MENDING THE SAFETY NET THROUGH SOURCE OF INCOME PROTECTIONS: THE NEXUS BETWEEN ANTIDISCRIMINATION AND SOCIAL WELFARE LAW

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INTRODUCTION

Nina is an African American woman and a single mother with five children living in New York City.[1] One of her children is severely disabled. Last year, after a long wait, Nina became eligible for a housing voucher through the federal Housing Choice Voucher Program (also known as Section 8). In spite of the promise of rental assistance, Nina and her family have repeatedly been denied housing. The landlords and real estate agents that sent her away never mentioned her race, the fact that she has children, or that one of her daughters is disabled. If they had, Nina would have a clear legal claim under the Fair Housing Act (FHA or "the Act").[2] Instead, landlords and agents continue to deny Nina housing on account of her housing voucher, claiming that the property owner cannot or does not accept those types of vouchers and that the owner will only accept people with "real jobs" as tenants. This treatment may not seem as

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[1] Nina's story refers to a real case handled by the Fair Housing Justice Center in New York City last year, but the client's name has been changed for the purposes of this publication.

[2] Fair Housing Act (FHA), 42 U.S.C. § 3601 (2011).

egregious as having a door slammed in one's face on account of one's race or being told by a real estate agent that there are more "people like her" nearby in a different neighborhood. However, Nina and her children are being discriminated against, and Nina's ability to choose where to live has been interfered with and frustrated.

What Nina and her family have experienced, and what many others like her experience each day, is known as source of income discrimination (SOI discrimination). In spite of the fact that her income is lawfully obtained through a federal voucher program that has operated since the 1970s, landlords and real estate agents fail to make rental units available to prospective tenants like Nina because of how she plans to pay her rent. The FHA protects against discrimination on the basis of race, color, national origin, religion, sex, familial status and disability in the sale or rental of properties.[3] However, it does not include a protection against SOI discrimination, discrimination that is often conducted so openly that it may be difficult to view it at first as a form of discrimination, but like other forms of discrimination, SOI discrimination is a significant obstacle to minorities and people with disabilities searching for housing. While landlords may openly refuse prospective tenants based on their status as voucher holders or recipients of public assistance, denial in such cases may be a thinly veiled means of rejecting tenants on the basis of race, familial status or disability.

Recognizing that SOI discrimination contravenes the express goals of fair housing, many states and municipalities have added SOI discrimination provisions to fair housing statutes and ordinances. In 2008 the National Commission on Fair Housing and Equal Opportunity issued a report recommending that Congress amend the FHA to include a provision prohibiting discrimination in sales or rentals based on source of income, essentially adding another protected class to those groups already covered by the Fair Housing Act.[4]

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[3] *Id.* § 3604 (2011) ("Discrimination in the sale or rental of housing and other prohibited practices.").

[4] COMM'N ON FAIR HOUS. & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING: REPORT OF THE NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY 62 (2008) [hereinafter FUTURE OF FAIR HOUSING].

This Article considers the issue of SOI discrimination, discussing its effects in practice as well as its status in laws, and recommends that SOI discrimination be addressed through a change to federal law.[5] In order to better understand the consequences of such an amendment, this Article argues that the addition of a source of income protection provision requires engagement with both the antidiscrimination model and the social welfare paradigm. The addition of a source of income provision would be compatible with both social welfare and antidiscrimination laws.

In Part I, this Article presents the problem of SOI discrimination and argues that SOI discrimination in housing should be outlawed by the federal FHA. Part I specifically focuses on the populations most affected by SOI discrimination, and explores the various gaps in fair housing laws at both the state and federal level. Part II presents two common theories of addressing inequality: the antidiscrimination and social welfare paradigms, approaches that are frequently seen as incompatible modes of redressing social inequalities. Part III examines how the addition of SOI protections to the FHA implicates each of these paradigms separately, and goes on to consider these two approaches as coextensive. Part IV considers means outside of outright amendment to the FHA to combat SOI discrimination, specifically focusing on possible changes to standing social welfare and antidiscrimination laws. Weighing potential alternatives, the Article concludes that amendment to the FHA is the best solution to SOI discrimination.

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[5] A number of authors have addressed variations on this topic in the past. *See e.g.* Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier*, 31 HARV. C.R.-C.L. L. REV. 155 (1996); Kim Johnson-Spratt, *Housing Discrimination and Source of Income: A Tenant's Losing Battle*, 32 IND. L. REV. 457 (1999); Laura Bacon, Godinez v. Sullivan-Lackey: *Creating a Meaningful Choice for Housing Choice Voucher Holders*, 55 DEPAUL L. REV. 1273 (2006). This Article contributes to the discussion by engaging with SOI discrimination and the Fair Housing Act discourse from a new perspective by considering the effects of SOI discrimination on certain minority groups and people with disabilities. Further, this Article examines how SOI discrimination works both inside and outside the antidiscrimination model and social welfare paradigms.

I. Definition and Description of Source of Income Discrimination

Instances of SOI discrimination similar to Nina's are increasingly common. Fair housing advocates report that although housing discrimination on the basis of race continues to occur, it is more subtle than it was years ago, when African American homebuyers and renters reported being told directly they were not welcome in certain buildings or housing developments because of their race.[6] Discrimination against a tenant on the basis of her disability or her source of income, however, may be much more blatant.[7]

Source of income discrimination occurs when a landlord or agent refuses to rent an available unit to someone because it is known or believed that the renter intends to pay rent, in whole or in part, with money derived from one or more welfare programs or some private income support arrangements. Public sources of income that are targeted vary, but include everything from Social Security and unemployment compensation to food stamps, Temporary Assistance for Needy Families (TANF), and Section 8 housing participation; private sources include alimony and child support.[8] Section 8 is perhaps the most well known of these federal income support programs: each year, over two million Section 8 vouchers are distributed to qualifying

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[6] *See, e.g.*, Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 207, 207–08 (1972) (finding that the owner of an apartment complex had discriminated against minority rental applicants by, *inter alia*, insinuating that they would not be welcome); *see also* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459–60 (2001) (arguing that the first generation discrimination "smoking guns," such as the exclusionary sign on the door, are no longer the most significant form of discrimination).

[7] FRED FREIBERG & DIANE HOUK, FAIR HOUSING JUSTICE CTR., NO LICENSE TO DISCRIMINATE: REAL ESTATE ADVERTISING, SOURCE OF INCOME DISCRIMINATION, AND HOMELESSNESS IN NEW YORK CITY (2008), *available at* http://www.fairhousingjustice.org/PDFs/License_to_Discriminate_finalDRAFT.pdf.

[8] U.S. Housing Act (USHA), 42 U.S.C. § 1437f (2011) (establishing what is colloquially known as "Section 8" housing subsidies).

individuals and families.[9] However, the Department of Housing and Urban Development (HUD) reports that in spite of the high number of vouchers distributed, approximately one-third of vouchers are returned unused.[10] Low-income families and individuals who are denied housing on account of their vouchers are not left with many housing opportunities.

Though the Section 8 voucher program plays an integral role in subsidizing housing for many Americans, there are other federal income support programs that are also widely rejected by landlords and real estate agents. Income based on disability is the most common form of supplemental income in the United States. In comparison with the two million Section 8 vouchers distributed annually, nearly 8.5 million people are beneficiaries of Social Security Disability Insurance (SSDI).[11] The Social Security Administration reports that one-seventh of all SSDI beneficiaries also receive Supplemental Security Income (SSI) payments.[12] In addition, sources of income subject to discrimination can include non-public funding, such as special needs trusts, income from legal settlements and third-party payers.

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[9] *See generally* U.S. DEP'T OF HOUS. & URBAN DEV., RESIDENT CHARACTERISTICS REPORT (2010), *available at* http://www.hud.gov/offices/pih/systems/pic/50058/rcr/index.cfm.

[10] U.S. DEP'T OF HOUS. & URBAN DEV. OFFICE OF POLICY DEV. AND RESEARCH,, STUDY ON SECTION 8 VOUCHER SUCCESS RATES, VOL. I (2001); *see also.* Manny Fernandez, *Bias Is Seen as Landlords Bar Vouchers*, N.Y. TIMES, Oct. 30, 2007, *available at* http://www.nytimes.com/2007/10/30/nyregion/30section.html?scp=1&sq=Bias%20Is%20Seen%20as%20Landlords%20Bar%20Vouchers&st=cse (stating that in New York City, which has the highest Section 8 enrollment in the country, many people that are denied housing on the basis of their Section 8 enrollment do not have alternative housing options available).

[11] U.S. SOC. SECURITY ADMIN., ANNUAL STATISTICAL REPORT ON THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM (2008), *available at* http://www.ssa.gov/policy/docs/statcomps/di_asr/.

[12] *Id.*

A. Source of Income Discrimination on the Ground: Persons Most Affected by SOI Discrimination

In order to understand the consequences of SOI discrimination, it helps to consider those who are most affected by this type of discrimination. The majority of people who receive rental assistance or other supplemental sources of income from government programs are people living with disabilities, single female heads of household,[13] families with children[14] and members of racial minority groups.[15] The people targeted by SOI discrimination are among the same people Congress intended to protect when it passed the FHA.

In a 2008 shadow report to the U.N. Committee on the Elimination of Racial Discrimination, the authors reported that across all HUD housing programs, seventy-nine percent of households are headed by women, forty-two percent are headed by women with children and fifty-eight percent are people of color.[16] At the international level, the U.N. Committee on the

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[13] U.S. HOUS. SCHOLARS AND RESEARCH AND ADVOCACY ORGANIZATIONS, RESIDENTIAL SEGREGATION AND HOUSING DISCRIMINATION IN THE UNITED STATES: A REPORT TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION 5 (2008) [hereinafter RESIDENTIAL SEGREGATION] (reporting that "[w]omen of color are disproportionately harmed by segregation in government-subsidized housing").

[14] U.S. DEP'T OF HOUS. & URBAN DEV. OFFICE OF POL'Y DEV. & RESEARCH, AFFORDABLE HOUSING NEEDS: A REPORT TO CONGRESS ON THE SIGNIFICANT NEED FOR HOUSING 2 (2003) [hereinafter AFFORDABLE HOUSING NEEDS] (finding that "[m]ore than one-third (thirty-six percent) of households with worst case housing needs are families with children").

[15] FUTURE OF FAIR HOUSING, *supra* note 4, at 62 (reporting that "two studies conducted by the Chicago Lawyers Committee for Better Housing based on testing to determine if home seekers who were voucher holders experienced discrimination found that discrimination against voucher holders was widespread and that discrimination was more pronounced when the voucher holder was Black"). Statistics show that minorities, both male and female, and women of all races are disproportionately affected by SOI discrimination. However, the problem is particularly acute for minority women and people with disabilities.

[16] Rep. of the Comm. on the Elimination of Racial Discrimination, 56th Sess., *Gender-Related Dimensions of Racial Discrimination*, U.N. DOC. A/55/18, annex V at 152 (2000), *available at* www.un.org/documents/ga/docs/55/a5518.pdf.

Elimination of Racial Discrimination published general comments on the gendered nature of racial discrimination, relying in part on the above statistics.[17] The Committee noted, "[t]here are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men."[18] Additionally, the Committee reported that certain types of racial discrimination can "escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life."[19]

That the majority of voucher holders are single female heads of household is not a new occurrence; in fact, since the early years of the Section 8 program, the majority of vouchers have been given to women with children.[20] If low-income minority women and children are being prevented from living in economically and racially diverse neighborhoods, the effects of this discrimination go well beyond the geographical details of

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[17] *Id.*

[18] *Id.*

[19] *Id.* at ¶ 1. Under the Department of Housing and Urban Development, the Office of Policy Development and Research offers an online dataset that allows researchers to study subsidized housing in the United States. It reports that eighty-four percent of Section 8 voucher holders are female heads of household. U.S. DEP'T OF HOUS. AND URBAN DEV., A PICTURE OF SUBSIDIZED HOUSEHOLDS–2000, http://www.huduser.org/picture2000/form_1S.odb (select "US Total" and follow "Next Screen" hyperlink; then select "Section 8 Certificates and Vouchers" and follow "Next Screen" hyperlink; then select "pct_female_head" and follow "Next Screen" hyperlink; then select "View data on screen in an HTML table") (last visited May 21, 2011).

[20] WOMEN AS SINGLE PARENTS: CONFRONTING INSTITUTIONAL BARRIERS IN THE COURTS, THE WORKPLACE, AND THE HOUSING MARKET, 127 (Elizabeth Mulroy ed., 1988) [hereinafter SINGLE PARENTS] (reporting that "Women who head households have always been a significant proportion of Section 8 . . . beneficiaries . . . . The preponderance of households who apply to the Section 8 Rental Assistance Program are single mothers. In 1976, two years after program inception, seventy percent of those participating nationwide were female heads of households").

where they sleep at night.[21] Where a child grows up is directly related to where he or she can go to school, and living in a low-income, racially segregated neighborhood with under-funded public schools can be a significant barrier to racial and economic integration for that family.[22]

People with disabilities also suffer from discrimination based on source of income. More than fifty-one million Americans have a disability and people with disabilities have suffered a long history of residential discrimination and exclusion.[23] In fact, net measures of systemic discrimination against people with disabilities are generally higher than the net measures of discrimination on the basis of race and ethnicity.[24] Like families with children, people with disabilities are significantly more likely to have "worst case housing needs"

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[21] *See* RESIDENTIAL SEGREGATION *supra* note 13, at 11 (noting that "segregated housing patterns often lead to segregated schools," and reporting that "integration in schools can . . . lead to greater residential integration.").

[22] FUTURE OF FAIR HOUSING, *supra* note 4, at 2; SHERYLL CASHIN, THE FAILURES OF INTEGRATION 244 (2004) (noting the "daily toll for those relegated to ghetto neighborhoods . . . [including] . . . greater risk for disease and death, exposure to violence, poor schools, limited access to jobs, higher risk for teen pregnancy.").

[23] *See infra* Part II.

[24] FUTURE OF FAIR HOUSING, *supra* note 4, at 11.

than others who are similarly economically situated.[25] Disability is highly correlated with poverty, and people with disabilities often depend on subsidized housing programs.[26] Advocates for disability rights and fair housing recommend that people with disabilities be able to more readily supplement their SSI payments with a monthly rental subsidy from Section 8.[27] Although the FHA was amended to include "people with disabilities" as a protected class, discrimination against people with disabilities as voucher holders has led to a concentration of

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[25] AFFORDABLE HOUSING NEEDS, *supra* note 14, at 2 (finding that "[p]ersons with disabilities have a greater likelihood of having worst case housing needs than other family types with very low incomes. About ten percent of households with worst case needs are families with non-elderly members with disabilities. More than one-third (36.4 percent) of very-low-income renter households that have non-elderly family members with disabilities also have worst case needs"). A report issued by the Department of Housing and Urban Development defines *worst case needs* as the

> [V]ery low-income renters with "incomes below 50 percent of the Area Median Income who do not receive government housing assistance and who either paid more than one-half of their income for rent or lived in severely inadequate conditions, or who faced both of these challenges."

U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF POL'Y DEV. AND RESEARCH, WORST CASE HOUSING NEEDS 2009: REPORT TO CONGRESS vii n.1 (2009), *available at* http://www.huduser.org/portal/Publications/pdf/WorstCaseNeeds2009Summary.pdf. HUD's estimates of worst case housing needs are based primarily on data from the American Housing Surveys. *Id.*

[26] Michael Allen, *Increasing the Usability of Housing Choice Vouchers for People with Disabilities*, 36 NAT'L HOUSING L. PROJECT 111, 111 (2006) (noting that people with disabilities disproportionately depend on subsidized housing programs to afford rental housing programs in order to "avoid institutionalization in hospitals, nursing homes and board and care homes"); *see also* ANN O'HARA ET. AL., TECHNICAL ASSISTANCE COLLABORATIVE, PRICED OUT IN 2006: PEOPLE WITH DISABILITIES LEFT BEHIND AND LEFT OUT OF FEDERAL HOUSING POLICY 1 (2007), *available at* http://www.tacinc.org/Docs/HH/OpeningDoors/ODIssue30.pdf (noting that 2006 was the first time that national average rents for both one-bedroom and efficiency units were more than the entire monthly income of an individual relying solely on SSI).

[27] O'HARA, *supra* note 26, at 9 (stating that the Section 8 Housing Choice Voucher Program and Supportive Housing for Persons with Disabilities are essential to closing the housing affordability gap for low-income people with disabilities).

people with disabilities in certain types of project-based housing.[28] Relegating people with disabilities to certain types of housing frustrates the goals of integration under the FHA and sends a discriminatory message that is fundamentally counterproductive to the pro-integration policies of the FHA, Section 8, and the integration mandate of the Americans with Disabilities Act (ADA).[29]

Although Section 8 voucher recipients are often low-income, people with disabilities may not be; and yet both groups are discriminated against on the basis of their receipt of income support from the government. Additionally, private sources of income such as trusts or income from legal settlements can also result in SOI discrimination, as landlords may claim to only take tenants who work full-time.[30] If a tenant can afford the property and does not pose a "direct threat" to the premises or to other residents, landlords should not be able to turn tenants away simply because their income does not come directly or exclusively from salaried employment.[31]

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[28] *See, e.g.*, Allen, *supra* note 26, at 111 (noting that the proliferation of "special needs" programs for people with disabilities seems "to ignore the integration mandate that has been at the heart of" the FHA and the Americans with Disabilities Act (ADA).

[29] Title II of the ADA, which proscribes discrimination in the provision of public services, specifies that no qualified individual with a disability shall, "by reason of such disability," be excluded from participation in, or be denied the benefits of, a public entity's services, programs, or activities. 42 U.S.C.A. § 12132 (2011).

[30] FREIBERG & HOUK, *supra* note 7, at 7 (noting that "must have a job" or "must be employed" may illegally exclude a person with sufficient income from other lawful sources).

[31] The direct threat exemption was added to the FHA in 1988, as part of the Fair Housing Amendments Act of 1988 (FHAA), in response to a concern raised in Congress that "allay the fears of those who believe that the non-discrimination provisions of [the FHA] could force landlords and owners to rent or sell to individuals whose tenancies could pose such a risk." H.R. Rep. No. 100-711 at 28 (1988) *reprinted in* 1988 U.S.C.C.A.N. 2173, 2189.

B. Current Source of Income Provisions in State and Municipal Laws

The Supreme Court has noted that states frequently serve as "laboratories for the development of new social, economic and political ideas." [32] At the state and local level, governments can pass laws that will benefit their constituents, and if successful, these state and local laws can be adopted at the federal level for the benefit of the entire nation. A similar initiative could be carried out in housing law, as some states have expanded their own fair housing protections rather than relying on the limited protections available under the FHA.[33]

As of today, thirteen states have incorporated SOI discrimination provisions into state statutes.[34] Additionally, several municipalities, including New York City, that have added

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[32] Fed. Energy Reg. Comm'n. v. Mississippi, 456 U.S. 742, 788 (1982). *See also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice Brandeis wrote, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." Well before the Supreme Court articulated its "laboratories of experimentation" language, Alexis de Tocqueville described this phenomenon as one of the many benefits of federalism in *Democracy in America*, writing "[I]t is this same republican spirit, it is these manners and customs of a free people, which are engendered and nurtured in the different States, to be afterwards applied to the country at large." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 181 (H. Reeve trans., 1961) (1831).

[33] For example, New York State and New York City civil rights laws also prohibit discrimination or harassment based on a tenant's sexual orientation and gender identity, rather than the more limited protections in the FHA, which only include race, religion, national origin, disability and sex as protected classes. N.Y. EXEC. LAW § 296 (2011); N.Y. CITY ADMIN. CODE § 8-107 (2011). Eventually, these protections could be made available at the federal level.

[34] These states are California, Connecticut, Maine, Massachusetts, Minnesota, New Jersey, North Dakota, Oklahoma, Oregon, Utah, Vermont and Wisconsin. *See* CAL. GOV'T CODE § 12955(a)(1) (2011); CONN. GEN. STAT. § 46a-63(3) (2011); ME. REV. STAT. tit. 5, § 4582 (2002); MASS. GEN. LAWS ch. 151B, § 4(10) (2011); MINN. STAT. § 363A.09 (2011); N.J. REV. STAT. § 10:5-4 (2011); N. D. CENT. CODE § 14-02.4-01 (2011); OKLA. STAT. tit. 25, § 1452 (2011); OR. REV. STAT. § 695A.421 (2011); VT. STAT. tit. 9 § 4503 (2011); WIS. STAT. § 66.1011 (2011). The District of Columbia also has a SOI discrimination law. D.C. CODE, § 2-1402.21 (2011).

SOI discrimination provisions to their local ordinances.[35] Over the last forty years, a number of states and local governments have added source of income protections to their fair housing and human rights laws, and not a single source of income provision has been repealed or found unconstitutional. This supports the argument that source of income laws remain a viable means of extending this form of protection to individuals and of promoting fair housing in general.[36]

Though many states have included SOI discrimination protections in their anti-discrimination statutes, not all of these statutes provide the same level of protection. Statutes that explicitly include Section 8 vouchers as a "lawful source of income" are able to protect more individuals from this form of discrimination. If Congress amends the FHA to include a source of income protection, it is imperative that the definition is crafted to include *all lawful sources of income*, including Section 8 vouchers and other public and private forms of income.[37]

Of the thirteen states that prohibit SOI discrimination in the housing context, Oregon, Wisconsin and California do not include Section 8 vouchers in their definitions of "source of

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[35] Local municipalities with SOI laws include New York City, Buffalo, Los Angeles, San Francisco, Chicago, and Montgomery County, MD, among others. POVERTY & RACE RESEARCH ACTION COUNCIL, KEEPING THE PROMISE: PRESERVING AND ENHANCING HOUSING MOBILITY IN THE SECTION 8 HOUSING CHOICE VOUCHER PROGRAM 18–35 (2010) [hereinafter KEEPING THE PROMISE] *available at* http://www.prrac.org/pdf/AppendixB-Feb2010.pdf.

[36] Connecticut Light & Power Co. v. Fed. Power Comm'n, 324 U.S. 515, 530 (1945) (noting that the "insulated chambers of the states' are still laboratories where many lessons . . . may be learned by trial and error on a small scale without involving a whole national industry in every experiment.").

[37] The FHAA marks the last time last time a protected class was added to the FHA. The 1988 amendment added "handicap" as a protected class under 42 U.S.C. § 3604(f) and instead of redefining "handicap" for the purposes of the FHA, the amendment took the definition of handicapped person used in the ADA. As discussed in Part I.C *infra*, there are several federal statutes that already prevent discrimination based on SOI, and, like the Equal Credit Opportunity Act, include all forms of public assistance in their definitions of SOI.

income."[38] In its definition section, the Oregon statute expressly excludes Section 8: "[S]ource of income' does not include federal rent subsidy payments under 42 U.S.C. 1347, income from specific occupations or income derived in an illegal manner."[39] Though Wisconsin's Open Housing Act does not explicitly state whether Section 8 vouchers constitute a lawful source of income, a 1995 Seventh Circuit decision, *Knapp v. Eagle Property Management Corp.*, interpreted the Open Housing Act to not include Section 8 vouchers.[40] The *Knapp* decision thus bars voucher holders from taking legal recourse when they are denied housing on account of their vouchers unless local laws are enacted.[41] Additionally, the court emphasized the voluntary nature of Section 8, and mentioned in

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[38] Though the California fair housing law had previously been interpreted to include Section 8 in its SOI protection, a recent court decision held that the law did not include Section 8 vouchers. *See* Sabi v. Sterling, Case No. BC313345, 2007 WL 4355543, (Cal. Super. Ct. 2007), *aff'd* 107 Cal.Rptr.3d 805 (Cal. App. 2010).

[39] OR. REV. STAT. § 659A.421 (2011) (criminalizing refusal to sell, lease or rent, or "make any distinction, discrimination or restriction against a purchaser . . . because of the race, color, religion, sex, sexual orientation, national origin, marital status, familial status or source of income of any person.").

[40] Knapp v. Eagle Prop. Mgmt. Corp., 54 F.3d 1272, 1282 (7th Cir. 1995). The court based its reasoning on the definition of "lawful source of income" in the WIS. ADMIN. CODE, § 89.10(9) (this provision is no longer available), which defined lawful SOI as income "includ[ing] but . . . not limited to lawful compensation or lawful remuneration in exchange for goods or services provided, profit from financial investments, any negotiable draft, coupon, or voucher representing monetary value such as food stamps, social security, public assistance or unemployment compensation benefits." The Seventh Circuit reasoned that a Section 8 voucher was not similar enough to the forms of income enumerated in the statute, because it was not a "voucher representing monetary value." *Id.* at 1282.

[41] In response to the *Knapp* decision, Madison and Dane county enacted a SOI provision at the municipal level. Dane County Ordinance 31.02(4) (20) (defining "lawful source of income" as "including receipt of rental assistance under 24 Code of Federal Regulations Subtitle B, Chapter VIII [the 'Section 8' housing program]"); *see also* METRO. MILWAUKEE FAIR HOUS. COUNCIL, FAIR HOUSING RIGHTS *available at* http://www.fairhousingwisconsin.com/housingrights.html# (listing the protected classes in the Madison and Dane County fair housing ordinances that go beyond protections enumerated in the state and federal fair housing laws).

dicta that it would seem "questionable . . . to allow a state to make a voluntary federal program mandatory."[42]

The remaining states have drafted their source of income laws to include explicit protection for Section 8 and other forms of rental assistance. While the language varies in each statute, these statutory provisions define "source of income" broadly, or explicitly state that the provision in question is intended to protect recipients of public assistance.[43] For example, Vermont's statute does not even use the term "source of income"; in Vermont, it is unlawful to refuse to sell or rent to a person because that "person is a recipient of public assistance."[44] Utah defines source of income as "the verifiable condition of being a recipient of federal, state or local assistance, including medical assistance, or of being a tenant receiving federal, state or local subsidies, including rental assistance or rent supplements."[45] While California may now interpret "source of income" more narrowly, several municipalities in California, such as Corte

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[42] *Knapp*, 54 F.3d at 1282. This is now known as the preemption argument, and while it has been raised in nearly every legal challenge to state or local SOI discrimination laws, this argument has continually failed in state courts. *See, e.g.*, Comm'n on Human Rights & Opportunities v. Sullivan Assoc., 250 Conn. 763, 773 (1999) (rejecting the landlord's preemption argument and concluding that federal law does not preempt the mandate of Connecticut's SOI protection law). The court noted, "On its face, 42 U.S.C. § 1437f contains no express preemption clause. Furthermore, the federal statute does not 'occupy the field' so comprehensively that states implicitly are prohibited from acting in the arena of low income housing assistance." *Id.* at 773; *see also* Franklin Tower One, L.L.C. v. N.M., 157 N.J. 602, 619 (1999) (finding that "nothing in the federal statute explicitly preempting state legislation requiring landlords to honor Section 8 vouchers . . . [and] the Section 8 program contemplates substantial state participation, and we are unpersuaded that the provisions of Section 8 and those of our state statute cannot be harmonized"); Godinez v. Sullivan-Lackey, 352 Ill. App. 3d 87, 93 (2004) (rejecting the preemption argument and declining to adopt the *Knapp* reasoning that Section 8 vouchers are not included as a SOI).

[43] Connecticut defines "lawful source of income" as "income derived from Social Security [SS], housing assistance, child support, alimony, or public or general assistance." CON. GEN. STAT. § 46a-63(3) (2011).

[44] VT. STAT. ANN. tit. 9 § 4503 (2011). "Public assistance" includes any assistance provided by federal, state or local government, including medical and housing assistance. *Id.* § 4501 (2011).

[45] UTAH CODE ANN. § 57-21-2(21) (2011) (defining *source of income*).

Madera, East Palo Alto, Los Angeles, and San Francisco, continue to interpret it broadly.[46]

New York City is one of the latest municipalities to add a source of income protection to its human rights laws, a much-needed addition given the large number of voucher holders in New York City who experience SOI discrimination. Until March 2008, New York City did not protect housing voucher holders from discrimination based on their source of income, and many prospective tenants with housing vouchers were being denied housing on account of their receipt of these rental supports.[47] Now, in addition to accepting Section 8 vouchers, New York City also has a number of city-funded rental assistance programs, including rental assistance for the recently homeless,[48]

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[46] KEEPING THE PROMISE, *supra* note 35, at 20 app. B.

[47] The J-51 law is an exception that included protection against Section 8 and other voucher discrimination before the enactment of the SOI provision in 2008. The J-51 law enables owners of older buildings to receive low-interest loans to rehabilitate their old buildings or convert their buildings into multi-family dwellings, provided that they do not "directly or indirectly deny" housing to any person because of "the use of, participation in, or being eligible for a governmentally funded housing assistance program, including *but not limited to*, the section 8 housing voucher program . . . ." N.Y. CITY ADMIN. CODE § 11-243(k) (emphasis added). Even before the enactment of Administrative Law 10, New York City courts held that landlords could not refuse to accept Section 8 payments from existing tenants in J-51 buildings, and that the J-51 protections also apply to tenants who live in J-51 buildings that become eligible for Section 8 benefits later on in their tenancy. *See, e.g.*, Kosoglyadov v. 3130 Brighton Seventh, L.L.C., 54 A.D.3d 822 (N.Y. App. Div. 2008); Matter of Rizzuti v. Haxel Towers Co., 2008 NY Misc. Lexis 2176 (N.Y. Sup. Ct. Mar. 27, 2008).

[48] Until September 2010, these forms of assistance were organized into separate programs depending on one's status. For example, the Work Advantage and Fixed Income Advantage vouchers programs worked with New York City's Department of Homeless Services to encourage homeless individuals and families to move out of the shelter and into apartments where they can live independently. In October 2010, New York City organized all of its rental assistance for the formerly homeless under a single program, called the Advantage Program. However, as of April 2011, New York City has ceased signing new Advantage leases, due to cuts in state funding. The City has not provided any additional information about the future of the Advantage program. For more information on Advantage, *see* N.Y. CITY DEP'T OF HOMELESS SERVS., ADVANTAGE: PROGRAM OVERVIEW (2010) [hereinafter ADVANTAGE], *available at* http://www.nyc.gov/html/dhs/html/rent/advntNY_about.shtml.

domestic violence survivors and their children,[49] people with disabilities[50] and people living with HIV/AIDS.[51] While New York State is home to a significant portion of the voucher holders in the country, the state itself does not yet have a source of income provision.[52]

Though a number of states have enacted laws to protect against SOI discrimination, the majority of states have not. The problem of SOI discrimination continues and, because of the lack of uniformity in SOI discrimination laws across states, similarly situated tenants living in different states will have different experiences with challenging this form of discrimination. Some may have no legal recourse when they are denied housing for discriminatory reasons.

C. Source of Income Provisions Currently in Federal Statutes

The FHA does not yet contain a prohibition on SOI discrimination, though the federal government has included protections against SOI discrimination in several other statutes. These provisions are helpful to individual voucher holders who

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[49] Child Advantage is a program for families with open cases from the Administration for Children and Families, which is the child protective services agency in New York City. Similar to Work Advantage and Fixed Income Advantage, Child Advantage will gradually be phased out and replaced with the Advantage Program. *See* NEW DESTINY HOUS. CORP., HOUSING LINK (2010), *available* at http://www.newdestinyhousing.org/ housinglink_online/ AdvantageNY.htm (describing the transition to the Advantage Program).

[50] The Advantage Program also helps families and individuals who are receiving federal benefits, such as Social Security Disability Insurance, leave shelters and achieve independence. *See* ADVANTAGE, *supra* note 48.

[51] The HIV/AIDS Services Administration (HASA) provides rental assistance, cash assistance, and access to other benefit programs. For more information on HASA see N.Y. CITY HUMAN RES. ADMIN., HASA SERVICES (2009), *available at* http://www.nyc.gov/html/hra/html/directory/ hasa_services.shtml.

[52] FREIBERG & HOUK, *supra* note 7, at 17 (noting that "[t]he inclusion of source of income protection in the State of New York's Human Rights Law would provide more uniform protection across the state as well as additional enforcement tools").

are protected under any of the following statutes, yet each statute only accepts certain types of public income, thereby leaving a number of potential tenants unprotected from SOI discrimination.

Most recently, in the American Recovery and Reinvestment Act of 2009 (ARRA), Congress made available an additional one hundred million dollars to the "Community Development Financial Institutions Fund." [53] This funding provides additional support under the community development block grant program,[54] and provides funding for "emergency assistance for the redevelopment of abandoned and foreclosed homes" under the Housing and Economic Recovery Act of 2008.[55] The statute includes an SOI discrimination provision:

> [T]he recipient of any grant or loan from amounts made available under this heading . . . may not refuse to lease a dwelling unit in housing with such loan or grant to a participant under section 8 of the United States Housing Act of 1937 . . . because of the status of the prospective tenant as such a participant.[56]

Though the protections under the ARRA are limited to Section 8 voucher holders, this provision protects a substantial number of tenants from discrimination based on their source of income.

The Low Income Housing Tax Credit program (LIHTC) is another federal law related to low-income housing that contains a provision that prohibits discrimination based on a tenant's

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[53] American Recovery and Reinvestment Act (ARRA) of 2009, Pub. L. No. 111-5, 123 Stat. 115, 148 (2011).

[54] This program operates under Title I of the Housing and Community Development Act (HCDA) of 1974. 42 U.S.C. § 5301 *et seq.* Congress recommended "systemic and sustained action by Federal, State, and local governments" to improve the living environments of low- and moderate-income families. *Id.* at § 5301(b)(1).

[55] Housing and Economic Recovery Act (HERA) of 2008, 122 Stat. 2654 (2011).

[56] ARRA, H.R. 1 103, 104. (2009).

source of income.[57] The LIHTC was created by the Tax Reform Act of 1986, and is the nation's largest low-income housing production program. It operates by providing a tax credit to builders that construct low-income housing.[58] Since its creation, the LIHTC program has helped to finance more than 2.1 million apartments for low-income families and continues to finance more than 100,000 new apartments each year.[59] The United States General Accounting Office reports that about three-quarters of the households that benefitted from LIHTC housing were at or below fifty percent of the median income for their area, which HUD considers to be "very low income."[60] The statute and the IRS regulations prohibit discrimination against voucher holders.[61] While the statute and regulations address discrimination on an individual level, the LIHTC program has not worked to address overall segregation patterns and expand accessibility to housing. Developers have not used the LIHTC to reverse segregated housing patterns and open up new opportunities for low-income families,[62] as studies have confirmed that the majority of low-income housing constructed

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[57] 26 U.S.C. § 42 (2009).

[58] SARAH BOOKBINDER, ET AL. BUILDING OPPORTUNITY: CIVIL RIGHTS BEST PRACTICES IN THE LOW INCOME HOUSING TAX CREDIT PROGRAM, POVERTY & RACE RESEARCH ACTION COUNCIL 3 (2008).

[59] NAT'L COUNCIL OF STATE HOUS. AGENCIES, 2009 NCSHA HOUSING CREDIT FACT SHEET (2009), *available at* http://www.ncsha.org/resource/2009-ncsha-housing-credit-fact-sheet.

[60] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-97-55, TAX CREDITS: OPPORTUNITIES TO IMPROVE OVERSIGHT OF THE LOW INCOME HOUSING PROGRAM 6 (1997), *available at* http://www.nmhc.org/Content/ServeFile.cfm?FileID=2214. An estimated seventy-one percent of the households that benefitted from the LIHTC program also benefitted directly or indirectly from one or more types of housing assistance aside from tax credits. About thirty-nine percent of these households received rental assistance. *Id.*

[61] 26 U.S.C. § 42(h)(6)(B)(iv).

[62] BOOKBINDER, *supra* note 58, at 3; 42 U.S.C. 3608 (requiring that state Housing Finance Agencies require developers in the LIHTC program to "certify" that they will "build and operate all units in compliance with the FHA." This includes the mandate to work to "affirmatively further fair housing").

as a result of the LIHTC program continues to be placed in predominantly low-income neighborhoods.[63]

Though not directly related to housing, the Equal Credit Opportunity Act ("ECOA") also contains a provision that prohibits discrimination based on source of income.[64] The scope of prohibition under the ECOA is broader than either the ARRA or the LIHTC program, as the ECOA makes it 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*."[65] The ECOA thus makes discrimination on the basis of income from any government program unlawful, while the ARRA and the LIHTC program are both limited to protecting Section 8 voucher holders against housing discrimination.

Though the protections provided by the aforementioned statutes are evidence of an awareness that voucher holders and recipients of public assistance are subject to discrimination, the goals of non-discrimination and increasing access to housing opportunities for such people have not yet been met. That these goals have yet to be attained can be attributed to the fact that builders under the LIHTC program have continued to build low-income housing developments in poor neighborhoods, and that individual landlords, real estate agents and municipalities regularly discriminate against prospective tenants on the basis of their source of income.[66] Furthermore, these federal laws do not account for other, non-public sources of income. Until the federal government prohibits discrimination based on a prospective tenant's source of income on a broader scale, many

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[63] BOOKBINDER, *supra* note 58, at 2.

[64] 15 U.S.C. § 1691.

[65] *Id.* at § 1691(a)(2) (emphasis added). In 1976, Pub.L. 94-239 amended the law to expand prohibitions against discrimination to include race, color, religion, national origin and age, and added clause 2, which protects against SOI discrimination.

[66] FRIEBERG & HOUK, *supra* note 7, at 3 (describing the increased incidents of SOI discrimination as the reason for the 2008 SOI amendment the New York City Human Rights Law).

voucher holders and other prospective tenants with lawful sources of income will remain unprotected.

D. An Amendment to Federal Law is Necessary to Address SOI Discrimination

Because socioeconomic status in this country is tightly linked to race, minority status, sex, and disability, the failure to prevent SOI discrimination at the federal level further reduces access to housing options and allows discrimination against certain classes of people to continue.[67] As can be seen from the previous sections, SOI discrimination presents a significant problem on the ground, since many people are harmed by this form of discrimination, and their choices of where to live are unduly restricted by discrimination. While there are a limited number of states that include SOI protections in fair housing statutes and human rights laws, these statutes are not uniformly worded, nor are they uniformly applied across states. Finally, while there are several federal statutes that include SOI protection laws, the Fair Housing Act itself does not contain a protection against this form of discrimination.

In addition, current civil rights laws that prohibit discrimination do not specifically address SOI discrimination, leaving many victims without legal protections and without housing. Without the addition of a federal source of income protection, many tenants have no legal recourse against SOI discrimination. If a tenant lives in a state where the fair housing statute is not clearly drafted to include all legal forms of income, as was the case in *Knapp*, the plaintiffs may lose.[68] In those situations and in states without SOI laws, plaintiffs have raised claims under other antidiscrimination laws in their attempts to

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[67] *See supra* Part I.A and notes 13–15.

[68] *See supra* Part I.B for further discussion of *Knapp*.

prevail on a claim of SOI discrimination.[69]

These legal arguments, made under the FHA's current antidiscrimination provisions, have been largely unsuccessful. Plaintiffs who are disabled and who receive SSI or SSDI payments have attempted to make a "reasonable accommodation" argument, claiming that a refusal to rent to them on account of their disability-related housing voucher amounts to a denial of a reasonable accommodation, in direct contravention of 42 U.S.C. § 3604(f)(3). This argument has not gained traction,[70] demonstrating that the reasonable accommodation argument for people with disabilities can only

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[69] Plaintiffs have attempted to raise "reasonable accommodation" arguments under 42 U.S.C. § 3604(f)(3). *See, e.g.*, Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 302 (2d Cir. 1998); Giebeler v. M & B Assocs., 343 F.3d 1143 (9th Cir. 2003). Plaintiffs have also claimed that landlord policies that expressly refuse housing vouchers or other source of non-salaried income constitute disparate impact in violation of the FHA. *See infra* notes 72–76.

[70] Allen, *supra* note 26, at 114 (describing the voucher-as-reasonable-accommodation argument as getting off to a "decidedly bumpy start"). Michael Allen notes that while the Second Circuit has not been amenable to this argument, the Ninth Circuit subsequently held that an unwilling landlord may be required to accept a co-signer if an applicant with a disability could demonstrate that his inability to meet a minimum income requirement was caused by his disability. *Id.* (citing Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 302 (2d Cir. 1998); Giebeler v. M & B Assocs., 343 F.3d 1143 (9th Cir. 2003)). In *Salute*, the Court distinguished between reasonable accommodations necessary to accommodate people with disabilities and requests for reasonable accommodation necessary to accommodate people in financial need:

> Plaintiffs seek to use this statute to remedy economic discrimination of a kind that is practiced without regard to handicap . . . [and] [w]hat stands between these plaintiffs and the apartments at Stratford Greens is a shortage of money, and nothing else. In this respect, impecunious people with disabilities stand on the same footing as everyone else. Thus, the accommodation sought by plaintiffs is not 'necessary' to afford handicapped persons '*equal opportunity*' to use and enjoy a dwelling . . . . Congress could not have intended the FHAA to require reasonable accommodations for those with handicaps every time a neutral policy imposes an adverse impact on individuals who are poor.

Salute, 136 F.3d at 302.

go so far, and that additional legal protection is needed to prevent SOI discrimination.

While a landlord policy that expressly denies housing to recipients of SSI and SSDI would actually fall under a claim of disparate treatment, since anyone who receives these forms of benefits is considered legally disabled, some landlord policies that appear facially neutral disproportionately affect a protected class of people. Because of this, plaintiffs have claimed that refusal to rent to them because of a housing voucher could potentially satisfy a disparate impact claim under the FHA.[71]

To establish a prima facie case of disparate impact under the FHA, a plaintiff must demonstrate that the challenged practice "actually or predictably" results in discriminatory impact that is significantly greater on a class of persons

[71] Though the FHA does not explicitly provide for a cause of action based on disparate impact (rather than disparate treatment), during the first twenty years of the FHA's enactment, the circuit courts appeared to be in consensus that the FHA included a discriminatory effect standard. After the 1988 enactment of the FHAA, court decisions have continued to recognize claims under the FHA without a showing of discriminatory intent, and a number of HUD administrative decisions have held that the "discriminatory effect" standard should be applied to HUD proceedings brought under the FHA. ROBERT SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION §10-4 (2011).

protected under the Act.[72] A disparate impact claim is most likely to succeed if the plaintiff can provide statistical evidence that shows that the defendant's policy or practice has a greater impact on members of a protected class.[73] In Washington State, a landlord's decision to terminate participation in a Section 8 program was found to violate the FHA based on disparate impact on African American women and children.[74] The plaintiffs presented evidence that the landlord's intent to terminate participation in Section 8 would " inordinately impact African-Americans, women and families with children" in the region, as 81.8 percent of the Section 8 households were African American, and one-hundred percent were female-headed households with children.[75] In Massachusetts, a HUD Administrative Law Judge

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[72] *Id.* at § 10-6. Courts do not all take the same approach to disparate impact claims under the FHA: some have adopted the Second Circuit "two step" approach, while others have adopted the four-factor test articulated by the Seventh Circuit. *Id.* at § 10-7. The Second Circuit holds that in order to make out a prima facie case under the FHA on a theory of disparate impact, a "plaintiff must demonstrate that an outwardly neutral practice actually or predictably has a discriminatory effect; that is, has a significantly adverse or disproportionate impact on minorities, or perpetuates segregation." At that point, the burden then shifts to a defendant to demonstrate that "its actions furthered . . . a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." Fair Hous. in Huntington Comm. Inc. v. Town of Huntington, N.Y., 316 F.3d 357, 366 (2d. Cir. 2003) (citations omitted). The Seventh Circuit adopted a four factor test: (1) the strength of the plaintiff's showing of discriminatory effect; (2) evidence of the defendant's discriminatory intent (though this could be insufficient to make out an intentional violation); (3) the defendant's interest in taking the challenged action; and (4) whether the plaintiff seeks to compel the defendant affirmatively to provide housing or merely to refrain from interfering with others who wish to provide housing. *See* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977).

[73] *See, e.g.*, Betsey v. Turtle Creek Assocs., 736 F.2d 983, 988 (4th Cir. 1984) (holding that a landlord's policy of evicting families with children from one of its buildings had a "substantially greater adverse impact" on minority tenants in the building). The plaintiffs in *Betsey* were able to show that 68.3 percent of the families with children in the building were minority families, and from this data the Fourth Circuit concluded that "disparate impact is self-evident." *Id.*

[74] Green v. Sunpointe Assocs., No. C96-1542C, 1997 WL 1526484 (W.D.Wash. 1997).

[75] *Id.* at *4.

held that a landlord's "no welfare policy" had a disparate impact on women in Holyoke and Hamden Counties.[76] The Administrative Law Judge cited the "overwhelming percentage" of local welfare recipients who were women.[77]

This discriminatory practice of refusing to rent to someone because of his or her income harms people who are supposed to be protected from discrimination under the Fair Housing Act. Because no federal laws directly address this form of discrimination, significant gaps exist in the ability of tenants to achieve legal recourse for SOI discrimination. SOI laws differ across states, and the judiciary's response to reasonable accommodation and disparate impact legal claims also vary. This lack of uniformity frustrates the Fair Housing Act's goals of accessibility, nondiscrimination and integration in housing throughout the United States.[78] A change to the current federal Fair Housing Act is necessary to remedy this situation.

II. Consideration of Two Common Legal Approaches that Address Inequality for Minorities and People with Disabilities

As described in Part I, people with disabilities and minorities, especially minority women, suffer most from SOI discrimination. In the last century, civil rights laws and policies were implemented to halt the discrimination, poor treatment, and social subordination that harmed these groups. Civil rights advocates and fair housing advocates agree that housing discrimination in general, and the problem of SOI discrimination

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[76] U.S. Dep't of Hous. and Urban Dev. v. Ross, HUDALJ 01-92-0466-8, 1994 WL 534694 (1994).

It bears noting that this decision was prior to the Personal Work and Responsibility Act of 1996, which terminated the AFDC program and enacted the current Temporary Aid to Needy Families (TANF) program. It is possible that similar challenges to landlord policies of not accepting residents on TANF today would yield different results.

[77] *Id.* at *9.

[78] *See infra* Part II.A for description of the antidiscrimination provisions of the FHA.

in particular, remain significant barriers for these minority groups in their struggle for social equality.[79]

Advocates accept that to rectify SOI discrimination changes to the current federal fair housing laws must occur. Yet, wide disagreement exists about how best to promote social equality and social change. This Part will contrast two common theoretical approaches to achieving social equality cited by civil rights scholars and activists: the antidiscrimination paradigm and the social welfare paradigm.[80] While elements of both paradigms are apparent today in different policies that work to correct

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[79] *See, e.g.*, CASHIN *supra* note 22, at 3 (noting that housing "is fundamental in explaining American separatism", and that "[h]ousing was the last plank in the civil rights revolution"). Housing is also the realm in which the United States has experienced the "fewest integration gains." *Id.* at 5. *See also* FUTURE OF FAIR HOUSING, *supra* note 4; RESIDENTIAL SEGREGATION, *supra* note 13, at 7; FRIEBERG & HOUK, *supra* note 7, at 2.

[80] While there are numerous articles that address "social welfare law" or "antidiscrimination law" as paradigms to addressing inequality, I define them here in relation to each other. This approach is similar to Samuel Bagenstos's description of the two paradigms in *The Future of Disability Law*, 114 YALE L.J. 1 (2004). However, Bagenstos sets the two paradigms at odds, recommending the social welfare approach over the antidiscrimination approach for the future of disability rights law.

Some readers may be familiar with "formal equality," or "anti-differentiation" paradigms. While the antidiscrimination paradigm is arguably a more practical paradigm, aimed at achieving equality through specific laws, the formal equality, anti-differentiation, and antidiscrimination paradigms do share certain attributes. In the context of discriminatory behavior, these approaches privilege the equal treatment of individuals, often focusing on the motivation of the individual bad actor. These approaches rarely pay attention to a larger societal context in which the bad actor operates. For an overview of the anti-differentiation approach to equal protection jurisprudence, as contrasted with an "anti-subordination" approach, see Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003, 1004–06 (1986) [hereinafter *Anti-Subordination*].

injustice, advocates and academics view these approaches as largely dissimilar and as antithetical to one another.[81]

A. From "Good Will" to "Civil Rights:" The Antidiscrimination Approach

The civil rights movements for racial equality, gender equality, and for people with disabilities have different origins, but a majority of the laws and policies enacted to protect all of these classes fit under the antidiscrimination paradigm. The antidiscrimination paradigm seeks to eliminate discrimination and favors integration and desegregation as a means of promoting equality. For the purposes of this Article, the Fair Housing Act and the Americans with Disabilities Act are prime examples of the antidiscrimination paradigm at work in civil rights laws,[82] though there are many other examples of this

[81] *See* Bagenstos *supra* note 80, at 8–9 (arguing that the antidiscrimination approach, unlike the social welfare approach, has only limited potential to achieve goals of freedom from paternalism and full integration); Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. 890, 899 (2000); *see generally* RUTH COLKER, WHEN IS SEPARATE UNEQUAL? 248 (2009) [hereinafter SEPARATE] (advocating an equality perspective that is not constrained by "principles of formal equality").

[82] ADA, 42 U.S.C. § 12101(b)(1) (2011) (stating that it is the purpose of the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"); FHA, 42 U.S.C. § 3604 (detailing "discrimination in the sale or rental of housing and other prohibited practices").

paradigm to be found in international and domestic civil rights and human rights laws. [83]

For racial minorities in the United States, desegregation and integration have been the most prevalent means of striving toward equality in the law.[84] During the 1950s, and specifically during the school de-segregation movement,[85] advocates of

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[83] Considered a fundamental principle of justice and equality, the antidiscrimination approach and rhetoric are employed in a number of international human rights laws and conventions. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 7, U.N. DOC. A/810 (1948) (stating that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law"); Documents Pertaining to Human Rights in the Inter-American System, OAS/Serv.L/V/I.4 Rev. 9; American Declaration on the Rights and Duties of Man art. II, June 2, 1998, O.A.S Res. XXX, (declaring that "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor"); International Convention on the Elimination of All Forms of Racial Discrimination (CERD), *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) ("Reaffirming that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State"); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13, art. 2 (condemning discrimination against women in all its forms); International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, art. 2 ¶ 2 (guaranteeing that the rights enunciated by this treaty "will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."). This is but a small example of the antidiscrimination paradigm at work in international human rights laws and treaties. *See also* Civil Rights Act (CRA) of 1964, 42 U.S.C. § 2000e *et seq.* (outlawing discrimination and segregation in voter registration, schools, in places of public accommodation and public facilities, and in the workplace).

[84] Because this Article is focused on antidiscrimination in the housing context, it will not address the history of school desegregation, public accommodations laws generally, or the feminist movement in the United States. For an informative history of race-based antidiscrimination laws and their relation to advancements in antidiscrimination law for people with disabilities, see SEPARATE, *supra* note 81, at 15–32. For background on the debates between "equal treatment" and "special treatment" in the feminist movements, see LEGAL THEORY: FOUNDATIONS 121–210 (D. Kelly Weisberg ed.,1993).

[85] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (concluding that in the field of public education the doctrine of "separate but equal" has no place).

racial equality focused on goals of formal equality for racial minorities, and the subsequent decade marked a period of significant advancement in civil rights laws. Even before the enactment of the FHA, the Warren Court had begun to issue decisions that furthered the goal of reducing housing discrimination.[86] With *Brown v. Board of Education* in the education context and *Jones v. Alfred Mayer* some years later in the housing context, the Supreme Court held that race-based segregation in schools and race-based discrimination in private housing were unlawful.[87] All of these legal advances focused on integration, and putting an end to discrimination.

A brief history of fair housing law in the United States shows the antidiscrimination approach at work in the creation of fair housing legislation and in the subsequent interpretation of these statutes by the Supreme Court. The enactment of the Fair Housing Act moved beyond the protections articulated in § 1982 of the Civil Rights Act of 1866 and in *Jones v. Alfred Mayor*. It created new causes of action and standing to challenge discrimination and further the mission of fair housing.[88] The legislative history behind the FHA demonstrates that Congress was aware that invidious housing discrimination was caused by both public and private actors, and that the FHA was created in order to halt discrimination in both spheres. The FHA's principal sponsor, Senator Walter Mondale, warned that without legislation, people would live "separately in white ghettos and

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[86] *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968) (holding that § 1982 of the Civil Rights Act of 1866 [§ 1982] forbids all racial discrimination in the sale or rental of housing, both public and private) Writing for the majority, Justice Stewart took into account the history of the Civil Rights Act of 1866 and its relationship to the Thirteenth Amendment, noting, "when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery." *Id,* at 442–43.

[87] *Jones*, 392 U.S. 409; *Brown*, 347 U.S. 483.

[88] The FHA was enacted in the wake of the highly publicized of a report by the National Advisory Commission on Civil Disorders, which had warned that the "Nation is moving toward two societies, one black, one white—separate and unequal." John P. Relman, et al., *Creating and Protecting Prointegration Programs Under the Fair Housing Act, in* THE INTEGRATION DEBATE: COMPETING FUTURES FOR AMERICAN CITIES 39, 39 (Hartman & Squires eds., 2010).

Negro ghettos."[89] This legislative history reveals two important and separate goals of the Act: ending housing discrimination in the public and private spheres and increasing accessibility and housing opportunities for all in the United States.

In the years following the enactment of the FHA, the Supreme Court, by that time the Burger Court, had the opportunity to decide several cases interpreting the provisions of the FHA and clarifying notions of standing to further the policy goals of the Act.[90] In *Trafficante v. Metropolitan Life Insurance Co.*, white and African American tenants in a San Francisco apartment complex argued that their landlord discriminated against minorities in his rental practices, thus depriving tenants of the "social benefits of living in an integrated community."[91] The Supreme Court held that complaints by private persons are the primary method of "obtaining compliance" with the FHA, and that standing should be defined "as broadly as it is permitted by Article III of the Constitution."[92] *Trafficante* emphasized that those who are injured from the housing discrimination described are not only the people on the "landlord's blacklist." Rather, the whole community is injured by this discriminatory behavior.[93]

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[89] SCHWEMM, *supra* note 71 at § 2.3 (quoting 114 Cong. Rec. 2276 (1968)). Senator Mondale also explained that prospective black residents "were unable to move to white suburbs because of the refusal by suburbs and other communities to accept low-income housing," and he cited "the policies and practices of agencies of government at all levels" as an important factor in this refusal. 114 Cong. Rec. 2277 (1968).

[90] Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972), is perhaps "the Supreme Court's most significant decision to shed light on Congress's intent" surrounding the FHA. CHARLES LAMB, HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960, 224 (2005) (internal citations omitted).

[91] *Trafficante*, 409 U.S. at 208 (1972). In addition to their complaint that the landlord had deprived them of living in an integrated community, the two tenant-plaintiffs claimed that they had been injured in that they missed certain business and professional advantages that would have accrued if they had lived in an integrated community and they suffered embarrassment from being "stigmatized as residents of a 'white ghetto'." *Id.* The District Court and Ninth Circuit both held that the plaintiffs were not within the class of persons entitled to sue under the act before the Supreme Court reversed.

[92] *Id.* at 209.

[93] *Id.* at 211 (citations omitted).

In the *Trafficante* decision, the Supreme Court recognized that there is a legal obligation to integrate housing under the FHA, emphasizing that the goal of the FHA was to replace the ghettos with "truly integrated and balanced living patterns."[94] Some years later, in *Gladstone Realtors v. Village of Bellwood*, the Court held that when racial minorities are steered away from purchasing or renting property in a particular neighborhood, the municipality and its residents suffer economic injury, are denied the social and professional benefits of integrated living, and therefore have standing to sue in federal court.[95]

The debates surrounding the enactment of the FHA, the language of the Act, and the subsequent Supreme Court decisions that interpreted its provisions all reiterate the stated goals of ending discrimination and increasing integrated housing opportunities within residential communities. However, in the years following these decisions, laws and regulations, it became clear that protections based on race, color, national origin or religion were not sufficient to address the range of discrimination that renters and homebuyers encountered, and the FHA was thus further amended.[96] Leading up to the enactment of the FHA Amendment (FHAA), a number of housing groups submitted letters of support for amendments, emphasizing that twenty years after the enactment of the Civil Rights Act of 1968,

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[94] *Id.*

[95] Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91 (1979) (noting that if real estate agents' practices actually "rob Bellwood of its racial balance and stability," the village would have standing to challenge the legality of that conduct). *Id.* at 111. In fact, while instances of outright discrimination may be more rare today, the practice of "steering" minority groups or protected classes away from certain neighborhoods and into others appears to be on the rise. FUTURE OF FAIR HOUSING, *supra* note 4, at 10.

[96] In 1974, sex was added as a protected class under the FHA. Pub .L. No. 93-383. In 1988, with the enactment of the Fair Housing Amendments Act of 1988 (FHAA), the protections under the FHA were expanded to include disability and familial status as protected classes. Pub. L. No. 100-430, 102 Stat. 1619 (1988).

housing discrimination was still a very serious issue.[97] The FHAA was described by Congressman Edwards as marking "a historic change" to federal housing law which would extend

[97] As an example, during the debates surrounding the enactment of the FHAA, the National Low-Income Housing Commission wrote a letter of support to Congress to urge them to "take the necessary steps to alleviate housing discrimination as shown by a 1986 HUD report which revealed 2.5 million incidents of housing discrimination—many involving families." 134 CONG. REC. S10532-04 (1988). The letter also added, "[m]oreover, 36 million disabled citizens of the United States who are already excluded from most of the housing market must also be protected." *Id.* The House Report for the House Judiciary Committee further substantiated these findings, highlighting the rampant discrimination that people with disabilities faced. H.R. REP. NO. 100-711, *supra* note 30 at 18. The House Report stated that "people who use wheelchairs have been denied the right to build simple ramps to provide access, or have been perceived as posing some threat to property maintenance. People with visual and hearing impairments have been perceived as dangers because of erroneous beliefs about their abilities. People with mental retardation have been excluded because of stereotypes about their capacity to live safely and independently. People with Acquired Immune Deficiency Syndrome (AIDS) and people who test positive for the AIDS virus have been evicted because of an erroneous belief that they pose a health risk to others." (internal citations omitted). *Id.* During the final deliberations prior to the enactment of the FHAA, Congressman Edwards from California rose in support of the bill, saying the Fair Housing Act had been "the final chapter in the great series of civil rights laws enacted in the 1960's. The Fair Housing Act states categorically that it is the policy of the United States to provide for fair housing throughout the country. But despite this proclamation, fair housing remained just a dream for too many Americans . . . ." 134 CONG. REC. H6491-02 (1988).

necessary protections to individuals with handicaps and families with children .[98]

Though the ADA was not enacted until the 1990s,[99] integrationist and antidiscrimination goals had also developed in the disability rights movement for different historical reasons.[100] While racial minorities were historically forced to live in segregated neighborhoods and attend segregated public schools, people with disabilities have their own history of disenfranchisement: individuals with disabilities were also excluded from juries, were prevented from attending school with "normal" children, and were often housed in "inhuman

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[98] 134 CONG. REC. H6491-02, *supra* note 97. Congressman Edwards also emphasized the other changes that the FHAA would bring to the original law: "[i]t goes beyond the mere statement of principles on fair housing, and creates an effective and meaningful enforcement system." *Id.* The new protection based on familial status was defined as discrimination in housing against "one or more individuals (who have not attained the age of 18 years) being domiciled with (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person." Pub. L. No. 100-430, 102 Stat. 1619. The protection for people with disabilities was given its own subsection amending § 3604, which protected any person with a handicap from being discriminated against in the sale or rental of property, and protected "any person associated with that renter or buyer" as well. Pub. L. No. 100-430, 102 Stat. 1619; 42 U.S.C. § 3604(f)(1)(c) (1988). In the Report of the House Judiciary Committee for the FHAA, supporters of the Act indicated that the line of decisions involving handicapped individuals and the definition of "handicapped" under § 504 of the Rehabilitation Act of 1973, now 29 U.S.C. § 794 (2009), should be applied to claims brought under the FHA. H.R. REPORT NO. 100-711 *supra* note 31, at 22.

[99] SEPARATE, *supra* note 81, at 11 (noting that "[i]t was not until 1990 that legislation comparable to the 1964 Civil Rights Act was enacted in the disability context").

[100] *See* 42 U.S.C. 12101(a)(2) (acknowledging that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem"); *see also* Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789, 792 (2006) [hereinafter *Disability Integration*] (noting that the disability plaintiffs' bar "urged adoption of the 'integration presumption' . . . [b]orrowing from the racial civil rights movement" and that the "judiciary and the legislature were quickly receptive to these efforts").

warehouses."[101] Known as *custodialism*, the historical approach to addressing people's disabilities was to keep those with disabilities separate from the public at large and give them charity, since it was believed that they could not live in the world on their own.[102] People with disabilities were not only excluded from participating in many activities, they were institutionalized and viewed as "unfortunates who deserved charitable largesse."[103]

Early leaders and scholars in the disability rights movements sought to move away from the custodial approach and advocated for an integrationist, antidiscrimination model, arguing that individuals with disabilities should have "the right to live in the world."[104] They worked to redefine "disability," arguing that disability was not a medical condition; rather, disability was a social condition that should be addressed by civil rights legislation that prohibited discrimination against people with disabilities.[105] In the campaign to enact the ADA, disability rights advocates frequently posed a stark choice between the welfare and civil rights approaches, advocating a freedom from paternalism and articulating goals of full integration and independence .[106]

The women's movement has also found antidiscrimination laws to be effective tools in ending the unequal treatment of women. For example, sexual harassment of women was not

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[101] SIMI LINTON, MY BODY POLITIC 135 (2006) (also noting that in the recent past children diagnosed with polio were taken out of school and not permitted to attend public school); SEPARATE, *supra* note 81, at 24.

[102] Weber, *supra* note 81, at 899.

[103] Bagenstos, *supra* note 80, at 11.

[104] Jacobus tenBrock, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841, 917 (1966).

[105] *Id.* at 912; Weber, *supra* note 81, at 890 (noting that although government programs had evolved, people with disabilities needed to "move further in the direction of promoting autonomy and self-sufficiency rather than paternalism and caretaking").

[106] *See* Weber, *supra* note 81, at 890.

recognized as a pervasive or serious problem in American culture, or in the law, until sexual harassment was identified as a form of sex discrimination.[107] As discussed above, Title VII of the Civil Rights Act of 1964 is a law built on the antidiscrimination paradigm. Title VII has been and continues to be used as a tool for preventing discrimination against women in the workplace, and the law has developed to include discrimination in the form of unequal pay, unequal hiring, and unequal treatment, such as sexual harassment .[108] Sex was added as a protected class to the Fair Housing Act in 1974, and today, sex discrimination in the housing context comprises a large portion of all housing discrimination cases brought under the FHA.[109]

Though people with disabilities, racial minorities, and women have very different group histories, each has found the antidiscrimination paradigm to be a powerful means of enacting civil rights laws and promoting equality. And yet, in spite of the broad array of legislation that has been enacted, discrimination and segregation remain pervasive for minorities, women, and people with disabilities. Neighborhoods across the United States

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[107] *See generally* CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

[108] For examples of Title VII sex discrimination cases see, for example, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (recognizing hostile work environment sexual harassment as actionable under Title VII of the Civil Rights Act of 1964); Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999) (recognizing sex discrimination in promotion as a Title VII violation).

[109] The Justice Department's Housing and Civil Enforcement Section has jurisdiction over FHA violations, and sexual harassment cases make up a significant amount of the Section's overall caseload. *See* CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, HOUSING AND CIVIL ENFORCEMENT SECTION CASES (2010), *available at* http://www.justice.gov/crt/housing/fairhousing/caseslist.htm#sex.

continue to be deeply segregated today by race, and class segregation is accepted as the "natural order."[110]

While the FHA and the ADA have provisions that mandate that landlords or employers provide tenants or employees with disabilities "reasonable accommodations," these obligations to provide for people with disabilities only go so far, and cease to be legally necessary if the accommodation would impose an "undue hardship."[111] Furthermore, in spite of the broadly articulated goals of integration set forth in the ADA, the statute has not managed to make a "significant dent" in the unemployment of people with disabilities, possibly due to individual instances of discrimination, but probably attributable to deep-rooted structural barriers.[112] While neighborhood statistics may partially reflect residents' choices of where to live, they also provide evidence of deeply entrenched social

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[110] CASHIN, *supra* note 22, at XIV; Relman, *supra* note 88, at 40 (noting that "for every study showing progress, there are others that describe a continuing pattern of entrenched, and in some cases, worsening segregation"); George Lipsitz & Melvin Oliver, *Integration, Segregation and the Racial Wealth Gap*, *in* THE INTEGRATION DEBATE: COMPETING FUTURES FOR AMERICAN CITIES 153, 161–62 (Hartman & Squires eds., 2010) ("Forty years after passage of the Fair Housing Act and the Supreme Court's ruling in *Jones v. Mayer*...people of different races in the United States today remain relegated to different spaces."); *see also* RESIDENTIAL SEGREGATION, *supra* note 13, at i (reporting that "many of the government's programs and policies continue to perpetuate segregation and concentrate poverty in communities of color").

[111] 42 U.S.C. § 3604(f)(3)(B); *id.* § 12112(b)(5)(A).

[112] Bagenstos, *supra* note 80, at 23. Though this Article is concerned with integration and nondiscrimination in the housing context, a number of scholars have addressed the failure of the ADA to promote integration in the workplace and in schools. *See, e.g.*, Matthew Diller, *Dissonant Disabilities Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003 (1998); Mathew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361 (1996); Colker, *supra* note 100.

segregation.[113] These statistics and statutory provisions reveal the limitations of what the antidiscrimination paradigm can accomplish "on the ground" and in courts of law. On its own, therefore, the antidiscrimination paradigm has not been able to fully accomplish the intended goals of integration and eliminating discrimination.

B. Equality Through Structural Change: The Social Welfare Paradigm

The social groups that are most affected by SOI discrimination—low-income individuals and families, single female heads of household, minorities (particularly minority women), and people with disabilities—have individual needs that may differ, but the legal application of the antidiscrimination approach has failed them.[114] Schools are more segregated now than they have at any point in the last thirty years, neighborhoods are deeply divided, and people with disabilities have not been able to enter the workforce or the housing market at the rate that advocates had intended.[115] These failures have led some advocates to argue for a different approach to gaining equality in society, one that requires "sustained and direct" government intervention through public

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[113] Sheryll Cashin argues that while African Americans and White Americans both seem to have a "tacit agreement to separate along lines of race and class," this "agreement" may not be as legitimate as we think. CASHIN, *supra* note 22, at XIV. Cashin writes, "we are all making choices about where to live in a market system that values racial and economic homogeneity . . . over racial and economic integration. This balkanization comes with very steep, long-term costs, particularly for black and Latino children." *Id.* at XVII.

[114] *See supra* Part II.A ; *see also* SEPARATE, *supra* note 81, at 42 (noting that in spite of the ADA's stated intention to promote economic sufficiency for people with disabilities, the "statute has not been able to live up to that promise"). Colker attributes this in part to the "way the courts have undermined Congress's basic intentions." *Id.*

[115] CASHIN, *supra* note 22, at 202 (reporting that "[p]ublic school became more segregated in the 1990s," and that "Black and Latino schoolchildren are relegated to 'high-poverty, overwhelmingly minority public schools' characterized by lower educational achievement and fewer resources than the public schools that most white children attend"); Bagenstos, *supra* note 80, at 10 (noting that employment for people with disabilities has "declined or remained stagnant" since the ADA's enactment).

funding and service provision.[116] One advocate describes the social welfare, or "post-integrationist," approach as favoring the "elimination of hierarchy" over the "elimination of different treatment."[117]

The social welfare paradigm advocates for a social safety net and for providing assistance and support to those who need it.[118] Today, there are many different forms of public funding and services, including the Supplemental Nutritional Assistance Program (SNAP or "food stamps"), Temporary Aid to Needy Families (TANF, *sub nom.* Aid to Families with Dependent Children or AFDC), Section 8 rental assistance, Supplemental Security Insurance (SSI) and Supplemental Security Disability Insurance (SSDI). Advocates tend to agree that social welfare programs for people with disabilities are necessary, as people with qualifying disabilities benefit from financial support in the form of SSI and SSDI.[119] In comparison, the antidiscrimination approach to racial equality has received broader support, though some advocates for race and gender equality also recognize the

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[116] Bagenstos, *supra* note 80, at 55.

[117] Colker, *supra* note 100. Colker places the anti-subordination approach to social equality in contrast to the "formal equality" approach, which she identifies as the approach that most courts have adopted in interpreting antidiscrimination laws. *Id.* Feminists have also contributed to this debate, as some argue that "equal treatment" of women is not the correct approach. Some scholars advocate "special treatment," and wish for women's differences from men to be acknowledged. *See* Linda Krieger & Patricia Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, *in* FEMINIST LEGAL THEORY: FOUNDATIONS 156 (1993).

[118] Justice Brennan, writing for the majority in *Goldberg v. Kelly* defined the social welfare approach: "Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community." 397 U.S. 254, 265 (1970).

[119] *See supra* Part I.A for statistics on the numbers of individuals receiving SSI and SSDI annually.

need for redistributive social programs.[120] Neighborhoods and school districts remain racially and socioeconomically divided, revealing that certain types of inequality cannot be remedied through the antidiscrimination approach.[121] Equality may be better achieved via forms of support that can help minorities, and particularly minorities that are women, reenter the housing market or the workplace, such as cash benefits, housing assistance, or childcare assistance.

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[120] *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) (arguing that antidiscrimination laws cannot account for the discrimination experienced by individuals at the intersections of protected classes, for example, black women). Crenshaw writes:

> In order to include Black women, both [black liberation and feminist] movements must distance themselves from earlier approaches in which experiences are relevant only when they are related to certain clearly identifiable causes (for example, the oppression of Blacks is significant when based on race, of women when based on gender).

Id. at 166. Crenshaw recommends a social welfare approach, concluding that instead we should focus on "the life chances and life situations of people who should be cared about without regard to the source of their difficulties." *Id. See also* OPPORTUNITY AGENDA, *Values that Drive Our Work*, *available at* http://opportunityagenda.org/about/core_values (last visited May 27, 2011); FRAMEWORKS INST., *Mission of the FrameWorks Institute*, *available at* http://frameworksinstitute.org/mission.html (last visited May 27, 2011); KIRWAN INST., *Mission & Vision*, http://kirwaninstitute.org/about-us/mission-vision.php (last visited May 27, 2011); AFR. POL'Y INST., *Discover Us*, *available at* http://aapf.org/discover_us/ (last visited May 27, 2011). Each of these organizations argue that nondiscrimination is not enough to remedy racial discrimination and racial inequality, and that larger structural changes are needed. These organizations and their approaches are further discussed *infra* Part III.

[121] Cashin notes that in spite of the antidiscrimination laws that are currently in place, there is a "hypersegregation" of the African American poor, and between 1970 and 2000, the geographical separation of the affluent and the poor increased by thirty percent. CASHIN, *supra* note 22, at 95–96.

Not all social welfare initiatives are politically and socially accepted.[122] Over the course of the history of the American welfare state, broad social insurance programs, such as SSI and SSDI, have fared better politically than more targeted interventions.[123] This may be because SSDI and SSI function as a social insurance mechanism and a relatively "low-stigma welfare program" for persons with disabilities.[124] In contrast, other entitlement programs, such as AFDC, have failed.[125] Advocates for these forms of targeted assistance argue that SSDI and SSI benefit people "regardless of income," as opposed to cash-benefit programs that specifically provide assistance to low-income Americans, especially minorities .[126]

Though many people with disabilities receive SSI and SSDI payments, they also commonly benefit from these other,

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[122] *See* THEODORE MARMOR ET AL., AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES 1 (1990) (declaring that America's social welfare efforts are taking a "bum rap," and that American social welfare programs, even if successful, are typically portrayed as failures).

[123] Bagenstos, *supra* note 80, at 71.

[124] Weber, *supra* note 81, at 923.

[125] "Most of the attention given to 'welfare reform'...was centered on the replacement of AFDC with a new Temporary Assistance to Needy Families program." Diller, *supra* note 112, at, 362 n.3 (citing Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2110-86 §§ 101–116 (1996)).

[126] john a. powell, *Race, Poverty, and Social Security: Racing the Social Security Debate*, POVERTY & RACE (2000). According to the most recent report to Congress by the Office of Family Assistance, the plurality of active cases of families receiving TANF benefits are African American families. Thirty-five percent of TANF families are African American, and the next largest group of recipients is white families, at thirty-two percent. OFFICE OF FAMILY ASSISTANCE, CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES OF TANF RECIPIENTS, FISCAL YEAR 2007, tbl. 8 (2007), *available at* http://www.acf.hhs.gov/programs/ofa/character/FY2007/tab08.htm.

more targeted, cash-benefit programs.[127] There is a tremendous gap "between the extreme degree of disability needed to qualify for [SSDI] and [SSI] and the degree of ability needed to integrate smoothly into the labor economy."[128] Consequently, many individuals with disabilities must rely on general public relief programs.[129]

Perhaps the strongest critique of the social welfare approach is that when the government takes control of promoting equality through the creation of a safety net, it is the government, not the welfare recipient, who determines the sufficient quality of life for recipients. [130]The welfare recipient is "told *what* he wants as well as how much he is wanting."[131] This is a particularly salient argument against the social welfare approach for people with disabilities, as the government's welfare programs once encouraged the pervasive institutionalization of many people with disabilities. This argument also applies to low-income individuals, families, and minorities—government programs dictate what constitute "necessities" and how many of these necessities are really "necessary."

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[127] There is significant crossover between the populations of people with disabilities and low-income individuals who qualify for other forms of federal and state assistance. *See, e.g.*, Bagenstos, *supra* note 80, at 9 (noting that "there are strong parallels between the structural barriers to employment for people with disabilities and the structural barriers to employment faced by poor people more generally"). "[D]isability and poverty are closely intertwined....and living in poverty often causes or exacerbates disabling conditions." *Id.* (citing COMM. ON A NAT'L AGENDA FOR THE PREVENTION OF DISABILITIES, INST. OF MED., DISABILITY IN AMERICA: TOWARD A NATIONAL AGENDA FOR PREVENTION 47 (1991)).

[128] Weber, *supra* note 81, at 934.

[129] *Id.*

[130] *See* Bagenstos, *supra* note 80, at 15 (citations omitted) (noting that "the nondisabled majority uses relatively small cash benefits as a means of dulling any urge among people with disabilities to protest existing power arrangements"). Welfare rights activists like Frances Fox Piven and Richard Cloward contended that public welfare generally serves to blunt lower-class unrest. *See also* MARMOR, *supra* note 122, at 13–14.

[131] Jacobus tenBrock & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809, 831 (1966).

Critiques of the social welfare paradigm have come from both sides of the political spectrum: some critics from the left argue that welfare programs essentially "buy off" an underrepresented group of people and promote "political quiescence," and critics from the right maintain that welfare programs promote a culture of dependency.[132] Though the weaknesses of the antidiscrimination paradigm have been discussed, for the social welfare paradigm to garner broader social and political support, advocates will need to address these political concerns—the charges of paternalism and oppression, as well as the promotion of dependency—and avoid perpetuating these conditions.[133]

As discussed in this section, the antidiscrimination and social welfare paradigms each provide a model for how to address social inequality and injustice. In spite of their similar goals, there is little agreement between the two approaches. While the antidiscrimination paradigm strives to achieve equality through laws that proscribe discrimination, we have seen that in application, the civil rights laws that adopted the antidiscrimination approach have not succeeded in eliminating discrimination. The social welfare approach, on the other hand, aims to address inequality through structural change, employing economic redistribution and social programs as tools to assist minorities, low-income individuals, and people with disabilities. While advocates may recognize the appeal of the social welfare approach, it has been met with much criticism from both the political left and right and has not achieved broad support.

Generally, we can imagine how individual laws could fit neatly within an antidiscrimination or social welfare paradigm. For example, the Fair Housing Act, the Americans with Disabilities Act, and the Equal Credit Opportunity Act are all modeled within the antidiscrimination approach, while the Social Security Act and the Housing and Community Development Act may have more in common with a social welfare approach. Part III will address the interesting conflicts

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[132] Bagenstos, *supra* note 80, at 15.

[133] *Id.* at 5–6.

that occur when a law could, and must, fit within both approaches.

III. A New Source of Income Provision: Working at the Nexus of the Antidiscrimination and Social Welfare Paradigms

Upon first glance, it is not quite clear whether the recommended source of income provision would best fit within the social welfare or antidiscrimination model. Amending the FHA to prevent discrimination against someone's source of income could fit squarely into an antidiscrimination approach, as this new provision would prohibit a form of discrimination that is currently permitted. This would hopefully lead to greater housing opportunities and greater racial and socioeconomic integration overall. As discussed in Part II, the previous amendments to the FHA, adding sex, familial status and disability status as "protected classes," all operate within an antidiscrimination paradigm.[134] And yet, when one considers what this form of antidiscrimination legislation would protect, namely, the provision of public sources of income derived from social welfare laws, the distinctions may not be quite as clear. This Part analyzes how the addition of an SOI provision to the FHA would seem to adhere to the social welfare model of addressing inequality, and how the same provision could also fit within the antidiscrimination paradigm. Finally, this Part addresses the challenges, and ultimately the benefits, of conceiving the SOI provision as working within both models.

A. Source of Income Discrimination Implicates the Social Welfare Paradigm

A SOI discrimination provision would necessarily implicate social welfare laws. SOI provisions contribute to the social safety net by enabling voucher holders and participants of other public programs to seek out housing in the same way that those who do not partake in public programs do. SOI provisions also ensure that social welfare programs that provide income, food and housing support can remain effective, rather than merely serving as grounds for denial of housing.

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[134] *See supra* Part II, at notes 92–94.

The Section 8 program, which provides rental assistance to low-income individuals and families, was created and grounded in a social welfare paradigm. In 1937, well before the enactment of the FHA or the FHAA, Congress enacted the United States Housing Act, beginning a major federal effort to provide decent and affordable housing for low-income people. Pursuant to this Act, the federal government provided funding to state and local housing agencies to construct and manage publically owned housing projects.[135] In creating the Section 8 voucher program, Congress declared that it was "the policy of the United States to *promote the general welfare of the Nation* by employing its funds and credit . . . to assist the several States and their political subdivisions to remedy . . . the acute shortage of decent, safe, and sanitary dwellings for families of low-income."[136] One can see the language of social welfare and the theme of redistribution at work in this Act.

Today, the Section 8 program, now known as the Housing Choice Voucher Program (HCVP), is the dominant form of federal housing assistance.[137] The intent of HCVP was to use individual leases for existing rental units, instead of building

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[135] Fair Housing Act of 1937, 42 U.S.C. § 1437 *et. seq.* (2011). Many years later, the federal Section 8 program was initiated as part of the Housing and Community Development Act (HCDA) of 1974. Pub. L. 93-383, 88 Stat. 833 (2011). The "Section 8" voucher that developed out of this legislation was named after the original Section 8 of the United States Housing Act of 1937. Montgomery Cnty. v. Glenmont Hills, 936 A.2d 325, 328 (Md. 2007) (a SOI discrimination case from Montgomery County, Md. that provides an in-depth overview of the history of Section 8).

[136] HCDA § 2 (emphasis added). The Act further provides, "[f]or the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing, newly constructed, and substantially rehabilitated housing in accordance with the provisions of this section." *Id.* at § 8(a).

[137] CTR. ON BUDGET & POL'Y PRIORITIES, POLICY BASICS: THE HOUSING CHOICE VOUCHER PROGRAM 1 (2009). Under the program, HUD pays rental subsidies to private landlords so eligible low-income families can afford decent, safe and sanitary housing. 24 C.F.R. § 982.1(a)(1) (2011). The program is "generally administered by State or local governmental entities called public housing agencies (PHAs)." *Id.* The amount of rental subsidy provided is determined by a formula that takes local average real estate prices into account. 24 C.F.R. § 982.1(4)(ii).

more low-income housing.[138] Once a prospective tenant receives a voucher from a public housing agency, the tenant must seek out an apartment on his or her own. This condition was intended to encourage low-income families to explore neighborhoods and school districts that they would not be able to afford without financial assistance.[139] A protection against SOI discrimination would enable Section 8 recipients to use their vouchers, rendering the HCVP program more effective. Due to the relationship between SOI discrimination and Section 8 and the overarching social welfare policies behind the creation of the Section 8 Program, the addition of SOI protections under the FHA would seem to accord with the social welfare approach to addressing inequality.

Supplemental Security Income and Disability Insurance are other examples of social welfare laws that are affected by SOI discrimination. SSI and SSDI are both social security programs that reflect a "traditional social insurance approach" to the issue of poverty among people with disabilities.[140] During the Great Depression and the New Deal, advocates in the United States were able to gain social and political support for the institution of government programs adhering to a social insurance approach.[141] Many more Americans annually receive SSI and SSDI benefits, or both, than receive Section 8 vouchers, and beneficiaries of these programs are subject to much less stigma.

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[138] With the emphasis on individual units, the enactment of the Housing Choice Voucher Program and its subsequent regulations was a significant departure from the "conventional public housing model." SINGLE PARENTS, *supra* note 20, at 125–26.

[139] Theoretically, the program would expand housing opportunities, as well as address the goals of promoting integration and preventing the concentration of low-income families in single neighborhoods. *See* HCDA § 8(a); 42 U.S.C. § 1437f. *But see supra* text accompanying notes 9–10 (discussing the Section 8 program and the high rate of returned, unused vouchers at the end of each year).

[140] Weber, *supra* note 81, at 923 (providing a background on the "history and philosophy" of SSDI and SSI).

[141] *Id.* at 924.

[142] Given this historical background and policy support, one can easily conceive of these forms of social insurance payments as part of social welfare law. And yet, without acknowledging and addressing discrimination against these welfare recipients, people with disabilities will continue to be turned away from an apartment building on account of monthly SSI payments, without any legal recourse.

While there may be fewer social welfare policies available to needy individuals and families today, the government continues to provide specific forms of welfare and support payments in the form of TANF, SNAP, Section 8 and other benefit programs.[143] Unfortunately, federal fair housing laws enable landlords and real estate agents to harm the recipients of these benefit programs because there are no federal legal prohibitions against refusing them housing on account of participation in these programs. In the case of Section 8 vouchers, a refusal to rent to a voucher holder essentially renders the voucher moot.[144] In New York City, for example, there are many families and individuals who are attempting to move out of homeless shelters, or who are at a substantial risk of homelessness, and who are trying to locate and maintain

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[142] Part I cites statistics on the total number of Americans who receive SSI or SSDI annually, as compared to Section 8 vouchers. As discussed in Part II, it has been easier to garner support for these types of benefits, and much of this may be explained by what is referred to as Social Security's "broad universal" approach—the fact that social security programs are intended for everyone's use and benefit. *See* Bagenstos, *supra* note 80 at 71; *supra* Part II.B.

[143] Prior to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 §§ 101-116, there were more benefit programs available to qualifying families and individuals, and these programs were considered legal entitlements. Today, there is no legal entitlement to TANF. For a more detailed description of the TANF and SNAP programs, *see supra* Part II.

[144] As discussed above, *supra* Part I, though over 2 million vouchers are distributed annually, approximately one-third of these vouchers are not used.

permanent housing. [145] Social welfare programs and laws, both at the federal and state levels, can assist these groups in getting back on their feet and achieving independence, and the addition of a source of income provision to the FHA would work alongside these existing social welfare laws and render them more effective.

B. Source of Income Discrimination Also Operates Within the Antidiscrimination Model

While it seems clear from the section above that a source of income provision functions within and supports a social welfare model, a law that prevents SOI discrimination also operates within an antidiscrimination paradigm. Amending the FHA to include another protected class would add an additional antidiscrimination provision to the FHA, and the new SOI provision would function like any of the other antidiscrimination provisions of that statute. [146] The new SOI law would be subject to HUD's enforcement mechanisms, [147] and in the case of a demonstrated "pattern or practice" of widespread SOI

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[145] A 2008 report by the New York City Independent Budget Office found that "the city was falling considerably short of its goals in locating permanent housing for families," in spite of the fact that New York City's Department of Homeless Services "is spending millions of dollars to reduce and prevent homelessness." FRIEBERG & HOUK, *supra* note 7, at 10 (citing N.Y. CITY INDEP. BUDGET OFFICE, HAS THE RISE IN HOMELESS PREVENTION SPENDING DECREASED THE SHELTER POPULATION? (2008)). By refusing to rent to people at risk of becoming homeless or staying homeless on account of their SOI, landlords and real estate agents are contributing to the problem of homelessness in New York City and beyond. *Id.* at 11. New York City's Department of Homeless Services reports that as of January 29, 2010, there are a total of 37,457 individuals in the city shelter system, including 8,838 families with children. N.Y. CITY DEP'T OF HOMELESS SERVS., DAILY CENSUS (2010), http://www.nyc.gov/html/dhs/html/home/home.shtml.

[146] *See* 42 U.S.C. § 3604 ("Discrimination in the sale or rental of housing and other prohibited practices"); *see also* 42 U.S.C. § 3617 (1988) ("Interference, coercion, or intimidation"); 42 U.S.C. § 3612 (1988) (addressing enforcement by the Secretary of HUD); 42 U.S.C. § 3613 (1988) (addressing enforcement by private persons); 42 U.S.C. § 3614 (1988) (addresses enforcement by the Attorney General and the Department of Justice).

[147] 42 U.S.C. § 3612 (1988).

discrimination the SOI law could be enforced by the Department of Justice.[148]

Fair housing and disability rights advocates claim that many antidiscrimination laws, including fair housing laws and laws meant to prevent discrimination against people with disabilities, are unable to address the larger, structural challenges faced by people with disabilities and minority groups, particularly minority women and children. [149] The addition of an SOI provision to the FHA would engage with these structural barriers in a way that other antidiscrimination laws cannot.

As discussed in Part I, a significant majority of Section 8 subsidy holders are minority women with children, and the recipients of SSI and SSDI disability payments are people with disabilities. Statistically, landlords' refusals to accept tenants with these forms of income have a discriminatory effect on minority women, renters with children, and people with disabilities—all protected classes under the FHA.[150] In spite of this, the disparate impact argument has usually failed in challenges to landlord policies concerning vouchers and other sources of income, largely because it is difficult to prove that the landlords' policies will disproportionately affect protected

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[148] 42 U.S.C. § 3614 (2011). Section 3614(a) gives the Attorney General jurisdiction to commence a civil action whenever the Attorney General has "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by [the FHA], or that any group of persons has been *denied any of the rights granted by* [the FHA]" (emphasis added). Section 3614(b) also permits the Attorney General to commence civil actions that have been referred by the Secretary of HUD.

[149] *See, e.g.*, Bagenstos, *supra* note 80, at 6 (noting that antidiscrimination laws are not suited to eliminating deep structural barriers to employment); SEPARATE, *supra* note 81, at 41 (writing that courts have resisted implementing the ADA as an anti-subordination law, and instead have "narrowed Congress's anti-subordination protection to cover such a narrow class that they rendered much of Congress's work ineffective").

[150] 42 U.S.C. § 3604 (2011); Beck *supra* note 5, at 170.

classes of individuals.[151] In addition, people with disabilities who experience SOI discrimination on account of their SSDI payments are being subjected to a form of intentional discrimination: because *all* recipients of SSDI are disabled, a refusal to rent to someone on account of these benefits payments constitutes disparate treatment, not disparate impact. This implies that people with disabilities who experience SOI discrimination on account of their SSDI payments are victims of a form of intentional discrimination that the law does not account for.

Due to these significant legal barriers, plaintiffs who experience SOI discrimination have not been able to successfully achieve legal recourse through existing antidiscrimination laws.[152] As requests for reasonable accommodation and disparate impact claims are not sufficient to prevent SOI discrimination, there is a need for a more particularized law.

The fact that plaintiffs suffering from SOI discrimination cannot address this form of discrimination under existing laws supports arguments that antidiscrimination law, at least as applied on the ground, cannot end SOI discrimination on its own. In addition, discrimination against voucher holders reveals a fundamental weakness of social welfare laws and programs, as social welfare laws require that eligible people apply in order to benefit from social welfare programs. Discrimination against recipients of public benefits may discourage recipients from participating in these benefit programs, thus rendering the

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[151] *Knapp*, 54 F.3d at 1280 (refusing to apply disparate impact analysis). *But see* Bronson & Carter v. Crestwood Lake Section 1 Holding Corp., 724 F. Supp. 148 (S.D.N.Y. 1989) (allowing for the possibility that refusing to accept Section 8 vouchers may satisfy the requirements for a race-based disparate impact claim). Further, plaintiffs claiming disparate impact bear the additional burden of identifying a landlord policy that has a discriminatory effect. Often the landlords' policies are sporadic and not sufficiently standardized, which makes it difficult for plaintiffs to successfully make a disparate impact claim.

[152] *See supra* Part I.D and text accompanying notes 65–73 discussing reasonable accommodation and disparate impact arguments under the FHA.

programs less effective overall.[153] For tenants to be adequately protected against this form of discrimination, legislative action must respond to the requirements and challenges of both social welfare and antidiscrimination laws. The next two sections address the difficulties that might arise were advocates of each paradigm to work together to address SOI discrimination. In spite of these potential struggles, the benefits of such an approach would be significant.

C. How a Source of Income Provision Reveals Conflicts Between the Antidiscrimination and Social Welfare Approaches

As discussed above, a source of income provision could function within either a social welfare or antidiscrimination approach. Given that each paradigm has its limitations, the problem of SOI discrimination may be best approached through both models. In fact, the addition of an SOI provision could be understood as fundamentally linked to social welfare law *and* to antidiscrimination law, and it would make sense to take advantage of each paradigm's strengths in attempting to enact this legislative change.

Though it appears that both paradigms are implicated in the act of SOI discrimination, it is possible that advocates for each model may not want the models to work together. For those who align themselves with the antidiscrimination paradigm, there may be a fear of stigmatization, as the appearance of a targeted focus on recipients of public benefits runs counter to the promotion of formal equality. For advocates of a social welfare approach, there may be a desire to go beyond the antidiscrimination approach, which, as it has been applied on the

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[153] Even today, the fear of "welfare stigma" is recognized as a barrier that prevents individuals and families from signing up for government assistance programs. Colleen Manchester & Kevin Mumford, *How Costly Is Welfare Stigma? Separating Psychological Costs from Time Costs* (SSRN Working Paper, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1544601. A substantial fraction of households that are eligible for welfare or public assistance do not participate. Depending on the program, most estimates of welfare participation rates for the United States range from forty to eighty percent. *Id.* at 2 (citations omitted).

ground, seems largely unsuccessful at addressing structural inequality.

SOI discrimination on its own does not expressly implicate other protected classes. And yet, as discussed *supra* in Part I, this form of discrimination will disproportionately affect low-income individuals, families, minority women and people with disabilities.[154] Fearing the stigma that may come with advocating for the poor or for an anti-poverty agenda, disability rights advocates may be unwilling to promote a law that they see as fundamentally connected to social welfare laws and programs.[155] This hesitation may stem from the bleak history of treatment that people with disabilities have faced in the United States[156]; people with disabilities used to be forced into custodial institutions where they were "protected" and kept from interacting with other members of society.[157] Because of this history of repression and stigmatization, people with disabilities and disability rights advocates may wish to distance themselves as far as possible from a social welfare approach that could seem grounded in charity or paternalism.

In response to the fear of being stigmatized as poor, or for representing the poor, advocates should recognize that the sources of income that can lead to discrimination are not necessarily connected to poverty. As mentioned in Part I, private sources of income and legal trusts, as well as SSDI payments, are all unconnected to income level, and individuals who rely on

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[154] *See supra* Part I.A for a discussion of the groups that are most harmed by SOI discrimination.

[155] *See, e.g.*, MARMOR *supra* note 122, at 1–21 (discussing why social welfare policy in the United States is largely considered a failure and a poor use of government funds).

[156] *See, e.g.*, Linton, *supra* note 101, at 135–55 (offering a brief history of disability studies and the growth of the disability studies movement in the United States as a response to the custodialism approach).

[157] *See* tenBrock & Matson, *supra* note 131 at 809–10 (noting that "[t]hroughout history the physically handicapped have been regarded as incompetent to aid themselves and therefore permanently dependent upon the charity of others—in short, as indigent beggars"); *see also* 42 U.S.C. § 12101(2011) (finding that historically people with disabilities have been discriminated against and isolated).

them are still subject to discrimination.[158] And though these advocacy concerns may be legitimate, one should recognize that today there remain substantial social and historical connections among poverty, disability and race. If anything, a federal SOI protection would enable advocates for all of these identity groups, and all recipients of such forms of non-traditional income, to forge alliances in their work. Currently, many fair housing groups and research reports emphasize the need for a federal SOI provision to protect Section 8 voucher holders, and few of these reports extend their arguments to include people with disabilities among those who experience SOI discrimination.[159] If national stakeholders form and mobilize a coalition that includes advocates for low-income families, women's rights groups and disability rights advocates, there

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[158] Many landlords explicitly state that they only take tenants that "work" for a living. FREIBERG & HOUK, *supra* note 7, at 7 (reporting that landlord policies stating that tenants "must have a job" or "must be employed" are common in New York City, and violate New York City's new SOI law).

[159] *See* Libby Perl, *Needed Element: Laws Prohibiting Source of Income Discrimination*, 14 POVERTY & RACE RESEARCH 9 (2005); Laura Bacon, Godinez v. Sullivan-Lackey*: Creating a Meaningful Choice for Housing Choice Voucher Holders*, 55 DEPAUL L. REV. 1273 (2006); Beck, *supra* note 5; FUTURE OF FAIR HOUSING, *supra* note 4, at 62 (noting that "one of the key ways housing is provided to low-income tenants . . . is through a housing subsidy, the most well known of which is the Housing Choice Voucher Program."); Austin Hampton, *Civil Rights and the Low Wage Worker: Comment: Vouchers as Veils*, 2009 U. CHI. LEGAL F. 503, 504 (2009) (arguing that through SOI discrimination landlords are able to use the Section 8 program as a "veil behind which to hide their true discriminatory intentions.").

would be a stronger likelihood that these reforms to the FHA would succeed .[160]

A more powerful argument against having both legal paradigms work together, and one that may be more difficult to resolve, is that the goals of the social welfare paradigm could be substantially limited in scope by the antidiscrimination paradigm. While the social welfare paradigm emphasizes the importance of targeted government funding and programs dedicated to eradicating structural inequality, the antidiscrimination approach aims to address inequality through the application of specific civil rights laws. In order to enact effective antidiscrimination legislation, antidiscrimination laws require a certain amount of categorization of individuals into "protected" classes, and require that individual actors *do* something in order to violate these laws. As Linda Krieger has described it, there is an "unexamined central premise" in antidiscrimination law that all disparate treatment is motivational, which creates a substantial discontinuity between the "jurisprudential construction of discrimination" and the real

[160]The history behind the enactment of New York City's SOI law is instructive. Some years before the enactment of Administrative Law 10, advocates for low-income families proposed SOI legislation in New York City, narrowly focusing their arguments on the importance of SOI protections for low-income families on Section 8. This proposal did not garner sufficient political support and the bill failed. In comparison, in 2008, disability rights groups all over New York City were involved in advocating for the current SOI law, and as discussed above, this bill passed overwhelmingly in the City Council. Email from Diane Houk, former Executive Director of the Fair Housing Justice Center (Dec. 7, 2010 1:48 PM EST) (on file with author) (noting that the first law failed around 2004 and that in preparation for the 2008 law, FHJC partnered with Legal Aid and other groups to successfully advocate for the law). Diane recalls contacting executive directors of disability rights groups, such as the Center for the Independence of the Disabled, New York and Staten Island Center for Independent Living, and seniors groups, such as the AARP, to get them on board. *Id.*

life occurrences that the law attempts to represent.[161] Krieger notes further that in our attempts to fit certain behavior into certain categories, we often miss the subtleties, and the unconscious forms of discrimination, that civil rights laws were meant to address and prevent.[162]

Advocates for structural change might wish to distance themselves from the "pretext storyboards" required of an antidiscrimination approach,[163] and because of this difference,

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[161] Linda Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164–65 (1995). She notes,

> As I encountered more offended, defensive decisionmakers accused of discrimination, and as I counseled and consoled more embittered employees who knew they had been treated differently because of their race or gender or ethnicity but could not, as the law requires in such cases, prove that their employer harbored a discriminatory motive or intent, I became convinced that *something about the way the law was defining and seeking to remedy disparate treatment discrimination was fundamentally flawed.*

Id. at 1164 (emphasis added).

[162] *Id.* While Krieger writes about Title VII, her analysis applies to a discussion of the antidiscrimination laws in the ADA and in the FHA. Further, much of the antidiscrimination jurisprudence that has developed under the FHA is modeled on claims articulated first under Title VII. In *Demarginalizing the Intersection of Race and Sex*, *supra* note 120, Kimberlé Crenshaw argues that antidiscrimination law has failed to account for individuals who fall into multiple protected classes, such as Black women. She writes, "[w]ith Black women as the starting point, it becomes more apparent how dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a *single categorical axis*." *Id.* at 140 (emphasis added). She suggests, "this single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group." *Id.*

[163] Krieger, *supra* note 162 at 1181 (writing that the "pretext story boards" approach requires that one label a perpetrator as a "wrongdoer"). While the antidiscrimination paradigm in the abstract may not require this "storyboard" approach, or even the categorization that Krieger discusses, the manner in which antidiscrimination laws are interpreted in courts has further emphasized the categorization of people and actions, rather than aiming to eradicate it.

might avoid engaging in the source of income discrimination debate. Advocacy organizations like the African American Policy Forum,[164] the Kirwan Institute, and others[165] expressly disagree with the reductive definition of "discrimination," and instead view racism and social inequality as structural problems.[166] Similarly, today's fair housing advocates recognize that housing discrimination has become less overt and therefore more difficult to detect overall.[167] A 2009 report published by the Frameworks Institute reported that there is a widespread belief that racial relations have significantly improved over the last fifty years, largely as a result of antidiscrimination laws.[168] The report notes that today members of the general public are not sure what, if anything, can be done to further eliminate racial inequality.[169] Supporters of a social welfare approach would view this prevailing sentiment as missing the point—bias and discrimination may no longer be quite as blatant or overt in

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[164] AFR.POL'Y INST., *supra* note 120.

[165] *See, e.g.*, FRAMEWORKS, *supra* note 120 (defining its goal as "changing the public conversation about social problems"); *About Us*, APPLIED RESEARCH CTR., www.arc.org/content/blogsection/4/200/ (last visited May 27, 2011) (promoting racial justice through media, research and activism); OPPORTUNITY AGENDA, *supra* note 12 (working to build national will to "expand opportunity in America").

[166] *Structural Racism*, KIRWAN INST., http://kirwaninstitute.org/research/structural-racism.php (last visited May 27, 2011) ("The word 'racism' is commonly understood to refer to instances in which one individual intentionally or unintentionally targets others for negative treatment because of their skin color or other group-based physical characteristics. This individualistic conceptualization is too limited. Racialized outcomes do not require racist actors.").

[167] As discussed in Part I *supra*, the practice of "steering" is on the rise. While steering a potential renter away from a certain neighborhood or a building may not be as easily identified as discrimination, it has the same overall effect on neighborhood demographics, and perpetuates racially and economically segregated housing patterns.

[168] LYNN DAVEY, STRATEGIES FOR FRAMING RACIAL DISPARITIES: A FRAMEWORKS INSTITUTE MESSAGE BRIEF 3 (2009).

[169] *Id.*

individual terms as they once were, but they still exist in equally insidious forms.[170]

While the criticism that the antidiscrimination paradigm has not been able to address certain forms of structural inequality is astute, advocates of the social welfare approach should recognize the structural issues inherent in SOI discrimination and should play a role in ensuring that the issues are addressed. Unlike forms of "first generation discrimination" that Susan Sturm notes are largely relics of the past, SOI discrimination has much more in common with "second generation discrimination," and implicates a larger structural problem.[171] Recipients of public benefits and of non-traditional sources of income are not uniformly protected from discrimination in the housing context, and as a result, stereotyping can run rampant: landlords imagine and fear the "welfare mother" who collects cash benefits in lieu of seeking employment, the "disabled veteran" who will not work and who will damage their building, or the female head of household with a wheelchair-bound child that may end up requesting an expensive accommodation to improve access to the apartment.

Sturm argues that second generation employment discrimination requires broader structural change, rather than simply more stringent enforcement of current antidiscrimination laws.[172] Similarly, social welfare advocates should recognize the

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[170] Sturm, *supra* note 6, at 465. Susan Sturm coins the term "second generation discrimination" to distinguish the more subtle forms of discrimination commonly experienced today from the deliberate and overt exclusion and race- or gender-based subordination that occurred under "first generation discrimination." She argues that the "wrong" of second generation discrimination cannot be reduced to a single, universal theory of discrimination, and that second generation discrimination does not "evoke the first generation's clear and vivid moral imagery." *Id.* at 473. Inequality still persists in spite of civil rights laws and policies prohibiting these forms of discrimination. *Id.*

[171] *Id.* at 463 (noting that the "motif of this second generation . . . approach is that of structuralism").

[172] *Id.* at 463 (recommending a structural approach that "encourages the development of institutions and processes to enact general norms" to prevent employment discrimination, which includes the interaction between workplaces, advocates and government institutions rather than limiting legal recourse to the judiciary).

need for greater structural changes in what could be called "second generation housing discrimination," and should support working with antidiscrimination advocates towards achieving these goals. Granted, if SOI protections were added to the FHA, the motivational behavior or "wrongdoer" narrative that underlies other antidiscrimination laws might be taken up to support these protections.[173] At the same time, these SOI protections could lead to more widespread use of social welfare programs and the more effective use of social welfare law overall. Without antidiscrimination laws and structural changes aimed at educating the general public on the purpose and utility of these benefit programs, certain tenants will continue to be stigmatized and "steered" away from integrated living arrangements, and instead towards economically and racially segregated neighborhoods.

D. How a Source of Income Provision Reveals That These Approaches Are Complimentary

In attempting to amend the FHA to include protections against SOI discrimination, one notes how clearly the law may fall under either, or both, the antidiscrimination and the social welfare paradigms. Some scholars have argued that these paradigms cannot be reconciled and have instead recommended that certain minority groups embrace a turn towards one approach at the expense of the other.[174] And yet, as we have seen above, the act of SOI discrimination, if addressed, implicates laws and policies relating to both paradigms, and challenges advocates concerned with this form of housing discrimination to learn how to build consensus between advocates both approaches.

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[173] *Krieger*, *supra* note 162, at 1181 (assuming that there must be a "wrongdoer" in instances of discriminatory behavior).

[174] *See* Bagenstos, *supra* note 80 (advocating a turn to the social welfare approach in disability law, given the failures of antidiscrimination law, in particular the ADA, to significantly change the status of people with disabilities in the employment context); *see also*, SEPARATE, *supra* note 81, at 10–15 (recommending a shift to an "anti-subordination approach" to equality over the current practice of formal equality and integrationism); tenBrock & Matson, *supra* note 132 (advocating a shift away from custodialism and towards integrationism in social welfare laws and policies).

The addition of an SOI provision requires us to consider the possibility of social welfare law and antidiscrimination law working together. One could interpret this in one of two ways: on the one hand, the fact that a new SOI law could function within both paradigms is a peculiarity or an aberration, and because of that, we should choose one approach to addressing SOI discrimination and not concern ourselves with both paradigms. On the other hand, this type of provision may allow us to understand more about both approaches because of the unique structure of an SOI law and its ability to fit within each model. The addition of an SOI provision to the Fair Housing Act would proscribe a form of discrimination that would also affect social welfare laws and programs. In this manner, an SOI protection would seem to be distinct—it is a law that adopts an antidiscrimination approach in order to support social welfare mechanisms and programs. While this would not be the first time that the federal government enacted legislation that includes protections against SOI discrimination, it would be the first amendment to a civil rights act to explicitly recognize this form of discrimination. [175]

The addition of a federal SOI provision demonstrates how these two approaches are able to work together to address social inequality, as the act of SOI discrimination provides a lens through which we can better understand how the approaches converge. By identifying SOI discrimination as a threat to the goals of antidiscrimination law *and* social welfare law, advocates and scholars should be able to set aside their ideological differences in favor of promoting both paradigms.

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[175] The Equal Credit Opportunity Act does prohibit discrimination on the basis of an applicant receiving income from a public assistance program. *See supra* Part I. However, the protection is limited to public forms of income assistance and to credit transactions. 15 U.S.C. § 1691 *et seq*. There is also the "Step-Up" program, administered by HUD, which is an apprenticeship-based employment and training program that provides career potential for low-income persons by enabling them to work on construction projects that have certain prevailing wage requirements. The Step-Up program operates more along the social welfare paradigm, as it requires that preference be given to public housing recipients. For more information on the Step-Up program *see Step-Up Program Description,* OFFICE OF LABOR RELATIONS APPRENTICESHIP OPPORTUNITIES PROGRAM, U.S. DEP'T OF HOUS. & URBAN DEV., *available at* http://portal.hud.gov/portal/page/portal/HUD/programdescription/stepup (last visited May 27, 2011).

While antidiscrimination laws and approaches aim to correct social inequality through legal enforcement mechanisms and the social welfare paradigm works to address social inequality through structural, redistributive mechanisms, both approaches seek to eliminate social subordination.[176] Advocating for a SOI discrimination provision would enable academics, advocates and policymakers to understand not only how these two approaches work together in this specific instance, but also how the antidiscrimination and social welfare paradigms can work together to address other forms of discrimination or subordination. Though these paradigms may seek to eliminate social inequality using different means, the problem of SOI discrimination provides an opportunity for these two approaches to support a measure that advances the goals of antidiscrimination and social welfare.

IV. Adding a Source of Income Provision to the Fair Housing Act

This Article recommends an amendment to the FHA as a means of addressing SOI discrimination that would ideally involve collaboration between the antidiscrimination and social welfare paradigms.[177] While this is not the only solution that could work to protect against this form of discrimination, it seems the most effective at preventing SOI discrimination in the housing context for the greatest number of people.

As Part II demonstrates, solving the problem of SOI discrimination would not necessarily require an amendment to the FHA.[178] Instead, one could amend several of the social

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[176] Whether one is an advocate of "formal equality" or "anti-differentiation," as opposed to "anti-subordination," both views express the goals of "substantive equality." SEPARATE, *supra* note 81, at 9. Though Colker advocates an anti-subordination approach, she concedes that the formal equality approach has had similar goals; it has just "outlived its usefulness." *Id.*

[177] The National Commission on Fair Housing and Equal Opportunity also proposed this measure in 2008. FUTURE OF FAIR HOUSING, *supra* note 4, at 62.

[178] See Part II *supra* for a contrast between the social welfare approach and the antidiscrimination approach to addressing social inequality; see Part III *supra* for a discussion of how an SOI protection provision could fit within each of these approaches.

welfare laws that are most relevant to SOI discrimination. The Section 8, TANF, SNAP, SSDI, and SSI statutes could all be amended to prevent discrimination based on receiving income from an enumerated list of federal programs.[179] Advocates of the social welfare approach might find this approach preferable in that it keeps social welfare laws, programs and protections separate from antidiscrimination laws.[180] Further, if each social welfare law had its own SOI provision, each corresponding administrative agency would have its own accountability to program participants, therefore potentially leading each agency to work harder to prevent this form of discrimination .[181] By spreading the accountability throughout several different government agencies, one could imagine a greater response and effort towards ending SOI discrimination.[182]

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[179] Low-Income Housing Assistance, 42 U.S.C. § 1437f; Temporary Assistance to Needy Families (TANF), 42 U.S.C. § 601; Supplemental Nutrition Assistance Program (SNAP) *sub nom.* Food Stamp Assistance Program, Pub. L. No. 110-246, 122 Stat. 1651 (2011).

[180] See *supra* Part III.B for a discussion of why advocates for a social welfare approach may not want to work within an antidiscrimination paradigm.

[181] The Section 8 program is administered by HUD through HUD field offices. 24 C.F.R. § 982.3 (1998); *see also* U.S. Dep't of Hous. & Urban Dev., *Housing Choice Vouchers Fact Sheet*, U.S. DEP'T OF HOUS. & URBAN DEV., *available at* http://portal.hud.gov:80/hudportal/HUD?src=/topics/housing_choice_voucher_program_section_8. TANF is administered by the Office of Family Assistance in the U.S. Department of Health & Human Services (last visited May 27, 2011); *Mission Statement,* OFFICE OF FAMILY ASSISTANCE, FOOD AND NUTRITION SERV., U.S. DEP'T OF AGRIC., *available at* http://www.acf.hhs.gov/programs/ofa/about.html#mission (last visited May 27, 2011). United States Dep't of Agriculture, Food & Nutrition Service, *Supplemental Nutrition Assistance Program*, FOOD AND NUTRITION SERV., U.S. DEP'T OF AGRIC, *available at* http://www.fns.usda.gov/snap/rules/Legislation/about.htm (last visited May 27, 2011). SSI/SSDI are administered by the Social Security Administration. *Benefits for People with Disabilities*, SSA, *available at* http://www.ssa.gov/disability/ (last visited May 27, 2011).

[182] *But see supra* Part I.C, which lays out a number of federal statutes that presently include SOI protections. The SOI protections in those varied statutes have not been able to address the problem of SOI discrimination overall. Similarly, there is no reason to think that merely adding to the number of social welfare statutes with SOI protections would have a significant effect on curbing SOI discrimination.

However, amending the current social welfare laws that are most affected by SOI discrimination would only address part of the problem. As discussed in Part I, recipients of public sources of income are not the only people who suffer from SOI discrimination.[183] SOI discrimination harms people who pay their rents with income received through trusts, legal settlements and third-party payers. A series of amendments that only addressed discrimination based on income from public programs would be unable to reach these individuals and families.

In addition, SOI discrimination as discussed in this Article is primarily a housing issue. The best means of addressing and ending this form of discrimination is through fair housing law. The Fair Housing Act has been amended several times before to address discrimination based on sex, familial status and disability status.[184] As discussed in Part III, the FHA already contains the necessary enforcement provisions to address this form of discrimination.[185] Furthermore, since nondiscrimination and community integration are expressed goals of the FHA, it would be a more effective declaration of public policy to address the problem of SOI discrimination in housing through an amendment to housing law specifically.

CONCLUSION

Discrimination based on source of income can have a profound effect on the housing and neighborhood choices that are available to prospective tenants. The benefits of income assistance programs can only accrue if landlords and property managers welcome voucher holders into their neighborhoods and communities. Only with the proper enforcement of an SOI antidiscrimination law can voucher holders and recipients of public and private income support have a full range of housing choices available to them. Among today's voucher holders, one finds significant overlap between racial minorities, single women with children, and people with disabilities. A landlord

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[183] *See supra* Part I.A.

[184] *See supra* Part II.A, at notes 96–98.

[185] *See supra* Part III.B, at notes 147–149 for discussion of the enforcement provisions that proscribe discrimination under the FHA.

may have illegal discriminatory motives when he turns a family away because of a housing voucher, but he is allowed to do so under current federal law.

The addition of source of income protection to the Fair Housing Act would not create a new, robust social welfare program. It would not provide further economic support to families, and it could not, on its own, encourage more families or individuals to join the welfare rolls. However, it would prevent social welfare programs from being neutered by discrimination, thus serving an essential function for recipients of these programs. This type of antidiscrimination law is necessary to ensure that the funds directed at social welfare initiatives can actually reach recipients in order to have the intended effect. Advocates of the antidiscrimination and social welfare paradigms should see how their own goals will be better achieved with an SOI amendment to the Fair Housing Act, and should actively promote this legislative change.

An amendment to the Fair Housing Act that prohibits discrimination on the basis of a renter's source of income will contribute to ending pernicious discrimination in the housing context and help achieve "truly integrated and balanced living patterns" across the United States.[186] This goal can serve as a reminder that overcoming structural inequality through social programs and proscribing discrimination through civil rights antidiscrimination laws do not always require different approaches. In fact, further success in curbing discrimination and improving the social welfare could emerge from this single change in housing discrimination policy.

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[186] 114 Cong. Rec. 3422 (1968) (Sen. Mondale speaking).