Exclusion of Families with Children from Housing

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EXCLUSION OF FAMILIES WITH CHILDREN FROM HOUSING

For most of this century the middle-class American dream has centered on the family and the home. Traditionally, couples married young and intended to have children; they began their married lives in apartments or in modest single-family homes. Familial prosperity was expected to keep pace with pregnancies as the families moved into ever larger homes in ever more affluent areas.

However much that image may once have reflected the common middle-class American experience, today it represents only one of several family and housing patterns. A variety of social and economic phenomena, including changes in the role of women, a rising divorce rate, greater mobility, and higher interest rates for mortgages, has contributed to this change. At the same time, another phenomenon has become more prevalent: the exclusion of families with children from housing.

Although the gravity of the exclusionary practice varies with the availability of housing in any given geographical area, statis-


2. See R. Goetze, supra note 1, at 4-7 (discussing changes in demographics of home ownership).

3. Many commentators have addressed this topic. Recent discussion has centered on an interesting group of California cases. See infra text accompanying notes 132-40. See, e.g., Dunaway & Bled, Discrimination Against Children in Rental Housing: A California Perspective, 19 Santa Clara L. Rev. 21 (1979) (discussing applicability of California Civil Rights Act to rental housing); O'Brien & Fitzgerald, Apartment for Rent—Children Not Allowed: The Illinois Children in Housing Statute—Its Viability and a Proposal for its Comprehensive Amendment, 25 DePaul L. Rev. 64 (1975) (analyzing current Illinois law and proposing an amendment); Travalio, Suffer the Little Children—But Not in My Neighborhood: A Constitutional View of Age-Restrictive Housing, 40 Ohio St. L.J. 295 (1979) (applying federal constitutional law to questions of age-exclusive housing); Note, Why Johnny Can't Rent: An Examination of Laws Prohibiting Discrimination Against Families in Rental Housing, 94 Harv. L. Rev. 1829 (1981) (seminal Note discussing child discrimination as one facet of a general housing shortage) [hereinafter cited as Note, Why Johnny Can't Rent]; Note, Housing Discrimination Against Children: The Legal Status of a Growing Social Problem, 16 J. Fam. L. 559 (1977) (discussing history of topic) [hereinafter cited as Note, Housing Discrimination].
tics show that exclusionary policies potentially affect millions of people. Until recently, only a few states had established any policy on this type of exclusion.4 Because market forces controlled the situation, landlords asserted without any supporting evidence the need to exclude children from their housing units.5 Meanwhile, families in some areas waited for months before finding any affordable housing.6

The dilemma suggests no easy answer. One cannot dismiss out of hand the economic interests of landlords or the privacy interests of families. Moreover, landlords do not stand alone in their opposition to the presence of children; indeed, many potential neighbors of currently excluded families demand the right to continue living in adults-only neighborhoods. Among those objecting to the presence of children, the elderly as a class most strongly assert a need to live in a neighborhood without children.7 Any solution must respect all these interests.

Historically, child-exclusion policies have most frequently affected apartment dwellers. Nevertheless, recent changes in housing trends have drawn other types of housing into the controversy.8 Because they are often structurally similar to apartments, condominiums have received a large amount of legal attention.9 Furthermore, the presence of large numbers of elderly people has contributed to efforts to exclude children from mobile home parks.10 Finally, although private homes have re-

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4. See infra text accompanying notes 111-30.
6. See CBS News, Adults Only, supra note 5; CBS News, No Kids Allowed, supra note 5; R. Goetz, supra note 1, at 45. The rental market in California is so tight that some families seek shelter in residential hotels and motels. Predictably, they are experiencing exclusion in that sector and are pursuing legal remedies. See CAL. DEP'T OF FAIR EMPLOYMENT AND HOUSING, ADDENDUM TO DIRECTIVE 22, Feb. 1, 1985.
7. See, e.g., Doyle, Retirement Communities: The Nature and Enforceability of Residential Segregation by Age, 76 MICH. L. REV. 64 (1977) (discussing the constitutionality of retirement communities reserved exclusively for the elderly); Travalio, supra note 3.
8. See R. Goetz, supra note 1; see infra text accompanying notes 23-35.
mained comparatively free of such regulation, some private housing developments have recently begun to enforce child-exclusion policies.\textsuperscript{11}

Excluded families seeking federal protection have met with little success.\textsuperscript{12} States, however, have taken a variety of positions on this issue. Nine states have enacted statutory measures explicitly prohibiting the exclusion of children from housing.\textsuperscript{13} Although none of the remaining jurisdictions have enacted statutes specifically addressing this matter, courts in two of these states have applied provisions in state civil or human rights statutes to the question. One of these states, California,\textsuperscript{14} forbade the practice of child exclusion, while the other, Michigan,\textsuperscript{15} permitted it. Nevertheless, the majority of the states have yet to address the problem.\textsuperscript{16}

This Note attempts to resolve the most significant problems raised by discrimination against children in housing. Part I briefly analyzes the prevalence of child exclusion in different types of housing. It also provides a statistical analysis of the rental housing market to enable the reader to gauge the extent of the problem in one type of housing. Part II discusses policy arguments supporting both those who seek to exclude children

\begin{enumerate}
\item See infra text accompanying notes 86-110.
  \begin{enumerate}
  \item Section 51 shall be construed to prohibit a business establishment from discriminating in the sale or rental of housing based upon age. Where accommodations are designed to meet the physical and social needs of senior citizens, a business establishment may establish and preserve such housing for senior citizens . . . .
  \item This section is intended to clarify the holdings in Marina Point, Ltd. v. Wolfson . . . and O'Connor v. Village Green Owners Association . . . .
\end{enumerate}
\item Michigan Dep't Civil Rights v. Beznos Corp., 421 Mich. 110, 365 N.W.2d 82 (1984) (interpreting state civil rights act to allow landlord to refuse to make certain apartments available to families with children).
\item One state, Ohio, has adopted a policy allowing landlords to discriminate against children. In Lamont Bldg. Co. v. Court, 147 Ohio St. 183, 70 N.E.2d 447 (1946), the Ohio Supreme Court held that landlords may confine occupancy of apartments in apartment buildings to adults and evict a tenant who brings a child to live in the apartment.
and those who advocate government policies forbidding exclusion. Part III then examines the various approaches that states have adopted in this area, as well as federal implications of the issue. Finally, the Note presents a model statute designed to achieve a just accommodation of the interests of all the parties involved in this controversy.

I. BACKGROUND

The exclusion of families with children from housing primarily burdens families who rent apartments. Recent litigation suggests, however, that exclusionary practices occur in all types of housing. No statistics exist to indicate the extent to which exclusion affects families. Nevertheless, estimates tend to show that millions of families must contend with exclusionary policies.

A. Scope of the Problem

Although child exclusion is not a new problem, the attention the issue has received and the litigation it has spawned have increased dramatically in recent years. A shortage of affordable housing, which has become acute in some regions, has forced excluded families to seek judicial assistance in overcoming discriminatory barriers. To aid them in their court fights, many of these families have turned to advocates of children's and tenants' rights. Over time these groups have developed expertise in the field and have striven to persuade lawmakers to establish a coherent policy preventing child exclusion. These two factors, a shortage of housing and increasing numbers of well-represented plaintiffs, have caused the controversy of child exclusion to spill over from rental housing into all types of housing.

Because the exclusion of children from apartments best ex-

17. New Jersey passed the first state statute prohibiting housing discrimination against children in 1898. L.1898, c. 235, p. 794.
18. See supra notes 1, 3, 5, and 7.
20. These groups include the Fair Housing Project, Santa Monica, Cal.; the National Center for Youth Law, San Francisco, Cal.; and the Fair Housing Center, Detroit, Mich.
21. See, e.g., YOUTH LAW NEWS, published by the National Center for Youth Law.
22. Throughout this Note “apartment” refers to a single unit, “apartment building” refers to a building containing several apartments, and “apartment complex” refers to a
emphasizes the general problem, this Note discusses exclusion from rental housing. Nevertheless, to formulate a coherent, consistent policy regulating child exclusion, one must examine the broad scope of the problem. The following cases demonstrate the patchwork approach courts have taken in addressing child-exclusion issues and thus emphasize the need for uniform legislation covering all types of housing.

Two state courts have considered the subject of exclusion of families from condominiums. The California Supreme Court relied on an earlier decision\(^{23}\) to hold that a condominium owners' association may not prohibit a family with children from living in a condominium.\(^{24}\) The Supreme Court of Florida reached the same conclusion when it affirmed a lower court's refusal to allow a condominium owner to exclude a family with children from its condominium.\(^{25}\) The Florida court, however, issued a much more limited ruling than its California counterpart. It based its holding on the landlord's unequal application of its policy\(^{26}\) and stated that it would not hesitate to uphold an exclusionary policy that was applied fairly to all residents.\(^{27}\)

As in the case of condominiums, two state courts have spoken on the subject of exclusion from mobile homes. Although an Arizona statute forbids discrimination against children in rental housing,\(^{28}\) an appellate court in that state refused to apply the statute in a non-rental case and enforced a restrictive covenant against parents who lived in a mobile home development with their minor children.\(^{29}\) In *Adamson Cos. v. Zipp*,\(^{30}\) a California group of apartment buildings under single ownership or management.

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For the purpose of the decision, the court ruled that the association was the alter ego of the condominium developer, and thus fell within the category of business establishments proscribed by the state statute from discriminating in real estate transactions.


26. *Id.* at 352.

27. *Id.* at 351. The Florida appeals court had relied on federal constitutional decisions—Loving v. Virginia, 388 U.S. 1 (1967) (discussing the right to marry); Griswold v. Connecticut, 381 U.S. 479 (1965) (discussing the right to marital privacy); Skinner v. Oklahoma, 316 U.S. 535 (1942) (discussing the right to procreate)—to establish that exclusion affected areas of privacy that the fourteenth amendment protects. Franklin v. White Egret Condominiums, Inc., 358 So. 2d 1084 (Fla. Dist. Ct. App. 1978), aff'd on other grounds, 379 So. 2d 346 (Fla. 1979). In affirming the lower court ruling, the state supreme court clearly disapproved that court's dicta concerning exclusionary policies.


appellate court recently extended its line of cases prohibiting child exclusion in order to protect families living in mobile home developments. In an earlier case, the California Supreme Court had excepted mobile home parks designed specifically for older people from the prohibition against child exclusion. The Zipp court did not find the park under consideration to be a specialized facility and held that the park could not exclude the plaintiff and his family.

Although federal and some state statutes prevent discrimination in the sale of private homes, no parents had challenged their exclusion from housing they had owned previously until a family living in an adults-only community in Florida challenged the use of a restrictive covenant to evict them from their home after the birth of a child. A lower state court ruled that "age restrictions are not odious if they are reasonable and are not used to prevent people from finding housing." It is not surprising that little exclusion of children has occurred in private homes. The notion of age-homogeneous neighborhoods is relatively new, and so owners and developers have only recently considered excluding families. Moreover, parents did not consider litigating until challenges to exclusionary policies in other types of housing became more frequent and more successful.

fused to address the question that would arise if the owner of property encumbered by a restrictive covenant against children attempted to rent his or her property to a family with children. 22 Ariz. App. at 227, 526 P.2d at 751. In response, the legislature amended the relevant statutes to make it a petty offense to rent to children in violation of a restrictive covenant or to rent property to a family with children within an "exclusive adult subdivision." ARIZ. REV. STAT. ANN. § 33-303(B) (Supp. 1983-1984). At the same time, the legislature reduced the penalty for refusing to rent to families with children from its earlier punishment of a "first offense by a fine of not less than one hundred nor more than five hundred dollars, and for a subsequent conviction by a fine of five hundred dollars, by imprisonment for three months in the county jail, or both." ARIZ. REV. STAT. ANN. § 33-303 (1974). The current statute treats all violations as petty offenses, ARIZ. REV. STAT. ANN. § 33-303 (Supp. 1984), punishable by fines of not more than three hundred dollars. ARIZ. REV. STAT. ANN. § 13-802(D) (1978).


34. Frank, Move, supra note 11.

35. See Travatio, supra note 3; Doyle, supra note 7.
B. Statistical Background

No definitive figures exist on the number of families excluded from housing because of their children. Because few people as yet perceive a problem in non-rental housing, no one has undertaken a statistical study of the exclusion of children from such housing. Despite its methodological limitations, a study sponsored by the Department of Housing and Urban Development (HUD) and performed by the Institute for Social Research at the University of Michigan (ISR) addresses the more common phenomenon of discrimination in rental housing. Relying on a random sampling of renters and apartment managers, the report considers only instances of outright discrimination and ignores subtle cases in which landlords or managers choose to rent to single persons or couples in preference to families with children. Although it may underestimate the problem, the ISR study, along with census figures, suggests the extent of exclusion in rental housing.

The 1980 census found approximately 59 million families in the United States, over half of which (30.5 million) include children under eighteen and approximately twenty percent of which (13 million) include children under six. About 43 million of these families live in urban areas; once again, half of these families include children under eighteen and about twenty percent include children under six. Given an average family size of 2.75 people, these figures indicate that approximately 84 million people belong to families containing children under eighteen, and approximately 36 million belong to families with children under six.

About forty-four percent (68 million) of all people living in non-institutional housing live in rental units, a term which in-
cludes both single-family houses and multiple-dwelling units.\textsuperscript{43} The Bureau of the Census has apparently not correlated this percentage of renters with the percentage of people with children. As raw figures, however, these data suggest that exclusionary policies affect a large proportion of the population. Although several other factors should enter into a definitive statistical analysis, if one assumes that the number of people in rental housing reflects demographically the population as a whole, then half of all renters belong to families with children under eighteen. As a very rough figure, therefore, these policies potentially exclude as many as 34 million people from rental housing.\textsuperscript{44}

The problem becomes more tangible when one looks at figures for a single class of people: single women who head households. Such households account for about forty percent of all renters, the largest single group.\textsuperscript{45}

\begin{center}
\textbf{Households Headed by Women Without Husbands}\textsuperscript{46}
\end{center}

\begin{tabular}{lcc}
 & Nationwide & Urban \\
\hline
Total & 8.2 million & 6.8 million \\
With children & & \\
Under 18 & 4.9 million & 4.2 million \\
Under 6 & 1.7 million & 1.5 million \\
\end{tabular}

Moreover, female-headed households have less than half the average income of households in which spouses live together.\textsuperscript{47} Because low income decreases a person's flexibility in searching for housing, the people comprising this large segment of the population must depend on their landlords' continued willingness to allow them to live with their children in rented housing.

The foregoing analysis emphasizes the potential seriousness of widespread exclusionary policies. Furthermore, the fact that approximately one out of every five rental units currently excludes families with children adds to the gravity of the problem.\textsuperscript{48} Finally, the larger the number of children in a family, the greater is the likelihood that the family will be excluded from housing.\textsuperscript{49} By preventing them from finding adequate rental housing, the

\textsuperscript{43} Id. at B-9.
\textsuperscript{44} See generally \textit{Housing Census}, supra note 42.
\textsuperscript{45} A. Downs, supra note 1, at 3.
\textsuperscript{46} \textit{Population Census}, supra note 39, at 1-69.
\textsuperscript{47} A. Downs, supra note 1, at 3.
\textsuperscript{48} Marans, supra note 37, at ES-2.
\textsuperscript{49} Id.
policy of excluding families with children primarily burdens those families already suffering the economic pressures associated with large families.

II. PUBLIC POLICY

Landlords and tenants who support policies excluding families with children rely upon specific instances of children's misbehavior or upon the tastes of individual renters to argue for a broad freedom to impose restrictions on renting to families. In contrast, advocates of unrestricted access to housing point to the fallacy of their opponents' characterization of most children as annoying. Furthermore, they argue, families looking for housing would more than fill vacancies generated by tenants who would move rather than be forced to live near children.

A. Policies Favoring the Exclusion of Children from Rental Housing

Two notions support the exclusion of families with children from rental housing. First, because children are boisterous, they will annoy other tenants.\(^{50}\) Second, having children as tenants will cost landlords money.\(^{51}\) The two themes are closely interwoven: because children frequently destroy property, they cost landlords money in upkeep and insurance, and, partly in response to children's objectionable behavior, potential tenants choose to live elsewhere, causing landlords either to forego rents or else to pay more to advertise and secure new tenants.\(^{52}\) Despite the close relationship between these two factors, one can trace the individual strands of the arguments.

1. Children's offensive behavior—The leading case on child exclusion from the early 1970's, Flowers v. John Burnham and Co.,\(^{53}\) addressed the argument that landlords have a right to ex-

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52. CBS News, Adults Only, supra note 5.

clude certain classes of tenants because of an expectation that such tenants will engage in undesirable conduct. The appellate court upheld a landlord's exclusion of boys over five from his apartments, finding that "the independence, mischievousness, boisterousness and rowdyism of children vary by age and sex," and that "regulating tenants' ages and sex to that extent is not unreasonable or arbitrary."\textsuperscript{54}

As a threshold matter, one should note that the Flowers court required no evidence that any tenants actually objected to the presence of particular children, but instead held that the effusive behavior of children in general justified their exclusion from an apartment complex. Precisely because the court relied on group characteristics to exclude individuals, the California Supreme Court subsequently overruled Flowers,\textsuperscript{55} maintaining that "[e]ven a true generalization about [a] class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."\textsuperscript{56} Despite the California Supreme Court's position, however, other states need not forbid owners from engaging in these group generalizations.\textsuperscript{57}

Of course, some tenants do in fact respond negatively to the presence of any children, often voicing aesthetic concerns.\textsuperscript{58} Other tenants may raise more serious objections to the presence of children and adolescents. Especially when individual children have engaged in acts of vandalism, landlords and other tenants may generalize from that behavior and exclude people whom they perceive as potential troublemakers.\textsuperscript{59}

In addition to the problem of generalization, the variety of

\begin{flushright}
54. Id. at 703, 98 Cal. Rptr. at 645.
56. Id. at 740, 640 P.2d at 127, 180 Cal. Rptr. at 508 (quoting Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 708 (1978) (emphasis omitted)).
57. The California legislature and California Supreme Court protect an extremely broad range of classes under their equal protection guarantees. See the discussion of protected classes in Marina Point, Ltd. v. Wolfson, 30 Cal. 3d. 721, 730-36, 640 P.2d 115, 120-24, 180 Cal. Rptr. 496, 502-06, cert. denied, 459 U.S. 858 (1982). Not every state will draft or interpret its constitution and statutes so broadly.
58. "The noise and laughter of children at play may be music to the ears of their parents and others who are kindly disposed toward children. That noise, laughter and occasional boisterousness, however, can be greatly disturbing to those not so favorably disposed." O'Connor v. Village Green Owners Ass'n, 132 Cal. App. 3d 178, 183 Cal. Rptr. 111, 117-18 (1982), rev'd, 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983).
59. Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 727-28, 640 P.2d 115, 118, 180 Cal. Rptr. 496, 500, cert. denied, 459 U.S. 858 (1982) (landlord argued that previous young tenants had "engaged in annoying or potentially dangerous activities," and that the landlord was therefore justified in excluding families with children in the future).
\end{flushright}
people's reactions to the presence of children in housing increases the difficulty in resolving the controversy. At one extreme are those tenants who, without any reason stronger than a preference for a particular style of life, wish to live apart from children. At the other extreme stand those tenants who have suffered some injury, either trivial or serious, and now generalize in order to avoid repetitions or even reminders of the injury. Despite the difference in the merits of their claims, both of these groups will unite to protest any action that allows the presence of children in a particular housing area.

Any analysis of this problem must also address the views of a particularly vocal group of tenants—the elderly. While some authorities question the validity of excluding children from housing for the general public, a significant number of commentators agree that the elderly have a right to live in communities reserved for their exclusive use if they so desire. To support their view, these commentators cite the many social and psychological benefits that accrue to the elderly in retirement communities. In particular, they note that a disproportionately high number of crimes committed against the elderly occur in the world outside their retirement communities and that adolescents and young adults perpetrate a disproportionate number of these crimes. Thus, commentators suggest that segregating the elderly from the young will tend to lower the rate at which the latter prey on the former.

60. CBS News, No Kids Allowed, supra note 5; CBS News, Adults Only, supra note 5.
61. See Doyle, supra note 7; Travalio, supra note 3.
62. See Dunaway & Blied, supra note 3; O'Brien & Fitzgerald, supra note 3; Travalio, supra note 3; Note, Why Johnny Can't Rent, supra note 3; Note, Housing Discrimination, supra note 3.
63. See generally Doyle, supra note 7 (examining constitutional challenges to retirement communities and concluding that it is constitutionally permissible to exclude the young from areas zoned or planned for the elderly); Travalio, supra note 3; see also Riley v. Stoves, 22 Ariz. App. 223, 229, 526 P.2d 747, 753 (1974) (finding the exclusion of children from a mobile home park permissible behavior because older adults' "housing interests and needs differ from families with children").
64. In these communities the elderly live within a network of friends with similar interests who often serve to take the place of friends who have died or moved away. Travalio, supra note 3, at 318-19. Removed from the outside world with its pervasive work ethic, they can enjoy their retirement without feeling idle or superfluous. Id. Unlike most apartment buildings, these communities can provide special physical facilities, such as ramps, wide doors, and housing on one floor. Id.
65. Id. at 319-20.
66. The segregation may not itself protect the elderly. Rather, a retirement community may better afford its residents protection. For example, the neighborhood may be more easily patrolled and the building doors more securely guarded. No one, however, seems to have raised the counterargument that a high concentration of old people in a
Many elderly people also argue that because they have already raised their own children, they have the right to live the remainder of their lives apart from those of other people. This attitude resembles the aesthetic disapproval of tenants that was discussed earlier. To resolve these problems, the law, while acknowledging that society generally allows individuals to choose particular lifestyles without having to defend their choices, steps in when these choices interfere with conflicting choices made by others.

2. Economic injury to landlords—Landlords and apartment managers may also advocate exclusion. Unlike tenants, however, who presumably care only about the quality of their individual lives, landlords and managers concern themselves both with the physical maintenance of apartment buildings and complexes and with the collective contentment of residents as reflected in continued full occupancy. At first sight, one might expect the property damage children cause to play an important role in landlords’ decisions to exclude children. The evidence, however, does not support this position. The HUD/ISR survey, which solicited apartment managers’ reactions to the presence of children in their units, found those managers who rented to families with children least likely to deem children a problem.

Of course one could attribute this finding to the fact that those landlords least likely to find children a problem may, in turn, choose most frequently to rent to families with children. On the other hand, one might instead draw the conclusion that once landlords rent to tenants with children they realize that children often do not present a problem. Although no conclusive evidence exists for either position, a portion of the HUD/ISR study bolsters the latter interpretation.

The study found no basis for the landlords’ assumption that the presence of children in their apartments leads to increased neighborhood may make it more conspicuous and hence more vulnerable to attack.

67. CBS News, Adults Only, supra note 5.
68. See supra text accompanying note 58.
70. When asked to rate difficulties associated with managing apartments, only one percent of the managers responding included children on their list. MARANS, supra note 37, at 66-67. “Managers of buildings or complexes not accepting children are twice as likely as managers of buildings and complexes accepting children to view each [of several suggested areas where children might cause trouble] as problematical.” Id. at 66.
71. Id. at 57, 60. See also D. ASHFORD & P. ESTON, THE EXTENT AND EFFECTS OF DISCRIMINATION AGAINST CHILDREN IN HOUSING: A STUDY OF FIVE CALIFORNIA CITIES 36 (1979).
repair costs and increased insurance premiums. The study also indicated that landlords' views do not represent an accurate assessment of the cost of allowing children as tenants, but rather are a facile answer to those parents seeking housing for themselves and their families. Landlords combine their assumptions about property costs with further assumptions about the concerns and prejudices of their tenants who, they assert, will move out if children are allowed to move in. The study found that approximately twenty-five percent of those apartment dwellers living in housing that excludes children explicitly chose to live there because of that exclusionary policy. This significance of child exclusion policies to potential tenants suggests that even landlords who realize that children present few problems to them directly may still choose to exclude children to appease their tenants.

Although the arguments up to this point have emphasized the harm that children can cause their neighbors or the landlords' property, landlords have also raised a number of concerns about harm to children. In defense of an exclusionary policy, landlords have argued that their apartment complexes were designed with traffic patterns that did not take into account the presence of children. Landlords maintain that they must plan construction sites and recreation facilities to avoid endangering young children or that they must confine children to one portion of a large complex to prevent their roaming unattended over dangerous areas. Although no court has definitively ruled on the validity of these arguments, courts in Michigan have ruled in favor of landlords asserting the claims.

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72. Marans, supra note 37, at 59.
73. Id. at 65.
76. Id.
77. Id.
B. Public Policies Opposing the Exclusion of Children from Rental Housing

Opponents of the exclusion of children from rental housing often maintain that landlords cannot impose restrictions on children who have not themselves harmed anyone.\textsuperscript{79} The California Supreme Court, for example, noted in one case that no concrete facts existed regarding the number of children involved in offensive activities to support the plaintiff landlord's worries about future misbehavior.\textsuperscript{80} In general, landlords' fears of annoying and destructive behavior from child tenants appear to be greater than reality warrants.\textsuperscript{81}

Furthermore, the HUD/ISR study results directly conflict with the assertion that tenants would never rent or would move if forced to live near children. While about seventeen percent of tenants currently living in age-restricted apartments would leave if children moved into the apartments, eighty-one percent would remain.\textsuperscript{82} Likewise, about seventy-five percent of those participating in the study did not choose their present apartment on the basis of whether or not the landlord had an exclusionary policy.\textsuperscript{83}

Although the twenty percent of tenants who refuse to live with children constitute a significant number of renters, they represent a small minority when compared with the fifty percent of families seeking apartments who claim that they have been victims of discrimination.\textsuperscript{84} Indeed, the fact that the number of people seeking rental housing for themselves and their children appears to offset the number of people who might move when faced with the prospect of young neighbors contradicts the landlords' assertion that they would lose tenants if forced to rent to families with children. Consequently, a sensible public policy

\textsuperscript{79} Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 728, 640 P.2d 115, 118, 180 Cal. Rptr. 496, 500 (presenting landlord's argument that the misbehavior of other children in the past justified the exclusion of a family with a new baby, despite neighbors' assertions that the baby caused no problems), \textit{cert. denied}, 459 U.S. 858 (1982). \textit{See also supra} notes 55-57 and accompanying text.


\textsuperscript{81} \textit{See supra} text accompanying note 72.

\textsuperscript{82} \textit{See supra} text accompanying note 37, at 61.

\textsuperscript{83} \textit{See supra} text accompanying note 73.

\textsuperscript{84} \textit{Marans, supra} note 37, at ES-3.
should attempt to avoid this restriction on families’ ability to rent freely and limit exclusionary policies only to exceptional circumstances.85

III. THE LEGALITY OF EXCLUDING CHILDREN FROM HOUSING

Although plaintiffs have sought relief from exclusionary policies under both federal and state laws, federal courts do not appear to be a successful arena in which to challenge exclusionary policies. Plaintiffs have had difficulty satisfying standing requirements for constitutional or civil rights actions, and other statutory protections do not appear to apply to families with children.

In contrast, some state laws do expressly prohibit child-exclusion practices. Although those statutes are frequently underutilized, explicit legislation seems the most desirable solution. Actions under state civil rights acts have led to contradictory and confusing results.

A. Federal Law

Plaintiffs seeking to challenge the exclusionary practices of landlords and property owners under federal law have brought constitutional claims based on either due process or equal protection, or statutory actions under federal civil rights and fair housing statutes. Although courts have not yet addressed all the issues in these areas, plaintiffs have so far enjoyed only limited success. Judging from the rulings courts have made, federal law does not appear to present a fruitful avenue for attacking child-exclusion policies.

1. The Constitution— The United States Constitution does not appear to prohibit the exclusion of children from housing.86 Only in certain limited circumstances does a plaintiff appear able to bring a constitutional challenge against such practices. Because other commentators have discussed in detail the broad constitutional implications of child exclusion,87 this Note will simply summarize and update these arguments.

85. See supra text accompanying notes 61-69.
86. Of course, plaintiffs may have more success under provisions in state constitutions.
87. See Doyle, supra note 7; Travalio, supra note 3.
To allege that the exclusion of children from a dwelling violates either due process or equal protection, a plaintiff must first satisfy the state action requirement. Because the government plays no role in most exclusionary practices, most plaintiffs name private individuals or corporations as defendants and cannot therefore pass this threshold requirement. In an exceptional case, however, *Halet v. Wend Investment Co.*, the Court of Appeals for the Ninth Circuit found state action because the landlord, who refused to rent to a family with a child, had an unusually interdependent relationship with the county. Thus, even though most plaintiffs cannot fulfill the state action test, in special circumstances like *Halet* a plaintiff may be able to raise a constitutional challenge.

A plaintiff who meets the state action requirement must then assert an infringement of her rights that violates either equal protection or due process. To support such an assertion, the plaintiff must establish that the government’s practice involved either a suspect classification or a fundamental right. If the plaintiff establishes either of these, a court must strictly scrutinize the government’s action. Because, however, the Supreme Court has held that age does not constitute a suspect classification, children excluded from housing on the basis of their age cannot challenge the exclusion with the allegation that they be-

88. U.S. Const. amend. XIV, § 1. If the federal government attempts to discriminate, then a plaintiff can challenge its actions under the due process clause of the fifth amendment. U.S. Const. amend. V.

89. See, e.g., *In re Civil Rights Cases*, 109 U.S. 3 (1883) (holding that the fourteenth amendment reaches only state action); cf. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (holding that a state participating in several aspects of the operation of a private business satisfies the state action requirement).

90. If, however, the government passed legislation such as a zoning ordinance that excluded children, a plaintiff could satisfy the state action requirement. A judge who issues an injunction or awards damages in compliance with a discriminatory restrictive covenant might also satisfy the requirement. See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

91. 672 F.2d 1305 (9th Cir. 1982). *See Case Note, Real Property—Prospective Tenant Denied Housing Because of Adults-Only Policy Has Cause of Action Under Fourteenth Amendment and Fair Housing Act—Halet v. Wend Investment Co.*, 672 F.2d 1305 (9th Cir. 1982), 23 SANTA CLARA L. REV. 965 (1983) [hereinafter cited as Case Note].

92. 672 F.2d 1305, 1310 (9th Cir. 1982). Examples of the interdependence included the facts that the county owned the land and leased it to Wend; that the county oversaw the development of the area and had final approval of the plans; that it controlled the use of the buildings and the rent charged; that Wend paid a percentage of the rentals to the county; and that Wend had to abide by all the conditions of its lease, which forbade racial and religious discrimination.

93. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). If the court should determine that there is no basis for strict scrutiny of the challenged statute, then it will ask only whether it is conceivable that the classification bears a rational relationship to an end of government that the Constitution does not prohibit.

94. *Id.* at 313.
long to a protected class. Nevertheless, they might be able to invoke strict judicial scrutiny on some other basis.\textsuperscript{95}

Decisions provide somewhat more hope for success in a challenge alleging the violation of a fundamental right. Although the Supreme Court held in \textit{Lindsey v. Normet}\textsuperscript{96} that access to housing does not represent a fundamental right, a plaintiff might still assert that the exclusion of children violates the right of privacy.\textsuperscript{97} Indeed, in \textit{Moore v. City of East Cleveland},\textsuperscript{98} Justice Powell's plurality opinion stated that government intrusion on choices concerning family living arrangements would trigger a search for a compelling state interest that the discriminatory action furthers.\textsuperscript{99} The \textit{Halet} court interpreted this to mean that if a lower court found that the challenged adults-only rental policy deprived family members of the right to live together, it would have to forbid the practice unless it could discover a compelling state interest.\textsuperscript{100} Thus, to challenge successfully a child-exclusion policy on constitutional grounds, a plaintiff must first establish state action and then demonstrate that no compelling state interest exists.

2. \textit{Statutes—} A number of plaintiffs have challenged child-exclusion policies under federal statutes, specifically the Fair Housing Act\textsuperscript{101} and sections 1982 and 1983 of the Civil Rights Act.\textsuperscript{102} No court, however, has definitively decided whether any of these statutes protect the rights of families excluded from housing because of their children. Instead, plaintiffs have had success only where they could establish that the exclusionary practices disproportionately discriminated against women or minorities.

In \textit{Halet}, the Ninth Circuit reversed the District Court's dismissal of a complaint filed under section 1983,\textsuperscript{103} finding that the

\textsuperscript{95} Halet v. Wend Inv. Co., 672 F.2d 1305, 1309 (9th Cir. 1982) ("Although Halet lacked standing to raise racial discrimination claims under § 1983 and the fourteenth amendment, he clearly has standing to challenge the adults-only policy under § 1983 and the fourteenth amendment on the grounds that it violates his right to raise a family and discriminates against families with children").

\textsuperscript{96} 405 U.S. 56, 74 (1972) ("We are unable to perceive in [the Constitution] any constitutional guarantee of access to dwellings of a particular quality. . . .").

\textsuperscript{97} Halet v. Wend Inv. Co., 672 F.2d 1305 (9th Cir. 1982).

\textsuperscript{98} 431 U.S. 494 (1977).

\textsuperscript{99} \textit{Id.} at 499.

\textsuperscript{100} Halet v. Wend Inv. Co., 672 F.2d 1305, 1310-11 (9th Cir. 1982).

\textsuperscript{101} 42 U.S.C. §§ 3601-3631 (1982).


\textsuperscript{103} Section 1983 provides in relevant part:

\textit{Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes}
landlord’s policies arguably infringed upon the plaintiff’s right to raise a family and discriminated against families with children.\textsuperscript{104} The plaintiff in \textit{Halet}, however, did not pursue his complaint and no other plaintiff has raised a similar section 1983 claim. Consequently, the applicability of section 1983 to child exclusion remains undecided. One should nevertheless note that because section 1983 merely permits a damage action for infringement of constitutional rights, a plaintiff would still have to establish state action and the absence of a compelling state interest.\textsuperscript{105}

Two recent discrimination cases brought under the Fair Housing Act\textsuperscript{106} have presented an intriguing mixture of arguments based on child exclusion and racial discrimination. Among other claims, the plaintiff in \textit{Halet} alleged that because blacks and Hispanics generally have more children in their families than whites, the landlord’s exclusionary policy disproportionately affected them in violation of the Fair Housing Act.\textsuperscript{107} Although the district court found that the white plaintiff in \textit{Halet} had no standing to sue, the Ninth Circuit held that the Act’s liberal standing requirements did grant the plaintiff a cause of

\textit{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.}

\textsuperscript{104} Halet v. Wend Inv. Co., 672 F.2d 1305, 1310-11 (9th Cir. 1982).

\textsuperscript{105} See supra text accompanying notes 88-90.

Plaintiffs have tried to bring suit under § 1982, 42 U.S.C. § 1982 (1982), but because the Supreme Court has held that that section applies only to cases of racial discrimination, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), they have had no success in using that provision to challenge child exclusion policies. In Fred v. Kokinokos, 347 F. Supp. 942 (E.D.N.Y. 1972), the court squarely addressed a claim under § 1982’s provision that “[A]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to … purchase [and] lease … real … property.” The case involved a Puerto Rican family that claimed that their landlord, in refusing to rent to them, had discriminated against them on the basis of race. The plaintiff alleged race discrimination in his complaint, and the court accepted for purposes of argument that ethnic origin could be a racial characteristic. Fred v. Kokinokos, 347 F. Supp. at 944. The landlord argued that he had refused to rent not because they were Puerto Rican but because too many children would occupy the apartment. The court upheld the landlord’s limitation on the size of tenant families, finding that prejudice against the tenants’ nationality had played no part in the landlord’s decision. \textit{Id.} As part of the rationale for its holding, the court quoted from Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1972), which held that § 1982 did not prevent an owner from considering factors other than race when deciding whether to rent to a prospective tenant. Specifically, the court said, “[S]uch factors … include … the size of [a tenant's] family, the ages of his children … .” \textit{Id.} at 162.

\textsuperscript{106} See 42 U.S.C. § 3604 (1982).

\textsuperscript{107} Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 n.6 (9th Cir. 1982).
The Fourth Circuit, in *Betsey v. Turtle Creek Associates*, went beyond *Halet*’s limited standing holding. There, the owners attempted to institute an all-adults policy by forcing those residents who had children to move. Because most of the residents asked to leave were black, the court held that the plaintiffs had established a prima facie case of discriminatory impact under the Act. Thus, the Fair Housing Act, which requires no state action, may afford some relief to minorities subject to child exclusion policies.

**B. State Law**

Only a few states currently have statutes expressly addressing the housing rights of families with children; none of these laws, however, is fully satisfactory. Yet the inconclusive experiences of those states that have attempted to solve the problem through judicial interpretation of general civil rights statutes suggest that a specific statute addressing the rights of all parties is the most desirable solution. An analysis of current state laws and their faults, as well as of judicial decisions, indicates areas in which a model statute can improve existing law.

1. *State statutes forbidding the exclusion of children*—Nine states have to date enacted statutes expressly forbidding discrimination against families with children. Although these statutes address the problem of discrimination against families, tenants have rarely used them. Both the public’s lack of awareness of these statutes and the difficulties involved in pursuing a remedy have contributed to this underuse. Not until legislatures remove these obstacles will landlords abandon their discriminatory practices. The following section describes the sig-

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108. The anomalous facts of *Halet* limit its precedential value. First, the plaintiff fulfilled the state action requirement. See *supra* note 92 and accompanying text. Second, by the time the court decided the case, Los Angeles had passed an anti-discrimination ordinance, which the owner chose to obey even though the apartment complex in which *Halet* resided was located outside the city limits. Nevertheless, rather than deem it moot, the court chose to decide the case because of the following: first, the owner could revert to an adults-only policy in the future, and failed to demonstrate that no reasonable expectation of such an occurrence existed. Second, whether the owner’s new policy had completely eradicated the effect of its prior adults-only policy remained unclear. *Halet v. Wend Inv. Co.*, 672 F.2d at 1307-08.

109. *Id.* at 988.

110. *Id.* at 988.

111. *See supra* note 13.

significant features of these state statutes and discusses some of their strengths and weaknesses.

The problem of tenant underutilization of the protections afforded by state statutes prohibiting child exclusion does not lie in the novelty of antidiscrimination measures; indeed, New Jersey passed such an act in 1898. States enacted the earliest of these laws at a time when landlords wielded even greater power than they do today, and when such laws provided tenants with the only protection they had. The typical antidiscrimination statute contains an initial flat prohibition against child exclusion, followed by a series of exceptions that permit discrimination under certain circumstances. All of the statutes, for example, allow elderly people to live in certain buildings or areas without children. Other exceptions permit child exclusion in one or two-family houses, owner-occupied houses, and temporary leasing situations. Some states also allow restrictions on the number of children in multi-building housing complexes.

Yet the mere existence of these statutes has not resulted in their application. Indeed, little litigation appears to have occurred in this field. This inactivity could imply acquiescence by landlords to the dictates of the statutes or summary lower-court affirmation of tenants' rights. Instead, one survey indicates that ignorance of such antidiscriminatory statutes may explain this inactivity.

113. L. 1898, c. 235, p. 794.
114. Note, Housing Discrimination, supra note 3, at 570.
115. See supra note 13.
116. See supra note 13.
120. Id.; Minn. Stat. § 363.02 (1984).
121. A search on LEXIS, STATES library, using the statute numbers as search terms, discovered one case each in Arizona, Riley v. Stoves, 22 Ariz. App. 223, 526 P.2d 747 (1974) (dealing with privately owned lots in a mobile home development); Connecticut, Jones v. O'Connell, 189 Conn. 648, 652 n.1, 458 A.2d 355, 357 n.1 (1983) (finding that the relevant statute did not apply retroactively); Illinois, Ill. Dep't of Human Rights v. Arlington Park Race Track Corp., 122 Ill. App. 3d 517, 461 N.E.2d 505 (1984) (holding that a court did not have the power to enjoin a discriminatory practice directed against trainers living with their families in the barracks area of a race track); and New Jersey, Gilman v. Newark, 73 N.J. Super. 562, 180 A.2d 365 (1962) (holding that an ordinance prohibiting occupation of rooming houses by minors conflicted with state statute). No cases were found in the other states.
122. O'Brien & Fitzgerald, supra note 3 (reporting that a survey of Illinois district attorneys' offices discovered that many law enforcement officials were unaware that the
The laws prohibiting discrimination against children fall into three categories. One type gives the injured party a right of action against the discriminating landlord.\textsuperscript{123} A second type of statute merely makes it an "unfair practice" to discriminate and authorizes courts to fashion appropriate remedies.\textsuperscript{124} The third group makes discrimination illegal and authorizes the use of criminal sanctions against those who discriminate.\textsuperscript{125}

Unfortunately, under the first two schemes these antidiscrimination measures depend too heavily on the initiative of the injured parties and require familiarity with, as well as access to, the court system. Most potential plaintiffs need a home immediately and consequently have neither the time nor the resources to pursue a complaint. Furthermore, most people, including those connected with law enforcement agencies, do not know that these statutes exist.\textsuperscript{126}

Problems exist even where the state bears the burden of enforcing criminal statutes. Although the threat of criminal prosecution clearly provides a deterrent, the imposition of such sanctions presupposes adequate prosecutorial staffs and sufficient evidence to convict. The Illinois survey, however, indicates that prosecutors do not use these laws,\textsuperscript{127} which suggests that these prerequisites do not always exist.

Because it addresses these problems, the Massachusetts statute merits special attention.\textsuperscript{128} Not only does it confer a private right of action on the party that allegedly suffered the wrong, it also provides an administrative remedy through the Commonwealth Commission Against Discrimination. This agency serves several purposes and helps to eliminate a number of the problems found in other states' statutes. It can help disseminate information about the statute to the public and aid in its invocation.\textsuperscript{129} The agency can develop expertise in processing com-

\textsuperscript{124} \textit{Minn. Stat. §§ 363.02-03 (1984).}
\textsuperscript{126} \textit{See O'Brien & Fitzgerald, supra note 3.}
\textsuperscript{127} \textit{Id.}
\textsuperscript{129} A commission may have more success than an individual tenant in getting a landlord to comply with an antidiscrimination law. For example, a landlord may feel less confident that it could win a war of attrition against the commission. A landlord may also be unwilling to engender ill will in a commission that will review his actions for
plaints and reap the benefits of efficiencies obtained from handling large numbers of claims instead of the infrequent complaints received by local prosecutors' offices throughout a state. Consequently, any statute that seeks to remedy the problem of child exclusion should authorize a commission to enforce its provisions.

2. Judicial interpretation of state civil rights statutes—Many states that do not have statutes explicitly forbidding the exclusion of children in housing do have general civil rights statutes that courts could use to prohibit child exclusion. So far, however, only two state courts have applied their civil rights statutes to the question of exclusionary practices, and they have come to opposite conclusions. Because these statutes appear on the surface to contain no significant differences, these two conflicting cases offer no conclusive resolution of this issue. In fact, each case has raised further questions.

In Marina Point, Ltd. v. Wolfson, the California Supreme Court applied the Unruh Civil Rights Act to a situation where a landlord attempted to evict a family from an adults-only apartment complex after the birth of their son. The court held that the Act prohibited discrimination on the basis of age, even though the Act did not enumerate age as a protected classification. To reach its holding, the court found that the legislature had intended the list of protected classes to be read...

130. See O'Brien & Fitzgerald, supra note 3.

The Massachusetts Commission Against Discrimination indicates that it is able to deal with most problems with a simple telephone conversation with the landlord, and that the threat of legal action is usually sufficient to stop attempted discrimination. (Telephone interview with Leslie Greer of the Massachusetts Commission Against Discrimination (Feb. 28, 1985).)


133. Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 1982):

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

expansively.135

California courts have reached the same result when interpreting the Unruh Act in different contexts. The same year it decided Marina Point the California Supreme Court heard a similar case involving a condominium136 and found that the Act prohibited the builder of the condominium and the association which administered it from discriminating against families with children. In 1984 a California appellate court ruled on a similar issue,137 this time allowing a family with a child to remain in its mobile home despite a park rule prohibiting children.

In spite of the holdings, political forces appear to have undermined these decisions.138 The Department of Fair Employment and Housing, the department empowered to hear complaints of violations of the California civil rights act, has only recently agreed to take complaints from individuals alleging exclusion because of children.139 Just as with statutes that explicitly forbid discrimination against children in housing,140 a legal rule will not achieve its intended purpose unless law enforcers use the rule.

Like the California Supreme Court, the Michigan Supreme Court, in Michigan Department of Civil Rights v. Beznos Corp.,141 has applied its civil rights statute142 to a landlord's discrimination against a family with children. The case involved the owner of two suburban Detroit apartment complexes who permitted families with children to rent in only one part of one complex yet allowed tenants without children to rent an apartment in any part of either complex.143 Unlike its California
counterpart, the Michigan Supreme Court did not rely on legislative intent but on precedent to argue that an expansive reading of the statute would prevent the state from enforcing "'regulations, rules, laws and policies designed to protect children.' " By this it meant that to prohibit a landlord absolutely from discriminating on the basis of age would force landlords to rent to minors acting alone. Because "the civil rights act does not prohibit differential treatment of minors per se where such treatment is reasonably necessitated by the special nature and characteristics of children," the court rejected a broad interpretation of the Act.

The court explicitly stopped short, however, of deciding what restrictions a landlord could impose on families with children. This reticence prompted a dissenting justice to maintain that the court’s ruling decided nothing and that, because it had no relation to the facts of the case, it represented, in substance, an unauthorized advisory opinion. The Michigan Supreme

_Id_. The Department of Civil Rights appealed to the Michigan Court of Appeals, which affirmed the lower court’s decision. Mich. Dep’t of Civil Rights v. Beznos Corp., 125 Mich. App. 500, 336 N.W.2d 494 (1983). In its opinion, however, the court of appeals answered a broader question than the one stipulated to by the parties, finding that the Civil Rights Act "prohibits discrimination on the basis of chronological age in real estate transactions but makes no mention of disparate treatment of families with children." _Id._ at 503, 336 N.W.2d at 495. Citing increased economic burdens that would fall on landlords, as well as the annoyance to tenants desiring to live apart from children, the court "decline[d] to infer a broad legislative intention to require that all apartments be made available to children." _Id._ at 505, 336 N.W.2d at 496. The court of appeals thus left the way open for landlords not merely to segregate children to one portion of a complex, but even to exclude children completely if the landlord’s economic interests or tenants’ wishes seemed to make such a step expedient.

One dissenting judge compared the _Beznos_ case to United States v. Mitchell, 580 F.2d 789 (5th Cir. 1978), in which the Fifth Circuit held that the Fair Housing Act, 42 U.S.C. § 3604 (1982), prevented a landlord from steering black tenants to one area of an apartment complex. The judge argued that the more explicit Michigan statute, which includes age, a category not mentioned in the federal statute, must preclude both the narrow restriction of families to particular buildings as well as the broader restriction, the complete exclusion, which the majority decision suggested might be permissible. Mich. Dep’t of Civil Rights v. Beznos Corp., 125 Mich. App. 500, 507-10, 336 N.W.2d 494, 497-98 (1983) (Mackenzie, J., dissenting).


147. _Id._ at 121, 365 N.W.2d at 88 (1984).


Court's majority opinion suggests that the plaintiff, the Department of Civil Rights, chose to ask the wrong question. Because the plaintiff stipulated too narrow a question, one can predict a spate of other challenges to landlords' actions as tenants attempt to determine exactly what the civil rights act allows their landlords to do.

The experiences of Michigan and California thus demonstrate the uncertainty that results from applying civil rights statutes to the problem of exclusionary policies. Moreover, Marina Point took five years to go from injury to final decision—six if one counts the United States Supreme Court's denial of certiorari. Similarly, Beznos has taken seven years to reach a conclusion on an extremely technical point. Neither case has definitively ruled on all types of housing. In such a volatile area of law, application of state civil rights statutes provides an unsatisfactory remedy.

IV. CONCLUSION AND MODEL STATUTE

The exclusion of children from housing poses a serious problem. The best evidence suggests that as many as one-half of all families seeking rental housing have encountered difficulties because of child-exclusion policies and that more and more landlords are adopting these policies. Moreover, the problem of exclusionary policies has spilled over into other types of housing. Consequently, residents of condominiums, mobile home parks, and even private homes find themselves confronted with obstacles to acquiring property or continuing to live in their homes. Unfortunately, existing statutes have proved ineffective in prohibiting this discrimination. To cure these deficiencies, this Note proposes a model statute that combines the best features of the current statutes with provisions addressing new concerns. While retaining exceptions for valid interests, such as those of the elderly, the model statute would directly prohibit discrimination against children in all forms of housing and would estab-

150. Id. at 117-18, 365 N.W.2d at 86 (1984).
lish a commission to enforce its provisions. In this way it seeks to accommodate the legitimate interests of all parties and to assure adequate and affordable housing to families with children.

**MODEL STATUTE**

**SECTION 1: DEFINITIONS**

In this Act:

(a) "Apartment" means a self-contained dwelling unit containing cooking facilities.

(b) "Apartment complex" means a group of buildings each containing four or more apartments on a contiguous parcel of land owned by the same person.

(c) "Child" means any individual under eighteen years of age.

(d) "Condominium" means an estate in real property consisting of an undivided interest in common in a portion of a parcel of real property together with a separate interest in space in a residential building.

(e) "Elderly person" means a person over sixty years of age.

(f) "Family" means two or more individuals related by blood, adoption, or marriage.

(g) "Infirm person" means an individual with a chronic, debilitating disability.

(h) "Mobile home" means a movable or portable unit, designed and constructed to be towed on its own chassis (comprising frame and wheels), and designed to be connected to utilities for year-round occupancy.

(i) "Private home" means a single-family or two-family dwelling in which the owner maintains a residence for himself or herself and for the members of his or her family.

(j) "Rental housing" means a house, mobile home, condominium, or apartment rented with or without a lease by a landlord to a tenant.
(k) "Tenant" means an individual living in rental housing; it is not limited to the individual(s) signing a lease.

SECTION 2: PROHIBITION OF DISCRIMINATION AGAINST CHILDREN IN RENTAL HOUSING

(a) Except as provided in Section 3, it is unlawful for a landlord to refuse to rent a housing unit to an individual because of the presence of children in the prospective tenant's family or because of the pregnancy of a prospective woman tenant.

(b) It is unlawful for a landlord to terminate a lease, evict a tenant, or refuse to renew an existing lease because of the presence of children in the tenant's family or because of the pregnancy of a woman tenant.

(c) It is unlawful to advertise rental housing or to accept an advertisement for rental housing if the advertisement contains any restriction against renting to a family because of children in the prospective tenant's family or because of the pregnancy of a prospective woman tenant.

(d) It is unlawful to demand or receive a greater sum as rent for the use and occupancy of any premises because of children in the family of the tenant or because of the pregnancy of a woman tenant.

SECTION 3: EXCEPTIONS

Notwithstanding the prohibitions listed in Section 2, the following situations are not unlawful:

(a) This Act does not affect any local, state or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling unit.

(b) This Act does not apply to an owner-occu-
pied dwelling of four or fewer apartments, one of which is occupied by the owner.

(c) This Act does not apply to any apartment house or apartment complex for which the owner has applied for a waiver and for which the waiver has been granted by the state commission for civil rights. The waiver may apply to:

(1) any apartment house in which a majority of the inhabitants are elderly or infirm or both;

(2) any single apartment house in which all current inhabitants have joined in a petition requesting the landlord to exclude families with children.

In either case (1) or (2) above, renting to a family that has children currently living with it shall act as notice to the landlord that the waiver is terminated.

In case (2) above, each new tenant must agree to the conditions of the waiver in order for the waiver to continue to be valid.

(d) In the case of apartment complexes containing one hundred or more apartments, if the number of children living in the complex is equal to or greater than sixty-five percent of the number of apartments in the complex, and if the structure of the buildings and/or the complex is such that families with children may be restricted to specific types of apartments or buildings, then this Act does not apply.

(e) In the case of apartment complexes, it is not unlawful for a landlord to restrict children to specific types of apartments or buildings if there is a rational reason for doing so. Nevertheless, a landlord may not refuse to rent an apartment in a substantially similar building to a family unless the waiver provision in (c)(2) has been fulfilled.

(f) This Act does not apply to the temporary sub-leasing or assignment of an apartment by the principal lessee.
SECTION 4: PROHIBITION OF DISCRIMINATION AGAINST CHILDREN IN OWNED HOUSING

Except as provided in Part 5,

(a) It is unlawful for the owner of any condominium, mobile home, or private home to refuse to sell such condominium, mobile home, or private home to any prospective buyer because of the presence of children in the buyer's family, or because the buyer or a member of the buyer’s family is pregnant.

(b) It is unlawful for any association or organization representing the owners of any condominiums, mobile homes, or private homes, or for the owners of the land on which such condominiums, mobile homes, or private homes are located,

(1) to refuse to sell any such condominium, mobile home, or private home; or

(2) to refuse to approve the sale of any such condominium, mobile home, or private home, or

(3) to interfere in any way with the sale of any such condominium, mobile home, or private home because of the presence of children in the buyer's family or because the buyer or a member of the buyer's family is pregnant.

SECTION 5: EXCEPTIONS

Notwithstanding the prohibitions listed in Section 4, the following situations are not unlawful:

(a) This Act does not affect any local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling unit.

(b) This Act does not apply to any dwelling unit for which the owner has applied for a
waiver and for which the waiver has been accepted by the state commission for civil rights. The waiver may apply to:

(1) Any condominium complex in which a majority of the inhabitants are elderly or infirm or both, and which has been designed specifically for occupancy by such individuals.

(2) Any condominium complex, mobile home park, or subdivision in which all current inhabitants have joined in a petition requesting the owners' association to exclude families with children.

In either case (1) or (2) above, sale of a unit to a family with children must be approved by two-thirds of the current residents of the condominium complex, mobile home park, or subdivision. Such a sale will remove the condominium complex, mobile home park, or subdivision from the protection of this section.

In case (2) above, each new buyer must agree to the conditions of the waiver in order for the waiver to continue to be valid. Refusal to sign the petition shall be grounds for the sale not to be approved.

(c) In the case of condominium complexes containing one hundred or more units, or of mobile home parks covering thirty or more acres, it is not unlawful for the managing association to restrict families with children to one building or group of buildings, or to one geographical area, provided there is a rational reason for doing so.

SECTION 6: REMEDIES

Any person who feels injured by the violation of a provision of Section 1 or Section 4 has the right to complain to the state commission for civil rights, which is designated to petition for relief in any court of competent jurisdiction. If
the commission fails to find a violation within twenty days, the person alleging injury has the right to petition for relief in any court of competent jurisdiction. If a court determines that a person was injured by a violation of this Act, damages are limited to the cost of replacement housing during the time that the party suffered injury.

—George Palmer Schober