 (July 2016), available at https://gflec.org/wp-content/uploads/2016/07/NFCS_2015_Report_Natl_Findings.pdf

[18] Jonathan Jones, *U.S. States with the Most Mortgage Delinquencies,* Construction Coverage, Oct. 23, 2020, available at https://constructioncoverage.com/research/states-with-the-most-mortgage-delinquencies-2020.

[19] Matt Tatham, *Fewer Americans Have a Subprime Credit Score,* Experian, Mar. 12, 2019, available at https://www.experian.com/blogs/ask-experian/research/subprime-study/#s4.

[20] Center For Responsible Lending, The State Of Lending In America And Its Impact On U.s. Households: Mortgages (2012), available at https://www.responsiblelending.org/state-lending/mortgages.


# A Race Equity Lens to Address Predatory Lending in New Mexico

*By Lindsay Cutler*

## Introduction

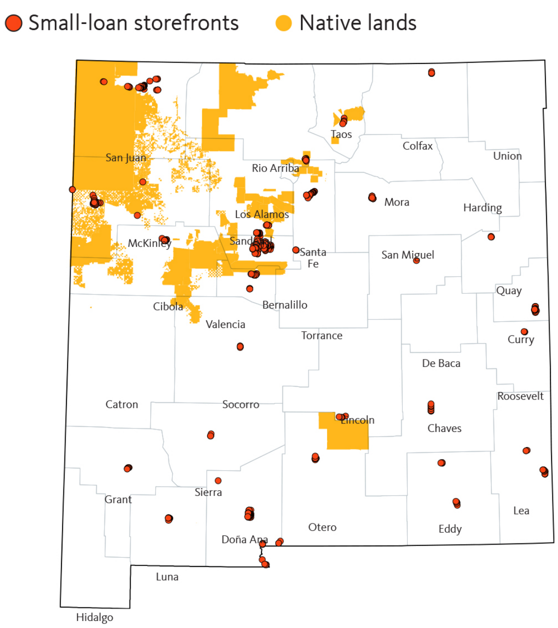
High-cost lending[1] has long been ubiquitous in New Mexico. For decades, New Mexico had no cap on the fees and interest payday lenders could charge. As a result, throughout most of the 1990s and early 2000s, interest rates soared into the hundreds, even the thousands. In 2017, when the New Mexico Legislature finally passed a bill that purportedly eliminated payday loans, often hailed as the worst breed of high-cost, storefront loans, the rate cap still remained shockingly high, at 175% annual percentage rate (APR).[2]

Predatory lending is a racial justice issue in New Mexico because communities of color, and Native American communities in particular, bear the brunt of these predatory businesses. In a rural state with an already high concentration of lenders—close to 600 small loan companies for roughly 2.1 million New Mexicans[3]—nearly two out of every three companies are located within 15 miles of Native American lands.[4]

The New Mexico Center on Law & Poverty (NMCLP)'s work is grounded in an understanding that predatory lending disproportionately impacts Native communities in part because of colonization and systemic failures to regulate the lending industry and extraction of wealth in New Mexico. NMCLP's legal work has always been in partnership with community-based organizations, but over the last few years staff and new leadership have made an intentional effort to develop our internal understanding and alignment with principles of race equity across the organization. As an organization, NMCLP is also working to more explicitly integrate a race equity focus and support community-based movements that build power in communities of color. This includes fair lending advocacy that aims to center the voices of people who see these lenders cluster in and target their communities, while also addressing the roots of those disparities. NMCLP continues this effort, which is in no way near complete.

I started as a fellow at NMCLP working on fair lending issues in late 2017, after the 175% APR cap had been signed into law. NMCLP's fair lending project was initially intended to improve enforcement against predatory lenders and to explore policy solutions to predatory lending. Our organization joined advocates who focused on this issue and led this work for years, including the Native American Voters Alliance-Education Project, the Navajo Nation Human Rights Coalition, and the wealth-building organization Prosperity Works. In early 2018, after the 175% APR rate cap was passed, we asked the state small loan regulator, the Financial Institutions Division of the Regulation and Licensing Department, to enact regulations to ensure that lenders were disclosing and implementing the new rate cap. In coalition with the consumer advocates and attorneys who have been engaged on this issue for years, we were initially able to enact minimal regulations.[5] Throughout 2018 and 2019, we also worked collectively on community education and investigation of the industry, which involved in-person events, surveys of borrowers and loan stores in partnership with law students, and AM radio spots in Navajo and English. During the next legislative session in 2019, we drafted a regulatory "fix" bill to improve transparency in data reporting and clean up potential loopholes in the lending laws with the same coalition of advocates and attorneys.[6]

**Small-loan lenders and Native lands: New Mexico, 2018**



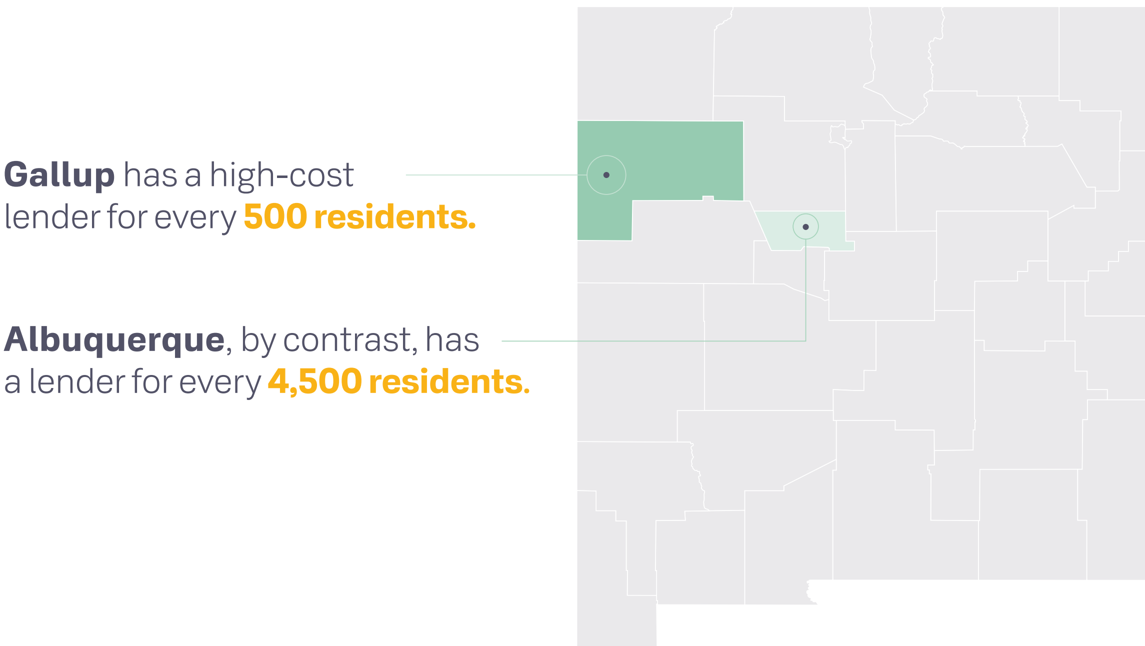

In the summer of 2019, I attended the Shriver Center on Poverty Law's Racial Justice Institute with the Executive Director of the Native American Voters Alliance Education (NAVA-EP) in an effort to develop how we centered racial justice in our fair lending advocacy. Much of our fair lending work has emerged from this training and from our partnership with NAVA-EP.

This essay offers an overview of New Mexico's current predatory lending landscape, which unfairly targets Native American communities. The story begins with the history of the high-cost lending industry in New Mexico, which is grounded in the ongoing colonialization and extraction of wealth from Native communities in our state. I'll explain why the New Mexico legislature is the primary arena for our fair lending advocacy and how we've applied a race equity lens in deploying that work.

## The Lending Landscape in New Mexico

In 2019, the high-cost lending industry made nearly 600,000 loans worth $666 million dollars to New Mexicans.[7] There are 595 companies currently licensed by the New Mexico Regulation and Licensing Department that make loans through storefronts and online platforms across New Mexico.[8] Lenders cluster in metropolitan areas and in low-income communities across the state, but in particular, target our state's Native American border towns, the towns immediately adjacent to the 23 Pueblos and Native Nations in the state.

Gallup, New Mexico, is one such border town, located in the northwest corner of New Mexico, in McKinley County, outside of the Navajo Nation and the Pueblo of Zuni.[9] Gallup is a border town for both the Navajo Nation and the Pueblo of Zuni, meaning that many people from the tribes come to Gallup to work, shop, and do business. In Gallup, there is a high-cost lender for roughly every 500 people.[10] Española, a border town located north of Santa Fe between the Santa Clara and the Ohkay Owingeh Pueblos also has a large number of high-cost lenders, with one storefront for roughly every 1,000 residents.[11] In contrast, Albuquerque has a lender for roughly every 4,500 residents.[12]




Payday lending reform in New Mexico has been incredibly difficult, in part because of the industry's ability to avoid regulation and invent new products, and in even larger part because of the industry's presence and influence within the New Mexico Legislature. Every year for the past decade or so, a progressive New Mexico legislator has introduced a 36% APR cap bill.[13] And every election cycle, every year, the payday loan industry pours thousands of dollars into campaign coffers and lobbying efforts.[14] The fiscal impact is broadly recognized: "The largesse of the small lending industry in making campaign donations is well-known. During the 2016 election cycle, high-cost lending companies and their professional associations donated more than $118,000 to candidates and political action committees. And those donations weren't anything new. In 2014 and prior years, the industry similarly gave big."[15] The high-cost lending lobby continues to be one of the largest financial campaign contributors in the state.

Each year, more than a dozen lobbyists represent various companies and facets of the payday lending industry, many with extensive experience in New Mexico government. Raymond Sanchez, the former Speaker of the New Mexico House of Representatives, is a lobbyist for the Consumer Installment Loan Association, the central high-cost loan lobbying group in the state.[16] Former New Mexico Attorney General Harold Stratton, Jr., is also a lobbyist for a company that makes high-cost loans.[17] Regulation of payday lending in general is notoriously difficult, and has been referred to as regulatory "whack-a-mole."[18] In New Mexico, this regulatory difficulty coupled with the financial influence and the power of the industry's lobbyists have made meaningful state policy reform nearly impossible.

Although payday-type loans have reared their ugly heads on multiple occasions over the last several centuries, payday loans in their current iteration rose to national prominence in the late 1980s and early 1990s.[19] In 1991, the New Mexico Legislature repealed its General Usury statute, the broad state law the prohibited companies from charging excessive rates of interest, opening the door for unregulated high-cost lending.[20] The usury repeal occurred under then-Speaker Raymond G. Sanchez, the aforementioned lobbyist for the Consumer Installment Loan Association.

From 1991 to 2007, the high-cost loan industry grew exponentially in New Mexico, setting up storefronts across New Mexico and unscrupulously charging triple- and even quadruple-digit interest rates.[21] In 2007, New Mexico passed the first limits on payday loans since the usury repeal, capping fees at $15.50 for every $100 borrowed.[22] In true "whack-a-mole" fashion, the lending industry shifted its model from payday lending (loan due in full on the borrower's next payday) to installment lending (a new installment of the loan due each payday), which allowed lenders to avoid the fee cap and continue to lend at astronomically high rates.[23] Over the next decade, advocates and dedicated legislators continued the fight for a meaningful and all-inclusive 36% APR cap. These ongoing efforts led to the first across-the-board rate cap in 2017, the 175% APR cap for all loan products.

> From Indian traders to tax refund anticipation loans, **discriminatory policies have enabled businesses** to extract wealth from Native American nations.

The 175% APR cap is still a far cry from fair or responsible. It is the highest in the nation for loans over $2,000, and nearly the highest for smaller dollar loans under $500.[24] Despite the industry's power, state policy remains the primary arena for fair lending reform.

## The Roots of Predatory Lending in New Mexico

In our work to dismantle the predatory structure of high-cost lending, NMCLP has worked to understand how this industry fits into the larger story of a centuries-long wealth extraction from the very communities that the predatory lending industry hits the hardest. While payday lending rose to prominence in the wake of federal and state deregulation over the last four decades, the history of this industry and institutions that extract wealth—particularly from Native communities in New Mexico—has roots that run much deeper.

In the 1860s, the federal government created Indian trading laws, setting up Indian trading posts across the country.[25] The trading posts were essentially company stores, run by non-native people with special license (and essentially a monopoly) from the federal government to sell goods on the rural reservation communities. The first trading post in New Mexico was established near Bosque Redondo in 1866, where the Navajo, or Diné, people, were forcibly deported several years prior.[26] When the Diné returned to Northwest New Mexico from the



Legal Impact Network

Shriver Center on Poverty Law

enslavement at Bosque Redondo, the trading posts returned with them, popping up across the Navajo Nation, run by predominately white business men ("Indian Traders").[27] The trading posts and the people who ran them were the genesis of what would become the border town high-cost loan industry. The trading posts and the Indian Traders themselves began making pawn loans to their Navajo customers throughout the twentieth century.[28] In the 1960s and 1970s, the trading posts on the Navajo Nation started to close, while the prominence of border town pawn shops grew.[29] The Indian Traders were the sole conveyer of many goods in the region—a monopoly controlled by white Indian Traders blessed by the federal government.[30] The Traders' monopoly brought them great wealth, but left the Navajo people, who could not get the federal licenses to run the posts, out of that prosperity.

One of the most prominent trading post families, the Tanners, have been operating trading posts and various other businesses around the Navajo Nation since the 1870s.[31] The Tanners started off in the formal trading post business and then opened the Navajo Shopping Center outside of Gallup in the 1960s.[32] The Navajo Shopping Center was a one-stop market, engaged in a variety of different businesses. The Tanners continued to grow their businesses and opened T&R Market, another one-stop market operating several different businesses, in Gallup several decades later. In the late 1990s and early 2000s, T&R Market got into the income tax business, specifically the tax *loan* business.[33] T&R and the Tanners began offering a pre-tax season quasi-refund anticipation loan, or a "holiday loan," a product that target low-income working families who received Earned Income Tax Credits and often receive a large refund at tax time.[34] The holiday loan business is particularly predatory—marketing "Christmas cash" and requiring borrowers to return in the spring to pay tax preparation fees and often roll the holiday loan over to a traditional tax refund loan. The tax refund goes directly to the T&R lender, and there is often very little left by the time borrowers receive their refund.[35]

Children from San Felipe and Santo Domingo Pueblo.

The story of the trading posts, pawn dealing, and now predatory lending fits into a larger narrative of extraction and colonization. From Indian Traders to tax refund anticipation loans, discriminatory policies have enabled businesses to extract wealth from Native American nations, whose resources have been stripped by centuries of colonization.[36] When New Mexican consumer protections were rolled back three decades ago, high-cost lenders set up shop and continued to profit from predatory loans in communities that do not have access to other mainstream financial services. On the Navajo Nation in particular, a lack of meaningful economic opportunity combined with predatory business practices traps low-income individuals in a cycle of debt. The debt-trap lending industry not only hurts thousands of families, but it impacts all of us when our state's economy is weakened by large high-cost loan companies that extract hundreds of millions of dollars from our state each year.

NMCLP has worked to elevate the story about predatory high-cost lending in New Mexico for the past several years. It is a narrative that departs significantly from the story the lenders tell—about how they serve as a resource, how they help people who don't have access to other emergency funds, and how the market would sustain lower interest rates if it could. The story of payday lenders as the next phase of institutions that extract wealth from New Mexico is helping to shift the conversation about payday lending out of the lenders' wheelhouse and move this issue forward.

## Policy Advocacy

Policy advocacy has been a central tactic for predatory lending reform in large part because of the increasing barriers to litigation created by arbitration clauses in loan contracts. In the last several decades, companies' use of fine-print arbitration clauses in their contracts that deprive consumers of their day in court and restricted the use of class action lawsuits has grown exponentially.[37] It's very rare to find a payday loan contract without such a clause, making private class action litigation to stop illegal and unfair practices almost impossible. State attorneys general are not bound by arbitration clauses and can be strong proponents of predatory lending enforcement. Prior attorney general administrations in New Mexico have been very active in enforcing the New Mexico Unfair Practices Act payday lenders,[38] but that enforcement activity, which varies from administration to administration, has dropped off significantly under the current New Mexico Attorney General.[39]

Notably, the federal law that created the Consumer Financial Protection Bureau a decade ago also declared the express authority of tribal governments to act in the same capacity as states' attorneys general to bring suit against predatory lenders pursuant to their sovereign authority under the Consumer Financial Protection Act.[40] The Navajo Nation, the largest Native nation in New Mexico, has exercised its authority under the Act against a loan company that illegally understated APRs and steered Navajo tax filers towards high-cost loans.[41] This litigation avenue remains an option, but many of New Mexico's smaller tribes simply do not have the resources to exercise this attorney general authority and go after bad actor corporations one at a time.

NMCLP and our community partners have chosen to work within the New Mexico Legislature for lending reform. Because the 175% APR cap is so costly that we cannot litigate, administrate, or regulate to truly make these loans fair—it is imperative to lower the rate cap to create any kind of meaningful reform.

Over the last few years, NMCLP has worked in partnership with members of the New Mexicans for Fair Lending Campaign to center the impact that predatory lending has on Native communities and constituents. NAVA-EP in particular has led the work at the Roundhouse (our state capitol building). NAVA-EP has led the coalition in power mapping and developing a legislative strategy at the Roundhouse around the 2019 regulatory fix bill and around the current push for a 36% APR cap. NAVA-EP's expertise has been crucial in leveraging a narrative shift and in moving the legislation forward.

Using a racial justice perspective, we've worked to illustrate how predatory these loans can be for New Mexican families. For too long, powerful industry lobbyists have controlled this conversation, but by demonstrating through data, maps and other visuals,[42] and individual stories, we've worked to change the narrative. We've presented in front of the interim Indian Affairs committees and have begun to reshape the story that's told about predatory lending in New Mexico as one that extracts wealth from our whole state and from Native American communities in particular. That narrative shift is far from complete, but it is an intentional effort that has made our collective advocacy more powerful and more effective.

Centering racial justice in fair lending advocacy has also begun to build and leverage power. Most recently, the Navajo Nation Human Rights Commission successfully lobbied the Navajo Nation Council to pass a Resolution in support of a 36% APR cap in New Mexico.[43] The Resolution marked the first time the Navajo Nation has taken an official position on the 36% APR cap. For the many New Mexico legislators who serve large numbers of Navajo constituents, the Resolution is a voice on this issue that cannot be ignored.

## The Public Health and Racial Justice Crises of 2020

The COVID-19 pandemic increased the urgency of reining in predatory lending in New Mexico. As an organization, much of NMCLP's work shifted in response to the pandemic in early 2020. Our initial plans for fair lending advocacy and outreach were put on the back burner because of shelter-in-place orders and the host of novel issues that instantly became a greater priority for communities we serve. After the declaration of emergency and the initial closures of non-essential businesses, the New Mexico Governor and Department of Health ordered high-cost lenders to shut their doors, declaring explicitly that these storefront lenders were not essential businesses.[44] It is unconscionable that anyone should have to pay 175% APR on a loan they need to put gas in their car, keep food on the table, or keep a roof over their heads after losing income as a result of the pandemic. But as Congress debated stimulus payments and the state struggled to effectively administer unemployment, many families who needed emergency cash relief had nowhere else to go.

The pandemic has brought systemic inequity to light across the country, and it has laid bare how alarming and

unconscionable it is to have a state economy and financial system where predatory lenders are expected to act as a social safety net. At a time when our economy as well as our families are struggling – with more than 100,000 New Mexicans household unable to pay rent and thousands more who have applied for unemployment[45]–the pandemic made the problem of predatory lending so much worse. High-cost, 175% APR loans only end up driving families deeper in debt.

These inequities have been amplified by the protests and national conversation about racism that followed the murder of George Floyd in May 2020. As we work to reckon with our country's history of systemic racism and recover from the COVID-19 pandemic, advocates should frame the urgent issues communities face with a racial justice lens. Centering racial justice in consumer and economic justice advocacy work is not just about doing the right thing in a crucial moment. It is and it should be about building power in communities most impacted by abusive consumer practices; listening to and elevating the stories of how communities are affected by predatory companies; and reimagining a different financial system

[1] Throughout this article, high-cost loans, storefront loans, and small loans are used interchangeably to refer to the non-bank loans made by loan companies licensed under the New Mexico Small Loan Act. I may also refer to this group of lenders as the "payday lending industry." Although two-week payday loans have been outlawed in New Mexico, community members and policymakers alike refer to these loan companies and their cadre of lobbyists as "payday lenders."

[2] *See generally* Center For Responsible Lending, Payday And Car-Title Lenders Drain Neary $8 Billion In Fees Every Year (Apr. 2019), available at https://www.responsiblelending.org/research-publication/payday-and-car-title-lenders-drain-8-billion-fees-every-year; *see also* Nathalie Martin, *1000% Interest – Good While Supplies Last: A Study of Payday Loan Practices and Solutions,* 52 ARIZ. L. REV. 563 (2010).

[3] This project initially focused on combatting predatory lending exclusively but, recognizing that predatory lending is just one of many financial barriers that face low-income New Mexicans and New Mexicans of color, we have expanded that work to include debt collection reform and housing and reorganized this project as NMCLP's Economic Equity Team.

[4] National Equity Atlas, New Mexicans Deserve Fair Loans (Aug. 2019) available at https://nationalequityatlas.org/sites/default/files/New_Mexico_Small_Loans_factsheet_08-05-19.pdf.

[5] N.M. Admin. Code 12.18.3-12.18.10 (2018) (regulations regarding disclosures, electronic media, and mandatory brochures and signage).

[6] H.B. 150 (2019).

[7] New Mexico Reg. & Licensing Dep't, 2019 Small Loan Annual Report (July 7, 2020) available at http://www.rld.state.nm.us/uploads/files/FID/2019%20SL%20Annual%20Report.pdf.

[8] New Mexico Reg. & Licensing Dep't, Small Loan Companies, at http://www.rld.state.nm.us/financialinstitutions/Small_Loan_Companies.aspx (last accessed Sept. 28, 2020).

[9] The U.S. Census Bureau reports that 44% of Gallup resident identify as American Indian alone and 38% of the town's residents identify as white alone. United States Census Bureau, "Quick Facts: Gallup City, New Mexico" https://www.census.gov/quickfacts/gallupcitynewmexico (last accessed November 30, 2020).

[10] New Mexico Reg. & Licensing Dep't, *supra* note 7.

[11] *Id.*

[12] *Id.*

[13] An all-inclusive 36% APR cap has been broadly recognized as an affordable solution to high-cost lending. See Lauren Saunders, National Consumer Law Center, Why 36%: The History, Use, And Purpose Of The 36% Interest Rate Cap (April 2013), at https://www.nclc.org/images/pdf/pr-reports/why36pct.pdf.

[14] Sandra Fish, *Payday Lending Industry Donated $118K in 2016 Campaign Cycle,* New Mexico In Depth, Feb. 20, 2017, at https://nmindepth.com/2017/02/20/payday-lending-industry-donated-118k-in-2016-campaign-cycle/.

[15] *Id.*

[16] New Mexico Campaign Finance Information System at https://www.cfis.state.nm.us/media/ReportLobbyistEmployers.aspx?id=367&el=2020 (accessed August 2, 2020).

[17] *Id.* Former Attorney General Stratton lobbies on behalf of Security Finance.

[18] Kevin O'Keefe, *John Oliver Blanches at the 1900% Interest of the Payday Loans Industry,* The Atlantic, Aug. 11, 2014, at https://www.theatlantic.com/culture/archive/2014/08/john-oliver-examines-the-resilience-of-payday-loans/375850/.

[19] Martin *supra* note 2, at 571.

[20] N.M.S.A. § 56-8-11 (West); NMSA 56-8-11.1 and 11.3 – repealed in the 1991 legislative session; see also Think New Mexico, How Predatory Lending Swallowed New Mexico And What We Can Do About It 13-14 (Fall 2020).

[21] *Id.*; Martin *supra* note 2, at 578.

[22] Martin, *supra* note 2, at 578.

[23] *Id.*

[24] National Consumer Law Center, State Rate Caps for $500 and $2000 Loans (Feb. 2020), at https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/FactSheet-StateRateCap.pdf.

[25] 25 U.S.C. § 261.

[26] *50 Years Ago: Trading Posts Face End of Operations,* Navajo Times, May 28, 2020, at https://navajotimes.com/50years/50-years-ago-trading-posts-face-end-of-operations/. The Navajo people were forcibly deported from their homelands to Bosque Redondo, outside of Fort Sumner in eastern in New Mexico during Hwéeldi, or what is referred to in English as the Long Walk in 1864.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] 25 U.S.C. § 261.

[31] Northern Arizona University, Oral History, Interview with Joe Tanner, http://library.nau.edu/speccoll/exhibits/traders/oralhistories/oralhist.html (last accessed Sept. 28, 2020).

[32] Id.

[33] *See generally,* Bill Donovan, *Settlements Reached in Cases Against Ellis Tanner, T&R,* The Navajo Times, July 19, 2018, at https://navajotimes.com/reznews/settlements-reached-in-cases-against-ellis-tanner-tr/.

[34] First Nations Development Inst., More Tax Time Troubles: Mystery Shopper Testing Exposes Refund Anticipation Loans In Reservation Border Towns, 5, 8-9 (2012). Holiday loans "are loans made prior to the tax filing season, before taxpayers receive their IRS Forms W-2s and can file their returns," and are extended based on the expectation that borrowers will receive substantial tax refunds, primarily from the federal government in the form of the EITC.

[35] It is difficult to understate just how large and predatory the tax refund market that targets ETIC taxpayers is in Gallup. One study estimated that approximately 90% of EITC recipients in the towns of Gallup and Farmington utilize the services of a paid preparer and often receive some kind of credit product in the course of doing so. Id. at 5.

[36] *See generally* Paige Knight, *Tax Policy: A Powerful Tool to Advance Racial Equity in New Mexico,* New Mexico Voices for Children (Dec. 2020), at https://www.nmvoices.org/archives/14895 (outlining how economic oppression of Native Americans in New Mexico culminated in the current racial wealth gap).

[37] For more about forced arbitration clauses in New Mexico, see the National Consumer Law's factsheet on this issue, National Consumer Law Center, Forced Arbitration: Harming New Mexico's Consumers, Servicemembers, and Veterans (2021), at https://www.nclc.org/images/pdf/arbitration/state-fact-sheets/new-mexico-arb.pdf.

[38] *See generally* State *ex rel*. King v. B & B Inv. Grp., Inc., 329 P.3d 658 (N.M. 2014).

[39] Steve Terrell, *A lending law graveyard,* The New Mexican, Feb. 27, 2017, at https://nmpoliticalreport.com/2017/02/27/a-lending-law-graveyard/. The current New Mexico Attorney General Hector Balderas received $16,400 in campaign contributions.

[40] Consumer Financial Protection Bureau, CFPB and Navajo Nation Take Action to Stop Illegal Tax-Refund Scheme (Apr. 14, 2015), at https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-navajo-nation-take-action-to-stop-an-illegal-tax-refund-scheme/.

[41] Id.

[42] New Mexicans Deserve Fair Credit, Fact Sheet on SB 66, available at https://www.povertylaw.org/wp-content/uploads/2021/05/SB-66-Factsheet-2021-03-11.pdf.

[43] Navajo Nation Human Rights Commission, Press Release: Naabik'iyati' Committee of the 24th Navajo Nation Council supports capping small loans at 36% interest rate in New Mexico, Sept. 25, 2020, at https://www.facebook.com/nnhumanrightscommission/photos/a.1462945643960216/2626766694244766/.

[44] Matthew Reichbach, *Liquor Stores, Payday Lenders Closed as Guv Extends, Expands Coronavirus Public Health Emergency Order,* The New Mexico Political Report, Apr. 6, 2020, at https://nmpoliticalreport.com/2020/04/06/guv-extends-expands-covid-19-public-health-emergency-order/. The governor's order concerning payday lenders came after state Financial Institutions Division interpreted the public health order as deeming payday lenders essential business, a decision that sparked strong opposition from advocates. Kyle Land, *Payday lenders deemed 'essential' during the coronavirus,* Albuquerque Journal, Mar. 31, 2020, at https://www.abqjournal.com/1438548/payday-lenders-deemed-essential-during-coronavirus.html.

[45] Eviction Right to Counsel Resource Center, Estimation of Households Experiencing Rental Shortfall and Potentially Facing Eviction, available at https://www.stout.com/en/services/transformative-change-consulting/eviction-right-to-counsel-resources (last accessed Aug. 13, 2020).

# Afterword

*By Nolan Downey*

The racial disparities that consumer advocates witness in their work are a natural consequence of a history of racist policies designed to extract wealth from communities of color and deny opportunities to build assets and economic stability. Acknowledging history is an important step toward achieving racial equity. All the contributors to this report recognize the ways in which history has impacted their clients, whether that history involves the enslavement of Black people; the subjection of people to Black Codes, Jim Crow, and other racist policies that denied them opportunity and generational wealth; the genocide, dispossession of land, and exploitation of Indigenous people; or war crimes and wanton disregard for the lives of Marshall Islanders people living near U.S. military nuclear test sites. All of these racist histories, and many others, can inform understanding of consumer abuses today. Framing racial disparities in the consumer space within the context of this history is not only useful, but necessary to understand the level of commitment required to remedy these abuses. Racial disparities exist because of generations of targeted discrimination, and it will take targeted investment and attention to eliminate disparities and create racial equity.

This report illustrates some of the ways in which consumer advocates have changed their messaging and approach to more directly address and call out racialized harms. Even as calls for racial justice continue to amplify in the wake of continued police violence against Black people, these gaps threaten to persist, or even widen, in the post-COVID economy. As the authors of this report have demonstrated, an approach that more directly addresses racial injustice could mean:

- messaging racial disparities in the context of historical intentional discrimination and racism;
- building new strategic partnerships with external stakeholders or different community groups who have been targeted by abusive lenders;
- committing time, energy, and resources to build cultural competence and trust within the community;
- rethinking the approach to institutions, like the courts, that consumer advocates interact with daily, and making different demands of those institutions that are consistent with equity and fairness; or
- building a foundation of knowledge, skills, and power within the community and empowering people to directly confront the harms they face.

Transformation can be uncomfortable. But pursuing racial equity in the consumer space—as in any other space—requires the courage to be bold, to experiment, and to try, fail, and try again. We hope the work highlighted in this report will engender excitement, inspiration, and new ideas that will help bring about racial justice ■

# Acknowledgements


Special thanks to former Shriver Center staff, including former Legal Impact Network Director Gavin Kearney, former Legal Impact Network staff attorney Kevin Herrera, and former Program Associate Brooke Peery, who conceived of this project and helped identify contributors.

**Consumer Law and Racial Justice in the Era of COVID-19**
benefited from the assistance of National Consumer Law Center Deputy Director, Carolyn Carter and Staff Attorney, Steve Sharpe.

**Using Equity to Confront and Correct Individual and Systemic Racism**
was inspired by the accessible, transformative legal scholarship of David Super, Carmack Waterhouse Professor of Law and Economics at Georgetown Law.

**Centering Race and Culture in Consumer Law: A Marshallese Case Study**
Susan Purtle was supported by the editing and feedback of Lee Richardson, Executive Director of Legal Aid of Arkansas, Molina Bien, Marshall Islanders Liaison at Legal Aid of Arkansas, Eldon Alik, Consul General of the Marshall Islanders Consulate General in Springdale, Arkansas, and Dr. Jane Purtle. Additional support and expertise were provided by Jaime Claire Wilson Kiser, Amy Pritchard, Casey Bryant, and Mallory Sanders. Dr. Sherry Thompson would like to acknowledge Jason Auer for ensuring the Marshall Islanders can access equitable housing. Melisa Laelan wishes to acknowledge her husband Aniur Pedro.

**How Payday Lending in Mississippi Is Rooted in the History of Sharecropping**
was supported by the staff of the Mississippi Center for Justice, who reviewed the final draft of the article and provided feedback. The article particularly benefited from the assistance of Consumer Protection Division paralegal, LaShay Melton, who provided constructive criticism and was essential to the completion of the project.

**A Race Equity Lens to Address Predatory Lending in New Mexico**
greatly benefited from the thoughtful comments of New Mexico Center for Law and Poverty Economic Equity Director, Maria Griego and Legal Director, Sovereign Hager.

Shriver Center on Poverty Law

Legal Impact Network

povertylaw.org ■ 312.263.3830