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NOTES

HOUSING DISCRIMINATION AND SOURCE OF INCOME: A TENANT'S LOSING BATTLE

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INTRODUCTION

Many believe that housing discrimination is a past wrong that is now corrected by the Fair Housing Act of 1968.¹ Nothing could be further from the truth. Housing discrimination against the poor is still permissible in many realms under current law. The poor in this country often cannot obtain adequate housing and can be forced to move their families into unsafe neighborhoods or find themselves homeless. Finding adequate housing can be a poor family's losing battle, as the law does not protect the family from discrimination. More specifically, a prospective tenant's source of income alone can serve as a justification for a landlord's refusal of tenancy. Sources of income that become tools of discrimination include Social Security, unemployment compensation, alimony, child support, and food stamps.

However, two sources of income are particularly unprotected by federal housing law: Section 8 of the Low-Income Housing Act² ("Section 8") and Temporary Assistance for Needy Families ("TANF").³ Those who participate in the Section 8 Voucher and Certificate Programs⁴ can be turned away by private landlords merely because of this source of income. The Certificate Program created by the Housing and Community Development Act of 1974⁵ allows certificate holders to pay only thirty percent of their income for a privately-owned apartment.⁶ Landlords are then reimbursed for the difference

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1. 42 U.S.C. §§ 3601-3619, 3631 (1994 & Supp. II 1996).

2. *Id.* §§ 1437 to 1437aaa-8.

3. *Id.* § 601 (Supp. II 1996) (formerly enacted as Aid to Families with Dependent Children ("AFDC"), ch. 257, 58 Stat. 277 (1994)).

4. *Id.* §§ 1437 to 1437aaa-8.

5. Pub. L. No. 93-383, 88 Stat. 683 (Aug. 22, 1974) (codified as amended at 42 U.S.C. §§ 1437-37(x); 1471-90g; 5301-16; 5401-26 (1994 & Supp. II 1996)).

6. 42 U.S.C. § 1437f (1994 & Supp. II 1996).

between the tenant's contribution and the rental cost.⁷ The Voucher Program allows more flexibility as vouchers are given to the tenants for the difference between the fair market rent in the tenant's geographical area and thirty percent of the tenant's income.⁸ In both subsidy programs, landlords must maintain their rentals at the Department of Housing and Urban Development's ("HUDs") Housing Quality Standards in order to rent to voucher and certificate holders.

Likewise, private landlords discriminate against recipients of TANF.⁹ The source of a prospective tenant's income can serve as a justification for refusal of tenancy by a private landlord. While this problem exists in public housing as well, approximately sixty-four percent of those receiving federal assistance live in private housing.¹⁰ This Note focuses on this realm of private housing and the struggle of tenants receiving vouchers or certificates from the Section 8 program or TANF to obtain adequate housing.

First, this Note discusses the existing protections against source of income discrimination and why they are inadequate without further interpretation or additional regulations. This Note explores the impact of the lack of protection against source of income discrimination on tenants and the policy reasons for why it is imperative that such protection exist. Inconsistent case decisions also indicate a need for such protection, as courts have little guidance on how to handle such a claim. Next, this Note explores solutions for improving source of income discrimination protection. This analysis includes an in-depth look at existing housing statutes and an examination of how protection is implicit in the legislative intent and purpose of such statutes. Other solutions discussed and evaluated include Congress amending the Fair Housing Act to include source of income as a protected category and HUD acting to promulgate regulations that ban source of income discrimination. This Note concludes by highlighting the seriousness of this problem, including the public's ignorance of it, and then calls for change.

I. WHY DISCRIMINATE AGAINST A TENANT'S SOURCE OF INCOME?

Society tends to stereotype its less powerful. The poor lack political power in this country, and with cut-backs to federal programs assisting the poor, many feel as if they are forgotten citizens.¹¹ People tend to forget that the poor are a deserving class, not second-class citizens, and harmfully label them as lazy

7. *See id.*

8. *Id.* § 1437f(o) (1994 & Supp. II 1996).

9. *See id.* § 601 (Supp. II 1996).

10. *See* COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, GREEN BOOK, BACKGROUND MATERIAL AND DATA ON MAJOR PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS, at tbl. 7-23, AFDC Characteristics by Unit Type (U.S. Gov't Printing Office 1998) (visited Dec. 29, 1998) <<http://www.access.gpo.gov/congress/wm001.html>> [hereinafter GREEN BOOK].

11. *See* HOWARD J. KARGER & DAVID STOEZ, AMERICAN SOCIAL WELFARE POLICY 68-91 (1990).

criminals who have too many children. The truth, however, is that we all need to develop a genuine concern for the widening gap between the rich and poor. The top one-fifth of the U.S. population takes home more money than the lower four-fifths combined.¹² Class position shapes every aspect of one's life, and "statistics indicate that the class position of one's family is probably the single greatest determinant of future success, quite apart from intelligence and determination."¹³ We need to remember our country's future depends on our actions of social responsibility now. Children are twice as likely to live in poverty than adults, and minorities and women represent a disproportionate percentage of the poor.¹⁴ Unfortunately, "environmental racism" is society's reaction when someone lives on the "wrong side of the tracks."¹⁵

As upward social mobility becomes even less attainable for the poor, available affordable housing becomes imperative. "Affordable housing" is basically a boondoggle—a system whereby middle-class people award cheap housing to their friends and relations on the grounds that they are helping the poor."¹⁶ This country's idea of affordable housing is a bit misguided. With federal housing programs relying more on the private sector, we need to focus on private landlords in order to solve the problem of discrimination against a tenant's source of income.¹⁷ Today, we subject low-income families to moral judgments before their tenancy is accepted, especially in the private sector.¹⁸ "Discrimination against rental subsidy holders seems to be as open and blatant today as was racial discrimination in the years preceding the enactment of the Fair Housing Act."¹⁹ The effect of this blatant discrimination is that anywhere from twenty to forty percent of Section 8 recipients cannot find a place to use their certificate or voucher.²⁰ Case law also displays this blatant discrimination as the landlord involved usually admits that he or she has a policy of not

12. See Gregory Mantsios, *Rewards and Opportunities: The Politics and Economics of Class in the U.S.*, in PAULA S. ROTHENBERG, *RACE, CLASS, AND GENDER IN THE UNITED STATES* 96, 99 (2d ed. 1992).

13. ROTHENBERG, *supra* note 12, at 93-94.

14. See KARGER & STOESZ, *supra* note 11, at 92-111.

15. Dr. Robert D. Bullard, *The Legacy of American Apartheid and Environmental Racism*, 9 ST. JOHN'S J. LEGAL COMMENT. 445, 445 (1994) ("In the real world, some communities are located on the 'wrong side of the tracks' and, as a result, receive different treatment.").

16. WILLIAM TUCKER, *THE EXCLUDED AMERICANS* 189 (1990).

17. See *id.* ("The place where the hopes of the poor will live and die is in the private rental sector.").

18. See *id.*

19. Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier*, 31 HARV. C.R.-C.L. L. REV. 155, 155 (1996).

20. See *id.* at 158 (citing NATIONAL COUNCIL OF STATE HOUSING AGENCIES, *THE LOW-INCOME HOUSING TAX CREDIT: THE FIRST DECADE* (1997); U.S. DEP'T OF HOUSING & URBAN DEV., *HUD REINVENTION: FROM BLUEPRINT TO ACTION* 28 (1995); John Weicher, *The Voucher/Production Debate*, in *BUILDING FOUNDATIONS: HOUSING AND FEDERAL POLICY* 263, 275 (1990)).

accepting Section 8 or TANF recipients as tenants.²¹ However, rather than focusing on this blatant discrimination, the courts focus on whether the fair housing law or statute actually applies.²²

Landlords have many reasons for discriminating against prospective tenants based on source of income. First of all, landlords stereotype tenants who receive Section 8 or TANF assistance. Landlords argue that Section 8 and TANF tenants bring noise and crime to their property. They claim that low-income families tend to damage the property more than others and that they have too many children.²³ One landlord said that he wanted "working" people and that he had other good tenants, so he wanted to keep his rentals nice.²⁴ This landlord also stated that "unemployed people would just be hanging around the house all day."²⁵ Frankly, these labels that landlords give to low-income families are naive and close-minded and cannot justify discrimination.

The most frequent reason that landlords give for why they discriminate on the basis of source of income deals with economic and business concerns. Section 8 regulations limit advance payment of any kind to \$50 or a tenant's one month payment, whichever is greater.²⁶ Because of these regulations, landlords fear that they cannot obtain the first and last month's rent of a standard lease. In one case, a landlord argued "that legitimate business reasons kept him from renting to Section 8 certificate holders, primarily [because of] his loss of the cash flow engendered from his collecting, in advance, the last month's rent and a security deposit equal to one month's rent."²⁷ Reliability undermines a landlord's cash flow concern. When a landlord enters a lease with a tenant that receives Section 8 assistance or even TANF, the tenant has a reliable and steady source of income to fund rent payments. One would think that a landlord would want a steady flow of cash rather than an unpredictable one in which tenants might default on their rent, especially if no formal lease agreement exists.

Along with the cash flow problem, landlords argue that the fair market rent rates set by regulations are too low to adequately maintain rental units.²⁸ However, Section 8 addresses this concern by providing that fair market rent rates are adjusted periodically to take into account increasing costs in a particular area.²⁹ Related to this problem, landlords also contend that the rent rates set by

21. See, e.g., *Salute v. Stratford Greens Garden Apts.*, 136 F.3d 293, 296 (2d Cir. 1998); *HUD v. Ross*, No. 01-92-0466-8, 1994 WL 326437, at *1-4 (H.U.D. July 7, 1994); *M.T. v. Kentwood Constr. Co.*, 651 A.2d 101, 102 (N.J. Super. Ct. App. Div. 1994).

22. See, e.g., *Salute*, 136 F.3d at 296; *Ross*, 1994 WL 326437, at *1-4; *Kentwood Constr. Co.*, 651 A.2d at 102.

23. See Florence Wagman Roisman, Lecture at the Indiana University School of Law—Indianapolis (Nov. 4, 1997) (notes on file with author).

24. See *Ross*, 1994 WL 326437, at *2-3.

25. *Id.* at *3.

26. 24 C.F.R. § 882.112(a) (1998).

27. *Attorney General v. Brown*, 511 N.E.2d 1103, 1109 (Mass. 1987).

28. See Beck, *supra* note 19, at 164.

29. See *id.* (citing 42 U.S.C. § 1437f(c)(1) (1994)).

regulation do not provide them with enough resources to keep their rental units maintained to HUD's Housing Quality Standards.³⁰ One has to question a landlord who would even rent out an apartment below these basic living standards. More generally, landlords complain about the red tape and inconvenience involved to accept Section 8 tenants.³¹ For example, one landlord said he does not accept Section 8 recipients "because (as he explains) he does not want to get involved with the federal government and its rules and regulations."³² This is a valid concern, and government agencies need to do away with this disincentive by limiting the red tape as much as possible. This administrative concern, however, in no way comes close to the weighing concern of providing affordable housing to needy families.

II. THE NEED FOR PROTECTION

A. Existing Protections

The Federal Fair Housing Act, also known as Title VIII of the Civil Right Act of 1968 ("Title VIII"),³³ provides the framework for action against housing discrimination. With the passage of Title VIII came bans on housing discrimination due to race, color, religion, or national origin.³⁴ In 1974, Congress added a ban on sex discrimination.³⁵ Also, in 1988 Congress expanded the Fair Housing Act to include such protected categories as familial status and handicap.³⁶ Title VIII provides some limited protection for people with low incomes. Some tenants have been successful in molding a discrimination case against a landlord into one of these protected classifications, even though the lurking problem may have been the tenant's source of income.³⁷

For example, in *Gilligan v. Jamco Development Corp.*,³⁸ the Ninth Circuit evaluated a family's claim that an apartment complex owner had a policy of refusing a tenant's application if the tenant received Aid to Families with Dependent Children ("AFDC").³⁹ The family claimed the landlord's refusal was intentional discrimination against the familial status provision of the Fair Housing Act.⁴⁰ The circuit court held that the family had a sufficient claim and

30. *See id.*

31. *See id.* at 165.

32. *Salute v. Stratford Greens Garden Apts.*, 136 F.3d 293, 296 (2d Cir. 1998).

33. 42 U.S.C. §§ 3601-3619, 3631 (1994 & Supp. II 1996).

34. *Id.* § 3604 (1994).

35. 42 U.S.C. § 3604 (1994).

36. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified at 42 U.S.C. § 3604(d) (1994)).

37. *See Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246 (9th Cir. 1997); *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148 (S.D.N.Y. 1989); *HUD v. Ross*, No. 01-92-0466-8, 1994 WL 326437 (H.U.D. July 7, 1994).

38. 108 F.3d 246 (9th Cir. 1997).

39. *Id.* at 248.

40. *Id.*

remanded the case for further proceedings.⁴¹

In another case, *Bronson v. Crestwood Lake Section 1 Holding Corp.*,⁴² a district court found discrimination against Section 8 recipients under the pretext of racial discrimination.⁴³ The district court in *Bronson* held that the defendant landlord's policies of refusing those who received Section 8 assistance or those whose income was not at least three times the rent charged resulted in an exclusion of African-Americans and Hispanics.⁴⁴ The defendant landlord claimed that "business necessities" forced it to have such policies, but the court rejected the defense due to apparent inconsistent treatment of minority applicants.⁴⁵

In an administrative decision, *HUD v. Ross*,⁴⁶ the agency ruled that a landlord violated the Fair Housing Act by discriminating against Hispanic and white women.⁴⁷ Several prospective tenants had inquired about renting an apartment. The landlord gave Hispanic women and other women extra hurdles to jump and additional conditions to meet.⁴⁸ The agency held that the landlord's "no welfare policy" had a disparate impact on women.⁴⁹

The courts in these three cases almost certainly knew that the landlord's problem with the tenants had more to do with their source of income than one of the protected categories. However, instead of addressing source of income discrimination, the courts disposed of each case by fitting the facts into a protected category like race, sex, national origin or familial status.

Tenants receiving Section 8 assistance or TANF also can find limited protection under the Equal Credit Opportunity Act ("ECOA").⁵⁰ The ECOA states that "[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . because all or part of the applicant's income derives from any public assistance program."⁵¹ This statute prohibits discrimination against credit applicants due to their source of income. Also, the Low-Income Housing Credit⁵² bans discrimination against participants in the Section 8 Voucher and Certificate Programs.

Finally, the protection best aimed to give support to Section 8 recipients was the "take one, take all" provision in the Housing and Community Development

41. *Id.* at 251.

42. 724 F. Supp. 148 (S.D.N.Y. 1989).

43. *Id.* at 156-57.

44. *Id.* at 160.

45. *Id.* at 158.

46. No. 01-92-0466-8, 1994 WL 326437 (H.U.D. July 7, 1994).

47. *Id.* at *7.

48. *Id.* at *6-8 (stating that the landlord either hung up when Hispanic women called or required that other women have \$950 in cash as a condition of their tenancy).

49. *Id.* at *7.

50. 15 U.S.C. § 1691 (1994 & Supp. II 1996).

51. *Id.* § 1691(a)(2) (1994).

52. 26 U.S.C. § 42(h)(6)(B)(iv) (1994).

Act of 1987.⁵³ This provision kept private landlords, who had previously accepted Section 8 tenants, from discriminating against new tenant applicants because they received Section 8 assistance.⁵⁴ The “take one, take all” provision was not well-received among housing advocates because it discouraged private landlords from even beginning to accept applications from Section 8 tenants. Landlords would prefer not to participate than to be bound to the program. The provision was repealed by Congress in 1996.⁵⁵

Along with these limited federal protections, some state and local governments have supplemented such federal provisions by including source of income as a protected category in their state or local housing statutes.⁵⁶ For example, in Wisconsin the pertinent statute reads: “[A]ll persons shall have an equal opportunity for housing regardless of . . . lawful source of income.”⁵⁷ However, in the majority of these states parties have not litigated under these statutes so the meaning of source of income in them remains untested.

A few state cases have addressed statutes that include source of income as a protected category. For example, in *Knapp v. Eagle Property Management Corp.*,⁵⁸ the Seventh Circuit contemplated whether the Wisconsin Open Housing Act applied to a case involving a landlord’s refusal to rent to a prospective tenant because of her status as a recipient of federal rent assistance under the Section 8 Voucher Program.⁵⁹ The court held that Section 8 vouchers did not fit within the meaning of the Wisconsin statute, even though the statute specifically includes “lawful source of income.”⁶⁰ This outcome is indicative of the battle of definitions that occurs with these state statutes. The court in *Knapp* thought that Section 8 rent assistance vouchers were more like subsidies than income and also agreed with the district court’s use of a dictionary definition of “income.”⁶¹

53. Pub. L. No. 100-242, § 147, 101 Stat. 1852 (codified at 42 U.S.C. § 1437f(t)(1) (1994 & Supp. II 1996)), *repealed by* Pub. L. No. 104-134, § 203(a), 110 Stat. 1321-281 (1996).

54. The statute provided: “No owner who has entered into a contract for housing assistance payments under this section on behalf of any tenant in a multifamily housing project shall refuse—(A) . . . (B) to lease any available dwelling unit . . . to a holder of a voucher . . . and to enter into a voucher contract respecting such unit, a proximate cause of which is the status of such prospective tenant as holder of such voucher.” *Id.*

55. *See* Pub. L. No. 104-134, § 203(a), 110 Stat. 1321-281 (1996).

56. *See, e.g.,* CONN. GEN. STAT. ANN. § 46a-64c (West 1995 & Supp. 1998); D.C. CODE ANN. § 1-2515(a) (West 1981 & Supp. 1998); MASS. GEN. LAWS ANN. ch. 151B, § 4(10) (West 1996); MINN. STAT. ANN. § 363.03 (West 1991 & Supp. 1998); N.J. STAT. ANN. § 2A:42-100 (West 1987 & Supp. 1998); UTAH CODE ANN. § 57-21-2 (1994 & Supp. 1998); WIS. STAT. ANN. § 106.04 (West 1997).

57. WIS. STAT. ANN. § 106.04(1).

58. 54 F.3d 1272 (7th Cir. 1995).

59. *Id.* at 1276.

60. *Id.* at 1282.

61. *Id.* (noting that although Wisconsin statute had enlarged the meaning of “income” from a standard dictionary definition, the court agreed with the district court).

In *Attorney General v. Brown*,⁶² a defendant landlord asserted that the Massachusetts statute preventing landlords from discriminating against recipients of public assistance was preempted by the United States Housing Act of 1937 (the "Act"). The landlord argued that since this Act only requires voluntary participation, the state statute should be void under the Supremacy Clause.⁶³ The Supreme Judicial Court of Massachusetts held that the federal housing law did not preempt the state statute. The court stated that, "[i]t does not follow that, merely because Congress provided for voluntary participation, the States are precluded from mandating participation absent some valid nondiscriminatory reason for not participating."⁶⁴ The court explained that "[t]he Federal Statute merely creates the scheme and sets out the guidelines."⁶⁵ Even though the court in *Brown* held the Massachusetts statute valid, it also determined that issues of material fact existed as to whether the defendant landlord discriminated against the prospective tenants because of their subsidy holder status and therefore remanded the case back to the trial court.⁶⁶

*M.T. v. Kentwood Construction Co.*⁶⁷ in New Jersey provided a more favorable result for tenants receiving Section 8 subsidies. The superior court held that a landlord's refusal to accept Section 8 subsidies from an existing tenant violated 42 U.S.C. § 1437f(t), (the federal "take one, take all" provision), and the New Jersey Statute.⁶⁸ Since this case was decided, Congress repealed the "take one, take all" provision. However, the repeal does not mean that courts would decide *Kentwood* differently now, especially given the recent New Jersey appellate court decision in *Franklin Tower One, L.L.C. v. N.M.*⁶⁹ That court held that the New Jersey statute requires landlords to accept Section 8 payments and that mandating such a requirement is not preempted by federal law.⁷⁰

Based upon these cases, housing advocates believe that state statutes that include source of income protection clauses are not as effective as a federal provision could be due to inconsistent results.⁷¹ Because the case law previously discussed is diverse in its results and remedies, tenants cannot rely on a state statute to guide them if they face discrimination based upon their source of income. Even though states do have some significant protections against discrimination based upon a tenant's source of income, the federal government should deal with this problem uniformly. If the federal government took a stand against housing discrimination based upon a tenant's source of income, then federal courts would have more guidance in their decisions. A new prospective

62. 511 N.E.2d 1103 (Mass. 1987).

63. *Id.* at 1105.

64. *Id.* at 1106.

65. *Id.*

66. *Id.* at 1110.

67. 651 A.2d 101 (N.J. Super. Ct. App. Div. 1994).

68. *Id.* at 103.

69. 701 A.2d 739 (N.J. Super. Ct. App. Div. 1997).

70. *Id.* at 742.

71. See Beck, *supra* note 19, at 170.

would also affect the states, because they would find support to enact their own legislation to protect against source of income discrimination.

B. Why Existing Protections Are Inadequate

The existing protections against source of income discrimination do not provide adequate protection for recipients of Section 8 assistance and TANF. The Fair Housing Act does not include source of income as a protected category.⁷² Therefore, any protections provided by it are indirect. If low-income families want to protect themselves from source of income discrimination, they have to mold and shape their cases into discrimination cases based upon an existing protected classification like race, sex, or national origin.⁷³ With this type of molding, the only relief available does not fit the actual harm. Also, if persons cannot fit within a protected class, like white males without a disability, then they have no remedy available. Further, the limited protections under the Equal Credit Opportunity Act⁷⁴ and the Low-Income House Credit⁷⁵ apply only to specific situations and are not broad enough to deal with the private rental housing sector. The “take one, take all” provision of Section 8 may have helped to at least contain the problem of discrimination, even though much criticism arose because of the disincentive it created for landlords to start participating in the program.⁷⁶ However, with the repeal of the provision, any hopes that private landlords will continue to participate in Section 8 programs are uncertain.⁷⁷

Therefore, recipients of Section 8 assistance and TANF will only find protection if their particular state or local government bans housing discrimination against them. The majority of states do not have any sort of protection against source of income discrimination. Those states that do have such protection⁷⁸ cannot provide complete reassurance for tenants. For example, if the statute does not specifically define what qualifies as “source of income,”⁷⁹ much controversy and litigation can result over the term’s meaning.⁸⁰ Also,

72. 42 U.S.C. §§ 3601-3619, 3631 (1994 & Supp. II 1996).

73. *See, e.g.*, *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246 (9th Cir. 1997); *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148 (S.D.N.Y. 1989); *HUD v. Ross*, No. 01-92-0466-8, 1994 WL 326437 (H.U.D. July 7, 1994).

74. 15 U.S.C. § 1691(a)(2) (1994).

75. 26 U.S.C. § 42(h)(6)(B)(iv) (1994).

76. 42 U.S.C. § 1437f(t)(1) (1994).

77. The “take one, take all” provision was repealed by Pub. L. No. 104-134 § 203(b), 110 Stat. 1321-281 (1996).

78. *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-64c (West 1995 & Supp. 1998); D.C. CODE ANN. § 1-2515(a) (West 1981 & Supp. 1998); MASS. GEN. LAWS ANN. ch. 151B, § 4(10) (West 1996); MINN. STAT. ANN. § 363.03 (West 1991 & Supp. 1998); N.J. STAT. ANN. § 2A:42-100 (West 1987 & Supp. 1998); UTAH CODE ANN. § 57-21-2 (1994 & Supp. 1998); WIS. STAT. ANN. § 106.04 (West 1997).

79. *See, e.g.*, WIS. STAT. ANN. § 106.04.

80. *See, e.g.*, *Knapp v. Eagle Property Management Corp.*, 54 F.3d 1272, 1282 (7th Cir.

courts often have to deal with preemption of the state law by federal law.⁸¹ With all of these issues thrown into the courtroom, the various courts have dealt with source of income discrimination in housing very differently.⁸² In the few instances when courts have decided cases based upon discrimination caused by a tenant's source of income, they have produced more confusion than clarification of the scope or the application of the state statute. It is therefore difficult for a tenant to rely on state provisions for protection of her right to housing. Inconsistency and confusion about source of income discrimination in state courts suggests that the federal government needs to address the issue. States alone cannot provide the ultimate solution to this injustice.

The injustices caused by allowing private landlords to discriminate against their tenants based upon the tenants' source of income are clear. Landlords do not even try to hide the reasons why they discriminate against tenants whose income comes from Section 8 or TANF programs because the law does not protect against it like it does race or sex.⁸³ Landlords have no fear that outright discrimination will ever come back to haunt them. Landlords sometimes even use a tenant's source of income as a defense to a claim of housing discrimination. "Indeed, the defense in many federal fair housing cases has been that the plaintiff was rejected not because of his race or other prohibited reason but because he could not afford the payments required for the defendant's housing."⁸⁴ Housing advocates and practitioners are frustrated by these injustices as well. One particular advocate related a complaint recently lodged by a woman with a disability.⁸⁵ The landlord had already failed to renew the leases of other Section 8 tenants in her private apartment complex or had evicted them. The complainant is the only Section 8 recipient left. The landlord threatened eviction, and the complainant filed a discrimination claim based upon her disability. This apartment complex landlord likely was more concerned with the complainant's source of income than her disability, but the poor are forced to battle discrimination based only upon protected categories.⁸⁶

The administrative process for filing a housing discrimination claim is burdensome. One Housing Authority explained that the complaint must be in

1995).

81. See, e.g., *Attorney General v. Brown*, 511 N.E.2d 1103, 1105-1107 (Mass. 1987) (holding that Section 8 did not preempt Massachusetts statute prohibiting discrimination against recipients of public assistance and rent subsidy holders); *Franklin Tower One v. N.M.*, 701 A.2d 739, 742 (N.J. Super. Ct. App. Div. 1997) (holding that Section 8 did not preempt New Jersey statute prohibiting landlords from refusing to rent to an individual with a lawful source of income).

82. See generally *Knapp*, 54 F.3d at 1272; *Brown*, 511 N.E.2d at 1103; *Franklin Tower One*, 701 A.2d at 739; *M.T. v. Kentwood Constr. Co.*, 651 A.2d 101 (N.J. Super. Ct. App. Div. 1994).

83. See 42 U.S.C. §§ 3601-19, 3631 (1994 & Supp. II 1996).

84. ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION LAW* 380 (1983).

85. Telephone Interview with Sandy Jensen, Attorney and PACE Real Estate Supervisor, Indiana Civil Rights Commission (Dec. 29, 1997).

86. See *id.*; see also *supra* notes 73-77 and accompanying text.

writing, and it must be tailored to a particular form.⁸⁷ The government form is long and complicated. Many victims of housing discrimination do not take the time and energy to fill out the form when they believe their chances of ever proving a claim are slim.⁸⁸ The resources required to file a private lawsuit against a landlord might also serve as a disincentive for victims.

Another problem related to the lack of protection against source of income discrimination is the lack of funding and technology for record-keeping. States that do not ban discrimination based upon source of income do not have the funding to keep computerized statistics on the number of reported complaints.⁸⁹ The only way to find a person's source of income in a housing discrimination complaint is to go back through records manually. Even then, the investigator usually does not ask about a tenant's source of income because the focus must be on protected civil rights.⁹⁰ Also, local housing authorities keep most statistics on the number of people that cannot find a place to use their certificate or voucher, making it difficult to find a consistent and reliable broad-based number that reflects the problem. This situation is troubling because without record-keeping in states coupled with the lack of source of income discrimination protection, legislators have little indication other than anecdotal evidence about the seriousness of this problem.⁹¹

The empirical evidence that does exist about housing discrimination based upon source of income is even more disturbing. According to the Department of Housing and Urban Development, eighty percent of families receiving Section 8 assistance successfully find a place to use their Section 8 vouchers and certificates.⁹² That leaves twenty percent without a place to use their voucher or certificate.⁹³ Other studies find the success number lower, more likely between sixty and sixty-five percent.⁹⁴ This success rate drops for minority families and large families. Also, sixty-four percent of families receiving TANF live in

87. Telephone Interview with Charlene Anderson, Project Administrator, Indiana Department of Family and Social Services, Housing and Community Services Division (Jan. 2, 1998).

88. *See id.* (explaining that a Form 903 is difficult to complete, and many people do not take the time to fill it out because they believe their chances of ever proving a claim of housing discrimination are slight).

89. *See* Telephone Interview with Sandy Jensen, *supra* note 85.

90. *See id.* (explaining that a location or field does not even exist to enter information about a tenant's source of income into the computer).

91. Telephone Interview with Mark St. John, Executive Director, Indiana Coalition on Housing and Homeless Issues, Inc. (Dec. 29, 1997) (noting that there is no legislation in Indiana in the area of landlord/tenant law).

92. U.S. DEP'T OF HOUSING AND URB. DEV., HUD REINVENTION: FROM BLUEPRINT TO ACTION 28 (Mar. 1995).

93. *See id.*

94. *See* Beck, *supra* note 19, at 158 n.18 (citing NATIONAL COUNCIL OF STATE HOUSING AGENCIES, THE LOW-INCOME HOUSING TAX CREDIT: THE FIRST DECADE 72 (May 1997) (finding that "one recipient in six fails to find acceptable housing even when aided by a Section 8 voucher."); Weicher, *supra* note 20, at 275).

private rental housing.⁹⁵ Combined, these statistics emphasize the need for affordable housing. Also, “[r]egardless of their eventual success or failure in finding housing, most recipients experience discrimination from at least one landlord because of their Section 8 status.”⁹⁶ Furthermore, governmental checks on private landlords are not as easy to administer as checks on government-owned housing. These statistics prove that the current federal law, including the Fair Housing Act and the Housing and Community Development Act of 1974, are not accomplishing the goals to provide affordable and fair housing with choice.

Federal housing law also is not accomplishing the goal of desegregation by race and class. When the Fair Housing Act was first passed, “[i]t [was] the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”⁹⁷ However, since the passage of the Fair Housing Act, poverty is still very much concentrated and low-income families are often grouped together into neighborhoods.⁹⁸ Furthermore, in the United States, housing is still segregated by class and race.⁹⁹ A major goal of the Section 8 programs was to provide more mobility to low-income families. Section 8 certificates and vouchers were supposed to give tenants some choice in their housing; that is, to get their families into safe neighborhoods where their children could play. However, without a federal ban on source of income discrimination in housing, low-income families have no meaningful choice in private rental housing. One housing advocate explains how the existing federal law is not enough to provide any meaningful choice for low-income families:

Providing the subsidy is a necessary but not a sufficient condition of deconcentrating poverty. To deconcentrate poverty, it is necessary both to provide the subsidy and to assure that the subsidy can and will be used in a neighborhood in which poverty is not concentrated. To the extent that one seeks to address both racial separation and poverty concentration, the provision of the subsidy must be linked to some desegregative or at least anti-discriminatory program.¹⁰⁰

Low-income families must go where a landlord will accept their tenancy. Unfortunately, the location of the rental units in which landlords do accept Section 8 are often in impoverished or deteriorating neighborhoods.¹⁰¹ Landlords

95. See GREEN BOOK, *supra* note 10, at tbl. 7-23.

96. Beck, *supra* note 19, at 161-62.

97. 42 U.S.C. § 3601 (1994).

98. See Beck, *supra* note 19, at 156.

99. See *id.*

100. See Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 517 (1995).

101. See *Bronson v. Crestwood Lake Sectional Holding Corp.*, 724 F. Supp. 148, 153 (S.D.N.Y. 1989). This case displays the lack of meaningful choice: Plaintiffs argued that if the court did not grant injunctive relief, they would continually be exposed to the harm of their present neighborhood, including a “high crime rate, active drug trade and unsafe conditions.” *Id.*

often decide where to place tenants geographically based upon whether they receive Section 8 or TANF. This strategic placement of tenants segregates housing by class. Allowing landlords to refuse Section 8 and TANF tenants arbitrarily only further traps people in a life of poverty. How can society expect growth and opportunity when it just pounds down the hopes any low-income families have to find a way out of deteriorating neighborhoods?

III. SOLUTIONS

The problem of housing discrimination based upon source of income is a serious and complicated one. The discrimination that occurs is blatant and leaves many people without any meaningful choice for adequate housing. Any solution proposed could not completely rid this world of housing discrimination based upon a person's source of income. However, by exploring some different alternatives to combat discrimination against Section 8 and TANF recipients, we can better learn how to deal practically with this problem. Taking steps toward curing this wrong can truly save many families' and their children's dim futures.

A. Amending the Fair Housing Act—The Beck Model

The first proposed solution to the source of income discrimination problem is calling for an amendment to current federal law. This alternative would involve an amendment to the Fair Housing Act which currently states that, "it shall be unlawful [t]o 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."¹⁰² An amendment to the Fair Housing Act would add source of income as a protected category, and the definition of "source of income" would include recipients of public assistance including Section 8 and TANF. Paula Beck, in her article, *Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier*, proposes that Congress amend the Fair Housing Act to prohibit landlords from discriminating against prospective tenants due to their status as rental subsidy holders.¹⁰³ Beck asserts that there is some precedent supporting this type of amendment including the Housing Act of 1937 and the Equal Credit Opportunity Act of 1974.¹⁰⁴

Beck begins her argument for an amendment to the Fair Housing Act by explaining that courts disfavor the use of race, sex, or another protected category in a discrimination case involving source of income.¹⁰⁵ An amendment to the Fair Housing Act would alleviate any need to fit a claim into another protected

102. 42 U.S.C. § 3604(a) (1994).

103. Beck, *supra* note 19, at 160. Paula Beck is an advocate of amending the federal housing law with respect to at least those receiving Section 8 assistance.

104. *Id.* at 160-61.

105. *Id.* at 169-71 (citing *Knapp v. Eagle Property Management Corp.*, 54 F.3d 1272, 1280 (7th Cir. 1995)).

category.¹⁰⁶ The exact language she proposes to add is: “Status with regard to rental assistance”¹⁰⁷ and the phrase would be defined: “The condition of being a tenant receiving federal, state, or local rental subsidies.”¹⁰⁸ After defining the actual terms of the proposed amendment, Beck engages in an economic analysis of it. Even though she states that landlords have no rational economic basis for discriminating against Section 8 tenants, she assumes, for a hypothetical model, that Section 8 tenants actually do pose a higher cost upon landlords.¹⁰⁹ Some possible sources of increased costs include “administrative fees, property damage, or elevated repair costs.”¹¹⁰ Beck notes that an amendment to the federal housing law would shift the burden to housing providers in the private market.¹¹¹ So, instead of Section 8 recipients bearing all extra costs, if extra costs in fact do exist, both landlords and tenants would share them.¹¹² After this cost-shifting framework is introduced, Beck then provides a “neighborhood model” to explain by example the economic theory behind the proposed amendment.¹¹³ What follows is an analysis of a community with two income levels and two levels of apartments, and the way in which the market will eventually take care of the cost-shifting problem.¹¹⁴

Although Beck labels this model as “highly stylized and unrealistic,” she claims that is helpful because it demonstrates who would bear the burden of discrimination.¹¹⁵ Without protection against discrimination, Beck concludes, “former public housing residents will be concentrated in low-income neighborhoods, displacing many of the unsubsidized, low-income tenants already residing there, [and] Section 8 tenants will be denied the freedom of choice in housing.”¹¹⁶ Beck then states that an amendment prohibiting discrimination against rental subsidy holders will open up middle-class neighborhoods to subsidized tenants and spread the cost of housing from low-income families to middle-class renters and landlords.¹¹⁷

106. See Beck, *supra* note 19, at 171.

107. *Id.*

108. *Id.*

109. *Id.* at 171.

110. *Id.*

111. *Id.*

112. See *id.*

113. *Id.* at 172.

114. *Id.* at 172-75. Beck’s model includes “two categories of rental units within [one] neighborhood.” *Id.* at 172. One level has a lower level of amenities and a lower rent rate. *Id.* Beck asserts that landlords may not want to rent the units with a higher level of amenities to Section 8 tenants because of alleged higher costs. *Id.* Landlords would prefer to save these units for middle-income tenants. See *id.* at 172-73. If Section 8 tenants want the higher level of units, they would have to outbid middle-income tenants. Section 8 tenants would end up paying more than thirty percent of their income. See *id.*

115. *Id.* at 181.

116. *Id.*

117. *Id.*

However, society does not accept this sort of cost-shifting. Beck acknowledges her critics who suggest that the public as a whole should bear the burden, not just middle-class renters and landlords.¹¹⁸ For example, U.S. Supreme Court Justice Scalia criticized that a “welfare transfer should not be treated like mere economic regulation because doing so disproportionately burdens certain groups instead of properly spreading the burden across society at large.”¹¹⁹ Beck points out that society already redistributes wealth and shifts the burden to certain segments.¹²⁰ Examples of such cost-shifting include minimum wage, rent control ordinances, laws limiting monopolies, worker safety laws and product liability laws.¹²¹ Beck also supports her proposition to amend fair housing law by pointing to the ways in which poverty law has increased the duties of land owners and how the recent trend makes owners consider the effects of their uses of their property.¹²²

Finally, the Beck model poses the question of whether the amendment will really work in practice. In this section, Beck points out that the Fair Housing Act was highly ineffective before the 1988 amendment because of the lack of enforcement and monitoring.¹²³ The 1988 amendment did make it more affordable for plaintiffs to bring complaints and it improved enforcement measures.¹²⁴ However, it is still quite costly to file a private lawsuit, and the costs often deter victims of source of income discrimination.¹²⁵ Likewise, an amendment to include subsidy holders will have similar enforcement problems.¹²⁶ There will also be problems of proof with invoking the new law and proving a landlord’s discriminatory assertions, which will no doubt become more subtle after the passage of such an amendment.¹²⁷ Even with all of these problems, Beck still asserts that an amendment would effectively shift the burden to those who can most afford it.¹²⁸

Beck’s proposed solution would help alleviate the burden currently thrust upon subsidized tenants. The debate about where to redistribute the burden will continue. However, examples of how society already redistributes burdens to certain members of society¹²⁹ included in Beck’s article help illustrate the

118. *Id.* at 182-83.

119. *Id.* at 182 (quoting *Pennell v. City of San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part)).

120. *Id.* at 182.

121. *See id.* Minimum wage laws, product and workplace safety provisions, and laws limiting the formation of monopolies shift the burden to employers and manufacturers. Rent control ordinances shift the burden to landlords. *See id.*

122. *Id.* at 182-83.

123. *Id.* at 183-84.

124. *See id.* at 184.

125. *See id.*

126. *See id.*

127. *See id.* at 185.

128. *Id.*

129. *See id.* at 182 (minimum wage, monopoly control, rent control, safety in products, safety

fairness of allocating the burden of renting to subsidized tenants to the middle-class and landlords. This argument correctly suggests that society needs to have more community responsibility woven into its fabric. We should not view this “cost-shifting” as a burden but as a duty because middle-class renters and landlords can better bear extra costs than low-income tenants. Also, if we compare competing interests of landlords and middle-income renters paying slightly higher costs for rentals and expenses across the board with the necessity for low-income renters to have adequate housing, the need for housing for all people should tip the scale.

However, in practice, an amendment to the Fair Housing Act to include “status with regard to rental assistance”¹³⁰ would be seriously flawed. First, the language of the amendment would leave out other sources of income that may also provide a basis for discrimination. Most importantly, those families who receive TANF would not find protection from such an amendment because not all recipients of TANF are also subsidy holders.¹³¹ Beck displays in her economic analysis that even under the new amendment, low-income families that do not receive rental assistance could be displaced by subsidized tenants due to increasing rent costs.¹³² Beck’s economic analysis in support of an amendment breaks down here because low-income tenants that are not subsidized will also bear the burden along with middle-income renters and landlords.

Second, people do not act in conformity with the workings of an economic model. Beck admits the model is unrealistic,¹³³ as all models are to some extent. Beck’s model illustrating who bears the burden seems like a mathematical equation with an appropriate solution. However, humans cannot always be subject to the mathematical calculations of economic analysis, as if there are no other aspects like morality and justice that motivate people’s actions. Cost-benefit analysis is not the best way to find a solution to the crisis of low-income families’ need for housing, but it is a definite beginning. Beck’s model is based upon the assumption that Section 8 tenants pose a higher cost to landlords than non-subsidized tenants. If landlords claim they are experiencing higher costs when renting to Section 8 tenants, then it is probably because their rentals are not in adequate shape for renting. The housing quality standards set by HUD regulations are not above and beyond maintaining a rental unit to decent living conditions.¹³⁴ Landlords who insist that Federal Housing Quality Standards are too stringent could even be violating the implied warranty of habitability wherein the landlord promises to deliver and maintain the premises in habitable

in the workplace).

130. *Id.* at 171.

131. GREEN BOOK, *supra* note 10, at tbls. 15-1 to 15-3. In 1995, only 31.1% of AFDC recipients also received assistance from public or subsidized rental housing. *Id.*

132. *Id.* at 180. See also *supra* note 114 and accompanying text.

133. *Id.* at 181.

134. See Telephone Interview with Mark St. John, *supra* note 91 (stating that standards set by HUD are reasonable and only deal with the necessities of livable housing).

conditions in the interest of the safety and health of the tenant.¹³⁵

Finally, an amendment to the Fair Housing Act to include protection for rental subsidy holders is not likely to occur in the near future. Legislators likely would not pass such a measure, as our country's politics are moderate to conservative right now. With recent trends in legislation, such as passage of the welfare reform bill, the poor in our country are receiving less assistance from the federal government than ever before.¹³⁶ If anything, legislation shows a trend away from passing an amendment to the Fair Housing Act to protect low-income families.¹³⁷ Also, the federal government would hesitate to include source of income as a protected category because in the realm of public housing, a court evaluating claims of discrimination may need to raise its level of scrutiny when reviewing the states' action when it undertakes a Fourteenth Amendment equal protection analysis.¹³⁸

B. Taking Existing Law and Finding Protection

An alternative solution to this problem of source of income discrimination is much less complicated than amending the Fair Housing Act. This solution involves analyzing the language of existing statutes. The purposes of existing federal housing law imply a prohibition against discrimination based upon a prospective tenant's source of income. Without any prohibition against this type of discrimination, the purpose of existing law would be frustrated. The following analysis looks specifically at the Section 8 statute¹³⁹ as well as the Personal Responsibility and Work Opportunity Act of 1996.¹⁴⁰

To begin this analysis, a close reading of the pertinent statutes is necessary. Section 8 declares as its official policy:

It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income and, consistent with the objectives of this chapter, to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs.¹⁴¹

Another stated purpose of the Section 8 programs is "to provide a decent home

135. See JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 519-52 (5th ed. 1998).

136. See 42 U.S.C. § 601 (Supp. II 1996).

137. See, e.g., 42 U.S.C. § 1437f(t), *repealed by* Pub. L. No. 104-134, §§ 203(b), (c), 110 Stat. 1321-281 (1996).

138. See generally JEROME A. BARRON ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 559-60 (5th ed. 1996).

139. 42 U.S.C. §§ 1437 to 1437aaa-8 (1994 & Supp. I 1995 & Supp. II 1996).

140. *Id.* § 601 (Supp. II 1996).

141. *Id.* § 1437 (1994).

and a suitable living environment for every American family that lacks the financial means of providing such a home without government aid.”¹⁴² Other goals of Section 8 are to promote mobility and desegregation along class and racial lines.¹⁴³

With these specific purposes in mind, it is unlikely that legislators would allow discrimination against a tenant’s source of income if they truly wanted to accomplish the stated goals. It is difficult to speculate exactly what the legislature’s intent was at the time the statute was passed. However, one cannot ignore the language of the statute which states that the goal of Section 8 is to provide safe and adequate housing for low-income families. If the purpose of the statute was to provide affordable housing and mobility to low-income families, then this purpose would be frustrated by allowing landlords to discriminate against prospective tenants because of their source of income. The promise of Section 8 is empty without giving the poor a chance to move out of deteriorating neighborhoods and find a safer place for their families to live.

Of course, there is the question of whether the legislators actually contemplated that federal law should allow source of income discrimination, as legislative history is silent on this issue.¹⁴⁴ However, a general theme of the statute discourages housing discrimination. Also, legislators might have assumed that HUD’s regulations already protected source of income discrimination. Most people would assume that such an injustice is protected. Section 8 seems pointless if low-income families cannot find a place in which to use their voucher or certificate and can never move out of a less than desirable neighborhood. Legislators might well have believed their actions and words through this statute represent a ban on source of income discrimination in housing because the goals of the statute are impossible without such a ban.

TANF also has a specific stated purpose:

The purpose of this part is to increase the flexibility of States in operating a program designed to—1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; 2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; 3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and 4) encourage the formatting and maintenance of two-parent families.¹⁴⁵

142. *Thorpe v. Housing Authority*, 393 U.S. 268, 281 (1969) (citation omitted).

143. *See* 42 U.S.C. § 1437(a) (1994); *see also* Beck, *supra* note 19; Roisman, *supra* note 100.

144. *See generally* S. REP. NO. 101-316 (1990), H.R. CONF. REP. NO. 101-943 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763; H.R. REP. NO. 100-604 (1988), *reprinted in* 1988 U.S.C.C.A.N. 791; S. REP. NO. 97-139 (1981), H.R. CONF. REP. NO. 97-208 (1981), *reprinted in* 1981 U.S.C.C.A.N. 396; S. REP. NO. 93-693 (1974), H.R. CONF. REP. NO. 93-1279 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4273.

145. 42 U.S.C. § 601 (Supp. II 1996).

The passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA")¹⁴⁶ marked a drastic change in society and ended welfare as we knew it. This welfare reform bill had very specifically stated purposes reflected in its slogan: "Moving people from welfare to work."¹⁴⁷ If the goal of this act that created the new TANF program really is to promote responsibility and less dependence of the government, then it is difficult to see how low-income families could accomplish such a goal without the ability to meaningfully choose their housing.

If one examines the language of the stated purpose of PRWORA, legislators clearly wanted strong traditional families.¹⁴⁸ However, the absence of an explicit provision protecting low-income families from housing discrimination indicates that legislators did not enable families with the tools to escape the trappings of poverty. Families who have an extremely burdensome struggle to find affordable and decent housing cannot always fit the mold of a "traditional two-parent family"¹⁴⁹ given all of the stress involved in just trying to put a roof over their children's heads. For these reasons, a prohibition against source of income discrimination must be implied in the act. Without such an implied ban, the goal of the statute is nearly impossible to reach.

The foundation definitely exists in Section 8 and TANF statutes for a court faced with a housing discrimination claim to look at the legislative intent at the time of passage and conclude that in order to fulfill accurately the purposes of the statute, a prohibition against source of income discrimination must be implied. This alternative solution definitely would not require society to move as many mountains it would take to amend the Fair Housing Act. However, courts may not want to build boldly on this foundation by ruling that the prohibition against source of income discrimination is implied in the statutes. Some members of the judiciary have taken steps to consider this approach.¹⁵⁰ However, there is a danger in this strategy because if the judiciary took such action, the public could view the court as making law. Arguably, making law on such a political issue might best be left to the other branches of government. Debate might ensue over the role of judicial activism and how we as a society do not want judges making law to suit their own policies and morals. The dangers of judicial power is a heated topic that will always spark debate, regardless of how one feels about the outcome of a particular decision. Regardless of this debate, if a court carefully laid out its opinion explaining step-by-step how a prohibition against housing discrimination based upon a tenant's source of income is implied in current federal law, the decision might stand over criticisms and appeals.

146. Pub. L. No. 104-193, §§ 101-913, 110 Stat. 2105 to 2355 (codified as amended at scattered sections of 42 U.S.C. (Supp. II 1996)).

147. Statement by President William J. Clinton, 1997 U.S.C.C.A.N. 176.

148. 42 U.S.C. § 601 (Supp. II 1996).

149. *Id.*

150. *See Salute v. Stratford Greens Garden Apts.*, 136 F.3d 293, 302-03 (2d Cir. 1998) (Calabresi, J., dissenting).

C. HUD Promulgating Regulations—NAACP v. American Family

The last alternative to solving the problem of source of income discrimination is the most practical and realistic. This solution calls for HUD to promulgate regulations prohibiting source of income discrimination. If the Secretary of HUD would interpret existing federal housing law to include source of income as a protected category and enact regulations consistent with this interpretation, then it is likely that courts would respect the Secretary's decision and authority. Further, HUD's promulgation of regulations would be the most efficient and least controversial solution to low-income families' need to find affordable housing free of discrimination. This statement may seem hasty, as one would think that courts and the power of judicial review would not respect an administrative decision made by the executive branch. However, precedent indicates the contrary.

The Seventh Circuit, in *NAACP v. American Family Mutual Insurance Co.*,¹⁵¹ determined whether "redlining in the insurance business [amounted to] racial discrimination, violating the Fair Housing Act. 'Redlining' is charging higher rates or declining to write insurance for people who live in particular areas (figuratively, sometimes literally, enclosed with red lines on a map)."¹⁵² When a potential home buyer seeks to take out a mortgage, lenders will not provide credit unless the buyer can secure insurance to serve as collateral for the loan.¹⁵³ As the majority of potential home buyers require a mortgage in order to have the funds to purchase a home, the need for insurance is clear. The practice of redlining often pushes potential buyers out of the market.¹⁵⁴ "If insurers redline areas with large or growing numbers of minority residents, that practice raises the cost of housing for black persons and also frustrates their ability to live in integrated neighborhoods."¹⁵⁵

After the court explained how the insurance industry deals with pools and risks, it concluded that "risk discrimination is not race discrimination."¹⁵⁶ The court noted that while this distinction exists, it is difficult to differentiate when risks are just risks or when risks are generated by discrimination.¹⁵⁷ The court then debated whether the Fair Housing Act applies to the insurance industry,¹⁵⁸ concluded that it does apply, and allowed the plaintiffs alleging discrimination to keep their claims under the Fair Housing Act.¹⁵⁹

In the midst of this debate, the court pointed to the fact that Congress enacted

151. 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993).

152. *Id.* at 290.

153. *See id.*

154. *See id.*

155. *Id.*

156. *Id.*

157. *Id.* at 290-91.

158. *Id.* at 293-302.

159. *Id.* at 301-02.

amendments to the Fair Housing Act in 1988 “authorizing [HUD] to make rules . . . to carry out this subchapter.”¹⁶⁰ The court explained that “Congress gave the Executive Branch,” namely HUD, this rule-making power.¹⁶¹ Also, Congress gave HUD “this power with knowledge that since 1978 a succession of Secretaries have believed that ‘[i]nsurance redlining, by denying or impeding coverage[,] makes mortgage money unavailable, rendering dwellings “unavailable” as effectively as the denial of financial assistance on other grounds.’”¹⁶² Given this background, the court found that the Secretary of HUD used the rule-making power given by Congress to issue regulations stating that refusing to provide insurance because of race was included in the prohibitions of 42 U.S.C. § 3604.¹⁶³

The Seventh Circuit then concluded that the Secretary of HUD’s construction of the text of 42 U.S.C. § 3604 was plausible.¹⁶⁴ More importantly, the court applied the rule that if the construction is plausible, then it should be respected.¹⁶⁵ “Courts should respect a plausible construction by an agency to which Congress has delegated the power to make substantive rules.”¹⁶⁶ The court acknowledged the predictable criticism that courts should not defer to administrative decisions when judges hold the power of enforcement,¹⁶⁷ but the court addressed the issue by pointing to the 1988 amendments of the Fair Housing Act in which a provision for administrative enforcement was created “paralleling judicial enforcement.”¹⁶⁸ Because the Fair Housing Act sets up administrative enforcement, and the Secretary’s regulations would receive deference in an administrative decision, plaintiffs would face different substantive law if their litigation began in the administrative courts than if it began in a district court.¹⁶⁹ To say that the Fair Housing Act applies to the insurance industry in administrative decisions but not in a district court does not make any sense and inconsistency would result.

The court also pointed to other precedent that suggested that even without Congress’ grant to HUD the power to make substantive rules, the Secretary’s regulations should be given deference by the court. Before the 1988 amendments were passed, “the Supreme Court declared that the Secretary’s views about the

160. *Id.* at 300 (quoting 42 U.S.C. § 3614a (1994)).

161. *Id.*

162. *Id.* (quoting Memorandum by the General Counsel of HUD, *quoted in* Dunn v. Midwestern Indem. Mid-Am. Fire & Cas. Co., 472 F. Supp. 1106, 1109 (S.D. Ohio 1979)).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* (citing *Pauley v. Bethernergy Mines, Inc.*, 501 U.S. 680, 706 (1991); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, *reh’g denied*, 468 U.S. 1227 (1984)).

167. *Id.*

168. *Id.* (citing 42 U.S.C. §§ 3610-12 (1994)).

169. *See id.*

meaning of [the Fair Housing Act] are entitled to ‘great weight.’”¹⁷⁰ The Seventh Circuit ended its analysis on the issue of whether administrative regulations should have deference in the interpretation of the Fair Housing Act by concluding that if “the Secretary’s regulations are tenable,” then the courts should respect them.¹⁷¹

The decision in *NAACP v. American Family Mutual Insurance Co.* opens the door for HUD to promulgate regulations interpreting federal housing law. The Secretary of HUD can openly express his views of the law, and as long his constructions are plausible, they will be respected. When we look at the legislative intent of Section 8 and TANF, we find an implied prohibition on source of income discrimination.¹⁷² Therefore, the Secretary of HUD could interpret these statutes to include a prohibition against “source of income” discrimination in housing in the form of regulations. Such an interpretation is not implausible because the existing statute from which the Secretary draws his construction need not explicitly mention “source of income,” just as the insurance industry was not mentioned in the Fair Housing Act in *American Family Mutual Insurance Co.*¹⁷³ Further, the Secretary’s views are always given great weight, so with careful wording and explanation of why the goals of Section 8 and TANF could not be fulfilled without a ban on “source of income” discrimination, the courts would likely respect the regulations.

This solution would be the least controversial one of the three proposed solutions in this Note. Armed with an explicit HUD regulation including source of income discrimination as a protected category, victims of source of income discrimination would no longer have to manipulate their claim into a protected category of the Fair Housing Act or rely upon the inconsistencies of state and local fair housing law to get relief. Arguably, the Seventh Circuit in *American Family Mutual Insurance Co.* addressed an issue dealing with race, and the court may not have been as receptive if the issue dealt with “source of income.” However, that court noted that the 1988 amendments to the Fair Housing Act gave HUD rule-making power and did not differentiate with respect to different issues.¹⁷⁴ The issue before the court, while implicating race, dealt with the insurance industry which does not explicitly appear in the Fair Housing Act either.

Action by the Secretary of HUD would not take an act of Congress, as Congress already granted HUD the power to make substantive rules and provide enforcement.¹⁷⁵ While it is true that enacting administrative regulation is not a quick process, it is more timely than Congress debating the issue and agreeing to terms of an act that the President will sign. Also, a court would not have to find

170. *Id.* at 300-01 (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 107 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972)).

171. *Id.* at 301.

172. *See* 42 U.S.C. § 1437 (1994); 42 U.S.C. § 601 (Supp. II 1996); *see also infra* Part II.B.

173. *NAACP v. American Family Ins. Co.*, 978 F.2d 287, 299 (7th Cir. 1992).

174. *Id.* at 300-01.

175. *See* 42 U.S.C. §§ 3610-12, 3614a (1994 & Supp. II 1996).

the precedent to protect itself if it looked to the purposes and goals of the existing federal housing laws. Courts would have some explicit guidance in how to deal with a claim of source of income discrimination. Regulations by HUD would substantially diminish the current inconsistency in source of income discrimination jurisprudence.

CONCLUSION

The need for protection against discrimination by landlords against low-income families will only increase in the future unless remedial action is taken. We need to remember that children are twice as likely to live in poverty than adults, and minorities represent a disproportionate number of the poor in our society.¹⁷⁶ With a portion of our population at great susceptibility to this type of discrimination, we need to take a stand against this injustice to ensure that low-income families find affordable housing free from discrimination.

The existing protections found in housing law against source of income discrimination are inadequate. Victims of source of income discrimination can not be expected to rely upon the Fair Housing Act and mold their case into a protected category, hoping for the best. Likewise, prospective tenants cannot hope that they live in a state that protects them from being discriminated against because of their status as a Section 8 or TANF recipient. The inconsistency in the case law cannot provide any reassurance to those who might pursue a source of income suit but do not because of the fear that they will not succeed.¹⁷⁷

The three proposed solutions to the problem of source of income discrimination provide some creative guidance and display that there is not one right answer to this complex problem. The Beck model is representative of a straight-forward approach, amending existing law to include status as a subsidy holder as a protected classification under the Fair Housing Act.¹⁷⁸ The second alternative does not require an act by Congress, but it does require a courageous court to build a foundation for an implied prohibition based upon the purposes of Section 8 and TANF. The last alternative requires the least action, as HUD would need to promulgate regulations prohibiting source of income discrimination based upon an interpretation of existing federal housing law. This solution already has a foundation built by the Seventh Circuit case, *NAACP v. American Family Mutual Insurance Co.*¹⁷⁹

While the last solution seems to provide the most practical and efficient remedy to the injustice of source of income discrimination, all three have merit that can guide future debate. Regardless of which alternative one prefers, we as a society must do what is right in our hearts. We can no longer allow such a blatant attack on the poor.

Most do not know the extent of this discrimination, and this Note serves as

176. See KARGER & STOESZ, *supra* note 11, at 92-111.

177. See Telephone Interview with Charlene Anderson, *supra* note 87.

178. Beck, *supra* note 19; see also *supra* Part III.A.

179. 978 F.2d 287 (7th Cir. 1992).

an educational tool to explain the depth of the problem. If the majority of people knew of this problem, many would be outraged to discover that source of income discrimination is not protected by existing law. Even the highest of government officials believes source of income discrimination is protected by existing law. Andrew Cuomo, the Secretary of HUD, was asked on a radio political talk show, *Talk of the Nation*, whether a landlord can discriminate against a person on the basis that they have a Section 8 rental subsidy.¹⁸⁰ He answered that “you can’t discriminate against a person on the basis that he or she has a Section 8 rental subsidy. You can turn down a prospective tenant on bona fide meritorious grounds because it’s your building and you have a right to interview the tenant, but not solely on the grounds that they have a Section 8 subsidy.”¹⁸¹ The Secretary of HUD is obviously wrong, but his answer reflects the ignorance of the public about this problem. The bottom line is that a landlord can turn prospective tenants away based solely on their source of income, without any rational economic reason, and this practice must be stopped. The law should at least protect those whom the Secretary of HUD believes the law already protects.

180. *Talk of the Nation* (NPR radio broadcast, Mar. 3, 1997).

181. *Id.*