
**A RACIAL FINANCIAL CRISIS:
RETHINKING THE THEORY OF REVERSE REDLINING
TO COMBAT PREDATORY LENDING UNDER THE FAIR
HOUSING ACT**

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I. INTRODUCTION

On January 27, 2011, after interviewing over 700 witnesses and reviewing millions of pages of documents, the Financial Crisis Inquiry Commission (FCIC) issued a 633-page report examining “the causes of the current financial and economic crisis in the United States.”¹ While the report scrutinizes the financial crisis in exacting detail, it largely ignores one crucial aspect of the story: its impact on the African American community. Indeed, even the chapter of the report that directly addresses subprime lending—a practice that has had especially negative consequences for minority communities—fails to discuss the issue of race in any meaningful fashion, making only minor allusions to the fact that certain communities were targeted by lenders for subprime loans.² Instead, the chapter describes the process of mortgage-backed securitization that enabled the subprime boom,³ as well as the lack of effective regulatory oversight to protect borrowers from abusive lending practices.⁴ While the report implies that race may have played a role in subprime lending practices, it does so

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1. THE FIN. CRISIS INQUIRY COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES xi-xii (2011) [hereinafter FCIC REPORT] (internal quotation mark omitted). The Commission, which was established pursuant to the Fraud Enforcement and Recovery Act, was given statutory instructions to examine the cause of the financial crisis. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 5(a), (c), 123 Stat. 1617, 1625–27 (codified as amended in scattered parts of 18 U.S.C. (Supp. 2010)).

2. See FCIC REPORT, *supra* note 1, at 67–80 (citing Congressional impetus for the Home Ownership and Equity Protection Act (HOEPA), which included Congress’s recognition that “certain communities were ‘being victimized . . . by second mortgage lenders, home improvement contractors, and finance companies who peddle high-rate, high-fee home equity loans to cash-poor homeowners’” (omission in original) (quoting S. REP. NO. 103–169, at 21 (1993), *reprinted in* 1994 U.S.C.C.A.N. 1881, 1905)).

3. *Id.* at 68–72.

4. *Id.* at 75–80.

only in passing, noting, for example, that subprime lenders “often preyed on the elderly, minorities, and borrowers with lower incomes and less education.”⁵ At no point in its 600-plus pages does the report explicitly recognize the devastating impact that subprime lending practices had—and continue to have—on the African American community. Yet the impact of the financial crisis is nothing short of the preeminent civil rights issue of our time, erasing, as it has, a generation of hard fought wealth accumulation among African Americans.⁶

That such a critical aspect of the financial crisis has been overlooked highlights the manner in which access to credit is seen, perhaps, as a peripheral civil rights issue. But if nothing else, the fallout from the financial crisis has underscored the centrality of fair access to credit to civil rights. Access to credit has a myriad of implications for housing and wealth, and thereby education, employment, criminal justice, and many other civil rights issues.⁷ While often not recognized as such, it is a core civil rights issue.

Over the past two decades, some civil rights advocates have sought to use the federal Fair Housing Act to challenge the sorts of predatory practices found in subprime mortgage lending, primarily under a theory of “reverse redlining.” Reverse redlining is “the practice of extending credit on unfair terms” to communities that have been historically denied access to credit, predominantly on the basis of race.⁸ The term reverse redlining comes from the manner in which this newer practice builds off of and has been enabled by the older practice of “redlining,” or “denying the extension of credit to specific geographic areas due to the income, race, or ethnicity of its residents.”⁹ The lack of lending institutions operating in African American and minority communities led to a credit vacuum in these communities. This dearth of credit created underserved communities that subprime lenders could “easily target and efficiently exploit.”¹⁰

Reverse redlining has been recognized as a cause of action by the federal courts for over a decade. Nevertheless, the courts remain in conflict as to the proper test that

5. *Id.* at 78 (relying on findings of the joint U.S. Housing and Urban Development (HUD) and Department of Treasury National Predatory Lending Task Force).

6. It is estimated that the subprime crisis will result in an unprecedented loss of wealth for people of color, somewhere between \$164 and \$213 billion. AMAAD RIVERA ET AL., *FORECLOSED: STATE OF THE DREAM* 2008, at 1 (2008).

7. See Gregory D. Squires & Charis E. Kurbin, *Privileged Places: Race, Uneven Development and the Geography of Opportunity in Urban America*, 42 *URB. STUD.* 47, 52–56 (2005) (discussing impact of racial wealth inequality).

8. *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000) (internal quotation marks omitted).

9. *Id.*; see also Charles Lewis Nier III, *The Shadow of Credit: The Historical Origins of Racial Predatory Lending and Its Impact upon African American Wealth Accumulation*, 11 *U. PA. J.L. & SOC. CHANGE* 131, 175–85 (2008) [hereinafter Nier, *Shadow of Credit*] (discussing history of redlining); Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 *J. MARSHALL L. REV.* 617, 619–35 (1999) [hereinafter Nier, *Perpetuation of Segregation*] (discussing redlining and congressional efforts to eliminate it).

10. Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 *AM. SOC. REV.* 629, 632 (2010).

should be applied. One test, established in *Hargraves v. Capital City Mortgage Corp.*,¹¹ requires a showing of an unfair loan and either intentional targeting or a disparate impact.¹² By contrast, the test established in *Matthews v. New Century Mortgage Corp.*,¹³ requires a plaintiff to show that “(1) she was a member of a protected class; (2) that she applied for and was qualified for loans”; (3) that she was given a loan on “grossly unfavorable terms”; and (4) that the lender either continues to provide loans on more favorable terms to other borrowers not in the plaintiff’s protected class, or, intentionally targets plaintiff’s protected class.¹⁴ Courts have also analyzed some claims (i.e., those involving discretionary mortgage-pricing policies) under the more traditional disparate impact framework.¹⁵

In his work on fair housing issues and the financial crisis, Raymond Brescia has addressed the differing approaches adopted by the courts, commenting that, “[c]onceptually, the approach under [the reverse redlining] framework actually appears to raise more questions than it answers; indeed, in the end, the framework might not be suited to address the many different forms of reverse redlining that have appeared in the context of the subprime mortgage crisis.”¹⁶ This Article will seek to provide clarity to the framework for reverse redlining that Brescia correctly identified as sorely lacking.

Part II of this Article starts by providing some historical background to the subprime lending that led to the financial crisis. It establishes the effect of predatory subprime lending practices on minority communities and demonstrates how such practices constitute lending discrimination. Part III lays out and critiques the reverse redlining framework originally crafted by the *Hargraves* court. This Part argues that *Hargraves* is best interpreted as establishing two separate analytical models for assessing reverse redlining claims. One model is premised upon showing that African Americans were intentionally targeted with unfair and predatory loans; the other is a systemic disparate treatment model that looks to both statistical evidence of a financial institution’s lending patterns as well as anecdotal evidence of discriminatory intent. Part IV similarly analyzes and critiques the model of proof established in *Matthews*. It concludes that *Matthews* inappropriately distorted the prima facie model of disparate treatment found in the *McDonnell Douglas* burden-shifting formula¹⁷ by including the requirement that the borrower must have been “qualified” for the loan and by adding the intentional-targeting component developed in *Hargraves* as an alternative fourth element. Part V discusses the connection between reverse redlining and claims alleging that discretionary mortgage-pricing policies have a disparate impact on minority

11. 140 F. Supp. 2d 7 (D.D.C. 2000).

12. *Hargraves*, 140 F. Supp. 2d at 20.

13. 185 F. Supp. 2d 874 (S.D. Ohio 2002).

14. *Matthews*, 185 F. Supp. 2d at 886.

15. See *infra* Part V for a discussion of the use of disparate impact in discretionary mortgage-pricing cases.

16. Raymond H. Brescia, *Subprime Communities: Reverse Redlining, the Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis*, 2 ALB. GOV’T L. REV. 164, 187 (2009).

17. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973).

individuals and communities. Part VI concludes that there are four viable theories for challenging reverse redlining as part of an overall effort to address the civil rights crisis that is plaguing African American communities and that has resulted in wealth stripping and foreclosures.

II. PREDATORY LENDING AS A CIVIL RIGHTS CRISIS

*“In a very real way . . . the old inequality in home lending made the new inequality possible by creating geographic concentrations of underserved, unsophisticated consumers that unscrupulous mortgage brokers could easily target and efficiently exploit.”*¹⁸

A. Subprime Lending

To understand the impact of predatory lending and reverse redlining on the African American community, it is necessary to understand the purpose and growth of the subprime lending industry in the 1990s and early 2000s. Subprime financial products were intended to provide credit to individuals who did not qualify for prime loans, including people with poor credit histories or high debt-to-income ratios.¹⁹ By pricing the loans to the risk posed by borrowers who traditionally may not have qualified for prime loans, subprime lending was touted as helping to make credit more widely available.²⁰

Previously a niche industry, the subprime market exploded and grew substantially throughout the 1990s.²¹ This growth can be at least partially accounted for by technological developments in mortgage lending, including reforms in the automated underwriting process and the growth of securitized mortgages.²² Coupled with the limited regulation of the mortgage lending industry,²³ these changes helped to increase the popularity and perceived attractiveness of subprime loans.²⁴ Indeed, between 1993 and 2006, subprime lending increased dramatically. In 1994, subprime lending accounted for less than five percent of all home-loan originations; by 2006, it accounted for twenty-three percent.²⁵

18. Rugh & Massey, *supra* note 10, at 632.

19. U.S. DEP'T OF HOUS. & URBAN DEV., CURBING PREDATORY HOME MORTGAGE LENDING 13 (2000).

20. John P. Relman, *Foreclosures, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629, 634–35 (2008); *see also* DANIEL IMMERGLUCK & MARTI WILES, WOODSTOCK INST., TWO STEPS BACK: THE DUAL MORTGAGE MARKET, PREDATORY LENDING, AND THE UNDOING OF COMMUNITY DEVELOPMENT 10 (1999) (noting that “there is some role for responsible and affordable subprime lending”).

21. RIVERA ET AL., *supra* note 6, at 4–5.

22. *See* Relman, *supra* note 20, at 634 (“[T]echnological advances in automated underwriting allowed lenders to predict with improved accuracy the likelihood that a borrower with blemished credit will successfully repay a loan.”); Rugh & Massey, *supra* note 10, at 631 (explaining that advent of securitized mortgages expanded possibilities for lending and borrowing).

23. RIVERA ET AL., *supra* note 6, at 5.

24. *See* U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 19, at 30, 41–43 (discussing how securitization and improved underwriting, among other things, increased lenders' interest in subprime lending).

25. Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 HARV. C.R.-C.L. L. REV. 375, 378 (2010); *see also* U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 19, at 28–30 (discussing rapid growth of subprime mortgage market); RIVERA ET AL., *supra* note 6,

The economic fallout from the housing bubble and the resulting foreclosure crisis made clear that both subprime loans are inherently riskier financial products than prime loans and that they failed to serve their intended purpose.²⁶ For one thing, subprime loans are more likely to result in foreclosure than prime loans.²⁷ In 2008, for example, there was a twenty-percent disparity between the rate at which prime and subprime loans went into foreclosure.²⁸ Subprime loans also move more quickly into foreclosure than prime loans do. In Philadelphia, during the years 2000 to 2003, the median period of time “between origination and foreclosure” for prime loans was 6.3 years.²⁹ By contrast, the respective figure for subprime loans was just 3.6.³⁰

The risks associated with subprime lending were exacerbated by the high rate of unnecessary, predatory practices among subprime lenders.³¹ As a general matter, predatory lending is “a catalogue of onerous lending practices, which are often targeted at vulnerable populations and result in devastating personal losses, including bankruptcy, poverty, and foreclosure.”³² While predatory lending has proved difficult

at 4–5 (same); Relman, *supra* note 20, at 635 (“As the subprime market grew, the opportunities for abusive practices grew with it.”).

26. Harold L. Bunce et al., *Subprime Foreclosures: The Smoking Gun of Predatory Lending?*, in U.S. DEP’T OF HOUS. & URBAN DEV., HOUSING POLICY IN THE NEW MILLENNIUM 257, 257 (2005).

27. FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, N.Y. UNIV., THE HIGH COST OF SEGREGATION: EXPLORING THE RELATIONSHIP BETWEEN RACIAL SEGREGATION AND SUBPRIME LENDING 1 (2009).

28. Vikas Bajaj & Louise Story, *Mortgage Crisis Spreads Past Subprime Loans*, N.Y. TIMES, Feb. 12, 2008, at A1 (noting that foreclosure rate for prime and subprime loans was four and twenty-four percent respectively). By the end of 2009, the percentage of subprime loans that were “seriously delinquent” topped forty percent. See MORTG. BANKERS ASS’N, NATIONAL DELINQUENCY SURVEY Q409, at 3 (2010), available at http://media.oregonlive.com/frontporch/other/NDS_Q409.pdf; MBA Q4 National Delinquency Survey Conference Call, CALCULATED RISK BLOG (Feb. 19, 2010, 11:17 AM), <http://www.calculatedriskblog.com/2010/02/mba-q4-national-delinquency-survey.html> (analyzing data from Mortgage Bankers Association’s National Delinquency Survey).

29. IRA J. GOLDSTEIN, THE REINVESTMENT FUND, LOST VALUES: A STUDY OF PREDATORY LENDING IN PHILADELPHIA 54 (2007).

30. *Id.*

31. See Schwemm & Taren, *supra* note 25, at 379 n.25 (“Predatory lending occurs most frequently, but not exclusively, in subprime loans.”); see also U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 19, at 2 (“While predatory lending can occur in the prime market, it is ordinarily deterred in that market by competition among lenders, greater homogeneity in loan terms and greater financial information among borrowers.”).

32. Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1260 (2002). As noted by one expert:

The population generally targeted [by predatory lenders] includes, among others, the elderly, minorities, and residents of neighborhoods that do not have ready access to mainstream credit. Credit terms *not* warranted by the objective facts regarding the creditworthiness of these individuals are imposed upon them because for various reasons the lenders feel they can take advantage of a borrower. Typically predatory lenders take advantage of borrowers due to their lack of sophistication in the lending market, due to their lack of perceived options for the loan based on discrimination or some other factor, or due to deceptive practices engaged in by the lender that mislead or fail to inform the borrower of the real terms and conditions of the loan.

Assoc. Home Equity Servs., Inc. v. Troup, 778 A.2d 529, 537 (N.J. Super. Ct. App. Div. 2001) (quoting Calvin Bradford).

to define, the link between predatory lending and subprime lending is clear.³³ Part of the difficulty in defining predatory lending arises from the fact that “bad actors are constantly developing new abusive practices.”³⁴ Some of these practices include: (1) excessive fees and interest rates; (2) “fraudulent, high-pressure, or misleading marketing”; and (3) high rates of refinancing, or “flipping,” leading to increased debt and equity stepping.³⁵ Although “[n]ot all subprime lending is predatory, . . . predatory practices are most frequently found in connection with subprime lending.”³⁶

With the growth in subprime lending during the 1990s and early 2000s, predatory lending abuses also increased.³⁷ Although subprime lending has come to a standstill in the wake of the financial crisis, the harm from predatory subprime practices continues, most obviously in the form of foreclosure actions.³⁸

B. Redlining and Reverse Redlining: Access to Credit in African American Communities

Homeownership has been traditionally accepted as “the best path to building financial assets and attaining wealth for most Americans.”³⁹ However, from historical redlining to reverse redlining, homeownership opportunities have been and continue to be affected by race. The current mortgage crisis is no exception as, due to the concentration of subprime mortgages and predatory lending practices in minority areas, it has disproportionately impacted African American borrowers and neighborhoods.⁴⁰ The net result has been to strip assets and wealth from communities of color, and to exacerbate the wealth gap between black and white families.⁴¹

33. See IMMERGLUCK & WILES, *supra* note 20, at i (“It is among subprime firms that predatory lending behavior is typically found. In order to understand the growth of predatory lending, it is important to understand the subprime sector.”).

34. U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 19, at 17.

35. IMMERGLUCK & WILES, *supra* note 20, at 1, 8. Other abusive practices include “yield spread premiums, high broker fees, undisclosed fees, balloon payments, pre-payment penalties, arbitration clauses and fraud.” *McGlaw v. Pa. Human Relations Comm’n*, 891 A.2d 757, 769 (Pa. Commw. Ct. 2006). In addition, predatory lenders often pack unnecessary products, such as insurance policies, into the terms of a loan; create false documents; and fail to advise borrowers of their rescission rights. *Id.* at 770.

36. U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 19, at 47.

37. This is a widely agreed upon proposition. See, e.g., Relman, *supra* note 20, at 634–35 (describing increase in subprime market and corresponding increase in abusive lending practices).

38. Borrowers in such cases may be able to assert a claim under the continuing violations theory of the FHA. Under this theory, a complaint is timely if the “‘last asserted occurrence’ of the pattern of violation falls within the statute of limitations.” See *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 18 (D.D.C. 2000) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380–81 (1982)). Reverse redlining plaintiffs have successfully invoked the continuing violations theory. E.g., *Barkley v. Olympia Mortg. Co.*, No. 04-cv-875, 2007 WL 2437810, at *15–17 (E.D.N.Y. Aug. 22, 2007); *Hargraves*, 140 F. Supp. 2d at 17–19.

39. CAL. REINVESTMENT COAL. ET AL., *PAYING MORE FOR THE AMERICAN DREAM: A MULTI-STATE ANALYSIS OF HIGHER COST HOME PURCHASE LENDING I* (2007).

40. Rugh & Massey, *supra* note 10, at 632.

41. See RIVERA ET AL., *supra* note 6, at 1 (noting severe loss of wealth among African Americans as result of subprime mortgage crisis); see also Michael Powell, *The New Poor: Blacks in Memphis Lose Decades of Economic Gain*, N.Y. TIMES, May 30, 2010, at A1 (discussing how mortgage crisis has erased decades of progress made by African Americans in Memphis).

Discriminatory lending practices and enduring residential segregation have played a key role in making black borrowers and minority neighborhoods vulnerable to toxic financial products. Rather than being a vestige of the past, “segregation remains a key feature of America’s urban landscape.”⁴² Data shows that blacks living in urban areas still live in conditions of hypersegregation,⁴³ and that during the 1990s, segregation increased for urban Latinos.⁴⁴ Redlining also persists, despite its formal prohibition.⁴⁵ To date, African American and Latino borrowers are consistently denied credit at a rate disproportionate to whites.⁴⁶ Indeed, data released pursuant to the Home Mortgage Disclosure Act reveals that African American and Latino borrowers remain more likely than whites to be turned down for a mortgage, even when controlling for income and home location.⁴⁷

Segregation, in and of itself, can create market conditions favorable to subprime lending.⁴⁸ As a result of historical discriminatory lending practices and enduring residential segregation, minority-dominant neighborhoods remain underserved by mainstream financial institutions.⁴⁹ This, in turn, facilitates reverse redlining,⁵⁰ as the practice is more likely to occur in cities where there has been historical housing discrimination or redlining and in cities that remain residentially segregated.⁵¹

Taking advantage of segregation and its historical legacy, lenders aggressively marketed subprime products at minority borrowers.⁵² Even after controlling for underwriting variables, African American borrowers were “6.1% to 34.3% more likely than whites to receive a higher rate subprime mortgage” during the subprime boom.⁵³ These disparities remain even after controlling for factors that affect pricing, such as

42. Rugh & Massey, *supra* note 10, at 629.

43. *Id.* Massey and Denton assess five dimensions of segregation: unevenness, isolation, clustering, concentration, and centralization. While “[a] high score on any single dimension is serious . . . as segregation accumulates across multiple dimensions, . . . its effects intensify.” DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 74 (1993). Massey and Denton use the term “hyper segregation” to describe high levels of segregation across all five dimensions. *Id.*

44. MASSEY & DENTON, *supra* note 43, at 74.

45. Marcia Johnson, *Will the Current Economic Crisis Fuel a Return to Racial Policies That Deny Homeownership Opportunity and Wealth?*, 6 *MOD. AM.* 25, 29 (2010).

46. *Id.*

47. CTR. FOR RESPONSIBLE LENDING, *A NATIONAL TRAGEDY: HMDA DATA HIGHLIGHT HOMEOWNERSHIP SETBACKS FOR AFRICAN AMERICANS AND LATINOS* (2010), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/HMDA-issue-brief-final.pdf>.

48. Rugh & Massey, *supra* note 10, at 630.

49. *Id.* (“By definition, segregation creates minority-dominant neighborhoods, which, given the legacy of redlining and institutional discrimination, continue to be underserved by mainstream financial institutions.”); see also George Lipsitz & Melvin L. Oliver, *Integration, Segregation, and the Racial Wealth Gap*, in *THE INTEGRATION DEBATE: COMPETING FUTURES FOR AMERICAN CITIES* 153, 164 (Chester Hartman & Gregory D. Squires, eds. 2010) (noting that segregation relegates racial groups to different sectors of banking industry with minority communities riddled with second class financial institutions).

50. Reverse redlining is “the practice of targeting residents in certain geographic areas for credit on unfair terms due to the racial or ethnic composition of the area.” Relman, *supra* note 20, at 636.

51. *Id.* at 636–37.

52. Rugh & Massey, *supra* note 10, at 632.

53. Alan M. White, *Borrowing While Black: Applying Fair Lending Laws to Risk-Based Mortgage Pricing*, 60 *S.C. L. REV.* 677, 684 (2009).

income. A study by the Department of Housing and Urban Development (HUD), for example, found that fifty-one percent of refinance loans in predominantly black neighborhoods were subprime; the respective figure for predominantly white neighborhoods was only nine percent.⁵⁴ Taking neighborhood income into account did not affect these numbers: nearly forty percent of refinance loans in upper-income black neighborhoods were subprime but only five percent of refinance loans in upper-income white neighborhoods were.⁵⁵ This frequency of subprime and predatory lending in minority communities—and, indeed, the targeting of minorities for unfavorable financial products—has had serious repercussions, in terms of increased debt, lost equity, increased foreclosures, and neighborhood devaluation.⁵⁶

Access to credit, however, is only one part of the story. As the very concept of reverse redlining suggests, the other part is the terms on which credit is given. When credit is provided on unfair terms, simple access ceases to be of benefit. And when credit is provided on unfair terms *because of* race, such lending behavior becomes a civil rights issue. That is precisely what has occurred. In addition to the correlation between predatory lending and segregated *neighborhoods*, analyses of loan-specific data have revealed statistically significant racial disparities among the *individuals* who received higher-cost loans. Again, even when controlling for relevant credit factors such as credit scores, loan-to-value ratios, and other legitimate predictors of risk, these disparities persist.⁵⁷

The most prominent source of data used to detect discriminatory lending is the data collected pursuant to the Home Mortgage Disclosure Act of 1975 (HMDA).⁵⁸ Enacted “to help identify and eliminate redlining,”⁵⁹ HMDA established reporting

54. U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 19, at 22–23.

55. *Id.* at 23.

56. IMMERGLUCK & WILES, *supra* note 20, at 1–2; *see also* CAL. REINVESTMENT COAL. ET AL., *supra* note 39 (“The skyrocketing levels of foreclosures in . . . minority communities . . . have been tied to the growth of concentrated subprime lending in these areas. Concentrated foreclosures have a devastating impact on cities and neighborhoods. They affect local property values, serve as a magnet for crime, and hurt a city’s property tax base.”); Second Amended Complaint for Declaratory and Injunctive Relief and Damages at 39–103 Mayor of Balt. v. Wells Fargo Bank, N.A., 677 F. Supp. 2d 847 (D. Md. Apr. 7, 2010), 2010 WL 1459070 (detailing costs incurred by Baltimore as result of Wells Fargo’s alleged predatory lending practices).

57. DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, UNFAIR LENDING: THE EFFECT OF RACE AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES 3 (2006) (“[F]or most types of subprime home loans, African-American and Latino borrowers are at greater risk of receiving higher-rate loans than white borrowers, even after controlling for legitimate factors.”); NAT’L CMTY. REINVESTMENT COAL., INCOME IS NO SHIELD AGAINST RACIAL DIFFERENCES IN LENDING II: A COMPARISON OF HIGH-COST LENDING IN AMERICA’S METROPOLITAN AND RURAL AREAS 12 (2008) (explaining that “African-Americans were more than twice as likely to receive high-cost loans as were . . . whites in almost half of all metro areas” that were analyzed); Robert B. Avery et al., 2006 HMDA Data, 93 FED. RES. BULL. A73, A75 (2007) (finding that “[b]lack and Hispanic whites were more likely . . . to have received higher-priced loans than non-Hispanic whites”).

58. Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, 89 Stat. 1124 (codified as amended at 12 U.S.C. §§ 2801–10 (2006 & Supp. 2010)).

59. Michael Aleo & Pablo Svirsky, *Foreclosure Fallout: The Banking Industry’s Attack on Disparate Impact Race Discrimination Claims Under the Fair Housing Act and the Equal Credit Opportunity Act*, 18 PUB. INT. L.J. 1, 17–18 (2008); *see also* BOCIAN ET AL., *supra* note 57, at 6 (stating that HMDA was enacted in response to widespread practice of redlining).

requirements for regulated institutions. As a result, regulated institutions must now disclose certain information about their mortgage lending practices, including the race of borrowers and pricing information relating to the annual percentage rate (“APR”) of loans.⁶⁰

Recent analyses of HMDA data reveal that “borrowers’ race and ethnicity continue to exert a statistically-significant influence on the cost of their subprime mortgages,” even after “control[ling] for the major factors lenders explicitly use to set prices.”⁶¹ One of the most comprehensive studies on the issue, which based its analysis on HMDA data augmented by a “large, proprietary subprime loan dataset,”⁶² found that borrowers of color were between 6% and 142% more likely to receive a higher-rate loan than were similarly qualified white borrowers.⁶³ Breaking that data down, the disparities actually *increased* for low-risk borrowers of color: low-risk African American borrowers were 65% more likely than similar white borrowers to receive a subprime home-purchase loan and 124% more likely to receive a subprime refinance loan.⁶⁴ Comparatively, high-risk African American borrowers were only six percent more likely than high-risk white borrowers to receive a subprime home-purchase loan and five percent more likely to receive a subprime refinance loan.⁶⁵ Other studies have reported similar results.⁶⁶

60. Aleo & Svirsky, *supra* note 59, at 18; BOCIAN ET AL., *supra* note 57, at 6. Initially, neither race nor information relating to APR were required reporting categories. Race was added in 1989, when Congress amended HMDA to include additional reporting requirements. Aleo & Svirsky, *supra* note 59, at 18. Moreover, in 2004, HMDA was again amended, this time to require that the borrower’s race be reported if the borrower completes the application by phone, mail, or electronically; previously, race only needed to be reported in face-to-face applications. *Id.* at 18–19. The 2004 amendment also required information relating to the APR of certain loans. See White, *supra* note 53, at 682 (“Beginning with HMDA reports for 2004, mortgage lenders had to report the annual percentage rate (APR) charged for each first mortgage with an APR that is more than 3% above the comparable Treasury rate and for each junior mortgage with an APR that is more than 5% above the comparable Treasury rate.” (footnote omitted)); see also BOCIAN ET AL., *supra* note 57, at 6 (noting that impact of this requirement is lenders must “report details on the costs of subprime home loans”).

61. BOCIAN ET AL., *supra* note 57, at 19.

62. *Id.* at 3.

63. *Id.* at 19–20.

64. *Id.* at 11–12 (defining low-risk borrowers as individuals with loan-to-value (“LTV”) ratio of less than 80 and FICO score of at least 680).

65. *Id.* (defining high-risk borrowers as individuals with LTV ratio of at least 90 and FICO score less than 620).

66. For example, a Federal Reserve report found that in 2006, 53.7% of African American borrowers received high-cost home-purchase loans, while only 17.7% of white borrowers did; similarly 52.8% of African American borrowers received high cost refinance loans, compared to 25.7% of white borrowers. Avery et al., *supra* note 57, at A95–A96. Only one-sixth and one-ninth of these disparities, respectively, could be explained by “borrower-related factors.” *Id.* In addition, a joint report by the Department of Housing and Urban Development (HUD) and the Department of Treasury found that fifty-one percent of refinance loans in predominantly African American neighborhoods were subprime, while only nine-percent of such loans in predominantly white neighborhoods were subprime. U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 19, at 22–23. The study noted that the disparity held true when controlling for neighborhood income. *Id.*

C. *The Impact of the Financial Crisis on Black Wealth*

The full impact of the financial crisis promises to be devastating on the economy, on communities and neighborhoods, and on individual homeowners. Thus far, almost eleven trillion dollars in household wealth has been stripped away.⁶⁷ Foreclosures are predicted to run between eight million and thirteen million in number by the time the crisis runs its course.⁶⁸ Children have faced increased homelessness and educational challenges as a result of repossessed or foreclosed upon homes;⁶⁹ “the demand from people who need help is outstripping community resources.”⁷⁰

Since subprime lenders targeted communities of color with toxic financial products, the ill effects of the financial crisis have not been colorblind. In the spring of 2010, the *New York Times* ran an exposé on the effects of the crisis on black homeownership and wealth in Memphis, describing how recent progress to narrow the black/white wealth gap has reversed.⁷¹ For example, during the real estate boom, the racial homeownership divide decreased: between 1993 and 2005, black homeownership increased by 11.9% (from 43.0% to 48.1% of the black population) while white homeownership increased by 3.3% (from 70.4% to 72.7% of the white population).⁷² In 2009, the black homeownership fell to 46.0% percent;⁷³ the white homeownership rate, however, remained unchanged at 74%.⁷⁴ By “wiping out whatever wealth blacks have accumulated,” the subprime crisis “assures racial economic inequality for the next generation,”⁷⁵ with some predicting that it will result in “the greatest loss of wealth for people of color in modern US history.”⁷⁶ The wealth that will be drained from the Latino and African American communities as a result is estimated to be as high as \$371 billion,⁷⁷ leading some civil rights activists to identify the impact of the subprime crisis as “the civil rights issue of this era.”⁷⁸

To be clear, however, although minority borrowers were targeted for subprime loans at disproportionate rates, they did not receive the majority of these loans,⁷⁹ nor

67. FCIC REPORT, *supra* note 1, at xv.

68. *Id.* at 402.

69. *Id.* at 409.

70. *Id.*

71. Powell, *supra* note 41.

72. GOLDSTEIN, *supra* note 30, at 2.

73. Schwemm & Taren, *supra* note 25, at 381.

74. PAUL TAYLOR, ET AL., PEW RES. CTR., WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS 4 (2011), available at http://pewsocialtrends.org/files/2011/07/SDF-Wealth-Report_7-26-11_FINAL.pdf.

75. Powell, *supra* note 41 (quoting Thomas M. Shapiro, Director of the Institute on Assets and Social Policy at Brandeis University) (internal quotation marks omitted).

76. RIVERA ET AL., *supra* note 6, at vii.

77. DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, FORECLOSURES BY RACE AND ETHNICITY: THE DEMOGRAPHICS OF A CRISIS 3 (2010).

78. *Field Briefing on Home Foreclosures in Memphis: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. of the Judiciary*, 111th Cong. 3 (2010) (testimony of Webb A. Brewer).

79. For example, HMDA data from 2006 indicates that approximately seventeen percent of white borrowers received subprime loans as compared to fifty-four percent of African Americans and forty-seven

have they been more prone to foreclosure than white homeowners.⁸⁰ In other words, while minority communities have been hit hard by the financial crisis, minority borrowers are emphatically *not* “to blame” for the foreclosure crisis, and arguments that suggest otherwise distort the data. One popular conservative argument, for example, has been that the Community Reinvestment Act (CRA),⁸¹ passed in 1977 to address redlining, was a significant contributor to the financial crisis because it forced banks to make bad loans.⁸² This theory, however, has been disproved,⁸³ with the vast majority of subprime loans having no connection to the CRA.⁸⁴

III. THE INITIAL FORMATION OF THE REVERSE REDLINING TEST

A. Hargraves Analytical Model

The predatory lending practices employed by some banks and mortgage companies has resulted in a wave of litigation, most of which has focused upon violations of the Truth in Lending Act (TILA),⁸⁵ the Home Ownership and Equity Protection Act (HOEPA),⁸⁶ and other consumer protection statutes.⁸⁷ As the impact of predatory lending on the African American community became increasingly apparent, some civil rights advocates recognized that such practices may have legal implications from a fair housing perspective.

In order to address subprime lending through the Fair Housing Act (FHA), some civil rights advocates found it necessary to develop a new analytical model in order to deal with the counter-instinctual nature of such claims. As noted above, African Americans had traditionally been subject to lending discrimination in the form of redlining and, in such cases, the prospective borrower was *denied* a loan.⁸⁸ Because, analytically, such claims mirror claims of discriminatory denials in the employment context, the proof structure adopted by courts in redlining cases largely traced the

percent of Latino borrowers. NAT'L COMM'N ON FAIR HOUS. AND EQUAL OPPORTUNITY, *THE FUTURE OF FAIR HOUSING* (2008).

80. See ELLEN SCHLOEMER ET AL., *CTR. FOR RESPONSIBLE LENDING, LOSING GROUND: FORECLOSURES IN THE SUBPRIME MARKET AND THEIR EFFECT ON HOMEOWNERS* 23 (2006) (indicating same projected foreclosure rate for whites, Latinos, and African Americans).

81. Pub. L. No. 95-128, 91 Stat. 1147 (codified as amended at 12 U.S.C. §§ 2901–2908 (2006)).

82. FCIC REPORT, *supra* note 1, at 72.

83. See *id.* at xxvii (“[T]he CRA was not a significant factor in subprime lending or the crisis.”).

84. See *id.* (“Many subprime lenders were not subject to the CRA. Research indicates only 6% of high-cost loans—a proxy for subprime loans—had any connection to the law.”); see also CHRISTIAN GONZÁLEZ-RIVERA, GREENLINING INST., *PEOPLE OF COLOR HARDEST HIT BY THE FORECLOSURE CRISIS* 2–3 (2009), available at <http://www.greenlining.org/resources/pdfs/foreclosuresandpocbrief.pdf> (stating that only twenty five percent of subprime mortgages were from CRA-regulated lenders).

85. 15 U.S.C. §§ 1601–1667 (2006).

86. 15 U.S.C. § 1639 (2006).

87. In addition to federal claims, plaintiffs have brought claims under state statutes as well. See generally Christopher L. Peterson, *Predatory Structured Finance*, 28 *CARDOZO L. REV.* 2185, 2225–32 (2007).

88. See *supra* notes 9–10, 45–47, and accompanying text for a discussion of redlining.

McDonnell Douglas burden-shifting formula.⁸⁹ In the context of predatory lending directed at minorities, the basic argument is flipped; it is not that the borrower was denied the loan, but rather that the borrower *received* the loan on “grossly unfavorable terms.”⁹⁰ In other words, the borrower was subject to reverse redlining.

Reverse redlining was established as a viable cause of action under the FHA in *Hargraves v. Capital City Mortgage Corp.*⁹¹ In *Hargraves*, the plaintiffs—six individuals, the Greater Little Ark Baptist Church, and the Fair Housing Council of Greater Washington—alleged that the defendants, Capital City Mortgage along with its sole stockholder and president, Thomas Nash, had engaged in a pattern or practice of predatory lending that targeted African American communities in the Washington, D.C. metropolitan area.⁹² Among other claims,⁹³ the plaintiffs alleged that the targeting of African American borrowers for loans that were designed to fail constituted reverse redlining, in violation of the FHA.⁹⁴

As support for their reverse redlining claim, the plaintiffs presented evidence showing, on the one hand, the segregated nature of the Washington, D.C. area,⁹⁵ and, on the other, the percentage of the defendants’ loans that were made within majority-black census blocks.⁹⁶ Furthermore, the plaintiffs argued that not only did most of the defendants’ lending take place in neighborhoods with high concentrations of African American residents, but that defendants intentionally targeted their advertising and

89. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (setting forth burden-shifting scheme for proving illegal discrimination under Title VII). Applying this framework to redlining cases, courts have required a plaintiff to show that (1) he or she is a member of a protected class, (2) applied for and was rejected for a loan, (3) and the lender continued to make loans to similarly situated borrowers. See *Thomas v. First Fed. Sav. Bank of Ind.*, 653 F. Supp. 1330, 1338 (N.D. Ind. 1987) (adopting *McDonnell Douglas* framework for claims of discriminatory loan denials).

90. This phrase originates from *Matthews v. New Century Mortgage Corp.*, 185 F. Supp. 2d 874, 886 (S.D. Ohio 2002).

91. 140 F. Supp. 2d 7, 20 (D.D.C. 2000). Just prior to *Hargraves*, the United States District Court for the Northern District of Illinois recognized that the FHA prohibited the sorts of practices subsumed within the concept of reverse redlining. *Honorable v. Easy Life Real Estate Sys.*, 100 F. Supp. 2d 885, 892 (N.D. Ill. 2000).

92. *Id.*

93. In addition to their FHA claims, the plaintiffs brought claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), the Equal Credit Opportunity Act (ECOA), and 42 U.S.C. §§ 1981 and 1982 (2006). *Id.* They also alleged various state law claims: unfair and deceptive lender practices, fraud, and breach of contract resulting from ongoing illegal and discriminatory activity. *Id.*

94. *Hargraves*, 140 F. Supp. 2d at 15; see also Brief of the United States as Amicus Curiae in Support of Plaintiffs’ Opposition to Defendants’ Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment, *Hargraves*, 140 F. Supp. 2d 7 (D.D.C. 2000) (No. 98-1021), 1999 WL 34985229 (“The Defendants are engaged in a predatory lending scheme targeted specifically at African American neighborhoods and designed to facilitate default or foreclosure rather than repayment of the loans. Defendants target African American communities because they believe them to be unsophisticated or financially desperate and therefore more susceptible to their fraudulent lending practices.”).

95. See First Amended Complaint para. 92, *Hargraves*, 140 F. Supp. 2d 7 (No. 98-1021), 1998 WL 35288126 (noting that “[m]ost (approximately 74.2 percent)” of African Americans who resided in D.C. metropolitan area lived either in the District of Columbia (65.3% African American) or in Prince George’s County (50.2% African American)). Moreover, approximately 90.3% of African Americans in the District and 76.7% in Prince George’s County resided in majority African American census tracts. *Id.* at para. 93.

96. *Id.* paras. 97–98.

marketing at those communities.⁹⁷ Finally, the plaintiffs noted the impact of targeting minority communities for subprime loans: “Approximately one out of every five loans made by Capital City on properties in the District of Columbia resulted in foreclosure sales.”⁹⁸

Rejecting the defendants’ motion for summary judgment the court set forth a two-pronged analytical model for establishing a prima facie case of reverse redlining under the FHA.⁹⁹ Under the model, a plaintiff must first establish that “the defendants’ lending practices and loan terms were ‘unfair’ and ‘predatory.’”¹⁰⁰ A plaintiff must then establish that the “defendants either intentionally targeted on the basis of race, or that there is a disparate impact on the basis of race.”¹⁰¹ If the plaintiff is able to establish a prima facie case, a defendant may avoid liability by demonstrating that its lending practices are legitimate.¹⁰²

In assessing the first prong of the test, the court identified a number of actions alleged by the plaintiffs which it defined as “predatory” lending practices, including:

[E]xorbitant interest rates, lending based on the value of the asset securing the loan rather than a borrower’s ability to repay (“equity-stripping,” in other words issuing a loan “designed to fail” and profiting by acquiring the property through default, rather than by receiving loan payments), repeated foreclosures, and loan servicing procedures in which excessive fees are charged.¹⁰³

The court also held that whether practices alleged are “unfair” and “predatory” is a question for the jury.¹⁰⁴ As one commentator noted, this was a “pragmatic” step for the court to take and will likely result in the determination being made based on a “reasonableness standard.”¹⁰⁵

Next, the court turned to the second prong: whether the “defendants either intentionally targeted on the basis of race, or [whether] there is a disparate impact on the basis of race.”¹⁰⁶ The court began by addressing the plaintiffs’ allegation that the defendants’ predatory lending practices had a disparate impact upon African Americans.¹⁰⁷ It first noted that the plaintiffs had produced documentation establishing that the District of Columbia was historically segregated in its housing market.¹⁰⁸ In conjunction with such segregation, the court accepted statistical evidence which tended to show that the defendant company “made a greater percentage of its loans in majority black census tracts than other subprime lenders, and made an even more

97. *Id.* para. 3.

98. *Id.* para. 102.

99. *Hargraves*, 140 F. Supp. 2d at 20.

100. *Id.*

101. *Id.* (citing *Jackson v. Okaloosa Cty.*, 21 F.3d 1531, 1543 (11th Cir. 1994)).

102. *Id.* at 21.

103. *Id.* at 20–21.

104. *Id.* at 21.

105. Benjamin Howell, Comment, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CAL. L. REV. 101, 143 (2006).

106. *Hargraves*, 140 F. Supp. 2d at 20.

107. *Id.* at 21.

108. *Id.*

disproportionately large number of loans in neighborhoods that are over 90 percent black.”¹⁰⁹ The court found this sufficient to establish a prima facie showing of disparate impact.¹¹⁰

While the court recognized that evidence of intent was not required to establish a disparate impact claim, it noted that it may be relevant in determining whether unlawful discrimination occurred.¹¹¹ The court thus examined the defendants’ marketing efforts in order to determine whether they intentionally targeted African Americans.¹¹² The court noted that the defendants had solicited brokers who worked in predominantly African American communities, distributed flyers in African American communities, located their offices in African American communities, and adorned their offices with pictures of former Mayor Marion Barry and Reverend Jesse Jackson.¹¹³ Based upon such evidence, the court concluded that the evidence “amply” raised a genuine issue as to whether the defendants acted on the basis of race. Accordingly, the court rejected the defendants’ motion for summary judgment.¹¹⁴

In several subsequent cases, courts have elaborated on the type of evidence necessary to establish a cause of action based on reverse redlining under the *Hargraves* standard. The first such case was *Associates Home Equity Services, Inc. v. Troup*.¹¹⁵ The *Troup* case arose from the following facts: Beatrice Troup and her son, Curtis Troup, African Americans, executed a contract for exterior repairs to their home, and later executed an amended contract for additional repairs in the amount of \$49,990 with General Builders Supply, Inc.¹¹⁶ Subsequently, an agent of General Builders Supply arranged for a mortgage loan in the amount of \$46,500, with a balloon payment¹¹⁷ and an interest rate of 11.65%, with East Coast Mortgage Corporation (“ECM”) to finance the Troups’ home repairs.¹¹⁸ ECM then assigned the mortgage loan and note to Associates Home Equity Services, Inc. (“Associates”).¹¹⁹ Approximately two years later, Associates commenced a foreclosure action against the Troups after they allegedly defaulted on the loan.¹²⁰ The Troups filed a counterclaim, alleging that Associates and ECM had violated the FHA by engaging in reverse redlining.¹²¹ The

109. *Id.*

110. *Id.* The court rejected the defendants’ argument that the plaintiffs’ disparate impact claim failed because its statistical evidence did not examine the entire area in which the defendants made mortgage loans. As the court noted, “[w]hile an analysis based on the entire loan area would have been appropriate, the study plaintiffs submit is sufficient to survive defendants’ motion for summary judgment.” *Id.* at 21 n.9.

111. *Id.* at 21 (“Although evidence of intent is not necessary to show discriminatory impact, it can support such a finding.”).

112. *Id.* at 21–22.

113. *Id.*

114. *Id.* at 22.

115. 778 A.2d 529 (N.J. Super. Ct. App. Div. 2001).

116. *Troup*, 778 A.2d at 534–35.

117. “A balloon loan is one that is not repayable in regular monthly installments, but rather requires repayment of the remaining balance in one large lump sum.” SCHLOEMER ET AL., *supra* note 80, at 34 n.44

118. *Troup*, 778 A.2d at 535.

119. *Id.*

120. *Id.*

121. *Id.* at 537.

trial court dismissed the Troups' claims and entered a judgment of foreclosure against them;¹²² the Troups appealed.¹²³

As an initial matter, the appellate court accepted certification of an expert report by the plaintiffs for the purpose of providing an overview of predatory lending practices in New Jersey.¹²⁴ The report explained that, based on HMDA data, a "dual housing finance market exists in New Jersey for the refinance and home repair loans market."¹²⁵ Further, it noted that "urban areas of heavy minority concentration are being disproportionately serviced by subprime lenders."¹²⁶ The report concluded that, "[i]n the home improvement market, African Americans are almost four times as likely to be slotted into subprime/lenders as whites, even after accounting for income, loan amount, and differences between deposit-taking banks and nondepository independent mortgage companies."¹²⁷

After discussing the general nature of predatory lending and its racial dimension, the court held that reverse redlining may violate the FHA and adopted *Hargaves*'s two-pronged standard.¹²⁸ The court then began its analysis by reviewing the mortgage loan at issue to determine whether its terms were "unfair" and "predatory."¹²⁹ It noted the conclusion of the Troups' expert witness that, based on their credit history and debt-to-income ratio, an 11.65% interest rate was not justified from an objective viewpoint.¹³⁰ In addition, the court noted that Associates paid ECM a yield-spread premium¹³¹ in the amount of \$2,325 for securing the loan that had the effect of increasing the loan's interest rate.¹³²

With respect to the second prong of the *Hargaves* test (i.e., racial targeting or impact), the court noted that the Troups were African Americans and resided in a predominantly African American neighborhood.¹³³ This evidence, in conjunction with

122. *Id.* at 534.

123. *Id.*

124. *Id.* at 536 n.2.

125. *Id.* (internal quotation marks omitted).

126. *Id.* (internal quotation marks omitted).

127. *Id.* (alteration in original) (internal quotation marks omitted).

128. *Id.*

129. *Id.* at 537–38.

130. *Id.* at 538.

131. *Id.*; see also *BOCIAN ET AL.*, *supra* note 57, at 20 ("Frequently, mortgage originators adjust the interest rate on home loans without regard to any objective risk-based criteria. When these adjustments are used to increase the interest rate of a loan, they increase the value of the mortgage (also called the yield) to the lender. The difference between the new higher rate and the lowest rate for which the borrower qualified is called a 'yield-spread.' When a loan with an increased rate is sold to an investor or delivered by a broker to a lender, the investor or lender will pay a premium price for that loan. The difference between the price paid for this loan with an inflated interest rate and the price that would have been paid for the loan had the borrower received the lowest rate for which he or she qualified is called a yield-spread premium, or YSP for short.").

132. *Id.* Further, the court deemed it significant that Associates provided ECM with a "pre-approval determination" two months prior to the Troups executing the loan and that ECM had assigned the loan to Associates nine days after the loan was closed. *Troup*, 778 A.2d at 538. Based upon such evidence, the court found that an inference could be drawn that Associates participated in increasing the interest rate and dictated the terms of the loan. *Id.*

133. *Id.*

the plaintiffs' expert report on the concentration of predatory lending in New Jersey's minority neighborhoods, appeared sufficient to satisfy *Hargraves*'s second prong.¹³⁴ Based upon such evidence, the court concluded that, at a minimum, the facts supported the Troups' claim "that Associates participated in the targeting of inner-city borrowers who lack access to traditional lending institutions, charged them a discriminatory interest rate, and imposed unreasonable terms."¹³⁵ As a result, the court concluded that the Troups' reverse redlining claim was sufficient to survive summary judgment.¹³⁶

Similarly, in *McGlawn v. Pennsylvania Human Relations Commission*,¹³⁷ the Commonwealth Court of Pennsylvania upheld a determination by the Pennsylvania Human Relations Commission that McGlawn & McGlawn, Inc., a mortgage broker company that provided subprime residential mortgage loans, and Reginald McGlawn, its mortgage loan specialist, engaged in reverse redlining in violation of Pennsylvania's fair housing law, which is interpreted in accordance with the FHA.¹³⁸ In affirming the Commission's decision,¹³⁹ the court adopted the *Hargraves* test in full and provided a comprehensive analysis of the means of proving reverse redlining.

After reviewing the definition of predatory lending as established by the courts and the Commission's expert witnesses, the court examined the loan terms and the circumstances surrounding the origination of the loans to the Complainants—Lucretia Taylor and Lynn Poindexter—to determine whether substantial evidence existed to support the Commission's determination that the loans were predatory.¹⁴⁰ The court noted that Taylor's interest rate of 13.09% was substantially above the three-point spread between subprime and prime loans.¹⁴¹ The court also commented that she was charged a broker fee, a yield spread premium, and her total settlement charges

134. See *id.* at 536–38 & n.2 (discussing expert report on predatory lending practices in New Jersey along with evidence of intentional targeting by Associates and ECM).

135. *Id.* at 538.

136. *Id.*

137. 891 A.2d 757 (Pa. Commw. Ct. 2006).

138. *McGlawn*, 891 A.2d at 762–63. *McGlawn* was brought under the Pennsylvania Human Relations Act (PHRA), and not the FHA. *Id.* at 762. The PHRA is analogous to, and interpreted in line with, the FHA. See *Brillhart v. Sharp*, No. 4:CV-07-1121, 2008 WL 2857713, at *8 n.5 (M.D. Pa. July 21, 2008) ("[T]he PHRA is to be interpreted as identical to federal anti-discrimination laws except where there is something specifically different in its language requiring that it be treated differently." (quoting *Fasold v. Justice*, 409 F.3d 178, 184 n.8 (3d Cir. 2005))). The fact that *McGlawn* was brought under the PHRA, therefore, does not fundamentally affect *McGlawn*'s relevance to a discussion of reverse redlining under the FHA. As the *McGlawn* court observed, "[t]he FHA and [PHRA] share the objective to prohibit discrimination" and have "identical language . . . prohibiting discrimination in real estate-related transactions." *McGlawn*, 891 A.2d at 766–67.

139. *McGlawn*, 891 A.2d at 765. In 2001 and 2002, complaints by two separate individuals were brought against McGlawn & McGlawn before the Pennsylvania Human Relations Commission, alleging that respondents had discriminated against the complainants in residential mortgage transactions because of the complainants' race and the racial composition of their neighborhoods. *Id.* at 763. After an investigation that included an examination of the respondents' loan records, the Commission found probable cause existed that discrimination had occurred, and after a public hearing, concluded that the respondents had engaged in predatory brokering activities, resulting in unfair and predatory loans in violation of the PHRA. *Id.* at 763–64.

140. *Id.* at 769–770.

141. *Id.* at 771.

accounted for twenty percent of the loan.¹⁴² Furthermore, she was unable to review the loan documents before signing them, was incorrectly told that she could not cancel the loan, and was charged an additional \$1,200 undisclosed broker fee after signing the documents.¹⁴³ Likewise, Ms. Poindexter's loan contained several predatory terms, including: a balloon payment, a pre-payment penalty, a high interest rate, and a broker fee equaling ten percent of her loan.¹⁴⁴ She was also not afforded the opportunity to review the loan documents prior to signing them and, unbeknownst to her, McGlawn created false employment documents in order to ensure the loan was approved by the lender.¹⁴⁵ After reviewing such factual determinations, the court concluded that substantial evidence existed that McGlawn's actions constituted predatory brokering activities resulting in predatory and unfair loans.¹⁴⁶

The court then considered whether McGlawn had intentionally targeted African American borrowers. It began by noting that targeting advertising towards African American communities is sufficient to show intentional targeting on the basis of race.¹⁴⁷ The court explained that McGlawn had engaged in extensive advertising in various forms of media outlets, including the internet, radio, television, newspapers, and the Yellow Pages.¹⁴⁸ Some of the media outlets were specifically geared to an African American clientele, and plaintiffs testified that their decision to contact McGlawn was "influenced by the fact that it was an African American company."¹⁴⁹

After finding sufficient evidence of intentional targeting, the court discussed the plaintiffs' statistical evidence to determine if the defendants' lending activities had a disparate impact.¹⁵⁰ Specifically, the court focused on the racial composition of McGlawn's loan applicants.¹⁵¹ Of the 100 loan applications analyzed, 66 provided the race of the applicant, and, of these, 65 were African American.¹⁵² Additionally, nine of the eleven properties at issue were located in areas that were at least ninety percent African American, while the remaining two properties were located in areas that were fifty to seventy-five percent African American.¹⁵³ The *McGlawn* court concluded that such evidence was sufficient to support a finding of intentional discrimination *and* disparate impact.¹⁵⁴

The Eleventh Circuit has also endorsed the *Hargraves* standard, albeit in a non-precedential opinion.¹⁵⁵ In *Steed v. EverHome Mortgage Co.*,¹⁵⁶ the plaintiff claimed

142. *Id.* at 770-71.

143. *Id.*

144. *Id.* at 771.

145. *Id.*

146. *Id.*

147. *Id.* at 772.

148. *Id.*

149. *Id.*

150. *Id.* at 773.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Steed v. Everhome Mortg. Co.*, 308 F. App'x 364, 368 (11th Cir. 2009).

156. 308 F. App'x 364 (11th Cir. 2009).

that EverHome, after purchasing his loan from Ohio Savings Bank, failed to notify him of the sale of his loan, failed to instruct him how to make his payments, charged him late fees, increased his hazard insurance premium, and sought to foreclose upon his home.¹⁵⁷ He further alleged that these predatory or unfair practices violated the FHA under a reverse redlining theory.¹⁵⁸ After noting that no circuit court had yet addressed the elements of a reverse redlining claim, the Eleventh Circuit expressed its agreement with the *Hargraves* standard.¹⁵⁹ Nevertheless, it upheld the lower court's grant of summary judgment for the defendant because regardless of whether the defendant actually engaged in unfair or predatory lending practices, the plaintiff had provided "no evidence of where EverHome advertised or that EverHome made an unusual number of loans in majority black areas or targeted those debtors for foreclosure."¹⁶⁰ In other words, the court's analysis focused on the second prong of the *Hargraves* model, determining that there was no evidence of either intentional targeting or disparate impact.

Taken together, *Hargraves*, *Troup*, *McGlawn*, and *Steed*¹⁶¹ establish several legal principles regarding reverse redlining claims. First, they establish that predatory lending in the form of reverse redlining may violate the FHA, or its state law equivalent. Second, they highlight the evidentiary considerations underlying the two prongs of the *Hargraves* standard. Under the first prong (i.e., whether the loan transaction was "unfair" and "predatory"), the terms and conditions of the loan as well as the circumstances surrounding the origination of the loan are considered. Both of these should be considered as separate factors because predatory lending comes in many forms, sometimes manifesting in the terms of the loans, sometimes in the circumstances surrounding the origination of the loan, and sometimes in both. Since a range of activities may be predatory in nature,¹⁶² the decisions suggest the need for adopting a flexible, rather than rigid, approach to defining predatory lending.

While the decisions provide rather limited guidance on the second prong (i.e., whether there is a connection between the predatory lending and race), three of the decisions point to marketing tactics as an important way of establishing intentional targeting.¹⁶³ With respect to disparate impact, *Hargraves* and *McGlawn* suggest statistical evidence showing that a large percentage of a company's loans were made to African American borrowers living within predominantly African American neighborhoods may be sufficient.¹⁶⁴

157. *Steed*, 308 F. App'x at 367.

158. *Id.* at 368.

159. *Id.* at 368–69.

160. *Id.* at 369.

161. *See also* *Bankers Trust Co. v. Brown*, 107 P.3d 609, 612–13 (Okla. Civ. App. 2004) (considering reverse redlining as counterclaim in foreclosure actions and adopting *Hargraves* test).

162. *See, e.g.,* *Assocs. Home Equity Servs., Inc. v. Troup*, 778 A.2d 529, 537 (N.J. Super. Ct. App. Div. 2001); *McGlawn v. Pa. Human Relations Comm'n*, 891 A.2d 757, 769–70 (Pa. Commw. Ct. 2006)

163. *Steed*, 308 F. App'x at 369; *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 21–22 (D.D.C. 2000); *McGlawn*, 891 A.2d at 772.

164. *Hargraves*, 140 F. Supp. 2d at 21 (finding prima facie case of disparate impact established based on evidence that lender "made a greater percentage of its loans in majority black census tracts than other subprime lenders, and made an even more disproportionately large number of loans in neighborhoods that are over 90

B. *Critique of the Hargraves Analytical Model*

Despite the fact that *Hargraves* and its progeny established the parameters of a reverse redlining claim, the model is problematic in several respects. As an initial matter, the analytical and evidentiary requirements are conceptually unclear. The *Hargraves* standard essentially collapses two distinct analytical models for establishing unlawful discrimination (i.e., intentional targeting and disparate impact), into one compound standard.¹⁶⁵ The *Hargraves* court, for example, concluded that the statistical and targeting evidence “in combination, amply establishes a genuine dispute of fact as to whether the defendants acted on the basis of race.”¹⁶⁶ The *Hargraves* court also noted that “[a]lthough evidence of intent is not necessary to show discriminatory impact, it can support such a finding.”¹⁶⁷ Similarly, courts adopting the *Hargraves* test have also considered evidence of disparate impact alongside evidence of intentional targeting when assessing whether the defendant engaged in reverse redlining.¹⁶⁸ Such a merger of evidentiary models—based on entirely divergent conceptions of discrimination—raises the question of whether a reverse redlining claim is more appropriately maintained on a single theory basis.

In considering this question, it is worth noting that *Hargraves* approvingly cited *Jackson v. Okaloosa County*¹⁶⁹ for the proposition that a FHA violation may be established by evidence of direct discrimination *or* discriminatory effects.¹⁷⁰ *Hargraves*'s reliance on *Okaloosa* thus suggests that it contemplated two distinct analytical models for analyzing cases of reverse redlining as opposed to a merged conceptual framework. As a result, it is necessary to examine each analytical model to determine its applicability to a reverse redlining cause of action.

C. *Intentional Targeting and Reverse Redlining*

Intentional discrimination may be established “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.”¹⁷¹ Direct evidence of discrimination has been defined as “evidence which, if believed, proves the existence of the fact in issue without inference or presumption.”¹⁷² In other words,

percent black”); *McGlawn*, 891 A.2d at 773 (finding plaintiffs' statistical evidence sufficient to establish disparate impact where sixty-five of sixty-six loan applications to defendant broker were from African Americans and where all properties at issue in case were in predominantly African American neighborhoods).

165. Under disparate treatment, proof of discriminatory intent is necessary, whereas under disparate impact no such showing is required. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (discussing differing characteristics of “disparate treatment” and “disparate impact” theories).

166. *Hargraves*, 140 F. Supp. 2d at 22 (emphasis added).

167. *Id.* at 21.

168. See *McGlawn*, 891 A.2d at 768–73 (assessing whether defendants established legitimate, nondiscriminatory reason to rebut prima facie case of both intentional targeting and disparate impact).

169. 21 F.3d 1531 (11th Cir. 1994).

170. *Hargraves*, 140 F. Supp. 2d at 20.

171. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

172. *Jones v. Bessemer Caraway Med. Ctr.*, 151 F.3d 1321, 1323 n.11 (11th Cir. 1998).

direct evidence provides a “smoking gun” of discriminatory intent,¹⁷³ whereas the indirect approach relies upon circumstantial evidence as a basis for drawing an inference of intent. Courts have defined circumstantial evidence under the direct method as follows:

1) suspicious timing, ambiguous statements, behavior toward or comments directed at [others] in the protected group, and other evidence from which an inference of discriminatory intent might be drawn; [or] 2) evidence that [others] similarly situated to the plaintiff other than in the characteristic on which the [defendant] is forbidden to base a difference in treatment (i.e., age, race, sex, etc.) received systematically better treatment.¹⁷⁴

While *Hargraves* and its progeny have not expressly stated whether the *Hargraves* standard relies upon a direct or indirect approach, it appears the courts implicitly recognized it to be premised upon the use of circumstantial evidence to establish intent. Both *Hargraves* and *McGlawn*, for example, relied upon similar types of circumstantial evidence consisting of marketing practices to support the inference that the plaintiffs were intentionally targeted based upon their race.

In *Hargraves*, the court identified a number of the defendants’ practices that suggested intentional targeting.¹⁷⁵ First, the defendants had solicited mortgage brokers who worked primarily in minority neighborhoods.¹⁷⁶ Second, the defendant company marketed itself to the African American community with flyers and advertisements.¹⁷⁷ Third, the defendant company located its office in an African American neighborhood.¹⁷⁸ Finally, the defendants sought to portray an image of trust as evidenced by pictures of the company’s president with prominent African American leaders such as Marion Barry, the former mayor of the District of Columbia, and the Reverend Jesse Jackson.¹⁷⁹

Likewise, in *McGlawn*, the court found it relevant that McGlawn had “engaged in an aggressive marketing plan targeting African Americans and African American neighborhoods in the Philadelphia area.”¹⁸⁰ McGlawn admitted to advertising extensively in print, radio, and television media and that many of the sources in which it chose to advertise were “oriented toward African American audiences and readers.”¹⁸¹ Further, the plaintiffs testified that they contacted McGlawn’s company because of its advertisements and that their decision to do so “was influenced by the fact that it was an African American company.”¹⁸² Part of McGlawn’s advertising strategy was to market itself as one of Philadelphia’s ““first African American owned

173. *E.g.*, *Amadeo v. Zant*, 486 U.S. 214, 226 (1988); *Cavalieri-Conway v. L. Buttermann & Assocs.*, 992 F. Supp. 995, 1003 (N.D. Ill. 1998).

174. *Huff v. UARCO, Inc.*, 122 F.3d 374, 380 (7th Cir. 1997).

175. *Hargraves*, 140 F. Supp. 2d at 21.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *McGlawn v. Pa. Human Relations Comm’n*, 891 A.2d 757, 764 (Pa. Commw. Ct. 2006).

181. *Id.* at 772.

182. *Id.* at 773.

and operated Mortgage and Insurance Financial Services [companies].”¹⁸³ As one commentator explained, “McGlawn emphasized its cultural affinity with the black borrowers it targeted and, at least in this instance, benefited from that affinity.”¹⁸⁴

Further suggesting the applicability of the intentional targeting model, the courts implicitly rejected the necessity of the inferential burden-shifting method espoused by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*.¹⁸⁵ Specifically, in *Hargraves*, the court stated that it was not necessary that the defendants made loans on more favorable terms to similarly situated, non-African American borrowers.¹⁸⁶ Such comparative analysis is often the hallmark of *McDonnell Douglas*’s burden-shifting test. *Hargraves* concluded that such a requirement would enable the perpetuation of injustice “so long as it is visited exclusively on” African American borrowers.¹⁸⁷ The court correctly recognized, therefore, that if a lender is effectively targeting minorities to the exclusion of non-minorities, a comparative analysis may simply not be possible, thereby necessitating the development of an intentional targeting model for reverse redlining claims.

As both *Hargraves* and *McGlawn* demonstrate, evidence of aggressive marketing techniques is sufficient to allow the inference that African Americans were being intentionally targeted by the defendants. Such affirmative marketing programs standing alone, however, do not violate the FHA.¹⁸⁸ Rather, evidence of intentional targeting of a protected class must be combined with evidence that the marketed product is harmful (i.e., a predatory or unfair loan) in order to demonstrate unlawful discrimination.

D. *The Use of Statistical Evidence Under the Hargraves Model*

Hargraves and its progeny also articulated the availability of disparate impact as a potential model for establishing reverse redlining.¹⁸⁹ However, while identifying the analysis as one of disparate impact, the cases seem to rely on a systemic disparate treatment model. This section addresses the distinction between systemic disparate treatment and disparate impact with respect to the use of statistical evidence.

183. *Id.* at 772.

184. Carol Necole Brown, *Intent And Empirics: Race to the Subprime*, 93 MARQ. L. REV. 907, 942 (2010); see also Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to Target Communities of Color*, 17 GEO. J. POVERTY L. & POL’Y 165, 200–01 (2010) (noting McGlawn’s “extensive advertising . . . oriented towards African American audiences” and plaintiffs’ testimony that “they were drawn to [McGlawn’s] business precisely because it was an African American-owned company”).

185. 411 U.S. 792 (1973).

186. *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000).

187. *Id.* (quoting *Contract Buyers League v. F&F Inv.*, 300 F. Supp. 210, 216 (N.D. Ill. 1969) (internal quotation mark omitted)).

188. See *South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors*, 935 F.2d 868, 882 (7th Cir. 1991) (explaining FHA requirement that alleged illegal actions “must lead to discriminatory effects on the availability of housing”) (emphasis omitted). HUD has also issued regulations interpreting the FHA as allowing affirmative marketing plans “designed to make available information which broadens housing choices.” Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3235 (Jan. 23, 1989).

189. E.g., *Hargraves*, 140 F. Supp. 2d at 20; *McGlawn v. Pa. Human Relations Comm’n*, 891 A.2d 757, 765 (Pa. Commw. Ct. 2006).

The United States Supreme Court has explained that the disparate impact theory applies to “practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.”¹⁹⁰ Under the disparate impact model, “[p]roof of discriminatory motive . . . is not required.”¹⁹¹ Instead, a plaintiff must demonstrate that a specific, identified practice or selection criteria disproportionately harms a protected class.¹⁹² If a plaintiff can make this showing, the defendant has the burden of showing that the policy or practice is job-related for the position in question and consistent with business necessity.¹⁹³ If the defendant is able to demonstrate a business necessity justification, the plaintiff may still prevail, but only if she can demonstrate that the defendant can meet its legitimate business needs by another reasonable manner that would have a lesser impact on the protected class.¹⁹⁴

While *Hargraves* and its progeny mention disparate impact as a possible analytical model in a reverse redlining case, they do not discuss the need for identifying a specific policy or practice that produces the disparate impact. Indeed, *Hargraves* accepted a prima facie case of disparate impact based only on a statistical analysis of the defendants’ lending patterns.¹⁹⁵ Likewise, in *McGlawn*, the court relied upon a statistical analysis that demonstrated that the defendant company’s customers were nearly exclusively African American and the properties at issue were located in African American neighborhoods to support its holding of disparate impact.¹⁹⁶

In rendering its decision on the issue of disparate impact based primarily upon statistics, the court in *Hargraves* cited *Hazelwood School District v. United States*,¹⁹⁷ which stands for the proposition that gross statistical disparities may, in a proper case, constitute prima facie proof of a pattern or practice of unlawful discrimination.¹⁹⁸ Such an analysis, however, is distinct from the disparate impact model. *Hargraves* and its progeny appear, therefore, to conflate disparate impact with the statistical analysis associated with systemic disparate treatment claims under *Hazelwood* and *International Brotherhood of Teamsters v. United States*.¹⁹⁹ As a consequence, it is necessary to review the systemic disparate treatment analysis to determine its applicability to reverse redlining under the FHA.

The use of statistics to prove discrimination in a disparate treatment analysis has its origins in the trio of Title VII cases, the “Teamsters Trilogy,” decided by the United

190. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

191. *Id.*

192. See 42 U.S.C. § 2000e-2(k) (2006) (explaining burdens of proof for each party to prove disparate impact in employment context); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (“[T]he plaintiff is . . . responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.”).

193. *Watson*, 487 U.S. at 998; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

194. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

195. *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 21 (D.D.C. 2000).

196. *McGlawn v. Pa. Human Relations Comm’n*, 891 A.2d 757, 773 (Pa. Commw. Ct. 2006).

197. 433 U.S. 299 (1977).

198. *Hargraves*, 140 F. Supp. 2d at 21 (citing *Hazelwood*, 433 U.S. at 307–08).

199. 431 U.S. 324 (1977).

States Supreme Court in 1977.²⁰⁰ In *Teamsters*, the United States government brought claims of discrimination against a motor freight company, and Teamsters, a union that represented a large number of the company's employees.²⁰¹ The government alleged that employees who were black or had Spanish-surnames were "given lower paying, less desirable jobs as servicemen or local city drivers, and were thereafter discriminated against with respect to promotions and transfers."²⁰²

In holding that the government had met its burden of showing discriminatory treatment, the Court explained that "pattern or practice" cases require proof of "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts."²⁰³ A plaintiff in a pattern or practice case must "establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice."²⁰⁴ Most importantly, *Teamsters* established that statistical proof alone can establish a prima facie case of discriminatory disparate treatment.

The Court emphasized the importance of statistical analysis in proving discrimination, noting that, "[w]e have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination."²⁰⁵ This is so because,

absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of long-lasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though . . . Title VII imposes no requirement that a work force mirror the general population.²⁰⁶

In a footnote, the Court further elaborated on the idea that statistical proof alone can be sufficient to raise an inference of discrimination. According to the Court, although "[p]roof of discriminatory motive is critical . . . it can in some situations be inferred from the mere fact of differences in treatment."²⁰⁷

In *Teamsters*, much of the government's proof of discrimination lay in statistical evidence of racial disparities in the employer's workforce. Although the defendant company employed 6,472 employees in total, only five percent, or 314, of those were black and only four percent, or 257, had Spanish-surnames.²⁰⁸ With respect to the specific position at issue—line drivers—only 0.4%, or 8, of the 1,828 line drivers were

200. *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Hazelwood*, 433 U.S. at 299; *Teamsters*, 431 U.S. at 324.

201. *Teamsters*, 431 U.S. at 328–29.

202. *Id.* at 329. The government also alleged that the company's seniority system operated in a discriminatory fashion. *Id.* at 330.

203. *Id.* at 336.

204. *Id.*

205. *Id.* at 339.

206. *Id.* at 340 n.20.

207. *Id.* at 335 n.15.

208. *Id.* at 337.

black; all 8 of whom were hired after litigation commenced.²⁰⁹ Only 5, or 0.3%, of the 1,828 had Spanish-surnames.²¹⁰ The government also provided evidence that the employer's lower-paying job categories were predominantly held by minorities.²¹¹ Whereas seventy-eight percent of Spanish-surnamed employees and eighty-three percent of black employees held city operations or serviceman jobs (which were among the company's lowest paid jobs), only thirty-nine percent of nonminority employees had jobs in these categories.²¹² Commenting on the extreme disparities that these statistics revealed, the Court introduced the concept of the "inexorable zero." As the Court noted: "[F]ine tuning of the statistics could not have obscured the glaring absence of minority line drivers . . . [T]he company's inability to rebut the inference of discrimination came not from a misuse of statistics [by plaintiffs], but from 'the inexorable zero.'"²¹³

The government, however, did not just rely on statistical evidence. Instead, it bolstered the statistics by presenting evidence of more than forty specific incidences of unlawful discrimination.²¹⁴ Despite the Court's recognition that statistics alone, in the appropriate case, could establish a prima facie case, the Court also recognized the strength of employees' personal experiences, as such anecdotal evidence helps bring "cold numbers convincingly to life."²¹⁵

Hazelwood, decided less than a month after *Teamsters*, expanded on and honed the sort of statistical analysis recognized in *Teamsters*. As with *Teamsters*, *Hazelwood* was a pattern or practice case brought by the United States; it involved allegations that the Hazelwood School District engaged in employment discrimination in violation of Title VII.²¹⁶ The government put forward evidence of both statistical disparities²¹⁷ in the district's hiring as well as alleged specific instances of discrimination against fifty-five African American applicants who were rejected for positions with the district.²¹⁸

209. *Id.*

210. *Id.*

211. *Id.* at 337–38.

212. *Id.* at 338.

213. *Id.* at 342 n.23; see also Note, *The "Inexorable Zero,"* 117 HARV. L. REV. 1215, 1216 (2004) (defining "core understanding" of inexorable zero concept as "based on a plaintiff's showing that an employer has hired zero or a negligible number of women or minorities, and assuming that at least some women or minorities were available for the job in question, a court may draw a prima facie inference of discriminatory motive against the employer").

214. *Id.* For example:

Numerous qualified black and Spanish-surnamed American applicants who sought line driving jobs at the company over the years, either had their requests ignored, were given false or misleading information about requirements, opportunities, and application procedures, or were not considered and hired on the same basis that whites were considered and hired.

Id. (alteration omitted) (internal quotation marks omitted).

215. *Id.* at 339.

216. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 301 (1977).

217. The government compared the percentage of teachers on the district's staff who were black with the percentage of qualified teachers in the St. Louis area who were black. While census figures showed that 5.7% of the qualified teacher population was black, the percentage of black teachers on the district's staff was below two percent. *Id.* at 308.

218. *Id.* at 303.

Unlike *Teamsters*, however, *Hazelwood* was not an “inexorable zero”²¹⁹ case; the Court thus relied more heavily on comparative statistics to determine whether there had been a “gross disparity” in the district’s hiring that was sufficient to establish discrimination.²²⁰

Hazelwood reaffirmed that “in a proper case” statistics alone can “constitute prima facie proof of a pattern or practice of discrimination.”²²¹ Specifically, the Court noted that an inference of discrimination could be drawn in the case if the government could show a “proper comparison . . . between the racial composition of Hazelwood’s teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.”²²² More importantly, the Court recognized standard-deviation analysis as a means for creating an inference of discrimination, adopting the rule that “a fluctuation of more than two or three standard deviations would undercut the hypothesis that decisions were being made randomly with respect to race.”²²³

Although many FHA cases cite the *Teamsters* line of cases, the *Teamsters* method for proving disparate treatment has infrequently been utilized in this context.²²⁴ The majority of FHA cases citing to *Teamsters* rely on its definition of a “pattern or practice” claim of discrimination.²²⁵ Under this approach, pattern or practice claims brought pursuant to § 3614 of the FHA²²⁶ must show that discrimination was “the company’s standard operating procedure” and not “isolated, accidental, or sporadic.”²²⁷

219. *Teamsters*, 431 U.S. at 342 n.23 (internal quotation mark omitted).

220. See *Hazelwood*, 433 U.S. at 307.

221. *Id.* at 307–08.

222. *Id.* at 308.

223. *Id.* at 311 n.17. “Standard deviation measures the typical distance from the mean for a given set of observations.” Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1144 (2008); see also Andrew Lichtenstein, *United We Stand, Disparate We Fall: Putting Individual Victims of Reverse Redlining in Touch with Their Class*, 43 LOY. L.A. L. REV. 1339, 1374 (2010) (discussing use of standard deviation analysis as evidence of disparate impact).

224. See, e.g., *United States v. Balistreri* 981 F.2d 916, 929–30 (7th Cir. 1992) (relying on *Teamsters* standard for finding FHA pattern or practice violations); *United States v. Biswas*, No. 2:09-cv-683, 2010 WL 5093545, at *3 (M.D. Ala. Dec. 8, 2010) (same); *United States v. Habersham Props., Inc.*, 319 F. Supp. 2d 1366, 1372 (N.D. Ga. 2003) (same).

225. See, e.g., *United States v. Di Mucci*, 879 F.2d 1488, 1497 n.11 (7th Cir. 1989) (noting that FHA allows federal government to bring *Teamsters* pattern or practice suit by showing that discrimination was company’s “standard operating procedure” and not “isolated or accidental or sporadic”); *Habersham*, 319 F. Supp. 2d at 1372–73 (same).

226. 42 U.S.C. § 3614(a) (2006). This section of the FHA empowers the Attorney General to bring pattern or practice cases: “Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.” *Id.*

227. *Habersham*, 319 F. Supp. 2d at 1372 (quoting Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977)). Other FHA cases rely on *Teamsters*’s and *Hazelwood*’s discussion of statistical analysis in systemic disparate treatment claims, but exclusively within the context of disparate impact claims. See, e.g., *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly*, No. 11–1159, 2011 WL 4035780, at *5 (3d

In the reverse redlining context, the factual analysis in *Hargraves* and *McGlawn* closely mirrors the pattern or practice model in *Teamsters* and *Hazelwood*, despite the fact that *Hargraves* and *McGlawn* referred to it as a disparate impact analysis.²²⁸ Specifically, the *Hargraves* and *McGlawn* courts combined statistical evidence of racial disparities among loan recipients with anecdotal evidence that the loans were unfair and predatory.²²⁹ As with *Teamsters*, the borrowers' personal experiences with the mortgage loans helped bring "the cold numbers convincingly to life."²³⁰

A pattern or practice analysis is well-suited as an analytical model for reverse redlining claims, as HMDA data readily allows for statistical analyses of a financial institution's lending patterns to determine whether a disproportionate number of high-cost loans are made to African Americans or African American neighborhoods.²³¹ Such data may also reveal racial pricing disparities in the terms and conditions accompanying the loans. If such evidence revealed gross statistical disparities in a financial institution's mortgage lending patterns, it would—in conjunction with evidence regarding specific borrowers who received unfair and predatory loans—appear sufficient as a single theory, under the *Teamsters* and *Hargraves* lineage of cases, to establish a prima facie case of reverse redlining.

IV. DISPARATE TREATMENT, COMPARATIVE ANALYSIS, AND REVERSE REDLINING

A. *The Matthews Turn*

In *Matthews v. New Century Mortgage Corp.*,²³² an entirely different test was established for reverse redlining. In *Matthews*, several elderly female borrowers brought suit against their lender, alleging, inter alia, that the lender discriminated against them on the basis of their gender, age, and marital status, in violation of sections 3604 and 3605 of the FHA.²³³ Specifically, plaintiffs alleged that the lender had granted them loans with "grossly unfavorable terms" based on their status as "elderly, unmarried women."²³⁴ The court held that reverse redlining claims were actionable under section 3605 of the FHA (the real estate-related transactions

Cir. Sept. 13, 2011) (stating that disparate impact plaintiffs can establish a prima facie case "where 'gross statistical disparities can be shown.'" (quoting *Hazelwood*, 433 U.S. at 307–08)); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 & n.4 (4th Cir. 1984) (finding that plaintiffs' statistics were sufficient to make out disparate impact claim based on statistical standards set forth in *Hazelwood*).

228. See *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 21–22 (D.D.C. 2000) (assessing whether evidence establishes intentional targeting and disparate impact); *McGlawn v. Pa. Human Relations Comm'n*, 891 A.2d 757, 772–74 (Pa. Commw. Ct. 2006) (same).

229. See *supra* notes 103–14 and accompanying text for a discussion of the *Hargraves* court's analysis.

230. *Teamsters*, 431 U.S. at 339.

231. See Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, § 304, 89 Stat. 1124, 1125 (codified as amended at 12 U.S.C. §§ 2801–10 (2006 & Supp. 2010)) (requiring banks and other financial institutions that offer loans to "compile and make available . . . to the public for inspection . . . the number and total dollar amount of mortgage loans").

232. 185 F. Supp. 2d 874 (S.D. Ohio 2002).

233. *Matthews*, 185 F. Supp. 2d at 885.

234. *Id.* at 886.

provision) but not under section 3605 (which makes it unlawful to discriminate in the terms or provisions of housing).²³⁵

Whereas the *Hargraves* court crafted a test for reverse redlining based seemingly on the theories of intentional targeting and discriminatory effects, *Matthews* followed the more common path in Title VIII litigation²³⁶ and reformulated the traditional Title VII *McDonnell Douglas* test from employment discrimination.²³⁷ In adopting such an assessment, the court set forth a definition of reverse redlining that incorporated the standard disparate treatment model.²³⁸ Under its formulation, a plaintiff must show:

- (1) that she is a member of a protected class; (2) that she applied for and was qualified for loans; (3) that the loans were given on grossly unfavorable terms; and (4) that the lender continues to provide loans to other applicants with similar qualifications, but on significantly more favorable terms.²³⁹

The court also incorporated the *Hargraves* intentional-targeting model by making it an alternative way of establishing the fourth element of the prima facie case. As it explained, “if the plaintiff presents direct evidence that the lender intentionally targeted her for unfair loans on the basis of [her protected class], the plaintiff need not also show that the lender makes loans on more favorable terms to others.”²⁴⁰

The best reading of the *Matthews* formulation is suggested in *Barkley v. Olympia Mortgage Co.*²⁴¹ In *Barkley*, the plaintiffs—first-time, minority homebuyers—alleged that the defendants, who included real estate companies, lenders, appraisers, and

235. *Id.* at 885–87. Note that this conflicts with *Hargraves* which held the alleged predatory practices fell within the scope of FHA’s prohibition on discrimination “in the terms, conditions, or privileges of sale or rental of a dwelling.” *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000) (quoting 42 U.S.C. § 3604(a)). *Hargraves* also held that the alleged predatory practices could violate the FHA by “mak[ing] housing unavailable by putting borrowers at risk of losing the property which secures their loans.” *Id.* (citing 42 U.S.C. § 3604(b)); see also *McGlaw v. Pa. Human Relations Comm’n*, 891 A.2d 757, 766–67 (Pa. Commw. Ct. 2006) (finding that reverse redlining violates section 5(h)(4) of the PHRA, analogous to 42 U.S.C. § 3605(b), as well as section 5(h)(8)(i), analogous to 42 U.S.C. § 3605(a)).

236. Courts analyzing Title VIII discrimination cases often analogize to Title VII. See *Graoch Assocs. #33 v. Louisville/Jefferson Cnty. Metro Human Relations Comm’n*, 508 F.3d 366, 371–72 (6th Cir. 2007) (agreeing with Second Circuit’s reasoning that Title VII and Title VIII “are part of a coordinated scheme of federal civil rights laws enacted to end discrimination” and concluding that claims under FHA should be evaluated “by analogizing them to comparable claims under Title VII” (citing *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988)).

237. Under *McDonnell Douglas*, a plaintiff must show:

- (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

238. *Matthews*, 185 F. Supp. 2d at 885–86.

239. *Id.* at 886.

240. *Id.* at 886–87 (justifying this alternative claim as necessary to avoid “allow[ing] an injustice to continue so long as it was visited exclusively on one class of people” (citing *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000)).

241. No. 04-cv-875, 2007 WL 2437810 (E.D.N.Y. Aug. 22, 2007); see also *Barkley v. Olympia Mortg. Co.*, No. 04-cv-875, 2010 WL 3709278, at *30 (E.D.N.Y. Sept. 13, 2010) (denying defendants’ motion for summary judgment and granting plaintiffs’ motion to consolidate).

lawyers, had perpetuated a “property-flipping” scheme which targeted first-time homebuyers lacking in financial means or savvy by touting a “one-stop shop” for first-time homebuyers.”²⁴² The plaintiffs alleged that the defendants violated sections 3604 and 3605 of the FHA by engaging in reverse redlining and exploiting the existing segregated housing market in New York.²⁴³ In particular, the plaintiffs alleged that defendants targeted minority census tracts by running advertisements that featured minority homebuyers in predominantly minority neighborhoods.²⁴⁴

The eight individual plaintiffs described similar experiences. They described being steered to properties in serious disrepair in predominantly minority neighborhoods,²⁴⁵ with some being falsely promised, prior to settlement, that repair work would later be done.²⁴⁶ The plaintiffs also alleged that they were not told the terms of the loan prior to settlement; when they later expressed concern about their ability to pay the high monthly payments, they were pressured to sign anyway and told they could afford the payments if they rented out part of the property.²⁴⁷ In addition, when at least one plaintiff attempted to speak with defendants about rescinding after settlement, her phone calls were not returned.²⁴⁸ When plaintiffs had their properties re-appraised after moving in, multiple properties were appraised around \$100,000 less than the value quoted at the time of the sale.²⁴⁹

In addressing the plaintiffs’ reverse redlining claim, the court adopted the *Matthews* test in its entirety, including the availability of intentional targeting as an alternative way to demonstrate the fourth prong.²⁵⁰ Finding that the plaintiffs had alleged sufficient facts to make out claims of intentional race discrimination under 42 U.S.C. §§ 1981,²⁵¹ 1982,²⁵² and 1985(3),²⁵³ the court had no trouble concluding that the

242. *Barkley*, 2007 WL 2437810, at *1.

243. *Id.* at *2, *13. In addition to alleging violations of the FHA, the plaintiffs alleged that defendants’ practices violated 42 U.S.C. §§ 1981, 1982, and 1985(3); TILA; and various state and local race discrimination claims, including violations of the state antidiscrimination statute, the state consumer protection law, and fraud. *Id.* at *17–19.

244. *Id.*

245. *Id.* at *2–9. For example, when one couple asked the young black man who showed them properties why he was showing them homes in particular areas, he told them that “he believed United Homes was trying to sell the [plaintiffs] a home in certain neighborhoods only.” *Id.* at *6 (internal quotation marks omitted). He also told them that he believed United Homes’s customer base to be “Puerto Ricans and blacks, but mostly blacks.” *Id.* (internal quotation marks omitted).

246. *Id.* at *2–9.

247. *Id.*

248. *Id.* at *3.

249. *Id.*

250. *Id.* at *15. The court specifically rejected the defendants’ argument that the plaintiff could only establish the fourth prong through disparate treatment or disparate impact as opposed to intentional targeting. The court explained that “[p]ermitt[ing] evidence of intentional targeting as an alternative to evidence of disparate treatment or impact is . . . in keeping with the Fair Housing Act’s twin aims of ‘forbidd[ing] those practices that make housing unavailable to persons on a discriminatory basis as well as discriminatory terms and conditions with respect to housing that is provided.’” *Id.* at *14 (quoting *Hack v. President of Yale Coll.*, 237 F.3d 81, 88 (2d Cir. 2000) (Pooler, J., concurring)).

251. 42 U.S.C. § 1981 (2006); see also *Bell v. City of Milwaukee*, 746 F.2d 1205, 1232 (7th Cir. 1984) (“42 U.S.C. § 1981 . . . protects against discrimination on the basis of race or alienage. Section 1981 is not

plaintiffs had satisfied the intentional targeting element of their reverse redlining claim.²⁵⁴ The *Barkley* court reasoned that a factfinder could conclude that the defendants “harbored ill will toward racial minorities, or that they had used race as a proxy, doing business exclusively with minorities out of the biased perception that those individuals would be especially vulnerable to fraud.”²⁵⁵ Whereas such allegations would have been sufficient under *Hargraves* to make out a reverse redlining claim, the *Barkley* court did not stop there as it also considered whether the plaintiffs had made out the remaining three elements under *Matthews*.²⁵⁶

In assessing the other elements of the *Matthews* test, the court addressed the defendants’ claim that the plaintiffs had failed to allege the second element (i.e., that they were qualified for the loan).²⁵⁷ Because the plaintiffs had alleged that they were coerced into signing mortgages that they could not afford, the defendants argued that they could not meet the requirement that they were qualified. The court, however, rejected this argument. Importantly, the court noted that it “d[id] not read the second element to require that plaintiffs were qualified for the *precise* predatory loans that were the subject of the scam, but only that they applied for and were qualified for *fairly administered loans*.”²⁵⁸ In support of this interpretation, the court pointed out that the plaintiffs in *Matthews* had “adequately alleged that they were qualified for loans, even though they could not afford the fraudulent loans that were the basis for their reverse-redlining claims.”²⁵⁹

B. *Deconstruction and Resurrection of Disparate Treatment*

While *Matthews* and *Barkley* provide an analytical model for establishing a reverse redlining case premised upon disparate treatment, it is necessary to examine whether it is an appropriate model given the unique factual circumstances often associated with predatory lending. In many ways, *Matthews*’s reliance on Title VII doctrine makes sense: Title VIII is generally interpreted in line with Title VII, and

confined to contractual matters, though it is most often invoked in that context. It deals with the protection of a limited range of civil rights, including the right to make and enforce contracts, to sue, and to give evidence.”)

252. 42 U.S.C. § 1982 (“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”).

253. *Id.* § 1985(3) (prohibiting conspiracy to deprive any person of equal protection of the laws).

254. *Barkley*, 2007 WL 2437810, at *11, *15. The court based its finding of discriminatory intent under 42 U.S.C. §§ 1981, 1982, and 1985(3) and intentional targeting under the *Matthews* test, based in large part on the allegations that the defendants targeted their advertising towards minority communities. *Id.* at *11.

255. *Id.* at *11.

256. *Id.* at *15.

257. *Id.* The defendant did not dispute the first element (i.e., whether plaintiffs were part of a protected class). It did, however, dispute the third element (i.e., whether plaintiffs had adequately alleged that they had received the loans on grossly unfavorable terms). Since the plaintiffs had alleged “significantly unfavorable terms and conditions,” the court rejected the defendants’ claim. *Id.*

258. *Id.* (emphases added).

259. *Id.* (citing *Matthews v. New Century Mortg. Corp.*, 185 F. Supp. 2d 874, 887 (S.D. Ohio 2002)).

courts frequently analogize to Title VII when analyzing a Title VIII claim.²⁶⁰ There is, however, a mismatch, both factually and theoretically, between the contexts of employment discrimination and predatory lending.²⁶¹ As has been noted by Judge Posner, “wholesale transposition of the *McDonnell Douglas* standard to the credit discrimination context would display insensitivity to the thinking behind the standard.”²⁶²

The most glaring problem with *Matthews* is its adoption of the *McDonnell Douglas* requirement that plaintiffs be “qualified.” While *Barkley*’s determination that plaintiffs only need be “qualified for a ‘fairly priced’ mortgage”²⁶³ ameliorates some of the problem with this requirement, it fails to cure the central failure. Specifically, one of the hallmarks of a predatory loan is that the borrower was not “qualified” for any type of mortgage, even one that was “fairly priced.” Evidence shows, for example, that at the height of the subprime boom, a borrower’s qualifications did not necessarily play any part in some lenders’ decision-making processes.²⁶⁴ In fact, in the wake of the financial crisis, some plaintiffs have specifically alleged that lenders falsified borrowers’ financial qualifications for loans.²⁶⁵ *Matthews*’s requirement that plaintiffs be “qualified,” therefore, excludes individuals harmed by predatory practices who should never have received loans in the first place.

Another problem with *Matthews* is that it is both unnecessary and unjustified²⁶⁶ to require plaintiffs to show that other applicants received loans on “significantly more favorable terms.”²⁶⁷ The problem with this type of comparative analysis in reverse redlining claims was aptly summarized by Judge Posner in the context of credit discrimination. According to Judge Posner,

[t]he fact that a qualified black is passed over for promotion in favor of a white has been thought sufficiently suspicious [in the employment context] to place on the defendant the minimum burden of presenting a noninvidious reason why the black lost out. But it is the competitive situation—the black facing off as it were against the white—that creates the (minimal) suspicion, and there is no comparable competitive situation in the usual allegation of credit discrimination.²⁶⁸

260. *E.g.*, *Graoch Assocs. #33 v. Louisville/Jefferson Cnty Metro Human Relations Comm’n*, 508 F.3d 366, 371–72 (6th Cir. 2007); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988).

261. *See Howell*, *supra* note 105, at 132 (describing *McDonnell Douglas* framework as “[p]erhaps the most ill-fitting doctrine imported from employment discrimination law into FHA cases alleging residential loan discrimination”).

262. *Latimore v. Citibank Federal Savings Bank*, 151 F.3d 712, 714 (7th Cir. 1998) (rejecting application of *McDonnell Douglas* analysis in context of credit denial based upon race).

263. *Barkley*, 2007 WL 2437810, at *15.

264. FCIC REPORT, *supra* note 1, at xxiii, 20, 110–11.

265. *E.g.*, Second Amended Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 56, at 25, 27; First Amended Complaint for Declaratory and Injunctive Relief and Damages at 38, *City of Memphis v. Wells Fargo Bank, N.A.*, No. 2:09-cv-02857x (W.D. Tenn. Apr. 7, 2010), 2010 WL 1506670.

266. *Brescia*, *supra* note 16, at 198–99.

267. *Matthews v. New Century Mortg. Corp.*, 185 F. Supp. 2d 874, 886 (S.D. Ohio 2002).

268. *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 714 (7th Cir. 1998).

Also problematic in *Matthews* is the alternative language of the fourth element that essentially incorporates the intentional targeting model of *Hargraves* into a mere subcomponent of the disparate treatment analysis.²⁶⁹ In effect, *Matthews* merged two incompatible analytical models: intentional targeting and the burden-shifting framework of disparate treatment.²⁷⁰ As a result, it dramatically increased the evidentiary burden of establishing a prima facie case of reverse redlining.

The *Matthews* model is particularly troubling because it has been so influential: of the approximately sixteen post-*Matthews* courts that have considered the structure of proof for a reverse redlining claim, thirteen have adopted some variation of the *Matthews* test.²⁷¹ The result is the exclusion of a significant subset of those affected by reverse redlining from the very remedy intended to benefit them. This, in turn, frustrates the FHA's aims of reducing housing discrimination and fostering desegregation.²⁷² Given the sheer size of the financial crisis and the evidence demonstrating that communities of color were targeted for bad loans, plaintiffs should not be kept out of court because of a judge-crafted requirement that does not incorporate a functional understanding of predatory lending.²⁷³

269. *Matthews*, 185 F. Supp. 2d at 886. See *supra* notes 250–56 and accompanying text for a discussion of the *Barkley* court's application of intentional targeting as an alternative way of establishing the fourth element under *Matthews*.

270. See *supra* notes 171–74 and accompanying text for a discussion of the difference between direct evidence of discriminatory intent and circumstantial evidence from which an inference of intent may be drawn.

271. Courts that have followed *Matthews* include: *Woodworth v. Bank of Am., N.A.*, No. 09–3058–CL, 2011, 2011 WL 1540358 (D. Or. Mar. 23, 2011); *Diaz v. Bank of Am. Home Loan Servicing*, No. CV 09–9286, 2010 WL 5313417 (C.D. Cal. Dec. 16, 2010); *M & T Mortg. Corp. v. White*, 736 F. Supp. 2d 538 (E.D.N.Y. 2010); *Davenport v. Litton Loan Servicing, LP*, 725 F. Supp. 2d 862 (N.D. Cal. 2010); *Ng v. HSBC Mortg. Corp.*, No. 07–CV–5434, 2010 WL 889256 (E.D.N.Y. Mar. 10, 2010); *Singh v. Wells Fargo Bank, N.A.*, No. C-09–2035, 2009 WL 2365881 (N.D. Cal. July 30, 2009); *Williams v. 2000 Homes Inc.*, No. 09–CV–16, 2009 WL 2252528 (E.D.N.Y. July 29, 2009); *Hafiz v. GreenPoint Mortg. Funding, Inc.*, 652 F. Supp. 2d 1039 (N.D. Cal. 2009); *House v. Cal. State Mortg. Co.*, No. CV-F-08–1880, 2009 WL 2031775 (E.D. Cal. July 9, 2009); *Barkley*, 2007 WL 2437810; *Wiltshire v. Dhanraj*, 421 F. Supp. 2d 544 (E.D.N.Y. 2005); *Munoz v. Int'l Home Capital Corp.*, No. C 03–01099, 2004 WL 3086907 (N.D. Cal. May 4, 2004); *Equicredit Corp. v. Turcios*, 752 N.Y.S.2d 684 (N.Y. App. Div. 2002). Courts that have followed *Hargraves* include: *Steed v. Everhome Mortg. Co.*, 308 F. App'x 364 (11th Cir. 2009); *Bankers Trust Co. v. Brown*, 107 P.3d 609 (Okla. Civ. App. 2004); *McGlaw v. Pa. Human Relations Comm'n*, 891 A.2d 757 (Pa. Commw. Ct. 2006).

272. See *Relman*, *supra* note 20, at 647 (identifying goals of FHA as nondiscrimination and integration).

273. Note, too, that following the ratcheting up of pleading requirements in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), plaintiffs alleging reverse redlining have had their cases dismissed for failing to plead claims for which relief can be granted. *E.g.*, *Davenport*, 725 F. Supp. 2d at 875; *Ng*, 2010 WL 889256, at *11, *13; *Singh*, 2009 WL 2365881, at *4; *Williams*, 2009 WL 2252528, at *5; *Hafiz*, 652 F. Supp. 2d at 1046. In fact, only one court that has analyzed a reverse redlining complaint under *Iqbal* has found the pleading requirements to be met. See *Diaz*, 2010 WL 5313417, at *5. For an example of the subjectivity of *Iqbal*'s “plausibility” standard, compare *Mayor of Balt. v. Wells Fargo Bank, N.A.*, 631 F. Supp. 2d 702, 704 (D. Md. 2009) (denying motion to dismiss and finding plaintiffs' claims of reverse redlining “sufficiently plausible and grounded in fact to permit the case to proceed to full-fledged merits discovery”), with *Mayor of Balt. v. Wells Fargo Bank, N.A.*, 677 F. Supp. 2d 847, 850 (D. Md. 2010) (granting motion to dismiss, after reassignment to another judge, and finding implausible “any alleged causal connection between Wells Fargo's alleged reverse redlining activities and the generalized type of damages claimed by the City”). For a discussion of the impact of *Iqbal* on civil rights plaintiffs generally, see JOSHUA CIVIN & DEBO P. ADEGBILE, AM. CONSTITUTION SOC'Y, RESTORING ACCESS TO JUSTICE: THE IMPACT OF *IQBAL* AND *TWOMBLY* ON FEDERAL CIVIL RIGHTS LITIGATION (2010). Courts that have followed

Despite *Matthews*'s analytical problems, however, a disparate treatment model can be an important analytical tool in reverse redlining cases. This is because banks and other financial institutions rarely limit their business to a single protected class; accordingly, a comparative analysis can be an appropriate evidentiary vehicle. The disparate treatment model, however, must use a prima facie case that recognizes the fundamental nature of predatory lending. In contrast to *Matthews* and *Barkley*, a prima facie case should be established when the plaintiff satisfies the following elements: (1) that he or she is a member of a protected class; (2) that he or she received a loan; (3) that the loan contained grossly unfavorable terms; and (4) that the lender continues to provide loans to other applicants on significantly more favorable terms. Further, there is no need to add the alternative language regarding intentional targeting to the fourth prong because such evidence, standing alone, is sufficient to support a claim under *Hargraves*.²⁷⁴ Such an application of the *McDonnell Douglas* framework to reverse redlining claims would be in keeping with the premise that a prima facie case is not a high threshold and that it "was 'never intended to be rigid, mechanized, or ritualistic.'"²⁷⁵

V. DISPARATE IMPACT, DISCRETIONARY PRICING, AND REVERSE REDLINING²⁷⁶

A separate lineage of reverse redlining cases has emerged regarding lenders' discretionary pricing policies, and whether such policies have a disparate impact on borrowers of color.²⁷⁷ These cases have not followed the *Hargraves* or *Matthews* tests,

Matthews include: *Woodworth v. Bank of Am., N.A.*, No. 09-3058-CL, 2011, 2011 WL 1540358 (D. Or. Mar. 23, 2011); *Diaz v. Bank of Am. Home Loan Servicing*, No. CV 09-9286, 2010 WL 5313417 (C.D. Cal. Dec. 16, 2010); *M & T Mortg. Corp. v. White*, 736 F. Supp. 2d 538 (E.D.N.Y. 2010); *Davenport v. Litton Loan Servicing, LP*, 725 F. Supp. 2d 862 (N.D. Cal. 2010); *Ng v. HSBC Mortg. Corp.*, No. 07-CV-5434, 2010 WL 889256 (E.D.N.Y. Mar. 10, 2010); *Singh v. Wells Fargo Bank, N.A.*, No. C-09-2035, 2009 WL 2365881 (N.D. Cal. July 30, 2009); *Williams v. 2000 Homes Inc.*, No. 09-CV-16, 2009 WL 2252528 (E.D.N.Y. July 29, 2009); *Hafiz v. GreenPoint Mortg. Funding, Inc.*, 652 F. Supp. 2d 1039 (N.D. Cal. 2009); *House v. Cal. State Mortg. Co.*, No. CV-F-08-1880, 2009 WL 2031775 (E.D. Cal. July 9, 2009); *Barkley*, 2007 WL 2437810; *Wiltshire v. Dhanraj*, 421 F. Supp. 2d 544 (E.D.N.Y. 2005); *Munoz v. Int'l Home Capital Corp.*, No. C 03-01099, 2004 WL 3086907 (N.D. Cal. May 4, 2004); *Equicredit Corp. v. Turcios*, 752 N.Y.S.2d 684 (N.Y. App. Div. 2002). Courts that have followed *Hargraves* include: *Steed v. Everhome Mortg. Co.*, 308 F. App'x 364 (11th Cir. 2009); *Bankers Trust Co. v. Brown*, 107 P.3d 609 (Okla. Civ. App. 2004); *McGlawn v. Pa. Human Relations Comm'n*, 891 A.2d 757 (Pa. Commw. Ct. 2006).

274. See *supra* notes 91-114 and accompanying text for a discussion of *Hargraves*.

275. *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

276. After the Supreme Court's decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005), some have questioned whether disparate impact claims are cognizable under the FHA. This Article operates under the assumption that disparate impact claims *are* available, an assumption supported by courts that have addressed the question. See, e.g., *Guerra v. GMAC LLC*, No. 2:08-cv-01297, 2009 WL 449153, at *2-3 (E.D. Pa. Feb. 20, 2009) (rejecting defendants' argument that FHA does not permit disparate impact liability, and citing to Third Circuit, which has recognized disparate impact claims under FHA, as well as to other district courts that have reached a similar position). For a full examination of why the FHA includes disparate impact as a basis for relief, see ROBERT G. SCHWEMM & SARA K. PRATT, NAT'L FAIR HOUS. ALLIANCE, DISPARATE IMPACT UNDER THE FAIR HOUSING ACT: A PROPOSED APPROACH (2009).

277. See, e.g., *Taylor v. Accredited Home Lenders, Inc.*, 580 F. Supp. 2d 1062, 1069 (S.D. Cal. 2008) (finding plaintiff sufficiently pled disparate impact claim by setting forth statistical data indicating defendant

but have, instead, followed a more traditional form of disparate impact analysis imported from Title VII.²⁷⁸ Such cases rely primarily on the United States Supreme Court's decision in *Watson v. Fort Worth Bank & Trust*.²⁷⁹ In *Watson*, the Court held that "subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases."²⁸⁰

In *Ramirez v. GreenPoint Mortgage Funding, Inc.*,²⁸¹ the plaintiffs brought a class action on behalf of minority consumers who received home mortgage loans from GreenPoint and were subjected to its discretionary pricing policy, resulting in discretionary points, fees, or interest rate mark-ups being applied to their loans.²⁸² The complaint alleged that GreenPoint had a "policy of authorizing its loan officers, brokers

engaged in lending policy that caused disproportionately high cost for African Americans); *Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251, 255–59 (D. Mass. 2008) (finding plaintiff sufficiently pled disparate impact claim by alleging defendant's facially objective lending policy resulted in African Americans paying more for loans than similarly situated whites); *Ramirez v. GreenPoint Mortg. Funding, Inc.*, 633 F. Supp. 2d 922, 927–29 (N.D. Cal. 2008) (finding plaintiff sufficiently pled disparate impact claim by alleging defendant's discretionary pricing policy resulted in minorities paying more for their loans than similarly situated whites).

278. The Fair Housing Act does not limit permissible claims to those where the plaintiff can show discriminatory intent, but allows for claims based on disparate impact. The evolution of the disparate impact standard under Title VIII does not follow that under Title VII. A variant of disparate impact was first recognized under Title VIII by the Seventh Circuit in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977). In *Arlington Heights*, the Seventh Circuit held that, under certain circumstances, "a violation of [the FHA] can be established by a showing of discriminatory effect without a showing of discriminatory intent." *Id.* It also held that, when analyzing whether such a showing has been made, a court should look to four factors: (1) the strength of the plaintiff's showing of discriminatory effects; (2) evidence of discriminatory intent; (3) the defendant's interest in taking the action alleged to have a discriminatory effect; and (4) the intrusiveness of the remedy sought (i.e., whether the plaintiff is asking for the defendant to affirmatively provide housing or for the defendant to refrain from interfering with others' attempts to provide integrated housing). *Id.* The heightened requirements placed on plaintiffs by this discriminatory effects test (as opposed to the traditional disparate impact analysis) can partly be explained by the early assumption "that the standards for proving a Title VIII violation [would be] identical to those applied in equal protection cases." John Stick, Comment, *Justifying a Discriminatory Effect Under the Fair Housing Act: A Search for the Proper Standard*, 27 UCLA L. REV. 398, 401 (1979) (footnotes omitted). Although *Arlington Heights'* four-factor test has survived and continues to be applied by some courts, most discriminatory-effects cases currently litigated under the FHA follow the disparate impact framework under Title VII (i.e., requiring the plaintiff to demonstrate that a specific practice or policy has a disproportionate impact on a protected class). *See, e.g., Ramirez*, 633 F. Supp. 2d at 927–28.

279. 487 U.S. 977 (1988).

280. *Watson*, 487 U.S. at 991. Although issued too recently to address here, the U.S. Supreme Court's opinion in *Wal-Mart Stores, Inc. v. Dukes*, imposes additional burdens on class action plaintiffs alleging that subjective decisionmaking processes caused a disparate impact. 131 S.Ct. 2547, 2554 (2011) ("The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's 'policy' of allowing discretion by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action . . ."). *Wal-Mart* has already had an impact on some class action cases alleging that the subjectivity permitted by discretionary pricing policies resulted in a disparate impact on minority homeowners. *See, e.g., In Re Wells Fargo Residential Mortg. Lending Discrimination Litig.*, No. 08–MD–01930, 2011 WL 3903117, at *4 (N.D. Cal. Sept. 6, 2011) (denying class certification, stating "where persons who are afforded discretion exercise that discretion differently, commonality is not established").

281. 633 F. Supp. 2d 922 (N.D. Cal. 2008).

282. *Ramirez*, 633 F. Supp. 2d at 924.

and correspondent lenders to impose subjective, discretionary charges and interest rate mark-ups that are included in the loans they originate.”²⁸³ The complaint further alleged that, as a result of the locations of GreenPoint’s local branches and its utilization of brokers, minority borrowers were more likely to obtain a loan through brokers (rather than through GreenPoint directly), and thus received more expensive loan terms.²⁸⁴ The complaint explained GreenPoint’s loan-origination process as involving two phases: first, an objective credit analysis that results in a financing rate, followed by a subjective component where discretionary charges may be added.²⁸⁵

After finding disparate impact claims cognizable under the FHA,²⁸⁶ the court laid out the elements necessary for a disparate impact claim: namely, “a significant disparate impact on [the plaintiff’s] protected class,” and proof that the disparity was “caused by a specific, identified . . . practice or selection criterion.”²⁸⁷ The court rejected the defendant’s claims that plaintiffs had failed to sufficiently identify a specific policy or practice.²⁸⁸ Citing *Watson*, the court held that GreenPoint’s discretionary pricing policy was a sufficiently specific policy—despite its subjective quality—to meet the specific policy or practice requirement.²⁸⁹ The court also rejected GreenPoint’s argument that the plaintiffs had failed to sufficiently allege that the policy disproportionately harmed minority borrowers, as the plaintiffs alleged that minorities paid more in discretionary charges and were almost fifty percent more likely than whites to receive a high-APR home loan.²⁹⁰

Similarly, in *Miller v. Countrywide Bank, N.A.*²⁹¹ plaintiffs alleged that Countrywide’s discretionary pricing policy had a discriminatory impact on African American home-mortgage loan applicants.²⁹² As alleged in the complaint, Countrywide’s discretionary pricing policy had the effect of making Countrywide’s African American borrowers two to three times more likely than white borrowers to receive a high-APR loan, a disparity that could not be accounted for by objective indicators of creditworthiness.²⁹³ The plaintiffs alleged that Countrywide’s salespersons, lenders, and brokers were permitted, under its discretionary pricing policy, to add “various charges and fees based on subjective non-risk factors . . . which, in turn, ha[d] a racially discriminatory impact on African-American borrowers.”²⁹⁴

283. *Id.* (quoting First Amended Complaint at 14, *Ramirez*, 633 F. Supp. 2d at 922 (No. 3:08-cv-00369), 2008 WL 7321821) (internal quotation marks omitted).

284. *Id.* at 924–25.

285. *Id.* at 925.

286. *Id.* at 926–27.

287. *Id.* at 927 (omission in original) (quoting *Stout v. Potter*, 276 F.3d 1118, 1121 (9th Cir. 2002)).

288. *Id.* at 927–28.

289. *Id.* at 928 (“[S]ubjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases.” (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988)) (internal quotation marks omitted)).

290. *Id.* at 928–29.

291. 571 F. Supp. 2d 251 (D. Mass. 2008).

292. *Miller*, 571 F. Supp. 2d at 253.

293. *Id.*

294. *Id.* at 255.

Under the court's formulation, a disparate impact plaintiff must plead "1) a specific and actionable policy, 2) a disparate impact, and 3) facts raising a sufficient inference of causation."²⁹⁵ Addressing the issue of specificity, the court acknowledged the defendants' argument that "point[ing] to a generalized policy that leads to" a disparate impact is not sufficient.²⁹⁶ Here, however, the plaintiffs alleged that Countrywide had a policy of "establishing a par rate keyed to objective indicators of creditworthiness while simultaneously authorizing additional charges keyed to factors unrelated to those criteria," and that this had "the net effect of . . . yield[ing] a discriminatory result."²⁹⁷ This was enough to survive the defendants' motion to dismiss.²⁹⁸

In so holding, the district court rejected the defendants' "market forces" argument: that plaintiffs had not pointed to a specific policy but rather to the fact that Countrywide "simply permit[ted] loan officers to negotiate loan interest rates, charges, and points that are higher than the par rate."²⁹⁹ According to the defendants, such negotiated terms were the result of competitive market forces, and thus could not "yield to disparate impact analysis."³⁰⁰ The court soundly rejected this argument, commenting that "[i]t is precisely because the market could not self-correct for discrimination that statutes like Title VII, the FHA, and ECOA were necessary."³⁰¹ Further, in scenarios where "the 'practice' amounts to the *absence* of a policy, that allows racial bias to seep into the process," courts should not allow such practices to escape scrutiny, since to do so "would enable companies responsible for complying with anti-discrimination laws to 'insulate' themselves by 'refrain[ing] from making standardized criteria absolutely determinative."³⁰² This is all the more critical in the lending context, where subjective criteria "should play *no* part in determining a potential borrower's eligibility for credit."³⁰³

The defendants also argued, again unsuccessfully, that, since the plaintiffs did not "expressly allege that African-Americans receive higher rates than *similarly situated* whites," they had not alleged a disparate impact claim with the required specificity.³⁰⁴ The court rejected this argument because a disproportionate impact on blacks could fairly be concluded from the facts alleged, which included allegations of racial steering into less advantageous loans.³⁰⁵

The defendants further argued that plaintiffs failed to adequately plead causation, since they had only alleged "bottom line" disparities without any theory to explain how

295. *Id.*

296. *Id.* at 256 (quoting *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005)) (discussing Supreme Court's specificity requirement).

297. *Id.* at 257.

298. *See id.* at 258 (finding "plaintiffs . . . identified a sufficiently specific policy").

299. *Id.* at 257 & n.12, 258.

300. *Id.* at 257 n.12 (internal quotation marks omitted).

301. *Id.* at 258.

302. *Id.* (quoting *Watson v. Fort Worth Bank*, 487 U.S. 977, 990 (1988)).

303. *Id.*

304. *Id.*

305. *Id.* at 259.

the discretionary pricing policy caused the disparity.³⁰⁶ The court rejected this argument because the plaintiffs had offered reports showing that allowing brokers or employers greater discretion to mark up loan terms leads to discriminatory results.³⁰⁷

As *Ramirez*, *Miller*, and similar cases³⁰⁸ demonstrate, the traditional disparate impact claim provides an additional basis on which to challenge predatory lending and reverse redlining. From an evidentiary perspective, such challenges have been primarily based on pricing disparities that were revealed through HMDA data analysis which can be traced to a specific policy.

While the disparate impact model thus presents a clear legal theory to challenge predatory lending practices, it has several important limitations. First, the requirement of identifying a specific policy or practice can present a significant hurdle in the predatory lending context. As a general matter, the mortgage loan process is exceedingly complex with multiple interrelated variables that determine the ultimate terms and conditions of the loan. In the context of predatory lending specifically, it may be difficult to isolate a single policy or practice that was the cause of the disparate impact. In fact, a predatory loan is often the result of a combination of different factors that may be attributable to multiple policies or practices. This, in turn, can make it very difficult to trace disparities to a specific policy or practice.

Second, after a specific policy is identified, it must be established that it was responsible for a disparate impact. Typically, such an analysis requires a sophisticated examination of statistical data, often regression analyses that seek to understand the relationship between a number of variables, including race.³⁰⁹ Again the unique nature of the mortgage loan process renders regression analysis difficult due to the large number of independent variables that must be factored into the analysis.³¹⁰ Though such an analysis is possible, it requires complicated and costly expert testimony.

Third, disparate impact claims in discretionary pricing cases are premised upon a practice of subjectivity, which allows discrimination to enter the loan process. Usually this is shown by the different terms and conditions provided to African Americans as compared to whites. Such a scenario, however, may also be viewed as a standard disparate treatment case. In *Ramirez* and *Miller*, the plaintiffs asserted that African Americans were charged more for loans than whites. Rather than resorting to disparate impact and complicated statistical analysis, a standard disparate treatment analysis should be able to ferret out unlawful discrimination in this context. Such an analysis would reveal whether the subjective pricing has allowed unlawful discrimination to infect the loan process in the form of pricing differentials among racial lines.

306. *Id.*

307. *Id.*

308. *E.g.*, Guerra v. GMAC LLC, No. 2:08-cv-01297, 2009 WL 449153 (E.D. Pa. Feb. 20, 2009);

309. *See generally* ALICIA H. MUNNELL ET AL., FED. RESERVE BANK OF BOS., MORTGAGE LENDING IN BOSTON: INTERPRETING HMDA DATA (1992); Marsha Courchane et al., *Lessons Learned: Statistical Techniques and Fair Lending*, 11 J. HOUSING RES. 277 (2000); Lei Ding et al., *Neighborhood Patterns of High-Cost Lending: The Case of Atlanta*, 17 J. AFFORDABLE HOUSING 193 (2008).

310. For examples of the complicated nature of regression analysis as applied to mortgage lending, see MUNNELL ET AL., *supra* notes 309, at 9–44; Courchane et al., *supra* note 309, at 284–94; and Ding et al., *supra* note 309, at 198–211.

VI. CONCLUSION: FOUR VIABLE THEORIES

Beginning in 2006, the United States was beset by the worst financial crisis since the Great Depression. One of the main causes of the crisis was a housing bubble that was, in large measure, created by predatory lending in the subprime mortgage market.³¹¹ While the financial crisis resulted in the demise of the subprime market, its residual consequences continue to afflict the United States in the form of delinquent mortgages and foreclosures that have scarred thousands of communities with boarded up and deserted homes. In 2010, a staggering forty percent of all subprime loans in the United States were either delinquent or in foreclosure. Overall, four million families have lost their homes and another four-and-a-half million remain delinquent, with nearly eleven trillion dollars in household wealth lost as a result.³¹²

While the financial crisis has been examined in great detail, lost in the story is the civil rights crisis that it has left in its wake. The representation of African Americans in the subprime mortgage market was disproportionately high. As a result, the subprime crisis wiped out a generation of accumulated wealth in the African American community. Tens of thousands of African Americans have lost their homes through foreclosures linked to predatory mortgage loans, and even those African Americans who have avoided foreclosure remain locked in high-cost subprime loans that impede their ability to accumulate wealth.

Reverse redlining is one of the reasons for such disproportionate representation of African Americans in the subprime market. Predatory lenders, taking advantage of the historic pattern of redlining that denied African Americans access to credit, filled the credit vacuum by targeting African Americans for predatory mortgage loans. As the consequences of such lending became clear, civil rights advocates turned to the Fair Housing Act (FHA) as a weapon to stem the tide of the crisis. In 2000, courts began to recognize reverse redlining as a cause of action under the FHA.³¹³ Since that time, courts have utilized a number of different analytical models to evaluate such claims, resulting in significant confusion and inconsistencies. This Article, which has sought to examine such inconsistencies, now posits four clear analytical models for addressing predatory lending and reverse redlining under the FHA.

*Hargraves v. Capital City Mortgage Corp.*³¹⁴ and its progeny are best understood as establishing two distinct analytical models for establishing a reverse redlining cause of action. First, the intentional targeting of African Americans for predatory or unfair mortgages may constitute reverse redlining. Such a model is premised upon establishing discriminatory intent through direct or circumstantial evidence of targeting (e.g., advertising directed towards African Americans). Second, while *Hargraves* mentions disparate impact, it is clear that the court was articulating a systemic disparate treatment model premised primarily on the statistical analysis set forth in *International Brotherhood of Teamsters v. United States*³¹⁵ and *Hazelwood School District v. United*

311. See, e.g., FCIC REPORT, *supra* note 1, at 101.

312. *Id.* at xv.

313. *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7 (D.D.C. 2000).

314. 140 F. Supp. 2d 7 (D.D.C. 2000).

315. 431 U.S. 324 (1977).

States.³¹⁶ Under such a model, reverse redlining may be established if a lender's mortgages are disproportionately concentrated in African American neighborhoods and there is evidence demonstrating that the lender's mortgage loans were unfair and predatory.

Third, while *Matthews v. New Century Mortgage Corp.*³¹⁷ correctly provides for a disparate treatment model premised upon the standard comparative analysis articulated in *McDonnell Douglas Corp. v. Green*,³¹⁸ it erects a prima facie case that is ill-suited for the functional reality of predatory lending. Courts have been clear that *McDonnell Douglas* is not a rigid tool but is adaptable depending upon the circumstances. As applied to reverse redlining cases, a prima facie case under *McDonnell Douglas* should entail the following elements: (1) that the borrower is a member of a protected class; (2) that the borrower received a loan; (3) that the loan contained grossly unfavorable terms; and (4) that the lender continues to provide loans to other applicants, outside the protected class, on significantly more favorable terms.

Finally, courts have also recently analyzed reverse redlining claims under the more traditional disparate impact framework. Such cases have identified a specific policy—discretionary mortgage pricing—which is reflected in the pricing disparities found in HMDA data. While the model has some limitations, it represents a possible vehicle to challenge specific, identifiable policies that produce unfavorable terms and conditions of mortgages for African Americans.

Predatory lending is complex and manifests in a myriad of ways in the mortgage market. The four analytical models for proving lending discrimination outlined above seek to provide an effective means for addressing its most common iterations. The severity of the crisis confronting the African American community necessitates the utilization of such tools to avert the continued wealth stripping caused by predatory loans and foreclosures.

316. 433 U.S. 299 (1977).

317. 185 F. Supp. 2d 874 (S.D. Ohio 2002).

318. 411 U.S. 792 (1973).