

THE BURDEN OF BEING A LANDLORD: THE TRUTH BEHIND DELAWARE'S SOURCE OF INCOME DISCRIMINATION LAWS

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ABSTRACT

Source of income laws are incorrectly added to fair housing laws across the nation. Delaware included source of income as a protected class under the Delaware Fair Housing Act in 2016. This law prohibits landlords from properly assessing their risk when determining whether to allow an applicant to become a tenant. Landlords must ignore where the applicant's income is derived from, which is a legitimate business concern in property management. Furthermore, this law severely limits a landlord's ability to recover his or her losses through traditional legal measures, such as wage garnishment. If landlords are restricted and no longer able to run their business properly, landlords will withdraw from the property management business thus creating a serious housing issue. Proponents for protecting source of income have claimed landlords are discriminating against low-income individuals because proponents are primarily focused on protecting housing voucher recipients. Opponents point out that the laws are unconstitutional and a pretext for solving the government's shortage of low-income housing. Given the evidence that Delaware enacted its law as a pretext, source of income should not have been added as a protected class.

Delaware should not force landlords to resolve the government's issues in this manner, especially since source of income is directly related to a landlord's ability to successfully run his business. Source of income also should not be elevated to protected class status since it is

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well within an individual's control to easily change it. Most law review articles argue for the proponents and attempt to justify their stance. This Note highlights the unpopular argument that it should not fall on the shoulders of landlords to fix low-income housing issues, but instead the government needs to look at the bigger picture.

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INTRODUCTION

Jonathan Beard,¹ a landlord in Delaware, walked into the kitchen of his now-vacant rental property and wanted to cry. Not only did it take nearly three months from the time he filed for eviction to when the court-ordered possession was received, but his house was a disaster.² The kitchen cabinets had no doors. The fridge was badly dented and the inside smelled like a rotting carcass. Unfortunately, the damages were not limited to the kitchen. Throughout the house, the carpet was covered in dog urine and feces, burn marks, and stains. There were holes in the bedroom doors and in the walls behind the doors. The former tenants, just evicted moments ago, also left furniture and piles of clothes that Jonathan will have to remove from the house. Aside from the major physical damages, the former tenants kept the house in such a filthy state that it will require more cleaning than what constitutes normal wear and tear. In the end, the damages would total nearly \$7000. Yet, Jonathan only charged \$800 per month for rent. After paying the mortgage and expenses,³ Jonathan made a mere \$200 per month in profit.

1. Fictional character. The story is based on a compilation of the author's personal experiences and multiple stories relayed to the author by the New Castle County Constables.

2. Based on the author's recent experience with filing for summary possession against a tenant in mid-December who owed over one month of rent. Court was scheduled for mid-February. The constable did not perform the eviction and return possession to the author until mid-March. This is a typical timeline in the Delaware Justice of the Peace Court system. It is not unusual for it to take three months to evict a non-paying tenant.

3. See Brian J. Delaney, *Landlord-Tenant Law: Protecting the Small Landlord's Rights During Summary Process*, 37 SUFFOLK U. L. REV. 1109, 1110 (2004) ("Most landlords . . . rely heavily on

Therefore, it would take nearly three years for him to recover from this costly experience.

Jonathan knows that, even if he is armed with a judgment against the tenant for the damages, he has no options to recover his losses from the tenant if she does not voluntarily pay him. Normally, a landlord could either place a lien against the former tenant's property or garnish the individual's wages.⁴ When the plaintiff places a lien against the defendant's property, the property is appraised and sold for the purpose of applying the proceeds to the defendant's debt.⁵ Wage attachment or garnishment occurs when the plaintiff requests for the court to order the defendant's employer to deduct a specific amount from the defendant's wages and mail the payment directly to the plaintiff.⁶ Jonathan cannot place a lien against the former tenant's property because she does not own anything. He cannot attach her wages because she does not have a job. In fact, the tenant has not worked in over twelve years. She met his minimum income level for the property based on the amount she received from the government in disability payments and her children's social security payments combined with alimony she received from her ex-husband.⁷

Situations like this happen on a regular basis around the country.⁸ Every day, many landlords hand the keys to an expensive asset over to a new tenant with the hopes that the property will be well maintained and the rent will be paid promptly. While there are upstanding tenants who pay their rent on time

rental income to subsidize mortgage payments, property taxes, and other general expenses necessary to maintain the residence.").

4. See Brian Sullivan, *Low-Rent Landlords: Tenants Take Exception to Tough Tactics*, 99 A.B.A. J. 71, 71 (2013) ("[T]here are many legitimate options for collecting money owed—one can hire a debt-collection agency, go to small claims court, hire a mediator or even put a lien on the debtor's property."); Randy G. Gerchick, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 805 (1994).

5. See *How to Collect and/or Revive a Judgment in the Justice of the Peace Court*, DEL. CTS., <http://courts.delaware.gov/help/judgments/jp-revive.aspx> (last visited Oct. 3, 2017).

6. *Id.*

7. Fictional character. The story is based on a compilation of the author's personal experiences with qualifying tenants for rental properties.

8. Deena Greenberg et al., *Discrimination in Evictions: Empirical Evidence and Legal Challenges*, 51 HARV. C.R.-C.L. L. REV. 115, 117 (2016).

and care for the premises, there are also tenants who refuse to pay rent and destroy the property well beyond normal wear and tear. As a landlord, Jonathan should have been able to take precautions to prevent being in the latter situation. The State of Delaware, however, took that right away from Jonathan when it elevated source of income to a protected class status under the Delaware Fair Housing Act.⁹ This law prohibited Jonathan from being able to properly assess his risk when renting to the tenant. After all, Jonathan would not have ordinarily rented to someone without a steady employment history or, at the very least, a job.

Each day, landlords like Jonathan take risks when deciding who will occupy their rental properties. Landlords review tenant applications and try to assess the likelihood that the tenant will pay the rent on time, whether the tenant will care for the property, and how long the tenant is likely to remain on the premises. Like with any business risk, landlords use a variety of factors to assess this risk.¹⁰ These factors include creditworthiness, income amount, employment, criminal history, and previous rental history.¹¹ Landlords are prohibited from considering race, color, national origin, religion, sex, familial status, disability, sexual orientation, creed, marital status, and age because these are protected classes under the Federal Fair Housing Act and the Delaware Fair Housing Act.¹²

In August 2016, Delaware passed a law prohibiting landlords from considering the tenant's source of income in addition to the already protected classes.¹³ Yet, source of income is unlike

9. See DEL. CODE ANN. tit. 6, § 4601 (2017).

10. See *infra* Section I.C.

11. See *infra* Section I.C.

12. tit. 6, § 4601; *Fair Housing Laws and Presidential Executive Orders*, U.S. DEP'T HOUSING & URB. DEV., https://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/FHLaws (last visited Aug. 14, 2017) ("Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), as amended, prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, based on race, color, national origin, religion, sex, familial status (including children under the age of 18 living with parents or legal custodians, pregnant women, and people securing custody of children under the age of 18), and disability.").

13. tit. 6, § 4601; see *Changes to Delaware Fair Housing Law*, RICHARDS, LAYTON & FINGER (Aug. 9, 2016), <https://www.rlf.com/Publications/6579>.

the other protected classes because it does not share similar qualities, such as immutability; furthermore, it is directly relevant to a landlord's business.¹⁴ First, the government is overreaching because landlords should have more control over the risks they take when renting their properties, especially in light of the fact that source of income is a legitimate business concern. Second, source of income should not be elevated to this status because it is neither an immutable characteristic, like race, age, and gender, nor does it have any deep-seeded value qualities to make it comparable to religion. Relative to an immutable characteristic, people can change their income sources fairly easily. Third, source of income laws are commonly used as a pretext to address the lack of affordable housing. Affordable housing is the industry term for any residence where an individual can use a government housing voucher, which is guided by a rule mandating that rent should not exceed 30% of income.¹⁵ Source of income, therefore, should not be a protected class under the Delaware Fair Housing Act.

This Note explores the recently enacted Delaware source of income discrimination law, its effects on landlords, and whether source of income should be a protected class. Part II discusses the background of housing discrimination, the development of fair housing laws, and how a landlord qualifies an applicant. Part III analyzes the effectiveness of this new law, the practical issues facing a landlord under the new law, the ways in which source of income distinguishes itself from other protected classes, and explores the real reasons behind the enactment of the law. Part IV concludes the Note by arguing why the source of income discrimination laws should never have been enacted in Delaware or any other jurisdiction.

14. See *infra* Section II.A.

15. See generally DEL. STATE HOUS. AUTH., STATE OF DELAWARE 2010 LOW INCOME HOUSING TAX CREDITS QUALIFIED ALLOCATION PLAN 21 (2010), https://www.novoco.com/sites/default/files/atoms/files/delaware_final_10.pdf ("A unit is considered affordable if the cost of housing (rent plus utilities) is income and rent restricted not to exceed 30% of the household income, adjusted for family size.").

I. BACKGROUND

A. *Race Relations in America: The Birth of the Fair Housing Laws*

Fair housing laws arose from the civil rights movement.¹⁶ The initial civil rights movement focused on racial discrimination throughout the nation in a variety of contexts.¹⁷ The Civil Rights Act of 1866 stated in relevant part:

That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.¹⁸

This law was passed around the same time as the *Slaughter-House Cases*¹⁹ and the Black Code laws.²⁰ The civil rights move-

16. See Leonard S. Rubinowitz, *A Missing Piece: Fair Housing and the 1964 Civil Rights Act*, 48 HOW. L.J. 841, 911 (2005).

17. *Id.* at 845.

18. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 (1968) (quoting Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27).

19. 83 U.S. 36 (1872).

20. See Hon. Steven Markman, *The "Judicial Holy Grail": Why the Supreme Court Should Not Revisit the Privileges or Immunities Clause*, HERITAGE FOUND. (May 31, 2016), <http://www.heritage.org/report/the-judicial-holy-grail-why-the-supreme-court-should-not-revisit>

ment as it relates to housing began many years later and culminated in the Federal Fair Housing Act and later state-level fair housing acts.²¹ Although the Fourteenth Amendment's equal protection clause should have afforded all U.S. citizens the same opportunity to own and occupy property,²² this was not the case throughout the country.

In 1948, the Supreme Court held in *Shelley v. Kraemer*²³ that citizens should not be denied the right to own or occupy property based solely on the color of their skin because such action violates the Fourteenth Amendment.²⁴ In *Shelley*, black petitioners purchased a property for "valuable consideration" without knowledge that there was a covenant restricting ownership of the tract to only white people.²⁵ Since the petitioners were ready, willing, and able buyers, the Court recognized that they were not being afforded the same enjoyment of property rights as white people based solely on their race.²⁶ Looking to the purpose behind why the framers wrote the Fourteenth Amendment, the Court stated, "[I]t is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color."²⁷ The *Shelley* decision, however, was not enough to end racial discrimination issues in housing.

One of the most important years for the fair housing movement was 1968, twenty years after *Shelley*. The country was at a point where race discrimination in housing was a recognized issue and citizens were calling for a solution. For example, there was public outcry over the unfairness of minority individuals

the-privileges-or.

21. See Lawrence M. Friedman, *Comments on Edward H. Rabin, the Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 585, 586 (1984) (noting the civil rights movement in the 1960s catalyzed major changes in landlord-tenant laws).

22. See U.S. CONST. amend. XIV, § 1.

23. 334 U.S. 1, 1 (1948).

24. *Id.*

25. *Id.* at 5.

26. *Id.* at 19.

27. *Id.* at 23.

who were fighting in the United States military but were not afforded the freedom to enjoy the same property rights as white citizens.²⁸ The National Advisory Commission on Civil Disorders, then called the Kerner Commission, advocated for a national fair housing law in its report because it was “‘essential to begin such a movement’ for ‘true freedom of choice in housing for Negroes of all income levels.’”²⁹ It famously explained how “‘the nation [was] rapidly moving toward two increasingly separate Americas . . . a white society principally located in suburbs, in smaller central cities and in the peripheral parts of large central cities; and a Negro society largely concentrated within large central cities.’”³⁰

In response to the outcry, Congress passed Title VIII of the Civil Rights Act of 1968, also known as the Federal Fair Housing Act, to prevent discrimination on the basis of certain immutable characteristics in situations involving the sale, rental, or financing of residential housing.³¹ This happened just days after the assassination of Dr. Martin Luther King, Jr., who had been fighting for fair housing options in Chicago and for the rest of the country.³²

Also in 1968, the Supreme Court heard *Jones v. Alfred H. Mayor*

28. See Brooke, Edward William, III, HIST., ART & ARCHIVES U.S. HOUSE REPRESENTATIVES, <http://history.house.gov/People/Detail?id=9905> (last visited Oct. 3, 2017) (stating that Senator Edward Brooke of Massachusetts—the first African American ever to be elected to the Senate by popular vote—spoke personally of his return from World War II and his inability to provide a home of his choice for his new family because of his race).

29. *Civil Rights 101, Housing*, LEADERSHIP CONF., <http://archives.civilrights.org/resources/civilrights101/housing.html> (last visited Oct. 3, 2017) (quoting REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968)); see also JORGES ANDRES SOTO & DEIDRE SWESNIK, THE PROMISE OF THE FAIR HOUSING ACT AND THE ROLE OF FAIR HOUSING ORGANIZATIONS 4 (2012), https://www.acslaw.org/sites/default/files/Soto_and_Swesnik_-_Promise_of_the_Fair_Housing_Act.pdf.

30. *Civil Rights 101, Housing*, *supra* note 29.

31. See *Fair Housing Law*, HOUSING ALLIANCE DEL., <http://housingforall.org/resources/fair-housing-law/> (last visited Oct 3, 2017); Title VIII: *Fair Housing and Equal Opportunity*, U.S. DEP’T HOUSING & URB. DEV. (Sept. 25, 2007), http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/progdsc/title8.

32. Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s “Affirmatively Further” Mandate*, 100 KY. L.J. 125, 125 (2012) (“A key goal of the 1968 Fair Housing Act . . . , which was passed as an immediate response to Dr. King’s assassination, was to replace the ghettos with ‘truly integrated and balanced living patterns.’”); *Fair Housing Act of 1968*, HISTORY.COM, <http://www.history.com/topics/black-history/fair-housing-act> (last visited Oct. 3, 2017); see *Housing*, *supra* note 29.

Co.³³ This case involved a black man in Missouri who was refused the sale of a house solely because of his skin color, or race.³⁴ The case was brought under 42 U.S.C. § 1982, which states, “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”³⁵ The Court held that § 1982 prohibits “all racial discrimination, private as well as public, in the sale or rental of property.”³⁶ While this statute is separate from the broadly applicable Federal Fair Housing Act and focused solely on race, § 1982 further enforced America’s desire for people of different races to be treated in the same manner.³⁷

B. The Addition of New Protected Classes Under the Emerging State-Level Fair Housing Laws

Although the government and citizens were primarily focused on ending race discrimination at the time it was enacted, the Federal Fair Housing Act was one of the first major steps that the federal government took to eliminate discrimination in housing. Originally, the Federal Fair Housing Act prevented people from being discriminated against on the basis of race, color, religion, or national origin.³⁸ Sex was added as a protected class in 1974.³⁹ In 1988, the Act was amended to include disability and familial status.⁴⁰

States followed the federal government’s lead and enacted state-level fair housing laws.⁴¹ This is not surprising since the federal government provides funding to “[s]tate and local fair

33. 392 U.S. 409 (1968).

34. *Id.* at 412.

35. *Id.* (quoting 42 U.S.C. § 1982 (1964)). The Supreme Court granted certiorari to answer whether § 1982 was applicable to private parties. *Id.* at 412-13.

36. *Id.* at 413 (original emphasis omitted).

37. *See id.* at 417.

38. *See Title VIII: Fair Housing and Equal Opportunity*, *supra* note 31.

39. *40 Years Ago: Fair Housing Act Amended to Prohibit Discrimination on Basis of Sex*, NAT’L LOW INCOME HOUSING COALITION (Aug. 4, 2014), <http://nlihc.org/article/40-years-ago-fair-housing-act-amended-prohibit-discrimination-basis-sex> [hereinafter *40 Years Ago*].

40. *Id.*; *Title VIII: Fair Housing and Equal Opportunity*, *supra* note 31.

41. *Title VIII: Fair Housing and Equal Opportunity*, *supra* note 31.

housing enforcement agencies once they demonstrate a fair housing law that is substantially equivalent to the federal Fair Housing Act."⁴² Therefore, many of these laws mirrored the Federal Fair Housing Act but most were more restrictive.⁴³

Delaware is no exception. It enacted its Fair Housing Act in 1968 "to eliminate, as to housing offered to the public for sale, rent or exchange, discrimination based upon [the protected classes], and to provide an administrative procedure through which disputes concerning the same may effectively and expeditiously be resolved with fairness and due process for all parties concerned."⁴⁴

Although structurally similar to the Federal Fair Housing Act, the Delaware Fair Housing Act (DFHA) was not intended to compensate victims of past discrimination as an affirmative action law.⁴⁵ It was solely intended to protect groups of people with certain shared characteristics.⁴⁶

DFHA is more restrictive than the then Federal Fair Housing Act. In addition to the federally protected classes, DFHA added age, creed, marital status, and sexual orientation as protected classes.⁴⁷ On August 3, 2016, Delaware included source of income as a form of prohibited discrimination.⁴⁸ It is speculated that the law was enacted to address homelessness and the shortage of low-income housing.⁴⁹ The Federal and Delaware Fair Housing Acts apply to most residential rental properties. There are exceptions for religious organizations and owner-occupied residential rentals with less than three other families living in

42. *Id.*

43. See *Differences Between Federal & State Fair Housing Laws*, GLENDALE CAL., <http://www.glendaleca.gov/government/departments/community-development/housing/fair-housing/differences-between-federal-state-fair-housing-laws> (last visited Aug. 13, 2017).

44. DEL. CODE ANN. tit. 6, § 4601 (2017).

45. *Quaker Hill Place v. Saville*, 523 A.2d 947, 954 (Del. Super. Ct. 1987).

46. *Id.* ("[T]he Delaware statute seeks only to eliminate certain inequities imposed upon the handicapped and other classes of individuals.").

47. tit. 6, § 4601. DHFA includes the following protected classes: race, color, national origin, religion, creed, sex, marital status, familial status, source of income, age, sexual orientation or disability. *Id.*; see *Fair Housing Law*, *supra* note 31.

48. tit. 6, § 4601.

49. See *infra* Section II.A.3.

the property.⁵⁰ Nearly all residential rental properties in Delaware must abide by DFHA.

There are two interesting provisions that were added to the DFHA when it added source of income as a protected class:

(h) The prohibitions in this chapter against discrimination based on source of income shall not limit the ability of any person to consider the sufficiency or sustainability of income, or the credit rating of a renter or buyer, so long as sufficiency or sustainability of income, and the credit requirements, are applied in a commercially reasonable manner and without regard to source of income.

....

(j) A landlord is not required to participate in any government-sponsored rental assistance program, voucher, or certificate system. A landlord's nonparticipation in any government-sponsored rental assistance program, voucher, or certificate system may not serve as the basis for any administrative or judicial proceeding under this chapter.⁵¹

Under section 4607(h), a landlord may consider whether the funding source will likely continue through the lease term.⁵² For example, if an applicant receives money through a private organization and the organization will not guarantee that the payments will continue for the lease term, the landlord retains the right to deny that applicant.⁵³ This is permissible as long as the landlord does not base the decision on the origin of the funds.⁵⁴

50. tit. 6, § 4607.

51. *Id.*

52. *Id.*

53. See Nat'l Hous. Law Project, *Courts Consider Landlord Defenses to Source of Income Laws*, HOUSING L. BULL. 239, 239 (2008), http://nhlp.org/files/03%20NHLP_Bull_NovDec08_source%20of%20income%20defense.pdf.

54. See generally *id.* (explaining that many courts require proof of a legitimate reason for a

While landlords are required to consider a housing voucher as a source of income,⁵⁵ under section 4607(j), they are not required to enroll in the housing voucher program.⁵⁶ This creates a paradox because the government will only provide vouchers to participating landlords.⁵⁷

1. *The development and push for the source of income protected class*

Like DFHA, every fair housing law includes a list of specific protected classes. While each class is different, most classes were formed in response to the unfair treatment that individuals were receiving solely based on a characteristic that they could not change.⁵⁸ The first protected class created was race or color, which stemmed from the civil rights movement.⁵⁹ The Fourteenth Amendment and early laws focused on ensuring that individuals were treated equally and afforded the same rights regardless of race or color.⁶⁰

The other protected classes were added as the nation became concerned with injustices toward people because of those certain qualities. For example, sex was added to the Federal Fair Housing Act after Tennessee Senator Bill Brock put forth an amendment stating it was unfair to claim “that men could perform these [homeownership] tasks while women could not.”⁶¹ This amendment prohibited the unfair treatment of women based solely on their gender. Furthermore, disability was added in response to the “use of stereotypes and ignorance” to exclude

landlord to deny an applicant, beyond the applicant’s use of government assistance vouchers).

55. tit. 6, § 4602(25).

56. tit. 6, § 4607(j).

57. See *What is Affordable Housing?*, DEL. ST. HOUSING AUTHORITY, <http://www.destatehousing.com/Renters/renters.php> (last visited Aug. 9, 2017) (“Th[is] program . . . offers housing subsidies to eligible low-income individuals and families to rent existing, privately-owned dwelling units from participating landlords.”).

58. See *supra* Section I.A.

59. See *supra* Section I.A.

60. See *supra* Section I.A.

61. See *40 Years Ago*, *supra* note 39.

people with disabilities from housing when they were otherwise qualified.⁶²

As evidenced by the evolution of the Federal Fair Housing Act, there has been an ongoing concern for protecting groups of people based on immutable or deep-seated characteristics.⁶³ Now certain groups are looking to protect people based on social inequalities, such as wealth distribution.⁶⁴ This has formed the beginning of the source of income discrimination laws.

2. Sources of income commonly discussed

In the residential rental industry, source of income discrimination occurs when a landlord refuses to rent to an applicant *solely* because of the source of that applicant's income.⁶⁵ The Delaware Fair Housing Act defines source of income as "any lawful source of money paid directly, indirectly, or on behalf of a renter or buyer of housing."⁶⁶ These sources include income that comes from "any lawful profession or occupation," and "[i]ncome or rental payments derived from any government or private assistance, grant, or loan program."⁶⁷ Common examples of sources of income are wages from an employer, self-employment or independent contractor payments, unemployment insurance payments, social security income based on age or disability, supplemental security income, alimony, military

62. *Federal Housing Programs: The Mandate to "Affirmatively Further Fair Housing,"* LEADERSHIP CONF., <http://www.civilrights.org/publications/reports/fairhousing/affirmatively.html> (last visited July 25, 2017) ("For most of our nation's history, persons with disabilities were viewed as unfit, dangerous, and a detriment to 'normal' society.").

63. While religion is not immutable and some argue sexual orientation is not biological, these characteristics are strongly grounded within the individual and are not necessarily easily changed.

64. See A U.S. Catholic Interview, *Why the Wealth Gap is Bad for Everyone*, U.S. CATH. (July 25, 2013), <http://www.uscatholic.org/articles/201306/economics-inequality-why-wealth-gap-bad-everyone-27421>.

65. See Kinara Flagg, *Mending the Safety Net Through Source of Income Protections: The Nexus Between Antidiscrimination and Social Welfare Law*, 20 COLUM. J. GENDER & L. 201, 204 (2011).

66. DEL. CODE ANN. tit. 6, § 4602 (2017); see POLICY COMM. ON ENDING HOMELESSNESS IN DEL., ENDING DISCRIMINATION FOR DELAWARE'S HOMELESS 14 (Mar. 2013), <https://www.aclu-de.org/wp-content/uploads/2013/03/Ending-Discrimination-for-Delawares-Homeless1.pdf>.

67. tit. 6, § 4602(25)(b).

payments, pensions, and housing vouchers.⁶⁸ While the public is generally familiar with the typical employer-employee style income, most people are not as familiar with the various government support programs, military benefits, and other non-traditional income sources.

Most discrimination allegations based on source of income tend to involve applicants who are receiving government benefits aside from social security retirement benefits.⁶⁹ For this reason, it is important to understand the details of each program, including how individuals qualify, which programs may be combined, the amount of money that can be awarded, the length of the award, and the potential abuses of each program.

a. Supplemental security income

Supplemental security income is commonly referred to as SSI.⁷⁰ Because it is administered by the Social Security Administration, it is frequently confused with the social security retirement program for older adults. SSI is very different; it is not based on retirement needs. SSI provides federal funds to those who are over sixty-five years old, are blind or disabled, and have limited incomes.⁷¹ SSI is available to both United States citizens and non-citizens.⁷² Recipients are required to have limited to no income and little to no assets.⁷³ The disability qualifications are broad and extend to physical and mental disorders.⁷⁴ For adults, the individual must have difficulties with doing a “substantial gainful activity.”⁷⁵ In other words, if the adult is

68. See POLICY COMM. ON ENDING HOMELESSNESS IN DEL., *supra* note 66, at 13-14, 22.

69. See *id.* at 14.

70. *What is Supplemental Security Income?*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/> (last visited Aug. 13, 2017).

71. *Understanding Supplemental Security Income (SSI) Eligibility Requirements*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/text-eligibility-ussi.htm> (last visited Aug. 13, 2017).

72. *Id.*; see also *Who is a Qualified Alien?*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/text-eligibility-ussi.htm#qualified-alien> (last visited Aug. 13, 2017).

73. *Understanding Supplemental Security Income (SSI) Eligibility Requirements*, *supra* note 71.

74. *Id.*

75. *Understanding Supplemental Security Income If You Are Disabled or Blind*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/text-disable-ussi.htm#sgact> (last visited Aug. 13, 2017). This does not apply to blind individuals. *Id.*

unable to make more than \$1170 per month due to his impairment, the administration generally finds the individual will meet this qualification.⁷⁶ While a child will receive an average monthly payment of \$639.76, an adult who qualifies based on age only receives \$438.57 per month.⁷⁷ A disabled or blind adult between eighteen and sixty-four years old on SSI, however, receives an average payment of \$561.11 per month.⁷⁸ This means a household with two children, both of whom have a behavioral disorder or a learning disability, could receive a supplemental income of over \$1700 per month. Likewise, an adult who qualifies for SSI with a qualified child would receive over \$1000 per month.⁷⁹ The amounts are adjusted if the recipient makes income that meets a complex series of criteria.⁸⁰

Over 1.2 million children are receiving monthly SSI payments. Nationally, there are 8,269,186 people receiving SSI.⁸¹ This is roughly 2.5% of the total population.⁸² As of December 2015, there were 16,880 Delawareans receiving SSI. This is roughly 1.8% of the Delaware population.⁸³ Nearly 30% of those recipients received other benefits in addition to SSI that were administered by the Social Security Administration.⁸⁴

76. *Id.* (explaining that substantial gainful activity is any amount exceeding \$1170 as of January 2017).

77. SOC. SEC. ADMIN., SSI MONTHLY STATISTICS, MAY 2017, TABLE 7 (2017) https://www.ssa.gov/policy/docs/statcomps/ssi_monthly/2017-05/table07.pdf.

78. SOC. SEC. ADMIN., SSI MONTHLY STATISTICS, MAY 2017, TABLE 1 (2017) [hereinafter TABLE 1], https://www.ssa.gov/policy/docs/statcomps/ssi_monthly/2017-05/table01.pdf.

79. The author recently encountered an applicant and child who combined made approximately \$2000 per month between SSI and social security disability payments.

80. See *Understanding Supplemental Security Income (SSI) Eligibility Requirements*, *supra* note 71.

81. TABLE 1, *supra* note 78.

82. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/> (last visited Dec. 2, 2017) (indicating the U.S. population is 326,368,962 people as of December 2, 2017).

83. See *Quick Facts Delaware*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/10> (last visited Dec. 2, 2017) (explaining that Delaware had a population of 952,065 as of July 1, 2016).

84. *SSI Recipients by State and County 2015*, SOC. SEC. ADMIN., https://www.ssa.gov/policy/docs/statcomps/ssi_sc/2015/de.html (last visited Aug. 13, 2017) (explaining that 4942 people in Delaware received SSI and other OASDI benefits).

b. Social security retirement income and disability income

In addition to SSI, the Social Security Administration offers benefits programs for a wide variety of reasons. The most widely known program is for retirement benefits, or social security. Individuals pay into the national system through their wages and then can apply for full retirement benefits once they are at least sixty-seven years old.⁸⁵ There is a credit system to qualify, which requires an individual to accumulate forty credits.⁸⁶ An individual can “earn one credit for each \$1300 in earnings – up to a maximum of four credits a year.”⁸⁷ The monthly benefits amount replaces approximately 40% of the taxpayer’s income.⁸⁸ Social security for retirement is not limited to the person who earned the household income; surviving widows and unmarried children may also receive benefits.⁸⁹

Another program administered by the Social Security Administration is disability insurance.⁹⁰ This is available to the disabled worker, the disabled worker’s spouse, and their children.⁹¹ To qualify, the worker has to accumulate a certain number of credits, similar to the retirement program.⁹² As of November 2017, there were 10,427,000 people receiving disability insurance with an average monthly benefit of \$1038.73.⁹³

c. Government housing program benefits

In addition to receiving monetary government benefits, many low-income families also qualify for governmental housing

85. See SOC. SEC. ADMIN., UNDERSTANDING THE BENEFITS 7-8 (2017), <https://www.ssa.gov/pubs/EN-05-10024.pdf>. The retirement age of sixty-seven years old is for individuals born after 1960. *Id.*

86. *Id.* at 6.

87. *Id.*

88. *Id.* at 1.

89. *Id.* at 12.

90. See *Benefits for People with Disabilities*, SOC. SEC. ADMIN., <https://www.ssa.gov/disability/> (last visited Oct. 4, 2017).

91. See *id.*

92. See *Disability Planner: How Much Work Do You Need?*, SOC. SEC. ADMIN., <https://www.ssa.gov/planners/disability/dqualify2.html> (last visited Oct. 4, 2017).

93. See *Research, Statistics, & Policy Analysis*, SOC. SEC. ADMIN., https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/#table2 (last visited Dec. 5, 2017).

benefits.⁹⁴ Housing vouchers or housing subsidies are provided to disabled or low-income individuals or families.⁹⁵ These vouchers have a face value that is paid directly to the landlord on the recipient's behalf.⁹⁶ The most common program is the Federal Housing Choice Voucher Program, which is also referred to as Section 8.⁹⁷ Local public housing agencies receive federal funding to administer the federal program in their local area.⁹⁸ The program "assist[s] very low-income families, the elderly, and the disabled to afford decent, safe, and sanitary housing in the private market."⁹⁹ An individual who qualifies for the program receives a voucher that can be used for any housing that has been approved by the agency.¹⁰⁰ The voucher is a promise from the government to pay a set amount of the rent based on the individual's situation.¹⁰¹ This means the recipient is not limited to government housing, like "subsidized housing projects," or limited to select neighborhoods, such as poorer urban sections.¹⁰² However, the landlord has to agree to the program and be willing to comply with the rules.¹⁰³

94. SARA EDELSTEIN, MICHAEL R. PERGAMIT & CAROLINE RATCLIFFE, CHARACTERISTICS OF FAMILIES RECEIVING MULTIPLE PUBLIC BENEFITS 2 (Urban Institute 2014), <http://www.urban.org/sites/default/files/publication/22366/413044-Characteristics-of-Families-Receiving-Multiple-Public-Benefits.PDF> ("[M]ultiple benefit receipt is common among low-income families with children, with 56 percent of families receiving two or more benefits."). The numbers of families that receive one, two, and three benefits are somewhat similar: 21% receive one benefit, 20% receive two benefits, and 16% receive three benefits. Another 20% of low-income families receive four or more benefits. *Id.* at 4; see also Merrill Matthews, *We've Crossed the Tipping Point; Most Americans Now Receive Government Benefits*, FORBES (July 2, 2014), <https://www.forbes.com/sites/merrillmatthews/2014/07/02/weve-crossed-the-tipping-point-most-americans-now-receive-government-benefits/#1f5a0f523e6c>.

95. John M. Lerner, *Private Rights Under the Housing Act: Preserving Rental Assistance for Section 8 Tenants*, 34 B.C. J.L. & SOC. JUST. 41, 42 (2014).

96. See *id.* at 48.

97. NAT'L COMM'N ON FAIR HOUS. & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING 62 (2008), http://www.prrac.org/projects/fair_housing_commission/The_Future_of_Fair_Housing.pdf.

98. *Housing Choice Vouchers Fact Sheet*, U.S. DEP'T HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housingprograms/hcv/about/fact_sheet (last visited Oct. 4, 2017); Lerner, *supra* note 95, at 48.

99. *Housing Choice Vouchers Fact Sheet*, *supra* note 98.

100. *Id.*; Lerner, *supra* note 95, at 48.

101. *Housing Choice Vouchers Fact Sheet*, *supra* note 98.

102. *Id.*

103. See *id.*

Qualifications for recipients and landlords are set forth by the local public housing agency. In Delaware, two agencies split the responsibilities for the three counties.¹⁰⁴ Delaware State Housing Authority is in charge of Kent and Sussex counties.¹⁰⁵ New Castle County is serviced by the New Castle County Community Development and Housing Division.¹⁰⁶

A resident of Kent or Sussex County can qualify for a housing voucher if he enrolls in the Moving to Work program, agrees to pay 30% to 35% of his income for rent and utilities, and has a household income equal or below 80% of the median area income.¹⁰⁷ The Moving to Work program spans seven years and was designed to help individuals to support themselves by providing education and employment resources.¹⁰⁸ The program stipulates that, in order to incentivize individuals to work, "rent is capped at a maximum of 35% of [their] monthly adjusted income or \$120, whichever is greater."¹⁰⁹ If the rent is higher than \$350, the cap is raised to \$350.¹¹⁰ "As the [individual's] income increases, it is required that the percentage of the additional income, which formerly would have been paid in rent, be placed in a savings account."¹¹¹ After five years, the individual will transition out of the housing voucher program if his income is at least 40% of the fair market value rent and he will receive a prorated portion of the amount in the savings account.¹¹² If his income is still below 40%, however, the individual has the option to continue in the program for two additional years.¹¹³ If needed, the individual can apply for an extension at

104. *Mission*, NEW CASTLE COUNTY, <http://www.nccde.org/456/Community-Development-Housing> (last visited Oct. 4, 2017); *See Section 8 Housing Choice Vouchers – Kent/Sussex Counties*, DEL. ST. HOUSING AUTHORITY, http://www.destatehousing.com/Renters/rt_s8hcv.php (last visited Oct. 4, 2017).

105. *Section 8 Housing Vouchers – Kent/Sussex Counties*, *supra* note 104.

106. *Mission*, *supra* note 104.

107. *Section 8 Housing Choice Vouchers – Kent/Sussex Counties*, *supra* note 104.

108. *Moving to Work (MTW)*, DEL. ST. HOUSING AUTHORITY, http://www.destatehousing.com/Renters/rt_mtw.php (last visited Oct. 4, 2017).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

the end of the program.¹¹⁴ Delaware State Housing Authority only distributes 902 vouchers.¹¹⁵ There is currently a waiting list comprised of Delaware residents seeking housing assistance.¹¹⁶

Delawareans residing in New Castle County can qualify for Section 8 vouchers based on their income and household size. The household income must fall at or below the “very low income” level.¹¹⁷ In 2016, a household consisting of four individuals had to have a household income at or below \$40,150 whereas a single individual could make up to \$28,150 per year.¹¹⁸ There are ways, however, for households at higher income levels to qualify.¹¹⁹ The federal government mandates that local public housing agencies must provide at least 75% of its allotted vouchers to households that are at the “extremely low income” level.¹²⁰ This equates to a household income of 30% or less of the median income for the specified area.¹²¹ The “extremely low income” limits for New Castle County in 2016 were \$24,300 for a family of four and \$16,900 for an individual.¹²² The qualification guidelines for New County residents are neither easy to access nor understand.

While New Castle County does not disclose how many vouchers have been distributed, it currently has closed the waiting list for new recipients without an anticipated open date.¹²³ Recipients may stay on the program indefinitely as long as they re-qualify based on lack of income each year.¹²⁴ The number of

114. *Id.*

115. *Section 8 Housing Choice Vouchers—Kent/Sussex Counties*, *supra* note 104.

116. Telephone Interview with Delaware State Housing Authority Waiting List Office (Sept. 5, 2017). The waiting list is eighteen to sixty months. *Id.*

117. ADMINISTRATIVE PLAN FOR THE HOUSING VOUCHER PROGRAM 3–10 (Nan McKay & Associates, Inc. 2010), <http://www.nccde.org/DocumentCenter/View/1469>.

118. *Section 8 Income Limits FY 2016*, HUDUSER.GOV 29, <https://www.huduser.gov/portal/datasets/il/il16/Section8-IncomeLimits-FY16.pdf> (last visited Oct. 4, 2017).

119. ADMINISTRATIVE PLAN FOR THE HOUSING VOUCHER PROGRAM, *supra* note 117.

120. *See Housing Choice Vouchers Fact Sheet*, *supra* note 98.

121. *Id.*

122. *Section 8 Income Limits FY 2016*, *supra* note 118 (stating that median income is \$80,300 for Philadelphia-Camden-Wilmington).

123. Telephone Interview with Matthew Alexander, New Castle County (Sept. 5, 2017). The author previously verified the waiting list was closed without an anticipated opening date and other program details by calling the same number on Dec. 28, 2016.

124. *Id.*

vouchers is determined by the budget and the waiting list is opened when more vouchers are issued.¹²⁵ It is not limited by the number of participating properties.¹²⁶ In 2012, the U.S. Department of Housing and Urban Development (HUD) issued 4553 housing vouchers throughout Delaware.¹²⁷

Because the housing voucher program is not limited to public housing, any landlord may voluntarily enroll in the program.¹²⁸ He must agree to abide by the agency's rules and certain lease provisions and the property must conform to the specified physical standards.¹²⁹ Some property requirements are minor and seem unnecessary while others target safety concerns.¹³⁰ These requirements include door handles facing a certain way, anti-tipping devices on stoves, weather stripping, clean carpets, screens installed in each window, bi-fold doors properly on tracks, and an address displayed on the unit.¹³¹

The benefits of the housing voucher program for the landlord include "guaranteed rent" at a typically higher rate than what the property would rent for in the conventional market and less vacancy loss between tenants since there is a high demand for properties.¹³² The program states the landlord may only charge the market rent for the property and the agency claims to con-

125. *Id.*

126. *Id.*

127. See POLICY COMM. ON ENDING HOMELESSNESS IN DEL., *supra* note 66.

128. *Prospective Housing Choice Voucher (HCV) Landlords*, DEL. ST. HOUSING AUTHORITY, http://www.destatehousing.com/Landlords/ot_landlords.php (last visited Oct. 8, 2017); see *Landlord Information*, NEW CASTLE COUNTY, <http://www.nccde.org/472/Landlord-Information> (last visited Oct. 8, 2017).

129. See *id.*

130. See *Prospective Housing Choice Voucher (HCV) Landlords*, *supra* note 128; *Housing Quality Standards*, HOUSING AUTHORITY COUNTY STANISLAUS, <http://www.stancoha.org/programs/housing-choice-voucher/housing-quality-standards/> (last visited Oct. 8, 2017).

131. NEW CASTLE COUNTY SEC. 8 HOUSING CHOICE VOUCHER NEWSL. (Dep't of Cmty. Servs., New Castle Cty., Del.), Spring 2013, at 1, 1-2, <http://www.nccde.org/ArchiveCenter/ViewFile/Item/1016>; *Prospective Housing Choice Voucher (HCV) Landlords*, *supra* note 128; *Housing Quality Standards*, *supra* note 130.

132. See Q: *Are There Tax Incentives for Providing Section 8 Housing?*, ALL PROP. MGMT. (Aug. 20, 2014), <http://www.allpropertymanagement.com/ask-a-pro/are-there-tax-incentives-for-providing-section-8-housing>.

duct market surveys to ensure landlords are not overcharging.¹³³ The landlord may use the rent amount guidelines set forth by HUD and the local agencies to determine the rent.¹³⁴ However, the vouchers are only good for a specific amount and are meant to also pay for the tenant's utilities.¹³⁵ New Castle County Community Development offers a series of utilities sheets that specify what the average utility allowances should be for the property.¹³⁶

d. Alimony and child support

Aside from these government programs, alimony and child support are two other common sources of income. Both forms may be arranged between the parties informally or ordered through the court.¹³⁷ Informal arrangements may be harder to enforce depending on whether there was a contract between the parties and the amounts and duration may vary greatly.¹³⁸ While alimony may be for a few months or until death, child support typically ends when a child turns eighteen years old unless he is in college. For this reason, some landlords may choose to consider whether to discontinue this income source during the lease term, similar to how they may treat a short-

133. Telephone Interview with Matthew Alexander, *supra* note 123; see Krista Sterken, Note, *A Different Type of Housing Crisis: Allocating Costs Fairly and Encouraging Landlord Participation in Section 8*, 43 COLUM. J.L. & SOC. PROBS. 215, 220 (2009) (stating housing can be up to 110% of the fair market value).

134. See *Montgomery Cty. v. Glenmont Hills*, 936 A.2d 325, 329 (Md. 2007).

135. See *Housing Choice Vouchers Fact Sheet*, *supra* note 98.

136. *Landlord Information*, *supra* note 128.

137. See generally *Spousal Support (Alimony) Basics*, FINDLAW, <http://family.findlaw.com/divorce/spousal-support-alimony-basics.html> (last visited Oct. 8, 2017) (showing that the court may award alimony or child support to one of the former spouses, based either on an agreement between the couple or a decision by the court itself); Joseph Pandolfi, *Enforcing Alimony Payments Post-Divorce*, LAWYERS.COM, <http://family-law.lawyers.com/divorce/enforcing-alimony-payments-post-divorce.html> (last visited Oct. 8, 2017) (demonstrating that one ex-spouse may negotiate an agreement with the other ex-spouse or seek a court order to enforce the judgment of alimony).

138. See generally *Spousal Support (Alimony) Basics*, *supra* note 137 (showing that courts have broad discretion in determining (1) whether to award alimony and (2) the amount and duration of payments); Matt Allen, *Why You Must Avoid Informal Child Support Agreements*, MEN'S RTS., <http://mensrights.com/why-you-must-avoid-informal-child-support-agreements> (last visited Oct. 8, 2017) (showing that modifying a child support order without filing said agreement with the court does not modify both parties' actual legal child support duties).

term employment contract.

3. *Proponents for source of income discrimination laws*

The concerns of proponents for source of income discrimination laws extend beyond treating people the same regardless of their color, race, sex, or other characteristics as set forth in the Fourteenth Amendment.¹³⁹ Activist groups are fighting to force wealth class integration in a number of ways.¹⁴⁰ These groups are lobbying for legislation to require a certain number of housing units in high-end neighborhoods and communities (also called “higher opportunity areas”) be designated for low-income families at very low rental rates.¹⁴¹ They are also pushing to add source of income as a protected class to fair housing laws in every jurisdiction.¹⁴² These source of income laws force landlords to consider all forms of income when qualifying a new tenant, thus reducing his ability to choose a tenant based on relevant qualifications.

Sometimes these proponents will look for any potential disparate impact to tie their cause to an already protected class.¹⁴³

139. Sterken, *supra* note 133, at 217–19.

140. See generally *Federal Housing Programs: The Mandate to “Affirmatively Further Fair Housing,” supra* note 62 (stating that one example of a proposed program is to designate “funds for up to 50,000 new geographically targeted vouchers each year that could only be used in low poverty communities with high quality schools and employment opportunities,” with the only eligible families being those in “segregated, high poverty neighborhoods”).

141. See Susan Jones, *HUD Mandates “Affordable Housing” in Affluent Baltimore Suburbs*, CNSNEWS.COM (Mar. 25, 2016), <http://www.cnsnews.com/news/article/susan-jones/hud-mandates-affordable-housing-affluent-baltimore-suburbs>; see also Barbara Sard & Douglas Rice, *Realizing the Housing Voucher Program’s Potential to Enable Families to Move to Better Neighborhoods*, CTR. ON BUDGET & POL’Y PRIORITIES, <http://www.cbpp.org/research/housing/realizing-the-housing-voucher-programs-potential-to-enable-families-to-move-to> (last visited Sept. 24, 2017); *National Housing Trust Fund 2016 Allocation Plan*, DEL. ST. HOUSING AUTHORITY, http://nlihc.org/sites/default/files/nhtf/de/2016_DE_national_housing_trust_fund_plan.pdf (last visited Sept. 24, 2017).

142. See *Protection from Discrimination for Low-Income Renters*, CORP. FOR ENTER. DEV., <http://scorecard.prosperitynow.org/2016/measure/protection-from-discrimination-for-low-income-renters> (last visited Sept. 24, 2017). Sources include National Housing Law Project, Poverty & Race Research Action Council, and Equal Rights Center. *Id.*

143. POLICY COMM. ON ENDING HOMELESSNESS IN DEL., *supra* note 66; Austin K. Hampton, *Vouchers As Veils*, 1 U. CHI. LEG. F. 503, 508 (2009) (“[V]oucher holders may be more susceptible to discrimination due to the voluntary nature of the HCV program coupled with the fact that most voucher holders are racial minorities.”).

These groups rely on statistics showing that the majority of individuals receiving government benefits are members of protected classes¹⁴⁴ to establish that source of income discrimination is a form of both discrimination and disparate impact; thus, it must be protected.¹⁴⁵ For instance, people have become more concerned with income disparities between races,¹⁴⁶ and how it leads to the resulting physical separation of the races, also known as “residential segregation.”¹⁴⁷ The argument is that, even if the rental applications of individuals of different races are held to the same standards, minority applicants continue to be treated unfairly because historically they have had lower incomes and were subject to other disadvantages, such as higher crime neighborhoods and lower quality education.¹⁴⁸ These disadvantages result in minorities living in predominately non-white neighborhoods that do not have the same amenities as white neighborhoods.¹⁴⁹ The amenities include nicer neighboring homes, good quality schools, social networks, and a sense of pride.¹⁵⁰

Proponents of source of income discrimination laws also express concern over poorer families being disadvantaged by not being able to afford housing near the jobs they apply for because the jobs are located in a high-cost area.¹⁵¹ This is especially

144. Flagg, *supra* note 65, at 206 (“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 households, families with children, and members of racial minority groups.”).

145. See ANDRES SOTO & DEIDRE SWESNIK, AM. CONSTITUTION SOC’Y, *THE PROMISE OF THE FAIR HOUSING ACT AND THE ROLE OF FAIR HOUSING ORGANIZATIONS* 19 (2012), https://www.acslaw.org/sites/default/files/Soto_and_Swesnik_-_Promise_of_the_Fair_Housing_Act.pdf.

146. See John Yinger, *Housing Discrimination and Residential Segregation as Causes of Poverty*, 21 FOCUS 52, 52 (2000), <http://www.irp.wisc.edu/publications/focus/pdfs/foc212.pdf> (discussing income disparity and discrimination).

147. *Id.* at 53.

148. *Id.*

149. *Id.* at 53–54; see also *Federal Housing Programs: The Mandate to “Affirmatively Further Fair Housing,” supra* note 62.

150. See Yinger, *supra* note 146, at 53–54; see also Sterken, *supra* note 133, at 218 (“Poor families enjoy educational, social, and economic benefits from being housed within more affluent communities . . .”).

151. See Yinger, *supra* note 146.

true when a low-skill job relocates to an established suburban area outside of a major city.¹⁵² The poorer individual cannot afford to move into the wealthier area and may not have affordable transportation to the job.¹⁵³

Additionally, proponents argue that protecting source of income is essential in order to bridge the gap between wages and the price of residential rental housing.¹⁵⁴ As the market demand for desirable housing increases, it drives up the rental rate, making housing unaffordable for poorer people. This argument targets housing vouchers more so than any other source of income. If the government offers high-value vouchers, desirable housing is suddenly accessible to people living in less desirable communities.¹⁵⁵ Proponents also argue source of income discrimination laws are necessary to end “environmental racism,” which occurs when an employer decides not to hire an individual because she or he lives in an area society views negatively.¹⁵⁶

Delaware’s source of income law was motivated by issues surrounding the availability of low-income housing. Beginning around 2013, the Delaware State Housing Authority and the Homeless Planning Council of Delaware proposed adding source of income as a protected class to address the shortage of low-income housing.¹⁵⁷ A five-year projection study performed for the low-income housing tax credit program for 2008 through 2012 found that nearly 17,000 of Delaware’s assisted rental units were substandard or required rehabilitation.¹⁵⁸ Additionally, the study revealed 24,901 households in need of affordable housing and/or currently on a housing program waiting list.¹⁵⁹

152. *Id.*

153. *Id.*

154. Brief for Md. Disability Law Ctr. et. al. as Amici Curiae Supporting Appellants at *11, *Montgomery Cty. v. Glenmont Hills*, 936 A.2d 325 (Md. 2007) (No. 20, Sept. Term, 2007).

155. See *Federal Housing Programs: The Mandate to “Affirmatively Further Fair Housing,” supra* note 62.

156. Sterken, *supra* note 133, at 218–19.

157. See POLICY COMM. ON ENDING HOMELESSNESS IN DEL., *supra* note 66, at 20–21.

158. DEL. STATE HOUS. AUTH., STATE OF DELAWARE 2010 LOW INCOME HOUSING TAX CREDITS QUALIFIED ALLOCATION PLAN 10 (2010), https://www.novoco.com/sites/default/files/atoms/files/delaware_final_10.pdf.

159. *Id.*

The study estimated approximately 33.8% of the statewide rent-subsidized units could convert to market-rate units by the end of 2012.¹⁶⁰ Interestingly, during the same time period, Delaware had an average vacancy among market-rate rental units of 10%.¹⁶¹

4. *Opposition to source of income discrimination laws*

There are several arguments against source of income discrimination laws. Some opponents to source of income discrimination laws argue that these laws are enacted to address the shortage of low-income housing by forcing all landlords to accept housing vouchers.¹⁶² In 2001, HUD released a nationwide report showing that around one-third of issued housing vouchers remain unused each year.¹⁶³ This supports the argument that these discrimination laws are targeted to protect individuals receiving housing vouchers and not those receiving other types of government benefits, alimony, child support, pensions, or other nontraditional forms of income not necessarily associated with low-income programs. The Delaware State Housing Authority and the Homeless Planning Council of Delaware indicated that the motivation behind their proposed amendment to the DFHA was in large part due to the shortage of housing for homeless people and voucher recipients.¹⁶⁴

Furthermore, some opponents argue that forcing a landlord to take housing vouchers and enroll in the housing voucher program is unconstitutional.¹⁶⁵ This argument is rooted in the language of the federal housing voucher program, under which

160. *Id.*

161. *Delaware Residential Rent and Rental Statistics*, DEP'T NUMBERS, <http://www.deptofnumbers.com/rent/delaware/> (last visited Sept. 24, 2017).

162. *Fair Housing: Source of Income Discrimination Fact Sheet*, NAT'L MULTIFAMILY HOUSING COUNCIL, <http://www.nmhc.org/Advocacy/Fair-Housing--Source-of-Income-Discrimination-Fact-Sheet/> (last visited Aug. 13, 2017).

163. Flagg, *supra* note 65, at 205. Unused vouchers were attributed to a shortage of available housing because landlords refused to accept housing vouchers. *Id.*

164. See POLICY COMM. ON ENDING HOMELESSNESS IN DEL., *supra* note 66, at 12-14.

165. See *Bourbeau v. Jonathan Woodner Co.*, 549 F. Supp. 2d 78, 88 (D.D.C. 2008); Sterken, *supra* note 133, at 224.

state programs are organized.¹⁶⁶ Congress intended the federal housing voucher program to be a voluntary program; therefore, under the Supremacy Clause, states should not be able to force landlords to partake in the program.¹⁶⁷ This, however, is not necessarily the case. Courts have upheld state and local laws by citing to a 1999 HUD amendment to the housing voucher program.¹⁶⁸ The amendment states, “Nothing in [the amendment] is intended to pre-empt operation of State and local laws that prohibit discrimination against a Section 8 voucher-holder because of status as a Section 8 voucher-holder.”¹⁶⁹ This is still a controversial point because courts are treating the laws as merely being more restrictive instead of being preemption issues.¹⁷⁰

With regard to housing vouchers versus other forms of income, landlords oppose the proposed source of income discrimination laws because participation in the housing voucher programs burdens them with additional mandatory administrative duties.¹⁷¹ It is considerably more time-consuming for a landlord participating in a housing voucher program to rent and maintain a participating property than it is for a non-participating landlord, who simply places the tenant and collects the rent without additional paperwork and inspections.¹⁷² These hous-

166. *Bourbeau*, 549 F. Supp. 2d at 88.

167. *See id.* (alteration in original) (“Pursuant to the Supremacy Clause of the United States Constitution, a state law must give way to a federal law under the theory of conflict preemption when ‘compliance with both [the state law and the federal law] is a physical impossibility’”); *Hampton*, *supra* note 143, at 504.

168. *Bourbeau*, 549 F. Supp. 2d at 87; *Montgomery Cty. v. Glenmont Hills*, 936 A.2d 325, 336-37 (Md. 2007).

169. 24 C.F.R. § 982.53(d) (2017).

170. *See* Roger D. Luchs, *The Invisible Mandate: Now You See It, Now You Don’t*, AM. THINKER (May 8, 2011), http://www.americanthinker.com/articles/2011/05/the_invisible_mandate_now_you.html; *see also Bourbeau*, 549 F. Supp. 2d at 87 (“Landlords remain free not to rent to voucher holders provided they do so on other legitimate, non-discriminatory grounds, such as an applicant’s rental history or criminal history.”).

171. *See generally* Armen H. Merjian, *Attempted Nullification: The Administrative Burden Defense in Source of Income Discrimination Cases*, 22 GEO. J. POVERTY L. & POL’Y 211 (2015) (analyzing the defense of administrative burden in source of income discrimination cases); *Sterken*, *supra* note 133, at 224-26.

172. *See Landlord Process*, NEW CASTLE COUNTY HOUSING AUTHORITY, <http://de-newcastle-county.civicplus.com/DocumentCenter/Home/View/1431> (last visited Sept. 24, 2017).

ing programs require routine inspections in addition to the initial and annual paperwork that must be filed with the agency.¹⁷³ The landlord must also wait approximately two months before receiving the first rental payment instead of receiving it before the tenant moves in.¹⁷⁴ A landlord may have difficulty using this argument, however, if he has any properties within his portfolio that are already part of the housing voucher program. Although each participating property presents additional administrative burdens, the landlord has already established the administrative process through his portfolio.¹⁷⁵ Despite the added paperwork and time spent on inspections, the courts view this as a less persuasive argument.¹⁷⁶

5. *Jurisdictional conflicts*

Approximately fourteen states and multiple local jurisdictions have enacted some form of source of income discrimination laws.¹⁷⁷ While the majority of the existing source of income discrimination laws protect all sources of income, California's source of income discrimination law specifically excludes housing vouchers as a source of income.¹⁷⁸ This solution resolves the speculations regarding the underlying purpose of the law and satisfies a landlord's desire not to participate in a housing voucher program.

Some cities have enacted source of income discrimination laws despite their states' decision to include source of income

173. Lerner, *supra* note 95, at 49–50; *Housing Choice Voucher*, HOUSING AUTHORITY COUNTY STANISLAUS, <http://www.stancoha.org/programs/housing-choice-voucher/> (last visited Sept. 24, 2017); see *Prospective Housing Choice Voucher (HCV) Landlords*, *supra* note 128.

174. *Landlord Process*, *supra* note 172.

175. See Sterken, *supra* note 133, at 224–25.

176. See Merjian, *supra* note 171, at 212, 233.

177. See generally POVERTY & RACE RESEARCH ACTION COUNCIL, EXPANDING CHOICE: PRACTICAL STRATEGIES FOR BUILDING A SUCCESSFUL HOUSING MOBILITY PROGRAM (2017) [hereinafter EXPANDING CHOICE], <http://www.prrac.org/pdf/AppendixB.pdf> (listing states and multiple local jurisdictions that have enacted source of income laws).

178. *Do Housing Providers Have to Accept Section 8 or Rental Assistance Payments?*, PROJECT SENTINEL, <http://housing.org/fair-housing/source-of-income-discrimination> (last visited July 29, 2017) (“[M]ost affordable housing properties that are financed with federal funds and tax credits are required by law to accept Section 8 vouchers,” but “[u]nder California state law, Section 8 Housing Vouchers are *not* considered tenant income.”).

as a protected class.¹⁷⁹ This dissonance between city and state laws can cause jurisdictional conflicts. For example, the City of Austin, Texas, implemented a source of income discrimination law in 2014.¹⁸⁰ It was proposed shortly after a study revealed that most voucher holders lived within a few select neighborhoods and that most owners of qualified properties throughout the city did not want to participate in the housing voucher programs.¹⁸¹ A co-director of the Texas Low Income Housing Information Service said, “[L]ocal fair housing laws like source of income protection help low income families, particularly families of color, find decent homes near good schools and good jobs.”¹⁸²

In 2015, however, the State of Texas passed a law prohibiting any local jurisdictions from enacting laws that specifically protect housing voucher holders, nullifying Austin’s law.¹⁸³ Notably, the state law still allowed local source of income discrimination laws to be enacted to protect individuals receiving other government benefits, as well as alimony, child support, and veterans’ program benefits.¹⁸⁴ The state law resolved concerns that source of income laws were a pretext for addressing the low-income housing issues or were linked to various racial discrimination concerns.

179. See generally EXPANDING CHOICE, *supra* note 177 (providing overview of state legislation).

180. *Texas Legislature Bans Local Ordinances Protecting Voucher Holders from Discrimination*, NAT’L LOW INCOME HOUS. COAL. (June 1, 2015), <http://nlihc.org/article/texas-legislature-bans-local-ordinances-protecting-voucher-holders-discrimination>.

181. *Id.*

182. *Id.* This is an example of how proponents of the laws use other protected classes to justify adding source of income to local fair housing acts.

183. *Id.*; see also Andra Lim, *Reactions: Gov. Greg Abbott Signs SB 267 into Law*, STATESMAN (June 23, 2015), <http://cityhall.blog.statesman.com/2015/06/23/reactions-gov-greg-abbott-signs-sb-267-into-law/>.

184. See *Texas Legislature Bans Local Ordinances Protecting Voucher Holders from Discrimination*, *supra* note 180.

C. *The Landlord's Applicant Qualification Process*

Traditionally, a landlord will look at a variety of factors to assess the risk level of renting to a particular tenant.¹⁸⁵ Some factors include credit score or worthiness, previous rental history, employment history, criminal history, and income.¹⁸⁶ Under the Federal and the Delaware Fair Housing Acts, landlords may not deny housing on the basis of a protected class.¹⁸⁷ Whether an individual falls under a protected class should be irrelevant because it is unrelated to the landlord's assessment of whether the rent will be paid and whether the unit will be well kept.

There are legitimate business reasons to consider each factor.¹⁸⁸ By looking at the credit score or payment history on an applicant's opened and closed accounts, a landlord can gauge whether an applicant is likely to pay rent on time.¹⁸⁹ For example, someone who only missed one or two payments and has ten open trade lines has a higher probability of paying rent on time than someone with over ten missed payments on three open trade lines.¹⁹⁰

Similarly, an applicant's previous rental history is a strong predictor of the type of tenant that the applicant will be in the new unit.¹⁹¹ Most landlords limit their inquiries to factual questions such as the amount of the rent, number of times it was late,

185. See Erin Eberlin, *10 Basic Tenant Screening Questions*, BALANCE (Feb. 26, 2017), <https://www.thebalance.com/questions-for-prospective-tenants-2124996>; Ron Leshnowar, *Do I Have to Accept Applicants in the Order They Applied?*, LANDLORDOLOGY, <https://www.landlordology.com/order-of-applicants/> (last updated Mar. 4, 2015) [hereinafter Leshnowar, *Accepting Tenants in Order*]; Janet Portman, *Choosing Tenants: Avoid Fair Housing Complaints and Lawsuits*, NOLO, <https://www.nolo.com/legal-encyclopedia/choosing-tenants-avoid-fair-housing-29816.html> (last visited July 29, 2017).

186. See Eberlin, *supra* note 185.

187. 42 U.S.C. § 3604 (2016); DEL. CODE ANN. tit. 6, § 4601 (2017).

188. See Gerchick, *supra* note 4, at 786.

189. See *id.* at 787.

190. See generally TRANSUNION, TRANSUNION CREDIT REPORT USER GUIDE (2011), <https://www.transunion.com/resources/transunion/doc/compliance-and-legislative-updates/HowToReadCreditReport.pdf> (explaining how to interpret a credit report). A trade line is a "credit-related item that is provided by a financial institution or lender." *Trade Line*, INVESTOPEDIA, <http://www.investopedia.com/terms/t/trade-line.asp> (last visited Aug. 17, 2017).

191. See Gerchick, *supra* note 4, at 787-89 (explaining how a landlord should screen potential tenants to avoid the eviction process).

number of insufficient payments, and whether there were lease violations or damages to the leased unit.¹⁹² Some landlords will ask whether the previous landlord would rent to the applicant again.¹⁹³ This practice, however, is becoming less common amongst professional property management companies and investors because of its subjective nature.¹⁹⁴

The motivations behind conducting a criminal background check may vary.¹⁹⁵ While most landlords conduct the check, it is not always a heavily weighted factor.¹⁹⁶ A landlord may be more lenient toward older or petty offenses but have a strict prohibition against sex-based offenses or violent felonies.¹⁹⁷ As long as the landlord is consistent with his application of the criteria, the consideration of an applicant's criminal background tends not to raise many fair housing issues.¹⁹⁸

Lastly, the basis for the amount of income qualification is to ensure the individual will be able to pay the rent.¹⁹⁹ Because proof of current income ties directly into a tenant's ability to pay, which translates into the landlord's business income, there

192. See *Top 10 Reference Questions to Avoid Bad Tenants*, PENDO, <http://pen.do/blog/avoid-bad-tenants-top-10-reference-questions/> (last visited July 30, 2017); see also Jennifer Chan, *5 Questions to Ask During a Landlord Reference Check*, ZILLOW, <https://www.zillow.com/rental-manager/resources/questions-ask-landlord-reference/> (last visited July 30, 2017).

193. *Landlord Basics: Checking Tenant References*, ANDREW-SCHULTZ (Mar. 30, 2009), <http://andrew-schultz.com/real-estate/landlord-basics/landlord-basics-checking-tenant-references/357>.

194. See generally Gerchick, *supra* note 4, at 789 (explaining why landlords may provide false information). Over the last ten or more years, the author has noticed a dramatic decrease in the number of large professional property management companies that are willing to answer subjective questions regarding whether they would re-rent to a tenant for litigious reasons.

195. See Shelley Ross Saxer, "Am I My Brother's Keeper?": *Requiring Landowner Disclosure of the Presence of Sex Offenders and Other Criminal Activity*, 80 NEB. L. REV. 522, 567 (2001) (stating landlord can be held liable for criminal activity if it is foreseeable).

196. See David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 LAW & SOC. INQUIRY 5, 14, 25 (2008) (explaining landlords frequently perform criminal checks on tenants to avoid potential liability of any foreseeable violent crimes).

197. *Id.*

198. See Ron Leshnow, *Act Consistently to Avoid Fair Housing Problems*, NOLO, <http://www.nolo.com/legal-encyclopedia/act-consistently-avoid-fair-housing-problems.html> (last visited July 30, 2017) ("Landlords who act consistently when it comes to adopting and enforcing rules have the lowest risk of fair housing violations."); see also Leshnow, *Accepting Tenants in Order*, *supra* note 185 ("Consistency is one of the best strategies a smart landlord can follow when it comes to a fair housing compliance.").

199. See *supra* Section I.B.2; see also *supra* Section II.A.1 (suggesting there are legitimate business reasons to consider income).

is a legitimate business reason to ask for proof of current income. It is normal for landlords to expect the household gross income to equal between two and three times the monthly rent.²⁰⁰ This difference provides a buffer between income and rent for the applicant's other expenses and taxes.²⁰¹

Some landlords also look to source of income for legitimate business reasons.²⁰² Depending on the landlord's business model, a landlord may prefer one income source over another. In Delaware, a landlord has the ability to garnish the tenant's wages once he has received a judgment from the court.²⁰³ For this reason, a landlord might choose to only accept applicants who have a history of being a traditional employee. Additionally, some landlords might believe that being employed is a sign of certain character traits that lessen the landlord's risk, such as being hardworking and responsible.²⁰⁴ Additionally, although employees and entrepreneurs both work, landlords may view each position differently. Some may consider employees a lower risk because they depend on a company for pay, whereas another landlord may prefer entrepreneurs because they may have more control over their income.

Alternatively, some landlords may prefer to accept applicants who receive government benefits, such as SSI, because it can be

200. See Jenny Greenhough, *10 Key Questions for Finding the Right Tenants*, ROCKETLAWYER (Sept. 23, 2013), <https://www.rocketlawyer.com/blog/10-key-questions-for-finding-the-right-tenants-915247> ("According to industry standards, a tenant should have a monthly income that's approximately two-and-a-half to three times the cost of the rent."); see also Madison Garcia, *How to Determine Income Level to Qualify for an Apartment*, SAPLING (Jan. 16, 2009), <https://www.sapling.com/4721244/determine-income-level-qualify-apartment> ("[I]ncome should be three times the rent payment."). But see *Ignore the '30 Percent Rule' When it Comes to Rent*, EARNEST (Sept. 17, 2015), <https://www.earnest.com/blog/rent-and-the-30-percent-rule/> (explaining the three-times-the-monthly-rent rule originated from public housing regulations which based their formulas on the percentage of household income the average person spent on rent).

201. See Karen Weise, *Housing's 30-Percent-of-Income Rule is Nearly Useless*, BLOOMBERG L. (July 17, 2014), <https://www.bloomberg.com/news/articles/2014-07-17/housings-30-percent-of-income-rule-is-near-useless>.

202. See Marcia Stewart, *Legal and Illegal Reasons Landlords May Turn Rental Applicants Down*, NOLO, <http://www.nolo.com/legal-encyclopedia/free-books/renters-rights-book/chapter1-2.html> (last visited July 23, 2017).

203. See *supra* Part I.

204. See E. Ericka Kelsaw, *Help Wanted: 23.5 Million Unemployed Americans Need Not Apply*, 34 BERKELEY J. EMP. & LAB. L. 1, 41-44 (2013).

a steadier form of income.²⁰⁵ By accepting someone who only receives government benefits, a landlord eliminates the risk of that person losing his job and being without income. Similarly, landlords may choose to rent to an applicant who receives court-ordered child support and alimony because they know the lifespan of the income. On the other hand, while government benefits are a regular income source, there is no guarantee the recipient will use them to pay rent, so it may not be a more guaranteed option. However, regardless of the reason, source of income is an important factor to many landlords.

II. ANALYSIS

A. *Source of Income Should Not Be Protected*

Source of income is different from other protected classes. For example, gender and race are immutable characteristics, but people choose the source of their income and can *generally* change that source at any time. While there are extreme cases in which an individual truly cannot work in any environment, this is rare considering the number of people receiving government benefits, the number of disabled people currently employed, and the wide variety of available jobs.²⁰⁶ Historically, discrimination laws were based on characteristics—such as race, gender, and religion—to protect individuals who would have otherwise received a benefit or been allowed to perform the action but for the characteristic because those characteristics were not relevant to the right that was withheld.²⁰⁷

It is important to remember that landlords have different views regarding the forms of income on which they prefer to base their business model; accordingly, even without source of income discrimination laws, there are housing choices available to all renters. Some landlords may only accept individuals re-

205. See *supra* Section I.B.2.

206. See *supra* Section I.B.2.; *infra* Section II.A.2.

207. See *supra* Section I.A–B.

ceiving housing vouchers, some may prefer applicants receiving Social Security benefits, and others may select employed applicants. Regardless of their preferences, landlords should be able to decide which types of income they accept because (1) there is a legitimate business reason to consider the source of a tenant's income,²⁰⁸ (2) source of income is easy to change relative to immutable characteristics, and (3) Delaware enacted the law as a pretext to resolve its low-income housing issues.

1. *Source of income is a legitimate business concern for landlords*

It is crucial for landlords to consider an applicant's source of income when analyzing whether he believes the tenant will pay and take care of the property. As discussed, the source of income lets landlords know whether they have the ability to recover losses through wage garnishment.²⁰⁹ This is a legitimate business concern because landlords are in the business to make money by renting properties. Forcing them to accept judgment-proof tenants directly impedes their business purpose.²¹⁰

Furthermore, source of income is tied to employment history or lack thereof. Employment history can indicate whether there is a likelihood that the applicant will continue to receive income.²¹¹ If an applicant has had steady employment over an extended period of time, it is likely that the applicant will continue to work.²¹² This is similar to the consideration of a credit score.²¹³

208. See *Quaker Hill Place v. Saville*, 523 A.2d 947, 956 (Del. Super. Ct. 1987) (“[U]nder a disparate impact theory, qualifications imposed by a landlord regarding an applicant’s ability to pay and his potential threat to property and other tenants certainly are ‘significantly related’ to legitimate landlord objectives.”).

209. See *supra* Part I.

210. See Gerchick, *supra* note 4, at 801–02. Judgment proof refers to a party who has insufficient assets to satisfy a judgment. Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 606 (2006).

211. See Craig Covert, *Landlords: Screen Potential Tenants Like Lenders Screen Borrowers*, BIGGER POCKETS, <https://www.biggerpockets.com/blogs/1226/8753-landlords-screen-potential-tenants-like-lenders-screen-borrowers> (last visited Aug. 13, 2017).

212. See *id.*

213. See *Miller v. Brookside at Somerville, LLC*, No. A-5757-06T3, 2008 WL 351338, at *4 (N.J. Super. Ct. App. Div. Feb. 11, 2008) (stating landlords are permitted to perform credit and background checks for legitimate business reasons).

Landlords look for a good credit score as an indicator that applicants will most likely continue to pay their bills.²¹⁴

In short, source of income should not be considered a protected class because two applicants with different forms of income are not similarly situated in terms of qualifications. An applicant with a full-time job is very different from an applicant whose only source of income is alimony. This is unlike the “similarly situated” analysis of other protected classes. For example, a landlord comparing two applicants—a man and a woman—with the same household incomes, credit scores, good rental history, etc., should not consider the applicant’s sex since it is an irrelevant factor for the qualifications.²¹⁵ In that example, both members of the protected class were similarly situated as it related to applicant qualifications.²¹⁶

Historically, this was the precise issue courts focused on when determining if there was impermissible discrimination. In *Shelley v. Kraemer*, the black petitioners had the means to purchase the property and the sellers were willing to convey the property to them.²¹⁷ The only issue was the petitioners’ skin color.²¹⁸ Likewise in *Jones v. Alfred H. Mayer Co.*, the court stated the home sale was refused solely based on skin color.²¹⁹ In both cases, the individuals had the necessary means to complete the transactions and the characteristic that prevented the transactions from occurring was irrelevant to the transactions.²²⁰

Skin color, gender, or any of the primary characteristics from

214. *Pasquince v. Brighton Arms Apartments*, 876 A.2d 834, 838–39 (N.J. Super. Ct. App. Div. 2005) (“[I]t is well established that creditworthiness is a legitimate, non-discriminatory criteria [sic] which landlords are permitted to consider when evaluating prospective tenants, including recipients of Section 8 housing assistance.”); see *supra* Section I.C.

215. See Michael A. Brennan, *Fair Housing Overview: Part 2 Pre-Tenant Considerations and How to Avoid Lawsuits*, AOA (May 1, 2013), <https://www.aoausa.com/magazine/?p=1243>.

216. See generally Leland Ware & Steven W. Peuquet, *The Admissibility of Matched-Pair Testing Evidence in Fair Housing Cases Under Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 14 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 23, 25 (2004) (discussing Fair Housing paired testing program).

217. *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948) (“[P]etitioners were willing purchasers of properties . . . The owners of the properties were willing sellers; and contracts of sale were accordingly consummated.”).

218. See *id.*

219. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 442 (1968).

220. See *id.*; *Shelley*, 334 U.S. at 19.

the remaining protected classes do not directly relate to the ability to pay or the landlord's ability to enforce a judgment.²²¹ An applicant's source of income, however, *is* directly related to the landlord's business; thus, landlords should have the right to choose whether they will consider source of income. After all, protecting source of income restricts landlords' ability to assess their risk. Payments from court-ordered child support may be meaningless if the applicant does not use the money to pay the rent, because the landlord has no recourse post-judgment.²²² Similarly, if the applicant has never had a job, the landlord may consider the applicant a higher risk because the applicant may be unwilling or unable to work. Accordingly, while \$500 from a man is the same as \$500 from a woman, an applicant who receives \$500 from SSI is not the same as an applicant who makes \$500 from an employer.

The ability to garnish wages post-judgment is a serious concern for landlords.²²³ Even if the rent was paid, it is common for a property to have damages when the tenant moves out.²²⁴ In Delaware, a landlord can require a refundable security deposit equal only up to one month of rent.²²⁵ This amount can quickly be consumed by a carpet replacement or the expense of removing the former tenant's belongings.²²⁶ Therefore, reliance on the security deposit to offset delinquent rent is not a realistic solution. If the former tenant does not pay, a landlord's only recourse is to file in court and obtain a judgment.²²⁷ From there, a landlord can file to garnish the former tenant's wages.²²⁸ If the tenant does not have an employer, however, the landlord loses

221. See *Fair Housing Laws and Presidential Executive Orders*, *supra* note 12.

222. See generally *How to Collect and/or Revive a Judgment in the Justice of the Peace Court*, *supra* note 5 (stating that methods of post-judgment collection include an agreement by both parties and wage garnishment from a tenant's employer).

223. See Gerchick, *supra* note 4.

224. See *id.* at 804.

225. DEL. CODE ANN. tit. 25, § 5514(2)-(3) (2017).

226. *How Much Does It Cost To Install New Carpeting?*, FIXR.COM, <https://www.fixr.com/costs/carpet-installation> (last visited Aug. 14, 2017) (stating that carpet replacement and installation averages \$18 per square yard with a national average of \$1200-\$1400 for a 16x16 area).

227. See *supra* Part I.

228. Gerchick, *supra* note 4.

this option.²²⁹ A landlord cannot garnish alimony, child support, or SSI.²³⁰ While a judgment may prevent the former tenant from easily obtaining a new residence, there are plenty of landlords who will not even be aware of the judgment and readily accept the tenant.²³¹ Regardless of any deterrent effect, the landlord is still not reimbursed for his costs. A judgment also becomes useless if the former tenant later claims bankruptcy, which is not uncommon, because it clears this debt and the landlord generally will receive no payment and now can no longer pursue payment.²³²

Lastly, landlords will be unjustly harmed by forced enrollment in a housing voucher program. It is costly for a landlord to comply with the additional government requirements for paperwork and inspections.²³³ Expenses are also incurred for maintenance requirements that exceed the housing code and onerous administrative paperwork.²³⁴ These extra expenses are another legitimate business concern for landlords to consider: either the landlord will be forced to absorb the lost revenue, or the landlord will be forced to compensate by increasing rent, which may lead to other issues. Some of the potential issues surrounding a rent increase include the property exceeding the allowable rent, increased vacancy time, and more demanding

229. *See id.*

230. *What Are the Laws Allowing the Garnishment and Levy of Social Security Benefits?*, SOC. SEC., <https://faq.ssa.gov/link/portal/34011/34019/Article/3812/What-are-the-laws-allowing-the-garnishment-and-levy-of-Social-Security-benefits> (last modified Oct. 17, 2017).

231. Brandon Turner, *Tenant Screening: The Ultimate Guide*, BIGGER POCKETS, <https://www.biggerpockets.com/renewblog/2013/01/27/tenant-screening> (last visited Aug. 14, 2017) (explaining that not all evictions will be displayed on a credit report).

232. This is based on the author's personal experiences. In several cases where the former tenant declared bankruptcy, the author was informed by the Justice of the Peace Court 13 and the Bankruptcy Court that the debt was cleared and no longer collectable. The most recent experience was in the spring of 2017.

233. *See Lerner, supra* note 95, at 49–50; *see also Sterken, supra* note 133, at 241.

234. Lerner, *supra* note 95, at 49–50; *Fair Housing: Source of Income Discrimination Fact Sheet*, NAT'L MULTIFAMILY HOUSING COUNCIL, <http://www.nmhc.org/Advocacy/Fair-Housing--Source-of-Income-Discrimination-Fact-Sheet/> (last visited Aug. 14, 2017) ("There are many reasons why a private property owner may choose not to participate in the Section 8 program. It has been plagued with inefficiencies and onerous bureaucratic requirements. Owners who participate are subject to often cumbersome [sic] program restrictions, such as repetitive unit inspections, resident eligibility certification and other regulatory paperwork. All of these make it more expensive for apartment firms to operate their communities.").

tenants. Although the majority of courts are reluctant to agree with this argument,²³⁵ it is unfair to force landlords to absorb and comply with these unnecessary administrative burdens when landlords should be able to properly assess and choose new tenants based on legitimate business concerns without government interference.

2. *Unlike most protected classes, source of income can be changed and is within the tenant's control*

Courts consider whether a characteristic is immutable or whether an individual has the ability to change the characteristic when analyzing whether the characteristic should be protected. Race, gender, age, and nationality are immutable and the courts found these characteristics should be protected. Conversely, courts have held that characteristics within an individual's control to change are harder to justify protecting as a class. A recent example involves hairstyles predominantly worn by black women that were deemed a characteristic that should not be protected in employment settings because a hairstyle is the individual's choice.²³⁶ Source of income is more similar to hairstyles than race based on the court's characterization of hair as a changeable quality.²³⁷ Yet, if hairstyles centered on an immutable characteristic are not protectable, it is very difficult to understand how an individual's choice for the source of his income could possibly be protected when it is not connected to race, gender, or another immutable characteristic.

People have the ability to obtain employment or change careers on a regular basis. While there are extreme examples where an individual is severely disabled and truly unable to work in any position,²³⁸ this situation is rare and not the case for

235. *Montgomery Cty. v. Glenmont Hills*, 936 A.2d 325, 340 (Md. 2007).

236. *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1030 (11th Cir. 2016) (“[D]iscrimination on the basis of black hair texture (an immutable characteristic) is prohibited by Title VII, while adverse action on the basis of black hairstyle (a mutable choice) is not.”).

237. *Id.* at 1021 (explaining that, although dreadlocks are “culturally associated with race,” it is not an immutable characteristic of black people).

238. Charles P. Mileski, *Those Lost but Not Forgotten: Applicants with Severe Disabilities, Title I of the ADA, and Retail Corporations*, 40 HOFSTRA L. REV. 553, 554 (2011) (explaining that there are

most people.²³⁹ Delawareans, like any American, can pursue any career that they choose. Likewise, there are jobs available for everyone's skill level and limitations.²⁴⁰ Delaware hosts a variety of industries ranging from retail, trade, and manufacturing to banking and health services.²⁴¹ Furthermore, its job market and unemployment rate remain better than the national average.²⁴²

Some people argue that it is not easy for those with minimal or no education to obtain employment, and therefore, those individuals do not choose *not* to work. While approximately one quarter of the Delaware workforce lacks a high school diploma,²⁴³ there are plenty of jobs that do not require a high school diploma or the equivalent. Many customer service, retail, and labor positions have minimal education requirements or none at all.²⁴⁴ Additionally, if someone without a diploma would like to earn their GED, free preparation programs and

jobs for individuals with severe disabilities, such as in retail).

239. *Id.* at 561; *Nearly 1 in 5 People Have A Disability in the U.S.*, U.S. CENSUS BUREAU (July 25, 2012), <https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html> (asserting that in 2012, at least 19% of the population had a disability).

240. *Nearly 1 in 5 People Have A Disability in the U.S.*, *supra* note 239 ("41 percent of those age 21 to 64 with any disability were employed, compared with 79 percent of those with no disability.").

241. *Current Employment Statistics*, ST. DEL., <https://lmi.delawareworks.com/Content/Information/CES.php> (last visited Aug. 12, 2017) (highlighting the variety of industries represented in Delaware).

242. *Compare Databases, Tables, & Calculators by Subject*, BUREAU LAB. STAT., https://data.bls.gov/timeseries/LASST100000000000003?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true (last updated Aug. 12, 2017, 3:05PM) (showing Delaware's unemployment rate was 4.3%, or 20,388 people, in November 2016), *with Labor Force Statistics from the Current Population Survey*, BUREAU LAB. STAT., <https://www.bls.gov/cps/cpsaat01.htm> (last updated Feb. 8, 2017) (showing the national unemployment rate was 4.9% in 2016).

243. *Delaware Profile of Adult Learning*, NAT'L CTR. FOR HIGHER EDUC. MGMT. SYS., <http://www.nchems.org/wp-content/uploads/DelawareAdultProfile.pdf> (last visited Sept. 22, 2017) (showing that in 2010, there were 19.5% of people between 18 and 24 years old and 10.4% of people between 25 and 64 years old that did not have high school diplomas).

244. *General Laborer: Job Description, Duties and Requirements*, STUDY.COM, http://study.com/articles/General_Laborer_Job_Description_Duties_and_Requirements.html (last visited Aug. 12, 2017); *Retail Sales Associates: Job Duties & Requirements*, STUDY.COM, http://study.com/articles/Retail_Sales_Associates_Job_Duties_and_Requirements_for_Becoming_a_Retail_Sales_Associate.html (last visited Sept. 22, 2017).

multiple testing centers are available.²⁴⁵ Therefore, an individual has ways to overcome any hurdles preventing him or her from obtaining a job that requires a high school diploma or the equivalent. The resources and jobs available are even more plentiful for those who are better educated. Thus, lack of education is not a sufficient reason to justify protecting source of income on the basis that low-education levels force individuals either not to work or to depend on government benefits. After overcoming the education and physical limitations arguments, it is easier to understand that source of income is not an immutable characteristic and is well within the applicant's control.

It is also important to understand that while there are plenty of people who legitimately need temporary assistance, there are also plenty of individuals who abuse the government programs. It is understandable that a person who is severely disabled or elderly should receive assistance, but it is hard to justify paying thousands of dollars per month to an eighteen-year-old individual who claims to have a disability yet is able-bodied and active. It is not uncommon to encounter prospective tenants who will show proof of making over \$50,000 per year in government assistance and/or disability pay. Similarly, it is not uncommon to hear an applicant with a Section 8 voucher brag about being able to pay the difference in a rental payment by earning money working "under the table."²⁴⁶ Again, there are many stories of legitimate need, but there must be tighter regulations to curb the abuse of these programs, and adding source of income as a protected class is not helping this situation.

245. *Frequently Asked Questions (FAQs)*, GED TESTING SERV., <http://www.gedtesting.service.com/testers/mygedfaqs> (last visited Aug. 12, 2017) (stating that the free GED program is a "start-to-finish online program to help [participants] succeed"); *Welcome to Adult Basic Education (ABE)/GED*, DEL. DEP'T EDUC., <http://www.doe.k12.de.us/page/2927> (last visited Aug. 12, 2017).

246. The author can recount many stories illustrating abuses of the government programs and has personally discussed the issue with multiple Delaware property managers who shared similar experiences. For instance, the author spoke to an applicant in 2015 who received money from several government programs while making over \$30,000 as a bar manager. She freely admitted that this income was not claimed on her taxes so she could retain the government benefits.

3. *Delaware's source of income law is a pretext for solving low-income housing shortages*

Source of income was listed as a protected class in Delaware to force landlords to fix the state's shortage of low-income housing and to force integration.²⁴⁷ This purpose is far removed from DFHA's original purpose of protecting people who would otherwise qualify for housing had it not been for an immutable characteristic.²⁴⁸ The organizations that proposed the law were not focused on protecting those receiving retirement benefits or alimony.²⁴⁹ Rather, the focus was on creating more low-income housing options for housing voucher and SSI recipients.²⁵⁰

For the purpose of benefitting low-income individuals, Delaware recently advertised that it will provide higher voucher amounts to landlords who own properties in the Pike Creek, Hockessin, and other low-crime, highly desirable communities.²⁵¹ Yet, in Delaware, the majority of employment opportunities are not located in these areas.²⁵² Both Pike Creek and Hockessin are primarily residential areas with little industry or employment,²⁵³ and there are either very limited or no public transportation options.²⁵⁴ These areas, however, are located in a desirable school district and have higher home values.²⁵⁵

It should not be a landlord's burden to solve the low-income housing issue. New Castle County should adopt a program

247. See DEL. CODE ANN. tit. 6, § 4601 (2017).

248. See *id.*

249. POLICY COMM. ON ENDING HOMELESSNESS IN DEL., *supra* note 66, at 4.

250. See *id.* at 12.

251. See, e.g., DEL. STATE HOUS. AUTH., FACT BOOK (2016), http://www.destatehousing.com/Renters/rentersmedia/payment_standards.pdf; *How Can We Assist You?*, DEL. ST. HOUSING AUTHORITY, <http://www.destatehousing.com/Renters/renters.php> (last visited Oct. 3, 2017); *DSHA Voucher Payment Standards Map*, DEL. ST. HOUSING AUTHORITY, <http://delaware.maps.arcgis.com/apps/Viewer/index.html?appid=70554a71516d45daa82b73f5ae3d3f> (last visited Oct. 3, 2017).

252. An online employment search for Pike Creek, Delaware on July 25, 2017 showed only five available jobs in the area. See INDEED.COM, <https://www.indeed.com/jobs?q=&l=Pike+Creek%2C+DE&radius=0> (last visited July 25, 2017).

253. See *id.*

254. See generally DEL. TRANSIT CORP., PIKE CREEK VALLEY ROUTES 18 & 30 (2016), <http://www.dartfirststate.com/information/routes/pdfs/winter/rt18.pdf?date=1491600883423> (showing limited bus transportation options for the Pike Creek area).

255. See *DSHA Voucher Payment Standards Map*, *supra* note 251.

similar to the Kent and Sussex Counties' Moving to Work program²⁵⁶ in order to push individuals to exit the housing voucher program. If the law was not a pretext, Delaware could have compromised with opponents and not protected housing vouchers as a source of income, similar to the Texas and California laws.²⁵⁷

B. *Operating Under the New Law*

1. *Practical confusion for landlords: a practical study*

Landlord L is looking to rent a three-bedroom house in an average middle-class neighborhood for \$1200 per month. He utilizes the traditional qualifying factors in addition to requiring three times the monthly rent to satisfy the income requirement. Therefore, an applicant must have a monthly gross income of \$3600. Three applicants apply for his property. Each applicant is a single mother with three children, and each has similar qualifications with the exception of their source of income.

Applicant X works full-time for an insurance agency and makes \$60,000 per year, or \$5000 per month. She has worked at the same location for fifteen years. Previously, she was in a similar position with another insurance company for five years.

Applicant Y has three children and has never had a job. Her ex-husband pays \$1500 per month in child support. SSI also pays her \$435.53 per month for herself and pays her \$644.32 per month for each child. In total, the household receives \$2368.49 from the Social Security Administration. Therefore, the total household income is \$3868.49.

Applicant Z has also never worked. She receives a government housing voucher for rent. She is supposed to receive child support, but the children's father rarely pays it. Therefore, her non-government benefit household income is sparse enough to conclude that all of her expenses are taken care of by the government.

256. *Moving To Work (MTW)*, DEL. ST. HOUSING AUTHORITY, http://www.destatehousing.com/Renters/rt_mtw.php (last visited Oct. 3, 2017).

257. See *supra* Section I.B.5.

Before the new law, Landlord L would have happily accepted Applicant X because of her steady employment; however, Landlord L must now consider Applicants Y and Z. If Applicant Y applied first, he would have no grounds to deny the application because she meets his criteria even though he does not like taking individuals who do not work and who provide little to no recourse to recover his costs if the tenant damages the property.²⁵⁸

If Applicant Z applied first, under the new law, it is unclear if Landlord L would be forced to accept Applicant Z despite that she does not have a household income at or exceeding three times the monthly rent. Alternatively, Applicant Z may claim that Landlord L does not have any risk because the government is covering the costs. Furthermore, it is unclear whether Landlord L would have to accept Applicant Z because one DFHA provision states he does not have to enroll in the housing voucher program.²⁵⁹ Yet, that is the only way the government will pay the rent to him so, without the enrollment, he is not in the same position as he is with the other applicants – it is guaranteed that he will not get paid without participating in the Section 8 program.²⁶⁰

2. *Conflicting signals*

The practical application of the DFHA is unclear. While landlords must consider all sources of income and cannot discriminate on the basis of income, they are not required to enroll in the housing voucher program and can still consider whether the income source will be sufficient for the lease term.²⁶¹ This creates an immense grey area that courts have not yet resolved.

A major question for most Delaware landlords is whether a landlord not participating in the program is required to accept

258. See Leshnow, *Accepting Tenants in Order*, *supra* note 185.

259. See *Prospective Housing Choice Voucher (HCV) Landlords*, *supra* note 128.

260. *Montgomery Cty. v. Glenmont Hills*, 936 A.2d 325, 328 (Md. 2007); see *Prospective Housing Choice Voucher (HCV) Landlords*, *supra* note 128.

261. See Eberlin, *supra* note 185; *Prospective Housing Choice Voucher (HCV) Landlords*, *supra* note 128.

an applicant who qualifies when the housing voucher value is considered income despite that the landlord will not receive the government's payment. Forcing landlords to consider housing vouchers while allowing them to exclude themselves from the program seems pointless. This does, however, raise a question of whether this was merely a stepping stone to a future proposed law that would put Delaware more in line with other jurisdictions, which require landlords to participate in housing voucher programs.

C. The Uncertain Future Under the Current Law

While it is impossible to predict the future, it is less difficult to see what may happen in light of establishing source of income as a protected class under the DFHA. As it stands, landlords will most likely proceed with caution. There is no question that a landlord can no longer decline an applicant who meets all qualifications but receives her income through an alternative means. However, there is still a cautious grey area regarding housing voucher recipients. While an applicant will not be turned away immediately because she holds a housing voucher, the landlord will have to explain that he does not participate in the housing voucher program. This may create a surge in Fair Housing complaints as the recipients might not fully understand their rights.

Over time, landlords may choose to leave the property management industry and invest in other industries, or purchase properties in neighboring states where the landlord has more rights. This is foreseeable as landlords will grow frustrated at the lack of means to recover damages. Additionally, several of the jurisdictions that are a mere ten to twenty miles away do not have source of income laws.

Since it is legal and has been suggested in case law,²⁶² landlords may adjust the remaining qualification criteria to increase

262. See *Glennmont Hills*, 936 A.2d at 330 (finding that the landlord has the responsibility to screen all applicants, including voucher recipients, and "may consider a family's background and tenancy history with respect to payment of rent and utility bills, caring for the apartment, respecting the rights of other residents, drug-related or other criminal activity, and compliance

their chances of lawfully declining applications. For example, a landlord may increase the minimum household income qualification to four times the rent.²⁶³ Alternatively, a landlord may require a higher credit score since low-income individuals tend to have lower credit scores.²⁶⁴ While this does not address the landlord's inability to decline applicants receiving alimony, child support, and other sources of income, it most likely solves the issue relating to housing vouchers.²⁶⁵

Lastly, the passing of this law raises the question of how far the government will overreach. Will Delaware decide to force landlords to participate in the housing voucher program in the near future? Since Delaware ignored the legitimate business purpose for a landlord to consider source of income, will it add criminal history and credit scores as the next protected classes? As landlords are forced to take housing vouchers for rental properties in highly desirable areas, will the neighboring homeowners move a few miles away to a neighboring state that does not force this burden on landlords? After all, why would a homeowner pay a high premium for a desirable area when someone living off of government benefits can also live there without the hard work? There are too many uncertainties to know whether the future will be better for all Delawareans or only those receiving housing vouchers.

CONCLUSION

Discrimination has been a serious issue throughout American history. Rightfully, laws have been enacted to protect those who are treated unfairly solely because of an immutable characteristic that they possess. However, it is important to remember the

with other essential conditions of tenancy" pursuant to federal regulations). The court in *Glenmont Hills* ultimately held, however, that the landlord violated a local law prohibiting discrimination based on source of income when it refused to rent to potential tenants *solely* because the tenants proposed to use vouchers. *Id.* at 342.; see *Bourbeau v. Jonathan Woodner Co.*, 549 F. Supp. 2d 78, 87 (D.D.C. 2008).

263. See *supra* Section II.C.

264. *Id.*; see also *Average Credit Score in America: 2017 Facts & Figures*, VALUE PENGUIN, <https://www.valuepenguin.com/average-credit-score> (last visited Oct. 4, 2017) (showing there is a 111 point difference between low-income and high-income classes).

265. See *supra* Section II.B.2.d.

basis for creating protected classes. Source of income is *not* an immutable characteristic, and, for the majority of the population, it is relatively easily changed by the individual.²⁶⁶ It is significantly more difficult or impossible to change an immutable characteristic. For this reason alone, it should not qualify as a protected class.

Since the consideration of source of income has a legitimate business reason, it is unfair to restrict a landlord from properly assessing his risk before placing a tenant in his expensive asset. In addition, Delaware's source of income law prevents a landlord from recovering his losses through legal channels in many circumstances.

Lastly, while low-income housing is a real issue, it is not a landlord's problem to solve. These laws should not be a pretext for adding an alternative way to introduce more low-income housing into the market. While it is unclear whether Delaware will take the next step and force landlords to accept housing vouchers, the enactment of this law seems to indicate that Delaware plans to continue making it hard for landlords to successfully run their businesses. Until there is more certainty, landlords like Jonathan will continue to shoulder the burden of fixing the low-income housing issue in addition to suffering the consequences of not being able to properly assess their risks. Hopefully, source of income laws will be eliminated in the future so Jonathan does not have to face such a horrible eviction experience again.

266. This is not to say that it is easy to change income status in all circumstances, but rather to point out that given the right mindset and drive, people overcome poverty. See Pam Fessler, *Housing Secretary Ben Carson Says Poverty Is A 'State Of Mind'*, NPR (May 25, 2017, 3:50 PM), <http://www.npr.org/2017/05/25/530068988/ben-carson-says-poverty-is-a-state-of-mind> (explaining that people able to work need to go back to work, and, quoting Ben Carson, who said that "people with the 'right mind set' can have everything taken away from them, and they'll pull themselves up").