"A Modest Proposal"—The Prohibition of All-Adult Communities by the Fair Housing Amendments Act of 1988

I. Introduction

The traditional American dream of owning a home is slowly fading. Zoning regulations and other local ordinances complicate new housing construction and convey an "anti-growth" attitude which discourages building.[1] This trend, combined with an increase in two-career families and a decrease in the number of families having children or having children later in life,[2] increases the demand for the available rental housing.[3] As the demand for rental housing intensifies, new legal issues emerge. One issue which has received a great amount of attention in recent years is familial discrimination. This discrimination occurs when apartment complex owners entirely exclude children (the "all-adult" apartment communities) or they only accept children with limitations.[4]

Familial discrimination appeals to apartment complex owners for many reasons. Many adults who choose not to have children, or wait longer to have children, wish to live in a child-free environment. Therefore, apartment complex owners can charge higher prices for all-adult communities. Lower insurance and maintenance costs for all-adult communities also induce owners to exclude children.[5]

Severe rental housing shortages faced by families with children in some areas of the country[6] have prompted judicial decisions[7] or legislation[8]

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1. R. Goetze, Rescuing the American Dream 41 (1983). In many of the older urban areas, the occupants of two out of three households reside in rental housing.

2. *Id.*

3. *See generally* A. Downs, Rental Housing in the 1980's 1-4 (1983).

4. R. Marans & M. Colten, Measuring Restrictive Rental Practices Affecting Families with Children: A National Survey 22 (1980). Restrictions on children include limits on the age of children allowed in rental units (*e.g.*, excluding children under the age of 12), and on the number or location of children (*e.g.*, only one child per apartment or children restricted to specific buildings). *Id.*

5. *Id.* at 54-67.

6. *See* D. Ashford & P. Eston, The Extent and Effects of Discrimination Against Children in Rental Housing: A Study of Five California Cities 6 (1979) (This study showed 53 percent of the apartment complexes in Fresno, California, 65 percent in San Diego, California, and 70 percent in San Jose, California excluded children. Note these statistics were compiled before California passed legislation prohibiting familial discrimination); *Landlord Discrimination Against Children: Possible Solutions to a Housing Crisis*, 11 Loy. L.A.L. Rev. 609, 612 (1978) (Statistics indicate 60-80 percent of the apartment units in Los Angeles, California exclude children while the vacancy rate was

prohibiting familial discrimination as the basis for denying rental housing occupancy. However, familial rights advocates criticize the various state nondiscrimination provisions for allowing limited familial discrimination, for being poorly drafted, and for providing only limited administrative remedies.[9] Familial rights advocates assert judicial decisions are inadequate due to the time and expense required to maintain a private cause of action.[10]

A few plaintiffs have sought federal protection from child-exclusionary policies under the Fair Housing Act[11] or under constitutional protection of the right to privacy or equal protection.[12] However, it is difficult for a plaintiff to maintain a cause of action under the Fair Housing Act[13] because the plaintiff must show the child-exclusionary policies have a "racially-disparate impact"[14] or that there has been state action, a prerequisite for litigation alleging violations of the constitutional

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2.5 to 3.5 percent); *Sixty Minutes* (CBS television broadcast, January 22, 1978) (Dan Rather stated that families with children in southern California experienced the greatest hardship locating rental housing. Dora Ashford reported only 20 percent of the apartment complexes in Santa Monica, California did not exclude children).

7. *See generally* Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982) (Richardson, J., dissenting), *cert. denied*, 459 U.S. 858 (1982).

8. *See generally* N.J. STAT. ANN. § 2A: 42-101 (West 1952 & Supp. 1987). This section provides:

> No person, firm or corporation or any agent, officer or employee thereof shall refuse to rent or lease any house or apartment to another person because his family includes children under 14 years of age or shall make an agreement, rental or lease of any house or apartment which provides that the agreement, rental or lease shall be rendered null and void upon the birth of a child. This section shall not apply to any State or Federally financed or assisted housing project constructed for occupancy by senior citizens or to any property located in a retirement subdivision as defined in the "Retirement Community Full Disclosure Act" (P.L. 1969, c.215; C.45:22A-1) or to any owner-occupied house containing not more than two dwelling units.

9. *Fair Housing Amendments Act, 1987: Hearings on H.R. 1158 Before the Subcomm. on Civil and Constitutional Rights of the House of Representatives Comm. on the Judiciary*, 100th Cong., 1st Sess. 398-99 (1987) [hereinafter *Hearings*] (statement of James B. Morales, Staff Atty., Nat'l Center for Youth Law). Some statutes allow discrimination against children over the age of 14. *Id.* Others are poorly drafted because they may allow subtle forms of discrimination by charging high security deposits for families with children or by placing familial discrimination statutes in sections apart from the civil rights areas, and not providing victims with all the remedies available for civil rights violations. *Id.*

10. Walsh, *The Necessity for Shelter: States Must Prohibit Discrimination Against Children in Housing*, 15 FORDHAM URB. L. J. 481, 518 (1987).

11. Betsey v. Turtle Creek Assoc., 736 F.2d 983 (4th Cir. 1984).

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

13. 42 U.S.C. § 3608 (1982).

14. *Betsey*, at 986.

rights to privacy or Equal Protection.[15] These contentions are difficult to prove because they require statistics reflecting a greater impact on minorities or that the action was performed under color of state law.[16]

In response to the assertion that "[f]amilies with children are facing a housing crisis,"[17] President Reagan signed the Fair Housing Amendments Act of 1988[18] into law on September 13 of that year. This Act amends the Civil Rights Act of 1968[19] by expanding the classes receiving protection[20] and revising the procedures for enforcement of fair housing practices.[21] The 1988 Amendments[22] prohibit discrimination in the sale

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15. *Hearings*, *supra* note 9, at 402 (testimony of James B. Morales, Staff Atty., Nat'l Center for Youth Law).

16. *Id.*

17. *Hearings*, *supra* note 9, at 680 (testimony of Hon. Don Edwards, Chairman, Subcomm. on Civil and Constitutional Rights, Comm. on the Judiciary).

18. Pub. L. No. 100-430, 102 Stat. 1619-1636 (1988).

19. 42 U.S.C. §§ 3601-3619 (1982).

20. 42 U.S.C. § 3604 (1982) provides protection for persons discriminated against on the basis of race, color, religion, sex or national origin. The Fair Housing Act as amended by Pub. L. No. 100-430, 102 Stat. 1622 (1988) now provides in pertinent part:

> It shall be unlawful-
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> (a) To 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, handicap, familial status, or national origin.
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> (b) To 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, handicap, familial status, or national origin.
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> (c) To make, print, or publish or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.
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> (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.
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> (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status or national origin.

21. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1625-35 (1988). This amends the enforcement procedure by allowing hearings before administrative law judges, or for a cause of action to be filed by the Attorney General or by a private person.

22. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1622 (1988).

or rental of a dwelling based on familial status[23] unless the dwelling is located in a retirement community.[24] The retirement community exception recognizes the fact that elderly persons have a greater need to live in a child-free environment.[25]

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23. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1622 (1988) provides in pertinent part:

> "Familial Status" means one or more individuals (who have not attained the age of 18 years) being domiciled with -
> (1) a parent or another person having legal custody of such individual or individuals; or
> (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.
> The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

24. Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1623 (1988) provides:

> (b)(1) Nothing in this title limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this title regarding familial status apply with respect to housing for older persons.
> (2) As used in this section, "housing for older persons" means housing -
> (A) provided under any State or Federal program that the Secretary determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal program); or
> (B) intended for, and solely occupied by, persons 62 years of age or older; or
> (C) intended and operated for occupancy by at least one person 55 years of age or older per unit. In determining whether housing qualifies as housing for older persons under this subsection, the Secretary shall develop regulations which require at least the following factors:
> (i) the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons; and
> (ii) that at least 80 percent of the units are occupied by at least one person 55 years of age or older per unit; and
> (iii) the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.
> (3) Housing shall not fail to meet the requirements for housing for older persons by reason of:
> (A) persons residing in such housing as of the date of enactment of this Act who do not meet the age requirements of subsection 2(B) or (C): *Provided*, That new occupants of such housing meet the age requirements of subsections 2(B) or (C); or
> (B) unoccupied units: *Provided*, That such units are reserved for occupancy by persons who meet the age requirements of subsections (2)(B) or (C).

25. *Fair Housing Amendments Act: Hearings on H.R. 4119 Before the Subcomm. on Civil and Constitutional Rights of the House of Representatives Comm. on the Judiciary*, 99th Cong., 2nd Sess. 62 (1986) (testimony of Hon. Hamilton Fish, Jr.).

Familial discrimination has not been limited to apartment complexes. It has also surfaced in mobile home parks[26] and condominiums.[27] However, this Note will focus on familial discrimination in apartment complexes because this constitutes the majority of familial discrimination occurrences.[28] The Note will examine the scope of the problems resulting from familial discrimination through available statistics, state legislation, and judicial decisions. Further, this Note will discuss the impact of the 1988 Act and address valid arguments against such broad sweeping legislation and the relief, or lack thereof, the Act will provide to families with children.

Finally, this Note will suggest alternatives to the broad sweeping policies of the Act. These alternatives would provide relief from extensive child-exclusionary policies which plague some areas of the country without totally prohibiting all-adult apartment communities.

II. Background

Familial rights advocates have denounced child-exclusionary policies as causing rental housing shortages for families with children.[29] These policies generated such a controversy that President Reagan signed legislation prohibiting all-adult apartment communities, unless they are designated as retirement communities, on September 13, 1988.[30] However, no statistics demonstrating the actual number of families with children affected by exclusionary policies exist to support this drastic measure.[31]

A. Changes in Rental Housing

The 1980's witnessed an increased inability to purchase homes.[32] This is due to higher real capital costs,[33] higher interest rates,[34] and a decrease in the construction of new homes due to high financing costs,[35] labor

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26. *See* Schmidt v. Superior Court, 43 Cal. 3d 1060, 742 P.2d 209, 240 Cal. Rptr. 160 (1987).

27. *See* Ritchey v. Villa Neuva Condo. Ass'n, 81 Cal. App. 3d 688, 146 Cal. Rptr. 695 (1978); White Egret Condo, Inc. v. Franklin, 379 So. 2d 346 (Fla. 1980).

28. *Exclusion of Families With Children From Housing*, 18 J.L. Reform 1121, 1122 (1985).

29. *See Hearings*, *supra* note 9.

30. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619-36 (1988).

31. The study completed by the University of Michigan Institute for Social Research is the only comprehensive study available.

32. A. Downs, *supra* note 3, at 60-61.

33. *Id.*

34. *Id.*

35. R. Goetze, *supra* note 1, at 36.

regulations,[36] zoning constraints,[37] and complex permit requirements.[38] Therefore, a greater number of people will be residing in rental housing.[39]

Yet, the supply of available rental units will not be able to meet this demand. The 1988 Statistical Abstract of the United States reported an overall vacancy rate of 5.0 percent for 1981; this rate increased gradually to 6.5 percent in 1985 and 7.2 percent in 1986.[40] However, in certain areas of the country, the problem is more intense. For example, there are serious housing shortages in some urban areas (e.g., Chicago and Manhattan)[41] and in the nation's sunbelt areas.[42] Part of this problem results from the fact that California, Texas and Florida (the sunbelt areas) together accounted for 53 percent of the population growth between 1980 and 1986.[43]

The inability of the supply of rental housing to meet the demand is attributable to many factors. Rental receipts are inadequate to meet construction and operating costs, making new apartment construction economically impractical.[44] Between 1970 and 1973 construction began on 871,000 multifamily units; this number decreased to 458,000 units annually from 1974 to 1980.[45] Additionally, many apartments are converted to condominiums each year so the owner can escape continued operating costs and receive a more immediate return on his investment.[46]

The proportion of households consisting of a married couple with children under the age of eighteen has decreased by thirteen percent since 1970.[47] Many of the adults who choose not to have children wish to live in a child-free environment and willingly pay extra for this luxury.[48]

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36. *Id.*

37. *Id.*

38. *Id.*

39. Between 1970 and 1979 the number of persons occupying rental housing increased by approximately 3.5 million persons. A. Downs, *supra* note 3, at 73 n.1. It is noted that the 1980's will see an increase of 4.2 million rental households. This translates to an increase of 424,000 rental households per year. *Id.* at 7.

40. U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States, 165 (108 ed. 1988).

41. A. Downs, *supra* note 3, at 42 n.34.

42. *See* D. Ashford & P. Eston, *supra* note 6; R. Goetze, *supra* note 1, at ix.

43. U.S. Dept. of Commerce, Bureau of the Census, State Population and Household Estimates, With Age, Sex, and Components of Change 1981-86 1 (Series P. 25, No. 1010, 1987).

44. A. Downs, *supra* note 3, at 40.

45. *Id.*

46. *Id.* at 40-41, n.30. The conversion of rental housing into condominiums has a lesser effect on rental supply and demand because many persons purchasing condominium units are former tenants.

47. U.S. Dept. of Commerce, Bureau of the Census, Household and Family Characteristics: March 1987 1 (Series P-20, No. 424. 1988).

48. *See generally* R. Marans & M. Colten, *supra* note 4.

Families without children are generally two-career couples who, because they do not have to bear the expense of raising a family, can afford to spend a greater portion of their income on rent. Landlords who saw a way to exclude children (whom they perceive as costlier tenants), and possibly to charge a premium for such rental housing, introduced the concept of all-adult or restricted apartment communities.[49] All-adult apartment communities totally prohibit anyone under the age of eighteen from living in the rental units.[50] Restricted communities accept children with limitations on possibly one of the following: age, the number of children, or the location of children within the complex.[51] Recent public outcry from familial rights advocates concerning child-exclusionary policies resulted in the passage of the Fair Housing Amendments Act of 1988,[52] which prohibits familial discrimination in the rental housing market.[53]

B. Problems Generated by Child-Exclusionary Policies

No comprehensive statistics exist which reflect the actual number of families affected nationwide by familial discrimination. The University of Michigan Institute for Social Research (the ISR Study) completed the most comprehensive study on the subject.[54] However, the authors of the study noted that it did not constitute a complete measure of the problem:

> These studies were prepared in growing communities where the rental housing market was tight and the problems for families with children particularly noticeable and salient. While the data strongly suggest that exclusionary policies may be an obstacle for many families with children in specific locations, no data are available on the extent to which this is a nationwide phenomenon.[55]

Thus, one needs to examine available statistics, case law, and legislative actions to put child-exclusionary policies into perspective.

1. Statistical Analysis of Familial Discrimination Practices.—The 1980 Census reported that 68 million people reside in rental housing.[56] Of

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49. *Id.*
50. *Id.*
51. *Id.*
52. Pub. L. No. 100-430, 102 Stat. 1619-1636 (1988).
53. *Id.*
54. R. MARANS & M. COLTEN, *supra* note 4.
55. *Id.* at 3.
56. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, 1980 CENSUS OF HOUSING, CHARACTERISTICS OF HOUSING UNITS, GENERAL HOUSING CHARACTERISTICS, PART A 1-59 (1983).

the rental units, over two-thirds, 67.6 percent, have no residents under the age of eighteen;[57] over one-half of these renters are under age thirty-five.[58]

The study conducted by the Institute for Social Research found that approximately one in four rental units nationwide are located in all-adult communities.[59] However, when the figures are adjusted to reflect exceptions made by apartment managers, the number of apartments excluding children falls to one in five.[60] The study further found that 50 percent of the units analyzed accepted children with limitations.[61] These limitations included policies limiting the number of children allowed depending on the size of the unit, policies limiting the children over or under a specific age, restrictions on children of the opposite sex sharing bedrooms, and policies separating families with children from those without children, either by floor or by building.[62]

At first glance, 75 percent of apartment units nationwide appear to either totally exclude children or accept them with limitations.[63] However, the figures must be put into perspective. First, some managers of apartment complexes reported exclusionary policies, but stated they had exceptions;[64] therefore, the proportion of exclusionary or restrictive policies is actually lower. Additionally, efficiencies which do not have a separate bedroom and one-bedroom apartments comprise the largest percentage of units which have exclusionary policies.[65] Alternatively, only 2.1 percent of three or more bedroom units have policies excluding children.[66]

2. Effect of Familial Discrimination on Minorities and Low Income Families.—If familial discriminatory policies are merely a smoke screen to enforce what is truly a racial discrimination policy, the excluded tenants have a cause of action under the Fair Housing Act of 1968.[67] A 1980 study suggests child-exclusionary policies are actually racially discriminatory policies reporting:

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57. R. Marans & M. Colten, *supra* note 4, at 12, Table III-1.

58. *Id.* at 5. This statistic shows that these renters do not qualify for residence in retirement communities. *Id.*

59. *Id.* at ES-2.

60. *Id.*

61. *Id.* at 27, Table IV-3.

62. *Id.* at nn.3-6.

63. *Id.* at Table IV-3.

64. *Id.* at 70.

65. *Id.* at 27, Table IV-5. 35.5 percent of efficiencies have exclusionary policies; 41.5 percent of one-bedroom apartments exclude children. *Id.*

66. *Id.* Two bedroom apartments do comprise the largest percentage of the various sized units which place restrictions on the children who are accepted. These restrictions usually limit the number of children allowed (56 percent) or do not allow children of the opposite sex to occupy the same bedroom (24.9 percent). *Id.*

67. 42 U.S.C. § 3604(a), (b) (1982).

> Even when controlling for income, there is a statistically significant difference between the percentage of minorities, who experienced serious housing problems due to no-children policies, and the percentage among their white counterparts. Undoubtedly this difference is due in part to racial discrimination, which housing studies have found to exist in the rental market. What is not known is the extent to which no-children policies are used as a smoke screen for racial discrimination.[68]

Alternatively, the ISR study states: "Among those who rent, female-headed households and minority groups are no more likely to suffer from no-children policies in the rental market than other groups."[69] The discrepancies between the two surveys can be explained in part by differing methodology.[70] Additionally, the ISR study reflected that the higher percentage of minorities reporting problems relating to child-exclusionary policies can be explained in part by the fact that minority group tenants are more likely to have children in the household than their white counterparts.[71] This study further suggested that the problems experienced by minority tenants correlate to the price of housing which is available in the various units to which they normally have access.[72]

Further, both studies discovered lower income families feel the effect of child-exclusionary policies to a much greater extent than do middle to higher income families.[73] The ISR study reports low income families with children experience more frustration when attempting to locate

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68. J. GREENE & G. BLAKE, HOW RESTRICTIVE RENTAL PRACTICES AFFECT FAMILIES WITH CHILDREN 30-31 (1980).

69. R. MARANS & M. COLTEN, *supra* note 4, at ES-2.

70. The Greene study and the ISR study utilized very different methods of obtaining their respective sampling groups. The Greene Study aired public service announcements on television and radio stations in six metropolitan areas. These announcements invited persons who had experienced or were experiencing difficulties in finding rental housing to call and tell of their experiences. The study reached only those persons who had experienced difficulties and was concentrated in urban areas where the problems are more intense. Nor did the Greene Study survey people who had not experienced difficulties to have an unbiased comparison group. J. GREENE & G. BLAKE, *supra* note 68, at 1. On the other hand, the ISR study was conducted by the use of randomly generated telephone numbers to gather a sample of tenants, the sample of managers was obtained by questioning the tenants who were part of the survey. R. MARANS & M. COLTEN, *supra* note 4, at 5.

71. R. MARANS & M. COLTEN, *supra* note 4, at 12, Table II-I.

72. *Id.* at 5.

73. J. GREENE & G. BLAKE, *supra* note 68, at 10, Table II. The study found 65.4 percent of the respondents reporting income fell below the $15,000 annual income level. The number of respondents above the $30,000 annual income level was 4 percent. The highest percentage group (26.2 percent) fell between an annual income level of $5,000 and $9,999. *Id.*

rental housing and were more likely to settle for housing below their expected standard.[74] This study further stated:

> While there is no discernible relationship between monthly rents and the presence or absence of no-children policies, the higher rent units are more likely to be found in buildings or complexes which limit children by age and location. . . . The likelihood of age and location limitations occurring increases as the monthly rent increases. Moreover, the likelihood that two bedroom rentals in apartment buildings or complexes renting for more than $200 prohibit families with children is roughly twice as great as comparably-sized units renting for $200 or less.[75]

Part of the reason low income families cannot find rental housing can be attributed to rent escalation rather than child-exclusionary policies. Although rental prices did not rise as quickly as the consumer price index from 1960 to 1981,[76] this trend has reversed and from July 1981 to December 1982, the consumer price index showed that the component for residential rent rose faster than the overall index.[77] Rental prices reportedly are now increasing at a faster rate than tenant income.[78] Therefore, the majority of nonsubsidized housing is merely beyond the reach of low income families with children.

In summary, no one has undertaken a comprehensive study which presents an accurate portrayal of the problems caused by familial dis-

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74. R. MARANS & M. COLTEN, *supra* note 4, at 72. The group experiencing the most difficult problems were those families who have at least three children and fall into the lower income range. *Id.*

75. *Id.* at 40.

76. A. DOWNS, *supra* note 3, at 3-4 (1983).

> [R]esidential rents did not increase as fast as consumer income, operating costs, or construction costs. This was true even after correction for substantial underestimation of rental costs by the consumer price index. The best available estimate is that real rent levels *fell* about 8.4 percent from 1960 to 1981, or roughly 4.2 percent each decade.

Id.

77. *Id.* at 133 n.3. In addition, beginning in about 1961 the Federal Government instituted programs designed to attract private developers into the low income housing market. The private developers were required to make a twenty or forty year commitment to the project. The developers are able to take low income housing off the market or convert it into high rental housing if they defaulted or prepaid their mortgage after their commitment period expired. Many developers have either defaulted or have prepaid their mortgage and, therefore, have removed their property from the low income market. The number of low income units removed from the low income housing market is projected to peak in the 1990's. NATIONAL LOW INCOME HOUSING PRESERVATION COMMISSION, PREVENTING THE DISAPPEARANCE OF LOW INCOME HOUSING, 1-6 (1988).

78. *Why Johnny Can't Rent-An Examination of Laws Prohibiting Discrimination Against Families in Rental Housing*, 94 HARV. L. REV. 1829, 1832 n.7 (1981).

crimination. The statistics which are available show that serious problems exist in the urban and sunbelt areas of the nation where there is a need for antidiscrimination measures.[79] There is no comprehensive data available for the less densely populated areas of the nation. Data shows that lower income families with children are more adversely affected by exclusionary policies. However, this can only be due to the unavailability of low income housing, and raising of rental rates which put many rental units beyond the reach of low income families with children regardless of child-exclusionary policies. However, when the national picture of problems arising from familial discriminatory policies is put into perspective, the Fair Housing Amendments Act of 1988[80] is much too broad and will not provide relief for those who need it most: lower income families with children.

3. Judicial Decisions.—Tenants denied rental housing or evicted from rental housing because of their race, color, religion, sex, or national origin have been provided protection under the Fair Housing Act[81] since 1968. Prior to the 1988 Amendments, tenants showing denial or eviction premised on familial discrimination, but related to a protected class, had a cause of action under the Fair Housing Act.

This was accomplished in *Betsey v. Turtle Creek Assoc.*[82] In *Betsey*, the apartment owner instituted an all-adult policy in a complex which housed mainly black families with children.[83] The tenants filed suit alleging violation of the Fair Housing Act[84] and presented statistics showing the conversion would have an immediate "disproportionate impact on the black tenants."[85] The Fourth Circuit held that a plaintiff presents a *prima facie* case of racial discrimination under the Fair Housing Amendments Act of 1968 if he can show that the denial of or eviction from rental housing "was motivated by a racially discriminating purpose or because it is shown to have a disproportionate adverse impact on minorities."[86] The court found both elements present and stated a "continuing disproportionate impact" on blacks was not required.[87]

Betsey represents the first case striking down racial discrimination disguised as familial discrimination and was the first case of its type decided under the Fair Housing Act. Although this case sets favorable

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79. *See supra* note 6 and accompanying text.
80. Pub. L. No. 100-430, 102 Stat. 1619-36 (1988).
81. 42 U.S.C. § 3604 (1982).
82. 736 F.2d 983 (4th Cir. 1984).
83. *Id.*
84. 42 U.S.C. § 3604 (1982).
85. *Betsey*, 736 F.2d at 986.
86. *Id.* at 987.
87. *Id.* at 986.

precedent for minority families with children who can show a disparate impact against them as minorities, it offers little or no relief for caucasian families with children who experience discrimination in the rental housing market.

Another case in which the plaintiff sought relief from child-exclusionary policies under the Fair Housing Act is the 1982 case of *Halet v. Wend Investment Co.*[88] The caucasian plaintiff in *Halet* was denied rental housing because he had a child who would be living in the unit. Although the district court dismissed the case on other grounds, the Ninth Circuit held the plaintiff had standing to challenge racial discrimination under the Fair Housing Act. The court stated:

> The Supreme Court . . . held that a plaintiff who has suffered an actual injury is permitted to prove that the rights of another are infringed. Here, Halet claims that he was denied an apartment because of a policy that allegedly infringes on the rights of Blacks and Hispanics. Under *Gladstone* this is sufficient to support Halet's standing under the Act.[89]

Although the Fair Housing Act *may* provide relief to victims of familial discrimination, plaintiffs often have difficulty proving the requisite discriminatory intent. In *Metropolitan Housing Development Corp. v. Village of Arlington Heights*,[90] the Seventh Circuit stated:

> [A] requirement that the plaintiff prove discriminatory intent before relief can be granted under the statute is often a burden that is impossible to satisfy. . . . [A] strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry.[91]

In addition to invoking the Fair Housing Act, plaintiffs have sought protection under the fourteenth amendment which provides that every United States citizen is entitled to equal protection and due process of the laws[92] or under Section 1983 of the Civil Rights Act.[93] Only recently

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88. 672 F.2d 1305 (9th Cir. 1982).
89. *Id.* at 1309 (citation omitted).
90. 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).
91. *Id.* at 1285.
92. U.S. CONST. amend. XIV, § 1. The Due Process Clause states:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

have cases alleging familial discrimination met with any success under the latter of these two federal provisions.[94]

The fourteenth amendment of the Constitution sets forth that no person shall be denied equal protection of the law by any state.[95] The Equal Protection Clause "governs all governmental actions which classify individuals for different benefits or burdens under the law,"[96] and requires that "individuals be treated in a manner similar to others as an independent constitutional guarantee."[97] The Equal Protection Clause does not invalidate the government's ability to classify people, "but it does guarantee that those classifications will not be based upon impermissible criteria or arbitrarily used to burden a group of individuals."[98]

There are three standards of review which the Court may utilize when analyzing equal protection issues.[99] If the class involved is one that the Supreme Court has termed an "insular minority" or a "suspect class," the case is subject to strict scrutiny.[100] If a case involves a suspect class, the practice involved will be invalidated unless it can be shown "that it is pursuing a 'compelling' or 'overriding' end—one whose value is so great that it justifies the limitations of fundamental constitutional

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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.

93. 42 U.S.C. § 1983 (1982). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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.

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

95. U.S. CONST. amend. XIV, § 1.

96. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 14.1 (3d ed. 1986). *See also* Lehr v. Robertson, 463 U.S. 250 (1983); Harris v. McRae, 448 U.S. 297, *reh'g denied*, 448 U.S. 917 (1980).

97. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 96, at § 14.1.

98. *Id.*

99. *Id.* at § 14.3.

100. *Id. See also* United States v. Carolene Products Co., 304 U.S. 144 (1938); Yick Wo v. Hopkins, 118 U.S. 356 (1886). The other types of review are the rational relationship test and the intermediate test. Under the rational relationship test, the court only looks to determine if the classification involved "bears a rational relationship to an end of government which is not prohibited by the Constitution." J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 96, at § 14.3. The intermediate test falls between the strict scrutiny and the rational relationship test. The intermediate test does not invoke the strong presumption of constitutionality present under the rational relationship test but allows the government to utilize the classification if it is a reasonable way to achieve a substantial government end and not an arbitrary classification. The intermediate test has been used with gender-based classes and illegitimacy cases. *Id.*

values."[101] To date, the suspect classes do not include one based on familial status.[102] Since families with children are not a suspect class, a familial discrimination cause of action will not be successful under the Equal Protection Clause of the fourteenth amendment[103] unless it can be shown the discriminatory practice involved is racial discrimination disguised as familial discrimination. A plaintiff may be better able to assert a cause of action under the Due Process Clause of the fourteenth amendment. In *Moore v. City of East Cleveland*,[104] the Supreme Court struck down an ordinance prohibiting extended family members from living together.[105] The Court, quoting *Cleveland Board of Education v. Lafleur*,[106] stated "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[107] The *Moore* case can be distinguished from familial discrimination cases because the ordinance involved did not merely ban the family in question from the rental unit, it completely prohibited the family from living together and subjected them to criminal penalties if they did.[108] However, the *Halet* court adopted this view and held:

> Family life, in particular the right of family members to live together, is part of the fundamental right of privacy. . . . The ordinance in *Moore* prohibited a household from including certain extended family members. The policy in this case prohibits a household from including immediate family members—that is children. A fundamental right is even more clearly involved here because the rental policy infringes the choice of parents to live with their children rather than the choice of more distant relations. . . . A fundamental right to be free from state intrusion in decisions concerning family relationships in the nuclear family has been clearly recognized.[109]

Under this theory, the court reversed the dismissal of Halet's claim and remanded it to the district court to determine whether a "genuinely

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101. J. Nowak, R. Rotunda & J. Young, *supra* note 96, § 14.3.

102. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage is a suspect class); Loving v. Virginia, 388 U.S. 1 (1967) (race is a protected class); Hernandez v. State, 347 U.S. 475 (1954) (national origin is a suspect class).

103. Halet v. Wend Inv. Co., 672 F.2d 1305, 1309 (1982).

104. 431 U.S. 494 (1987).

105. *Id.*

106. 414 U.S. 632 (1974).

107. Moore v. City of E. Cleveland, 431 U.S. at 499 (quoting Cleveland Bd. of Educ. v. Lafleur, 414 U.S. 632, 639-40 (1974)).

108. *Id.*

109. Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (1982).

significant deprivation"[110] of a fundamental right had taken place, and if so whether the child-exclusionary policy could stand up to the strict scrutiny test.[111] These same arguments sustained Halet's claim of deprivation of rights under Section 1983 of the Civil Rights Act.[112]

Although a plaintiff alleging familial discrimination may show a Section 1983 or fourteenth amendment deprivation of rights, there is yet another obstacle to overcome. To maintain a Section 1983 action, the plaintiff must show the injury was rendered under color of state law.[113] A plaintiff must show state involvement to have a successful fourteenth amendment due process cause of action.[114] Essentially, an action under color of state law and state action are the same.[115] Halet alleged he could present evidence of sufficient state action in his particular case and, therefore, the court directed the district court to grant Halet leave to amend his complaint to include such allegations.[116] On remand the district court found for Halet, awarding him attorney fees and costs.[117]

However, many plaintiffs will not be able to show such state involvement because most apartment complex owners have little contact with the state. This was the result in *Langley v. Monumental Corp.*,[118] where the district court held that there was not sufficient state action when a county ordinance permits familial discrimination.[119] The court

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110. *Id.* (quoting Hawaii Boating Ass'n v. Water Transp. Facilities Div., 651 F.2d 661, 664-65 (9th Cir. 1981)).

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

112. *Id.* at 1309.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 1310. Specifically, Mr. Halet alleged the following state involvement:

(1) the County owns the land leased to Wend [landlord] for the apartment complex;
(2) the County acquired and prepared the land using federal and state funds and used federal services in dredging the harbor in the redevelopment area;
(3) the purchase of land was part of a large redevelopment program;
(4) the County leased the land to Wend for the benefit of the public in providing housing;
(5) the lease prohibits race or religious discrimination;
(6) the County oversees the development of the area and the design of the buildings and had final approval of all plans;
(7) the County controls the use and purpose of the apartment and the rent charged;
(8) Wend pays a percentage of the rentals to the County; and
(9) Wend must abide by all the conditions of the lease.

Id.

117. *Familial Discrimination in Rental Housing: The Halet Decision*, 28 St. Louis U.L.J. 1085, 1090 n.36 (1984).

118. 496 F. Supp. 1144 (D. Md. 1980).

119. *Id.* at 1150.

further stated that invocation of judicial eviction proceedings by the apartment owner would be sufficient to sustain the state action requirement.[120] Thus, the *Halet* decision offers only a small portion of familial discrimination victims relief under the fourteenth amendment Due Process Clause[121] or under Section 1983 of the Civil Rights Act.[122]

Many plaintiffs seeking relief from child-exclusionary polices have pursued a cause of action at the state level.[123] One of the earliest state cases involving familial discrimination is the 1946 case of *Lamont Building Co. v. Court*.[124] In *Lamont*, the tenants rented an apartment with full knowledge of the adults-only policy and with full knowledge that the wife was pregnant. When the child was born and began residing in the apartment, the apartment owner advised the tenants the child must be removed from the apartment or the family would have to vacate the premises. Upon the tenants' refusal to leave, the owner filed an action in forcible entry and detainer.[125] The Ohio Supreme Court enforced the adults-only provision stating the owner of the realty may impose conditions on its occupancy so long as the conditions do not contravene public policy.[126] The court further held the child-exclusionary policy was not injurious to the public.[127]

A California Court of Appeals reached a similar result in *Flowers v. John Burnham & Co.*[128] In *Flowers*, the court upheld the validity of a landlord's policy limiting child tenants to girls of all ages and boys under five, finding the policy was not unconstitutionally discriminatory and, therefore, it did not violate California's Unruh Act which guarantees equal protection.[129] The Court found the Unruh Act prevents arbitrary discrimination; however, the court held the policy in question was not

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120. *Id.* at 1150-51.

121. U.S. CONST. amend. XIV, § 1.

122. 42 U.S.C. § 3604 (1982).

123. *See generally* Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (Richardson, J., dissenting), *cert. denied*, 459 U.S. 858 (1982); Flowers v. John Burnham & Co., 21 Cal. App. 3d 700, 98 Cal. Rptr. 644 (1972).

124. 147 Ohio St. 183, 70 N.E.2d 447 (1946) (Bell, J., dissenting).

125. *Id.*

126. *Id.* at 183, 70 N.E.2d at 448.

127. *Id.*

128. 21 Cal. App. 3d 700, 98 Cal. Rptr. 644 (1972).

129. CAL. CIV. CODE §§ 51, 52 (West 1970). Section 51 provided in part:

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

Section 52 specified the damages for violation of § 51. *Flowers*, 21 Cal. App. 3d at 702, 98 Cal. Rptr. at 644-45.

arbitrary "[b]ecause the independence, mischievousness, boisterousness, and rowdyism of children vary by age and sex."[130]

Approximately ten years after the *Flowers* decision, the California Supreme Court decided the landmark case of *Marina Point, Ltd. v. Wolfson*,[131] which effectively overruled *Flowers*. In *Marina Point*, an apartment complex owner altered his policy to ultimately exclude children after plaintiffs had assumed residency. The owner allowed the children who were present when the policy took effect to remain there. Plaintiffs had their first child after the policy was instituted. The owner sought to evict plaintiffs who asserted the no-children policy violated the California Unruh Act.[132] The court invalidated the policy stating "the Unruh Act does not permit a business enterprise to exclude an *entire class* of individuals on the basis of a generalized prediction that the class 'as a whole' is more likely to commit misconduct than some other class of the public."[133]

In its discussion, the court stated that if owners could exclude children from rental housing under the Unruh Act, then all business owners could technically exclude children from their enterprises.[134] The court distinguished familial discrimination from the validity of age discrimination retirement communities noting housing for the elderly meets a specialized social need. In its conclusion, the court made a very strong statement against familial discrimination:

> 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. . . . To permit such discrimination is to approve of widespread, and potentially universal, exclusion of children from housing. Neither statute nor interpretation of statute, however, sanctions the sacrifice of the well-being of children on the alter [sic] of a landlord's profit, or possibly some tenant's convenience.[135]

The dissent, however, noted the policy was not designed to provide "wholesale discrimination against children" but to recognize there are two conflicting interests involved.[136] Children should be protected from

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130. *Flowers* at 703, 98 Cal. Rptr. at 645.

131. 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (Richardson, J., dissenting), *cert. denied*, 459 U.S. 858 (1982).

132. *Id.* at 724, 640 P.2d at 118, 180 Cal. Rptr. at 499-500.

133. *Id.* at 744, 640 P.2d at 125, 180 Cal. Rptr. at 507.

134. *Id.* at 739, 640 P.2d at 126, 180 Cal. Rptr. at 508.

135. *Id.* at 744, 640 P.2d at 129, 180 Cal. Rptr. at 510.

136. *Id.* at 745, 640 P.2d at 130, 180 Cal. Rptr. at 511.

widespread housing discrimination, yet adults may have a legitimate desire to live in a child-free environment.[137] The dissent stated that a "just society and its law courts" should attempt to accommodate both groups.[138] However, the *Marina Point* decision effectively prohibited familial discrimination policies in all apartment complexes in California.[139]

Although some plaintiffs alleging familial discrimination have received relief through judicial decisions, there are many who will be unable to obtain such relief. It is very expensive and time consuming to initiate legal action. Many victims of familial discrimination will not be able to finance a lawsuit and, therefore, cannot receive judicial relief. The Fair Housing Act[140] provides that the Secretary of Housing and Urban Development (HUD) will investigate allegations of housing discrimination, and also provides proper enforcement mechanisms.[141] However, HUD receives complaints concerning less than one percent of the instances of discrimination and of those presented, HUD attempts to resolve only one-third.[142]

4. State Legislative Action.—At the present time, seventeen states and the District of Columbia have legislation prohibiting or limiting familial discriminatory practices.[143] These statutes vary in the classes they protect and the exceptions they allow. They do not provide adequate relief in the areas of the country where families with children face a serious plight.

Many of the statutes prohibit familial discrimination, but provide many exceptions.[144] For example, the Virginia statute provides in part: "It shall be an unlawful discriminatory housing practice because of . . .

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137. *Id.*

138. *Id.*

139. *See* San Jose Country Club Apartments v. County, 137 Cal. App. 3d 951, 187 Cal. Rptr. 493 (1982).

140. 42 U.S.C. §§ 3610-3611 (1982).

141. *Id.* at §§ 3608, 3610.

142. *The Necessity for Shelter*, *supra* note 10, at 510 n.179. The remaining two-thirds of the complaints received are diverted to local agencies.

143. ALASKA STAT. § 18.80.240 (1986); ARIZ. REV. STAT. ANN. § 33-1315 (1974); CAL. CIV. CODE § 51.2 (West 1982 & Supp. 1988); CONN. GEN. STAT. ANN. § 46a-64 (West 1958 & Supp. 1988); DEL. CODE ANN. tit. 25, § 6503 (1974 & Supp. 1986); D.C. CODE ANN. § 1-2511 (1987); ILL. ANN. STAT. ch. 68, para. 3-104 (Smith-Hurd 1959 & Supp. 1988); ME. REV. STAT. ANN. tit. 14, § 6027 (1964 & Supp. 1987); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1982 & Supp. 1988); MICH. COMP. LAWS ANN. § 37.2502 (West 1985); MINN. STAT. ANN. § 363.03 (West 1982 & Supp. 1988); MONT. CODE ANN. § 49-2-305 (1987); N.H. REV. STAT. ANN. § 354-A:8 (1984); N.J. STAT. ANN. § 2A:42-101 (West 1952 & Supp. '1987-88); N.Y. EXEC. LAW § 296 (McKinney 1982 & Supp. 1988); R.I. GEN. LAWS § 34-27.4 (1984 & Supp. 1988); VT. STAT. ANN. tit. 9 § 4505 (1984 & Supp. 1987); VA. CODE ANN. § 36-88 (1984 & Supp. 1988).

144. ALASKA STAT. § 18.80.240 (1986); VA. CODE § 36-88 (1984 & Supp. 1988).

parenthood . . . [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."[145] At first glance, it appears the statute totally prohibits familial discrimination. However, the statute continues and states: "Notwithstanding the foregoing provisions, it shall not be an unlawful discriminatory housing practice to operate an all-adult or all-elderly community. . . ."[146] In effect, a landlord may establish an all-adult community if it is specified as such. If, however, the community is not classified as an all-adult or all-elderly community, it is unlawful to practice familial discrimination.[147]

Some of the state statutes do not place the prohibition of familial discrimination within their fair housing law section.[148] This limits the remedies which are available to victims of child-exclusionary policies.[149] Other statutes place familial discrimination within the civil rights section, but in sections separate from the main text where other protected classes (*e.g.*, race, religion, sex) are located.[150] The Illinois statute dealing with familial discrimination provides protection only for children under the age of fourteen;[151] New Hampshire exempts communities where all residents are at least forty-five while Michigan sets the age at fifty.[152]

A few of these statutes allow familial discriminatory policies in a portion of the buildings of a large community.[153] For example, in Massachusetts, if the complex contains one hundred or more buildings,

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145. VA. CODE ANN. § 36-88 (1984 & Supp. 1988).

146. *Id.*

147. ALASKA STAT. § 18.80.240 (1986); VA. CODE ANN. § 36-88 (1984 & Supp. 1988).

148. ALASKA STAT. § 18.80.240 (1986); ARIZ. REV. STAT. ANN. § 33-1315 (1974); CAL. CIV. CODE § 51.2 (West 1982 & Supp. 1988); DEL. CODE ANN. tit. 25 § 6503 (1974 & Supp. 1986); ME. REV. STAT. ANN. tit. 14 § 6027 (1964 & Supp. 1987); N.J. STAT. ANN. § 2A:42-101 (West 1952 & Supp. 1987-88); N.Y. EXEC. LAW § 296 (McKinney 1982 & Supp. 1987).

149. *Hearings*, *supra* note 9, at 398 stimony of James B. Morales, Staff Atty., Nat'l Center for Youth Law].

150. ARIZ. REV. STAT. ANN. § 33-1315 (1974); CAL. CIV. CODE § 51.2 (West 1982 & Supp. 1988); DEL. CODE ANN. tit. 25 § 6503 (1974 & Supp. 1986); ILL. ANN. STAT. ch. 68, para. 3-104 (Smith-Hurd 1959 & Supp. 1988); ME. REV. STAT. ANN. tit. 14, § 6027 (1964 & Supp. 1987); MASS. GEN. LAWS ANN. ch. 151B § 4 (West 1982 & Supp. 1987).

151. ILL. ANN. STAT. ch. 68, para. 3-104 (Smith-Hurd 1959 & Supp. 1988).

152. MICH. COMP. LAWS ANN. § 37-2502 (West 1985); N.H. REV. STAT. ANN. § 354-A:8 (1984).

153. MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1982 & Supp. 1988). *See also* MINN. STAT. ANN. § 363.03 (West 1966 & Supp. 1988) (which permits familial discrimination policies in one-third of a complex's buildings); ME. REV. STAT. ANN. tit. 14 § 6027 (1964 & Supp. 1987) (which permits discriminatory practices in 25 percent of the units within a complex).

children may be excluded from one-half.[154] While allowing a portion of the complex to restrict children attempts to recognize the needs and desires of families with children and those adults who wish to live in a child-free environment, these methods are criticized as providing a "major loophole" which promotes familial discrimination.[155]

Some familial rights advocates criticize the state statutes alleging the statutes provide weak enforcement procedures.[156] The majority of these laws provide a private cause of action which may be too expensive and time-consuming for the injured party to pursue.[157] The relief available to the plaintiff is inadequate and often allows the discriminatory policies to continue, and worse, the plaintiff and family may still be without housing. Many states have established administrative agencies to handle the complaints and enforcement of their fair housing statutes.[158] This alleviates the necessity of the plaintiff financing a lawsuit, but it may not be effective. For example, California passed its statute prohibiting familial discrimination in 1982, but the administrative agency directed to handle these matters refused to take action for over two years.[159]

In addition to the civil penalties, some state statutes impose criminal penalties for violations.[160] These may be the least effective way of achieving enforcement as the prosecuting attorneys may be reluctant to prosecute a landlord, and this type of case will not demand their time when compared to more serious crimes.[161]

To summarize, state legislative schemes provide haphazard protection for families with children who face discrimination in rental housing. Some allow apartment complexes to be registered as all-adult communities, and state it is only discrimination if communities not registered as such exclude children.[162] Others only prohibit discrimination against children under a certain age, provide exemptions down to the age of forty-five, or allow a certain percentage of buildings within a complex

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154. MASS. GEN. LAWS ANN. ch. 151B § 4 (West 1982 & Supp. 1988).

155. *Hearings*, *supra* note 9, at 396-97.

156. *Id.*

157. *See, e.g.*, CAL. CIV. CODE § 51.2 (West 1982 & Supp. 1988); MICH. COMP. LAWS ANN. § 37:2502 (West 1985); N.Y. EXEC. LAW § 296 (McKinney 1982 & Supp. 1987); VA. CODE ANN. § 36-88 (1984 & Supp. 1988).

158. *See generally* CAL. CIV. CODE § 51.2 (West 1982 & Supp. 1988); CONN. GEN. STAT. ANN. § 46a-64 (West 1958 & Supp. 1988); MONT. CODE ANN. § 49-2-305 (1987).

159. *Hearings*, *supra* note 9, at 400-01 n.57. The administrative agency claimed they did not have adequate resources or lacked legal authority to handle familial discrimination complaints. They began handling such complaints after receiving political pressure and familial discrimination complaints constituted 30 percent of the housing complaints received.

160. *Id.* at 396-97.

161. *Id.*

162. *See supra* note 147 and accompanying text.

to be designated as adults-only. Often, the enforcement procedures do not provide adequate relief.

III. The Fair Housing Amendments Act of 1988

The Amendments to the Fair Housing Act which was passed on September 13, 1988, added families with children to the list of protected groups.[163] The Amendments also modified enforcement procedures to make them more effective. The purpose of the Amendments was to alleviate the problems families with children face in finding adequate rental housing.[164] However, the problems faced by low income families with children will not be alleviated by the Amendments.

A. Modified Procedures

Prior to the 1988 Amendments, all discriminatory housing complaints referred to HUD or private civil actions had to commence within 180 days.[165] Under the terms of the Amendments, a complaint about an apartment owner may be filed with HUD within one year of the alleged discriminatory act.[166] This allows the aggrieved person to take care of the immediate problem of locating housing before proceeding with the complaint, and alleviates the problems associated with a short statute of limitations. The new Act shortens the amount of time HUD has to investigate a complaint after its receipt from thirty to ten days. The Act still provides the accused apartment owner an opportunity to file an answer, but the owner must now file an answer within ten days of receiving notification of the complaint.[167] The Amendments further provide HUD must complete all investigations within 100 days.[168]

Under both the prior law and the Amendments, HUD officials may engage in conciliatory actions to the extent feasible.[169] The conciliation agreement may provide for binding arbitration of the dispute.[170] If HUD or the aggrieved person can show that the owner has breached the conciliation agreement, the Attorney General may commence a civil action

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163. Fair Housing Amendments Act of 1988, Pub. L. No. 101-430, 102 Stat. 1622 (1988).

164. *See Hearings*, *supra* note 9.

165. 42 U.S.C. §§ 3610, 3612 (1982).

166. Fair Housing Amendments Act of 1988, Pub. L. No. 101-430, 102 Stat. 1624-25 (1988).

167. *Id.*

168. *Id.* If HUD cannot complete the investigation within the requisite 100 days, the appropriate HUD official must notify both parties in writing. *Id.*

169. *Id.* at 1626.

170. *Id.*

within 90 days of the alleged breach.[171] The Amendments further provide in emergency situations HUD may initiate a civil action seeking temporary relief for the aggrieved person immediately after the filing of the complaint.[172] If HUD believes no conciliatory agreement will be reached, and HUD finds reasonable cause to believe the owner has discriminated, HUD officials are to turn their investigate results over to the Attorney General who will commence civil action against the owner.[173] These modifications take the burden of financing a lawsuit off of the tenant and provide immediate remedial measures if the aggrieved person is unable to locate rental housing.

In addition, unless an election otherwise is made, an administrative law judge appointed pursuant to federal regulations presides over the hearing.[174] This hearing must be held within 120 days of the filing of the charge.[175] The judge must report a decision within 60 days of completion of the hearing.[176] If the administrative law judge finds an apartment owner has or is about to engage in discriminatory activity, the judge "shall promptly issue an order for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or equitable relief. Such order may, to vindicate the public interest, assess a civil penalty against the respondent. . . ."[177] If no discriminatory action took place or was about to take place, the action will be dismissed. However, the lawsuit will injure the owner to the extent he had to finance his defense. This will provide a deterrent against the temptation of engaging in discriminatory practices.

Any party to the final order of the administrative law judge may obtain judicial review of the order pursuant to the federal regulations governing the appellate process.[178] Jurisdiction for judicial review is in the judicial circuit where the alleged discriminatory activity occurred.[179] If HUD officials do not enforce the administrative law judge's findings, nor seek judicial review of the findings, the party entitled to relief may seek a decree enforcing the order from the Court of Appeals in the

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171. *Id.*

172. *Id.*

173. *Id.*

174. 5 U.S.C. § 3105 (1982).

175. Fair Housing Amendments Act of 1988, Pub. L. No. 101-430, 102 Stat. 1625, 1630 (1988).

176. *Id.*

177. *Id.* The civil penalties begin at $10,000 and range to $50,000, the amount assessed increasing if the owner has been adjudicated as having practiced discriminatory housing policies within the recent past. *Id.*

178. 28 U.S.C. § 158 (1982).

179. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1625, 1631 (1988).

circuit where the violation occurred.[180] Again, the court from which judicial review is sought may issue temporary orders to alleviate any pressing problems faced by the aggrieved party.[181] The Amendments further provide that an aggrieved person may commence a civil action in a district court without utilizing HUD services or they may initiate such an action on their own for the breach of a conciliation agreement.[182] The tenant must finance the lawsuit when he initiates it. The aggrieved party must initiate the action within two years of the occurrence of either the discriminatory practice or the breach of the conciliation agreement.[183] However, if HUD obtained a conciliation agreement or an administrative law hearing has begun, the tenant cannot commence a civil action in a court of law.[184] Under both the Fair Housing Act and the Amendments, there is a provision that a private person may have the court appoint an attorney for him if the requisite need can be shown.[185] The same relief is available to a private person who commences a civil action as there is for a person who proceeds through HUD.[186]

There are advantages and disadvantages with a tenant utilizing HUD's services and with a tenant filing a private action. Allowing HUD to investigate, attempt conciliation, or the Attorney General to file an action against the apartment owner removes the expense of financing a lawsuit from a tenant's shoulders. This provides a way for many low income persons to be heard. The advantage of filing a private action is that the plaintiff is able to maintain more control over the suit. For most tenants, the decision will rest on the amount of money necessary to maintain a cause of action.

The Amendments provide that the Attorney General may commence a civil action in district court when he believes discriminatory practices prohibited by the Fair Housing Act are taking place or have taken place.[187] The Attorney General may also intervene in an action initiated by a private person if "the case is of general public importance."[188] In a civil action maintained privately or by the Attorney General, the court may order injunctive or other preventive relief, award monetary damages and access civil penalties.[189]

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180. *Id.* at 1632.
181. *Id.*
182. *Id.* at 1633. In all matters commenced under the Fair Housing Act, the amount in controversy requirement is waived. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 1626.
188. *Id.* at 1633.
189. *Id.* at 1636. The Amendments provide that the Court:

The overall purpose behind the 1988 Amendments is to include families with children in the list of classes protected from housing discrimination and to increase the ease and effectiveness of the enforcement measures.[190] This has been accomplished by lengthening the time in which to file the action and decreasing the time in which HUD has to respond. Under the terms of the Amendments, the parties may agree to submit to binding arbitration or the matters may be heard by administrative law judges with a provision for judicial review. Civil action may be commenced upon the breach of a conciliation agreement, by a private person who chooses to proceed without HUD's services, or by the Attorney General if there is reasonable cause to believe discriminatory practices are taking place. The Amendments provide for immediate relief, when necessary, injunctive relief, equitable relief, monetary damages and civil penalties, the amount of which may increase if the owner has violated the Fair Housing Act in recent years.

B. Shortcomings of the Fair Housing Amendments Act of 1988

As has been established previously, there are areas of the country where families with children face serious problems in locating adequate rental housing.[191] The 1988 Amendments[192] to the Fair Housing Act[193] totally prohibit child-exclusionary policies nationwide.[194] However, such broad-sweeping legislation is not necessary nor is it appropriate. Initially, one must realize that child-exclusionary policies have not arisen out of hatred. Familial rights advocates have placed familial discrimination on the same level as racial discrimination. For example, the majority in *Marina Point* stated, "[t]o permit such discrimination is to approve of widespread, and potentially universal, exclusion of children from housing. Neither statute nor interpretation of statute, however, sanctions the

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(A) may award such preventive relief, including a permanent or temporary injunction, restraining order, or other order against the person responsible for a violation of this title as is necessary to assure the full enjoyment of the rights granted by this title,

(B) may award such other relief as the court deems appropriate, including monetary damages to persons aggrieved, and

(C) may to vindicate the public interest, assess a civil penalty against the respondent -

(i) in an amount not exceeding $50,000 for a first violation; and

(ii) in an amount not exceeding $100,000 for any subsequent violation.

190. *Id.* at 1624-36.

191. *See supra* note 6 and accompanying text.

192. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619-1636 (1988).

193. 42 U.S.C. § 3601-3631 (1982).

194. Pub. L. No. 100-340, 102 Stat. 1625 (1988).

sacrifice of the well-being of children on the alter [sic] of a landlord's profit, or possibly some tenants' convenience."[195]

Alternatively, the *Marina Point* dissenting opinion recognizes there are two sides to every issue, and that if the question were phrased differently, the response would not be the same.[196] Additionally, the dissent states there should be an attempt to accommodate both families with children and those wanting to live in an all-adult community. The dissent in *Marina Point* notes that rather than asking if we should approve "whole sale discrimination against children,"[197] the question could be phrased "do our middle aged or older citizens, having worked long and hard, having raised their own children, having paid both their taxes and their dues to society retain a right to spend their remaining years in a relatively quiet, peaceful and tranquil environment of their own choice?"[198] The dissent indicates a compromise between the two extremes would be more appropriate.

Under the Amendments, retirement communities may continue to exclude children.[199] However, the Amendments ignore the rights and needs of young and middle-aged adults without children. Statistics show that adults without children occupy over two-thirds of the rental units[200] and that persons under age thirty-five occupy over one-half of these households.[201] This Note does not dispute the necessity for legislation limiting the number of apartment units which exclude children; what the Note disputes is its total prohibition of all-adult apartment communities. This total prohibition is too broad when adults without children occupy 67.6 percent of the rental units and there is no substantial data measuring the extent of familial discrimination nationwide.[202]

Studies have documented that the families with children facing the greatest problem in locating rental housing are low income families.[203] The California Supreme Court stated that landlords have instituted familial discriminatory policies so that they may charge a premium for their rental units.[204] However, the latter proposition is not an accurate assessment. The ISR study completed in 1980 stated:

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195. Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 745, 745, 640 P.2d 115, 129, 180 Cal. Rptr. 496, 511 (Richardson, J., dissenting), *cert. denied*, 459 U.S. 858 (1982).

196. *Id.* at 745, 640 P.2d at 130, 180 Cal. Rptr. at 511 (Richardson, J., dissenting).

197. *Id.*

198. *Id.*

199. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619-1636 (1988).

200. *See supra* note 57 and accompanying text.

201. *See supra* note 58 and accompanying text.

202. *See supra* note 55 and accompanying text.

203. *See supra* notes 73-75 and accompanying text. *See also Hearings*, *supra* note 9, at 373 stimony of James B. Morales, Staff Atty, Nat'l Center for Youth Law].

204. Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 271, 744, 640 P.2d 115, 129, 180 Cal. Rptr. 496, 511 (Richardson, J., dissenting), *cert. denied*, 459 U.S. 858 (1982).

> Families with children pay a significantly higher monthly rent than families without children, primarily because they tend to occupy larger units. When the number of bedrooms and the occupancy per unit are held constant no significant differences are found between the monthly rents of the two groups. The higher cost of rental housing for families with children is attributable to the greater number of persons in the household and the size of the unit rented.[205]

The all-adult units which command such high prices often offer extra facilities. Adult communities are often equipped with attractive nuisances such as saunas, whirlpools, exercise facilities and swimming pools, which account for the increased rental price.[206] Even when these apartments can no longer exclude children, the rental price will not decrease enough to be within the affordable price range for low income families. Until owners build more low and moderately priced rental housing, low income families will be unable to locate adequate housing.

Additionally, at least one study stated that minority groups and households headed by women feel the greatest impact of exclusionary policies.[207] However, the ISR study concluded this is not the case.[208] Logic explains the differing results. Minorities and female head of household families tend to fall within the lower income brackets, and when the study accounts for those variables, the disparities between minorities, women and the general rental population come close to disappearing.[209]

The drafters of the Amendments failed to realize that many apartment complexes have been designed and built for adults-only and, therefore, are inherently dangerous to children. The dissent in *Marina* recognized this danger stating:

> The evidence before the trial court established, in substance, that Marina Point was designed and constructed for the purpose of providing all-adult rental housing, and that as such its facilities were ill-adapted for use by children. . . . [T]he use of existing facilities at Marina Point by children when playing results in substantial danger both to themselves and to adult tenants alike.[210]

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205. R. Marans & M. Colten, *supra* note 4, at 72.

206. *Marina Point, Ltd.*, at 744, 640 P.2d at 130, 180 Cal. Rptr. at 511 (Richardson, J., dissenting).

207. J. Greene & G. Blake, *supra* note 68, at 72.

208. R. Marans & M. Colten, *supra* note 4, at 72.

209. *See id.*

210. *Marina Point, Ltd.*, at 746, 640 P.2d at 130-31, 180 Cal. Rptr. at 512 (Richardson, J., dissenting).

Although all the dangers faced by children can never be eliminated, those apartment complexes designed exclusively for adults should remain just that, all-adult communities.

The 1988 Amendments could be the impetus for apartment owners to withdraw or remain out of the rental market. From 1970 to 1976, owners removed approximately 250,000 rental units which were constructed before 1965 from the market each year.[211] This phenomenon, combined with the decreased number of multifamily units on which construction has begun,[212] causes increased problems for potential tenants. If developers and landlords perceive children as a problem to avoid, and they realize they cannot avoid children, they will remove their units from the rental market or forego construction.

In parts of the country, there is a severe problem confronting families with children who are attempting to locate rental housing.[213] However, no statistics measure the extent of the problem nationwide. Lower income families face the gravest difficulty in locating adequate rental housing. The 1988 Amendments to the Fair Housing Act in part eliminate familial discrimination.[214] They will not, however, eliminate the problems faced by low income families since it will not significantly lower rental costs. In addition, the drafters of the Amendments failed to recognize the needs and desires of the greatest portion of the rental population—adults without children. Finally, the drafters of the Amendments did not consider the inherent dangers children may face when they occupy apartments which have been designed and built for an all-adult clientele.

IV. Shortcomings of Total Prohibition of All Adult Apartment Communities

Familial discrimination, unlike racial discrimination, is not based on hatred. There are legitimate reasons why adults desire to live in a child-free environment and why apartment owners want to restrict their rental units to adults-only. Rather than assuming such desires are based on hatred or greed, Congress and the courts should look at both sides of the issue.

A. The Rights of Adults to Live in a Child-Free Environment

The New Jersey Supreme Court stated that "[t]here cannot be the slightest doubt that shelter, along with food, are the most basic human

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211. A. Downs, *supra* note 3, at 40.

212. *See supra* notes 44-45 and accompanying text.

213. *See supra* note 6 and accompanying text.

214. Fair Housing Amendments of 1988, Pub. L. No. 100-430, 102 Stat. 1619-36 (1988).

needs. . . . It is plain beyond dispute the proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare. . . ."[215] The supporters of all-adult communities are not attempting to deny families with children a place to live, but are asserting that they also have rights, one of which is to live in a child-free environment if they so desire.

Over two-thirds of the occupied rental units have no residents under the age of eighteen,[216] yet the majority of the rental population are not allowed to choose their living environment under terms of the 1988 Amendments. In 1972, the California Supreme Court stated that children are more independent, boisterous, and rowdy.[217] This is only one reason adults without children choose to live in an all-adult community.

In addition, it may be much easier to find amenities such as saunas, whirlpools, swimming pools, and exercise facilities in all-adult communities. These amenities become attractive nuisances when children are present. If children are allowed to become residents of apartment complexes with such facilities, owners may limit the hours of availability or eliminate such facilities.

Furthermore, the Department of Commerce has documented that certain crimes associated with residences are highly likely to be committed by minors.[218] Specifically, 1988 statistics show that 32 percent of all thefts, 35.9 percent of all burglaries, 40.4 percent of all arsons, and 42.8 percent of all vandalism is committed by persons under the age of eighteen.[219]

In *Halet v. Wend Investment Co.*,[220] the Ninth Circuit held that "the right of family members to live together is part of the fundamental right to privacy."[221] However, adults without children have a similar right to privacy when deciding where to live their lives and a similar right to equal protection under the fourteenth amendment of the Constitution. The Supreme Court in *Eisenstadt v. Baird*[222] held that single people cannot be treated differently than married people as far as the distribution of contraceptives is concerned.[223] The Court held:

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215. Southern Burlington County NAACP v. Mount Laurel, 336 A.2d 713, 727 (N.J.), *cert. denied*, 423 U.S. 808 (1975).

216. *See supra* note 57 and accompanying text.

217. Flowers v. John Burnham & Co., 21 Cal. App. 3d 700, 98 Cal. Rptr. 644 (1972).

218. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS. STATISTICAL ABSTRACT OF THE UNITED STATES, 165, 278 (108 ed. 1988).

219. *Id.*

220. 672 F.2d 1305 (9th Cir. 1982).

221. *Id.* at 1311.

222. 405 U.S. 438 (1972).

223. *Id.*

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. . . . [I]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[224]

Similarly, single people should not be treated differently than families with children and should be granted the fundamental right to privacy and, therefore, the ability to decide where and in what manner they will live.

Tenants raised the right to privacy and equal protection arguments in *San Jose Country Club Apartments v. County of Santa Clara*.[225] The court rejected both arguments stating the cause of action involved no fundamental right.[226] However, in *Halet*,[227] the Ninth Circuit held that "[f]amily life, in particular the right of family members to live together, is part of the fundamental right of privacy."[228] Therefore, the right to privacy and the equal protection argument of adults without children merit discussion.

The Court of Appeals for the District of Columbia stated "[l]iberty under law extends to the full range of conduct which the individual is free to pursue."[229] Thus, liberty extends to one's right to decide how and where he will live. In *Shelton v. Tucker*,[230] the Supreme Court held:

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.[231]

The 1988 Amendments constitute a total ban on all-adult apartment communities with an exception for retirement communities.[232] Studies

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224. *Id.* at 453.

225. 137 Cal. App. 3d 948, 198 Cal. Rptr. 493 (1982). This case was decided shortly after *Marina Point, Ltd.*

226. *Id.* at 954, 198 Cal. Rptr. at 496.

227. 672 F.2d 1305 (1982).

228. *Id.* at 1311.

229. Ricks v. District of Columbia, 414 F.2d 1097, 1101 (D.C. Cir. 1968) (quoting Bolling v. Sharpe, 347 U.S. 497 (1954)).

230. Shelton v. Tucker, 364 U.S. 479 (1960).

231. *Id.* at 488 (footnotes omitted).

232. Fair Housing Amendment of 1988, Pub. L. No. 100-340, 102 Stat. 1619-36 (1988).

have not documented that families with children face serious problems finding adequate rental housing nationwide.[233] However, studies have documented that 67.6 percent of all rental households have no residents under the age of eighteen[234] and low income families with children face a serious problem locating adequate rental housing.[235] Therefore, the Fair Housing Amendments Act of 1988 stifles liberty, a fundamental right.

The one exception to the ban on child-exclusionary policies is retirement communities.[236] In *Taxpayers Association of Weymouth Township, Inc. v. Weymouth Township*,[237] the New Jersey Supreme Court recognized that the elderly were a class deserving special treatment.[238] The court noted that the elderly have specialized housing needs because they have fixed and limited incomes.[239] Although familial rights advocates state that child-exclusionary policies are the reason so many families cannot locate adequate housing, the real cause of the problem is limited income.[240] Rather than prohibiting all-adult apartment communities and adversely affecting the rights of over two-thirds of the rental households, the legislation should turn its efforts toward providing adequate rental housing within the economic means of low income families.

B. Apartment Owners and the Free Enterprise System

In America's capitalistic society, supply increases to meet demand.[241] Therefore, if all-adult communities eventually become too widespread, and families with children cannot locate housing due to exclusionary policies, apartment owners will invest in apartment complexes which welcome children. The supply will fit itself to the needs of the demand. However, it will take time to achieve the balance. In some areas of the country, families with children face severe problems and the requisite time is not available. Thus, some form of legislation is necessary, but it need not be as prohibitive as the 1988 Amendments.

The court in *Marina Point* characterized landlords who exclude children as being greedy,[242] and the connotation was that these landlords

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233. *See* R. MARANS & M. COLTEN, *supra* note 4.

234. *See supra* note 57 and accompanying text.

235. *See supra* note 203 and accompanying text.

236. Fair Housing Amendment of 1988, Pub. L. No. 100-430, 102 Stat. 1619-36 (1988).

237. 71 N.J. 249, 364 A.2d 1016 (1976), *cert. denied*, 430 U.S. 977 (1977).

238. *Id.*

239. *Id.* at 267-68, 364 A.2d at 1026.

240. *See supra* notes 56-61 and accompanying text.

241. R. MCKENZIE, ECONOMICS 44-66 (1986).

242. Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 745, 640 P.2d 115, 129, 180 Cal. Rptr. 496, 511 (Richardson, J., dissenting), *cert. denied*, 459 U.S. 858 (1982).

are evil.[243] However, there are legitimate reasons why landlords want to restrict their apartments to all adults. Initially, familial rights advocates must recognize that landlords are first and foremost business persons who provide rental housing to make a profit, a reasonable endeavor.

With the decline in the number of women who have children, and the increase in the number of two-career families,[244] landlords saw an increased demand for all-adult communities. Landlords and land developers responded by providing apartment communities which restricted or excluded children.[245] The owners designed and developed many of these complexes for adults-only.[246] Apartment owners realize that they are held to a higher standard of care in negligence actions when children are present because accidents concerning children are foreseeable and, therefore, have a legitimate interest in excluding or restricting children.[247] Thus, a landlord's interest in excluding children from rental units is a legitimate economic one not solely motivated by greed.

There are no statistics reflecting whether or not the presence of children leads to increased maintenance costs and increased insurance costs. However, the ISR study reflects that 81 percent of the landlords surveyed felt that higher maintenance costs were a problem associated with child tenants and 38 percent felt higher insurance costs were a similar problem.[248] When one combines these factors with rents which are inadequate to meet construction and operating costs,[249] landlords face an economically infeasible situation. If their operating costs increase,

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243. *Id.*

244. *See supra* note 49 and accompanying text.

245. *See id.*

246. *See supra* note 206 and accompanying text.

247. *See generally* D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on Torts 200-01 (5th ed. 1984) ("The question comes down essentially to one of whether the foreseeable risk outweighs the utility of the actor's conduct.") *Id.* Kopera v. Moschella, 400 F. Supp. 131 (S.D. Miss. 1975) (complex owners were negligent in failing to have a lifeguard on duty at the pool, to fence the area and secure it with a gate, to cover the pool during time when the weather was not conducive to its use and to maintain rescue equipment in the area of the pool; their negligence was the proximate cause of death); Lidster v. Jones, 176 Ga. App. 392, 336 S.E.2d 287 (1985) (landlord held liable for dog biting tenant when he knew of dog's vicious propensities but did nothing to keep dog out of complex's common areas); Acosta v. Irdank Realty Corp., 38 Misc. 2d 859, 238 N.Y.S.2d 713 (1963) (landlord held liable for child eating lead paint chips).

248. R. Marans & M. Colten, *supra* note 4 at 64-65, Table VI-I. Additionally, this author conducted a telephone survey of insurance agencies in Indianapolis, Indiana, who provide liability insurance for apartment complex owners. Of the 18 who stated they take the presence of children into account, the policy price was an average of 14 percent less expensive when children were excluded. Six other companies reported they turned the information over to their underwriters who determine the policy price. The underwriters take into consideration the presence of children and attractive nuisances.

249. *See supra* note 44 and accompanying text.

and they are held to a higher standard of care due to the presence of children, they will convert the units into condominiums or remove them from the rental market. The trend has been toward an increase in the number of units being removed from the rental market in recent years.[250]

Further, it is unrealistic to believe that the prohibition of child-exclusionary policies will increase the number of rental units which are within the economic means of low income families. Landlords and developers must be able to charge prices which will meet their operating costs and generate a profit. Studies have shown that when occupancy per unit and the number of bedrooms per unit are held constant, there is no significant difference in the monthly rent charged for families with children and those without children.[251] Thus, prohibiting familial discrimination will not change the composition of the rental market, rental prices will not decrease significantly, and low income families will still experience problems locating adequate rental housing.

To summarize, the free enterprise system would eventually solve the problem as apartment owners would change the nature of their supply to meet the current demand. However, in some areas of the country, this process would be too time consuming. Genuine economic interest, not greed, generates the increased instances of familial discrimination. Increased restrictions on landlords and higher prices associated with child tenants will prompt some landlords to take their rental units off the market and may discourage developers from entering the market. In addition, the Amendments will not result in lowering rental prices to a level within the economic means of low income families.

V. Alternatives to the 1988 Amendments

Rather than a total prohibition of familial discrimination, the government should institute a less restrictive provision which would recognize both factors. An alternative is to allow a percentage of all-adult communities based on the population of a given area. Alcoholic beverage commissions work on this type of quota system. This Note will utilize the Indiana Alcoholic Beverage Laws.[252] The Indiana Code provides for issuance of five types of alcoholic beverage permits.[253] The number of each type of permit issued is based on the population figures of the county, city, or town in question.[254] For example, "the commission may issue only one [1] package liquor store dealer's permit in an incorporated

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250. *See supra* note 211 and accompanying text.
251. *See supra* note 205 and accompanying text.
252. Ind. Code § 7.1-3-22 (1988).
253. Ind. Code §§ 7.1-3-22-1 to -5 (1988).
254. *Id.*

city or town for each five thousand [5,000] persons, or fraction thereof, within the incorporated city or town."[255] The commission bases the population figures on reports issued by the federal government.[256]

There have been few suits filed in this area,[257] suggesting the quota method is an effective means of limiting permits. In *Smock v. Coots*,[258] the Indiana Court of Appeals upheld the commission's denial of a package store permit recognizing that the quota statute set the upper, not the lower limits, on the number of permits which could be issued.[259] This allows for flexibility in the system so that area-specific problems can be addressed.

The legislature could establish a system similar to Indiana's alcoholic beverage permit quota system to regulate the number of all-adult apartment complexes allowed. The statute would require an applicant receiving a permit to pay fees established by the statute.[260] Those obtaining such a permit could redeem the cost through lower maintenance costs, lower insurance costs, or they could pass the cost on to tenants willing to pay more to live in a child-free environment. In those areas where the number of apartment owners desiring such a permit would exceed the number of authorized permits, HUD could hold an auction,[261] or the apartment

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255. IND. CODE § 7.1-3-22-5 (1988).

256. IND. CODE § 7.1-3-22-1.5 (1988) (approved March 5, 1988). The decennial census is reported by the federal government and is adjusted by corrected population counts which may be issued periodically after the decennial census.

257. Research uncovered two cases challenging the denial of an alcoholic beverage permit since the quota system took effect in 1973. *See* Indiana Alcoholic Beverage Comm'n v. State *ex rel.* Harmon, 269 Ind. 48, 379 N.E.2d 140 (1978); Smock v. Coots, 165 Ind. App. 474, 333 N.E.2d 119, *reh'g denied* (1975).

Research uncovered four cases dealing with the renewal of a liquor permit. *See* Pettit v. Indiana Alcoholic Beverage Comm'n, 511 N.E.2d 312 (Ind. App. 1989); Indiana Alcoholic Beverage Comm'n v. Johnson, 158 Ind. App. 467, 303 N.E.2d 64 (1973); Indiana Alcoholic Beverage Comm'n v. Lake Superior Court, 259 Ind. 123, 284 N.E.2d 746 (1972); Indiana Alcoholic Beverage Comm'n v. Lamb, 256 Ind. 65, 267 N.E.2d 161 (1971). In O'Banion v. State *ex rel.* Shively, 146 Ind. App. 223, 253 N.E.2d 739 (1969), plaintiff sought to enjoin defendant from selling alcoholic beverages until the defendant received authority from the Zoning Board to carry on the business at its particular location.

258. 165 Ind. App. 474, 333 N.E.2d 119, *reh'g denied* (1975).

259. *Id.*

260. *See generally* IND. CODE § 7.1-3-24-10 (1988).

261. *See generally* IND. CODE § 7.1-3-22-9 (1988). This section provides in pertinent part:

> (a) This section applies to any permit that is subject to the quota provisions of this chapter unless that permit is obtained by sale, assignment or transfer under I.C. 7.1-3.2-4.
>
> (b) Whenever a permit to which this chapter applies becomes available, the commission shall offer an opportunity to bid for that permit to all persons who are qualified to receive that permit and who have indicated a desire to obtain

complexes having the policy in existence longer could be given the first option of a permit.

Opponents may argue that such a permit system would be difficult and expensive to administer. However, the alcoholic beverage permit quota systems have been operational for some time.[262] In addition, part of HUD's duties is to investigate the effectiveness of the blanket ban on exclusionary policies.[263] These investigations are time consuming and expensive. If these resources are applied to the administration of a quota system which accounts for the needs of both groups, the cost may well even out. In addition, the all-adult permits would generate fees which could be applied toward the cost of providing subsidized housing, or to provide incentives for developers to build familial units or low income housing.

Providing incentives for the construction of low income housing may be more effective than a ban on all-adult communities because it will lure future building into the precise area where it is needed.[264] Direct subsidies may not be seen as desirable, because there are other more pressing needs for those federal funds.[265] Other options are available and are discussed below.

One incentive to promote the development of low income housing is tax exempt bonds. If developers perceive the rental market as a losing proposition, they will not invest their capital. However, tax exempt bonds may provide the necessary incentive to promote building. Further, tax exempt bonds could be offered only to those whose rental units will be offered at a price within the range of low income families.

In addition, incentives could be offered to the owners of existing units so they will not be removed from the market. Grants, low interest loans,[266] or tax exempt bonds could be offered for the rehabilitation of rental units targeted to be removed from the market. A condition

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that permit. The commission shall receive bids at an auction that it conducts. The highest bidder at the commission's auction who is qualified to receive the permit in all respects (including a determination by the local board that the person is of good moral character and good repute in the community in which that person resides) is entitled to receive the permit. This bidder shall pay the amount of the bid at the time the permit is issued as a special fee for initial issuance of the permit.

262. The Indiana Alcoholic Beverage System has been operational since 1973. 1973 Ind. Acts 55.

263. 42 U.S.C. § 3604 (1982). Some of this investigation is accomplished through the use of testers. A person or couple with and without a child would be sent to inquire about the availability of rental housing to see if patterns of discrimination can be detected.

264. *See supra* note 78, at 1846-47.

265. A. Downs, *supra* note 3, at 9.

266. *Id.*

precedent for the receipt of such funds could be the provision of low income rental housing for families.

There are also tax advantages which may be offered to developers willing to invest in low income housing.[267] First, the federal government could allow those people willing to invest in such rental housing the opportunity to write off the interest and property taxes during construction rather than capitalizing them.[268] This program would need established guidelines and limitations to avoid allowing only wealthy investors to take advantage of the incentives.[269]

There is one disadvantage with the tax incentives discussed above. The Tax Reform Act of 1986[270] repealed these incentives, and it is unlikely they will be reinstated. However, the reform enacted section 42 which provides a tax credit for qualified low income housing.[271] Section 42(h) limits the amount of new low income housing credits issued annually per state.[272] Owners of qualified low income housing are entitled to a credit in each of ten years.[273] The income tax credit equals the applicable percentage for the building multiplied by the qualified basis allocable to low income rental units in each qualified building.[274] The existence

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267. *Id.* at 10.

268. *Id.* at 165.

269. *Id.*

270. Pub. L. No. 99-514, 100 Stat. 2189 (1986).

271. I.R.C. § 42 (1986). This section provides in pertinent part:

> I.R.C. § 42(g)(1) defines a qualified low-income housing project as any residential rental project where either 20% or more of the residential units in such property are both rent restricted and occupied by individuals whose income is 50% or less of the area's median gross income, or 40% or more of the residential units in such projects are both rent restricted and occupied by individuals whose income is 60% or less of the area's median gross income. The owner must irrevocably elect to comply with either of the minimum set-aside requirements at the time the project is placed in service.

R. MADDEN, TAXATION OF REAL ESTATE TRANSACTIONS-AN OVERVIEW, 480-2nd Tax Mgmt. (BNA) A-66-68 (1987) (footnotes omitted).

272. I.R.C. § 42 (1986). This section provides in pertinent part:

> A taxpayer who is otherwise eligible to take the low-income housing credit must still obtain an allocation of credit authority from the state or local credit agency in whose jurisdiction the qualifying low-income housing project is located, unless the taxpayer finances it with the proceeds of a tax-exempt bond which received an allocation pursuant to the private activity bond limitation added by the 1986 TRA. There is no state volume limitation for projects financed by such tax exempt bonds and the taxpayer does not need to obtain any credit authority. . . . Each state is allocated an annual credit authority equal to $1.25 for every resident of the state.

R. MADDEN, *supra* note 271 (footnotes omitted).

273. I.R.C. § 42(f)(1) (1986).

274. I.R.C. § 42(a)(b) (1986). This section provides in pertinent part:

of the low income housing tax credit indicates the legislature's awareness of the need for low income housing and willingness to provide a tax incentive for apartment owners and developers. Because the current credits allowed are not sufficient to provide an adequate supply of low income housing, the logical way to promote further development of low income housing is to increase the present 4 and 9 percent credit amounts and increase the number of credits allowed by the Code.

In response to the problem Congress has established Housing Voucher and Certificate Programs which provide tenant-based assistance (assistance that follows the family if it moves) so that the eligible family can afford standard housing.[275] Under the terms of both programs, the families receiving certificates or vouchers are responsible for finding suitable housing which meets eligibility requirements established by HUD.[276] The two programs share a common waiting list,[277] and both programs require that a family contribute the greater of 30 percent of their adjusted monthly income or 10 percent of their monthly income toward the rental payment, with HUD paying the balance directly to the apartment owner.[278]

> The credit is equal to the applicable credit percentage for the project, multiplied by the qualified basis allocable to low-income units in each qualified low-income building. § 42(a).
>
> For projects placed in service in 1987, the applicable credit percentage is 9% for non-federally subsidized newly constructed or rehabilitated low-income units (provided that rehabilitation expenditures average $2,000 or more per low-income unit), 4% for newly constructed or rehabilitated low-income units where the construction or rehabilitation is financed with tax-exempt bonds or similar subsidies (provided that rehabilitation expenditures average $2,000 or more per low-income unit), and 4% for the acquisition of existing low-income units provided that the property is acquired at least 10 years after the latter of the date the property was last placed in service or the date of the most recent unqualified substantial improvement. . . . For projects placed in service after 1987, credit rates are to be issued by the IRS on a monthly basis. . . . For newly constructed or rehabilitated units without federal subsidies, the credit rates are to be computed so that the present value of the 10 annual credit amounts at the beginning of the 10-year period equals 70% of the qualified basis on the low-income units.

R. MADDEN, *supra* note 271 (footnotes omitted).

275. Section 8 Housing Vouchers, 53 Fed. Reg. 34,371, 34,374-75 (1988) (to be codified at 24 C.F.R. § 511).

276. *Id.* at 34,398; 24 C.F.R. § 882.103 (1988). In general, the housing must be sanitary, it must contain adequate toilet facilities, kitchen facilities, hot and cold running water, a living room, bedroom, safe heating and/or cooling system, and adequate lighting. Although this list is not exhaustive, it does cover the basic requirements. *Id.*

277. *Id.* at 34,393. The family may refuse the offer of a housing voucher if they prefer to wait for the availability of a certificate and vice versa. If, however, a family refuses the offer of both, they may be removed from the waiting list. *Id.*

278. *Id.* at 34,403, 24 C.F.R. §§ 813.107, 882.102. HUD provides the following simple example for the computation of the requisite tenant payment:

The main difference between the programs is that with a certificate, the rent charged by the owner cannot exceed ceilings set by HUD,[279] while the voucher program allows the rent to exceed HUD's ceilings, but the family is required to make up the difference.[280] The primary shortcomings of the housing voucher and the certificate programs are the long waiting lists, and the fact elderly and handicapped persons are granted preference for the receipt of a voucher or certificate over low income families.[281]

Hence, there are many less restrictive programs the legislature could implement. The best approach is a quota system combined with an increase in the low income housing credit.[282] This would account for the needs and desires of both families with children and those who wish to live in a child-free environment. It would generate revenues which could be used to finance programs designed to provide incentives to developers to enter the low income rental market and for existing owners to remain in the market.

VI. Conclusion

There are areas of the country facing a severe rental housing shortage with an inordinate number of all-adult apartment communities. However, the areas of the country reflecting the most serious problems account for 53 percent of the population increase nationwide.[283] The supply of

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> [I]f a family qualifies for a four-bedroom housing voucher under the PHA occupancy standards and has monthly adjusted income of $500, and the payment standard amount for a four-bedroom housing voucher is $600, the housing assistance payment for the family is the payment standard amount ($600) minus 30 percent of the family's monthly adjusted income ($150) which is $450.

Id. at 34,403. Monthly adjusted income is 1/2 of a family's annual income less allowances for each dependent, elderly family members, handicapped assistance expenses, and child care expenses. 24 C.F.R. § 813.102 (1988).

279. 24 C.F.R. § 882.104 (1988). Under the certificate program a certificate will not be issued if the fair market rent for the apartment exceeds HUD's set ceilings. *Id.*

280. 53 Fed. Reg. § 887.209 (1988). The voucher program allows the rent charged to exceed the fair market rent by approximately $20 to $50, but the participating family must account for the difference. Telephone interview with Pat Beeler, Clerk for Program Manager of the Indiana Department of Human Services (March 1, 1989).

281. As of March 1989, the public housing authority for Marion County, Indiana ceased accepting applications. There are approximately 5,000 families currently on the waiting list, and a family has to wait approximately three years before receiving a voucher or certificate. Elderly and handicapped persons are granted preference and may receive a voucher or certificate in about six months. Additionally, the landlord may not decide to rent the apartment in compliance with the program requirements. Therefore, the unit is not devoted to low-income housing for a long period of time. Telephone interview with Pat Beeler, Clerk for Program Manager of the Indiana Department of Human Services (March 1, 1989).

282. I.R.C. § 42 (1986).

283. *See supra* note 43 and accompanying text.

rental housing is not meeting the demand as there is an increase in the number of rental units removed from the market annually, and a decrease in the construction of new units.[284]

HUD's previous enforcement policies under the Fair Housing Act were not effective.[285] The 1988 Amendments provide much more effective enforcement procedures. The Amendments put the burden of preparing and financing a legal action on the government, allowing more victims to take advantage of the protection provided. It further provides for conciliation agreements and binding arbitration which may alleviate the necessity of going to court.

Remedial legislation is definitely needed, but it should not consist of a complete prohibition of child-exclusionary policies. The statistics do not call for such broad-sweeping legislation. Adults without children occupy the great majority of rental units.[286] The segment of the population facing the greatest housing problems is low income families with children, but statistics suggest inadequate income, not familial discrimination prompts this problem.[287] Obviously, the legislature must place a limit on the amount of familial discriminatory policies allowed in a given case, but statistics do not call for a total prohibition of such policies.

Families with children have a fundamental right to privacy to live as a nuclear family.[288] However, the other 67.6 percent[289] of the rental market has a corresponding right to privacy which should be recognized and respected. This right to privacy includes the right to live in an environment of their choice.[290]

Apartment owners also have legitimate reasons to exclude or restrict children. The legislature must remember that apartment complex owners entered the rental market to generate a profit. Apartment owners face increasing difficulties in receiving rental receipts which exceed operating costs.[291] Furthermore, many developers designed and built complexes with added features specifically for adults. These amenities become attractive nuisances to children and, therefore, apartment owners may be held to a higher standard of care in negligence actions when children are present.[292] These costs may appear insurmountable and may prompt landlords to get out of the rental market. Furthermore, these costs are a barrier to

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284. *See supra* note 45 and accompanying text.
285. *See supra* note 142 and accompanying text.
286. *See supra* note 57 and accompanying text.
287. *See supra* note 73 and accompanying text.
288. *See supra* notes 221-31 and accompanying text.
289. *See supra* note 57 and accompanying text.
290. *See supra* notes 221-31 and accompanying text.
291. *See supra* note 44 and accompanying text.
292. *See supra* notes 246-48 and accompanying text.

developers who are considering investments in the rental market.

There are less restrictive measures to control familial discrimination than total prohibition. These consist of a quota system which would allow a certain number of all-adult apartment communities in each town or city. This system has the advantage of flexibility lacking in the Fair Housing Amendments Act of 1988.[293] The quota system would generate revenue which the government could use to offset revenue lost through an increased percentage for the low income housing tax credit. This program has the advantage of directly targeting the problem areas and increasing the availability of adequate rental housing for low income families with children. The same cannot be said of the 1988 Amendments to the Fair Housing Act,[294] which are far too sweeping and which will hinder provision of adequate rental housing to the low income rental market.

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293. Pub. L. No. 100-430, 102 Stat. 1619-36 (1988).
294. *Id.*