

1987

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Recommended Citation

Gretchen Walsh, *The Necessity for Shelter: States Must Prohibit Discrimination Against Children in Housing*, 15 Fordham Urb. L.J. 481 (1987).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol15/iss2/6>

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THE NECESSITY FOR SHELTER: STATES MUST PROHIBIT DISCRIMINATION AGAINST CHILDREN IN HOUSING

I. Introduction

For many families, the dream of "a white picket fence" is less likely than ever before to become a reality. The increased costs of purchasing a home¹ make it extremely difficult for the majority of homeowners to raise enough capital to realize their dream.² The rental market is just as bleak as the buying market, because the demand for apartments often exceeds the supply,³ which creates a landlords' market and shifts increased costs to the tenant.⁴

The tightening of both the buying and rental markets for housing, as well as changing societal needs⁵ and the unequal bargaining power

1. See North, *Effects of the Recession and Housing Supply on Fair Housing Goals*, in A SHELTERED CRISIS: THE STATE OF FAIR HOUSING IN THE EIGHTIES 70, 71 (1983) [hereinafter North]. From 1976 to 1981, the median sales price of single-family homes increased from \$38,100 to \$66,400, and the average sales price increased from \$42,200 to \$78,300. See *id.*

2. See *id.* at 72. Using an affordability index, a measure which equates median family income with the qualifying income required by the National Mortgage Association to purchase a home with a 20% down payment, and the number 100 occurs when qualifying income equals median income, the capacity to purchase a home declined from 120.6 in 1977 to 70.6 in 1982. See *id.*

3. See Hinds, *How 135,000 Change Tenancies Every Year*, N.Y. Times, Feb. 16, 1986, § 8, at 1, col. 2. The author states that New York City has an "unofficial housing vacancy rate of minus 1 percent—the official vacancy rate of 2 percent minus the 3 percent of housing that is dilapidated." *Id.*; see also *Protests are Mounting Over "Adults-Only" Rentals*, U.S. NEWS & WORLD REP., Feb. 4, 1980, at 58. "Vacancy rates in many cities are at a record low because of a sharp decline in building and the conversion of many rental projects to condominiums." *Id.*

4. See Schechter, *The Effects of the Recession and Housing Supply on Fair Housing Goals, Public and Private*, in A SHELTERED CRISIS: THE STATE OF FAIR HOUSING IN THE EIGHTIES 54, 55 (1983) [hereinafter Schechter]. "As [a] result, more of available income was being paid for housing in 1980 than in 1970. The median gross rent for the overall populace, for example, rose from 20% of income to 27 percent in 1980." *Id.* Furthermore, families with children "often pay over one-third of their income for housing because they are refused cheaper housing." J. Greene & G. Blake, *How Restrictive Rental Practices Affect Families with Children* 3 (1980) (prepared for the U.S. Department of Housing and Urban Development, Office of Policy Development and Research) [hereinafter Greene & Blake].

5. See Ridings, *Discrimination Against Women in Housing Finance*, in A SHELTERED CRISIS: THE STATE OF FAIR HOUSING IN THE EIGHTIES 104 (1983). "As homeownership becomes less financially possible for young families and as the number of divorced, widowed, elderly, and childless couples increases—all of which

between landlord and tenant, have caused many landlords to convert their buildings into "adults-only"⁶ complexes. A recent federal study revealed that twenty-six percent of the nation's rental units banned children entirely, and an additional fifty percent limited them by number, age, or other factors.⁷ Landlords justify their actions by pointing to the increased maintenance and liability insurance costs related to renting to families with children.⁸

No statistics, however, support the contentions of these landlords.⁹ Thus, critics of "adults-only" housing argue that the driving force behind child-exclusion practices is the demand for such housing created by individuals who wish to isolate themselves from the disturbances of children and are willing to pay a premium for their

have altered the demand for housing—the availability of rental housing for families with children has turned into a salient issue." *Id.* at 107.

6. For the purposes of this Note, the phrase "adults-only" complexes will encompass apartments, cooperatives, and condominiums that restrict residency to those over the age of eighteen.

7. See Lublin, *Landlords' "No-Children" Policies Frustrate Parents Seeking Housing*, Wall St. J., Oct. 16, 1985, at 35, col. 3 [hereinafter Lublin]; see also R. MARANS & M. COLTEN, MEASURING RESTRICTIVE RENTAL PRACTICES AFFECTING FAMILIES WITH CHILDREN: A NATIONAL SURVEY 24 (1980) (prepared for the U.S. Department of Housing and Urban Development, Office of Policy Development and Research) [hereinafter MEASURING RESTRICTIVE RENTAL PRACTICES].

8. See Edelman, *No Children—Landlords Say—Stop It*, N.Y. Times, Nov. 24, 1983, at A23, col. 3 [hereinafter Edelman]. The author states that "[l]andlords cite higher maintenance costs as the reason for creating no-children policies. But there is no evidence to support this claim. The truth is that landlords may be able to charge higher rents for all-adult complexes in a nation that is increasingly anti-child." *Id.*; see also MEASURING RESTRICTIVE RENTAL PRACTICES, *supra* note 7, at 63. The authors found that "[f]our in five respondents said that . . . higher maintenance costs [were] either a big problem or somewhat of a problem . . ." *Id.*

On the issue of higher insurance costs, see Note, *Why Johnny Can't Rent—An Examination of Laws Prohibiting Discrimination Against Families in Rental Housing*, 94 HARV. L. REV. 1829, 1836 n.39 (1981) ("Fifteen percent of the apartment owners or managers found higher insurance costs a big problem, with an additional 23% considering them somewhat a problem") (citation omitted) [hereinafter *Why Johnny Can't Rent*]. See MEASURING RESTRICTIVE RENTAL PRACTICES, *supra* note 7, at 68. The survey reported that a total of 36% of managers stated that higher insurance costs were a big problem or somewhat of a problem, whereas 64% did not find higher insurance costs a problem at all. See *id.*

9. See *supra* note 8; see also *Marina Point Ltd. v. Wolfson*, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496, cert. denied, 459 U.S. 858 (1982). In *Marina Point*, the landlord's expert witnesses testified that landlords who rent to families with children tend to have higher maintenance costs than landlords who exclude children, because children cause more wear and tear on the property. 30 Cal. 3d at 728, 640 P.2d at 119, 180 Cal. Rptr. at 500. The witnesses based this statement, however, on their general experience rather than on empirical data. *Id.*; cf. *Why Johnny Can't Rent*, *supra* note 8, at 1836 n.39 (study found that insurance companies did not "consider the presence of children a significant factor in setting rates for apartment buildings") (citation omitted).

seclusion.¹⁰ In addition, the current lack of apartment construction suitable for family living arrangements has exacerbated this problem.¹¹

Rationales underlying child-exclusion practices include both the landlord's right to the free alienation of his property and the right of tenants to choose a child-free living situation.¹² Both these goals are ordinarily sanctioned by society. Nevertheless, when the groups most affected by these child-exclusion practices are considered,¹³ the end result is an increase in the number of homeless individuals¹⁴ and families living in substandard conditions.¹⁵ This

10. See *supra* note 9; see also Golubock, *Housing Discrimination Against Families with Children: A Growing Problem of Exclusionary Practices*, in *A SHELTERED CRISIS: THE STATE OF FAIR HOUSING IN THE EIGHTIES* 128 (1983) [hereinafter Golubock]. The author reported on a 1980 United States Department of Housing and Urban Development (HUD) study that revealed that rents tended to be higher in child-restricted buildings. See *id.* at 130 (citation omitted).

The 1980 HUD survey revealed that 40% of the persons living in child-excluded complexes had reasons for their preference not to live near children. See *MEASURING RESTRICTIVE RENTAL PRACTICES*, *supra* note 7, at 57. Fifty-one percent gave noise as the reason for their preference, and only 17% of the responses had to do with "destructiveness, property damage or pranks." *Id.*

11. See Lublin, *supra* note 7, at 35, col. 3. "The family-housing crisis . . . is largely a symptom of . . . the widespread shortages of affordable apartments and the increased popularity of adults-only complexes that cater to the elderly and to young, childless adults." *Id.*; see also *MEASURING RESTRICTIVE RENTAL PRACTICES*, *supra* note 7, at 44. The authors found that "[w]hereas one in three units built since 1970 are in buildings/complexes not accepting families with children, about one in five units in places built earlier have such restrictions." *Id.* Furthermore, "[e]xclusionary policies appear to be increasing over time. Whereas one in four units in 1980 do not allow children, one in six units in buildings/complexes built prior to 1975 excluded children at that time." *Id.* at 71.

In the same survey, 40% of persons living in complexes excluding children said they chose the complex because children did not live there. See *id.* at 59. Furthermore, 37.3% would move out of the complex if children were permitted to live there. See *id.* at 62.

12. But see *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496, cert. denied, 459 U.S. 858 (1982). In *Marina*, the court stated: "[n]either statute nor interpretation of statute, however, sanctions the sacrifice of the well-being of children on the altar of a landlord's profit, or possibly some tenants' convenience." *Id.* at 745, 640 P.2d at 129, 180 Cal. Rptr. at 511; see also *infra* note 17.

13. See *infra* note 175 and accompanying text for a discussion of the groups most affected by these practices.

14. See Edelman, *supra* note 8, at A23, col. 3. "In the worst instances, families live in cars, vans, abandoned buildings, tents and rundown motels and hotels. One family with six children spent two and one-half months living on the Santa Monica, Calif., pier in the family's station wagon while they searched for a home." *Id.* See also Greene & Blake, *supra* note 4, at 33. The survey revealed that "[d]uring the past year, 44 percent of all respondents had lived with family or friends, 19 percent had lived with family members in separate households, and 33 percent had lived in cars, vans, abandoned buildings, or tents." *Id.*

15. See Edelman, *supra* note 8, at A23, cols. 1-2. "The H.U.D. survey revealed

outcome bothers the consciences of many. For example Justice Matthew O. Tobriner, voicing his opinion in *Marina Point, Ltd. v. Wolfson*,¹⁶ "A society that sanctions wholesale discrimination against its children in obtaining housing engages in suspect activity. Even the most primitive society fosters the protection of its young; such a society would hardly discriminate against children in their need for shelter."¹⁷

Although there is a real need to eradicate this form of discrimination, state legislatures have been unable to find a practical solution for the problem. The strong lobbying power of real estate developers and landlords often defeats any legislative attempts at reform.¹⁸ Furthermore, the few states that have passed legislation dealing with this problem have failed to provide an effective scheme for enforcing these rights.¹⁹ Finally, courts cannot find the legal support, in the absence of statutory authority, to strike down these practices.²⁰

stories about rats and severe cockroach infestations Many parents said they believed their apartments were not repaired because the owners knew that the families had no place else to go. More than eight million children in the United States are now living in inadequate housing." *Id.*; see also Golubock, *supra* note 10 at 129; cf. Greene & Blake, *supra* note 4, at 16. The survey revealed that "[f]orty-seven percent of the sample said they lived in substandard housing in the past year with 35.6 percent currently living in substandard housing" *Id.*

16. 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496, cert. denied, 459 U.S. 858 (1982).

17. *Id.* at 744, 640 P.2d at 129, 180 Cal. Rptr. at 511; see *Schmidt v. Superior Court*, 215 Cal. Rptr. 840 (Cal. Ct. App. 1985). In *Schmidt*, the court stated:

We can certainly understand the motivation of some adults to seek the peace and quiet of a setting that is free from the rough and tumble commotion of exuberant youth. However, the right of an adult to enjoy such relative tranquil[ity] is decidedly outweighed by society's vital and compelling interest in providing housing which fosters wholesome development of its children."

215 Cal. Rptr. at 847.

18. See Lublin, *supra* note 7, at 35, col. 4. For instance, Rhode Island's bill was "stalled for five years in the state Senate . . . and passed only after developers were granted an exemption for adults-only housing." *Id.* Similar exemptions are found in the statutes of Arizona, Alaska, Maine and Virginia. See *infra* notes 206-09 and accompanying text. Similarly, a proposed amendment to the Fair Housing Act has met opposition from the National Realtors Association over the inclusion of families as a protected class. See *infra* notes 24, 184 and accompanying text.

19. See *infra* notes 217-97 and accompanying text for a discussion of the problems with the current statutory schemes.

20. See *Flowers v. John Burnham & Co.*, 21 Cal. App. 3d 700, 98 Cal. Rptr. 644 (1971) (plaintiffs failed to assert violation of Unruh Act because discrimination against families not based on color, race, religion, ancestry, or national origin); *Lamont Bldg. Co. v. Court*, 147 Ohio St. 183, 70 N.E.2d 447 (1946) (upholding landlord's discrimination against children because state had not declared such practices against public policy); see also *Department of Civil Rights v. Beznos Corp.*, 421 Mich. 110, 365 N.W.2d 82 (1984) (restricting families with children is not *per se*

Recognizing the need for federal legislation to curtail child discrimination in housing, in 1983, several members of Congress introduced a bill to amend the Fair Housing Act (the Act).²¹ The bill, which would include families with children as a protected class under the Act,²² was not enacted during the 98th Congressional Session, and Senator Mathias reintroduced the bill for congressional consideration in February, 1986 and February, 1987.²³ The bill has not yet had a full hearing, and is currently pending in the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee.²⁴

After surveying the different paths courts and legislatures have taken in their attempts to end this discriminatory practice, this Note concludes that the most feasible and appropriate solution to the problem is a more effective form of state legislation.²⁵ Part II discusses the likelihood of success and the issues surrounding a claim based upon a denial of fourteenth amendment rights.²⁶ Part III centers on the possibility of using the Fair Housing Act for a private cause of action and the problems with the proposed bill to amend the Act.²⁷ Part IV examines the state statutes that attempt to ban this form of discrimination and the reasons for their ineffectiveness.²⁸ Finally, because of the inadequacy of each of these other courses of action, this Note advocates amending existing state statutes to provide for both a private cause of action and the establishment of housing commissions.²⁹ In either case, the statute should empower

violation of Civil Rights Act since Act does not require identical treatment of children and adults in every situation).

21. The Fair Housing Act of 1968, §§ 801-831, 42 U.S.C. §§ 3601-3631 (1982), provides, in pertinent part:

[I]t shall be unlawful—(a) [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin. (b) [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin. . . .

Id. § 3604.

22. See S. 1220, 98th Cong., 1st Sess., 129 CONG. REC. 6152 (1983).

23. See S. 2040, 99th Cong., 2nd Sess. 132 CONG. REC. 848 (1986); S. 558, 100th Cong., 1st Sess., 133 CONG. REC. 2256 (1987).

24. Telephone interview with staff member of the House Judiciary Committee. (Mar. 14, 1986).

25. See *infra* notes 217-97 and accompanying text for a discussion of the problems with the present statutes and proposals to make them more effective.

26. See *infra* notes 33-134 and accompanying text.

27. See *infra* notes 135-201 and accompanying text.

28. See *infra* notes 202-97 and accompanying text.

29. See *infra* notes 235-64 and accompanying text.

the court or administrative agency: (1) to use the doctrine of a prima facie case similar to that used in claims brought under the Fair Housing Act;³⁰ (2) to create a rebuttable presumption of discrimination whenever a landlord refuses to rent to individuals with children, thereby shifting the burden of persuasion to the landlord;³¹ and (3) in order to encourage private enforcement of these statutory rights, to provide economic incentives to the parties injured by this discrimination, e.g., a civil penalty and attorney's fees.³²

II. A Fourteenth Amendment Cause of Action

In *Halet v. Wend Investment Co.*,³³ the Ninth Circuit faced the issue of whether it should strike down child-exclusion practices as a violation of the equal protection and due process clauses of the fourteenth amendment.³⁴ After plaintiff Halet's application for an apartment in defendant Wend's complex was denied because of an adults-only rental policy,³⁵ Halet sued Wend claiming a denial of his fourteenth amendment rights.³⁶ Specifically, Halet contended that the policy infringed on his right under the due process clause to raise a family and discriminated against families with children in violation of the equal protection clause.³⁷ The Ninth Circuit held that the district court had improperly analyzed the landlord's practice under a rational basis test, the minimum standard of review applied to a fourteenth amendment challenge.³⁸ The appellate court stated that the highest standard of review was necessary; "Strict scrutiny is required . . . when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a

30. See *infra* notes 268-72 and accompanying text.

31. See *infra* notes 273-83 and accompanying text.

32. See *infra* notes 284-97 and accompanying text.

33. 672 F.2d 1305 (9th Cir. 1982).

34. See U.S. CONST. amend. XIV, § 1, which provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." See *infra* note 39 for a discussion of judicial review of fourteenth amendment challenges.

35. See *Halet*, 672 F.2d at 1307.

36. See *id.* at 1307.

37. See *id.* at 1309.

38. See *id.* at 1310. The district court had dismissed the complaint stating that because children were not a "[discrete and] insular minority" the policy passed the lesser degree of judicial scrutiny required in equal protection claims when a suspect class was not involved. *Id.*

suspect class.”³⁹ Based on *Moore v. City of East Cleveland*,⁴⁰ in which the Supreme Court had held that the right of family members to live together is part of the fundamental right of privacy,⁴¹ the Ninth Circuit reversed and remanded the case for the district court’s consideration of whether a “‘genuinely significant’ deprivation of a fundamental right [had] occurred.”⁴²

If adopted by other jurisdictions, the *Halet* holding would provide a significant weapon for parties injured by a landlord’s discrimination against children.⁴³ Other holdings of the Supreme Court,⁴⁴ however, as well as the decisions of several federal⁴⁵ and state⁴⁶ courts, indicate that, because of two requirements to a fourteenth amendment cause of action, the chance the courts would declare these practices unconstitutional is minimal at best.

A. The State Action Requirement

To claim that a private person has denied one his rights secured by the fourteenth amendment of the Constitution, one must allege some form of state involvement in the private activity. The next two subsections set forth the theories upon which courts have found that a private party’s actions would be deemed “state action” for the purposes of the fourteenth amendment.

39. *Id.* Generally, economic or social welfare legislation, or state actions, which differentiate between individuals, will be upheld by a court as long as they are rationally related to a legitimate governmental purpose. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 535-734 (2d ed. 1983) [hereinafter CONSTITUTIONAL LAW]. However, if a law or action by the state works to the disadvantage of a member of a “suspect class,” a court will require the state to assert a “compelling” governmental interest that is necessarily advanced by the legislation, or action. See *id.* at 591-92. The classifications that the Supreme Court has deemed to be suspect include race, alienage, national origin, and gender. See *id.* at 611-713. See *infra* note 109 for a discussion of the level of judicial scrutiny applied to gender-based classifications.

40. 431 U.S. 494 (1977).

41. *Id.* at 498-99. In fourteenth amendment actions, “the ‘right to privacy’ has come to mean the right to engage in certain highly personal activities.” CONSTITUTIONAL LAW, *supra* note 39, at 735. See *infra* notes 90-92 for cases involving the right to privacy under the fourteenth amendment.

42. *Halet*, 672 F.2d at 1311.

43. See Granelli, “Adults Only” Housing Suffers Judicial Setbacks, Nat’l L.J., Mar. 1, 1982, at 5, col. 2 (stating that “the [Ninth] Circuit case [is] potentially more important . . . [since] the federal case could become law across the nation”).

44. See *infra* notes 52-53, 83, 89, 91, 100-01, 106-07, 112-14 and accompanying text.

45. See *infra* notes 60-62, 80, 91, 96-105, 108, 111, 127-34 and accompanying text.

46. See *infra* notes 52, 63-72, 91-95, 117-26 and accompanying text.

1. *The Shelley Doctrine*

Typically, plaintiffs who claim to be the victims of discrimination at the hands of landlords' child-exclusion practices, and who seek relief under the fourteenth amendment, base their right to sue on section 1983 of Title 42 of the United States Code.⁴⁷ To maintain an action under this statute, the plaintiff must show that the defendant deprived him of a right secured by "the constitution and the laws"⁴⁸ of the United States and that the defendant effected this deprivation "under color of any statute, ordinance, regulation, custom or usage, of any state or territory."⁴⁹ Thus, a necessary element of any claim brought under this statute is the presence of state involvement in the alleged deprivation.⁵⁰ As stated in *Halet*, "[t]he under-color-of-state-law requirement of section 1983 is equivalent to the state action requirement of the fourteenth amendment."⁵¹

Because of the purely private nature of a lease agreement, it is difficult to find state action in the landlord-tenant relationship.⁵² Consequently, constitutional scrutiny of a landlord's refusal to rent

47. The Civil Rights Act of 1968, 42 U.S.C. § 1983 (1982). The Act provides that in a civil action alleging a deprivation of rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.; see also *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155-56 (1978); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

48. See *supra* note 47 and accompanying text.

49. See *id.*

50. *Halet*, 672 F.2d at 1309.

51. *Id.* at 1309-10 (citing *Arnold v. IBM Corp.*, 637 F.2d 1350, 1355 n.2 (9th Cir. 1981)).

52. See Note, *Housing Discrimination Against Children: The Legal Status of a Growing Social Problem*, 16 J. FAM. L. 559, 579 (1977) (contending that "[d]iscrimination by a landlord in the private sector appears to be beyond the scope of the fourteenth amendment as interpreted by the Supreme Court") (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972)); see also *Lamont Bldg. Co. v. Court*, 147 Ohio St. 183, 70 N.E.2d 447 (1946). *Lamont* involved an eviction by a landlord because of the tenants' alleged violation of a condition in the lease prohibiting occupancy by children. See *id.* at 183, 70 N.E.2d at 447. In upholding the eviction, the court stated:

"Competent persons ordinarily have the utmost liberty of contracting, and their agreements voluntarily and fairly made will be held valid and enforced in the courts. Parties may incorporate in their agreements any provisions that are not illegal or violative of public policy." . . . Ordinarily, the owner of real property may surround its occupation and use by others with such reasonable restrictions as he may deem fit and proper.

Id. at 184-85, 70 N.E.2d at 448 (citation omitted).

to individuals with children is frequently unavailable—"the [fourteenth] [a]mendment erects no shield against merely private conduct, however discriminatory or wrongful."⁵³

One commentator has enumerated the various ways a landlord can discriminate against children: "[A]n initial refusal to rent to families with children, a refusal to renew a lease . . . because of the presence of children, and a covenant in a lease permitting the landlords terminate the lease if children later occupy the premises."⁵⁴ In the absence of any substantial state involvement with the landlord, any finding of state action in these circumstances would be tenuous at best.⁵⁵ Although there is a doctrine—known as the "*Shelley* doctrine," after the case of *Shelley v. Kraemer*⁵⁶—that allows courts to find state action based on a landlord's use of a state's judicial machinery to enforce a private agreement, the courts have refused to extend this doctrine beyond cases involving the enforcement of racially restrictive covenants.⁵⁷

It is true that a literal reading of *Shelley's* language—"but for the active intervention of the state courts, . . . petitioners would have been free to occupy the properties in question without restraint,"⁵⁸—would, as one commentator has noted, "subject *any* private agreement enforceable by a court to constitutional review."⁵⁹ Nevertheless, courts have consistently limited the *Shelley* doctrine because of their fear that its unfettered use would serve as a vehicle for constitutional review of *all* private actions, whenever a defendant utilizes the state's judicial machinery.⁶⁰

53. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); see *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). In *Adickes*, a white woman claimed a denial of equal protection when she was refused service in a cafeteria because she was accompanied by blacks. See *id.* at 147. The Supreme Court stated: "On the other hand, § 1 of the Fourteenth Amendment does not forbid a private party, not acting against a backdrop of state compulsion or involvement, to discriminate on the basis of race in his personal affairs as an expression of his own personal predilections." *Id.* at 169.

54. Travaglio, *Suffer the Little Children—But Not in My Neighborhood: A Constitutional View of Age-Restrictive Housing*, 40 OHIO ST. L.J. 295, 335 (1979).

55. See *infra* notes 75-77 and accompanying text for a discussion of the type of state involvement needed to find state action.

56. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

57. See *infra* notes 60-62 and accompanying text.

58. *Shelley*, 334 U.S. at 19.

59. Stanley, *Age Restrictions in Housing: The Denial of the Family's Right to its Integrity*, 19 HARV. C.R.-C.L. L. REV. 61, 80-81 (1984) (emphasis added) [hereinafter Stanley].

60. *Fallis v. Dunbar*, 386 F. Supp. 1117, 1120-21 (N.D. Ohio 1974), *aff'd*, 532 F.2d 1061 (6th Cir. 1976). In *Fallis*, the court stated that:

A second reason for limiting the *Shelley v. Kraemer* rule is the danger which the use of that doctrine poses as a precedent. A logical extension

Courts applying the *Shelley* doctrine to cases involving discrimination against children in housing have disagreed on how to apply it. For example, in the rental context, the court in *Langley v. Monumental Corp.*⁶¹ refused to apply the *Shelley* doctrine to a landlord's eviction proceeding, stating that:

The mere use of a state's eviction procedures does not constitute "state action," at least where there has been no showing of other significant state involvement in the private conduct, when the challenged discrimination is not racial in nature, or when the courts are not thereby enforcing a covenant which is discriminatory on its face.⁶²

By contrast, in the sale context, some courts have held that *Shelley's* doctrine will apply. For example, in *Franklin v. White*

of the doctrine would result in a federal cause of action existing whenever any state police power is used by private persons where constitutionally protected rights are involved Such an extension has so great an application to purely private action as to be overbroad.

386 F. Supp. at 1120-21.

All but one federal court considering this question has held that a tenant cannot successfully argue that a landlord's use of the state judicial system to effectuate an eviction constituted state action. *See, e.g.,* *Zephier v. Pierce*, 714 F.2d 856 (8th Cir. 1983); *Deal v. Newport Datsun, Ltd.*, 706 F.2d 141 (4th Cir. 1983); *Higbee v. Starr*, 698 F.2d 945 (8th Cir. 1983); *Miller v. Hartwood Apts., Ltd.*, 689 F.2d 1239 (5th Cir. 1982); *Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973); *Weigand v. Afton View Apts.*, 473 F.2d 545 (8th Cir. 1973); *Lavoie v. Bigwood*, 457 F.2d 7 (1st Cir. 1972); *Lee v. Patel*, 564 F. Supp. 755 (E.D. Va. 1983); *Chicarelli v. Plymouth Garden Apts.*, 551 F. Supp. 532 (E.D. Pa. 1982); *Walton v. Darby Town Houses, Inc.*, 395 F. Supp. 553 (E.D. Pa. 1975); *Hohensee v. Dailey*, 383 F. Supp. 6 (M.D. Pa. 1974); *Anderson v. Denny*, 365 F. Supp. 1254 (W.D. Va. 1973); *Caramico v. Romney*, 390 F. Supp. 210 (E.D.N.Y. 1972), *aff'd on other grounds*, 509 F.2d 694 (2d Cir. 1974); *Mullarkey v. Borglum*, 323 F. Supp. 1218 (S.D.N.Y. 1970). *But see* *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501, 505 (S.D.N.Y. 1969) ("[t]here is no doubt today that judicial action in private disputes is a form of state action required for application of the [fourteenth] amendment").

61. 496 F. Supp. 1144 (D. Md. 1980). *Monumental* had registered its building with the local housing commission as restricted to adults-only. *See id.* at 1146. After the *Langleys'* lease expired, *Monumental* refused to renew their lease because the *Langleys* were allegedly violating the adults-only restriction. *See id.* *Monumental* had threatened to bring a holdover proceeding in state court when the *Langleys* refused to vacate the premises. *See id.* at 1150-51.

62. *Id.* at 1151. The court was wary of applying the *Shelley* doctrine to this situation because it could "convert much purely private action into 'state action'" *Id.* (citing *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976); *Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973); *Weigand v. Afton View Apts.*, 473 F.2d 545 (8th Cir. 1973); *Lavoie v. Bigwood*, 457 F.2d 7 (1st Cir. 1972); *McGuane v. Chenango Court, Inc.*, 431 F.2d 1189 (2d Cir. 1970), *cert. denied*, 401 U.S. 994 (1971); *Fallis v. Dunbar*, 386 F. Supp. 1117 (N.D. Ohio 1974), *aff'd*, 532 F.2d 1061 (6th Cir. 1976); *Mullarkey v. Borglum*, 323 F. Supp. 1218 (S.D.N.Y. 1970)).

Egret Condominium, Inc.,⁶³ the plaintiffs asked the court to compel the reconveyance of a condominium because the defendants had breached the condominium rules provision included in their contract of sale that prohibited occupancy by children under the age of twelve.⁶⁴ The court recognized that voluntary adherence to these agreements would fail to implicate state action.⁶⁵ Nevertheless, the court found state action on the ground that, in ordering reconveyance, the court would necessarily legitimize the restrictive covenant.⁶⁶ On appeal, the Florida Supreme Court failed to address the issue of the lower court's use of the *Shelley* doctrine. The appellate court's opinion, however, contains evidence of that court's acceptance of the use of the *Shelley* doctrine. The court stated that "[w]henever an age restriction is attacked on due process or equal protection grounds, we find the test is: (1) whether the restriction under the particular circumstances of the case is reasonable, and (2) whether it is discriminatory, arbitrary, or oppressive in its application."⁶⁷ The mere mention of a due process or equal protection analysis indicates that the Florida Supreme Court found the requisite state action in this case. Other jurisdictions have followed this test.⁶⁸

63. 358 So. 2d 1084 (Fla. Dist. Ct. App. 1977), *aff'd on other grounds*, 379 So. 2d 346 (Fla. 1979).

64. *See* 358 So. 2d at 1086.

65. *See id.* at 1088.

66. *See id.* at 1089.

67. *White Egret Condominium, Inc. v. Franklin*, 379 So. 2d 346, 351 (Fla. 1979). *See Schreiner v. McKenzie Tank Lines & Risk Management Servs., Inc.*, 408 So. 2d 711, 719-20 (Fla. Dist. Ct. App. 1982) (court explained finding of state action in *White Egret* by stating that "the use of the power of the judiciary to compel or legitimize private actions is really state *encouragement* of forbidden discrimination") (emphasis in original).

68. *See Hill v. Fontaine Condominium Ass'n, Inc.*, 334 S.E.2d 690, 691 (Ga. 1985) ("age restrictions as to occupancy of condominiums are not unreasonable"); *Preston Tower Condominium Ass'n v. S.B. Realty, Inc.*, 685 S.W.2d 98, 102 (Tex. Ct. App. 1985) (condominium by-law which prohibited children if they moved in during first seven months of ownership held "reasonable means of achieving the legitimate goals of maintaining a virtually child free environment without undue hardships to present owners and residents"). *But see Covered Bridge Condominium Ass'n, Inc. v. Chambliss*, 705 S.W.2d 211, 213 (Tex. Ct. App. 1985). In *Chambliss* although the court used the *White Egret* test, it did not find the requisite state action, and thus, disagreed with the plaintiff's contention of *Moore's* applicability. *See id.*

In California, there is some authority for the finding of state action through the judicial enforcement of a restrictive covenant. *See Park Redlands Covenant Control Comm. v. Simon*, 181 Cal. App. 3d 87, 226 Cal. Rptr. 199 (1986). In *Simon*, although the court mentioned the possibility of finding state action through the court's enforcement of the covenant restricting occupancy by children, the court based state action on the state's encouragement of the violation of rights. *See* 226 Cal. Rptr. at 206 (citations omitted). The encouragement by the state was

Even in the sale context, however, some courts have refused to apply the *Shelley* doctrine. For example, the court in *Riley v. Stoves*⁶⁹ refused to apply the doctrine, stating that when the state had no hand in drafting the restriction, a court should not use a rational relationship test.⁷⁰

The contrary results reached in *Franklin* and *Riley* are surprising when one considers their factual similarity to *Shelley*.⁷¹ In these cases, the sale between a willing buyer and a willing seller would have occurred but for the request of a third party (usually an adjoining homeowner) for judicial intervention.⁷² In the rental context, however, the court would not interfere with the dealings of two willing parties.⁷³ This factual difference between the sale and rental contexts could explain the lack of cases applying the *Shelley* doctrine to a court's enforcement of a restrictive lease provision.⁷⁴

2. Other Theories for State Action

The state action requirement of section 1983 has been satisfied on the basis of three other theories espoused by the Supreme Court. Under these theories courts may consider a private party to be engaging in state action when: (1) the private party serves a public

an agreement between the developer and the city that in return for a special use permit, the developer would limit occupancy by the age and number of occupants. *See id.*

69. *See* 22 Ariz. App. 223, 526 P.2d 747 (1974).

70. *Id.* at 228, 526 P.2d at 752.

71. *See Shelley v. Kraemer*, 334 U.S. 1 (1948). In *Shelley*, the Supreme Court held that a lower court's enforcement of a racially restrictive covenant constituted state action. *See id.* at 20. The facts are similar to these cases: in *Shelley*, the seller was willing to sell his home to a black family and it was the adjoining landowners who sought the court's enforcement of the racially restrictive deed covenant. *See id.* at 6. In these cases, the adjoining condominium owners brought suit to enjoin the sale to families with children. *See Franklin v. White Egret Condominium Ass'n*, 358 So. 2d 1084 (Fla. Dist. Ct. App. 1977), *aff'd on other grounds*, 379 So. 2d 346 (Fla. 1979); *Hill v. Fontaine Condominium Ass'n, Inc.*, 255 Ga. 24, 334 S.E.2d 690 (1985); *Preston Tower Condominium Ass'n v. S.B. Realty, Inc.*, 685 S.W.2d 98 (Tex. Ct. App. 1985). *But see Riley v. Stoves*, 22 Ariz. App. 223, 526 P.2d 747 (1974) (court refused to apply *Shelley* doctrine).

72. *See supra* note 71 and accompanying text.

73. In the rental situation, it is a landlord's refusal to rent, or a restrictive lease provision, that prevents the family from living in the apartment.

74. *See supra* notes 60-62. *But see Stanley, supra* note 59, at 80-81, in which he argues that restrictive covenants are a powerful tool and may have the same effect as zoning an area childless. *See id.* In addition, Stanley argues that "if society is to maintain effective control on private land use restrictions, that control must come from the courts in the form of judicial review." *Id.* at 82.

function;⁷⁵ (2) the state commands or encourages the private activity;⁷⁶ or (3) the state and the private party have enough mutual contacts that the state may be deemed to be a "joint participant" in the activity.⁷⁷

The state action requirement in *Halet* was predicated on this "joint participant" theory.⁷⁸ Several of the factors the court deemed relevant to this theory were that: (1) Los Angeles County had owned the land and leased it to defendant Wend; (2) federal and state funds had been used to develop the land; (3) the County had had final approval on the design plans; (4) the County had controlled the use and purpose of the apartment, as well as the rent charged; and (5) Wend had given the County a percentage of the rent charged.⁷⁹ Other courts have deemed the state to be a joint participant with the landlord when: (1) the latter received financial benefits from the government and was subject to substantial state regulation;⁸⁰ and (2) an urban renewal

75. Courts will employ the public function theory when the state entrusts a private individual with the performance of functions that are governmental in nature. *See Evans v. Newton*, 382 U.S. 296 (1966) (operation of private park in racially discriminatory manner violated fourteenth amendment under public function theory); *Terry v. Adams*, 345 U.S. 461 (1953) (racially restrictive pre-primary elections violated fifteenth amendment); *Marsh v. Alabama*, 326 U.S. 501 (1946) (privately owned town's refusal to allow Jehovah's Witness to distribute literature on sidewalk violated first amendment rights, because town served a public function); *Smith v. Allwright*, 321 U.S. 649 (1944) (democratic convention establishing rule that only whites could vote in primary held to violate fifteenth amendment). *But see Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (sale by warehouseman of goods stored with him and in which he had a warehouseman's lien held not serving public function); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (operation of privately owned utility licensed and regulated by state held not serving public function).

76. *See Reitman v. Mulkey*, 387 U.S. 369 (1967) (state action found when California voters by referendum amended state constitution to prohibit state government from interfering with any private individual's right to discriminate in real estate transactions).

77. *See Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (operation of restaurant in racially discriminatory manner violated fourteenth amendment utilizing joint participant theory).

78. *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1310 (9th Cir. 1982).

79. *See id.* The other factors the court deemed relevant were: (1) that the purchase of the land was part of a large redevelopment plan; (2) that the land was leased to Wend for public housing; (3) that the lease prohibited racial or religious discrimination; and (4) that Wend had to abide by all of the conditions enumerated in the lease. *See id.*

80. *See Barnett, Child Exclusion Policies in Housing*, 67 Ky. L.J. 967, 976 n.45 (1978) (citing *Geneva Towers Tenants Org. v. Federated Mortgage Investors*, 504 F.2d 483, 487 (9th Cir. 1974); *Joy v. Daniels*, 479 F.2d 1236, 1239 (4th Cir. 1973); *Fenner v. Bruce Manor, Inc.*, 409 F. Supp. 1332, 1343 (D. Md. 1976); *Owens v. Housing Auth.*, 394 F. Supp. 1267, 1272-73 (D. Conn. 1975); *Dew v. McLendon*

agency obtained land through its use of an eminent domain proceeding.⁸¹

B. The Requirement of a Deprivation of a Fundamental Right

Thus, if a plaintiff could assert sufficient state involvement in the alleged discrimination, the second element of a section 1983 action, *i.e.*, the "under color of state law" element, would be satisfied. Plaintiffs bringing a section 1983 action, however, face an even greater difficulty in showing a deprivation of a right secured by the Constitution, the first element of a section 1983 action. The following sections discuss the likelihood of a court's finding that a landlord's child-exclusion practices violate a family's constitutional rights.

1. *Moore and the Fundamental Right of Family Living Arrangements in Apartments*

The first element of a section 1983 action is that the plaintiff must show the defendant denied him his constitutional rights.⁸² This requirement would be satisfied if a court found that the right to live together as a family in an apartment is a fundamental right under the Constitution.⁸³ If it made such a finding, the court would

Gardens Ass'n, 394 F. Supp. 1223, 1230 (N.D. Ga. 1975); *Bloodworth v. Oxford Village Townhouses, Inc.*, 377 F. Supp. 709, 716-17 (N.D. Ga. 1974); *Anderson v. Denny*, 365 F. Supp. 1254, 1256 (W.D. Va. 1973). *Contra Rodriguez v. Towers Apts., Inc.*, 416 F. Supp. 304 (D.P.R. 1976) [hereinafter *Child Exclusion*]. See also *Swann v. Gastonia Housing Auth.*, 675 F.2d 1342, 1343 (4th Cir. 1982) (eviction of tenant from housing subsidized by state in accordance with § 8 of United States Housing Act of 1937 was under color of state law for purposes of § 1983). But see *Zepher v. Pierce*, 714 F.2d 856, 858-59 (8th Cir. 1983) (no state action when § 8 landlord evicts tenant) (dicta); *Miller v. Hartwood Apts., Ltd.*, 689 F.2d 1239, 1243-44 (5th Cir. 1982) (eviction of tenant from § 8 housing project held devoid of state action).

81. See *Child Exclusion*, *supra* note 80, at 976 n.46 (citing *Lopez v. Henry Phipps Plaza South, Inc.*, 498 F.2d 937, 943 (2d Cir. 1974); *Male v. Crossroads Assocs.*, 469 F.2d 616, 620-21 (2d Cir. 1972); *McQueen v. Druker*, 438 F.2d 781 (1st Cir. 1971); *Short v. Fulton Redev. Co.*, 390 F. Supp. 517 (S.D.N.Y. 1975); *Colon v. Tompkins Square Neighbors, Inc.*, 294 F. Supp. 134 (S.D.N.Y. 1968)); see also *McClellan v. University Heights, Inc.*, 338 F. Supp. 374 (D.R.I. 1972) (land acquired through eminent domain pursuant to urban renewal plan was sufficient governmental involvement to find state action; landlord's actions were subject to fourteenth amendment).

82. See *supra* notes 47-48.

83. See *Moore v. East Cleveland*, 431 U.S. 494 (1977). In *Moore*, the Supreme Court held that a city's zoning restriction had unconstitutionally interfered with family living arrangements. See *id.* at 499-500, 506. Courts consistently distinguish *Moore* from cases involving apartments or condominiums, and hold that there was no unconstitutional infringement because age is not a suspect class, and housing is not a fundamental right. See *infra* notes 92-109 and accompanying text for a

then require the state to assert that the discriminatory practice necessarily serves a compelling governmental interest.⁸⁴

A court, however, would be unlikely to hold that a landlord's child-exclusion practices interfered with a fundamental right. Only two courts have held that a state had impermissibly interfered with a fundamental right when it attempted to exclude children from housing.⁸⁵ First, in *Halet v. Wend Investment Co.*, the Ninth Circuit held that the right of family members to live together is part of the fundamental right of privacy.⁸⁶ The court decided that the intrusion into the familial right of privacy on the facts of this case was even greater than that presented in *Moore*.⁸⁷ The court found this intrusion to be greater because the adults-only restriction in question prohibited parents from living with their children, while the zoning ordinance in *Moore* had merely prohibited a grandmother from living with her grandchildren.⁸⁸

Second, in *Franklin v. White Egret Condominium, Inc.*, the Florida District Court of Appeal found that all the pertinent decisions of the United States Supreme Court⁸⁹ concerning the family added up to

discussion of these holdings. Therefore, in order for a court to find an unconstitutional infringement upon a fundamental right, the right to live together as a family in an apartment must be held to be a fundamental right.

84. The exact level of judicial scrutiny in *Moore* was somewhat vague: "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Moore*, 431 U.S. at 499. In contrast, the traditional strict scrutiny applied whenever a state by its actions infringes upon a fundamental right is "that the law be necessary to promote a compelling or overriding interest of government." CONSTITUTIONAL LAW, *supra* note 39, at 418-19.

85. See *Halet v. Wend Inv. Co.*, 672 F.2d 1305 (9th Cir. 1982); *Franklin v. White Egret Condominium Inc.*, 358 So. 2d 1084 (Fla. Dist. Ct. App. 1977), *aff'd on other grounds*, 379 So. 2d 346 (Fla. 1979); see also *Park Redlands Covenant Control Comm. v. Simon*, 181 Cal. App. 3d 87, 226 Cal. Rptr. 199 (1986) (covenant restricting residency to three persons aged 45 and older violated constitutional right to privacy under California state constitution).

86. *Halet*, 672 F.2d at 1311 (citing *Moore*, 431 U.S. at 498-99).

87. See *id.* at 1311.

88. See *id.*; see *Moore*, 431 U.S. at 499.

89. The court cited the following Supreme Court decisions as providing the constitutional basis for declaring a child-exclusion practice unconstitutional because of the recognized right of privacy regarding family decisions: *Moore*, 431 U.S. at 521 (zoning statute regulating family living arrangements violated fourteenth amendment); *Trimble v. Gordon*, 430 U.S. 762 (1977) (statute prohibiting illegitimate children from inheriting by intestate succession from father but allowing legitimated children to inherit violated equal protection clause); *Whalen v. Roe*, 429 U.S. 589 (1977) (statute requiring doctors and pharmacists to send lists of persons using narcotics held constitutional); *Roe v. Wade*, 410 U.S. 113 (1973) (statute prohibiting abortion violated constitutional right of privacy in decisions involving right to beget children); *Stanley*

a "right of privacy [that] grants to the family protection from unreasonable restrictions on the use of a residence."⁹⁰ The court held that the decision to have children is protected under the fundamental right of privacy, and stated that "[t]he fear of being compelled by the courts of this state through the operation of this covenant to sell or relocate a family domicile merely because a couple may choose to have children is a burden which neither the Constitution nor this court will condone."⁹¹

The weight of authority, however, is against the application of *Moore* to this situation. In fact, the Florida Supreme Court rejected the appellate court's application of *Moore* to *Franklin*. The supreme court stated that "age limitations . . . are reasonable means to accomplish the lawful purpose of providing appropriate facilities . . . [for] varying age groups. We reject the view that *Moore v. City of*

v. Illinois, 405 U.S. 645 (1972) (statute that denied unwed fathers hearing concerning fitness as parent but did not deny unwed mothers or divorced parents such hearing prior to child becoming charge of state violated due process and equal protection clauses); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (statute creating durational residency requirements before resident had right to vote unconstitutionally burdened right to travel and violated equal protection); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (one-year residency requirement to obtain welfare benefits violated equal protection clause because plaintiffs were exercising constitutional right to travel); *Loving v. Virginia*, 388 U.S. 1 (1967) (statute prohibiting interracial marriage held unconstitutional intrusion upon fundamental right to marry); *United States v. Guest*, 383 U.S. 745 (1966) (conspiracy to deprive blacks of certain constitutional rights guaranteed by fourteenth amendment and right to interstate travel held within province of federal criminal conspiracy act); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (statute prohibiting married couples from using contraceptives held unconstitutional intrusion upon right of privacy); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (statute prohibiting children from distributing literature in public places held not to violate first amendment nor equal protection clause); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (statute requiring parents to send children to public schools held unconstitutional violation of fourteenth amendment liberty to raise children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (statute prohibiting teaching of foreign language to children violated right of parents to engage such instruction guaranteed by fourteenth amendment). See *Franklin*, 358 So. 2d at 1089 nn.4-6.

90. *Franklin*, 358 So. 2d at 1089.

91. *Id.* The court relied upon the following Supreme Court cases to support its holding that the Constitution protects the choice to have children, and thus, the covenant unreasonably restrained this choice: *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (statute prohibiting pharmacists from selling contraceptives to those under age 16 held unconstitutional); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (mandatory maternity leave violated fundamental right to bear children guaranteed by fourteenth amendment); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (statute prohibiting unmarried persons from using contraceptives violated equal protection). See *id.* at 1089 n.8.

But see *Lamont Bldg. Co. v. Court Comm.*, 147 Ohio St. 183, 70 N.E.2d 447 (1946). In this case, the court rejected such an argument: "[P]laintiff did not say

East Cleveland absolutely prohibits this type of limitation.”⁹² Florida courts have followed the Florida Supreme Court’s holding in five cases involving condominium restrictions⁹³ and in a case involving

to the defendant, ‘You cannot have children’; it said, merely, ‘If you do have children, they may not occupy my premises.’ ” *Id.* at 185, 70 N.E.2d at 448. See also *Child Exclusion*, *supra* note 80, at 980-81. In this article, the author drew an analogy between a covenant which prevented the presence of children in a condominium, and a denial of welfare benefits to a pregnant woman. See *id.* In *Dandridge v. Williams*, 397 U.S. 471 (1970), the Court held that a state regulation imposing a maximum grant of financial assistance for a family’s size and needs did not violate the equal protection clause. See *Dandridge*, 397 U.S. 471, 486 (1970). Thereafter, other federal courts have held that the denial of welfare benefits to women pregnant with their first child did not violate their fundamental right to bear children. See *Alcala v. Burns*, 545 F.2d 1101 (8th Cir. 1976), *cert. denied sub nom. Doe v. Burns*, 431 U.S. 920 (1977); *Taylor v. Hill*, 420 F. Supp. 1020 (W.D.N.C. 1976), *aff’d*, 430 U.S. 961 (1977); *Murrow v. Clifford*, 404 F. Supp. 999 (D.N.J. 1975). Thus, the author stated that the “[l]ack of access to necessary or desired finances and [the] lack of access to necessary or desired housing are equally distant from the constitutionally-protected activity of procreation . . . [and] the compelling governmental interest test is inappropriate.” *Child Exclusion*, *supra* note 80, at 981.

This rationale, however, was not the only constitutional basis for the holding in *Franklin*. For instance, the Court also found that the restrictive covenant infringed on “free and open travel among the states,” *Franklin*, 358 So. 2d at 1089 (citing *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Guest*, 383 U.S. 745 (1966)), “the interest which parents have in being able to supervise their children’s education,” *id.* at 1089 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)), “and enjoy their companionship,” *id.* at 1089-90 (citing *Stanley v. Illinois*, 405 U.S. 645 (1972); *Kovacs v. Cooper*, 336 U.S. 77 (1949)), and “the interest concerning family living arrangements.” *Id.* at 1089-90 (citing *Moore v. City of East Cleveland*, 431 U.S. 494 (1977)). Therefore, the Court found that the covenant had to be supported by a “countervailing and superior interest.” *Franklin*, 358 So. 2d at 1090. (footnote omitted).

92. *White Egret Condominium, Inc. v. Franklin*, 379 So. 2d 346, 351 (Fla. 1979). The Florida Supreme Court affirmed the lower court’s decision that the age restriction could not be enforced against the plaintiffs because the age restriction was selectively and arbitrarily applied. See *id.* at 352.

93. See *Constellation Condominium Ass’n, Inc. v. Harrington*, 467 So. 2d 378, 382 (Fla. Dist. Ct. App. 1985) (court upheld injunction prohibiting family from residing together because doing so violated condominium rules that excluded children under age 12 as permanent residents because rule was not selectively or arbitrarily applied); *Everglades Plaza Condominium Ass’n, Inc. v. Buckner*, 462 So. 2d 835, 837 (Fla. Dist. Ct. App. 1984) (upholding condominium’s amendment to its declaration that excluded children under age 16 from residing on premises); *De Slatopolsky v. Balmoral Condominium Ass’n, Inc.*, 427 So. 2d 781, 782 (Fla. Dist. Ct. App. 1983) (court upheld as unambiguous provision in condominium declaration which prohibited children under age 14); *Star Lake North Commodore Ass’n, Inc. v. Parker*, 423 So. 2d 509, 511 (Fla. Dist. Ct. App. 1982) (court held insufficient plaintiffs’ argument that they mistakenly believed that they were unable to have children when they began living in condominium, and therefore, plaintiffs did not intentionally violate condominium rules); *Pacheco v. Lincoln Palace Condominium*,

a deed restriction.⁹⁴ Two other jurisdictions that lacked sufficient case law have applied this holding.⁹⁵ These holdings, and the lack of other cases involving this issue, diminish the likelihood that other state courts would find a violation of a constitutional right in landlords' child-exclusion practices.

The treatment of this discrimination in federal courts further diminishes the importance of the holdings in *Halet* and *Franklin*. In *Bynes v. Toll*,⁹⁶ a pre-*Moore* case, students argued that denying on-campus housing to families with children constituted a denial of equal protection, a compulsory waiver of the parents' right of marital privacy, and the right to raise their children as they chose.⁹⁷ The Second Circuit held that the University was not interfering with the marital privacy of the plaintiffs or the right to bring up their children, because they were free to procreate and educate their offspring.⁹⁸ The court stated that the relevant issue was whether the University was constitutionally required to provide the students with housing so that they could perform their protected prerogatives.⁹⁹

The court then agreed with the lower court's application of the rational basis test¹⁰⁰ and rejected the notion that the University's

Inc., 410 So. 2d 573, 574 (Fla. Dist. Ct. App. 1982) (court upheld condominium's decision to refuse application because of restrictive covenant in condominium bylaws prohibiting children under age 12). *But see* Pearlman v. Lake Dora Villas Management, Inc., 479 So. 2d 780, 780-81 (Fla. Dist. Ct. App. 1985) (condominium declaration provision which prohibited residency by children under age 16 but exempted children from transferees of institutional first mortgage violated equal protection as arbitrary and discriminatory); O'Connor v. Village Green Owners Ass'n, 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983) (condominium's attempt to bar children under age 18 from residing on premises held an unreasonable restriction, and therefore, violated California's Unruh Act, prohibiting business establishments from engaging in arbitrary discrimination).

94. See Pomerantz v. Woodlands Section 8 Ass'n, Inc., No. 85-163, slip. op. at 1 (Fla. Dist. Ct. App. 1985).

95. See Hill v. Fontaine Condominium Ass'n, Inc., 334 S.E.2d 690, 691 (Ga. 1985) (court upheld amendment passed subsequent to plaintiff's purchase of condominium restricting permanent residence to persons aged 16 or older, because restriction was not so unreasonable as to be "repugnant to the estate granted"); Covered Bridge Condominium Ass'n, Inc. v. Chambliss, 705 S.W.2d 211, 214 (Tex. Ct. App. 1985) (age restrictive covenant in deed to condominium held not unreasonable nor applied in an arbitrary way); Preston Towers Condominium Ass'n v. S.B. Realty, Inc., 685 S.W.2d 98, 101 (Tex. Ct. App. 1985) (exception in by-laws to no-children policy applied to: (1) persons under age of sixteen who were residents at time declaration was filed; and (2) children born of owners at time owners were residents of project in excess of seven months, held not unreasonable).

96. 512 F.2d 252 (2d Cir. 1975).

97. See *id.* at 253.

98. See *id.* at 255.

99. See *id.*

100. See *id.* at 254. The court cited *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) for the rational relationship standard of review. In *Belle Terre*, the United

policy interfered with the plaintiffs' constitutional right to live together in marriage.¹⁰¹ In the court's view, because the plaintiffs had not asserted that the policy had an unequal impact on a "suspect class," and because the right to housing does not involve a fundamental interest, the compelling interest test was inappropriate.¹⁰²

Similarly, in *Braunstein v. Dwelling Managers, Inc.*,¹⁰³ the plaintiffs, relying on *Moore*, claimed that the defendant's policy of renting only one-bedroom apartments to a parent and child of the same sex, while permitting the rental of two-bedroom apartments to a parent and child of the opposite sex, infringed on their right of privacy and impermissibly regulated their family living arrangements without due process.¹⁰⁴ The court held that the "defendant's policy . . . neither forbids a family from living together nor unduly interferes with their choice of living arrangements . . . [and therefore] is not violative of plaintiffs' fourteenth amendment rights."¹⁰⁵

Thus, the use of *Moore* in child discrimination cases is premature until the Supreme Court decides that the right to housing of one's choice is a fundamental right,¹⁰⁶ or that age classifications are based

States Supreme Court reviewed a zoning ordinance which restricted the number of unrelated persons who could live together in one home. See *Belle Terre*, 416 U.S. 1, 2 (1974). The Court upheld the ordinance and stated that it did not violate the equal protection clause. See *id.* at 8. The standard of review applied was the rational relationship test: if the law is "reasonable, not arbitrary" and bears "a rational relationship to a [permissible] state objective." *Id.* at 8 (citations omitted).

101. See *Bynes*, 512 F.2d at 255. The court supported its decision by citing cases in which resident aliens claimed that the deportation of their spouses abrogated their constitutional right to live together in marriage. See *id.* at 255. This claim was rejected in *Noel v. Chapman*, 508 F.2d 1023 (2d Cir. 1975); *Silverman v. Rogers*, 437 F.2d 102 (1st Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); *Swartz v. Rogers*, 254 F.2d 338 (D.C. Cir.), *cert. denied*, 357 U.S. 928 (1958).

102. *Id.* at 255 (citing *Lindsey v. Normet*, 405 U.S. 56, 74 (1972)).

103. 476 F. Supp. 1323 (S.D.N.Y. 1979).

104. See *id.* at 1323.

105. *Id.* at 1331.

106. See *Lindsey v. Normet*, 405 U.S. 56 (1972) (rejecting proposition that right to housing is fundamental right). *Lindsey* involved an attempt to have an eviction statute declared unconstitutional because of alleged violations of the due process and equal protection clauses. See *id.* at 63-64. The appellants argued that "the need for decent shelter" and the "right to retain peaceful possession of one's home" were fundamental interests that could be impinged upon only after the state demonstrated some superior interest. *Id.* at 73. In response, the Court stated:

We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement.

Id. at 74 (emphasis added). See *supra* notes 92-105 and accompanying text for cases

on suspect criteria.¹⁰⁷ Courts tend to look at the age restrictions literally and to decide that landlords' policies of excluding persons under the age of eighteen do not directly forbid a family from living together.¹⁰⁸

Construed broadly, *Moore* holds that courts must scrutinize any state interference with the choices concerning family living arrangements for a finding of an important governmental interest that is substantially advanced by the regulation.¹⁰⁹ Certain decisions by landlords to exclude children, however, would arguably meet the "important governmental interest" standard in the following cases: (1) cases in which a housing development is specifically designed for the elderly;¹¹⁰ (2) cases in which the premises are unsafe for children;¹¹¹

lessening the applicability of *Moore* to child discrimination cases.

107. The Supreme Court has rejected the argument that for equal protection analysis age should be considered a suspect class. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (state law that forced state police officers to retire at age 50 did not violate equal protection clause). See *supra* notes 92-105 and accompanying text for cases lessening the applicability of *Moore* to child discrimination cases.

108. See *Lamont Bldg. Co. v. Court*, 147 Ohio St. 183, 70 N.E.2d 447 (1946); see also *Bynes v. Toll*, 512 F.2d 252, 255 (2d Cir. 1975) (court stated "[t]he University here is not interfering with the marital privacy of the plaintiffs or their unquestioned natural right to bring up their children. They are totally free to procreate and educate their offspring"). But see *Stanley*, *supra* note 59, at 64, 104-08 (arguing that family unit should be given status of quasi-legal entity, because courts fail to understand that exclusion of young children necessarily burdens families).

109. See *Moore*, 431 U.S. at 499. The Court seemed to apply an intermediate level of judicial scrutiny that is typically applied to statutes that create gender-based classifications. See, e.g., *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (court held unconstitutional statute which granted widows workers' compensation benefits, but only granted widowers such benefits if they proved to be financially dependent upon their wives). In *Wengler*, the Supreme Court stated that to be constitutionally permissible, "gender-based discriminations must serve important governmental objectives and that the discriminatory means employed must be substantially related to the achievement of those objectives." *Id.* at 150.

110. See *infra* notes 117-26 and accompanying text.

111. See *Bynes v. Toll*, 512 F.2d 252 (2d Cir. 1975). In *Bynes*, the court upheld the restriction primarily because of the dangers that the facilities would pose for children. See *id.* at 258. The University argued that the inadequate cooking facilities posed a fire hazard, and the lack of an emergency exit from the apartment constituted a danger to children. See *id.* at 256. To these contentions the court responded:

The fire hazard here alone would . . . provide a rational basis for the University position . . . the fact that adults in the past have escaped injury is hardly predictive that infant children will possess sufficient physical coordination and mental acuity to avoid injury, particularly in housing with insufficient means of egress . . . it is rational for the University, which will be legally responsible for its negligence, to postpone the residence of children until such time, if ever, that it can provide the housing it (and not the parents) deems adequate.

Id. at 258. But see *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 640 P.2d 715,

or (3) cases in which the lifestyle of the community would be detrimental to the health, safety, and general welfare of the children.¹¹²

Construed narrowly, *Moore* holds only that a city may not use its zoning power to exclude the right of an extended family from living together within its boundaries,¹¹³ because of an irrational fear of increased density, traffic, and extra burdens on the school system.¹¹⁴ Using this holding, courts have granted exemptions in the areas of zoning for the elderly¹¹⁵ and mobile home parks designed for the elderly.¹¹⁶ In these cases, courts have used the rational basis test rather than the stricter scrutiny *Moore* would require.

2. Moore's Impact on Land-Use for the Elderly

In cases involving challenges to zoning ordinances that restrict land use for the benefit of the elderly,¹¹⁷ state courts have emphasized

180 Cal. Rptr. 496, *cert. denied*, 459 U.S. 858 (1982). In *Marina Point*, the court did not accept the landlord's argument that the premises presented a danger to children, thereby making the landlord's decision to exclude children reasonable. *See id.* at 744 n.13, 640 P.2d at 129 n.13, 180 Cal. Rptr. at 510 n.13.

112. *See* *Young v. American Mini Theatres, Inc.*, 437 U.S. 50 (1976) (separate zoning of adult movie theatres upheld against first amendment challenge as valid line drawn to preserve character of neighborhoods); *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (upheld statute making it unlawful to sell pornography to minors but not to adults). *But see* *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496, *cert. denied*, 459 U.S. 858 (1982). In *Marina Point*, the landlord argued that the apartment complex did not lend itself to the presence of children, similar to bars, adult bookstores and theatres. *See id.* at 741, 640 P.2d at 127, 180 Cal. Rptr. at 508. To this argument, the court stated that "nothing in the nature of an ordinary apartment complex is incompatible with the presence of families with children." *Id.*

113. *See Moore*, 431 U.S. at 507 (Brennan, Marshall, J.J., concurring) (stating that "zoning power is not a license for local communities to enact senseless and arbitrary restrictions which cut deeply into private areas of protected family life").

114. *See id.* at 507 ("classifying family patterns in this eccentric way is not a rational means of achieving the ends East Cleveland claims for its ordinance").

115. *See infra* notes 117-20 and accompanying text.

116. *See infra* notes 121-26 and accompanying text.

117. *See* *Taxpayers Ass'n of Weymouth Township, Inc. v. Weymouth Township*, 71 N.J. 249, 364 A.2d 1016 (1976) (zoning ordinance which limited residency of mobile homes to families where head of household was over age 52 did not violate equal protection or due process); *Shepard v. Woodland Township Comm. and Planning Bd.*, 71 N.J. 230, 364 A.2d 1005 (1976), *cert. denied*, 430 U.S. 977 (1977) (zoning ordinance which permitted special use exception for retirement communities and mandated that residency be restricted to persons aged 52 or older, except for one child over age 18, did not violate equal protection or due process); *Campbell v. Barraud*, 58 A.D.2d 570, 394 N.Y.S.2d 909 (2d Dep't 1977) (zoning ordinance which limited residency to those aged 55 or older did not violate equal protection guarantee). *See generally* Doyle, *Retirement Communities: The Nature and Enforceability of Residential Segregation by Age*, 76 MICH. L. REV. 64 (1977).

that age is not a suspect classification¹¹⁸ and that housing is not a fundamental interest.¹¹⁹ These cases resemble the factual setting in *Moore* because a community is excluding families by utilizing its zoning power. Despite this similarity, the courts have declined to apply the higher scrutiny standard used in *Moore*. Instead, using the rational basis test, state courts have upheld the ordinances.¹²⁰ In the rental context, the affected individuals have less of a property interest than do homeowners, and the discriminatory provision is found in a lease as opposed to a zoning ordinance; thus state courts will be even less likely to apply a higher scrutiny standard. Consequently, courts will probably use a rational basis test and uphold child-exclusion practices in rentals.

In *Dubreuil v. West Winds Mobile Lodge*,¹²¹ plaintiffs attempted to sell their mobile home to a family with two minor children.¹²² Defendant West Winds, however, rejected the purchaser's application because it had a policy restricting residency to those who were eighteen years of age or older.¹²³ The plaintiffs contended that the California Civil Code, which permitted adults-only mobile home parks, was a denial of equal protection because the discrimination between adults and minors limited the plaintiffs' access to housing.¹²⁴

118. See *Weymouth*, 71 N.J. at 280-87, 364 A.2d at 1033-37; *Shepard*, 71 N.J. at 247-48, 364 A.2d at 1015; *Campbell*, 58 A.D.2d at 572, 394 N.Y.S.2d at 912-13.

119. See *Weymouth*, 71 N.J. at 281-83, 287-88, 364 A.2d at 1033-34, 1037.

120. See *Shepard*, 71 N.J. at 247, 364 A.2d at 1015; see also *Weymouth*, 71 N.J. at 287-88, 364 A.2d at 1037; *Campbell*, 58 A.D.2d at 572, 394 N.Y.S.2d at 912-13. In *Shepard*, the court held "that the equal protection and due process clauses do not require government to treat all persons identically. Rather, they require only that differences in treatment must not be arbitrary or invidious, and that distinctions must be justified by an appropriate state interest and bear a real and substantial relationship to furthering governmental ends." *Shepard*, 71 N.J. at 247, 364 A.2d at 1015 (citation omitted). In *Campbell*, the court stated "differences in treatment on the basis of age will be sustained so long as the classification rationally furthers a legitimate state objective." *Campbell*, 58 A.D.2d at 572, 394 N.Y.S.2d at 912 (citation omitted). See also *Pomerantz v. Woodlands Section 8 Ass'n, Inc.*, No. 85-163, slip op. at 1 (Fla. Dist. Ct. App. 1985) (deed restriction prohibiting residency by persons under 16 upheld pursuant to *White Egret* holding). In testifying to the reasonableness of such a restriction, an expert witness stated that "an age restricted community is an excellent way to increase the morale of older people and to limit the amount of stimuli on them." *Id.*

121. 213 Cal. Rptr. 12 (Cal. Dist. Ct. App. 1985).

122. See *id.* at 14.

123. See *id.*

124. See *id.* at 17. The plaintiffs contended that a section of the California Civil Code violated the equal protection clause. See CAL. CIV. CODE § 798.76 (West 1982). Section 798.76 provides: "the management may require that a purchaser of a mobile home which will remain in the park, comply with any rule or regulation limiting residence to adults only." *Id.* But see *Schmidt v. Superior Court*, 215 Cal. Rptr.

In this instance also, because courts generally do not consider age to be a suspect class, nor the right to housing a fundamental right, the court found that the statute could withstand an equal protection attack if it was rationally related to a legitimate public purpose.¹²⁵ Accordingly, the court upheld the statute, stating that by "[e]ffectively limiting residence to working or retired adults, the statute is rationally related to a legitimate interest in providing quiet property enjoyment by eliminating the noise and distractions children cause."¹²⁶

The holdings of *Moore* and *Halet* have had little influence in these cases; indeed, the courts disregarded them entirely. Moreover, *Halet* was recently criticized in *Hameetman v. City of Chicago*.¹²⁷ In this case, a fireman was discharged for violating a city ordinance requiring all civil employees to be residents of the city.¹²⁸ Hameetman argued that the ordinance interfered with his constitutional right to live with his family, because the well-being of his child¹²⁹ required him to live outside the city.¹³⁰

Because in this case the ordinance interfered only indirectly with the right of family association—unlike *Moore* and *Halet*, in which the interference was direct¹³¹—the court held that the regulation was not an unconstitutional deprivation of Hameetman's right to live with his family.¹³² The court then expressed its doubts over the *Halet* decision:

Although an adults-only rental policy might in a rare case result in [parents] living apart from their children, the real purpose and dominant effect of such policies is not to break up families but

840 (Cal. Dist. Ct. App. 1985). In *Schmidt*, the plaintiff's application for admission to a mobile home park was rejected because the plaintiff (who was 23 years old) intended to live in the mobile home with her daughter and her younger sister, and the park had a restriction prohibiting residency by persons under age 25. See 215 Cal. Rptr. at 841-42. In its interpretation of California's Civil Code section 798.76, which did not specify the meaning of the term "adult," the court concluded that the legislature intended to "allow the proprietor of a mobile home park to draft rules excluding children only where the facility is reserved for senior citizens" and, therefore, the court struck down this restriction. *Id.* at 845.

125. See *Dubreuil*, 213 Cal. Rptr. at 17.

126. *Id.* at 18, 213 Cal. Rptr. at 18. But see *Schmidt v. Superior Court*, 215 Cal. Rptr. 840 (Cal. Dist. Ct. App. 1985). See *supra* note 124 for a discussion of the holding in *Schmidt*.

127. See 776 F.2d 636 (7th Cir. 1985).

128. *Id.* at 639.

129. The plaintiff testified that his child was hyperkinetic and had to attend school outside the city. See *id.* at 642.

130. See *id.*

131. See *id.* at 643.

132. See *id.*

to spare people who do not have young children of their own the noise and commotion of other people's children; the incidental effects on families with small children must be very small.¹³³

The court went on to state the major difficulties surrounding this issue, noting that "the case law in this area, maybe because the subject matter is so emotional and the constitutional guideposts so sparse, is untidy."¹³⁴

III. Utilization of the Fair Housing Act to Combat Child-Exclusion Practices

A recent phenomenon in Fair Housing Act litigation involves the use of the Act in child-exclusion cases—although plaintiffs using the Act in this way have faced several obstacles. A bill to amend the Act would include families with children as a protected class under the Act. The next two sections will discuss the issues involved in each of these developments.

A. Child-Exclusion Practices as Having a Disparate Impact on Minorities and Females

Studies have shown that black families and those headed by women are more than twice as likely as other families to rent, rather than buy, their homes.¹³⁵ Moreover, in large cities, rental buildings in predominantly white neighborhoods are more than twice as likely to have no-children policies.¹³⁶ These statistics have led some commentators to state that discrimination against children is a "subtle blind" for race and sex discrimination.¹³⁷ The Fair Housing Act protects, among other groups, minorities and women from housing discrimination.¹³⁸ Consequently, two recent cases were brought under the Fair Housing Act¹³⁹ in which the plaintiffs challenged a landlord's

133. *Id.*

134. *Id.*

135. See Edelman, *supra* note 8, at A23, col. 2.

136. See *id.* at A23, cols. 2, 3; see also MEASURING RESTRICTIVE RENTAL PRACTICES, *supra* note 7, at 34. The survey revealed that 28.9% of apartments in predominantly white neighborhoods excluded families, whereas only 17.5% of apartments in predominantly black neighborhoods excluded families. *Id.*; cf. Greene & Blake, *supra* note 4, at 3-4. The authors compared minorities with an income of over \$15,000 to their white counterparts and found that minorities had more frequent problems with these adults-only policies. See *id.* Thus the authors stated that "[t]his raises the questions as to whether at times no-children policies are a smoke screen for racial discrimination." *Id.*

137. See Edelman, *supra* note 8, at A23, col. 2; see *supra* note 136.

138. See The Fair Housing Act of 1968, § 804, 42 U.S.C. § 3604(a) (1982).

139. See *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983 (4th Cir. 1984); *Halet v. Wend Inv. Co.*, 672 F.2d 1305 (9th Cir. 1982).

adults-only rental policy as having a "disparate impact"¹⁴⁰ on minorities. In these cases, uncertainty surrounded the issues of (1) standing; and (2) the nature of the burden on the plaintiffs in establishing a prima facie case.

1. *Standing Under the Fair Housing Act*

Because only the rights of certain classes, for instance women and minorities, are protected under the Act, it follows that the only parties permitted to challenge an adults-only restriction in housing as having a discriminatory effect are those classes protected under the Act.¹⁴¹ In at least one child-discrimination case, however, the court permitted a non-protected party to assert the rights of others under the Act.¹⁴²

In *Halet v. Wend Investment Co.*, the plaintiff claimed that the landlord's policy was racially discriminatory and violated the fourteenth amendment and several federal statutes, including the Fair Housing Act.¹⁴³ Alleging a violation of the Act under a "discriminatory effects" standard,¹⁴⁴ the plaintiff contended that the adults-only policy would have a greater impact on blacks and other minorities, because their households were more likely to contain children.¹⁴⁵ Despite the fact that the plaintiff was white, the Ninth Circuit held that he had standing to bring a claim of racial discrimination under the Act.¹⁴⁶ The court held that, regardless of race, any party injured by such discrimination has standing to bring a

140. For the purposes of this Note, "disparate impact" is used synonymously with "disproportionate impact."

141. See The Fair Housing Act of 1968, § 804, 42 U.S.C. § 3604(a) (1982) ("it shall be unlawful [to] . . . deny, a dwelling to any person because of race, color, religion, sex, or national origin"). See generally Schwemm, *Standing to Sue in Fair Housing Cases*, 41 OHIO STATE L.J. 1 (1980); Calmore, *Fair Housing and the Black Poor: An Advocacy Guide*, 18 CLEARINGHOUSE REV. 609, 616-18 (1984) [hereinafter Calmore].

142. See *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1309 (9th Cir. 1982).

143. See *id.* at 1307.

144. See *infra* note 169 and accompanying text for a discussion of the different standards of review utilized in order to make out a prima facie case under the Fair Housing Act.

145. See 672 F.2d at 1311. The court set forth the percentage of black, hispanic, white and female-headed households with children. See *id.* at 1311 n.6.

146. See *id.* at 1309. The court determined that the standing requirement of Article III is only that the person bringing suit have been injured by the conduct. See *id.* at 1308. The Supreme Court, however, has required that a party assert its own rights and not those of third persons. See *id.* (citing *Duke Power Co. v. Carolina Envt'l Study Group*, 438 U.S. 59, 80 (1978); *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Under the Act, however, Halet would not have any right to assert since he was not a member of one of the protected classes under the Act. See *supra* note 141 for a list of the protected classes under the Act.

cause of action under the Act.¹⁴⁷ Accordingly, a party does not necessarily have to be a member of one of the protected classes under the Act in order to challenge a landlord's discrimination against children.

2. *The Prima Facie Case*

The federal courts, in addressing claims brought pursuant to the Fair Housing Act, have allowed plaintiffs to prove a prima facie case under two theories: showing discriminatory intent or showing discriminatory impact.¹⁴⁸ An example of a case involving the discriminatory impact theory is *Betsey v. Turtle Creek Associates*.¹⁴⁹

In *Betsey*, tenants brought an action under the Fair Housing Act after their landlord attempted to evict them in order to institute an adults-only rental policy in their building, which was part of a three building complex.¹⁵⁰ The plaintiffs claimed that the defendants' attempts to evict them were motivated by racial discrimination¹⁵¹ and argued that the evictions would have a disparate racial impact, which would violate the Act.¹⁵²

On the discriminatory intent claim, the lower court found that the reasons furnished by the defendants for the conversion were valid economic considerations,¹⁵³ thereby refuting the plaintiffs' prima facie showing of racial discrimination.¹⁵⁴ In addressing the discriminatory impact claim,¹⁵⁵ the court found that the percentage of black renters in the complex exceeded the percentages of black renters in both the election district and in the county.¹⁵⁶ Thus, the representation

147. See *Halet*, 672 F.2d at 1309. The court, however, reasoned that "Congress expanded standing under that Act to the full extent of Article III." *Id.* Also, the Supreme Court has held that a plaintiff asserting a claim under the Act who has suffered an actual injury may assert that the rights of another are infringed. See *id.* (citing *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100, 103 n.9 (1979) (footnote omitted)).

148. See *infra* note 169 for a discussion of the different standards required for a prima facie showing of discrimination under the Act.

149. 736 F.2d 983 (4th Cir. 1984).

150. See *id.* at 985.

151. See *id.*

152. See *id.*

153. See *id.* at 986. The district court found a prima facie showing of discriminatory intent. See *id.*

154. See *id.*

155. In its opinion, the court stated "that it was 'unnecessary' under these circumstances to consider whether the tenants had proved a *prima facie* case of discriminatory impact." *Betsey*, 736 F.2d at 986. In dicta, the court stated that it did not believe the plaintiffs had proved discriminatory impact. See *id.* Later, upon the plaintiffs' motion for reconsideration of the discriminatory impact claim, the court held that the plaintiffs had failed to prove discriminatory impact. See *id.*

156. See *id.* at 986-87.

of blacks in the complex was greater than in the community as a whole.¹⁵⁷ Moreover, the court stated that although the immediate effect would be a disproportionate impact on blacks, the plaintiffs had failed to show that the policy would cause long-term segregated housing patterns in the complex.¹⁵⁸ Based on these findings, the lower court held that the plaintiffs had failed to make the requisite *prima facie* showing of discriminatory impact.¹⁵⁹

The Fourth Circuit, however, held that the lower court's rejection of the discriminatory impact claim was erroneous.¹⁶⁰ The court set forth the requirements necessary to bring a discriminatory impact claim: (1) that the plaintiffs be members of a discrete minority; and (2) that the policy would have a discriminatory impact on them as individuals.¹⁶¹ The court stated that the correct inquiry was whether the policy had a disproportionate impact on the minority residents of the plaintiff's building—*i.e.*, the total group to which the policy was applied—rather than the impact on the county or the complex as a whole.¹⁶² The court stated that the plaintiffs' statistics¹⁶³ established a disparate impact according to the United States Supreme Court standards of statistical significance.¹⁶⁴ The court remanded the

157. *See id.*

158. *See id.* at 986.

159. *See id.*

160. *See id.* at 987. The court stated that the district court's decision was based on three factors that were totally irrelevant to a showing of discriminatory impact: "the absence of a continuing disproportionate impact, the high percentage of blacks in the entire complex, and the insignificant impact of the policy on blacks in the local community." *Id.*

161. *Id.*

162. *Id.* The court drew an analogy to the Supreme Court's holding in *Connecticut v. Teal*, 457 U.S. 440 (1982). Specifically, in *Teal*, the Court stated that "[t]he principal focus of the statute [Title VII] is the protection of the individual employee, rather than the protection of the minority group as a whole." *Teal*, 457 U.S. at 453-54. Therefore, the court reasoned that because the objectives of Title VII and Title VIII are "parallel," the same focus would apply to a Title VIII case. *Betsey*, 736 F.2d at 987 (citing *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982) ("some courts have reasoned that since the anti-discrimination objectives of Title VIII are parallel to the goals of Title VII, the *Griggs* rationale must be applied in Fair Housing Act cases")) (citations omitted); *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977) (court noted that objective of Title VII was to "achieve equality of employment opportunities" and objective of Title VIII was to promote "open, integrated residential housing patterns," and therefore, both have been construed broadly), *cert. denied*, 434 U.S. 1025 (1978), *aff'd*, 616 F.2d 1006 (7th Cir. 1980)).

163. Approximately 54% of the non-white tenants received eviction notices, as opposed to only 14% of the white tenants. *See Betsey*, 736 F.2d at 988.

164. *See* 736 F.2d at 988 n.4 (citing *Castenada v. Partida*, 430 U.S. 482 (1977)). In *Castenada*, the Supreme Court used a "rule of exclusion test" and compared the amount of the affected class in that population as a whole with the amount of the affected class in the situation claimed to have discriminatory effect, and found that

case and instructed the district court to uphold the practice if the defendant proved a "compelling business necessity" for its adults-only policy.¹⁶⁵

Although this Note does not intend to cover all the requirements necessary to bring a successful Fair Housing Act claim,¹⁶⁶ it is important to note the uncertainty that still persists as to the showing a plaintiff must make to establish his prima facie case under the Act.¹⁶⁷ One commentator has suggested that the legislative history of the Act shows an intent on the part of Congress to use the "effects standard"¹⁶⁸ and points out that most circuits apply this standard without requiring a showing of a discriminatory intent.¹⁶⁹

a prima facie case is made with as little as a 15% differential. *Id.* at 494-96; see *Hazelwood School Dist. v. United States*, 433 U.S. 299, 311 n.17 (1977) ("a fluctuation of more than two or three standard deviations would undercut the hypothesis that decisions were being made randomly with respect to race") (citation omitted)).

165. See 736 F.2d at 988-89 (citing *Williams v. Colorado Springs School Dist. No. 11*, 641 F.2d 835, 842 (10th Cir. 1981) ("[i]n a disparate impact case, . . . we have said that the employer must *prove* business necessity for the challenged practice to rebut the prima facie case [t]he practice must be essential, the purpose compelling") (citations omitted); and *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("[t]he touchstone is business necessity")). The court adopted the "compelling business necessity" test which is the test utilized in employment discrimination cases. See *Betsey*, 736 F.2d at 989 (citing *Wright v. Olin Corp.*, 697 F.2d 1172, 1188 (4th Cir. 1982) ("test is whether there exists an overriding legitimate business purpose") (citations omitted); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.) ("the business purpose must be sufficiently compelling to override any racial impact")), *cert. dismissed*, 404 U.S. 1006 (1971), *vacated without opinion sub nom. Wright v. Olin Corp.*, 767 F.2d 915 (4th Cir. 1984).

One author has stated that "[t]his 'business necessity' test . . . would require that defendant present independent and objective evidence that the adults-only policy furthers a legitimate business purpose and is necessary for the safe and efficient operations of the business." *Recent Fair Housing Act Litigation: Betsey v. Turtle Creek Associates*, 18 CLEARINGHOUSE REV. 640, 641 (1984); see also Note, *Business Necessity in Title VII: Importing an Employment Discrimination Doctrine into the Fair Housing Act*, 54 FORDHAM L. REV. 563 (1986) [hereinafter *Business Necessity*].

166. See generally Note, *Fundamental Issues in Housing Discrimination Litigation*, 14 N.C. CENT. L.J. 555 (1984) [hereinafter *Fundamental Issues*]; Calmore, *supra* note 141, at 609.

167. See *infra* note 169 and accompanying text.

168. See *Fundamental Issues*, *supra* note 166, at 582.

169. See *id.* at 583, n.270 (citing *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982) (court uses *Arlington II* analysis); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982) (court mentions possibility of utilizing discriminatory effect standard but decides to wait until record was more fully developed); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1039 (2d Cir. 1979) (court hedges in using only discriminatory effects standard by stating: "[i]t is clear, therefore, that even were a motivation test to be applied, plaintiff has established a prima facie case"); *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978) ("a significant discriminatory effect flowing from rental decisions is sufficient to demonstrate a

The United States Supreme Court has not addressed this issue, although it has required a showing of intent under sections 1982¹⁷⁰ and 1981.¹⁷¹

violation of the Fair Housing Act"); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977) ("we are convinced that a Title VIII claim must rest, in the first instance, upon a showing that the challenged action by defendant had a racially discriminatory effect"), *cert. denied*, 435 U.S. 908 (1978); *Metropolitan Housing Dev. Corp. v. Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (*Arlington I*) ("attempts to discern the intent of an entity . . . are at best problematic . . . [w]e therefore hold that at least under some circumstances a violation of section 3604(a) can be established by a showing of discriminatory effect without a showing of discriminatory intent"), *cert. denied*, 434 U.S. 1025 (1978), *on remand*, 469 F. Supp. 836 (N.D. Ill. 1979), *aff'd*, 616 F.2d 1006 (7th Cir. 1980) (*Arlington II*); *Smith v. Anchor Building Corp.*, 536 F.2d 231, 233 (8th Cir. 1976) (court uses the discriminatory effects standard); *United States v. City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir. 1974) (plaintiff need only show conduct resulted in discrimination), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Pelzer Realty Co.*, 484 F.2d 438, 443 (5th Cir. 1973) ("it is not necessary to show that [realtor] intended to deprive [plaintiffs] of rights granted by the Act. A violation occurred because his words had that effect"), *cert. denied*, 416 U.S. 936, *on remand*, 377 F. Supp. 121 (M.D. Ala. 1974), *aff'd*, 537 F.2d 841 (5th Cir. 1976).

Arlington II used the discriminatory effects test only after the court has analyzed four questions:

(1) [H]ow strong is the plaintiffs showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.

Arlington II, 558 F.2d at 1290.

It appears that the only two circuits which have held that discriminatory effects alone are sufficient to make out a prima facie case are the Third and Eighth Circuits. See *Keith v. Volpe*, 618 F. Supp. 1132, 1148 (C.D. Cal. 1985). However, the Fourth Circuit must be added when the defendant is a private individual. See *Betsey*, 736 F.2d at 988 n.5 (four-prong *Clarkton* test not applicable when defendant was private individual); see also Schwartz, *Poverty Law*, N.Y.L.J., Oct. 16, 1984, at 1, col. 1. The author reported that although the Supreme Court has not ruled on this issue, most circuits have agreed "that the *Griggs* prima facie case principles of Title VII are applicable in Title VIII actions. In addition to the Fourth Circuit, this includes decisions of the Third, Fifth, Seventh and Eighth Circuits." *Id.* at 2, col. 1. The author also stated that the Second Circuit followed suit in *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d Cir. 1979). See *id.* at 2, cols. 1-2.

See generally Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME L. REV. 199 (1978); Comment, *Justifying a Discriminatory Effect Under the Fair Housing Act: A Search For the Proper Standard*, 27 U.C.L.A. L. REV. 398 (1979); Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128 (1976). See also Calmore, *supra* note 141, at 625-26.

170. See *Memphis v. Greene*, 451 U.S. 100, 119 (1981).

171. See *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 389 (1982).

Finally, the federal circuits have differed on what kind of a justification the defendant must present in order to rebut the plaintiff's prima facie showing.¹⁷² In *Betsey*, the court required that the defendant assert a compelling business necessity for the challenged eviction.¹⁷³ Thus, since this case was the first and only case involving discrimination against children that was decided under the Act, it could set the precedent for the cases that follow.

Because an action under the Fair Housing Act does not require a showing of state action,¹⁷⁴ and therefore permits a plaintiff to challenge purely private discriminatory acts, the amended Act would provide a remedy for a large number of families seeking redress from child discrimination.¹⁷⁵ Nevertheless, the Act has been ineffective in its administration and does not meet the desired goal of its framers.¹⁷⁶

The Fair Housing Act declares as its policy "to provide, within constitutional limitations, for fair housing throughout the United States,"¹⁷⁷ but it has not been effectively enforced and thus falls far short of its declared goal.¹⁷⁸ Furthermore, less than one percent of the instances of discrimination are brought to the attention of the complaint system of the Housing and Urban Development (HUD).¹⁷⁹

172. When the defendant is a private individual, "most courts in Title VIII cases have adopted their circuit's Title VII formulations of business necessity." *Business Necessity*, *supra* note 165, at 580 n.118 (citing *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988-89 (4th Cir. 1984); *Smith v. Anchor Bldg. Co.*, 536 F.2d 231, 235-36 (8th Cir. 1976); *Williams v. Matthews Co.*, 499 F.2d 819, 828 (8th Cir.), *cert. denied*, 419 U.S. 1021 (1974)). When the defendant is a public entity, however, the courts have used different language in weighing the justification offered by the defendant against the interests of the plaintiff. See *Business Necessity*, *supra* note 165, at 602-05.

173. See *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988-89 (4th Cir. 1984).

174. See *United States v. Mintzes*, 304 F. Supp. 1305, 1313 (D. Md. 1969) (no state action limitation); see also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (same).

175. Studies have found that females and minorities, two of the protected classes under the Act, are the groups affected most by these child exclusion practices because of their increased representation in the rental market. See Ridings, *Discrimination Against Women in Housing Finance*, in A SHELTERED CRISIS: THE STATE OF FAIR HOUSING IN THE EIGHTIES 104, 107 (1983).

176. See S. 1220, 98th Cong., 1st Sess., 129 CONG. REC. 6152, 6152-53 (1983); *infra* notes 179-80.

177. The Fair Housing Act of 1968, § 801, 42 U.S.C. § 3601 (1982).

178. See *supra* note 176; *infra* notes 179-80.

179. For instance, approximately 4,500 discrimination in housing complaints are presented to HUD. HUD diverts two-thirds of these complaints to local agencies and attempts to resolve one-third of the remaining complaints. Approximately one-half of the 500 complaints are successfully conciliated. See S. 2040, 99th Cong., 2nd Sess., 132 CONG. REC. 848, 850 (1986).

The ineffective enforcement of the statute may be explained by the lack of financial incentives for private parties to bring claims under the Act, and the absence of a quick and inexpensive forum in which to hear housing discrimination complaints.¹⁸⁰

B. The Proposed Bill to Amend the Fair Housing Act to Include Families with Children as a Protected Class

In May, 1983, February, 1986, and February, 1987, a group of congressmen, headed by Senators Mathias and Kennedy, introduced a bill to the Senate that would amend the Fair Housing Act so that it could better achieve its desired goals.¹⁸¹ The bill would strengthen the Act's enforcement mechanisms, by appointing administrative law judges to hear complaints, and providing economic incentives to injured parties in order to encourage the filing of claims.¹⁸² Furthermore, the bill would include handicapped persons and families with children as protected classes under the Act.¹⁸³ The strong lobbying power of the National Association of Realtors, which vigorously opposes the bill, has led to tremendous dispute over the issue of whether to extend protection to families.¹⁸⁴ The Association's strong opposition makes it imperative to determine whether the amendment, which would protect familial status, could withstand constitutional attack.

The Act has been upheld as a valid exercise of congressional power under the thirteenth amendment,¹⁸⁵ which grants Congress the power

180. The bill to amend the Act gives an administrative law judge the authority to award compensatory damages for the "pain, humiliation and suffering" and also punitive damages. See S. 2040, 99th Cong., 2d Sess., 132 CONG. REC. 850 (1986). Furthermore, the bill establishes administrative courts as the "back-up" to the conciliation process. See *id.* The 1983 bill proposes an award of a civil penalty of \$10,000 and reasonable attorney and expert witnesses' fees. See S. 1220, 98th Cong., 1st Sess., 129 CONG. REC. 6152, 6153 (1983).

181. S. 1220, 98th Cong., 1st Sess., 129 CONG. REC. 6152 (1983); see S. 2040, 99th Cong., 1st Sess., 132 CONG. REC. 848 (1986); see also S. 558, 100th Cong., 1st Sess., 133 CONG. REC. 2256 (1987).

182. See *supra* note 180 and accompanying text.

183. See S. 1220, 98th Cong., 1st Sess., 129 CONG. REC. 6152, 6155 (1983); see also S. 2040, 99th Cong., 1st Sess., 132 CONG. REC. 848, 851 (1986); S. 558, 100th Cong., 1st Sess., 133 CONG. REC. 2256 (1987).

184. Telephone interview with staff member of House Judiciary Committee (Mar. 14, 1986).

185. U.S. CONST. amend. XIII, § 1. Section 1 provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." *Id.*; U.S. CONST. amend. XIII, § 2. Section 2 provides: "Congress shall have the power to enforce this article by appropriate legislation." *Id.*

"to eliminate the 'badges and incidents of slavery,' "186 by "bar[ring] all racial discrimination, private as well as public, in the sale and rental of real property."187

One commentator has noted that the Fair Housing Act is consistently read as thirteenth amendment legislation¹⁸⁸ and "that the lack of a firm base of thirteenth amendment authority was the reason Congress left obscure the constitutional basis of the Fair Housing Act's proscription on sex discrimination."¹⁸⁹ Although it has been stated that "Congress has the power under the Thirteenth Amendment rationally to [define] what are the badges and the incidents of slavery,"¹⁹⁰ a literal reading of the amendment would require that the plaintiff suing under this provision allege a condition of slavery and involuntary servitude.¹⁹¹

Not all the protected classes under the Act meet this criterion, however, because sex, religion, handicap, and familial status do not encompass the traditional notions of the conditions of slavery or involuntary servitude. Furthermore, it appears that the thirteenth amendment is the exclusive constitutional provision authorizing congressional action against private discrimination in housing.¹⁹² Nevertheless, no one has mounted a challenge to Congress' constitutional authority to protect persons on the basis of their sex or religion.

186. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (emphasis in original); *Williams v. Matthews Co.*, 499 F.2d 819, 825 (8th Cir.), *cert. denied*, 419 U.S. 1021 (1974); *United States v. Hunter*, 459 F.2d 205, 214 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972); *Morgan v. Parcener's Ltd.-Partnership*, 493 F. Supp. 180, 182 (W.D. Okla. 1978); *Meadows v. Edgewood Management Corp.*, 432 F. Supp. 334, 335 (W.D. Va. 1977); *United States v. Mintzes*, 304 F. Supp. 1305, 1313 (D. Md. 1969).

187. *United States v. L & H Land Corp., Inc.*, 407 F. Supp. 576, 579 (S.D. Fla. 1976); *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973), *aff'd*, 509 F.2d 623 (9th Cir. 1975); *United States v. Real Estate Dev. Corp.*, 347 F. Supp. 776, 781 (N.D. Miss. 1972); *see also* *United States v. Mintzes*, 304 F. Supp. 1305, 1313 (D. Md. 1969). *But see* *United States v. Harris*, 106 U.S. 629, 640-42 (1883) (Congress exceeded its authority under the 13th amendment by enacting statute that would be applied to protect whites against discrimination).

188. *See* Calhoun, *The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Sex Discrimination*, 61 MINN. L. REV. 313, 323 n.51 (1977) [hereinafter Calhoun].

189. *Id.* (citing Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUSTON L. REV. 844 (1975)).

190. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

191. *But see* Calhoun, *supra* note 188, at 355-56. The author argues that the Supreme Court's holding in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), no longer requires Congress to prohibit discrimination under the thirteenth amendment only with regard "to the current or former inferior legal status of the class discriminated against." *Id.* at 356.

192. *See* *United States v. Mintzes*, 304 F. Supp. 1305, 1312 (D. Md. 1969) (holding that section 3604(e) of the Fair Housing Act was not within Congressional authority under commerce clause or § 5 of fourteenth amendment).

The lack of litigation concerning Congress' authority to protect individuals from sex and religious discrimination in housing makes it unlikely that anyone will challenge the protection of families as unconstitutional legislation. Moreover, the language in *Jones v. Alfred H. Mayer Co.*,¹⁹³ concerning the power of Congress to enact legislation under the thirteenth amendment that touches on "fundamental rights which are the essence of civil freedom,"¹⁹⁴ leads one to conclude that Congress' protection of families would be upheld as a "rational means of effectuating the stated policy of the legislation 'to provide, within constitutional limitations, for fair housing throughout the United States.'"¹⁹⁵ By utilizing its broad enforcement powers under the thirteenth amendment, as interpreted by the *Jones* Court, Congress would merely be preventing unreasonable restraints on the fundamental right of privacy concerning family living arrangements and the right to procreate without undue hardship.¹⁹⁶

At present, the bill has been referred to the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee,¹⁹⁷ but has not had a full hearing.¹⁹⁸ When introduced in 1983, it had thirty-nine supporters,¹⁹⁹ but upon reintroduction in 1986, this number had dwindled to thirty-two.²⁰⁰ Although many supporters are fighting for its passage, the power of the National Association of Realtors is overshadowing their efforts.²⁰¹ Therefore, since it is unlikely that the bill will pass, it will be important to pass state legislation designed to accomplish the goals set forth in the proposed bill.

IV. Local Legislative Attempts to Combat the Problem and Recommended Changes

Prior to 1979, only six states had enacted statutes declaring child exclusion practices to be illegal and void as against public policy.²⁰²

193. 392 U.S. 409 (1968).

194. *Id.* at 441 (citation omitted).

195. *United States v. Mintzes*, 304 F. Supp. 1305, 1313 (D. Md. 1969) (citation omitted).

196. See Calhoun, *supra* note 188, at 323 n.51 for the arguments asserted for expanding Congress' power under the thirteenth amendment.

197. Telephone interview with staff member of House Judiciary Committee (Mar. 14, 1986).

198. *Id.*

199. See S. 1220, 98th Cong., 1st Sess., 129 CONG. REC. 6152 (1983).

200. S. 2040, 99th Cong., 2d Sess., 132 CONG. REC. 848 (1986). But see S. 558, 100th Cong., 1st Sess., 133 CONG. REC. 2256 (1987) (38 supporters).

201. See S. 1220, 98th Cong., 1st Sess., 129 CONG. REC. 6152 (1983) (supporter's letters); *supra* note 184.

202. See ALASKA STAT. § 18.80.240 (1986); ARIZ. REV. STAT. ANN. § 33-1317 (1974 & Supp. 1986); DEL. CODE ANN. tit. 25, § 6503 (1975 & Supp. 1986); ILL.

Because of the publicity²⁰³ and public concern surrounding this issue, and the efforts of local activist groups,²⁰⁴ an additional nine states have recently adopted statutes that ban this discrimination.²⁰⁵ Of the sixteen states that have passed legislation, the statutes in Alaska, Arizona, Maine,²⁰⁶ Rhode Island, and Virginia provide little or no relief to the victims of child discrimination.²⁰⁷ Instead, they are inadequate because they exempt adults-only complexes from their coverage without regard to the age of the inhabitants.²⁰⁸ Therefore, landlords can effectively exclude children without violating the statutes simply by designating their complexes as adults-only dwellings, or by registering their buildings with their respective state housing commissions as adults-only residences.²⁰⁹

These statutes take a variety of approaches, ranging from a statement that it is an unlawful discriminatory practice and a civil rights violation to discriminate against families with children²¹⁰ to a clas-

ANN. STAT. ch. 68, para. 3-104 (Smith-Hurd Supp. 1986); MASS. ANN. LAWS ch. 151B, § 4(11) (Law. Co-op. 1976 & Supp. 1986); N.Y. REAL PROP. LAW §§ 236, 237 (McKinney 1968 & Supp. 1987); N.J. STAT. ANN. § 2A:42-101 (West Supp. 1986).

203. Articles have appeared in U.S. News and World Report, The Wall Street Journal, The New York Times, and the National Law Journal. *See Protests are Mounting Over "Adults-Only" Rentals*, U.S. NEWS & WORLD REP., Feb. 4, 1980, at 58; Edelman, *supra* note 8, at A23, col. 2 [hereinafter *Protests Are Mounting*]; Lublin, *supra* note 7, at 35, col. 3; Granelli, "Adults-Only" Housing Suffers Judicial Setbacks, Nat'l L.J. Mar. 1, 1982, at 5, col. 1; *see also* Morris & Block, *The Conversion of Apartment Buildings To All-Adult Tenancy May Be Illegal*, Nat'l L.J., Oct. 22, 1984, at 20, col. 3.

204. James B. Morales, Staff Attorney at the National Center for Youth Law, 1663 Mission Street, San Francisco Ca., 94103, has been very vocal in his attempts to ban child discrimination in housing.

205. *See* CAL. CIV. CODE § 51.2 (West Supp. 1987); CONN. GEN. STAT. ANN. § 46a-64a (West 1986); D.C. CODE ANN. §§ 1-2515(c), 45-2555 (1981); ME. REV. STAT. ANN. tit. 14, § 6027 (Supp. 1986); MASS. ANN. LAWS ch. 151B, § 4(11) (Law. Co-op. 1976 & Supp. 1986); MINN. STAT. ANN. § 504.265 (West Supp. 1987) N.H. REV. STAT. ANN. § 354-A:8(V)(a) (Supp. 1986); R.I. GEN. LAWS § 34-37-4(E) (Supp. 1986); VA. CODE ANN. § 36-88 (1984 & Supp. 1986).

206. *See* ME. REV. STAT. ANN. tit. 14, § 6027 (Supp. 1985) (an adults-only complex must reserve 25% of the complex for families).

207. *See* ALASKA STAT. § 18.80.240(1), (2) (1986) ("nothing in this paragraph prohibits the sale, lease or rental of classes of real property commonly known as housing for 'singles' or 'married' couples"); ARIZ. REV. STAT. ANN. § 33-1317(b) (Supp. 1986) (guilty of petty offense if rent to persons with children in violation of restrictive covenant covering an exclusive adult subdivision); R.I. GEN. LAWS § 34-37-4 (E)(5)(e) (Supp. 1986) ("[n]othing . . . shall be construed to affect a housing accommodation in . . . adults-only housing complexes"); VA. CODE ANN. § 36-88 (Supp. 1986) ("it shall not be an unlawful discriminatory housing practice to operate an all-adult or all-elderly housing community").

208. *See supra* notes 206-07 for a list of these statutes.

209. *See id.*

210. *See* CAL. CIV. CODE § 51.2 (West Supp. 1987) (violation of Unruh Civil Rights Act); CONN. GEN. STAT. ANN. § 46a-64a(a) (West Supp. 1986) (unlawful

sification of the landlord's discriminatory practice as a misdemeanor or a petty offense.²¹¹ Some states impose civil penalties that range from twenty-five dollars for a first offense to two thousand dollars for subsequent offenses.²¹² The exemptions from compliance with these statutes invariably include housing for the elderly and two-family to five-family owner-occupied dwellings.²¹³

An absolute ban on child-exclusion practices in these statutes is impracticable because at least twenty-five percent of the rental units on the market are not designed for habitation by families.²¹⁴ Also, landlords are always permitted to reject individuals in accordance with local occupancy laws.²¹⁵ Nevertheless, present statutory schemes

discriminatory practice); D.C. CODE ANN. §§ 1-2515(c), 45-2555 (1981) (same); ILL. ANN. STAT., ch. 68, para. 3-104 (Smith-Hurd Supp. 1986) (civil rights violation); ME. REV. STAT. ANN., tit. 14, § 6027 (Supp. 1986) (unlawful housing discrimination); MASS. ANN. LAWS ch. 151B, § 4(11) (Law. Co-op. 1976 & Supp. 1986) (unlawful discriminatory practice); N.H. REV. STAT. ANN. § 354-A:8(V)(a) (1984) (same); R.I. GEN. LAWS § 34-37-4 (1984 & Supp. 1986) (unlawful housing practice); VA. CODE ANN. § 36-88 (1984 & Supp. 1986) (unlawful discriminatory practice).

211. See ALASKA STAT. § 18.80.270 (1986) (misdemeanor and fine of \$500 and/or 30 days imprisonment); ARIZ. REV. STAT. ANN. § 33-1317 (Supp. 1986) (petty offense and civil penalty up to three times monthly rent); N.Y. REAL PROP. LAW § 236 (McKinney 1968 & Supp. 1987) (misdemeanor and fine of \$50-\$100); N.J. STAT. ANN. § 2A:42-102 (West Supp. 1986) (civil penalty of \$200 for first offense and \$500 for subsequent offenses).

212. Connecticut's statute provides for a fine of \$25-\$100. See CONN. GEN. STAT. ANN. § 46a-64a(c) (1986). In contrast, Maine's statute provides for a fine of \$1000 for a first offense and \$2000 for all subsequent offenses. See ME. REV. STAT. ANN. tit. 5, § 4613(2)(B)(7) (Supp. 1986).

213. See CAL. CIV. CODE § 51.2(a) (West Supp. 1987) (elderly); CONN. GEN. STAT. ANN. § 46a-64a(b)(1)(a), (b) (West 1986) (two and four family owner-occupied); DEL. CODE ANN. tit. 25, § 6503(d) (Supp. 1986) (elderly); D.C. CODE ANN. § 1-2515(c)(3) (1981) (elderly); *id.* § 1-2518 (1981) (owner-occupied two-family or five-family sharing bath or kitchen facilities); ILL. ANN. STAT. ch. 68, para. 3-106(B) (Smith-Hurd Supp. 1986) (five-family owner-occupied); ME. REV. STAT. ANN. tit. 5, § 4613(4)(e) (Supp. 1986) (seniors over 62); *id.* § 4613(4)(a) (Supp. 1986) (five-family owner-occupied); MASS. ANN. LAWS ch. 151B, § 4(11)(1), (3) (Law Co-op. 1976 & Supp. 1986) (three-family dwelling occupied by elderly in which presence of child would be hardship); N.H. REV. STAT. ANN. § 354-A:8(V)(b)-(d) (1984 & Supp. 1986) (age 45 and older and less than three-family); N.J. STAT. ANN. § 2A:42-101 (West Supp. 1986) (federally financed senior citizen retirement community); N.Y. REAL PROP. LAW § 236 (a)(1), (2) (McKinney 1968 & Supp. 1987) (senior citizen community financed by federal government and mobile home parks for those aged 55 or older and two-family owner-occupied); R.I. GEN. LAWS § 34-37-4(E)(5)(a), (d) (Supp. 1986) (seniors and two-family owner-occupied).

214. *Protests Are Mounting*, *supra* note 203, at 58, col. 3.

215. See, e.g., ARIZ. REV. STAT. ANN. § 33-1317(D) (Supp. 1986) ("[n]othing in this section shall prohibit a person from refusing to rent a dwelling by reason of reasonable occupancy standards"); ME. REV. STAT. ANN. tit. 14, § 6027(1) (Supp. 1986) ("[a] landlord may refuse to rent a dwelling unit to a family if the size of the family, with children, would exceed the number permitted by local

fail to provide an effective enforcement mechanism for the remaining apartments on the market that are suitable for family living.²¹⁶ It is necessary to amend these statutes if they are to provide a realistic deterrent to landlords' child-exclusion practices.

A. The Ineffectiveness of Current Statutes

The lack of litigation utilizing the state statutes that prohibit child-exclusion practices by landlords has been noticeable.²¹⁷ One may attribute this fact to the ineffective enforcement of these statutory rights by the parties empowered to protect them. A statute may place the power of enforcement in: (1) the states' attorneys;²¹⁸ (2) the parties injured by this discrimination;²¹⁹ (3) the states' fair employment and housing commissions;²²⁰ or a combination of these entities.²²¹ As discussed below, problems in enforcement by each of

zoning or other municipal ordinance or reasonable standards of human health, safety or sanitation"); R.I. GEN. LAW § 34-37-4(E)(7) (Supp. 1986) (landlord may reject when number of persons is more than twice number of bedrooms).

Recently, landlords have started to use occupancy standards that are more restrictive than local occupancy laws in order to discriminate against families with children. See Morales, *Restrictive Occupancy Standards: Landlords Find New Ways to Discriminate Against Children*, 20 CLEARINGHOUSE REV. 152 (1986) [hereinafter *Restrictive Occupancy Standards*]. See *infra* note 241 for a discussion of the theories used to strike down this practice.

216. See *infra* notes 217-97 and accompanying text for a discussion of proposals to make these statutes attain their objective.

It is important to note, however, that one study found that over 25% of two-bedroom apartments excluded families with one child, one-third excluded families with two children, and 60% excluded families with three children. See MEASURING RESTRICTIVE RENTAL PRACTICES, *supra* note 7, at 71.

217. See *Pardy v. Fountainhead Owners Corp.*, N.Y.L.J., Oct. 2, 1985, at 14, col.4 (Sup. Ct. Westchester County) (child discrimination by a co-op board is not in violation of New York Real Property Law § 236 since law only applies to rentals); *Gilman v. Newark*, 73 N.J. Super. 562, 180 A.2d 365 (1962); *Boyd H. Wood, Co. v. Finkelstein*, 193 Misc. 315, 84 N.Y.S.2d 459 (Sup. Ct. Kings County 1948); see also *People v. Metcuff*, 392 Ill. 418, 64 N.E.2d 867 (1946).

218. See *supra* notes 211-12 and accompanying text for a list of the statutes that place the power of enforcement in the state attorney general.

219. See ARIZ. REV. STAT. ANN. § 33-1317(C) (Supp. 1986); CAL. CIV. CODE § 52(c) (West Supp. 1987); CONN. GEN. STAT. ANN. § 46a-98a (West 1986); DEL. CODE ANN. tit. 25, § 6503(c) (1975); D.C. CODE ANN. § 1-2556(a) (1981); ME. REV. STAT. ANN. tit. 5, § 4551 (Supp. 1986); MASS. ANN. LAWS ch. 151B, § 9 (Law. Co-op. 1975); N.Y. REAL PROP. LAW § 236 (McKinney 1968 & Supp. 1987); N.J. STAT. ANN. § 2A:42-102 (West Supp. 1986); R.I. GEN. LAWS § 34-37-5(L)(2) (1984); VA. CODE ANN. § 36-94(b) (1984).

220. See *supra* note 210 and accompanying text for a list of the statutes which place the power of enforcement in the state's fair employment and housing commissions.

221. For instance, New York's statute gives the Attorney General the enforcement

these entities severely hinder the possible elimination of this discriminatory practice.²²²

1. Problems with the Assertion of These Rights by a State's Attorney or an Injured Party

It is difficult to ascertain the primary cause of a lack of suits brought by states' attorneys or injured parties against landlords who discriminate against families with children. A combination of factors may account for the lack of enforcement of the statutes. As discussed below, a general ignorance of the statutes' existence, the difficulty of proving discrimination, and the lack of financial incentives, are the primary causes for the lack of cases.

One factor that helps to explain the lack of enforcement of these statutes is that if a landlord's discrimination against children is made a criminal offense or violation under the statute, a state attorney would still be unlikely to prosecute the landlord.²²³ Even if a state's attorney were to prosecute a landlord, the landlord could be convicted only of a misdemeanor and fined a minimal amount, which would not deter the landlord from future violations.²²⁴

Prior to its amendment, the Illinois statute placed the power of enforcement in the state's attorney general.²²⁵ Based on this statute, an Illinois survey revealed that statutes that make child discrimination a criminal offense lack a deterrent effect.²²⁶ The survey found that seventy-eight percent of the discriminating landlords were unaware that the statute existed.²²⁷ More important, forty-eight percent stated that they were unconcerned about violating the law.²²⁸ It was not determined whether the landlords' lack of concern was related to

power but also permits a private cause of action. See N.Y. REAL PROP. LAW §§ 236, 237 (McKinney 1968 & Supp. 1986). Furthermore, California's Civil Code Section 52 gives an injured party a private cause of action, or the right to file a verified complaint with the Department of Fair Employment & Housing. See CAL. CIV. CODE § 52(a), (c), (f) (West 1982 & Supp. 1987).

222. See *infra* notes 223-97 and accompanying text.

223. See *supra* notes 211-12 and accompanying text for a list of statutes which give states' attorneys general the enforcement power.

224. See *id.*

225. See ILL. ANN. STAT., ch. 14, para. 5 (Smith-Hurd 1963); see also *id.* ch. 80, paras. 37, 38 (Smith-Hurd 1966).

226. See O'Brien & Fitzgerald, *Apartment For Rent—Children Not Allowed: The Illinois Children in Housing Statute—Its Viability and a Proposal For Its Comprehensive Amendment*, 25 DEPAUL L. REV. 64, 78-79 (1975) [hereinafter *Apartment For Rent*].

227. See *id.* at 79.

228. See *id.*

the minimal penalty imposed (*i.e.*, \$50-\$100), or their belief that they would be safe from prosecution for their actions.²²⁹

Other studies have shown that the certainty of prosecution creates a greater deterrent effect than the severity of the punishment.²³⁰ Enforcement of the Illinois statute provided neither certainty nor severity of punishment, because not one landlord was prosecuted despite evidence of widespread discrimination²³¹ and a penalty of fifty dollars was not severe enough to deter the landlords' child-exclusion practices.²³²

The survey set forth two possible explanations for the lack of any criminal prosecutions. First, approximately forty-nine percent of the state's attorneys admitted their ignorance of the statute's existence.²³³ Second, "an average of *less than [forty] minutes per county per year* [was] spent investigating and prosecuting the statute."²³⁴ Thus, the lack of a single case brought by a state's attorney, as well as any deterrent effect of the statute shows the need for an alternative to criminal prosecution.

One alternative would be a private cause of action. Even if the statute allowed a private party to bring a cause of action, however, the time and expense of litigating the case would deter many individuals from pursuing this avenue of enforcement.²³⁵ Furthermore, seventy-eight percent of the persons polled in the Illinois survey were unaware that a state law existed prohibiting the practice of child-exclusion.²³⁶ Thus, the ignorance of the general population, as well as a probable reluctance to bring suit, may help explain the lack of litigation under these statutes.

Recent publications and the efforts of the National Association for Youth Law have increased the awareness of the population.²³⁷

229. *See id.*

230. *See, e.g.,* Antunes and Hunt, *The Impact of Certainty and Analysis*, 64 J. CRIM. L. & CRIMINOLOGY 486, 488-89 n.25 (1973) ("[s]everity alone is simply irrelevant to the control of deviance"); *id.* at 489 ("severity of punishment exhibits a moderate deterrent impact on homicide rates, but is unrelated to crime rates for other types of crimes").

231. The authors found that only two complaints were filed during the years 1970-1975, *see Apartment for Rent*, *supra* note 226, at 83, and that no prosecutions occurred during the years 1970-74 despite the finding that 21.11% of the rental advertisements discriminated against children under the age of 14. *See id.* at 78 n.69.

232. *See* ILL. ANN. STAT., ch. 80, para. 38 (Smith-Hurd 1966) (misdemeanor and a fine of \$50-\$100).

233. *See Apartment For Rent*, *supra* note 226, at 83.

234. *Id.* (emphasis in original).

235. *See infra* note 239 and accompanying text.

236. *See Apartment for Rent*, *supra* note 226 at 77.

237. *See supra* notes 203-04 and accompanying text.

Even if an individual is aware that a landlord violated his rights, however, "[people are] more interested in moving than suing."²³⁸ To most people, litigation seems complex, time consuming, and expensive.²³⁹ In addition, the type of damages awarded in these cases fails to provide an adequate remedy for injured parties.²⁴⁰ A final problem with a private cause of action is the difficulty plaintiffs encounter in attempting to prove an act of discrimination.²⁴¹ There-

238. See Davis, *State Must Fight Housing Discrimination Against Children*, L.A. Daily J., Jan. 16, 1985, at 4, col. 2 [hereinafter Davis].

239. For instance, in the case of *Marina Point*, the attorney for the plaintiff had worked full-time on the case for two years and planned to petition the court for several hundred thousand dollars in attorney's fees. See Granelli, "Adults Only" *Housing Suffers Judicial Setbacks*, Nat'l L.J., Mar. 1, 1982, at 20, col. 2 [hereinafter Granelli]; see also Davis, *supra* note 238, at 2, col. 4; The Sacramento Bee, *The Child Next Door*, L.A. Daily J., Nov. 29, 1984, at 4, col. 1 ("[a]nd though victimized families can take their complaints to court, that remedy is too costly and time-consuming to be useful").

240. See *infra* notes 286-97 and accompanying text for a discussion of the type of damages awarded in these cases.

241. For example, if the statute imposed criminal sanctions, the attorney general would have to prove beyond a reasonable doubt that an act of discrimination occurred. See *People v. Metcuff*, 392 Ill. 418, 64 N.E.2d 867 (1946). In *Metcuff*, the state failed to meet this burden because the act of discrimination had occurred over the phone and the plaintiff could not identify the voice, having never met the landlord in person. See *id.* at 420-21, 64 N.E.2d at 868. Furthermore, it is unlikely that a disinterested person would look at an apartment; therefore, it is difficult for a plaintiff to produce a credible witness later at the trial. See *Apartment for Rent*, *supra* note 226, at 71. Furthermore, even a checker's testimony is sometimes challenged as biased. See Calmore, *supra* note 141, at 629. For instance, in one case, the court observed that "when one has an interest in the outcome of a case or harbors strong feelings against a party or the conduct challenged, there is a tendency to shape one's sensory perceptions or reactions to fit the testimony one desires to give." *Id.*

In addition, if an attorney general investigates a complaint, an intricate procedure is utilized in order to prove the discrimination. See *Apartment for Rent*, *supra* note 226, at 71 n.35. The "sandwich investigation" involves three teams. See *id.* The first team poses as a married couple without children. See *id.* The second team poses as a married couple with children the same number and ages as the victim's. See *id.* Finally a third team poses as a married couple without children. See *id.* Thus, an enormous amount of time and manpower is necessary to prove this discrimination, perhaps explaining why the attorney general's office gives these cases low priority. See *supra* note 234 and accompanying text for an example of the amount of time spent per year investigating these complaints. See *Apartment for Rent*, *supra* note 226, at 85 n.91 ("[t]o my knowledge D.A.'s in large cities accord low priority to prosecution of such complaints (New York)").

A new vehicle for child discrimination has emerged which requires the type of statistics necessary to prove disparate impact under the Fair Housing Act. See *Restrictive Occupancy Standards*, *supra* note 215, at 153. Landlords have started to impose occupancy standards which are more restrictive than the local occupancy laws. See *id.* at 152. In states that statutorily prohibit child discrimination, injured parties can claim that the occupancy standard has a disparate impact on families with children. See *id.*

fore, to encourage private enforcement of these rights, state legislators should amend statutes to provide for financial incentives²⁴² and relax existing evidentiary rules.²⁴³

2. *The Establishment of a Fair Housing Commission*

A middle ground between a criminal offense statute²⁴⁴ and one that provides for a private cause of action²⁴⁵ would be an amendment to the states' human rights statutes that would give departments of Fair Housing and Employment authority to receive complaints involving child discrimination. A fair housing commission would have the capability to remedy ignorance about this discrimination and decrease the expense associated with a private cause of action.²⁴⁶ As previously noted, the individuals most likely to be victims of discrimination by landlords are women and minorities.²⁴⁷ These classes of individuals are also the most likely to be indigent and unable to

In *Commission on Human Rights and Opportunities v. Hillcroft Partners*, No. 8520090 (Conn. Commission on Human Rights and Opportunities Feb. 28, 1986) the landlord's policy prohibited more than four persons to reside in a three bedroom apartment. See *Restrictive Occupancy Standards*, *supra* note 215, at 153. Under the local occupancy law, however, a three bedroom apartment was suitable for eight occupants. See *id.*

The statistics that the plaintiffs introduced to prove disparate impact were: (1) a comparison of the families with children in the apartment complex (13%) with the percentage of families in the area (43%); (2) a comparison of adults-only households which would be eligible for the apartment (99%) with households with children, where only 75% would be eligible; and finally (3) 97% of all five person households contained children. See *id.* Relying on these statistics, the hearing officer held that plaintiffs proved a prima facie case of disparate impact. See *id.*; see also *Smith v. Ring Bros. Management Corp.*, 183 Cal. App. 3d 649, 228 Cal. Rptr. 525 (1986). In *Smith* a couple with two children were refused occupancy to a two bedroom apartment. See 228 Cal. Rptr. at 525. If the couple had waited to have their second child until after they had moved in, they would have been permitted to stay in the apartment. See *id.* The landlord's standard was more restrictive than the local occupancy code. See 228 Cal. Rptr. at 525 n.1. The court found that although the practice was "age neutral," the landlord's refusal was in violation of a Los Angeles Municipal Code because it "favors children in utero, or in contemplation, over children in esse." 228 Cal. Rptr. at 525-26.

242. See *infra* notes 286-97 and accompanying text for a discussion of remedies that presently are and those that should be made available in these cases.

243. See *infra* notes 265-82 and accompanying text for the current evidentiary rules and those that are needed to lessen plaintiffs' burden of proof.

244. See *supra* note 211-12 for a list of criminal offense statutes.

245. See *supra* note 219 for a list of statutes which provide for a private cause of action.

246. See Granelli, *supra* note 239, at 20, col. 2.

247. See *supra* note 175 and accompanying text.

afford a private attorney.²⁴⁸ Therefore, a commission would be helpful in enforcing the rights of these individuals.

The advantages of a commission would include: (1) public investigations of discrimination by the commission's use of checkers—commission personnel posing as potential tenants;²⁴⁹ (2) a central location for both the investigation and resolution of complaints;²⁵⁰ and (3) a forum capable of handling cases quickly²⁵¹ and inexpensively, made possible by conciliation efforts and commission hearing.²⁵² For the commission to be effective, states must enact statutes that unequivocally prohibit discrimination against families in all housing²⁵³ and give the commission jurisdiction to hear complaints.²⁵⁴

If a statute provides both for a private cause of action and a housing commission, a conflict in jurisdiction could arise between

248. In 1977, 41.8% of female-headed households with children and three-fifths of all black families headed by women were at the poverty level. See Golubock, *supra* note 10, at 130 (quoting U.S. DEP'T OF HOUSING AND URBAN DEV., HOUSING OUR FAMILIES 3 (1980)).

249. See Calmore, *supra* note 141, at 629.

250. Telephone interview with Joan Thompson, Director of the Fair Housing Division, New York City Commission on Human Rights (Aug. 2, 1986).

251. It is questionable how quickly a complaint is resolved by a housing commission. For instance, in *People v. Arlington Park Race Track Corp.*, 129 Ill. App. 3d 584, 472 N.E.2d 547 (1984) (*Race Track II*), the complaint was at the hearing stage for two years.

252. See S. 1220, 98th Cong., 1st Sess., 129 CONG. REC. 6153 (1983); see also S. 2040, 99th Cong., 2d Sess., 132 CONG. REC. 850 (1986).

253. It is necessary to limit the exemptions to two-family owner-occupied residences because of the lack of housing available for family living. See *Protests Are Mounting*, *supra* note 203, at 58, col. 3 ("Pat Harris, Secretary of Health, Education & Welfare, has called the shortage of apartments that allow children a top concern of the agency's new Office of Families"). See *supra* note 216 for the percentages of apartments made available for families. Furthermore, if it did not apply to all housing, landlords would probably convert their buildings into condominiums. See *Protests Are Mounting*, *supra* note 203, at 58, col. 3 ("[v]acancy rates in many cities are at a record low because of the sharp decline in building and the conversion of many rental projects to condominiums"). Finally, if a statute does not explicitly prohibit discrimination in co-operatives, condominiums, etc., it is unlikely that a court would apply the statute to situations other than rentals. See *Pardy v. Fountainhead Owners Corp.*, N.Y.L.J., Oct. 2, 1985, at 14, col. 4 (N.Y. Sup. Ct. Westchester County). A bill currently pending in the New York State Senate would amend the New York statute by including cooperatives and condominiums in the statute's coverage. See *infra* note 264 and accompanying text.

254. The necessity for the legislature to give a housing commission the jurisdiction to hear these complaints is exemplified by what transpired in California after the decision of *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496, cert. denied, 459 U.S. 858 (1982). After *Marina Point*, the Department of Fair Employment and Housing refused to accept the child discrimination complaints because it questioned its jurisdiction unless the complaint also alleged discrimination on the basis of "sex, religion [or] race." See Davis, *supra* note 238,

the commission's tribunal and a court.²⁵⁵ In an effort to resolve this conflict, some statutes stipulate that once a complaint is filed with the commission, a party waives its right to a private cause of action unless, as in some of the statutes, the party dismisses the complaint filed with the commission.²⁵⁶ Some courts also require an exhaustion of administrative remedies before asserting jurisdiction over the matter.²⁵⁷

To date, only one case has been brought to the attention of a state court in which the statute had granted enforcement authority to a commission. *People v. Arlington Park Race Track Corp.*²⁵⁸ illustrates the procedural absurdities that can occur when a court attempts to assert its jurisdiction over a housing complaint. In this case, the statute specified that the court's jurisdiction was limited to granting temporary relief during the pendency of the commission's proceedings or reviewing an order of the commission.²⁵⁹ The case also exemplifies the inefficiency that can occur in a commission's enforcement of the statute.²⁶⁰

Accordingly, statutes must be drafted explicitly to give plaintiffs the right to bring a private cause of action, so that a court can assert its jurisdiction without requiring an exhaustion of administrative remedies.²⁶¹ Furthermore, the statutes should provide a "bail-

at 4, col. 4. Two years after the *Marina Point* decision, the Fair Employment and Housing Commission voted that the department had the jurisdiction and the department finally agreed to accept the complaints. *See id.*; *see also* Carrizosa, *Housing Agency Reverses Stance on Families With Kids*, L.A. Daily L.J., Dec. 11, 1984, at 2, col. 4 ("the department had been refusing to accept the complaints, first for lack of money, then for lack of legal authority").

255. *See, e.g.*, *People v. Arlington Park Race Track Corp.*, 129 Ill. App. 3d 584, 472 N.E.2d 547 (1984) (*Race Track II*).

256. *See* CONN. GEN. STAT. ANN. § 46a-98a (West Supp. 1986) (in lieu of but not in addition to, filing complaint); D.C. CODE ANN. § 1-2556 (1981) (cause of action for damages unless complaint filed with agency; however, can bring separate cause of action if complainant dismisses agency complaint before final disposition); MASS. ANN. LAWS ch. 151B, § 9 (Law. Co-op. 1976) (aggrieved party can bring separate cause of action within ninety days of filing complaint with commission if dismisses complaint pending before commission).

257. *See, e.g.*, *East Chop Tennis Club v. Massachusetts Comm'n Against Discrimination*, 364 Mass. 444, 448, 305 N.E.2d 507, 510 (1973).

258. 129 Ill. App. 3d 584, 472 N.E.2d 547 (1984) (*Race Track II*).

259. *See* 122 Ill. App. 3d at 521, 461 N.E.2d at 508 (1984) (*Race Track I*).

260. The original complaint was filed with the housing department on May 6, 1982. *See Race Track I*, 122 Ill. App. 3d at 519, 461 N.E.2d at 507. On December 7, 1984, the date of the decision in *Race Track II*, however, the department had still not rendered a decision.

261. *See, e.g.*, The Fair Housing Act of 1968, § 812, 42 U.S.C. § 3612 (1982) (no exhaustion of administrative remedies required).

out" provision, which gives a party the option to drop commission proceedings and bring a private cause of action, without waiving this right once the proceedings begin.²⁶²

The establishment of a commission is necessary to resolve this problem, because many of the persons affected by discriminatory practices would be unable to hire private attorneys.²⁶³ In view of the lack of effective enforcement by attorneys general and the value of a commission as an agency to hear complaints, New York and Missouri have proposed bills to have families protected as a class under the Human Rights Laws.²⁶⁴ The commission would investigate complaints and inform injured parties that they could pursue a private cause of action or seek redress through the commission.

3. *Evidentiary Problems*

When a complaint cannot be resolved by conciliation, a commission

262. A bail-out provision is necessary because many of the statutes waive a party's right to a private cause of action once department proceedings begin. See *supra* note 256 for a list of the statutes that require a plaintiff to waive his rights to a private cause of action once commission proceedings begin. Furthermore, courts usually require an exhaustion of administrative remedies if an administrative body is empowered to deal with the complaints. See, e.g., *East Chop Tennis Club v. Massachusetts Comm'n Against Discrimination*, 364 Mass. 444, 305 N.E.2d 507 (1973).

263. See *supra* notes 247-48 and accompanying text.

264. See Lublin, *supra* note 7, at 35, col. 4; see also N.Y.S. 6046-A, N.Y.A. 6824, 208th Sess. (1985); Nix, *Panel Acts on Rent Bias Against Children in City*, N.Y. Times, May 22, 1986, at B1, col. 5 [hereinafter Nix].

The state's Real Property Law prohibits discrimination against children in housing, but it has rarely been used in such cases because its enforceable only by the Attorney General or through a state court and there is a maximum fine of \$100 The proposed bill would allow victims to win compensatory damages of as much as \$25,000 through the Human Rights Commission.

Nix, *supra*, at B17, col. 5.

New York City recently passed a law that amends the administrative code of the City of New York by protecting children along with the other classes from discrimination in all housing (rental units, co-operatives, etc.), and exempts only two-family owner-occupied rooming houses and dormitories. See New York, N.Y., 1986 N.Y. Local Laws 1 (No. 17).

Similar bills that would have amended section 296(5) of New York's Executive Law were introduced in 1983 and 1984 and passed in the Assembly (A. 694, A. 694-D). See Memorandum of Attorney General Robert Abrams, N.Y.S. 6046-A, N.Y.A. 6824, 208th Sess. 1-2 (May 8, 1985). The bill was introduced because:

The Attorney General believe[d] that the acute housing shortage in many parts of the State warrant[ed] the expansion of the housing discrimination laws to ensure that all New Yorkers have an equal opportunity—free from the obstacles posed by arbitrary barriers to seek a variety of housing accommodations. The bill recognize[d] the need of individuals and families

hearing usually begins.²⁶⁵ Thus, evidentiary burdens are involved in both commission proceedings and private litigations.²⁶⁶ Because of the difficulty in proving an act of discrimination, the statutes should specify both the burdens of production and persuasion²⁶⁷ and on whom these burdens should be placed.

In a Fair Housing Act cause of action, to make a *prima facie* case, the complainant must show that: (1) he is a member of a protected class under the Act; (2) he qualifies for the requested apartment; (3) the landlord rejected his application; and (4) the apartment remained unoccupied after the landlord's rejection.²⁶⁸ In other words, the Fair Housing Act imposes a four-part burden of production upon the plaintiff. After this initial showing, the courts also place the burden of persuasion on the complainant.²⁶⁹ At both stages of the litigation, the evidentiary burdens weigh heavily on the plaintiff.

The same rules would be applicable to a child discrimination case, and thus the burden of persuasion would be on the plaintiff.²⁷⁰ Once the plaintiff has established his *prima facie* case, a landlord, in order to avoid a directed verdict or summary judgment, must explain his

to rent an apartment or space in a mobile home park, or to buy a cooperative or condominium on a nondiscriminatory basis.

Id.

265. See S. 2040, 99th Cong., 2d Sess., 132 CONG. REC. 855 (1986).

266. See *infra* notes 268-82 and accompanying text for a discussion of these evidentiary burdens.

267. For the purposes of this Note, the burden of production will encompass the evidence plaintiff must bring forth in order to make out a *prima facie* case. The burden of persuasion will be used synonymously with the burden of proof, and will encompass the burden of proving by a preponderance of the evidence that an act of discrimination did or did not occur.

268. See *Fundamental Issues*, *supra* note 166, at 581 (citing *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1038 (2d Cir. 1979) (court used this four-part *prima facie* case)). Other courts have applied this formula to housing discrimination cases. See, e.g., *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184, 189-90 (7th Cir. 1982) (court uses this four-part *prima facie* case); *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976) ("where a black rental applicant meets the objective requirements of a landlord, and the rental would likely have been consummated were he or she a white applicant, a *prima facie* inference of discrimination arises as a matter of law"); see also Calmore, *supra* note 141, at 625-26.

This four-part *prima facie* showing is the norm for suits brought under the Fair Housing Act by a single plaintiff. See Calmore, *supra* note 141, at 626. When a broad class-based discrimination is alleged, however, the *prima facie* showing would most likely be the discriminatory effects showing. See *supra* note 169 and accompanying text.

269. See C. TILFORD, MCCORMICK ON EVIDENCE § 337 (1984) [hereinafter MCCORMICK]. Thus, "[i]n most cases, the party who has the burden of pleading a fact will have the burdens of producing evidence and of persuading the jury of its existence as well." *Id.* at 948 (citations omitted).

270. See *id.*

rejection of a prospective tenant, decision for eviction, or denial of a lease renewal with any non-discriminatory reason.²⁷¹ The burden of persuasion would then shift back to the plaintiff, who must show by a preponderance of the evidence that the defendant discriminated against him because of his children and that the defendant's reasons were pretextual.²⁷²

In an effort to remedy the problem, the District of Columbia has created a rebuttable presumption of discrimination in its statute, when the person alleging discrimination has one or more children.²⁷³

An adoption of a rebuttable presumption in these statutes would lessen the plaintiff's burden in establishing a prima facie case. Thus this Note advocates adopting a rebuttable presumption. At present, a division of authority exists on the effect of a rebuttable presump-

271. See *Fundamental Issues*, *supra* note 166, at 581 ("[i]f the plaintiff establishes a prima facie case, the burden then shifts to the defendant to 'articulate some legitimate nondiscriminatory reason for the [plaintiff's] rejection' ") (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)); see also *Williams v. Colorado Springs School Dist. No. 11*, 641 F.2d 835, 842 (10th Cir. 1981). If, however, it is a broad, class-based action, the defendant may have to show a compelling business necessity in order to rebut the plaintiff's prima facie case. See *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983 (4th Cir. 1984).

In a broad class-based action, once a plaintiff proved that the policy had a disproportionate impact on families, or that the landlord intended to discriminate because of the presence of children, the landlord would have to justify his actions. When the plaintiff presents a prima facie case of discriminatory intent, the defendant could assert any " 'legitimate non-discriminatory reason for the challenged practice.' " *Betsey*, 736 F.2d at 988 (citation omitted). However, it is not clear how important the justification must be in order to prevent being found liable when plaintiffs assert a discriminatory impact prima facie case. See *Restrictive Occupancy Standards*, *supra* note 215, at 153. In *Betsey*, the landlord had to justify his action by showing a compelling business necessity. See *Betsey*, 736 F.2d at 988. However, in *Commission on Human Rights & Opportunities v. Hillcroft Partners*, the court adopted the test pronounced in *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), *cert. denied sub nom. Whitman Area Improvement Council v. Resident Advisory Bd.*, 435 U.S. 908 (1978), which states that "a justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." *Rizzo*, 564 F.2d at 149; see *Restrictive Occupancy Standards*, *supra* note 215, at 153.

272. See *infra* note 275. It is important to note, however, that when the statute makes the discrimination a criminal offense, the burden of proof could be "beyond any reasonable doubt." See *supra* note 241 and accompanying text.

273. See D.C. CODE ANN. § 1-2515(c)(2) (1981) which provides:

(2) There shall be a rebuttable presumption that an unlawful discriminatory practice has occurred if the person alleging discrimination has 1 or more children who reside with that person and any of the acts prohibited by subsections (a) & (b) of this section are done to maintain residential occupancies more restrictive than the following: (A) In an efficiency apartment, 2 persons; or (B) In an apartment with 1 or more bedrooms, 2 times the number of bedrooms plus 1.

Id.

tion. Under the first view, the rebuttable presumption shifts the burden of producing evidence with regard to the presumed fact—*i.e.*, the fact of discrimination in the refusal to rent because of the presence of children—to the defendant, who must then assert proof of the non-existence of discrimination.²⁷⁴ Under the second view, the presumption can shift the burden of persuasion to the defendant, who must then convince a judge or jury, by a preponderance of the evidence,²⁷⁵ that he did not engage in discrimination.²⁷⁶ The first view is called the Thayer Theory,²⁷⁷ which the Model Code of Evidence has adopted and the Federal Rules of Evidence have incorporated in Federal Rule of Evidence 301.²⁷⁸ The latter view is referred to as the Morgan View,²⁷⁹ and states “that anything worthy of the name ‘presumption’ has the effect of fixing the burden of persuasion on the party contesting the existence of the presumed fact.”²⁸⁰

California adopted an interesting approach to determine which view should be utilized in a trial. Sections 605 and 606 of California’s Evidence Code provide that presumptions established to implement some public policy shift the burden of proof.²⁸¹ Sections 603 and 604 provide that a presumption that does not implement public policy other than to facilitate the determination of a particular action, shifts the burden of producing evidence.²⁸² In other words, if public policy concerns are involved in the enforcement of a statute, California’s statute would shift the burden of persuasion to the defendant to show that he did not engage in a discriminatory act. This Note agrees with the California system, and recommends that the statutes explicitly shift the burden of persuasion in child discrimination cases to defendants once a rebuttable presumption is established. When a state enacts a statute that bans child discrimination, public policy concerns outweigh the courts’ reluctance to interfere with the use and enjoyment of a landlord’s property.²⁸³

274. *See infra* note 277 and accompanying text.

275. *See* McCORMICK, *supra* note 269, § 339, at 956; *id.* § 340, at 959. It appears that “preponderance of the evidence” is the standard of proof typically used in civil cases. *See id.* However, when there is a claim which is disfavored by the courts, (*e.g.*, fraud, oral contracts to make a will, modifications of written agreements) courts may require a showing of clear and convincing evidence. *See id.*

276. *See id.*

277. *See* McCORMICK, *supra* note 269, § 344, at 974-75.

278. *See id.* at 975.

279. *See id.* at 980-81.

280. *See id.* at 980.

281. *See* CAL. EVID. CODE §§ 605, 606 (West 1966 & Supp. 1987).

282. CAL. EVID. CODE §§ 603, 604 (West 1966).

283. “The law favors the free and unobstructed use and enjoyment of property

4. Inadequate Incentives

Finally, the greatest weakness in the present statutes is the lack of financial incentives to bring a private cause of action.²⁸⁴ A private individual is more likely to be diligent in pursuing his rights than a commission would be acting on his behalf.²⁸⁵ Although most statutes provide for an award of attorney's fees to the prevailing party,²⁸⁶ such an award is far from guaranteed.²⁸⁷ Thus, a plaintiff is likely

. . . . " Premium Point Park Ass'n v. Polar Bar, 306 N.Y. 507, 512, 119 N.E.2d 360, 362 (1954).

284. See *infra* notes 290-93 and accompanying text for a discussion of remedies available.

285. See *supra* note 260 for an example of how long a case may take before it is resolved by a commission.

286. See ARIZ. REV. STAT. ANN. § 33-1317(c)(4) (Supp. 1986) (court costs and reasonable attorney's fees); CAL. CIV. CODE § 52(a) (West 1982 & Supp. 1987) (attorney's fees); CONN. GEN. STAT. ANN. § 46a-86(c) (1986) (attorney's fees); D.C. CODE ANN. § 1-2553(a)(1)(E) (1981) (reasonable attorney's fees); ILL. ANN. STAT. ch. 8, para. 108(G) (Smith-Hurd Supp. 1986) ("pay to the complainant all or a portion of the costs of maintaining the action, including reasonable attorney fees and expert witness fees"); ME. REV. STAT. ANN. tit. 5, §§ 4614, 4622 (Supp. 1986) (no award of attorney's fees or civil penalty unless commission dismissed the complaint or failed within 90 days to enter a conciliation agreement); MINN. STAT. ANN. § 504.255 (West Supp. 1987) (treble damages and reasonable attorney's fees for unlawful ouster or exclusion); N.Y. REAL PROP. LAW § 236(b)(2) (McKinney Supp. 1987) ("reasonable attorney's fees . . . may be awarded to a prevailing plaintiff"); R.I. GEN. LAWS § 34-37-5(L) (1)(B) (1984) (costs and reasonable attorney's fees); VA. CODE ANN. § 36-94(b) (1984) (court costs and reasonable attorney's fees). If the statute does not expressly provide for attorney's fees, a court may, nevertheless, imply such an award from the statutory intent. See, e.g., *E.D. Swett, Inc. v. New Hampshire Comm'n for Human Rights*, 124 N.H. 404, 470 A.2d 921 (1983) (although statute did not authorize award of attorney's fees, court found it to be appropriate to award them because of legislative purpose of statute). But see MASS. ANN. LAWS ch. 151B, § 5 (Law. Co-op. 1976 & Supp. 1986) (explicitly forbidding award of attorney's fees).

287. See, e.g., Powell, *The Effects of Hensley v. Eckerhart on the Award of Attorney's Fees*, 13 FORDHAM URB. L.J. 527 (1985) [hereinafter *Attorney's Fees*].

For instance, under the Fair Housing Act, a court may grant attorney's fees to the prevailing plaintiff if in the court's opinion the plaintiff is not financially able to pay the fees. See Fair Housing Act of 1968, § 812(c), 42 U.S.C. § 3612(c) (1982). The Second and Ninth Circuits deny attorney's fees "in cases in which the prospects of success are sufficiently high to attract competent private counsel without the incentive provided by CRAFAA." *Attorney's Fees*, *supra*, at 540-41.

Even if a court is willing to award attorney's fees, the court will require that the fees are "reasonable." See *Attorney's Fees*, *supra*, note 534-35. Federal courts evaluate reasonableness by weighing several factors:

- (1) [T]ime and labor required; (2) novelty and difficulty of the questions;
- (3) skill required to perform the legal service properly; (4) preclusion of other employment by the attorney due to acceptance of the case; (5) customary fee in the community; (6) whether fee was fixed or contingent;
- (7) time limitation imposed by the client or the circumstances; (8) amount

to receive at most only an award of compensatory damages²⁸⁸ and possibly the satisfaction of seeing a civil penalty imposed on the defendant.²⁸⁹

A plaintiff's compensatory damage award could include such out-of-pocket costs as: (1) loss of income;²⁹⁰ (2) moving and storing expenses;²⁹¹ (3) reasonable expenditures to find adequate and suitable substitute housing;²⁹² and (4) the difference in the rent charged in

involved and the results attained; (9) experience, reputation, and ability of the attorneys; (10) "undesirability" of the case; (11) nature and length of the professional relationship with the client; and (12) awards in similar cases within or without the circuit.

Id. (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)).

See generally Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651; Note, *Civil Rights—Attorneys' Fees—When Lodestar Adjusting Factors are Considered in Initial Lodestar Computation, No Abuse of Discretion for District Court to Reject Further Adjustments Based Upon Same Factors*, 53 MISS. L.J. 679 (1983); Note, *Awards of Attorney's Fees in Federal Courts*, 56 ST. JOHN'S L. REV. 277 (1982); Note, *Theories of Recovering Attorney's Fees: Exceptions to the American Rule*, 47 U.M.K.C. L. REV. 566 (1979).

288. See *infra* notes 290-93 and accompanying text for a discussion of the compensatory damages awarded in these cases.

289. ARIZ. REV. STAT. ANN. § 33-1317(c)(3) (Supp. 1986) (plaintiff may recover civil penalty of three times monthly rent if violation was intentional); ME. REV. STAT. ANN. tit. 5, § 4613(2)(B)(7) (Supp. 1986) (civil penalty damages \$500 for first offense, \$1000 for second offense, and \$2000 for third offense); N.J. STAT. ANN. § 2A:42-102 (West Supp. 1986) (civil penalty \$200 for first offense, \$500 for subsequent offenses); R.I. GEN. LAWS § 34-37-5(L)(1)(c) (1984) (punitive damages up to \$500); see S. 1220, 98th Cong., 1st Sess., 129 CONG. REC. 6155, 6158 (1986) (law judge may order equitable and declaratory relief, compensatory damages and impose civil penalty up to \$10,000); see also S. 2040, 99th Cong., 2d Sess., 132 CONG. REC. 855, 855 (1986) (in civil action court can award civil penalty up to \$50,000 for first offense and \$100,000 for subsequent offenses).

290. See *State Human Rights Comm'n v. Pauley*, 158 W.V. 495, 503, 212 S.E.2d 77, 81 (W. Va. 1975) (no proof that complainant suffered monetary loss, thus, award based on his earnings was incorrect since he lost no work by reason of discrimination); *Mendota Apts. v. District of Columbia Comm'n on Human Rights*, 315 A.2d 832, 836 (D.C. 1974) (only evidence of pecuniary loss was time out from work and bus fare); *Massachusetts Comm'n Against Discrimination v. Franzaroli*, 357 Mass. 112, 115, 256 N.E.2d 311, 313 (1970) (commission awarded complainant cost of commuting and loss of time).

One study revealed that 14.3% of the respondents to the survey had job-related difficulties that were directly caused by discrimination against children in housing. See Green & Blake, *supra* note 4, at 24. Fifteen of the 79 complaints concerned the loss of a job or a job opportunity. See *id.*

291. See MASS. ANN. LAWS ch. 151B, § 5 (Law. Co-op. 1976 & Supp. 1986) (expenses for alternate housing, storage and moving costs); see also CONN. GEN. STAT. § 46a-86(c) (1986) (expense for obtaining alternate housing, storage of goods and effects, moving costs, etc.).

292. *Id.*; DEL. CODE ANN. tit. 25, § 6503(c) (1975) (reasonable expenditures to find adequate substitute housing).

the substitute apartment.²⁹³ This small award would not encourage individuals to bring an action on their own behalf, especially when the greatest damage involves the stress and inconvenience associated with a denial of adequate shelter.²⁹⁴ Mental anguish awards are disfavored in many jurisdictions and usually require extensive evidence as well as medical testimony.²⁹⁵ Therefore, a solution to this

293. See *Jackson v. Concord Co.*, 54 N.J. 113, 253 A.2d 793 (1969) (traveling expenses and additional rent costs); *State Div. of Human Rights v. Janica*, 37 A.D.2d 444, 447, 326 N.Y.S.2d 854, 857 (4th Dep't 1971) (increased rent at another location).

294. Examples of the suffering include:

A Cincinnati mother, forced to leave her apartment, had to seek a foster home for her 10-year-old son. A Santa Monica, Calif., family unable to find housing after a year-long search, set up housekeeping in their car for several weeks. A divorced woman in Palo Alto, Calif., had to transfer custody of two of her three children to her former husband after failing to find a suitable apartment. Experts point to the psychological strains on parents who are turned away repeatedly by landlords. "Rejection results in loss of esteem and self-confidence" . . . such parents can create a "poisoning climate for children."

Protests are Mounting, *supra* note 203, at 58, cols. 2-3.

295. See generally *Trenkner, Recovery Of Damages For Emotional Distress Resulting From Discrimination Because Of Sex Or Marital Status*, 61 A.L.R.3d 944 (1975) [hereinafter *Damages For Emotional Distress*].

The author had found only one case in which a person had recovered against a real estate agent on the basis of the real estate agent's refusal to rent her an apartment because of her sex and marital status. See *id.* at 946-47 (citing *Zahorian v. Russell Fitt Real Estate Agency*, 62 N.J. 399, 301 A.2d 754 (1973)). The author stated that the court had found that in enacting the statute and giving this type of damage award, the legislature intended to "serve towards eradication of the cancer of discrimination and whose remedial actions would serve not only the interest of the individual involved but also the public interest." *Id.* at 947.

When conduct is "outrageous," however, a showing of physical distress is unnecessary. *Id.* at 945 (citing *RESTATEMENT (SECOND) OF TORTS* § 46 comment d (1965)).

If, however, discrimination was inflicted intentionally and unreasonably, a person can recover for emotional distress when it cumulates into foreseeable physical harm. See *id.* at 945-46 (citing *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970)); see also 121-129 *Broadway Realty, Inc. v. New York State Div. of Human Rights*, 49 A.D.2d 422, 376 N.Y.S.2d 17 (3d Dep't 1975). In *Broadway*, plaintiff's testimony that she became ill and unable to do housework was enough to support damages of emotional distress without corroborating medical testimony. See *id.* at 423-24, 376 N.Y.S.2d at 19; see also *Massachusetts Comm'n Against Discrimination v. Franzaroli*, 357 Mass. 112, 115-16, 256 N.E.2d 311, 313 (1970) (court upheld commission's award of \$250 for mental suffering because of racial discrimination in housing). But see *Mendota Apts. v. District of Columbia Comm'n on Human Rights*, 315 A.2d 832, 836-37 (D.C. 1974) (lack of evidence to sustain \$950 award for mental anguish and humiliation because doctor who testified had never examined plaintiff); *State Div. of Human Rights v. Janica*, 37

problem would be an award of a civil penalty,²⁹⁶ or treble damages,²⁹⁷ to compensate for this humiliation and to deter this discrimination.

B. The Constitutionality of Statutes Banning Child Discrimination

In adopting a statute banning these practices, the balance between the rights and liabilities of landlords and tenants should result in favoring the welfare of families at the expense of a landlord's freedom to contract. The Supreme Court views the regulation of landlord-tenant relationships to be a legislative rather than a judicial function.²⁹⁸ As in zoning, statutes creating the rights and liabilities of landlords and tenants have been upheld as within the police power of the state as long as they were rationally related to the proper goal of protecting the health, safety, morals, and general welfare of the community.²⁹⁹ Therefore, statutes banning child discrimination would be upheld since they promote the general welfare of families.

A.D.2d 444, 447, 326 N.Y.S.2d 854, 857 (4th Dep't 1971) (insufficient evidence to support mental anguish award).

296. See *supra* note 289 and accompanying text for statutes that award a civil penalty.

297. See CAL. CIV. CODE § 52(a) (West 1982 & Supp. 1987) (liable for actual damages and up to three times amount of actual damage); MINN. STAT. ANN. § 504-255 (West Supp. 1987) (treble damages).

298. See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

299. See *Joy v. Daniels*, 479 F.2d 1236, 1243 (4th Cir. 1973) ("[l]andlord-tenant law is traditionally the province of the states. State judges are bound as we are by the due process clause of the fourteenth amendment"). See also *San Jose Country Club Apts. v. County of Santa Clara*, 137 Cal. App. 3d 948, 955, 187 Cal. Rptr. 493, 496 (1982) (Unruh Civil Rights Act which protects families from discrimination in housing upheld against contract clause challenge as "a 'reasonable' regulation adopted in the interests of the community' ") (citations omitted). But see *Metropolitan Dade County Fair Hous. and Employment Appeals Bd. v. Sunrise Village Mobile Home Park, Inc.*, 485 So. 2d 865, 867-68 (Fla. Dist. Ct. App. 1986) (court denied review of circuit court's holding which declared ordinance prohibiting age discrimination in housing unconstitutional).

The plurality in *Sunrise Village*, held that the circuit court "afforded petitioner a full appeal in compliance with due process requirements, and that it observed essential legal principles in rendering its decision," *Sunrise Village*, 485 So. 2d at 867, and therefore, the court of appeals denied discretionary review. See *id.* The court agreed in dicta with the circuit court's holding that the law was unconstitutional, and stated:

The ordinance in question states that its goal is to assure equal opportunity to all persons to live in decent housing facilities Although the commission, in promulgating the ordinance, adopts a laudatory policy, it utilizes extreme methods to implement its goal. The effect of the ordinance is to eliminate all adult and retirement housing in its jurisdiction, a drastic means of fulfilling its purpose of assuring decent housing.

Id. (citation omitted).

V. Conclusion

A fourteenth amendment challenge to a landlord's child-exclusion practice is unlikely to succeed. Even if a court were to find that the right of families to live together in an apartment was a fundamental right, an initial refusal by a landlord would not constitute state action, except in the unusual case in which the state was a joint participant with the landlord. A proposed amendment to the Fair Housing Act would provide an excellent vehicle for the resolution of this problem and serve as a declaration that this problem is one of national concern. Without the passage of this amendment, states must pass their own legislation prohibiting child discrimination. The statutes enacted by state legislators must give the injured party the option of an administrative proceeding or a private cause of action.

The more legally sound and persuasive argument is found in Chief Judge Schwartz' dissent. The Chief Judge stated:

The ordinance in question is firmly rooted in the most fundamental source of governmental authority: the police power. That doctrine validates any enactment which may reasonably be construed as expedient for the protection or encouragement of the public health, safety, welfare or morals Anti-discrimination laws like this—which prohibit the arbitrary exclusion of a class of citizens from otherwise publicly available facilities and services—are clearly related to the most basic concerns of the public welfare and morality and thus may not be struck down Indeed, I think it self-evident that government may properly conclude that it is simply wrong to discriminate on the basis of a personal characteristic over which the concerned individual has no control—whether it be race, sex, handicap or age; therefore, there can be no basis for interfering with a legislative conclusion to forbid it.

Id. at 869 (Schwartz, C.J., dissenting).

In *San Jose*, a landlord attempted to have the statute declared unconstitutional because it violated his "rights of association, expression, privacy, travel, speech, due process, and equal protection." 137 Cal. App. 3d at 954, 187 Cal. Rptr. at 495. The court rejected all of his arguments and upheld the statute as rationally related to a legitimate state interest. *See id.* at 955, 187 Cal. Rptr. at 496.

The court rejected the plaintiff's first amendment claim because it held that the plaintiff had "no [f]irst [a]mendment interest when the 'commercial activity itself [was] illegal.'" *Id.* (citing *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (1977); *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976); *Welton v. City of Los Angeles*, 18 Cal. 3d 497, 556 P.2d 1119, 134 Cal. Rptr. 668 (1976) and *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 389 (1973)). In addressing the due process denial, the court held that the statute was neither overbroad, nor unconstitutionally vague. *See id.* (citations omitted). Moreover, despite the plaintiff's argument that the exemption of adults-only mobile home parks violated the equal protection clause, the court held that the statute passed the rational relationship test because no fundamental right was involved. *See id.* (citation omitted).

They should also provide for evidentiary rules and remedies in order to serve as a realistic deterrent to child discrimination in housing.

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