

GENDER, MATERNITY LEAVE, AND HOME FINANCING:
A CRITICAL ANALYSIS OF MORTGAGE LENDING DISCRIMINATION AGAINST
PREGNANT WOMEN

MAUREEN R. ST. CYR*

INTRODUCTION	109
I. WHAT IS THE PROBLEM AND WHY ARE WE SEEING IT NOW?	113
A. Mortgage Discrimination Against Expectant Mothers Today.....	113
B. Discriminatory Denial of Loans In the Wake of the Credit Crisis	118
C. Loan Underwriting and the Concept of Creditworthiness.....	119
II. THE STATUTORY FRAMEWORK: A HISTORICAL OVERVIEW.....	122
A. The Fair Housing Act.....	124
1. Sex Added as Protected Class.....	125
2. Familial Status Added as a Protected Class	125
The Equal Credit Opportunity Act.....	126
III. “AN UNFAIR STANDARD”: EXAMINING THE LEGAL HARM BEHIND POLICIES THAT DISPROPORTIONATELY SCRUTINIZE PREGNANT WOMEN.....	127
IV. SEEKING REDRESS THROUGH LITIGATION.....	133
A. Potentially Discriminatory Practices or Policies	135
1. Simply Refusing to Lend to Pregnant Women	135
2. Requiring the Woman to Be Back at Work Prior to Closing	135
3. Family Planning Inquiries.....	136
4. Calculating Creditworthiness.....	137
5. Requiring Maternity Contracts	138
V. THE LIMITS OF ANTIDISCRIMINATION LAWS: ENTITLEMENT TO FAMILY OR PARENTAL LEAVE AND ITS IMPACT ON AN APPLICANT’S ABILITY TO QUALIFY FOR A LOAN	139
VI. CONCLUSION.....	140

INTRODUCTION

In the early 1970s, Congress held hearings on women’s access to consumer credit and heard testimony of how mortgage lenders regularly discriminated against women seeking to obtain home financing loans.¹ Witnesses presented evidence of widespread, sometimes

* J.D., 2011, University of Pennsylvania Law School; M.A., Queen’s University Belfast; A.B., Kenyon College, 2004. The author would like to thank Charles L. Nier, III, Lisa Knight, and Professor Serena Mayeri for their invaluable support and insight in preparing this article.

¹ *Economic Problems of Women: Hearings Before the J. Economic Comm.*, 93d Cong. (1973) [hereinafter

outrageous, discrimination by lenders.² The most common discriminatory practice was something called “income discounting”; that is, when a lender would devalue a woman’s income when she applied for a loan based on the assumption that women were unlikely to remain in the workforce, and therefore their income could not safely be counted on to underwrite a loan.³ Indeed, because a woman’s income was considered so unreliable, lenders would frequently request that a married couple applying for a loan provide a “baby letter” if they wished to have the woman’s income counted.⁴ A baby letter was a letter stating that a married couple was sterile or practicing birth control—and occasionally went so far as to require the couple to state that they would seek an abortion should the wife become pregnant.⁵ Steven Rhode, an advocate testifying at these hearings, commented acerbically that these practices rested on the “insulting assumption” that women “[could not] rationally plan their lives, . . . [and would] deliberately quit work . . . even if doing that would result in a foreclosure and loss of their house.”⁶

In response, Congress passed the Equal Credit Opportunity Act in 1974, which prohibits discriminating against any applicant for credit on the basis of sex or marital status.⁷ Similarly, the Fair Housing Act, as amended in 1974 and 1988, prohibits discrimination on the basis of sex or familial status (interpreted to include pregnancy status) in real estate-related transactions.⁸

Such laws would appear to make the denial of mortgage financing based on sex an anachronistic practice; yet, in the summer of 2010, the *New York Times* published a story that revealed that income discounting, and even “baby letters,” still haunt the lending industry under the guise of prudent underwriting practices. The article detailed how, in the wake of the financial crisis, mortgage lenders have tightened underwriting requirements to the extent that some lenders will deny a mortgage to a woman because she is pregnant.⁹ It focused on the story of Dr.

Hearings on Economic Problems of Women]; *Credit Discrimination: Hearings on H.R. 14856 and H.R. 14908 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 93d Cong. (1974). These hearings followed the National Commission on Consumer Finance’s report to the President and Congress, which found evidence of “widespread instances of unwarranted discrimination in the granting of credit [including mortgage credit] to women.” NAT’L COMM’N ON CONSUMER FIN., *CONSUMER CREDIT IN THE UNITED STATES* 160 (1972).

² See, e.g., *Hearings on Economic Problems of Women*, *supra* note 1, at 192 (statement of Steven Rohde, Member of Staff, Center for National Policy Review). One of the more outrageous incidences recounted by Mr. Rohde was a statement made by a Veterans Administration loan official that “[i]t is un-American to count a woman’s income,” and that the only way that particular official would support counting a woman’s income would be if she were to have a hysterectomy. *Id.*

³ *See id.*

⁴ U.S. COMM’N ON CIVIL RIGHTS, *MORTGAGE MONEY: WHO GETS IT? A CASE STUDY IN MORTGAGE LENDING DISCRIMINATION IN HARTFORD, CONNECTICUT* 23 (1974) [hereinafter *HARTFORD STUDY*]; see also Linda S. Hume, *A Suggested Analysis for Regulation of Equal Credit Opportunity*, 52 WASH. L. REV. 335, 351 (1977) (explaining that couples, out of frustration, would simply sign the baby letters to avoid the devaluation).

⁵ *Id.* Such practices appear in records dating before the U.S. Supreme Court’s 1973 holding in *Roe v. Wade*, establishing the right to abortion nationwide. 410 U.S. 113 (1973). As a result, the practice of requiring baby letters, including statements of a willingness to terminate a pregnancy, was presumably limited to those jurisdictions where abortion was legally available.

⁶ *Hearings on Economic Problems of Women*, *supra* note 1, at 192.

⁷ 15 U.S.C. § 1691(a)(1) (2006).

⁸ 42 U.S.C. § 3605 (2006).

⁹ Tara Siegel Bernard, *Need a Mortgage? Don’t Get Pregnant*, N.Y. TIMES, July 19, 2010, http://www.nytimes.com/2010/07/20/your-money/mortgages/20mortgage.html?_r=1.

Elizabeth Budde, a thirty-four-year-old oncologist from Washington state.¹⁰ In June 2010, Dr. Budde applied for a mortgage, was approved, and then immediately thereafter was denied when her mortgage lender became aware that she was on maternity leave.¹¹ Dr. Budde had applied for the mortgage based on her income,¹² and her lender sent her an email approving the loan on June 15, 2010.¹³ Dr. Budde's lender, however, sent the email documenting her approval to her work email address, which prompted an out-of-office reply message that stated she was out on maternity leave.¹⁴ The following day, she received a second email, which stated that her loan had been denied due to a lack of qualifying income.¹⁵ Specifically, the email from her lender stated that "maternity leave is classified as paid via short-term or temporary disability income," and, as a result, could not be used to qualify for a mortgage.¹⁶

On July 21, 2010, responding to the *New York Times* article, the Department of Housing and Urban Development (HUD) announced that it was initiating multiple investigations into the practices of lending institutions to determine whether those practices violate the Fair Housing Act (FHA). In a press release announcing its investigation, HUD expressed its belief that denying a mortgage to an expectant mother or parent on parental leave is illegal discrimination "if the borrower can demonstrate that she intends to return to work and can otherwise continue to meet the income requirements to qualify for the loan."¹⁷ HUD noted that it would be working with Fannie Mae and Freddie Mac to determine whether their underwriting guidelines violate the Fair Housing Act.¹⁸ Then, on June 1, 2011, HUD announced that a settlement agreement had been reached with Cornerstone Mortgage Company (the lender in Dr. Budde's case).¹⁹ At the same time, HUD issued a charge of discrimination against Mortgage Guaranty Insurance Corp. (MGIC), along with two individual defendants, alleging that the defendants had violated the FHA by refused to approve a married couple's application for mortgage insurance until the wife had returned to work from maternity leave.²⁰ The complainant, Carly Neals, elected to pursue enforcement through a civil action and, on July 5, 2011, the Attorney General filed a complaint in the Western District of Pennsylvania, pursuant to 42 U.S.C. § 3612(o)(1).²¹ Advocacy groups have also spoken out against lending discrimination based on pregnancy discrimination. In

¹⁰ *Id.*

¹¹ *Id.*

¹² Dr. Budde had applied for the mortgage based on her income alone because she had strong credit and because her husband was a graduate student with little income. *Id.*

¹³ *Id.*

¹⁴ Bernard, *supra* note 9.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Press Release, HUD, HUD to Investigate Mortgage Lenders Who Discriminate Against Expectant Mothers and New Parents (July 21, 2010) [hereinafter July 2010 HUD Press Release] (quoting HUD Secretary Shaun Donovan), available at http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2010/HUDNo.10-158.

¹⁸ *Id.*

¹⁹ Press Release, HUD, HUD Acts Against Pregnancy Discrimination in Home Mortgages (June 1, 2011) [hereinafter June 2011 HUD Press Release], available at http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2011/HUDNo.11-108.

²⁰ *Id.*; see also Charge of Discrimination at 4, U.S. Dep't of Hous. & Urb. Dev. v. Mortg. Guar. Ins. Corp., FHEO Case No. 03-10-0530-8 (May 31, 2011).

²¹ United States v. Mortg. Guar. Ins. Corp., No. 2:05-mc-02023 (W.D. Pa. filed July 5, 2011).

particular, a coalition of advocacy groups, including the American Civil Liberties Union, the Center for Responsible Lending, and the National Partnership for Women and Families, has sent letters to Fannie Mae and Freddie Mac urging them to address the issue through written clarification of their underwriting guidelines.²² Vice President Biden has also condemned lending discrimination based on pregnancy, stating, “[d]enying a mortgage to people just because they’re having a baby is flat wrong.”²³

Yet, overall, this is an issue that has received relatively scant attention. This Article seeks to fill a gap in the scholarship through a critical examination of the interaction of antidiscrimination principles and mortgage underwriting principles as they relate to pregnancy. The basic goal of antidiscrimination laws is to eradicate discrimination based on irrelevant characteristics and “archaic and stereotypic notions.”²⁴ The basic goal of underwriting in mortgage lending is to properly assess the risk involved in the making of a loan based on the borrower’s creditworthiness. These two goals need not clash; however, given the current economic situation, lenders have more frequently and more openly viewed pregnancy as a bar to establishing creditworthiness. Lenders have relied on “stereotyped assumptions about women’s commitment to returning to work following childbirth.”²⁵ Lenders have also applied income verification requirements in the underwriting process in a manner that discriminates against pregnant women or parents taking parental leave²⁶ by relying upon the “temporarily lower income that women would receive during their leave, rather than their regular salary, as a basis for determining the borrower’s ability to pay.”²⁷ These practices violate the Fair Housing Act and Equal Credit Opportunity Act’s mandates against discrimination on the basis of sex, familial status, or marital status.²⁸

The revival of sex discrimination in mortgage lending described above has clear implications for gender equality in the United States. This Article argues that discrimination against women and families based on pregnancy or familial status is sex discrimination, and should be understood as such—and not as prudent underwriting, justified by economic realities. In order to most clearly articulate this position, it will place the problem in the context of the discourse of feminist legal theory originating out of employment discrimination, and in particular, the emerging field of family responsibilities discrimination.

Part I will describe the problem in detail and place it in the context of the recent subprime mortgage crisis and subsequent foreclosure crisis. As a result of the foreclosure crisis,

²² Letter from the American Civil Liberties Union, A Better Balance: The Work and Family Legal Center, Center for Responsible Lending; Moms Rising, National Fair Housing Alliance, National Partnership for Women and Families & National Women’s Law Center to Karen R. Pallotta, Exec. Vice President, Single Family Portfolio Mgmt., Fannie Mae (Oct. 13, 2010), available at <http://www.aclu.org/womens-rights/aclu-letter-fannie-mae-regarding-pregnancy-discrimination-mortgages>. The coalition sent an identical letter to Anthony Renzi, Exec. Vice President, Single-Family Portfolio Mgmt., Freddie Mac, (Oct. 13, 2010), available at <http://www.aclu.org/womens-rights/aclu-letter-freddie-mac-regarding-pregnancy-discrimination-mortgages> [hereinafter, collectively, Letter to Fannie Mae and Freddie Mac].

²³ July 2010 HUD Press Release, *supra* note 17.

²⁴ See *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

²⁵ Letter to Fannie Mae and Freddie Mac, *supra* note 22, at 2.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1) (2006); Fair Housing Act, 42 U.S.C. §§ 3601-05 (2006).

lenders have become more cautious in their underwriting. Underwriting principles rely on a concept of “creditworthiness” in order to determine whether an applicant qualifies for a loan. Creditworthiness is determined by analyzing an applicant’s financial resources to assess whether that applicant is likely to be able to afford the requested loan. Part I will therefore also describe how this renewed scrutiny of applicants’ financial circumstances has led lenders to treat women who are pregnant or on temporary parental leave as suspect or likely to have a reduced income, and consequently unable to meet mortgage payments. Finally, Part I will identify specific practices that are likely to violate federal fair lending laws.

Part II will provide an overview of the federal antidiscrimination statutes that prohibit mortgage discrimination and the historical impetus for their passage. A historical synopsis of the primary fair lending laws—the Fair Housing Act and the Equal Credit Opportunity Act (ECOA)—will provide context for textual and purposivist arguments for under what circumstances, and why, these Acts forbid the practices in which lenders currently engage.

Part III will explore in more detail the circumstances in which denials of mortgage loans constitute unlawful discrimination. It will then address defenses and concerns raised by lenders who maintain that the recent denials are not discriminatory in nature. Two claims predominate. First, lenders argue that it is simply prudent underwriting to err on the safe side and not lend to pregnant women without extra assurance that they will return to work and/or be able to afford the requested loan. Second, they assert that there is no real harm in utilizing underwriting methods that explicitly rely on sex (or pregnancy) as a relevant characteristic because the worst that will happen is that a pregnant woman or a couple will have to wait a little longer to qualify for a home loan. Both of these arguments overlook the harm inherent in permitting mortgage lenders to rely on gender stereotypes in their decision-making processes. This section will argue that family responsibilities discrimination theory—developed to counter employment discrimination against workers who are also caregivers—is a useful frame for clarifying how pregnancy discrimination in the mortgage lending context operates, and why it is unlawful discrimination.

Part IV will then apply the fair lending statutes to the type of scenarios detailed above—denials of mortgage loan applications based on pregnancy or parental leave—and suggest how such claims might progress.

Finally, Part V will raise an important caveat: an applicant’s ability to qualify for a loan is conditioned on her financial status, and, importantly in this context, her entitlement to secure parental leave. Yet, despite federal requirements embodied in the Pregnancy Discrimination Act and the Family and Medical Leave Act, many workers are not entitled to leave at all, much less paid leave. This fact has significant implications for the ability of antidiscrimination laws to wholly redress problems of unequal access to mortgage credit.

I. WHAT IS THE PROBLEM AND WHY ARE WE SEEING IT NOW?

A. *Mortgage Discrimination Against Expectant Mothers Today*

Historically, sex discrimination in lending was the norm, not the exception. One commenter has noted that “[s]ex discrimination in mortgage lending [was] not nearly as difficult to detect as discrimination on the basis of race or national origin. Much of it [was] based on what lenders consider[ed] prudent and objective criteria. [Generally], sex discrimination [was] part and parcel of official bank policy.”²⁹

²⁹ HARTFORD STUDY, *supra* note 4, at 18-20.

In other words, it was common practice to discount a woman's income, in part or whole, when evaluating her qualifications for a mortgage loan as a single woman or as a wife.³⁰ Women's position in the job market was viewed with suspicion, their income seen as precarious or simply as "pin money."³¹ With the passage of the Equal Credit Opportunity Act and the amendment of the Fair Housing Act to include protections based on sex and familial status, however, income discounting became a prohibited practice.³²

Yet, Dr. Budde's experience—and the experiences of other women who made their stories public following the publication of Tara Siegel Bernard's *New York Times* article—makes clear that discrimination in housing based on sex is not a thing of the past.³³ Indeed, some anecdotal evidence suggests that, despite the prohibitions of the ECOA and the FHA, lenders continued to hold women to higher standards throughout the 1980s and 1990s.³⁴

Recently, HUD publicized two cases alleging pregnancy discrimination in mortgage lending: Dr. Budde's complaint against Cornerstone Mortgage Company, and a complaint

³⁰ See, e.g., *Hearings on Economic Problems of Women*, *supra* note 1, at 191-93 (statement of Steven Rohde, Member of the Staff, Center for National Policy Review); HARTFORD STUDY, *supra* note 4, at 21.

³¹ Hume, *supra* note 4, at 346.

³² See Fair Housing Act, Pub. L. No. 93-383, § 808(b), 88 Stat. 633, 729 (1974) (adding "sex" as a protected class); Equal Credit Opportunity Act, Pub. L. No. 93-495, § 701(a), 88 Stat. 1521, 1521 (1974) (codified at 15 U.S.C. § 1691(a)(1)); Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 800, 102 Stat. 1619, 1622 (1988) (codified as amended at 42 U.S.C. § 3605(a)) (adding "familial status" as protected class).

³³ See U.S. DEP'T OF HOUS. AND URBAN DEV., THE STATE OF FAIR HOUSING: ANNUAL REPORT ON FAIR HOUSING FY 2009 22 (2009). HUD statistics show that of all the complaints filed in 2009, 10% were based on sex; of complaints filed in 2008, 11% were based on sex; of complaints filed in 2007, 10% were based on sex; and of complaints filed in 2006, 10% were based on sex. *Id.* In addition, HUD statistics show that of all complaints filed in 2009, 20% were based on familial status; for 2008, 16% were based on familial status; for 2007, 14% were based on familial status; and for 2006, 14% were based on familial status. *Id.* The Justice Department also prosecutes allegations of sex discrimination in housing. In 2009, thirty-one referrals were made to the DOJ under ECOA, of which thirteen involved marital status and three involved gender. See DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S 2009 ANNUAL REPORT TO CONGRESS PURSUANT TO THE EQUAL CREDIT OPPORTUNITY ACT AMENDMENTS OF 1976 2 (2010). See also Press Release, Civil Rights Div., Dep't of Justice, Justice Department Files Fair Housing Lawsuit in Iowa Against Owner and Managers of Federally-subsidized Property for Sex Discrimination (Nov. 10, 2010), available at <http://www.justice.gov/opa/pr/2010/November/10-crt-1275.html> (announcing that the Justice Department filed a lawsuit against a federally-subsidized apartment complex alleging a pattern or practice of sexual harassment); *United States v. Peterson*, No. 2:09-cv-10333-JAC-DAS (E.D. Mich. Mar. 3, 2011) (imposing a jury verdict in the amount of \$115,000 for plaintiffs in case alleging sexual harassment against female tenants).

³⁴ Seattle-based advocacy group MomsRising provides the following anecdote:

I was pre-approved for a loan prior to house hunting. The night before I closed on my home the underwriter determined that I was a risk because I was a single mother with two children and two jobs There was an attorney involved in one of the homes up the chain and he contacted the underwriter to inform her that he would take my discrimination case pro-bono and she backed down. I got my home, it just took a few extra days. That was 18 years ago. I'm still working 2 jobs. My children are in college and I've never missed a mortgage payment.

Press Release, MomsRising, MomsRising Lauds Settlement in Case Involving Pregnancy Discrimination in Mortgage Lending (June 1, 2011), available at <http://www.momsrising.org/page/moms/momsrising-lauds-settlement-in-case-involving-pregnancy-discrimination-in-mortgage-lending>; see also *Ohio Civil Rights Comm'n v. Countrywide Home Loans, Inc.*, No. CI 00-4580, 2001 WL 36036383 (Ohio C.P. Apr. 6, 2001) (stating that underlying charge of discrimination filed by Eric and Vonda Williams alleged that defendant discriminated against complainants by "refus[ing] to consider Vonda Williams [sic] income because she was on maternity leave").

brought by Carly Neals of Pennsylvania against Mortgage Guaranty Insurance Corporation (MGIC).³⁵ The two cases stem from very different factual scenarios, but in both cases, the lenders denied or significantly delayed an applied-for loan based solely on concerns over the applicant's being pregnant.

On May 31, 2011, HUD reached a settlement with Cornerstone Mortgage Company. The agreement followed a ten-month investigation by HUD to determine if Cornerstone had engaged in unlawful discrimination in violation of the Fair Housing Act by "utilizing discriminatory mortgage lending practices" and/or by "making discriminatory statements."³⁶

As detailed in the conciliation agreement, Dr. Budde alleged that Cornerstone's actions violated 42 U.S.C. §§ 3604(a), 3604(c), and 3605: that is, that Cornerstone had violated the FHA's prohibitions against making discriminatory statements; against taking actions that "otherwise make unavailable or deny" housing on a discriminatory basis; and/or against discriminating in real estate-related transactions.³⁷ Specifically, Dr. Budde alleged that Cornerstone had initially approved her for a mortgage loan, but, when Cornerstone learned she was on maternity leave, it notified her that her "income could not be considered for purposes of qualifying for a loan."³⁸ This occurred even though Dr. Budde was on *paid* leave and had resources sufficient to qualify for a loan.³⁹ As a result, her loan was subject to unspecified conditions, and she returned early to work from maternity leave in order to qualify for the loan.⁴⁰

In response, Cornerstone denied any wrongdoing, contending that its actions resulted

³⁵ At the time this article goes to press, HUD announced that it has reached a conciliation agreement in a third case. Press Release, HUD, HUD Reaches Settlement With Connecticut Lender Accused of "Maternity Discrimination" (Nov. 3, 2011), *available at* http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2011/HUDNo.11-261. In this case, the complainant was allegedly denied a mortgage loan because she was on maternity leave, even though the complainant's employer provided a letter stating that she was on paid maternity leave. *Id.* In addition, Secretary Trasviña has commented that HUD is currently investigating additional cases. John Trasviña, *Ending Pregnancy-Related Lending Discrimination Is a Priority for HUD and America's Families*, HUFFINGTON POST (June 7, 2011, 4:09 PM), http://www.huffingtonpost.com/john-trasvina/housing-lenders-discrimination_b_872716.html.

³⁶ Conciliation Agreement Between U.S. Dep't of Hous. & Urban Dev. and Cornerstone Mortg. Co., at 2 (2011) [hereinafter *Budde Conciliation Agreement*], *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=cornerstoneagreement.pdf>.

³⁷ In relevant part, 42 U.S.C. § 3604(a) states: "[I]t shall be unlawful [t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of . . . sex [or] familial status . . ." 42 U.S.C. § 3604(c) states:

[I]t shall be unlawful [t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . sex . . . [or] familial status . . . , or an intention to make any such preference, limitation, or discrimination.

Finally, 42 U.S.C. § 3605(a) states, in relevant part:

[i]t shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of . . . sex . . . [or] familial status . . .

³⁸ *Budde Conciliation Agreement*, *supra* note 36, at 3.

³⁹ *Trasviña*, *supra* note 35.

⁴⁰ *Budde Conciliation Agreement*, *supra* note 36, at 3.

from prudent underwriting and that the incident described by Dr. Budde occurred only because she failed to disclose that she would be on leave.⁴¹ Cornerstone emphasized that the loan application was not denied, and, moreover, that Cornerstone “reaffirmed the decision to approve the loan application” through a one-day process confirming that Dr. Budde was on paid leave.⁴² It further denied imposing any conditions on the loan requiring Dr. Budde to return to work earlier than she otherwise would have.⁴³

At the same time that HUD announced the agreement it had reached with Cornerstone, HUD announced that it was charging MGIC with lending discrimination based on pregnancy in violation of 42 U.S.C. §§ 3604(b), 3604(c), and 3605.⁴⁴ The charge alleges that MGIC discriminated against the complainant, Carly Neals, by refusing to approve her application for mortgage insurance until she returned to work from maternity leave.⁴⁵

Carly Neals had applied for a refinance mortgage loan from PNC Mortgage on May 14, 2010.⁴⁶ PNC Mortgage issued a Conditional Approval on July 6, 2010, approving the loan with the requirement that Neals obtain mortgage insurance due to the high Loan-to-Value (LTV) ratio.⁴⁷ PNC Mortgage then submitted a mortgage insurance application to MGIC.⁴⁸ MGIC requested a verification of assets for two months reserves, indicating that the mortgage insurance application requirements were otherwise satisfied.⁴⁹ At this time, Neals was on maternity leave, having given birth on June 21, 2010.⁵⁰ She arranged to have a bank transaction history faxed to PNC, and sent an email to her PNC Loan Processor explaining that her salary was deposited in two parts because she was on maternity leave.⁵¹ The documentation was forwarded on to Kelly Kane, an underwriter with MGIC.⁵² Kane made note that she had “[received] updated bank statements along with email from Borrower that states she is on maternity leave. [Left voicemail] for [PNC mortgage underwriter] notifying her that we cannot proceed until borrower is back to work full-time.”⁵³ In subsequent communications between MGIC and PNC, Kane reiterated the position that the application could not be approved until Neals had returned to work from maternity leave.⁵⁴ Indeed, MGIC refused to accept multiple letters from Neals’s employer that

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See June 2011 HUD Press Release, *supra* note 19; Charge of Discrimination, *supra* note 20. As noted above, 42 U.S.C. § 3604(c) prohibits discriminatory statements regarding the sale or rental of a dwelling and 42 U.S.C. § 3605 prohibits discrimination in real estate-related transactions. Additionally relevant here, 42 U.S.C. § 3604(b) prohibits discrimination in the “terms, conditions, or privileges of sale or rental of a dwelling.”

⁴⁵ Charge of Discrimination, *supra* note 20, at 1.

⁴⁶ *Id.* at 3.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Charge of Discrimination, *supra* note 20, at 3.

⁵² *Id.*

⁵³ *Id.* at 4.

⁵⁴ *Id.* For example, on July 26, 2010, Kane requested that PNC’s Mortgage Underwriter:

stated that “Carly is an active full time employee of mine” as sufficient to establish employment, but rather insisted on direct verification that Neals had returned to work.⁵⁵ Kane later additionally required that Neals provide a pay stub.⁵⁶ PNC informed Neals that MGIC had requested a pay stub and commented that “unfortunately the one showing paternal [sic] time off is not going to work.”⁵⁷ Neals provided a pay stub to her loan processor at PNC showing that she was on “short-term disability vacation.”⁵⁸

Thereafter, on August 20, three months after Neals’s initial application to PNC Mortgage and a month after MGIC indicated that it would approve the mortgage insurance application once it received verification of assets, MGIC “[issued] the certificate/commitment for mortgage insurance.”⁵⁹ PNC informed Neals that MGIC had granted her an “exception” to its policy that borrowers “must be back to work and receive a paystub with full pay prior to closing.”⁶⁰ Because of her “substantial frustration in dealing with the numerous delays and requests for additional information relating to her maternity leave,” Neals declined to close on the loan with PNC, and obtained a refinance loan with another lender.⁶¹ Neals then filed a class action complaint in the Western District of Pennsylvania, alleging unlawful discrimination in violation of both the FHA and the ECOA.⁶² On May 18, 2011, the district judge dismissed the ECOA claim as well as Neals’s claims under 42 U.S.C. §§ 3604(a) (“otherwise make unavailable or deny”) and 3605 (real estate-related transactions), but found that she had stated cognizable claims under 42 U.S.C. §§ 3604(b) (discrimination in terms or conditions) and 3617 (unlawful interference with the exercise or enjoyment of rights protected under the FHA).⁶³

HUD has also investigated the claims that MGIC discriminated against Neals in violation of the FHA. On May 31, 2011, following a nine month long investigation, HUD issued a charge of discrimination against MGIC and two MGIC employees on behalf of Carly Neals and her family.⁶⁴ Based on its investigation of the allegations described above, HUD determined that reasonable cause existed to believe that housing discrimination occurred and charged the

Verify that Borrower is back to work full time. Upon receipt of this information, we will continue to underwrite this application and advise you of our decision. . . . If we do not receive the requested additional information . . . , MGIC will be unable to give further consideration to the application for private mortgage guaranty insurance.

Id.

⁵⁵ Charge of Discrimination, *supra* note 20, at 4.

⁵⁶ *Id.* at 5.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Class Action Complaint, Neals v. Mortg. Guar. Ins. Corp., 2011 WL 1897452 (W.D. Pa. May 18, 2011) (No. 210CV01291), 2010 WL 4000111.

⁶¹ Charge of Discrimination, *supra* note 20, at 5; Class Action Complaint, *supra* note 60.

⁶² See Class Action Complaint, *supra* note 60.

⁶³ See *id.*; Neals v. Mortg. Guar. Ins. Corp., No. 2:10CV1291, 2011 WL 1897452 (W.D. Pa. May 18, 2011) (incorporating Magistrate’s Report and Recommendation, Neals v. Mortg. Guar. Ins. Corp., 2011 WL 1897442 (W.D. Pa. Apr. 6, 2011) (No. 10-1291)).

⁶⁴ These employees were Kelly Kane, the MGIC Underwriter referenced above, and Elgina Cunningham, MGIC Underwriting Production Manager. See Charge of Discrimination, *supra* note 20, at 1.

respondents with violating 42 U.S.C. §§ 3604(b), 3604(c), and 3605.⁶⁵ Following HUD's charge of discrimination, the Attorney General filed a complaint in federal district court on July 5, 2011.⁶⁶

B. Discriminatory Denial of Loans In the Wake of the Credit Crisis

These cases are prominent examples of the reemergence of discrimination against women in home financing in the immediate aftermath of the financial crisis. Over the past few years, in response to the financial disaster resulting in part from poor underwriting and easy credit, banks have shifted to much more stringent underwriting practices and have tightened the availability of credit across the board.⁶⁷ Lenders have taken a more conservative position, interpreting the fundamental underwriting requirement—that a borrower have enough income to pay for the loan, and that the borrower's income be likely to continue for three years⁶⁸—more strictly, and are more critically analyzing a potential borrower's financial circumstances. A spokesperson for the consumer advocacy group, the National Community Reinvestment Coalition, describes how lenders are more strictly interpreting the three-year income requirement: "In the past, lenders didn't pay close attention to these guidelines. But now that there's more scrutiny, lenders are rejecting women if they receive a pay cut or go on disability during maternity leave because this creates a gap in their income."⁶⁹ As a result, even individuals with "enviable financial situations" currently are unable to obtain a loan because they cannot satisfy lenders' "rigid checklists."⁷⁰

Unsurprisingly, given the historical discrimination in lending along racial lines, this stringency has had a disproportionate impact on minority communities.⁷¹ More surprising,

⁶⁵ See Charge of Discrimination, *supra* note 20, at 2.

⁶⁶ United States v. Mortg. Guar. Ins. Corp., No. 2:05-mc-02023 (W.D. Pa. filed July 5, 2011).

⁶⁷ See James R. Hagerty & Nick Timiraos, *Borrowers Hit New Home-Loan Hurdles*, WALL ST. J., July 10, 2010, at A3.

⁶⁸ See FAIR HOUS. ADMIN., *HUD 4155.1, Mortgage Credit Analysis for Mortgage Insurance*, in FHA HANDBOOK, at § 4.D.2.aa (2011) [hereinafter *FHA HANDBOOK*], available at <http://www.fhaoutreach.gov/FHAHandbook/prod/contents.asp?address=4155-1.4> (dictating that "the income of each borrower who will be obligated for the mortgage debt [must]" be evaluated to establish whether his/her income level "can be reasonably expected to continue through at least the first three years of the mortgage loan. In most cases, a borrower's income is limited to salaries or wages. Income from other sources can be considered as effective, if properly verified and documented by the lender.") (second emphasis added); see also ALLISON TAIT, CTR. FOR WORKLIFE LAW, ISSUE BRIEF: DISCRIMINATION IN MORTGAGE LENDING ON THE BASIS OF PREGNANCY AND MATERNITY LEAVE 2 (2010), available at <http://www.worklifelaw.org/pubs/WLLMortgageDiscriminationBrief.pdf>.

⁶⁹ Molly M. Ginty, *HUD Investigates Mortgage Squeeze on Pregnancy*, WOMEN'S ENEWS.ORG, (Sept. 7, 2010), <http://www.womensenews.org/story/economyeconomic-policy/100903/hud-investigates-mortgage-squeeze-pregnancy> (quoting Robert Strupp, spokesperson for the National Community Reinvestment Coalition).

⁷⁰ Hagerty & Timiraos, *supra* note 67, at A3.

⁷¹ Numerous studies and articles have documented this impact. See, e.g., AMAAD RIVERA ET AL., UNITED FOR A FAIR ECON., *FORECLOSED: STATE OF THE DREAM 2008* (Christina Kasica et al. eds., 2008), available at http://www.faireconomy.org/files/StateOfDream_01_16_08_Web.pdf (examining data which indicates that the recent subprime mortgage crisis has resulted in disproportionate losses in wealth for people of color); ELLEN SCHLOEMER ET AL., CTR. FOR RESPONSIBLE LENDING, *LOSING GROUND: FORECLOSURES IN THE SUBPRIME MARKET AND THEIR COST TO HOMEOWNERS 4* (2006) (acknowledging, though not examining the fact that subprime foreclosures "will [disproportionately] affect a great many African American and Latino homeowners"); Jacob S. Rugh & Douglas S.

perhaps, is the impact it has had on pregnant women and parents. The tightening of underwriting guidelines has disproportionately affected women who are pregnant or on maternity leave, in part because women are perceived as “less likely than other workers to return from leave as planned.”⁷² Given the impact of this tightening of credit on pregnant women, advocates are increasingly recognizing sex discrimination in mortgage lending as a problem.

Evidence gathered by HUD and advocates such as the ACLU and MomsRising suggests that lenders have engaged in a variety of potentially discriminatory practices, most prominently:

Lenders may request that pregnant women provide “maternity contracts,” which state a return date for work. Lenders require that both a physician and the employer approve these contracts.⁷³

Lenders may require the applicant to return to work prior to closing on the loan. They may also require a pay stub before closing to document that the borrower has, in fact, returned to work.⁷⁴

Lenders may simply refuse to lend to expectant mothers or women on parental leave, or may tell these women “not to bother applying for loans.”⁷⁵

Lenders may deny a loan application without verifying the applicant’s income once discovering that the applicant is pregnant or on parental leave.⁷⁶

Lenders may rely on the “temporarily lower income that women would receive during their leave, rather than their regular salary, . . . [when] determining their ability to pay over a three-year period.”⁷⁷

All of these practices single out pregnant women for different treatment, on the basis of pregnancy. Moreover, to varying degrees, all of these practices rely on “stereotyped assumptions about women’s commitment to returning to work following childbirth.”⁷⁸ In order to understand how these discriminatory policies have developed, it is important to understand underwriting analysis more generally.

C. Loan Underwriting and the Concept of Creditworthiness

The lynchpin of underwriting is “creditworthiness,” a concept that encapsulates such considerations as an individual’s debt-to-income ratio, her credit history and credit score, her available reserves, and the loan-to-value ratio.⁷⁹ One commentator has described creditworthiness

Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 632 (2010) (explaining that since racial minorities were “much more likely to receive subprime loans” even “compared with whites with similar credit profiles,” the minorities therefore were disproportionately affected by the “bursting of the housing bubble”).

⁷² Ginty, *supra* note 67 (quoting Ariela Migdal, staff attorney at the ACLU in New York).

⁷³ TAIT, *supra* note 68, at 3.

⁷⁴ *See id.*; *see also* Bernard, *supra* note 9 (quoting Marc Savitt, president of the Mortgage Center, “There is no real assurance that the new mom will come back to work after she has the baby It’s just prudent underwriting to go ahead and approve the loan, *but she has to be back before closing.*”) (emphasis added).

⁷⁵ Galen Sherwin & Vania Leveille, *What Does Birth Control Have to Do With Your Mortgage?*, ACLU BLOG OF RIGHTS (Oct. 26, 2010, 2:19 PM), <http://www.aclu.org/blog/reproductive-freedom-womens-rights/what-does-birth-control-have-do-your-mortgage>.

⁷⁶ *See id.*

⁷⁷ *Id.*

⁷⁸ Letter to Fannie Mae and Freddie Mac, *supra* note 22, at 2.

⁷⁹ *See* Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d 251, 253 (D. Mass. 2008); *see also* Carvalho

as “a person’s ability and willingness to repay the creditor.”⁸⁰ Creditworthiness is one of the most important factors in a lender’s determination of whether to approve a loan; if an individual meets the lender’s conception of a creditworthy applicant, barring other considerations, the borrower is much more likely to be approved for the loan. Given the current economic situation and high rates of unemployment, however, many consumers do not have the income and wealth to qualify for a traditional mortgage.

Governmental sponsored enterprises (GSEs) play a critical role in underwriting. These agencies, most prominently the Federal National Mortgage Association (FNMA, or “Fannie Mae”) and the Federal Home Loan Mortgage Corporation (FHLMC, or “Freddie Mac”), constitute a secondary market for mortgage loans.⁸¹ By buying loans from direct lenders and reselling them, the GSEs shift the risk for default from the loan originator to the secondary market.⁸² Additionally, Fannie and Freddie set guidelines for mortgage lending in order to incentivize lenders to properly underwrite or assess the risk of a particular loan.⁸³

When a lender deviates from these guidelines and improperly underwrites a loan, Fannie and Freddie may require the lender to repurchase those loans.⁸⁴ This policy has more bite now than it historically did because Fannie and Freddie are considerably more likely to enforce the repurchase policy in the current economic situation.⁸⁵ This revitalization of the repurchase threat has contributed to the tightening of credit. The president of one lending corporation described the impact of the repurchase threat, commenting that “[w]hile repurchase requests have always happened in the past, it’s never been to the degree that it is happening now The end result is [that] lenders are running a bit scared. So when in doubt, they just reject the loan.”⁸⁶

Additionally, in order to help evaluate the risk of loans, in 2010 Fannie Mae and Freddie Mac adopted new quality control measures.⁸⁷ These measures include, but are not limited to, a rule requiring lenders to obtain “verbal verification of employment” prior to closing.⁸⁸

Some lenders have interpreted and applied these guidelines in manners that negatively

v. Equifax Info. Servs., LLC, 615 F.3d 1217, 1231 (9th Cir. 2010) (citing BLACK’S LAW DICTIONARY 426 (9th ed. 2009)) (“Black’s Law Dictionary defines ‘creditworthy’ as ‘financially sound enough that a lender will extend credit *in the belief default is unlikely.*’”) (emphasis added in the court opinion); HUD—Glossary, HUD, <http://www.hud.gov/offices/hsg/sfh/buying/glossary.cfm> (last visited Nov. 23, 2010) (defining creditworthiness to mean “the way a lender measures the ability of a person to qualify and repay a loan”).

⁸⁰ Winnie F. Taylor, *Meeting the Equal Credit Opportunity Act’s Specificity Requirement: Judgmental and Statistical Scoring Systems*, 29 BUFF. L. REV. 73, 74 (1980).

⁸¹ Helen F. Ladd, *Evidence on Discrimination in Mortgage Lending*, J. OF ECON. PERSPECTIVES, Spring 1998, at 41, 47.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See Hagerty & Timiraos, *supra* note 67, at A3 (“When a borrower defaults, Fannie and Freddie typically buy the loan out of the mortgage-security pool and pursue a workout or foreclosure. But they can force lenders to repurchase loans when they find flaws in the way they were underwritten. Repurchases have escalated over the past year.”).

⁸⁶ Bernard, *supra* note 9 (quoting Kevin Iverson, president of Reed Mortgage Corporation).

⁸⁷ *Id.* Freddie Mac’s new measures went into effect in January 2010, and Fannie Mae’s in June 2010.

⁸⁸ FANNIE MAE, SELLING GUIDE: FANNIE MAE SINGLE FAMILY 1081 (2010); see also FREDDIE MAC, SINGLE-FAMILY SELLER/SERVICER GUIDE: FORM 90, VERBAL VERIFICATION OF EMPLOYMENT (2010) (requiring information on whether the borrower is “currently employed” and whether the borrower is “active or on leave”).

impact pregnant women and parents.⁸⁹ On one end of the spectrum, some lenders have simply assumed, without verifying, that an individual who is on maternity leave has insufficient income to qualify for a loan.⁹⁰ On the other end, lenders have required pregnant women or women on maternity leave to provide significantly more documentation of current and continuing employment than non-pregnant applicants.⁹¹

For example, some lenders have interpreted the GSEs' requirement that a lender "document the likelihood of continued receipt of income for at least three years" to severely limit or preclude lending to pregnant women.⁹² Although the fair lending laws "do not provide precise parameters for determining creditworthiness," evaluation of an applicant's creditworthiness should be premised on "valid and reasonable criteria."⁹³ Specifically, when determining creditworthiness, under Fannie Mae and Freddie Mac's guidelines, a lender "must" analyze an applicant's income "to determine whether the borrower's income level can be reasonably expected to continue through at least the first three years of the mortgage loan."⁹⁴ For these purposes, short-term disability, medical leave, and unemployment compensation "will often not be considered for underwriting purposes, but may be considered as a compensating factor."⁹⁵ In other words, federal guidance suggests a two-tiered analysis that would start by looking to the loan applicant's income first to determine whether that individual meets creditworthiness requirements. Then, if the applicant falls short, a second, more searching analysis may be conducted that examines short-term benefits in order to help the borrower reach the creditworthiness minimum. HUD has endorsed this form of analysis, stating:

If a borrower is on maternity or short-term disability leave at the time of closing, lenders must document the borrower's intent to return to work, that the borrower has the right to return to work, and that the borrower qualifies for the loan taking into account any reduction of income due to their leave.⁹⁶

While an evaluation of a borrower's ability to repay a loan is both lawful and prudent, basing that calculation of a borrower's creditworthiness on pregnancy and maternity leave, as well as that borrower's stated intent to return to work, suggests the continuing persuasive weight of gendered stereotypes and assumptions about women's commitment to working.⁹⁷

In its press release announcing its investigation of pregnancy discrimination in mortgage lending, HUD endorsed limiting the creditworthiness analysis to factors that were clearly valid and reasonable, noting that the Fair Housing Act protects against discrimination on the basis of

⁸⁹ Letter to Fannie Mae & Freddie Mac, *supra* note 22, at 2.

⁹⁰ *Id.*

⁹¹ See, e.g., TAIT, *supra* note 68, at 3 (describing the requirement of future income verification and "maternity contracts" that some lenders ask pregnant applicants to provide).

⁹² FANNIE MAE, *supra* note 88, at 283.

⁹³ See *Shammas v. Merchs. Nat'l Bank*, No. 90-12217N, 1990 WL 354452, at *3 (D. Mass. Nov. 9, 1990) ("[T]he legislative history of the ECOA indicates that creditors are expected to use 'valid and reasonable criteria' in their evaluation of creditworthiness.") (quoting *Haynes v. Bank of Wedowee*, 634 F.2d 266, 270 (5th Cir. 1981)).

⁹⁴ FHA HANDBOOK, *supra* note 68, at § 4.D.2.aa.

⁹⁵ TAIT, *supra* note 68, at 2 (citing FEDERAL HOUSING ADMINISTRATION, HUD 4155/1, *Mortgage Credit Analysis for Mortgage Insurance*, in FHA HANDBOOK, at § 4.D.2.aa).

⁹⁶ July 2010 HUD Press Release, *supra* note 17.

⁹⁷ See TAIT, *supra* note 68, at 2-3.

pregnancy “if the borrower can demonstrate that she intends to return to work and can otherwise continue to meet the income requirements to qualify for the loan.”⁹⁸ What is neither valid nor reasonable, however, is the application by lenders of both of these rules in a manner that discriminates against women who are pregnant or on maternity leave by requiring that they jump through special hoops to prove their creditworthiness.⁹⁹

Any analysis of whether an applicant can be expected to be able to pay for a loan clearly requires some investigation into that applicant’s actual income. Ideally, the analysis would follow federal guidance and determine whether an applicant qualifies based on a full analysis of their financial circumstances.¹⁰⁰ But at a minimum, the determination cannot be based on the simple assumption that an individual on maternity leave has insufficient income, nor should it be based exclusively on the temporarily lower income received by an applicant on leave rather than their regular salary. As detailed above, however, many lenders have adopted practices that treat pregnant women as suspect and place higher burdens on them when they apply for loans. These practices constitute unlawful sex discrimination in violation of the Fair Housing Act and the Equal Credit Opportunity Act.

II. THE STATUTORY FRAMEWORK: A HISTORICAL OVERVIEW

Prior to 1974, no federal law prohibited sex discrimination in mortgage lending.¹⁰¹ The federal Fair Housing Act was passed into law in 1968, but at that time it covered only discrimination on the basis of race, color, religion, and national origin.¹⁰² The legal scheme in existence at the time permitted explicit discrimination on the basis of sex or pregnancy. As a result, lenders could—and did—rely on information such as marital status and use of birth control in determining whether a woman was a good risk for a loan.¹⁰³ Indeed, credit institutions routinely requested that female applicants provide information such as her “age, sex, race, color, religion, national origin, *birth control practices, and child-bearing intentions or capability.*”¹⁰⁴

In 1973, while Congress was holding hearings on credit discrimination against women, the President of the American Banker’s Association commented in a magazine interview,

⁹⁸ July 2010 HUD Press Release, *supra* note 17.

⁹⁹ See Letter to Fannie Mae and Freddie Mac, *supra* note 22, at 1-2 (describing the misapplication by lenders of the rules listed in the Single-Family Selling and Services Guide).

¹⁰⁰ See July 2010 HUD Press Release, *supra* note 17 (asserting that under federal laws, lenders cannot ask for more than a borrower’s showing of adequate income and intention to return to work).

¹⁰¹ Note that, prior to the shift in the legal regime in 1974, scholars noted the ill fit of constitutional arguments to the arena of credit discrimination. See Neil O. Littlefield, *Sex-Based Discrimination and Credit Granting Practices*, 5 CONN. L. REV. 575, 595 (1973) (“Even if the proposed Equal Rights Amendment is adopted by the requisite number of states, it is problematical as to its effect upon the activities of the private credit industry. . . . [I]t seems doubtful that the courts would recognize consumer credit as a function which requires constitutional recognition.”).

¹⁰² Federal Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 82 (1968) (codified at 42 U.S.C. §§ 3601-19 (2006)). Congress also passed the Equal Credit Opportunity Act (ECOA) in 1974, which prohibited discrimination in the granting of credit on account of sex and marital status. Pub. L. No. 93-495, § 701(a)(1), 88 Stat. 1521 (1974) (codified at 15 U.S.C. § 1691(a)).

¹⁰³ Susan Smith Blakely, *Credit Opportunity for Women: The ECOA and Its Effects*, 1981 WIS. L. REV. 655, 656 (1981). Moreover, in order to qualify for a loan in her own right, a divorced woman might even be required to provide information about her ex-husband in order to establish *his* creditworthiness, even if she received no alimony or child support from him. *Id.*

¹⁰⁴ *Id.* (emphasis added).

“I think we have to acknowledge that banks, along with the rest of the credit industry, do in fact discriminate against women when it comes to granting credit. The question then becomes, is that discrimination justified?”¹⁰⁵

Many institutions did consider such discrimination justified. For example, it was considered “sound business practice” to engage in income discounting of married women—the practice under which a woman’s income was “prorated or ‘discounted’ in proportion to a woman’s age and potential childbearing status.”¹⁰⁶ This practice was even adopted by the Veterans Administration, a federal agency that, along with the Federal Housing Administration, guarantees home loans.¹⁰⁷ In February 1973, the VA issued a bulletin that declared that it was the VA’s policy not to count “a wife’s income for a veteran’s home loan unless the veteran himself could not qualify.”¹⁰⁸ The bulletin also detailed further restrictions on when a wife’s income would be counted, including her age, the nature of her employment, and her family composition.¹⁰⁹ “Family composition” was understood to mean the number of children. Its presence as a factor reveals the VA’s assumption that a woman’s income was more likely to be steady and long-term if the woman already “had her 2.5 standard children.”¹¹⁰

In sum, as a result of private and governmental practices, women were frequently denied loans based on the “preconceived notion that single women of child-bearing age are not good credit risks.”¹¹¹ However, as one astute commentator noted just prior to the passage of a federal law banning sex discrimination in mortgage lending, “[t]he credit grantor who discriminates on the basis of sex would seem to be closing a portion of the market which could increase his profits. The activities of credit grantors can only be ascribed to deeply engrained role stereotypes based upon sex.”¹¹²

By 1974, Congress had recognized that sex discrimination formed a barrier to equal housing opportunity for women, and was striving to address the problem at the national level. In particular, recognizing that basing the decision of whether to grant credit on an applicant’s sex was discriminatory, Congress banned discrimination in mortgage lending on the basis of sex through two major federal acts. First, Congress amended the federal Fair Housing Act to prohibit discrimination in mortgage lending on the basis of sex.¹¹³ That same year, Congress passed the Equal Credit Opportunity Act, which prohibits discrimination in the granting of credit on the basis

¹⁰⁵ Richard L. Peterson, *An Investigation of Sex Discrimination in Commercial Banks’ Direct Consumer Lending*, 12 BELL J. OF ECON. 547, 547-48 (1981) (citing Eugene Adams, Speech before the Florida Bankers Association, reprinted in AM. BANKER, June 25, 1973, at 22).

¹⁰⁶ Emily Card, *Women, Housing Access, and Mortgage Credit*, 5 SIGNS S215, S217 (1980); see also Littlefield, *supra* note 101, at 576-77 (discussing cases of sex discrimination in granting credit even where the husband was on less sound financial footing than the wife in a post-divorce situation).

¹⁰⁷ See *id.*, at S217-18; see also Ladd, *supra* note 81, at 47 (explaining the complex system of agencies that guarantee loans and how these agencies discriminate against minority borrowers).

¹⁰⁸ Card, *supra* note 106, at S217.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at S217-18.

¹¹¹ Blakely, *supra* note 103, at 657. For a countervailing view, see Peterson, *supra* note 105, at 560 (arguing that commercial banks did not engage in systematic discrimination against women prior to the enactment of the ECOA).

¹¹² Littlefield, *supra* note 101, at 577.

¹¹³ Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 808, 88 Stat. 633, 729 (1974) (codified at 42 U.S.C. §§ 3601, 3605 (2006)).

of sex and marital status.¹¹⁴ These prohibitions were further bolstered in 1988, when Congress amended the Fair Housing Act to include familial status as a protected category.¹¹⁵

A. *The Fair Housing Act*

As noted above, the federal Fair Housing Act was signed into law in 1968.¹¹⁶ Congress passed the Fair Housing Act primarily in response to a few particular events: urban riots, the findings of the Kerner Commission, and the assassination of Dr. Martin Luther King, Jr.¹¹⁷ The Act had as its primary purposes the elimination of segregation and the promotion of integration.¹¹⁸ Its broader purpose, however, was “to provide . . . for fair housing throughout the United States.”¹¹⁹ In operation, this means that Congress sought to “[e]nsure the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics.”¹²⁰

The Fair Housing Act broadly acts to bar discrimination in housing transactions. Thus, in addition to prohibiting discrimination in the context of the sale or rental of a housing accommodation, the Fair Housing Act also specifically prohibits discrimination in mortgage lending. In particular, Section 3605(a) states that “[i]t shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of . . . sex . . . [or] familial status.”¹²¹ Section 3605(b) defines “residential real estate-related transactions” as including the “making or purchasing of loans or providing other financial assistance” for purposes of “purchasing, constructing, improving, repairing, or maintaining a dwelling.”¹²²

¹¹⁴ Equal Credit Opportunity Act, Pub. L. No. 93-495, § 502, 88 Stat. 1521, 1521 (1974) (codified as amended at 15 U.S.C. § 1691 (2006)).

¹¹⁵ Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 805, 102 Stat. 1619, 1619 (1988).

¹¹⁶ President Johnson signed the Fair Housing Act into law on April 11, 1968; *see* Jean E.

Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 160 (1969).

¹¹⁷ *See, e.g., id.* at 149.; Robert G. Schwemm, *Introduction to Mortgage Lending Discrimination Law*, 28 J. MARSHALL L. REV. 317, 317-18 (1995). Of particular importance was the finding of the Kerner Commission that, “[o]ur nation is moving toward two societies, one black, one white—separate and unequal.” THE NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).

¹¹⁸ *See* 42 U.S.C. § 3601; *see also* John P. Relman, *Foreclosures, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629, 647 (2008) (“Two broad remedial objectives underlie the FHA: non-discrimination and integration.”).

¹¹⁹ 42 U.S.C. § 3601 (2006); *see also* Smith v. Woodhollow Apartments, 463 F. Supp. 16, 18 (W.D. Okla. 1978) (“The Fair Housing Act was designed to provide fair housing throughout the nation.”).

¹²⁰ *See* *ex rel.* Bad Horse v. Carlson, HUDALJ 08-91-0077-1, at 13 (HUD ALJ Nov. 14, 1994) (citing United States v. Parma, 494 F. Supp 1049, 1053 (N.D. Ohio 1980)) (alteration in the original), *available at* <http://hud.gov/offices/oha/oalj/cases/fha/files/HUD%2008-91-0077-1.pdf>.

¹²¹ 42 U.S.C. § 3605(a) (2006).

¹²² 42 U.S.C. § 3605(b).

1. Sex Added as Protected Class

The Fair Housing Act's prohibition against discrimination on the basis of sex was added in 1974, through a provision of the Housing and Community Development Act.¹²³ Although there is scant detail in the legislative history on this particular provision, it seems clear that, through the addition of sex as a protected class, Congress intended "to end housing practices based on sexual stereotyping."¹²⁴ Senator Brock, the principal sponsor of the 1974 amendment, noted that "[t]he assumption that men could perform these [home ownership] tasks while women could not is just the sort of discrimination based on sex that" Congress sought to strike.¹²⁵ There is some evidence, however, that this was a controversial position. Some scholars, for example, suggest that the 1974 amendment to Title VIII was "opposed by Justice Department attorneys on the grounds that it was not 'needed' and was 'unworkable.'"¹²⁶

2. Familial Status Added as a Protected Class

Since 1988, the Fair Housing Act has prohibited discrimination in residential real estate-related transactions on the basis of "familial status."¹²⁷ The Act's definitions explicitly note that "[t]he protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years."¹²⁸

When Congress amended the Fair Housing Act to ban discrimination based on familial status in 1988, its stated purpose was "to protect families with children from discrimination in housing, without unfairly limiting housing choices for elderly persons."¹²⁹

¹²³ Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 808, 88 Stat. 633, 729 (1974); see also ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 11C:1 (2011), available at Westlaw HDISLL (describing the provision as "little-debated").

¹²⁴ See *ex rel. Holley v. Baumgardner*, HUDALJ 02-89-0306-1, 1990 WL 456960, at *4 (HUD ALJ Nov. 15, 1990), *aff'd in part and rev'd on other grounds*, 960 F.2d 572 (6th Cir. 1992) (internal citation omitted).

¹²⁵ *Hearings on S. 1604 Before the Subcomm. on Hous. & Urban Affairs of the S. Banking, Hous., & Urban Affairs Comm.*, 93d Cong. 1288 (1973).

¹²⁶ Card, *supra* note 106, at S218. Assuming the existence of this opposition, it can be partly explained by the Equal Credit Opportunity Act's passage in the Senate in 1973. *Id.* Although ECOA did not become law until October 1974 (two months after the amendments to the Fair Housing Act were added in August 1974), the amendments to the Fair Housing Act could have arguably been seen as redundant in light of ECOA.

¹²⁷ 42 U.S.C. § 3604 (2006).

¹²⁸ 42 U.S.C. § 3602(k)(2) (2006). It is important to note, although this Article will not explore this nuance, that the Fair Housing Act's protections extend to cover adoptive familial status. *Id.*; see also *Gorski v. Troy*, 929 F.2d 1183, 1189-90 (7th Cir. 1991) (holding that the "familial status" provision of the Fair Housing Act protects potential foster parents); Press Release, Fair Hous. Council of Suburban Phila., Bucks County Landlords to Pay \$40,000 for Illegally Evicting Mom and Adopted Son (Sept. 29, 2010), available at http://www.fhco.org/pdfs/news/NEWS_PennLLsPay40KforEvictingMomAndAdoptedSon_09292010.pdf.

¹²⁹ SCHWEMM, *supra* note 123, at § 11E:1. Schwemm identifies the additional purpose of "eliminat[ing] a form of discrimination that has a discriminatory effect on black and Hispanic households and that 'is often used as a smokescreen to exclude minorities from housing.'" *Id.* (quoting 134 CONG. REC. H4688 (1988) (remarks of Rep. Dellums)); see also James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1094-95 (1989) (describing awareness of the part of the courts and Congress, prior to the enactment of the Fair Housing Amendments Act, that discrimination based on familial status was frequently "pretext

The focus of Congress in enacting the 1988 amendments seems to have been on barriers to rental faced by families with children, rather than on the discriminatory practices of mortgage lenders to families with children. Indeed, a 1980 national study commissioned by HUD surveyed restrictive rental practices and found that approximately 25% of the units surveyed banned families with children, and an additional 50% imposed some restrictions on families with children (e.g., limiting the number of children allowed or allocating only certain units or areas for families).¹³⁰ Given this focus on rental restrictions, it is not surprising that Congress failed to directly address the application of the amendments to the Section 3605 prohibition on discrimination in real estate-related transactions. However, even with this focus on rental restrictions, Congress clearly also determined that there was a need for protection in the mortgage lending arena when they passed the 1988 amendments. Particularly, familial status was incorporated to apply to Section 3605. Moreover, the background to regulations promulgated pursuant to the Fair Housing Amendments Act of 1988 state that “the protections afforded” by the familial status coverage should be “interpret[ed] . . . in the same manner as the protections provided to others under . . . the Fair Housing Act.”¹³¹ Under the Fair Housing Amendments Act, “families with children must be provided the same protections as other classes of [protected] persons.”¹³²

The Equal Credit Opportunity Act

By its terms, the Equal Credit Opportunity Act (ECOA) is primarily an antidiscrimination statute. It states: “It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of . . . sex or marital status”¹³³ Moreover, like the Fair Housing Act, its reach is broad; for example, its definition of a creditor is expansive, covering any “person who, in the ordinary course of business, regularly participates in a credit decision, including setting the terms of the credit.”¹³⁴

However, unlike the Fair Housing Act, the ECOA was originally intended to prevent discrimination *against women* in obtaining credit.¹³⁵ Although it currently also covers discrimination on the basis of race, color, religion, national origin, age, and receipt of public

for racial discrimination”).

¹³⁰ ROBERT W. MARANS ET AL., HUD, MEASURING RESTRICTIVE RENTAL POLICIES AFFECTING FAMILIES WITH CHILDREN: A NATIONAL SURVEY 24 (1980). Numerous law review articles from the time period identify the difficulties facing families in the rental market. See, e.g., Larry D. Barnett, *Child Exclusion Policies in Housing*, 67 KY. L.J. 967 (1979) (discussing housing unit policies of excluding families with children as a condition that might reduce population growth); Kushner, *supra* note 129, at 1094-95 (noting that “[t]here exists pervasive discrimination in renting to” families with children and to individuals who are pregnant or in the process of adopting); George Palmer Schober, Note, *Exclusion of Families with Children from Housing*, 18 U. MICH. J.L. REFORM 1121 (1985) (noting exclusionary housing policies with regards to families with children); Note, *Why Johnny Can’t Rent: An Examination of Laws Prohibiting Discrimination Against Families in Rental Housing*, 94 HARV. L. REV. 1829 (1981) (examining special difficulties faced by families with minor children such as exclusion rates in vacancies as high as 71%).

¹³¹ Implementation of the Fair Housing Amendments Act of 1988, 53 Fed. Reg. 44,992, 44,995 (Nov. 7, 1988).

¹³² Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3236 (Jan. 23, 1989).

¹³³ 15 U.S.C. § 1691(a)(1) (2006).

¹³⁴ 12 C.F.R. § 202.2(l) (2010).

¹³⁵ Blakely, *supra* note 103, at 661-62.

benefits, when it was originally adopted it only covered sex and marital status.¹³⁶ The ECOA's original 1974 statement of purpose read:

The Congress finds that there is a need to insure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status. Economic stabilization would be enhanced and competition among the various financial institutions and other firms engaged in the extension of credit would be strengthened by an absence of discrimination on the basis of sex or marital status, as well as by the informed use of credit which Congress has heretofore sought to promote. It is the purpose of this Act to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all creditworthy customers without regard to sex or marital status.¹³⁷

The original focus of the ECOA on barriers to women building credit outside a marriage is clear, and, indeed, the ECOA was explicitly adopted and publicized as a “women’s bill.”¹³⁸

The ECOA is enforced by private litigants, as well as by bank regulatory agencies. Those agencies are authorized under the statute to “refer . . . matter[s] to the Attorney General with a recommendation that an appropriate civil action be instituted.”¹³⁹ In addition, the agencies “shall refer the matter to the Attorney General whenever the agency has reason to believe that 1 or more creditors has engaged in a pattern or practice of discouraging or denying applications for credit in violation of” the Act.¹⁴⁰

III. “AN UNFAIR STANDARD”: EXAMINING THE LEGAL HARM BEHIND POLICIES THAT DISPROPORTIONATELY SCRUTINIZE PREGNANT WOMEN

Many lenders may be creating extra loopholes because they assume pregnant women are less likely than other workers to return from leave as planned. . . . But that sets an unfair standard. If people have knee operations, is there any way to know when they will return to work? Is there any way to guarantee that their medical procedures will go exactly as planned?¹⁴¹

The legal framework described above prohibits sex or pregnancy discrimination in mortgage lending. This section will address two specific inquiries: first, what constitutes sex or familial status mortgage discrimination under federal law? Second, what is the impact of denying women mortgages based on pregnancy—what, in other words, is the “cost” of underwriting

¹³⁶ ECOA was amended in 1977 to cover race, color, religion, national origin, age, and receipt of public benefits. *Id.* at 662 n.36. The Act’s protections against retaliation, embodied in Section 1691(a)(3) were also added as part of the 1977 amendments. *Id.*

¹³⁷ Equal Credit Opportunity Act, Pub. L. No. 93-495, § 502, 88 Stat. 1521, 1521 (1974).

¹³⁸ Blakely, *supra* note 103, at 661.

¹³⁹ 15 U.S.C. § 1691e(g) (2006).

¹⁴⁰ *Id.*

¹⁴¹ Nan Hunter, *HUD Investigates Pregnancy Discrimination in Mortgages*, HUNTER OF JUSTICE (Sept. 12, 2010, 8:41 AM), http://hunterforjustice.typepad.com/hunter_of_justice/2010/09/hud.html (quoting Ariela Migdal, senior staff attorney for the ACLU Women’s Justice program).

measures that presume that women who are pregnant will receive less income or will be unlikely to return to work following maternity leave?

Antidiscrimination claims, at heart, revolve around the question of whether there is another explanation for a particular negative outcome. As noted above,¹⁴² in the context of mortgage denials, one common other explanation is that the borrower-applicant did not qualify for the loan. In response to characterizations of mortgage denials based on pregnancy as discrimination, lenders have pointed to the need for “prudent underwriting.” They argue that loan underwriters should—and indeed must—consider pregnancy as a factor in order to accurately limit risk in underwriting.¹⁴³ By not taking pregnancy into account, the argument goes, a lender risks making a loan to someone who cannot afford it, resulting in negative consequences for both the lender and the borrower.¹⁴⁴

Journalist Daniel Indiviglio, writing in *The Atlantic*, articulates his understanding of the “best-case scenario” when a pregnant woman seeks a loan:

The woman may plan to take three months paid leave for the pregnancy, and then return to work, putting the child in day care. That’s all well and good, but plans can go awry or change. Having a child is a life-altering event. Maybe the couple was lying and one of them plans to stay at home with the baby.¹⁴⁵ Or maybe they just change their mind once the child is born, because they can’t bear the thought of putting their precious little one in day care. Why wouldbanks imagine such possibilities? Because that’s their job. Relying on people’s promise to pay didn’t work out so well for [the banks] over the past few years. Can you really blame them?¹⁴⁶

Other lenders concur that it is reasonable to err on the “safe side” and assume that a woman may not return to work after taking maternity leave: “There is no real assurance that the new mom will come back to work after she has the baby. . . . It’s just prudent underwriting to go ahead and

¹⁴² See *supra* notes 77-98 and accompanying discussion.

¹⁴³ In particular, these consequences may include foreclosure and the bank having to buy back the loan from Fannie Mae or Freddie Mac. See Daniel Indiviglio, *Mortgage Companies Should Discriminate*, THE ATLANTIC (July 21, 2010, 9:43 AM), <http://www.theatlantic.com/business/archive/2010/07/mortgage-companies-should-discriminate/60141/>.

¹⁴⁴ Hagerty & Timiraos, *supra* note 67, at A3 (explaining that Fannie Mae and Freddie Mac can “force lenders to repurchase loans when they find flaws in the way they were underwritten”).

¹⁴⁵ Indiviglio, *supra* note 143. Note that making false statements on a mortgage application is illegal fraud, and is, for all intents and purposes, irrelevant to a discussion of discrimination in underwriting. Underwriting is designed to predict ability to repay a loan; on the aggregate, it may take into account the likelihood of some borrowers engaging in fraud, but that is a tangential concern. Other avenues exist for lenders to recover their loss when applicants engage in fraud.

¹⁴⁶ *Id.* He goes on to talk about unexpected expenses a couple with a newborn might face:

What if the baby turns out to have birth defect and the family needs a full-time private nurse to care for the child? Suddenly, the woman quitting her job to stay home with the baby might be more sensible from a financial standpoint. With a one-parent income of \$1,500 and a mortgage of \$1,000, you can understand why the mortgage company wouldn’t be pleased with such outcomes.

Id. This scenario recalls the concerns relating to the FMLA raised above in Section I(c). Like Indiviglio’s concern about fraud, however, it is also something of a red herring: any family or individual faces potential unexpected financial difficulties, including illness or death of a family member, or loss of job.

approve the loan, *but she has to be back before closing.*"¹⁴⁷ Similarly: "If you are not back at work, it's a huge problem. . . . Banks only deal in guaranteed income these days. It makes sense, but the guidelines are sometimes harsher than they need to be."¹⁴⁸

Concluding his article, Indiviglio asks: "And really, what's the cost of such [overly strict underwriting] measures?"¹⁴⁹ His answer? "In the case of pregnant women, it means the couple might have to rent for another year or two, until their baby is born. Then, they can show the bank that the woman returned to work as planned and their income is more clearly stable."¹⁵⁰ Indiviglio's suggested outcome is something like the concept of harmless error; although the lender *may* get it wrong by assuming that pregnant women are "bad risks" for loans, the worst thing that happens to the individuals affected is that they have to wait a bit longer to qualify for a loan. This statement is troubling for a number of reasons, not least of which is the manner in which it collapses the range of potential applicants into one model, that is, the married couple. Moreover, this imagined married couple is one that fits a very traditional framework in which the man's income is implicitly primary (he is the breadwinner), and the woman's income is supplemental (and, as a result, she is cast in the role of the homemaker).¹⁵¹ What, then, does this presumption against pregnant women mean for non-married couples, same-sex couples, or single mothers?¹⁵² Furthermore, what happens when the very couples Indiviglio identifies—heterosexual, married couples—recognize the incentives this model creates, and attempt to adjust to it? A presumption against pregnant women, after all, privileges the male income, which, in turn, encourages couples to adopt, to the extent possible, a traditional, male-breadwinner/female-homemaker division of labor. The result of Indiviglio's presumption against pregnant women in a very real way is effectively to channel women into the very stereotyped roles that Indiviglio is suspicious of, thereby "creat[ing] a self-fulfilling cycle of discrimination that force[s] women to assume the role of primary family caregiver, and foster[ing] . . . stereotypical views about women's commitment to work."¹⁵³

Furthermore, when Indiviglio posits that there is no harm in denying a pregnant woman a mortgage loan, he is also stating that there is no harm in conditioning mortgage loans on terms that *explicitly consider sex to be a relevant underwriting factor*. Such a position runs directly counter to the purpose and intent of federal fair lending laws, which by their terms forbid discrimination on the basis of sex or pregnancy and were adopted in large part to prevent women from being denied loans based on assumptions concerning their economic instability.

¹⁴⁷ Bernard, *supra* note 9 (quoting Marc Savitt, president of the Mortgage Center) (emphasis added).

¹⁴⁸ *Id.*

¹⁴⁹ Indiviglio, *supra* note 143.

¹⁵⁰ *Id.*

¹⁵¹ Note, for instance, that married couples "have on average a higher household income than unmarried people (including those single or cohabitating in heterosexual and lesbian or gay partnerships)" Naomi Gerstel & Amy Armenia, *Giving and Taking Family Leaves: Right or Privilege?*, 21 YALE J.L. & FEMINISM 161, 169 (2009).

¹⁵² This Article does not directly address the effect of lending discrimination on single mothers; however, it should be noted that the same stereotypes that are deployed against married women like Dr. Budde apply with equal force to single parents. Moreover, such parents are likely to be looked upon as even greater risks, since their applications are based on only one, as opposed to two, individual's income.

¹⁵³ Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721, 736 (2003). This is problematic for another reason: to the extent that the underwriting guidelines lead to an exacerbation of gender stereotyping, this not only undercuts the purpose of the FHA and the ECOA, but it also involves the federal government in the promotion of gendered care-giving roles in a way that is constitutionally suspect.

The obvious response to a claim of discrimination, though, is just what Indiviglio has articulated: it is not discrimination to consider a woman's ability or willingness to pay a loan; doing so is simply proper underwriting and assessment of her creditworthiness.¹⁵⁴ This assumption has some weight when the sort of underwriting under discussion is searching enough to truly assess an applicant's ability to pay. What Indiviglio suggests, however, is basing underwriting decisions on the statistical possibility that a pregnant woman will have lower income *or* will decide not to return to work.¹⁵⁵ These are two distinct issues, both problematic, but for different reasons.

First, to the extent that lenders base underwriting decisions on the fact women that are more likely to take leave than men, this decision-making process may be rational, but it is problematic for other reasons. While it may be true, on average, that women are more likely to take short-term leave accompanied by lesser or no pay,¹⁵⁶ when a lender has a policy or practice of basing a determination concerning an applicant's creditworthiness on an assumption about their income, such policies may easily sweep too broadly. As a result, women whose incomes *are* sufficient may be denied loans, as in the case of Dr. Budde.

Additionally, such policies distinguish between men and women in a manner that violates strong public policy that seeks to promote equal treatment and equal access to opportunity. Since the 1970s, women—and in particular, pregnant women—have achieved greater workforce participation,¹⁵⁷ and now “work more and longer while pregnant and return sooner after childbirth.”¹⁵⁸ Despite these increases in workforce participation since the 1970s, however, women with young children *are* more likely than men, on average, to take some leave.¹⁵⁹ Nevertheless, basing a relevant decision on the “gender-based assumption” that the applicant will “assume caretaking responsibilities,” violates Title VII and should be understood to violate fair lending laws.¹⁶⁰

¹⁵⁴ See Indiviglio, *supra* note 143.

¹⁵⁵ See *id.*

¹⁵⁶ Letter to Fannie Mae and Freddie Mac, *supra* note 22, at 2.

¹⁵⁷ Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 573 (2010) (“Women have occupied an increasing proportion of the labor force since the 1970s . . .”).

¹⁵⁸ See *id.* Between 1961 and 1965, 16% of women were back at work three months after giving birth and 26% after 12 months. Now, 58% are back after three months and 79% within twelve months. *Id.* at 574. See also EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html> [hereinafter EEOC GUIDANCE]. The guide emphasizes that treating caregivers in accord with anti-discrimination laws is imperative now more than ever because of changes in workforce demographics:

Since Congress enacted Title VII, the proportion of women who work outside the home has significantly increased, and women now comprise nearly half of the U.S. labor force. The rise has been most dramatic for mothers of young children, who are almost twice as likely to be employed today as were their counterparts 30 years ago. *Id.*

¹⁵⁹ Letter to Fannie Mae and Freddie Mac, *supra* note 22, at 2.

¹⁶⁰ EEOC GUIDANCE, *supra* note 158.

Although women actually do assume the bulk of caretaking responsibilities in most families and many women do curtail their work responsibilities when they become caregivers, Title VII does not permit employers to treat female workers less favorably merely on the gender-based assumption that a particular female worker will assume caretaking responsibilities or that a female worker's caretaking responsibilities will interfere with her workplace performance. *Id.*

Indeed, Title VII is a useful parallel for clarifying why mortgage discrimination based on pregnancy is unlawful sex discrimination. Concerns over the denial of employment opportunities due to pregnancy (or, more broadly, caregiving or family responsibilities) have been considered more fully in the context of employment law than they thus far have been in the mortgage lending context. Advocates in the area of employment discrimination have articulated a theory of family responsibilities discrimination, understood to be “discrimination against workers based on their family caregiving responsibilities.”¹⁶¹ In 2007, the EEOC recognized this form of discrimination when it issued enforcement guidance “advis[ing] that discrimination can take the form of different treatment of men and women with young children, [or] . . . the form of stereotyping.”¹⁶²

These theories should be applied in the context of mortgage discrimination. The EEOC has identified examples of unlawful discrimination that can usefully be applied in the context of mortgage discrimination. For instance, the EEOC’s guidance on caregiver discrimination suggests what forms of evidence may be helpful in determining claims of disparate treatment. Relevant evidence may include, first, “[w]hether the respondent asked female applicants, but not male applicants, whether they were married or had young children” as well as “[w]hether male[s] . . . with caregiving responsibilities received more favorable treatment than female[s].”¹⁶³ These suggestions provide a starting point for conceptualizing claims of mortgage lending discrimination against pregnant women.

Asking women different questions from men or requiring that women provide additional information not required from men is disparate treatment, and is evidence that suggests that a denial may have been based on unlawful discrimination. In addition, in the arena of race discrimination, courts have held that “requiring a higher level of documentation” from applicants within protected classes violates the fair lending laws.¹⁶⁴ It could be argued by analogy that requiring greater documentation from pregnant applicants violates the Fair Housing Act and the ECOA.

Additional relevant evidence identified by the EEOC is “[w]hether decisionmakers or other officials made stereotypical or derogatory comments about pregnant [women] or about . . . female caregivers.”¹⁶⁵ Comments made by decisionmakers, such as those made by Indiviglio or Marc Savitt, in the context of a denial of a loan to a pregnant woman, would indicate that the decision to deny the loan was based on the applicant’s pregnancy and/or assumptions about women’s commitment to work. Such a decision would be an example of unlawful discrimination. The EEOC Guidance which addresses employment discrimination also comments that enforcement agencies should “generally regard a pregnancy-related inquiry as evidence of pregnancy discrimination where the [decision-maker] subsequently makes an unfavorable . . . decision affecting a pregnant [applicant].”¹⁶⁶

Second, when lenders deny a loan on the wholly speculative concern that a woman might not return to work after a pregnancy or maternity leave, they base lending decisions on a

¹⁶¹ *About FRD*, THE CTR. FOR WORKLIFE LAW, <http://www.worklifelaw.org/AboutFRD.html> (last visited Nov. 7, 2011).

¹⁶² *Id.*

¹⁶³ EEOC GUIDANCE, *supra* note 158.

¹⁶⁴ See Gwen A. Ashton, *The Equal Credit Opportunity Act From a Civil Rights Perspective: The Disparate Impact Standard*, 17 ANN. REV. BANKING L. 465, 476 (1998) (citing GEN. ACCOUNTING OFFICE, GGD-96-145, FAIR LENDING: FEDERAL OVERSIGHT AND ENFORCEMENT IMPROVED BUT SOME CHALLENGES REMAIN 43 (Aug. 1996)).

¹⁶⁵ EEOC GUIDANCE, *supra* note 158.

¹⁶⁶ *Id.*

perception that relies on a stereotyped assumption that “pregnant women . . . are . . . less committed to their jobs” and also “less available.”¹⁶⁷ This is not a rationally based business decision, but rather one that frequently explicitly “discount[s] an applicant’s stated intention to return to work after a pregnancy or maternity leave” because of “stereotypes and assumptions about working women’s commitment to the workplace once they become pregnant or mothers, as well as stereotypes of men as breadwinners.”¹⁶⁸ This assumption violates fair lending laws: “stereotypes that female caregivers should not, will not, or cannot be committed to their jobs are sex-based” and decisions based on such stereotypes are prohibited.¹⁶⁹ Decision-making based on sex stereotyping has been consistently rejected since the adoption of federal prohibitions on sex discrimination in real estate lending. As noted above, both the Fair Housing Act and the ECOA are fundamentally concerned with preventing adverse credit determinations based on sex stereotyping.¹⁷⁰ Interpreting the Fair Housing Act, the Sixth Circuit held that refusing to rent to four men based on a belief that male renters are “messy and unclean” is impermissible sex discrimination.¹⁷¹ In holding so, the court adopted HUD’s finding that,

Title VIII of the Civil Rights Act of 1968, as amended, makes it unlawful to discriminate in the rental of housing on the basis of sex. Title VIII was amended in 1974 to prohibit sex discrimination. *The intent of the 1974 amendment is to end housing practices based upon sexual stereotyping.*¹⁷²

Additional cases from the early years of the Fair Housing Act and the ECOA support that these statutes intend to “end housing practices based upon sexual stereotyping.”¹⁷³

¹⁶⁷ Susan E. Huhta et al., *Looking Forward and Back: Using the Pregnancy Discrimination Act and Discriminatory Gender/Pregnancy Stereotyping to Challenge Discrimination Against New Mothers*, 7 EMP. RTS. & EMP. POL’Y J. 303, 318 (2003).

¹⁶⁸ TAIT, *supra* note 68, at 3.

¹⁶⁹ EEOC GUIDANCE, *supra* note 158.

¹⁷⁰ Note that the ECOA also provides protection on the basis of marital status. This provision has been utilized in cases where individuals were denied loans because they were unmarried although cohabiting, or in instances where the lender refused to aggregate non-married couples’ incomes despite having a policy of aggregating married couples’ incomes. See, e.g., *Markham v. Colonial Mortg. Serv. Co.*, 605 F.2d 566, 568-69 (D.C. Cir. 1979). Although it is not unimaginable that lenders might make distinctions between married expectant couples and non-married expectant couples, this distinction is not one that has, as of yet, appeared, and so is not one that this Article will address beyond commenting on the availability of the marital status protection in the ECOA.

¹⁷¹ *Baumgardner v. Sec’y ex rel. Holley*, 960 F.2d 572, 574 (6th Cir. 1992).

¹⁷² *Sec’y. ex rel. Holley v. Baumgardner*, HUDALJ 02-89-0306-1, 1990 WL 456960, at *4 (HUD ALJ Nov. 15, 1990), (emphasis added) (internal citation omitted), *aff’d in part and rev’d on other grounds*, 960 F.2d 572 (6th Cir. 1992); see also *Hearings on S. 1604 Before the Senate Subcomm. on Hous. & Urban Affairs*, 93d Cong. 1228 (1973) (recognizing the prevalence of sexual stereotyping in the property rental market and the need for inclusion of sex as a protected class under the Fair Housing Act).

¹⁷³ *Baumgardner*, 1990 WL 456960, at *4. See, e.g., *Markham*, 605 F.2d at 568-69 (finding that a lender’s refusal to aggregate the unmarried plaintiffs’ income when determining their creditworthiness, a practice they engaged in regularly with respect to married applicants, violated the ECOA); *United States v. Reece*, 457 F. Supp. 43, 48 (D. Mont. 1978) (finding that landlord’s refusal to rent to single women who did not own cars and refusal to consider a woman’s alimony or child support payments when determining whether the woman had sufficient income to pay the rent violated the Fair Housing Act); *Normal v. St. Louis Concrete Pipe Co.*, 447 F. Supp. 624, 629 (E.D. Miss. 1978) (noting that proof of defendants’ alleged refusal to take into account a wife’s income in ascertaining whether the family income is sufficient

In 1973, just prior to the addition of sex as a protected class to the FHA and to the passage of the ECOA, one commentator argued against basing lending decisions on pregnancy, stating that “[t]o do so is to perpetuate myths concerning the proper societal role of the female.”¹⁷⁴ When Indiviglio states that a woman might “just change [her] mind” about going back to work “once the child is born, because [she] can’t bear the thought of putting [her] precious little one in day care,” he is engaging in the very stereotyping that Congress sought to prohibit by passing the ECOA and amending the FHA.¹⁷⁵ It could hardly be clearer that decisions based on this type of analysis are prohibited sex discrimination, and result in very real harm—both in terms of limited access to mortgage credit and in terms of psychological harm caused by offensive, outdated gender stereotypes.

IV. SEEKING REDRESS THROUGH LITIGATION

A plaintiff seeking to prove that she was discriminatorily denied a mortgage based on pregnancy has a few avenues open to her: she can claim that she has been discriminated against on the basis of sex or familial status (under the Fair Housing Act), sex (under the Fair Housing Act and the ECOA), or marital status (under the ECOA).¹⁷⁶

Under any of these causes of actions, a plaintiff may prove discrimination with direct evidence of discrimination, disparate treatment analysis, or disparate impact analysis.¹⁷⁷ In the fair housing context, in order to prove disparate treatment, a plaintiff seeking to prove a discriminatory denial will need to show “(1) [membership in] a protected class; (2) that [she] applied and [was] qualified for a loan from [the] defendant[]; (3) that the loan was rejected despite [such] qualification[]; and (4) that the defendant[] continued to approve loans for applicants with qualifications similar to [those of the] plaintiff[].”¹⁷⁸

Disparate impact is also available under both the Fair Housing Act and the ECOA, despite some current uncertainty on the matter.¹⁷⁹ There is “a strong consensus that the [fair

to meet defendants’ minimum income requirements for applicants would have been enough to prove sex discrimination in violation of the Fair Housing Act).

¹⁷⁴ Littlefield, *supra* note 101, at 588.

¹⁷⁵ Indiviglio, *supra* note 143.

¹⁷⁶ This Article will not directly address marital status discrimination. Note, however, that under certain factual circumstances, the ECOA’s marital status provision might be a viable path to recovery. For example, a single mother could argue marital status discrimination if a lender denied her a loan based on an assumption that, as a single mother, she could not qualify for a loan.

¹⁷⁷ Schwemm, *supra* note 117, at 328-31.

¹⁷⁸ See *Thomas v. First Fed. Sav. Bank of Indiana*, 653 F. Supp. 1330, 1338 (N.D. Ind. 1987). Following the traditional *McDonnell Douglas* burden-shifting framework, once a plaintiff has established a prima facie case, the burden shifts to the lender/creditor to state a legitimate, nondiscriminatory reason for the adverse decision. If the lender/creditor meets that burden, the burden shifts back to the applicant to demonstrate pretext. See Schwemm, *supra* note 117, at 328-29.

¹⁷⁹ The U.S. Supreme Court has recently agreed to hear oral arguments on the availability and exact contours of disparate impact analysis under the Fair Housing Act. See *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010), *cert. granted*, 79 U.S.L.W. 3653 (U.S. Nov. 7, 2011) (No. 10-1032). It is worth noting that numerous courts have rejected defendants’ arguments that the 2005 Supreme Court case *Smith v. City of Jackson* implies that disparate impact is unavailable under the Fair Housing Act or the ECOA. See Robert G. Schwemm, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 HARV. C.R.-C.L. L. REV. 375, 413 (2010); see also, *Guerra v. GMAC LLC*, No. 2:08-cv-01297-LDD, 2009 WL 449153, at *2-3 (E.D. Pa. Feb. 20, 2009) (“[W]e decline to hold that the *Smith*

lending laws do] include an impact standard.”¹⁸⁰ Moreover, “[f]or many years, HUD has expressed its view that the FHA includes an impact standard.”¹⁸¹ Indeed, on November 16, 2011, HUD issued a proposed amendment to an agency regulation that would provide guidance on the standard for disparate impact under the Fair Housing Act.¹⁸²

The legislative history of the ECOA also supports the use of disparate-impact theory. The Senate Report states that “courts or agencies are free to look at the *effects of a creditor’s practices* as well as the creditor’s motives or conduct in individual transactions.”¹⁸³ In 1994, HUD, the Department of Justice, and eight additional federal regulatory agencies adopted a policy “expressly appl[ying] the disparate impact test to discriminatory lending [that] stands as the federal regulators’ interpretation” of both the Fair Housing Act and ECOA.¹⁸⁴

Disparate impact in the mortgage lending context can be described as follows:

A mortgage lending policy or practice that operates to exclude persons in a protected category at a substantially higher rate than it excludes other persons not in the protected category is unlawful; unless the lender can show that the policy or practice constitutes a business necessity, and that there are no less restrictive alternatives to achieve the same business purpose.¹⁸⁵

In other words, to establish that a given practice—such as using a woman’s temporarily lower income, rather than her regular salary, while on maternity leave to determine her ability to pay—has a disparate impact in violation of fair lending laws, a plaintiff must establish that the practice affects the protected class at a “substantially higher rate.”¹⁸⁶ No showing of intent is required.¹⁸⁷

decision . . . overruled prior precedent recognizing disparate impact liability under the FHA and ECOA.”); Nat’l Cmty. Reinv. Coal. v. Accredited Home Lender Holding Co., 573 F. Supp. 2d 70, 76-78 (D.D.C. 2008) (“*Smith* does not preclude disparate impact claims pursuant to the FHA.”); Miller v. Countrywide, 571 F. Supp. 2d 251, 255-58 (D. Mass. 2008) (finding that plaintiffs had identified a policy with sufficient specificity to satisfy the disparate impact requirement unlike the plaintiffs in *City of Jackson*); Ramirez v. GreenPoint Mortg. Funding, Inc., 633 F. Supp. 2d 922, 926-29 (N.D. Cal. 2008) (“[N]o court has applied *Smith* to find that disparate impact claims are not cognizable under the FHA or ECOA. To the contrary, numerous courts post-*Smith* have addressed disparate impact claims under these statutes.”).

¹⁸⁰ ROBERT G. SCHWEMM & SARA K. PRATT, NATIONAL FAIR HOUSING ALLIANCE, DISPARATE IMPACT UNDER THE FAIR HOUSING ACT: A PROPOSED APPROACH 3 (Dec. 1, 2009) (citing 2922 Sherman Ave. Tenants’ Ass’n v. District of Columbia, 444 F.3d 673, 679 (D.C. Cir. 2006)), available at <http://www.nationalfairhousing.org/Portals/33/DISPARATE%20IMPACT%20ANALYSIS%20FINAL.pdf>.

¹⁸¹ *Id.* at 4.

¹⁸² Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 76 Fed. Reg. 70921 (Nov. 16, 2011) (to be codified at 24 C.F.R. pt. 100).

¹⁸³ S. REP. NO. 94-589, at 13 (1976) (emphasis added), quoted in Ashton, *supra* note 164, at 480. Note too, that in 1995 Congress rejected an amendment to the ECOA that would have “limit[ed] it to a standard of intentional discrimination and barr[ed] the use of statistical data alone to show discrimination.” *Id.*

¹⁸⁴ *Id.* at 477; see Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266, 18,269-70 (Apr. 15, 1994).

¹⁸⁵ Stephen M. Dane, *Disparate-Impact Analysis in the Mortgage Lending Context*, 115 BANKING L.J. 900, 902-03 (1998).

¹⁸⁶ *Id.* at 903. It should be noted that it is widely established that the Fair Housing Act is interpreted in line with Title VII. See, e.g., G. Carol Brani, *Civil Rights and Mortgage Lending Discrimination: Establishing a Prima Facie Case Under the Disparate Treatment Theory*, 5 RACE & ETHNIC ANC. L.J. 42, 51 (1999). As a result, although there is no clear definition for what “substantially higher rate” means in practice, the Equal Employment Opportunity Commission’s

Once the plaintiff-applicant has established a disparate impact, the defendant-lender may still prevail if it can show that the practice is justified by business necessity¹⁸⁸ and that there is “no less restrictive alternative[]” that would “achieve the same business purpose.”¹⁸⁹

A. Potentially Discriminatory Practices or Policies

As outlined above,¹⁹⁰ advocates concerned with lending discrimination affecting pregnant women have identified a number of practices or policies that may violate the fair lending laws. These requirements are premised in large part on a distrust of women’s commitment to work. While mortgage lenders are by no means required simply to trust that an individual will pay them back, they have mechanisms at their disposal besides discrimination to prevent default or to mitigate loss—most simply, enforcement of the terms of the mortgage. Concern over higher numbers of mortgage defaults and foreclosures warrants stricter underwriting practices and tighter lines of credit, but it does not license underwriting practices which violate fair lending laws. The following section describes in greater detail some current practices that likely violate federal antidiscrimination mandates.

1. Simply Refusing to Lend to Pregnant Women

There is no justification for telling expectant mothers or women on parental leave, as lenders apparently have done, “not to bother applying for loans.”¹⁹¹ This is differential treatment on the basis of pregnancy and violates the Fair Housing Act’s prohibition against discrimination on the basis of familial status, which explicitly encompasses pregnancy, as well the ECOA’s prohibition against sex discrimination.¹⁹² As in race-based cases where a mortgage lender states baldly, “I don’t think we ought to approve this loan because it’s in a black neighborhood,” the statement “do not apply for this loan because we do not lend to pregnant women” is a straightforward violation of the fair lending laws and should be responded to as such.¹⁹³

2. Requiring the Woman to Be Back at Work Prior to Closing

Another alleged practice is conditioning closing on a loan on the requirement that a woman be back at work after her parental leave.¹⁹⁴ Similarly, some lenders require further proof

4/5th or 80% rule of thumb is a useful guide. Dane, *supra* note 185, at 903-04 (“A selection rate for any [protected] group which is 4/5 or 80 percent, of the rate for the group with the highest rate will generally be regarded by the federal enforcement agencies as evidence of adverse impact”) (citing 29 C.F.R. § 1607.4(D) (1998)).

¹⁸⁷ Dane, *supra* note 185, at 903 (“[E]vidence of discriminatory intent is not necessary. The result is what counts, not the intent.”).

¹⁸⁸ “Business necessity” can be understood to mean that “the practice is necessary to the conduct of the lender’s business.” See *id.* at 906-07 (“[V]ery few fair housing defendants have ever been able to establish a business necessity in disparate-impact cases.”).

¹⁸⁹ *Id.* at 906.

¹⁹⁰ See discussion *supra* notes 71-76 and accompanying text.

¹⁹¹ Sherwin & Leveille, *supra* note 75.

¹⁹² See 15 U.S.C. § 1691(a)(1); 42 U.S.C. § 3602(k) (2006).

¹⁹³ Schwemm, *supra* note 117, at 328.

¹⁹⁴ See, e.g., Bernard, *supra* note 9 (noting that Marc Savitt, president of the Mortgage Center, said, “There

of return to work before closing, such as a pay stub.¹⁹⁵

When a lender tells a woman that she may qualify for the loan but that it will not approve the loan until she returns to work, that lender is saying two things: (1) it will not take any parental leave benefits she qualifies for under the terms of her employment into account in calculating her creditworthiness and (2) it suspects she may not return to work. The first of these involves applying a heavier burden to a subset of applicants within a protected class, in contravention of 42 U.S.C. § 3605, which prohibits discrimination in the making available of terms and conditions of residential real-estate transactions on the basis of sex or familial status. It also violates 15 U.S.C. § 1691(a) by discriminating with respect to an aspect of a credit transaction on the basis of sex.

The second of these rests on “impermissible stereotypes about women’s commitment to returning to the paid workforce after having babies.”¹⁹⁶ As explained in more detail above, this is disparate treatment under both the Fair Housing Act’s prohibition against sex and pregnancy discrimination and under the ECOA’s prohibition against sex discrimination.

3. Family Planning Inquiries

In a move reminiscent of the “baby letters” of the 1970s, at least one lender has requested that applicants provide documentation concerning their “family planning” intentions.¹⁹⁷ For instance, when one fifty-year-old couple applied for a mortgage, their lender required them to submit a “‘motivational letter,’ explaining why they were moving.”¹⁹⁸ They were encouraged to include information concerning their plans regarding an “‘increase/decrease in family’ or property size.”¹⁹⁹

This type of inquiry recalls practices from the 1970s that included requesting information from applicants concerning their “birth control practices, and child-bearing intentions or capability.”²⁰⁰ This is exactly the type of inquiry that the ECOA sought to ban, and it is certainly covered by the Fair Housing Act as well. A federal official, speaking on condition of anonymity,

is no real assurance that the new mom will come back to work after she has the baby It’s just prudent underwriting to go ahead and approve the loan, *but she has to be back before closing.*” (emphasis added).

¹⁹⁵ See TAIT, *supra* note 68, at 3. Practices may vary as to what type of proof a lender will require from a mother-to-be:

At one bank, prior to approval, one underwriter might consider the field in which the mother-to-be works Another bank might approve the loan as is, but require the couple put funds in escrow until they can verify that the wife is back at work full-time. Another underwriter at another bank, as this purchaser has experienced, might require the mother-to-be to be back at work full-time prior to closing.

Alison Rogers, *Do I Have to Skip My Maternity Leave to Buy a Home?*, CBSMONEYWATCH.COM (May 13, 2009) (quoting Matthew Wahler of WCS Lending), <http://moneywatch.bnet.com/saving-money/blog/ask-agent/do-i-have-to-skip-my-maternity-leave-to-buy-a-home/404/>; see also Bernard, *supra* note 9 (giving as an example of adequate proof at closing letters from a doctor as well as the employer with return date and salary).

¹⁹⁶ Sherwin & Leveille, *supra* note 75.

¹⁹⁷ Tara Siegel Bernard, *Wells Fargo’s Odd Mortgage Essay Question*, BUCKS: MAKING THE MOST OF YOUR MONEY, (Aug. 25, 2010, 12:40 PM), <http://bucks.blogs.nytimes.com/2010/08/23/wells-fargos-odd-mortgage-essay-question/>.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Blakely, *supra* note 103, at 656.

commented on this scenario: “The question itself certainly suggests that the lender is violating the Fair Housing Act by making decisions based on their familial status.”²⁰¹ Moreover, this sort of questioning is specifically banned for Federal Housing Administration-insured lenders:

FHA-insured lenders cannot, however, inquire about future maternity leave. If a borrower is on maternity or short-term disability leave at the time of closing, lenders must document the borrower’s intent to return to work, that the borrower has the right to return to work, and that the borrower qualifies for the loan taking into account any reduction of income due to their leave.²⁰²

Similarly, the Federal Trade Commission—an agency with enforcement power over the primary mortgage market—has issued consumer guidelines which state that lenders cannot “ask about your plans for having a family, although they can ask questions about expenses related to your dependents.”²⁰³

4. Calculating Creditworthiness

As Dr. Budde’s case illustrates, lenders are denying loan applications upon learning of the applicant’s pregnancy, without verifying that the applicant actually does not qualify for the loan.²⁰⁴ In order to comply with the fair lending laws, a lender must perform an accurate evaluation of an applicant’s qualifications. HUD has clarified that this evaluation requires that FHA-insured lenders document “that the borrower qualifies for the loan taking into account any reduction of income due to their leave.”²⁰⁵ Although a lender is barred from asking an applicant whether she is pregnant or intends to take maternity leave,²⁰⁶ once a lender has learned of either of these scenarios, that lender then cannot make assumptions about the impact on the borrower’s income. Instead, the lender should document the borrower’s qualifications, inclusive of short-term benefits.²⁰⁷ The FHA Handbook suggests this as well, commenting that, “[i]ncome from other sources can be considered as effective, if properly verified and documented by the lender.”²⁰⁸

In other instances, lenders are relying on the “temporarily lower income that women would receive during their leave, rather than their regular salary [when] determining [their] ability to pay” over a three-year period.²⁰⁹ This practice has a disproportionate impact on women because women “are more likely than men to take short-term unpaid or reduced-pay leave.”²¹⁰ As

²⁰¹ Bernard, *supra* note 197.

²⁰² July 2010 HUD Press Release, *supra* note 17.

²⁰³ FED. TRADE COMM’N, FTC FACTS FOR CONSUMERS: MORTGAGE DISCRIMINATION: A GUIDE TO UNDERSTANDING YOUR RIGHTS & TAKING ACTION 2 (2009), available at <http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea08.pdf>.

²⁰⁴ See Bernard, *supra* note 9.

²⁰⁵ July 2010 HUD Press Release, *supra* note 17.

²⁰⁶ HUD’s FHA handbook states that “[l]enders *must not* ask the borrower about possible, future maternity leave.” FHA HANDBOOK, *supra* note 68, § 4.D.2.aa.

²⁰⁷ See July 2010 HUD Press Release, *supra* note 17.

²⁰⁸ FHA HANDBOOK, *supra* note 68, § 4.2.D.2.aa.

²⁰⁹ Letter to Fannie Mae and Freddie Mac, *supra* note 22, at 1-2.

²¹⁰ See *id.* at 2 n.1 (noting that studies measuring the effects of the Family and Medical Leave Act have

a result, this practice can be challenged under the Fair Housing Act and the ECOA under a disparate impact theory. Moreover, such practices are not justified by business necessity. In order to demonstrate business necessity, a lender must show that “the practice is necessary to the conduct of the lender’s business and that no less restrictive alternatives to achieve the same business purpose are available.”²¹¹ Here, there are certainly less restrictive alternatives; indeed, the federal guidance provides an alternative method of analyzing applicants that allows the lender to determine risk without engaging in unlawful discrimination. As a result, policies such as relying solely on an applicant’s maternity leave income or engaging in modern day income discounting are simply not justified by business necessity, and are therefore impermissible under the FHA and ECOA.

5. Requiring Maternity Contracts

One policy that lenders have developed to accurately document pregnant women’s financial circumstances is the “maternity contract.” A maternity contract is a document that states the woman’s intent to return to work, and includes the approval of the woman’s physician and employer.²¹² Rather than simply being an example of prudent underwriting, however, this requirement imposes a higher burden on pregnant women based on a suspicion that women may not return to work after taking parental leave. Such assumptions are inappropriate and signal unlawful sex discrimination: fair lending laws should not be interpreted to allow disparate, unfavorable treatment of women “[b]ecause [of] stereotypes that female caregivers should not, will not, or cannot be committed to their jobs”²¹³

Maternity contracts, however, have been endorsed by HUD as well as Fannie Mae. HUD requires FHA-insured lenders to “document the borrower’s intent to return to work, that the borrower has the right to return to work, and that the borrower qualifies for the loan taking into account any reduction of income due to their leave.”²¹⁴ Similarly, Fannie Mae has stated that an individual on maternity leave may qualify for a mortgage, but she must have “proof at the time of the closing that . . . her income would be adequate upon returning to work.”²¹⁵ This can be established through a “[l]etter[] from a doctor (with a return date) and the employer (stating the return date and salary)”²¹⁶

The theory, presumably, behind requiring pregnant women (and other individuals taking leave) to document their “right to return to work,” rests on the notion that, in order to avoid risky underwriting, lenders need to obtain *some* information. To the extent that this requirement is

shown that “more than three-quarters of women with young children took some leave during an 18-month period, compared with less than half of men with children”).

²¹¹ Dane, *supra* note 185, at 906-07.

²¹² See TAIT, *supra* note 68, at 3; Bernard, *supra* note 9.

²¹³ EEOC GUIDANCE, *supra* note 158. *Baumgardner v. Secretary, U.S. Department of Housing and Urban Development ex rel. Holley*, and *United States v. Reece* provide further support for an argument that the fair lending laws do not permit requirements that make stereotyped assumptions about members of a protected class. See *Baumgardner*, 960 F.2d 572, 574-75, 584 (6th Cir. 1992) (finding that a refusal to rent to males because they are “messy and unclean” is discrimination on the basis of sex); *Reece*, 457 F. Supp. 43, 48-49 (D. Mont. 1978) (finding that a refusal to rent to women without cars but not to men without cars is a violation of 42 U.S.C. § 3604).

²¹⁴ July 2010 HUD Press Release, *supra* note 17.

²¹⁵ Bernard, *supra* note 9.

²¹⁶ *Id.*

imposed only on women taking parental leave, lenders risk a disparate treatment suit. To the extent, however, that such documentation is required of both women and men who take temporary leave, the requirement is subject to a disparate impact suit, given the greater impact it would have on women, who are more likely to take short-term leave than are men.²¹⁷

V. THE LIMITS OF ANTIDISCRIMINATION LAWS: ENTITLEMENT TO FAMILY OR PARENTAL LEAVE AND ITS IMPACT ON AN APPLICANT'S ABILITY TO QUALIFY FOR A LOAN

The foregoing sections have identified lenders' problematic practices and explained how these practices violate federal fair lending laws. This section will address those applicants who fail to qualify for a loan even when no illegal discrimination occurs. Even when lenders evaluate applicants' qualifications fairly and without prejudice or reliance on practices which disproportionately impact women, many applicants may nevertheless fail to qualify for a loan under a full analysis that accounts for reduction in income because of maternity leave.²¹⁸ This is because a large percentage of American workers do not receive benefits while on parental leave; indeed, despite federal requirements—such as the Family and Medical Leave Act²¹⁹ and the Pregnancy Discrimination Act—many workers are not entitled to leave at all.²²⁰

The Pregnancy Discrimination Act, a 1978 amendment to Title VII, “require[s] that maternity leave be covered under the provisions of any existing temporary disability leave policy.”²²¹ The FMLA has a broader reach: it “mandate[s] that employers provide up to twelve weeks of unpaid leave for employees' personal illness . . . and family caregiving responsibilities”²²² In addition, “[t]he FMLA ensures the right to continuation of benefits throughout the leave and restoration to the same job or an equivalent position following leave.”²²³ Taken together, these Acts were intended to “promote the goal of equal employment opportunity for women and men”—and, as a result, reduce employment discrimination based on gender, and its attendant economic impact.²²⁴

Yet, the equal opportunity promised by the statutes is out of reach for many individual workers. Even under the broader terms of the FMLA, employees who wish to take advantage of its protections must work for certain types of employers and must have been employed for a certain amount of time to even qualify.²²⁵ As a result, a full 53% of the workforce is simply ineligible for FMLA leave.²²⁶ An additional limitation on access to benefits and protections under

²¹⁷ See Letter to Fannie Mae and Freddie Mac, *supra* note 22, at 2.

²¹⁸ See *id.*

²¹⁹ See Gerstel & Armenia, *supra* note 151, at 162 (describing the requirements the FMLA places on employers).

²²⁰ See *id.* at 166 (discussing specific eligibility requirements for coverage of employees and employers).

²²¹ *Id.* at 162.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 163-64.

²²⁵ Gerstel & Armenia, *supra* note 151, at 166 (“Employees are covered only if they have worked for an eligible employer for at least one year, and for at least 1250 hours in the previous year. Eligible employers are public agencies or private employers with fifty or more employees within a seventy-five-mile radius.”).

²²⁶ *Id.*

the FMLA is employers' lack of awareness or, or refusal to follow, the mandates of the FMLA.²²⁷ Department of Labor statistics from 2000 suggest that 83.7% of covered employers were in compliance with the FMLA—however, other studies have documented much lower compliance rates, finding that approximately 42 to 50% of covered employers were not in compliance with the FMLA's requirement concerning parental leave.²²⁸ While lawsuits can be brought to address compliance with the FMLA, such lawsuits would not affect the 53% of the workforce ineligible for leave under the FMLA.

This highlights the limitations of litigation strategies for effecting broad-based social change. While rejected loan applicants can raise claims of discrimination, such claims are targeted at redressing instances of discrimination and not at minimizing broader inequality based on gender or family responsibilities.²²⁹ Substantive equality for the sexes is affected by access to paid leave as well as to job security that enables women who give birth or adopt to take any sort of leave without losing their job. As noted above, the job security promised by the FMLA only extends to that subsection of workers who are eligible for its coverage. Additionally, the FMLA does nothing to encourage the sort of paid leave that would enable individuals to qualify for loans on a broader scale.

VI. CONCLUSION

This Article has sought to demonstrate why denying an individual a mortgage loan based on pregnancy or intent to take temporary caregiving leave violates both the terms and purpose of the Fair Housing Act and the Equal Credit Opportunity Act. The sex discrimination provisions of the fair lending laws were adopted to directly address concerns of sex stereotyping that prevented women from obtaining fair housing and credit opportunity. Current practices that deny pregnant women loans based predominantly on the simple fact of pregnancy, or an assumption that mothers are less committed to paid work, violate these laws.

In some ways, the problem outlined above is simple and requires only minimal efforts to remedy. First and foremost, lenders must be held to the requirements of existing antidiscrimination mandates. At a bare minimum, this means requiring that lenders review a woman's actual benefits rather than rejecting her application outright upon learning that she is pregnant or intends to take parental leave, as happened to Dr. Budde in the case outlined in this Article's Introduction. Enforcement actions should be brought both by private plaintiffs as well as prosecuted by government agencies. HUD's investigation into lending practices is an important signal to the lending community that the federal government recognizes recent lending practices as a new form of lending discrimination. Equally important will be continued monitoring of lenders for non-compliance with the fair lending laws.²³⁰ To the extent that lenders are engaging in patterns or practices of discriminatory behavior, DOJ should—and must, by statute²³¹—be apprised of the situation. Finally, Fannie Mae and Freddie Mac must clarify their

²²⁷ See *id.* at 176-77.

²²⁸ *Id.*

²²⁹ For more on barriers that prevent unqualified success of federal laws that attempt to respond to gender inequality, see Gerstel & Armenia, *supra* note 151, at 165, discussing how the FMLA “ignor[es] variations in families and jobs among women and among men,” and as a result, “intensifies class inequalities and maintains inequalities rooted in race, marital status, and sexuality.”

²³⁰ See Letter to Fannie Mae and Freddie Mac, *supra* note 22, at 2.

²³¹ See 15 U.S.C. § 1691e(g) (2006) (“Each agency [having enforcement responsibility] shall refer the

guidelines to firmly establish that they do not intend those guidelines to be interpreted to permit practices such as denying mortgages based solely on pregnancy, denying loans without verifying income, or basing judgments on stereotypical assumptions about women's commitment to return to work after childbirth.²³²

In other respects, however, this problem—like all forms of discrimination—is extraordinarily complex and difficult to attack. This is because it exists both as a result of sex stereotypes, which are uniquely justifiable by those who engage in unlawful discrimination, and because unequal access to mortgage credit rests in part on gendered patterns of caregiving. To the extent that it seems natural to assume that a woman's income cannot be counted on if she becomes pregnant, and to the extent it seems normal to question whether a woman will *really* return to work after giving birth, sex stereotypes affect how loans are underwritten and how creditworthiness is analyzed. To the extent that the problems described herein result from societal inequalities rooted in class, race, sex, and sexuality, more than antidiscrimination suits are needed.

Antidiscrimination law, therefore, faces limitations in what it can accomplish. Moreover, lawsuits are an expensive and slow means of social change. Nevertheless, despite the limited reach of antidiscrimination laws to redress underlying societal problems, the specific practices detailed above can be attacked through the Fair Housing Act and the Equal Credit Opportunity Act. These laws provide a critical and effective tool to minimize bars to equal access to homeownership—and lawsuits, while limited, can compensate victims, they can bring new social ills to public awareness, and they can initiate dialogue concerning accepted prejudices.

matter to the Attorney General whenever the agency has reason to believe that 1 or more creditors has engaged in a pattern or practice of discouraging or denying applications for credit.”).

²³² Letter to Fannie Mae and Freddie Mac, *supra* note 22, at 2. HUD indicated this past summer that HUD is in the process of reviewing Fannie Mae and Freddie Mac's underwriting guidelines, “to determine if they satisfy the Fair Housing Act, including income verification for persons taking maternity or parental leave.” June 2011 HUD Press Release, *supra* note 19.