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The Necessity for Shelter: States Must Prohibit Discrimination Against Children in Housing

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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 home\(^1\) 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 needs\(^5\) and the unequal bargaining power

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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 Schecter]. "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" 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. Landlords justify their actions by pointing to the increased maintenance and liability insurance costs related to renting to families with children.

No statistics, however, support the contentions of these landlords. 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.


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

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. Both these goals are ordinarily sanctioned by society. Nevertheless, when the groups most affected by these child-exclusion practices are considered, the end result is an increase in the number of homeless individuals and families living in substandard conditions.

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.

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.


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 tranquillity 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

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[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.


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

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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.” Based on Moore v. City of East Cleveland, in which the Supreme Court had held that the right of family members to live together is part of the fundamental right of privacy, 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.”

If adopted by other jurisdictions, the Halet holding would provide a significant weapon for parties injured by a landlord’s discrimination against children. Other holdings of the Supreme Court, however, as well as the decisions of several federal and state 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.


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.\(^7\) 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" 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."\(^8\) Thus, a necessary element of any claim brought under this statute is the presence of state involvement in the alleged deprivation.\(^9\) 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."\(^10\)

Because of the purely private nature of a lease agreement, it is difficult to find state action in the landlord-tenant relationship.\(^1\) Consequently, constitutional scrutiny of a landlord's refusal to rent

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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.


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

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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.


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


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

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


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.* 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.


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.

Egret Condominium, Inc., 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. The court recognized that voluntary adherence to these agreements would fail to implicate state action. Nevertheless, the court found state action on the ground that, in ordering reconveyance, the court would necessarily legitimize the restrictive covenant. 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." 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.

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.
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\(^6^9\) 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.\(^7^0\)

The contrary results reached in Franklin and Riley are surprising when one considers their factual similarity to Shelley.\(^7^1\) 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.\(^7^2\) In the rental context, however, the court would not interfere with the dealings of two willing parties.\(^7^3\) 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.\(^7^4\)

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

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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.

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 1084 (Fla. Dist. Ct. App. 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

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\(^75\) 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).


\(^78\) *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*.

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


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 Redevel. 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.\(^4\)

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.\(^5\) 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.\(^6\) 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*.\(^7\) 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.\(^8\)

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 Court\(^9\) 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." 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."

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 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 constitutionally 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]auntiff 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 "[lack 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...
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policy interfered with the plaintiffs' constitutional right to live together in marriage. 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.

Similarly, in *Braunstein v. Dwelling Managers, Inc.*, 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. 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."

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, or that age classifications are based

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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)).


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.\textsuperscript{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.\textsuperscript{108}

Construed broadly, \textit{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.\textsuperscript{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;\textsuperscript{110} (2) cases in which the premises are unsafe for children;\textsuperscript{111}

\textsuperscript{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 \textit{supra} notes 92-105 and accompanying text for cases lessening the applicability of \textit{Moore} to child discrimination cases.

\textsuperscript{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, \textit{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).

\textsuperscript{109} See \textit{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., \textit{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 \textit{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." \textit{Id.} at 150.

\textsuperscript{110} See \textit{infra} notes 117-26 and accompanying text.

\textsuperscript{111} See Bynes v. Toll, 512 F.2d 252 (2d Cir. 1975). In \textit{Bynes}, the court upheld the restriction primarily because of the dangers that the facilities would pose for children. \textit{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. \textit{See id.} at 256. To these contentions the court responded:

\begin{quote}
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.
\end{quote}

\textit{Id.} at 258. \textit{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 classification\textsuperscript{118} and that housing is not a fundamental interest.\textsuperscript{119} These cases resemble the factual setting in \textit{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 \textit{Moore}. Instead, using the rational basis test, state courts have upheld the ordinances.\textsuperscript{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 \textit{Dubreuil v. West Winds Mobile Lodge},\textsuperscript{121} plaintiffs attempted to sell their mobile home to a family with two minor children.\textsuperscript{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.\textsuperscript{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.\textsuperscript{124}

\textsuperscript{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.

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

\textsuperscript{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 \textit{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.” \textit{Shepard}, 71 N.J. at 247, 364 A.2d at 1015 (citation omitted). In \textit{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.” \textit{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 \textit{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.” \textit{Id.}

\textsuperscript{121} 213 Cal. Rptr. 12 (Cal. Dist. Ct. App. 1985).

\textsuperscript{122} See \textit{id.} at 14.

\textsuperscript{123} See \textit{id.}

\textsuperscript{124} See \textit{id.} at 17. The plaintiffs contended that a section of the California Civil Code violated the equal protection clause. \textit{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.” \textit{Id.} But see Schmidt v. Superior Court, 215 Cal. Rptr. 124.
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. Accordingly, the court upheld the statute, stating that by "effectively 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." 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. In this case, a fireman was discharged for violating a city ordinance requiring all civil employees to be residents of the city. Hameetman argued that the ordinance interfered with his constitutional right to live with his family, because the well-being of his child required him to live outside the city.

Because in this case the ordinance interfered only indirectly with the right of family association—unlike Moore and Halet, in which the interference was direct—the court held that the regulation was not an unconstitutional deprivation of Hameetman’s right to live with his family. 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.
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 commen-
tators 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 discrim-
ination. 138 Consequently, two recent cases were brought under the
Fair Housing Act 139 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 pre-
dominantly 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.
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" 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.

I. 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. In at least one child-discrimination case, however, the court permitted a non-protected party to assert the rights of others under the Act.

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. Alleging a violation of the Act under a "discriminatory effects" standard, 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. 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. 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."
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.\footnote{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. \textit{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.\footnote{148} An example of a case involving the discriminatory impact theory is\textit{ Betsey v. Turtle Creek Associates}.\footnote{149}

In\textit{ 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.\footnote{150} The plaintiffs claimed that the defendants’ attempts to evict them were motivated by racial discrimination\footnote{151} and argued that the evictions would have a disparate racial impact, which would violate the Act.\footnote{152}

On the discriminatory intent claim, the lower court found that the reasons furnished by the defendants for the conversion were valid economic considerations,\footnote{153} thereby refuting the plaintiffs’ prima facie showing of racial discrimination.\footnote{154} In addressing the discriminatory impact claim,\footnote{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.\footnote{156} Thus, the representation

\footnote{147. See \textit{Halet}, 672 F.2d at 1309. The court, however, reasoned that “Congress expanded standing under that Act to the full extent of Article III.” \textit{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 \textit{id} (citing \textit{Gladstone Realtors v. Village of Bellwood}, 441 U.S. 91, 99-100, 103 n.9 (1979) (footnote omitted)).

148. See \textit{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. \textit{See id.} at 985.

151. \textit{See id.}

152. \textit{See id.}

153. \textit{See id.} at 986. The district court found a prima facie showing of discriminatory intent. \textit{See id.}

154. \textit{See id.}

155. In its opinion, the court stated “that it was ‘unnecessary’ under these circumstances to consider whether the tenants had proved a \textit{prima facie} case of discriminatory impact.” \textit{Betsey}, 736 F.2d at 986. In dicta, the court stated that it did not believe the plaintiffs had proved discriminatory impact. \textit{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. \textit{See id.}

156. \textit{See id.} at 986-87.
of blacks in the complex was greater than in the community as a whole.\textsuperscript{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.\textsuperscript{158} Based on these findings, the lower court held that the plaintiffs had failed to make the requisite prima facie showing of discriminatory impact.\textsuperscript{159}

The Fourth Circuit, however, held that the lower court's rejection of the discriminatory impact claim was erroneous.\textsuperscript{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.\textsuperscript{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—\textit{i.e.}, the total group to which the policy was applied—rather than the impact on the county or the complex as a whole.\textsuperscript{162} The court stated that the plaintiffs' statistics\textsuperscript{163} established a disparate impact according to the United States Supreme Court standards of statistical significance.\textsuperscript{164} The court remanded the

\begin{itemize}
\item \textsuperscript{157} See id.
\item \textsuperscript{158} See id. at 986.
\item \textsuperscript{159} See id.
\item \textsuperscript{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.
\item \textsuperscript{161} Id.
\item \textsuperscript{162} Id. The court drew an analogy to the Supreme Court's holding in Connecticut v. Teal, 457 U.S. 440 (1982). Specifically, in \textit{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." \textit{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. \textit{Betsey}, 736 F.2d at 987 (citing Smith v. Town of Clarkson, 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)).
\item \textsuperscript{163} Approximately 54\% of the non-white tenants received eviction notices, as opposed to only 14\% of the white tenants. See \textit{Betsey}, 736 F.2d at 988.
\item \textsuperscript{164} See 736 F.2d at 988 n.4 (citing \textit{Castenada} v. \textit{Partida}, 430 U.S. 482 (1977). In \textit{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

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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].


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 1982 and 1981.

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, 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.


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. In \textit{Betsey}, the court required that the defendant assert a compelling business necessity for the challenged eviction. 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, 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. Nevertheless, the Act has been ineffective in its administration and does not meet the desired goal of its framers.

The Fair Housing Act declares as its policy "to provide, within constitutional limitations, for fair housing throughout the United States," but it has not been effectively enforced and thus falls far short of its declared goal. 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).

\footnotesize{
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." \textit{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 \textit{Business Necessity}, supra note 165, at 602-05.

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


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 \textit{Ridings, Discrimination Against Women in Housing Finance}, in \textit{A SHeltered Crisis: The State of Fair Housing in the Eighties} 104, 107 (1983).


178. See supra note 176; \textit{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).


¹⁸². See supra note 180 and accompanying text.


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,’" 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.


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


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.,\textsuperscript{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,"\textsuperscript{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.'"\textsuperscript{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.\textsuperscript{196}

At present, the bill has been referred to the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee,\textsuperscript{197} but has not had a full hearing.\textsuperscript{198} When introduced in 1983, it had thirty-nine supporters,\textsuperscript{199} but upon reintroduction in 1986, this number had dwindled to thirty-two.\textsuperscript{200} Although many supporters are fighting for its passage, the power of the National Association of Realtors is overshadowing their efforts.\textsuperscript{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.\textsuperscript{202}

\textsuperscript{193} 392 U.S. 409 (1968).
\textsuperscript{194} \textit{Id.} at 441 (citation omitted).
\textsuperscript{196} See Calhoun, supra note 188, at 323 n.51 for the arguments asserted for expanding Congress' power under the thirteenth amendment.
\textsuperscript{197} Telephone interview with staff member of House Judiciary Committee (Mar. 14, 1986).
\textsuperscript{198} \textit{Id.}
\textsuperscript{201} See S. 1220, 98th Cong., 1st Sess., 129 CONG. REC. 6152 (1983) (supporter's letters); supra note 184.
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-


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.


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

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

209. See id.
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
fail to provide an effective enforcement mechanism for the remaining apartments on the market that are suitable for family living. 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. 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; (2) the parties injured by this discrimination; (3) the states’ fair employment and housing commissions; or a combination of these entities. 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.


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.


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.  

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.  

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.  

Prior to its amendment, the Illinois statute placed the power of enforcement in the state's attorney general. Based on this statute, an Illinois survey revealed that statutes that make child discrimination a criminal offense lack a deterrent effect. The survey found that seventy-eight percent of the discriminating landlords were unaware that the statute existed. More important, forty-eight percent stated that they were unconcerned about violating the law. 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.
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." To most people, litigation seems complex, time consuming, and expensive. In addition, the type of damages awarded in these cases fails to provide an adequate remedy for injured parties. A final problem with a private cause of action is the difficulty plaintiffs encounter in attempting to prove an act of discrimination. There-

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. Metcoff, 392 Ill. 418, 64 N.E.2d 867 (1946). In Metcoff, 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 incentives and relax existing evidentiary rules.

2. The Establishment of a Fair Housing Commission

A middle ground between a criminal offense statute and one that provides for a private cause of action 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. As previously noted, the individuals most likely to be victims of discrimination by landlords are women and minorities. These classes of individuals are also the most likely to be indigent and unable to

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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.\textsuperscript{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;\textsuperscript{249} (2) a central location for both the investigation and resolution of complaints;\textsuperscript{250} and (3) a forum capable of handling cases quickly\textsuperscript{251} and inexpensively, made possible by conciliation efforts and commission hearing.\textsuperscript{252} For the commission to be effective, states must enact statutes that unequivocally prohibit discrimination against families in all housing\textsuperscript{253} and give the commission jurisdiction to hear complaints.\textsuperscript{254}

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

\begin{footnotesize}

\footnote{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, \textit{supra} note 10, at 130 (quoting U.S. DEP'T OF HOUSING AND URBAN DEV., \textit{HOUSING OUR FAMILIES} 3 (1980)).}

\footnote{249. See Calmore, \textit{supra} note 141, at 629.}

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

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

\footnote{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).}

\footnote{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 \textit{Protests Are Mounting}, \textit{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 \textit{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 \textit{Protests Are Mounting}, \textit{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 \textit{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 \textit{infra} note 264 and accompanying text.}

\footnote{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 \textit{Marina Point, Ltd. v. Wolfson}, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496, \textit{cert. denied}, 459 U.S. 858 (1982). After \textit{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 \textit{Davis}, \textit{supra} note 238,}
\end{footnotesize}
the commission's tribunal and a court. 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. Some courts also require an exhaustion
of administrative remedies before asserting jurisdiction over the matter.

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. 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. The case also exemplifies the ineffi-
cency that can occur in a commission's enforcement of the statute.

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 adminis-
trative remedies. 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 de-
partment finally agreed to accept the complaints. See id.; see also Carrizosa, Housing
at 2, col. 4 ("the department had been refusing to accept the complaints, first for
lack of money, then for lack of legal authority").


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


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.

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.


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
rejection of a prospective tenant, decision for eviction, or denial of a lease renewal with any non-discriminatory reason. 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.

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.

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-

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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. 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, that he did not engage in discrimination. The first view is called the Thayer Theory, which the Model Code of Evidence has adopted and the Federal Rules of Evidence have incorporated in Federal Rule of Evidence 301. The latter view is referred to as the Morgan View, 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.”

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. 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. 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.
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...


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.


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) time 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 damages\textsuperscript{288} and possibly the satisfaction of seeing a civil penalty imposed on the defendant.\textsuperscript{289}

A plaintiff's compensatory damage award could include such out-of-pocket costs as: (1) loss of income;\textsuperscript{290} (2) moving and storing expenses;\textsuperscript{291} (3) reasonable expenditures to find adequate and suitable substitute housing;\textsuperscript{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.

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


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. 835, 835 (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, \textit{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 CONNECT. 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. 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. Mental anguish awards are disfavored in many jurisdictions and usually require extensive evidence as well as medical testimony. Therefore, a solution to this


294. Examples of the suffering include:

A Cincinnatti 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, or treble damages, 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. 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. Therefore, statutes banning child discrimination would be upheld since they promote the general welfare of families.


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).


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 petitioners 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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