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# Eliminating Redlining by Judicial Action: Are Erasers Available?

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## I. INTRODUCTION

In Section 2 of the Housing Act of 1949, Congress piously declared it to be the policy of the United States Government to provide every American family with "a decent home and a suitable living environment."[1] This policy was reaffirmed in the Housing and Urban Development Act of 1968 in which Congress stated that the resources and capabilities existed in the private sectors to accomplish this policy within the "next decade by the construction or rehabiliation of twenty-six million housing units. . . ."[2] No one who has lived in the urban areas of the United States would assert that eight years later—1976—this goal is any nearer achivement than in 1968.

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1. 42 U.S.C. § 1441 (1970).

2. 12 U.S.C. § 1701t (1970) provides in pertinent part:

The Congress affirms the national goal, as set fortb in section 1441 of Title 42 of 'a decent home and a suitable living environment for every American family.'

The Congress finds that this goal has not been fully realized for many of the Nation's lower income families; that this is a matter of grave national concern; and that there exist in the public and private sectors of the economy the resources and capabilities necessary to the full realization of this goal.

The basic approaches which have been pursued in seeking to fulfill this declared policy of a decent home and a suitable living environment have been two-fold. The first approach involves the large-scale demolition of existing structures in urban areas and their replacement with either new residential complexes, generally on a large scale, or commercial developments.[3] This approach is perceived as a method of removing blighted and delapidated housing from the housing stock ostensibly to benefit the urban poor. In practice it generally has resulted in removing the poor and replacing them with more affluent citizens with no concomitant benefit to those displaced.[4] The second approach involves assistance in the form of loan guarantees, tax relief, and some direct grants in order to encourage private investment in housing.[5] This approach is perceived as aiding the construction of new, primarily single-family homes and the rehabilitation of existing housing stock. In practice it has fostered the mushrooming of suburban areas with new homes for middle income families, with only limited improvement of the existing housing stock.[6] Clearly, after more than thirty years of this two-pronged approach we are not closer to accomplishing our declared National Housing policy. Arguably, for those who live within the boundaries of major American cities, we are further removed from a "suitable living environment" than was true in 1949.[7]

The primary resource of any planner in his efforts to accomplish the National Housing goals is the existing housing inventory. The President's Committee on Urban Housing reported that at any given point ninety-seven to ninety-eight percent of the housing inventory consists of "used" housing and any successful program

3. REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS TO THE CONGRESS AND TO THE PRESIDENT OF THE UNITED STATES, BUILDING THE AMERICAN CITY, 80-87 (1968) [hereinafter cited as BUILDING THE AMERICAN CITY]. See particularly Table 7, which compares dwelling units demolished with those built and shows a deficit in 74 cities of 40,004 units. These demolitions impose an even heavier burden on the existing urban dwellings. *See also* GRIGSBY, HOUSING MARKETS AND PUBLIC POLICY 322-35 (1963) [hereinafter cited as GRIGSBY].

4. W. SMITH, HOUSING, THE SOCIAL AND ECONOMIC ELEMENTS 480-82 (1970).

5. BUILDING THE AMERICAN CITY, *supra* note 3, at 94-100; REPORT OF THE PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME [hereinafter cited as A DECENT HOME]; J. STEVENS, IMPACT OF FEDERAL LEGISLATION AND PROGRAMS ON PRIVATE LAND IN URBAN AND METROPOLITAN DEVELOPMENT 143-45 (1973). For additional efforts by the federal government to solve the urban housing problems see generally 12 U.S.C. § 1701e (1970) (improvement and standardization of building codes); § 1701g (1970) (housing for handicapped and elderly); § 1701s (1970) (rent supplements); 1701z-3 (1970) (experimental housing allowance payment program); § 1701z-4 (1970) (abandoned properties demonstration project); § 1715z-8 (1970) (mortgage assistance payments).

6. *See, e.g.*, NATIONAL CAPITAL PLANNING COMMISSION, PROBLEMS OF HOUSING PEOPLE IN WASHINGTON D.C. 6 (1966).

7. BUILDING THE AMERICAN CITY, *supra* note 3, at 13-16.

must make the "maximum efficient use of existing homes. . . ."[8] This maximization of the use of existing housing is particularly important in light of both the scarcity of urban real estate and the historic reliance of the urban poor on housing that "filters" down to them when middle and upper income groups leave the inner city.[9] We have not been making use of this resource. In New York City during the period 1965-1967, the annual loss of housing units from the city's housing inventory exceeded the number of units added by an average of 7,000 units while the remaining housing stock had deteriorated in quality.[10] In California, it is estimated that at least one million units will need to be rehabilitated or replaced during the period 1974-1978.[11] Thus the prospects of achieving the goals enunciated in 1968 appear to be more chimerical in 1976 than in 1968.

This paper will consider one practice—mortgage disinvestment, commonly referred to as "redlining"[12]—which has worked in contravention to the declared policy of Congress by contributing to the destruction of the urban housing inventory and has been partly responsible for the failure to meet our housing goals. This paper will discuss the concept and effects of redlining, the relevant statutes and administrative regulations, and the use of class action litigation as a means of eliminating the practice. Before turning to this discussion, however, it is important to emphasize that eliminating the practice of redlining will prove no panacea to our urban problems. It is only one element which must be attacked in any attempt to recreate a "suitable environment in our urban centers."[13]

8. A DECENT HOME, *supra* note 5, at 20. Maximizing the use of existing housing is even more critical in this time of limited resources and rising construction costs. *See, e.g.*, the discussion in the CALIFORNIA ATTORNEY GENERAL'S REPORT ON LAW AND MODERATE INCOME HOUSING 9-15 (1976), which demonstrates that costs of new housing is beyond the reach of a substantial number of Americans.

9. *See* R. RATCLIFF, URBAN LAND ECONOMICS 321-22 (1949); GRIGSBY, *supra* note 3, at 84, for a complete discussion of the concept of filtering. Obviously, the availability of an adequate housing inventory is crucial to this concept.

10. Rental Housing in New York City, Vol. 1, Confronting The Crisis (N.Y. Rand Institute 1970).

11. CALIFORNIA ATTORNEY GENERAL'S REPORT ON LOW AND MODERATE INCOME HOUSING 7 (1976); THE SAN FRANCISCO DEVELOPMENT FUND, A CALIFORNIA HOUSING PROGRAM 15 (1975).

12. The term "redlining" arose from the practice of some lending institutions to draw red lines on urban maps to designate areas in which they would make no loans. A colorful and artistic exercise that will probably cease outwardly—the attitude it reflects will remain.

13. The entire range of governmental services—police, fire, garbage collection, schools, playgrounds and traffic—are all intertwined with the availability of mortgage financing and in any consideration of the decline or rebirth of specific urban areas.

## II. WHAT IS REDLINING?

A mortgage lender redlines a specified geographic area located within the larger area normally serviced by that lender when it adopts one or more of the following investment policies:

(a) Refusal to accept any loan applications for real estate loans secured by real property within the designated area;[14]

(b) Refusal to make any real estate loans secured by real property within the designated area;

(c) Refusal to make a real estate loan secured by real property within the designated area unless the loan is guaranteed by some form of mortgage insurance either public or private;[15]

(d) Granting real estate loans secured by real property within the designated area only on terms and conditions more onerous than those for loans on residential property outside the designated areas. These include lower loan to value ratios, increased loan fees, larger down payments, higher rates of interest, and shorter loan duration.

Another investment practice that constitutes a form of redlining is the refusal by a lending institution to make loans secured by real property older than some arbitrarily determined age. This practice differs in concept from the more traditional redlining practices because ostensibly it is not directed at an entire neighborhood. The net effect, however, may be the same because the great majority of houses in specific areas of the urban community may exceed the arbitrary age classification, thus effectively depriving that area of any source of mortgage money.

Certain observations should be made concerning redlining in order to understand the investment practice and to arrive at reasonable solutions which may lead to its elimination. First, although redlining is undoubtedly a universal practice,[16] the vast majority of

14. *Special Hearings on Redlining by the State of California Business and Transportation Agency* (1975) [hereinafter cited as *Redline Hearings*] included testimony of a number of witnesses who were told over the telephone, after identifying the zip code of the property, "there was no money available for that area."

15. Strictly speaking, under Interpretative Rulings of the Comptroller of the Currency § 7.2145(b)-(c) applicable to commercial banks, such a loan is not a real estate loan within the meaning of 12 U.S.C. § 371 (1970).

16. T. MARVELL, THE FEDERAL HOME LOAN BANK BOARD 240 (1969) [hereinafter cited as MARVELL]:

> All mortgage lenders have engaged in the practice of redlining—refusing to consider certain urban districts, claiming they are too rundown to invest in.

*See also Redline Hearings*, *supra* note 14, particularly at the testimony of Jothan Leher-Graiwer and Cary Low (June 16, 1975), Merle Mergell, Mayor of the City of Inglewood (June

mortgage lenders who have redlined areas of our cities have not done so to destroy neighborhoods or to discriminate intentionally against borrowers on the basis of race, religion, national origin, or sex.[17] Such destruction or discrimination may be the natural consequence of their redlining decision but seldom will a litigant be able to establish that a disinvestment policy was adopted to accomplish such a purpose.

Another consideration is that mortgage lenders have a finite amount of funds to lend; the officers and directors of these institutions believe that it is their obligation to lend these funds so as to maximize the return on their investment. Thus the decision to redline an area is purportedly an investment policy arrived at by the mortgage lender based on an assessment of the risks and the rate of return from loans secured by property in the redlined area compared with the risks and return from loans secured by property in other geographic areas.[18] It is this so-called "fiduciary" obligation of the officers and directors toward their depositors which renders the voluntary elimination of redlining so problematical.

Additionally, real estate loans are generally long-term, and the decision to redline an area must be based primarily on subjective underwriting judgments. These judgments involve estimates of the long-term value of the building, speculation about changes that may occur in the ethnic composition of a given neighborhood and the effect of those changes on the value of residential property, forecasts concerning potential economic changes in the immediate geographic area and adjacent areas, and estimates of long-range availability of governmental services.[19]

Regardless of the reasons advanced for the decision to redline an area, this decision results in the discriminatory handling of real

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16, 1975), and Robert Farrell (June 23, 1975). *But see* testimony of Anthony Frank, Chairman, Citizens Savings at the hearing on December 12, 1975:

> I believe that there is relatively little redlining going on, and that means that few if any applications are being turned down on a discriminatory basis.

17. *Redline Hearings*, *supra* note 14, at the testimony of W. Dean Cannon Jr., Robert Jacobson, Arthur L. Ferris, Roger Williams, and William Popejoy (June 16, 1975).

18. *Redline Hearings*, *supra* note 14, at the testimony of Dr. Maurice Mann, President, Federal Home Loan Bank, San Francisco (June 16, 1975).

19. Even more subjective than these judgments are the assumptions that underpin them, including determinations that certain types of people are less likely to maintain their property, property values will decline in racially changing neighborhoods, and suburban living is more desirable than urban living. BUILDING THE AMERICAN CITY, *supra* note 3, at 100; W. GRIGSBY & L. ROSENBERG, URBAN HOUSING POLICY 204-05 (1972) [hereinafter cited as GRIGSBY & ROSENBERG]. An interesting study which rejects the traditional view that changing racial patterns reflect a decline in the neighborhood is Phares, *Racial Changes and Housing Values: Transition in an Inner Suburb*, 52 SOC. SCI. Q. 460 (1971).

estate loan applications by the lending institutions. Applications for real property loans in non-redlined areas will be approved or rejected based upon the credit worthiness of the applicant and the appraised value of the real property involved.[20] In redlined areas, however, the application is denied primarily because of the neighborhood regardless of the applicant or the intrinsic value of the real property. Thus the loan-making process for redlined areas is the converse of the normal underwriting approach followed by the lender. Even if a loan is granted, the terms are different from those loans granted in non-redlined areas, again based primarily on the neighborhood considerations. Whether such discrimination is illegal may depend on a number of considerations, but discriminatory handling of loan applications is a fact that cannot be disputed. Finally, many of the redlined neighborhoods are areas with a high concentration of residents of ethnic minorities, or are deemed to be areas that are becoming dominated by ethnic minorities.[21]

## III. What Are the Effects of Redlining?

There is little dispute that the practice of redlining exists in all urban areas of this country.[22] The real controversy surrounding redlining is not its prevalence but whether it is a cause or an outgrowth of urban decline. Mortgage lenders argue that the decision not to invest mortgage funds in a given neighborhood arises only after the neighborhood has started to decline, after the housing stock has become undesirable to the large majority of purchasers, and after there has been a loss of governmental services.[23] They argue that the decision to disinvest is merely a recoguition of the deterioration of a given neighborhood and a prudent exercise of investment policy. On the other hand, opponents of redlining argue that the decision of the mortgage lender dooms the neighborhood and causes the destruction of the housing stock. Redlining, in their mind, is a self-fulfilling prophecy over which the individual has no control.[24]

While such arguments as to causation may be interesting philosophically, they do little toward reversing the decline of the urban environment and are of no help in providing a solution to the problem. Regardless of one's position in this philosophical debate, some

20. While it may be true that the neighborhood is considered in such loan applications, the neigbborhood is considered only as an aspect of the appraised value of the real property itself.

21. *See* note 16 *supra*; Grigsby & Rosenberg, *supra* note 19, at 261.

22. *See* note 16 *supra*.

23. *See* notes 17 & 18 *supra*.

24. *See* note 16 *supra*.

consequences are inextricably intertwined with a lender's decision to redline an area. These consequences are by their very nature so destructive of the neighborhood environment that we are compelled to find methods of eliminating redlining.

One consequence of redlining is that the owner-occupant of a residence in a redlined area is deprived of any meaningful opportunity to sell his property. He faces essentially two options—either retain ownership and rent the premises or sell to a buyer with cash. Either option, if exercised, will have a negative impact on the neighborhood. As homes become less owner-occupied and more rental in character, families are less attracted to this area as a place to purchase.[25] The purchaser with cash usually will be a speculator who is bent on destroying the neighborhood—a form of economic blockbusting.[26]

Additionally, a purchaser in a redlined area will be required to dedicate a larger portion of his income for housing than purchasers in non-redlined areas. Thus the purchaser in a redlined area will be more likely to default during periods of economic instability.[27] Vacant houses all too often are the blight which hastens the decline. Further, to the extent a neighborhood is in decline prior to the lender's decision to redline it, that decision will accelerate and make almost irreversible the process of deterioration.[28] Once a decision to redline a neighborhood is made, the prospect of rehabilitating the housing stock in that neighborhood is seriously, if not fatally, damaged.

## IV. THE MORTGAGE MARKET AND GOVERNMENT INVOLVEMENT

The primary sources of home mortgage funds are savings and loan associations,[29] mutual savings banks,[30] and commercial banks.[31]

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25. GRIGSBY & ROSENBERG, *supra* note 19, at 23-26.

26. *Id.* at 184.

27. BUILDING THE AMERICAN CITY, *supra* note 3, at 77.

28. C. RAPKIN, THE REAL ESTATE MARKET IN OUR URBAN RENEWAL AREA 44 (1959); GRIGSBY & ROSENBERG, *supra* note 19, at 184.

29. As of 1967 a total of $112.5 billion was invested in housing mortgages representing 90.3% of the savings capital in savings and loan associations. As of June 1, 1972, the number of home mortgages had risen to 188,884,000. A DECENT HOME, *supra* note 5, at 130, 245 Appendix 1-1; 6 FED. HOME LOAN BANK BD. J. 51 (1973).

30. As of 1967 a total of $44.8 billion was invested in housing mortgages and this represented 67.5% of the total deposits in mutual savings banks. As of June 1, 1972, the number of home mortgages had risen to 64,333,000. A DECENT HOME, *supra* note 5, at 245 Appendix 1-2; 6 FED. HOME LOAN BANK BD. J. 51 (1973).

31. As of 1967 a total of $37.3 billion was invested in housing mortgages and this represented only 20.6% of the total time deposits in commercial banks. As of June 1, 1972, the

These financial institutions are subject to federal or state regulation, and all rely upon federal or state agencies to assist them in their operation. All savings and loan associations chartered by the Federal Home Loan Bank Board (FHLBB)[32] or state-chartered members of the Federal Savings and Loan Insurance Corporation (FSLIC)[33] are subject to regulation by FHLBB.[34] The FHLBB is empowered to make rules and regulations to provide for the "examination, operation and regulation . . . giving primary consideration to the *best practices* of local mutual thrift and home-financing institutions. . . ."[35] It is given broad power to compel compliance with its rules and regulations including the issuance of cease and desist orders when it has reasonable cause to believe that an association "is about to engage in an unsafe or unsound practice."[36]

In addition to regulating the vast majority of savings and loan associations, the FHLBB provides the member savings and loan associations with a ready source of funds through the twelve Federal Home Loan Banks.[37] These banks make short-term loans or "advances" to the member savings and loan associations.[38] The advance can be used to assist a savings and loan association in meeting an extraordinary run on withdrawals (withdrawal advance) or encourage the granting of mortgages (expansion advance).[39] Thus it is fair

amount of home mortgages had risen to 90,114,000. A DECENT HOME, *supra* note 5, at 245 Appendix 1-3; 6 FED. HOME LOAN BANK BD. J. 51 (1973).

32. 12 U.S.C. § 1464(a) (1970). By statute these have a dual purpose. Institutions provide for the investment of peoples' funds and provide for the financing of homes.

33. 12 U.S.C. §§ 1464(d), 1725, 1730 (1970).

34. 12 U.S.C. § 1464 (1970). The combined federally chartered savings and loan associations and state chartered associations insured by the FSLIC constitute over 90% of all savings and loan associations in terms of assets.

35. 12 U.S.C. § 1464(a) (1970). This regulatory scheme bas been described as covering every aspect of the savings and loan operation "from its cradle to its corporate grave." People of California v. Coast Fed. Sav. & Loan Ass'n, 98 F. Supp. 311, 316 (S.D. Cal. 1951). *See also* Meyers v. Beverly Hills Fed. Sav. & Loan Assoc., 499 F.2d 1145 (9th Cir. 1974) (bolding that such regulations "occupy the field").

36. 12 U.S.C. § 1464(d)(2)(A) (1970). It can be argued that redlining is economically unsafe or unsound because of the potential liability to which it exposes the lending institution in legal proceedings. It is more likely, however, that this section will be relied upon by the savings and loans to justify their redlining practice. *See, e.g.*, Laufman v. Oakley Bldg. and Loan Co., 408 F. Supp. 489 (S.D. Ohio 1976), in which the court referred to this argument raised by counsel for defendant.

37. 12 U.S.C. § 1429 (1970). The 12 Federal Home Loan Banks are owned by the member savings and loan associations through common stock ownership.

38. 12 U.S.C. § 1421 (1970).

39. 12 U.S.C. § 1430 (1970); 12 C.F.R. § 531 (1975); MARVELL, *supra* note 16, at 74-83 n.34. A criticism has been made that the Banks have failed to utilize the expansion advance in times of shortage of mortgage funds as contemplated; rather, they have operated in exactly the opposite manner. BUILDING THE AMERICAN CITY, *supra* note 3, at 457-59. The amount of

to say that the federal government provides a source of the funds that create the liquidity necessary for the savings and loan associations to operate successfully.

The regulation of the commercial and savings banks is somewhat more complex, involving three different regulatory bodies. National chartered commercial banks are under the supervision of the Comptroller of the Currency, who is responsible for their organization, operation, and regulation.[40] The Federal Reserve Board (FRB) supervises state-chartered banks that are members of the Federal Reserve System[41] and the Federal Deposit Insurance Corporation (FDIC) supervises all state-chartered banks that it insures, but that are not members of the Federal Reserve system.[42] The FDIC also regulates the insured savings banks.[43] The FDIC, like the FHLBB, has broad powers to regulate "unsafe or unsound practices"[44] and is authorized to consider in its rules the "convenience and needs of the community to be served."[45]

Closely related to the federal government's supervisory and regulatory involvement with mortgage lending institutions is the secondary market for mortgage loans. Because mortgages have been undesirable investments due to their lack of liquidity,[46] the federal government has created a number of instrnmentalities that create greater liquidity in the home mortgage market. The institutions include the Federal National Mortgage Association (FNMA),[47] the Government National Mortgage Association (GNMA),[48] and the Federal Home Loan Mortgage Corporation (FHLMC).[49] FNMA and GHMA are authorized to purchase, service, sell, or otherwise deal in federally insured mortgages.[50] Under certain specified circumstances, FNMA also may purchase, service, sell, or otherwise deal

these advances is suhstantial. At the peak in 1966, there were $7.3 billion worth of advances owed to the twelve banks. MARVELL, *supra* note 16, at 56.

40. 12 U.S.C. § 21 (1970).

41. 12 U.S.C. §§ 321, 348(a) (1970).

42. 12 U.S.C. § 1815 (1970).

43. 12 U.S.C. § 1815 (1970).

44. 12 U.S.C. § 1818(a) (1970).

45. 12 U.S.C. § 1816 (1970). The FRB, however, has taken a restrictive view of its regulatory role, asserting that state regulation is primary. Letter from Robert C. Holland to Rev. Theodore M. Hesburgh, Chairman, Civil Rights Commission, March 12, 1971 (with attached Federal Reserve Board Memorandum).

46. A DECENT HOME, *supra* note 5, at 133.

47. 12 U.S.C. § 1717(a)(2)(B) (1970).

48. 12 U.S.C. § 1717(a)(2)(A) (1970).

49. 12 U.S.C. § 1452 (1970).

50. 12 U.S.C. § 1717(b)(1) (1970).

in conventional mortgages.[51] FHLMC, in reality an arm of the FHLBB, is empowered to purchase "residential mortgages which are deemed by the Corporation [FHLMC] to be of such quality, types and class as to meet generally the purchase standards imposed by private institutional mortgage investors."[52] GNMA has included within its power what is known as the "special assistance function."[53] This function consists of the power to commit to purchase and to purchase certain types, classes or categories of home mortgages as designated by the President that are not readily acceptable to private institutional mortgage investors at the time of purchase, but still meet the purchase standards generally imposed by private institutional mortgage investors.[54]

Another area of direct involvement of the federal government in the mortgage lending market is the insuring of real estate loans of member lending institutions through the Federal Housing Authority and Veterans Administration.[55] This insuring activity entitles the federal government to impose conditions on loans it insures.[56]

Given the degree of federal involvement in the mortgage lending market, Congress could enact legislation or the four regulatory agencies could issue rules declaring the practice of redlining illegal and creating a private right of action for anyone injured by the practice. Unfortunately, this solution appears to be unlikely in the near future. In the absence of such a specific statutory or administrative prohibition, a solution must be fashioned out of existing law. There are statutory weapons that are sufficient to provide administrative and judicial solutions to eliminate the practice of redlining.

## V. Applicable Statutes

There are a number of federal statutes that specifically prohibit discrimination on the basis of sex, race, color, religion, or national origin in the sale, rental, or financing of housing.[57] A recent United

51. 12 U.S.C. § 1717(b)(2) (1970). A conventional mortgage is one not federally insured or guaranteed.

52. 12 U.S.C. § 1454(a)(1) (1970). Similar language appears in 12 U.S.C. § 1719(a)(1) (1970) in connection with FHMA's activities. Would this include redlining practices if such practices are the "purchase standards" of the private mortgage investors? The answer would appear to be "yes" judging by the practices of the past. Building the American City, *supra* note 3, at 100.

53. 12 U.S.C. § 1720 (1970).

54. 12 U.S.C. § 1720(b) (1970).

55. 12 U.S.C. § 1703 (1970).

56. 12 U.S.C. § 1706c(b) (1970). *See* Building the American City, *supra* note 3, at 94-100 for a survey of the performance of the FHA and VA programs.

57. 42 U.S.C. § 3603-05 (1970). In addition, the Equal Credit Opportunity Act of 1974

States District Court decision, *Laufman v. Oakley Building and Loan Co.*[58] dealt with some statutory prohibitions in the context of redlining. On a motion for summary judgment by defendant, the court interpreted the Fair Housing Act of 1968[59] as barring redlining in connection with loan application denials in interracial neighborhoods.[60] In holding section 3604 of the Act applicable to redlining, the court observed that to deny financial assistance in connection with the sale of a home was to "make unavailable or deny" a dwelling, and when combined with "racial consideration" the statute was violated. This court apparently believed that the existence of "racial consideration" could be established by the mere fact that the loan was for property in an integrated area. Such an expansive reading of section 3604 would bring redlining practices in the vast majority of urban areas within the sphere of prohibited conduct.

The court was even more expansive in interpreting section 3605 to prohibit conduct that resulted in the denial of a loan because of the applicant's race. The court held that section 3605 prohibited the practice of redlining if it resulted in the denial of a loan to "finance the purchase of a home in an integrated neighborhood."[61] Under this reading of the Fair Housing Act, all that is necessary to prove a violation of section 3605 is to establish the existence of the practice of redlining in a given area and to establish that the area is integrated. This two-step test appears to have the advantage of simplicity, but it may not be simple in practice. What is the relevant geographic area for purposes of determining redlining? What is the meaning of an "integrated neighborhood"? Does integration require a minimum fixed percentage? What if the neighborhood is entirely black and plaintiffs are black? Does the "integrated neighborhood" test have any relevance to the other prohibited forms of discrimination—sex, marital status, religion, national origin? Obviously, these questions and many others must be considered in the context of the specific facts of each lawsuit, and the difficulty in answering them poses problems for the lending institutions themselves.

The court in *Laufman* held that 42 U.S.C. § 3617[62] also was

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bans all discrimination based on sex or marital status in any loan transaction, including real estate transactions. 15 U.S.C. § 1691 (Supp. 1974).

58. 408 F. Supp. 489 (S.D. Ohio 1976).

59. 42 U.S.C. §§ 3604-05 (1970).

60. Order dated Feb. 13, 1976. The court, however, considered only defendant's motion for summary judgment and the holding merely establishes that plaintiffs stated a cause of action under these statutes.

61. *Id.* at 493.

62. 42 U.S.C. § 3617 (1970) states:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the

applicable because the alleged redlining interfered with plaintiffs' right to a "voluntary interracial association." Once again, the court's broad interpretation focused on considerations in addition to the race of the borrower and provided litigants with statutory bases for attacking redlining regardless of the race or ethnic background of the borrower.

Finally, the court held that Title VI of the Civil Rights Act of 1964,[63] which prohibits discrimination in federally assisted programs, created a separate and independent basis for a claim by plaintiffs that redlining of an interracial area violates federal law. The language of *Laufman* regarding this statutory provision is particularly siguificant in that the court held that the extension of home mortgage money was an activity receiving federal assistance; thus a denial of a loan based on the racial composition of the neighborhood is discriminatory within the meaning of section 2000d of the Act.[64] The court stated in dictum that the term "discrimination" as used in section 2000d "basically . . . refers to a denial of equal protection."[65] Although there was no discussion by the court as to how it determined that the extension of home mortgage loans was a federally assisted program, it would seem to be a correct conclusion in view of the substantial federal involvement in the home mortgage market.

Another potentially applicable civil rights statute not discussed in *Laufman* is 42 U.S.C. § 1982,[66] which may be available when the effect of redlining is racial discrimination. This section remained largely unused until it was resurrected by the Supreme Court in *Jones v. Alfred H. Mayer Co.*[67] In *Jones*, the Supreme Court held that section 1982 barred all public or private racial discrimination in the sale or rental of property. The Court took care to note that this particular section did not refer explicitly to "discrimination in financing arrangements" contrasting it with the specific language of

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exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title. This section may be enforced by appropriate civil action.

63. 42 U.S.C. § 2000(d) (1970).

64. 408 F. Supp. at 499.

65. *Id.*

66. 42 U.S.C. § 1982 provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

67. 392 U.S. 409 (1968). For a discussion of this case, see 82 HARV. L. REV. 63, 82-92 (1968).

section 3605 of the Fair Housing Act.[68] Thus the section's applicability in a redlining case is questionable; in view of the specific language of section 3605, it would be unusual when a plaintiff would have to rely solely on section 1982.

Of particular interest concerning the applicability of section 1982 to the redlining practice is a recent Seventh Circuit decision, *Clark v. Universal Builders, Inc.*[69] In *Clark*, plaintiffs, a class of black Chicagoans, purchased homes from defendants under land installment contracts. Plaintiffs alleged a dual housing market existed in Chicago which had the effect of requiring blacks to purchase homes at an inflated price compared to housing in other parts of the Chicago area. Defendants asserted that they would sell the homes at the same price to either blacks or whites. The court, in finding that plaintiffs had stated a valid claim, rejected a reading of section 1982 which would limit its application solely to the classic discrimination case. The court held that "section 1982 is violated if the facts demonstrate that defendants exploited a situation created by socioeconomic forces tainted by racial discrimination."[70] Although the allegation in *Clark* was that defendants engaged in exploitation because of racial considerations, the rationale of the opinion would apply with equal force to redlining. It should not be difficult for a plaintiff to establish that redlining was "created by socioeconomic forces tainted by racial discrimination."

In those few instances when a litigant is unable to establish a sufficient nexus between a particular redlining practice and the conduct prohibited by sections 3604, 3605, and 3617 of the Fair Housing Act of 1968, or 42 U.S.C. § 1982, it may be necessary to rely on the language of the equal protection clause of the fourteenth amendment. In *Jones*, the Court found it unnecessary to reach that issue,[71] but a strong argument can be constructed that the discrimination inherent in the practice of redlining by lending institutions is violative of the equal protection clause.[72]

Additionally, there are a number of other statutory and admin-

68. 392 U.S. at 413 n.9.

69. 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974). For a discussion critical of this case, see 88 HARV. L. REV. 1610 (1975). Much of this criticism would not be applicable to a redlining case in which the statistical evidence should be more compelling.

70. 501 F.2d at 330. This action arose prior to the enactment of the Fair Housing Act of 1968, but it seems clear that the court would have had no difficulty holding defendant's conduct to be a violation of 42 U.S.C. § 3604 (1970).

71. 392 U.S. 412 n.5.

72. Carter v. Gallagher, 452 F.2d 315, 325 (8th Cir. 1971) (holding that the fourteenth amendment prohibited any discrimination regardless of race). The degree of governmental involvement in connection with lending activities should satisfy the requisite "state action."

istrative provisions which might be helpful in any action either against mortgage lenders or directly against the various federal regulatory agencies.

First, the Housing Act of 1949 specifically provides:

> [O]ther departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established, and in such manner as will encourage and assist . . . the development of well-planned, integrated, residential neighborhoods . . .[73]

Secondly, the Fair Housing Act of 1968 provides:

> All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this subchapter [Title VIII] and shall cooperate with the Secretary to further such purposes.[74]

Thirdly, Section 2000d-1 of the Civil Rights Act of 1964 provides that each federal department and agency is to issue rules, regulations, and orders "consistent with achievement of the objectives. . . ."[75] In spite of these statutory admonitions to take affirmative action the regulating agencies have been grudging in their responses. The FHLBB has taken the affirmative action of issuing formal regulations and guidelines that prohibit discrimination based on race, color, religion, sex, marital status, or national origin in connection with the lending activities of member institutions.[76] The Board has issued a statement of policy to assist member institutions to develop nondiscriminatory underwriting standards.[77] Among the various policies enunciated are the following:

(1) Each applicant's creditworthiness should be determined on an individual basis.[78]

(2) Lending standards that are discriminatory in effect violate the law even without any intent to discriminate, unless the standards "achieve a genuine business need which cannot be achieved by means which are not discriminatory in effect or less discriminatory in effect."[79] In view of the language of *Laufman*, there is a

73. 42 U.S.C. § 1441 (1970).

74. 42 U.S.C. § 3608(c) (1970).

75. 42 U.S.C. § 2000d-1 (1970). Similarly, Executive Orders have sought to provide guidance in accomplishing the goals of Titles VI and VIII. *See, e.g.*, Exec. Order. No. 11,764, 3a C.F.R. 124 (Supp. 1974); Exec. Order No. 11,063, 3 C.F.R. 652 (Supp. 1962).

76. 12 C.F.R. 528.2 (1975).

77. 12 C.F.R. § 531-8 (1975).

78. 12 C.F.R. § 531.8(b) (1975).

79. *Id.*

serious question whether this statement of policy is legal. Clearly, the excuse of "genuine business need" cannot be utilized to justify the denial of a loan due to racial considerations.[80] This exception is an invitation to the lending institution to carry on business as usual. This danger is particularly real in view of the vague language—"genuine business need." What considerations must the lending institution take into account in determining a "genuine business need" to justify discrimination? If the institution has discrimination as its purpose, is this permissible as long as it is cloaked in the language of "a genuine business need"? What documentation must the institution present to satisfy this requirement? Because this language invites impermissible conduct, it should be deleted from FHLBB's statement of policy. Additionally, the language is unnecessary since an institution's lending decisions generally will not be discriminatory in effect if that institution is not indulging in the practice of redlining.

(3) The FHLBB favors flexible lending standards that consider all available income for the family unit as well as its prior credit history. The Board should be alert to the possible discriminatory effect of rigid lending standards.[81]

(4) In its declaration of policy the FHLBB states:

> Refusal to lend in a particular area solely because of the age of the homes or the income level in a neighborhood may be discriminatory in effect since minority group persons are more likely to purchase used housing and to live in low-income neighborhoods. The racial composition of the neighborhood where the loan is to be made is always an improper underwriting consideration.[82]

These particular statements of policy offer some faint hope that the FHLBB will move in an affirmative manner to eliminate an attitude which appears to exist—an insensitivity to the problems of minorities in our urban areas. Time will tell if the member institutions will take any steps to implement these guidelines.

None of the other three regulatory agencies has seen fit to adopt these rather minimal steps of the FHLBB. Both the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association, in connection with their mortgage purchase agreements, only require member lending institutions to take certain

80. In Bennett v. Granville, 323 F. Supp. 203, 214 (D. Md. 1971) the court stated:

> [A]s a matter of law and public policy, where "racial discrimination" is practiced, good faith cannot be interjected as a valid defense.

81. 12 C.F.R. § 531.8(c)(3), (5) (1975).

82. 12 C.F.R. § 531.8(c)(4) (1975).

actions and establish compliance with the federal civil rights acts and the Equal Credit Opportunity Act.[83]

## VI. Gathering Facts on Redlining

Given the statutory and administrative prohibitions already available, the most important ingredients needed to attack redlining successfully are the relevant facts relating to the practice and its effect on a given area. There have been isolated studies made in some urban areas to demonstrate that redlining exists,[84] but such studies merely scratch the surface of what is believed to be a nationwide practice. Thus it is necessary to obtain data in each urban area relating to redlining, including the composition of the affected neighborhoods and information concerning the applicants themselves. Some steps have been taken in this direction recently.

### *A. Agency Disclosure Procedures*

The Department of Housing and Urban Development (HUD), with the cooperation of the four regulatory agencies, surveyed the lending industry in 1971 by means of Private Lending Institutions Questionnaires.[85] No concrete results can be ascribed to this joint effort.[86] During the period from June 1, 1974 to November 30, 1974, the four regulatory agencies conducted a Fair Housing Information Survey in eighteen Standard Metropolitan Statistical Areas (SMSA) throughout the United States. The FHLBB used a form that surveyed the loan and ethnic background of loan recipients in

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83. Section 4.2 of the FHLMC Master Selling Agreement FHA/VA contains the following:

> Seller shall comply with Title VI of the Civil Rights Act of 1968, as amended by the Housing and Community Development Act of 1974, section 527, of the National Housing Act, and the Equal Credit Opportunity Act, and any applicable regulations and orders thereunder, and with Executive Order 11,063, Equal Opportunity in Housing issued by the President of the United States on November 30, 1962.

CCH Fed. Banking L. Rep. ¶ 25,318 (1976). Even more significant is the provision in section 103, FNMA Conventional Selling Contract Supplement which reads:

> To assure the carrying out of the goals of equal opportunity, FNMA will require sellers to maintain appropriate records for a minimum of one year, whether involving mortgage submitted to FNMA for purchase or not, which records shall be available to FNMA, upon request, in order to determine that the seller's loan production to minorities is consistent with the goal of equal treatment.

CCH Fed. Banking L. Rep. ¶ 25,705 (1975).

84. *See* note 16 *supra*.

85. Report of the Commission on Civil Rights, The Federal Civil Rights Enforcement Effort—A Reassessment 185-86 (1973) [hereinafter cited as Reassessment].

86. *Id.* at 186.

six SMSAs.[87] Census tracts were to he the geographic measure for the FHLBB survey, but because of substantial errors in the census tract designation the Board did not find the results meaningful.[88] A substantial portion of the published material relates to the entire SMSA rather than to the smaller component geographic areas. Thus the six month FHLBB survey will be of limited value in any attack on redlining. A review of the "summary of result" materials prepared by the FHLBB from this six month survey indicates that discrimination exists, but the results are not sufficiently specific to provide information that can be utilized in litigation.[89]

The FDIC and FRB used forms that required the reporting institutions to submit summary statements of the number of applicants, their race, and the value of the property. This information was for six SMSAs and was to be broken down by postal zip codes.[90] The form prepared by the Comptroller of Currency included the applicant's race, sex, marital status and economic condition along with the value of the property and census tract location. This form went to member institutions in six SMSAs.[91]

In addition to these special studies, the regnlatory agencies have adopted some procedures that might assist in the information gathering process:

*FHLBB*: As part of the examination of a supervised institution by the FHLBB, the examiner-in-charge is required to complete a civil rights compliance questionnaire. Included in this questionnaire are estimates of the size of the minority population served and the number and percent of minority loans written.[92] The source of this information is the institution's manager and the FHLBB examiner-in-charge cannot require documentary or other support for the information given. In view of this restriction, the practical value of this questionnaire is highly suspect and the information obtained is not the kind of evidence upon which legislative or judicial action could be based.

*Comptroller of the Currency*: This agency, after proposing some significant regnlations that were never adopted,[93] has taken no steps

87. Fair Housing Information Survey, Federal Home Loan Bank Board I, 1 (August 18, 1975) [hereinafter cited as Fair Housing].

88. *Id.* at II, 3-4.

89. *Id.* at IV, Tables 1-4.

90. *Id.* at I.

91. *Id.* at I, 1-2.

92. REASSESSMENT, *supra* note 85, at 164-67.

93. Searing, *Discrimination in Home Finance*, 48 NOTRE DAME LAW. 1113, 1130-32 (1973). This article is an excellent survey of efforts made to get the regulatory agencies to act in an affirmative manner.

toward requiring disclosure of loan policies. Its examination process does not include even the minimal discrimination inquiries utilized by the FHLBB.[94]

*FRB*: This Board utilizes a civil rights questionnaire similar to, but more complete than that of the FHLBB.[95] Although the exminers are authorized to verify the answers given by the bank manager, it appears that this verification is seldom done. Thus the information is only marginally more reliable than that gleaned by the FHLBB questionnaires.

*FDIC*: This agency has been remiss in performing any regulatory activities that would disclose the existence of discriminatory lending practice, not even adopting the minimal civil rights questionnaire.[96] Nevertheless, the FDIC has indicated an intention to propose and endorse a concept requiring its regulated institutions to collect and maintain racial and ethnic data on all loan applications.[97]

### *B. Home Mortgage Disclosure Act of 1975*

Because of the failure of the regulatory agencies to take action, and the need felt by Congress for additional information on the question of redlining, Congress enacted legislation commonly called the Home Mortgage Disclosure Act of 1975.[98] This Act, which was passed by Congress on December 18, 1975, and signed into law by the President in January 1976, states the following as its purpose:

> [T]o provide the citizens and public officials of the United States with sufficient information to enable them to determine whether depository institutions are filling their obligations to serve the housing needs of the communities and neighborhoods in which they are located and to assist public officials in their determination of the distribution of public sector investments. . . .[99]

To accomplish this purpose, the Act requires all depository institutions with a home or branch office located within a Standard Metropolitan Statistical Area[100] to compile and make available for public inspection at the home office, and at least one branch office, the following information:[101]

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94. REASSESSMENT, *supra* note 85, at 172-73.
95. *Id.* at 176-78.
96. *Id.* at 182-84.
97. *Id.* at 183-84.
98. 12 U.S.C.A. § 2801 (Supp. I, 1976).
99. 12 U.S.C.A. § 2801(b) (Supp. I, 1976).
100. The Act incorporates the concept of Standard Metropolitan Statistical Area as defined by the Bureau of the Census.
101. 12 U.S.C.A. § 2803(a)(1) (Supp. I, 1976).

(a) Number and total dollar amount or mortgage loans originated or purchased, itemized by census tract, or if not available, by postal zip codes;[102]

(b) Number and total dollar amount of mortgage loans secured by property located outside the SMSA;[103]

(c) Number and dollar amount of mortgage loans which are FHA insured loans made to borrowers who do not intend to reside in the property;[104]

(d) Number and dollar amount of home improvement loans.[105]

The FHLBB is given the responsibility to develop and to help improve methods of matching addresses and census tracts to facilitate compliance and to recommend additional legislation. The Act requires the Federal Reserve Board to prescribe the necessary regulations to carry out its purposes.[106] While this Act is a step in the right direction in developing fact gathering machinery, the author submits that it is inadequate and may prove to be ineffective in a number of respects.

The most significant omission is the lack of a requirement for maintaining records of loan applications that were not granted. Since redlining reflects a mortgage disinvestment policy, information relating to rejected applications would be of particular relevance. Without some method of ascertaining loan demand in a given area, it will be difficult to establish that a lending institution is systematically redlining that area. While certain inferences arise from the complete absence of loans in a given area, the validity of such an assumption is open to attack in the absence of evidence of rejected loans and the identity of the applicants. A requirement that such records be kept was proposed at the legislative hearings on proposals that culminated in the Mortgage Disclosure Act, but it was not adopted.[107] Opponents of the Act recoguized the importance of this loan demand information, stating that the absence of any

102. 12 U.S.C.A. § 2803(a)(2)(A) (Supp. I, 1976).

103. 12 U.S.C.A. § 2803(a)(2)(B) (Supp. I, 1976).

104. 12 U.S.C.A. § 2803(b)(1)-(2) (Supp. I, 1976).

105. 12 U.S.C.A. § 2803(b)(3) (Supp. I, 1976).

106. 12 U.S.C.A. § 2806 (Supp. I, 1976). Recently, the Federal Reserve Board issued a notice of proposed rulemaking that indicates which institutions are required to maintain disclosure statements, what information is required to be disclosed, and whether that information must be broken down by census tract or zip code. 41 Fed. Reg. 13,619 (1976). The Board, however, has proposed that institutions be allowed to disclose information pertaining to loans made prior to July 1, 1976 by zip code rather than by census tract. *Id.* at 13,621. The chief sponsor of the Act, Congressman Fernand J. St. Germain (D-R.I.), has urged the Board to require retrospective as well as prospective information to be broken down by census tract rather than by zip code since the more specific census tract information is more useful in analyzing redlining patterns. *See* letter from Congressman St. Germain to Arthur F. Burns, March 31, 1976 (on file with *Vanderbilt Law Review*).

107. H.R. Rep. No. 561, 94th Cong., 1st Sess. 32 (1975) (minority views on H.R. 10024).

requirement for records relating to loan demands made it legislation in "search of a mission."[108] Prompt steps should be taken to add loan demand information to the record-keeping requirements, either by additional legislation or by administrative regulations.[109]

By requiring the information to be available only at the home office and one branch office in the SMSA, only the persistent inquirer is likely to see the information. The home office may be removed from the redlined area, and little imagination is required to determine which branch will be selected as the single branch depository for this information. In view of the easy methods of duplication, it would not impose too great a burden to have this information available at each branch.

Further, because the legislation delegates the details of the record keeping mechanism to the various regulatory agencies, the real effectiveness of this legislation will have to await the adoption of the specific disclosure requirements. If, for example, the institutions are required only to disclose the total number and total dollar amounts of residential mortgages in a census tract or zip code area, the quest for meaningful information will not be enhanced significantly. The following information is needed from each loan application, whether approved or rejected: the dollar amount of loan requested; the dollar amount of loan granted; loan fees; terms and conditions; description, valuation, and location of the real property; and the racial or ethnic identity of the borrower.[110] All of the information should be specified in a manner which is understandable to a reader. The purpose of the Act—public disclosure—will be largely circumvented if the institutions are allowed to provide this information on computer printouts that are totally unintelligible to all but the initiated.

An additional criticism of the Act is the lack of requirements for disclosure of information concerning deposits at each savings and loan by individuals living within the SMSA. Although this information is not as vital to an analysis of the institutions' investment policies as some of the information referred to earlier, it is relevant to an analysis of that institution's performance. Substantial deposits by residents of the area are certainly some evidence of

108. H.R. REP. No. 94-561 (1975) (minority views on H.R. 10024).

109. Any hope that the regulatory agencies would adopt such regulations in the absence of a congressional mandate seems unlikely in view of their past attitudes. In fact, Congress' failure to include such a requirement in the Mortgage Disclosure Act will probably be used as a justification for the regulatory agencies not to add this requirement under their rulemaking powers.

110. The legality of requiring this latter information is clearly established. REASSESSMENT, *supra* note 85, at 179 n.26.

the financial condition of the families residing in the area, and should be the basis for imposing obligations on the institution to reinvest in the area.

Finally, when one considers the basic antagonism of the mortgage lending industry to regulations requiring full disclosure of mortgage investment policies, the enunciation by Congress in section 302(c) of the Act that "Nothing in this chapter is intended to, nor shall it be construed to, encourage unsound lending practices or the allocation of credit"[111] may provide the peg upon which the institutions will seek to hang the practice of redlining. Although Congress may have thought it merely was stating the obvious in section 302(c); it in reality may have codified the grounds on which the lending institutions will refuse to make real estate loans in specific census tracts.

### *C. The California Approach*

The California Business and Transportation Agency held a series of hearings in 1975 in Los Angeles and San Francisco concerning the practice of redlining. As a result of these hearings, new regulations were adopted with the intent of eliminating the practice in state-regulated lending institutions. The California approach appears to effectuate its purpose more thoroughly than the Mortgage Disclosure Act of 1975.

In California, all state-chartered savings and loan associations file a Loan Register Report on a monthly basis.[112] Under the new regulations of the California Business and Transportation Agency, Savings and Loan Committee, which are to become effective on July 1, 1976, this Loan Register Report will be expanded to include, in addition to detailed information on each individual loan, information on the following subjects:

(a) Details of denied loan applications;
(b) Information on home improvement loans;
(c) Expanded information on loans sold or purchased;
(d) Detailed information as to race, ethnic background, income level, sex and age of the borrower-applicant.[113]

Of particular significance is the attitude demonstrated in the regulations. The California Agency makes a specific finding that the practice of redlining "has had a sharp discriminatory effect against

111. 12 U.S.C.A. § 2801(c) (Supp. I, 1976).
112. 10 CALIF. ADMIN. CODE § 116 (1976).
113. 10 CALIF. ADMIN. CODE § 242.2(t)(u) (1976).

racial and ethnic minorities"[114] and states that the purposes of the new regulations include the following:

> [P]revention of discrimination by associations in home mortgage lending because of the conditions, characteristics or trend in the neighborhood or geographic areas surrounding the security property. . . .[115]

Even more specific is the language of section 245.2(a) which reads:

> Discrimination Prohibited. (a) No association shall deny a mortgage loan, or discriminate in application procedures or in the setting of the terms or conditions of any such loan, due, in whole or in part, to consideration of the conditions, characteristics or trends in the neighborhood or geographic area surrounding the security property, unless the association can demonstrate that such consideration in the particular case is required to avoid an unsafe or unsound business practice.[116]

Unfortunately, after enunciating this clear declaration of the illegality of redlining, the California regulations introduced some disturbing, if not destructive, exceptions. The regulations allow an increase in interest rates, adjustment of loan-to-value ratios, or shortening the term to maturity if the association can document the need for such adjustment.[117] These exceptions appear to sanction the practice of redlining on a more sophisticated level. Admittedly, the burden is on the association to justify the exception, but this burden can be sustained easily against a single unprotected applicant.

Two interesting aspects of the California regulations are the creation of boards of inquiry to investigate all complaints and the concept that approval of a loan for an amount less than requested shall be considered a denial of the application.[118] Once again, however, "what the state giveth, the state taketh away." Only two boards of inquiry are created for the entire state. In a state with over twenty million residents, two boards to investigate redlining complaints appear to be woefully inadequate.[119]

In addition to the compilation of extensive redlining information, the California regulations provide for filing a neighborhood impact statement before any changes in location of branch savings and loan associations will be approved.[120] The neighborhood impact statement will contain information as to the geographical source of

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114. 10 CALIF. ADMIN. CODE § 245(c)(6) (1976).
115. 10 CALIF. ADMIN. CODE § 245(b) (1976).
116. 10 CALIF. ADMIN. CODE § 245.2(a) (1976).
117. 10 CALIF. ADMIN. CODE § 245.3(b)(1)-(2) (1976).
118. 10 CALIF. ADMIN. CODE §§ 245.4(i), 245.5 (1970).
119. This weakness was commented on repeatedly by the advocates of effective anti-redlining regulations. *Redline Hearing*, *supra* note 14.
120. 10 CALIF. ADMIN. CODE §§ 145.2(c)(1)-(2), (g) (1970).

deposits, the distribution of loans, the effect of the relocation of the branch on the source of deposits and distribution of loans, and how the original location will continue to be served adequately.[121]

While the California scheme may not be a complete answer, it is an advance over the approach of the Mortgage Disclosure Act of 1975 and the actions of the federal regulatory agencies. Unfortunately, the reach of the California regulation is minimal when compared to the potential for control of the home mortgage market inherent in federal laws or regulations.

## VII. LITIGATION

Presumably, if the new record-keeping machinery accomplishes its purpose, any person who believes he has been the victim of redlining will be in a position to commence legal action under the statutes discussed above. The *Laufman* decision is precedent for judicial intervention to eliminate redlining when the effect is discriminatory. A case by case approach, however, will not provide the necessary relief without imposing intolerable burdens on the judicial system. It is unrealistic to believe that this pervasive mortgage investment policy can be changed by relying on individual aggrieved loan applicants. Many of these loan applicants will be iguorant of the reasons why their application was denied and many will be without funds to pursue litigation.[122]

The judicial weapon which can be employed to effectively attack redlining is the class action.[123] The class action provides a ready vehicle for injunctive and declaratory relief. It will provide a vehicle for a broad attack on the practice of redlining within the entire urban community. Armed with data disclosed under the various federal and state record-keeping statutes, and information gathered from pretrial discovery, a strong statistical showing of the discriminatory effect of redlining should be possible. In those jurisdictions where appropriate, the class action could be combined with actions against the various regulatory agencies to compel affirmative action.[124]

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121. 10 CALIF. ADMIN. CODE § 145.2(c)(1)-(2) (1970).

122. It is not a mere coincidence that the plaintiff in *Laufman* was an attorney. BUS. WEEK, March 22, 1976, at 143.

123. FED. R. CIV. P. 23. *See also* state class action statutes, including 9 CAL. CIV. CODE § 1812.31 (West Supp. 1975) (relating to discrimination in credit transaction by reason of sex or marital status).

124. In light of the statutory language requiring "affirmative action," serious consideration should be given to instituting actions against these agencies by reason of their inaction. *See* Mahaley v. Cuyahoga Metro. Hous. Auth., 355 F. Supp. 1257, 1263-67, (N.D. Ohio 1973),

When evidence demonstrates that lending institutions are engaged in redlining, all the necessary elements of a class action suit are satisfied.[125] The plaintiff class could consist of a single class of plaintiffs or any combination of at least three distinct classes. First, there could be a class composed of all individuals who either were denied an opportunity to submit an application or whose application for a real estate loan was rejected because the real estate was located in the redlined area.[126] A second class could be composed of all owners of residential property within the redlined area. A third class of plaintiffs could be those individuals whose loan applications were granted on terms and conditions more onerous than those for loans granted in non-redlined areas.

The most difficult procedural aspect of a class action suit in a

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for a discussion of numerous civil rights cases in which inaction resulting in a continuation of discriminatory conditions was held to be violative of the United States Constitution. Class action plaintiffs would appear to have a right to bring action to compel compliance with this duty under 5 U.S.C. §§ 701-02 (1970) if not under the various Housing Acts themselves. *See* Davis v. Romney, 490 F.2d 1360, 1369 (3rd Cir. 1974).

125. FED. R. CIV. P. 23(a) sets out four prerequisites for class action litigation: (1) numerosity; (2) common questions of law or fact; (3) claims or defenses of the represented parties are typical, and (4) representatives will fairly and adequately protect the class. FED. R. CIV. P. 23(b) reads as follows:

> Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) The prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
>
> The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Rule 23(b)(2) is an appropriate vehicle for Civil Rights suits. 3b J. MOORE, FEDERAL PRACTICE ¶¶ 23.01 [10.2], 23.40 (2d ed. 1975).

126. Within this class there could be a number of subclasses predicated on sex, marital status, race, ethnic background, or age.

redlining case relates to the identity of the defendants against whom plaintiffs may file an action. It is unlikely that the representative plaintiffs, particularly in either the first or third class above, will have dealt with all of the lending institutions who would be potential defendants in a class action. Thus it can be anticipated that the defendants who have not dealt directly with the named plaintiffs will seek to have the claims against them dismissed. If they are successful, the effectiveness of the class action would be substantially impaired.

Some courts have denied standing to a representative plaintiff against a defendant with whom that plaintiff has not dealt.[127] Other courts, particularly in the area of civil rights, have taken a more expansive view and permitted the class action to proceed against all defendants allegedly engaged in discriminatory practices.[128] The ability to keep all defendants in the litigation may turn on the strength of plaintiff's evidence. If the evidence tends to establish complete mortgage disinvestment in the area by all lending institutions, a court may be more likely to allow the action to proceed against all defendants. In such a case, the inference that an application would have been denied should be enough to eliminate any need for plaintiffs to perform the empty gesture of submitting an application to all lending institutions. In any case, if the plaintiff class includes the present owners of real property in the redlined area, it appears that plaintiffs should have standing to sue, and all lending institutions without investments in the area could be proper

127. La Mar v. H & B Novelty and Loan Co., 489 F.2d 461 (9th Cir. 1973) (denial of class action against group of defendants engaging in similar conduct to that of the defendant with whom the representative plaintiff dealt); Weiner v. Bank of King of Prussia, 358 F. Supp. 684 (E.D. Pa. 1973) (denial of class action against 20 national and state banks where representative plaintiff had dealt with only one).

128. Generally, the courts have been receptive to class action litigation in civil rights enforcement. *See, e.g.*, Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974) (holding class action proper when allegations were made that onerous loan terms were racially motivated); United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 864-66 (5th Cir. 1966), *decree corrected*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967) (swimming pool desegregation, although appellate court upheld District Court finding of nonclass action in specific factual situation); Afro American Patrolmen's League v. Duck, 366 F. Supp. 1095 (N.D. Ohio 1973) (discrimination in promotion); Gerstle v. Continental Airlines, Inc., 50 F.R.D. 213 (D. Colo. 1970) (sex discrimination in employment). *Contra*, Crim v. Glove, 338 F. Supp. 823 (S.D. Ohio 1972) (class action denied in rental discrimination case). *See generally* 3 J. MOORE, FEDERAL PRACTICE § 14.07(2) (2d ed. 1974); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 935 (1958); *Class Actions—A Study of Group-Interest Litigation*, 1 RACE REL. L. REP. 991 (1956); Comment, *The Class Action Device in Antisegregation Cases*, 20 U. CHI. L. REV. 577 (1953).

defendants.[129] The injury suffered by those plaintiffs arises out of the course of conduct of defendants and not on any direct dealings with them. In any case, a skillful drafting of the class action complaint should defeat any argument by a specific defendant institution that it should be dismissed from the litigation absent an allegation that it denied a loan application to a named plaintiff.

If the evidence shows an apparent policy of substantial mortgage disinvestment on the part of all lending institutions, the plaintiff litigants should seek to have them named as a defendant class. Such a procedure is not without its conceptual difficulties, although the language of Rule 23 contemplates a defendant class. Rule 23(a) uses the language "One or more members of a class may . . . *be sued* as representative parties. . . ." Further, it speaks of the defenses of the representatives being typical of the class defenses.

There is no case authority providing a clear answer to the question whether an action can be maintained against representative defendants as a class action against all lending institutions in a given SMSA.[130] In a recent District Court case, *Kendall v. True*,[131] however, the court certified a class action against a class made up of the judges in a single county and allowed the action to proceed against a representative of that class. Similarly, in *Washington v. Lee*,[132] the court held it sufficient to name certain wardens, jailers, and sheriffs as representatives of all penal officials who might be affected by the litigation.[133] It is submitted that no justification exists for not allowing an action attacking redlining on the basis of discrimination or on equal protection grounds to proceed against defendants as a class, especially if the relief sought by the plaintiff class is injunctive and declaratory.

In any class action litigation attacking redlining, the most important aspect of the case will be the development of the facts. This development will involve consideration of the following elements of the case:

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129. Serious questions might be raised by defendants against this plaintiff class based on the concept of "duty." It will be argued that the lending institutions did not owe a duty to the owners of property in the redlined area not to engage in such a practice. The author believes this argument can be met by establishing the quasi-public role played by the lending institutions, the substantial involvement of the federal government in all their activities, and the obvious injury suffered by this class.

130. *But see* note 128 *supra*. Clearly, if the holding in *La Mar* is controlling, any such defendant class would have to fail.

131. 391 F. Supp. 413 (W.D. Ky. 1975).

132. 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968).

133. *See generally* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE CIVIL §§ 1770-71 (1972).

(a) Definition of a relevant residential area ("Defined area") (this definition may be crucial as it will shape all subsequent proof);

(b) Survey of housing inventory within the defined area;

(c) Survey of composition of population within the defined area;

(d) Data concerning practices of individual lending institutions within the defined area; and

(e) Comparison of lending practices within the defined area with those practiced in other areas.

It is obvious that the development of these facts will be a difficult task and their analysis and utilization will entail sophisticated research and organization by counsel.

One possible approach in developing facts to prove discriminatory practices is the use of statistical methods.[134] This statistical approach will become more significant once lending institutions are made aware of their potential liability for mortgage discrimination, since then direct evidence of a mortgage disinvestment policy rarely will be available. At that point, it will be necessary to establish statutory violations by the use of the comparison of actual lending patterns and not by utilization of enunciated policies of the institutions. This, however, should not discourage a prospective plaintiff—the tracks in the snow are frequently more convincing than the testimony of alleged eyewitnesses.

Once a plaintiff establishes by a statistical showing that lending institutions have denied loans in a particular area and that the area is integrated (or possesses some other characteristic that raises an inference of another kind of proscribed discrimination), the burden will shift to the defendant lender to prove some compelling necessity for his conduct.[135] Presumably, an effort will be made to overcome this burden by trying to shown an economic justification. However, such a justification may prove difficult; for example, any attempt to claim that the loan was denied solely because of the nature of the property itself can be met with a proof that similar

134. An informative discussion of this approach is found in Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387 (1975), setting forth a precise discussion of the use of statistical methods in an employment discrimination action. Its methodology is relevant to a redlining action.

135. Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974); Afro American Patrolmen's League v. Duck, 366 F. Supp. 1095 (N.D. Ohio 1973); Harper v. Mayor, 359 F. Supp. 1187 (D. Md. 1973); Mahaley v. Cuyahoga Metro. Hous. Auth., 355 F. Supp. 1257 (N.D. Ohio 1973); Newbern v. Lake Lorelei, Inc., 308 F. Supp. 407 (S.D. Ohio 1968).

property in other areas of the urban area with a similar valuation was found acceptable. Similarly, comparisons can be made between the creditworthiness of borrowers and rejected applicants.

## VIII. Alternatives and Conclusion

It is beyond the purview of this article to discuss how the impact of class action litigation can be softened or avoided entirely by voluntary action by lending institutions. It is obvious, however, that judicial decrees are not the most satisfactory methods of accomplishing the elimination of redlining. Unfortunately, the lending institutions have made it clear that they are not prepared to invest in these areas absent either compulsion or some reward for what they deem to be the greatest risks involved.

Assuming that there will be little voluntary reintroduction of investment into a redlined area what possible inducements exist to promote home loans in depressed urban areas? One possible remedy is a flexible use of the expansion advance mechanism. FHLBB regulations provide as follows:

> When economic considerations dictate, advances may be extended with more liberal limits and at lower interest rates than might normally apply . . .[136]

The urban housing plight is arguably an "economic consideration" that would justify a Federal Home Loan Bank making advances "with more liberal limits and at lower interest rates" to member institutions for the specific purpose of making real estate loans in areas presently redlined. The advances would allow the lending institutions to make loans in redlined areas on terms equally favorable as those in other geographic areas, but would provide the institution with a larger profit margin to compensate for the additional risk. Advances also could be made secured by loans with provisions excusing the lending institution from repayment upon default by the underlying borrower. Naturally, the burden would be placed on the lending institutions to justify this more liberal expansion advance. Such a program would infuse additional funds into the urban residential mortgage market, but still would require the lending institution to bear most of the risk from an unsound loan. It is this lack of risk by the lending institution that undoubtedly is partially the cause for the present dismal record of FHA insured mortgages.[137]

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136. 12 C.F.R. 531.1(c) (1975).

137. *HUD's Role in the Rotting of Detroit*, San Francisco Chronical, March 17, 1976, at 13.

FHLBB regulations further provide that when an advance is for any purpose *not consistent* with the Federal Home Loan Bank Act, it should be denied.[138] Loan offices of the various district Federal Home Loan Banks are to scrutinize applications for advances with particular attention given to the precise purposes of the proposed advance and the property to which it relates. Presumably, this scrutiny is required to assure the Federal Home Loan Bank that the advance is not for an undesirable purpose. In view of this mandated scrutiny, no substantial burden would be imposed on the bank to implement a policy of advances for the specific purpose of affirmatively pursuing the national housing goals and eliminating discrimination in lending practices.

A second possible inducement is the use of government insurance in connection with loans secured by real property in the redlined area. Caution should be exercised with this approach.[139] Insurance may be a proper method, but it should not be structured to allow the lending institution to escape all risk of loss. Finally, the secondary mortgage market can provide the mechanism for purchasing from the lending institutions the loans granted in the redlined areas. Fuller development of these and other inducements for voluntary changes in investment policies must await another day.

The statutory tools exist to eliminate the destructive practice of redlining. The fact-gathering mechanisms are being created that will provide the necessary predicate to successful class action litigation based on these statutory prohibitions. All that is needed are skillful and determined litigants prepared to assume the responsibilities of preparing and litigating such attacks.

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138. 12 C.F.R. 531.1(f) (1975).

139. Many witnesses who testified at the California Redline Hearings were critical of the FHA insurance approach. *See Redline Hearings*, *supra* note 14.