12-1-1979

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THE REDLINING BATTLE CONTINUES: DISCRIMINATORY EFFECT V. BUSINESS NECESSITY UNDER THE FAIR HOUSING ACT

John K. Lucey*

I. INTRODUCTION

The passage of the Civil War Amendments1 provided the necessary constitutional springboard for the century-long battle to end race discrimination in the United States. Resistance to the prospects of racial equality resulted in such temporary setbacks as the judicial doctrine of separate but equal,2 but significant progress has nevertheless been made. As the forms of discrimination have become more subtle, courts have developed sophisticated doctrinal tools with which to combat racism. Examples include the categorization of race as an inherently suspect classification requiring the demonstration of a compelling state interest before the classification will be permitted,3 and the prohibition against laws which are fair in form yet discriminatory in application.4

The chronology of the school desegregation cases5 dramatically illustrates the complexity and pervasiveness of the discrimination

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* Articles and Citations Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.
1 U.S. Const. amend. XIII (prohibiting slavery); U.S. Const. amend. XIV (providing equal protection and due process); U.S. Const. amend. XV (guaranteeing the right to vote regardless of race, color, or previous servitude).
2 See Plessy v. Ferguson, 163 U.S. 537 (1896).
problem which has required active judicial intervention in fashioning the necessary and appropriate relief.

Many of the difficulties encountered in bringing about integrated schools are linked to the problems of neighborhood segregation.\^ Like school segregation, the causes and cures of neighborhood segregation are complex. The barriers which blacks and other minority groups face in obtaining decent housing may not be the result of overt discrimination as manifested in refusals to sell or rent.\^\^ Rather, part of the problem can be traced to the economic consequences of poverty and the concomitant inability of an individual to obtain mortgage financing for the purchase of a home. This problem has become particularly acute in recent months with soaring interest rates, accelerating inflation, and a shortage of loanable funds.\^\^\^ Typically, poor people can only afford to live in old, deteriorating neighborhoods often located in large urban areas. To the extent that individual properties in these areas are in poor condition, the prices asked for these properties will be low and their value as collateral for a mortgage loan is diminished.\^\^\^\^ Low income buyers, however, face additional hurdles in their search for mortgage funds where lending institu-

\^ Congress' belief that the lack of integrated housing was in part responsible for segregation in schools was one reason why a fair housing law was enacted. Laufman v. Oakley Bldg. & Loan Co., 408 F. Supp. 489, 496-97 (S.D. Ohio 1976). This housing law is the Fair Housing Act (Title VIII), 42 U.S.C.A. §§ 3601-3619 (West 1977 & Supp. 1979) (amended 1978).


\^\^\^ In March, 1980, an Associated Press survey revealed that mortgage rates ranged from 14 1/4% to 16% nationwide, compared with an average of 13% in February, 1980, and only 10 1/4% one year ago. Boston Globe, March 14, 1980, at 1, col. 5. Higher interest rates may drastically increase the monthly costs of a mortgage. For example, a $50,000 mortgage with a pay-back period of 30 years at an interest rate of 10 1/4% would cost the borrower $448.06 per month. The same loan at 16% would increase the monthly payments to $673.38, a gain of approximately 50%. Id. at 7, col. 1. It is unlikely that low income persons who were barely able to afford a mortgage a year ago would realize substantial increases in their incomes sufficient to cover this year's increased carrying costs. Even those who would otherwise qualify are finding it difficult to secure a mortgage because lending institutions do not have the funds. With the increased availability of more attractive investment alternatives, depositors are withdrawing their money from low-yielding savings accounts, a major source of mortgage funds. Id. at 6, col. 1. Where banks are faced with a scarcity of funds, it makes sense that they will allocate those funds among the more affluent and less risky applicants, thus putting a tighter squeeze on lower income borrowers.

\^\^\^\^ Factors which determine the value of the collateral are enumerated in the text at note 175, infra.
tions generalize about the condition of the property and the income level in specific neighborhoods. The process whereby these generalizations are reduced to a blanket refusal to grant mortgage loans in certain neighborhoods has been labeled "redlining." Redlining is commonly defined as the systematic refusal of lending institutions to grant mortgage loans in a particular neighborhood regardless of the creditworthiness of the applicant or the condition of the property offered as collateral.\(^\text{10}\)

Determining precisely why mortgage applications are granted or denied is a formidable task insofar as an individual lending decision comprises a complex set of variables.\(^\text{11}\) Fundamentally, a lending institution will attempt to maximize long-term profits by minimizing the risk of loss associated with the loans which it grants. Overall risk of loss on a particular application can be pre-

\(^{10}\) See, e.g., Note, Attacking the Urban Redlining Problem, 56 B.U. L. Rev. 989, 989 (1976). Much attention has focused on the subject of redlining because of the belief that it is a major cause of urban decay. According to conventional wisdom, the process of neighborhood decline begins with the bank's decision to disinvest in a particular neighborhood. The decision is based on a perception of increased risk of neighborhood deterioration and results in potential buyers being steered to other areas while current residents are unable to secure home improvement loans. The inability to renovate causes homes to deteriorate and the inability to find potential buyers further reduces the incentive to maintain the properties. Eventually, financially able residents will leave their homes creating an excess supply of housing and driving down prices. Where the market value of a home falls below the outstanding principal on the mortgage, it will be in the economic interests of the owner to default. The downward spiral continues as the number of abandoned buildings rises along with crime and vandalism, while prices and government services fall. Finally, the neighborhood will be torn down, the residents will be relocated, and the area will be developed for more affluent families and commercial enterprises. For a more comprehensive and detailed examination of the causes and effects of redlining and the various proposed remedies see Duncan, Hood, & Neet, Redlining Practices, Racial Resegregation and Urban Decay; Neighborhood Housing Services as a Viable Alternative, 7 Urb. L. 510 (1975); Givens, The "Antiredlining" Issue: Can Banks be Forced to Lend?, 95 Banking L.J. 515 (1978); Hood, & Weed, Redlining Revisited: A Neighborhood Development Bank as a Proposed Solution, 11 Urb. L. 139 (1979); Renne, Eliminating Redlining by Judicial Action: Are Erasers Available?, 29 Vand. L. Rev. 987 (1976); Searing, Discrimination in Home Finance, 48 Notre Dame L. 1113 (1973); Van Alstyne, Redlining—The Cure Worse than the Illness, 3 J. Contemp. L. 264 (1977); Werner, Frej, & Madway, Redlining and Disinvestment Causes, Consequences, and Proposed Remedies, 10 Clearinghouse Rev. 501 (1976); Note, Urban Housing Finance and the Redlining Controversy, 25 Clev. St. L. Rev. 110 (1976); Note, Redlining: Remedies for Victims of Urban Disinvestment, 5 Fordham Urb. L.J. 83 (1976); Note, Redlining—The Fight Against Discrimination in Mortgage Lending, 6 Loy. Chi. L.J. 71 (1975); Redlining: Should Local Government Become Involved?, 10 U.C.D. L. Rev. 243 (1977).

\(^{11}\) For a more complete discussion of the criteria involved in lending decisions, see R. Schaefer, Joint Center for Urban Studies of M.I.T. & Harvard University, Mortgage Lending Decisions ch. 1 (1978) [hereinafter cited as Joint Study].
dicted by examining the creditworthiness of the applicant and the suitability of the property offered as collateral. An evaluation of creditworthiness may take into account the applicant's income in relation to the size of the loan requested, the applicant's overall net wealth and credit history, and the ratio of the size of the loan requested to the appraised value of the property. The suitability of the property offered as collateral is determined by the general condition of the property and other relevant neighborhood characteristics believed to affect the future value of the collateral. The final decision to grant, deny, or modify the application is based on all of the above factors viewed collectively.

To date, judicial treatment of the redlining controversy has been both limited and inadequate. In Laufman v. Oakley Building and Loan Co., a white married couple brought an action under the Fair Housing Act, alleging that they had contracted to purchase residential property in a racially integrated area, and that the defendant had denied their application for a mortgage loan on the basis of the racial composition of the neighborhood in which the property was located. The court found that in order to "effectuate the purposes of Congress" the Act must be interpreted liberally and concluded that a prohibition against redlining was within the spirit of the Act. While the decision serves as a useful starting point in addressing the redlining problem, the precise dimensions of the prohibition as outlined by the court remain unclear.

One of the major difficulties with Laufman is that the court

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13 See text at note 175, infra.
14 A decision to modify a particular application may include a reduction in the size of the loan, a change in the length of maturity, or an alteration in the cost of the loan (interest rate, closing costs, etc.).
15 There is no commonly accepted evaluation of the relative importance of each factor. The weight given each individual factor in arriving at a final decision will vary among institutions.
17 See Note 175, supra.
20 408 F. Supp. at 497.
never defined redlining. Hence, it is uncertain whether the court was addressing only intentional acts of systematic loan denial, or whether the court also contemplated other lending practices which have discriminatory results. However, the court's continual reference to "racial redlining" leaves one with the unsettling impression that the prohibition announced by the court is limited to situations where lenders intend to discriminate on the basis of the racial composition of the neighborhood. This circumscribed definition of redlining, which requires a showing of discriminatory intent, may well prove inadequate in successfully challenging a large number of lending decisions where redlining is alleged. Alternatively, a definition which dispenses with the intent requirement would permit a greater number of harmful lending practices to be subsumed under the word "redlining" and would focus attention on the discriminatory impact of the lender's conduct rather than his motivation.

This article will concentrate on one particular mode of judicial

19 For example, in discussing congressional amendments to the Fair Housing Act the court said: "but Congress did not change the language of this provision [§ 3605] to make clear that it did not intend to prohibit racial redlining despite the prior agency determinations that this practice was prohibited by the Act." 408 F. Supp. at 496. At another time, the court again drew a connection between individual lending decisions based on race and redlining. "Unquestionably, a denial of federal assistance to loan applicants on the basis of the racial composition of the neighborhood would constitute 'discrimination.' We believe that Congress could and did prohibit private sources from engaging in such discrimination . . . ." Id. at 499.

20 The fact that the court was content to quote extensively from the remarks made by counsel for the Federal Home Loan Bank Board further supports the proposition that the court was employing a restrictive definition of redlining.

[T]he gist of what Congress was attempting to make illegal in Title VIII and the gist of what the Bank Board was trying to make illegal in its regulations, was the feeling on the part of a great many lenders that a racially integrated neighborhood per se must be a bad credit risk . . . it's been shown time and again that a neighborhood which had changed from white to black or a neighborhood that is racially integrated . . . need not be a declining neighborhood. . . . The Board is anxious that lenders not use the racial composition of the neighborhood to effect an automatic judgment that it must be declining.

408 F. Supp. at 501.

21 Indeed, in the MIT-Harvard study, wherein redlining was alleged to occur on the basis of location, age of the housing stock, and the racial composition of the neighborhood, statistical analysis contradicted allegations of redlining in 22 out of 30 cases while producing equivocal results in 6 others. 1 Joint Study, supra note 11, at iii to iv. This data suggests that other factors may have been responsible for a paucity of loans being granted in specific neighborhoods. A more expansive definition of redlining which accounts for instances of redlining in effect, would cover a larger number of cases insofar as all lending practices having a discriminatory effect would be prohibited where not justified by business necessity.
action which could provide relief to victims of mortgage discrimination. First, an expanded definition of redlining is proposed which includes a variety of injurious lending practices not previously embraced within other definitions. Second, the history and provisions of the Fair Housing Act\textsuperscript{22} are examined to determine whether the Act prohibits the types of practices included under the proposed definition. A section then bridges the gap between the restrictive language of the Act and the broad language of the new definition with the introduction of the \textit{discriminatory effects test}. This intermediate section discusses the contours of the test, including its applicability under the Act and the general considerations relevant to a plaintiff's presentation of a prima facie case\textsuperscript{23} in a redlining claim. Finally, the business necessity defense under the effects test will be discussed, with emphasis upon the particular justifications which the defendant lending institution may employ to defeat a plaintiff's prima facie case.

II. Redlining: Reaching a Suitable Definition

The complex nature of the lending process requires that accepted definitions of redlining be re-evaluated to include a broader range of potentially harmful lending practices. A recent comprehensive study of the subject\textsuperscript{24} provides an illustration of an underinclusive definition of redlining: "Redlining is the refusal to lend, or the granting of mortgages with less favorable terms, in certain geographic areas even though the expected yield and risk of loss are the same as they are for mortgages granted in other areas."\textsuperscript{25} This definition is essentially geographically comparative in that the existence of redlining is determined by examining lending practices within a discrete geographic area and then comparing those practices with practices in other areas. Additionally, the inclusion of "expected yield" and "risk of loss" parameters within the definition provides clues as to possible defenses which a lending institution might assert in attempting to justify its practices.

The above definition is deficient insofar as the use of the term "refusal" implies that lending institutions must make a conscious

\textsuperscript{23} See cases cited at note 62, infra.
\textsuperscript{24} See Joint Study, supra note 11.
\textsuperscript{25} 1 id. ch. 1, at 10.
choice not to grant loans in certain geographic areas before redlining is established. Likewise, other attempts to define redlining also appear to include an intent requirement. For example, "racial redlining"—the term employed in the Lau{man case—refers to discrimination in the granting of mortgage credit based on the perceived racial characteristics of the neighborhood in which the loan applicant wishes to live, while "economic redlining" implies that lenders categorize certain geographic areas as zones of excessive risk and thus refuse to grant mortgages regardless of the characteristics of individual borrowers. All of these definitions are fatally underinclusive in that they overlook a kind of de facto redlining which may exist where loan applications are considered individually, yet the criteria used in evaluating those applications result in few loans being granted in specific neighborhoods. This type of practice is equally injurious to those seeking mortgage funds and therefore should be prohibited where no legitimate business reason is proven. Given the increasing propensity of courts to look at the discriminatory effects of conduct in actions brought under antidiscrimination legislation, such a prohibition is logical notwithstanding the continued requirement of demonstrating discriminatory intent in constitutional claims. Hence, any test which is employed for the purpose of curbing mortgage discrimination should address cases involving redlining in effect as well as those in which an intent to redline is present.

With the above considerations in mind, the following definition of redlining is the most appropriate: Redlining is the refusal to lend (or the granting of mortgages with less favorable terms) in certain geographic areas, or the employment of any lending criteria which effectively result in comparatively few loans being granted in certain geographic areas, even though the expected yield and risk of loss parameters are equivalent to those of mortgages granted in other areas.

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57 Id.
56 Id.
59 Not to be confused with any constitutional significance given the term "de facto" as used in the school desegregation cases listed at note 5, supra.
50 See cases cited at note 79, infra.
52 Unless specifically stated otherwise, the term "redlining" will be used throughout the balance of this article to refer to both intentional and unintentional acts of redlining.
The introduction of this new definition requires that several points be noted. The definition is facially neutral with respect to race because it attempts to account for many harmful lending practices which are not racially motivated. On the other hand, actionable mortgage discrimination under the antidiscrimination laws only occurs where lending practices have an adverse effect on members of a particular race or other protected class. Thus, while the definition describes the universe of undesirable lending practices, only those falling within the scope of appropriate civil rights legislation will be prohibited. The value of the expanded definition in protecting those who most need help is not diluted insofar as redlining is peculiar to poorer neighborhoods where blacks and other minority group members are more likely to reside. The remaining obstacles are discovering the proper statutory foundation on which to ground a prohibition against redlining and determining whether such a prohibition requires a showing of discriminatory intent.

III. THE NEED FOR A STATUTORY BASIS: THE FAIR HOUSING ACT

The redlining problem has triggered a varied legislative response at the state and federal levels. Current federal legislation requires lending institutions to periodically disclose the geographic distribution of their mortgage loans and mandates that

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34 Without making first-hand observations of some of the older, poorer neighborhoods in the nation's larger cities, the conclusion that minority group members tend to live in poor neighborhoods can only be drawn by inference. The median income of blacks in the United States in 1977 was $9,563 compared to $16,740 for whites. Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 449, table no. 735 (1979). The median income in central cities (50,000 plus inhabitants, id. at 2) where approximately 58% of the blacks reside (27% for whites), id. at 17, table no. 16, was $12,059 compared with a median income in suburban areas of $16,579, id. at 459, table no. 751, where 40% of the white population lives, id. at 17, table no. 16.

35 Periodic disclosure is required under the Home Mortgage Disclosure Act of 1975, 12 U.S.C. §§ 2801-2809 (1976). The purpose of the Act is to provide the public with sufficient information to enable them to determine whether lending institutions are fulfilling their obligation of meeting the housing needs of the communities in which they are located. Id. § 2801. The provisions of the Act are enforced by the Federal Reserve Board and are applicable to any depository institution which makes "federally related mortgage loans." Id. § 2802. Basically, this includes any institution who is regulated or whose deposits are insured by an agency of the federal government, or whose loans are in any way insured,
they meet the credit needs of the communities they serve under the auspices of the appropriate federal regulatory agencies.\textsuperscript{37} Mandatory disclosure can be an effective means of exposing undesirable lending practices, but the law's primary weakness is that it presumes that depositors will act on such information and

\textsuperscript{37} The Home Mortgage Disclosure Act is complemented by the Community Reinvestment Act of 1977, 12 U.S.C.A. §§ 2901-2905 (West Supp. 1979), which requires federal regulatory agencies to "encourage" lending institutions to help meet the credit needs of local communities "consistent with the safe and sound operations of such institutions." \textit{Id.} § 2901(b). Regulatory agencies must assess the institution's efforts to address local credit needs whenever that institution has filed an application with the agency for a charter, deposit insurance, establishment of a domestic branch, relocation of a home office, or a merger or acquisition. \textit{Id.} § 2902(3). Regulations passed by the various agencies require the periodic filing of a Community Reinvestment Act statement which contains information similar to that required under the Home Mortgage Disclosure Act and which includes the institution's own statement of its efforts to meet the communities' needs. \textit{See, e.g.}, 12 C.F.R. § 563e.4 (1979). The agency will then use that information in deciding whether to approve or deny the institution's application. 12 U.S.C.A. § 2903(2) (West Supp. 1979). The Community Reinvestment Act regulations are discussed in Note, \textit{The Community Reinvestment Act Regulations: Another Attempt to Control Redlining}, 28 CATH. U.L. REV. 635 (1979).


Regulations promulgated by the various agencies under the Community Reinvestment Act are contained in: 12 C.F.R. §§ 25.1-.8 (1979) (COC); 12 C.F.R. §§ 228.1-.8 (1979) (FRB); 12 C.F.R. §§ 345.1-.8 (1979) (FDIC); 12 C.F.R. §§ 563e.1-.8 (1979) (FHLBB).
channel their savings away from offending institutions.\textsuperscript{38} In addition to requiring disclosure, state legislation enacted to date often contains an explicit prohibition against redlining.\textsuperscript{39} Such legislation is the most direct and potentially most effective means of combating redlining, but it too may suffer where a narrow concept of redlining has been employed.\textsuperscript{40} Furthermore, given the limited applicability of state statutes, existing federal civil rights legislation poses an attractive alternative in providing a broadly-based prohibition against mortgage discrimination.\textsuperscript{41}

\textsuperscript{38} Obviously such disclosure laws will only be effective if depositors are well-informed and well-organized. While this may be too much to expect from the public in general, it would appear to be a particularly serious problem in poorer communities where depositors are likely to be less educated. Although the legislative history is silent on this point, the Community Reinvestment Act (CRA) may have been a response to the need for a disclosure statute with teeth as it requires institutions to demonstrate that they are meeting the credit needs of local communities, and permits the supervising agency to use such information when it acts upon applications for charters, branch offices, etc. The weakness of the CRA may be that it seems to provide for the imposition of sanctions only in the event that the institution has an application pending with the agency and thus does not necessarily provide immediate relief for those individuals who are adversely affected by the bank's practices.


\textsuperscript{40} For example, under the Michigan statute lenders are prohibited from discriminating due to the racial or ethnic characteristics of the neighborhood, the age of the structure proposed as security for the mortgage, or the age of adjoining structures. Mich. Stats. Ann. § 23.1125(2) (Callaghan Cum. Supp. 1979). Although the Act additionally requires that lending criteria be applied uniformly and loan applications be considered individually, id., the enumeration of race and age of the housing as the only prohibited criteria raises the possibility that other harmful lending criteria will be ignored if applied on a uniform basis. It also implies that lending decisions are actually made on the basis of race or the location of the property alone. The Illinois statute likewise frames the prohibition narrowly by focusing on the location of the property, but the Act also prohibits the employment of any lending criteria which have a discriminatory effect. Ill. Ann. Stat., ch. 95, § 304 (Smith-Hurd Cum. Supp. 1979). Thus, it is the inclusion of the discriminatory effects test in the Illinois statute which enables it to reach a wide variety of harmful lending practices and thereby avoid any implication that there must be a showing that the lender consciously chose to discriminate on the basis of race, or that he explicitly decided not to lend in a particular neighborhood.

\textsuperscript{41} It is not suggested that the specific anti-redlining legislation outlined above is useless and that the best or only way to proceed is via the civil rights legislation. Use of the antidiscrimination laws contains a significant limitation for as one commentator explained: "suits under the several Civil Rights Acts provide a valuable and flexible tool for eliminating arbitrary racial redlining but cannot cure arbitrary redlining based upon factors unre-
While none of the current antidiscrimination statutes specifically prohibits redlining, the Fair Housing Act (Title VIII) most closely addresses the kind of conduct complained of in a redlining case. The purpose of the Act is to provide fair housing, within constitutional limitations, throughout the United States. The factors which led to the passage of the Act further illuminate its purpose. During a period when rioting and civil disturbances were commonplace in many major cities across the country, Congress recognized the "discontent of people trapped in the nation's ghettos." While a high percentage of the non-white population lived in urban areas, most new factories and stores were located in suburban areas outside the reach of non-whites, thereby accounting for the high incidence of unemployment in the cities. Indeed, studies showed that many black families who could otherwise afford to move from old urban areas were effectively excluded from predominantly white suburbs. Congress believed that a fair housing law would solve many of these problems.

The Fair Housing Act prohibits, inter alia, discrimination in the sale or rental of housing and in the extension of financial

lated to race or racial transition." Note, Attacking the Urban Redlining Problem, 56 B.U. L. Rev. 989, 1013 (1976) (emphasis supplied). Challenging redlining through the antidiscrimination laws is advocated in this article because it is existing legislation applicable on a national scale which should reach a large number of instances where redlining is alleged. See note 34, supra. State legislation such as the Illinois statute may also prove to be an effective weapon against redlining where the principles of the discriminatory effects test have been employed.


The Act was passed in 1968, with many riots having occurred during the summer of 1967.


Dubofsky, supra note 46, at 153.


Section 804 of the Act provides:

[I]t shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale
assistance for housing.\textsuperscript{61} Like other antidiscrimination statutes, the language of the Act only prohibits discrimination "because of race, color, religion, sex, or national origin."\textsuperscript{62} If this narrow language is read literally and applied to redlining, then the statute would only apply in the limited number of cases where the decision not to lend was based on a discriminatory intent, and the plaintiff would have the difficult and often insurmountable task of proving such an intent.\textsuperscript{63}

or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.


\textsuperscript{61} Section 805 states:

[I]t shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, sex, or national origin of such person or of any person associated with him in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given: Provided, That nothing contained in this section shall impair the scope or effectiveness of the exception contained in section 3603(b) of this title.


\textsuperscript{63} The problems inherent in literally applying the language of the Fair Housing Act to include a requirement of proving discriminatory intent was noted in Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978), where the
Whether the provisions of the Act ban only intentional redlining cannot be divined from the statutory language alone, and the legislative history of the Act is silent with respect to the scope of its prohibitions. Arguably, the sweeping concerns of Congress outlined above dictate that the Act be construed broadly to include redlining and that the intent requirement be dispensed with in order to eliminate the greatest number of discriminatory housing practices. However, two federal district courts that have endorsed a liberal reading of the discrimination provisions of the Act to include a prohibition against redlining also appear to have required a showing of discriminatory intent.  

IV. JUDICIAL APPLICATION OF THE FAIR HOUSING ACT TO REDLINING

Historically, in claims of discrimination based on constitutional grounds, courts have frequently required some demonstration of discriminatory purpose. For example, in the area of school desegregation the Supreme Court has held that proof of discriminatory purpose is required. In Washington v. Davis, 426 U.S. 229 (1976), the Court stated:

Looking to [the Act] itself, we note that the “because of race” language might seem to suggest that a plaintiff must show some measure of discriminatory intent. To so construe [the Act], however, would have the effect of increasing the plaintiffs’ burden in proving a prima facie Title VIII case. . . . We would be most reluctant to sustain such a requirement.

Id. at 146-47. This portion of the decision is discussed in 46 Geo. Wash. L. Rev. 615, 625 (1978).

See Laufman v. Oakley Bldg. & Loan Co., 408 F. Supp. 489 (S.D. Ohio 1976) (plaintiffs stated a cause of action under the Fair Housing Act where they claimed that they were denied a mortgage loan solely on the basis of the racial composition of the neighborhood); Harrison v. Otto G. Heinzeroth Mortgage Co., 414 F. Supp. 67 (N.D. Ohio 1976) (the Fair Housing Act only requires that mortgage loans be denied because of racial considerations and therefore, the loan applicant may be white). But see Dunn v. Midwestern Indemnity Co., 472 F. Supp. 1106 (S.D. Ohio 1979), where the court in an action under the Fair Housing Act held that “a discriminatory failure or refusal to provide property insurance on dwellings” violated § 3604 of the Act. Id. at 1109. Use of the term “failure” implies that plaintiff need not demonstrate a discriminatory intent, although this interpretation is clouded somewhat by the court’s earlier definition of “insurance redlining”: “[f]or purposes of this motion, insurance redlining is defined as the restriction of insurance based on the racial composition of the neighborhood, apart from any consideration of risk.” Id. at 1107 n.3. Thus, it appears that the court employed a narrow definition of redlining with the result that plaintiff would be required to offer some evidence indicating that the defendant refused to provide insurance on the basis of the racial composition of the neighborhood.

This requirement was made explicit in Washington v. Davis, 426 U.S. 229 (1976), discussed in text at notes 73-78, infra.
tory purpose was needed to establish de jure segregation. Similarly, the language of the antidiscrimination statutes implies a requirement of discriminatory purpose or intent. In order to bridge the gap between the proposed definition of redlining and the restrictive language of the Fair Housing Act, the remainder of this article will focus on the proposed use of the discriminatory effects test, as developed in employment discrimination cases, in claims of redlining brought under the Fair Housing Act.

The discriminatory effects test was first articulated in cases brought under Title VII, the civil rights legislation governing equal employment. Indeed, to date the test has been most widely applied and refined under statutory claims in the employment field. However, courts have begun to recognize the adaptability of the test to other fields of civil rights legislation including Title VIII, the Fair Housing Act.

The effects test enjoyed only limited success in cases brought on constitutional grounds. E.g., Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); United States v. Chesterfield County School Dist. 484 F.2d 70 (4th Cir. 1973); Wahton v. County School Bd. of Nansemond County, 492 F.2d 919 (4th Cir. 1974); Armstead v. Starkville Municipal Separate School Dist. 325 F. Supp. 560 (N.D. Miss. 1971), modified, 461 F.2d 276 (5th Cir. 1972). But cf. Washington v. Davis, 426 U.S. 229 (1976), discussed in text at notes 73-78, infra, where the Court explicitly denied application of the effects test in a claim brought under the Fifth Amendment.

Reasons why the effects test has not enjoyed wider popularity in Title VIII litigation to date and the rationale for employing the test under Title VIII has been cogently stated by one commentator:

Title VII law has been substantially refined with respect to such matters as the elements of a prima facie case, the proper use of statistical evidence, and the proof necessary to establish discriminatory effect and the business necessity defense, whereas no comparable Supreme Court guidance exists concerning the substantive requirements of the Fair Housing Act.

The fact that different issues have become prominent under Title VII and Title VIII is, of course, not a reason to limit Griggs [discussed in text at notes 66-72, infra] to the employment discrimination field. Rather, it simply demonstrates the greater concern the Supreme Court has shown for Title VII cases and, correspondingly, the growing
In any claim brought under the Fair Housing Act, the plaintiff must establish a prima facie case of discrimination in order to avoid a directed verdict. The elements of a prima facie redlining case are closely related and not always separable. The current discriminatory effects test as applied to redlining comprises a statistical demonstration that the defendant's conduct has a discriminatory effect through: 1) a showing that the class affected by the discriminatory conduct is one which is protected under the Act; and 2) evidence showing that the plaintiffs are qualified to receive the mortgage funds that they were denied. Insofar as the plain-need for a definitive statement by the Court concerning the meaning of the Fair Housing Act.

When that statement does come, the analogy of Griggs and Title VII should prove compelling: the "because of race" language is similar in both laws; ... the related provisions of the Civil Rights Act of 1866 are similarly construed in the employment and housing fields; the Fair Housing Act, like Title VII, is a remedial civil rights statute and as such is entitled to a "generous construction"; none of the differences between employment and housing justify a fundamental difference in the interpretation of the two statutes; and finally, and most importantly, the congressional desire to eradicate the consequences of discrimination, not simply the motivation behind it, is just as strong under Title VIII as it is under Title VII. Thus, the Fair Housing Act should also be held to proscribe "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."

Schwemm, Discriminatory Effect and the Fair Housing Act, 54 Notre Dame L. 199, 237-38 (1978) (emphasis in original). For another viewpoint supporting the transferability of Title VII principles to Title VIII, see Comment, Applying the Title VII Prima Facie Case to Title VIII Litigation, 11 Harv. C.R.-C.L.L. Rev. 128 (1976).

Regulations promulgated by the Federal Home Loan Bank Board partially in response to the policies announced in the Fair Housing Act, lends further support for the viability of the effects test in Title VIII claims. While some of the Board's regulations parrot the language found in the Act, others specifically address the redlining problem:

The basic purpose of the Board's nondiscrimination regulations is to require that every applicant be given an equal opportunity to obtain a loan. Each loan applicant's credit worthiness should be evaluated on an individual basis without reference to presumed characteristics of a group. The use of lending standards which have no economic basis and which are discriminatory in effect is a violation of law even in the absence of an actual intent to discriminate. However, a standard which has a discriminatory effect is not necessarily improper if its use achieves a genuine business need which cannot be achieved by means which are not discriminatory in effect or less discriminatory in effect.

12 C.F.R. § 531.8(b) (1979) (emphasis supplied).


tiff is attempting to prove discrimination indirectly (i.e. without evidence of discriminatory intent), the defendant may rebut the plaintiff's prima facie case by claiming that his actions were justified by business necessity.64 This defense is not available where the plaintiff presents evidence proving actual discriminatory intent.65

A. Presence of Discrimination: Discriminatory Effect

The concept of a discriminatory effects test was first fully introduced in Griggs v. Duke Power Co.66 In that case, black employees brought suit under Title VII of the Civil Rights Act of 1964,67 challenging an employer's requirement that employees pass a series of intelligence tests or possess a high school diploma before being admitted to certain job classifications. The plaintiffs claimed that where the requirements were unrelated to job performance and operated to disqualify blacks at a substantially higher rate than whites,68 the requirements were racially discriminatory and violated Title VII. The Supreme Court agreed.

Reversing a court of appeals determination that absent a showing of discriminatory purpose Title VII had not been violated, the

65 In one Title VII case the Fourth Circuit stated: "In some instances the reasons for taking particular action may determine whether the action is unlawfully discriminatory. However, if a respondent's actions are otherwise determined to constitute an unlawful employment practice, the existence of a business purpose for continuing the practice will not negate its illegality." Robinson v. Lorillard Corp., 444 F.2d 791, 797 (4th Cir. 1971), cert. dismissed under Rule 60, 404 U.S. 1006 (1971). Along these same lines one commentator added: "Congress clearly proscribed the explicit use of race as an employment qualification, and therefore even 'business necessity' cannot justify an employment practice's overt reliance on racial classification." Note, Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach, 84 YALE L.J. 98, 107 (1974) (referring to 42 U.S.C. § 2000e-2(e) (1976), which allows sex, religion, and national origin, but does not allow race or color to be used as a bona fide occupational qualification).
66 401 U.S. 424 (1971). While Griggs was the first case to explicitly lay out the full effects test, prior cases provided clues as to the eventual development of the test. See Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); United States v. Sheet Metal Workers, 416 F.2d 123 (8th Cir. 1969); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971).
68 According to a 1960 North Carolina census, 34% of the white male population had completed high school compared to 12% of the black male population. Similarly the Equal Employment Opportunity Commission had determined that in one case, the tests used by the employer had a pass rate of 58% for whites and only 6% for blacks. 401 U.S. at 430 n.6.
Supreme Court looked to the purpose of the statute, focusing on the congressional desire to achieve equality in employment opportunities through the removal of artificial barriers that had operated to discriminate on the basis of race or other impermissible classifications. Thus, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." With respect to employment practices which are facially neutral yet discriminatory in effect, the employer must demonstrate that the practice is mandated by business necessity, i.e. a practice which has a discriminatory effect will be prohibited if not sufficiently related to job performance. In Griggs, the Court concluded that the employer had failed to discharge this burden where evidence showed that those employees who had not been subject to the requirement continued to perform their jobs satisfactorily in the departments where the requirements were now imposed.

Griggs represents an important step towards effectively combating the redlining problem in that it provides a foundation for challenging practices having a disproportionate adverse impact on a protected class without the necessity of proving discriminatory purpose or intent. As is the case in redlining, the employment practice in Griggs did not directly involve discrimination on the basis of a prohibited classification. Thus, the discriminatory effects test essentially permits, through a showing of disproportionate impact, a re-characterization of the particular form of discrimination involved from a benign to a prohibited act, when the act has the effect of discriminating on a prohibited basis.

The application of the discriminatory effects test is not permissible in all claims of discrimination. For example, in Washington v. Davis employment tests which were alleged to have a disparate impact on blacks were challenged under the due process clause of the Fifth Amendment, and the Supreme Court found the effects test to be inappropriate. Holding that the court of appeals erred in resolving the Fifth Amendment issue by applying standards applicable to Title VII cases, the Supreme Court stated
that even though the Fifth Amendment was designed to curb official acts which discriminated on the basis of race, such an official act had never been found unconstitutional solely on the basis of racially disproportionate impact.\textsuperscript{74}

Constitutional claims of discrimination have been subject to the tests of either "strict scrutiny" or "minimum rationality."\textsuperscript{75} The former test is applied whenever racial or other inherently suspect classifications are involved and requires the state to justify those classifications through a demonstration of a compelling state interest. The latter test is employed in all other cases and merely requires the classification to be rationally related to the legislative goal.\textsuperscript{76} Insofar as the former test presents a hurdle which is extremely difficult to overcome while the latter practically accords the legislature unbridled discretion, the choice of test is crucial.

The Court in \textit{Davis} focused on the degree to which evidence of disproportionate impact would influence the choice of test. In reaching its result, the Court did not explicitly state that a discriminatory purpose must appear on the face of the act or that evidence of disproportionate impact was irrelevant.\textsuperscript{77} Rather, the Court indicated that one may draw an inference of discriminatory purpose from a showing of disproportionate impact, but that fact alone would not trigger the rule that classifications on the basis of race be subject to strict judicial scrutiny.\textsuperscript{78} The limitation on the use of the effects test and the resulting need to prove intent in constitutional cases thus requires that claims of redlining be grounded on a statutory rather than a constitutional foundation.

The extent to which the effects test has been utilized in cases arising under the Fair Housing Act is difficult to measure, perhaps in part due to the wide variety of fact patterns in these types of cases.\textsuperscript{79} However, logic would dictate that the rationale

\textsuperscript{74} \textit{Id.} at 239.
\textsuperscript{75} See cases cited at note 3, \textit{supra}.
\textsuperscript{76} This method of analysis was succinctly summarized in \textit{City of New Orleans v. Dukes}, 427 U.S. 297 (1976): "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." \textit{Id.} at 303.
\textsuperscript{77} 426 U.S. at 242.
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} See \textit{Metropolitan Housing Development Corp. v. Village of Arlington Heights}, 558 F.2d 1283 (7th Cir. 1977) (exclusionary zoning); \textit{Williams v. Matthews Co.}, 499 F.2d 819
outlined by the *Griggs* court for employing the effects test in Title VII litigation would apply with equal force when considering the applicability of the effects test under Title VIII. In *Griggs*, the Court found that the broad purpose of Title VII required a concomitantly expansive test for detecting discriminatory conduct in employment. Use of the effects test should also be mandated in Title VIII cases in order to implement the comprehensive congressional goals in the housing field.

Cases decided under Title VIII in recent years indicate an increasing willingness on the part of the courts to adopt an effect-oriented approach to housing discrimination. Thus, where a developer’s practice of only selling to “approved” builders was challenged, the Eighth Circuit declared that practices which resulted in racial discrimination would be prohibited regardless of the defendant’s motivation. Further, evidence of a disparate impact on blacks along with a showing that the party was otherwise qualified to rent defendant’s apartment was held sufficient to establish a prima facie inference of discrimination.

In *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, the Seventh Circuit found that at least under certain circumstances a violation of § 3604 of the Fair Housing Act could be established through a showing of discriminatory effect without also establishing intent. The court was unwilling to say, however, that all showings of discriminatory effect would constitute a per se violation of the Act, as such an interpretation would go beyond the intent of Congress. Several critical factors were outlined by the court as being determinative of whether §


See text at notes 69-70, *supra*.

Indeed, parallels between the two Acts in terms of their broad congressional purposes have already been drawn by the judiciary. See *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977).


*Id.*

*Id.*


558 F.2d at 1290.

*Id.*
3604 had been violated. Important points in the court's test are the strength of the plaintiff's showing of discriminatory effects, and the presentation of some evidence of discriminatory intent. Evidence of intent need not meet the evidentiary test set forth in Davis, and the court actually minimized the importance of the intent component, indicating that a showing of discriminatory intent was only one factor to be weighed in determining whether the Fair Housing Act had been violated. Presumably, this balancing process operates on a sliding scale—evidence of other factors becomes less important to the plaintiff's case as the showing of discriminatory effect becomes stronger.

The precise contours of the effects test as applied under Title VIII remain as yet undefined. Arlington Heights suggests, as does its subsequent endorsement in dicta by the Third Circuit, that a discriminatory effects test roughly analogous to the test applied in Title VII cases will also be appropriate in Title VIII claims. In sum, unlike Laufman v. Oakley Building and Loan Co., where allegations of redlining focused solely on the racial composition of the neighborhood as the motivation for refusing to lend, use of the effects test under Title VIII would not require that a plaintiff demonstrate any motivation for the discriminatory practice—the plaintiff would not even need to show that the defen-

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88 Two varieties of discriminatory effects are possible. In one instance a decision or practice has a greater impact on one racial group than on another. In the second case the decision perpetuates segregation and thus has an undesirable effect on the community as a whole. Id. Discriminatory effects are not lessened even though a particular decision or practice may affect white people as well. Id. at 1291. Both types of discriminatory effects have potential applicability to the redlining situation.

89 Id. at 1290. Two other criteria to be examined in a § 3604 action are the defendant's interest in taking the action complained of, and whether the plaintiff sought to compel the defendant to affirmatively provide housing for members of minority groups or whether the plaintiff merely wanted to restrain the defendant from interfering with individual property owners who wished to provide such housing. Id. The court discussed the first criterion in the context of a disputed action by a governmental body, presumably in the public interest. This case is to be distinguished from one where an individual is seeking to protect private rights, in which case the courts would more likely intervene to end the discriminatory conduct.

90 Id.

91 Indeed, the court concluded that partial reliance on discriminatory intent involved the same problems of proof as when intent is the sole requirement. Id. at 1292.


93 See Comment, Applying the Title VII Prima Facie Case to Title VIII Litigation, 11 HARV. C.R.-C.L. L. REV. 128 (1976).

dant actually adopted a policy of not lending in specified areas. Under an effect-oriented approach, in order to establish a prima facie case the plaintiff would only have to show that the lending criteria used by an institution result in few mortgage loans being granted in a specific geographic area and that the use of such criteria has a disproportionate impact on a protected class. Thus, the plaintiff would not be required to identify the particular lending criterion which is responsible for the adverse impact to satisfy the prima facie requirement. If courts were to adopt the effects test in redlining claims rather than requiring evidence of discriminatory intent, the plaintiff would only be required to build a statistical case showing a pattern of loan denial. This in turn creates an inference that the criteria employed by the lending institution are responsible for the discriminatory pattern.85

The essence of the effects test is that it substitutes a showing of discriminatory effect for a showing of discriminatory intent. Because the test allows recovery based solely on evidence of indirect discrimination, the standard of proof necessary to satisfy the prima facie requirement is necessarily more rigid than it would be in a direct discrimination case. For this reason, the plaintiff in order to state a prima facie case in an action based on the effects test is required to designate the proper class disproportionately affected by the conduct and to demonstrate that the class was sufficiently qualified for that which they were denied. The business necessity defense provides an opportunity for the defendant to justify conduct having discriminatory effects, while no such justification would be permitted had plaintiff presented evidence of intentional discrimination.86

B. Class Affected

The discriminatory effects test focuses on a showing that a par-
ticular practice has a disproportionate impact on a protected class.\textsuperscript{97} The method by which discriminatory impact is calculated is therefore of critical importance.

In Title VII actions, three basic measures of disproportionate impact have been used to satisfy the plaintiff's burden of presenting a prima facie case.\textsuperscript{98} The foundation in an employment discrimination case under Title VII is established where: 1) blacks as a class (or at least blacks in a specified area) \textit{would} have been excluded by the employment practice in question at a substantially higher rate than whites;\textsuperscript{99} 2) evidence reveals the number of black and white job applicants \textit{actually} excluded by the practice;\textsuperscript{100} and 3) evidence shows the percentage of blacks employed by the defendant and the percentage of blacks residing in the geographic area are significantly different.\textsuperscript{101} It should be noted that since the issue in Title VII actions is whether the employment practice in question excludes members of a protected class at significantly higher rates than others, any test must measure the effect of the practice on both classes separately.\textsuperscript{102}

The variety of claims arising under Title VIII suggests that no simple formula for measuring disproportionate impact will automatically apply in all cases.\textsuperscript{103} Because an actionable redlining


\textsuperscript{98} Both Title VII and Title VIII prohibit discrimination on the basis of race, thereby making racial minority groups a protected class. In the interests of clarity and ease of presentation, the following examples of the basic measures of disproportionate impact use blacks as the protected class.

\textsuperscript{99} In \textit{Griggs}, it was shown that different percentages of blacks and whites in North Carolina failed to finish high school. See note 68, \textit{supra}.

\textsuperscript{100} The \textit{Griggs} decision cited statistics showing the number of blacks and whites who actually failed the employment tests. See note 68, \textit{supra}.

\textsuperscript{101} A fuller summary of the above evidentiary requirements complete with examples of where those requirements have been employed appears in Green v. Missouri Pac. R.R., 523 F.2d 1290, 1293-94 (8th Cir. 1975).

\textsuperscript{102} \textit{Id.} at 1295. In \textit{Green}, the court found that the employer's practice of barring employment to anyone convicted of a crime other than a minor traffic offense excluded 5.3% of the black applicants while only excluding 2.2% of the white applicants. The court concluded that the practice excluded blacks at a substantially higher rate than whites, and plaintiffs thus established a prima facie case of discrimination. Hence, the court rejected the claim of \textit{de minimis} discriminatory effect where it was argued that the percentage of blacks rejected compared to the total applicant pool (2.05%) was significantly less than the percentage of blacks residing in the St. Louis area (16%). \textit{Id.} at 1294-95.

\textsuperscript{103} See, e.g., Williams v. Matthews Co., 499 F.2d 819 (8th Cir. 1974), \textit{cert. denied}, 419 U.S. 1021 (1974) (disproportionate impact may exist where statistics show that all of a substantial number of lots have only been sold to whites). In a more complex factual case, the court in Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558
claim under Title VIII requires the existence of unlawful discriminatory effects against a protected class in a specific location, the plaintiff must specify the geographic area which has been redlined, and he must adopt a yardstick for measuring disproportionate impact. This yardstick requirement poses some potential problems, illustrating that a direct application of the methods used in Title VII cases\textsuperscript{104} may not always be appropriate in a redlining claim under Title VIII. For example, a comparison between the percentage of mortgage loans granted to blacks by Bank A and the percentage of blacks residing in a community served by Bank A is a poor measure of disproportionate impact because it ignores financial criteria which may, under some circumstances, warrant the institution's denial of a mortgage loan.\textsuperscript{105} Likewise, a comparison between the number of blacks and whites which would have been excluded\textsuperscript{106} by a particular practice may be impossible insofar as the plaintiff may have no actual knowledge of the lending criteria employed by the defendant.\textsuperscript{107} Finally, while a comparison of loan denial rates between whites and blacks provides the most objective measure of disproportionate impact, deciding which statistics will adequately demonstrate a disparity in

\textsuperscript{104} See text at notes 98-101, supra.

\textsuperscript{105} Indeed, if the blacks in a neighborhood alleged to have been redlined only comprise a small percentage of the black population in a larger geographic area, it might be argued that the disproportionate impact was significantly lessened. The argument loses much of its strength however, in light of Green v. Missouri Pac. R.R., 523 F.2d 1290 (8th Cir. 1975), where the court suggested that a comparison between the number of blacks affected by the practice and the total black population in a geographic area is an improper method of measuring discriminatory effect. See note 102, supra.

\textsuperscript{106} This could be done for example, by comparing the income levels of all blacks and whites in an area served by the defendant if income level was one factor which was suspected of excluding a large number of blacks.

\textsuperscript{107} Compare the situation in Griggs v. Duke Power Co., 401 U.S. 424 (1971), where the plaintiffs knew that they were being denied employment specifically because they could not pass a test or meet a minimum education requirement. In a redlining case, the plaintiff may not know the specific reasons for the loan denial other than that he failed to satisfy the institution's lending criteria. This problem appears to have been accounted for in the Michigan redlining law. Under that statute, rejected loan applicants have a right to have the lending institution produce a written statement outlining the reasons why the loan has been rejected. MICH. STATS. ANN. § 23.1125(5) (Callaghan Cum. Supp. 1979). The effectiveness of such a requirement, however, will be a function of how much detail banks will actually be required to furnish.
loan denial rates may present its own difficulties.

An actionable redlining claim requires that loan denial rates be compared on a neighborhood-wide basis, and hence the size of the particular geographic areas to be compared is of crucial importance. Secondly, Griggs involved a case where blacks were rejected in "substantially higher" numbers than whites. This implies that it may be necessary to show that the neighborhood alleged to have been redlined is predominantly inhabited by members of a protected class and that the neighborhood denial rate is "substantially higher" than in the non-redlined neighborhood. Unfortunately, the courts have provided little guidance in this area, and therefore the precise level of disproportionate impact which will be legally sufficient to sustain a redlining claim will have to be resolved on a case by case basis.

401 U.S. 424, 426. (1970). Again, there is no logical reason why the standards imposed in Title VII cases should not apply as well to Title VIII claims. See note 61, supra.

If neighborhood X is 85% black and only 2% of its mortgage requests are granted, while neighborhood Y is 85% white with 80% of its mortgage requests being granted, a fairly clear case of disproportionate impact can be established assuming both neighborhood's risk parameters are roughly equivalent. However, if neighborhood X is 60% black with only 40% of its mortgage requests being granted while neighborhood Y is 60% white with 60% of its mortgage requests being granted, a much closer case is established insofar as these statistics alone do not reveal what percentage of blacks in each of the respective neighborhoods were granted mortgages. In this second case, it is possible that no blacks received any mortgages or that—assuming each neighborhood is the same size—an equal number of blacks from each neighborhood received mortgages. Thus, while actionable redlining requires that comparisons be made on a neighborhood-wide basis, the percentage of blacks receiving mortgages in each of the neighborhoods cannot be ignored.

The problem of choosing the proper statistics to demonstrate disproportionate impact exists in the employment field as well where geography and skills of the comparison group are critical factors. See Comment, Statistics and Title VII Proof: Prima Facie Case and Rebuttal, 15 Hous. L. Rev. 1030 (1978). For example, in Hazelwood School Dist. v. United States, 433 U.S. 299 (1977), the size of the geographic area from which the comparison group was drawn determined whether or not the plaintiff had established a prima facie case. Id. at 310-13. Hazelwood is discussed at some length in Note, The Role of Statistical Evidence in Title VII Cases, 19 B.C. L. Rev. 881 (1978). For a general discussion of the problem of statistical proof, see Note, Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal, 89 Harv. L. Rev. 387 (1975).

A more difficult problem arises when the racial composition of the neighborhood is in the process of changing. It is commonly believed that lending institutions redline areas into which many blacks are moving because this movement is interpreted as an indication that the neighborhood is declining. Indeed, this appeared to be one of the concerns of the Federal Home Loan Bank Board as reflected in its regulations. See notes 20 & 61, supra. Thus, under the effects test, it would seem that in a "changing" neighborhood, one would not have a claim until the neighborhood reached a stage where it was "predominantly" black, unless plaintiff had some evidence linking the changing characteristic of the neighborhood with the fact that it was being redlined.
C. Qualification of Plaintiffs

Implicit in the demonstration of disproportionate impact is a showing that those who are discriminated against are qualified for that which they are being denied. The Court in *Griggs* cautioned that the opinion should not be read as prohibiting all job-related testing which results in a lower pass ratio among minorities.\textsuperscript{111} Indeed, the purpose of Title VII was to ensure that persons were hired on the basis of their qualifications rather than their race.\textsuperscript{112} Hence, the plaintiff in an employment discrimination case must show that the defendant's employment practices had the effect of discriminating against otherwise qualified applicants. Absent some evidence of qualification, a mere statistical showing that few blacks are hired will probably be insufficient.\textsuperscript{118}

In mortgage lending, qualification is determined by analyzing the applicant's financial background, including his income, net wealth, and overall credit history.\textsuperscript{114} These parameters are intricately related. Whether an application is denied or modified not only depends on the applicant's financial resources but also hinges on the amount of the loan requested in relation to income, the length of maturity desired, and the ratio of the amount requested to the appraised value of the collateral property.\textsuperscript{118} For purposes of satisfying the prima facie requirement, if the plaintiff can produce statistics showing that those denied loans had figures which roughly approximated those granted loans in other neighborhoods, then the financial portion of the qualification requirement would have been met.

The property which will be the subject of the mortgage must also qualify. Included in the computation of qualification is the


\textsuperscript{112} *Id.*

\textsuperscript{118} This conclusion can be drawn from the language in *Griggs* where the Court stated: Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

*Griggs* v. Duke Power Co., 401 U.S. 424, 430-31 (1971). Later, the Court quoted language from Senators Clark and Case (co-managers of the bill on the Senate floor) in discussing the legislative history of Title VII: "the proposed Title VII 'expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications.'" *Id.* at 434 (emphasis in original).

\textsuperscript{114} 1 *Joint Study*, supra note 11 ch. 1, at 3.

\textsuperscript{118} *Id.* at xvii, xix. This last numerical relationship is known as the loan-to-value ratio.
security of the property as reflected in its appraised value,116 which includes measures of risk of loss affecting the marketability of the property. Marketability will depend on the structural soundness of the dwelling and its overall condition. Other relevant factors may include the number of building vacancies in the neighborhood, incidence of vandalism, and the presence or absence of necessary public services.117 A difficult problem arises where the plaintiff attempts to show that risk of loss is no greater in his neighborhood than in other neighborhoods where more mortgage loans are granted. Initially, it might be difficult to compile data on things such as tax delinquencies, building vacancies, and housing code violations.118 Secondly, since the list of factors which can be used to measure risk is potentially very long,119 and since the plaintiff probably has no idea which criteria the particular lending institution is actually using, a mere showing, for example, that risk of vandalism or fire is no greater in neighborhood A than in neighborhood B may be meaningless. There are, however, additional statistics which a plaintiff might introduce which could evidence a systematic denial of mortgage loans within a given neighborhood.

One method of discriminating against loan applicants in certain neighborhoods is through the use of appraisal practices.120 When a bank is attempting to discourage lending in an area it may, without altering its policies regarding acceptable loan-to-value ratios,121 underappraise property and thereby reduce the amount that it will be willing to lend in any one loan. This raises the amount of the required downpayment, a factor which may be significant enough to preclude purchase of the property.122

While lenders may underappraise property and thus not alter their loan-to-value ratios, the test for determining whether lenders are systematically underappraising property is to compare appraised value to purchase price from neighborhood to neighbor-

116 Id. ch. 1, at 3.
117 Id. ch. 1, at 5.
118 See 2 JOINT STUDY, supra note 11 app. A, where the process of compiling this type of data is discussed.
119 These factors may range from the individual criteria which are part of the appraised value formula to practically any neighborhood characteristic which a bank believes could influence the future market value of the property.
120 1 JOINT STUDY, supra note 11, at xi.
121 See text at note 115, supra, for a definition of loan-to-value ratio.
122 1 JOINT STUDY, supra note 11 ch. 4, at 1.
If the ratios of appraised value to purchase price are lower in neighborhoods claimed to be redlined than in other neighborhoods served by the bank, the plaintiff has not conclusively proven that the bank has intentionally redlined, although he may have shown enough to shift the burden of rebutting the inference of discrimination over to the defendant. Just as the effects test allows the plaintiff to substitute an inference of discrimination for actual proof of an intent to discriminate, the introduction of statistics showing lower appraisal to purchase value ratios, while not in itself sufficient to prove intentional redlining, would at least be enough to warrant a shifting of the burden to the defendant to justify the lower figures in the neighborhood alleged to be redlined.

Appraised values may be systematically lower than market values for several legitimate reasons: 1) appraisers may underestimate the value of property because the consequences of doing so are more acceptable than if they overestimate the value—the risk of loss is greater where the property is overappraised should the borrower default on the loan; 2) lenders face greater uncertainties in that they do not exercise the same amount of control over the property which borrowers do; and 3) lenders might use a longer time horizon than the market in order to predict events which might affect the long-term value of the property which serves as security for the loan. Introduction of appraisal statistics can be a valuable tool. If, for example, lenders are basing their expectations of future market value on the number of abandoned buildings in the neighborhood or the incidence of vandalism, these expectations should be reflected in lower appraised-to-purchase-price ratios in the neighborhood alleged to be redlined. Assuming that a prima facie case is established, the burden will then shift to the lender who will have to articulate what criteria he uses and why he uses them.

\[123\] Id. ch. 4, at 2.
\[124\] See discussion of Griggs in text at notes 66-72, supra.
\[125\] 1 JOINT STUDY, supra note 11 ch. 4, at 2-3.
\[126\] Id. ch. 4, at 3.
\[127\] Id. Assuming that as perceived risk increases, the appraised value of the property decreases, the use of a longer time horizon by lenders will necessarily result in lower appraised values insofar as the longer the time frame, the greater the amount of uncertainty, and therefore, the greater the level of risk.
\[128\] In the JOINT STUDY, supra note 11, researchers were trying to determine whether systematic underappraisal took place independent of the lender's expectations of future
Another of the primary indicia of the existence of redlining is the disposition of mortgage loan applications according to neighborhood. Consequently, regulations of the Federal Home Loan Bank Board require that loan applications be processed individually rather than on a neighborhood-wide basis. Presumably, this prevents lending institutions from drawing inaccurate and unfair generalizations regarding the risk associated with a particular neighborhood. Nevertheless, introduction of statistics by the plaintiff showing equivalent rates of default risk between neighborhoods and unequal mortgage grants may create an inference that a lending institution is in fact redlining a neighborhood by not examining loan applications from that neighborhood on an individual basis. Specifically, a recent study concluded that default risk was associated neither with the age of the housing stock within a neighborhood nor with the age of the specific property being mortgaged. Rather, research produced three factors which had the greatest bearing on risk of default: 1) economic burden—the larger the ratio of loan payments to income, the more likely default will occur; 2) the amount of equity in the property—the larger the initial amount the less likely default will occur; and 3) building condition—buildings in poor condition were more likely to result in payment problems than buildings in good condition. Assuming that the above factors are accurate measures of default risk, lenders would only be able to make a determination as to the level of risk involved in a particular loan by examining each loan application separately since factors will vary significantly among different buyers and different pieces of property within a given neighborhood.

120 See 12 C.F.R. § 531.8(b) (1979) at note 61, supra, bearing in mind that FHLBB regulations do not apply to all lending institutions.

121 Default risk has been broken down into four subcategories: 1) the probability of delinquency; 2) the duration of delinquency; 3) the frequency of delinquency; and 4) the probability of foreclosure. 1 Joint Study, supra note 11 ch. 3, at 103-04.

122 Id. ch. 3, at 104. Indeed, if a lender subject to Board regulations were found to base his lending decisions on these two criteria, he would be in violation of FHLBB regulations. 12 C.F.R. § 531.8(c) (1979).

123 1 Joint Study, supra note 11 ch. 3, at 104.
If the plaintiff can produce statistics showing that the level of default risk in an area alleged to be redlined is equivalent to or lower than default rates in other neighborhoods, one could infer that either the defendant did not in fact use risk of default in determining whether or not to grant loans,\textsuperscript{133} or that the measure of default risk employed by the defendant was based on neighborhood-wide generalizations regarding risk rather than on the characteristics of the individual applications. Since it is almost a universal business practice to use risk of default in determining whether or not to grant a loan, the second possibility is more likely. A strong inference of redlining would then be created which would shift the burden to the defendant to explain the statistics on other grounds.

\section*{D. The Business Necessity Defense}

\subsection*{1. Elements in General}

While \textit{Griggs v. Duke Power Co.}\textsuperscript{134} opened new avenues of relief to victims of employment discrimination via the use of the discriminatory effects test, it also provided the basis for a new defense. Once the plaintiff establishes a prima facie case of discrimination through a showing of disproportionate impact, the burden shifts to the defendant to demonstrate that the practice is required by business necessity.\textsuperscript{135} Under \textit{Griggs}, a successful showing of business necessity rests on the nebulous requirement that any employment tests must "fairly measure" knowledge or skills required for the class of job sought by the applicant.\textsuperscript{136} While the \textit{Griggs} court provided the possibility of a business necessity defense, it failed to furnish a more precise definition of the test. Subsequent cases have clarified the justification of business necessity.

In the employment testing area, business necessity has been coupled with the requirement that employers demonstrate the job-relatedness of their testing devices.\textsuperscript{137} Frequently, employers attempt to prove job-relatedness by introducing statistical studies

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\item \textsuperscript{133} The Joint Study found that the amount of mortgage lending was not always consistent with the expected relationship that lending decreases as risk rises. \textit{Id. at xiv.}
\item \textsuperscript{134} 401 U.S. 424 (1971).
\item \textsuperscript{135} See generally \textit{Griggs v. Duke Power Co.}, 401 U.S. 424 (1971).
\item \textsuperscript{136} \textit{Id. at 433 n.9} (quoting Equal Employment Opportunity Guidelines).
\item \textsuperscript{137} \textit{Id. at 431.}
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to validate the employment tests used.\textsuperscript{138} In analyzing the sufficiency of such a validity study the Fifth Circuit, in \textit{United States v. Georgia Power Co.},\textsuperscript{139} provided clues as to the adequacy of certain aspects of the business necessity defense. The court concluded that the employer’s validity study was invalid, in part because it was “wholly irrelevant” to the employer’s test scoring techniques.\textsuperscript{140} The study was thus incapable of demonstrating any business necessity.\textsuperscript{141}

The opinion in \textit{Georgia Power} appears consistent with the underlying rationale for employing the discriminatory effects test in the first place. Just as a showing of disproportionate impact does not require evidence that the defendant intended to discriminate, \textit{Georgia Power} indicates that a sufficient showing of business necessity cannot be found in the employer’s proof that he did not intend to discriminate, nor will his good faith attempt to verify that his practices were not discriminatory suffice. As in the effects test, business necessity is concerned with that which occurs \textit{in fact}. If the plaintiff cannot demonstrate a disproportionate impact in appropriate circumstances, then he has not presented a prima facie case of discrimination. Likewise, when the disproportionate impact is proven where the defendant fails to prove that his testing devices are in fact predictive of proper job performance, then he has not demonstrated an adequate business necessity to justify the use of those testing devices.

In some cases, courts have articulated the magnitude of business necessity which must be demonstrated to overcome a prima facie Title VII case. One business phenomenon which has been particularly susceptible to Title VII actions has been union se-

\textsuperscript{138} In the employment area, validation studies consist of statistical data which employers use in an attempt to prove the job-relatedness of their testing devices. This is accomplished by establishing a correlation between test scores and job performance.

\textsuperscript{139} 474 F.2d 906 (5th Cir. 1973).

\textsuperscript{140} Basically, the employer required a passing score on each of a series of tests. However, the method used to validate the tests involved weighting the results on each of the tests and reaching a composite score. Because the scoring techniques used in the validation study differed from the techniques used by the employer in determining who was qualified for employment the court concluded, “[i]t is apparent that absolutely no relationship was demonstrated between successful job performance and the ability to achieve the Company-established cutoff score on each test in the battery.” \textit{Id}. at 917.

\textsuperscript{141} \textit{Id}. There, the court found that while the Equal Opportunity Commission guidelines regarding validation studies need not be followed to the letter, they did serve as a valid framework for determining whether such a study was adequate, and therefore the guidelines could not be ignored absent a cogent reason for non-compliance. \textit{Id}. at 913.
niority systems. In one of the leading cases, the Second Circuit found that where seniority and transfer provisions of a labor contract perpetuated prior admittedly discriminatory practices by "locking" discriminatorally assigned employees into their jobs, business necessity required more than a showing that the system served a legitimate management function. Not only must the system directly foster safety and efficiency, it must be "essential" to those goals. If safety and efficiency could be served by a "reasonably" available alternative with less discriminatory effect, then the seniority system would have to be modified. In the same year, the Fourth Circuit phrased the test in terms of an "overriding legitimate business purpose" which could not be accommodated by an "acceptable" alternative having lesser differential impact.

As the seniority cases suggest, what is at issue is the legitimacy and importance of the business interest claimed to be served and, most important, whether the business practice at issue is necessary to effectuate the asserted business interest. Assuming that a legitimate business interest is to maximize profits, it is a relatively simple matter to phrase employee qualifications and other general policies in terms of efficiency and productivity—terms which imply the furtherance of a legitimate business motive. The courts' use of the terms "essential" and "overriding" imply that the essence of the problem is determining whether a particular business practice is sufficiently necessary to justify a discriminatory effect. Different business practices will trigger different thresholds of necessity depending on the level of discriminatory

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143 United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).

144 Id. at 658. Title VII permits employers to apply different terms or conditions of employment pursuant to a bona fide seniority system as long as there is no intention to discriminate. The court found that where the seniority system perpetuated the effects of past discrimination, the seniority system was not bona fide. Id. at 661.

145 Id. at 662.

146 Id.

impact. This suggests the possibility that the business necessity defense operates on a sliding scale whereby the defendant will be expected to absorb higher costs as the discriminatory impact of the challenged practice becomes more severe.

In order for the defendant to demonstrate that a particular practice is "necessary" for the furtherence of a legitimate business interest, it must be shown that no reasonable alternative policy exists which would have a lesser discriminatory effect. The determination of reasonableness is dependent on the level of discriminatory effect: using the sliding scale, costlier alternatives will be deemed "reasonable" as the level of disproportionate impact rises. The issue of reasonable alternatives was examined by the Eighth Circuit in a case where the defendant refused to consider job applicants who had been convicted of crimes other than minor traffic offenses. The court concluded that while such considerations would be relevant in making individual hiring decisions, a practice which served as an absolute bar to employment swept too broadly and was therefore invalid.

While cases involving business necessity generally revolve around matters of efficiency, productivity, or, in the case of governmental bodies, public policy, business necessity in the context of mortgage redlining focuses on financial risk. Financial considerations were involved in Boyd v. Lefrak Organization. There, the plaintiffs challenged a landlord's practice of requiring...
a tenant's weekly net income to be equal to a specified percentage of his monthly rent on the grounds that the practice excluded all but a small percentage of public assistance recipients, the large majority of whom were either black or Puerto Rican. The court not only denied the plaintiffs' claim, it also refused to apply the discriminatory effects and business necessity tests to a claim brought under the Fair Housing Act.

The dissent in Boyd would have applied the Griggs standard to claims brought under the Act. Thus, where the landlord's policy was shown to have a disproportionate impact on minorities, he would be required to demonstrate the business necessity of such a policy. The dissent agreed that the landlord in Boyd had the right to adopt the reasonable economic standards designed to ensure the future payment of rent, but the dissent would have invalidated the landlord's chosen policy insofar as no evidence was presented which tended to prove that the particular income requirement was necessary to guarantee the continued economic viability of the organization. Hence, while the dissent found that the defendant had asserted a legitimate business interest, there was no showing that a less discriminatory alternative did not exist.

2. Considerations for Redlining

The business necessity defense in the context of a redlining case will focus on the following three considerations: 1) Is there a legitimate business interest justifying the adoption of specific lending criteria which have the effect of denying mortgage funds to disproportionate numbers of persons protected under the Fair Housing Act? 2) Do the criteria used in determining whether or not mortgage lenders will supply funds actually further that business interest? 3) Are there nevertheless any other criteria which could be employed in evaluating the suitability of property for mortgage assistance which would not have the effect of denying access to funds in entire neighborhoods predominantly inhabited by members of a protected class? The first two parts of the business necessity defense in a redlining case are integrally related.
Certainly, minimization of risk is a legitimate business goal because it ensures the maximization of long-term profits. However, whether that goal is sufficient to overcome a showing of discriminatory effect will depend upon the specific lending criteria used and whether those criteria significantly further the goal of minimizing the risk to which the lender's funds are exposed. Therefore, as the level of discriminatory impact increases, a closer nexus between the criteria employed and the furtherence of the desired goal will be required.

Assuming that the criteria sufficiently fulfill their purpose, the third aspect of the defense examines whether legitimate business goals could be reached through means which have a less discriminatory effect. Here, the viability of less discriminatory alternatives will be a function of both the increase in costs borne by the defendant and the amount by which the disproportionate impact is reduced. To put this another way, an alternative will not be forced on the defendant where the cost of compliance is high and the reduction of discriminatory effect is minimal. On the other hand, an alternative may be required in spite of its high cost if the level of discriminatory effect is high under the existing practice and stands to be reduced significantly. However, it is possible for the defendant to present other valid defenses which do not fall into the business necessity category.

Demonstration of a sufficient business necessity in a redlining case concentrates on the adequacy of the criteria employed to minimize economic risk to the lender. However, there may be other factors which are responsible for a paucity of loans being granted in a given area which are unrelated to risk. Where these factors are independent of specific bank policies, a lending institution will not offer them to justify its practices, but rather to explain why few loans are made in a specific area irrespective of its lending criteria. The offering of a defense based on the production of extrinsic circumstances would not appear to require that the defendant satisfy the three-pronged business necessity test.

For example, a lending institution may not lend frequently in a particular neighborhood due to lack of demand. This might occur because there are few unoccupied homes, or a low turnover of homes that are occupied. The latter possibility is particularly

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188 1 JOINT STUDY, supra note 11 ch. 1, at 4-5.
likely in areas with many long-term residents who have paid off their mortgages and who are not interested in refinancing their homes and incurring additional debt.\textsuperscript{169} Alternatively, mortgage demand might be relaxed because housing demand is being satisfied elsewhere. If the homes in a neighborhood become obsolete due to size or lack of facilities, then residents may relocate to other neighborhoods, with the result that housing prices in the old neighborhood fall.\textsuperscript{166} With falling prices, automatic neighborhood disinvestment results since smaller loans are required to purchase individual pieces of property. Therefore, as the amount of the average loan decreases, the aggregate value of all loans outstanding in the area will also be reduced.\textsuperscript{161} However, falling prices may actually discourage lending due to the increased risk associated with uncertainty regarding future prices.\textsuperscript{168} Arguably, if banks are not lending because few people are applying for loans it is less likely that anyone will be challenging the bank’s practices in the first place. Nonetheless, if neighborhood disinvestment is taking place because banks claim that falling prices are creating unjustifiably high levels of risk, the reasonableness of this claim would be a proper matter for the trier of fact in the context of the business necessity defense.

External considerations bearing upon restrictive lending may support the defendant’s case and be virtually unassailable by the plaintiff. For example, an institution’s internal policies regarding diversification of risk are supplemented by federal regulations on the maximum percentage of funds which any single institution may have in any one particular type of investment.\textsuperscript{163} If a defendant had already reached the regulatory mortgage quota, it would have no choice but to discontinue those types of loans. Likewise,

\textsuperscript{169} \textit{Id.}
\textsuperscript{166} \textit{Id.} ch. 1, at 12.
\textsuperscript{161} \textit{Id.}
\textsuperscript{168} See generally \textit{id.} ch. 1, at 12, 15.
\textsuperscript{163} Lending institutions which are regulated by the Comptroller of the Currency are generally limited to an outstanding aggregate balance of real estate loans not to exceed the amount of the institution’s unimpaired capital plus unimpaired surplus (as defined in 12 C.F.R. § 7.1100(b) (1979)), or 100% of the time and savings deposits of the bank, whichever is greater. 12 C.F.R. § 7.2155 (1979). Regulations of the Federal Home Loan Bank Board, which regulates the institutions that make the majority of real estate loans, are much more complicated. While some types of mortgage loans are not subject to percentage-of-assets or percentage-of-savings-accounts limitations, other types of loans including loans for housing for the aging, and loans for urban renewal are subject to specific restrictions. These lending restrictions are contained in 12 C.F.R. §§ 545.6-1 to 545.6-26 (1979).
the existence of state usury laws limiting the amount of interest which can be charged on mortgage loans might have an effect on the bank's supply of loanable funds. If the current market rates of interest are above the usury limit, funds will be diverted to out-of-state borrowers willing to pay the higher rates with the result that the supply of funds for in-state borrowers will be reduced.

Broad business policy reasons may underlie a limitation on the amount of mortgage funds available in certain neighborhoods. These strategic business policies would be subject to evaluation under the three considerations of the business necessity defense. For example, one method of promoting financial stability, if not greater long-term profits, is to reduce overall risk by diversifying an institution's loan portfolio. This means that a bank will decide not only what percentage of its total supply of loanable funds to invest in real estate, but also what percentage of real estate funds should be invested in which areas. Thus, a refusal to grant additional loans in a particular neighborhood may be justified on the grounds that the supply of loanable funds allocable to that area has been exhausted. Nevertheless, the pivotal question again becomes one of risk. Invariably, the supply of funds is based on perceived risk; thus, the criteria used in measuring risk and the effect which those criteria have on the overall allocation of funds can always be challenged by the plaintiff.

Some strategic policies, although based on sound management criteria, would nevertheless fail to pass muster under the business necessity defense. Included under this category would be any strategy which precludes the need to consider loan applications individually. Such a practice, besides being in violation of Federal Home Loan Bank Board regulations, would probably be invalid because less drastic alternatives exist and therefore, it "sweeps too broadly." For example, a lender may have information that a sizeable percentage of the residents of a neighborhood are not

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164 For a discussion of the New York usury law and its effect on the supply of mortgage funds in New York, see generally 1 Joint Study, supra note 11 ch. 2.
165 Id. The MIT-Harvard study concluded that this indeed happens under New York's usury statute.
166 See text at p. 389, supra.
167 1 Joint Study, supra note 11 ch. 1, at 2.
168 Id.
169 See 12 C.F.R. § 531.8(b) (1979) at note 61, supra.
creditworthy. Therefore, it might adopt a practice of not lending in a particular area in order to save money on the administrative costs of processing loan applications which would result in few actual loans.\textsuperscript{171} Another management strategy not based on a particular area which nevertheless could have an impermissible disparate impact would be a minimum loan size requirement. If processing and servicing costs are independent of the loan size, an institution might decide to set such a minimum in order to maximize the return on its investment.\textsuperscript{172} Such a policy should not be upheld where large numbers of minority applicants do not have the resources to borrow the minimum amount of money required. In general, these policies cannot be justified when the marginal increase in institutional cost is compared to resulting discriminatory impact in a situation where obvious alternatives exist.\textsuperscript{173}

The criteria used to measure creditworthiness and risk of loss are likely to be the subject of much attention in future redlining litigation. As mentioned earlier, creditworthiness is generally determined on the basis of the applicant’s income, employment experience and prospects, assets, liabilities, and overall credit history.\textsuperscript{174} Risk of loss generally takes into account not only the condition of the building as reflected by its appraised value, but also characteristics of the neighborhood such as the number of housing code violations, property tax delinquencies, serious fires, vandalism, and vacant buildings.\textsuperscript{175} Research indicates that individual financial constraints and the condition of the property are significantly related to risk of default.\textsuperscript{176} Thus, the issue in the future will probably be whether the standards set by the sum of individual criteria are sufficiently related to the goal of minimizing risk as to justify the discriminatory effect on a neighborhood.

Some guidance in this area is provided by the dissent in \textit{Boyd v. Lefrak Organization},\textsuperscript{177} which did not quarrel with the land-

\textsuperscript{171} 1 Joint Study, supra note 11 ch. 1, at 8.
\textsuperscript{172} Id. ch. 1, at 17.
\textsuperscript{173} The Joint Study also cites the example where the bank restricts mortgage lending to depositors in times of tight credit even though the depositors are predominantly white. Id. ch. 1, at 8. Contrary to the conclusion reached in the Study, such a policy probably would not constitute a sufficient business necessity defense insofar as the harm to members of a protected class would greatly outweigh the cost of using a less discriminatory alternative.
\textsuperscript{174} Id. ch. 1, at 3.
\textsuperscript{175} Id. at xiii.
\textsuperscript{176} Id. ch. 3, at 105.
\textsuperscript{177} 509 F.2d 1110 (2d Cir. 1975), cert. denied, 423 U.S. 896 (1975).
lord's setting of minimum income requirements but inquired whether the particular standard set was necessary to serve its alleged purpose. If a lender specifies a certain income to loan ratio, by this standard it must show that this ratio is the absolute minimum ratio that will reasonably satisfy the bank's risk parameters. If a slightly lower ratio could be used which would cure the discriminatory effect demonstrated by the plaintiff without a significant rise in risk, then the defendant has not demonstrated a sufficient business necessity for leaving the requirement as it stands.

V. Conclusion

Challenging the practice of redlining through judicial action poses certain practical and conceptual problems. Traditionally, courts have frequently required proof of discriminatory intent. In virtually all cases, proving an intent to discriminate is a practical impossibility. Even if proving intent were simple, it is evident that only a small percentage of the harmful lending practices would be affected. The solution is reached by first expanding the definition of redlining, then using the discriminatory effects test which lets the plaintiff prove discrimination indirectly. Finally, a liberal reading of the discrimination provisions of the Fair Housing Act must be accepted.

Under the analysis proposed in this article, several elements serve to establish a prima facie case of redlining under Title VIII. The use of the discriminatory effects test provides evidence of discrimination by first requiring that the plaintiff demonstrate that the lending practices of the defendant have a disproportionate impact on a class protected under Title VIII. Second, the plaintiff must show that those injured by the practice were indeed qualified for the loans which they were denied. An adequate demonstration that the plaintiff was qualified is a potentially difficult task as he must show that he met the lender's financial require-

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178 Id. at 1117-18.
179 One factor which lending institutions consider is the amount of the loan requested in relation to the applicant's yearly income. The Study found that applications were more likely to be rejected when the requested amount exceeded twice the applicant's yearly income. 1 Joint Study, supra note 11, at xix.
180 Likewise, if a bank requires that a neighborhood have a certain number of fire hydrants per block, the bank must demonstrate that to remove the requirement would subject the bank to unreasonably high levels of risk on loans granted in that neighborhood.
ments and that the risk of loss associated with the property was within acceptable levels. Once the plaintiff presents sufficient evidence to establish a prima facie case, the burden shifts to the defendant to justify his lending practices.

Business necessity may be shown by first explaining the business interest to be served by using the individual sets of criteria involved in a lending decision. Next, the defendant must show how those criteria further that legitimate business interest and, finally must show why no alternative criteria will satisfy the lender's business objectives equally well. A requirement that he demonstrate sufficient business necessity is thus a heavy burden for the defendant. Assuming that most varieties of business practices are ultimately geared towards the goal of maximizing profits, only practices sufficiently necessary to achieve those ends should remain where the alternative is the perpetuation of "built-in headwinds" against those who are trying to secure better housing. The utilization of the effects test provides a basic means of challenging all undesirable lending practices included in the expanded definition of redlining, while the use of this test removes the onerous requirement that the plaintiff prove discriminatory intent. The test thus provides a streamlined mechanism through which aggrieved parties may more effectively curb the incidence of mortgage discrimination.