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Marina Point, Ltd. v. Wolfson: A Victory For Children in Rental Housing - Implications For Further Expansion of the Unruh Civil Rights Act

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NOTES

MARINA POINT, LTD. V. WOLFSON: A VICTORY FOR CHILDREN IN RENTAL HOUSING—IMPLICATIONS FOR FURTHER EXPANSION OF THE UNRUH CIVIL RIGHTS ACT

In *Marina Point, Ltd. v. Wolfson*¹ the California Supreme Court held that the Unruh Civil Rights Act protects children and families with children from discrimination.² The court further held that the owner of a large apartment complex could not arbitrarily evict a family because they had a child.³

The Unruh Civil Rights Act⁴ (the Act) prohibits discrimina-

1. 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982), *cert. denied*, ___ U.S. ___ (1982). The United States Supreme Court refused to review the plaintiff's appeal in October 1982. The appeal was based on a procedural claim and on the assertion that the state supreme court relied on evidence not presented to the trial court and which had not been cross-examined by the plaintiff. According to Eugene Gratz, attorney for the Wolfsons, the evidence in question consisted of published reports of findings presented by expert witnesses at the trial. Telephone interview with Eugene Gratz, Gratz & Starler, Los Angeles, California, (October 5, 1982).

The Supreme Court, without comment, left the ruling intact. *Adults-Only- Rentals Still Illegal*, San Francisco Chron., Oct. 4, 1982, at A14, col. 5.

The California Supreme Court opinion, written by Justice Tobriner, was joined by Chief Justice Bird and Justices Newman, Broussard and Retired Associate Justice White sitting under assignment by the Chairperson of the Judicial Council. The dissenting opinion was written by Justice Richardson with Justice Mosk concurring. 30 Cal. 3d at 722, 640 P.2d at 115, 180 Cal. Rptr. at 497.

2. *Id.* at 724, 640 P.2d at 116, 180 Cal. Rptr. at 498.

3. *Id.* at 745, 640 P.2d at 129, 180 Cal. Rptr. at 511.

4. CAL. CIV. CODE § 51 (West 1982) provides:

This section shall be known, and may be cited, as the Unruh Civil Rights Act.

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatever.

This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or

tion based on sex, race, color, religion, ancestry, or national origin in all business establishments in California. Prior to *Wolfson* the California Supreme Court declared in *In Re Cox*⁵ that the enumerated protected classes in the Act were "illustrative rather than restrictive" and thus the scope of the Act was broader than the protection of designated classes. The Act covers all arbitrary discrimination in public accommodations.⁶

In *Wolfson*, the court held that landlords cannot arbitrarily discriminate against children and families with children. This Note will discuss this aspect of the *Wolfson* decision and its significance and implications. *Wolfson* resolved the issue of discrimination in rental housing against families with children,⁷ which will be of particular benefit to women who have been hardest hit by such discrimination and by the shortage of rental housing.⁸ But, *Wolfson* also may have extended the coverage of the Unruh Civil Rights Act to include classes other than children. This Note will also discuss this equally important aspect of the *Wolfson* decision.

which is applicable alike to persons of every sex, color, race, religion, ancestry, or national origin.

5. 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970). *Cox* involved a situation where a man was arrested pursuant to a local ordinance after he refused to leave a shopping center. He was asked to leave because he was seen talking with a person wearing long hair and unconventional attire, a "hippie." The court found the exclusion unreasonable and arbitrary.

6. *Id.* at 216, 474 P.2d at 999, 90 Cal. Rptr. at 31.

7. The problems of discrimination against families with children is not limited to low income families. A 1980 national survey showed that approximately one-third of the renting population are families with children. MARANS & COLTEN, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF POLICY DEVELOPMENT AND RESEARCH MEASURING RENTAL POLICIES AFFECTING CHILDREN (1980).

Steven Wolfson is an example of the affect that discrimination against children has on moderate and upper income families. Wolfson is an attorney who lived in an ocean-side apartment complex with several swimming pools. 30 Cal. 3d at 744 n. 13, 640 P.2d at 129, 180 Cal. Rptr. at 510. See also BERKELEY, CAL. CODE § 4853-NS § 1, ch. 13.24(D): "This discrimination [against families with children in property rentals] falls most heavily on the poor but cuts across all racial, ethnic and economic levels." (Emphasis added.)

8. Twice as many households headed by women are tenants as compared to non-female headed families. Women head fifteen percent of all families, but twenty-nine percent of all-renter families. Comment, *Why Johnny Can't Rent - An Examination of Laws Prohibiting Discrimination Against Families In Rental Housing*, 94 HARV. L. REV. 1829, 1836-37 (1981) [hereinafter cited as *Why Johnny Can't Rent*].

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I. THE HOUSING PROBLEM PRIOR TO *Wolfson*

A. *Housing Shortage*

The determining factor in the *Wolfson* decision was the court's recognition of the housing needs of families with children as well as the social and economic problems created by discrimination against them.⁹ Several factors coalesced to create the current rental housing shortage. Among them are population growth,¹⁰ high interest rates and building costs which have constricted new apartment construction and the ability of many families to buy a home,¹¹ condominium conversions,¹² the deterioration of existing housing stock,¹³ and the growing divorce rate

9. 30 Cal. 3d at 743, 640 P.2d at 128, 180 Cal. Rptr. at 510.

10. See CAL. HEALTH & SAFETY CODE § 50003 (West 1980) for legislative recognition of the statewide housing shortage. For further discussion of the dimensions of the California housing problem, see also Comment, *Local Attempts to Ban Discrimination in Rental Housing Against Families with Children: Avoiding the Preemption Barrier*, 17 SAN DIEGO L. REV. 403 (1980). For a description of the national housing shortage refer to *Why Johnny Can't Rent*, *supra* note 8, at 1829-33, and Note, *Housing Discrimination Against Families with Children: A National Concern*, 20 WASHBURN L.J. 307 (1980-81).

Various California newspapers have commented on the increasing seriousness of the housing shortage, e.g., *How A Home Can be Renovated to Produce Granny Flats*, San Francisco Chron., July 11, 1982, at 4, col. 1, which proposes the addition of rental flats to single family homes as a solution to the critical housing problem; *Tenants' Rights for Children*, Oakland Tribune, Aug. 14, 1981, at A16, col. 1, stating that sixty percent of the state's rental units exclude children at a time when there is a scarcity of housing for the total population; and *A Frustrating Decade Ahead for the Baby Boom Homebuyers*, San Francisco Examiner, June 14, 1982, at C3, col. 5, which notes that the homebuying age group, thirty to thirty-five, increased by 10 million between 1970 and 1980.

11. *Homeownership: the American Dream Adrift*, San Francisco Examiner, June 14, 1982, at C1, col. 6. Few young people can afford to borrow money at high interest rates, thus, homebuying is limited to established upper middle-class people. See Note, *Housing Discrimination against Children: The Legal Status of a Growing Social Problem*, 16 J. FAM. L. 559, 562 (1978) [hereinafter cited as Note, *Housing Discrimination*] (fewer families are able to buy houses as the competition for rental units increases).

Home ownership is currently out of the reach of low, middle and some upper income families. CAL. SEN. COMM. ON LOCAL GOVERNMENT, 1977 STATEWIDE HOUSING PLAN AND HOUSING ELEMENT at 2 (1977).

12. Condominium units increased from 18,700 in 1976 to 102,000 in 1978. There were 2,000 conversions in 1975, 9,200 in 1978, and a projected 20,000 by the end of 1979. The effect of these conversions is to substantially reduce the number of available rental units. When low and moderate income tenants are displaced because they cannot buy their units, renters who were previously housed are forced to compete for already scarce low-rent housing. CAL. DEPT. OF HOUSING AND COMMUNITY DEVELOPMENT, UPDATE OF THE 1977 CALIFORNIA STATEWIDE HOUSING PLAN at 84 (1979).

13. Many rental units have been removed from the market because owners cannot afford high rehabilitation costs. Of the 3.6 million rental units in California in 1979, 350,000 units needed to be replaced and 800,000 units required rehabilitation. CAL. STATE ASSEMBLY SUBCOMMITTEE ON HOUSING PRODUCTION REPORT at 72-73 (1979).

which requires two shelters to house persons formerly living in one unit.¹⁴

A 1979 survey found that thirty percent of California families with children were renters.¹⁵ These families were excluded from fifty-three to eighty percent of the available rental housing in metropolitan areas.¹⁶ Forty-five percent of renters with children were found to be inadequately housed as compared to thirty-two percent of renters without children.¹⁷ This figure increased from eighty-one to ninety-eight percent, depending on the city, for low income renters with children.¹⁸ New construction did not ease the shortage, but resulted in even more exclusion of families with children.¹⁹

Discrimination against renters with children has resulted in clustering of these families in certain areas. This arbitrary clustering, causing an unusually large number of children in particular neighborhoods, creates dislocations requiring additional schools, transportation, differential traffic controls, police protection, and recreational facilities.²⁰ The clustering of families with children in certain areas also prevents inter-generation contact. Such contact benefits both children and older persons.²¹

14. J. ISERI, *LOW INCOME SINGLE MOTHERS AND PUBLIC ASSISTANCE PROGRAMS*, CALIFORNIA ASSEMBLY OFFICE OF RESEARCH at 1 (1980). This report shows that single parent families in California increased from one in nine in 1970 to one in five in 1980. Ninety percent of these families were headed by women.

See also *Big Increase in Families With Single Parent*, San Francisco Chron., June 18, 1982, at 3, col. 6, reporting that the recent Census Report showed that single parent families grew from 3.3 million in 1970 to 6.6 million in 1980. Most of the increase was attributed to divorces. In 1970, 956,000 families were headed by divorced women; in 1980, divorced women headed 2.7 million families.

15. D. ASHFORD & P. ESTON, *THE EXTENT AND EFFECT OF DISCRIMINATION AGAINST CHILDREN IN RENTAL HOUSING: A STUDY OF FIVE CALIFORNIA CITIES* at v (1979) [hereinafter cited as ASHFORD].

16. A sample survey of newspaper advertisements in five cities showed that children were excluded from more than half of the available apartment units. The percentages varied from seventy-one percent in Los Angeles, fifty-three percent in Fresno, sixty-five percent in San Diego, and seventy percent in San Jose. In contrast, in San Francisco, which had an ordinance prohibiting discrimination against children, twelve percent of the units surveyed banned all children. *Id.* at v.

17. *Id.*

18. *Id.* at vi.

19. *Id.* at 7-9.

20. *Id.* at 29.

21. *Id.* at 33.

The concentration of renters in certain neighborhoods correlates with the concentration of minorities and women and creates segregated living patterns based on race and sex.²² Racial imbalance in public schools has intensified as middle-class renters are forced out of the cities by the unavailability of affordable and desirable housing and as minority renters are excluded from the suburbs by high rents.²³

The California Legislature recognized this overall housing problem and began to develop a state-wide housing plan in 1977 to accommodate an expected population of 24,400,000 by 1985.²⁴ Investigation of the factors causing the housing shortage showed that discrimination against children distorted the already troubled housing market. When a house or apartment is denied to a family with children, there is additional pressure on the housing market as these families compete for the remaining units available to them. Rental costs increase as demand exceeds supply.²⁵ This situation forces people to live in undesirable neighborhoods or to pay higher rents than they would otherwise pay.²⁶

In recognition of this problem, the 1977 Housing Plan included a proposal to add families with children to the coverage of the Fair Housing Act and the Unruh Civil Rights Act.²⁷ This proposal, as well as other proposed amendments to the anti-discrimination statutes, failed in the legislature.²⁸

22. *Id.* at vii.

23. *Id.* at 31.

24. CAL. DEPT. OF HOUSING AND COMMUNITY DEVELOPMENT, STATEWIDE HOUSING PLAN OF 1977 at 18 (1977).

25. *Id.* at 47.

26. *Id.* at 13.

27. *Id.* at 49.

28. 30 Cal. 3d at 735 n.7, 640 P.2d at 123, 180 Cal. Rptr. at 505. See Dunaway & Blied, *Discrimination Against Children in Rental Housing: A California Perspective*, 19 SANTA CLARA L. REV. 21 at 49 n.141 (1979) for the argument that these attempts to enact statutes banning discrimination against children were defeated by real estate and landlord lobbies. The most recent attempt to add families with children to the Unruh Civil Rights Act was A.B. 256 (1980-81), sponsored by Assemblyman Leo McCarthy. The bill was dropped for the time being by its author after *Wolfson* was decided. Telephone interview with member of Assemblyman McCarthy's staff (July 23, 1982). A report by Senator Milton Marks, Chairman of the Senate Committee on Local Government, dated August 12, 1981, discussed A.B. 256. This report lists a number of supporters of the bill and names the California Association of Realtors and the Western Mobilehome Association as opponents. SEN. COMM. ON LOCAL GOVERNMENT, Staff Analysis of Assembly Bill 256 at 3 (1981).

B. Discrimination

Discrimination against families with children can take three forms: eviction, denial of access to housing, or higher rents and security deposits²⁹ than those charged for adult-only tenants.³⁰ The most easily detected form is eviction because it usually involves an exclusionary policy or history of trouble with a particular family's child or children as the basis of the eviction. This type of discrimination is quite common even where prohibited by local ordinances.³¹

Evictions typically result from a landlord's policy change or new ownership. The birth of a child to a previously childless couple, as in the Wolfsons' case, could prompt an eviction in an apartment building with an existing exclusionary policy. Prior to the *Wolfson* ruling, this situation was becoming increasingly common as more couples and single women in their thirties chose to have children.³² In the absence of an express statement that the child is the basis for eviction, this kind of discrimination is difficult to prove. Ordinarily a landlord can terminate a tenancy without cause with thirty days' written notice.³³

Refusal to rent to a family with children is also very com-

29. Interview with Ed Hernandez, attorney for Metropolitan Housing Alliance, Oakland, Ca. (July 1, 1982).

30. See Supplemental Brief filed in *Marina Point, Ltd. v. Wolfson* by West Coast Regional Office of Consumers Union of U.S., Inc., San Francisco, Ca., at 52. See also *Why Johnny Can't Rent*, *supra* note 8, at 1836.

31. Telephone interview with Karen Arthur, attorney for Housing Rights for Children Project, Oakland, Ca. (July 22, 1982). Confirmed by telephone interviews with Mike Rosen, Hayward Legal Aides, Hayward, Ca. (July 20, 1982); Michelle Kuhlman and Paul Smith, attorneys for Echo Housing Assistance Center, Hayward, Ca. (July 21, 1982).

32. *The New Baby Boom*, TIME, February 22, 1982, at 52, discusses the trend toward delayed child-bearing. See also, Note, *Housing Discrimination*, *supra* note 11, at 560 for a similar conclusion.

33. CAL. CIV. CODE § 1956 (West 1982). *But cf.*, M. Moskowitz, *Retaliatory Eviction in California: An Update*, STATE BAR OF CAL. REAL PROP. NEWS, Winter 1982, at 18. CAL. CIV. CODE § 1942.5(c) protects a tenant from retaliation by the landlord when the tenant has exercised "any rights under the law." Professor Moskowitz proposes that the rights would also seem to be constitutional as well as statutory, and since a tenant has a right to have a baby, the statute may be read to prohibit the landlord from retaliating against the tenant for doing so. He then goes on to say that an act which might be prohibited by law, even if it presently is not, would not seem to be a "right under the law." If the statute were construed in this way, smokers, drinkers, or pet owners would not be included in the statutory coverage.

mon.³⁴ The problem is illustrated by the fact that housing or renter assistance agencies³⁵ receive a large number of complaints of discrimination. It is often hard to prove the reason for the refusal because a landlord need not give any justification for not renting an apartment. Landlords sometimes refuse to rent to families with children and claim that the unit is too small for the family or that the unit has already been rented, even when this is not true.³⁶ Some landlords may require an abnormally large deposit or a high ratio of wages to rent to disqualify many low or moderate income families.³⁷

Discrimination against children and their families in rental housing, combines with the overall housing shortage, and places a heavy burden on society, a burden which predictably will increase in scope and severity unless steps are taken to resolve the

34. See notes 16 and 20, *supra*. Discrimination against children has also provided a loophole for landlords who are actually discriminating on the basis of race or sex. *Discrimination Against Kids - A Victory!*, 9 HOUSING L. BULL. at 24 (July-August 1979).

35. A Los Angeles agency received over a thousand calls a year from families with children who wanted to file complaints because they were having housing problems. Declaration of Louis Moss, Executive Director of Fair Housing Congress of Southern California (FHCS), in *Robinson and Presley v. Green*, No. C-203059, (Super. Ct., Los Angeles County, filed June 21, 1977).

The Housing Rights for Children Project in Oakland received 548 complaints of discrimination against children from female heads of households between December 1980 and June 1982. Telephone interview with Karen Arthur, Director, Housing Rights for Children Project, Oakland, Ca. (July 22, 1982).

A recent federal case, *Coles v. Havens Realty Corporation*, 633 F.2d 384 (1980), gave standing to sue to a housing agency whose purpose was to eliminate unlawful discriminatory practices. Although this case involved racial discrimination, the court commented that "[h]ousing, as a personal choice right of a citizen, is no less important than other rights affecting human dignity, such as unfettered access to public facilities." *Id.* at 387. If this right of standing could be invoked to give public agencies the right to sue for violations of the Unruh Civil Rights Act, more low income people would be encouraged to participate in such suits.

36. The determination that a particular factor is the basis for unlawful discrimination can be made by using "testers." This process involves sending at least two persons, similar in all respects but one, i.e., race, sex, children, etc., to apply for a particular rental unit or one in a particular group of units. If the landlord agrees to rent to the one without the particular factor to be tested, and refuses to rent to the one who has it, then the presumption is that the factor is the reason for the refusal. This procedure generally takes place pursuant to a complaint by an aggrieved party to an agency whose function is to assist tenants who believe they have been victims of discrimination. Interview with Ed Hernandez, *supra* note 29.

37. An unusually large deposit violates the statute limiting advance rental deposits to two months' rent for an unfurnished residence and three months' rent for a furnished residence. CAL. CIV. CODE § 1950.5(c) (West 1980).

problem. This, then is the situation the court attempted to redress in *Wolfson*.

II. THE *Wolfson* DECISION

A. *Facts of Wolfson*

The Wolfsons had no children when they leased their apartment at the Marina Point complex. After renting the unit, Mrs. Wolfson had a child. The landlord notified the couple that their lease would not be renewed because they had violated the minor child exclusion provision of the rental agreement. The Wolfsons' refused to vacate the apartment. The landlord then filed an unlawful detainer action against them.³⁸

The apartment was one of several hundred in the complex. The units were originally designed for adult occupancy; however, the previous landlord had rented to families with children. A few months after the Wolfsons leased their apartment, their landlord instituted a policy to exclude all children. Those tenants with children were allowed to remain, but no new families with children or pregnant women would be allowed to rent an apartment. The implementation of the policy proceeded rather slowly as shown by the fact that families with children were still living in the Marina Point apartments at the time of the trial.³⁹

The trial court granted the unlawful detainer and ruled that the Unruh Act did not include children, parents with children, or families with children as a protected class.⁴⁰ The California Supreme Court reversed, holding that the legislative intent of the Unruh Act was to prohibit all arbitrary and unreasonable discrimination based on class membership, and that children and families with children came within the purview of the statute.⁴¹

B. *Majority Analysis*

The court's inquiry focused on three issues: the legal issue of preventing all arbitrary discrimination; the social issue per-

38. CAL. CIV. PROC. CODE § 1161 (West 1982).

39. 30 Cal. 3d at 741, 640 P.2d at 127, 180 Cal. Rptr. at 509.

40. *Id.* at 724, 640 P.2d at 116, 180 Cal. Rptr. at 498.

41. *Id.* at 725, 640 P.2d at 117, 180 Cal. Rptr. at 498.

taining to the shortage of adequate rental housing and its effect on California families; and the issue of society's duty to protect its young. The core of the court's reasoning concerning these issues was its assertion of individual rights and the legislature's intent to protect them. The court identified a state interest in protecting the rights of families and children and found that this interest is more compelling than those of landlords and tenants who desire a child-free environment.

The narrow issue before the court was whether or not the Unruh Civil Rights Act would prohibit a landlord from refusing to rent an apartment to a family simply because the family included a minor child.⁴² The court rejected the trial court's deter-

42. *Id.* at 727, 640 P.2d at 120, 180 Cal. Rptr. at 499. The Wolfsons' lease defined minors as persons under age eighteen. The Wolfsons' appeal from the trial court decision asserted violations of the Unruh Civil Rights Act, the Fair Housing Act, and their rights to familial privacy and equal protection under the state and federal constitutions. The supreme court determined that the matter could be resolved under the civil rights statute and declined to address the other challenges. *Id.* at 730, 640 P.2d at 120, 180 Cal. Rptr. at 502. Under CAL. GOV. CODE § 12995(c) (Deering 1982) formerly the Fair Housing Law, CAL. HEALTH & SAFETY CODE §§ 35700, 35720 (West 1980) discrimination is not prohibited if based on factors other than race, color, religion, sex, marital status, national origin or ancestry. Discrimination against children and families with children would not directly violate this statute. See Comment, *Landlord Discrimination Against Children: Possible Solutions to the Housing Crisis*, 11 LOY. L.A.L. REV. 609, 624 (1978) for the argument that marital status might be grounds for including children and parents within the ambit of the Fair Housing Law.

The housing statutes are more restrictive in the number of protected classes, but they cover rental housing and housing for sale. The Unruh Civil Rights Act only covers housing for sale when sold by a business enterprise. *Burks v. Poppy Construction Co.*, 57 Cal. 2d 463, 370 P.2d 313, 20 Cal. Rptr. 609 (1962).

These differences are somewhat reconciled by CAL. GOV. CODE § 12993(c) which states, in pertinent part: "While it is the intention of the Legislature to occupy the field of regulation of discrimination in . . . housing encompassed by the provisions of this part . . . nothing in this part shall be construed, in any manner or way, to limit to restrict the application of section 51 of the Civil Code."

The court's decision not to address the constitutional questions raised by the defendants appears to be based on a lack of necessity for deciding these issues, "because we conclude that the landlord's exclusionary policy violates the Unruh Act we need not, and do not, reach the Wolfson's additional contentions." 30 Cal. 3d at 730, 640 P.2d at 120, 180 Cal. Rptr. at 502.

Underlying the decision not to discuss the constitutional issues may have been the essentially private nature of the conflict. 30 Cal. 3d at 748, 640 P.2d at 131, 180 Cal. Rptr. at 513. It could have been argued that as the apartment complex was located on land leased from Los Angeles County, there was sufficient state involvement for a judicial determination of the constitutional questions. *Id.* at 726, 640 P.2d at 117, 180 Cal. Rptr. at 499. Further, under *Shelly v. Kraemer*, 334 U.S. 1 (1948), judicial enforcement of the unlawful detainer action might be construed as sufficient state action. However, on the contrary, the definition of landlord-tenant relationships has been deemed a legisla-

mination that a landlord could exclude children and their families because children may be expected to be noisier and more troublesome than adults,⁴³ and because children and their families were not protected by the Act.⁴⁴ The court stated that the protected classes enumerated in the Act were meant to be "illustrative rather than restrictive," language taken from *In Re Cox*.⁴⁵

The court held that the Act applied to rental housing and that Marina Point, Ltd. was subject to the Act.⁴⁶ It determined that the legislature did not intend to limit the protective reach of the Act, but intended to prohibit all arbitrary discrimination by business establishments.⁴⁷

The majority summarily dismissed the landlord's argument that, under the second sentence of the Unruh Act, discrimination against all persons regardless of sex, race, religion, ancestry or national origin was beyond the scope of the Act. If the landlord's proposed interpretation were accepted, persons could be excluded from public accommodations because of sexual preference or political affiliation. The court remarked that such an interpretation would be a retreat from a long-established statutory policy prohibiting all arbitrary discrimination in public accommodations.⁴⁸

Next, the court rejected the landlord's argument that exclu-

tive rather than a judicial function, and thus, out of the court's jurisdiction. *Lindsey v. Normet*, 405 U.S. 56 (1971).

It is interesting to note that the federal government has shown some interest in providing housing for children. Under the Federal Housing Act, 12 U.S.C.S. § 1713(b)(2) (1976), 24 C.F.R. § 207.20 (1977), the federal housing program makes mortgage insurance benefits available to landlords who certify that they do not discriminate against children.

In this case, where the decisive theory was a violation of a civil right rather than a property right, the court could have decided the case on a constitutional basis had it elected to do so.

43. 30 Cal. 3d at 724, 640 P.2d at 116, 180 Cal. Rptr. at 498.

44. *Id.*, 640 P.2d at 116, 180 Cal. Rptr. at 498.

45. *Id.* at 725, 640 P.2d at 116, 180 Cal. Rptr. at 498.

46. *Id.* at 731, 640 P.2d at 120, 180 Cal. Rptr. at 502. *Swann v. Burkett*, 209 Cal. App. 2d 685, 26 Cal. Rptr. 286 (1962) (Unruh Act was applicable to rental housing in a case where a man was denied housing because of his race); *Abstract Investment Co. v. Hutchinson*, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962); *Flowers v. John Burnham & Co.*, 21 Cal. App. 3d 700, 98 Cal. Rptr. 644 (1971).

47. 30 Cal. 3d at 732, 640 P.2d at 121, 180 Cal. Rptr. at 503.

48. *Id.* at 734, 640 P.2d at 122, 180 Cal. Rptr. at 504; *See supra* note 4.

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sion of children was reasonable because they are “noisier and rowdier” than adults and that such exclusion was not arbitrary but is rationally related to an interest in preserving a quiet environment.⁴⁹ The court stated that exclusion of an “entire class of individuals on the basis of a generalized prediction that the class ‘as a whole’ is more likely to commit misconduct than some other class” would be invalid under the Act. Even if the generalization about a class is true, an individual member of the class to whom the generalization does not apply cannot be denied his or her statutory rights. Only an individual’s disruptive conduct, *not* membership in a class based on “status” or group classification, provided grounds for exclusion from public accommodations.⁵⁰

Evidence was presented in *Wolfson* which showed that the defendants’ child’s behavior was not disruptive. The court concluded therefore that there was no justification for individually excluding him and his parents, especially when other children were still permitted to live in the apartment complex.⁵¹

Thus, the court determined that membership in a class expected to behave in a certain way must be coupled with actual misconduct for exclusion to be justified. This decision effectively overruled *Flowers v. John Burnham & Co.*,⁵² which permitted a landlord to exclude male children over five years of age. The *Flowers* court held that eviction of a family with children was neither arbitrary nor unreasonable because children can be noisy, boisterous and mischievous.⁵³

49. *Id.* at 737, 640 P.2d at 125, 180 Cal. Rptr. at 506.

50. *Id.* at 740, 640 P.2d at 126, 180 Cal. Rptr. at 508.

51. *Id.* at 728, 640 P.2d at 118, 119, 180 Cal. Rptr. at 505. The court used the terms “children” and “families with children” interchangeably. It is not clear just which class was being protected. However, it is reasonable to assume that both groups were included, particularly in connection with rental housing given the fact that minor children usually share a home with family members (parents, blood relatives or legal guardians).

The use of the term “families with children” is significant in that the Act’s coverage would not be limited to the nuclear family. This is important in those situations where the adult seeking a rental unit is not the parent of the child who will be living there. These cases could arise as a result of adversity, either the death or absence of a parent, which requires that a child or children live with some one else.

The value of the extended family was recognized by the United States Supreme Court in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). The Court held that a city ordinance prohibiting extended families in one residence violated the constitutional rights of privacy and family relationships.

52. 21 Cal. App. 3d 700, 98 Cal. Rptr. 644 (1971).

53. *Id.* at 703, 98 Cal. Rptr. at 647.

Based upon its “reasonableness” analysis, the court also rejected the landlord’s contention that the apartment complex’s facilities were unsuitable for use by children. The court noted that the complex’s facilities, such as swimming pools and un-gated walkways to the ocean, were not incompatible with occupancy by children, but had, in fact, been used by children for several years.⁵⁴ The landlord’s exclusionary policy was also distinguishable from age-limited admissions policies for retirement communities and specially designed senior citizen housing units. Marina Point apartments served no special purpose such as providing a peaceful and quiet environment for the benefit of the elderly.⁵⁵ No societal interest, such as protecting children from harmful activities or safety hazards, could be achieved by their exclusion.⁵⁶ On the contrary, if the presence of a hazard to children’s health or safety could justify child discrimination, landlords could evade the Act by adding “some incidental facility which posed a special danger to an undesired class of potential patrons.”⁵⁷ Evasion of the Act’s provisions cannot be allowed so easily. The court concluded that there was no reasonable basis for the landlord’s arbitrary discrimination.⁵⁸

It rejected the landlord’s absolute right to select his or her tenants by noting that this right was already circumscribed by the Act.⁵⁹ The inference is that adding another class of tenants who cannot be arbitrarily excluded or rejected would do little harm to a landlord’s already limited discretion. A landlord’s right to maximize profits (economic gain) is not a reasonable basis for exclusion.

The court did not discuss the rights of non-elderly tenants who would prefer to live in a child-free residential facility. The majority did make a passing reference to tenants’ interests when it refused to sanction the “sacrifice of the well-being of children on the altar of a landlord’s profit, or possibly some tenants’ convenience.”⁶⁰

54. *Id.* at 744 n.13, 640 P.2d at 129 n.13, 180 Cal. Rptr. at 511 n.13.

55. *Id.* at 742, 640 P.2d at 127, 180 Cal. Rptr. at 509.

56. *Id.* at 744, 640 P.2d at 129, 180 Cal. Rptr. at 511.

57. *Id.* at 730, 640 P.2d at 120, 180 Cal. Rptr. at 502.

58. *Id.* at 744, 640 P.2d at 129, 180 Cal. Rptr. at 511.

59. *Id.* at 730, 640 P.2d at 120, 180 Cal. Rptr. at 502.

60. *Id.* at 745, 640 P.2d at 129, 180 Cal. Rptr. at 511.

The court noted that the legislature specifically allowed mobile home parks to enforce "adults only" regulations. It speculated that this action may have been taken because the special features of mobile home parks, their cost, unit size, and the age-homogeneous environment, closely correlate with the needs of the elderly. There was no attempt to reconcile the legislative intent to provide some child-free residential areas with the intent to bar all arbitrary discrimination under the Act. The court noted that several attempts to enact legislation barring discrimination against children in rental housing had failed to pass, and commented that unadopted proposals have little value as evidence of legislative intent. Thus, the *failure* of these proposals was not to be interpreted as an indication of the legislature's intent to provide child-free residences.⁶¹

In the absence of a statute protecting the rights of children and their families by specific designation, the *Wolfson* court used the broader civil rights statute to solve a serious social problem: the shortage of decent housing for households with children.⁶² The rationale was that to allow landlords to continue arbitrary discrimination against children would sanction "widespread and potentially universal, exclusion of children from housing."⁶³

C. *The Dissent*

The dissent concluded that the exclusionary policy would be justified since the apartments had been originally planned for all-adult occupancy. The dissent disagreed with the majority's

61. *Id.* at 735, 736 n.7, 640 P.2d at 123 n.7, 180 Cal. Rptr. at 505 n.7. See CAL. CIV. CODE §§ 798.76, 799.5 (West 1982).

62. In the absence of statutory guidelines, the court saw the need to resolve a serious problem and took the most direct route. Many other states have statutes prohibiting discrimination against children. They include: Arizona, Connecticut, Delaware, Illinois, Massachusetts, Michigan, Montana, New Hampshire, New Jersey, New York and the District of Columbia. *Why Johnny Can't Rent*, *supra* note 8, at 1829-30 n.4. Several California cities have local ordinances prohibiting housing discrimination against children. They are: Berkeley, Davis, Fresno, Los Angeles, Oakland, San Francisco, San Jose and Santa Monica. *Id.*

The outcome of the case had no direct effect on the Wolfsons. They had vacated their apartment before the appeal was heard. However, the outstanding judgment for damages, attorney fees, and costs, as well as the importance of the issue prevented the appeal from being rendered moot. 30 Cal. 3d at 730 n.3, 640 P.2d at 120 n.3, 180 Cal. Rptr. at 501 n.3.

63. *Id.* at 743, 640 P.2d at 128, 180 Cal. Rptr. at 510.

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suggestion that the present owner was barred from using his property for its intended purpose merely because the previous owner had not chosen to do so. It conceded that a different conclusion would follow had the premises been designed for "general" use, not specifically for adult rentals.⁶⁴

III. IMPACT AND SIGNIFICANCE

The *Wolfson* court expanded the coverage of the Unruh Civil Rights Act by including children and families with children as protected classes. No prior state or case law had made such a determination.⁶⁵ Now, if a tenant believes that an eviction's purpose is to remove children, she can use the *Wolfson* ruling as a defense to an unlawful detainer action.⁶⁶

Although the holding is intended to ameliorate the housing problems of families with children, it does not apply to all rental housing. Landlords in mobile home parks may still exclude children under California law.⁶⁷ The status of condominium owners who wish to rent units controlled by covenants, conditions or regulations excluding children, however, was recently determined in *O'Connor v. Village Green Owners Ass'n*, where the California Supreme Court stated that "the restrictive covenant against children is already invalid under Marina Point as to

64. *Id.* at 745, 748, 640 P.2d at 129, 132, 180 Cal. Rptr. at 512, 513.

65. 30 Cal. 3d at 724, 640 P.2d at 116, 180 Cal. Rptr. at 498.

66. See Note, *Housing Discrimination*, *supra* note 11, at 576, 578, for the notion that in the absence of a statute preventing housing discrimination against families with children, a judicial determination that such discrimination occurred can only be used as a defense, as in an ejection action. Although judicial intervention may prevent an eviction, it will not help a family find a place to live.

67. CAL. CIV. CODE § 798.76 (West 1982) allows rules and regulations limiting residence to adults only in mobile home parks. These statutes may be open to a constitutional challenge. The state's interest in protecting the elderly will be a decisive factor on this issue because the majority of mobile home park residents are over sixty. CAL. COMM. ON HOUSING AND COMMUNITY DEVELOPMENT, REPORT OF THE ASSEMBLY, HOUSING FOR THE ELDERLY at 2 (1976). Over ninety percent of California's mobile home parks are for adults only. *Id.*

As long as these adults-only restrictions are upheld, an affordable housing option will be denied to families with children. *No Room for 'Adults Only'*, Los Angeles Times, Sept. 10, 1981, at 8, col. 1.

An additional problem created by the uncertainty of acceptable age limits is that adults also complain about arbitrary age limits which may deny them access to mobile home parks. CAL. DEPT. OF FAIR EMPLOYMENT AND HOUSING, FIELD OPERATIONS DIRECTION No. 22 at 1 (1982).

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units held as income property and rented out by their owners.”⁶⁸ Furthermore, a sublessor who executes a written lease with a sublessee is barred from excluding children.⁶⁹

One result of *Wolfson* is that businesses open to the public may not arbitrarily deny access to minors unless the denial is permitted by statute⁷⁰ or otherwise related to the services performed and the facilities provided.⁷¹ Exclusion based on the presumption that children may be nuisances or thieves would be prohibited as arbitrary discrimination.

A recent case, *American Booksellers Ass'n, Inc. v. Superior Court*⁷² relied on the *Wolfson* holding in determining that the local ordinances of two California towns were overbroad.⁷³ The ordinances denied access to children unaccompanied by parents to supermarkets, convenience stores, drug stores, and bookstores which sold and displayed books, magazines or other publications portraying sexually explicit material.⁷⁴

In addition to finding that the ordinances would have a “chilling effect . . . on the exercise of free speech,”⁷⁵ the court of appeal noted that “the California Supreme Court has recently

68. No. LA 31495, Slip op. at 11 (Cal. Supreme Court May 9, 1983). In 1982 the California Supreme Court granted a hearing and remanded *O'Connor* for consideration in light of the *Wolfson* decision. The court of appeal declined to follow *Wolfson* and held that a condominium association could enforce rules prohibiting occupancy by families with children who owned a unit although a local ordinance would have allowed the owner to rent to a family with children. *O'Connor v. Village Green Owners Ass'n*, 132 Cal. App. 3d 173, 183 Cal. Rptr. 111 (1982).

69. CAL. CIV. CODE § 53 (West 1982) prohibits any written instruments, including a lease, to discriminate against the classes designated in the Act. Should this section be construed as part of the anti-discriminatory scheme of the Act, then children and their families would be protected. In a separate concurring opinion in *O'Connor v. Village Green Owners Ass'n*, No. 31495, slip op. at 4 (Cal. Supreme Court May 9, 1983) (Broussard, J., concurring), Justice Broussard stated that section 53 was sufficient to invalidate the condominium association's discriminatory restrictions. He noted that section 53 dealt specifically with discriminatory restrictions on the use of real property and was intended by the legislature to receive the same illustrative reading as section 51. *Id.* at 1.

70. CAL. BUS. & PROF. CODE § 25658 (West 1983) prohibits furnishing alcoholic beverages to minors under twenty-one; CAL. PEN. CODE § 313.1 (West 1982) prohibits the distribution of “harmful matter” to minors.

71. 30 Cal. 3d at 737, 640 P.2d at 124, 180 Cal. Rptr. at 506.

72. 129 Cal. App. 3d 197, 181 Cal. Rptr. 33 (1982).

73. *Id.* at 205, 181 Cal. Rptr. at 38.

74. *Id.* at 199, 181 Cal. Rptr. at 34.

75. *Id.* at 206, 181 Cal. Rptr. at 39.

held . . . that children as a class are protected by the Unruh Civil Rights Act . . . against arbitrary exclusion from businesses. This ruling would prohibit the type of wholesale exclusion of minors . . . authorized by the subject ordinances."⁷⁶

Presently, some movie theaters commonly exclude children who are under sixteen and unaccompanied by a responsible adult, during the evening hours. This restriction is enforced for the purpose of ensuring "an adult atmosphere" rather than preventing children from seeing films with an "R" or "X" rating.⁷⁷ A court could find an adult moviegoer's pleasure no more compelling than "tenants convenience"⁷⁸ and thus, no better justification for the exclusion of children unless it concluded that limited access to public accommodations, admission during the daytime, precluded a claim of arbitrary discrimination.

The *Wolfson* court specifically addressed the problem of discrimination against families with children in rental housing, but it went beyond that issue by designating children and their families as protected classes in terms of *all* public accommodations. Therefore, theaters, restaurants, hotels, stores and other similar businesses may no longer be able to arbitrarily refuse admission to children and their families.

More significantly, the court left open the possibility of future adjudications to define other classes which merit protection under the Act. Under the court's "illustrative rather than restrictive"⁷⁹ interpretation of the Act, there may be few, if any, limits to the number and variety of classes that may be deemed protected. The *Wolfson* court stated that the protection against discrimination granted by the Act applied to "all persons."⁸⁰

76. *Id.* at 205, 206, 181 Cal. Rptr. at 38.

77. The existence of this type of discrimination was confirmed in a telephone conversation with Bill Hume, Festival Cinema, Inc., Walnut Creek, Ca. (July 20, 1982). The right to entertainment may not have the same priority as decent housing, but when the history of the public accommodations statutes which preceded the Act is considered, the right to entertainment and amusement has a long tradition of importance. See the historical note following CAL. CIV. CODE § 51 (West 1982) referring to an earlier amendment, Stats. 1905, c. 413, p. 553 § 1, which included theatres, skating rinks, and "all other places of . . . amusements" under the public accommodations statute.

78. 30 Cal. 3d at 745, 640 P.2d at 129, 180 Cal. Rptr. at 508.

79. *Id.* at 732, 640 P.2d at 121, 180 Cal. Rptr. at 503.

80. *Id.* at 736, 640 P.2d at 124, 180 Cal. Rptr. at 506. Presently, landlords can dis-

The victim of an arbitrary exclusionary practice must be an "innocent" individual whose conduct does not conform to the generalization about the behavior of the class to which he or she belongs, and membership in that class must be the basis for the discrimination.⁸¹ Judicial interpretation has already extended the Act's coverage to include homosexuals, students, welfare recipients, persons with a particular occupation or marital status, and those persons who associate with members of protected classes.⁸²

If courts should apply a literal interpretation of the policy that the Act is intended to prevent discrimination against all persons, a number of other classifications could be found to be protected by the civil rights statute. Persons with psychiatric problems, or problems caused by alcohol or drug abuse, who may experience some difficulty in rental housing would be likely candidates for statutory protection. Similarly, young persons who have not yet established a credit rating, or those with poor credit ratings, may face discrimination by landlords who want

criminate against tenants who have pets. A personal dislike of animals, or a fear that the pet owner will allow the animal to be noisy or destructive would be an insufficient basis for discrimination if this generalization does not apply to a particular tenant or prospective tenant. *Id.* at 740, 640 P.2d at 126, 180 Cal. Rptr. at 508. California law already allows guide, signal or service dogs in many public accommodations, CAL. CIV. CODE § 54.2 (West 1982); bakeries, CAL. HEALTH & SAFETY CODE § 28204 (West 1980); and shops in public buildings, CAL. GOV. CODE § 6909 (West 1980). Elderly tenants in public agency housing may keep two pets, CAL. HEALTH & SAFETY CODE § 19901 (West 1980).

Owners of motorcycles are another group who have experienced difficulty in finding rental housing. Interview with Paul Smith, *supra* note 31. The *Wolfson* court specifically referred to motorcyclists as a group which could be excluded because the owner of a business enterprise had reason to believe that such a group might present greater problems than some other groups and rejected an interpretation of the Act that would permit such discrimination. 30 Cal. 3d at 739, 640 P.2d at 126, 180 Cal. Rptr. at 508.

Smokers, waterbed owners, and ex-convicts are examples of the variety of classes which can be used as an excuse for discrimination by landlords. If the court should decide that exclusion based on *any* arbitrary classification is prohibited, then these, and other similar classifications would be construed as classes protected by the Act.

81. *Id.* at 740, 640 P.2d at 126, 180 Cal. Rptr. at 508.

82. *Id.* at 736, 640 P.2d at 124, 180 Cal. Rptr. at 505. *See, Stoumen v. Reilly*, 37 Cal. 2d 713, 234 P.2d 969 (1951), (homosexuals cannot be excluded from restaurants and bars.) *See also*, 59 Ops. Att'y Gen. 70, 72 (1976) for the opinion that the Act applies to students and young people who are likely to patronize fast food outlets and convenience stores in residential neighborhoods.

A recent case, *Hubert v. Williams*, 133 Cal. App. 3d Supp. 1, 184 Cal. Rptr. 161 (1982), relied on *Wolfson* in holding that a landlord could not evict a tenant whose live-in housekeeper was a lesbian. Neither homosexuality nor association with homosexuals is a justifiable reason for exclusion from rental housing. *Id.* at 5, 184 Cal. Rptr. at 163.

some assurance of prompt payment. In the absence of some reasonable basis for anticipating late payment or non-payment, landlords would be prohibited from excluding or evicting such persons.

Wolfson offers no guidelines for determination of the threshold number of persons required to constitute a class. The court referred to "broad 'status' classifications" and "broad status-based exclusionary polic[ies]"⁸³ but did not state *how broad* the classification must be. The court frequently emphasized the individual's right to be free from arbitrary discrimination and stated that the loss of the right must be based on a specific individual's own conduct.⁸⁴ Any exclusion "on the basis of class or group affiliation basically conflicts with the individual nature of the right afforded by the act of access to such [public] enterprises."⁸⁵ From this statement, it could be inferred that a class or group warranting protection need not be large, but need only have some distinctive mark on which a proprietor or landlord could base a presumption of group behavior.⁸⁶

IV. CONCLUSION

A democratic society continually adjusts the tension between individual freedom and social equality. The *Wolfson* court favored equality in competition for available rental housing over landlords' freedom to have a significant voice in selecting tenants.

If *Wolfson* is narrowly interpreted, it is limited to the prohibition of the exclusion of children and families with children in rental housing.⁸⁷ However, because of *Wolfson*, children are now a protected class under the Unruh Civil Rights Act. They may be excluded from public accommodations only if the exclusion is based on the facilities or services available, or if a particular child or children actually misbehave.

A broader interpretation of *Wolfson* based on the court's re-

83. 30 Cal. 3d at 740, 640 P.2d at 126, 180 Cal. Rptr. at 508.

84. *Id.* at 738, 640 P.2d at 125, 180 Cal. Rptr. at 507.

85. *Id.* at 740, 640 P.2d at 126, 180 Cal. Rptr. at 508.

86. *See supra* note 80.

87. 30 Cal. 3d at 738, 640 P.2d at 125, 180 Cal. Rptr. at 507.

vival of its "illustrative rather than restrictive" interpretation of the Act, has great significance. This interpretation of *Wolfson* may be used by other classes of aggrieved tenants to claim discrimination when landlords use classifications or other characteristics which they find undesirable to deny housing. The court implied when it stated that, "under the Unruh Act we have condemned *any* arbitrary discrimination against *any* class,"⁸⁸ that it would not be adverse to extending the protection of the Act to other as yet undefined classes. The *Wolfson* decision can and has been used by the lower courts to address a variety of discriminatory practices.

The court expanded its prohibition against age discrimination in *O'Connor v. Village Green Owners Ass'n* by holding that age restrictions in covenants, conditions, and regulations established by condominium owners associations violate the civil rights statute. The *O'Connor* court did not define another protected class, but reached the interest in privately owned real property by defining condominium associations as "business establishments" subject to the Unruh Civil Rights Act.⁸⁹

O'Connor reinforces the majority's determination to eradicate arbitrary discrimination. Future cases will test the evasive measures used by landlords, property owners, and business interests. The trend toward a broad interpretation of the Act established by *Wolfson* and its progeny will benefit victims of discrimination in the housing market. The majority's stance holds forth the promise that class-based discrimination or exclusion may be judicially eliminated in areas beyond public accommodations.

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88. 30 Cal. 3d at 744, 640 P.2d at 129, 180 Cal. Rptr. at 511. (Emphasis added.)

89. No. LA 31495, slip op. at 10 (Cal. Supreme Court May 9, 1983).

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