INDIRECT THREATS TO THE WAGES OF LOW-INCOME WORKERS: GARNISHMENT AND PAYDAY LOANS

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The theme of this conference is *Inequality, Opportunity, and the Law of the Workplace*. For reasons that I will discuss, I will approach that topic from a somewhat off-kilter perspective. I hope you will agree that there is some value in looking at the issue in this way.

First, let me set the framework. When one talks about "inequality," one can focus on some workers being paid too little, or others being paid too much. Working on either dimension could reduce inequality. I will focus on the workers-being-paid-too-little side of that equation.

When we think of workers being paid "too little," the discussion normally begins, and sometimes ends, with discussions of how to increase the income that low-income workers earn from their employers. Increases in the minimum wage would be the prime example: if we increase it, low-income workers might receive more income from their employers.

When discussing topics such as garnishment and payday loans, the narrative becomes complicated in two main ways. First, we are not talking about the total amount those workers are owed—for example, the number of hours they work times the minimum wage. Rather, we are talking about the amount they actually receive at the end of the day. We are talking about a different kind of threat to the earnings of low-wage workers—not only the direct threat of simply being paid too little, but also the indirect threat of not getting all of those meager wages. To state it somewhat differently, if a worker needs $X/month to survive, she might fail to get there because the minimum wage is too low, or she might fail to get there because—even though the minimum wage is sufficient—the amounts taken out of her check through garnishment will cause her

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to fall below that amount. The two scenarios are equally problematic for the worker, but the second tends to be less on the radar screen than the first.

Second, the narrative is complicated because we are no longer talking only about the employer and worker. A third party—a creditor in the case of garnishment or a lender in the case of payday lending—is also involved. I will come back to these points later, but I will begin by pointing out why I am calling garnishment and payday loans indirect threats and why I think these examples reveal new ways of thinking about inequality and limited opportunity, and new problems in addressing them.

Let me begin by providing a brief sketch of garnishment and payday loans. For both, there are two primary take-away points. First, I think you will be surprised by how common and widespread these practices are. These are bigger threats to low-income workers than generally perceived. Second, the threat is targeted at a group of workers that is especially vulnerable. People whose wages are garnished or who take out payday loans are not the poorest of the poor, nor are they even the lowest earning tier of low-income workers. To be "garnished" or to take out a payday loan, one has to at least have some stability of employment and some level of income to make those actions viable. So, we are generally talking about people who earn $15,000–$40,000/year—people who work hard and regularly, but who make barely enough to live a halfway decent life.[1]

Let us take a quick look at garnishment first:

1. From 2001 to 2012, the National Labor Relations Board (NLRB) received roughly 20,000 to 30,000 charges of unfair labor practices each year.[2]

2. For that same period, the Equal Employment Opportunity Commission (EEOC) received about 80,000 to 100,000 charges of illegal discrimination each year.[3]

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1. *See* Consumer Fin. Prot. Bureau, *Payday Loans and Deposit Advance Products: A White Paper of Initial Data Findings*, CONSUMERFINANCE.GOV 17–18 (Apr. 24, 2013), http://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf (reporting that 72% of borrowers from payday lenders had annual incomes between $10,000 and $40,000).

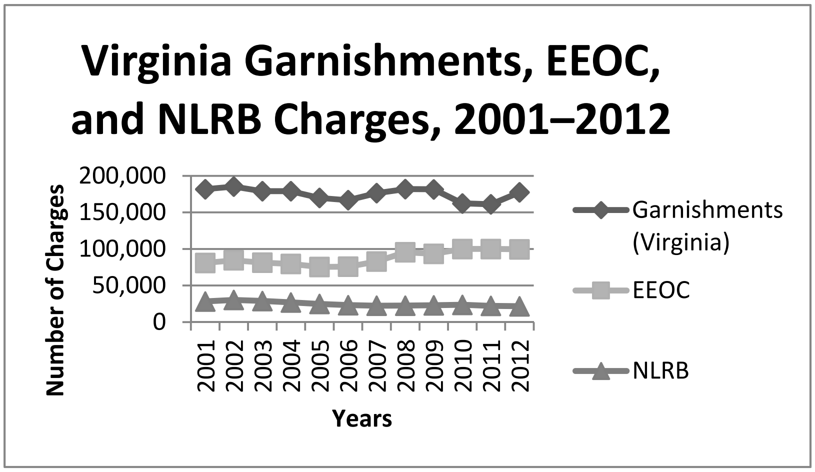
2. Nat'l Labor Relations Bd., *Charges and Complaints*, NLRB.GOV, https://www.nlrb.gov/news-outreach/graphs-data/charges-and-complaints/charges-and-complaints (last visited Dec. 14, 2015) (providing number of charges for 2005–2012); Nat'l Labor Relations Bd., *Annual Reports*, NLRB.GOV, https://www.nlrb.gov/reports-guidance/reports/annual-reports (last visited Dec. 14, 2015) (providing number of charges for 2001–2004).

3. U.S. Equal Emp't Opportunity Comm'n, *Charge Statistics FY 1997 Through FY 2014*, EEOC.GOV, http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Dec. 14, 2015) (providing the charge statistics for 1997–2014).

3. Over the same period, the number of garnishments ranged between 160,000 and 180,000, which roughly doubled the number of EEOC charges and considerably exceeded the number of NLRB and EEOC charges combined.[4]

4. And, that count of garnishments is for Virginia only.[5]

The following chart depicts Virginia garnishments, EEOC, and NLRB charges for 2001–2012:



The garnishment statistics are for Virginia only because, to my knowledge, Virginia is the only state that records garnishments as a separate category in its court statistics, and that is a function of how garnishment works in that state.[6]

I have done various back-of-the-envelope calculations to estimate the nationwide incidence of garnishment based on a study by the ADP Research Institute,[7] extrapolations from the Virginia data,[8] and a

4. *Caseload Statistical Information*, COURTS.STATE.VA.US, http://www.courts.state.va.us/courtadmin/aoc/judpln/csi/home.html (last visited Dec. 14, 2015) (providing garnishment statistics by year in Virginia circuit, district, and juvenile and domestic relations courts).

5. *Id.*

6. *See generally* Charles J. Nabit, *Garnishment in Virginia*, 21 WM. & MARY L. REV. 793 (1980) (discussing the development of garnishment and the Virginia statutory scheme).

7. The ADP study estimated that 7.2% of all workers had their wages garnished each year. ADP Research Inst., *Garnishment: The Untold Story*, ADP.COM 8 (2014), *available at* http://www.adp.com/tools-and-resources/adp-research-institute/insights/~/media/RI/pdf/Garnishment-whitepaper.ashx. The civilian labor force in December 2013 was 154 million. *Labor Force Statistics from the Current Population Survey*, U.S. DEP'T OF LABOR, http://data.bls.gov/pdq/SurveyOutputServlet?request_action=wh&graph_name=LN_cpsbref1 (last visited Dec. 14, 2015). This produces an estimate of about 11 million garnishments.

8. In 2013, there were 196,000 garnishments in Virginia. *Caseload Statistical Information*, *supra* note 4. Virginia's population was 2.36% of the total population of the United States. *Id.* This produces an estimate of about 7.5 million garnishments nationally.

snapshot report I received from a very large national retailer,[9] to estimate that between five and eleven million workers have their wages garnished each year. This is a wide range, and these are all rough estimates, but even if they are considerably off, a very large number of people undoubtedly have their wages garnished every year.

The focus of all of these garnishments is not on the very poorest of the poor. Perhaps that is a blessing, or perhaps it is just a signal of how hopelessly desperate that class is. Instead, the focus is precisely on a group that is struggling to maintain a stable and decent life. Workers earning between $25,000 and $40,000 annually have the highest garnishment rate by income;[10] workers between the ages of thirty-five and forty-four have the highest garnishment rate by age.[11]

With regard to payday loans, the story is roughly similar to that of garnishment. The payday loan industry is large: over 22,000 payday advance locations nationwide are estimated to make about $17 billion in loans annually.[12] The borrowers tend to have low incomes of about $23,000 to $26,000 annually.[13] The mean and median loan amounts are $392 and $350, and the mean and median fees are $56 and $53.[14] Because the loans are very short term, these fees translate into very high annual percentage rates of 339% and 322%, respectively.[15] The loans are not generally made for frivolous, beyond-the-necessities purposes. Rather, they are generally used to cope with the travails of a low-income life. The most common reasons given by borrowers for taking out the loans are unplanned expenses (including medical expenses)—49% of borrowers—and the inability to pay ordinary expenses between paydays—44% of borrowers.[16] Thus, both garnishment and payday loans are threats to opportunity, equality, and fair pay—both are pretty widespread, both

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9. The large national retailer reported that 3.7% of all garnishments occurred in Virginia (on file with the Author). If the 196,000 garnishments in Virginia in 2013 were 3.7% of all garnishments in the United States, there would have been about 5.3 million nationally.

10. ADP Research Inst., *supra* note 7, at 12.

11. *Id.* at 10.

12. Robert B. Avery, *Payday Loans Versus Pawnshops: The Effects of Loan Fee Limits on Household Use*, BD. OF GOVERNORS OF THE FED. RESERVE SYS. 6–7 (May 13, 2011), *available at* http://www.frbsf.org/community-development/files/2-avery-handout.pdf.

13. Consumer Fin. Prot. Bureau, *supra* note 1, at 18 (reporting that the median and mean loan amounts were $22,476 and $26,167, respectively).

14. *Id.* at 17.

15. *Id.* (providing the mean and median duration of loans as eighteen and fourteen days, respectively).

16. Cmty. Fin. Servs. Ass'n of Am., *Payday Loans and the Borrower Experience*, CFSAA.COM 7 (Dec. 2013), *available at* http://cfsaa.com/Portals/0/Harris_Interactive/CFSA_HarrisPoll_SurveyResults.pdf.

have significant impacts on the already low wages of these workers, and both are fairly targeted at a vulnerable group.

The second part of my thesis is that legal regulation of these threats to low-income workers is old and outdated. So, let me begin with the garnishment laws. This is a real backwater and the fact that few know about it speaks for itself. The modern history of garnishment laws begins in 1968 with the Consumer Credit Protection Act (the Act),[17] and the key thing to remember about the Act, and about garnishment laws in general, is that they are *worker* protection laws. The Act sets a national floor of protection—no wages can be garnished until a worker earns at least thirty times the federal minimum wage, and no more than 25% of disposable earnings can be garnished.[18]

When the Act was enacted, it was explicitly viewed in that way—to protect workers,[19] and like other federal statutes, it merely provided a floor of protection, inviting states to provide greater protections. Many states have expanded the protections, but the federal floor is still the most common level of protection at the state level.[20] More significantly, perhaps, garnishment laws are not generally viewed as a means of protecting workers today. Rather, while the invitation to states to enter the field has not led to enormously increased consumer protection, it has led to a hellishly complicated and very inefficient set of laws that do little to protect workers.

Some readers might know that the Uniform Law Commission is currently embarked on a project to bring some efficiency and organization to state garnishment laws.[21] Even though I am supportive of the effort, the primary emphasis of the proposed changes is improved uniformity and, hence, efficiency—which is very good for employers and only *sort of* good for employees. However, there is likely only a small chance that the effort will lead to any stronger or better worker protections. Those protections are likely to stay at about the level provided by the Consumer Credit Protection Act almost a half a century ago. So, the threats to workers are, at best, about the same as they have

17. 15 U.S.C. §§ 1671–1693r (2012).

18. *Id.* § 1673(a)(1)–(2).

19. *See* H.R. Rep. No. 1040, 90th Cong., 1st Sess. 10 (1968) (noting that wage garnishment restrictions were intended to protect "unwitting" workers from "unscrupulous" lenders).

20. AMORETTE NELSON BRYANT, COMPLETE GUIDE TO FEDERAL AND STATE GARNISHMENT 9-40 to 9-45 (2015 ed., 2014) (depicting a table showing that the garnishment limitations in seventeen states mirror the federal protections, which is the most common level of state protection).

21. Unif. Law Comm'n, *Wage Garnishment Act*, UNIFORMLAWS.ORG, http://www.uniformlaws.org/Committee.aspx?title=Wage%20Garnishment%20Act (last visited Dec. 14, 2015). I am the reporter (principal drafter) for this Committee, but the views expressed here are mine alone.

been for the past fifty years, and maybe a bit more daunting given the increased use of garnishment to collect debts of various kinds.

For payday loans, the story is similar. First, there is direct regulation of payday loans in most states. Four or five states do not regulate payday loans and maybe another twelve or thirteen effectively limit them through strict interest-rate ceilings.[22] But, most states permit it—although many with an interest-rate ceiling that provides some protection—and some explicitly authorize it through their regulation.[23]

In addition to interest-rate regulation, some states have limits on the size of a payday loan (for example, no more than $400 per loan), limits on rollover of loans (for example, loans cannot rollover more than three times), or limits on collection practices.[24]

At the federal level, the current regulation is a mixed blessing. On the one hand, there are laws that apply and provide some protections—like the Truth in Lending Act, which requires disclosures, and the Fair Debt Collection Practices Act, which regulates collection practices.[25] On the other hand, the National Bank Act governs federally insured banks and the interest-rate ceilings applicable to those banks are those of their home states.[26] So, banks can support payday loans, or do an equivalent type of loan, with interest-rate limits that are generous because the banks choose states to locate in based on their lenient regulations.[27]

An interesting aspect of the payday-loan problem for low-wage workers is that it is a problem that was addressed by most states a century ago. Then, states were worried about employers that took improper deductions from worker wages or forced them to borrow from employers, and so on. That resulted in a wave of wage-payment laws in the first quarter of the twentieth century,[28] which led to a wave of *Lochner*-type

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22. Nat'l Conference of State Legislatures, *Payday Lending Statutes*, NCSL.ORG (Jan. 14, 2015), http://www.ncsl.org/research/financial-services-and-commerce/payday-lending-state-statutes .aspx.

23. *Id.*

24. *Id.*

25. *See* 15 U.S.C. § 1601 (2012) (discussing the importance of the informed use of credit and meaningful disclosure of lease terms); *see also id.* § 1692 (discussing the purpose of the Fair Debt Collection Practices Act as "eliminat[ing] abusive debt collection practices" and promoting consistent action by the states).

26. 12 U.S.C. § 85 (1980).

27. The federal government is beginning to consider more effective protections for workers. *See* Consumer Fin. Prot. Bureau, *CFPB Considers Proposal to End Payday Debt Traps*, CONSUMERFINANCE.GOV (Mar. 26, 2015), http://www.consumerfinance.gov/newsroom/cfpb-considers-proposal-to-end-payday-debt-traps (discussing the beginning of a rule-making process to regulate payday loans).

28. *See* Claudio J. Katz, *Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Progressive Era*, 31 LAW & HIST. REV. 275, 286–94 (2013).

legal challenges.[29] But, at the end of the day, state wage-payment statutes survived to restrict the ability of employers to do what payday lenders do—that is, make loans to low-wage workers at high interest rates.[30] Given this history, it is ironic that the payday loan industry had arisen to do almost exactly what employers were doing prior to the state wage-payment laws. This is not what David Weil means when he talks about the fissured workplace. Rather, he is talking about employers contracting out work that was formerly done by employees.[31] But, that is one way of viewing this.[32] In the past, workers would look to employers for this sort of loan, and were exploited in doing so. Now, that function has been fissured off to other providers. Interestingly, employers sometimes serve as brokers in this process, setting up formal programs to give payday lenders access to workers and then assisting the lenders by facilitating wage assignments to help ensure that the loans are repaid.

Maybe there is something useful in this excursion across these aspects of equality and opportunity for low-wage workers. I hope that there are at least some seeds here that might be worth further thought. First, thinking about the earnings of low-wage workers should extend beyond consideration of their gross income alone. At the least, it should also include thinking about the amount that actually makes it through to them in their paycheck—that is, their gross income minus any amounts deducted for garnishments and payday loan obligations.

Second, in theory at least, regulation of these aspects of the pay of low-wage workers should be easier than other aspects. In contrast to the minimum wage, in these cases the interests of employers in protecting their workers' wages generally align with the interests of those workers. So, in the Uniform Law Commission project on garnishment, it is employers who are trying to make that process more transparent, efficient, and rational—and that cuts in the direction of helping low-wage workers. In theory at least, the same should be true for payday loan protections.

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29. Lochner v. New York, 198 U.S. 45 (1905). *Lochner* held that a state-labor regulation violated the due process clause. *Id.* at 64. Before *Lochner* was overturned in the 1930s, it was relied on to overturn hundreds of labor laws. For good reviews of the *Lochner* era, see David E. Bernstein, Lochner*'s Legacy's Legacy*, 82 TEX. L. REV. 1 (2003); Cass Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873 (1987). For a list of cases overturning labor laws during the *Lochner* era, see WILLIAM FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR LAW MOVEMENT 177–92 app. A (1991).

30. Katz, *supra* note 28, at 305, 316.

31. DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 8–14 (Harv. Univ. Press 2014).

32. *Id.*

On the other hand, protecting low-wage workers from these indirect threats is more complicated because the game has more players. Unlike the minimum wage, for example, where we are generally attending only to employee and employer interests, in these cases we also have third parties with deep interests in whatever protections might seem appropriate. These third parties include those with direct interests, such as the many types of creditors who might seek garnishment and the payday lending industry, itself. But, they also include those with less direct interests, such as those who might offer substitutes for payday lending were it to be restricted—for example, those engaged in pawn shop lending or advance deposits.

In sum, addressing the issue of low pay for workers through direct action is important and necessary. But, broadening the view to consider the full range of threats to the wages of low-wage workers is also important and necessary if we want to avoid having the direct efforts undermined by other types of threats. And yet, broadening the view in that way makes the task even more difficult and daunting.