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ARTICLES

IN THE RACIAL CROSSHAIRS. RECONSIDERING Racially Targeted Predatory Lending Under A New Theory of Economic Hate Crime

Cecil J Hunt, II*

I. INTRODUCTION

At the end of Lorraine Hansberry's groundbreaking 1959 Broadway play, "A Raisin in the Sun," the Younger's are able to move out of their overcrowded inner city apartment and become the first Black family to buy a home in a previously all-white suburban neighborhood. Despite weak but unambiguous white resistance in the form of an offer by the neighborhood association to buy them out before they move in, the play ends on a powerful and uplifting note as the family triumphantly and symbolically leaves their cramped city apartment for the spaciousness and opportunity represented by the white suburbs.

Imagine what might realistically have become of the powerful matriarch, Lena Younger, and her fragile little family over the course of the next forty years in suburban white America. As the children grew up, the whites would have abandoned the area and fled to whiter and more distant enclaves, and the neighborhood would have shifted from all white to virtually all Black. Real estate values would have stagnated while neighboring white areas would have flourished and greatly appreciated.

Long after the children had grown and moved away, Lena would have paid off the mortgage and settled into a comfortable retirement on a fixed income. She would also have been aggressively and racially targeted by units of some of the largest banks in the country for high cost predatory loans that would have slowly stripped away virtually all of the equity she had built up in her home over the many years of hard work and sacrifice. Eventually, with her equity depleted and the costs of the new mortgage nearing or exceeding her fixed monthly income, Lena would have lost her little dream house through foreclosure and become another homeless statistic living on the street or surviving through the kindness of strangers or family

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members. What had begun so hopefully as part of a non-racialized American Dream, would have ended tragically as part of an emerging and highly racialized American Nightmare.

This allegorical nightmare story of the Younger family is unfortunately a tragic reality for millions of people of color all across America who have been racially targeted and economically exploited by a segment of the mortgage market referred to as "subprime lending." The most pernicious and exploitative portion of this subprime market is characterized as "predatory lending." Although there is no authoritative or definitive statutory definition of predatory lending, it is generally considered to consist of any terms and/or practices which are unreasonably exploitive, abusive or excessive and thereby presumably the product of imposition rather than bargaining.

The subprime segment of the national mortgage market has recently experienced stunning and explosive growth, having increased almost 1000% between 1995 and 2000, and is conservatively estimated to cost the nation a staggering "$9.1 billion each year of lost homeowner equity and back-end penalties and excess interest paid." As a consequence, the subprime and predatory lending markets have been described as "probably one of the most important public policy issues that America will have to address in the coming years."

2. Subprime lending is generally understood to consist of a category of loans made to "consumers with incomplete or tarnished credit histories." FDIC Frets over Risks in Subprime Lending, BANKING POL’Y REP., June 2, 1977 at 3. See also Cathy Lesser Mansfield, The Road to Subprime "HEL" Was Paved With Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market, 51 S.C. L. REV. 473, 533 n.372 (2000) ("Subprime loans include those with more lenient underwriting standards (such as high loan-to-value ratios), those made to borrowers with blemished credit histories, and those with both characteristics.... [S]ubprime borrowers are further categorized by lenders in funding subcategories usually designated as A- B, C, or D, with A- being the best of these categorizations and D being the worst.").

3. See U.S. DEP’T OF HOUS. & URBAN DEV. AND U.S. DEP’T OF TREASURY, CURB PREDATORY HOME MORTGAGE LENDING: A JOINT REPORT 17 (2000) [hereinafter HUD REPORT], available at www.huduser.org/publications/pdf/treasrpt.pdf ("[N]one of the relevant statutes and regulations governing mortgage transactions provides a definition of predatory lending. Public debate around the issue of predatory lending has focused on practices and loan terms that alone or in combination, are abusive or put borrowers at a high risk of abuse.").

4. HUD REPORT, supra note 3, at 1 ("[P]redatory lending—whether undertaken by creditors, brokers, or even home improvement contractors—involves engaging in deception or fraud, manipulating the borrower through aggressive sales tactics or taking unfair advantage of a borrower’s lack of understanding about loan terms ... that, alone or in combination, are abusive or make the borrower more vulnerable to abusive practices.").

5. Mansfield, supra note 2, at 475 ("The number of high-rate, high-cost home secured loans has exploded over the past seven or eight years ....").

6. See HUD REPORT, supra note 3, at 26-27 It has been estimated that the total amount of outstanding residential mortgages in the United States in 1994 stood at $768 billion dollars and subprime lending constituted only 3% of that market or approximately $25 billion dollars. However, within just four short years, by 1998, the national outstanding loan volume had increased to approximately $1.2 trillion dollars and the subprime portion of that portfolio had soared to 13% or $160 billion dollars.


8. Mansfield, supra note 2, at 475 ("[T]he consequences of some subprime lending are now starting to be felt through record numbers of home foreclosures, victimization of some borrowers
The recent explosive growth in the predatory subprime market has "created a crisis of epidemic proportions for communities of color, elderly homeowners, and low-income neighborhoods [because of] the plague of predatory mortgage lending." Such predatory and abusive loan practices, especially when their victims are targeted on the basis of race, are particularly important and problematic because they can not only ravage the individual lives and families of their victims but they also undermine and devastate whole communities. Moreover, these practices also have the symbolic effect of depriving people of color of the benefits of homeownership, which is not only the essence of the American Dream, but also through inappropriate lending and lending practices, and concerns over lender liquidity and investor security.

9. Predatory Mortgage Lending: The Problem, Impact, and Responses: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs, 107 Cong. 404 (2001) [hereinafter Shea Statement] (statement of Mike Shea, Executive Director of ACORN Housing Corporation), available at http://banking.senate.gov/01_07hrv/072701/sheah.htm ("[H]undreds of thousands of unsuspecting homeowners and homebuyers ... have been robbed by a predatory lender, and these modern day sharks continue to sink their teeth into new victims every day."). Shea further noted: "The rise in subprime and predatory lending has been most dramatic in minority communities.... Subprime lending, with its higher prices and attendant abuses, is becoming the dominant form of lending in minority communities...."

10. HUD REPORT, supra note 3, at 17 ("In many neighborhoods, abusive practices threaten to erode the enormous progress that has been made over the past several years in revitalizing neighborhoods and expanding home ownership. In many instances, the consequences for borrowers, foreclosure in particular, have been disastrous."); Frank Lopez, Note, Using the Fair Housing Act to Combat Predatory Lending, 6 GEO. J. ON POVERTY L. & POL'Y 73, 79 (1999) ("The proliferation of predatory lending practices may result in 'the social fabric of many inner-city urban neighborhoods [being] torn apart' and the further destabilization of minority communities.") (quoting Julia Patterson Forrester, Mortgaging the American Dream: A Critical Evaluation of the Federal Government's Promotion of Home Equality Financing, 69 TUL. L. REV 373, 392 (1994))). Lopez goes on to point out:

The loss of a home can be financially and psychologically devastating. Financially, a homeowner may lose all equity in his home, and ultimately may end up homeless. Psychologically, homeowners facing the loss of their homes are more likely to suffer from mental illnesses, commit suicide, or engage in criminal behavior. Therefore, the problem of predatory lending in minority communities is a grave concern.

Id. at 79 (emphasis added). See also Deborah Goldstein, Protecting Consumers from Predatory Lenders: Defining the Problem and Moving Toward Workable Solutions, 35 HARY C.R.-C.L. L. REV. 225, 226 (2000) ("The concentration of high-cost loans in particular areas can damage entire neighborhoods causing property maintenance to deteriorate, neighboring properties to become devalued, businesses and residents to pull out, and the sense of community to decline.").

11. See generally MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 8 (1995) ("Homeownership is without question the single most important means of accumulating assets."); Predatory Mortgage Lending: The Problem, Impact and Responses: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs, 107th Cong. 289 (2001) (statement of Wade Henderson, Executive Dir., Leadership Conference on Civil Rights), available at http://banking.senate.gov/01_07hrv/072701/henderson.htm ("[H]omeownership is a basic key to financial viability."). Henderson concludes: "Predatory lending is a cancer on the financial health of our communities and it must be stopped." Id. at 294. See also Fred Galves, The Discriminatory Impact of Traditional Lending Criteria: An Economic and Moral Critique, 29 SETON HALL L. REV 1467 1467 (1999) ("[L]ending discrimination is an illegitimate impediment to the American Dream."); Forrester, supra note 10, at 374 ("Home ownership is the American Dream.").
the gatekeeper of the middle class, financial security and upward socio-economic mobility.

The primary targets of these abusive loans are vulnerable homeowners who are cash poor but home equity rich, and who, for a variety of reasons, are either in fact, or simply believe they are, shut out of the mainstream credit markets and have nowhere else to turn for credit. Because of this marginalization, these borrowers are credit starved, vulnerable to exploitation and disproportionately populated by people just like Lena Younger—elderly, poor, female, and Black. As a result of the deep penetration into these vulnerable markets by predatory lenders, the consumer credit market has become so deeply bifurcated along racial lines that it has been described as a modern form of "financial apartheid."

The central conceptual claim of this article is that a system of financial apartheid which targets its victims through the crosshairs of race constitutes a very serious public policy problem which is currently being inadequately addressed. I argue here that such racially charged practices should be referred to as what I term "racialized"

12. See Oliver & Shapiro, supra note 11, at 8-9 ("We estimate that institutional biases in the residential arena have cost the current generation of blacks about $82 billion. Passing inequality along from one generation to the next casts another racially stratified shadow on the making of American inequality.").

13. Id. at 6 ("[Homeownership] is central to the wealth portfolio of the average American ... [and] ... makes up the largest part of wealth held by the middle class, whereas the upper class more commonly hold a greater degree of their wealth in financial assets."). See also Christine A. Klein, A Requiem for the Rollover Rule: Capital Gains, Farmland Loss, and the Law of Unintended Consequences, 55 Wash. & Lee L. Rev. 403, 408 (1998) (noting that homeownership is "perceived as far more than a luxury or convenience—it is seen as the 'foundation of all society. Federal policy reflects this respect for home ownership through tax preferences such as the home mortgage interest deduction, ... and the home sale preference of [§] 121 and [§] 1034 of the Code...."). Klein also noted that these preferences have been heavily criticized as being "potentially inequitable [and] racially skewed." Id. at 408.

14. See Lopez, supra note 10, at 76 ("People in these communities typically have little disposable income, but often have substantial home equity as a result of paying down their mortgages or simply through appreciation ... ...). See also Kenneth R. Harney, Your Mortgage: New Bills Restrict 'High Cost Mortgages, L.A. Times, Nov 14, 1993, at K4 (indicating that borrowers in this category have few options).

15. See Richard R. Daugherty, Will North Carolina's Predatory Home Lending Act Protect Borrowers from the Vulnerability Caused by the Inadequacy of Federal Law?, 4 N.C. Banking Inst. 569, 570 n.5 (2000) ("At the Federal Trade Commission (FTC) press conference on July 29, 1999, FTC Chairman Robert Pitofsky stated that the elderly are the most vulnerable target for predatory lenders."). See also Deborah Goldstein, Understanding Predatory Lending: Moving Towards a Common Definition and Workable Solutions 16 (Joint Ctr. for Hous. Studies, Working Paper No. W99-11, 1999), available at http://www.jchs.harvard.edu/publications/finance/goldstein_w99-11.pdf (stating that predatory lenders target older homeowners because they have significant equity in their homes and substantial needs for money); Lopez, supra note 10, at 74 ("Low-income minorities often do not have the same opportunities as white persons to obtain loans from mainstream lenders. Consequently, minority borrowers are often vulnerable to predatory lenders, who take advantage of minorities' limited borrowing options by charging egregious interest rates and forcing them into foreclosure.").

16. Lynn Drysdale & Kathleen E. Keest, The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and its Challenge to Current Thinking About the Role of Usury Laws in Today's Society, 51 S.C. L. Rev 589, 590-91 (2000) (observing that while some call this development "the 'democratization of credit' [its] [c]ritics ... call the trend 'financial apartheid' or the 'second-class' market").
predatory lending.” Although this racialized predatory lending is a form of subprime lending generally, and predatory lending specifically, it represents a distinct variety of abusive lending that is significantly different from other forms of non-racialized financial exploitation. The significance of this difference lies in the deep historical stain of racial subordination in America and the contemporary legacy of that history in creating and perpetuating both institutional and cognitive racialized barriers to accessing capital, credit and property.

The legal tools that are now aimed at combating racialized predatory lending are fundamentally inadequate to the job, because they either fail to reflect this essential historical context or fail to appreciate its current manifestations in contemporary abusive lending practices. I argue that this vitiating racialized practice cannot be adequately addressed or resolved until and unless it is first appreciated as a separate and distinct variety of predatory lending that must be understood within a different racial, historical, cultural, and social context than the rest of the market.

In my view, this appreciation and understanding requires a reconceptualization of racialized predatory lending in its full historical context. I argue that such a historically contextual reconceptualization of racialized predatory lending yields a more realistic appreciation for this pernicious practice, which is more accurately characterized as “home equity theft.” In short, I argue that racialized predatory lending should be regarded as racially targeted theft; and theft of the most serious degree, of one of every American citizen’s most precious possessions—a home and the economic engine and leverage its wealth represents.

Once that reconceptualization is complete, I argue that in light of the severity and scope of the harms it causes, this form of “racialized theft” should be subject to a public policy punishment preference that is far more commensurate with those harms than the choices currently available and in use. Based on these insights, I

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Home equity theft is the theft of the equity in the home or the actual title to the home. The theft is accomplished through illegal practices and scams and also through otherwise legitimate business practices which are employed abusively ....

....

What we are all seeing is that the substantial equity in the homes in ... low and moderate income neighborhoods ... which formally constituted an element of wealth for these homeowners, albeit in small amounts, is now held hostage or owned outright by predatory lenders. Their abusive business practices have resulted in a substantial increase in foreclosures which divest homeowners of their property and leave them homeless. The result is destabilization of what were formerly vibrant neighborhoods populated by owner-occupied homes and an increase in the need for government funded social service agencies to address the social ills generated by this destabilization.

Id.

propose a fundamental paradigm shift in punishment preference from the civil law arena to the criminal law context. In reconceptualizing racialized predatory lending as a particularly pernicious form of racialized theft, I argue that the criminal sanction paradigm seems a much more appropriate context jurisprudentially within which to decide punishment than that of the civil law perspective—particularly in the most egregious and damaging cases.\textsuperscript{19}

In advocating a shift from the civil to the criminal paradigm as a basis for the punishment preference for racialized predatory lending, it is important to keep in mind that predatory lenders are well aware of the damage they do to minority victims and their communities. Predatory lenders are well aware that in many cases they are foisting a loan on an innocent victim for whom such a loan is wholly economically unsuitable. These lenders are also well aware that in many cases they are imposing loans on borrowers who simply cannot afford them and that such practices will almost certainly lead to stripping virtually all of their equity from their homes and ultimately end in foreclosures. Consequently, it seems appropriate to hold such lenders fully accountable for the devastation that they knowingly and willfully cause in pursuit of profit. Pursuit of profit is not and should not be an affirmative defense.

However, I do not suggest that racialized predatory lending practices be criminalized per se. While such a prospect is intriguing, it deserves to be considered more fully in a treatment separate from this one. But if such a new criminal offense were created, the culpable criminal intent or mens rea requirement could be borrowed from the criminal negligence or depraved indifference standards for liability based on a conscious disregard for the harmful and reasonably foreseeable consequences of the perpetrator's actions.

Instead, I suggest that the punishment preference be shifted from civil to criminal in such a way that these abusive practices are policed by the aggressive use of existing criminal sanctions already on the books. For example, abusive lenders could be aggressively pursued under the slender and never-used criminal sanction already buried deep in the Truth in Lending Act that provides for up to a five thousand dollar fine and imprisonment for not more than one year.\textsuperscript{20} In addition to

http://banking.senate.gov/01_07hrng/072701/brenbaum.htm.

Mr. Chairman, under the law, if a person holds someone up at gunpoint and robs them of their possessions, that person goes to jail. However, if a lender uses deception, high-pressure sales tactics, and other abusive means to steal another person's home—their most prized possession—the lender profits. Predatory lending is no different than robbery at gunpoint, and both our laws and regulations must adequately reflect that fact. \textit{Id.}

\textsuperscript{19} In our legal tradition we have a long history of sending thieves to jail—not giving them a fine. Moreover, the greater the value stolen and the more significant the harm imposed, the more harsh the penal sanction usually is. There is no conceptual reason why the theft of home equity should be treated any differently than the theft of a similar economic assets, for example: a retirement pension, savings account or investment portfolio or 401-K.

aggressive use of this existing statutory tool, I argue that these criminal sanctions could and should be amended to provide for higher fines and longer maximum sentences. Moreover, the criminal fraud statutes could be enthusiastically brought to bear on the most egregious cases of racialized predatory lending through any number of mail or wire fraud provisions.

In punishing racialized predatory lending by aggressive enforcement through existing and expanded criminal sanctions, the criminal law violation imposed on such practices could be regarded as a predicate crime subject to enhanced sentencing by treating it as a hate crime—of the economic variety—under existing statutory authority. Under this approach, the requisite mens rea requirements under the predicate criminal statutes would remain unchanged and unaffected by my proposed paradigm shift. To the extent that the abusive racialized lending practices amount to conduct that also satisfies the elements of the current relevant hate crime statutes, this conduct could be severely punished as an economic hate crime. I suggest that this approach could yield significantly enhanced commensurability between the offense and the punishment, which is currently absent, and almost certainly act as a powerful deterrent to continued acts of abusive and exploitative lending.

My approach to understanding and contributing to the solution of racialized predatory lending does not in any way constitute a suggestion that racism is, or even may be, the sole or deliberate cause of these racially abusive lending practices. Instead, I argue that, given our nation's long and deeply problematic historical record on issues related to race and property, it is reasonable to conclude that there are powerful institutional and cognitive racial biases at work in racialized predatory lending which reflect that history to the stark disadvantage of people of color generally and Black people in particular.21

Since racialized predatory lending is essentially an offense which mixes race and economic deprivation, I suggest that the best place to begin our paradigm shift is to borrow from the criminal hate crime statutes and redefine this practice as what I term an "economic hate crime." The hate crime paradigm is a particularly appropriate and revealing perspective from which to view racialized predatory lending—especially in its most egregious forms. This is true because the existence and enforcement of hate crime statutes reflect a strong public policy against aggressive, inappropriate and harmful conduct targeted at victims on the basis of race. Racialized predatory lending is precisely that kind of conduct and therefore

21. See Ian F. Haney Lopez, Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination, 109 Yale L.J. 1717, 1827 (2000) ("Under the sway of institutional racism, persons fail to recognize their reliance on racial notions, and indeed may stridently insist that no such reliance exists, even while acting in a manner that furthers racial status hierarchy."). Discussing his institutional racism theory in more detail, Professor Lopez explains the relevance of the historical context as follows:

Racial status-enforcement reflects not only the latent effects of past purposeful racism, but the contemporary prevalence of institutional racism. Institutional analysis makes evident that effects-based approaches are necessary to address not simply the present results of past discrimination, amorphous and attenuated, but also the current manifestations of ongoing institutional racism, robust and real.

Id. at 1840.
constitutes a compelling candidate for expanding the reach of existing hate crime statutes to include such abusive practices.

In calling for the recognition of racialized predatory lending as the first form of an economic hate crime, I am essentially cutting a new jurisprudential trail. However, the scope, severity and reach of these incredibly abusive and exploitive racialized lending practices cry out for creative solutions far beyond those which have already been tried and met with only modest success. I think my theory of conceiving of racialized predatory lending as an economic hate crime suggests interesting new ways to think about economic and financial racial discrimination generally. This is particularly important since I think a very compelling argument can be made that the civil rights struggles of the twenty-first century will be largely over economic rather than political and social rights. If that is true, the creation of an economic hate crime paradigm seems a particularly good way to start off the new millennium—in anticipation of the struggles to come.

In making a case for recognizing racialized predatory lending as a new form of economic hate crime, Section II begins by reviewing and analyzing the debate over the definition of precisely what constitutes predatory lending and how it is distinguished from non-abusive and socially useful subprime lending. Next, Section III reviews and analyzes the evidence suggesting the existence of racialized targeting in marketing, structuring, and placing predatory loans disproportionately to people of color and their communities. Section IV then considers both current solutions and my proposed solutions to the problem of racialized predatory lending. Finally, Section V offers some concluding observations and remarks.

II. DEFINING PREDATORY LENDING

A. What is Subprime Predatory Lending?

The conceptual problems of the current legal paradigm associated with regulating subprime and predatory lending are exacerbated by two interrelated definitional concerns. The first involves the difficulty of defining predatory lending itself, and the second consists of distinguishing between acceptable and even beneficial subprime lending and unacceptable predatory lending. Despite considerable effort, the term "predatory lending" appears to be particularly elusive and resistant to precise definition.

Although there is no authoritative statutory definition of predatory lending, it is generally considered to consist of any terms and/or practices which are unreasonably exploitive, abusive or excessive and, thereby, presumably the product of imposition rather than bargaining. The Joint HUD/Treasury Task Force

22. See HUD REPORT, supra note 3, at 17. The report notes:

Although diverse laws apply to home mortgage lending, none of the relevant statutes and regulations governing mortgage transactions provides a definition of predatory lending. Public debate around the issue of predatory lending has focused on practices and loan terms that alone or in combination, are abusive or put borrowers at a high risk of abuse.

Id.
concluded that, despite this definitional difficulty, it was clear that the essence of predatory lending involves "deception or fraud, manipulating the borrower through aggressive sales tactics, or taking unfair advantage of a borrower's lack of understanding about loan terms."23

The goal of effectively regulating predatory lending is significantly complicated by the fact that, "while all agree that predatory lending is abhorrent, few agree on what it is."24 Unfortunately the concept of "predatory lending" is not fixed and easily grasped. Instead, it is has been observed that the definition of predatory lending is "quite elastic and has been used to refer to many practices that are common in the mortgage industry, particularly in the subprime lending area."25 As a consequence of this threshold definitional concern, "[m]uch of the struggle in finding a proper solution to preventing predatory lending occurs because of the difficulty in being able to determine when a loan is predatory .. [because] innumerable practices may be predatory, thus making it extremely difficult to define predatory lending except in the broadest of terms."26

In fact, as the former chairman of the Senate Banking Committee, Republican Senator Phil Gramm refused to schedule hearings on the issue of predatory lending because of the difficulty of defining the problem with precision.27 However, Senator Gramm did direct his staff to poll nine government agencies participating in a Federal Reserve Board working group on predatory lending,28 in order to determine

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23. Id. at 1 (observing that "[t]hese practices are often combined with loan terms that alone, or in combination, are abusive or make the borrower more vulnerable to abusive practices").


25. Id.

26. Daniel S. Ehrenberg, If the Loan Doesn't Fit, Don't Take It: Applying the Suitability Doctrine to the Mortgage Industry to Eliminate Predatory Lending, 10 A.B.A. J. AFFORDABLE HOUSING & COMMUNITY DEV. 117 118 (2001). Despite the difficulties involved in defining predatory lending, the author concludes that "an analysis of the common themes involved in such practices can help shape a workable definition." Id.


It does not help borrowers or lenders for regulators to target their considerable enforcement power on an array of practices that may or may not be predatory, or that may be of benefit to consumers in some instances and predatory in others, without defining what in essence makes them predatory. Providing a clear definition is the beginning step and cannot be skipped. That step has not yet been taken by the regulators. It is difficult to expect adherence to a standard unless that standard is clear. The lack of a definition threatens to subject those regulated to the abuses of arbitrary and capricious governmental action at worst, and at best will frustrate effective regulatory action to address the problems.

Id.

28. In October 1999, the Federal Reserve Board organized a working group consisting of nine federal regulatory agencies that was ordered "to tighten enforcement of existing statutes, to identify those predatory practices that might be limited by tightened regulations or legislative changes, and in general to establish a coordinated attack on predatory practices." Federal Reserve Board Governor Edward M. Gamlich, Remarks at the Fair Housing Council of New York (April 14, 2000), available at http://federalreserve.gov/BOARDSDOCS/SPEECHES/2000/200004142.htm.
“what the regulators view as predatory lending and what they see as the extent of the problem.” The responses he received led the Senator to conclude that the regulators did not have a systematic or organized database of predatory lending practices based on a common definition, and the data that was collected was, “anecdotal at best.” On the basis of this evidence, he concluded that no regulatory or legislative action should be taken until “the problem is properly identified, the data systematically gathered, and the effectiveness of existing law evaluated.”

However, a more practical real-world view was reflected in the “sea [of] change in [the] Senate Banking [committee] on consumer issues since the populist Maryland Democrat [Senator Paul Sarbanes] took the reins [in June 2001] from free-market conservative Sen. Phil Gramm, R Tex.” Unlike his conservative Republican predecessor, to address the growing abuses associated with the subprime predatory mortgage industry Senator Sarbanes was not deterred by a lack of definitional precision to at least conduct a number of extremely important, informative, and revealing hearings on the issue in the summer of 2001.

B. The Subprime Predatory Market

The size and dimensions of the predatory lending problem are difficult to chart with precision because separate statistics are not kept on the number of predatory loans made each year. Instead, they are considered to be part of the overall subprime mortgage market. However, as previously noted, while all predatory lenders are subprime, not all subprime lenders are predatory. In fact, estimates of the portion of the subprime market that consists of predatory lenders ranges from a low of 25% to a high of 50%. Accordingly, in just four short years, “assuming that predatory loans comprise 25% of the subprime market, these loans grew from over $6 billion to roughly $40 billion…. This increase in loan activity exceeded 500% in just a four year period.”

These subprime lenders constitute not only one of the newest credit marketers, but also the fastest growing and most profitable segment of the entire financial services

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29. Gramm Staff Report, supra note 27, at 228.
30. Id. at 230.
31. Id. at 231. This conclusion was justified because, as the Senator noted, “It is difficult to understand how the regulators or Congress can formulate proposals to combat predatory lending when there is no clear understanding as to what it is. A definition of the practice is sine qua non for any progress toward a remedy.” Id.
33. See generally Predatory Mortgage Lending: The Problem, Impact and Responses, Hearing Before the Senate Comm. on Banking, Hous., and Urban Affairs, 107th Cong. (2001). These efforts have led to proposed reform legislation in both the Senate and the House to amend the Truth In Lending Act, to more specifically address the problems associated with predatory lending.
34. See HUD REPORT, supra note 3, at 47
36. Daugherty, supra note 15, at 575 n.41.
industry. The enormous profits to be reaped in this market have attracted the large
national institutional lenders and, due to rapid and considerable consolidation,
subprime lending has grown to the point that it now represents a significant and
growing segment of the credit industry, increasingly attracting major private and
public sector players into the field.

C. Explosive Growth of the Subprime Market

"Predatory lending occurs primarily in the subprime mortgage market," which
has grown at an explosive and astonishing rate over the past few years. In 1994, this
industry had less than a 5% market share of mortgage originations in the United
States, amounting to approximately $35 billion that year. In just five short years,
subprime’s market share increased to 13% and the annual dollar amount to more
than $160 billion. One of the primary engines fueling this growth has been the
securitization of subprime loans by institutional investors.

37 See Jeff Glasser, Sometimes a Deal Is Too Good to Be True: Big Bank Lending and Inner-
City Eviction, U.S. NEWS & WORLD REP., March 5, 2001, at 42 ("Th[ese] loans often produce margins
eight times those of conventional mortgages, although there’s a greater risk of default and higher
servicing costs. Banks can make more money by packaging subprime loans as mortgage-backed
securities and selling them to mutual funds." (emphasis added)).

38 Andrew L. Sandler & Benjamin B. Klubes, Compliance Risk Management in Subprime
("[S]ubprime lending now accounts for 15% of all home equity loans.").

39 Id.

Several major banks have acquired subprime lenders recently. First Union Corporation
purchased Money Store, Inc. Key Corp bought Champion Mortgage Company. Also, Conseco
Inc., an insurer, purchased GreenTree Financial. In addition, various other banks have built
significant subprime lending operations. Indeed, 70 percent of the top mortgage lenders of 1997
are currently originating subprime loans.

40 HUD REPORT, supra note 3, at 1.

41 Id. See also Sandler & Klubes, supra note 38, at 113 ("Despite a recent slowdown, the
subprime mortgage lending industry has been growing at an astonishing rate over the past several
years."); Mansfield, supra note 2, at 475 ("The number of high-rate, high-cost home-secured loans has
exploded over the past seven or eight years...").

42 HUD REPORT, supra note 3, at 2. The Report explains:

Securitization of subprime mortgages has developed in the past few years and has contributed
significantly to rapid growth of the market. Issuance of securities backed by subprime
mortgages increased from $11 billion in 1994 to $83 billion in 1998. In 1998, 55 percent of
subprime mortgages were securitized, falling back to 37 percent in 1999.

Id.
By the beginning of the 1990's, asset-backed securities with various types of loans as the underlying collateral became a significant and common investment vehicle for investors with varying degrees of risk tolerance. Although car loans originally comprised the majority of the assets underlying these securities, "during the 1990's, multifamily loans, automobile, manufactured home, subprime mortgage loans, and community development loans [were] securitized and sold to investors" in record numbers. Securitization of subprime mortgages generated significant profits and attracted so many new players to the field that this factor alone has been cited as "a major reason for the rapid growth of finance companies and new entrants into the industry during the mid-1990's."

D. Identifying Predatory Lending Practices

Although subprime predatory lending may be difficult to define in precise legal terms, it is remarkably easy to recognize in the real world. At its conceptual core, it has two essential characteristics: (1) a wide range of lender behavior that is either substantively or procedurally unreasonably abusive, exploitive, harmful, or unfair; and (2) a pool of borrowers that are particularly vulnerable, targeted, and exploited precisely because of their vulnerability. While there clearly is some difficulty in precisely defining the borders of acceptable and unacceptable subprime lending, it is equally clear that there are common practices that can be identified which are the source of significant hardships to vulnerable homeowners and rightly deserve the pejorative title of predatory lending. As one scholar in the field has observed,

43. Id. at 41 ("Automobile and other forms of consumer credit initially accounted for the majority of loans securitized by finance companies although home equity loans accounted for the majority of loans securitized by the mid-1990's.").

44. Id. (defining securitization as "the process of pooling together a group of loans and issuing a security representing an ownership interest in the loans").

45. Id.

46. Ehrenberg, supra note 26, at 117 The author points out:

Predatory lending involves a number of different practices. These include the following: making high-interest-rate loans; charging excessive closing costs and fees, or both; requiring prepayment penalties, single-premium credit insurance, negative amortization, and/or balloon payments; steering and using bait-and-switch tactics; financing of fees; making loans based only upon the equity in the property and not on the ability to pay; servicing loans in a deceptive manner; and failing to include payment of homeowners' insurance and property taxes without informing the borrower/customer.

47 See GOLDSTEIN, supra note 15, at 8. The author observes: "Predatory lending describes a set of loan terms and practices that fall between appropriate risk-based pricing by subprime lenders and blatant fraud...." Id. at 5. "The loans are predatory because they prey on borrowers' inexperience and lack of information to manipulate them into loans that they cannot afford to repay or with terms that are significantly less advantageous than a loan for which the borrowers are qualified." Id. at 8. See also Ehrenberg, supra note 26, at 117 ("Although subprime loans are made to borrowers who may have blennshed credit and may involve greater risks to the lender than would conventional loans, 'it is when the cost of credit for a borrower is not related to these costs and risks that a loan becomes predatory.'") (citing GOLDSTEIN, supra note 15, at 10)).

48. Mansfield, supra note 2, at 535. Mansfield notes:
"[t]he hallmark of a subprime loan is a high interest rate and high points or fees charged at the time the loan is closed."49

The essence of the subprime predatory loan is the attempt to "strip" as much equity out of the home as possible. This is accomplished through a process that begins with mortgage brokers intentionally "steering" homeowners into high rate loan programs. The loans are then "packed" with as many additional fees, expenses, costs, points, and onerous terms as possible in order to maximize the broker's and the lender's up-front profits and to keep the borrower economically hostage. The loans are then repeatedly "flipped" or refinanced in order to generate more fees and costs with the intent of draining as much of the homeowner's equity as possible. When the equity is exhausted, the property is foreclosed and sold at auction.

The prey for choice of predatory lenders are homeowners who are either racial minorities living in predominantly minority neighborhoods, senior citizens, especially women, the poor, or any combination thereof. As a consequence, the victims of predatory lending are generally much less financially knowledgeable, sophisticated, assertive, and litigious. They also are far more likely than their subprime or prime market counterparts to trust in and rely on the lender, or anyone purporting to be their agents. This willingness to trust makes the victims of predatory lenders especially vulnerable to being abused and exploited. Tragically, they are.

1 Stripping

Although the term "equity stripping" generally refers, as indicated above, to draining as much of a homeowners equity as possible, the term "stripping" also refers to the practice of lending solely on the basis of the home's value rather than the borrower's ability to repay. Foreseeably, this practice invariably ends in default, foreclosure, personal bankruptcy and, tragically, even homelessness.50 These loans are characterized not only by the lender's disregard for the borrower's ability to repay, but they are also frequently made where it is clear that the borrower cannot repay. This practice has been described as "asset-based lending," "in rem financing," or "unaffordable loans," and all too often leads to complete equity stripping, "whereby the borrower loses not only the equity in her home, but also the home itself as the result of taking out a loan that she cannot repay."51

Although it is clear that subprime pricing is higher than conventional lending, it is impossible to determine or describe with accuracy the rates, points, and fees charged by the subprime home equity industry as a whole, because pricing information is neither collected by any public source nor advertised with specificity by the industry. Nevertheless, it is still possible to make some general conclusions about the subprime home lending industry and market from the information that is available.

Id.

49. Id.

50. The most tragic of these examples occur when, before the predatory lender arrived, the now newly homeless person had a home that was debt free after more than 30 years of faithful mortgage payments.

51. Id. at 552. The following passage explains the problem:
2. **Steering**

Racialized predatory lending is frequently not simply a two party dance. There is often a critical third participant in this dance of deception; the mortgage broker.\(^2\) Typically, the vast majority of subprime borrowers do not apply directly to the lender.\(^3\) Instead, they usually go through a mortgage broker, who, in exchange for a fee, provides assistance in locating a lender and closing the loan.\(^4\) Due to their relative lack of economic sophistication, these borrowers are often successfully induced by the brokers to trust them and rely on their advice regarding which loan program, and even which lender, to accept. This practice of mortgage brokers directing borrowers to the highest priced and highest commissioned loan program is referred to as "steering."\(^5\) Unlike real estate transactions, these borrowers are usually not aware nor informed that the broker is the lender’s agent and not theirs. Therefore, not only are they unaware that the broker works for the lender and not

A borrower’s inability to pay can result from taking a loan with an unaffordable monthly payment that may exceed the borrower’s monthly income. It may also result from an affordable monthly payment followed by a balloon payment that the borrower will never be able to afford. The existence of the balloon payment in the contract allows the lender to focus the borrower’s attention on the low monthly payment, even though the borrower clearly will not have any way to pay the balloon and will thus be forced to refinance the loan. Finally, loans may even be issued to borrowers who have no ability to pay based on loan applications falsified by mortgage brokers or lender employees eager for high commissions. In the worst cases, the loan is so bluntly unaffordable that the borrower defaults on the very first payment due.

*Id.* at 552-53.

52. The term mortgage broker is used here to include:

["Any entity that solicits, processes and/or places a mortgage loan with a third-party mortgage lender on behalf of a borrower ... [does] not provide the actual funds for the loan, [but] acts only as an intermediary between a borrower seeking funds for the purchase or refinance of a home and the mortgage lender who ultimately provides these funds.


53. *Id.* at 1737 ("The majority of borrowers purchasing or refinancing a home today obtain their mortgage loans through a mortgage broker. Within the last decade, mortgage brokers have surpassed the traditional mortgage lenders as the main providers of residential mortgage services."). *See also* Kenneth Harney, *Bias in Pricing of Mortgage Fees Cuts Across Lines of Race, Sex, Age*, WASH. POST, September 14, 1996, at F-1.

54. Often, because of the manner in which they advertise, many borrowers do not know that they are dealing with a broker. Instead they think that they are dealing with a direct lender. When they are aware that they are dealing with a broker, they are told that the brokers services, for which they charge one or more points, are based on their finding an appropriate lender for the borrower’s individual credit history and characteristics. *See Elizabeth Renuart & Margot Saunders, Equity Predators: Stripping, Flipping, Packing Their Way to Profits, Before Senate Special Comm. on Aging, 105th Cong. 5 (1998) [hereinafter Renuart & Saunders Statement], available at* http://www.nclc.org/initiatives/predatory_mortgage/equity_predators.shtml ("Many of these brokers advertise as if they are market-rate lenders and do not disclose their true role—or their commissions—until loan closing. By that time many borrowers have lost their leverage to object or walk away.").

55. *Id.* ("Mortgage brokers have played a major role in steering borrowers into bad loans.").
the borrower, they are intentionally induced by the broker to believe just the opposite.

Relying on the trust and confidence of these borrowers, mortgage brokers are able to foist predatory loans on vulnerable consumers through the use of old-fashioned fraud and misrepresentation. It is not uncommon to find borrowers that were pressured into signing either blank loan documents, or documents with significant amounts of critical terms left blank, to be filled in by the lender after the closing. Just as often, many such borrowers show up at the closing to find that the loan documents contain terms, fees, and costs that are strikingly at variance with what they were led to expect by the broker and the lender. When the borrowers object, they are told that changing the documents would require canceling and rescheduling the closing after a significant delay. Not surprisingly, most borrowers in that position, unwilling to endure a significant delay, sign the documents notwithstanding the differences. Most strikingly, many such borrowers are induced into signing predatory loan documents without even realizing that they have placed a mortgage on their homes and that, in the event of non-payment, their homes can and will be taken from them through foreclosure.56

The core of this broker-borrower problem is not simply the potential existence of an undisclosed conflict of interest, but, more importantly, a perverse and reverse institutional compensation incentive structure motivating the broker to serve his own ends at the considerably, and all too often devastating, expense of their customer the borrower. The is true because the mortgage broker-borrower relationship is structured such that, “[b]rokers are paid in either (or both) of two ways: directly by the borrower in the form of cash or by financing the broker fee as part of the loan; and/or by the lender in the form of a yield spread premium which is repaid by the borrower over the term of the loan in the form of a higher interest rate.”57

As a consequence of these financial incentives, brokers are motivated to counsel borrowers to accept loans with higher rates and/or fees than is appropriate for them in light of their individual credit and financial history. They do so because the lender pays the broker a higher fee for delivering borrowers who subscribe to their higher rate and fee mortgage products. The higher the rate and fee structure of the loan, the more the lender pays the broker in the form of essentially a finder's fee. The brokers are therefore paid by both the borrower in fees and points on the loan and by the lender in the form of finders fees, based on the price of the loan. Foreseeably, with such financial incentives, the broker’s recommendations to their borrower client regarding particular mortgage lenders and programs are motivated

56. Often these loans are taken out to consolidate existing credit card and other consumer debt, the ostensible advantage being potentially lower total monthly payments and the apparent advantage of tax deductibility of the payment stream. However, due to potential fraud and misrepresentations by the broker and lender, these borrowers are often unaware that they have thereby transformed unsecured personal debt, for which their homes are not at risk, into secured mortgage debt for which their homes are very much at risk. These situations are all the more tragic when, as they frequently do, they involve a borrower who has a mortgage free, or very low interest rate or low balance mortgage when they first enter the predatory forest, and then end up losing their homes through the foreclosure of a high rate, high fee predatory mortgage that they did not need and could not pay from the moment it was closed.

57 Renuart & Saunders Statement, supra note 54, at 5.
more by their own profit than by the borrower’s interests. These types of reverse incentives “not only drive up the cost of mortgage loans, but also create reverse competition. The result is that brokers are provided incentives to steer borrowers to the lenders that pay brokers the most rather than to the lenders which give borrowers the most favorable terms.”

The principal source of the broker’s reverse incentive is the widespread industry use of the so-called “yield spread premium.” The yield-spread premium is a system of financial inducements, rewards or fees that the lender pays the broker in connection with their referring a borrower to the lender. Generally, the amount of the fee is directly dependent on the terms of the loan program that the borrower accepts. The higher the rates and fees associated with a given loan program, the higher the broker’s fee.

However, under existing law, these broker fees may be illegal if they are given and accepted simply for the referring of the borrower to the lender. Section 8(a) of the Real Estate Settlement Practices Act (RESPA) explicitly prohibits both the giving or receiving of “any fee, kickback or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service shall be referred to any person.” As a consequence, although these fees are not illegal per se, they may become so if characterized as fees paid simply for the referrals themselves; in short, fees paid to buy referrals. Under the statute, it is illegal to either offer to pay, pay, or accept payment for such referrals.

However, such fees may be legally acceptable to the extent that they are paid to compensate the broker for services that are actually performed, beyond simply referring the customer to the lender. Section 8 provides an exception to its ban on referral fees by explicitly excluding from liability “the payment of a fee by a lender to its duly appointed agent for services actually performed in the making of a loan.”

The courts have articulated a three-part test to identify those fees that are prohibited under section 8(a). Under the decision in Culpepper v Irwin Mortgage Corp., the court held that section 8(a) prescribed the payment of such fees, as prohibited referral fees, if “(1) a payment of a thing of value is (2) made pursuant to an agreement to refer settlement business and (3) a referral actually occurs.” The department of Housing and Urban Development (HUD) clarified its position regarding referral fees in 1999 by articulating a two-part test by which to determine the legality of such fees. Under that test, the threshold question is “whether goods or facilities were actually furnished or services were actually performed for the compensation paid.”

Under this analysis, however, even if those “services have been actually performed by the mortgage broker, [that] does not by itself make the

58. Id.
60. 12 U.S.C. § 2607(c)(1)(C)
61. 132 F.3d 692, 696 (11th Cir. 1998) [hereinafter Culpepper I].
payment legal."[^63] If the answer to this threshold question is in the negative, that is the end of the inquiry and the fee is proscribed. However, if the answer to the threshold question is in the affirmative, it then leads to the second question, which is "whether the payments are reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed."[^64]

Under the test enunciated in *Culpepper I*, and as clarified in the HUD policy statement, the court in *Culpepper II* held that, "under § 8(a), a payment whose reason is to compensate for referrals is illegal."[^65] However, the court preserved the harmony between § 8(a) and 8(c) by concluding that "paying referral fees may be prohibited (as § 8(a) provides), but paying service fees is not (as § 8(c) provides), unless of course the lender pays so much that [one] can legitimately suspect a disguised referral fee."[^66] Accordingly, the court held that, "the first step in the test for liability under § 8 is not only whether the broker performed some of the services described in the HUD Statement, but also whether the yield spread premium is payment for those services rather than for a referral."[^67]

The perverse compensation incentive structure, exemplified by yield spread premiums, is one of the primary bases by which vulnerable consumers are steered into high-rate, high-cost predatory loans. In fact, such financial incentives are so compelling that, notwithstanding the existence of section 8(a), they frequently result in brokers pushing vulnerable and unsophisticated borrowers into loan programs that are highly remunerative to the broker, but which the borrower cannot afford and provide figuratively no net financial benefit to the borrower. It appears, therefore, that section 8(a)’s prohibition on the selling of referrals is honored more in its breach than in its enforcement.

3. **Packing**

Packing involves the practice of adding on additional fees to the original principal amount financed. Although this practice frequently involves adding a range of fees for services presumably provided in connection with making the loan, by far the worst offense is the relatively common practice of adding or packing on single-premium credit life insurance to the loan amount, often without the borrower’s knowledge or consent. This type of insurance "generally does not benefit the borrower, and ... is routinely financed over the life of the loan."[^68] As a consequence

[^63]: *Id.*

[^64]: *Id.*

[^65]: *Culpepper v. Irwin Mortgage Corp.*, 253 F.3d 1324, 1330 (11th Cir. 2001).

[^66]: *Id.* Besides simply the amount, there may be innumerable other ways in which what is truly a referral fee can be similarly disguised by the parties as an acceptable and therefore legal, fee for services.

[^67]: *Id.* at 1332 ("[T]he terms and conditions under which a lender pays the broker a yield spread premium can determine whether the yield spread premium is compensation for referring loans rather than a bona fide fee for services.").

[^68]: Mansfield, *supra* note 2, at 551 ("These charges are usually added into the loan without the borrower’s consent and then taken out only if the borrower objects.").
of this practice, "[t]he costs of these products [are] 'packed' into the borrower's loan amount, raising their price and disguising their true cost to the borrower."\textsuperscript{69}

4. Flipping

Loan flipping is a particularly abusive and exploitive practice that involves a lender repeatedly refinancing a borrower's loan over a very short period of time. Each time the loan is refinanced, the balance of the old loan is paid off and the lender imposes a range of charges on the borrower, such as prepayment fees on the previous loan, points and fees on the new loan, as well as various types of useless insurance products, over and over again.\textsuperscript{70} Each additional layer of refinancing slowly consumes the homeowner's equity with a seemingly unending list of fees.\textsuperscript{71}

5. Foreclosure

One of the most distressing aspects of the subprime mortgage market is the potential link between loans associated with predatory practices and an increase in the number of home foreclosures. Although comprehensive national data is lacking, there is strong and compelling evidence to suggest that the increasing use of predatory lending practices is positively correlated to a significant and tragic increase in the number of home foreclosures across the country\textsuperscript{72} To date, only two major studies have specifically focused on this correlation.\textsuperscript{73} Both confirmed three disturbing aspects to this problem: (1) Predatory lending appears to be positively correlated to a dramatic increase in the frequency and speed of foreclosures; (2) the alarming increase in foreclosures appears to be disproportionately concentrated in low and moderate-income minority neighborhoods; and, (3) the frequency and pace of these foreclosures in these neighborhoods appear to be especially damaging in terms of causing housing abandonment and destabilization in already fragile minority neighborhoods.

The Joint HUD/Treasury Report was keenly aware of the link between predatory lending and foreclosure rates when it concluded that "dramatic growth in foreclosure actions in some neighborhoods that has accompanied the growth in subprime lending over the last several years suggests the potentially damaging effects of lending abuses."\textsuperscript{74} Similarly, one expert in the area, testifying before the House Banking Committee, observed that "[o]ne unfortunate result of the explosion in subprime lending, and the predatory practices, which are only too commonly a part

\textsuperscript{69} HUD REPORT, supra note 3, at 22.
\textsuperscript{70} Mansfield, supra note 2, at 548.
\textsuperscript{71} HUD REPORT, supra note 3, at 21 ("Lenders also structured high-cost loans with terms that forced lower-income borrowers to refinance a loan multiple times. With mortgage loan flipping, the end results of default and foreclosure are often devastating.").
\textsuperscript{73} See generally id., HUD REPORT, supra note 3.
\textsuperscript{74} HUD REPORT, supra note 3, at 24.
of it, has been a parallel explosion in foreclosure filings."\(^7\)\(^5\) Another expert characterized the relationship between subprime lending and foreclosures by concluding that "with the advent of the subprime home equity market, loan defaults and foreclosures appear to be increasing at an almost frightening rate."\(^7\)\(^6\) Although there is a "paucity of data from which to make any ... comprehensive conclusions"\(^7\)\(^7\) of a causal link between predatory lending and foreclosure, a preliminary study of the available data indicates that, "there has been a marked and tragic increase in the number of home foreclosures as the result of subprime home equity lending."\(^7\)\(^8\) Given this high-risk target market, "it is not surprising that, generally, subprime loan borrowers present more credit risk as a class, and have higher rates of serious delinquency and default than mainstream conventional borrowers ..."\(^7\)\(^9\) However, the evidence suggests that the rates ad fees charged by predatory lenders is frequently far more than is justified by the increased credit risk of even problem borrowers.\(^8\)\(^0\) In fact, it has been suggested that often it is the very presence of the high rates and exorbitant fees characteristic of predatory loans that actually cause many foreclosure to occur.\(^8\)\(^1\) These foreclosures then are not necessarily caused by weak borrowers so much as by egregious loan rates, fees, and terms. As a consequence, many of these foreclosures might not have occurred but for the predatory loan.

Although the Chicagoland Study limited its focus to the city and surrounding suburbs of Chicago between 1993 and 1998, its findings were startling and a clear indicator of similar problems which could be found in many other large urban areas around the country.\(^3\)\(^2\) Specifically, the Chicagoland Study found:

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75. Shea Statement, supra note 9, at 413.
77. Id. at 45.
78. Id. at 47. "[O]ne in four borrowers taking a subprime loan will lose or will be in serious danger of losing their home." Id. at 46.
79. HUD REPORT, supra note 3, at 49 ("By providing loans to borrowers who do not meet the credit standards for borrowers in the prime market, subprime lending can and does serve a role in the nation's economy. These borrowers typically have blemishes in their credit record, insufficient credit history, or non-traditional credit sources.").
80. Ehrenberg, supra note 26, at 118 ("[I]t is when the cost of credit for a borrower is not related to these costs and risks that a loan becomes predatory ").
81. See generally Predatory Mortgage Lending: The Problem, Impact, and Responses: Hearing Before the Senate Comm. on Banking, Hous., and Urban Affairs, 107th Cong. 317-39 (2001) [hereinafter Ackelsberg Testimony] (testimony of Irv Ackelsberg, Managing Attorney, Community Legal Services, Inc., testifying on behalf of the National Consumer Law Center), available at http://www.banking.senate.gov/01_07hrq/072701/aklsbrg.htm. In fact, Ackelsberg noted that "[t]he terms of these high cost loans are not necessary to protect the lenders against loss; indeed the terms are generally so onerous that they precipitate default and foreclosure. With these equity based loans, even foreclosure does not pose actual risk of loss to the lender." Id.
82. Chicago is probably an excellent laboratory within which to observe the operation of the subprime and predatory lending mortgage market, especially with respect to foreclosure frequency and correlation because "Chicago's foreclosure rate for subprime loans is the highest in the nation [and] seven times higher than the prime foreclosure rate." CHICAGOLAND STUDY, supra note 72, at 36.
1. The number of loans by subprime lenders between 1991 and 1997 increased by 1,524%;
2. The number of foreclosures by subprime lenders during this time period increased by 4,623%;
3. The number of foreclosures on so-called "high interest rate loans" increased by over 400%,
4. Subprime loans were directly linked to accelerated foreclosures, with more than a 300% increase in the number of foreclosures on loans that were less than four years old; and
5. A significant majority (64%) of abandoned homes had subprime loans that had been foreclosed.83

The study concluded that "subprime lenders play a significant role in the number of foreclosure cases .. [and] that foreclosure cases on loans that involve subprime lenders can, and often do, result in abandonment."84 It also pointed out that its "key finding is that today's foreclosures are qualitatively different than they have been in the past."85 This difference is grounded in the notion that these loans are priced at levels that do not appear to be justified by the nature of the risks involved and that "increasing numbers of loans are going into foreclosure faster, a trend which suggests that some of these loans should never have been made in the first place."86

The dramatic increase in the number of subprime foreclosures must also be viewed against a backdrop of recent increases in the amount of loan volume, the percentage of homeownership, and in the number of foreclosures generally in all risk categories.87 Even in that context, the numbers are still quite disturbing because, as the study concluded, "[l]oan volume cannot account for the increase in subprime foreclosures in the Chicagoland area."88 More generally, it has been observed that "[t]his increase in foreclosure rates cannot be traced either to a rise in homeownership or to the increase in mortgage loans being made. During the same time period, homeownership increased by only 2% ... The increase in home

83. Id. at 5.
84. Id. at 29 The study also noted that "if subprime lenders continue to gain a greater share of the loan market, as was shown here, then even more foreclosure cases and abandonment are likely in the future." Id. Because of the difficulty in defining both "subprime" and "predatory loans" the study's methodology involved identifying those "lenders and loan servicers [who] specialize in subprime loans ... using industry sources." Id. at 10. With this list, the "NTIC was able to identify loans originated or foreclosed by these lenders." Id.
85. Id. at 5.
86. Id.
87 Ackelsberg Testimony, supra note 81, at 319 ("Between 1980 and 1999 both the number and the rate of home foreclosures in the United States have skyrocketed.... This means that, although this was a period of economic prosperity, almost four times the number of homes were foreclosed upon in 1999 as in 1980.").
88. CHICAGOLAND STUDY supra note 72, at 17 "Although subprime lenders' share of the loan market increased greatly, from 2.6% in 1991 to 24.3% in 1997 with a corresponding increase in the number of loans they made, other non-subprime lenders failed to show a similar increase...." Id. at 16. "In fact, non-subprime loan volume grew by only 20,194 loans, a 14.6% increase, from 1991 to 1997." Id. at 17
secured lending during the same period was almost twofold, from 30 million loans outstanding in 1980 to 52.5 million loans 1998.  

One scholar bluntly described the causal link between predatory lending and foreclosures in the following manner:

The problem is that too many home loans are being made for purposes that have nothing to do with the home, and too often these loans are being made with terms that are inherently unconscionable—that increase the costs of homeownership and the risk of loss of homeownership to the borrower.  

Although the empirical evidence is not dispositive, it strongly suggests a causal link between predatory lending and foreclosures. For example, the evidence indicates that, in 1998 the “delinquency rates on all traditional home equity loans [was] around 1.25%.” By comparison, subprime home equity loans, in particular “securitized pools had a delinquency rate generally ranging between 6% and 9%.”

The foreclosure rates at some of the country’s largest subprime lenders are even more striking. Against an overall national foreclosure rate on residential mortgages of 1.16%, significant subprime lenders like “ContiMortgage” had delinquencies of 2.81% and defaults (e.g. foreclosures, bankruptcies) of 7.51% as of September 30, 1999 in its $12 billion portfolio ... Aames Financial Corp reported delinquencies and defaults of 16.3% as of December 1998. Similar foreclosure rates were reported for other large subprime players. “‘Wall Street’ estimates of cumulative foreclosure rates show that ‘[a]fter six years, approximately 13 percent of mortgages were in default.’ A similar rate of 11% to 12% was reported by United Lending Companies in 10-K reports filed with the SEC.

Almost as distressing as the significance of the disparity in overall foreclosure rates between subprime and conventional loans is the marked increase in the speed with which subprime mortgages go into foreclosure compared to their prime counterparts. From the few studies that have focused on this element, it is clear that “[t]he speed with which the subprime loans in [inner city minority] communities have gone to foreclosure suggests that some lenders may be making mortgage loans to borrowers who did not have the ability to repay those loans at the time of origination.”

The Joint HUD/Treasury Study reached similar results. While the Chicagoland Study focused only on the city of Chicago and surrounding suburbs, the Joint

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89. Ackelsberg Testimony, supra note 81, at 320.
91. Mansfield, supra note 2, at 554.
92. Id.
93. ContiMortgage ranked as the 3rd largest national subprime lender in 1998. Id. at 555 n.496.
94. Aames ranked as the twentieth largest national subprime lender in 1998. Id. at 555 n.500.
95. Id.
96. Id. at 554 n.495 (quoting JOHN C. WEICHER, THE HOME EQUITY LENDING INDUSTRY: REFINANCING MORTGAGES FOR BORROWERS WITH IMPAIRED CREDIT 83 (1997)).
97 HUD REPORT, supra note 3, at 25.
HUD/Treasury Study focused its inquiry on three cities: Chicago, Baltimore, and Atlanta. In all three cities, the Joint HUD/Treasury Study found "the growth in mortgage foreclosures paralleled the growth in subprime lending[,] ... subprime borrowers are quicker to default on their loans than are prime borrowers, sometimes leading to foreclosure by the lender[,] [and] [f]oreclosures on subprime loans are concentrated in low-income and minority neighborhoods."  

The Joint HUD/Treasury Study validated and confirmed the original findings of the NTIC's Chicagoland Study 99 With respect to Atlanta, citing a study performed by Abt Associates, the HUD/Treasury Study found that:

Among lenders that report to HMDA, the overall share of foreclosures attributable to subprime lending increased from 5 percent in 1996 to 16 percent in 1999. The subprime share of originations was 10 percent in 1996, 12 percent in 1997 and 9 percent in 1998.

Over the 1996-99 period, loans with high interest rate spreads (more than four percentage points over 30-year Treasury) represented 44 percent of the subprime loans entering foreclosure.

The median age of loans entering foreclosure was only two years for subprime loans, compared with 4 years for prime loans.

Considering only foreclosures by HMDA reporters, subprime lenders accounted for 36 percent of all foreclosures in predominantly minority neighborhoods during 1999, compared to their origination shares of 28 percent in 1997 31 percent in 1997 and 26 percent in 1998. 100

With respect to the third city in the Joint HUD/Treasury Report study, Baltimore, the study found that:

The subprime share of foreclosures in Baltimore is much larger than the subprime share of mortgage originations. While subprime loans account for 45 percent of the foreclosure petitions, the subprime share of mortgage originations in Baltimore City was 21 percent in 1998.

Subprime loans account for 50 percent of foreclosure petitions in low-income Baltimore City neighborhoods, compared with 33 percent of mortgage originations.

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98. *Id.* at 49

99. *Id.* The Report explained:

Between 1991 and 1997 the subprime share of the mortgage origination market rose from 3 percent to 24 percent. However, between 1993 and 1998, the subprime share of foreclosures increased from 1.3 percent to 35.7 percent. Foreclosures on loans originated after 1994 had higher average interest rates than foreclosures on loans originated before 1994. Between 1993 and 1998, the greatest growth in foreclosures was on loans with interest rates 4-8 percentages points above the 30-year Treasury rate. Fast foreclosures in the Chicago area grew rapidly in the subprime market. The vast majority of foreclosures on home loans less than two years old were foreclosed by subprime lenders.

100. *Id.* at 50.
Subprime loans account for 57 percent of foreclosures in predominantly black neighborhoods, compared with 42 percent of mortgage originations in predominantly black Baltimore City neighborhoods. Subprime loans resulted in foreclosure during a shorter period of time after origination than prime and FHA loans. The mean lag between the origination date and the date that the foreclosure petition was filed is 1.8 years for subprime loans compared to 3.2 years for FHA and prime loans. Subprime loans originated in 1999 account for a substantial minority (28 percent) of all subprime foreclosure petitions.101

These findings were all consistent with HUD sponsored studies in Los Angeles and New York.102 The findings from these studies suggest, as the Chicagoland Study concluded, that “today’s foreclosures are qualitatively different than they have been in the past.”103 In the past, in the traditional foreclosure, whether at prime borrower rates or below, foreclosure was a relatively unanticipated, unintentional aberration that the lender sought to avoid because it was costly and problematic. In short, foreclosure traditionally was an indication that something had gone wrong with the loan and constituted an economic threat to the lender’s projected profitability.

In stark contrast, it appears that in a predatory loan foreclosure is quite different. In these types of loans, foreclosure occurs with such frequency and speed that it appears to be a natural, anticipated, and worst of all, intended consequence. Instead of constituting a threat to the lender’s profits, it represents an anticipated income opportunity. This opportunity comes in such a form, allowing the lender to “flip” the loan with a new round of refinancing accompanied by a large entourage of new fees, including prepayment fees on retiring the old mortgage.

For a predatory lender, this amounts to a classic “win-win” situation. If the borrower manages to pay the exorbitant fees and rates without an event of foreclosable default, the lender has made a tidy profit on the upfront fees, especially credit life insurance and the high interest rate over the term of the loan. However, if the borrower cannot manage to make their payments, and begins to approach default and potential foreclosure, the lender can offer to refinance the old loan with a new one, thereby eliminating the arrearage and bringing the borrower current. Of course, the new loan also comes with a host of new fees, including a prepayment fee.

101. Id. at 50-51. The small percentage of subprime foreclosure petitions in 1999, may well be due in large part to the fact that this study was conducted in 2000, and those loans were all less than one year old at the time the study occurred.
103. CHICAGOLAND STUDY, supra note 72, at 6.
to retire the old mortgage, all financed by the new mortgage and coming right out of the equity in the home. Either way the lender wins; the only question is how much.

The only limitation on the ability of an unscrupulous predatory lender to use this flipping strategy is the amount of equity in the home. Diligently applied, this strategy can effectively strip every cent of equity out of the home and turn a homeowner into a bankrupt and homeless wanderer. Once all of the equity has been stripped and actual foreclose does occur, it is unlikely that a predatory lender will incur any net costs in the process of seizing and selling the home. This is true because, as a rule, such lenders maintain a steep loan-to-value ratio, rarely lending more than 50% of the market value of the property, thereby ensuring that it can be readily sold at auction for an amount sufficient to cover the mortgage. The only risk the lender takes in this regard is collateral risk, which can be hedged by controlling the loan to value ratio.

In a perverse reversal of the traditional lending risk assessment, in which the lender takes a risk of a foreclosure occurring, thereby limiting its profit potential, the predatory lender’s profit potential is threatened only if a foreclosure does not occur. But, as we have seen, in these loans even that risk is of little consequence because the lender profits either way. The question is not whether the loan will be profitable, but rather how profitable and how quickly.

In addition, because these profits can be made so easily and quickly the lender has no incentive to avoid foreclosure as long as there is strippable equity left in the home. Obviously then, the lender is disinclined to offer a defaulting borrower any workout arrangements other than refinancing on the now familiar predatory terms. This, of course, is in stark contrast to the normal and healthy relationship between lender and borrower where both parties are eager to avoid the costs and burdens of foreclosure. Predatory lending then is truly a case of conventional lending turned upside down. As a consequence, it has been suggested that many subprime predatory loans are intentionally designed to end in foreclosure. However,


In the business of selling debt, there are only a few ways to grow: get more people in debt; get them deeper in debt; keep them there longer, get other lender’s customers, or a combination of those. Keeping existing customers in debt has long been a mainstay of finance companies. Historically, more than two-thirds of finance company loans have been written to existing customers. . . . Refinancing compounds the financial impact on the consumer: the presence of these kinds of charges in the prior loan inflates the payoff amount on the prior loan which is folded into the principal/amount financed of the new loan, upon which a new round of fees, charges and add-ons are added. . . . And so it goes, as Kurt Vonnegut might say.

Id.

105. Ackelsberg Testimony, supra note 81, at 326.

106. See Forrester, supra note 10, at 390 (concluding that “predatory lending is premised not on ability to repay, but on foreclosure”). See also Lopez, supra note 10, at 74 (describing predatory lending as lenders who “take advantage of minorities limited borrowing options by charging egregious interest rates and forcing them into foreclosure”); Michael McGee, Preying on the American Dream, SAN DIEGO UNION-TRIB., August 15, 2001, at B9 (“[T]he goal of these deceptive [predatory] practices
whether by design or coincidence, for the borrower the consequences of foreclosure prone mortgages are the same; economic ruin and shattered lives.\textsuperscript{107} By the time these already fragile borrowers lose their homes through such predatory induced foreclosures, the devastation to both the individual and their community is often massive and frequently irreparable.

One of the most distressing aspects of the subprime predatory lending problem is the fact that it is disproportionately concentrated in minority communities. Despite the absence of a comprehensive national data source, based on the information available, there can be little question that one of the dirty little secrets of subprime lending is that it is overwhelmingly concentrated in minority communities. The market penetration is so complete in these communities has been observed that “subprime lending, with its higher prices and attendant abuses, is becoming the dominant form of lending in minority communities.”\textsuperscript{108}

It follows, therefore, that if foreclosures are concentrated in subprime lending loans, and subprime lending loans are concentrated in minority communities, then foreclosures are also concentrated in those same communities. The joint HUD/Treasury study confirmed this logic tree when it found that “[a]nalysis of HMDA data show that subprime lending is disproportionately concentrated in low-income and minority neighborhoods.”\textsuperscript{109} In fact, the study concluded that “[t]he rise in subprime and predatory lending has been most dramatic in minority communities. Subprime lenders now account for half, 51 percent, of all refinance loans made in predominantly black neighborhoods, compared to just 9 percent of the refinance loans made in predominantly white neighborhoods.”\textsuperscript{110} Surprisingly the HUD/Treasury study found that the “disparity between the share of borrowers in black and white neighborhoods refinancing in the subprime market holds even after controlling for neighborhood income.”\textsuperscript{111}

Even more surprising, the HUD/Treasury study found that this racial disproportionality existed not only in low and moderate-income black neighborhoods but also in higher income black neighborhoods. It concluded that “among borrowers living in upper income white neighborhoods, only 6 percent turned to subprime lenders for refinancing in 1998. In contrast, 39 percent of borrowers living in upper income black neighborhoods refinanced in the subprime market….”\textsuperscript{112} In sum, this means that generally, “borrowers in black neighborhoods

\textsuperscript{107} Daugherty, supra note 15, at 569 n.3 (“Individuals who lose their homes are likely to be psychologically devastated as well.”).

\textsuperscript{108} ACORN REPORT, supra note 102, at 2. See also Drysdale & Keest, supra note 16, at 591 (“Known as the ‘alternative financial services’ (AFS) or ‘fringe banking sector, this market has become a major source of traditional banking services for low-income and working poor consumers, residents of minority neighborhoods, and people with blemished credit histories.”).

\textsuperscript{109} HUD REPORT, supra note 3, at 47 (“HUD’s study found that there has been a tremendous growth in subprime lending since 1993, and that this growth is concentrated in low-income and minority neighborhoods.”).

\textsuperscript{110} ACORN REPORT, supra note 102, at 2. See also HUD REPORT, supra note 3, at 47

\textsuperscript{111} HUD REPORT, supra note 3, at 47 (“The HMDA data indicate that borrowers in black neighborhoods are five times as likely to refinance in the subprime market than borrowers in white neighborhoods.”).

\textsuperscript{112} Id. at 47
[were] five times as likely to refinance [with a subprime loan borrowers] in upper-income black neighborhoods were twice as likely as homeowners in low-income white neighborhoods to refinance with a subprime loan."\textsuperscript{113}

To be sure, the loss of a family home through foreclosure can be, and often is, an emotionally devastating experience. However, it is particularly so for the victims of predatory lending, who tend to be disproportionately poor, elderly, female and/or racial minorities. Among this group, it is most problematic for the victims who are racial minorities, especially Blacks. This is true because, even on the threshold of the twenty-first century, Blacks remain one of the most residentially segregated racial groups in the United States.\textsuperscript{114}

One of the most significant and destructive costs of the high number of foreclosures is "the devastation of America's housing infrastructure."\textsuperscript{115} This devastation is most keenly felt in the foreclosed homes that are subsequently abandoned.\textsuperscript{116} As a consequence, a concentration of subprime loans in Black neighborhoods, with its attendant shadow of frequent and rapid foreclosures and abandoned properties, can have devastating and long-lasting effects on the entire community. Predatory lending highly correlated to foreclosure\textsuperscript{117} thus turns what would ordinarily be a personal tragedy for the borrower into a potential disaster for the entire community.\textsuperscript{118}

On this issue, the Joint HUD/Treasury Report study concluded that "in an area where predatory practices may be driving families into foreclosure, the impact can be concentrated and felt throughout the community."\textsuperscript{119} Foreclosed homes frequently remain vacant for a prolonged period of time, during which they are poorly maintained. These vacant homes can contribute to neighborhood instability

\textsuperscript{113} Id. at 47–48 (emphasis added). Explaining this phenomenon, the Report notes:

Reasons for the disproportionate amount of subprime lending in certain neighborhoods likely results from the following factors: differences in credit characteristics of borrowers; differences in the types of loans (e.g. small balance loans); and less competition from mainstream lenders. Low-income and minority neighborhoods may be especially vulnerable to abusive lending practices because subprime lending tends to be concentrated in these neighborhoods.

\textsuperscript{114} Id.


\textsuperscript{116} Id. at 47.

\textsuperscript{117} Id.

\textsuperscript{118} Id.

\textsuperscript{119} Id. at 25.
in terms of depressed property values and increased crime. "Testimony from neighborhood development advocates documented the difficulty they have encountered in trying to encourage businesses to locate in neighborhoods where foreclosed properties remained vacant."\(^{120}\) In one recent study, this aspect of the problem was regarded as so severe that the author's concluded that:

> The damage that predatory lending inflicts on our communities cannot be underestimated. Homeownership provides the major source of wealth for low-income and minority families. Rather than strengthening neighborhoods by providing needed credit based on this accumulated wealth, predatory lenders have contributed to the further deterioration of neighborhoods by stripping homeowners of their equity and overcharging those who can least afford it, leading to foreclosures and vacant houses.\(^{121}\)

This community wide impact is especially troubling in light of the fact that the evidence suggests that many of these predatory loans appear to be causally linked to the foreclosure. It has been persuasively argued that "for most borrowers in foreclosure [with a subprime loan] but for the relationship with the subprime lender the homeowner might not have lost the home to foreclosure."\(^{122}\) As one noted scholar concluded:

> Thus it appears that subprime mortgage loans have very high delinquency rates, especially when one looks at more serious delinquencies and foreclosures. The costs to a borrower of losing his or her home in a foreclosure are obvious and tragic. The foreclosure becomes even more tragic in cases where the borrower owned the home for a long time, sometimes generations, before a subprime home equity loan led to foreclosure. In these cases, but for the encounter with the subprime lender, the borrower would most likely still own and live in the home.\(^{123}\)

### III. RACIAL TARGETING OF PREDATORY LOANS

#### A. Evidence of Racial Targeting

The reason that Black neighborhoods suffer from such a concentration of predatory loan foreclosures is that although both Blacks and Whites are victims of predatory lending practices, Blacks appear to be particularly targeted by subprime

120. *Id. See also* Mansfield, *supra* note 76, at 48 ("A final cost of high foreclosures is the devastation of America's housing infrastructure. As more and more homes go into foreclosure, and homes lay vacant until they can be resold, neighborhoods suffer.").
121. *ACORN REPORT, supra* note 102, at 4.
122. Mansfield, *supra* note 76, at 47 (emphasis added).
123. *Id.* at 47-48. Mansfield also notes:

There are other costs of delinquency and foreclosure as well. It is not at all clear how much loss is caused to lenders and investors because of foreclosures. There have been some companies, which continue to operate profitably despite any foreclosure issues. There are others which have gone out of business.

*Id.* at 48.
lenders. Because of their high degree of residential segregation, the harms imposed on their communities are especially concentrated and, therefore, more severe.\(^{124}\)

In fact, while Whites appear to be targeted for predatory loans because they are either poor, pose a high credit risk, or have no other credit options in the prime market, Blacks appear to be targeted simply because of their race, regardless of income, credit risk, or other available credit options in the prime market. The result of this sort of racialization of the subprime market results in “infusing lending that carries higher costs and higher risks for the borrower into minority communities where it is not justified by the risks to the lender.”\(^{125}\)

This pernicious practice constitutes a type of economic racial profiling, which considers race as a proxy for market weakness and exploitability, without regard to the income or particular credit worthiness of the individual. As stark evidence of this pernicious form of economic racial profiling, a former assistant manager of the subprime lending arm of Citigroup testified that “if someone appeared uneducated, inarticulate, was a minority, or was particularly old or young, I would try to include all the coverages Citifinancial offered. [T]he more gullible the consumer appeared, the more coverages I would try to include in the loan.”\(^{126}\)

The most troubling aspect of the former Citifinancial manager’s testimony was that for Whites, evidence of their vulnerability to abusive predatory practices was whether they were “uneducated, inarticulate .. old or young ... [or] ... gullible.”\(^{127}\) In stark contrast, by her testimony, it appears that vulnerability for minorities was determined simply by their minority status. In short, for whites to be targeted for predatory loan practices, there had to be specific evidence of vulnerability, but for minorities, they became eligible for such treatment simply because they were minorities. It appears that minorities are presumed to be weak, vulnerable, and exploitable simply on the basis of their minority-ness, while whites are not similarly treated unless there is specific evidence suggesting that they would make profitable targets.

\(^{124}\) HUD REPORT, supra note 3, at 47 (“Comparable 1993 figures were 8 percent in black neighborhoods and 1 percent in white neighborhoods.”). The study also pointed out:

Subprime loans are three times more likely in low-income neighborhoods than in high-income neighborhoods.... In the poorest communities, where families make only 50 percent of the median income, fully 44 percent of borrowers refinanced in the subprime market in 1998 [whereas] [i]n upper-income neighborhoods, only 7 percent of borrowers refinanced ....

\(^{125}\) Bradford, supra note 114, at 63.

\(^{126}\) Michelle Heller & Rob Garver, Congress May Investigate Citigroup Loan Practices, AM. BANKER, June 15, 2001, at I (noting a former assistant manager, Gail Kubminiec, testified that “common practices at her branch included identifying vulnerable borrowers”).

\(^{127}\) Id.
A recent study of the relationship between race and subprime lending revealed a number of disturbing findings, substantiating this assertion. Among the study’s major findings were the following:

1. “Minorities are much more likely than whites to receive a subprime loan when refinancing.”

2. “The concentration of subprime loans is greatest among lower income minorities.”

3. “The racial disparity remains if we compare minority homeowners with white homeowners of the same income, and it persists among higher income homeowners.”

4. “Subprime lenders also target lower income white homeowners.”

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128. See generally ACORN REPORT, supra note 102. The study divided its focus between refinance loans on the one hand and home purchase loans on the other because “[t]he vast majority of subprime loans are for refinances, rather than purchases, and a significant number of predatory practices are linked to refinances.” Id. at 8. Moreover, these refinance loans are not like “the traditional refinance in which homeowners seek to lower their interest rate or lock-in at a fixed rate. Subprime refinances are most often promoted for debt consolidation or in order to provide money for home improvements or other household or personal needs.” Id.

129. Id. at 6. The Report further explained:

In 2000, 49.9% of all conventional refinance loans received by African-American homeowners were from subprime lenders, as were 26.2% of the refinance loans received by Latino homeowners, compared to 18.0% of the refinance loans received by white homeowners. In comparative terms, African-Americans were 2.8 times more likely to receive a subprime loan, and Latinos were 1.5 times more likely to do so.

Id.

130. Id. In fact:

More than half of the refinance loans received by low and moderate income African-American homeowners were from subprime lenders. Subprime lenders accounted for 57% of the refinance loans made to low-income African-American homeowners and 54.3% of the refinance loans made to moderate-income African-American homeowners. One in three refinance loans made to low and moderate income Latinos was subprime. Subprime lenders accounted for 31.1% of the refinance loans made to low-income Latino homeowners and 33.5% of the refinance loans made to moderate income Latino homeowners.

Id.

131. Id. The Report details this finding by noting:

[Thirty-six and one-half percent] of the conventional refinance loans received by upper-income African-American homeowners were from subprime lenders, as were 17.2% of refinance loans received by upper-income Latino homeowners. In contrast, only 12.4% of the refinance loans received by upper-income white homeowners were from subprime lenders. In addition, upper-income African-American homeowners were more likely than low-income white homeowners to receive a subprime loan when refinancing.

Id.

132. Id. (“Subprime lenders made 25.5% of all conventional refinance loans received by low-income white homeowners and 24.0% of all refinance loans received by moderate-income white homeowners. In contrast, subprime lenders made just 12.4% of the refinance loans to upper-income white homeowners.”).
5. "African-Americans receive a much larger share of subprime refinance loans than of prime refinance loans."133
6. "From 1993 to 2000, the rate of growth in the number of subprime refinance loans to minorities was larger than the rate of growth to whites."1134
7. "African-American homebuyers were 4 times more likely than white homebuyers to receive a subprime loan, and Latinos were twice as likely to do so."135
8. "Minorities receive a much larger share of subprime purchase loans than of prime conventional loans."1136
9. "The rate of growth of subprime lending has been much faster than the rate of growth of prime lending, especially to African-American borrowers."1137

The findings of the ACORN study were consistent with those reached in the joint HUD/Treasury study which concluded that Black borrowers in general were five times more likely to receive a subprime loan than Whites.138 However, the most disturbing aspect of these findings is the conclusion that "[t]he racial disparity is still present if we compare minority borrowers with white borrowers of the same incomes, and it persists among higher income borrowers."139 Thus, minority borrowers are significantly more likely to receive a subprime loan than their white counterparts with the same income. Most shockingly, upper income Blacks were significantly more likely to receive subprime loans than even low-income Whites.140

133. ACORN REPORT, supra note 102, at 6.
134. Id. ("The number of subprime refinance loans has risen 659% to African-American homeowners, 599% to Latino homeowners, and 398% to white homeowners.").
135. Id. at 7 ("Of the conventional prime and subprime purchase loans originated in 2000, subprime loans made up 25.5% of the loans received by African-Americans and 13.8% of the loans to Latinos, but just 6.3% of the loans to whites.").
136. Id. The Report indicated:

In 2000, African-Americans received 13.3% of all the subprime purchase loans made in the United States, a 3.5 times larger share than the 3.8% they received of prime purchase loans. Latinos received 10.2% of the subprime loans, almost double their 6.1% share of prime loans. In contrast, whites received half, 51.1%, of the subprime purchase loans, but three quarters, 73.6%, of the prime loans.

Id.

137 Id. The Report explained:

The number of subprime purchase loans to African-American homebuyers has risen 714% from 1995 to 2000, while the number of prime conventional purchase loans received by African-American homebuyers in 2000 was actually than in 1995. Subprime purchase loans increased 723% to Latino homebuyers during this time, while prime loans rose 47%. White homebuyers also saw a larger percentage increase in subprime loans than in prime loans during this time, a 348% increase in the number of subprime loans and a 7.1% increase in the number of prime loans.

Id.

138. HUD REPORT, supra note 3, at 47 ("The HMDA data indicate that borrowers in black neighborhoods are five times as likely to refinance in the subprime market than borrowers in white neighborhoods.").
139. ACORN REPORT, supra note 102, at 9 (emphasis added).
140. Id. (emphasis added) ("[U]pper-income African-American homeowners were more likely
It seems, therefore, that in the world of subprime lending, the highest income Blacks are considered a greater credit risk than the lowest income whites.141

Similar evidence of this racialized behavior is found in a recent comprehensive study of the relationship between race and subprime lending, entitled “Race or Risk.”142 The authors found that significant racial disparities exist in all minority communities regardless of income, and again, counterintuitively the concentration of subprime lending in minority communities actually increases at higher income levels.143 The “Race or Risk” study was national in scope, and its central question was, in light of “the consistent and pervasive racial disparities and concentration of subprime lending in communities of color and to borrowers of color at all income levels whether factors other than risk alone account for them.”144 The study’s authors concluded that “the wide disparities in subprime lending to Blacks and Hispanics at all income levels, suggest that factors other than risk may be at work.”145

However, they were also quick to point out that while “the persistent racial disparities in levels of subprime lending found in this analysis do not, in and of themselves, constitute conclusive proof that there is widespread discrimination in subprime lending markets, [they] do raise serious questions about the extent to which risk alone could account for such patterns.”146 This concern is especially compelling in light of the long and shameful history of racial discrimination in mortgage lending in America.147

The Race or Risk study reached the following three definitive findings: “[1] Racial disparities actually increase with increased borrower income; [2.] High levels of subprime lending and racial disparities exist in all regions in the nation; and [3.] High levels of subprime lending and racial disparities occur in MSA’s of all sizes.”148 The study found that while

141. See HUD REPORT, supra note 3, at 23.
142. See generally Bradford, supra note 114.
143. Id. at vi (“African-Americans are disproportionately represented in the subprime home refinance mortgage market. Surprisingly, this study finds that the disparity between whites and African-Americans and other minorities actually grows at the upper income levels and is greater for higher income African-American homeowners than for lower-income white homeowners.”).
144. Id. at vi (“This study reviews subprime lending patterns in the mortgage refinance markets for all 331 Metropolitan Statistical Areas [MSA] in the United States.”).
145. Id. at x.
146. Id. at ix.
147 Id. at ix-x. This shameful history is explained in the following passage:

Discrimination has been a persistent problem in the home finance markets in the United States. The history of mortgage lending discrimination adds weight to the need to explore more fully the role that discrimination plays in the subprime markets through either differential treatment of individual minority borrowers or through the effects of industry practices.

Id.

148. Id. at 3. The authors of the study devised a revealing and useful system for comparing the different MSAs, in what they referred to as “racial disparity ratios.”

We calculated racial disparity ratios by comparing the subprime percentages for minority
the overall national urban level of subprime loans is 25.31% ... [only] 17 42% of the conventional refinance loans made to white borrowers in 2000 were subprime loans. The comparable figures are 49.28% for African-Americans, 30.33% for Hispanics, and 27.94% for Native Americans.... Additionally, [only] 16.22% of the conventional refinance loans made to Asians are subprime.... This indicates that Asians are slightly less likely than whites to receive a subprime loan.149

The study concluded that "the highest percentage of subprime loans in each income range is for African-Americans ... [and that] ... the percentage of loans that are subprime for African-Americans never goes below the overall national level of 25.31%, even for the highest income range."150

Perhaps the most provocative of the study's findings was that not only is the level of minority subprime lending disturbingly high and present in all areas of the country, but

[f]or African-Americans, Hispanics and Asians, the disparities in subprime lending actually increase as the income ranges increase. For Native Americans, this pattern holds for all but the lowest income range. For African-Americans, this means that, while lower-income borrowers are about twice as likely as whites to receive subprime loans, upper-income African-Americans are about three times more likely to receive a subprime refinance loan. For Hispanics, the disparity ratios increase from less than 1.5 at the lower income range to well over 2.0 in the upper-income range. For Asians, borrowers switch from having a lower share of subprime loans than whites in the lower-income range to having a larger percentage of subprime loans in the middle- and upper-income ranges. Therefore, income not only fails to explain the disparities, it indicates that the disparities increase as the income range increases.151

borrowers to the subprime percentages for whites. Any ratio above 1.00 indicates a disparity by race. Disparities above 2.00 indicate that the minority borrowers are at least twice as likely to have a subprime loan as are whites. Based on figures for 2000, the disparity ratio for African-Americans is 2.83, the disparity ratio for Hispanics is 1.74, and the disparity ratio for Native Americans is 1.60.

Id. at 4.

149. Id. at 3, 4. However, the study found that as Asians' income increases, their percentage of subprime loans approaches and surpasses the level of whites: "[F]or the middle and upper income ranges, the percentages of subprime loans are greater for Asians as well when compared to whites." Id. at 5.

150. Id. at 5 ("[T]he percentage of subprime loans within each income range is always greater for minority borrowers that for white borrowers, with the single exception of Asian borrowers.").

151. Id. Furthermore:

Almost all of these studies that show large disparities in subprime lending related to race have been based on Home Mortgage Disclosure Act data. These data do not provide information on the credit profiles, loan-to-value (LTV) ratios, debt ratios, and some other factors generally associated with risk. Yet, there is reason to question whether large racial disparities can be explained away by risk factors alone. This is especially true when the racial disparities are within similar borrower income ranges.
Therefore, although not conclusive proof of widespread discrimination, objective measures, such as differences in income levels, cannot explain why minorities generally, but Blacks in particular, receive such vastly disproportionate levels of subprime lending. Finding such racial disparities in subprime lending among upper income Blacks is "particularly troubling, since one would expect few upper-income borrowers, of any race or ethnicity, to receive subprime loans."\(^{152}\) The weight of the evidence indicates quite compellingly "that subprime lending is more an issue of racial targeting than a targeting of low-income people."\(^{153}\)

**B. Subprime False Negatives**

These shocking comparisons are all the more troubling in light of the fact that many of those who receive subprime loans are what could be described as "subprime false negatives" borrowers.\(^{154}\) This means simply that these borrowers do not belong in the subprime market. Contrary to what they are told by the mortgage broker, they are, in fact, qualified to borrow in the prime market, and their participation in the subprime market is based on a false finding that they are not eligible for a prime loan at lower rates.\(^{155}\)

The relative size of this population of subprime false negatives was highlighted by Fannie Mae, which concluded that "as many as half of all borrowers in subprime loans could have qualified for a lower cost conventional mortgage."\(^{156}\) Similarly, the Joint HUD/Treasury Report found that "some borrowers who would likely

\(^{152}\) Id. at 76.

\(^{153}\) Id. at 57.

\(^{154}\) Thirty-one MSAs had disparity ratios for upper-income African-Americans that were above 2.00. Of these MSAs, 5 had disparity ratios greater than 4.00, and 18 had disparity ratios between 3.00 and 4.00.

For upper-income Hispanics, 12 MSAs had disparity ratios above 2.00, and 1 of these had a disparity ratio above 3.00.

\(^{155}\) Dolores Kong, Study Tracks Subprime Loans by Race: Higher-Interest Deals on Home Refinancing Found to Target Minorities, BOSTON GLOBE, Mar. 1, 2001, at D1. Kong quotes a report on subprime lending in Massachusetts by the Massachusetts Community & Banking Council, which found a "pretty dramatic" discrepancy between subprime loans given to Blacks and Latinos, accounting for roughly one-third of all refinance loans, and subprime loans given to whites, accounting for "less than 10 percent of all refinance loans." Id.

\(^{156}\) Which is to say that they have been falsely classified as a high-risk borrower, unable to obtain credit at prime rates and terms.

\(^{156}\) ACORN REPORT, supra note 102, at 32. The prime lending market is limited to borrowers with "A" rated credit, while those with A- and below receive subprime loans. However, it is interesting to note that "almost two-thirds of subprime lending is comprised of A- loans." Bradford, supra note 114, at 76 (citing Retail Retains Momentum During First Half of 2001 INSIDE B&C LENDING, Sept. 17, 2002, at 3). "These are loans on the margin between prime loan risk standards and the subprime market. Discrimination often occurs on the margins of eligibility." Id. at 76.

\(^{156}\) ACORN REPORT, supra note 102, at 31: The chairman of Fannie Mae has estimated that if a subprime false positive borrower had received the prime rate loan that he or she deserved, it "would save a borrower more than $200,000 over the life of a thirty year loan." Id.
qualify for a prime loan are not accessing credit at a bank. There may be a substantial number of borrowers currently borrowing in the subprime market who could qualify for a prime loan.\textsuperscript{157} Citing an unpublished draft report from Freddie Mac, the Fannie Mae report also observed that "for 10 to 35 percent of the subprime loans analyzed, the borrowers may have been eligible for a prime-rate loan.\textsuperscript{158}"

Fannie Mae reached the same conclusions regarding the over-inclusiveness of the subprime lending when they found that "a significant share of the subprime market actually could be served under prime risk underwriting standards.\textsuperscript{159}" Lending and banking industry leaders, in prepared statements at congressional hearings, have even corroborated these findings.\textsuperscript{160} Similar findings of potential subprime false negatives were found by the Department of Justice. It concluded that "approximately 20% of the borrowers had FICO credit scores above 700, significantly higher than the minimum score of 620 which is usually required to receive a prime interest rate.\textsuperscript{161}"

One of the reasons for subprime false negatives levels as high as 50% is the absence of any uniform industry wide underwriting standards. In the subprime market, each lender is free to make his or her own underwriting decisions. Foreseeably, the result is an inconsistent and uneven market, where the ability to receive a mortgage on reasonable terms is less a function of the individual borrower's personal, objective financial credentials and more a result of the particular underwriting standards, values, and biases of the specific lender involved.

As a result of this high level of subprime false positives, a great many borrowers are paying much more than necessary to obtain and maintain a mortgage.\textsuperscript{162} The

\textsuperscript{157} HUD REPORT, supra note 3, at 23.
\textsuperscript{158} Id. at 23 n.6 ("Freddie Mac's analysis relied on a sample of 15,000 subprime mortgages originated by four financial institutions."). See generally FREDDIE MAC, We Open Doors for America's Families, in FREDDIE MAC'S ANNUAL HOUSING ACTIVITIES REPORT FOR 1997 at 23-24 (1998).
\textsuperscript{159} Bradford, supra note 114, at 77. One author indicated:

[Research commissioned by Fannie Mae suggests that there are real opportunities for conventional prime market lenders to bring their low-cost financing options to markets now dominated by high-cost providers [and] ... the growth in subprime lending in these communities indicates that there are opportunities for prime credit lenders to serve more customers and deliver value in some of these markets.

\textit{Id.}

\textsuperscript{160} For example, David Berenbaum, Senior Vice President for the Civil Rights National Community Reinvestment Coalition, stated:

These very extreme disparities in subprime lending by race and income cannot be solely related to the credit history or risk of the borrower. In fact, as Freddie Mac and Fannie Mae have estimated, anywhere between 30 and 50 percent of subprime borrowers could qualify for prime loans. This is product steering or "reverse redlining" at its worst.

Berenbaum Statement, supra note 18, at 348.
\textsuperscript{161} ACORN REPORT, supra note 102, at 32.
\textsuperscript{162} Id. More specifically:

The most obvious consequence for borrowers who have been improperly steered into subprime
consequences of this unnecessarily high debt burden on already vulnerable and disproportionately minority borrowers can be significant and potentially devastating. One study described the potential range of these damaging consequences as follows:

A subprime loan with inappropriately high costs can impact homeowners in several ways. The added expense increases the likelihood that the homeowner will be unable to make the mortgage or other payments on time, which hurts their credit, and thus keeps them trapped in the subprime market with unfavorable terms. In addition, the higher costs strip homeowners of their hard-earned equity and prevent them from building future equity. Furthermore, having a subprime loan means that the homeowner is more likely to be subject to a host of predatory practices, beyond just higher rates and fees.... All of these factors make it more likely that the homeowner will ultimately and unnecessarily lose their house in foreclosure.

In light of the high degree of publicity surrounding the existence and the size of the pool of subprime false positives, it is reasonable to conclude that the lenders must be aware of this problem. Yet, it appears that this knowledge has not affected the way in which they do business. This observation is particularly troubling in light of the fact that "subprime refinance lending ... is often 'sold' to customers rather than 'sought' by the borrower." The unavoidable conclusion is that these lenders are knowingly and intentionally inducing many borrowers to take on mortgages that are significantly more expensive and burdensome than necessary to offset the real risks involved.

In light of this evidence, it is reasonable to ask, who are these subprime false positive borrowers that are unfairly and inappropriately trapped in the subprime lending world? Unfortunately, to date, there are no studies or data that analyzes the composition of the subprime false positive population. However, based on what is known, it seems reasonable to conclude that this group probably consists primarily of members of minority groups, especially Blacks.

This is a reasonable conclusion because it follows from the evidence that it is unlikely that any borrower would willingly take on a significantly more expensive and burdensome mortgage than they have to. It follows that these borrowers must

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loans is that they are unnecessarily paying more than they should. In the loans that were examined by the Department of Justice, the borrowers were paying interest rates of 11 and 12 percent and 10 to 15 points of the loan in fees, while borrowers with a prime loan had 7 percent interest rates and just 3 or 4 points of the loan in fees.... As discussed in this report, subprime loans are disproportionately made to lower income borrowers. This means that subprime lenders are overcharging those homeowners who can already least afford it.

Id.

163. See Bradford, supra note 114, at 78.
164. ACORN REPORT, supra note 102, at 32.
165. See Bradford, supra note 114, at 77 Subprime lenders engage in very aggressive marketing efforts in order to reach vulnerable and gullible borrowers and then "sell the advantages of loan consolidation or cash-back refinancing that allegedly lowers a borrower's monthly payments. Moreover, marketing techniques may disproportionately target minority market segments." Id.
be taking subprime loans, and thereby assuming much higher costs and burdens because they are not aware that they have a choice of borrowing on more favorable terms in the prime market. However, while it is clear that many and probably most subprime false positives are unaware of the true range of the borrowing options available to them, their subprime lenders are not. As a result, subprime lenders intentionally exploit "these information asymmetries and induce borrowers to commit to predatory loans."

How is it that so many subprime borrowers are unaware that they are in the wrong line, that, in fact, they are qualified to borrow in the prime market at substantially reduced rates and on much less onerous terms? There are undoubtedly many complex reasons for such expensive ignorance. However, it can be suggested that at least part of the explanation must be tied to the fact that many of these borrowers are "disconnected from the credit market .. [and] have not had experience with legitimate lenders."

As a consequence of being disengaged from the mainstream currents of traditional credit sources, many of these borrowers are confined to the backwaters of the shadow banking industry. Many are also probably unaware of their eligibility to borrow at prime lending rates in part because they have never tried to secure loans in that market. If, in the past, they had tried to borrow in the prime market and failed, then they would not be "A" rated credit risks and could not be accurately characterized as subprime false positives. If on the other hand they had not tried to borrow in the prime market before, its probably because they perceive, albeit erroneously, that they cannot get a mortgage on anything other than subprime terms.

This perception could be the result of the disgraceful history of racialized barriers to mortgage lending in America, leading large numbers of minorities to conclude

166. See ACORN REPORT, supra note 102, at 31 ("A study by Benedict College found that half of African-Americans with good credit ratings were not aware of it.").
167. Kathleen C. Engel & Patricia A. McCoy, A Tale of Three Markets: The Law and Economics of Predatory Lending, 80 TEX. L. REv. 1255, 1281 (2002). The authors noted:

Lenders and brokers have extensive knowledge about the credit market and mortgage products. In contrast, the typical victims of predatory lenders are unsophisticated about their options... They may need credit but not be aware that they are eligible for loans. Many do not know that there are less expensive sources of credit. And when lenders and brokers give these borrowers estimates and loan documents, the borrowers may not be able to comprehend the information.

Id. at 1280-81.
168. Id.
169. See ACORN REPORT, supra note 102, at 31. The report explains this phenomenon in the following manner:

The ten million American families without bank accounts represent a substantial market of consumers who require alternative financial services. In response, a "fringe economy" has emerged made up of check-cashing stores, pawnshops, and pay day lenders, which are then able to overcharge lower income consumers. Many of these "shadow banks" are funded by mainstream banks. For instance, Wells Fargo, the seventh largest bank in the country, has arranged more than $700 million in loans since 1998 to three of the largest check cashers: Ace Cash Express, EZ Corp., and Cash America.

Id. (citing Dean Foust, Easy Money, BUS. WK., Apr. 24, 2000, at 109).
that conventional prime rate lenders simply will not lend to them. Consequently they do not even apply. Or, this perception could be based on being persuaded by aggressive mortgage brokers soliciting their business, claiming that subprime loans are the only mortgages for which they are qualified. In either case, the result is the same: disproportionately high numbers of Black homeowners paying hundreds of thousands of dollars more than necessary for expensive and burdensome subprime loans, thereby putting their homes, their security, and their family's future at grave and unnecessary risk.

C. Explaining Racial Targeting

In light of the overwhelming evidence that minorities are intentionally targeted for subprime loans, it follows that the excesses associated with predatory lending practices, which are concentrated almost entirely in the subprime lending market, would similarly fall most heavily on those same individuals and communities of color. In fact, as shown earlier in this analysis, communities and individual people of color do suffer from disproportionately high levels of foreclosure and home abandonment in direct proportion to the depth of penetration of subprime lending involved. This is the face and the disgrace of racialized predatory lending.

The evidence that the subprime mortgage market may contain a substantial racialized element is very disturbing. However, the weight of the evidence is so compelling as to be tantamount to dispositive. This disturbing conclusion evokes a simple question: why? Why do subprime lenders generally and predatory lenders in particular make Black people their prey of choice and, thereby, the principal beneficiaries of the economic devastation so characteristic of this most egregious form of lending?

The distressing answer to this question is that racialized predatory lending is caused by institutional and cultural racism. It is quite simply a modern manifestation of the lingering effects of racialized stigmata and the badges and incidences of slavery. Except that, in the context of racialized predatory lending, the badge is in the form of a target: a bulls eye on the back of every Black homeowner without regard to class or income, over which the crosshairs of predatory lending have taken careful and deliberate aim. The obscene and
unconscionable profits gained by the corporate victimizers has resulted in enormous, systemic, and intergenerational devastation to its victims, their families and their communities.

There is no dispositive answer to this question. However, at least part of the solution to this problem must proceed from a basic acknowledgment: the weight of the evidence clearly suggests that the subprime predatory mortgage market appears to be imbued with a racialized value system that not only targets the poor and the weak, but pursues with particular vigor, racial minorities, especially Blacks, at all income levels and in all areas of the country. As a consequence, this is a racialized target population, which means that they are being targeted, not solely, but at least principally, because they are Black.173

Moreover, this population suffers from two distinct forms of racialized vulnerability. An analysis of these racialized vulnerabilities might form part of the basis for understanding why people and communities of color appear to be the targets of choice for subprime predatory lenders. These two vulnerabilities can be characterized as (1) Racialized Market Vulnerability; and (2) Racialized Cultural Vulnerability

1 Racialized Market Vulnerability

In economics, just like physics, nature abhors a vacuum. As an unintended result of the confluence of a number of factors, over the last 25 years traditional banks have "for the most part abandoned low-income and minority neighborhoods."174 Subprime and predatory lenders have aggressively and enthusiastically filled the vacuum left by the departure of traditional banks from these neighborhoods. Deprived of access to traditional sources of credit, low-income and minority communities turned to the subprime and predatory lenders who rushed in to fill the void. Ironically, many of these subprime lenders are owned by "some of the worlds largest financial institutions, and in fact, many of the same institutions which created the situation by their failure to serve certain communities are now opportunistically reaping the profits."175

173. See Engel & McCoy, supra note 167 at 1281 ("In order to exploit [the] information asymmetries, predatory lenders need to identify people who are disconnected from the credit economy and therefore unlikely or unable to engage in comparison shopping. The people most likely to meet these criteria are [low and middle income] people of color....").

174. ACORN REPORT, supra note 102, at 30. The Report highlighted:

A study by economists at the Federal Reserve found that the number of banking offices in low and moderate income areas decreased 21% from 1975 to 1995, while the total number of banking offices in all areas rose 29% during the same period. This is significant because studies have documented that the proximity of a bank's branches to low and moderate income neighborhoods is directly related to the level of lending made by the bank in those neighborhoods.

Id.

175. Id. at 31. Notwithstanding the absence of an official corporate presence in these neighborhoods, some of "these institutions have direct ownership of subprime lending subsidiaries, such as Citigroup and Citifinancial." Id.
2. **Racialized Cultural Vulnerability**

There are a host of reasons why subprime predatory lending has recently exploded in terms of scope and significance, one of which is racialized market cultural vulnerability. However, the central question of this paper is focused not simply on the mere proliferation of predatory abusive mortgage practices, however substantial that may be. Instead, the concern here is with why racial minorities generally, and Blacks in particular, are so overwhelmingly and disproportionately represented among the victims of these pernicious lending practices. Racialized predatory lending has its ideological roots deep in the soil of America's tragic history of slavery and Jim Crow segregation. As a consequence, it is suggested here that absent an analysis of that history one cannot adequately assess either the significance of the problem or the effectiveness of potential solutions. Unfortunately, until now this historical context has been almost completely absent from most academic analysis of predatory lending.176

Any useful analysis of this history must begin with an honest and historically accurate view of the social meaning of race in America and a due regard for the historical relevance and contemporary implications of black chattel slavery. Indeed, as one scholar has correctly observed:

> When considering the social meaning of race in the United States, one wants to attend to the specific historical processes that conditioned our nation's race-making. Fundamental in this regard, I assert, was the institution of chattel slavery, an institution grounded in America's primordial racial classification—the "social otherness" of blacks.177

That sense of "social otherness," the view of Blacks as a despised and degraded alien outside the social contract which infected both America's colonial history and its founding as a nation, continues even to this day. The following passage explains this persistent phenomenon:

> Despite all of the progress of the last several decades, we continue to talk about black America as place and a people apart. [F]or all the well-documented black success stories, and for all the heartwarming statistics, blacks remain, in substantial measure, a race apart in America: a race admired, even emulated, yet held at arm's length. It reflects a particular American schizophrenia. We embrace equality and yet struggle with it in reality. We have come so far, and yet have not escaped the past.178

176. *Id.* at 30 ("Predatory lenders have been able to get away with abusive practices [targeting Blacks] in part because they are exploiting the history of racial discrimination and neighborhood redlining by traditional financial institutions.").

177. GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 60, 67-68 (2002). Specifically, he stated "that the history of slavery in America casts a long shadow, one with contemporary relevance." *Id.* at 68.

The central fact and paradox of that past was the simultaneous “rise of liberty and equality in this country ... accompanied by the rise of slavery”179. By the time the American republic was founded in 1776, slavery had been an established institution in America for over a hundred years. The ideological cornerstone of racialized slavery was white racial supremacy, whereby Whites were presumptively viewed as superior and therefore free, while Blacks, whether free or slave, were viewed as presumptively inferior and therefore naturally suited to slavery.180 The racialized


[If] racism made “the rise of liberty possible,” as the paradox would have it, then racism was not a flaw of American bourgeois democracy, but its very special essence. Morgan’s “paradox” therefore contains in itself the very challenge that he set out to refute. The “Ordeal of Colonial Virginia” was extended as the Ordeal of America, wherein racial oppression and white supremacism have indeed been the dominant feature, the parametric constant, of United States history.

Id. at 256.

180. Id. As Allen explains:

“Toward the end of the seventeenth century” there occurred “a marked tendency to promote a pride of race among the members of every class of white people; to be white gave the distinction of color even to the agricultural [European-American bond-]servants, whose condition, in some respects, was not much removed from that of actual slavery; to be white and also to be free, combined the distinction of liberty.”

...The exclusion of free African-Americans from the intermediate stratum was a corollary of the establishment of “white” identity as a mark of social status. If the mere presumption of liberty was to serve as a mark of social status for masses of European-Americans without real prospect of upward social mobility, and yet induce them to abandon their opposition to the plantocracy and enlist them actively, or at least passively, in keeping the Negro bond-laborer with whom they had made common cause in the course of Bacon’s Rebellion, the presumption of liberty had to be denied to free African-Americans.

Id. at 249 (quoting Philip Alexander Bruce, Social Life in Virginia in the Seventeenth Century 137-38 (Frederick Ungar Publishers 1964) (1902)). See also John Hope Franklin, Race and History: Selected Essays 1938-1988, at 137 (1989). Franklin writes:

The idea of the inferiority of the Negro enjoyed wide acceptance among southerners of all classes and among many northerners. It was an important ingredient in the theory of society promulgated by southern thinkers and leaders.... In 1826 Dr. Thomas Cooper said that he had not the slightest doubt that Negroes were an “inferior variety of the human species; and not capable of the same improvement as the whites.” Dr. S.C. Cartwright of the University of Louisiana insisted that the capacities of the Negro adult for learning were equal to those of a white infant; and the Negro could properly perform certain physiological functions only when under the control of white men. Because of the Negro’s inferiority, liberty and republican institutions were not only unsuited to his temperament, but actually inimical to his well-being and happiness.

...[O]utside the white race there was to be found no favor from God, no honor or respect from man.... “Color alone is here the badge of distinction, the true mark of aristocracy and all who are white are equal in spite of the variety of occupation.”

Id. at 137 (quoting John Hope Franklin, The Militant South, 1800–1861, at 83-86 (1956)).
form of slavery is a peculiarly American phenomenon, distinct in kind and significance from slavery found anywhere else in the world from antiquity to the present day. Such racialized slavery rested on a "dogma of racial inequality" that was biological in nature and ordained by God.  

America was thus founded on a series of shared racialized cultural values and beliefs, premised on the presumption of racial difference and hierarchy. That belief system held that humans are rationally separable into two natural and immutable hierarchical racial groups, Whites and non-Whites, with Whites being the superior group and non-Whites, especially Blacks, the inferior group. As the noted historian Professor John Hope Franklin has pointed out:

For a century before the American Revolution the status of Negroes in the English colonies had become fixed at a low point that distinguished them from all other persons who had been held in temporary bondage. By the middle of the eighteenth century, laws governing Negroes denied to them certain basic rights that were conceded to others. They were permitted no independence of thought, no opportunity to improve their minds or their talents or to worship freely, no right to marry and enjoy the conventional family relationships, no right to own or dispose of property, and no protection against miscarriages of justice or cruel and unreasonable punishments. They were outside the pale of laws that protected ordinary humans. By the time that the colonists took up arms against their mother country in order to secure their independence, the world of Negro slavery had become deeply entrenched and the idea of Negro inferiority well established.

The obvious hypocrisy of our nation's racialized founding was not lost on those who witnessed the events firsthand. During the revolutionary struggle, Abigail Adams, wife of patriot John Adams, wrote to her husband proclaiming that, "it always appeared a most iniquitous scheme to me . . . to fight ourselves for what we are daily robbing and plundering from those who have as good a right to freedom as we have." However, the founding fathers did not see the world as clearly as Abigail Adams did. For example, in addition to being a slave owner himself, one of George Washington's first declarations upon taking command of the Continental army was an order forbidding his recruiting officers from enlisting "any deserter...

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181. GUNNAR MYRDAL, AN AMERICAN DILEMMA 89 (1944). The author further explains:

The biological ideology had to be utilized as an intellectual explanation of, and a moral apology for, slavery in a society which went out emphatically to invoke as its highest principles the ideals of the inalienable rights of all men to freedom and equality of opportunity. It was born out of the conflict between an old harshly nonequalitarian institution—which was not, or perhaps in a short time could not be, erased—and the new shining faith in human liberty and democracy. Another accomplishment of early rationalistic Enlightenment had laid the theoretical basis for the racial defense of slavery: the recognition of Homo sapiens as only a species of the animal world and the emerging study of the human body and mind as biological phenomena. Until this philosophical basis is laid, racialism was not an intellectual possibility.

182. FRANKLIN, supra note 180, at 132-33.
183. Id. at 133.
from the ministerial army, nor any stroller, Negro or vagabond, or person suspected of being an enemy to the liberty of America."

Similarly Thomas Jefferson, like Washington, was also a slave owner of considerable note, and although he wrote in the Declaration of Independence that "all men are created equal and endowed by their creator with inalienable rights," he also wrote that "I advance it therefore as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to whites in the endowments both of body and mind." Although "some patriots were apparently troubled by the contradiction between their revolutionary philosophy of political freedom and the holding of human beings in bondage," their reservations notwithstanding, they created a nation whose founding documents institutionalized, protected, and perpetuated racialized caste slavery. Although the word "slavery" does not appear in the text of either the Declaration of Independence or the Constitution, through those documents the institution of slavery was clearly imbued with constitutional protection. As Judge Higginbotham has so eloquently written:

The Constitution accommodated the institution of slavery without ever explicitly using—prior to 1865—in any article or clause the word "slavery." But the drafters' intentions were clear. In classifying Negroes with the dregs of society, traitors and children, Washington made it clear that Negroes, slave or free, were not to enjoy the high privilege of fighting for political independence. He would change that order later, but only after it became clear that Negroes were enlisting with the "ministerial army" in droves in order to secure their own freedom. In changing his policy if not his views, Washington availed himself of the services of more than five thousand Negroes who took up arms against England.

184. Id. Franklin continues:

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185. THE DECLARATION OF INDEPENDENCE para. I (U.S. 1776). Although the South clearly ignored this fundamental notion, masking any true understanding of it, Myrdal notes that when "Jefferson and his contemporaries ... said that men were equal, [they] meant it primarily in the moral sense that they should have equal rights, the weaker not any less than the stronger." See MYRDAL, supra note 181, at 87.


187. FRANKLIN, supra note 180, at 156. Franklin pointed out that this contradiction led patriots like Patrick Henry to conclude that "slavery was 'repugnant to humanity, but at the same time own slaves. George Washington, Thomas Jefferson, George Mason, and Edmund Randolph also spoke of the senselessness of slavery while continuing "to hold blacks in bondage." Id.

188. See id. at 155-56. Franklin explains the reasons for this apparent silence:

The final consideration, as the colonists fought for their own freedom from Britain, was what would be the effect of their revolutionary philosophy on their own slaves. The colonists argued in the Declaration of Independence that they were oppressed; and they wanted their freedom. Thomas Jefferson, in an early draft, went so far as to accuse the king of England of imposing slavery on them; but more "practical" heads prevailed and that provision was stricken from the Declaration.

Id. at 155. See also LOURY, supra note 177 at 120 ("No, they didn't put the word "slavery" in the Constitution—true enough. They merely put the institution of slavery under the protection of the Constitution—rather a worse offense.").
coyness about using the word "slavery" did not necessarily reveal an aversion to the institution of slavery. Rather, it suggested a reluctance to sully the great document with a word that most of the founders realized, despite their protestations to the contrary, denoted a fundamentally evil institution.  

The Declaration of Independence cloaked slavery with constitutional protection in at least three specific places. First, "in the so-called major compromise of the Constitution, the delegates agreed that a slave was three-fifths of a man, meaning that five slaves were to be counted as three persons."  

This is similar to what Professor Ronald Dworkin has described as a "malign preference," which is "rooted in a belief that certain racial or other groups simply deserve less of life's good things than the rest of us ... [and] ... involve[s] a desire to deprive another person or group of an equal share of life's goods or opportunities." 

Something akin to Dworkin's malign preferences helps make sense of the stunning paradox of the simultaneous raising of the American creed of freedom, equality, and liberty with the degrading, dehumanizing, and peculiar institution of black chattel slavery. Unable to rationalize the apparent contradiction of a nation founded on human freedom, but financed by inhuman slavery, our founding fathers solved their problem by declaring that Blacks were simply not fully human. This view was most notoriously articulated by Supreme Court Chief Justice Taney in the

190. FRANKLIN, supra note 180, at 157 See also U.S. CONST. art. 1, § 2, cl. 3.  
192. See MYRDAL, supra note 181, at 4. In describing the American Creed, he wrote: 

"There is evidently a strong unity in this nation and a basic homogeneity and stability in its valuations. Americans of all national origins, classes, regions, creeds, and colors, have something in common: a social ethos, a political creed. It is difficult to avoid the judgment that this "American Creed" is the cement in the structure of this great and disparate nation."

Id. at 3. The author continues: 

These ideals of the essential dignity of the individual human being, of the fundamental equality of all men, and of certain inalienable rights to freedom, justice, and a fair opportunity represent to the American people the essential meaning of the nation's early struggle for independence. In the clarity and intellectual boldness of the Enlightenment period these tenets were written into the Declaration of Independence, the Preamble of the Constitution, the Bill of Rights and into the constitutions of the several states. The ideals of the American Creed have thus become the highest law of the land.  

Id. at 4.  
193. See HIGGINBOTHAM, supra note 189, at 9. In discussing what he calls our founding's "convenient myth," Judge Higginbotham observes: "The precept of inferiority did not define any specific right or obligation. Instead, 'inferiority' spoke to the state of mind and the logic of the heart. It posed as an article of faith that African-Americans were not quite altogether human." Id.
Dred Scott case when he said that Black people were "considered as a subordinate and inferior class of beings."194 He went on to make the following declaration:

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.195

By Justice Taney's sweeping conclusion that Black people "had no rights which a white man was bound to respect,"196 the Supreme Court officially enshrined white supremacy into law and succinctly articulated one of its core defining principles. However, it is important to note that his views were not reserved solely to slaves but included freed slaves as well.197 In his view, all Black people, both slave and free, were infected by the "degraded condition of this unhappy race."198

Roger Taney's now notorious opinion in the Dred Scott case (that blacks have no rights that a white need respect) was by far the more accurate account of prevailing opinion at the time of the Founding. It seems right to say that, with few exceptions, the Founders thought the Africans in their midst were not quite fully human. They did not see them... as part of the social contract. No they didn't put the word "slavery" in the Constitution—true enough. They merely put the institution of slavery under the protection of the Constitution—rather a worse offense.199

Although Dred Scott, and the culture that made it possible, is part of our national past, regrettably, it is also part of the national legacy of racial discrimination that shapes our present as well. Justice Brennan warned the Supreme Court that we ignore this tragic national history of racism "at our peril."200 Although his warning to the court was in the context of a death penalty case, his words are both revealing and relevant to our discussion:

195. Id. at 407
196. Id.
197. In framing the issue regarding Dred Scott's eligibility for citizenship, Justice Taney made it clear that the question was "whether the descendants of such slaves, when they shall be emancipated, or are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States." Id. at 403.
198. Id. at 409.
199. LOURY, supra note 177, at 120.
At the time our Constitution was framed 200 years ago this year, blacks "had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the with race, either in social or political relations; and so far inferior, that they had no rights with the white man was bound to respect." [citing Dred Scott] Only 130 years ago, this Court relied on these observations to deny American citizenship to blacks. A mere three generations ago, this Court sanctioned racial segregation, stating that "if one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."

In more recent times, we have sought to free ourselves from the burden of this history. Yet it has been scarcely a generation since this Court's first decision striking down racial segregation, and barely two decades since the legislative prohibition of racial discrimination in major domains of national life. These have been honorable steps, but we cannot pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries.... [W]e ignore him [the plaintiffs pleas of racial discrimination in the administration of the death penalty] at our peril, for we remain imprisoned by the past as long as we deny its influence in the present.201

Justice Brennan's words have the imprimatur of wisdom when he reminds us of the significance of the past in shaping the present. While this admonition is true generally it is particularly salient with respect to race. As Alexis de Tocqueville observed during his historic visit to America in the 1830's, just as in the lives of individuals, "the circumstances of the birth of nations deeply affect their development."202

Therefore, it is important to remain conscious of the idea that along with what Gunnar Myrdal calls the American Creed203 of freedom, equality, and liberty the founding of America also contained a "dedication to the doctrine of white supremacy ... [which] .. deeply and unalterably affected how America has developed as a nation."204 In short, "the doctrine of white supremacy and its corollary precept of black inferiority made us who we were a very short time ago

201. Id. at 343-44 (quoting Plessy v. Ferguson, 163 U.S. 537, 552 (1896)).

202. ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 10 (Henry Reeve trans., 3d ed. 1838) (1835). See also FRANKLIN, supra note 180, at 161 ("Racial segregation, discrimination, and degradation are no unanticipated accidents in this nation's history. They stem logically and directly from the legacy that the founding fathers bestowed upon contemporary America.").

203. MYRDAL, supra note 181, at 3.

204. HIGGINBOTHAM, supra note 189, at 8. Highlighting the products, if you will, of white supremacy, he noted:

[The principle of white supremacy] gained us the land on which Native Americans and Mexicans used to live; it produced prosperity for the generations who directly and indirectly profited from the free labor of slaves; it resulted in generations of American apartheid; it allowed us to pretend that we were truly a white European nation; it saddled us with W.E.B. Du Bois called "the problem of the color line."

Id.
and, inevitably who in part we still are today.\footnote{As the late Judge Higginbotham once observed:}

The truth was that our nation was founded explicitly prosperous implicitly, and still often lives uneasily on the precept of black inferiority and white superiority. Indeed that precept helped to legitimize slavery in America and served to justify the segregation of Blacks in this nation long after slavery had been abolished. To this day, the premise of black inferiority and white superiority remains an essential element of the "American Identity," mesmerized as we still are by race and color.\footnote{Id. See also Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism 3-5 (1992). As Bell makes clear, "[d]espite undeniable progress," not only does "slavery refuse[] to fade," there also remains "the deeply embedded personal attitudes and public policy assumptions that supported it for so long." Id.}

There is no doubt that the creation, protection, and perpetuation of Black caste slavery was a betrayal of the founding principles of the American republic. The bitter irony is that it did not have to be that way.\footnote{Higginbotham, supra note 189, at 9.} As one noted scholar has concluded, "America ... was not born racist; it became so gradually as the result of a series of crimes against black humanity that stemmed primarily from selfishness, greed, and the pursuit of privilege."\footnote{George M. Fredrickson, The Arrogance of Race: Historical Perspectives on Slavery, Racism, and Social Inequality 205 (1988).}

The original dream of English colonization of the new world did not envision a society based on slavery. Quite to the contrary, before the marriage of slavery and freedom, the original American dream was of a multi-racial community composed of poor Englishmen, freed Spanish slaves, and peaceful Indians, living productively and harmoniously under gentle English rule. It was a dream of an "integrated biracial community, in which indigent Englishmen would work side by side with willing natives, under gentle English government. \ldots a dream in which slavery and freedom were not yet married, a dream in which Protestant Britons liberated the oppressed people of the New World from the slavery that the papist Spaniard had imposed on them."\footnote{Edmund S. Morgan, American Slavery, American Freedom: The Ordeal of Colonial Virginia 44 (1975) (emphasis added). Morgan explains:}

Virginia gained its name in 1585 when Sir Walter Raleigh sponsored an attempt by Englishmen to settle in America. Raleigh's colony, the famous lost colony of Roanoke, was the starting point of Virginia's history. It was a false start, and the next attempt, at Jamestown in 1607, was made under different auspices, by men who had learned something from Raleigh's failure. But Raleigh's venture was an end as well as a beginning, and its failure was a greater failure than can be found in the romantic story of the band of colonists who disappeared. Roanoke was the failure of a dream; a dream on the verge of becoming reality, a dream in which slavery and freedom were not yet married, a dream in which Protestant Britons liberated the oppressed people of the New World from the slavery that the papist Spaniard had imposed on them.\footnote{Id. at 6 (emphasis added).}
a long sad story that is beyond the scope of this article. Suffice it to say here that, like so many socioeconomic practices, slavery was "the result not of a rich rationality, but instead of such things as sheer chance; economic, physical, and social power; injustice; and the arbitrary sequence of events." Such serendipitous origins do not make slavery any less blameworthy, but it can provide some insight in understanding the nature and extent of the legacy of slavery that survives and haunts American society to this very day. The most significant aspect of that legacy is the "precept of inferiority" and the institutionalized "ideology in which whiteness was the nimbus of superiority and blackness the stigma of inferiority '"

1. Racialized stigma

A careful consideration of racialized stigma is important in light of America's history of racial exploitation of Black people, since "stigma was a central component of the system of slavery whose vestiges antidiscrimination seeks to eradicate." However, in focusing on the historical and contemporary extension of the stigmatization of Blacks, it is important to keep in mind that stigma was "not just a consequence of the fact that blacks were once slaves[, rather] that stigma was a component of the slave system, part of what made it function."  

209. This phenomenon has been well documented elsewhere. See generally HIGGINBOTHAM, supra note 189; MORGAN, supra note 208.

210. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 130 (1993). "To take only the most obvious example, the system of segregation could not readily be justified on Burkean grounds, however long it may have persisted. Far from representing a wise social response to the complexities of race relations, it was a mechanism for perpetuating the system of white supremacy." Id. at 131.

211. HIGGINBOTHAM, supra note 189, at 15. Judge Higginbotham defines the precept of inferiority as "presume, protect, and defend the ideal of superiority of whites and the inferiority of blacks. In application, this precept has not remained fixed and unchanged. Nonetheless, it has persisted even to recent times, when many of the formal, overt barriers of racism have been delegitimized." Id. at xxv. "In other words, the doctrine of white supremacy and its corollary precept of black inferiority made us who were a very short time a go and, inevitably, who in part we still are today." Id. at 8.

212. ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 62 (1996). Koppelman explains this stigma in the following manner:

"The real sweetness of mastery for the slaveholder lay not immediately in profit, but in the lightening of the soul that comes with the realization that at one's feet is another human creature who lives and breathes only for one's self, as a surrogate for one's power, as a living embodiment of one's manhood and honor." And this is a large part of the satisfaction of racism: the sense that one's identity as a white is confirmed and made valuable by the class of degraded persons to whom all whites are superior. It was the social distance between white and black, the stigmatization of the black as a nonperson, that made it seem normal and natural for blacks to be enslaved—or later subordinated—to whites. This is the existential basis of slavery as Hegel saw it: that because my sense of myself is largely derived from the image of myself I get from others, I will find it satisfying in a fundamental way to make another person into a slave, a living trophy of my superior value. This gratification was an important part of the value of slavery to (indeed, was largely constitutive of the personalities of) the Southern master class.

Id. at 62-63 (citations omitted).

213. Id. at 63 ("To the extent that the stigma persists, slavery itself has not been wholly eradicated. Stigma, then is an essential part of racial injustice.").
As a consequence, an examination of the racialized stigma born from our national "legacy of racial dishonor .. [and] history of chattel slavery, .. can be used to gain insight into problems of perception, representation, and standing in contemporary American public life that adversely affect (some) blacks." This type of examination can be particularly productive in trying to answer the question of why Black people are so disproportionately targeted and victimized by predatory lending practices.

This concept of racialized stigma borrows heavily from the insights of Professor Glenn Loury and his evaluation of the work of Erving Goffman. One of Goffman's central insights on stigma that Loury emphasizes is the concept of a "virtual .. social identity." The essential idea here is that there is a distinction between an identity constructed "from the outside," via social imputations based on a person's physical presentation, and an identity constructed "from the inside," via the accumulation of facts specific to a person's biography. The former is virtual, a social artifact, a construction that reflects whatever social meanings may be ascribed to the visible marks. The latter is actual, a life history, something relatively objective, more or less independent of conventional ascriptions. These two identities—the virtual and the actual ones—can diverge systematically in the social experience of a given individual.

Under this analysis, a person is therefore considered to be "stigmatized" when the person's "virtual .. identity [is] negative, because observers tend to associate the visible indicators at hand with some dishonorable conception of the subject." Under Goffman's analysis, once a person's virtual social identity has been so stigmatized, then the individual's "social identity is 'spoiled' in an essential way." The most critical aspect of this "spoiled" or "stigmatized" virtual social identity is that once established, it involves more than merely the drawing of a negative surmise about someone's productive attributes. It entails doubting the person's worthiness and consigning him or her to a social netherworld. Indeed, although the language is somewhat hyperbolic, it means being skeptical about whether the person can be assumed to share a common humanity with the observer.

214. LOURY, supra note 177 at 61.
215. Id. at 60. "Goffman studies the problems faced by people with virtual social identities that are disreputable or 'spoiled'—people carrying bodily marks (stigmata) that incline others to judge them negatively, but also people with less visible markings who live at constant risk of being 'exposed.'" Id. (citing ERVING GOFFMAN, STIGMA. NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963)).
216. Id. at 61.
217 Id. at 60 ("[W]hen this happens, an interesting drama unfolds for both subject and observer. This is Erving Goffman's key insight, which I borrow to enrich this reflection on racial inequality.").
218. Id. at 61.
219. Id. ("[I]t can rightly be said that the person is 'stigmatized.'")
220. Id. See also KOPPELMAN, supra note 212, at 67. Here, Koppleman provides further insight into this abhorrent concept.
A person that is the subject of this form of stigma within any social group is relegated to a "deviant status ... (of the) degraded racial other,"221 and thus the object of racism222 on three levels: individual,223 institutional,224 and cultural.225 This concept of racism includes not only all manner of active racial animus but also the more subtle and equally, if not more, destructive form characterized by "racially selective sympathy and indifference."226 Such "racedly selective sympathy and

[A] stigma is a mark, a perceived condition of deviation from a prototype or norm, that defines the bearer as deviant, flawed, or otherwise undesirable. "To mark a person implies that the deviant condition has been noticed and recognized as a problem in the interaction or the relationship. To stigmatize a person generally carries a further implication that the mark has been linked by an attributional process to dispositions that discredit the bearer, i.e. that 'spoil' his identity."

Id. at 68 (citation omitted).

221. KOPPELMAN, supra note 212, at 68-69. Koppelman explains that unlike whites, "[u]pon first meeting someone they must 'prove' through their professional comportment that they are respectable." Id. at 68 (citing IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 138, 141 (1990)).

222. See IMPACTS OF RACISM ON WHITE AMERICANS 3 (Benjamin P. Bowser & Raymond G. Hunt eds., 2d ed. 1996) [hereinafter IMPACTS OF RACISM] ("[R]acism is a complex social and psychological concept that justifies and produces systematically unequal outcomes for people of different races. The concept of racism used here emphasizes ideological and personal attitudes of racial superiority (individual racism), institutional power as a means of implementing ideological biases (institutional racism), and the broad-based cultural support of an ideology based on one racial group's worldview (cultural racism).

223. Individual Racism is defined as "[a person] 'who considers that Black people (or people of color) as a group are inferior to Whites because of physical (genotypical and phenotypical) traits. She or he further believes that these physical traits are determinants of (inferior) social behavior and moral or intellectual qualities, and ultimately presumes that this inferiority is a legitimate basis for inferior social treatment of black people (or people of color) in American society. ... [I]ndividual racists' deeply held views regarding race are characterized by gross generalizations based on inaccurate assumptions about the connection between physical-biological traits and social-psychological characteristics that can be easily attributed to others, and are essential to maintaining their sense of self." IMPACTS OF RACISM, supra note 222, at 2 (quoting J.M. JONES, PREJUDICE AND RACISM 148 (1972)).

224. "Institutional Racism consists of 'those established laws, customs, and practices which systematically reflect and produce racial inequalities in American society ... whether or not the individuals maintaining those practices have racist intentions. The clearest indication of institutional racism is disparity in the circumstances of Whites and people of color, which continues from the past into the present." IMPACTS OF RACISM, supra note 222, at 2 (quoting JONES, supra note 223, at 131).

225. "Cultural Racism is 'the belief in the inferiority of the implements, handicrafts, agriculture, economics, music, art, religious beliefs, traditions, language and story of African (Hispanic, Asian, and Indian) peoples; ... [and the belief that] Black (and other non-White) Americans have no distinctive implements, handicrafts, agriculture, economics, music, art, religious beliefs, traditions, language or story apart from those of mainstream white America.'" IMPACTS OF RACISM, supra note 222, at 2-3 (quoting JONES, supra note 223, at 148 (alteration in original)).

226. KOPPELMAN, supra note 212, at 73. The problem, Koppelman notes, is that "racedly selective sympathy and indifference' creates a racial stigma that may be 'deeply rooted in traditions that give coherence to the daily life of existing communities[,] [a]ny assault on those traditions risks being an assault on those communities."' Id. at 73 (footnote omitted). See also id. at 73 n.47 ("To the extent that racism is itself part of the architecture, this will require some reconstruction, but the basic model is renovation, not arson. 'Insofar as we can recognize moral progress, it has less to do with the discovery or invention of new principles than with the inclusion under the old principles of previously
"indifference" is therefore a principal characteristic of racial stigma in both its conscious and unconscious expression, and a central aspect of the racism that both fuels and explains racialized predatory lending. However, it is important to note in this regard that racial stigma, or racial stigmata and the racism from which it was spawned "does not exist in a social vacuum.... [R]acism is caught from an infected society ... [and] is taught, supported and advanced by many aspects of our society and culture."

ii. Origin of racial stigma

Racial stigmata casts all Black people as presumptively outside the human family and as inherently degraded and inferior to Whites, simply by virtue of their color. However, although racial stigmata arose coterminously with, and is a principal artifact of, slavery, from an ideological perspective, it was not caused by slavery. Rather, the essential animating cause of racial stigmata was based on class not race. Racial stigmata was born from a desire on the part of the wealthy ruling colonial elite to avoid solidarity among the laboring classes, by dividing poor European-Americans from poor Blacks in the hopes of preventing them from forming a unified and threatening political coalition.

227. Id. at 73; HIGGINBOTHAM, supra note 189, at 129.

Reflecting on the American experience, Professor Charles Lawrence III has developed a theory of racism as the systemic imputation of stigma onto African Americans through the courts and through extralegal actions. As he explains, racism is part of the common cultural heritage of all Americans. According to Lawrence, racism is a group of assumptions about the world and its inhabitants that are expressed, often unconsciously, in a "mutually reinforcing and pervasive pattern of stigmatizing actions that cumulate to compose an injurious whole that is greater than the sum of its parts." These assumptions are based on notions, explicit or implicit, of African Americans as dirty, lazy, oversexed, in poor control of their ids, and otherwise less than fully human. Indeed, such assumptions give rise to behavior, such as the establishment of race segregated housing and bathrooms, that dramatize white stereotypes of African Americans as impure, contaminating, or untouchable.

HIGGINBOTHAM, supra note 189 at 129 (quoting Charles R. Lawrence III, The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 351 (1987)). 228. IMPACTS OF RACISM, supra note 222, at x. See also TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION 63 (1992). Morrison explains the way in which racism is used in America's contemporary society.

Race has become metaphorical—a way of referring to and disguising forces, events classes, and expressions of social decay and economic division far more threatening to the body politic than biological "race" ever was. Expensively kept, economically unsound, a spurious and useless political asset in election campaigns, racism is as healthy today as it was during the Enlightenment. It seems that it has a utility far beyond economy, beyond the sequestering of classes from one another, and has assumed a metaphorical life so completely embedded in daily discourse that it is perhaps more necessary and more on display than ever before.

Id. at 63.
These early Virginia colonial elites had good reason to worry about a potential community of interest forming between poor Whites and enslaved Blacks. It had happened before. In 1676, almost 100 years before the great American Revolution of 1776, in what was called Bacon’s Rebellion, poor landless Whites, white bond-servants, and Black slaves joined together in a common cause—the first civil war in the New World. In addition, by its very nature, the colonial system of bond-labor “was antithetical to the interests not only of African-American bond-laborers, but also of all the rest of the population that did not own bond-laborers.”

As the great Yale historian, Edmund Morgan so eloquently observed:

[If] freemen with disappointed hopes should make common cause with slaves of desperate hope, the results might be worse than anything Bacon had done. The answer

229. See MORGAN, supra note 208, at 327-28. In fact, Morgan points out:

Bacon himself had given the lessons in the social usefulness of racism. He had had no special bias against blacks. Once committed to rebellion he had welcomed servants and slaves alike to his forces.... [T]he rebellion did make Virginians connect their most powerful racial hostilities, publicly and officially, with slavery, [because] [a]lthough Bacon was out to kill Indians, he was also out to enslave them.

Id. 230. ALLEN, supra note 179, at 248.

In their solidarity with the African-American bond-laborers in Bacon’s Rebellion, the laboring-class European-American bond-laborers had demonstrated their understanding of their interests, and bond-laborers had had the sympathy of the laboring poor and propertyless free population.

What was to be done?... How was laboring-class solidarity to be undone? Back to first principles, never better enunciated by an English statesman than by Sir Francis Bacon. “[I]t is a certain sign of wise government,” Sir Francis advised, “... when it can hold men’s hearts by hopes, when it cannot by satisfaction.” And, with acknowledgment to Machiavelli, Bacon advocated “dividing and breaking of all factions and combinations that are adverse to the state, and setting them at a distance, or at least distrust among themselves.”

Id. at 248 n.57 (citing Francis Bacon, Essay No. 15, Of Seditions and Troubles, in 6 WORKS OF FRANCIS BACON 406-12 (1860)). Allen continues:

In the world the slaveholders made, however, “hope” depended upon the prospect of social mobility into the ranks of owners of bond-labor, and ... there was little opportunity for the non-owner of bond-labor to make that transition to the “yeoman” class. The cost of lifetime bond-laborers presented a threshold that few non-owners of bond-labor could reach.

...Instead of social mobility, European-Americans who did not own bond-laborers were asked to be satisfied simply with the presumption of liberty, the birthright of the poorest person in England; and with the right of adult males who owned sufficient property to vote for candidates for office who were almost invariably owners of bond-laborers. The prospects for stability of a system of capitalist agriculture based on lifetime hereditary bond-servitude depended on the ability of the ruling elite to induce the non-“yeoman” European-Americans to settle for this counterfeit of social mobility. The solution was to establish a new birthright not only for Anglos but for every Euro-American, the “white” identity that “set them at a distance,” to use Sir Francis’s phrase, from the laboring-class African-Americans, and enlisted them as active, or at least passive, supporters of lifetime bondage of African-Americans.

Id.
to the problem, obvious if unspoken and only gradually recognized, was racism, to separate dangerous free whites from dangerous slave blacks by a screen of racial contempt.\footnote{231} 

In order to erect this social “screen of racial contempt,” as early as 1680 the Virginia assembly passed a series of laws that effectively denied Blacks, whether free, bond, or slave, the elemental right to defend themselves against Whites. Expectedly, this allowed “servants to bully slaves without fear of retaliation, thus placing them psychologically on a par with masters.”\footnote{232} The ruling class went to great lengths to deny Blacks, whether bond-laborers, slaves for life, or even Black freemen, the most elemental human rights.\footnote{233} Moreover, “[t]he ruling class took

\begin{quote}
By a series of acts, the assembly deliberately did what it could to foster the contempt of whites for blacks and Indians. In 1670 it forbade free Negroes and Indians, “though baptized,” to own Christian servants. In 1680 it prescribed thirty lashes on the bare back “if any negro or other slave shall presume to lift up his hand in opposition against any christian.” ... And in 1705, when the assembly ordered the dismemberment of unruly slaves, it specifically forbade masters to “whip a christian white servant naked, without an order from a justice of the peace.” Nakedness, after all, was appropriate only to a brutish sort of people, who had not achieved civility or Christianity.
\end{quote}

\footnote{231. MORGAN, supra note 208, at 328 (emphasis added). See also 2 ALLEN, supra note 179, at 249. Allen states: “Here, then, is the true answer ... [t]he exclusion of free African-Americans from the intermediate stratum was a corollary of the establishment of ‘white’ identity as a mark of social status.” Id. at 249. 

232. MORGAN, supra note 208, at 331. Morgan elaborates on the means used to erect this screen of racial contempt:

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233. 2 ALLEN, supra note 179, at 250. Allen identifies similar means:

\begin{quote}
Such were the laws ... making free Negro women tithable; forbidding non-Europeans, though baptized Christians, to be owners of “christian,” that is, European, bond-laborers; denying free African-Americans the right to hold any office of public trust; barring any Negro from being a witness in any case against a “white” person; making any free Negro subject to thirty lashes at the public whipping post for “lifting[ing] his or her hand” against any European-American, (thus to a major extent denying Negroes the elementary right of self-defense); excluding free African-Americans from the armed militia; and forbidding free African-Americans from possessing “any gun, powder, shot, or any club, or any other weapon whatsoever, offensive or defensive.”
\end{quote}

\footnote{233. 2 ALLEN, supra note 179, at 250-51. One of the most significant was that of the right to self-defense. In fact, Allen believes that this deprivation became “a factor in the development of the peculiar American form of male supremacy.” Id. The most depraved manifestation of this practice was the failure to “criminalize the rape of slave women.” Id. (footnotes omitted). This sexual vulnerability to white male rape was all the more exacerbated and tragic, because any Black woman being raped, or her Black husband, father, or child that physically resisted the white rapists assault, was automatically guilty of the crime of “lifting their hand against” a European-American and thereby subject to public whipping themselves and forbidden to give testimony explaining the justification for their actions. In short the law decreed that there was no such thing as a legal justification, nor any opportunity to offer one, for an Black, simply because they were Black, to resist the imposition, no matter how vile, violent or degrading, of a European-American upon their person, their honor or even their life. By the beginning of the eighteenth century, under the sanction and protection of the coercive authority of the law, it was open season on any Black person, whether free or bond, by any White

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special pains to be sure that the people whom they ruled were indoctrinated with the moral and legal ethos of white-supremacism. By employing rules to deny Blacks elemental human rights and to place them wholly and defenselessly at the mercy of white exploitation, the ruling elite set poor and propertyless Blacks and European-Americans "at a distance" from one another and:

Thus was the "white race" invented as the social control formation whose distinguishing characteristic was not the participation of the slaveholding class, nor even of other elements of the propertied classes; ... What distinguished this system of social control, what made it "the white race," was the participation of the laboring classes: non-slaveholders, self-employed smallholders, tenants, and laborers. In time this "white race" social control system begun in Virginia and Maryland would serve as the model of social order to each succeeding plantation region of settlement.

The effort bore fruit so far as danger from the European-American bond-laborers was concerned. "The fear," writes Winthrop D. Jordan, "of white servants and Negroes uniting in servile rebellion, a prospect which made some sense in the 1660s and 70s ... vanished completely during the following half-century." ... "Significantly, the only rebellions of white servants in the continental colonies came before the entrenchment of slavery." Racial stigmata was thus created by the ruling white elite, and enforced by the poor Whites, to protect the social and political dominance of the ruling white elite. This resulted in a "white race solidarity," domestic defense against slave insurrection, and financial gain. One of the most important, albeit tragic, ways in which this racial stigma has been manifested through American society and culture is the negative associations between Black people and the ownership of property. In the beginning, Black people were property through legalized slavery. Thereafter, there was a "re-incorporation of slavery jurisprudence concepts—through the

person. Id. at 251. For instance, "laws mandated that parish clerks or churchwardens, once each spring and fall at the close of Sunday service, should read ('publish') these laws in full to the congregants. Sheriffs were ordered to have the same done at the courthouse door at the June or July term of court." Id. (citation omitted). These types of laws, Allen points out, led to the regular and systematic subjugation of the general public with the "white supremacist agitation." Id.

Id. at 251-52. Once slavery became commonplace, "the poor and propertyless European-Americans were the principal element in the day-to-day enforcement of racial oppression not only in the Chesapeake but wherever the plantation system was established." Id. at 252.

See id. ("[T]he State secured the co-operation of the landless whites who were usually strangely willing to have a fling at the slaves and who, no doubt, were anxious to get the reward offered for ... information [regarding illegal slave emancipations by sympathetic owners].") (footnotes omitted).

FREDRICKSON, supra note 207 at 197-98. He noted that, despite the existence of social privilege for free blacks prior to the 1690's, "the situation began to change dramatically" after the 1690's. Id. at 198. By 1723, Blacks were "deprived of many of their rights," with the "first restrictions [being] placed upon private manumission of slaves" and ultimately a "transformation of the free Negro group from a participating element of the community into a pariah class." Id. See also 2 ALLEN, supra note 179, at 183-84. Allen notes that the drastic reduction in the percent of property owning Blacks was "the result not of normal capitalist economic development but of racial oppression." Id.
manipulation of the law—into residential legislation and court decisions .. [which] .. were predicated on the assumptions of whites in power that African Americans were too inferior to be their neighbors." 238

iii. Racism as an ideology

Race-based slavery as a practice was born in seventeenth-century colonial America as a rank political tactic. It was a relatively transparent effort by the ruling elite to divide and conquer their natural adversaries: the great masses of the poor and the propertyless. 239 However, notwithstanding almost 200 years of societal racism as a social practice, a formal "rationalized ideology" 240 of racism "did not develop until the nineteenth century." 241

"This gap of more [than] a hundred years between practice and theory can be explained," 242 argues the historian George M. Fredrickson, as a result of two historical developments: first, the eighteenth-century scientific enlightenment; and

Id.

238. Higginsbotham, supra note 189, at 119 ("These whites in power therefore used the legal process to implement their racial prejudices.").
239. See Fredrickson, supra note 207, at 11.

Class, according to James Henry Hammond and other South Carolina militants, was an inevitable feature of human society; there always had to be a menial or "mudsill" element to do the hard, unpleasant, physical work. But a stable class hierarchy could only exist in the presence of inherent racial differences between leisured and laboring classes, such as those said to exist between black and white in the southern states. Attempts to have servile work done by biological equals, namely whites, was a prescription for class conflict and revolution.

Id.

240. See Stephen Jay Gould, The Mismeasure of Man 20 (1981). Gould further explains, "We inhabit a world of human differences and predilections, but the extrapolation of these facts to theories of rigid limits is ideology." Id. at 29
241. In using the term "ideological racism," I adopt the meaning attributed to it by George M. Fredrickson in The Arrogance of Race when he wrote that "explicit or ideological racism is of some historical importance and merits attention. By giving legitimacy to pre-existing patterns of racial subordination, it strengthens a system and enables it to counter serious ideological challenges, such as those which emanated from ... the rise of bourgeois democracy." Fredrickson, supra note 207, at 189-90.
242. Id. at 201. Fredrickson explains that this was because "[s]ocietal racism did not require an ideology to sustain it so long as it was taken for granted. Until the revolutionary era no one had seriously challenged slavery and black subordination in the southern colonies." Id. at 201-02. But see Sunstein, supra note 210, at 18.

In the pre-Revolutionary period, many of these patterns were attributed to nature itself. These include not merely the institution of slavery but also existing family structures, relations between employers and employees, occupational categories, education, the crucial concept of the gentleman, and of course the structures of government. Indeed, those very structures were thought to be modeled on the family and grow out of the same natural sources.

Id. at 18-19.
243. Fredrickson, supra note 207 at 201.
second, the evangelical assault by northern abolitionists on the institution of slavery.\textsuperscript{244}

\textit{iv. Scientific racism}

It is important to note that although colonial Americans considered Blacks to be inferior, "[n]evertheless, the dominant eighteenth-century view was that racial characteristics were not innate but were rather the result of environmental factors, such as climate and social habits."\textsuperscript{245} The natural extension of this predominant view was that, like all men, Blacks were perfectible over time, with the application of sufficient effort. However, with the coming of the enlightenment, this all began to change, producing calamitous results. With the emergence of eighteenth-century scientific enlightenment, Western man began to re-imagine himself and his world.

Under the old worldview, man was the mortal reflection of God, imbued with a divine spark and an immoral soul. Under the new scientific enlightenment view, man was subject to a "biological determinism,"\textsuperscript{246} dictated by the physical laws of nature.\textsuperscript{247} This view allowed humans to be grouped in what appeared to be neutral

\textsuperscript{244}. See id. at 205.

In short, it can be said that the long story of the development of American racism, first as a way of life and then as a system of thought, suggests that social forces have played a key role. Subliminal and deeply rooted psychological factors were undoubtedly present, but they can hardly explain the extent to which racial feeling and ideology have been developing and changing, subject to situational variations in intensity and character. America, I would conclude, was not born racist; it became so gradually as the result of a series of crimes against black humanity that stemmed primarily from selfishness, greed, and the pursuit of privilege.

\textsuperscript{245}. \textit{Id. at 201} ("[T]his environmentalist theory of human differences, combined with the natural-rights philosophy, led during the era of the American Revolution to an intellectual assault on the institution of slavery, an assault that contributed to the triumph of gradual emancipation in the North and provoked some soul-searching in the South.").

\textsuperscript{246}. GOULD, supra note 240, at 20 ("[B]iological determinism ... holds that shared behavioral norms, and the social and economic differences between human groups—primarily races, classes, and sexes—arise from inherited, inborn distinctions and that society, in this sense, is an accurate reflection of biology "). See also id. at 28.

\textsuperscript{247}. FREDRICKSON, supra note 207, at 201 ("It took the eighteenth-century Enlightenment to replace the traditional view of man as a child of God who stood above the rest of creation with an
scientific categories and then rank ordered hierarchically from least to most, from lowest to highest, on the basis of value and development.

Adherents of this enlightenment philosophy of nature thereby recast slavery from a political and economic expedient to a reflection of the "dictates of nature," with the inferior being dominated and exploited by their natural superior. Under this view of the world, Whites did not make Blacks slaves, God did. As a consequence, by making "nature herself an accomplice in the crime of political inequality," the appropriateness of slavery was transformed from a debatable moral question into a provable scientific fact. There can be no question that after 1859 and the publication of Darwin’s Origin of the Species, "subsequent arguments

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248. See GOULD, supra note 240, at 20 ("Determinists have often invoked the traditional prestige of science as objective knowledge, free from social and political taint. They portray themselves as purveyors of harsh truth and their opponents as sentimentalists, ideologues, and wishful thinkers.").

249. FREDRICKSON, supra note 207 at 201 ("The new emphasis on the physical side of human nature led to the first systematic efforts to classify the races and to provide scientific explanations of the differences among them.").

250. GOULD, supra note 240, at 80 ("[T]he general philosophy of biological determinism provides [that] hierarchies of advantage and disadvantage follow the dictates of nature; stratification reflects biology.").

251. See id. at 20 ("[A] principal theme within biological determinism [is] the claim that worth can be assigned to individuals and groups by measuring intelligence as a single quantity.... [S]ocial and economic roles accurately reflect the innate construction of people."). See also SUNSTEIN, supra note 210, at 128, 129-30 (generally discussing the irrationality of basing rights on notions of the "natural" relationship among people). Sunstein further notes, "Naturalness is irrelevant from the moral or legal point of view." Id. at 130.


The inherent contradiction between the bondage of Blacks and republican, rhetoric that championed the freedom of all men was resolved by positing that Blacks were different. The laws did not mandate that Blacks be accorded equality under the law because nature—not man, not power, not violence—had determined their degraded status.

Id. See also HIGGINBOTHAM, supra note 189, at 48-49.

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Id.

254. See FREDRICKSON, supra note 207, at 202 (noting that a "minority" of scholars advanced the view of a "new biological concept of man," who was "created permanently unequal" with "inherently inferior" qualities and, thus, "not entitled to the same rights" as whites).
for slavery, colonialism, racial differences, class structures, and sex roles would go forth primarily under the banner of science.\textsuperscript{225} This formed the basis of what came to be known as "scientific racism,"\textsuperscript{226} whose modern day vestiges are very much a part of contemporary society

\textit{v Evangelical abolitionism}

The second primary source of America's racist ideology that Fredrickson identifies was the assault on slavery by the evangelical northern abolitionists.\textsuperscript{227} He argues that many were absolutists and insisted not only that "slavery was an evil, but also demanded that blacks be freed immediately and granted full legal equality."\textsuperscript{228} William Lloyd Garrison was perhaps the most famous, unequivocal, and outspoken of these abolitionist firebrands.\textsuperscript{229} Garrison and other abolitionists threw down the

\textsuperscript{225} GOULD, \textit{supra} note 240, at 72. Gould noted that while "[e]volutionary theory swept away the creationist rug that had supported the intense debate between monogenists and polygenists," it satisfied both sides by presenting an even better rationale for their shared racism." \textit{Id.} at 73 (citation omitted). The result was a reconciliation of "intellectual tensions" and an adoption of "a comprehensive evolutionism which was at once monogenist and racist," affirming "human unity even as it relegated the dark skinned savage to a status very near the ape." \textit{Id.} (citations omitted).

\textsuperscript{226} \textit{Id.} at 73-74.

\textsuperscript{227} FREDRICKSON, \textit{supra} note 207, at 202.

\textsuperscript{228} \textit{Id.} at 203 ("This assault, from William Lloyd Garrison and his followers, on the foundations of societal racism forced proslavery southerners and their northern sympathizers to develop and promulgate a racist theory that accorded with their practice.").

\textsuperscript{229} See DON E. FEHRENBACKER, THE \textsc{DRED SCOTT} CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 117 (1978) ("The most striking development [in the years prior to the Civil War], of course, was the rise of radical abolitionism as exemplified in the person of William Lloyd Garrison and signalized by his launching of \textit{The Liberator} in Boston on New Year's Day 1831."). Fehrenbacher continues:

Except among the Quakers, earlier antislavery activity had often been a secondary concern of busy men of affairs and therefore not entirely free of dilettantism. The new, Garrisonian breed made the war on slavery the central factor in their lives. They thus professionalized the movement, and, in spite of their alleged anti-institutional bias, they institutionalized it. Opposition to slavery for the first time became ... an interest as well as a sentiment, and the slaveholding interest felt the difference immediately

\textit{Id.} at 118-19. See also William L. Garrison, \textit{No Compromise with Slavery, in SELECTIONS FROM THE WRITINGS AND SPEECHES OF WILLIAM LLOYD GARRISON} 140-41 (1852). Perhaps his most famous inflammatory rhetoric on the subject consists of the following:
ideological gauntlet before the proslavery forces and "forcefully demanded consistency in the application of egalitarian ideals." The proslavery supporters had little room to maneuver, being placed as they were by the radical abolitionists between the rock of ideals enunciated by the Constitution and the hard place of slave bondage as a way of life in the South.

In response, Fredrickson argues that "proslavery apologists had two choices: they could either reject egalitarianism entirely ... or they could define blacks as members of another subhuman species and retain the entire egalitarian, natural-rights philosophy as a white prerogative." Many, in both the North and the South, chose to adhere to the latter view.

In exemplifying the attitude of those who embraced the view that Blacks were fit for slavery because they were, in fact, "subhuman," Fredrickson cites:

William Yancey, the militant Alabama secessionist and fire-eater, [who] told a northern audience:

"Your fathers and my fathers built this government on two ideas: The first is that the white man is the citizen and the master race, and the white man is the equal of every other white man. The second idea is that the Negro is the inferior race."

Fredrickson concludes by observing that "[e]xPLICIT racISm [as] a public ideology based on the doctrinaire conception of the black man as a natural underling, developed therefore directly out of the need to defend slavery against nineteenth-century humanitarianism."
In picking up the egalitarian gauntlet thrown down by the evangelical abolitionists and in creating an express racist ideology upon which to defend slavery, the proslavery supporters were waging a war they could not win. The Civil War, the emancipation proclamation, and the federally mandated demise of America's peculiar institution of slavery was just around the corner. Moreover, given the egalitarian underpinnings of the Declaration of Independence, the document itself had always "carried a long-range threat to slavery and racial caste." It was thus only a matter of time before America caught up with itself.

However, few but the most radical abolitionists, like Garrison and his followers, either intended or expected the end of slavery in a restored union to create social and political freedom for the black man, whether already free or newly emancipated. Even Lincoln, despite his contemporary image as the great emancipator of the slaves, neither intended nor desired that freedom should bring blacks into social, political, or economic equality with Whites. In fact, to date, there is no evidence that Lincoln ever abandoned what appears to be a deeply held and oft expressed commitment to both white supremacy and racial segregation. Consider for example his rather strongly phrased remarks during the Lincoln-Douglass debates as early as 1858:

There is a physical difference between the white and the black races which I believe will forever forbid the two races living together on terms of social and political

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Id. at 202. Fredrickson explains:

[This] threat ... had only briefly surfaced during the revolutionary era before being temporarily put to rest by the Constitution's provisions recognizing the existence of slavery and providing for its protection. In the 1830s, the application of the concept of equal rights to blacks was made with a new evangelical immediacy by northern abolitionists ....

Id. at 204 ("That northerners could oppose slavery without a commitment to racial equality helps explain why the Civil War resulted in the emancipation of the Negro from slavery but not from caste discrimination and the ravages of racism.").

Id. at 62 ("Lincoln could reject the most blatant forms of racist ideology without escaping an underlying emotional commitment to whiteness and white supremacy.... In 1854, for example, he confessed that his 'own feelings' would not allow him to contemplate the political and social equality of blacks.").

Cf. id. at 70-71 (noting that if General Benjamin F. Butler's recollections of President Lincoln's remarks about colonization were correct, "then one can only conclude that Lincoln continued to his dying day to deny the possibility of racial harmony and equality in the United States and persisted in regarding colonization the only real alternative to perpetual race conflict"). See also id. at 72.

Equally speculative and, on balance, less plausible is the theory that Lincoln did an about-face in the last year and a half of the war and ended up as a convinced believer in the possibility of full racial equality. Lincoln was a flexible man, but the deeply rooted attitudes and ideas of a lifetime do not change easily.
equality. And inasmuch as they cannot so live, while they do remain together there
must be the position of superior and inferior, and I as much as any other man am in
favor of having the superior position assigned to the white race.269

Also, consider Lincoln's remarks made just a year earlier in response to the now
infamous Dred Scott decision:

Even having asserted the humanity of African Americans, Lincoln nevertheless
stressed the potential need for separation of the races, perhaps by colonization of
African Americans. He declared that there was a "natural disgust in the minds of
nearly all white people at the idea of an indiscriminate amalgamation of the white
and black races," and that "[a] separation of the races is the only perfect preventive
of amalgamation; but as an immediate separation is impossible, the next best thing
is to keep them apart where they are not already together."270

In stressing the need for physical separation of the slaves after emancipation,
Lincoln was in concert with no less a figure than Thomas Jefferson. Arguing
against the emancipation of slaves on practical grounds, Jefferson wrote, "[a]mong
the Romans, emancipation required but one effort. The slave, when made free,
might mix with, without staining the blood of his master. But with us a second is
necessary, unknown to history. When freed, he is to be removed beyond the reach
of mixture."271 Despite these deeply held beliefs, slavery, as a formal institution,
ended.

3. Group Status Production

The death of slavery, however, was not accompanied by the demise of racism.
In fact, although the racist ideology that had justified slavery as a public good and

269. GOULD, supra note 240, at 35. Gould also points to his concluding remarks in which he says
"Negro equality! Fudge! How long, in the Government of a God great enough to make and rule the
universe, shall there continue knaves to vend, and fools to quip, so low a piece of demagogism as
this." Id. (citation omitted). But see FREDRICKSON, supra note 207, at 61. While certainly not the
bastion of egalitarianism, Fredrickson believes that these comments by Lincoln provide only a minimal
understanding of his views on the equality Blacks should have enjoyed. In fact, Fredrickson points
out, he concluded the above quoted speech in the following manner: "I agree with Judge Douglas he
is not my equal in many respects—certainly not in color, perhaps not in moral or intellectual
endowment. But in his right to eat the bread, without the leave of anybody else, which his own hand
earns, he is my equal and the equal of Judge Douglas, and the equal of every living man." Id. (citing
COLLECTED WORKS OF ABRAHAM LINCOLN, 1858-1860, at 16 (Roy P Basler ed., 1953); Abraham
Lincoln, Speech at Springfield, Illinois (July 20, 1858), in 2 THE COLLECTED WORKS OF
ABRAHAM LINCOLN, supra, at 520.

270. HIGGINBOTHAM, supra note 189, at 67 (citing Abraham Lincoln, Address on the Dred Scott
Decision at Springfield, Illinois (June 26, 1857), in FAMOUS SPEECHES [OF] ABRAHAM LINCOLN 14,
17 (Peter Pauper Press ed. 1935)). See also FREDRICKSON, supra note 207, at 12 ("[T]he question of
where Lincoln stood on black rights in 1865 is moot... Lincoln in the 1850s and during at least the
early war years held to a Whig-colonizationist view of race relations and could not visualize racial
equality as a realistic possibility for American society[,] is well documented and has not been
effectively refuted.").

271. JEFFERSON, supra note 186, at 143.
a reflection of the natural order of things had been a “child of slavery, not only [did it] outlive[, its parent but grew stronger and more independent after slavery’s demise.”

In the political and economic retrenchment that arose in the devastation that followed the Civil War, racist ideology adjusted to the changed circumstances of Black emancipation and exchanged slavery for Jim Crowism as its primary manifestation. This ideological transition burned racist stigmata even deeper into the American soul and was characterized by an intense focus on producing, elevating, and protecting the boundaries of white racial status.

This status production model of racial discrimination has been eloquently described in insightful works by Professor Richard H. McAdams, recently published in the Harvard Law Review and the Yale Law Journal. In the Harvard piece, through the lens of modern economic theory, Professor McAdams focuses on “[r]ace discrimination [as what he considers] the best and most important illustration of a more general phenomenon of intra-group cooperation and inter-group conflict.”

He posits that focusing on “[t]his two-fold importance of status is essential to a genuine understanding of race discrimination, which has eluded economics.” McAdams suggests that analyzing racism by borrowing from economic theory and focusing on the production and preservation of white group status “is the starting point of a new economic account of race (and other forms of) discrimination—an account that succeeds as social science theory because it predicts and explains much of what we observe concerning race.”

The central value of McAdams’ theories is that, in the best tradition of socioeconomics, he challenges the assumptions of the neoclassical economic paradigm, in terms of its ability to adequately “predict[] and explain[] much of what we

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272. Fredrickson, supra note 207, at 3. Fredrickson theorizes that slavery, although “inspired mainly by exploitive interests and rational calculations,” ultimately engendered a cultural and psychosocial racism that after a certain point,” taking on “a life of its own and created a powerful irrational basis for white supremacist attitudes and actions.” Id.

273. See id. at 256.

274. See id. at 260.


[A] material view of human motivation underestimates both the level of cooperation that groups elicit from their members and the level of conflict that groups elicit from each other. A single group dynamic connects these added increments of cooperation and conflict: groups achieve solidarity and elicit loyalty beyond what economic analysis conventionally predicts, but solidarity and loyalty within groups lead predictably, if not inevitably, to competition and conflict between groups. The connection is the desire for esteem or status. Groups use intra-group status rewards as a non-material means of gaining material sacrifice from members, but the attendant desire for inter-group status causes inter-group conflict.

Id. at 1007


277. McAdams, supra note 275, at 1008.

278. Id. at 1007 (“Discrimination is a means by which social groups produce status for their members, but pivotal to understanding this form of inter-group conflict is the role that status plays in generating the intra-group cooperation necessary to make discrimination effective.”).

279. Id. at 1044-45.
He argues that while "[n]eoclassical economic analysis commonly employs a concept of self-interest in which people are concerned solely about their own consumption," it has completely "neglected the fact that people [also] desire relative position." He goes on to observe that this neglect is significant because "[t]he omission of relative preferences from economic theory is part of a broader tendency to assume that consumer preferences are independent of each other, i.e., that individuals are concerned only about their own consumption, and are 'indifferent[ ] to the welfare of others."

McAdams suggests that the individual desire to attain "relative position" in comparison to others is a fundamental feature of social man, where he attempts to satisfy that desire by seeking status in comparison to his fellows. He argues that this desire for status is so compelling and irresistible that not only do "people sometimes seek [it] as an end in itself," but that it can also be "an end literally worth killing or dying for."

The striving for status that McAdams describes is based primarily on those "visible distinctions [that] affect the level of esteem one receives from strangers." As a result, he suggests that people invest in creating or producing their status and compete with others to raise their status by focusing on "their visible characteristics."

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280. Id. at 1045.
281. McAdams, supra note 276, at 7
282. Id. at 3. McAdams argues that people who are focused on only their own consumption are engaging in "self-regarding" preferences. However, simultaneously with such self-regarding preferences, people are also motivated by concerns regarding "the consumption of others" which he terms "other-regarding" preferences. Id. at 7. He also notes in this regard that "[w]ithin this category, we may distinguish between positive and negative other-regarding preferences. The terms 'positive' and 'negative' refer to the mathematical nature of the dependency: one's satisfaction may vary positively or negatively with the consumption of others." Id. at 8.
283. Id. at 3 (alteration in original) (quoting Kenneth E. Boulding, Economics as a Moral Science, 59 AM. ECON. REV 1, 6 (1969)).
284. He describes this "social position" as "'status, 'prestige, or 'distinction.'" Id.
285. Id. at 18.
286. See id. at 38.
287. Id. at 3.
288. Id. In illustrating his point, McAdams relates two interesting and revealing stories. The first is about a mother who wanted so badly to "secure her daughter a position on her high school cheerleading team ... [that she] solicited a [hit]man to kill the mother of her daughter's chief rival, hoping that the mother's death would distract the rival from the competition." Id. at 2 (footnote omitted). He also notes that the murderous mother first considered contracting for the death of both the teenage rival and her mother, and only reconsidered because it was apparently cheaper to only have one of them killed. See id. at 2 n.1. The second story is about a syndrome called "karoshi," apparently well known in Japan, which is the name the Japanese culture has given to the syndrome where people literally work themselves to death. See id. at 2 n.2. "In Japan, karoshi is recognized as a fatal mix of apoplexy, high blood pressure and stress that doctors relate to too many hours on the job.... A recent Health Ministry report called karoshi the second leading cause of death after cancer among Japanese workers." Id. (quoting Ronald E. Yates, to Some in Japan, Job Holds a Fatal Attraction, CHI. TRIB., Apr. 22, 1990, at 1). "An insurance company polled Japanese workers and found that more than 40% feared that overwork might kill them, but that few planned to do anything about it." Id. (quoting Jim Impoco, Dying to Work, U.S. NEWS & WORLD REP., Mar. 18, 1991, at 24).
289. McAdams, supra note 275, at 1045.
290. Id.
produce this much-valued status. The first method of producing status involves “invest[ing] in acquiring visible traits that others consider desirable.” In the second method, an individual can produce status by “investing in making others consider one’s existing visible traits desirable.” According to McAdams’ theory, it is this second method that can be problematic from a racial perspective.

Although he points out that status production can be benignly achieved directly “by accumulating accomplishments that enhance the trait’s status,” he notes that status production can also be achieved malevolently and “indirectly by lowering the status accorded [to] the traits of others.” In this respect, he concludes that when individuals engage in this latter form of malevolent “indirect production strategy of lowering the status of accorded other traits, they engage in discrimination.”

Under McAdams’ theory, race is an easy and fertile ground for status production because it is based on socially constructed and visible distinctions in physical traits. Thus he observes, “race discrimination is ... a means by which people who share certain roughly similar and observable traits that come to be known as ‘race’ produce social status for themselves.” McAdams concludes by stating that “[n]ot only do people compete for esteem by investing in the subordination of previously defined groups, but people invest in preserving group boundaries to maintain their position in a high status group.” The unique and valuable contribution of McAdams’ status production theory is that by focusing on its unique “subordinating quality” it captures the special “spirit-murdering” characteristic of racism and racist stigmata. For example, he writes that:

I propose that we understand race discrimination as an especially virulent and pathological form of status production ... by which one racial group seeks to produce esteem for itself by lowering the status of another group. The key to understanding this behavior is to perceive its subordinating quality. Status comes about by disparaging others, by asserting and reinforcing a claim to superior rank.”

291. Id.
292. Id.
293. Id.
294. Id.
295. Id.
296. Id.
298. McAdams, supra note 275, at 1044 (emphasis added). See also FREDRICKSON, supra note 207 at 201. Fredrickson observes:

From the vantage point of nonslaveholders there was a natural tendency to project upon the blacks their own suppressed sense of inferiority as a way of gaining or retaining a sense of status. If this analysis is valid, it would help explain the ostentatious effort to relegate the highest black to a status below that of the lowest member of the dominant race; it would also account for the origins of the persistent emphasis in the South on race as the foundation of a kind of pseudo-equality among whites. Here indeed might be found the basis of the powerful mythology that would later serve to guarantee a consensus in favor of slavery and racial subordination.
1. The ideology of the guild

However, McAdams was neither the first nor the only legal commentator to note the importance of the creation and defense of racial status in explaining the power and pervasiveness of white discrimination against Blacks.299 But his theory is particularly enriching to this tradition. One of the reasons for this is McAdams persuasively argues that "absent a central coercive authority . . . ideology . . . is essential for status production to succeed," at least in part, to "prevent other whites from free-riding on each other's investment in the status of their shared trait."300 In this model, "ideology" is, thus, both the fuel that drives the status production engine and the glue that holds it together.

In illustrating the essential role of ideology in group status production, McAdams draws on Richard Posner's analysis of "how certain cartels solve collective action problems."301 He points out:

According to Posner, the distinguishing feature of certain successful cartels—which he terms "guilds"—is their having an ideology. A guild is as social as well as an economic institution in which members have adopted a common "personal morality" of loyalty, conformity, and craftsmanship, and which has achieved a certain "mystique" involving the idealization of quality over quantity. The "mutually reinforcing combination" of this morality and mystique comprises "the ideology of guild production," which serves the "self-interest of producers in the cartelization of production."302

Posner's argument is important because it points out that the 'ideology of the guild' functions as a source of 'common personal morality,' which motivates both loyalty and conformity from each individual member of the guild to pursue the self-interest of the guild as a group. By elevating the central bonding force of the guild from a pursuit of their own self interest, to promoting a larger sociological 'ideology' of the good, "the guild members convince themselves that the public interest is served by the restrictions on market entry and production necessary to cartelize an industry."303

Posner's argument is that the "ideology of the guild" is sufficiently powerful to both motivate and enable its members to deceive themselves into believing that the pursuit of the collectivist interests of the guild is tantamount to "a principled concern

299 See McAdams, supra note 275, at 1044 ("Observers of race relations have long noted the importance of status to discrimination."). Id. Beginning with "[c]ommentators from the Jim Crow era," critical race theorist and other modern commentators including many sociologists and social psychologists who examine race "insist on the importance of the appropriation of social status to understanding race discrimination." Id. (citing MYRDAL, supra note 181, at 591 n.159) ("What white people really want is to keep the Negroes in a lower status."). See also FRANK TANNENBAUM, DARKER PHASES OF THE SOUTH 8-9 (1924) (describing Whites of both upper and lower classes living in fear of the Negro ever being able to "change [his] status").
300. McAdams, supra note 275, at 1046-47, 1057
301. Id. at 1059.
302. Id. at 1059 (citing Richard A. Posner, The Material Basis of Jurisprudence, 69 IND. L.J. 1, 10 (1993)).
303. Id.
for the public good. Consequently, by internalizing the ‘ideology of the guild’ into a positive social norm, individual guild members can appear to be both civic minded and rational in concluding that any of their actions, or those of their colleagues, which undermine the guild’s interests, similarly harms the public interest. In this way, the principled moral force of promoting the public interest can be co-opted by ideology and thereby turned into a “moral force against free-riding.”

McAdams concludes by observing that “[s]elf-interested self-deception thus serves the cartel’s long run interests by curbing the individual’s impulse to free-ride on the restraint of others.”

It is important to note the emphasis that Posner places on the role of self-deception in creating and perpetuating the collectivist actions of individual guild members. As McAdams points out, one of the primary characteristics of the status production model is that it “commonly involves the denial that one’s motive is status production.... Consequently ‘guild ideology’ never acknowledges its self-serving nature.”

The plausible deniability of status production’s true motivation is so

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304. Id.
305. Id. at 1047
306. Id. at 1059
307 Id. at 1059-60. McAdams explains:

This analysis implies that a principled concern for the public good has some force in motivating behavior, so that cartel members would be even more likely to free-ride if they realized that cartel pricing is contrary to the public interest. Ideology, however, turns the moral force against free-riding. An ideological commitment to quality allows the guild member to believe that conduct that would undermine the cartel—lowering quality and expanding output—would harm the public.

308. Id. at 1060. McAdams points out that what is intrinsic in the status production model is that “[m]embers of ... [the] representative guild do not openly declare, even among themselves, that they desire to restrain competition in order to charge higher prices and earn monopoly profits.” Id. at 1060-61. Also an inherent element of the status production model is that “whites never explain their discriminatory behavior as serving the function of status production.” Id. As an example, McAdams cites the Jim Crow South where “whites attempted to justify segregation not by reference to naked self-interest but by claims that blacks were inherently inferior, that blacks preferred segregation, or that segregation somehow reflected the natural order of things.” Id. McAdams also observes that the mere existence of inequality worked to “enhance the production of status whites could then (choose to selfishly) believe that the failures of blacks to achieve equality were their own fault,” allowing whites to “gain the benefit of cheating in a competition without the loss of self-respect that comes from acknowledging that one is cheating.” Id. at 1061 n.230. In elaboration of the Jim Crow justification for segregation that blacks preferred segregation, or that segregation somehow reflected the natural
critical that "[w]hen proponents of a status-driven ideology can no longer confidently deny the status motivation of their beliefs, the ideology fails and proponents must search for another ideology." 309

ii. Racial guilds and individual racism

In applying Posner's guild analysis to racial discrimination, it can be suggested that Whites engaging in such practices can accurately be analogized to a type of "racial guild." The guild ideology, based on negative racial stereotypes of Black people, operates as a collective guild social norm, which in turn motivates its members to cooperate in the "racial guild's" efforts to monopolize production of self esteem. 310 By similar analogy, we can equate the actions of the Whites acting as a "guild" to Whites acting like a "cartel," which uses the same social norms to gain monopoly power. 311 This analogy works so well that even McAdams admits that:

Whites do act like a cartel. But whites are more accurately described as the subset of cartels that Posner calls "guilds," that is, cartels with "social cohesiveness." Based on a morality emphasizing loyalty and conformity, these guilds have an "ideology"—a set of beliefs that serves to inhibit free-riding—specifically that

order of things, McAdams quotes Gunnar Myrdal:

It would, indeed, be possible to defend the caste order simply by arguing that it is in the white people's interest to keep the Negroes subordinate. Such a defense would be logically tight.... Unlike the rationalizations [that Negroes like to be separated or that separation is necessary to prevent social friction], it need not look forward to an ultimate social equality as an ideal.... The remarkable thing, however, is that in America, social segregation and discrimination will practically never be motivated in this straightforward way as being in white people's interests. Indeed, to judge from the discussion in all social classes of whites, and this is particularly true of the South, one is led to believe that such base and materialistic considerations never enter into their thoughts.

Id. at n.229 (quoting MYRDAL, supra note 181, at 585).

309. McAdams, supra note 275, at 1061 (noting that this may be the cause for the modern civil rights movement, particularly in light of the teachings of WWII, which was an "ideological shock," making it difficult to reconcile the country's "revulsion to Nazi claims of racial superiority" with the similar degradation of blacks by the South). Id. at 1061-62. McAdams points to other historical events that may have led whites to this realization and ultimately the modern civil rights movement, including the extreme use of violence by recalcitrant southern racists against peaceful Black protestors and the "rising level of black education and job skills." Id.

310. Id. at 1060 ("Even for beliefs that serve an instrumental purpose (such as evaluating potential employees), the desire for esteem will cause an individual to adopt distorted beliefs about racial groups as long as the esteem benefit exceeds the instrumental cost.").

311. McAdams observes that "Cooter argues that the proper economic model for discrimination is that of a cartel and that during the Jim Crow era, southern whites advanced their material ends by using law to gain monopoly power in various markets." Id. at 1069 (citing Robert Cooter, Market Affirmative Action, 31 SAN DIEGO L. REV. 133, 153, 155-56 (1994)).
blacks tend to be inferior, that whites should not interact with blacks in certain ways, and that whites must "stick together."\(^{312}\)

One of the most important contributions with respect to race coming from the McAdams/Posner analysis of collective guild or cartel activity is the clear suggestion that individual members of the group need not harbor personal racial animus or racist attitudes in or to cooperate in enhancing the group's status. Instead, the dynamics of the group are such that, based on its group ideology regarding the natural inferiority of Blacks, a social norm arises that creates a sense of moral "social cohesiveness"\(^{313}\) among its members which commands both their loyalty and conformity, thereby motivating them to engage in conduct that is degrading to Blacks.

Due to the "self-interested, self-deception"\(^{314}\) created by the guild ideology even members who are not personally racist can convince themselves that their actions in degrading Blacks is a positive public good that also enhances the status of the group.\(^{315}\) Although a sense of personal racial animus harbored by individual group members would no doubt make this process considerably easier, it is clearly not necessary in order to compel their cooperation. In this way, members, both individually and collectively,\(^{316}\) can engage in racially degrading behavior toward Blacks without feeling that in doing so they are pursuing their own selfish self-interests. As a consequence, members can protect and produce increased white group status, while diminishing Black group status and persuade themselves that they are acting in a moral, rational, and non-racist manner for the public good.

It is important to emphasize that this dynamic not only motivates individual members of the group to comply, but also acts to deter and punish free-riders or group traitors who might otherwise desire to break the group's rules and refuse to subordinate Blacks.\(^{317}\) Whites who refused or even resisted compliance with the

\(^{312}\) Id. at 1070 ("Consider, then, a new economic analogy for race discrimination: not transportation costs, but an analogy to the acquisition of a public reputation." Put quite simply, such "[d]iscrimination exists because it is productive for its practitioners." (emphasis added)).

\(^{313}\) Id.

\(^{314}\) Id. at 1059-60.

\(^{315}\) Id.

\(^{316}\) Id. at 1051.

\(^{317}\) Id. The group ideology thus serves not only to motivate its members but also to police and punish those who might refuse to comply with the dictates of the group social norm. McAdams claims, for example, that commonly devised terms such as "nigger lover" and Jim Crow laws were manifestations of whites "predictably concerned about other whites who associated with blacks in a respectful manner that implied social equality." Id. at 1050-51 (emphasis removed) (quoting JOHN DOLLARD, CASTE AND CLASS IN A SOUTHERN TOWN 66 (3d ed., Doubleday 1937)). The threat to whites of being labeled as a "nigger lover" and classed with the 'scorned Negro' could be potentially fatal. See, e.g., GRACE ELIZABETH HALE, MAKING WHITENESS: THE CULTURE OF SEGREGATION IN THE SOUTH, 1890-1940, at 201 (Pantheon Books 1998). In describing the use of non-public, non-spectacle lynchings, which Hale describes as private white violence, she writes:

"Lynching in the night claimed many more victims than the open-air spectacles of torture that drew such large crowds... [Such] "[p]rivate violence," ... stemmed from the same circumstances that made spectacle lynchings "socially defensible" from a southern white perspective: "[t]o smash a sassy Negro, to kill him, to do the same to a white 'nigger
group ideology were considered to have betrayed their caste, and were accordingly subject not only to harsh group punishment, but they also suffered a "form of lowered intra-group status." Therefore, the costs of such group betrayal were high and the benefits were, save personal conscious, so low as to be virtually non-existent.

iii. Group status production and predatory lending

In the traditional form of economic status production, Whites would produce status and, correspondingly, degrade and disparage Blacks by "refusing to engage in economic trades that would otherwise be mutually beneficial." In a perverse lover—this was to assert the white man’s perogative as pointedly, to move as certainly [to get a] black man back in his place, as to lynch." (quoting W.J. CASH, MIND OF THE SOUTH 118-19 (1941)).

While social and political ostracism were probably the most common tools used to punish whites whose conduct made them subject to being labeled as a ‘caste traitor,’ the caste or group enforcement arsenal was considerably more well stocked. See, e.g., ARTHUR F. RAPER, THE TRAGEDY OF LYNCHING 20 (1933) (noting that with respect to lynchings, "[t]he general public either justified or condoned the lynching, and any individual or group who disagreed was made to suffer. Merchants, bankers, lawyers, and preachers faced a public boycott—or thought they did—should they take a stand in defense of law and order."). See also McAdams, supra note 275, at 1051 n.190 (noting that “Raper reported that a National Guardsman who used his bayonet to cut a white man who was attempting to remove a black rape suspect from custody ‘was never after that time to keep employment in [that town.]’” (citing RAPER, supra, at 244)).

The punishment takes the form of lowered intra-group status. “The white people enforce caste rules with ominous unanimity and one is compelled, by one’s white-caste membership, to assist to some degree in the personal derogation of the Negro and the expression of hostile pressure against him.” Social ostracism was a powerful threat: “If one lives in a Southern town, ‘not to be received’ is a very serious matter and would be more so if one’s family were there; living would be quite intolerable without opportunity for friendly contacts within the white caste.”

One can signal simply by reporting in a factual manner how one feels about the other individual. It is more effective, however, for an individual to resort to disparaging and insulting words or actions. Aristotle instructed that, to be effective, an insult must be gratuitous and must not otherwise accord with the insulter’s self-interest.

McAdams, supra note 275, at 1048. McAdams continues:

The true snub occurs only when one goes out of one’s way to ignore someone. Refusing to
reversal of this practice, Whites, through predatory lending, have instead intentionally chose to engage in economic trades with Blacks, but only on terms that are disproportionately beneficial to Whites and devastating to Blacks. In so doing, Whites gained both enormous financial profits and increased racial status at the expense of Blacks.

In light of this analysis, predatory lending can be accurately described as a contemporary version of racialized stigma and white group status production. By intentionally targeting Blacks for the most abusive and egregious types of home loans, their economic status is lowered while the status of similarly, and even inferiorly, situated Whites is raised.

Their status is raised since their whiteness puts them outside the crosshairs of targeted and aggressive predatory lenders, enabling Whites to safely build and retain home equity. Conversely, their Black economic counterparts, and even Blacks with clearly superior economic credentials, are intentionally targeted by those same lenders, thereby placing Blacks in constant danger of having their home equity stripped and stolen solely because of their race. The acquisition, retention, and accumulation of home equity thus becomes, like homeownership itself, a privilege, not of hard work and neutral economic forces, but rather a privilege of race. This kind of racial targeting is “doubly effective” because American society grants esteem partly on the basis of wealth, both disparages and inflicts economic loss. As a consequence, the victims of racially targeted predatory lending are simultaneously degraded personally and impoverished economically, which in turn leads to an even greater sense of personal degradation.

McAdams was correct to predict that the unique value of the status production model is that it “predicts and explains much of what we observe concerning race.”

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accept a gift is, other things being equal, more insulting than refusing to make a gift. Refusing to accept an invitation to do something one enjoys is more insulting than refusing to participate in an activity one does not enjoy. In each case, acting against one’s own interest’s is both a less equivocal and more intense signal of one desire to insult.

Id. at 1048 n.179 (citing Aristotle, Rhetoric II.2.1378b-79a (W.D. Ross ed. & W Rhys Roberts trans., 1924).


323. See MORTGAGE LENDING, RACIAL DISCRIMINATION, AND FEDERAL POLICY 15 (John Goering & Ron Wienk eds., 1996) (“The Boston Fed study’s startling finding that race was indeed a fairly powerful influence in lending decisions initially stunned banking regulators.”); Michael Zuckoff & Peter G. Gosselin, Fed Finds a Racial Gulf in Mortgages, BOSTON GLOBE, Oct. 22, 1991, Economy, at 1 (then Representative Joe Kennedy responded to the Boston Fed study by observing that “the study’s results portray an America where credit is a privilege of race and wealth, not a function of ability to pay back a loan”).

324. McAdams, supra note 275, at 1048.

325. See supra notes 82-83 and accompanying text.

326. McAdams, supra note 275, at 1045.
When applied to the problem of racially targeted predatory lending, the status production model provides revealing insight into the function and consequences of this pernicious form of economic exploitation. It also helps in understanding why the individual players in the subprime and predatory lending industry would engage in such behavior. Some of the players in this industry may be racist, either consciously or unconsciously. However, under the status production model, engaging in racially targeted predatory lending does not require that any of the individual players harbor personal racial animus toward their targets.

By combining the concepts of racialized stigma and status production, a persuasive argument can be made that white players in the predatory lending industry perceive Blacks as stigmatized and inferior outsiders, seeking to enhance their own status by subordinating the status of Black homeowners. Whites engaged in this business gain not only personal and group status, but also enormous profits in the process. So, unlike the traditional economic status production model where Whites gain racial status only by foregoing profitable business transactions with Blacks, through racialized predatory lending, Whites get the best of both worlds because they can actually generate both positive racial status and significant economic profit at the same time.

For Blacks, racialized predatory lending is a particularly powerful source of status reduction because it both degrades and impoverishes its victims. For Whites it is an equally powerful source of positive status production. This is accomplished in two ways. First, such degradation reduces the status of Blacks as homeowners, while correspondingly increasing the status of Whites as homeowners. Second, the economic reduction in the value of homes and home equity increases the value of white homes and artificially inflates the value of white home equity by comparison. Racially targeted predatory lending then has the effect of increasing and protecting the value of white homes, home equity and their communities at the expense of the value of Black homes, home equity, and communities.

Over time, the stigmatized view of Black homeowners and their systematic subordination as a form of white status production have become institutionalized within the lending industry, affecting the ability of Black people to both obtain and retain a home mortgage. The institutionalization of this process has had a tendency to make its racial implications seem so normal as to almost be invisible. But, like someone being stalked by a sniper, just because he cannot see the crosshairs trained

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327 See MYRDAL, supra note 181, at 207-08. Myrdal contends:

"[i]here is a cultural and institutional tradition that white people exploit Negroes. In the beginning the Negroes were owned as property. When slavery disappeared, caste remained. Within this framework of adverse tradition the average Negro in every generation has had a most disadvantageous start. Discrimination against Negroes is thus rooted in this tradition of economic exploitation."

Id.

328 See Lawrence, supra note 227, at 322 ("We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.").
on him does not make them any less of a target. In fact, blindness may well make an even more vulnerable target.

IV Solutions to Racialized Predatory Lending

A. Competing Paradigms

There are a number of competing paradigms to solving the problem of predatory lending that range from enhanced industry self-regulation to more aggressive legislative regulation. Each competing paradigm has both positive and negative dimensions. However, a threshold requirement in the evaluating the worth of any potential solution is the establishment of a standard by which the competition is to be judged. In an insightful recent article, Professors Kathleen Engel and Patricia McCoy have suggested that in order to be judged as effective, a solution to the problem of predatory lending generally should meet the following standard:

It must force predatory lenders and brokers to internalize the harm they cause and create effective disincentives to refrain from making predatory loans. It must compensate victims for their losses and grant reformation of predatory loan terms. It must outlaw predatory practices in such a way that the law is understandable, violations can be easily proven, and lenders and brokers cannot evade their obligations. At the same time, it must avoid unnecessary price regulation and excessive constraints on legitimate subprime lending. It must furnish the private bar and victims with adequate incentives to bring predatory lending claims, while avoiding incentives toward spurious claims. And it must promote the adoption of best practices by the mortgage industry.

While one can support the general thrust of the Engel-McCoy standards, it is important to point out that no single paradigmatic approach needs to meet all of their requirements in order to be judged satisfactory. Instead, the ultimate solution to the problem of predatory lending should consist of a range of remedies that can work harmoniously together and satisfy all of Engel and McCoy’s concerns.

The ultimate goal of any effort to eliminate predatory lending practices generally, and racialized predatory lending specifically, is to “enhance the long term sustainability of [] homeownership” for economically fragile and vulnerable families. As a consequence, “[t]he ultimate success of homeownership as an asset building strategy will be measured by the degree to which new homeowners are able

329. See generally Engel & McCoy, supra note 167 at 1255.
330. Id. at 1318.
331. Increase in Predatory Lending and Appropriate Remedial Actions: Hearing before the House Comm. on Banking, and Fin. Servs. (statement of Margot Saunders, Managing Attorney, National Consumer Law Center) [hereinafter Saunders Testimony], available at http://financialservices.house.gov/banking/52400sau.htm. Saunders testified that “the number of homeowners who are exploited in refinancing transactions is far too high. These abusive loans are an indication of a failure in the marketplace; competition and self regulation do not stop bad loans from being made. The message is, therefore, efforts by industry to rely on enforcement of current laws will only hurt consumers.” Id.
to afford proper maintenance, avoid foreclosures, build equity in .. homes, and use ...
... equity effectively as wealth."

1 Internal Industry Self-Restraint

The most important contribution of the Engel-McCoy standard is its emphasis on forcing "predatory lenders and brokers to internalize the harm that they cause and create effective disincentives to refrain from making predatory loans." Internalization is viable in light of the enormity of profits at stake in the predatory lending industry. Indeed, externally imposed regulatory remedies are fundamentally inadequate for the task of effectively preventing lenders from seeking to extract some of that profit by any means available to them. As a consequence, any clear regulatory barriers imposed by government to prevent predatory lending will simply become targets that the industry will constantly and cleverly seek to avoid, evade, and manipulate to their advantage.

Any real and lasting solution must not only disarm the predators, but also must restrain and deter them from seeking alternative armaments with which to exploit such easy profits. Such reforms must seek to reduce the internal incentive of lenders to seek predatory profits by raising the price of their attainment beyond their capacity or at least their willingness to pay. External restraints are inherently inadequate to this task. Instead, what is needed is a regulatory paradigm that can so effectively deter predatory lenders from pursuing exploitive profits that they restrain themselves.

This concept of internal industry self-restraint is particularly important, yet potentially problematic. In order to effectively deter predatory lenders from deliberate racialized targeting, it is essential to have some degree of understanding of what motivates this behavior in the first instance. In the absence of such insight, any efforts at deterring the practice will almost by necessity miss the mark because, quite literally it would be shooting at the wrong target.

A central observation of this paper is that racialized stigmata and group status production are the primary drivers behind race-based predatory lending. Thus, any consideration of the racialized predatory lending is both impoverished and anemic unless it takes into consideration the combined influences of racialized stigmata and group status production. In short, racialized stigmata and group status production constitute the missing pieces in the current effort to understand, reduce, and ultimately eliminate the problem of race-based predatory lending. Consequently these concepts should constitute an important part of any serious and potentially effective paradigm that seeks to solve the problem of race-based predatory lending.

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332. Id. Although "government, and the housing and lending industries have done an excellent job in recent years in expanding programs to establish new homeownership opportunities for low-income families," it is time to take the next step in that process and protect those gains from being exploited and destroyed by predatory lenders. Id.

333. Engel & McCoy, supra note 167 at 1318.

334. Focusing on racialized stigmata and group status production in relation to racialized predatory lending also helps to explain a great deal about what we objectively observe regarding the racialized way in which such lending is actually practiced in the marketplace.
2. Legislative Remedies

The fundamental organizing principle of virtually all of the legislation addressed at the problems of predatory lending is informational in nature. The essential animating premises of this legislative regime are "(1) to promote the full disclosure of credit terms in consumer credit transactions, and (2) to prescribe a uniform method for stating these terms to better enable the consumer to compare the various credit terms available to him and avoid the uninformed use of credit."335 Although the informed use of credit through mandated disclosure of relevant information is clearly beneficial, it is only a partial solution to the problem because it fails to address either the underlying causes of subprime lending abuse or to effectively deter predatory lenders from exploiting vulnerable borrowers with abusive and predatory loans.336

1. Federal legislation

a. Truth in Lending Act

The Truth in Lending Act (TILA)337 is the "seminal federal consumer protection legislation"338 in credit transactions. In both content and tone, it clearly reflects a disclosure-oriented philosophy. For example, the preamble to TILA provides:

[T]he informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subtitle to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit ... practices.339

336. This approach is analogous to treating a gunshot wound with morphine. While this pain management approach will undoubtedly make the victims feel better, it is far from a cure. However, all the pain management in the world is going to provide only limited help to the victims of predatory lending so long as abusive lenders are still armed, unrestrained, and motivated.
338. John Roddy, Reversing Field: Is There a Trend Toward Abrogating Truth in Lending, in 1 CONSUMER FINANCIAL SERVICES LITIGATION 637 639 (PLI Commercial Law & Practice Course, Handbook Series No. 772, 1998). Roddy points out that this kind of pro-consumer legislation represented a "sea change" from the earlier pro-business or pro-corporate philosophy. Id. In this regard, Roddy writes:

The last several years have seen a gradual but consistent legislative retreat from some of the bolder consumer protection initiatives which had their genesis in Lyndon Johnson's Great Society agenda. Part of that agenda held that big business could no longer be assumed to work in tandem with the public good, and so the post-war Daddy Warbucks mentality was replaced with a fairly radical viewpoint in which large corporations were inherently distrusted.

Id.
339. 15 U.S.C. § 1601(a) (2009). That provision also provides: "Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other
Originally enacted in 1968, and subsequently amended a number of times, TILA has consistently been interpreted by the courts in a manner consistent with its disclosure-based premise. "[This] reflects a transition in Congressional policy from a philosophy of let-the-buyer-beware to one of let-the-seller-disclose."\(^3\)\(^4\) The underlying theory is that by providing consumers seeking credit with sufficient information about their proposed transaction, they will be able to understand the true nature of what they are getting themselves into and thereby comparison-shop among creditors for the best deal.\(^3\)\(^4\)

At its core, TILA is not only disclosure focused, it is also remedial\(^3\)\(^4\) rather than punitive.\(^3\)\(^4\) Rather than punishing lenders for what amounts to technical violations firms engaged in the extension of consumer credit would be strengthened by the informed use of credit."\(^3\)\(^4\)\(^0\)

340. Allen v. Beneficial Fin. Co., 393 F. Supp. 1382, 1384 (D. Ind. 1975), aff'd, 531 F.2d 797 (7th Cir. 1976), cert. denied, 429 U.S. 885 (1976). The court noted that "[t]he Truth in Lending Act was designed to provide for mandatory disclosure requirements upon those institutions who extend credit to consumers. The purpose was to assure meaningful disclosure of the cost of credit so that consumers could compare various credit terms and avoid the uninformed use of credit." Id. (quoting 15 U.S.C. § 1601 (2000)). See also Smith v. Chapman, 614 F.2d 968, 971 (5th Cir. 1980); Wise Furniture v. Dehning, 343 N.W 2d 26, 28 (Minn. 1984).

341. See Brown v. Marquette Sav. & Loan Ass'n, 686 F.2d 608, 612 (7th Cir. 1982) ("The TILA is a disclosure statute whose fundamental purpose is to provide information to facilitate comparative credit shopping and thereby the informed use of credit by consumers.") (citing 15 U.S.C. § 1601 (2000)); Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161, 1163 (7th Cir. 1974). See also GAC Finance Corp. v. Burgess, 558 P.2d 1386, 1389 (Wash. Ct. App. 1977) (holding that "the purpose of this Act and the Regulation is to convey information to potential debtors in a manner that allows such potential debtors to make intelligent, informed decisions as to the cost of available credit"); Roddy, supra note 338, at 640 (noting that the right of rescission in TILA provides additional protection by complimenting the disclosure provision). For example, Roddy points to the fact that "If a lender fails to provide the homeowner with accurate disclosures of certain aspects of the transaction which TILA deems material, that affirmative right to rescind is extended from three days up to three years." Id. Even more beneficial, Roddy claims, is that this right gives a borrower the ability to recover "(or possibly credits the borrower with) all payments made in connection with the transaction and the borrower returns to the lender the balance of the loan." Id.

342. See Smith v. Fid. Consumer Disc. Co., 898 F.2d 896, 898 (10th Cir. 1988) ("TILA, as a remedial statute which is designed to balance the scales "thought to be weighed in favor of lenders, is to be liberally construed in favor of borrowers.") (quoting Bizier v. Globe Fin. Servs., 654 F.2d 1, 3 (1st Cir. 1981)).

343. Redhouse v. Quality Ford Sales, Inc. 511 F.2d 230, 237 (10th Cir. 1975). In Redhouse, the Tenth Circuit noted:

The Truth in Lending Act is a remedial act which must be liberally construed to effect the intent of Congress. Even so, ... the purpose of the Act is to assure that the consumer debtor is fully aware of the cost of his credit. The Act is basically a disclosure act. As such its purpose is remedial and not punitive. In this vein, although the Act should be strictly construed, it would not serve the cause of justice to enforce the Act so as to achieve a means of harassment, oppression, or unjust enrichment.

Id. at 237 (citations omitted). The court overturned a lower court order of money damages in favor of a group of Native Americans, because, although it acknowledged that under the Act "harm need not be shown," they nevertheless found that "[n]o harm arose from the appellant's technical violations of the Act." Id. But see Glenn v. Trust Co. of Columbus, 262 S.E.2d 590, 594 (Ga. Ct. App. 1979)
of the disclosure requirements, the statute is instead focused on ensuring that lenders make "material disclosures" of the most important "components of the prospective consumer credit transaction." The most important of these components consist of the following five material disclosures: [1] the annual percentage rate (APR), [2] the finance charge, [3] the amount financed, [4] the total of payments, and [5] the payment schedule.

TILA seeks to achieve its remedial goals in two ways. First, strict liability is imposed for violations of the act. Second, violations may give rise to borrower remedies that include a right not only to rescind the loan but also to recoup any and all monies already paid to the lender.

TILA is premised upon reality, that is, that potential borrowers and institutional lenders are not on a level playing field. In seeking to level the playing field, the courts have consistently held that TILA is to be "liberally construed in favor of the consumer." For instance, the New Mexico Supreme Court held that "enforcement of TILA is referred to as a system of strict liability in favor of consumers." That court went on to observe that this "mandatory imposition of damages by courts 'was intended by Congress to create a private attorney general scheme of enforcement which would obviate the need for a large federal bureaucracy to perform such a task.'"


See id. at 643 ("TILA achieves its remedial goals by a system of strict liability in favor of consumers when mandated disclosures have not been made. This is 'strict liability in the sense that absolute compliance is required and even technical violations will form the basis for liability.") Id. (citing 15 U.S.C. § 1604(a) (citing Shepheard, 730 F. Supp. at 1299; In re McElvany, 98 B.R. 237, 240 (Bankr. W.D. Pa. 1989); Smith v. Wells Fargo Credit Corp., 713 F. Supp. 354, 355 (D. Ariz. 1989)).

Rowland 812 F. Supp. at 878; Dorsey v. Beads, 416 A.2d 739, 745 (Md. 1980) (holding that "the Act is a remedial statute and should be construed liberally in favor of the consumer in order to effectuate congressional purpose. It is not to be construed so liberally or loosely, however, as to lose sight of the balance which Congress sought to strike between borrowers and lenders."). See also Equity Plus Consumer Fin. & Mortgage Co. v. Howes, 861 P.2d 214, 216 (N.M. 1993) ("[S]ince the Act is a remedial statute designed to protect borrowers who are viewed as not on equal footing with lenders, either in bargaining for credit terms or in knowledge of credit provisions, it 'is to be liberally construed in favor of borrowers.'") (quoting Bizier 654 F.2d at 3)).

Equity Plus, 861 P.2d at 216 (citing Thomka v. A.Z. Chevrolet, Inc., 619 F.2d 246, 248 (3d Cir. 1980)).

Equity Plus, 861 P.2d at 216 (quoting In re Steinbrecher, 110 B.R. 155, 161 (Bankr. E.D. Pa. 1990) (internal citation omitted)). The Equity Plus court observed that "[i]n the cases, almost uniformly, hold that the civil penalty sections are mandatory, upon finding a TILA violation.... [A]nd it is unnecessary for the borrowers to demonstrate actual damages. Statutory penalties apply regardless of whether the borrower was misled or injured." Id. at 216. That court accordingly held that "the civil penalty is mandatory and a showing of reliance or actual harm is not required." Id. However, the TILA does provide for the following three limited exceptions to civil liability: "bona fide error, good
Despite its laudable goals, TILA “has not lived up to its goal”\(^3\) of protecting consumers by mandating and standardizing disclosure of the true cost of credit in order to allow comparison shopping and truly informed consent. TILA has a number of significant deficiencies. First, the idea was conceptually flawed at its inception because of its belief that the playing field could be leveled by statutorily mandating that consumers be advised in writing of the true cost of their credit transaction prior to committing themselves to the loan obligations. While such disclosures undoubtedly can make a significant difference in the prime market where borrowers are sufficiently sophisticated to meaningfully understand them and possess enough market power to shop around for the best comparison deal, the same is not true in the subprime market. In the subprime market, and especially the predatory extremes of that market, the borrowers generally have neither the financial sophistication to meaningfully understand the disclosures or the market power to use them as a basis to comparison shop.

Second, the disclosure requirements have been frequently ignored and abused by lenders and infrequently and inconsistently enforced by the courts. There are many reported instances where lenders’ required TILA disclosures have been misleading, false, late, incomplete, or altogether non-existent. This has been especially true with respect to providing consumers with the mandated disclosure of their right to rescind the agreement within three days after execution. Moreover, many borrowers who are targeted for predatory loans suffer from such vulnerability, unsophistication, and economic urgency. In many situations, once at the closing table, borrowers either do not understand that they have no obligation to complete the transaction or, even if they do understand it, they have no meaningful choice to not complete it.\(^2\)

\(b.\) The Home Ownership and Equity Protection Act

Although it did not in any way acknowledge or seek to regulate racialized predatory lending practices, in response to mounting evidence of TILA’s inability to prevent widespread and growing problems associated with abusive high cost home loans,\(^3\) Congress amended TILA by enacting the Home Ownership and Equity Protection Act. However, even TILA did not contain strong enough deterrent to significantly curb abusive home loan lending practices. The need to specifically address this problem led Congress in 1994 to enact further protections, incorporated into TILA, to address the ongoing problem of such
Equity Protection Act (HOEPA) in 1994. Like TILA, the central thrust of HOEPA is informational or disclosure based, consisting of two alternative and independent disclosure triggers. The first is an interest rate trigger, originally set at ten points over the Treasury bill rate for a comparable term to the loan in question. The second is a fee or cost based trigger, originally set at 8% of the principal amount of the loan.

If either one of these triggers is met, the loan is considered a HOEPA loan, or a high-cost mortgage, and the lender is required to make a range of additional disclosures to the borrower. However, HOEPA only applies to so-called closed-end home equity loans and does not apply to purchase money acquisition mortgages. Further, in order to be classified as a HOEPA loan, the non-purchase money mortgage must be secured by the borrower's principal dwelling.

In terms of HOEPA's disclosure requirements, it must be kept in mind that HOEPA is an amendment to TILA and, as such, all HOEPA loans must also comply with the "general disclosures required for all closed-end consumer credit transactions." In particular, this means that HOEPA loans are "subject to TILA's rescission rules ... [and therefore] ... the notice of right to rescind must also be given." This includes early notice disclosure at least three days before the loan.
closes, as well as the three day cooling off period afterward. Moreover, at least three days prior to the closing, HOEPA loans require additional notice to be given to each borrower that includes the annual percentage rate of the loan and the amount of the monthly payments. Additionally, it must provide the following express warning: “If you obtain this loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the loan.”

Despite the protections provided, HOEPA was not designed to ban racialized predatory loans nor generalized predatory loans. Instead, it sought to regulate the limited class of closed-end high cost loans through a matrix of rate and price triggers by giving consumers more information and the opportunity to digest it before committing themselves. HOEPA did, however, expressly prohibit or limit certain contract terms and practices that appeared to be the source of particular abuse by many predatory lenders and are often the focus of abuse in racialized predatory loans.

Perhaps the most important prohibition from the perspective of racialized predatory loans is HOEPA’s explicit ban on subprime lenders extending credit based solely or even primarily on the asset value of the mortgaged home without regard to the ability of the borrower to repay. This provision may not only be one of

disclosures creates a 3-day waiting period before the consumer commits him or herself, during which, with this new information in hand, the consumer can think carefully about this, or ask for advice.”). See also Roddy, supra note 338, at 655 (recalling that HOEP adopted TILA’s recission remedy, which, he claims, is “one of the principal means by which Congress sought to protect homeowners from [a significant and continuing predatory lending problem in this country].”). Roddy also points out that the recission remedy “is most often invoked to defend against efforts to collect a mortgage loan, typically in response to foreclosure proceedings.” Id.

362. See Constantine-Davis, supra note 357 at 252. The author points out that “[i]t appears that the mandated early HOEPA disclosures are in fact not given early, but are backdated and given with other papers” at the closing table, where frequently borrowers see them for the first time, while under pressure to close the loan. Id. (citing Newton v. United Co. Fin. Corp., 24 F Supp. 2d 444, 451 (E.D. Pa. 1998)).

363. 15 U.S.C. § 1639(a)(1)(B) (2000). See also Engel & McCoy, supra note 167, at 1305 (“HOEPA lenders must also advise borrowers in writing that they could lose their homes and are not obligated to proceed to closing simply because they signed a loan application or received disclosures.”).


Prohibition on extending credit without regard to payment ability of consumer. A creditor shall not engage in a pattern or practice of extending credit to consumers under mortgages referred to in section [1602(aa) of this title] based on the consumers’ collateral without regard to the consumers’ repayment ability, including the consumers’ current and expected income, current obligations, and employment.

Id. Other interesting prohibitions and limitations include a ban on negative amortization. See 15 U.S.C. § 1639(f) (2000). This section provides that a covered loan “may not include terms under which the outstanding principal balance will increase at any time over the course of the loan because the regular periodic payments do not cover the full amount of interest due.” Id. HOEPA contains a ban on increased rates after default. See 15 U.S.C. § 1639(d) (2000). Specifically, the Act explicitly forbids the imposition of “an interest rate applicable after default that is higher than the interest rate that applies before default.” Id. A ban on direct payments to contractors is also included. 15 U.S.C. § 1639(i) (2000). This amendment recalls the rampant abuses occasioned by unscrupulous home
HOEPA’s most important provisions with respect to racialized predatory loans, but for all predatory loans as well.

It is important because it is aimed at particularly pernicious and economically and personally devastating lending practices, which target borrowers based solely on their race. Specifically, this practice consists of extracting mortgage loans from the weakest victims, who are, at the outset, clearly unable to repay. In short, it is the quintessential predatory lending practice. Since the borrowers are not able to repay the loans, the loans can only be satisfied by stripping the equity from homes in a series of successive and increasingly downward spiraling refinancings.

Each refinancing pays off the old loan, generates immediate profits to both the lender and the broker in the form of points, fees, and costs while providing almost no benefit to the homeowner. Once begun, this process is nearly impossible for any homeowner to stop until virtually all home equity has been exhausted. As a consequence, like some kind of economic “flesh eating virus,” such asset based loans invariably dash promptly and directly to early foreclosure as soon as the equity is exhausted, leaving the borrower destitute and homeless. This practice is of particular concern in the context of racialized predatory lending because of the devastating economic ripple effects on the entire neighborhood.

Unfortunately HOEPA’s provision banning asset based predatory loans does not provide for individual lawsuits. Instead, liability under the provision is strictly limited to those cases where there has been a showing that the lender has engaged in a pattern or practice of making such strictly asset based or flesh eating loans. To date, the only published opinion construing this pattern or practice requirement has held that the statute should be read strictly, requiring a high level of “proof … of a representative sample of loans analyzed empirically and cannot be inferred from examples selected by plaintiffs.”

However, the Joint Report to Congress by HUD improvement contractors that arranged to receive direct mortgage disbursements from the lender but failed to complete the project. In order to prevent such practices in the future, this provision provides that “[a] creditor shall not make a payment to a contractor under a home improvement contract from amounts extended as credit under a mortgage … [unless it] is payable to the consumer or jointly to the consumer and the contractor.” Id. HOEPA also includes a partial ban on balloon payments. See 15 U.S.C. § 1639(e) (2000). Such payments are forbidden but only on loans that have “a term of less than 5 years.” Id. The Act provides a limitation on advance payments, which states that a covered loan “may not include terms under which more than 2 periodic payments required under the loan are consolidated and paid in advance from the loan proceeds provided to the consumer.” 15 U.S.C. § 1639(g) (2000). Finally, HOEPA contains a limitation on prepayments penalties, which provides that a covered loan “may not contain terms under which a consumer must pay a prepayment penalty for paying all or part of the principal before the date on which the principal is due.” 15 U.S.C. § 1639(c)(1)(A) (2000). However, an express exception was carved out which provided that a prepayment penalty was not a violation if only applied to the first five years of the loan. 15 U.S.C. § 1639(e)(2)(C) (2000).

365. See ACORN REPORT, supra note 102, at 7 (highlighting the economic consequences predatory lending has on communities, namely “the further deterioration of neighborhoods by stripping homeowners of their equity …, leading to foreclosures” and depriving low-income minority families of one of their only sources of wealth).

366. Newton v. United Cos. Fin. Corp., 24 F Supp. 2d 444, 457 (E.D. Pa. 1998). The court noted that this requirement placed an “admittedly heavy burden on consumers” Id. However, the court suggested that the appropriate remedy was legislative in character. Id. The court reached this holding even though it found that in all of the three cases at bar, the loans had in fact been made “without
and the Department of the Treasury takes a considerably more progressive view. It specifically recommends that "Congress ... repeal the 'pattern and practice' requirement under HOEPA and create a safe harbor."\textsuperscript{367}

\textbf{c. Proposed amendments to HOEPA}

Obviously, HOEPA has deficiencies. Responding to criticisms that HOEPA had not effectively stemmed the tide of predatory mortgages, in 2002 Congress proposed amending the Truth in Lending Act to include a new anti-predatory lending component in order to more specifically respond to the problems associated with predatory lending. The Senate version of the proposed act is entitled the Predatory Lending Consumer Protection Act of 2002 (PLCPA). Senator Paul Sarbanes, Chairman of the Senate Banking, Housing, and Urban Affairs Committee, proposed the amendment with much fanfare.\textsuperscript{368}

The Sarbanes proposal to amend HOEPA addresses neither the problem of racialized predatory lending nor does it constitute a significant change in the law. In fact, it merely suggests a rather modest amount of necessary tightening of the restrictions imposed by HOEPA. For example, the PLCPA includes a tightened definition of what constitutes a high cost mortgage. It includes first lien mortgages with annual percentage rates that exceed the rate on comparable Treasury securities by six percentage points instead of the old rate of eight percent.\textsuperscript{369} By manipulating regard to the borrowers' ability to repay." \textit{Id.} at 456.

\textsuperscript{367} HUD REPORT, supra note 3, at 77. The Report also recommends that the "Federal Reserve Board should consider using its authority to place new restrictions on asset-based lending." \textit{Id.} at 78. Specifically, the Joint Report suggests that the Board use its broad regulatory authority to respond to the restrictive holding in \textit{Newton v. United Companies Financial Corp.}, which held that the statutory pattern or practice standard, required an empirical analysis of a representative sample of the lender's loan portfolio. \textit{Id.} at 77. Instead, the Joint Report suggests that the Board "could clarify that a 'pattern or practice' does not have to be proved by a statistically significant, random sample, and that the phrase should be given the same meaning that the same phrase in the Fair Housing Act (FHA), 42 U.S.C. § 3614, has been given. The courts have ruled that the FHA pattern-or-practice requirement can be satisfied by proof of several instances of a prohibited conduct in a relatively short period of time." \textit{Id.} at 78 (quoting United States v. Balistrieri, 981 F.2d 916, 929-30 (7th Cir. 1992)).

Regulation Z recently clarified the implementation of the "pattern or practice" requirement. It specifically provided that "a pattern or practice exists depends on the totality of the circumstances," specifically referencing "statutes relevant to a pattern or practice determination, [including] the Truth in Lending Act, The Equal Credit Opportunity Act, the Fair Housing Act, and Title VII of the Civil Rights Act of 1964 ...." Press Release, Board of Governors of the Fed. Reserve, Truth in Lending (Dec. 14, 2001). Providing more guidance, it mentions "that while a 'pattern or practice' of violations is not established by isolated, random, or accidental acts, it can be established without the use of a statistical process." \textit{Id.}

\textsuperscript{368} News Release, U.S. Senate Committee on Banking, Housing and Urban Affairs, Sarbanes Announces Introduction of Legislation to Combat Predatory Lending Practices (May 1, 2002), available at http://www.senate.gov/-banking/prel02/0501pred.htm. According to that news release, "The legislation is designed to restrict abusive predatory lending practices, expand consumer protections, and strengthen enforcement of existing protections in current law by enhancing civil remedies and statutory penalties." \textit{Id.} at 1.

\textsuperscript{369} The new law also includes a rate trigger for second mortgages at 8% and includes mortgages where the total of all the fees and points paid by the borrower is in excess of either 5% of the loan or $1,000. \textit{See} Predatory Lending Consumer Protection Act of 2003, S. 1928, 108th Cong. § 2 (2003).
HOEPA's interest rate and cost triggers, the PLCPA seeks to bring more abusive loans within its jurisdictional purview. While the concept is laudable, the proposed trigger levels are likely to have only a modest effect in extending HOEPA's reach.

However, unlike the House version, the Sarbanes proposal does suggest an important improvement over the old law with respect to asset based mortgages or loans made solely or primarily on the basis of the equity in the home and without regard to the actual ability of the borrower to repay. While the Sarbanes proposal does not eliminate the troublesome "pattern or practice" requirement, it adds a new tier by requiring a "case by case assessment" of each consumer's ability to repay any individual loan. 370

d. **State regulation following HOEPA**

A number of states have passed their own anti-predatory lending laws. 371 However, with rare exception, these laws are all created in the image of the federal HOEPA law. They do little more than lower the interest rate and/or cost triggers, and merely massage the federal rules around the edges. One notable exception is California, which expressly makes mortgage brokers acting agents of the borrower owe the borrower a fiduciary duty. 372 California also allows for the imposition of punitive damages. 373

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370. The Sarbanes proposal provides expressly:

> In addition to the prohibition ... on engaging in certain patterns and practices, a creditor may not extend any credit in connection with any mortgage referred to in section 103(aa) unless the creditor has determined, at the time such credit is extended, that 1 or more of the resident obligors, when considered individually and collectively, will be able to make the scheduled payments under the terms of the transaction based on a consideration of the current and expected income, current obligations, employment status, and other financial resources of any such obligor, without taking into account any equity of any such obligor in the dwelling which is the security for the credit.


372. Amendments to Assembly Bill 489, as amended in Senate July 10, 2001 § 4978, which provides that "[a] licensed person, in providing real estate brokerage services ... to a consumer, is acting as the agent of the consumer and owes that consumer a fiduciary duty of utmost care, honesty, and loyalty in the transaction, including the duty of full disclosure of all material facts." See A.B. 489, § 4979, 2001-02 Leg., Reg. Sess. (Cal. 2001).

373. A.B. 489, § 4978(b), 2001-02 Leg., Reg. Sess. (Cal. 2001). The law provides that "[t]he court may, in addition to any other remedy, award punitive damages to the consumer upon a finding that such damages are warranted...." Id.
Although these types of consumer protections are helpful, considerable pressure has been brought to bear on Congress to pre-empt state and local anti-predatory lending legislation in order to avoid a patchwork quilt of national regulations which could have an unfair and unreasonable burden on the subprime lending industry. The issue of whether there should be federal preemption of state anti-predatory lending laws that "impinge on a national bank's lending ability" is becoming increasingly contentious and at the writing of this article, is far from resolved.\(^3\)

e. Civil Rights Acts

None of the current or proposed legislation acknowledges or addresses the specific problem of racialized predatory lending. Resort to "antidiscrimination laws to halt predatory lending," may be misplaced because, "[t]he fair-lending laws necessarily are tangential in their focus, because they address differential treatment of customers on prohibited grounds such as race, age, or gender, rather than abusive loan terms per se."\(^3\) Perhaps the answer to these problems can be found within the constellation of the national civil rights acts.\(^3\)

There have been a number of suggestions trying to explain why these civil rights statutes have not been potent weapons in the struggle against racialized predatory lending. They include, for example, the view that many victims of racialized predatory lending lack adequate sophistication to appreciate that they have been

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374. See Rob Blackwell, How Allies Wound Up Sparring on Preemption, AM. BANKER, Feb. 10, 2003, at 1. Blackwell argues that "[t]he tense exchange underscores how volatile the issue of preempting state law has become and how carefully federal agencies are being scrutinized for their actions in this area.... Meanwhile, federal lawmakers continue to debate the wisdom of establishing one national standard to govern efforts to discourage lending abuses." Id. See also Rob Blackwell & Michele Heller, Debate Heats Up Over National Predator Law, AM. BANKER, Feb. 7, 2003, Mortgages at 1. Blackwell and Heller note:

As Georgia took steps to roll back its tough predatory lending laws, Democrats and Republicans argued here Thursday about whether to establish national lending standards and how strict to make them.... The about face in Georgia underscored the volatility of the issue and the strong lobbying pressure being applied by financial services companies that seek to avoid a patchwork of state laws. The Georgia House voted unanimously Tuesday to water down its Fair Lending Act removing some of its most controversial items and adding new provisions—including one that could neutralize the act.

Id. at 10.

375. Engel & McCoy, supra note 167, at 1317. Engel and McCoy explain:

[Racial targeting] is a major tactic of predatory lenders, which is why ECOA and FHA will always be useful adjuncts in combating predatory lending. Nevertheless, a direct approach that goes to the heart of predatory lending (i.e. to abusive loan terms and practices themselves) offers the greatest potential for stemming predatory loans.

Id.

376. The range of such acts include the Equal Credit Opportunity Act (ECOA) of 1974, 15 U.S.C. § 1691, and the Fair Housing Act (FHA), 42 U.S.C. §§ 3604–3616 (Title VIII of the Civil Rights Act of 1968). However, "few victims of lending discrimination have brought claims under these statutes." Engel & McCoy, supra note 167 at 1315. See generally Lopez, supra note 10, at 73.
victimized by a predatory lender. Although many of these victims may be unaware of the particular fair lending laws that their lender may have violated, they know enough to appreciate that they have been cheated and robbed. An inability to discern when one has been violated is not likely a strong reason why more minority litigants are not taking advantage of the civil rights laws in combating racialized predatory lending.

It has also been suggested that the evidentiary difficulties and prohibitive expenses of putting together a case that has a reasonable likelihood of success is among the most significant obstacles facing those who might want to use the civil rights laws against predatory lenders. While this is undoubtedly true, they are not unique to civil rights laws and would pose equally daunting obstacles in the pursuit of any private right of action by a private plaintiff. Moreover, no such obstacles exist for actions brought under the civil rights laws by the government, and, therefore, cannot go very far in explaining why those laws have not been more energetically utilized by the government.

Finally, it has been suggested that civil rights laws are not actively utilized against predatory lenders because the actual damages available under these laws are "low and uncertain." The availability of punitive damages, for instance, fails to provide a very robust incentive to bring suit. Obtaining awards of sufficient size to serve any deterrent effect are just not available. This observation is quite true. Besides

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377 See Engel & McCoy, supra note 167, at 1315 ("There are several explanations for this paucity of claims. Many loan applicants cannot discern lending discrimination because they do not have inside information about the factors that went into the lenders' decisionmaking.").

378 See Engel & McCoy, supra note 167 at 1315-16. Engel and McCoy write:

The few customers who realize that lenders discriminated against them in violation of fair-lending laws encounter significant obstacles in proving their discrimination claims. In most cases, lenders can point to neutral underwriting criteria and reasons why applicants failed to meet their criteria. In addition, loan information pertaining to other applicants, which would assist plaintiffs in establishing discriminatory treatment, is difficult and costly to obtain.

Id. They also point out that much of the information needed by the plaintiffs to prove their discrimination claims is quite unavailable to them because it is locked up in the lenders files. Presumably the only way to get access to those records is to file a lawsuit and seek them in the discovery process. Id. at 1316. The authors conclude, however, that even that route is unlikely to be successful because, "even when the information is available, the cost of extensive discovery and expert statistical analysis can be prohibitively expensive." Id. See generally Eva v. Midwest Nat'l Mortgage Banc, Inc., 143 F. Supp. 2d 862 (N.D. Ohio 2001); Fairman v. Schaumberg Toyota, Inc., No. 94 C 5745, 1996 WL 392224 (N.D. Ill. July 10, 1996).

379 See Engel & McCoy, supra note 167, at 1316. The authors contend that "[p]unitive-damage awards, which should provide incentives for victims of discrimination, fail to perform their intended function. This is, in part because the FHA limits punitive awards to $11,000." Id. (citing 42 U.S.C. § 3612(g)(3) (1994)). Engel and McCoy also believe punitive damages fail to provide an incentive because

[to the extent that fair-lending plaintiffs recover only small damages awards or nonmonetary damages such as rescission, their punitive awards will be correspondingly limited. Finally, courts are reluctant to impose punitive damages in the absence of actual damages. Many states and at least two circuit courts have refused to uphold punitive damages awards unless plaintiffs have incurred actual damages.]

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arguing for an increase in the size of the awards available and a relaxation of the standards for punitive damages, this observation points out what is perhaps the only real solution to the this problem, i.e., a viable deterrent effect.\textsuperscript{380}

B. Proposed Solutions

As discussed throughout this article, a critical reason for the racialized targeting of Black people, for the worst and most abusive predatory loans, is their “spoiled identities.” It grows directly out of the racial stigmata that, because of the nature of our founding and development, hangs like a shroud about the shoulders of every person of color in America. And through the process of group status production, that stigma invites Whites, whether consciously or unconsciously, to exploit race in order to raise both their groups,’ and by reference, their own status in comparison. Racialized predatory lending clearly exploits race and, by focusing its devastation particularly on Black people, all Whites benefit as the status of Blacks is lowered and the status of Whites is correspondingly raised.

As a consequence of this dynamic at play in racialized predatory lending, formulistic solutions are completely ineffectual. Quantitative roadblocks serve only to act as temporary detours until the lenders find another way to reach their destination. Temporary because the legislation in this area contains catchall clauses, which attempt to reach any and all behavior. Under these conditions, evasion is common. Quite simply, it is expected that the lenders to try and evade the rules, and they do not disappoint.

Accordingly, what is needed is a less formulistic and a more holistic regulatory regime. The best enforcement environment would be one that focused less on quantitative thresholds like interest rate or cost triggers, and more on the totality of the circumstances from a reasonable person’s perspective. In this way, for example, predatory loans that target elderly Black widows, calling for them to make monthly payments that are equal or in excess of her monthly income, would be viewed for what they are: equity theft at the point of a briefcase!

In order to accomplish that goal, it is suggested here to begin by reconceptualizing predatory lending generally, and racialized predatory lending in particular, from a mere market excess, to regarding it as theft, theft of home equity wealth. Moreover, that theft should be regarded as particularly pernicious and undermining when it is intentionally focused on victims because of race.

1 Liability

In keeping with the suggestion that enforcement efforts against predatory lending take a more holistic approach, the full range of common law consumer protection actions should be available to redress exploitive or otherwise abusive loans. This

\textit{Id.} at 1317 (footnotes omitted).

\textsuperscript{380} Whether the civil rights laws either in their present form or as amended, can provide sufficient deterrence to restrain predatory lenders, remains to be seen. To date there has been too little litigation or discussion on the issue to yield a satisfactory answer. This topic deserves a fuller treatment than is available here.
would include making use of the doctrines of unfair and deceptive practices, unconscionability, and common law fraud. Each of which has already been used with varying degrees of success in actions against predatory lenders.  

1. **Unfair and deceptive practices**

There is no precise definition of what constitutes an unfair or deceptive practice, either generally or in the context of reverse redlining. In fact, the Federal Trade Commission has determined that a precise definition of unfair or deceptive practices "is not appropriate as it would necessarily be underinclusive, creating a shield for subsequent unfair or deceptive practices as the markets for goods and services evolve."  

An excellent example of a well-reasoned and well-written opinion applying the principles of unfair and deceptive practices to reverse redlining and racialized predatory lending is *United Companies Lending Corp. v. Sargeant* from the Federal District of Massachusetts.  

In that case, a federal judge was called upon to interpret a state statute which the court found had been specifically "promulgated in order to counter the reverse redlining practices pervasive in low-income communities and communities of color during the eighties and early nineties." The lender argued that the state statute banning unfair or deceptive acts was unenforceable because it was at variance with the standards set by the FTC. However, the court reasoned that the FTC's three-prong test to determine whether a practice is unfair or deceptive had been satisfied by the Massachusetts statute and found the lender liable. Similarly, the same unfair and deceptive practices


382. *Sargeant*, 20 F Supp. 2d at 205 ("Neither the language nor the history of the [FTC] Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories."). See also *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (noting that unfair and deceptive practices should not be rigidly defined); FTC v. R.F Keppel & Co., 291 U.S. 304, 310 (1934) (same).

383. See generally *Sargeant*, 20 F Supp. 2d at 192.

384. *Id.* at 206 ("These lending practices had dire financial consequences for borrowers often resulting in foreclosure."). The state regulation in question provided that "[i]t is an unfair or deceptive practice for a mortgage broker or lender to procure or negotiate for a borrower a mortgage loan with rates or terms which significantly deviate from industry-wide standards or which are otherwise unconscionable.*

385. *Id.* at 198 (citing MASS. REGS. CODE tit. 940, § 8.06(6) (1992)). See also *Sperry*, 405 U.S. at 244 n.5 (approving of this three-prong test). The court reiterated the continued salience of the FTC's three-prong test by noting that "a more detailed sense of both the definition and limits" of the test had been issued by the FTC in response to a congressional request. *Sargeant*, 20 F Supp. 2d at 200. It observed:

[The 1980 policy statement] gives greater clarification to the consumer injury portion of the test. Consumer injury is substantial when (1) the harm is neither trivial nor merely speculative and,
doctrines were used with considerable success in cases around the country, as exemplified by the recent federal case brought by the New York State Attorney General against Delta Funding.\textsuperscript{386}

\textit{ii. Unconscionability}

The doctrine of unconscionability offers a potentially promising tool to combat reverse redlining and racialized predatory lending. Although the Uniform Commercial Code (UCC) provides the baseline definition of unconscionability,\textsuperscript{387} it can be applied generally outside the sale of goods.\textsuperscript{388} This doctrine seems potentially promising in policing abusive lending practices because it gives the court the ability, as a matter of equity, to enforce some or none of the terms of an offending contract, "so as to avoid any unconscionable result."\textsuperscript{389} The decision in United Lending exemplifies the flexible use of this doctrine in fighting racialized predatory lending. In that case, the court held that like the term "unfair or deceptive practice" with respect to the doctrine of unconscionability, "there is no clear, all-purpose definition .. nor could there be, unconscionability must be determined on a case by case basis, giving particular attention to whether, at the time of the

\textsuperscript{386}See Sandler & Klubes, supra note 38, at 113. Sandler and Klubes note:

Recently, the first enforcement resolution against a subprime lender for alleged unfair and deceptive trade practices was announced. In June 1999, the Attorney General of New York announced a $6 million settlement with Delta Funding that included payments to more than 1,000 customers and appointment of an outside monitor for Delta. The deal was not finalized, however, and the Attorney General and Banking Department then announced a settlement with Delta in August 1999 for $12 million. Days after that settlement announcement, the Attorney General backed out, filing suit in federal court against Delta.

\textsuperscript{387}U.C.C. § 2-302(1) (2000) provides:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unreasonable clause so as to avoid any unconscionable result.


\textsuperscript{389}U.C.C. § 2-302(1) (2000).
execution of the agreement, the contract provision could result in unfair surprise and was oppressive to the allegedly disadvantaged party. 390

The court in United Lending pointed out that the doctrine of unconscionability contains a procedural and substantive component. Procedural unconscionability is designed to police the process by which an agreement is reached, 391 while its substantive sibling focuses on the content of the agreement. 392 If, under either or both of these standards, the court determines that "the provisions ... drive too hard a bargain, a court of conscience will not assist its enforcement." 393

Although promising, there are difficulties associated with applying the doctrine of unconscionability to reverse redlining and racialized predatory lending. With respect to procedural unconscionability, the focus on unfair surprise means that absent concealment or misrepresentation, it is likely that the price terms of a predatory loan would not qualify for coverage. More likely, procedural unconscionability would be limited to non-price terms of the transaction. 394 However, whether substantive or procedural, unconscionability claims can involve both high costs and risks, and thereby deter victims of reverse redlining from using this tool in their defense. 395 Even in United Lending, a courageous and insightful jurist came right to the brink but refused to cross over the line and find the lender's conduct unconscionable. The court explained its reluctance to cross the unconscionability threshold on procedural grounds. 396

390. Sargeant, 20 F Supp. 2d at 206 (quoting Zapatha v. Dairy Mart, Inc., 408 N.E.2d 1370, 1376 (Mass. 1980)) ("Unconscionability is a question of law to be assessed at the time the contract was executed by the parties." (citing Zapatha, 408 N.E.2d at 1375)). "Where the word 'unconscionable' is used in a statute or regulation, '[a] court may be guided by the text of a statute and a consideration of the abuses sought to be remedied by its enactment' in determining its meaning." Id. at 206 (quoting Commonwealth v. Gustafsson, 346 N.E.2d 706, 711 (Mass. 1976)).

391. See United Cos. Lending Corp. v. Sargeant, 20 F Supp. 2d 192, 206 (D. Mass. 1998) ("Procedural unconscionability evaluates the circumstances under which the contract was executed to determine if it is the product of unfair surprise.").

392. See id. ("Substantive unconscionability evaluates the actual terms of the contract to determine if they are substantively unfair.").

393. See id. (quoting Waters v. Min Ltd., 587 N.E.2d 231, 234 (1992)).

394. See Engel & McCoy, supra note 167 at 1300. Engel and McCoy note that courts exercise hesitation when confronted with claims that excessive prices are unconscionable, attributing such hesitation to "legitimate reservations about their competence to judge fairness as to price." Id. Thus, they conclude that "to the extent that borrowers have prevailed in asserting unconscionability, they have largely prevailed only with respect to non-price terms in loan contracts." Id.

395. See id. at 1301 ("Finally, unconscionability claims and defenses are extremely expensive to litigate, dampering incentives to bring those claims."). See also Arthur Leff, Unconscionability and the Crowd—Consumers and the Common Law Tradition, 31 U. Pitt. L. REV. 349, 354 (1970) (indicating how the costs and difficulties of successfully mounting an unconscionability claim act as deterrents to the poor and unsophisticated to sue); Creola Johnson, Welfare Reform and Asset Accumulation: First We Need a Bed and a Car 2000 WIS. L. REV. 1221, 1256 (2000) (same).

396. See Sargeant, 20 F Supp. 2d at 209-10. The court notes:

Upon reflection, as the question of unconscionability is a close one, the matter is a fact-specific expression of Massachusetts common law, and an equally just ground of decision between these particular parties is available, this Court refrains from expressing an opinion on the issue of unconscionability. While the question could readily be decided by a Justice of the Massachusetts Superior Court, I am hesitant as a federal judge to declare Massachusetts common law in the absence of some decisional guidance.
iii. Amend the pattern or practice requirement

In addition, the threshold requirement for so-called unaffordable or asset based loans, which requires a finding that the lender has engaged in a "pattern or practice," must be amended. To the extent that predatory lending has been reconceptualized as a form of theft, it is no defense to an allegation of individual theft that the thief has not engaged in a pattern or practice of stealing from others. He has stolen from this one victim. Is that one victim any less deserving of relief and defense simply because they are alone? Obviously, the reasonable person has no problem answering that question with a clear and unequivocal "No." Accordingly, it is suggested here to follow the lead of Senator Sarbanes in his proposed amendment to HOEPA, which provides liability both for a pattern or practice and in individual cases as well.

iv. Suitability doctrine

Another positive contribution in the effort to fight racialized predatory lending is the "suitability doctrine." Borrowing from national securities law, the suitability doctrine as applied to predatory lending would require that loans be recommended to borrowers only if they are "suitable to the needs of the particular customer." There is no reason why this concept cannot be borrowed, particularly since it has the potential of being quite useful in the area of predatory lending. Under this doctrine, unaffordable loans would be banned entirely, and many barely affordable ones would come under intense scrutiny. Moreover, it would put the

Id. at 209-10. However, it should be noted that the judge would not necessarily have had to "declare Massachusetts common law." Instead, it seems reasonable for him simply to have asked, whether in light of the applicable standard of review that it had just articulated so well, could a Massachusetts state court, acting reasonably, have found the subject conduct to be in violation of the statute. If the answer is yes, if the federal court could have concluded that such a state court would not have been acting unreasonably in reaching such a finding in light of the content of the doctrine as applied to the instant facts of that case, then it could have found the conduct to be unconscionable. Such a finding would not have established the parameters of the doctrine under state law, but rather, simply a reasonable application of a doctrine whose boundaries have yet to be explored and charted with precision. But as the court was "sitting in equity," it was "necessarily empowered to do complete justice as between the parties." Id. at 210. Accordingly, although the court refused to certify the class, it did grant the plaintiff relief in the form of "an opportunity similar to, albeit not as complete as, recission." Id. As a consequence, the court held that the plaintiff had six months from the order date to "tender to United the outstanding principal (not interest) due on the loan as of the order date, as well as interest thereon at the contract rate from this date, the mortgage shall be discharged and the mortgage note satisfied." Id.

397 See generally Ehrenberg, supra note 26, at 117. See also Engel & McCoy, supra note 167, at 1318 (describing how securities law concept can be applied to predatory lending).


burden on brokers and lenders, to ensure that the loans are in the borrower’s interest and not just the source of continued fees to the professionals involved.

The particular usefulness of this doctrine in addressing issues of reverse redlining and racialized predatory lending lies in its flexibility to adapt to changing and individual circumstances. The suitability doctrine, like the California’s anti-predatory lending law that establishes a fiduciary relationship between the borrower and the mortgage broker, reflects the fact that “[m]aking a loan involves a relationship between the borrower and the lender.” As a professional relationship, there are attendant duties and responsibilities that cannot be waived. In the lender-borrower relationship, which would presumably include the broker, the borrower should be owed a duty to provide a loan that suits both financial needs and economic abilities and any breach thereof should give rise to an appropriate remedy.

v. Fraud

The most egregious and blameworthy forms of racialized predatory lending “involve the age old problem of fraud.” Although all of the lending practices that could be accurately characterized as fraud are already punishable under existing “state fraud statutes, state consumer protection law, state fiduciary duties and federal disclosure statutes such as the Truth in Lending Act or the Real Estate Settlement Procedures Act,” such enforcement is almost universally pursued as a civil rather than criminal matter. I argue here for a paradigm shift that recognizes the most

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400. See Ehrenberg, supra note 26, at 119 (contending that flexible regulatory rules are more advantageous). More specifically, Ehrenberg claims that “excessively stringent parameters may overly chill the mortgage market, prohibit risk-based pricing, and prevent consumers from obtaining financing while looser parameters may not do anything to ameliorate the problem.” Id.

401. Id. at 120 (“This relationship is similar to the relationship between other professionals and their clients.”).

402. See id. at 119 (analogizing the relationship between a lender and a borrower to that between a lawyer and her client, a doctor and her patient, an accountant and her client and a securities broker-dealer and her customer). Ehrenberg continues, explaining that there exists some type of duty to deal fairly with customer, whether that customer is a patient or client. Id. Moreover, as for the mortgage industry, Ehrenberg adds that “the securities industry has a highly evolved suitability doctrine that could serve as a model for developing a similar doctrine with respect to the mortgage industry.” Id. at 120.

403. See id. at 119-20. Ehrenberg explains:

Another way of looking at the issue of predatory lending is to realize that predatory lending involves a mismatch between the needs and capacity of the borrower on the one hand and the making of and final shape of the loan product by the lender on the other. In essence, the loan does not fit the borrower, either because the borrower’s underlying needs for the loan are not being met or the terms of the loan are so disadvantageous to the particular borrower that there is little likelihood that the borrower has the capability to repay the loan. The lender has not engaged its client sufficiently to craft a product that is suited to the borrower. The lender, as a professional, has failed in its duty to the client/borrower.

Id. at 120.

404. Engel & McCoy, supra note 167, at 1267 (noting that all of the lending practices that could be characterized as fraudulent).
blatant forms of racialized predatory lending as a form of both civil and criminal fraud and aggressively prosecuted in the appropriate cases.

To the extent that racialized predatory lending is characterized as a form of "racialized theft," criminal fraud is a more appropriate enforcement preference because it recognizes the inherent economic violence, trauma, and devastation that it causes. The concept of fraud is sufficiently flexible to include the most egregious forms of racialized predatory conduct because "fraud is not a crime with prescribed elements... rather the term is a 'concept' at the core of a variety of criminal statutes." However, fraud is generally thought of as including a broad range of sharp or manipulative behavior involving various degrees of "deceit" or "secrecy." In the predatory lending context, fraud has two particular applications, one racialized and the other not. The racialized version targets its borrowers at least partially on the basis of race. The non-racialized version "is aimed at capital sources, such as secondary-market purchasers of loans, federal loan guarantors and sometimes even loan originators themselves."

In terms of racialized predatory lending, fraud frequently occurs in the targeting of racial minorities for the most "notorious deceptions." To the extent that some victims are targeted for these abusive practices on the basis of race, such practices should be regarded as racialized criminal fraud and punished accordingly. This expansion would be in keeping with recent legislative, judicial and prosecutorial decisions to apply criminal fraud across an ever enlarging "spectrum of fraud offenses." This expansion has been driven by legislative and prosecutorial policy priorities. Moreover, precisely because the line between civil and criminal fraud is so blurred, prosecutors enjoy considerable discretion in deciding whether to charge particular deceptive and harmful conduct as criminal fraud. While this discretion

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406. Id. at 737
407. Engel & McCoy, supra note 167, at 1268 (footnotes omitted).
408. Id. at 1267 The authors describe typical fraudulent deceptions to include:

fraudulent disclosures, failures to disclose information as required by law, bait-and-switch tactics, and loans made in collusion with home-repair scams. There are reports of lenders financing fees without borrowers' knowledge, secretly conveying title to borrowers' property, and deliberately concealing liens on borrowers' homes. Some lenders misrepresent to borrowers that they must purchase credit life insurance in order to proceed to closing. ... Brokers may dupe borrowers into believing that they are acting in the best interests of the borrowers when their real financial loyalties are to the lenders. Brokers and lenders alike may lure borrowers to closing by promising to finance needed home repairs or to refinance loans at lower rates.

Id at 1267-68.
409. Podgor, supra note 405, at 734. "In addition to the legislature, executive priorities also present a clear voice in the development of fraud. The expansion of enforcement in the areas of health care fraud and financial fraud has been in large part an executive function." Id. at 732.
410. Id. "In recent years, criminal fraud statutes have multiplied, offering new laws that often match legislative or executive priorities." Id. at 731.
411. Id. at 767 ("The charging discretion afforded prosecutors becomes especially pronounced when examining the "blurring" between what will be considered civil fraud and what will be
may be problematic from a constitutional perspective, it could be potentially very helpful in adjusting the punishment for racialized predatory lending to match the harm it engenders. This is true because it would allow local and state prosecutors the discretion to make the enhanced punishment of racialized predatory lending a prosecutorial priority under a variety of substantive criminal statutes. The most obvious examples of such appropriate statutes would include not only cases where fraud is the object of the offense, or part of a conspiracy to defraud, but also generic mail fraud and wire fraud statutes, which are the most common bases used by prosecutors to bring criminal fraud actions.

Unfortunately, existing bank fraud statutes would be of no assistance in this effort because they are premised on the financial institution being the victim of the fraud. Those statutes do not even envision a scenario where the borrower is the victim of a fraud perpetrated by the institution. However, now that we know that a variety of bank or financial institution fraud exists in which the borrower is the victim and the institution is the victimizer, it is time to begin to seriously consider applying existing generic fraud statutes to the most troublesome and egregious cases of racialized predatory lending.

In 1988, Congress enacted a statute defining the term “scheme or artifice to defraud” to allow prosecutions premised upon a deprivation of the “intangible right of honest services.” In 1994, Congress again modified the statute to permit prosecutions of mail fraud absent a post office mailing.

...The mails are a mere jurisdictional hook which permits the prosecution of fraudulent schemes when the delivery is via an interstate carrier. An incredible array of schemes have been prosecuted under the mail fraud statute. One finds, for example, “divorce mill” fraud, insurance fraud, securities fraud, and franchise fraud. Few restrictions have been placed on what will be subject to prosecution under this statute.

Id. at 752-54 (footnotes omitted).

141. See 18 U.S.C. § 1343 (1994) (providing a punishment range of up to 20 years in prison for frauds that do not involve financial institutions, and up to 30 years in prison or a fine of one million dollars if the fraud affects a financial institution. See also Podgor, supra note 405, at 752. Podgor notes:

"Like mail fraud, the use of the wires allows an enormous breadth of conduct to be included within its realm [and] the wires [are] a mere jurisdictional hook required for federal prosecution.

15. See Podgor, supra note 405, at 760 ("Although most fraud statutes provide specificity, prosecutors commonly use generic statutes, such as mail and wire fraud.

16. Id. at 757 ("The bank fraud statute was expressly designed to provide an effective vehicle for the prosecution of frauds in which the victims are financial institutions that are federally created, controlled or insured.") (citations omitted)).
2. **Punishment**

Few reforms on the liability side of the equation can have much of an effect on reducing the harms of racialized predatory lending without also reforming the enforcement or punishment side. It is an old axiom in the law that the "punishment should fit the crime." In the case of predatory lending generally, and racialized predatory lending specifically, the range of existing punishments are clearly not commensurate with the harm these loans occasion. The use of a hate crime paradigm is a plausible addition.

1. **Hate crime paradigm**

Hate crime legislation is a relatively recent legal phenomenon. The sudden and robust growth of hate crime laws at virtually all levels of government within the past twenty-five years "attest to the growing concern with, visibility of, and public resources directed at violence motivated by bigotry, hatred or bias. They reflect the increasing acceptance of the idea that criminal conduct is "different" when it involves an act of discrimination." The core justification for hate crime laws is that racially targeted criminal acts are offenses not just against the individual victim but also against their community at large, "inflict[ing] not only physical harm, but also unique psychic damage."

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> The concept of "hate crime" is relatively new, emerging in the past 20 years. However, legal responses to hate-motivated behavior in America date back to reconstruction-era civil rights statutes and early-20th-century state statutes aimed at the activities of white supremacist organizations, most notably the Ku Klux Klan. Such groups were targeted for vandalism to churches, temples, and synagogues, and the wearing of masks and hoods. Later, in the 1960s and 1970s, the U.S. Department of Justice prosecuted some hate-motivated criminal offenses under federal civil rights statutes.

418. Ryken Grattet & Valerie Jenness, *Examining the Boundaries of Hate Crime Law: Disabilities and the "Dilemma of Difference"*, 91 J. CRIM. L. & CRIMINOLOGY 653, 658-59 (2001) ("In the last two decades almost every state in the United States has adopted at least one hate crime statute that simultaneously recognizes, defines, and responds to discriminatory violence.").

419. See id. at 658-59 ("More importantly ... it is clear that the law has become the primary institution charged with defining and curbing hate or bias motivated violence.").

Across the state and federal jurisdictions, hate crime statutes vary widely in their precise wording. "[D]espite their wording and content, criminal hate crime statutes are laws that criminalize, or further criminalize, activities motivated by bias toward individuals or groups because of their real or imagined characteristics." These laws generally provide an explicit "list of protected social statuses, such as race, religion, ethnicity, sexual orientation, gender, disabilities, etc." Although bias crime statutes exist at both the state and federal level, "[t]he federal approach to punishing bias-motivated crimes is more limited than the state approach." Both statutory schemes have "adopted penalty enhancement statutes that increase penalties" for bias crime violations. Initially, bias crime statutes caused a good deal of controversy regarding the constitutionality of their penalty enhancement provisions. One argument advanced, for example, was that the law represented a new kind of "thought police" which punished mere ideas or opinions. However, "such questions have now been largely resolved ... [and] ... [i]n recent years, a consensus has emerged among jurists that hate crime laws are indeed constitutional." Although federal prosecutions of bias-crimes have been carried out largely under the various civil rights statutes, there are two federal statutes that specifically attack bias crimes. Section 245 prohibits bias-motivated interference with federally

Gary M. Felder, United Against Hate, 80 Mich. B.J. 58, 58-59 (2001). Green and Felder state that "the simple truth about hate crimes is that each offense victimizes not one victim but many. A hate crime victimizes not only the immediate target but every member of the group that the immediate target represents." Id. at 59. Likening a violent hate crime to a virus, they contend that hate crimes produce "'quick spreading feelings of terror and loathing across an entire community[,]’" exacting a significant toll on other members of the targeted group. Id. (quoting Bureau of Justice Assistance: A Policymaker’s Guide to Hate Crimes x (1997)).

Though the federal and state methods overlap in some respect, two features of the federal approach restrict its range of application. First, federal law prohibits a narrower range of conduct than do most state bias crimes laws. In order to be punishable under federal law, bias-motivated conduct must either constitute a federal crime or interfere with a federally protected right or activity.... In most states, however, hate crimes encompass a wider range of criminal conduct. In some states any crime may be punished as a hate crime if bias motivated the criminal conduct. Second, federal law, particularly civil rights law, protects against fewer types of discrimination than do many state laws. Most federal civil rights laws do not cover crimes motivated by gender, sexual orientation, or disability, while many states do.

Id.

421. Garrett & Jenness, supra note 418, at 666 ("First, the law provides a new state policy action, by either creating a new criminal category, altering an existing law, or enhancing penalties for select extant crimes when they are committed for bias reasons.").

422. Id. ("These elements of the definition of hate crime law capture the spirit and essence of hate crime legislation designed to punish bias-motivated conduct.").


424. Hate Is Not Speech, supra note 420, at 1314.

425. Phillips & Grattet, supra note 417, at 575 ("Clearly, hate crime laws generated a significant constitutional debate. The central constitutional issues regarding speech, due process, and equal protection presented perplexing questions upon which reasonable people could and did, disagree.").
protected activities,427 while section 3631,428 "its housing rights counterpart,"429 protects against "violence and intimidation directed at individuals in their homes."430

The hate crime paradigm is a particularly appropriate and revealing lens through which to view the most egregious and racialized predatory lending practices. This is true because hate crime statutes are an accomplished and established fact of modern American society reflecting a strong national public policy against violent crime targeted at victims on the basis of race.431 In that context, the theft of home equity value, which frequently represents a family’s largest economic asset, from homeowners who have been targeted on the basis of their race seems a particularly good subject for such a regulatory paradigm.

By way of analogy if a company sent its agents into minority communities to seek out the oldest and most established homeowners in order to rob them of their life savings at gunpoint, society would have no problem calling that theft and punishing it as a hate crime. A similar analogy has been used by United States Senator Debbie Stabenow from Michigan to describe the problem of predatory lending:

If a gang of swindlers had targeted a neighborhood and preyed on widows, retirees or the poor—stealing their life’s savings—we’d send in the police to both catch the crooks and warn potential victims to be on the lookout. But when financial institutions do the same thing with predatory lending tactics—wiping out people’s home equity and saddling them with enormous debt—we are often powerless to intervene. The time has come to end these practices ... that while presently legal, are clearly unethical.432

Despite being a practical alternative, there are three threshold problems in applying the hate crime paradigm to reverse redlining or racialized predatory

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Such activities include, without limitation, "voting, ... participating in or enjoying any benefit ... provided or administered by the United States ... applying for or enjoying employment by any agency of the United States serving or attending upon any court [as a] grand or petit jury or enrolling in or attending any public school or public college...traveling in or using any facility of interstate commerce ... [or] enjoying the [services of a place of public accommodation]."

Id. 427. Wang, supra note 423, at 1401.
428. 42 U.S.C. § 3631 (2000). This provision explicitly proscribes “housing related violence on the basis of race, color, religion, sex, handicap, familial status, and national origin[,]” protecting all individuals in and at all stages of the housing transaction. See Green & Felder, supra note 420, at 62. About this provision, Green and Felder note that “violence usually prosecuted under this section includes cross-burnings, firebombings, arsons, gunshots, rock-throwing, or vandalism.” Id.
429. Wang, supra note 423, at 1401.
430. Id. at 1402.
431. See generally Sara Sun Beale, Federalizing Hate Crime: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement, 80 B.U. L. Rev. 1227 (2000) (arguing for the adoption of a federal hate crime law because the many state hate crime laws are not enough protection to victims); David G. Brathwaite, Note, Combating Hate Crimes: The Use of Civil Alternatives to Criminal Prosecutions, 6 B.U. PUB. INT. L.J. 243, 244, 250 (1996) (arguing that reported hate crimes are on the rise and most states have hate crime statutes).
lending. First, traditionally hate crime law has focused on racially motivated "violence" rather than economic exploitation. Second, there is an absence of an underlying "crime" for the bias crimes penalty enhancement to attach. Finally, there is an absence of traditional "bias motivation," which is generally required in all such statutes.

a. Physical violence v economic exploitation

Current hate crime legislation focuses on bias motivated violence. This focus was a response to what was perceived at the time as a significant increase in the incidence of violent physical assaults on persons and property based on race or other protected classes. Nonetheless, there are several reasons why these statutes can be applied to economic exploitation.

The legislative histories of these statutes reveal that the authors were attempting to address the problems they saw in front of them. There is no evidence that any of the state or federal legislatures even considered, much less expressly rejected, the idea that hate crimes should be limited simply to acts of violence rather than also encompassing acts of bias motivated economic exploitation. Violent conduct was simply the easiest bias motivated target to hit. There is also no conceptual limiting principle restricting the reach of hate crime statutes to only violent conduct. In addition, the definition of what constitutes a hate crime is currently undergoing considerable expansion in the courts, which clearly indicates that the boundaries are not fixed. Moreover, there does not appear to be an overarching organizing principle behind these laws that would suggest that they are limited to acts of violence.

Most importantly, just as the initial wave of hate crime legislation came in response to a perception of an epidemic of bias motivated violent assaults, America is now witnessing a similar epidemic of bias motivated economic assaults directed at racial minorities in the form of reverse redlining or racialized predatory lending. As a consequence, in recognition of the obvious, the current epidemic of economic exploitation should receive the same response as the first, i.e., bias motivated legislation designed to punish, deter, and educate the victimizers.


In response to what most experts agree was an increase in hate crimes during the 1980s and early 1990s, hate crime legislation became the hot topic of debate and resulted in most states passing some form of legislation to attack hate crimes. Tragic, intolerable stories such as those of Jim Byrd Jr., Matthew Shepard, and Marc Lepine helped nationalize the hate crime issue and strengthen the push for legislation.

Id.

434. See Phillips & Grattet, supra note 417 at 582-84. Phillips and Grattet note that while hate crime cases were limited to a narrow set of cases, mainly those that were generally more likely to produce success, over time, the type of case that could be brought under the hate crime rubric expanded to include "property damage cases...and...cases revolving around harassment and intimidation." Id. at 582.
Alternatively, it is also possible to think of economic exploitation as a type of violence—economic violence. The modern dictionary defines the word “violence” in the following manner: “a strong or powerful force”; “involving an unlawful exercise or exhibition of force”; and “having a marked or powerful effect.” Accordingly, even within the confines of a statute that speaks specifically of “acts of violence,” economic violence is not automatically excluded.

In light of these reasons, it is reasonable to conclude that to the extent that acts of economic exploitation create similar social harms as acts of physical violence, there is no ideological impediment to treating them similarly within the context of bias regulation. In fact, a persuasive case can be made that had the legislators considered the option of including economic exploitation within the original purview of hate crime legislation, it is likely that they would have allowed for it under the appropriate conditions. This claim is even more appropriate in light of the extent to which courts have already begun to push the definitional envelope of what constitutes a hate crime, an expansion that included economic exploitation would be consistent with a reasonable and natural “elaboration and domain expansion.”

b. Underlying crime for enhancement

This requirement does not present a problem either. There are two ways to satisfy this requirement. Either the creation of a new economic hate crime for racialized predatory lending, or a more robust enforcement of existing and applicable criminal sanctions.

Of course, the easiest and most efficient way to supply the necessary criminal act for sentencing enhancement under hate crime laws is to simply establish a new category of hate crime called, “economic hate crime.” However, one need not go that far in order to satisfy the underlying crime requirement.

Currently the punishment for breach of fair lending laws is generally limited to rescission, reformation, refund, and minimal money damages. However, although it is little noted and almost never enforced, TILA does contain a criminal sanction

436. See Phillips & Grattet, supra note 417, at 585. In explaining the evolution of the concept of hate crimes over time, the authors point out:

First, the judicial conception of hate crimes has become more elaborate and complex than the handful of signifiers contained in the statutes would seem to imply. In other words, today one would not be able to understand what exactly hate crime laws cover by looking at the statutes alone. Additional layers of meaning have been added as judges have worked to spell out the precise legal definition of hate crime and delineate the boundaries of what is included in the concept and what is not. Second, and perhaps more surprising, courts have recently expanded the scope of what they recognize as hate crime. Thus, once the core of the concept was largely secured from challenges, courts began to apply the concept to novel circumstances. Both these characteristics, which we have termed construct elaboration and domain expansion, are indicative of a concept that is gaining acceptance, or settling.

Id.
437. Id.
as well.\textsuperscript{438} Although the amount of time available under TILA's penal sanction, at only one year, is relatively low, the symbolic effect of sending violators of TILA to jail under appropriate circumstances could be very significant.\textsuperscript{439} Vigorous prosecution of racialized predatory lenders under this criminal provision of TILA could easily provide a criminal predicate upon which hate crime enhancement penalties could attach.

In addition, HOEPA gives the Board rather sweeping powers to regulate abusive loans, beyond the specific interest rate and price triggers. The statute specifically provides that "[t]he Board, by regulation or order shall prohibit acts or practices in connection with— (A) mortgage loans that the Board finds to be unfair, deceptive, or designed to evade the provisions of this section, and (B) refinancing of mortgage loans that the Board finds to be associated with abusive lending practices or that are otherwise not in the interest of the borrower."\textsuperscript{440} As a consequence, the Board has the authority to police abusive loans well beyond the limited scope of the HOEPA triggers.

The Board could exercise this authority to police any loan that it considers to be abusive, and to impose the Act's penal sanction on the most exploitive lenders. In addition, it is also possible to more vigorously utilize the existing criminal fraud laws in order to find abusive lenders subject to criminal convictions and sanctions. The concept of criminal fraud is not subject to easy or precise definition\textsuperscript{441} as it has undergone considerable recent development in new areas.\textsuperscript{442} However, this expansion has not been without its dissenters. Some judges believe that fraud does not require a precise definition and that the current expansion of the concept has yet to sweep the field.\textsuperscript{443}

\textsuperscript{438} See 15 U.S.C. § 1611 (2000). Under TILA, criminal liability for willful and knowing violations requires that "[w]hoever willfully and knowingly ... or ... otherwise fails to comply with any requirement imposed under this subchapter, shall be fined not more than $5,000 or imprisoned not more than one year, or both." \textit{Id.} See also Porter v. Household Fin. Corp. of Columbus, 385 F. Supp. 336, 342 (S.D. Ohio 1974) ("In fact, the Truth-in-Lending Act has a separate penal provision imposing criminal liability for willful and knowing violations."). See also Turner v. Beneficial Corp., 242 F.3d 1023, 1025 (11th Cir. 2001) ("In addition to allowing for actual damages, TILA provides three other remedies for violations of it provisions."). The court explained: "First TILA empowers the Federal Trade Commission as its overall enforcement agency, 15 U.S.C. § 1607(c), and provides other federal agencies with enforcement authority over specific categories of lenders.... Second, TILA imposes criminal liability on persons who willfully and knowingly violate the statute. 15 U.S.C. § 1611." \textit{Id.}

\textsuperscript{439} To date no reported cases have been found in which this penal sanction has actually been imposed.


\textsuperscript{441} See Podgor, \textit{supra} note 405, at 730.

\textsuperscript{442} See \textit{id.} at 732-33 (noting that "executive priorities ... present a clear voice in the development of fraud[,]" expanding fraud into "the areas of health care fraud and financial institution fraud"). Beyond executive expansion of fraud and judicial interpretations, which tends to "affect[] the amount of flexibility under a fraud statute[,]" Podgor points out that "[i]n addition to merely using fraud statutes as a tool for prosecuting criminality, prosecutors have also generated new theories of fraud." \textit{Id.}

\textsuperscript{443} See \textit{id.} at 739-40. In this regard, the author states:

Although judges differ on whether a narrow or broad approach should be given to a fraud statute, there appears to be an acceptance of an "I know it when I see it" approach. Judge Holmes of the Fifth Circuit stated that "the law does not define fraud; ... it is as old as falsehood as versatile
It is clear that the concept of criminal fraud is quite flexible and responsive to policy priorities. It is also equally clear that many of the most abusive practices commonly found in racialized predatory lending could rather easily be accommodated, even under the most traditional definitions of criminal fraud. Accordingly, many of the abuses of racialized predatory lending could be prosecuted as acts of criminal fraud. All that is required is the political will to do so by prosecutors.

c. Bias motivation

The bias motivation requirement also does not present a problem. There are two primary standards by which to determine whether an actor meets the hate crime bias motivation requirement. A narrow standard has been adopted as the majority view. The narrow standard provides that “in order to constitute a hate crime, the selection of a victim must result from the defendant’s hate or racial animus” toward the victim. In a compelling and well reasoned article, Professor Lu-in Wang describes the second, broader standard as a “discriminatory selection or discriminatory victim selection model.” This broader standard is helpful to overcome the final threshold requirement.

Professor Wang describes this model as being based on “a perpetrator” who selects his “victims on the basis of their social group membership not because he consciously bears any ill will toward that group.” The key to her insightful analysis requires an understanding of her theory of what constitutes an “opportunistic bias crime.” She argues that the problem with the current animus based standard is that it “encompasses only ‘prototypical’ bias crime cases, in which the perpetrator appears to have been motivated solely or primarily by hostility or hatred toward the victims group.” Wang claims that “[t]his approach does not account for the possibility of more mundane, opportunistic motivations, such as the

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444. See Restatement of Restitution § 8 (1937). The Restatement of Restitution defines criminal fraud as having the following elements: “(a) misrepresentation known to be such, ..., or (b) concealment, or (c) non-disclosure, where it is not privileged ... in order to induce the latter to enter into or refrain from entering into a transaction.” Id.
446. Id. at 1406.
448. Wang, supra note 423, at 1400.
desire to obtain material rewards." Thus, opportunistic bias crimes are those which "contribute to and take advantage of the social vulnerability of particular groups." From a quantitative perspective, she argues that this model "requires only that the victim's social group status was a significant or substantial factor in the defendant's selection."

Professor Wang's insight into bias crimes helps in understanding that in order to protect socially vulnerable groups from victimization, it is necessary but not sufficient to focus only on stereotypical "hard-core, animus-driven individuals whose violent acts are deviant, irrational, and intended solely to inflict harm on a member of the 'target group.'" As she points out:

Social scientists have shown ... that when society identifies a particular group as "suitable" or "acceptable" victims, a perpetrator need not "hate" that group in order to have reason to target that group for crime. In fact, committing crimes against members of such groups may be conducive to the perpetrator's obtaining a variety of benefits—from social or psychological rewards to material or monetary gains.

In seeking to gain social, psychological, or monetary rewards by targeting members of a socially vulnerable group, Professor Wang's "Calculating Discriminator" appears to be engaging in precisely the sort of group status production described earlier. The perpetrator gains status by appropriating it from the group against whom he discriminates. By incorporating Professor Lopez's observations regarding institutionalized racism, we can begin to appreciate how

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449. Id. at 1400 ("It would not apply, for example, to cases in which the perpetrator wanted to find an 'easy target' for a robbery or vandalism and determined that a member of a vulnerable social group would readily serve that purpose.").

450. Id. Wang argues that as a matter of policy, bias crime laws should cover these non-animus based crimes because they "create the same harmful effects and often are prompted by the same motivations as the prototypical crimes that we attribute to 'hate.'" Id.

451. Id. at 1407. In elaborating on how this standard operates, Wang explained:

The discriminatory victim selection model would apply, for example, in cases where the victim's protected characteristic was a factor considered by a "rational" criminal who calculated that targeting such a person would make the crime "easier" or more profitable to commit. This type of perpetrator selects victims on the basis of their social group membership not because he consciously bears any ill will toward that group, but because he seeks to maximize the "benefits" relative to the "costs" of criminal conduct in which he already was planning to engage. This "calculating" discriminator uses the victim's social group status merely as a "proxy" for other information relevant to his decision making process in committing the crime—in other words, this perpetrator "economize[s on his information costs] by using stereotypes and playing the odds.


452. Wang, supra note 423, at 1413.

453. Id.
much more insidious and harmful such calculating discrimination can be when practiced and promoted across time by institutionalized predatory lending practices.\textsuperscript{454}

Once members of a particular socially vulnerable group are “marked ... as suitable victims,” they can and will be victimized by members of the dominant group, because their victimization advances the personal and group interests of the dominant group.\textsuperscript{455} Moreover, such victimization tends to also create what Professor Wang calls a vicious “feedback loop.” This is because the socially vulnerable groups’ vulnerability that marks them for victimization is “tied to pre-existing harms caused by past discrimination,” and “the bias crime perpetrator perpetuates the view that the group is suitable for use by other perpetrators.”\textsuperscript{456} In fact, it not only continues their perception as “suitable” for victimization, it also communicates to the other perpetrators that the group can be successfully exploited for both personal and group status production. It also sends the same signal to the victims, who no doubt understand and perceive their vulnerability far more acutely than even the most “calculating discriminator.” The foreseeable result among all of the members of the socially vulnerable group is a sense of fear, intimidation, dread, and a desire to avoid contact with the perpetrators. Although a broader standard, this is precisely the harm that hate crime legislation was designed to address.

d. Hate crime paradigm accounts for the unique dynamic of predatory lending

Looking back to the earlier discussion regarding spoiled identities and societal racial stigmata, one can begin to appreciate how racial minorities generally and Blacks in particular have been marked as suitable victims for not only physical violence but also economic exploitation.\textsuperscript{457} They are, by any reasonable measure, “particularly susceptible to victimization” in the form of economic exploitation regarding complex mortgage transactions. And since they are in fact victimized in this way, producing significant rewards to their perpetrators personally, financially and in terms of group status production, they seem to be caught in what Professor Wang called a “feedback loop.” This feedback loop justifies the economic

\textsuperscript{454} See Lopez, supra note 21, at 1843-44 (noting that this type of racial discrimination is difficult to see and eradicate because it: “remain[s] shrouded from observation precisely because they draw on institution, the received grammars on which all persons rely”).

\textsuperscript{455} Wang, supra note 423, at 1417 Professor Wang points out that such rewards include “excitement, the recognition of others, social bonding with peers, or even money.” Id. at 1416.

\textsuperscript{456} Id. at 1417 (citing Andrew E. Taslitz, Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong, 40 B.C. L. REV 739, 758-65 (1999)).

\textsuperscript{457} See id. at 1420. Professor Wang argues that under the federal sentencing guidelines, the concept of an “opportunistic discriminatory victim selection” process is incorporated in its “vulnerable victim provision,” which authorizes the sentencing court to adjust a defendant’s sentence upward if “the defendant knew or should have known that a victim of the offense was a vulnerable victim.” Id. (citing U.S. SENTENCING COMMISSION, GUIDELINES MANUAL § 3A1.1(b)(1) (2000)). Wang goes on to point out that “the victims’ social group status might sometimes warrant an upward adjustment. Appropriate cases might include those where members of a particular ethnic group were particularly susceptible to victimization due to lack of education, extreme insanity, superstition, or lack of familiarity with United States business practices or law enforcement....” Id. at 1426.
victimization of Blacks through racialized predatory lending based on their spoiled social identities and historically accumulated racial stigmata. Since that victimization is so profitable, on all levels, it perpetuates their suitability for victimization and encourages others to target them as well. This dynamic creates a self-perpetuating cycle of economic victimization based on socially vulnerable group membership. Accordingly the only hope of breaking this vicious cycle lies in a vigorous intervention by the law, which appreciates the nature of its dynamics and attacks it at its core.

Current and proposed legislative remedies for predatory lending can potentially do an adequate job of compensating individual victims of racialized predatory lending. But because the current system neither understands nor address the real dynamics fueling this exploitation, it cannot effectively put an end to the widespread use of these practices. Something more than mere compensation to the victims is needed. A truly effective remedy not only bails out the water, but it also stops up the hole in the boat.

Punishing egregious racialized predatory lending through state or federal hate crime statutes could very well stop up the hole in the predatory lending boat. Moreover, it would send a very clear and powerful message to the business and consuming communities that these racialized, abusive, exploitive, and all too often, devastating lending practices are being taken seriously. Like the recent corporate governance scandals involving such now infamous names as Enron, WorldCom, and Tyco, the prospect of jail time being imposed on business executives that defraud, exploit, and abuse the public gets businesses' attention and restores the public's faith in the market system. As eloquently summed up by economist Larry Kudlow, "nothing concentrates the corporate mind more than the vigorous enforcement of white-collar crime laws and prospect of personal criminal sanctions." This is even more true where the perpetrator is not only branded as a criminal, but also bears all the social approbation that goes along with being convicted of a hate crime.

A paradigm which allows, under appropriate circumstances, the punishment of racialized predatory lending as a criminal offense and an economic hate crime could provide the necessary deterrent effect that the current laws lack. Faced with the prospect of personal criminal liability, many mortgage brokers, home improvement contractors, and loan officers may well be motivated for the first time to restrain themselves from targeting racial minorities for the worst forms of predatory lending. The existing enforcement regimes which allow for rescission, reformation, refund, and money damages could be significantly enhanced by the vigorous enforcement of TILA's criminal sanction and the statutory enhancement of the sentence by virtue of being labeled an economic hate crime. The potential reach of the concept of economic hate crimes is difficult to predict at this distance. However, it may well be a significant theoretical step forward because it recognizes that racialized abuse and exploitation today is not limited to physical attacks on an individual's person. Instead, it recognizes that such intentional race based victimization may just as well take the form of economic abuse. Our legal system needs to be cognizant of this evolution of abuse and reflect in enforcement regimes a similarly evolving social

458. Larry Kudlow, Kudlow & Kramer (MSNBC broadcast, Nov. 19, 2002) (referring to the Enron and WorldCom fraud scandals).
sense of punishment and deterrence. It must also adopt punishments that are truly commensurate with the harms, both to individual victims as well as whole communities.

V CONCLUSION

It is a sad and telling fact that in twenty-first century America, access to credit is, as it has been since our founding, a function of the color of skin rather than the content of one's wallet. In light of the enormous profits generated, it is unlikely that the predatory lending market is simply going to go away. Predatory lending has been a source of enormous profits to its perpetrators. Although its perpetrators are benefitting, predatory lending causes tremendous heartache to its victims. This is especially true for members of racial minorities who have been the victims of intentional racialized targeting. The devastation to fragile minority communities and individual families with only a tenuous hold on upward economic mobility is difficult to overstate.

However, these victims have been almost completely overlooked in both the discussions regarding the problem of predatory lending and the suggestions for legislative and regulatory reform. Because of this oversight, "[p]redatory lending threatens to reverse the progress that has been made in increasing homeownership rates among minority and lower income families .... Rather than strengthening neighborhoods by providing needed credit based on this accumulated wealth, predatory lenders have contributed to the further deterioration of neighborhoods by stripping homeowners of their equity and overcharging those who can least afford it, leading to foreclosure and vacant houses." It is indeed ironic and counterproductive for our nation, as a matter of public policy, to be pouring million of dollars each year into revitalizing depressed minority neighborhoods and encouraging minorities to participate in the housing market while simultaneously allowing racist predatory lending practices. Fortunately, it is now understood that the motivation behind such racialized exploitation is more than simple economics and that racialized predatory lending is a contemporary manifestation of our long national nightmare of racial stigmata.

459. See Liz Pulliam, 'Sub-Prime Lenders Hurt in Credit Crunch, L.A. TIMES, Oct. 12, 1998, at C1 (quoting an industry analyst as saying that "[t]he sub-prime market is not going to go away.... It's too profitable.").

460. ACORN REPORT, supra note 102, at 3-4. The report notes:

[Higher cost subprime loans are replacing rather than supplementing lower cost "A" credit, even for borrowers who could and should qualify for A loans. When buyers who should be eligible for loans at good interest rates are instead steered towards subprime lenders, they end up paying hundreds of dollars more each month than they would with a prime loan, and the higher interest rates and added fees deprive these homeowners of a fair opportunity to build equity. In the worst cases, the high interest and fees are only the top of a predatory lending iceberg in which the loan also contains harmful terms, and the combination of these factors increase the likelihood of foreclosure.

Id. at 3.
Moreover, it is also understood that reverse redlining and racialized predatory lending is not necessarily caused by a few bad actors who are motivated by feelings of personal racism against minorities. Instead, such racial exploitation is a function of institutional racism with deep roots in America's cultural and economic history. This institutional dynamic is fueled, both consciously and unconsciously, by the psychological desire of Whites to increase their sense of the value of both personal and group white status by lowering the status of Blacks.

As a consequence, society is compelled to conclude that the current legislative remedial approach cannot fully solve this problem because it neither recognizes nor attacks the root causes. Like weeds in a garden, institutionalized racialized predatory lending cannot be controlled by simply trimming the leaves. Instead, it must be pulled out root and branch. It must be attacked at its core or it simply will find another path of expression. Professor Lopez was right when he observed that an understanding of the dynamics of institutional racism can "engender despair," because so deeply rooted a problem can seem understandably "difficult to eradicate."

Understood in this institutional light, it is unrealistic in the extreme to expect that predatory lenders will cleanse themselves of this racialized taint. By virtue of being institutionalized over so long a time, racialized economic exploitation of Blacks in the mortgage market has taken on such a normative character that predatory lenders have probably long since ceased to recognize it. This situation is reminiscent of the old saying that counsels that the last thing the fish notice is the water in which they live.

According to a well-known philosophical maxim, the last thing a fish notices is the water. Things that are unproblematic seem natural and tend to go unnoticed. Fish take the water they swim in for granted, just as European Americans take their race as a given, as normal. White Americans may face difficulties in life—problems having to do money, religion, or family—but race is not one of them. White Americans can be sanguine about racial matters because their race has not been (until recently) visible to

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461. See Lopez, supra note 21, at 1827 (explaining how institutional racism "describes how individual actors often unintentionally engage in racial discrimination by relying on unexamined background understandings ... [which] proceeds almost automatically.").

462. See id. at 1843. Lopez elaborates on how an institutional analysis produces feelings of despair. Id. The despair, Lopez explains, is the product of our realization that bigotry and racism are "endemic, difficult to eradicate, and, above all, effectively misunderstood and misaddressed by current equal protection law." Id. In addition to despair, Lopez believes that an institutional understanding of racism can engender frustration because, for instance, it "exculpates social actors and society in general by locating harm to minorities in hidden cognitive dynamics." Id.

463. Id.

464. See id. Lopez explains:

Script and path racism remain shrouded from observation precisely because they draw on institutions, the received social grammars on which all persons rely. Racial institutions and institutionalized racial practices form part of the world-known-in-common; they constitute the reality that we have socially constructed.

Id.
the society in which they live. They cannot see how this society produces advantages for them because these benefits seem so natural that they are taken for granted, experienced as wholly legitimate. They literally do not see how race permeates America’s institutions—the very rules of the game—and its distribution of opportunities and wealth.

Accordingly, the ultimate solutions to reverse redlining and racialized predatory lending must be as bold, creative, energetic, and nimble as the scourge they hope to eliminate. Since the problem lies at the institutional core of the subprime and predatory lending industry, the solutions must similarly attack those core understandings and socially constructed realities. Such remedies require that the problem is first honestly seen in its full legal, historical, social, and cultural context. Only by doing so can society, perhaps for the first time, begin to conceive of remedies to this problem with the wisdom, insight, perspective, and solutions that are truly commensurate with its scope and significance. This is the only way to create a remedial paradigm that has a realistic prospect of solving the problem.

It is critically important to begin to appreciate the sedimentary dynamic, the institutional nature, and the profound intergenerational and long-term personal, community, and national consequences of economic racist business practices such as racialized predatory lending. Only by doing so can society begin to take the problem of racialized predatory lending as seriously as it demands. Perhaps in this way one can begin to think outside the box, and consider new remedies or the application of old ones to newly understood problems, such as the concept of an economic hate crime. Perhaps this is a crime whose time has come. At the very least, just discussing the possibility of recognizing corporate criminal liability for committing an “economic hate crime” enlarges and enriches the discussion of the causes and cures for our persistent economic racial inequalities. This discussion will force us to acknowledge the racist institutional water all around us and “recognize that racism is lodged in the structure of society, [and] that it permeates the workings of [all of our] economic, political, educational, and legal institutions.”

465. MICHAEL K. BROWN ET AL., WHITENING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 34 (2003) (footnote omitted). “Failure to understand that they take whites’ racial location for granted leads [whites] to ignore the ways in which race loads the dice in [their] favor ... while simultaneously restricting African Americans’ access to the gaming table. White privilege, like the water that sustains fish, is invisible in their analysis.” Id. at 35.

466. See Lopez, supra note 21, at 1843-44.

It is necessary, or at least appropriate, to model some racism in the relatively dry language of institutionalism because the racism of institutions elicits barely any attention, and still less emotion and uproar. It exhibits no fiery hatred, reveals no easily singled out and easily condemned culprit or decision, stimulates no fury or moment of truth. There is only the steady, unremarkable progression of reality, the day-to-day doldrums of racial discrimination. The language that explains the tedious creep of institutional racism cannot be suffused with incendiary imagery, for such language would not accurately reflect the social processes described. The heat of moral condemnation warranted by the inequitable results of institutional racism misdescribes its monotonous, unquestioned, sedimentary progress.

Id. 467. BROWN, supra note 465, at 35-36. Brown continues, “Without that recognition, however,
By reconceptualizing reverse redlining and racialized predatory lending as a form of institutionalized racist theft, subject to appropriate civil and criminal sanctions, a clear and unequivocal message can be sent to the business and corporate community. This message should be that, in twenty-first century America, deliberate racially targeted economic exploitation and abuse of one group of consumers is totally unacceptable in any form. And, as a consequence, the law can and will aggressively pursue and severely punish such fundamentally racist conduct, whether the harm is physical or economic, and whether the weapon of choice is a fist, a torch, or a briefcase.