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DISCRIMINATION AGAINST CHILDREN IN RENTAL HOUSING: A CALIFORNIA PERSPECTIVE

Baxter Dunaway*
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INTRODUCTION

In recent years, one of the more noticeable trends in housing throughout the United States, and especially in California, has been the growing number of families with young children who are seeking rental housing—as opposed to purchasing a house or other housing accommodation. For some it is a matter of personal preference. For most it is a matter of economic necessity. Regardless of their reasons for seeking rental housing, virtually all of these prospective tenants are quickly confronted with the cold, hard fact that a substantial majority of landlords do not wish to rent to adults who have children.

In the great majority of states, including California, it currently is permissible for owners of rental properties to discriminate by refusing to rent to adults solely because they have children, as well as to evict tenants solely because they have a child during their tenancy. The legal issues raised by this form

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1. "Family" will be used throughout this article as a shorthand term for the family unit, and as used herein it includes any household where there is at least one parent and one or more minor children living with that parent.
2. For example, the Southern California Association of Governments (SCAG) surveyed the six southern California counties within its jurisdiction and found that there were 1.6 million households with children, of which 604,000 (38%) were renters. Of these renter families, 320,000 (53%) were inadequately housed as of January, 1976. Southern Cal. Ass'n of Governments, Supplemental Report to SCAG Regional Housing Allocation Model—Inadequately Housed Families with Children 2 (staff report 1977). The SCAG report defined "inadequately housed" as households paying more than 25% of gross income for housing, having more than 1.01 persons per room (overcrowding), or living in substandard or dilapidated housing. Id. at 1.
3. To use the Los Angeles area as an example, renters' organizations which have conducted informal surveys report that up to 80% of the total available apartment units do not accept children. See Los Angeles Times, June 27, 1978, § 4, at 1, col. 4 (View).
of discrimination are complex and deep-rooted, ranging from matters of statutory interpretation to fundamental questions as to the proper scope and interpretation of constitutionally guaranteed rights. Aside from the purely legal problems which arise from discrimination against children in rental housing, the social and economic issues are of equal magnitude in both complexity and importance.

This article will address the legal issues involved in the refusal to rent to, or to continue to rent to, adults with children, focusing primarily on the current situation in California. First, the present legislative and judicial responses to the problem will be considered. Second, possible federal and state constitutional restrictions on this form of discrimination will be discussed. Finally, various suggestions and proposals for reform will be evaluated, placing emphasis on their practicality in light of current social and political realities.

**Analysis of the Relevant California Statutes**

Nearly every state has at least one broad anti-discrimination statute designed to reach private acts of discrimination, patterned after the various federal civil rights acts. California is no exception. California's Unruh Civil Rights Act, in its present form, expressly prohibits discrimination based upon "sex, race, color, religion, ancestry, or national origin." In addition, California has its counterpart to the Fed-

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For a view of the problem from the other end of the age spectrum—retirement communities, see generally Doyle, Retirement Communities: The Nature and Enforceability of Residential Segregation by Age, 76 Mich. L. Rev. 64 (1977); Comment, Neither Seen Nor Heard: Keeping Children Out of Arizona's Adult Communities Under Arizona Revised Statutes Section 33-1317(B), 1975 Ariz. State L.J. 813.


For a brief but informative discussion of the various state statutes in this area, see Note, Housing Discrimination Against Children: The Legal Status of a Growing Social Problem, 16 J. Fam. L. 559, 572-75 (1977-1978).

7. CAL. CIV. CODE §§ 51-52 (West Supp. 1978). Strictly speaking, only section 51
eral Fair Housing Act in the Rumford Fair Housing Act. The Rumford Act, as amended in 1977, makes it unlawful for "the owner of any housing accommodation to discriminate against any person because of the race, color, religion, sex, marital status, national origin or ancestry of such person."

The language of both of these statutes, by specifying certain types of discrimination which are prohibited, taken by itself would indicate a clear legislative intent to limit the coverage of each Act to discrimination based on the enumerated factors. However, the Rumford Act also contains the provision that "[n]othing contained in this part shall be construed to prohibit selection based upon factors other than race, color, religion, sex, marital status, national origin, or ancestry."

Recent cases and opinions of the Attorney General have construed the Unruh Civil Rights Act to broaden the effective scope of the Act considerably. Although the Rumford Act has up to this point been more limited in its application, the same judicial rationale which led to the expansion of the coverage of

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10. Id. at § 35720(1). For the full text of section 35720, see note 63 infra.

the Unruh Act could feasibly be applied to the Rumford Act by the California courts. Moreover, several attempts have been and will continue to be made by members of the California Legislature to pass new legislation which would specifically prohibit discrimination in rental housing against families.\footnote{In January, 1978, a bill that would have banned discrimination against families in rental housing came within four votes of passage in the California State Senate. S.B. No. 359, introduced by Senators David Roberti and Peter Behr on February 23, 1977, was voted down three times by the State Senate within a one year span of time. In its final amended form, S.B. 359 provided that, with certain exceptions, any person having the right to rent or lease a housing accommodation who refused to rent or lease to any person “solely because such person has a minor child who will occupy the leased or rented premises” would be liable to the person discriminated against as provided in section 52 of the Civil Code. S.B. 359, 1976-77 Reg. Sess., § 3 (1977). S.B. 359 would have also made it illegal to “include in any lease or rental agreement for a housing accommodation a clause providing that as a condition of continued tenancy the tenants shall remain childless . . . .” Id. § 2. On March 20, 1978, Assemblyman Roos introduced two separate bills, A.B. 2979 and A.B. 3000, each of which contains the provision that “[i]t is unlawful for any person to terminate the rental of housing accommodations based upon the age of the tenant or the presence of children in his or her household, unless the facilities are unsafe for such tenant or children.” A.B. 2979, 1977-78 Reg. Sess., § 54400 (1978); A.B. 3000, § 6, 1977-78 Reg. Sess. (1978). A.B. 2979 and A.B. 3000 died in committee.}

\textit{The Unruh Civil Rights Act}

\textbf{A. Legislative History}

Prior to 1959, section 51 of the California Civil Code stated:

All citizens within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of inns, restaurants, hotels, eating houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theaters, skating rinks, public conveyances and all other places of public accommodations or amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens.\footnote{\textit{Cal.} Civ. Code § 51 (West 1954).} In 1959 the legislature designated Civil Code section 51 as the Unruh Civil Rights Act and amended it to read, in pertinent part:

All citizens 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 serv-
ices in all business establishments of every kind what-
soever.\footnote{14} In 1961 the Unruh Act was again amended to substitute
“person” for “citizen” throughout the statute.\footnote{15} Most recently,
in 1974, “sex” was added to the list of prohibited bases of
discrimination.\footnote{16} Hence, the legislative history of the Act
clearly indicates a pattern of successive attempts to stream-
line, to clarify and to improve the language of the Act, as well
as an attempt to specify carefully, and thus to limit, the pro-
hibited bases of discrimination.

B. Judicial Expansion of the Unruh Act

Of even greater significance than the legislative refine-
ments to the Unruh Act has been its interpretation and expan-
sion by the courts. The leading case construing the Act with a
view toward enlarging its scope was \textit{In re Cox},\footnote{17} in which the
California Supreme Court determined that the listing of spe-
cific types of discrimination in the Act was merely illustrative,
rather than restrictive, and that the history and the language
of the Act “disclose a clear and large design to interdict all
arbitrary discrimination by a business enterprise.”\footnote{18}

The factual holding of \textit{Cox} was that a shopping center
could not arbitrarily exclude persons from the premises merely
because they had long hair or wore unconventional dress. The
petitioner in \textit{Cox}, before the Supreme Court of California via
a writ of habeas corpus, had been arrested at a shopping center
and charged with violating a municipal ordinance which pro-
hibited remaining upon “‘business premises’ after being
notified by the owner or lessee or person in charge thereof to
remove therefrom.”\footnote{19} The petitioner had apparently been
asked to leave the center because he was in the company of a

\footnote{14} 1959 Cal. Stats. ch. 1866, § 1, at 4424 (current version at Cal. Civ. Code §
51 (West Supp. 1978)).
\footnote{15} 1961 Cal. Stats. ch. 1187, § 1, at 2920 (current version at Cal. Civ. Code §
51 (West Supp. 1978)).
\footnote{16} 1974 Cal. Stats. ch. 1193, § 1, at 2568 (current version at Cal. Civ. Code §
51 (West Supp. 1978)).
\footnote{17} 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970).
\footnote{18} \textit{Id.} at 212, 474 P.2d at 995, 90 Cal. Rptr. at 27.
\footnote{19} \textit{Id.} at 210 n.2, 474 P.2d at 994 n.2, 90 Cal. Rptr. at 26 n.2. The San Rafael
trespass ordinance in question, section 8.12.210 of the San Rafael Municipal Code,
interacted with the Unruh Act by providing that it would not be effective in an in-
stance in which “its application results in or is coupled with an act prohibited by the
person who was a "long hair" and wore unusual attire.\textsuperscript{20}

The \textit{Cox} court sought to define limits to its broad construction of the Unruh Act by explaining that:

In holding that the Civil Rights Act forbids a business establishment generally open to the public from arbitrarily excluding a prospective customer, we do not imply that the establishment may never insist that a patron leave the premises. Clearly an entrepreneur need not tolerate customers who damage property, injure others, or otherwise disrupt his business. A business establishment may, of course, promulgate reasonable deportment regulations that are rationally related to the services performed and the facilities provided.\textsuperscript{21}

Of special significance in \textit{Cox} was the court's discussion of the legislative and decisional history of the Unruh Act. The decision noted that two cases decided well before the 1959 amendments to the Unruh Act used the Act as a means to reach specific instances of discrimination arguably not within the prohibitory language of the Act. In \textit{Orloff v. Los Angeles Turf Club},\textsuperscript{22} decided in 1951, the California Supreme Court held that the Civil Rights Act barred a race track from expelling a patron who had acquired "a reputation as a man of immoral character."\textsuperscript{23} Later that same year, in \textit{Stoumen v. Reilly},\textsuperscript{24} the supreme court recognized the right of persons reputed to be homosexuals to obtain food and drink in a public restaurant and bar.

In support of its contention that the Unruh Act should be applied to all arbitrary discrimination, rather than being restricted to the categories enumerated on the face of the statute by the 1959 amendment, the \textit{Cox} court reasoned that:

The Legislature enacted the 1959 amendment subsequent to our decisions in \textit{Orloff} and \textit{Stoumen}. Neither of those cases restricted discrimination to 'race, color, religion, ancestry or national origin'—the particular incidents

\begin{itemize}
\item \textsuperscript{20} 3 Cal. 3d at 210, 474 P.2d at 994, 90 Cal. Rptr. at 26.
\item \textsuperscript{21} \textit{Id.} at 217, 474 P.2d at 999, 90 Cal. Rptr. at 31. In subsequent California decisions involving restrictions or regulations imposed by landlords, the courts have shown a greater inclination to find stringent apartment standards "reasonable" and "rationally related to the services performed and the facilities provided" because a shopping center is a business establishment "more open to the public." Newby v. Alto Riviera Apartments, 60 Cal. App. 3d 288, 300-01, 131 Cal. Rptr. 547, 556 (1976). See notes 54-58 and accompanying text \textit{infra}.
\item \textsuperscript{22} 36 Cal. 2d 734, 227 P.2d 449 (1951).
\item \textsuperscript{23} \textit{Id.} at 736, 227 P.2d at 551.
\item \textsuperscript{24} 37 Cal. 2d 713, 234 P.2d 969 (1951).
\end{itemize}
of discrimination specified in the 1959 amendment. We must, of course, presume that the legislature was well aware of these decisions. [citations] We cannot infer from the 1959 amendment any legislative intent to deprive citizens in general of the rights declared by the statute and stanchioned by public policy.25

Yet the court's conclusion in Cox that "in Stoumen and Orloff this court clearly established that the Civil Rights Act prohibited all arbitrary discrimination in public accommodations"26 is, at best, questionable. A good argument can be made that the Cox court's reliance on either Orloff or Stoumen as the source of such a broad public policy statement is misplaced.

In Orloff, the plaintiff, an alleged bookmaker, had been excluded from the defendant's race track based upon track rules patterned after a Civil Code provision permitting the ejection of "known undesirables, touts, . . . persons of lewd or immoral character, and persons guilty of . . . conduct detrimental to racing or the public welfare."27 The Orloff court held that mere suspicion of off-track gambling activity by the plaintiff did not justify his exclusion from the track but rather, "[i]t is a person's conduct when entering and attending a public place to which the statutory standards apply."28

The court in Orloff also concluded that it was not the legislative intent to vest in the race track management the right to determine what persons were sufficiently moral to be admitted.29 Allowing such a determination, the court con-

25. 3 Cal. 3d at 215, 474 P.2d at 998, 90 Cal. Rptr. at 30.
26. Id. at 214, 474 P.2d at 997, 90 Cal. Rptr. at 29.
27. 36 Cal. 2d at 737, 227 P.2d at 452. The track rules in question were promulgated by the California Horse Racing Board and found their basis in the provisions of Civil Code section 53, as it existed in 1951. Id. at 736-37, 227 P.2d at 451-52. At that time section 53 provided that while as a general rule persons over age twenty-one who presented a valid admission ticket could not be refused admittance to places of "public amusement or entertainment," an express statutory exception allowed the exclusion of "[a]ny person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character . . . ." 1905 Cal. Stats. ch. 413, § 3, at 554 (current version at CAL. CIV. CODE §§ 51, 52 (West Supp. 1978)).
28. 36 Cal. 2d at 741, 227 P.2d at 454. The court made a sharp distinction between drunkenness, boisterous conduct, and lewd or immoral acts by patrons at the track, and the private business affairs, personal relations with others, and past conduct of patrons away from the track. The former actions are all "visible or readily ascertainable" at the time and place of entertainment. Conversely, the latter criteria, whether or not they are reliable indicia of character, "are immaterial in the application of the statutory standards under the facts of this case." Id. at 740-41, 227 P.2d at 454.
29. Id. The court questioned the indefiniteness of the "lewd or immoral character" standard, but held that such indefiniteness was not fatal to the use of the word "immorality" as a guide. Id. at 740, 227 P.2d at 453. However, it is interesting to note
cluded, would be a denial of equal protection and due process.\textsuperscript{30}

Immediately after the \textit{Orloff} decision, the legislature enacted a statute specifically providing that touts and gamblers could be excluded from race tracks, but only after a hearing.\textsuperscript{31} Thus, based on the fact that the language and holding of \textit{Orloff} are limited to the facts in that case, as well as on the subsequent legislative response of specifically providing for the exclusion from race tracks of undesirable persons after a hearing, it is difficult to find any support in \textit{Orloff} for the \textit{Cox} court's finding that \textit{Orloff} prohibited all arbitrary discrimination in public accommodations.\textsuperscript{32} On the contrary, \textit{Orloff} arguably stands for little more than a failure of procedural due process in the exclusion of persons from race tracks.

The second case extensively relied on in the \textit{Cox} decision was \textit{Stoumen v. Reilly}.\textsuperscript{33} In \textit{Stoumen} the State Board of Equalization had suspended the plaintiff's liquor license based on its finding that persons of known homosexual tendencies patronized his restaurant and bar.\textsuperscript{34} The supreme court held that this was an improper ground for denial of plaintiff's license:

Members of the public of lawful age have a right to patronize a public restaurant and bar so long as they are acting properly and are not committing illegal or immoral acts; the proprietor has no right to exclude or eject a patron 'except for good cause,' and if he does so without good cause he is liable in damages.\textsuperscript{35}
The "except for good cause" language relied on by the Stoumen court was drawn from Civil Code section 52 which, prior to 1959, stated in part: "whoever makes any discrimination, distinction or restriction on account of color or race, or except for good cause, applicable alike to citizens of every color or race whatsoever . . . is liable for damages . . . ." In 1959, eight years after the Stoumen decision, the legislature amended Civil Code section 52 to delete the "except for good cause" provision and provide for liability under section 52 only for the specifically enumerated types of discrimination set forth in Civil Code section 51.

Accordingly, it is difficult to follow the court's reasoning in Cox that the Stoumen decision and the subsequent legislative amendments support a legislative intent to have sections 51 and 52 of the Civil Code interpreted as a broad prohibition of all arbitrary discrimination. The Stoumen court merely applied the applicable statute—Civil Code section 52—as it read in 1951. No attempt was made in the brief decision to step beyond the facts at issue or to dictate that the Civil Rights Act prohibited all arbitrary discrimination in public accommodations.

Although the Cox court appeared to be straining considerably to find legislative and decisional intent that the Civil Rights Act prohibits discriminatory acts other than the specific categories listed on the face of the statute by the 1959 amendment, it should be noted that the court was faced with a difficult factual situation. The petitioner in Cox, intending to make a purchase at a shopping center, had been arrested and charged with a criminal offense merely because he had refused to leave the shopping center. The security guard who asked him to leave would not give any reason, but it was apparently because the petitioner was talking with a person "who wore long hair and dressed in an unconventional manner." Confronted with such a blatant and arbitrary act of discrimination by a shopping center, the "modern analogue of the town center," the court

36. CAL. CIV. CODE § 52 (West 1954).
37. See note 14 and accompanying text supra. The deletion of the language "except for good cause" was not merely an oversight by the legislature. The legislative history reveals that the language was specifically deleted; however, no reason for the deletion is revealed in history. For a comprehensive discussion of the legislative changes, see Horowitz, The 1959 California Equal Rights in "Business Establishments" Statute—A Problem in Statutory Application, 33 So. CAL. L. REV. 260, 264-70 (1960).
38. 3 Cal. 3d at 210, 474 P.2d at 994, 90 Cal. Rptr. at 26.
39. Id. at 217, 474 P.2d at 1000, 90 Cal. Rptr. at 32. The Cox court based its
was obviously of a mind to find legislative or judicial intent to prevent such discrimination.

C. Post-Cox Developments

As mentioned above, the California Legislature amended the Unruh Act in 1974 to add "sex" to the list of prohibited types of discrimination. Just as the legislature was deemed by the Cox court to be aware of the Orloff and Stoumen decisions at the time it incorporated the 1959 amendments into the Unruh Act, so also it must be assumed that the legislature was aware of the decision in Cox at the time of the 1974 amendment to the Act. Yet, the legislature in 1974 chose not to codify the "all arbitrary discrimination" language of Cox. Instead, it maintained and even added to the specific list of prohibited bases of discrimination set forth in the Unruh Act. Thus, by implication at least, it would appear that the rationale of Cox, if not its holding, has been rejected by the Legislature.

It is not clear whether the California Supreme Court would still adhere to its interpretation in Cox that the Unruh Act is intended to encompass all arbitrary discrimination. No supreme court decision since the Cox decision in 1970 has construed the Unruh Act.

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comparison of the modern shopping center to a town or city on the fact that shopping centers "perform an important public function. In some areas the public must rely upon the shopping center as its sole source of food, clothing and other commodities. If a shopping center arbitrarily denies individuals the right to purchase essentials, these people may have no practicable alternative source of supply." Id. at 218, 474 P.2d at 1000, 90 Cal. Rptr. at 32.

40. See note 16 and accompanying text supra.

41. See text accompanying note 25 supra.

42. Discrimination solely on the basis of sex by business establishments would appear to be clearly arbitrary, and hence, if the legislature thought that the Unruh Act already covered sex discrimination after Cox, there would have been no need to amend the Act to specify "sex." Indeed, the logical amendment would have been to codify the "all arbitrary discrimination" language contained in Cox.

43. In S.P. Growers Ass'n v. Rodriguez, 17 Cal. 3d 719, 552 P.2d 721, 131 Cal. Rptr. 761 (1976), the California Supreme Court held that the defendant tenants stated a valid defense to unlawful detainer proceedings brought by their landlord. They alleged that they were being evicted in retaliation for their filing suit against plaintiff in federal court, charging him with violations of the Federal Farm Labor Contractor Registration Act of 1963. The court did not decide nor even discuss the validity of defendants' additional contention that the actions of the plaintiff landlord constituted arbitrary discrimination in violation of the Unruh Act. Id. at 730 n.5, 552 P.2d at 728 n.5, 131 Cal. Rptr. at 768 n.5.

The California Second District Court of Appeal, in Marsh v. Edwards Theatres Circuit, Inc., 64 Cal. App. 3d 881, 134 Cal. Rptr. 844 (1976), has already taken the position that the Unruh Act does not apply to discrimination—whether or not it is arbitrary—against the physically handicapped. As the Marsh court pointed out, Civil
D. Applicability of the Unruh Act to Rental Housing

The Unruh Act prohibits discrimination on the specified bases in "all business establishments of every kind whatever." Yet, there are no guidelines in the Unruh Act itself as to what this phrase encompasses. In light of the relevant California appellate decisions construing this phrase, the California Attorney General's office no doubt correctly concluded in a recent opinion that "interpreted in the broadest sense reasonably possible, [it] includes the sale, rental, or lease of property for value." Therefore, assuming that the Act does apply to rental housing and that the California Supreme Court would still interpret the Act to prohibit all arbitrary discrimination, the issue which remains unresolved is whether the refusal of a landlord to rent to families merely because they have children constitutes arbitrary discrimination within the purview of the Unruh Act.

Because of the sweeping importance of the decision in Cox, California appellate courts subsequently called upon to construe claims of arbitrary housing discrimination based on the Unruh Act have relied heavily on the language in Cox that a business can "promulgate reasonable deportment regulations that are rationally related to the services performed and the facilities provided." In Flowers v. John Burnham & Co., the Fourth District Court of Appeal was called upon to decide whether or not a landlord's policy of limiting children in its

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Code section 54.1, dealing specifically with discrimination against the physically handicapped, was enacted after Civil Code section 51. Therefore, the rule that "[a] special statute dealing expressly with a particular subject controls and takes precedence over a more general statute covering the same subject" is applicable. Id. at 890, 134 Cal. Rptr. at 849.

44. CAL. CIV. CODE § 51 (West Supp. 1978).
46. 56 Ops. Cal. Att'y Gen. 546, 551 (1973). The Attorney General's office further opined that "Civil Code section 51 includes within its scope owners of triplexes, owners of duplexes, owners of non-owner occupied single family dwellings, and any other owners of housing accommodations as defined in the Rumford Fair Housing Act . . . ." Id. at 546.
47. 3 Cal. 3d at 217, 474 P.2d at 999, 90 Cal. Rptr. at 31. See note 21 and accompanying text supra.
apartments to "girls of all ages and boys under five" was arbitrary under the standard set forth in Cox. The Flowers court concluded that "[b]ecause the independence, mischievousness, boisterousness and rowdiness of children vary by age and sex," the landlord's policy was neither unreasonable nor arbitrary and thus was not in violation of the Unruh Act. In 1975 the California Attorney General was asked to render an opinion as to whether the Unruh Act "prohibit[s] forms of discrimination other than those specifically enumerated therein with regard to the sale or rental of real property; for example, occupation, marital status, or number of children." The resulting opinion relied on Cox for the proposition that the Unruh Act prohibits all forms of arbitrary discrimination, including discrimination in the sale or rental of real property. However, with respect to the specific categories cited in the opinion request, the Attorney General sidestepped the issue somewhat by stating that:

In the absence of specific facts of the nature of the property being sold or rented, its location, the size of the property, and the size of the entity of individual involved in the sale or rental of the real property, and in the absence of facts as to the nature of the occupation, the type of marital status, or the numbers of children involved in the classification, no definitive answer can be given as to what would or would not constitute discrimination which would be in violation of Civil Code Section 51.

The denial of housing accommodations because of one's occupation, marital status, or number of children, may or may not be violative of the Act depending on whether any regulations denying such housing accommodations are reasonable and somehow rationally related to the services performed and the facilities provided.

49. Id. at 703, 98 Cal. Rptr. at 645. The plaintiffs in Flowers were tenants who had four children, two girls aged one and three, and two boys aged eight and ten. Less than two weeks after plaintiffs moved into defendant's apartment complex, they received a 30-day notice to quit the premises pursuant to Civil Code section 1946. Plaintiffs then brought suit, alleging a violation of the Unruh Act, as well as of their parental and marital rights to "have and raise their male children in a home of their own choice." Id. at 702, 98 Cal. Rptr. at 644.

50. Id. at 703, 98 Cal. Rptr. at 645. At the time Flowers was decided, the specified forms of discrimination listed in the Unruh Act did not include sex. As noted previously (see text accompanying note 16 supra), sex was added to the list in 1974. It is doubtful, therefore, that the Flowers court would have reached the same conclusion if the case were decided today.


52. Id. at 613.

53. Id. The opinion went on to state by way of illustration that the owner of an
In *Newby v. Alto Riviera Apartments*, the landlord had announced a rent increase and plaintiff, a tenant, was instrumental in organizing a tenant protest. After several heated discussions between the resident manager and the plaintiff, the plaintiff was given a thirty-day eviction notice, but no further proceedings to evict were undertaken. Plaintiff then brought suit against the owners and managers seeking declaratory and injunctive relief in connection with the threatened eviction. One of plaintiff's causes of action was for damages based on alleged arbitrary discrimination in violation of the Unruh Act. The First District Court of Appeal ruled in *Newby* that the actions of the apartment owners and manager did not constitute a violation of the Unruh Act. The *Newby* court relied on the *Cox* standard, as had the court in *Flowers*. It first posed, and then answered in the affirmative, the question of whether the actions of the defendant owners and manager were "reasonable" and "rationally related to the facilities provided."

The court concluded that actions—such as evictions and eviction threats—taken by a landlord to protect his own economic interest in promoting a "quiet and peaceable environment free from the threat of rent strikes and to prevent tenants from organizing to protest rent increases" are rationally related to the renting of apartments.

In June of 1978, the First District Court of Appeal held, in *Ritchey v. Villa Nueva Condominium Association*, that a provision in the bylaws of a condominium association restricting occupancy of condominium units to persons eighteen years of age or older was not an unreasonable restriction upon either a condominium owner's right to sell or to lease his condominium or upon his right of occupancy. Responding to the plaintiff's
contention that age restrictions are per se unreasonable, the Ritchey court reiterated the principle that whether a given age restriction is reasonable is to be determined in light of the circumstances of each individual case.60

As the pertinent cases and opinions of the Attorney General indicate, families seeking rental housing in California have found little solace in the fact that the Unruh Act purports to prohibit arbitrary discrimination in rental housing. Under the standards set forth in Cox, to avoid liability a California landlord wishing to designate an apartment complex as "adults only" merely has to demonstrate that the regulation excluding children is rationally related to the services performed and the facilities provided. An apartment complex designed for the maximum peace and quiet of the tenants, one lacking proper play facilities or safety precautions for children, or simply a landlord's economic self-interest in avoiding the destructive tendencies of children would each appear to be permissible reasons for excluding children under the Unruh Act, so long as there is no indication of discrimination on the prohibited bases of sex, race, color, religion, ancestry, or national origin.

The Rumford Fair Housing Act

A. Legislative History and Intent

The Rumford Fair Housing Act,61 originally enacted in 1959,62 was amended in 1977 to include within its coverage all housing accommodations, public and private.63 Prior to the

60. Id. at 694, 146 Cal. Rptr. at 699. The opinion in Ritchey cited Flowers, but placed principal reliance on Riley v. Stoves, 22 Ariz. App. 223, 526 P.2d 747 (1974), an Arizona decision upholding a private covenant in a deed restricting occupancy of a housing subdivision to persons twenty-one years of age or older.


62. The original act, entitled "Discrimination in Publicly Assisted Housing," was added by 1959 Cal. Stats. ch. 1681, § 1, at 4074 (repealed 1963). The present Act was added by 1963 Cal. Stats. ch. 1853, § 2, at 3823, and was entitled "Discrimination in Housing." The heading of the act was amended to read "Fair Housing Law" by 1977 Cal. Stats. ch. 1187, § 1, at 1187.

63. CAL. HEALTH & SAFETY CODE § 35720 (West Supp. 1978). Section 35720, defining prohibited discrimination, has been amended three times since its original enactment in 1963. In 1974, section 35720 was amended to include a provision prohibiting any owner of housing accommodations to harass, evict, or otherwise discriminate against any person in the sale or rental of housing in retaliation for that person's opposition to practices unlawful under the Rumford Act. A 1975 amendment to section 35720 added "sex" and "marital status" to the list of prohibited bases of discrimination. Finally, section 35720 was rewritten by the 1977 amendment to read as follows:

It shall be unlawful:

1. For the owner of any housing accommodation to discriminate
1977 amendment, the Rumford Act did not attempt to reach acts of discrimination by the owners of private dwellings containing four or less units.\textsuperscript{64} Unlike the Unruh Act, which provides for private enforcement by persons against whom there has been discrimination,\textsuperscript{65} the Rumford Act specifies that the State Fair Employment Practice Commission\textsuperscript{66} and the Department of Industrial Relations' Division of Fair Employment Practices are empowered to prevent and eliminate discrimination in housing.\textsuperscript{67} However, the Rumford Act does contain a provision which gives the Fair Employment Practice Commission jurisdiction over persons "subject to the provisions of Section 51 of the Civil Code [the Unruh Act], as that section applies to housing accommodations . . . ." who discriminate on the basis of "race, color, reli-

against any person because of the race, color, religion, sex, marital status, national origin, or ancestry of such person.

2. For the owner of any housing accommodation to make or to cause to be made any written or oral inquiry concerning the race, color, religion, sex, marital status, national origin, or ancestry of any person seeking to purchase, rent or lease any housing accommodation.

3. For any person 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 limitation, or discrimination based on race, color, religion, sex, marital status, national origin, or ancestry or an intention to make any such preference, limitation or discrimination.

4. For any person subject to the provisions of Section 51 of the Civil Code, as that section applies to housing accommodations, as defined in this part, to discriminate against any person because of race, color, religion, sex, marital status, national origin, or ancestry with reference thereto.

5. For any person, bank, mortgage company or other financial institution to whom application is made for financial assistance for the purchase, organization, or construction of any housing accommodation to discriminate against any person or persons, or of prospective occupants or tenants, in the terms, conditions, or privileges relating to the obtaining or use of any such financial assistance.

6. For any owner of housing accommodations to harass, evict, or otherwise discriminate against any person in the sale or rental of housing accommodations when the owner's dominant purpose is retaliation against a person who has testified or assisted in any proceeding under this part. Nothing herein is intended to cause or permit the delay of an unlawful detainer action.

7. For any person to aid, abet, incite, compel, or coerce the doing of any of the acts or practices declared unlawful in this section, or to attempt to do so.

\textsuperscript{64} \textsc{Cal. Health & Safety Code} § 35270 (West Supp. 1978).

\textsuperscript{65} \textit{Id.} § 35720(5) (West 1973).

\textsuperscript{66} \textsc{Cal. Civ. Code} § 52 (West Supp. 1978). \textit{See} note 7 \textsuperscript{supra} for text.

\textsuperscript{66} The State Fair Employment Practice Commission, created by section 1414 of the Labor Code, is a seven member panel appointed to four year terms by the Governor. \textsc{Cal. Lab. Code} § 1414 (West 1971).

\textsuperscript{67} \textsc{Cal. Health & Safety Code} § 35730 (West Supp. 1978).
region, sex, marital status, national origin, or ancestry . . . .","68 Furthermore, the Legislature, possibly foreseeing a potential for conflicting interpretations or decisions under the Rumford Act and the Unruh Act, expressly provided in section 35743 of the Rumford Act that “[n]othing contained in this part shall be construed to, in any manner or way, limit or restrict the application of Section 51 of the Civil Code."69

However, with respect to attempts to regulate discrimination in housing at the city or county level, section 35743 states that it is the intent of the legislature that the Rumford Act preempt such regulations, at least to the extent that they deal with those areas of discrimination covered by Rumford.70 But since the Rumford Act, as presently construed and amended,71 does not address itself to the issue of discrimination against families in rental housing, it follows that city and county regulations in this area are not currently preempted.72

B. Applicability of the Rumford Act to Housing Discrimination Against Children

The California courts have not attempted to construe the Rumford Fair Housing Act as prohibiting “all arbitrary discrimination,” because the Act does contain the provision that “[n]othing in this part shall be construed to prohibit selection based upon factors other than race, color, religion, sex, marital status, national origin, or ancestry.”73 Therefore, it is necessary to look to the specifically enumerated list of prohibited bases for discrimination to determine whether the Rumford Act makes discrimination against children in rental housing illegal. The focus, necessarily, is on the meaning of the term “marital

68. *Id.* § 35720(4). As used in the Rumford Act, the term “housing accommodation” is broadly construed to include “any improved or unimproved real property, or portion thereof, which is used or occupied, as the home, residence, or sleeping place of one or more human beings . . . .” *Id.* § 35710(f).
69. *Id.* § 35743 (West 1973).
70. *Id.* For a more complete discussion of the preemptive powers and scope of the Rumford Fair Housing Act, see 60 OPNS. CAL. ATT’Y GEN. 44 (1977) (county ordinance establishing an “affirmative marketing program” to promote racially balanced communities would be preempted by the Rumford Act).
71. A.B. 3000, which has died in committee in the California Assembly, was a proposal to amend the Rumford Fair Housing Act to prohibit discrimination against tenants who have children during the course of their tenancy in rental housing. If it had been enacted, this provision would arguably have preempted local efforts to deal with the issue of discrimination against children in rental housing. A.B. 3000, 1977-78 Reg. Sess. (1978). *See* note 12 *supra*.
72. *See* text accompanying note 147 *infra*.
status” as used in the Act.

The only California case to consider and construe the term “marital status,” Atkisson v. Kern County Housing Authority, held that the Rumford Act prohibited eviction of tenants by the county housing authority solely on the ground that a man and a woman “cohabiting” an apartment were unmarried. For the moment it would appear that the statutory prohibition of discrimination on the basis of marital status is limited to a factual situation like that in Atkisson—a landlord may not base his decision of whether to rent on whether the tenants or applicants are single or married. It remains to be seen whether the courts will choose to expand the scope of the term “marital status” to include an implicit prohibition against discrimination against families in rental housing. At present, it can safely be asserted that the Rumford Fair Housing Act is not applicable to the family rental housing discrimination issue.

Constitutional Considerations

The due process and equal protection clauses of both the United States and California Constitutions provide, in substantially the same terms, that the state may not deprive any

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75. Id. at 99, 130 Cal. Rptr. at 381. In Atkisson, the Fifth District Court of Appeal first ruled the Housing Authority’s policy enjoining a tenant from “living with anyone of the opposite sex to whom the tenant is not related by blood, marriage or adoption” was invalid on various constitutional grounds. The court then applied the “marital status” standard of the Rumford Act, noting that a literal application of the statute may well have rendered the constitutional considerations moot. Id. at 99-100, 130 Cal. Rptr. at 381-82.
76. In Atkisson, for example, the fact that the plaintiff tenant had six children from a previous marriage living with her was apparently not considered relevant to the discussion of the Rumford Act by the court.
77. It is interesting to note that the term “discrimination” as defined in the Rumford Act “includes the provision of segregated or separated housing accommodations.” Cal. Health & Safety Code § 35710(d) (West Supp. 1978). Therefore, if the courts were to construe “marital status” to include a prohibition against discrimination against families in rental housing, it would not be acceptable under the act for apartment complexes to designate certain areas as “family” areas and others as “adult only” areas.
78. U.S. Const. amend. XIV provides in pertinent part: “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”
79. Cal. Const. art. I, § 7, provides in pertinent part: “A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.”
80. Section 7 of article I of the California Constitution has been held to be identical in scope and purpose to the fourteenth amendment of the United States
person of his basic rights to due process and to the equal protection of the law. To bring due process, equal protection, and other constitutional safeguards of individual rights into play, there must first be some "state action" involved. The issue of discrimination against families in rental housing presents the following constitutional questions. In the absence of a statute prohibiting such discrimination against families, does the use by a private landlord of judicially enforced eviction procedures to evict tenants with children constitute sufficient state action to make the constitutional guarantees applicable? What possible state action is involved when a family is initially refused housing accommodations by a private landlord solely because they have children? Assuming, arguendo, that the initial hurdle of finding the required state action could be overcome, by what standard and with what probable result should this form of discrimination be judged for constitutional purposes? There are no clear-cut answers for these questions. In the final analysis, all that can be suggested is a set of reasonably broad guidelines or parameters, indicating the strengths and weaknesses of the various constitutional arguments against discrimination against children in rental housing.

The State Action Issue

It is axiomatic that the constitutional protections afforded to individuals by the fourteenth amendment apply to inhibit only state action and do not offer recourse against private acts of discrimination—no matter how repugnant. However, the United States Supreme Court has, in a series of decisions, broadly construed the term "state action" so as to include certain actions taken by seemingly private individuals or organizations. The two basic theories which have evolved for characterizing private activities as state action are the "public function" theory and the "state contacts" theory.


82. "The action inhibited by the first section of the Fourteenth Amendment is only such action as may be fairly said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." 334 U.S. at 13.

83. See, e.g., Marsh v. Alabama, 326 U.S. 501, 506 (1946) (proprietor of privately owned "company town" held subject to the constraints of the first and fourteenth amendments "since [its] operation is essentially a public function"); Smith v. All-
A landmark decision which extended the "state contacts" theory to its reasonable limits was *Shelley v. Kraemer*, in which the Supreme Court ruled that the judicial enforcement of private racial discrimination makes that discrimination subject to the fourteenth amendment because of the significant state participation in the discrimination via the state courts. *Shelley* involved the state court enforcement of a racially restrictive covenant signed by all the homeowners in a white neighborhood which provided for injunctive relief against any sale by a white homeowner to a black person.

Taken to its logical extreme, the Court's decision in *Shelley* could be viewed as prohibiting the state action involved in the judicial enforcement of private discrimination whenever state legislation, or a local ordinance imposing the same prohibition, would violate any rights guaranteed by the fourteenth amendment. However, the Supreme Court has never extended the *Shelley* doctrine beyond the area of racially-restrictive covenants.

The California courts, applying the *Shelley* doctrine, have held that tenants are entitled to raise, in unlawful detainer proceedings brought against them in state courts, the equitable defense that the use of the courts to evict them solely on the basis of race constitutes a prohibited state action. Conversely, however, the California Supreme Court has also ruled that

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84. See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (state action found where private restaurant lessee in a state-owned parking facility refused to serve blacks); *Evans v. Newton*, 382 U.S. 296 (1966) (private trustees under a private will devising property to a city to be used for a park excluding blacks held subject to fourteenth amendment equal protection guarantees because of significant state participation in control and maintenance of the park). *But see* *Moose Lodge v. Irvis*, 407 U.S. 163 (1972) (no state action where a private club which had no public funding, but did have a state liquor license, discriminated racially in its dining room).

85. 334 U.S. 1 (1948).

86. The *Shelley* Court recognized that racially-restrictive covenants—voluntarily adhered to—remain valid as between private parties, but are unenforceable if the private discriminator seeks the aid of the courts to carry out his purpose, either via specific performance, as in *Shelley*, or through the awarding of damages. *Id.* at 13. *See also* *Barrows v. Jackson*, 346 U.S. 249 (1953).

87. Furthermore, it has been suggested by at least one lower federal court that the finding of the requisite state action might be more difficult in the case of discrimination on other than racial grounds. *See Edward v. Habib*, 397 F.2d 687, 692-93 (D.C. Cir. 1968).

there is not sufficient state action to justify injunctive relief when a landlord merely serves a notice to quit on a tenant, even if the sole motivation for the eviction is racial.88

Given the present state of the case law, it is apparent that refusal by private landlords to rent to families in the first place is immune from attack under the fourteenth amendment because the requisite state action is lacking.90 If such discrimination is to be prohibited, it will have to be by means of a state or local statute. Although there is no case law on point, it is doubtful whether the California courts would be willing to extend the Shelley doctrine to find state action in a landlord's use of the courts to evict a tenant based on the fact that the tenant has children, as long as no racial discrimination is present. Finally, even with state action, it would also be necessary to find that the state was participating in the impermissible denial of a right safeguarded by the fourteenth amendment—that is, a denial of equal protection or due process.

**Equal Protection Issues**

The Supreme Court has developed a two-tiered standard for determining whether the state has denied an individual equal protection of the law. Most classifications of individuals made by a state, especially those contained in economic or social legislation, are subject to very limited judicial review. The classification is presumed valid and will be upheld by the courts, unless no rational basis and reasonable relation to a valid state objective can be found.91 Furthermore, the burden of proof that the classification is wholly arbitrary and bears no reasonable relation to the object of the legislation is on the person challenging the classification.92

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90. One lower federal court has specifically found that discriminatory practices by a private landlord do not involve any state action and cannot be reached by the courts except via a statute. Boyd v. Lefrak Organization, 509 F.2d 1110, 1114 (2d Cir. 1975).


92. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). Classifications having a reasonable basis do not violate the fourteenth amendment merely because they lack "mathematical nicety" or result in "some inequality." *Id.* at 78.

Hence, under the rational basis standard, the test for determining whether a classification is valid is similar to the arbitrariness test set forth in *Cox* to determine whether or not discrimination violates the Unruh Civil Rights Act. *See* note 21 and accompanying text *supra*.
If a court should require no more than a rational basis for discrimination against families in rental housing, it is probable that the policy of excluding children will be upheld.\(^9\) Permissible objectives might include the landlord's economic self-interest in avoiding the extra costs of safety features, maintenance and repairs occasioned by the presence of children, as well as the interest of other adult tenants in privacy and a tranquil and peaceful atmosphere.

Tenants with children wishing to avoid eviction from their apartment—or seeking to find rental housing in the first place—will of course argue that discrimination against them by a landlord solely on the basis of having children should be subjected to strict judicial review, because a classification based on the presence or age of children is a constitutionally "suspect" class and also deprives them of certain "fundamental rights" protected by the Constitution. If the tenants are successful in their argument and convince the court that either a suspect classification or a fundamental right is involved, then the court will subject the classification to "strict scrutiny."\(^9^4\) In order to prevail, the state must then meet the difficult burden of showing that the classification serves a "compelling state interest."\(^9^5\)

At the present time, the categories which the Supreme Court has expressly declared to be "suspect" are race,\(^9^6\) national origin,\(^9^7\) and alienage.\(^9^8\) Those rights which the Supreme Court has defined as "fundamental rights" presently include only the right to travel,\(^9^9\) the right to vote,\(1^0^0\) freedom of associa-
tion, and various personal privacy rights, including the right to marry, the right of procreation, the right to use contraceptives, the right to an abortion, and the right to educate one's children as one chooses. Moreover, the Court has expressly rejected the contentions that "age" is a suspect criterion or that "housing" is a fundamental right.

Because discrimination against families in rental housing does not fit within any of the presently recognized suspect categories, and in view of the fact that age-based classifications are not considered suspect, it seems clear that the courts will subject classifications excluding children from rental housing to "strict scrutiny" only if it can be established that such discrimination abridges a fundamental right. Of the list set forth above, it is arguable that at least two—the right to travel and the rights of personal privacy—might be applicable.


In Graham v. Richardson, 403 U.S. 365, 372 (1971), the Supreme Court stated that the test which is applied to determine whether a classification is suspect is whether the category burdens a "discrete and insular minority for whom such heightened judicial solicitude is appropriate." The Court has apparently adopted a restrictive interpretation of this test because it has strongly resisted any expansion of the list of suspect categories. See, e.g., Kahn v. Shevin, 416 U.S. 351, 355 (1974) (sex); Matthews v. Lucas, 427 U.S. 495, 506 (1976) (illegitimacy); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 23-24 (1973) (wealth).

108. Lindsey v. Normet, 405 U.S. 56, 73-74 (1972). In Lindsey, the Court rejected the argument that the "need for decent shelter" and the "right to retain peaceful possession of one's home" are fundamental rights. Id. at 73. The petitioners in Lindsey, who were tenants, contended that the Oregon unlawful detainer statute was invalid for equal protection purposes because of the relatively short period of time allowed for litigation and the narrow range of issues that could be considered. In dismissing the argument that housing is a fundamental right, the Court stated: "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill . . . . Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions." Id. at 74.
A. The Right to Travel

Although nowhere expressly guaranteed by the Constitution, the right to travel freely from state to state has been repeatedly held to be a part of the "liberty" protected by the fifth and fourteenth amendments. As developed by the case law, the right has come to include not only the right to freedom of movement from state to state, but also the right to take up residence in the state of one's choice. The decisions which have struck down state action imposing burdens on the right to travel have almost exclusively involved classifications aimed at transients, that is, discrimination against a class of persons solely because they have recently moved into a state.

Conversely, attempts to utilize the right to travel as a means of invalidating local housing restrictions have not been successful to date. The pertinent cases have chiefly involved restrictive zoning ordinances. In Village of Belle Terre v. Boraas, the United States Supreme Court affirmed the constitutionality of a zoning ordinance which operated both to limit land use to single family dwellings and to prohibit occupancy of a dwelling by more than two unrelated persons. Plaintiffs, who were the owners of a house and several unrelated tenants, challenged the zoning ordinance on equal protection grounds, arguing unsuccessfully that it was violative of their fundamental rights of travel, association, and privacy. Applying the rational basis standard of review, the Court held that the ordinance infringed on neither the right to travel—because


it was not “aimed at transients”\textsuperscript{113}—nor upon any other fundamental right. Hence, the ordinance was upheld as a valid land use regulation addressed to family needs.\textsuperscript{114}

In Construction Industry Association of Sonoma County v. City of Petaluma,\textsuperscript{115} a federal district court found that a planned growth plan which sought to regulate the rate of growth in the city of Petaluma, California, constituted an invalid infringement upon the right to travel. Specifically, the trial court ruled that the city’s desire to preserve its rural, small-town character was “not a compelling governmental interest.”\textsuperscript{116} However, most, if not all, of the precedential value of Petaluma was destroyed when the Ninth Circuit Court of Appeals reversed the district court decision, holding that the plaintiffs in Petaluma did not have standing to raise the issue of interference with future residents’ rights to travel.\textsuperscript{117}

Accordingly, as one commentator has noted: “[W]hile the courts have recognized that the right to travel exists, and while it has been applied in cases involving situations other than land-use controls, it is not clear how a zoning case would be framed under the present state of the law.”\textsuperscript{118} Where a private landlord refuses to rent to families with children, the chances of any right to travel argument being successful are even more remote.

\section*{B. Right of Privacy}

In Skinner v. Oklahoma,\textsuperscript{119} the Supreme Court affirmed

\begin{footnotesize}
\textsuperscript{113} Id. at 7.
\textsuperscript{114} Id. at 9. The Court concluded that “[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs.” Id.
\textsuperscript{115} 375 F. Supp. 574 (N.D. Cal. 1974), rev’d on other grounds, 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976).
\textsuperscript{116} 375 F. Supp. at 586.
\textsuperscript{117} 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976). The same conclusion was reached as to a developer, faced with growth restrictions, asserting the right to travel of future residents in Rasmussen v. City of Lake Forest, 404 F. Supp. 148 (N.D. Ill. 1975).
\textsuperscript{118} D. Moskowitz, EXCLUSIONARY LAND ZONING 182 (1977). At least one court, however, has ruled that a zoning ordinance which was designed to (and in fact did) exclude children from a municipality violated the equal protection clause. In Molino v. Mayor of Glassboro, 116 N.J. Super. 195, 281 A.2d 401 (Super. Ct. Law Div. 1971), a New Jersey court struck down a zoning ordinance which admittedly sought to exclude children because they would require more schools, and hence, higher taxes. However, it is important to note that Molino was decided prior to Belle Terre, where the Supreme Court expressly found that a quiet, low-density village is a permissible state objective, and exclusionary zoning ordinances are rational means of achieving such an objective. See note 114 supra.
\textsuperscript{119} 316 U.S. 535 (1942).
\end{footnotesize}
that "[m]arriage and procreation are fundamental to the very existence and survival of the race." Subsequent Court decisions have expanded the rights of procreation and marital privacy so as to preclude unwarranted governmental interference with the freedom of personal choice in matters of marriage and family life. Furthermore, the Court has recognized that these protected marital and family privacy rights extend beyond matters involving merely the right of procreation. In Loving v. Virginia, the Court held that freedom to marry the person of one's own choosing is "one of the 'basic civil rights of man,' fundamental to our very existence and survival." Recognition of the right to privacy and freedom of choice in matters relating to the education of one's children was implicit in both Pierce v. Society of Sisters and Meyer v. Nebraska. However, it is questionable whether any of the privacy rights thus far recognized by the Court are applicable to the issue of discrimination against children in rental housing. Two reported decisions dealing with the constitutionality of restrictions excluding children from housing are illustrative of the diversity of opinion which exists regarding this question.

120. Id. at 541. In Skinner, the Court banned sterilization as a punishment for repeated criminal offenders.

121. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) (striking down mandatory maternity leave rules requiring pregnant schoolteachers to take unpaid maternity leave four months before the expected date of childbirth); see Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding that unmarried persons have the same right of access to contraceptives as do married persons); see also Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating a state statute forbidding the use of contraceptives by married persons). Furthermore, a couple need not be married in order to assert their rights to privacy and procreation.

122. 388 U.S. 1 (1967).

123. Id. at 12 (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

124. 268 U.S. 510, 534-35 (1925) (striking down a state statute which required children to attend only public schools, on the ground that the act "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control").

125. 262 U.S. 390, 399-401 (1923) (overturning a state statute which prohibited instruction in modern languages other than English to schoolchildren prior to the ninth grade as violative of the right of parents to control the upbringing of their children).
In *Franklin v. White Egret Condominium, Inc.*, a Florida Fourth District Court of Appeal held that a restrictive covenant contained in a condominium association's bylaws forbidding residency by families with children under twelve years of age was an unconstitutional violation of residents' rights to marry and to procreate. On petition for rehearing brought by the condominium association, the court expanded its listing of applicable fundamental rights to include the right of privacy, the right of travel, the right of freedom of choice concerning family living relationships, and the right of parents to supervise their children's education and to enjoy their companionship.

Conversely, in *Riley v. Stoves*, an Arizona appellate court applied the minimal rational basis standard of review in upholding a private covenant restricting occupancy of units in a mobile home subdivision to persons twenty-one years of age and older. The court determined that the restriction based on age was reasonably related to the legitimate objective of creating a "quiet, peaceful neighborhood by eliminating noise associated with children at play or otherwise."

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127. Id. at 1088.
128. The *Franklin* court cited *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), in support of their assertion that the right of freedom of choice concerning family living relationships is a fundamental right. 358 So. 2d at 1090 n.12. In *Moore*, the Supreme Court invalidated a local housing ordinance that limited occupancy of dwelling units to members of a single family, but defined "family" in such narrow terms that the appellant was subjected to criminal prosecution for allowing her son and her two grandsons (who were first cousins rather than brothers) to reside with her. 431 U.S. at 496 n.2. The Court noted in *Moore* that "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." Id. at 499.
129. 358 So. 2d at 1089-90. In another 1977 case involving a similar condominium use restriction, the Florida Second District Court of Appeal upheld the age restriction contained in the condominium agreement without any discussion of constitutional issues. See *Coquina Club, Inc. v. Mantz*, 342 So. 2d 112 (Fla. Dist. Ct. App. 1977). The *Franklin* court concluded that its decision was not in conflict with *Coquina Club*, because in *Coquina Club* the validity of the age-based restrictions was "only a 'subsidiary question' and was not 'dispositive of the primary issue.'" 358 So. 2d at 1090.
131. Id. at 228, 526 P.2d at 752. Apparently the plaintiff in *Riley* did not even argue that any fundamental rights—triggering the stricter standard of review—were applicable. Id. at 228 n.2, 526 P.2d at 52 n.2. Hence, the court did not even discuss the issue.
132. See id. at 228, 526 P.2d at 752. The *Riley* court placed principle reliance on *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), noting that there was little, if any,
The obvious conclusion from these opposite results reached by the courts in Franklin and Riley is that housing discrimination against families is not likely to be construed as violative of equal protection principles so long as the minimal rational basis standard of review is applied. The Riley court was no doubt correct in asserting that providing a peaceable and quiet environment for adults is a permissible and reasonable objective. Conversely, if a fundamental right is determined to be applicable when families are denied rental housing solely because they have children, the Franklin court no doubt correctly concluded that such discrimination cannot withstand the strict judicial scrutiny accorded to fundamental rights.

In light of the fact that recent Supreme Court decisions have demonstrated a marked reluctance to expand the scope of rights deemed "fundamental," it is doubtful whether discrimination against families in rental housing will be generally subjected to "strict scrutiny"—the decision in Franklin notwithstanding.

Due Process: The Irrebuttable Presumption Argument

Absent the presence of any fundamental personal rights or liberties, a challenge to state action on substantive due process grounds will not succeed unless it can be demonstrated that the particular state action being challenged is wholly arbitrary or capricious. As with equal protection claims not involving any suspect classifications or fundamental interests, the state action is presumed valid and will be upheld unless no reasonable set of facts can be conceived of which would support the action, or unless it bears no rational relation to the goal sought. Under this standard of review the chance of successful substantive due process claims being advanced by families facing discrimination in rental housing appears remote.

However, in several recent cases in which the interests at stake were important, although not recognized by the Supreme Court as fundamental, the Court has invalidated stated classifications on the ground that they improperly created "conclusive" or "irrebuttable" presumptions. The reasoning distinction between the private age-based restriction at issue in Riley, and the zoning ordinance in Belle Terre which prohibited the occupancy of a single dwelling by more than two unrelated persons. 22 Ariz. App. at 228, 526 P.2d at 752-53.

of the Court is that when all persons within the classification established by the state do not automatically fit within the criteria on which the classification is based, procedural due process requires that individuals be given a hearing and an opportunity to prove that they do not fit within the classification.\textsuperscript{137}

For example, if the objective of a landlord in excluding children from his apartments is to provide a peaceable and quiet environment for his tenants, a child—no matter how quiet—is automatically excluded; an adult—no matter how noisy or destructive—is not. Therefore, it could be argued that the attempt to preserve an atmosphere of tranquility in an apartment complex by barring all children, while not automatically excluding others who would be just as noisy and destructive, is not a rational means of attaining that end. The issue then becomes one of the overall reasonableness of the restriction against children. In California, at least, the courts have demonstrated a great willingness to find that age-based restrictions in housing accommodations are reasonable and rationally related to the services performed and the facilities provided.\textsuperscript{138}

SUGGESTIONS FOR ALLEVIATING THE PROBLEM

As the foregoing discussion has indicated, it is difficult to support the contention that there are currently any valid statutory or constitutional grounds to prevent a California landlord from refusing to rent to a family, or to prevent an eviction based on the fact that the tenants have children. In light of the fact that the problems presented by discrimination against families in rental housing are substantial and of concern to a significant segment of society, there is a genuine need to take steps to alleviate the problem.

down school board rules requiring all pregnant teachers to take unpaid maternity leave four months before the expected date of childbirth); Vlandis v. Kline, 412 U.S. 441 (1973) (invalidating irrebuttable presumption of nonresidency for entire period of education for out of state applicants to state university); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973) (conclusive presumption that any household claiming a tax dependent over age eighteen was not in need of food stamps held improper); Stanley v. Illinois, 405 U.S. 645 (1972) (invalidating a statute which automatically separated illegitimate children from their father's custody upon the death of their mother). \textit{But see} Weinberger v. Salfi, 422 U.S. 749 (1975) (provision of the Social Security Act which denied benefits to wives and stepchildren who were such for less than nine months prior to the wage earner's death held to be justified by its ease and certainty of operation despite conclusive presumption created that marriages within nine months of death were undertaken solely to secure benefits).


\textsuperscript{138} See text accompanying notes 47-60 \textit{supra}. 
The most direct way of dealing with the situation would appear to be for the California Legislature to enact legislation prohibiting such discrimination. Currently, there are several bills under consideration in the California Assembly which are designed to do just that. However, in light of the rather limited success which such statutes have enjoyed in other states, as well as the very real dangers of political and social backlash from other segments of the population, it is perhaps advisable for California and other states to look first to other alternatives before attempting to solve the problem of rental housing discrimination against families by means of a sweeping statewide legislative prohibition of such discrimination.

Solutions on the local level—city and county—would seem to be a better alternative than state-wide legislation. The primary reason is that the problems faced by families in finding adequate rental housing differ greatly according to geographical location. In most rural areas and even in a few urban areas, the problem may well be non-existent. However, in the densely populated urban regions of southern California, the proportion of total rental housing catering to families is as low as twenty percent in some areas. Attacking the problem on the local level allows greater flexibility in dealing with a complex issue.

In many areas, a preferable alternative to an outright ban against discrimination against children in rental housing might be for local governments to take positive steps to encourage the

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139. See note 12 supra.
140. Currently, six states have such statutes. See note 4 supra. Although some of these statutes have been in effect for a number of years, their effectiveness has been questioned. For example, one recent comprehensive study of the Illinois statute concluded that it "is not a viable statute whatsoever." O'Brien & Fitzgerald, Apartment for Rent—Children Not Allowed, 25 De Paul L. Rev. 64, 86 (1975). Under the Illinois statute, the state's attorneys are the only persons empowered to investigate and prosecute violations of the statute. Ill. Ann. Stat. ch. 14, § 5 (1973). The survey conducted by O'Brien and Fitzgerald showed that from 1970 through 1975, only two consumer complaints occurred statewide. O'Brien & Fitzgerald, supra at 83.
141. For example, all recent efforts to push through the California Legislature legislation banning discrimination against children in rental housing have been vigorously and successfully opposed by the powerful real estate and landlord lobby. See Los Angeles Times, June 27, 1978, § 4, at 4, col. 1 (View).
143. Los Angeles Times, June 27, 1978, § 4, at 4, col. 1 (View). Sacramento has been cited as one urban area in California where there is not a shortage of apartments for children. Id.
144. Id. at 1, col. 1.
building of more apartments catering to children. This is the suggestion offered by one landlords' organization, the California Apartment Association. This alternative would provide rental housing for tenants with children, rather than concentrating on fining or punishing landlords who do not comply with anti-discrimination ordinances. Local action—either incentives to construct new or to convert already-existing rental housing reserved for tenants with children, or mandatory reservation of a percentage of rental housing for tenants with children—would be the action most likely to achieve the desired goal of increased rental housing for tenants with children. While such action would impose restrictions on a landlord's choice of tenants, the inconvenience could be minimized by "sectioning off" a portion of the rental building for tenants with children. The net effect would be to provide some rental housing for families with children without imposing overly severe requirements or sanctions on landlords.

Local action to alleviate the problem, regardless of whether that action takes the form of zoning, a housing ordinance, steps to encourage construction of more family apartments, or other similar actions, will hopefully result in more effective solutions to the problem, as well as more effective implementation of those solutions. Since the problems faced by families seeking rental housing vary from one area to the next, implementation and enforcement of solutions on the local level allows local governments to tailor their approach to best suit the needs of that locale.

Even more importantly, local governments acting individually can more completely and equitably balance the rights and needs of families seeking rental housing against the rights and desires of other segments of the local population. Adults who wish to live in retirement or adult-only housing developments, as well as landlords who wish to avoid the added burdens and costs associated with the presence of children in rental housing, also have constitutional and statutory rights which must be respected. Additionally, they constitute a politi-

145. In the words of a spokesperson for that organization:
Very few people in the [apartment] industry will dispute that there is a problem. There isn't enough family housing. But, by excluding the right of the adult to live in an adult atmosphere, that isn't right either. A lot of apartment complexes aren't geared for children. They are rather a disturbing element. We would like to encourage more apartment building for children rather than legislation restricting property rights.

Id. at 4, col. 1.
cal force to be reckoned with and consulted if attempts to provide additional rental opportunities for families are to prove viable.

At the present time there are indications that more California communities, spurred on in part by activist renters' organizations, are taking the initiative to tackle the problem as it exists in their area. At least three California jurisdictions, Berkeley, San Francisco and Santa Clara County, presently have ordinances restricting discrimination against children in rental housing. In Los Angeles, a city councilwoman has proposed a similar ordinance on which hearings are presently being held. However, there is evidence that the city ordinances existing in Berkeley and San Francisco are not very effective. Under the San Francisco ordinance, for example, there has only been one fine imposed against a landlord for discriminating against children in the three years that the ordinance has been in existence.

Hopefully, within the next few years the overall result of these efforts will be a more equitable balancing of the rights and needs of all individuals involved. It seems that the solutions, at this point, depend on affirmative legislation or local action which would increase the amount of rental housing available to tenants with children, and the efficient enforcement of these regulations.
