
Fair Housing in Tennessee

Persistence of Housing Discrimination Demands Greater Support for Federally Funded Local Programs and New Approaches to Enforcement

September 2009

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The United States Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957, reconstituted in 1983, and reauthorized in 1994. It is directed to investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices; study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice; appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice; serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin; submit reports, findings, and recommendations to the President and Congress; and issue public service announcements to discourage discrimination or denial of equal protection of the laws.

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By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. The committees are composed of state citizens who serve without compensation. The committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction. More specifically, they are authorized to advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states.

Letter of Transmittal

Tennessee Advisory Committee to the
U.S. Commission on Civil Rights

Martin Dannenfelser, *Staff Director*

The Tennessee Advisory Committee (Committee) submits this report, *Fair Housing in Tennessee: Persistence of Housing Discrimination Demands Greater Support for Federally Funded Local Programs and New Approaches to Enforcement*, as part of its responsibility to study civil rights issues in the State and report on its findings. The report was unanimously approved by the members of the Tennessee Advisory Committee at a meeting of the Committee by a vote of 11 yes, 0 no, and no abstentions.

Although often not the most glamorous of issues, housing discrimination is a critical civil rights issue. It deprives individuals of much more than a place to stay—it also has a negative effect on a person's quality of life and general well being. The cases presented to the Supreme Court and the Courts of Appeals of the United States throughout the second half of the twentieth century, and into the more recent times have tested the limits of the Fair Housing Act. In spite of the tools available for enforcement of the Act, violations occur to this day, and the process of refining the boundaries of the law continues. Despite federal and state local fair housing laws, housing discrimination continues to be prevalent. The number of housing discrimination complaints in fiscal years 2006 and 2007 filed with federal, state, and local agencies were the highest ever recorded.

Studies by HUD as well as private groups such as the National Fair Housing Alliance continue to show that hundreds of thousands of instances of housing discrimination go unreported. There needs to be a renewed effort to increase use of public service and educational forums to inform the public of governmental protections against housing discrimination and these should be offered in a variety of different languages and locations.

In this report there is a special section devoted to the use of "paired testing" in fair housing enforcement. Since the late 1970s, paired testing has been used to test and measure the prevalence of discrimination in the housing market. In practice, most paired testing is conducted by private FHIP agencies under HUD's Private Enforcement Initiative grants. The effectiveness of this enforcement strategy, along with its pitfalls and challenges—both legal and logistical—are discussed.

If the State of Tennessee and the Nation are to be serious about fair housing, there needs to be renewed commitment to enforcing the fair housing laws. To the end, Tennessee should work to have more local, public FHAP-certified agencies in the state. At the federal level, Congress should increase funding for HUD's oversight and enforcement programs, in particular providing additional funding for private FHIP agencies to allow for more paired testing. Finally, to bridge the modern gap in housing discrimination, both the State of Tennessee and Congress should revisit the Nation's fair housing strategies and examine new remedies for resolving fair housing issues that might better deter violations of the law.

Respectfully,
Rev. Bernie Miller, *Chairman*
Tennessee State Advisory Committee

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Introduction

The U.S. Commission on Civil Rights is an independent, bipartisan federal agency charged with the responsibility to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin. Although voting rights and employment discrimination dominated the early civil rights agenda, over time housing discrimination became an increasingly important civil rights issue. This, in part, is because housing discrimination deprives individuals of much more than a place to stay, it has a negative effect on their quality of life and general well being.¹ For example, the demographics of housing and schools are deeply interwoven as segregated neighborhoods create segregated schools.² Acts of housing discrimination reject a fundamental premise of the nation, i.e., every person, regardless of class or group background, should have the same right to the rewards of his or her work and enterprise. Unchallenged, housing discrimination impedes opportunities that should be allowed individuals as a matter of right.³

Since its inception in 1957, the Commission has been active in the study of housing discrimination. In the 1990s the Commission issued a statutory report on the status of fair housing enforcement in 1994.⁴ A decade earlier the Commission examined data from the 1980 Census and found that based upon a 100 point segregation scale, that the index was 70 or more in the least segregated major cities, Washington, D.C., and San Francisco, and in cities like Chicago, Detroit and Cleveland, the racial isolation index escalated to around 90.⁵ In 2009 the Commission intends to engage in a nationwide study of fair housing practices.

Even though decades have elapsed since the passage of the first federal fair housing act, blacks and other minorities can still expect to encounter discriminatory housing practices when looking for a home to either rent or buy. An analysis by the Lewis Mumford Center of 2000 Census data shows deep residential segregation patterns, despite the nation's growing racial and ethnic diversity. The study notes that "[t]he average white person continues to live in a neighborhood that looks very different from those neighborhoods where the average black, Hispanic, and Asian live. For example, the average white person in metropolitan America lives in a neighborhood that is almost 83 percent white and only 7 percent black. In contrast, a typical black individual lives in a neighborhood that is only 33 percent white and as much as 54 percent black."⁶

Moreover, as reported by the Civil Rights Project, relatively little has changed in recent years with respect to racial integration. Housing experts measure segregation by a *dissimilarity index*, which is a 100-point scale where 100 represents complete segregation with all blacks and whites living in separate, racially homogeneous areas and 0 represents a perfect random housing distribution by race. In metropolitan areas, where most blacks, Hispanics, and Asians live, an analysis of 2000 Census data shows only modest changes in integration from two decades earlier. Conditions had improved slightly in San Francisco and Washington, DC, which had segregation indices in the low 60s, while the segregation index in Chicago, Cleveland, and Detroit were still at about 80.⁷ Similarly, analyses of data from the 2000 Census by the Washington Post concluded that Hispanics increasingly live in largely segregated areas, and that blacks remain more segregated than Hispanics in every region of the country. The same analysis

¹ U.S. Commission on Civil Rights, *The Fair Housing Amendments Act of 1988: The Enforcement Report* (Washington, D.C.:1979), p. 4 (hereafter cited as *Fair Housing Report*).

² National Fair Housing Alliance, *2006 Fair Housing Trends Report*, Apr. 5, 2006.

³ *Ibid.*, p. 5.

⁴ *Fair Housing Report*, p. 4.

⁵ U.S. Commission on Civil Rights, *The Fair Housing Amendments Act of 1988: The Enforcement Report* (Washington, D.C.: September 1994), p. 4

⁶ The Lewis Mumford Center at <http://www.albany.edu/mumford/census/magazine/> (last accessed on December 1, 2007).

⁷ The Civil Rights Project at http://www.civilrights.org/research_center/civilrights101/housing.html (last accessed December 2, 2007).

further found that segregation levels are higher in mid-western cities and large urban areas, while integrated neighborhoods are more common in the faster-growing West and South and in smaller metropolitan areas.⁸

State advisory committees are part of the Commission and established in each of the 50 states to advise the Commission and inform the public of civil rights issues in their states. In keeping with its advisory role, the Tennessee Advisory Committee to the U.S. Commission on Civil Rights determined at a meeting of the Committee in August 2008 to examine fair housing enforcement in the state, with a particular emphasis on the use of ‘testing.’

In doing this work the Committee received a briefing on fair housing enforcement.⁹ It undertook to research federal, state, and local fair housing laws as well as the historical background behind their adoption. Data was collected about fair housing complaints filed in Tennessee, as well as the locations where there were the highest number of complaints. Finally, the types and extent of the use of ‘testing’ in fair housing enforcement were examined.

In Part I of this report, the Committee looks at federal and state fair housing legislation. The Civil Rights Act of 1866 in Section 1982 is discussed, followed by an examination federal fair housing legislation as set out in the Fair Housing Act of 1968 and the Fair Housing Amendments Act of 1988. Tennessee fair housing laws are then reviewed, as well as specific local fair housing statutes.

Part II looks at the major types of housing discrimination that are reported in Tennessee and the basis for these complaints. Housing discrimination in the rental of property, the Section 8 housing voucher program, and predatory lending receive specific attention. Also, there is specific discussion of housing discrimination against persons with disabilities, racial and ethnic minorities, and immigrants.

Part III examines housing discrimination in Tennessee. A state-wide summary of housing discrimination complaints is set out. That is followed by an examination of housing discrimination complaints in Davidson County, which is contrasted with fair housing complaints in Shelby County.

Part IV explores fair housing enforcement. Separate sections look at operations at the federal level by the U.S. Department of Justice and the U.S. Department of Housing and Urban Development. The two major federal initiatives with local agencies, the Fair Housing Assistance Program and the Fair Housing Initiative Program, are also discussed. The final section examines ‘testing’ in fair housing enforcement, to include its use, pitfalls, and legal challenges.

In Part V, the Committee looks at the role of government in unintentionally perpetuating housing discrimination, and both the public housing program and the country’s urban renewal program receive comment. Following this part, the Committee sets out its unanimous consent as to findings of fact and concludes with its recommendation.

⁸ Ibid.

⁹ Briefing before the Tennessee Advisory Committee to the U.S. Commission on Civil Rights, “Fair Housing Enforcement in Tennessee,” August 8, 2008, Chattanooga, TN. A record of the transcript is available from the Southern Regional Office, U.S. Commission on Civil Rights, Atlanta, GA.

Part I – Fair Housing Legislation

The Civil Rights Act of 1866 in Section 1982 was the first federal established statute to provide for equal rights in the purchase, lease, selling, or holding of real and personal property. Active involvement by the federal government to combat housing discrimination began in 1968 when Congress enacted the Civil Rights Act of 1968, and chapter VIII of that Act has come to be known as the Fair Housing Act (FHA). In 1988, Congress amended the FHA with the Fair Housing Amendments Act.

1. 1982 Claims

Section 1982 of the Civil Rights Act provides: “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”¹⁰ In *Jones v. Alfred H. Mayer Co.*, the Supreme Court held that Section 1982 bars all racial discrimination, private as well as public, in the sale or rental of property.¹¹ The Court construed Section 1982 as a valid exercise of Congressional power to enforce the Thirteenth Amendment, concluding that the inability to purchase property freely could rationally be determined to be a badge or incident of slavery.¹² The Supreme Court subsequently upheld this ruling in *Sullivan v. Little Hunting Park, Inc.*, striking down a private interference with an individual’s right to lease property to whomever he or she chooses.¹³

Procedurally, Section 1982 claims are not bound by a statute of limitations found in federal fair housing legislation, and courts have generally agreed that the Section 1982 statute of limitations is determined by selecting the limitations period of the forum state’s most analogous cause of action.¹⁴ Some courts have suggested wrongful appropriation of property, personal injury, defamation, intentional infliction of emotional distress as most analogous.¹⁵ Other courts have held that the limitation period imposed by the state’s own anti-discrimination statute is controlling.¹⁶ In addition, unlike the federal fair housing laws, there is no cap on punitive damages that can be awarded to a prevailing plaintiff in a Section 1982 claim.¹⁷ Further, the prevailing party may also recover attorneys fees associated with a Section 1982 claim.¹⁸

In the past, property owners often used private contracts to further housing discrimination. One common method of doing so was through the use of restrictive covenants that limited the alienation of property based on discriminatory factors, primarily race. *Shelley v. Kraemer* was the landmark case which declared state judicial enforcement of restrictive covenants to be state action in violation of the Fourteenth Amendment.¹⁹ While restrictive covenants that were voluntarily adhered to did not violate the Fourteenth Amendment, once the covenants were violated and the aggrieved parties sought to enforce the terms of those covenants through state courts, the Supreme Court found that state action in violation of

¹⁰ 42 U.S.C. § 1982 (1944).

¹¹ 392 U.S. 409, 423-24 (1968).

¹² *Id.* at 441-44.

¹³ 396 U.S. 229, 236-37 (1969).

¹⁴ *See, e.g., Hampton v. Roberts*, 386 F.Supp. 609, 611 (D.C. Va. 1974) (“The Statute of Limitations applicable to a cause of action brought under 42 U.S.C. § 1982 is the state Statute of Limitations expressly, or most nearly applicable to the type of claim asserted.”)

¹⁵ *See Allen v. Gifford*, 462 F.2d 615, 615 (4th Cir. 1972) (noting that the state’s statute of limitations applies to actions brought under Section 1983 for personal injuries and holding that the reasons underlying such application also apply in the context of claims brought under Section 1982).

¹⁶ *Warren v. Norman Realty Co.*, 513 F.2d 730, 733-34 (8th Cir. 1975).

¹⁷ *Dillon v. AFBIC Dev. Corp.*, 597 F.2d 556, 563-64 (5th Cir. 1979).

¹⁸ 42 U.S.C.A. § 1988 (2000) (West, Westlaw through P.L. 110-452 approved 12-2-08).

¹⁹ 334 U.S. 1, 20, 23 (1948). An example of a restrictive covenant that would be prohibited from state judicial enforcement would be a covenant that bound the purchaser of a property to only resell that property to whites.

the Fourteenth Amendment had taken place.²⁰ In *Barrows v. Jackson*, the Supreme Court extended the ruling in *Shelley* by holding that damages could not be awarded by a state court for a breach of a restrictive covenant.²¹

Citizens also utilized the political process to advance discriminatory housing practices. *Reitman v. Mulkey* set the stage for referenda cases—the Supreme Court struck down a voter proposition which would have amended the state constitution in a way that “encouraged” private discrimination, nullified prior fair housing laws, and constituted unconstitutional state action in violation of the Fourteenth Amendment.²² In *Hunter v. Erickson*, the Supreme Court moved away from its theory of “encouraging” private discrimination articulated in *Reitman*. Instead, the Supreme Court chose to invalidate a facially neutral voter amendment to a city charter on the grounds that it would have discriminated, on racial or religious grounds, against groups seeking the law’s protection by setting up a new, more complex procedure of lawmaking than the method used by any other group.²³

James v. Valtierra dealt with a referendum that discriminated against the poor.²⁴ In this case, the Supreme Court upheld the referendum because the Court determined that wealth is not a suspect class subject to strict judicial scrutiny and that, in order to succeed in challenging a racially discriminatory referendum, a discriminatory purpose aimed at a racial minority must be shown.²⁵ Indeed, *City of Eastlake v. Forest City Enterprises, Inc.* illustrated the Court’s faith in the referendum process as “a basic instrument of democratic government” that will not be second-guessed as long as it is facially neutral as to race and arguably serves a legitimate purpose.²⁶

2. Federal Fair Housing Act

a. Legislative History

Federal fair housing law is the result of two major statutes—the Fair Housing Act of 1968²⁷ and the Fair Housing Amendments Act of 1988.²⁸ After Congress passed the Fair Housing Act in 1968, over the course of the next 20 years several proposals were considered that would eventually evolve into the amendments passed in 1988 as well as several individual amendments to Title VII.²⁹ Separately from the 1988 amendments, however, in 1974 “sex” was added to the list of proscribed categories of housing discrimination.³⁰

The FHA established as federal law equal rights in the purchase, lease, selling, or holding of real and personal property. The FHA, however, contained no administrative mechanism for dealing with complaints. Twenty years after passage of the Fair Housing Act, Congress strengthened and expanded its provisions via the Fair Housing Amendments Act of 1988. Among the provisions added were: (1) a new enforcement mechanism for dealing with administrative complaints; (2) the addition of families with children and the handicapped to the protected groups; and (3) changes regarding the coverage, procedures, and remedies of the 1968 Act.³¹ Some of the more important changes in the latter group were the expansion of section 3505 to include discrimination in residential financing to include a wide range of real estate transactions, the expansion of the definition of “discriminatory housing practice” to include

²⁰ *Id.* at 13-14, 19, 22-23.

²¹ 346 U.S. 249, 253-54 (1953).

²² 387 U.S. 369, 384-87 (1967).

²³ 393 U.S. 385, 391-93 (1969).

²⁴ 402 U.S. 137, 141 (1971).

²⁵ *Id.*

²⁶ 426 U.S. 668, 678-79 (1976).

²⁷ Pub. L. 90-284, 82 Stat. 73 (1968).

²⁸ Pub. L. 100-430, 102 Stat. 1619 (1988).

²⁹ SCHWEMM, *supra* note 18, § 5.1, at 5-1 to -2.

³⁰ Pub. L. 93-383, § 808, 88 Stat. 729 (1974).

³¹ SCHWEMM, *supra* note 18, § 5:3, at 5-7.

intimidation and interference claims, the extension of the statute of limitations, the elimination of the punitive damages cap for private lawsuits, the requirement that HUD provide Congress with annual reports on housing discrimination, and the requirement that HUD promptly issue regulations to administer and interpret Title VIII as amended.³²

The federal Fair Housing Act of 1968 was the product of three years of congressional debate and deliberation about housing discrimination legislation.³³ Between 1966 and 1967, Congress frequently considered the fair housing bill, but failed to attain the required majority for passage.³⁴ Its legislative history spans several nationally traumatic events, including the urban riots of 1967 and the assassination of Dr. Martin Luther King, Jr. in 1968.³⁵

Congress first examined fair housing legislation because of a proposal made by President Johnson.³⁶ The administration bills, S. 3296 and H.R. 14765, were comparable to what eventually became Title VIII but they afforded judicial enforcement only.³⁷ Subsequent amendments for an administrative remedy were proposed later in 1966 because a “‘nonjudicial avenue of relief . . . would provide a more expeditious and less burdensome method of resolving housing complaints.’”³⁸ The Senate and House Judiciary committees conducted extensive hearings regarding the proposals but they were ultimately stalled in the Senate after a successful filibuster prevented further floor action on the matter.³⁹

In 1967, President Johnson’s administration again pushed for civil rights legislation that included provisions concerning housing discrimination.⁴⁰ This time, however, the House did not act favorably on the bill, opting instead to report another bill devoid of fair housing provisions.⁴¹ The bill was passed by the House but again, the bill’s progress stalled and it did not reach the full Senate for consideration in 1967.⁴²

Upon the bill’s introduction on the Senate floor in early 1968, Senators Brooke and Mondale sponsored a fair housing amendment to the bill.⁴³ This proposal was subsequently withdrawn in favor of a compromise fair housing plan.⁴⁴ The only significant change made in Mondale and Brooke’s proposal by the compromise plan was the removal of the “‘cease and desist’ power advocated for HUD as a component of the administrative remedy in favor of ‘informal methods of conference, conciliation, and persuasion.’”⁴⁵ Even this version, however, failed at first to garner enough votes to overcome the filibuster.⁴⁶

The tide changed upon release of the *Report of the National Advisory Commission on Civil Disorders* (the “Kerner Commission Report”). The report stated that the nation [was] moving toward two societies, one black, one white--separate and unequal.⁴⁷ The Kerner Commission noted that “although housing costs [blacks] relatively more, they had worse housing—three times as likely to be overcrowded

³² *Id.* § 5:3, at 5-7 to -8.

³³ *Id.*

³⁴ Department of Housing & Urban Development, History of Fair Housing, <http://www.hud.gov/offices/fheo/aboutfheo/history.cfm> (last visited Nov. 30, 2008).

³⁵ SCHWEMM, *supra* note 18, § 5:2, at 5-2.

³⁶ *Id.* § 5:2, at 5-2 to -3.

³⁷ *Id.* § 5:2, at 5-3.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* § 5:2, at 5-3 to -4.

⁴⁴ *Id.* § 5:2, 5-4.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968), available at <http://www.eisenhowerfoundation.org/docs/kerner.pdf>.

and substandard. When compared to white suburbs, the relative disadvantage is even more pronounced.”⁴⁸ Furthermore, “nearly two-thirds of all non-white families living in the central cities . . . live[d] in neighborhoods marked with substandard housing and general urban blight.”⁴⁹ In addition, the report also acknowledged the connection between racial segregation in housing and in schools.⁵⁰ Among the Kerner Commission’s major recommendations was the enactment of a comprehensive federal fair housing law.⁵¹ Specifically, the Commission advocated adoption of “a comprehensive and enforceable federal open housing law to cover the sale or rental of all housing, including single family homes.”⁵²

Both the Kerner Commission Report and the urban riots that encouraged it are important factors in the legislative history of the Fair Housing Act.⁵³ After the report was issued, the Senate voted cloture on the filibuster blocking the housing measure and the bill was subsequently debated and agreed to with minor amendments.⁵⁴ The bill was then returned to the House for consideration. Less than a month later, Dr. Martin Luther King, Jr. was assassinated, catalyzing a whole new round of civil disorders.⁵⁵

The assassination of Dr. Martin Luther King, Jr., on April 4, 1968, prompted President Lyndon B. Johnson to encourage the speedy passage of the bill.⁵⁶ On April 11, 1968, President Johnson signed the Civil Rights Act of 1968, which included the Fair Housing Act, into law.⁵⁷ The 1968 act “expanded on previous acts and prohibited discrimination concerning the sale, rental, and financing of housing based on race, religion, national origin, sex, and (as amended) handicap and familial status.”⁵⁸ Notably, “[t]he legislative history makes clear that residential integration is a major goal of the Fair Housing Act, separate and independent of the goal of expanding minority housing opportunities.”⁵⁹ While Congress debated fair housing measures, the U.S. Supreme Court heard oral arguments in *Jones v. Alfred Mayer Co.*⁶⁰, ruling in June 1968 that the Civil Rights Act of 1866 prohibited all race discrimination in housing, including among private parties.⁶¹

b. Discrimination Defined

Under the Fair Housing Act, “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”⁶² In order to effectuate this directive, the Act proscribes “discriminatory housing practice[s],” which are acts deemed unlawful by one of four sections of the Act.⁶³ The most important of these sections makes it unlawful to “refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”⁶⁴ Similar language is employed in section 3604(f)(1), which bans handicap discrimination.

⁴⁸ *Id.* at 7.

⁴⁹ *Id.* at 24.

⁵⁰ *Id.* at 21-22.

⁵¹ SCHWEMM, *supra* note 18, § 5:2, at 5-5.

⁵² NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, *supra* note 38, at 24.

⁵³ SCHWEMM, *supra* note 18, § 5:2, at 5-5.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ History of Fair Housing, *supra* note 25.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ SCHWEMM, *supra* note 18, § 2:4, at 2-7.

⁶⁰ *Id.* §§ 3604-3606 and § 3617

⁶¹ TRACEY MCCARTNEY & SARA PRATT, THE FAIR HOUSING ACT: 35 YEARS OF EVOLUTION 1, <http://www.fairhousing.com/include/media/pdf/35years.pdf>.

⁶² *Id.* § 3601.

⁶³ *Id.* § 3601.

⁶⁴ *Id.* § 3604(a). The broad catch-all phrase “otherwise make available or deny” can “be read to include almost every housing practice imaginable.” ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 4:4, at 4-5 (1990).

Section 3604(b) makes it illegal to discriminate in the terms or conditions of sale or rental of a property or the provision of facilities or services in connection therewith. Section 3604(c) prohibits discriminatory advertisements and statements in connection with a housing transaction. Finally, section 3604(d) proscribes misrepresentations that a dwelling is unavailable for inspection, sale, or rental. The Act also prohibits discrimination by individuals engaged in the business of real estate transactions based on the enumerated categories as well as discrimination in the provision of brokerage services.

Section 3605 bars discrimination in the finance of housing and certain other “residential real estate-related transactions.” Section 3606 prohibits discrimination related to membership or participation in multiple-listing and other brokerage services. Finally, section 3617 outlaws coercion, intimidation, threats or interference with any person for the exercise of rights under §§ 3603-3606 or for assisting another person in the exercise of those rights.

Establishing a Prima Facie Case in Title VIII Claims

In a Title VIII case, the burden of going forward shifts to the defendant as soon as the plaintiff has made out a prima facie case of discrimination.⁶⁵ In a typical case, the prima facie case is established by proving the following elements: (1) that plaintiff is a member of a protected minority group; (2) that he attempted to apply to rent or purchase the disputed house; (3) that he was ready, willing and able to purchase or rent the housing; (4) that he was rejected or subjected to differential treatment or delayed or otherwise hindered by the defendant or his agents; (5) that the housing remained available after defendant failed to rent or sell same to plaintiff.⁶⁶ The plaintiff’s burden is satisfied when he or she has proven all the elements of the case by a preponderance of the evidence.⁶⁷

In the absence of direct guidance from the statutory language, the legislative history, and the Supreme Court, the lower courts have generally held a Fair Housing Act violation may be based on the discriminatory effect standard—that a violation of the Fair Housing Act exists, absent discriminatory intent, when there are discriminatory effects.⁶⁸

Who is a Landlord?

The Fair Housing Act of 1968 does not list the term “landlord” in the definitions section of the statute. Nevertheless, the act itself does set some parameters as to who is subject to liability under the Act. The Fair Housing Act does not apply to any single-family house rented by an owner as long as the owner does not own more than three single-family houses at any one time. The Act also does not apply to rooms or units in dwellings containing living quarters occupied by no more than four families, living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence. Based upon these parameters, generally speaking the term “landlord” refers to:⁶⁹

1. Any person who owns and rents more than three single-family houses at one time;
2. Any person who owns and rents a residential property containing four or more units if the landlord does not maintain one of the units as his residence; or
3. Any person who owns and rents a residential property containing five or more units even if the landlord maintains one of the units as his residence.

Similar to the Fair Housing Act, the Tennessee Code Annotated does not explicitly define “landlord.” Nevertheless, the Tennessee statute contains nearly identical provisions as those included in

⁶⁵ Resident Advisory Bd. v. Rizzo 425 F.Supp. 987, 1021 (E.D. Pa. 1976).

⁶⁶ *Id.*

⁶⁷ Marr v. Rife, 503 F.2d 735, 739 (6th Cir. 1974).

⁶⁸ See, e.g., Hallmark Developers, Inc. v. Fulton County, Ga., 466 F.3d 1276, 1286 (11th Cir. 2006) (“[A] showing of significant discriminatory effect suffices to demonstrate a [prima facie] violation of the Fair Housing Act.’ ”)

⁶⁹ Fair Housing Act of 1968, 42 U.S.C.A. § 3603 (b)(1)-(2).

the Fair Housing Act and further limits the exempted “landlords.” Tennessee law proves to be more stringent than Federal law because the Act applies to the rental of housing accommodations in a building that contains units for no more than two families living independently of each other, if the owner or a member of the family resides in one of the units. Thus, in Tennessee, a property with two or more units not occupied by the owner is covered by the Act and the owner is considered a landlord.. Much the same as “reasonable accommodation,” the judiciary has not explicitly defined who or what constitutes a “landlord” under the Fair Housing Act. However, through the case law certain characteristics, elements, and requirements become evident in determining who federal courts have deemed to be a “landlord.”

The United States Supreme Court appears to apply a more stringent definition of “landlord” compared to some federal circuit courts. The Supreme Court limited “landlord” to being the owner of a rental dwelling or home.⁷⁰ The Ninth Circuit Court of Appeals has interpreted “landlord” much more broadly, holding that the term “landlord” applies to the owner, manager, and real estate developer of real property that is sold or rented.⁷¹ Tennessee’s circuit, the Sixth Circuit, also applies the broader definition of “landlord.” The Sixth Circuit Court of Appeals found that “landlord” under the Act applies to owners and operators of residential real estate.⁷² In the Sixth Circuit case, *Stewart v. Furton*, the court held that control of the estate and exercise of control to discriminate constituted being a “landlord.”⁷³ In *Stewart*, the owners and managers of a trailer park were found liable for not allowing the owner of a trailer within the park to sublease to a black man.

Reasonable Accommodation

The Fair Housing Act prohibits discrimination in the sale or rental of a dwelling, or otherwise making a dwelling unavailable to handicapped person⁷⁴, including a refusal by a landlord to make “reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [handicapped] person[s] equal opportunity to use and enjoy a dwelling.”⁷⁵

The Fair Housing Act has a long and storied judicial history but courts have not precisely defined what constitutes a “reasonable accommodation” under the statute. In fact, the United States Supreme Court found that “reasonable accommodation” is a “threshold question” that should be determined by a fact-finder.⁷⁶ The Court further expounded that “reasonable accommodations” should afford afflicted persons an “equal opportunity to use and enjoy” housing.⁷⁷

Federal Circuit Courts’ case law sheds more light regarding the Fair Housing Act’s “reasonable accommodation” standard. The Ninth Circuit Courts of Appeals has found that the reasonable accommodation inquiry is highly fact-specific, requiring case-by-case determination.⁷⁸ The Second Circuit Court of Appeals, however, has focused on the financial aspects of such alterations. In the Second Circuit, a complainant must show that, but for the accommodation, the complainant likely will be denied an equal opportunity to enjoy the housing of their choice. A defendant must incur reasonable costs and take modest, affirmative steps to accommodate the plaintiff as long as the accommodations sought do not pose an undue hardship or a substantial burden.⁷⁹ In addition, the Fourth Circuit found that the Fair Housing Act’s requirement for reasonable accommodations mandates not only the level of benefit that must be sought by reasonable accommodation but also provides limitation on what is required. The Fair

⁷⁰ *City of Edmonds v. Oxford House, Inc.* 514 U.S. 725, 735 (1995).

⁷¹ *Garcia v. Brockway*, 526 F.3d 456, 488 (9th Cir. 2008).

⁷² *Graoch Associates v. Louisville/Jefferson County Metro Human Relations Comm'n*; 508 F.3d 366, 378 (6th Cir. 2007).

⁷³ *Stewart v. Furton*, 774 F.2d 706, (6th Cir. 1985).

⁷⁴ 42 U.S.C.A. § 3604(f)(1)(A)

⁷⁵ *Id.* § 3604 (f)(3).

⁷⁶ *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 726 (1995).

⁷⁷ *Id.* at 737.

⁷⁸ *DuBois v. Ass’n of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1178 (9th Cir. 2006).

⁷⁹ *Tsombanidis v. West Haven Fire Dept.*, 352 F.3d 565, 578 (2d Cir. 2003).

Housing Act does not require accommodations that increase benefit to handicapped persons above that provided to non-handicapped persons with respect to matters unrelated to the disability.⁸⁰

The Sixth Circuit adopted an objective test to determine whether “reasonable accommodation” efforts have been made.⁸¹ In the Sixth Circuit, an accommodation is reasonable when it “imposes no fundamental alteration in the nature of a program, or undue financial and administrative burdens.”⁸² The Sixth Circuit also held that while the Act imposes an affirmative duty on the landlord to provide reasonable accommodations, the plaintiff in a fair housing suit has the burden of showing that a proposed accommodation is reasonable. The inquiry into such reasonableness will be highly fact-specific, will balance the burdens of providing the requested accommodation against the benefits to the plaintiff, and will consider functional and administrative aspects as well as costs.⁸³ In *Groner v. Golden Gate Apts.*, the Sixth Circuit held that a handicapped tenant’s accommodation requests were not reasonable, and thus the landlord had not acted improperly in denying the requests. The plaintiff in *Groner* suffered from a mental illness that caused him to make noise that disturbed neighbors in his apartment complex. The plaintiff requested two accommodations: the first, that he remain in his unit and seek counseling in the hopes that his noise-making would cease and the second, that his counselor be contacted upon any complaints about him. The court found that these accommodation requests, which would enable the plaintiff to remain in his apartment, were not reasonable when weighed against the defendant’s “legitimate interest” in protecting the quiet enjoyment of all of its tenants.⁸⁴

3. Tennessee Fair Housing Laws

Tennessee’s Human Rights Statute provides authority for Tennessee’s execution of the principles of the Civil Rights Act (as amended in 1972), the Age Discrimination Employment Act, and the Pregnancy Act.⁸⁵ The statute declares that the state has an interest in protecting personal dignity and freedom from humiliation in adopting these policies.⁸⁶ Part Six of the statute, Discrimination in Housing and Financing, is dedicated to the promotion of the fair housing standards as set out in Title VIII of the Civil Rights Act. “Housing accommodation,” as defined in the statute, “includes improved and unimproved property and means a building, structure, lot or part thereof that is used or occupied, or is intended, arranged or designed to be used or occupied, as the home or residence of one (1) or more individuals.”⁸⁷

Like the federal statutory protections afforded in the sale and rental of “dwellings,” Part Six covers a variety of discriminatory practices prohibited in providing housing accommodation such as the prohibition of block busting and restrictive covenants.⁸⁸ There are also a number of exemptions to which the fair housing provisions do not apply. Part Two of the statute creates the Human Rights Commission, which has the authority to, among other duties, initiate, investigate and attempt to reconcile claims of violations arising under this statute.⁸⁹ Furthermore, “[i]n addition to the remedies provided under [Tennessee law], any local or municipal government [that] has enacted a fair housing ordinance in connection with this part may enforce the provisions of the ordinance in the circuit court of the county in which the violation occurred.”⁹⁰

⁸⁰ *Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597, 604 (4th Cir. 1997).

⁸¹ *Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1044 (6th Cir. 2001).

⁸² *Id.*

⁸³ *Id.* at 1045.

⁸⁴ *Id.* at 1047.

⁸⁵ TENN. CODE. ANN. § 4-21-101(a)(1) (West, Westlaw through 2008 Reg. Session).

⁸⁶ *Id.*

⁸⁷ *Id.* § 4-21-102(11).

⁸⁸ *Id.* § 4-21-601.

⁸⁹ *Id.* § 4-21-201, § 4-21-202(9).

⁹⁰ *Id.* § 4-21-601(e).

Several municipalities have gone further to create local ordinances that govern fair housing, many of which surpass the state and federal protected classes. For example, Memphis added “source of income” as a protected class.⁹¹ To follow is a brief look at some of these ordinances.

Chattanooga

In 1986, the City of Chattanooga instituted a more proactive approach toward correcting discrimination in housing, which had been an ongoing problem that culminated in a 1979 civil suit brought by the NAACP and Tennessee Properties against the City. To remedy this situation, Chattanooga developed its own fair housing ordinance.⁹² At the same time, the City and HUD created a Community Housing Resource Board (CHRB), which consists of community members and realtors. The Board’s responsibilities include promoting the concept of equal housing opportunities among realtors, landlords, tenants, lenders and the community at large. Issues that are addressed include equal access to housing, tenant/landlord disputes, compliance with the Americans with Disabilities Act, and compliance with the Equal Employment Opportunity Act.⁹³

Memphis

The Memphis Code of Ordinances contains the city’s affordable housing regulations. Chapter 48 is the Housing Code and Article XI of this chapter is Memphis’ Fair Housing law. Section 48-255 describes unlawful practices, covering the same protected classes as the federal law with the addition of source of income. In addition, Section 2-228.b describes the reimbursement of certain fees collected by the city engineer for asphalt paving and certain sewer development fees. Only new residential subdivisions located within the city limits of Memphis are eligible for fee reimbursement.⁹⁴

Nashville

Chapter 11, section 20 of the Nashville Metropolitan Municipal Code covers housing practices. Entitled “Fair Employment and Housing Practice,” this code does not have provisions specifically geared toward enforcement of fair housing practices. Instead, the substance of the code addresses almost exclusively the prohibition of discrimination in employment.⁹⁵

Selmer

Title 20, Chapter 2 of the town ordinance defines its fair housing standards. Along with discrimination in housing and financing, the ordinance also covers education of those in the housing industry about standards of fair housing. In addition, the ordinance grants the mayor concurrent authority with the Tennessee Human Rights Commission to investigate claims and bring claims to proper court if there is no compliance with the ordinance within the designated 30-day period.⁹⁶

⁹¹ MEMPHIS, TN., CODE OF ORDINANCES § 10-36-2(A)(3) (LEXIS through Ordinance 5288, passed Jan. 6, 2009), available at <http://municipalcodes.lexisnexis.com/codes/memphis/>.

⁹² CHATTANOOGA, TN., CODE § 21-87, available at http://www.chattanooga.gov/City_Council/Code/22%20--%20Chapter%2021%20HOUSING.pdf.

⁹³ Best Manufacturing Practices Center of Excellence, http://www.bmpcoe.org/bestpractices/internal/chatt/chatt_23.html (last visited Dec. 1, 2008).

⁹⁴ MEMPHIS CODE OF ORDINANCES § 2-22-8(B).

⁹⁵ Metropolitan Government of Nashville and Davidson County Municipal Code, <http://www.municode.com/resources/gateway.asp?pid=14214&sid=42>.

⁹⁶ SELMER, TN., ORDINANCE NO. 439 § 5 (2006), <http://www.selmer-tn.com/downloads/selmer.t-20.pdf>.

Part II — Types of Housing Discrimination and Persons Affected

Housing discrimination can take a variety of forms, to include the rental of housing property, the provision of section 8 housing, and the availability and terms of mortgage lending. The targets of housing discrimination frequently include the disabled, racial minorities, and recent ethnic immigrants.

1. Types of Housing Discrimination

Tennessee has had a long history of housing discrimination. According to the Tennessee Human Rights Commission, race and disability have been the most common basis of race discrimination in Tennessee, followed by national origin and familial status.⁹⁷ Tables and graphs in the Appendix 1 provide detailed information about the extent of discrimination by cities and counties in the state. In Tennessee, housing discrimination typically occurs in the terms, conditions, and/or privileges relating to the rental of property.⁹⁸ Failure to provide individuals with reasonable accommodations has also been a form of housing discrimination in Tennessee.

a. Rental Housing

According to the National Fair Housing Alliance, rental cases have been and continue to represent the largest source of fair housing complaints. In 2006 private fair housing groups reported 14,211 complaints of housing discrimination in the rental market (out of over 17,000 total complaints) including such practices as, (1) denying the availability of units, (2) higher rents or security deposits, and (3) the steering of minority renters to certain buildings.⁹⁹ Adding to the high numbers of reported incidents of housing discrimination is the troubling fact that most individuals may have no idea that they have been victims of discrimination, because there is no identifiable comparison group as a point of reference.¹⁰⁰ Housing discrimination, unlike employment discrimination or public accommodation, occurs in private and therefore victims of housing discrimination do not witness different treatment to other individuals. The National Fair Housing Alliance estimates that there are at least 3.7 million instances of discrimination annually against blacks and Latinos alone, but less than 1 percent of violations are reported.¹⁰¹

The Fair Housing Act requires HUD to annually report to Congress on the progress made nationally in eliminating discriminatory housing practices and the remaining obstacles to achieving equal housing opportunity. As part of this requirement, HUD conducts studies of discrimination against racial and ethnic minorities and persons with disabilities when they look for housing to buy or rent. These studies provide a better understanding of the most commonly reported bases of housing discrimination.¹⁰²

HUD housing studies have found that consistently shown adverse treatment toward African Americans and Hispanics since passage of the FHAA in 1988. African Americans experience adverse treatment in approximately one in every five encounters with rental agents, while Hispanics experience adverse treatment in about one in four encounters with rental agents. These studies also found that Native Americans experience adverse treatment in one in four encounters with rental agents.

⁹⁷ TENN. HUMAN RIGHTS COMM'N ANNUAL REPORT 2007-2008, *supra* note 135, at 7.

⁹⁸ *Id.*

⁹⁹ National Fair Housing Alliance, *2007 Fair Housing Trends Report*, Apr. 30, 2007.

¹⁰⁰ Reed, Veronica. *Civil Rights Legislation and the housing status of black Americans. Evidence from Fair Housing. Review of Black Political Economy* Winter/Spring91. vol 19, Issue 3 p29.

¹⁰¹ National Urban League Policy Institute, *Fair Housing Fact Sheet*, Apr. 30, 2007.

¹⁰² U.S. Department of Housing and Urban Development, "The State of Fair Housing," FY 2007 Annual Report on Fair Housing, p.3 (hereafter referred to as HUD 2007 Annual Report).

Table 1. Issues in HUD and FHAP Complaints (FY 2006 and FY 2007)

	FY 2006		FY 2007	
	Number	% of Total	Number	% of Total
Refusal to Sell	288	3%	234	2%
Refusal to Rent	2,634	26%	2,649	26%
Steering	86	1%	76	1%
Discriminatory Terms or Conditions in Rental or Sale	6,005	58%	5,922	58%
Discriminatory Notices, Statements, or Advertisements	541	5%	593	6%
False Denial or Representation of Availability	236	2%	251	2%
Failure to Permit Reasonable Modification	124	1%	169	2%
Failure to Make Reasonable Accommodation	1,896	18%	2,094	21%
Noncompliance with Construction Requirements	228	2%	195	2%
Discriminatory Financing	552	5%	411	4%
Mortgage Redlining	4	<0.5%	12	<0.5%
Refusal to Provide Insurance	3	<0.5%	3	<0.5%
Coercion or Intimidation	1,354	13%	1,477	15%

Source. U.S. Department of Housing and Urban Development.

Persons with disabilities often have similar experiences. Among persons who have a hearing impairment, HUD reports that such persons experience adverse treatment nearly one-half of the time when they contact rental agents via a telephone-operator relay, and wheelchair users experience adverse treatment nearly one-third of the time when they inquire in person about rental properties.

As evidenced by the high number of fair housing complaints filed, housing discrimination continues to be a stubborn social problem. In 2006, HUD and its state and local partners received a record number of housing discrimination complaints, 10,328.¹⁰³ In fiscal year 2007 there were 10,154 housing complaints filed nationwide—the second highest number of annual complaints since 1988.

Discrimination in the rental of housing property accounts for the vast majority of complaints filed with HUD and its state and local partners. In FY 2007, refusal to rent was the basis for 26 percent of all housing complaints filed compared to refusing to sell, which accounted for only 2 percent. Extrapolating those case numbers to the other discrimination categories listed in HUD’s annual report, e.g., false representation of availability, failure to make reasonable accommodation, etc., it is likely that rental property discrimination accounts for about 90 percent of all housing discrimination.¹⁰⁴

Compounding the severity of the problem is that HUD research suggests that only a small fraction of individuals who believe they have experienced housing discrimination file a complaint with a government agency, so the above reported numbers likely reflect only a small percentage of the extent of housing discrimination. In its study on public awareness of fair housing, HUD reported that 14 percent of the public—the equivalent of more than 28 million people—believe they had experienced some form of housing discrimination at one point or another in their lives. Of those who thought they had suffered discrimination, only about 17 percent reported that they had taken any action, while almost two out of five people who did nothing about the perceived discrimination held that taking action was not worth the effort.¹⁰⁵ As a result, the reported numbers of complaints likely reflects only a small percentage of the extent of housing discrimination that actually occurs.

¹⁰³ Through its Fair Housing Assistance Program (FHAP), HUD partners with state and local human rights agencies to enforce fair housing laws that provide rights, remedies, procedures, and opportunities for judicial review that are substantially equivalent to those provided in the federal Fair Housing Act.

¹⁰⁴ HUD 2007 Annual Report, pp. 4-9.

¹⁰⁵ U.S. Department of Housing and Urban Development, “How Much Do We Know? Public Awareness of the Nation’s Fair Housing Laws,” April 2002, pp. ix and x.

b. Section 8 Housing

A second type of housing discrimination that has a substantive impact on racial and ethnic minorities is through Section 8 housing. A landlord can legally discriminate against protected individuals on Section 8 by not accepting or enlisting in the Section 8 program. That is, under the U.S. Housing Act of 1937 it is the landlord's prerogative to refuse to participate in the Section 8 program.¹⁰⁶ As protected persons constitute the overwhelming majority of persons with Section 8 vouchers, this refusal by landlords to participate in the program is a *de facto* form of housing discrimination.

Courts have interpreted the law to mean that no landlord is obligated to accept Section 8 tenants and participation by landlords is strictly voluntary.¹⁰⁷ Furthermore, a landlord is not required to offer any justification for a policy of refusing Section 8 vouchers.¹⁰⁸ Legislative intent and jurisprudence both indicate that a landlord can legally discriminate against Section 8 participants because they are not legally bound to accept Section 8 vouchers. The voluntary nature of the Section 8 program has prompted Congress to consider amending the Section 8 program to lessen the "burdens" on landlords in an effort to entice them to participate.¹⁰⁹

However, if a landlord decides to accept Section 8 tenants, the landlord can be held liable for discriminatory practices. In discrimination cases involving Section 8 holders, courts generally have readily applied the disparate treatment theory for claims of discrimination, but federal courts are divided about whether a disparate impact theory is applicable to Section 8.¹¹⁰ In order to prove disparate treatment, a plaintiff must state that he or she: 1) is a member of a protected class, 2) applied to and was qualified to rent or purchase certain housing, and 3) was rejected and the housing remained vacant.¹¹¹ Once this is established, if a landlord proffers a legitimate non-discriminatory reason for the disparate treatment then the plaintiff must establish that the articulated reason is a pretext.¹¹²

In order to prove disparate impact, a plaintiff must: 1) establish a prima facie case of discrimination against private defendant by identifying and challenging a specific housing practice, 2) offer an adverse effect through sufficient statistical evidence, and 3) show that the practice in question has caused the adverse effect.¹¹³ If the plaintiff makes a prima facie case, the defendant landlord must show a legitimate business reason for the challenged practice¹¹⁴ with the plaintiff having the opportunity to show the landlord's reasoning is a pretext or that there is an alternative housing practice that would achieve the same business results with a less discriminatory impact.¹¹⁵

c. Sub-Prime Loans and Predatory Lending

Home ownership and mortgage lending are closely associated because the vast majority of home purchases are made with the help of a mortgage loan. An individual's ability to obtain a mortgage at fair and reasonable rates is essential to equal opportunity housing.

For years conventional mortgages were the standard vehicle for financing a home. Simply put, a conventional loan is an agreement that is not guaranteed or insured by the federal government under the Veterans Administration, the Federal Housing Administration, or the Rural Housing Service of the U.S. Department of Agriculture.

¹⁰⁶ 42 U.S.C.A. § 1437f(d)(1)(B)(ii).

¹⁰⁷ *Kravette v. Stratford Greens Garden Apartments*, 136 F.3d, 294 (2d Cir. 1998).

¹⁰⁸ *Id.* at 301.

¹⁰⁹ *Graoch Assoc. v. Louisville*, 508 F.3d, 377 (6th Cir. 2007).

¹¹⁰ See, e.g., *Graoch*, 508 F.3d at 373.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 373.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 374.

From 1999 through 2007, conventional loans continued to dominate the mortgage loan market and accounted for 60 percent of all mortgage loans. African Americans, however, proportionately received a lower percentage of conventional loans. Whereas 64 percent of all mortgage loans during this time to whites were conventional loans, just 44 percent of home loans to African Americans were conventional loans. However, also during this time period, home mortgage lending practices changed markedly as a new set of loan products entered the market.

Historically, lenders offered consumers a relatively limited array of mortgage products at prices that varied according to the characteristics of the loan and the property. Beginning in the 1990s and concomitant with the development and availability of credit-scoring, there was an evolution toward an explicitly risk-based pricing of credit. In this new environment, the supposed creditworthiness of individual borrowers could lead to different prices for the same product. Less creditworthy applicants were more likely to be offered credit at a higher price instead of being outright rejected.¹¹⁶

Essentially, mortgage loans developed a multi-tiered market system. Lower price mortgages, i.e., those with low interest rates, became known as the prime market. Loans in this tier are made available to persons who present less credit risk based upon their credit score. In contrast, loans in the higher price tier, i.e., loans with higher interest rates and/or less favorable terms, are considered ‘near prime’ or ‘sub-prime’ loans.

Most sub-prime borrowers come from black and low-income communities. These loans have higher interest rates—typically 3 to 5 percentage points compared to ‘prime’ market loans as well as higher points and fees, to compensate for the perceived added risk of lending to a “potential at-risk borrower.”¹¹⁷ In 2004, nearly one-third of all conventional mortgages given to African Americans were sub-prime loans. A year later, in 2005, that had increased to 54.2 percent.¹¹⁸

However, many African Americans who are sub-prime borrowers are not financially destitute, nor do they have particularly low credit scores. African Americans living in low-income neighborhoods, where traditional banking services are limited tend to turn to sub-prime lenders despite their credit history. As evidence, sub-prime lenders account for fifty-one percent of all refinance loans made in predominately black neighborhoods, compared to just nine percent in white neighborhoods.¹¹⁹ In addition, almost one in three refinance loans made to low-income Latinos in 2006 was sub-prime.¹²⁰ These figures illustrate the fact that sub-prime loans and predatory lending has an adverse affect on minorities because they are by far the greater population of people using sub-prime loans and borrowers with sub-prime loans are “eight times more likely to default than those with prime conventional loans.”

Predatory lending is a subset of sub-prime mortgage loans. Some consider predatory loans are “unsuitable loans designed to exploit unsophisticated and vulnerable borrowers.”¹²¹ Predatory loans are proffered by mortgage companies, banks, and other financial institutions that prey on the underserved and financially uneducated. They are categorized by: higher charges and interest rates that are “required” to cover the added risks of loaning to borrowers with credit imperfections; contracts containing abusive terms and conditions trapping borrowers in increased indebtedness; a flagrant disregard for the borrower’s ability to repay the loan; and the propensity to violate fair lending laws by targeting women, minorities and communities of color.¹²²

Although predatory lending takes place in many areas, none is more pronounced than in the area of home ownership. This corresponds with the fact that most of the average American’s equity exists in

¹¹⁶ Robert B. Avery, Glenn B. Canner, and Robert E. Cook, Federal Reserve Board, “New Information Reported under HMDA and Its Application in Fair Lending Enforcement,” Federal Reserve Bulletin, Summer 2005.

¹¹⁷ See GREGORY D. SQUIRES, *WHY THE POOR PAY MORE: HOW TO STOP PREDATORY LENDING* 6 (2004).

¹¹⁸ Edward M. Gramlich, *Subprime Mortgages – America’s Latest Boom and Bust*, The Urban Institute Press, Washington, D.C., 2007, p. 17.

¹¹⁹ ROBERT SCHAFFER & HELEN F. LADD, *DISCRIMINATION IN MORTGAGE LENDING* 117 (1981).

¹²⁰ *Id.*

¹²¹ *Id.* at 2.

¹²² *Id.*

their home. The home equity market has increased since the 1990s at an annual growth rate of 18.8 percent.¹²³ A large part of this increase and the home equity structure in general is the home equity loan. A home equity loan is traditionally a second mortgage on a home used by many borrowers for debt consolidation and for home improvement. Currently, the term “home equity loan” also includes sub-prime first mortgages because they have the same pricing structure, underwriting standards, and share several terms of agreement with second mortgages. The sub-prime industry has grown five hundred percent since 1994, reaching \$160 billion dollars in 2005.¹²⁴ As a result of this profit potential, new lenders and brokers have been attracted to the market. Sub-prime lending companies make a significantly larger return than traditional and more commonly operated banks.

Home equity loans provide an ideal opportunity for predatory lenders to prey on households that have financial crises caused by: health problems, unemployment or recent job loss, loss of spouse, and major home repairs. Mortgage companies, banks, and other financial institutions engaged in predatory lending find individuals with debts related to these factors and offer them mortgages or refinancing, even when they know that the borrowers will likely not be able to make payments at some point.¹²⁵ Lenders use strategies such as “teaser” rates, couched within adjustable rate mortgages. A “teaser” is a special low rate that lasts for the first year or two of a mortgage, after which the rate skyrockets in three, five, or seven years. Many people are duped into going along with these rates because the broker involved makes the rate seem worry free, neglecting to explain that the initial rate will eventually increase to another rate in a matter of years.¹²⁶

Predatory lending practices put individuals in low-income families at a high risk of losing their homes to foreclosure. For example, most elderly homeowners homes are free and clear of any mortgage debt. The average elderly American has equity of at least \$100,000 or more and lives on a fixed income of \$30,000 or less.¹²⁷ These individuals are classified as “cash-poor” and “asset-rich.” They are vulnerable to predatory lending because they face bills from medical expenses and/or repairs for older homes. To pay off their debts, these homeowners are encouraged to tap into their home equity. Their knowledge of financial alternatives is limited and using their equity as collateral is often presented as the only option to eliminate debt. In several cases, these victims of predatory lending use home equity loans to pay off debts without realizing that they are replacing unsecured loans (credit card and personal loan balances) with secured debt.¹²⁸

2. Persons Affected by Housing Discrimination

While there was an increase in the overall number of complaints, not all bases of complaint increased. For the third consecutive year, disability was the most common basis of housing discrimination complaints filed with HUD and FHAP agencies, cited in 43 percent of complaints. This is likely due, at least in part, to the additional protections afforded persons with disabilities under the Fair Housing Act, i.e., reasonable accommodation, reasonable modification, and accessible design and construction. Despite experiencing a slight drop in complaints, race continued to be the second most common basis of complaints filed with HUD and FHAP agencies. In FY 2007, racial discrimination was alleged in 37 percent of complaints.

¹²³ See ROSS & YINGER, *supra* note 170, at 199.

¹²⁴ *Id.* at 202.

¹²⁵ See ROBERT J. SCHILLER, *THE SUBPRIME SOLUTION* 83 (2008).

¹²⁶ *Id.*

¹²⁷ See STEPHEN ROSS & JOHN YINGER, *THE COLOR OF CREDIT: MORTGAGE DISCRIMINATION, RESEARCH METHODOLOGY, AND LENDING ENFORCEMENT* 251 (2002).

¹²⁸ *Id.* at 252.

a. Persons with Disabilities

According to HUD data, the share of disability complaints has increased by five percentage points each year from 2004 to 2007, reflecting increases of approximately 300 complaints in each of the past 3 years. “Housing discrimination really affects people's chance for success in life and has a more significant impact than other kinds of discrimination. It affects access to jobs, education, transportation and safe communities.”¹²⁹ Housing discrimination against the disabled can multiply this disparate impact tenfold. The disabled form a rare minority group — one open to future members — as anyone can become disabled or have a disabled family member. It is a problem that can come home to all.¹³⁰

Additionally, housing discrimination against the disabled likely affects a larger and larger portion of the population each day. The baby boomers are becoming seniors, and as advances in medical treatments are made people are able to live longer despite having debilitating conditions that may have been fatal in the past. In addition, America has been at war for nearly a decade and has seen a growing number of injured veterans returning home. These facts make disabled housing discrimination a growing concern.

Discrimination against the disabled is not simply a landlord's unwillingness to rent to a disabled individual. Discrimination may also take the form of an unwillingness to alter established housing to make it accessible for persons with disabilities or a city's failure to provide enough accessible housing. Housing that lacks appropriate accommodations can reduce disabled individuals to “virtual prisoners” in their homes.¹³¹ Persons with disabilities report being confined to one or two rooms while at home, getting trapped in their own bathrooms, and even having to use a service entrance just to get into their own homes.¹³² Many disabled persons describe their living situation as desperate, which has forced some to turn to nursing homes or shelters even though they do not need to be there.¹³³

b. Racial Minorities

In its recent annual report to Congress, except for disability HUD reported that the percentage of complaints for each basis, such as race, has been relatively constant over the past 4 years. Moreover, in contrast to the increase in disability complaints, there has been a slight decrease in the number of housing discrimination complaints filed on the basis of race. Still, despite experiencing a slight drop in complaints race continued to be the second most common basis of complaints filed with HUD and FHAP agencies. In FY 2007, racial discrimination was the primary basis for an allegation of housing discrimination in 37 percent of complaints. Familial status continued to be the third most common basis of housing discrimination complaints filed with HUD and FHAP agencies, cited in 14 percent of complaints.

Familial status discrimination covers acts of discrimination against a parent or another person having legal custody of a child under the age of 18, the designee of such parent or guardian, and persons who are pregnant or in the process of obtaining legal custody of a child under the age of 18. As this high number of complaints likely overlaps with race, race is then conceivably the most common basis for housing discrimination complaints. As to other forms of discrimination, sex continued to be the fifth most common basis of housing discrimination complaints filed with HUD and FHAP agencies, alleged in 10 percent of complaints. As in previous years, retaliation, religion, and color were the least common bases of housing discrimination complaints filed with HUD and FHAP agencies.

¹²⁹ Thomas Caywood, *Where We Live—Housing Discrimination Persists: Children and Disabled Pushed Away, Housing Discrimination Persists Despite Federal Law*, June 9, 2008, <http://www.laccm.org/work/news/where-we-live>.

¹³⁰ See Glenn Collins, “Accessible Homes? Not Really, Say Disabled Residents”, N.Y. TIMES, Aug 24, 2008, available at <http://www.nytimes.com/2008/08/25/nyregion/25handicap.html>.

¹³¹ Collins, *supra* note 156.

¹³² *Id.*

¹³³ *Id.*

Table 2. Bases of HUD and FHAP Complaints (FY 2006 and FY 2007)

	FY 2006		FY 2007	
	Number	% of Total	Number	% of Total
Disability	4,110	40%	4,410	43%
Race	4,043	39%	3,750	37%
Family Status	1,433	14%	1,441	14%
National Origin	1,427	14%	1,299	13%
<i>National Origin--Hispanic or Latino</i>	931	9%	784	8%
Sex	997	10%	1,008	10%
Religion	258	2%	266	3%
Color	154	1%	173	2%
Retaliation	577	6%	588	6%

Source. U.S. Department of Housing and Urban Development.

c. Latino Immigrants

Analysis of Census data by the Center for Immigration Studies indicates that 28.4 million immigrants now live in the United States, the largest number ever recorded in the nation's history and a 43 percent increase since 1990. As a percentage of the population, immigrants now account for more than one in 10 residents, the highest percentage in 70 years. Mexico is, of course, the largest sending country, accounting for nearly 30 percent of all immigrants, and more than five times as many immigrants as the combined total for China, Taiwan, the Philippines, and India. Overall, Latin American, Caribbean, and East Asian countries dominate the list of immigrant-sending countries, accounting for 14 of the top-20 post-1970 countries.¹³⁴

Housing discrimination against immigrants can be manifested in many ways, such as contracts with exorbitant interest rates on mobile home sales and charging rent based on the number of people in a unit. These social problems are compounded by language and cultural barriers. Some apartment complexes require foreign speaking applicants to provide extra written information while not making a similar requirement of American applicants. In addition, because of difficult working conditions for many immigrant families, often immigrant households are single-parent families or working families with older relatives present in the household. Housing discrimination against this group of people makes quality housing more scarce, which in turn can result in forcing families into undesirable neighborhoods with high crime rates and poor quality schools. This has the greatest adverse impact on the children of immigrants, as they are then forced to grow up in bad neighborhoods exposed to crime and violence simply because of housing discrimination.

Immigrants may not be aware of the fair housing laws or may not have the language skills to properly communicate how they were discriminated against. Since discrimination against illegal immigrants is a more complicated case to prove, these barriers become nearly insurmountable. Housing discrimination can have a tremendous social marginalization effect on immigrant populations because of the extreme vulnerability and volatility of their lives. With no roots in this country and a limited ability to communicate, the inability to find suitable housing pushes many immigrants to the edges of society.

¹³⁴ Center for Immigration Studies, "Immigrants in the United States—A Snapshot of America's Foreign Born Population," January 2001 <http://www.cis.org/articles/2001/back101.html> (last accessed May 19, 2009).

While immigration law does not protect the sale or rental of property to undocumented immigrants, federal housing law does offer certain protections in specific situations under the Fair Housing Act.¹³⁵ The federal Fair Housing Act was enacted in order to combat housing discrimination based on several protected classifications.¹³⁶ The Act prohibits, among other things, discrimination in the sale and rental of housing, home mortgages, appraisals and home insurance based on race, color, religion, national origin, sex, familial status, and disability.¹³⁷ The Act does not, on its face, afford any protection on the basis of immigration status *alone*.¹³⁸ This does not mean however, that an immigrant—legal or illegal—has no rights to bring a claim under the Fair Housing Act. An illegal immigrant may bring a claim alleging discrimination based on the protected classifications, such as race or national origin. Another way in which undocumented immigrants could possibly bring a claim of discrimination under the Fair Housing Act is if a landlord selectively asks for proof of citizenship or immigration status only when he or she suspects that the applicant is undocumented.

¹³⁵ Garcia, Ruben J., *Across the Borders: Immigrant Status and Identity in Law and Latcrit Theory*, 55 FLA. L. REV. 511, 520 (2003).

¹³⁶ 42 U.S.C.A. § 3601.

¹³⁷ *Id.* § 3604.

¹³⁸ Garcia, *supra* note 160, at 521.

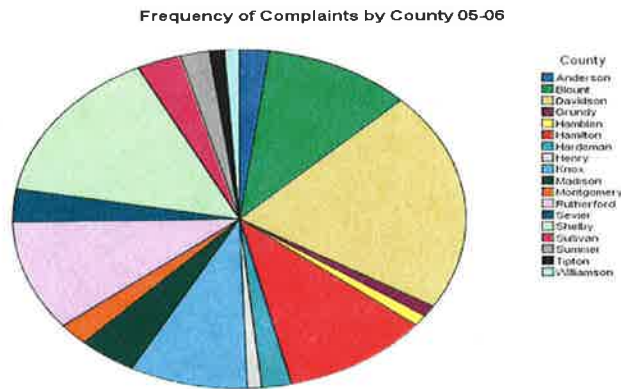
Part III—Housing Discrimination in Tennessee

1. Housing Discrimination Complaints in Tennessee

In Tennessee, housing discrimination typically occurs in the terms, conditions, and/or privileges relating to the rental of property.¹³⁹ Failure to provide individuals with reasonable accommodations has also been a major form of housing discrimination in Tennessee.

Figure 1 and figure 2 show frequency of complaints by county. Davidson County has the highest percentage of complaints filed with HUD and the Fair Housing Assistance Program (FHAP). HUD and FHAP are the nerve centers in which complaints are routed. They collect data on the number of complaints issued in a specific year, the race of the complainants, and how the complaints are handled.¹⁴⁰ From 2005 to 2007 there were a total of 213 documented complaints. Of those, 95 were from the 2005-2006 reporting year and 118 were from the 2006-2007 year¹⁴¹

Figure 1: Frequency of Housing Complaints in Tennessee by County (2005-2006)



Source. Tennessee Advisory Committee.

The data indicates that a large percentage of discrimination cases occur in counties with relatively high density. These areas of Tennessee have a significant amount of urban sprawl, which creates a need for rental properties. Renters in these areas tend to represent a much more diverse population than in other regions of the state. Diversity and education play a large role in the number of complaints filed. For example, with an increase in the amount of immigrants coming to the state, there appears to be a positive correlation with the amount of complaints based on race.

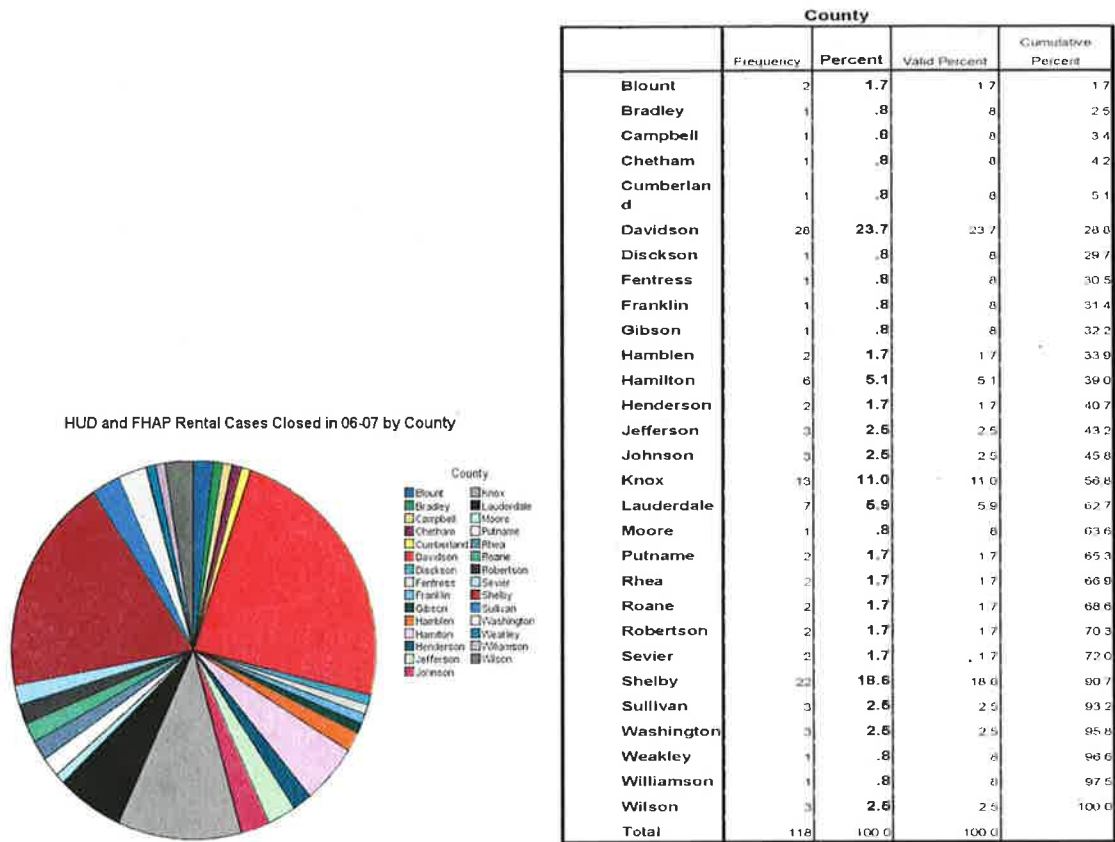
While there can be some debate as to the difference between race and national origin, it appears that for many the difference is insignificant—especially since complainants can indicate more than one basis for a complaint. With that being said, it appears that as the diverse population in the state increases, the number of complaints also increase. Furthermore, there is a higher number of discrimination complaints in counties with higher level educational institutions. This incidence, coupled with the fact that there are more organizations in urban areas that monitor areas of discrimination, combine to offer those living in urban areas an opportunity to understand their rights as residents and to bring forth discrimination charges.

¹³⁹ *Id.*

¹⁴⁰ See Appendix (listing data from HUD on housing discrimination in Tennessee counties). The data is strictly representative of parties that made a formal complaint with the HUD or FHAP.

¹⁴¹ *Id.*

Figure 2: HUD and FHAP Rental Housing Discrimination Cases Closed in Tennessee by County (2006-2007)



Source. Tennessee Advisory Committee.

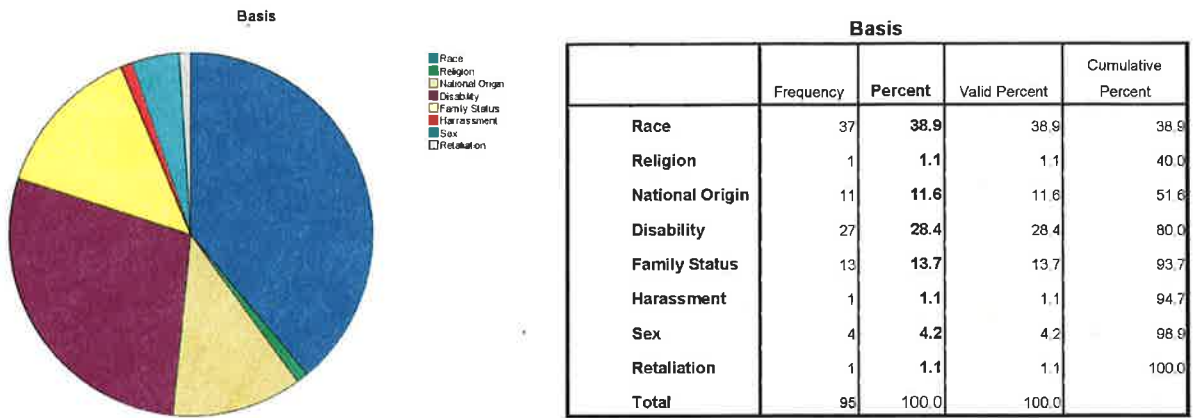
2. Housing Discrimination in Davidson County

Figure 3 and 4 show the basis for complaints by type in Davidson County. Data indicates that most complaints are made in Davidson County and that race was the basis for many of them. In order to further understand the data, cross tabulations were used in order to examine the overlap between variables such as basis for complaint and the county in which the complaint was made.

About twenty-one to twenty-four percent of the complaints in Tennessee are made in Davidson County. Ironically, Davidson County only accounts for about ten percent (according to 2007 population estimates) of the state’s population.¹⁴² This disparity can be attributed to the county’s largest metropolitan area, Nashville. Many people within the city rent instead of purchase, thus allowing for more discrimination to occur within the population. For many, renting is the only option available when it comes to housing. Because the county’s average income is \$41,981, it is easy to understand why purchasing property would be out of reach for many. Davidson County’s population is about two-thirds Caucasian and one-third other races. Even though whites make up the majority of the population, the majority of renters are minorities.

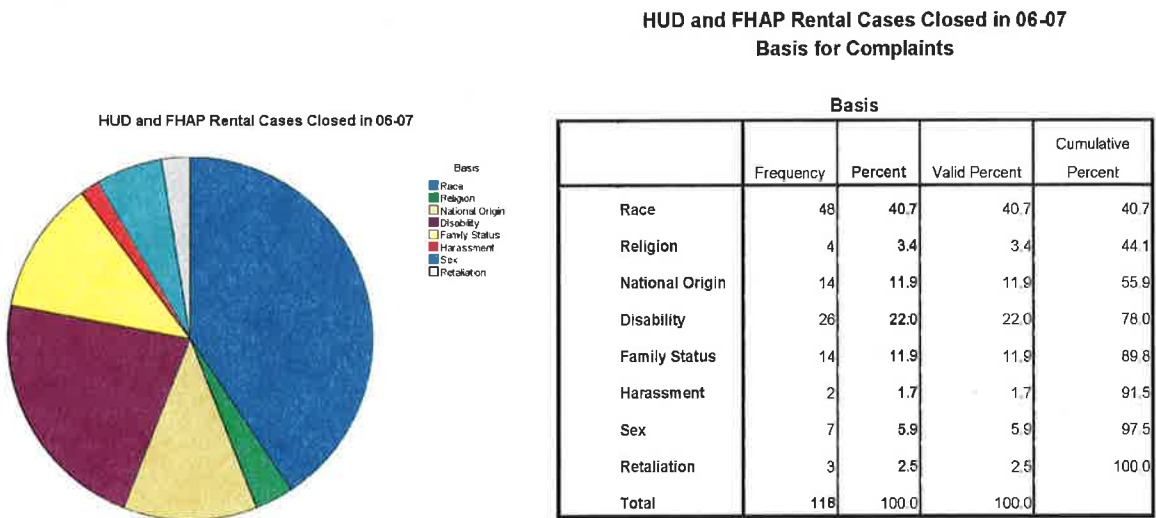
¹⁴² *Id.*

Figure 3: Basis for Housing Complaints in Davidson County by type (2005-2006)



Source. Tennessee Advisory Committee.

Figure 4: Basis for Complaints in Davidson County by Type (2006-2007)



Source. Tennessee Advisory Committee.

3. Davidson County Compared with Shelby County

Comparing Davidson County compared with Shelby County illustrates a departure from the typical trend in which more populated counties log a higher frequency of complaints than less populated counties. Davidson County, Tennessee's second most populous county (with approximately 613,856 residents), filed twenty complaints in 2005-2006 compared to Shelby County, Tennessee's most populous county (an estimated population of 910,605 residents), which only filed fourteen complaints.

Several factors may play a role in this discrepancy. One of the primary factors may be the demographic make-up of the two counties. Shelby County has no majority ethnic group, as whites and blacks both constitute about forty-eight percent of the population. The remainder of the population belongs to other ethnic groups. Such a large black population probably results in more black landlords who may be more inclined to rent to black applicants; therefore, black tenants will likely not perceive racial discrimination. Conversely, Davidson County clearly has a majority racial group, thereby increasing the probability that landlord and tenant are of a different race and allowing perceived racial discrimination to seep into the housing sector.

Furthermore, Davidson County is home to approximately fifteen institutions of higher education versus Shelby County, which houses about seven institutions of higher learning. Davidson County's emphasis on higher education may result in a populace that is better informed of their housing rights and more inclined to litigate in order to protect those rights. These reasons and others may help explain why Davidson County has approximately forty percent more complaints than Shelby County despite the fact that Shelby County has a significantly larger population.

Part IV – Fair Housing Enforcement

1. U.S. Department of Housing and Urban Development--Enforcement & Investigatory Procedures

The Department of Housing and Urban Development (HUD) is a regulatory arm of the federal government with the legislative mandate and authority to investigate and prosecute housing discrimination claims.¹⁴³ The Office of Fair Housing and Equal Opportunity (FHEO) is the internal section of HUD that is responsible for processing and investigating complaints of housing discrimination. The section receives inquiries from complainants to determine whether their claim involves a violation of the Act. After a complaint is filed, an investigation is performed to collect evidence in order to determine whether reasonable cause exists to believe that discrimination occurred. If a violation is found to exist, the matter can be resolved through conciliation or adjudicated by an administrative law judge, an administrative entity, or court trial to remedy the illegal action.¹⁴⁴

Throughout the years, HUD has developed numerous procedures and enforcement tactics to achieve its objective.¹⁴⁵ Two such programs are the Fair Housing Assistance Program (FHAP) and the Fair Housing Initiative Program (FHIP). The FHAP program is designed to provide incentives to state and local agencies to shoulder a greater responsibility for administering fair housing laws. The FHIP program is a partnership between HUD and not-for-profit organizations that assist alleged victims of housing discrimination.¹⁴⁶

a. Fair Housing Assistance Program (FHAP)

Under the program, HUD provides funding to local agencies to allow housing discrimination investigations to be conducted at the local level. FHAP allows HUD to use the services of and provide funding to “substantially equivalent” state and local agencies in the enforcement of fair housing laws.¹⁴⁷ The efficiency concept behind FHAP is that by providing funding to these agencies, the agencies will be in a position to use their familiarity with local housing stocks and trends and their close proximity to the alleged discrimination to increase efficiency in case processing.

For a local public agency to be eligible under the FHAP program, a state or local agency must first become certified through HUD in a two-phase procedure to be eligible for funds through the FHAP. The first phase requires the Assistant Secretary for Fair Housing and Equal Opportunity (Secretary) to establish that on its face, the state or local law provides “rights, procedures, remedies and judicial review provisions that are substantially equivalent to the federal Fair Housing Act.”

The second and final phase requires the Secretary to conclude that in operation the state or local law provides “rights, procedures, remedies, and the availability of judicial review that are substantially equivalent to the federal Fair Housing Act.” An agency is certified for five years upon an affirmative conclusion of both phases by the Secretary.¹⁴⁸ HUD also requires of FHAP agencies submit fair housing plans to the agency on an annual basis. These plans provide an historical analysis of fair housing in the local area, as well as demographic information such as population, median household income, and housing characteristics. The plan also is required to set out an analysis of impediments to fair housing that

¹⁴³ Department of Housing & Urban Development, HUD’s History, <http://www.hud.gov/library/bookshelf12/hudhistory.cfm> (last visited Feb. 22, 2009).

¹⁴⁴ U.S. Department of Housing and Urban Development, <http://www.hud.gov/offices/fheo/partners/FHAP>, last accessed March 27, 2008.

¹⁴⁵ See JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION 192-93 (1997) (discussing the 1988 Fair Housing Amendment Act and how it broadened HUD’s enforcement role).

¹⁴⁶ Fair Housing Initiatives Program (FHIP), <http://www.hud.gov/offices/fheo/partners/FHIP/fhip.cfm> (last visited Feb. 22, 2009).

¹⁴⁷ Department of Housing & Urban Development, Fair Housing Assistance Program (FHAP), <http://www.hud.gov/offices/fheo/partners/FHAP/> (last visited Feb. 23, 2009).

¹⁴⁸ Department of Housing & Urban Development, Substantially Equivalency Certification, <http://www.hud.gov/offices/fheo/partners/FHAP/equivalency.cfm> (last visited Feb. 23, 2009).

may exist in the local area. This analysis would include public policy, residential segregation patterns, mortgage lending, and emerging fair housing issues.¹⁴⁹

The potential impact of local FHAPs on housing enforcement is illustrated in two recent studies. The GAO established that regional differences were apparent in complaint investigations by HUD. In particular, the GAO study reported that investigations completed in Region 4, the Region for Tennessee, were more likely to end in no-cause determinations—53 percent—than investigations in any other HUD region. However, the study did not similarly report on regional differences between FHAP investigations and those of HUD.¹⁵⁰

To that purpose, a recent study by the North Carolina Advisory Committee to the U.S. Commission found that the mere presence of a local human rights agency increased the number of housing complaints filed.¹⁵¹ Moreover, in North Carolina—a neighbor state of similar size to Tennessee—there are 8 FHAP agencies.

b. Tennessee Human Rights Commission

In Tennessee there are only two agencies that are FHAP-certified. One is the state human rights agency, the Tennessee Human Rights Commission (THRC). The only local FHAP-certified human rights agency in the state is the Knoxville Department of Community Development. All the other major cities in the state, such as Chattanooga, Jackson, Memphis, and even the state capitol Nashville, lack a local human rights agency that is FHAP-certified.

As for the Tennessee Human Rights Commission, it was created by Part Two of the Tennessee Human Rights Statute.¹⁵² The THRC is an independent state agency charged with “preventing and eradicating” discrimination in employment, public accommodations, and housing.”¹⁵³ THRC has established cooperative agreements with HUD as well as with the Equal Employment Opportunity Commission to coordinate efforts in investigating and eliminating discrimination.

The Housing Division of THRC closed 127 cases in fiscal year 2008 and secured both monetary and non-monetary resolutions such as: accommodations, modifications or fair housing training.¹⁵⁴ The time to investigate a housing discrimination complaint by THRC has increased in recent years. In FY 2008, the average time to close a case was 180 days. That is a sharp increase from the previous year, when the average time to close a case was 121 days.¹⁵⁵ State enforcement representatives blame this increase on “a lack of resources and training of new hires.”¹⁵⁶

¹⁴⁹ See for example, City of Durham, “Analysis of Impediments Study and Fair Housing Plan,” October 2006. Similar fair housing reports were prepared by all local FHAP-certified agencies in North Carolina.

¹⁵⁰ GAO-04-463, *Fair Housing: Opportunities to Improve HUD’s Oversight and Management of the Enforcement Process*, (Washington, D.C.) May 2004, p 58 (hereafter referred to as GAO report).

¹⁵¹ North Carolina Advisory Committee to the U.S. Commission on Civil Rights, “Fair Housing Enforcement in North Carolina: Presence of HUD-Certified Local Agencies to Investigate Fair Housing Complaints Substantially Increases Discrimination Complaint Filings,” November 2008.

¹⁵² TENN. CODE ANN. § 4-21-201; *Id.* § 4-21-202(9).

¹⁵³ State of Tennessee, About the Tennessee Human Rights Commission, http://state.tn.us/humanrights/about_thrc.html (last visited Feb. 21, 2009).

¹⁵⁴ TENN. HUMAN RIGHTS COMM’N, ANNUAL REPORT 2007-2008 (2008), available at http://www.tennessee.gov/humanrights/publications/2007_2008THRCAnlRpt.pdf.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

2. Fair Housing Initiative Program and PEI Grants

HUD's PEI is arguably the most utilized and effective method of enforcing, educating, and preventing housing discrimination in communities all across the United States.¹⁵⁷ The FHIP program has four initiatives that promote fair housing laws and equal housing opportunity awareness: (1) Fair Housing Organizations Initiative (FHOI), (2) Private Enforcement Initiative (PEI), (3) Education and Outreach Initiative (EOI), and (4) Administrative Enforcement Initiative (AEI).¹⁵⁸

- FHOI provides funding to non-profit fair housing organizations whose primary focus is the fair housing enforcement and education initiatives for persons with disabilities.
- PEI funds non-profit fair housing discrimination organizations with a general objective of eliminating discriminatory housing practices; primarily through testing activities.
- EOI provides funding to State and local government agencies that educate the general public and housing providers on compliance with the Fair Housing Act and equal opportunity in housing.
- AEI assists State and local governments that have enacted and currently enforce fair housing laws that mirror those found in the Fair Housing Act.

To be eligible for PEI funds, an organization must have experience in: (1) conducting complaint-based and targeted testing and other investigations of housing discrimination, (2) linking fair housing organizations in regional enforcement activities, and (3) establishing effective means of meeting legal expenses in support of fair housing litigation.¹⁵⁹

However, there is evidence that HUD is not managing its PEI effectively. Studies show that sixty-five percent of the fair housing complaints in the United States were brought by private non-profit fair housing organizations.¹⁶⁰ Yet from 2003 to 2007, approximately fourteen fair housing organizations shut down due to insufficient funding and at least twelve have had to significantly curtail their enforcement activities.¹⁶¹ Cathy Cloud, Senior Vice-President of the National Fair Housing Alliance ("NFHA") attributes this decrease in private fair housing organizations to the "inconsistent funding from year to year and inadequate funding in almost all circumstances to address the full range of discrimination and levels of segregation throughout our communities."¹⁶²

According to studies administered by the NFHA, the average funding necessary for a fair housing organization to engage in enforcement, education, and outreach activities is roughly \$440,000.¹⁶³ Nevertheless, from 2003 to 2007, HUD only averaged approximately \$86,835 in grant funds issued to private fair housing organizations.¹⁶⁴ There are consequences for the lack of and inconsistency in funds made available by HUD through its PEI to private fair housing organizations. In other remarks Cloud explained that "[w]hen funding for fair housing groups is interrupted for even one year, there are negative consequences for staffing, training and program activities, all which take additional money to restore—money that is diverted from investigating housing discrimination and educating the community."¹⁶⁵

¹⁵⁷ Cathy Cloud, Senior Vice-President, Nat'l Fair Hous. Alliance, Testimony Before the Nat'l Comm'n on Fair Housing & Equal Opportunity (Sep. 22, 2008).

¹⁵⁸ *Id.*

¹⁵⁹ Fair Housing Initiatives Program (FHIP), *supra* note 114.

¹⁶⁰ Cloud, *supra* note 117.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

During the six year period 2000-2006, Tennessee was a major recipient of funding under PEI and ranked in the top eight states among recipients.¹⁶⁶ A substantial portion of this funding was directed to West Tennessee Legal Services, a nonprofit that continues to conduct fair housing enforcement activities throughout the state of Tennessee. In 2006, West Tennessee Legal Services received \$275,000 to support its fair housing activities, a portion of which was pledged towards conducting paired tests to look for evidence of racial or ethnic discrimination, particularly against Hispanics.¹⁶⁷ From 2000 – 2006, West Tennessee Legal Services received \$1,467,340 under HUD’s PEI for use in combating housing discrimination.¹⁶⁸

3. U.S. Department of Justice and Fair Housing Enforcement

a. Emergence of the “Private Attorney General”

Throughout the 1970s and 1980s, the Supreme Court addressed the issue of standing for fair housing testers. The Court’s broad reading of the “persons aggrieved” language in the Fair Housing Act provided the opportunity for those who had not directly experienced discrimination to seek enforcement of Fair Housing law. In *Traficante v. Metropolitan Life Insurance Company*¹⁶⁹, the Supreme Court recognized that standing to sue in fair housing cases was not limited to those who had been discriminated against. The Supreme Court read the language of the Fair Housing Act that gives standing to “persons aggrieved” or “any person who claims to have been injured by a discriminatory housing practice,” to be construed as broadly as is permitted under the Constitution.¹⁷⁰ As residents of the apartment complex who had been deprived of the benefits of living in an integrated community, the plaintiffs had standing to sue for enforcement of the Act.¹⁷¹

In *Warth v. Seldin*¹⁷², the Court articulated the limits of standing in fair housing cases, and re-affirmed the requirement of injury in fact to establish standing. A number of petitioners associated with the city of Rochester, New York, sued the zoning commission of Penfield, a suburb of Rochester, alleging injuries ranging from increased taxes in Rochester to the inability of people of low- and moderate-income to live in the suburb.¹⁷³ The plaintiffs, however, failed to establish specific concrete facts to support the allegations that the zoning laws harmed them, and so lacked standing to sue the zoning commission.¹⁷⁴

¹⁶⁶ Fedspending.org - Assistance for 14.410: FAIR HOUSING INITIATIVES PROGRAM (FHIP) PRIVATE ENFORCEMENT INITIATIVE.

¹⁶⁷ <http://www.hud.gov/offices/fheo/partners/FHIP/FY2006FHIP.cfm#tn> – FY 2006 Fair Housing Initiatives Program (FHIP) Awards.

¹⁶⁸ Fedspending.org - Assistance for 14.410: FAIR HOUSING INITIATIVES PROGRAM (FHIP) PRIVATE ENFORCEMENT INITIATIVE.

¹⁶⁹ 409 U.S. 205 (1972).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² 422 U.S. 490 (1975).

¹⁷³ *Id.*

¹⁷⁴ *Id.* The court held that the Rochester residents who claimed injury because they were prevented from living in Penfield failed to allege specific concrete facts demonstrating that the zoning practices harmed them. The taxpayers of Rochester, asserting that their taxes were increased because Penfield’s zoning laws required Rochester to provide more tax abated low- and moderate-income housing, did not sufficiently establish the line of causation between Penfield’s zoning actions and their taxes. Metro-Act, a non-profit organization that sought to alleviate housing shortages for low- and moderate-income people in Rochester, did not have standing for the same reasons that those seeking housing in Penfield and the taxpayers of Rochester did not have standing. The Rochester Home Builders Association did not have standing to claim for damages on behalf of its members; individualized proof of injury and damages in fact would be required. Finally, the Housing Council, a non-profit interested in housing problems, did not have standing because none of its members had made any efforts toward building or securing housing in Penfield.

In *Gladstone v. Village of Bellwood*¹⁷⁵, the Court defined the limits of standing for those suing under §812 of the Fair Housing Act, which allowed complainants to bring suit directly to federal court without exhausting the agency remedies provided for in §810.¹⁷⁶ The Supreme Court held that, although §812 did not include the “persons aggrieved” language of §810, the two sections provided alternative remedies to the same class of plaintiffs.¹⁷⁷ Therefore, standing to sue under §812, like standing under §810, extends as broadly as the Constitution allows.¹⁷⁸

b. Remedies under the Fair Housing Act

Violations of the Fair Housing Act have not presented the only problem for courts. Remedies proposed by local governments have also proven a source of controversy. For example, though it had initially given first priority to former residents of a renewed urban area, the New York Housing Authority later sought to abandon the policy, claiming that the plan would create a non-white “pocket ghetto” that would reach the neighborhood “tipping point” and cause white residents to leave the area.¹⁷⁹ Former residents sued the Housing Authority for enforcement of its regulations, and the Second Circuit held that the Housing Authority was obligated to take affirmative steps to promote racial integration, though the steps might offer temporary disadvantages to non-white persons.¹⁸⁰

In *Linmark Associates v. Willingboro Township*¹⁸¹, a realtor sued the town of Willingboro, claiming that a town ordinance banning “For Sale” signs on residential property was unconstitutional. The township had banned the use of signs outside of homes in an effort to prevent the “panic sale” of homes in the town by its white residents who saw the signs as a signal that other white residents were abandoning the town.¹⁸² The Court held that the restriction on advertising violated the First Amendment, though only a single form of advertising was prohibited; because the advertising alternatives available to realtors were more costly and less effective than “For Sale” signs, they did not offer a satisfactory option.¹⁸³

In *U.S. v. Starrett City Associates*¹⁸⁴, the Second Circuit held that rigid racial quotas could not be used indefinitely to maintain integration in an apartment complex. Starrett City offered subsidized housing that sought to maintain a racial distribution of 64% white, 22% black, and 8% Hispanic residents; the developers of the complex maintained that these quotas were necessary to prevent the loss of white tenants.¹⁸⁵ The government filed suit against the complex, claiming that the complex’s rental procedures, which made apartments available based on race, violated the Fair Housing Act.¹⁸⁶ Though Starrett City claimed that its practices were motivated by a desire to maintain a racially integrated community, and not by any racial animus, the Second Circuit held that the procedures violated the Fair Housing Act.¹⁸⁷

The Fair Housing Act authorizes the DOJ to pursue a lawsuit when it has cause to believe that an individual or organization is engaged in a “pattern or practice” of discrimination or where a “denial of rights to a group or persons raise an issue of general public importance.”¹⁸⁸ DOJ has and can obtain both actual and punitive monetary damages for victims of housing discrimination as well as the United States.

¹⁷⁵ 441 U.S. 91(1979).

¹⁷⁶ *Id.* at 101.

¹⁷⁷ *Id.* at 108.

¹⁷⁸ *Id.*

¹⁷⁹ *Otero v. New York City Hous. Auth.*, 484 F. 2d 1122, 1124 (2d Cir. 1973).

¹⁸⁰ *Id.* at 1125.

¹⁸¹ 431 U.S. 85 (1977).

¹⁸² *Id.* at 88.

¹⁸³ *Id.* at 96.

¹⁸⁴ 840 F.2d 1096 (1988).

¹⁸⁵ *Id.* at 1098.

¹⁸⁶ *Id.* at 1099.

¹⁸⁷ *Id.* at 1103.

¹⁸⁸ Department of Justice, Housing & Civil Enforcement, <http://www.usdoj.gov/crt/housing/faq.php> (last visited Feb. 22, 2009).

When a complainant or respondent elects to have the case heard in federal court, the DOJ will bring the case on behalf of the complainant. Additionally, criminal charges can be brought where “force or a threat of force” is used to deny or obstruct fair housing rights.¹⁸⁹ Below is a brief summary of some recent DOJ activity in the State of Tennessee:

United States v. Fountainbleau Apartments (E.D. Tenn.): On April 27, 2006, the United States filed a complaint in *United States v. Fountainbleau Apartments*, against the owner and resident manager of the Fountainbleau Apartments, located in East Ridge, Tennessee. The complaint alleges that the defendants engaged in a pattern or practice of discrimination by refusing to rent apartments to persons with children and by steering them to another apartment complex. On June 19, 2008, the court granted the United States' motion for partial summary judgment as to liability. The evidence was developed under the DOJ's testing program.¹⁹⁰

Memphis Center for Independent Living and the United States v. Milton and Richard Grant Co. et al. (W.D. Tenn.): On February 15, 2007, a federal court in Memphis approved a consent decree resolving *Memphis Center for Independent Living and United States v. Grant, et al.* The DOJ suit, which was filed on November 6, 2001, joined a case filed on January 25, 2001, by the Memphis Center for Independent Living (“MCIL”), a disability rights organization, alleging that the defendants failed to design and construct the Wyndham Apartments in Memphis and Camden Grove Apartments in Cordova, Tennessee, with required features for people with disabilities. The consent decree requires the Richard and Milton Grant Company, its principals and affiliated entities, and their architects and engineers, to retrofit apartments and public and common use areas at the two complexes and provide accessible pedestrian routes from front entrances of ground floor units to public streets and on-site amenities. The defendants must establish a Community Retrofit Fund of \$320,000, administered by the MCIL, to enable qualified individuals in Shelby County, Tennessee, to modify residential dwellings to increase their accessibility to persons with disabilities. The defendants must also pay \$10,000 in compensatory damages to the MCIL, \$110,000 in civil penalties to the government, and undergo training on the requirements of the Fair Housing Act and the Americans with Disabilities Act. The consent decree will remain in effect for three years.¹⁹¹

United States v. William E. Brewer and Lena P. Brewer (E.D. Tenn.): On April 16, 2007, the Court approved and entered the consent order resolving *United States v. William E. Brewer and Lena P. Brewer*, a Fair Housing Act “pattern or practice” case which alleged sexual harassment discrimination. The consent order requires the defendants to pay \$110,000 in monetary damages to nine women and a \$15,000 civil penalty. The consent order also requires the defendants to transfer all managerial responsibilities to an independent manager. The complaint, which was filed on December 22, 2005, alleged that from at least 2004 through the present, the defendant subjected female tenants to severe, pervasive, and unwelcome sexual harassment, entering the dwellings of female tenants without permission or notice and threatening to evict female tenants when they refused or objected to his sexual advances. An investigation of the defendants was commenced in late 2004 based on a referral from the City of Knoxville.¹⁹²

¹⁸⁹ *Id.*

¹⁹⁰ 566 F. Supp. 2d 726; *see also* <http://www.usdoj.gov/crt/housing/documents/casesummary.php#nissan> (last visited Mar. 2, 2009).

¹⁹¹ *See* *United States v. Milton* (W.D. Tenn. Feb. 15, 2007), <http://www.usdoj.gov/crt/housing/documents/casesummary.php#nissan>.

¹⁹² *See* *United States v. Brewer* (E.D. Tenn. Apr. 16, 2007), <http://www.usdoj.gov/crt/housing/documents/casesummary.php#nissan>.

4. Paired Testing

Since the late 1970s, paired testing has been used to measure the prevalence of discrimination in the housing market. Paired testing illustrates differences in the treatment of equally qualified home-seekers who differ only with respect to their minority status.¹⁹³ In a typical paired test, a minority tester (or actual potential buyer or renter) and a majority-group tester are matched on all relevant characteristics, such as age, income, education, and attire.¹⁹⁴ Each tester separately visits a targeted apartment building or realtor within a short time of one another and inquires about the availability of housing.¹⁹⁵ Both are carefully trained to make the same inquiries, express the same preferences, and offer the same qualifications and needs.¹⁹⁶ From the perspective of the landlord or real estate agent they visit, the only difference between the two testers is the minority status of one tester; therefore, each tester should receive the same treatment.¹⁹⁷ Both testers then report on their entire experience on a standardized tester report form.¹⁹⁸ Based on these reports, the organization sponsoring the paired testing will decide whether housing discrimination has occurred and if so, whether to file suit.¹⁹⁹

While each organization has its own standards for deciding whether to initiate testing, there are common situations in which it is appropriate to test. Testing can be initiated to discover or verify the identity of a respondent, a dwelling address, or the type and size of a dwelling for the purpose of establishing jurisdiction.²⁰⁰ Testing is also appropriate to corroborate allegations that a respondent made statements or engaged in conduct that indicated a discriminatory preference.²⁰¹ Similarly, testing may occur when there is reason to believe that the respondent is engaged in an ongoing violation of the Fair Housing Act or when there is evidence that a respondent has a history of similar, discriminatory conduct.²⁰² Finally, testing may be initiated after the respondent has executed a conciliation agreement requiring him or her to refrain from engaging in discriminatory housing practices.²⁰³

Because the two members of a testing team present themselves as equally qualified borrowers in every aspect except minority status, differences in the treatment they receive provide direct evidence of discrimination.²⁰⁴ This evidence, however, is expensive to procure; it requires a highly structured and controlled process that includes careful preparation prior to the test visits, conscientious adherence to the assignment during test visits, and thorough documentation of the test experience after test visits are completed.²⁰⁵ Notwithstanding the costs, if proper procedures are followed and credible results are generated paired testing is a powerful tool for gathering evidence of housing discrimination.²⁰⁶

The Department of Justice (DOJ) Civil Rights Division has operated a testing program dedicated to proactively uncovering housing discrimination since 1991. Similar to HUD's initiative through FHIP, DOJ's program also conducts paired tests.²⁰⁷ In February 2006, then Attorney General Alberto R. Gonzales announced Operation Home Sweet Home, a concentrated initiative to expose and eliminate

¹⁹³ MARGERY A. TURNER & STEPHEN L. ROSS, HOUSING DISCRIMINATION IN METROPOLITAN AMERICA: FINDINGS FROM THE LATEST NATIONAL PAIRED TESTING STUDY 17 (2003).

¹⁹⁴ DERRICK BELL, RACE, RACISM AND AMERICAN LAW 418 (4th ed. 2000).

¹⁹⁵ *Id.*

¹⁹⁶ Beverly L. Watts, Executive Director, TN Human Rights Commission, Presentation to the U.S. Commission on Civil Rights, TN State Advisory Commission on Fair Housing Testing (June 9, 2009).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ MARGERY A. TURNER ET AL., ALL OTHER THINGS BEING EQUAL: A PAIRED TESTING STUDY OF MORTGAGE LENDING INSTITUTIONS i (2002).

²⁰⁵ *Id.* at 8.

²⁰⁶ BELL, *supra* note 188, at 417.

²⁰⁷ U.S. DOJ Press Release # 07-769: 09-26-07 Operation Home Sweet Home.

housing discrimination in America. This initiative is intended to implement improved targeting of discrimination tests, increased testing, and public awareness efforts.

Under Operation Home Sweet Home, DOJ has conducted a record number of undercover housing discrimination investigations. During fiscal year 2006, the Civil Rights Division increased the number of fair housing tests 38 percent compared to fiscal year 2005.²⁰⁸ In fiscal year 2007, there was an all-time high number of paired tests, nearly double the number of the prior year, which led to DOJ filing 30 lawsuits and obtaining settlements and judgments requiring the payment of over \$5 million in monetary damages to victims of discrimination and civil penalties.²⁰⁹ DOJ has initiated paired testing in the state of Tennessee under Operation Home Sweet Home,²¹⁰ however the agency would not make public the number of paired tests that have been conducted in Tennessee and to what extent these tests have focused on certain characteristics, e.g., race, disability, etc.

The Reagan administration and the National Association of Realtors (NAR) sought to constrain FHIP by barring grants to agencies that engaged in systematic “testing.” Testing is a method by which two persons, differing only on a single characteristic that is being tested (e.g., race), independently inquire about an advertised housing unit. Each of the testers independently records his or her experience, and difference in treatment is often only apparent when the analysts compare their resulting information. Congress rejected the Reagan-NAR guidelines, but a 1992 report found the Department of Housing and Urban Development “has not made any progress in utilizing this important investigative technique in evaluating the complaints it receives.”²¹¹

a. The Efficacy of Paired Testing

Paired testing is the sole tool used to confront and measure housing discrimination in Davidson County and other counties in Tennessee. James Davis, Housing Director for the Tennessee Human Rights Commission, stated in an interview that “there have not been that many changes in fair housing laws in Tennessee.”²¹² Given the lack of alternative fair housing protections, the question becomes whether paired testing is effective.

Paired testing functions as a very effective method of identifying discrimination in today’s housing market. Discrimination is rarely overt and some individuals may not be able to recognize the signs of housing discrimination. When discrimination takes “the form of politely steering minority customers away from white neighborhoods, showing some but not all of the available housing options, or providing less assistance in resolving credit problems, victims are unlikely to know that comparable white customers receive better treatment.”²¹³ Paired testers are trained to recognize discriminatory conduct as well as provide a non-biased report regarding the specifics of the discrimination. Even if an individual recognizes that he or she is the victim of discrimination, the individual still may not be aware of the remedies available. Many individuals do not have the time or resources to take legal action against a landlord. In contrast, paired testers are adept at recognizing discriminatory conduct and moreover, the organizations sponsoring these tests have the expertise and resources necessary to take proper remedial action once discrimination has occurred.

²⁰⁸ PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE U. N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION - APRIL 2007.

²⁰⁹ U.S. DOJ Press Release # 07-858: 10-26-07.

²¹⁰ U.S. DOJ Press Release # 06-256: 04-27-06 - Justice Department announces that it has filed a lawsuit against the owner and resident manager of the Fountainbleau Apartments, located in East Ridge, Tenn., alleging housing discrimination.

²¹¹ Civil Rights.org at http://www.civilrights.org/research_center/civilrights101/housing.html (last accessed on December 1, 2007).

²¹² Interview with James E Davis, Housing Director for Tennessee Human Rights Commission.

²¹³ MARGERY A. TURNER, THE PERSISTENCE OF DISCRIMINATION IN U.S. HOUSING MARKETS, TESTIMONY BEFORE THE NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY 4 (2008).

The Tennessee Human Rights Commission uses a testing facility in West Tennessee that conducts tests using profiles that the THRC creates based on situations deemed potentially discriminatory.²¹⁴ THRC Housing Director James Davis finds these tests to be the most useful way to get opinion-free profiles of potential discriminators to determine whether a more detailed investigation is necessary.²¹⁵ Davis finds that testing provides the THRC with witnesses in situations where there otherwise would be none and in situations when time is of the essence.²¹⁶ The use of these tests allows the THRC to monitor housing discrimination and take action against individuals who violate fair housing laws without having to rely solely on complaints from individuals in the housing market.

The evidence gathered from paired tests is particularly strong due to the fact that it provides a control group allowing easier comparison of statistics gathered during investigation.²¹⁷ The likelihood of similar treatment of two testers is very high because they have the same relevant characteristics and have been sent into very similar circumstances.²¹⁸ This high probability of similar treatment decreases the likelihood that differences in treatment arise by chance and increases the ability to statistically isolate systematic discrimination of a given group.²¹⁹ As a result, the evidence provided from paired testing carries considerable weight and credibility, making it an ideal tool for researching discrimination and enforcing anti-discrimination statutes.

One positive that sometimes goes unnoticed is the effect that knowledge of potential testing has on the housing market. When the housing market realizes it is being watched, rational actors will operate in accordance with fair housing laws.²²⁰ Paired testing can motivate landlords to refrain from discrimination if for no other reason than to avoid penalty.

b. Pitfalls of Paired Testing

Although paired testing is generally a powerful tool for uncovering housing discrimination, it will not uncover the existence of adverse impact discrimination in a given market.²²¹ Adverse impact discrimination occurs when a policy that is not justified by business necessity is uniformly applied across the population but has the effect of placing a minority group at a disadvantage.²²² This type of discrimination cannot be detected by paired testing because the policy is applied uniformly—both testers will receive identical treatment under the policy.²²³ Thus, a major loophole is present in the paired testing process. To thwart paired testing, a person would only need to have a facially neutral policy that is universally applied but has a discriminatory effect on minorities.

The methods used to conduct tests also may not be representative of the methods used by home seekers in their attempts to enter the housing market. A common testing protocol, which uses testers walking into a real estate agency and referring to an advertisement they found in the newspaper, may not resemble the approach followed by most consumers when entering the housing market.²²⁴ Those looking to enter the market generally tend to seek referrals from friends or co-workers, move into an area near friends or family, or search for a home they want first and then inquire about its availability. Additionally, testing results cannot factor in the efforts of protected class individuals to mitigate the effects of

²¹⁴ Interview with James E. Davis, *supra* note 207.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ STEPHEN L. ROSS, PAIRED TESTING AND THE 2000 HOUSING DISCRIMINATION SURVEY, MEASURING HOUSING DISCRIMINATION IN A NATIONAL STUDY 53 (2002).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Beverly L. Watts, Presentation, *supra* note 196.

²²¹ *Id.* at 50.

²²² *Id.*

²²³ *Id.*

²²⁴ ANGELA WILLIAMS FOSTER, FAITH MITCHELL & STEPHEN E. FEINBERG, COMMITTEE ON NATIONAL STATISTICS, MEASURING HOUSING DISCRIMINATION IN A NATIONAL STUDY: REPORT OF A WORKSHOP 51 (2002).

discriminatory practices and their efforts to avoid these practices all together.²²⁵ The sampling of testers is non-random and instead, a product of the hiring practices of testing facilities. This leads to "systematic differences between the population of white and minority testers."²²⁶

Current remedies and enforcement tactics are ineffective in providing timely responses to housing discrimination. Because housing often moves quickly, landlords, sellers, and realtors are often able to dispose of the disputed property before litigation even begins.²²⁷ As a result, landlords can lease or sell the disputed property to an innocent third party, foreclosing the possibility of having a court-ordered temporary injunction render any realistic relief. The strong evidence of discrimination that is provided by paired testing is relatively useless in the sense that it does not result in temporary injunctions being put into place before landlords can encumber the disputed property. Even when a temporary injunction has been placed on the disputed property, plaintiffs must find a place to live during the process of litigation. Once alternative, acceptable housing has been found, a court order offering the plaintiffs the original space will often be useless to them.²²⁸ Finally, tame sanctions and "traditionally low damage awards in housing discrimination suits," fail to discourage housing discriminators and do not adequately compensate injured parties.²²⁹ Despite the compelling evidence of discrimination that can be offered by paired testing, "violators often simply receive a fine, which some realtors and owners can simply roll it into the cost of doing business."²³⁰

c. Challenges in Conducting "Fair" Paired Testing

Although evidence of discrimination garnered from paired testing is compelling, paired testing requires a highly structured and controlled process that includes careful preparation prior to the test visits, conscientious adherence to the assignment during test visits, and thorough documentation of the test experience after test visits are completed.²³¹ However, the subjective nature of the process lends itself to distrust in the results. People that have suffered discrimination and sometimes even testers go into a situation looking for things to label as discrimination. This certainly raises questions about the fairness of tests. This not only makes it hard for organizations like the THRC to complete an investigation, but it can also serve to inundate the system with complaints.

The training of testers by organizations such as the one in West Tennessee can help to alleviate some issues of fairness, but the accuracy of test results can still be questioned. There is the problem of "imperfect pairs"—the paired testing approach is unlikely to yield a perfect match between two testers.²³² It is nearly impossible to get testers that are exactly alike and testers may differ on many characteristics that influence behavior or treatment during a test.²³³ For example, differences in a person's posture, dialect, or eye contact can result in different treatment that is not properly characterized as actionable discrimination.

Testing has not undergone a tremendous amount of legal scrutiny. Several challenges have come in the form of doubts about its legitimacy and fairness. The only major challenge that has been presented regarding the legality of paired testing has been in the form of constitutional standing challenges. The landmark case in this area is *Havens Realty Co. v. Coleman*, in which the Supreme Court extended

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Margalynne Armstrong, *Desegregation through Private Litigation: Using Equitable Remedies to Achieve the Purposes of the Fair Housing Act*, 64 TEMP. L. REV. 909, 938 (1991).

²²⁸ *Id.*

²²⁹ BELL, *supra* note 188, at 369.

²³⁰ *Id.* at 408.

²³¹ *Id.* at 8.

²³² ROSS, *supra* note 212, at 53, 64.

²³³ *Id.*

standing in Fair Housing Act claims to “testers” and housing organizations.²³⁴ In *Havens*, after a complaint by an African-American home seeker, Housing Opportunities Made Equal (HOME), a fair housing organization, conducted a test on two Virginia-based apartment complexes.²³⁵ HOME sent one white tester and one black tester to the apartments to inquire about vacancies on two different occasions.²³⁶ The black tester was told there were no vacancies while two different white testers were told that apartments were available. HOME, the black tester, the white tester, and the actual home seeker all filed suit alleging injury from the apartment’s discriminatory conduct.²³⁷

The lower courts dismissed the claims of all but one of the parties based on a lack of standing. However, the Supreme Court found that the testers had standing to assert that the defendant deprived them, as residents of the community, of the benefits of interracial association but decided that the palpable effects of this deprivation would be limited to specific neighborhoods and could not be imputed to all the residents of the city of Richmond.²³⁸ Similarly, the housing organization, HOME, had standing to sue for damages on its own behalf through its claim that steering tactics interfered with its efforts to guide members to integrated housing.²³⁹ Notably, a genuine intent to rent was not required for an individual to have standing.

Another smaller challenge came in *Metro St. Louis Equal Housing Opportunity v. Gordon A. Gundaker Real Estate Co., Inc.*, where a defendant in a testing case challenged the admissibility of the testimony of the testers.²⁴⁰ Gundaker argued that the “tests [we]re inadmissible because they are so flawed (as to design and execution) no juror could reasonably conclude that they show racial steering.”²⁴¹ The court strongly upheld the precedent of previous courts that had allowed testers to testify at trials. The court stated that “the bottom line is that evidence of the design of the test forms and the specific individual execution of each test is factual evidence which stands or falls on the credibility of the witnesses.”²⁴²

²³⁴ 455 U.S. 363 (1982) (Standing is a question of whether the litigant is entitled to have the court decide the merits of the issue in dispute).

²³⁵ *Id.* at 368.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ 132 F. Supp. 2d (2001).

²⁴¹ *Id.* at 1211.

²⁴² *Id.*

Part V—Government Policy and Equal Opportunity Housing

Despite federal, state, and local legislation to eliminate housing discrimination and improvements in the ability of victims of discrimination to bring claims to court, discrimination has continued to occur and sometimes it has been the result of government action.

1. Public Housing

Public housing was established to provide decent and safe rental housing for eligible low-income families, the elderly, and persons with disabilities. Public housing comes in all sizes and types, from scattered single family houses to high-rise apartments for elderly families. HUD administers Federal aid to local housing agencies that manage the housing for low-income residents at rents they can afford. HUD furnishes technical and professional assistance in planning, developing and managing these developments.

Today there are approximately 1.2 million households living in public housing units, managed by some 3,300 local housing authorities. Public housing is limited to low-income families and individuals. A housing authority determines a person's eligibility based on: 1) annual gross income; 2) whether the individual qualifies as elderly, a person with a disability, or as a family; and 3) U.S. citizenship or eligible immigration status.

There have been allegations and court cases that housing authorities have acted in a discriminatory manner. For example, African American tenants and applicants for public housing in Chicago brought class action lawsuits against the Chicago Housing Authority and Department of Housing and Urban Development, alleging that the organizations had “deliberately selected family public housing sites in Chicago to ‘avoid the placement of [non-white tenants] in white neighborhoods.’”²⁴³ After ten years of litigation to determine a suitable remedy, the Supreme Court held that a public housing program that extended beyond the city limits of Chicago was permissible to remedy the discrimination.²⁴⁴

Public housing can also conflict with local zoning laws. In *Metropolitan Housing Development Corporation v. Village of Arlington Heights*²⁴⁵, the U.S. Supreme Court determined that the disparate impact of zoning laws was not sufficient to render them invalid.²⁴⁶ A nonprofit real estate developer sought to compel Arlington Heights, Illinois, a Chicago suburb, to rezone its property to permit the construction of federally financed low- and moderate-income housing, claiming that the refusal to rezone was racially discriminatory.²⁴⁷ The Supreme Court held that the zoning laws were valid unless the decision not to change them was racially motivated.²⁴⁸

2. Urban Renewal Programs

Generally speaking, urban renewal is a public or privately sponsored initiative specifically designed to transform large sections of blighted urban areas into new residential and commercial precincts. Typically urban renewal programs employ a mix of renovation, selective demolition, commercial development, and tax incentives. Although around in the United States since Robert Moss and the redevelopment of New York City in the 1930s, urban renewal programs became widespread under President Lyndon Johnson and the War on Poverty. In 1968, the Housing and Urban Development Act and The New Communities Act of 1968 guaranteed private financing for private entrepreneurs to plan and develop new communities. Subsequently, the Housing and Community Development Act of

²⁴³ *Hills v. Gautreaux*, 425 U.S. 284, 284 (1976).

²⁴⁴ *Id.* at 306.

²⁴⁵ 429 U.S. 252 (1977).

²⁴⁶ *Id.* at 266.

²⁴⁷ *Id.* at 252.

²⁴⁸ *Id.* at 267.

1974 established the Community Development Block Grant program (CDBG), which focuses on redevelopment of existing neighborhoods and properties.

Through urban renewal programs, cities seek to improve low-income neighborhoods, but at times the plans come at the cost of the homes of those residents who called the neighborhoods home. When the city of Norwalk, Connecticut sought to renew an area of the city in 1962, its contract with HUD required that it provide comparable low-cost housing to the families displaced by the project.²⁴⁹ Current and former residents of the renewed area brought suit against the city for its failure to provide such housing; some of the residents were compelled to move to overcrowded or expensive housing after their homes were demolished.²⁵⁰ The Court of Appeals for the Second Circuit held that the residents, who had articulated individual injury as a result of the renewal program, had established standing to bring suit.²⁵¹ Unlike claimants who had challenged urban renewal projects on the basis of economic harm, which was thought to be a matter of public, rather than private, right, the plaintiffs in Norwalk Core asserted their individual rights to freedom from racial discrimination at the hands of the government.²⁵²

The Eighth Circuit, in *Moorer v. Department of Housing and Urban Development*²⁵³, refused to grant relocation costs to residents who lost their homes as part of a private urban-renewal project funded in part by the government. Residents of Kansas City sought relocation benefits after they were forced to leave their apartments due to rehabilitation done by a private party that purchased the buildings with the help of the National Housing Act.²⁵⁴ The tenants sought relocation expenses under the Uniform Relocation and Assistance and Real Property Acquisition Policies Act (URA), which provides benefits to people whose homes are taken by eminent domain.²⁵⁵ Because the property in this case was not acquired by governmental action, the Eighth Circuit court held that they were not entitled to relocation expenses under the URA.²⁵⁶

Incidents of racially-motivated housing discrimination have persisted through the twenty-first century; in adjudicating these claims, the courts have continued to apply and refine fair housing law. In *Meyer v. Holley*²⁵⁷, the Supreme Court determined that the traditional rules of vicarious liability apply to the owners and shareholders of corporate realtors whose employees practice discrimination.²⁵⁸

When an interracial couple attempted to buy a home in Twenty-Nine Palms, California, a salesman for realtor Triad, Inc. prevented the couple from buying the house for allegedly racially discriminatory reasons.²⁵⁹ The couple brought suit against the salesman and Triad under the Fair Housing Act, and later filed a separate suit against the president and sole shareholder of Triad, David Meyer. The Supreme Court held that, under the Fair Housing Act, traditional vicarious liability rules apply, and though the corporation was responsible for the actions of its employee, the officers and owners of the corporation were not personally liable for his discriminatory actions.²⁶⁰

²⁴⁹ Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 923 (2d Cir. 1968).

²⁵⁰ *Id.* at 922.

²⁵¹ *Id.* at 926.

²⁵² *Id.* at 927.

²⁵³ 561 F.2d 175 (8th Cir. 1977).

²⁵⁴ *Id.* at 177.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 183.

²⁵⁷ 537 U.S. 280 (2003).

²⁵⁸ *Id.* at 285-86.

²⁵⁹ *Id.* at 283.

²⁶⁰ *Id.* at 290.

Findings

1. Despite federal and state local fair housing laws, housing discrimination continues to be prevalent. The number of housing discrimination complaints in fiscal years 2006 and 2007 filed with federal, state, and local agencies were the highest ever recorded.
2. Most housing discrimination occurs in the rental of housing. Racial and ethnic minorities encounter adverse treatment in the rental of housing in 1 of every 5 encounters. Persons in wheelchairs encounter adverse treatment in 1 of every 3 encounters trying to rent housing.
3. Current remedies and enforcement tactics often are ineffective in providing timely responses to housing discrimination. Often landlords are able to dispose of the disputed property before litigation even begins, foreclosing the possibility of having a court-ordered temporary injunction render any realistic relief. Weak sanctions and low damage awards in housing discrimination suits also provide little deterrent effect.
4. Under the Federal Housing Assistance Program (FHAP), HUD partners with state and local agencies to allow housing discrimination complaints to be conducted at a local level. In Tennessee, there are only 2 certified FHAP agencies—the Tennessee Human Rights Commission and the Knoxville Department of Community Development.
6. The Fair Housing Initiative Program (FHIP) is a partnership between HUD and not-for-profit organizations to assist in the enforcement of fair housing laws. Private FHIP agencies account for two-thirds of all fair housing complaints filed. Nevertheless, federal funding for FHIP has been dramatically cut in recent years. From 2003 to 2007 more than 14 fair housing organizations have shut down due to insufficient funding, and at least another 12 have had to sharply curtail enforcement activities.
7. Studies by HUD as well as private groups such as the National Fair Housing Alliance continue to show that thousands of instances of housing discrimination go unreported, and that only a very small percent of alleged victims file a complaint. Underreporting is a particular problem among recent immigrants of Hispanic origin.
8. Since the 1970s systemic paired testing has been used to measure the prevalence of housing discrimination. As discrimination is rarely overt, paired testing functions has been proven to be very effective method of identifying housing discrimination. The systemic testing program in the state, however, has been severely under-funded—with only one FHIP agency in the state receiving any funds for testing on an annual basis.
9. Regarding mortgage lending, in 2005 more than one-half of all conventional mortgages given to African Americans were sub-prime loans. In the re-financing market, sub-prime loans account for 51 percent of all re-finance loans made in predominantly black neighborhoods, compared to just 9 percent in white neighborhoods.

Concluding Observation and Recommendation

The cases presented to the Supreme Court and the Courts of Appeals of the United States throughout the second half of the twentieth century, and into the more recent times have tested the limits of the Fair Housing Act. In spite of the tools available for enforcement of the Act, violations occur to this day, and the process of refining the boundaries of the law continues.

If this nation is to be serious about fair housing, there needs to be a commitment to enforcing the fair housing laws, it is clear to the Committee that a substantial increase in funding is called for in HUD's oversight and enforcement programs. Given the demonstrated effectiveness federally supported local enforcement initiatives and the fiscal constraints on public agencies, additional funding would be best served by targeted increases to the Federal Housing Assistance Program (FHAP) and the Federal Housing Initiative Program (FHIP).

Studies by HUD as well as private groups such as the National Fair Housing Alliance continue to show that hundreds of thousands of instances of housing discrimination go unreported. There must be a renewed effort to increase use of public service and educational forums to inform the public of governmental protections against housing discrimination and these should be offered in a variety of different languages and locations.

Appendix -- Demographic Data of Tennessee Counties

Income and Population Data for Tennessee Counties (2004-2007)

Geographic area	Total population	Race								Hispanic or Latino (of any race)	Median Income	
		One race										
		Total	White	Black or African American	Armenian Indian and Alaska Native	Asian	Native Hawaiian and Other Pacific Islander	Some other race	Two or more races			
Tennessee U.S. Census	5,689,263	5,626,174	4,563,310	932,809	15,152	56,662		2,265	26,036	3,109	123,836	35,760
COUNTY (in alphabetical order)												
Anderson County	71,330	70,461	66,593	2,786	220	593		8	274	969	797	37,101
Bedford County	37,588	37,149	32,640	3,169	105	170		20	1,025	437	2,911	36,725
Benton County	16,537	16,424	15,948	348	54	40		0	33	114	157	29,428
Benton County	12,367	12,255	11,860	456	47	14		3	23	142	138	29,282
Boutwell County	105,823	104,775	100,241	3,077	305	759		27	363	1,048	1,120	38,889
Bradley County	67,965	66,852	61,792	3,511	250	501		14	784	1,113	1,822	36,101
Campbell County	39,654	39,491	39,109	120	123	62		15	62	363	269	25,989
Cannon County	12,826	12,722	12,424	197	42	16		3	51	184	157	33,885
Carroll County	29,475	29,152	25,843	3,050	72	47		8	134	223	385	31,361
Cass County	56,742	56,289	55,318	566	112	148		5	153	444	504	28,550
Chattooga County	35,912	35,660	34,793	532	135	63		17	130	252	437	46,811
Cherokee County	15,540	15,373	13,696	1,559	35	36		0	48	167	150	34,772
Clatsop County	29,862	29,642	29,202	224	72	65		9	56	220	192	26,843
Clay County	7,976	7,897	7,717	115	26	11		0	19	79	139	24,484
Cocke County	33,595	33,244	32,277	669	135	62		5	106	321	354	28,443
Coffee County	48,014	47,534	44,850	1,724	140	353		15	439	480	1,051	35,885
Crockett County	14,532	14,441	11,910	2,088	29	6		0	406	91	793	30,957
Cumberland County	46,802	46,430	45,917	59	110	113		12	211	372	579	31,276
Davidson County	669,891	658,652	361,783	147,698	1,679	13,275		403	3,616	1,239	26,091	40,423
DeKalb County	11,731	11,624	11,041	407	27	23		3	141	89	238	29,302
DeKalb County	17,422	17,260	16,853	259	49	24		3	282	163	633	31,264
Dickson County	43,186	42,718	40,243	1,978	172	115		5	204	438	484	39,263
Dyer County	37,279	37,005	31,835	4,795	82	124		9	160	274	434	33,719
Fayette County	28,806	28,586	17,897	10,355	58	63		2	113	220	298	40,027
Ford County	16,025	15,563	16,499	19	25	18		0	5	62	90	24,989
Franklin County	39,270	38,854	38,426	312	78	152		13	237	417	620	30,681
Gibson County	46,152	45,794	37,878	9,497	94	67		8	240	368	540	32,091
Giles County	29,447	29,195	25,454	3,476	87	103		3	62	252	266	25,754
Graham County	29,659	29,634	29,330	67	32	10		5	82	125	229	29,035
Greene County	62,909	62,556	60,659	1,329	112	168		15	272	353	641	31,100
Grundy County	14,322	14,230	14,092	20	45	24		0	89	192	141	24,822
Hamilton County	59,138	57,653	54,732	2,388	120	335		33	1,922	576	3,299	33,443
Hamilton County	307,896	304,381	275,000	62,005	900	3,924		198	2,356	3,515	5,491	39,048
Hancock County	6,786	6,722	6,644	33	18	5		1	23	64	25	20,849
Hannington County	28,105	27,884	16,116	11,616	74	88		5	85	221	273	28,738
Hardin County	25,579	25,394	24,277	944	50	42		4	77	104	260	20,646
Hawkins County	63,983	63,262	62,088	830	90	124		8	154	303	417	32,681
Henderson County	19,797	19,683	19,252	10,166	24	10		10	272	114	524	28,661
Henderson County	25,522	25,282	23,885	2,043	33	35		3	94	240	247	33,170
Henry County	31,115	30,820	27,757	2,787	59	85		9	122	295	311	31,827
Hickman County	22,285	22,095	20,893	1,009	109	18		3	69	200	222	32,021
Houston County	6,888	6,811	7,659	268	15	10		5	63	77	101	30,606
Humphreys County	17,829	17,777	17,142	527	46	48		3	127	146	146	35,302
Hutchinson County	10,984	10,910	10,834	16	37	7		3	13	54	89	27,187
Jefferson County	44,294	43,951	42,370	1,027	138	118		18	280	343	589	33,476
Johnson County	17,499	17,411	18,069	424	60	21		4	40	81	150	23,866
Knox County	382,032	377,615	336,671	32,997	1,007	4,937		111	1,992	4,517	4,802	36,129
Lake County	7,954	7,872	5,300	2,491	31	11		0	49	62	109	22,579
Lauderdale County	25,401	25,290	17,205	9,236	169	43		5	154	211	414	29,657
Lawrence County	39,926	39,636	30,660	597	128	96		8	156	290	399	31,211
Levisa County	11,367	11,276	11,034	165	23	21		0	33	91	136	30,606
Lincoln County	31,340	30,958	28,289	2,204	156	100		10	108	374	321	34,800
Loudon County	39,086	38,703	37,452	447	120	84		6	569	363	694	41,372
McMinn County	49,015	48,496	45,445	2,195	133	344		12	367	619	684	33,049
McHenry County	24,653	24,412	22,224	1,527	59	24		0	59	241	225	31,055
Madison County	20,286	20,297	19,549	44	85	48		14	167	89	349	21,119
Madison County	91,637	91,044	59,672	29,810	150	579		13	616	793	1,572	37,535
Marion County	27,276	27,259	26,201	1,149	72	58		3	76	217	202	32,666
Marshall County	26,707	26,562	23,935	2,091	66	54		4	392	205	787	39,404
Maury County	69,498	68,629	67,262	9,994	214	232		14	1,003	869	2,264	41,564
Meigs County	11,088	11,019	10,826	138	23	20		0	12	67	63	30,192
Memphis County	30,961	30,489	28,962	894	142	140		6	335	492	684	31,156
Montgomery County	134,769	130,849	98,611	25,848	709	2,455		287	2,939	3,919	6,960	39,865
Moore County	5,740	5,705	5,501	156	11	8		0	29	35	45	37,231
Morgan County	10,757	10,640	10,109	440	40	23		1	27	117	120	20,696
O'Brien County	32,459	32,219	28,807	3,136	44	61		15	299	231	616	34,348
Overton County	20,119	20,020	19,834	16	37	7		3	13	54	89	27,187
Perry County	7,631	7,567	7,358	130	26	7		11	25	64	61	29,098
Pickett County	4,945	4,823	4,803	5	8	2		0	5	22	41	25,697
Polk County	16,059	15,888	15,795	22	44	19		3	15	162	117	30,766
Randolph County	62,312	61,727	58,903	1,094	127	581		55	986	598	1,891	32,360
Rhea County	28,400	28,094	27,097	600	111	83		10	213	395	474	31,655
Rhea County	41,910	41,278	40,440	1,409	112	210		15	67	637	359	34,376
Robertson County	64,433	63,985	49,518	4,601	164	169		12	451	438	1,447	44,389
Rutherford County	162,023	159,833	156,050	17,312	622	3,467		74	2,498	2,190	5,085	47,801
Scott County	21,122	20,925	20,817	19	52	25		0	22	192	120	25,152
Seminole County	11,370	11,318	11,218	22	39	15		3	19	65	83	31,673
Sevier County	71,179	70,662	69,220	398	229	394		14	299	698	884	34,970
Shelby County	692,472	688,277	424,834	435,824	1,790	14,694		324	9,902	9,195	23,384	41,048
Smith County	17,712	17,548	16,900	448	65	38		1	104	184	209	36,412
Stewart County	12,370	12,234	11,795	169	75	180		6	29	136	124	33,169
Sullivan County	153,049	151,885	147,771	2,880	334	652		21	319	1,063	1,090	39,767
Sumner County	130,449	129,199	119,344	7,640	373	856		30	1,037	1,251	2,291	46,025
Tilton County	51,271	50,737	39,820	10,292	197	190		31	197	634	622	41,025
Trousdale County	7,259	7,207	6,284	824	17	8		2	72	62	110	32,974
Union County	17,667	17,550	17,307	12	44	15		5	167	117	342	31,105
Union County	17,808	17,655	17,634	16	41	29		3	30	153	140	28,463
Van Buren County	5,599	5,480	5,454	7	10	4		0	5	28	10	29,315
Warren County	29,276	29,056	25,083	1,211	79	160		16	136	361	1,895	32,097
Washington County	102,188	101,156	100,466	4,091	252	792		20	545	1,042	1,492	34,094
Wayne County	16,842	16,736	15,492	1,145	33	42		2	32	106	142	26,800
Weakley County	34,895											