One Hundred Years of Equality: Saving California's Statutory Ban on Arbitrary Discrimination by Businesses

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MOST UNITED STATES LAWS prohibiting discrimination by businesses focus on specific types of discrimination, including race, religion, ancestry, national origin, gender, age, or disability.[1] Businesses may exclude customers for any reason so long as they do not do so for a statutorily prohibited reason. For over 100 years, California has taken a significant step further, prohibiting *all* forms of arbitrary business discrimination.[2] Initially, the statutory ban applied only to public accommodations; however, since the enactment of the Unruh Civil Rights Act[3] ("Unruh Act" or the "Act") amendments in 1959, the statutory ban has applied to "all business establishments of every kind whatsoever."[4] Until recently, California businesses could not exclude someone on the basis of a simple excuse such as, "I don't like you" or "I don't like your kind." As a result, California businesses could not discriminate against hippies because they were hippies,[5] police of-

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1. *See* Civil Rights Act, 42 U.S.C. § 1983 (1994 & Supp. IV 1998); Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (1994) (providing recourse to those discriminated on the basis of their disability); Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (1994) (providing recourse to those discriminated against on the basis of their age); New York Public Accommodations Act, N.Y. CIV. RIGHTS LAW § 40 (Consol. 2001) (prohibiting discrimination on the basis of "creed, color, or national origin").

2. *See* 1897 Cal. Stat., ch. 108, § 1, p. 137; *see also* 1919 Cal. Stat. ch. 210, § 1, p. 309; 1923 Cal. Stat., ch. 235, § 1, p. 485.

3. CAL. CIV. CODE § 51 (West 2001).

4. *Id.* This article will not discuss the issue of what constitutes a business establishment under the Act. That issue has been previously addressed. *See, e.g.*, Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218 (1998).

5. *See In re* Cox, 474 P.2d 992, 999 (Cal. 1970) (holding that a business may not arbitrarily exclude a would be customer from its premises).

ficers because they were police officers,[6] gays because they were gay,[7] or Republicans because they were Republican.

Over the past ten years, however, several lower courts in California have radically reduced these broad statutory protections. These lower courts have held that the Unruh Act only prohibits discrimination on the basis of characteristics specifically enumerated in the Act—sex, race, color, religion, ancestry, national origin, or disability.[8] If followed, this line of cases threatens to convert the Unruh Act into a pale imitation of federal law, overturning a century of anti-discrimination jurisprudence.[9] Some might view these cases, not yet ratified by the California Supreme Court, as evidence of extreme judicial activism. Alternatively, the recent trend in the case law may be explained, at least in part, by the lack of a set of well-articulated standards for adjudicating discrimination claims not framed in terms of suspect classes.

Part I of this Article reviews the history of California's ban on arbitrary discrimination by businesses, from the 1897 Equal Rights Statute[10] to its most recent legislative amendments to the Unruh Act. This history establishes that the California legislature intended, and until recently the courts had uniformly construed, the ban to prohibit all forms of arbitrary discrimination. Part II examines the recent cases that purport to radically limit that ban, and focuses in particular on the difficulties that may have led recent lower courts to seemingly extreme interpretations of the Act. Finally, Part III attempts to resolve these difficulties by proposing an approach, consistent with the 100-year history of the ban, that would permit courts to continue to respect the often-stated will of the legislature.

Regardless of whether courts adopt the approach set forth herein, courts should find a way to construe the Unruh Act to protect the rights of all persons to participate in a society free from arbitrary discrimination. This protection is necessary not just on the basis of

6. *See* Long v. Valentino, 265 Cal. Rptr. 96 (1989), *cert. denied*, 498 U.S. 855 (1990) (discriminating on the basis of occupation was covered; ACLU could violate the Act by forcibly requesting police officer to leave conference on police espionage).

7. *See* Rolon v. Kulwitzky, 200 Cal. Rptr. 217 (1984) (holding that a restaurant's policy of seating only two people of opposite sex in semi-private booths is illegal); Hubert v. Williams, 184 Cal. Rptr. 161, 163 (1982) (holding that homosexuals and those who associate with homosexuals are protected from arbitrary discrimination).

8. *See* Beaty v. Truck Ins. Exch., 8 Cal. Rptr. 2d 593, 597 (1992); Roth v. Rhodes, 30 Cal. Rptr. 2d 706 (1994); Liebaert v. Biltmore Props., No. 238402 (Kern Co. Super. Ct. 1999).

9. *See* 42 U.S.C. § 1983 (1994 & Supp. IV 1998).

10. 1897 Cal. Stat., ch. 108, § 1, p. 137.

immutable characteristics such as race or national origin, but on all aspects of personal choice, such as religion, marital status, personal appearance, and occupation. Certainly businesses and places of public accommodation may need some legitimate business exceptions to this general policy; however, those exceptions must be narrow and based on sound, rational judgments, not on arbitrary characteristics.

I. Historic Interpretation of the Statutory Ban

A. Basic Rule

At common law, enterprises engaged in "public" or "common" callings or "affected with a public interest"[11] were prohibited from engaging in discriminatory conduct.[12] Common law imposed upon these enterprises "the duty to serve all customers on reasonable terms without discrimination and the duty to provide the kind of product or service reasonably to be expected from their economic role."[13] In 1897, the California legislature codified these common law doctrines,[14] stating:

> [A]ll citizens within the jurisdiction of this civil state shall be entitled to the full and equal accommodations, advantages, facilities, and privileges of inns, restaurants, hotels, eating-houses, barber shops, bath-houses, theaters, skating rinks, and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens.[15]

11. The Civil Rights Cases, 109 U.S. 3, 26, 37–42 (1883) (Harlan, J,. dissenting); *In re* Cox, 474 P.2d 992, 996 (Cal. 1970). *See* Klim v. Jones, 315 F. Supp. 109, 118–20 (N.D. Cal. 1970). *See* Norman F. Arterburn, *The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411, 418–28 (1927); *see also* Walton H. Hamilton, *Affectation with Public Interest*, 39 YALE L.J. 1089, 1098–99 (1930); Matthew O. Tobriner & Joseph R. Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CAL. L. REV. 1247, 1249 (1967).

12. *See* Tobriner & Grodin, *supra* note 11, at 1250 ("[S]uch occupations as blacksmith, food seller, veterinarian, and tailor, as well as those of common carrier and innkeeper, were probably included in that category.") (footnotes omitted).

13. *Id. See* J. STORY, COMMENTARIES ON THE LAW OF BAILMENTS, § 508, at 483 (9th ed. 1878); *cf.* Bell v. Maryland, 378 U.S. 226, 286, 296–304 (1964) (Goldberg, J,. concurring); Lombard v. Louisiana, 373 U.S. 267, 274–76 (1962) (Douglas, J,. concurring); Greenberg v. W. Turf Ass'n., 82 P. 684, 685 (Cal. 1905); Willis v. McMahan, 26 P. 649 (Cal. 1891); Turner v. North Beach & Mission R.R., 34 Cal. 594, 600 (1868); Pleasants v. North Beach & Mission R.R., 34 Cal. 586, 589 (1868).

14. *See* Ronald P. Klein, *The California Equal Rights Statutes in Practice*, 10 STAN. L. REV. 253, 257–58 (1958) ("These statutes . . . have been thought merely to provide the means for preservation of *existing* common law rights . . . .").

15. 1897 Cal. Stat., ch. 108, § 1, p. 137.

In 1919, the 1897 Act was broadened to include public conveyances,[16] and in 1923, the Act was further broadened to include "places where ice cream or soft drinks of any kind are sold for consumption on the premises . . . ."[17]

The 1897 Act and its amendments were construed to require "public service businesses and the duty of innkeepers and common carriers to furnish accommodations to all persons in the absence of some reasonable ground for discrimination."[18] The ban was premised on the principle that "[u]nder our institutions the freedom to pursue the declared right [to public accommodations] on an equal basis is just as precious as many other freedoms and rights."[19] In applying the ban, therefore, courts construed it as protecting against all forms of arbitrary discrimination. In 1951, in *Orloff v. Los Angeles Turf Club*,[20] the California Supreme Court held that the 1897 Act barred the manager of a racetrack from expelling a patron who had acquired a reputation as a man of immoral character.[21] The court reasoned that "the private business, the personal relations with others, [and] the past conduct [of the patron] not on the premises, . . . whether or not relevant to indicate his character, are immaterial in the application of the statutory standards . . . ."[22] The court acknowledged that the proprietor might be justified in limiting a patron's access to a public establishment if public safety and welfare were threatened by the patron's acts.[23] In *Orloff*, however, there was no evidence that the patron posed any threat to the safety and welfare of the public.[24] The court therefore held that the manager of the racetrack acted unlawfully in excluding the plaintiff.[25] Later that same year, in *Stoumen v. Reilly*,[26] the court held that the 1897 Act prohibited businesses from discriminating against gay persons. The court found that

> 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

16. *See* 1919 Cal. Stat., ch. 210, § 1, p. 309.
17. 1923 Cal. Stat., ch. 235, § 1, p. 485.
18. Klein, *supra* note 14, at 258.
19. Orloff v. Los Angeles Turf Club, 227 P.2d 449, 453 (Cal. 1951).
20. 227 P.2d 449, 453 (1951).
21. *See id.* at 449.
22. *Id.* at 454.
23. *See id.* at 453–54.
24. *See id.* at 454.
25. *See id.*
26. 234 P.2d 969 (1951).

> right to exclude or eject a patron "except for good cause," and if he does so without good cause he is liable in damages.[27]

In the late 1950's, the legislature became concerned that the courts were too narrowly defining the types of businesses to which the 1897 Act applied.[28]

In 1959, the legislature amended the Unruh Civil Rights Act,[29] providing in part that "[a]ll persons . . . are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations . . . in all business establishments of every kind whatsoever."[30] The purpose of the Unruh Act was to expand, not restrict, the scope of the 1897 Equal Rights Statute—specifically, to make clear that the statutory ban on arbitrary discrimination applied to all businesses, not just to those enumerated in the Act.[31] As the California Supreme Court promptly acknowledged, the Unruh Act's enumeration of specific types of discrimination was intended to be illustrative, not exhaustive.[32] Prior to the amendment, courts never limited the 1897 Act's protections to discrimination based on "color, race, religion, ancestry, and national origin . . . ."[33] There was no evidence that the Unruh Act was intended to deprive citizens of protection from arbitrary discrimination—indeed, all evidence was to the contrary.[34]

Accordingly, in 1970, in *In re Cox*,[35] the court ruled that the 1897 Act as amended by the Unruh Act (collectively the "Acts"), prohibited discrimination on the basis of a person's appearance. In *Cox*, the plaintiff alleged that he had been unlawfully excluded from a shopping center because his male companion had long hair and was unconventionally dressed, in short, because his friend was a "hippie."[36] The court concluded that both the history and language of the Unruh Act indicated the legislature's intent to prohibit *all* forms of arbitrary

27. *Id.* at 971. The court also recognized the right of prostitutes to dine and drink in a bar or restaurant. *See id.* (citing *In re* Farley, 217 N.Y. 105 (1916)).

28. *See In re* Cox, 474 P.2d 992, 997 (1970).

29. CAL. CIV. CODE § 51 (West 2001).

30. *Id.* at § 51.1.

31. *See Cox*, 474 P.2d at 995; *see also* Rolon v. Kulwitzky, 200 Cal. Rptr. 217, 218 (1984).

32. *See Cox*, 474 P.2d at 995; *see also Rolon*, 200 Cal. Rptr. at 218.

33. *Cox*, 474 P.2d at 995.

34. *See id.* ("[B]oth its history and its language disclose a clear and large design to interdict all arbitrary discrimination by a business enterprise."); *see also id.* at 999 ("[T]he Civil Rights Act forbids a business establishment . . . from arbitrarily excluding a prospective customer.").

35. 474 P.2d 992 (1970).

36. *See id.* at 1000.

discrimination by business establishments, regardless of the basis.[37] The court held that discrimination against the plaintiff because of his companion's appearance violated the Acts.[38] "The shopping center may no more exclude individuals who wear long hair or unconventional dress, [than those] who are black, who are members of the John Birch Society, or who belong to the American Civil Liberties Union, merely because of these characteristics or associations."[39]

In 1974, the California legislature again amended the Acts by adding "sex" to the categories of specifically enumerated bases of prohibited discrimination, while leaving all other portions of the statute intact.[40] In making this modification, the legislature again noted that the amendment was not intended to limit the scope of the statute's protection to the specifically enumerated classes, but was merely intended to be illustrative.[41] The legislature was explicit in this regard:

> The purpose of the bill is to bring to the attention of the legal profession that the Unruh Act provides a remedy for arbitrary discrimination against women (or men) in public accommodations which are business enterprises. This bill does not bring such discrimination under the Unruh Act because the Act has been interpreted as making *all* arbitrary discrimination illegal, on whatever basis. The listing of possible bases of discrimination has no legal effect, but is merely illustrative.[42]

In so acting, the legislature ratified the prior consistent judicial view that the Acts proscribed *all* forms of arbitrary discrimination, not merely those specifically enumerated in the Acts.[43]

Consistent with this view, throughout the 1970s and 1980s, both the California courts and the California Attorney General interpreted the Acts as continuing to prohibit all forms of arbitrary discrimination by covered businesses. Discrimination on the basis of sexual orientation,[44] age,[45] marital status,[46] or occupation,[47] and discrimination

37. *See id.* at 995, 998.

38. *See id.* at 995–96.

39. *Id.* at 1000.

40. *See* 1974 Cal. Stat., ch. 1193, § 1, p. 194. *See also* Harris v. Capital Growth, 805 P.2d 873, 877 (Cal. 1991).

41. *See* Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 122 (Cal. 1982).

42. *Id.* at 122–23.

43. *See id.*

44. *See* Rolon v. Kulwitzky, 200 Cal. Rptr. 217 (1984) (finding that a restaurant's policy to only seat two people of the *opposite* sex in semiprivate booths to be illegal discrimination under the Unruh Act); Hubert v. Williams, 184 Cal. Rptr. 161, 163 (1982) (holding that homosexuals, as well as those who associate with homosexuals, are protected from arbitrary discrimination under the Unruh Act).

against students,[48] welfare recipients,[49] persons who associated with blacks,[50] and families with children[51] were all held to be unlawful under the Acts even though Unruh Act amendments did not enumerate these classifications. The Act prohibited covered California businesses from discriminating on any arbitrary basis.[52]

B. Legitimate Business Exception

The law was equally clear that only arbitrary discrimination was prohibited. Businesses frequently make distinctions, for example, between customers who can afford to pay and those who cannot, and between customers whose use is consistent with the service provided and those whose use is not. The courts acknowledged that businesses might limit access to their services on grounds "rationally related to the services performed and facilities provided."[53] This "legitimate business exception," in effect, permits business owners to run their businesses in a business-like manner. The "particular business interests of the purveyor in maintaining order, complying with legal requirements, and protecting a business reputation or investment" justify policies that make "distinctions among its customers."[54] The legitimate

45. *See* O'Connor v. Vill. Green Owners Ass'n, 662 P.2d 427 (Cal. 1983) (condemning an age restriction in the covenants, conditions, and restrictions of a condominium development refusing residency to persons under the age of 18 as violative of the Unruh Act).

46. *See* 58 Op. Cal. Att'y Gen. 608, 613 (1975).

47. *See* Long v. Valentino, 265 Cal. Rptr. 96 (1989), *reh'g denied*, 1990 Cal. App. LEXIS 202 (4th App. Dist. Jan. 19, 1990), *cert. denied* 498 U.S. 855 (1990)) (finding that discrimination on the basis of occupation was covered by the Act, the court found that the American Civil Liberties Union could be held in violation of the Act by forcibly requesting a police officer to leave a conference on police espionage).

48. *See* 59 Op. Cal. Att'y Gen. 70, 71 (1976) ("[A]rbitrary discrimination based on . . . student status is . . . prohibited by the Act.").

49. *See* 59 Op. Cal. Att'y Gen. 223, 225 (1976) ("We conclude that a blanket termination of tenancy and refusal to rent housing merely because the tenant/applicant is eligible for and receiving public assistance benefits would not be permitted under the Act.").

50. *See* Winchell v. English, 133 Cal. Rptr. 20 (1976) (finding the business practice of discriminating against persons on account of their associations with individuals of the black race to be arbitrary discrimination, which is prohibited under the Act).

51. *See* Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 116 (Cal. 1982) (holding that a rental policy refusing to rent housing to families with children to be illegal discrimination under the Unruh Civil Rights Act).

52. As stated above, the issue of what qualifies as a business under the Unruh Act is not within the scope of this article.

53. *In re* Cox, 474 P.2d 992, 995–96 (Cal. 1970) (noting that the statute's proscription against discrimination on the basis of arbitrary classifications is not absolute, whereby establishments may implement discriminatory policies so long as those regulations are reasonable and rationally related to a legitimate business interest).

54. Harris v. Capital Growth Investors XIV, 805 P.2d 873, 884 (Cal. 1991).

business exception, however, does not apply to classes that are specifically enumerated in the Unruh Act.[55]

1. Non-Specifically Enumerated Classes

The court in *Wynn v. Monterey Club*[56] held that the exclusion by a gambling establishment of a pathological gambler who had written bad checks was "good business and social practice" that did not violate the Unruh Act.[57] Since the exclusion was not based on any of the specified categories within the Act, the court's inquiry turned on whether the alleged discrimination was arbitrary.[58] In contrast to *Orloff*, the court in *Wynn* found that the denial of access to the establishment was not arbitrary.[59] In *Orloff*, the plaintiff was expelled from an establishment simply because of his reputation of immoral character.[60] Conversely, in *Wynn*, plaintiffs had written bad checks totaling $1,750 and had accumulated gambling debts of up to $30,000 causing the defendant to exclude plaintiffs in order to avoid additional future monetary losses.[61] Thus, the exclusion was not arbitrary because plaintiff's poor credit history with defendant's establishment directly threatened defendant's business practice of securing payment.

Similarly in *Frantz v. Blackwell*,[62] the court held that refusal to sell to a potential competitor did not violate the Unruh Act. Blackwell, a single family home developer, refused to sell real estate property to plaintiff, a real estate agent, because the plaintiff allegedly "purchase[d] units in new developments, delay[ed] escrow closing, and attempt[ed] to resell the units before his escrow close[d], using the time delay and Blackwell's promotional efforts . . . to create a profit."[63] To require the defendant to sell to plaintiff would adversely affect defendant's business because the plaintiff would become a sales competitor instead of a buyer-occupant. Furthermore, defendant's refusal to sell to plaintiff was not arbitrary discrimination against a group of people nor was it status-based.[64] Instead, the plaintiff's conduct, as opposed to his status, caused the defendant to reasonably re-

55. *See* Wynn v. Monterey Club, 168 Cal. Rptr. 878 (1980).
56. *Id.*
57. *Id.* at 882.
58. *See id.* at 881.
59. *See id.*
60. Orloff v. Los Angeles Turf Club, 227 P.2d 449 (Cal. 1951).
61. *Wynn*, 168 Cal. Rptr. at 880.
62. 234 Cal. Rptr. 178 (1987).
63. *Id.* at 179.
64. *See id.* at 181.

fuse to sell to an investor-speculator taking advantage of the defendant's skills as a developer.[65]

Additionally in *Ross v. Forest Lawn Memorial Park*,[66] the court upheld the exclusion of uninvited "punk rockers" from a private funeral. Here, plaintiff had an agreement with the defendant park owner to keep the funeral services quiet and private.[67] The defendant failed to do so, allowing a group of "punk rockers" to attend the services.[68] The "punk rockers" disturbed the services to the point that police had to be called.[69] The defendant business argued that cases such as *Marina Point, Ltd.* and *In re Cox* supported their argument that they could not deny the "punk rockers" access to the services.[70] The court found that these cases did not apply, because the "punk rockers" were not potential customers and were being disruptive.[71] Since the defendant was in the business of providing services by bringing comfort to families, the court found that the denial of access was "rationally related to the services performed."[72] The defendant was held responsible for allowing the "punk rockers" to disturb the funeral.[73]

Finally, in *Reilly v. Stroh*,[74] the court held that a proprietor was not required to allow underage patrons on premises that sold alcoholic beverages.[75] The plaintiff, a restaurant owner, had a "'bona fide public eating place' on-sale beer and wine license" which was suspended as a result of serving alcohol to minors.[76] The plaintiff claimed that he had done all that could be done to try to prevent the underage customers from drinking, but that he could not go as far as to prohibit entry.[77] Plaintiff cited the Unruh Act and prior decisions prohibiting arbitrary discrimination.[78] The court found that denying access to persons between the ages of eighteen and twenty-one was not arbitrary discrimination because the California Constitution provides that bar owners may do so in order to prevent underage drinking.[79]

65. *See id.*
66. 203 Cal. Rptr. 468 (1984).
67. *See id.* at 470.
68. *See id.* at 471.
69. *See id.* at 470–71.
70. *See id.*
71. *See id.* at 473.
72. *Id.* at 471 (quoting Marina Point, Ltd. v. Wolfson, 640 P.2d 115 (1982)).
73. *See id.* at 472.
74. 207 Cal. Rptr. 250 (1984).
75. *See id.* at 251.
76. *Id.*
77. *See id.* at 251.
78. *See id.* at 252.
79. *See id.* at 253.

The Act prohibits arbitrary discrimination, not discrimination based upon legitimate business practices. As evidenced by the cases above, to use the legitimate business practice exception the defendant must prove that the exclusion of an individual or group of people is "rationally related to the services performed."[80]

2. Specifically Protected Classes

The legitimate business exception is not available, however, to justify discrimination on any of the bases specifically enumerated in the Unruh Act—race, color, religion, ancestry, national origin, disability, or sex. Thus, in *Koire v. Metro Car Wash*,[81] no legitimate business exception was found for offering discounts and free admission to women only.[82] The court stated: "Although the list of classes enumerated in the Act has been held to be illustrative rather than exhaustive . . . the inclusion of 'sex' in the list clearly covers discrimination based on sex."[83] The court so held notwithstanding undisputed evidence that the discounts were profitable to defendant's business. In the case of specifically protected classes, the court ruled that discriminatory practices are not lawful simply because they are profitable or otherwise in the interest of the business.[84]

Similarly, in *Engel v. Worthington*,[85] the court rejected a photographer's justification for refusing to publish a picture of a male high school alumnus with his male guest in a high school reunion picture book.[86] The defendant asserted that "pictures of men and women sold better than same-gender pictures and [the] goal was to make as many pictures as possible that would sell."[87] Defendant acknowledged that if the alumnus had been female, or if his guest had been female, the photograph would have been published,[88] and therefore, the defendant's "services were gender dependent."[89] As in *Koire*, the court held

80. *See supra* note 72.

81. Koire v. Metro Car Wash, 707 P.2d 195 (Cal. 1985).

82. *Id.* at 200.

83. *Id.* at 196 ("[T]he Act applies to classifications based on sex.").

84. *See id.* at 199.

85. 23 Cal. Rptr. 2d 329 (1993). Review to the California Supreme Court denied on Feb. 3, 1994. Engel v. Worthington, No. G012734, 1994 Cal. LEXIS 558, 558, 94 Cal. Daily Op. Service 881 (1994). In denying review, the California Supreme Court ordered that the opinion be not officially published. CAL. R. COURT 976, 977, 979 (the Court of Appeal decision was previously published at 19 Cal. App. 4th 43).

86. *See* Engel v. Worthington, 23 Cal. Rptr. 2d 329 (Cal. App. 4 Dist. 1993).

87. *Id.* at 333.

88. *See id.*

89. *Id.* at 331.

that the discriminatory practice was unlawful under the Unruh Act notwithstanding the defendant's purported economic justifications.[90] Holding the photographer's business reasons as insufficient to justify the refusal to extend services to same-sex companions, the court reasoned that "[i]f a business owner could avoid the Act's mandates simply by relying on economic defenses, exceptions would eviscerate the rule."[91]

Courts have also held that discrimination contrary to public policy is arbitrary, and therefore is not protected under the Unruh Act. For instance, in *Marina Point, Ltd. v. Wolfson*,[92] a landlord refused to renew a lease in an apartment complex advertised as adult-only to a couple after they had given birth.[93] The landlord attempted to justify its restrictive policy as an effort to maintain a "quiet and peaceful residential atmosphere by excluding *all* minors from its housing accommodations, thus providing its adult tenants with a 'child free' environment."[94] The California Supreme Court held that the landlord's discrimination was arbitrary, and therefore unlawful,[95] refusing to apply the legitimate business exception in such circumstances.[96] The court held that there was a paramount social interest in making housing available to families with children.[97] In *O'Connor v. Village Green Owners Association*,[98] the court similarly condemned condominium covenants that prohibited the residency of any person under the age of eighteen as violative of the Unruh Act.[99] The court rejected, as

90. *See id.* at 334.

91. *Id.*

92. 640 P.2d 115 (Cal. 1982).

93. *See id.* at 117–18.

94. *Id.* at 117.

95. *See id.* ("The fact that the landlord's exclusionary policy in this case discriminated against children and families with children, rather than a specific racial or religious group or some other classification specifically involved in a prior judicial decision, does not place the exclusionary practice beyond the reach of the Unruh Act.").

96. *See id.* at 124–26.

97. *See id.* at 128. The court noted that in 1979, the Legislature stated:

> The Legislature finds and declares that the state's housing problems are substantial, complex and now of crisis proportions . . . . The Legislature finds and declares that the greatest need for housing is experienced by residents at the lower end of the economic scale. Many moderate and low income households *with children* cannot normally find decent, safe and suitable housing at prices they can afford . . . .

Id. at 128–29 (citing 1979 Cal. Stat., ch. 1043, §§ 1, 2, pp. 3643–44). Therefore, the court concluded, the landlord's business practice exacerbates the current housing problem, and thus runs counter to public policy. *See id.*

98. 662 P.2d 427 (Cal. 1983).

99. *See id.* at 428.

contrary to public policy, arguments that children were disruptive and that their exclusion was therefore a legitimate business practice.[100]

The legislature subsequently codified *Marina Point, Ltd.* and *O'Connor*, adding California Civil Code section 51.2 which explicitly prohibits discrimination in housing on the basis of age.[101] The legislature once again ratified the court's long standing interpretation that the Acts prohibit all arbitrary discrimination, not merely specifically enumerated forms. In recognition of the special needs of senior citizens, it also adopted California Civil Code section 51.3, allowing an exception for senior citizen housing.[102]

II. Recent Judicial Difficulties

A. The California Supreme Court—*Harris v. Capital Growth Investors XIV*

For nearly twenty years prior to 1986, the California Supreme Court consistently interpreted the Unruh Act to by and large prohibit all arbitrary discrimination. Most notably, in 1970 Justice Tobriner wrote the *Cox* opinion expressing the unanimous view of the court that the Unruh Act prohibited all arbitrary discrimination, including discrimination on the basis of a person's appearance.[103] This opinion laid the foundation for establishing that all forms of arbitrary discrimination by businesses, irrespective of their bases, are unlawful.[104] In the

100. *See id.* at 431.

101. *See* CAL. CIV. CODE § 51.2 (West Supp. 2001). This section entitled *Age discrimination in housing prohibited; exception; intent*, provides:

> (a) 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 that housing for senior citizens, pursuant to [s]ection 51.3 . . . .
>
> (b) This section is intended to clarify the holdings in [*Marina Point, Ltd. v. Wolfson*, 640 P.2d 115 (Cal. 1982), and *O'Connor v. Vill. Green Owners Ass'n*, 662 P.2d 427 (1983)].

Id.

102. *See* CAL. CIV. CODE § 51.3 (West Supp. 2001). This section entitled *Housing; age limitations; necessity for senior citizen housing* states:

> (a) The Legislature finds and declares that this section is essential to establish and preserve specially designed accessible housing for senior citizens. There are senior citizens who need special living environments and services, and find that there is an inadequate supply of this type of housing in the state.

Id.

103. *See In re* Cox, 474 P.2d 992, 999–1000 (Cal. 1970).

104. *See id.* at 995.

decade following *Harris*, the California courts continually followed the Tobriner view advanced in *Cox*.[105]

However, the California Supreme Court's approach drastically changed in 1986. The 1986 judicial retention election deposed three justices from the California Supreme Court: Chief Justice Bird and Justices Grodin and Reynoso.[106] This transition marked the end of the short-lived Bird Court. The aftermath of the 1986 election resulted in the appointment of more conservative justices and the promotion of Malcolm Lucas to Chief Justice.[107] The Lucas court "maintained the appearance of continuity in the law and respect for precedent while, nevertheless, significantly changing the results in individual cases."[108] In particular, the California Supreme Court's 1991 decision in *Harris v. Capital Growth Investors XIV*[109] meaningfully altered the interpretation of the Unruh Act, though the court was careful not to tread upon the precedent of *Cox*.[110] The Lucas opinion in *Harris* limited the scope of the Unruh Act and challenged the historically recognized blanket prohibition against all arbitrary discrimination.

In *Harris*, the defendants, who owned and operated apartment buildings, required that applicants demonstrate sufficient income to be considered as potential renters—a fairly standard business practice among landlords.[111] For this purpose, defendants defined sufficient income as monthly income equal to or greater than three times the rent charged.[112] The plaintiffs, whose income consisted solely of public assistance benefits, claimed that the defendants' policy was arbi-

105. *See* Marina Point, Ltd. v. Wolfson, 640 P.2d 115 (Cal. 1982); O'Connor v. Vill. Green Owners Ass'n, 662 P.2d 427 (Cal. 1983); Rolon v Kulwitzky, 662 P.2d 427 (Cal. 1984); Long v. Valentino, 640 P.2d 115 (Cal. 1989); Winchell v. English, 62 Cal. App. 3d 125 (1976).

106. *See* Kevin M. Mulcahy, *Modeling the Garden: How New Jersey Built the Most Progressive State Supreme Court and What California Can Learn*, 40 SANTA CLARA L. REV. 863, 891 (2000) (discussing the 1986 retention election campaign as focused on the liberal decisions of the Bird court.). *See generally* Stephen R. Barnett, *California Justice*, 78 CAL. L. REV. 247 (1990) (observing that the focus of the opposition was primarily on Chief Justice Bird because of her dissents from opinions affirming death penalties. Justices Reynoso and Grodin were bystanders at the beginning, but they remained vulnerable as attention spread from the Chief Justice to the court. The state Republican party position itself opposed the retention of the Chief Justice, and Justices Reynoso and Grodin as well, because they were convenient targets for officeholders seeking a political advantage.).

107. *See* Mulcahy, *supra* note 106, at 892–93.

108. J. Clark Kelso, *A Tribute to Retiring Chief Justice Malcolm M. Lucas*, 27 PAC. L.J. 1401, 1401 (1996).

109. 805 P.2d 873 (1991).

110. *See id.* at 874.

111. *See id.* at 885.

112. *See id.*

trary discrimination on the basis of income and was prohibited under the Unruh Act.[113] Plaintiffs argued that the assumption that persons who met the specified income standard would be more likely to pay rent than those who did not was unsubstantiated and did not reflect the actual ability to pay.[114] Plaintiffs also maintained that use of a minimum income policy was arbitrary because it declined to treat them as individuals and "stereotype[d]" them as being low income and unable to pay rent.[115] Relying on the prior decision in *Cox*, plaintiffs argued that the Unruh Act banned all forms of arbitrary discrimination, including the alleged discrimination at bar.

Rather than relying on the legitimate business exception to uphold their policy, defendants argued that the Unruh Act simply did not apply.[116] Defendants' contended that the Unruh Act did not apply to economic selection criteria such as the minimum income policy because they fell outside the Unruh Act's specified classifications of race, religion, ancestry, national origin, gender, age, or disability.[117] Focusing on the language of the Act and the repeated references to enumerated classes, defendants requested that the court either confine the scope of the Act's protections to the enumerated classes, or at least exclude from its coverage economic and financial criteria such as its minimum income requirement rental policy.[118] Defendants pointed to the language of the Act that gave special emphasis to the list of categories of prohibited discrimination by repeating the list three times—twice in section 51 and again in section 52, where it provided a remedy only for discrimination "on account of color, race, religion, ancestry, or national origin."[119] This construction seemingly prohibited only specific types of discrimination based on the enumerated categories, rather than a complete ban on all forms of arbitrary discrimination. Thus, defendants argued, the Unruh Act was inapplicable to defendants' alleged economic discrimination because such discrimination was not of the type falling within the enumerated categories of discrimination prohibited by the Act.

The new conservative court was reluctant to overrule the prior California Supreme Court opinions despite the majority's reservation

113. *See id.*
114. *See id.*
115. *Id.* at 886.
116. *See id.* at 878.
117. *See id.*
118. *See id.*
119. *Id.*

with past interpretations of the Unruh Act.[120] The court was unwilling to infer legislative intent based on defendant's interpretation of the descriptive language of the statute. Although it viewed defendant's argument as meritorious, the court examined both the actions taken by the legislature in response to *Cox*, and the related appellate court decisions.[121] The court presumed that the legislature was aware of those prior decisions and acknowledged that the legislature did not take specific action to overrule them.[122] Moreover, the legislature amended the Unruh Act several times in the twenty-year period since *Cox* was decided without altering portions of the provision that various appellate courts had previously construed.[123] Thus, the court rejected defendant's suggestion that the Unruh Act applies only to statutorily enumerated categories of discrimination.

Instead of rejecting *Cox* and its progeny to hold in favor of defendants, the court introduced an alternative interpretation of the Unruh Act to hold in favor of defendants while cautiously leaving precedent intact. The court in *Harris* devised a new interpretation of the Act by returning to the prohibited categories of discrimination in the statute. In essence, the court found that the specified categories share a common element involving *personal* characteristics.[124] When prior courts applied the Act to arbitrary discrimination beyond the specified categories, "personal characteristics and not financial status or capability provided the basis of decision."[125] Because prior cases have involved arbitrary discrimination based on personal characteristics in some form or another, there is no case law supporting the notion that economic distinctions are proscribed.[126] Nonetheless, the court held that defendants' minimum income policy was justified by the landlord's legitimate business interest in assessing the capability of prospective tenants to pay rent on a continuing basis.[127] The court recognized that "[b]usiness establishments have an obvious and important interest in obtaining full and timely payment for the goods and services they provide"[128] and "citizens . . . shall pay the charges

120. *See id.* at 879 ("Although defendants' argument against *Cox*, *Marina Point, Ltd.*, and related cases is not without foundation, it does not afford a sufficiently compelling reason to overrule the holdings of *Cox* and its progeny.").

121. *See id.* at 879–80.

122. *See id.* at 879.

123. *See id.*

124. *See id.* at 883.

125. *Id.*

126. *See id* at 883–84.

127. *See id.* at 889.

128. *Id.* at 884.

imposed, equally and without discrimination."[129] Thus, a landlord has the legitimate business interest of securing rental payment and implementing policies "designed to screen out prospective tenants who are likely to default."[130]

Absent the court's respect for prior judicial decisions in cases such as *Cox*, the court in *Harris* would have reached the same decision to uphold the defendant's selection policy, but on different grounds. The court in *Harris* stated:

> As we have explained, were we writing on a clean slate, the repeated emphasis in the language of [the Act] . . . on the specified classifications of race, sex, religion, etc., would represent a highly persuasive, if not dispositive, factor in our construction of the Act . . . . Indeed, plaintiffs' argument in favor of an additional classification of "economic discrimination" would effectively discard the listed classifications as surplusage in violation of the mandate to attribute significance to "every word and phrase" used by the Legislature.[131]

The court reasoned, however, that the categories expressly enumerated in the Act "involve personal as opposed to economic characteristics—a person's geographical origin, physical attributes, and personal beliefs."[132] Additionally the "Legislature's decision to enumerate personal characteristics, while conspicuously omitting financial or economic ones, strongly suggests a limitation on the scope of Unruh Act."[133] Therefore, had the court presided over unprecedented territory absent prior decisions such as *Cox*, the court would have construed the Act as inapplicable to discrimination based on nonpersonal factors such as financial or economic characteristics, thus relieving the defendants from the Unruh Act at the onset.

In their dissents, Justices Mosk and Broussard argued that the court disregarded *stare decisis* by ignoring *Cox* and its progeny's prohibition of all forms of arbitrary discrimination.[134] The dissent noted that "until today courts of this state have understood . . . that *all* arbitrary discrimination by a business establishment is prohibited by the Unruh Act."[135] Thus, the majority's distinction based on personal characteristics was not supported by prior case law.[136] Referring to

129. *Id.* at 885.
130. *Id.* at 885.
131. *Id.* at 882 (citations omitted).
132. *Id.* at 883.
133. *Id.* (citations omitted).
134. *See id.* at 894–95.
135. *Id.* at 895.
136. *See id.* at 894–96.

Cox, the dissent questioned whether any personal characteristics were involved in discriminating "against [persons with] long hair and unconventional dress, or against friends of those with long hair and unconventional dress."[137] The dissent concluded, "[i]n spite of the fact that the majority do not expressly overrule our holding in *In re Cox*[,] . . . they still run afoul of the doctrine of stare decisis by limiting *Cox* to its facts."[138]

Moreover, the dissent noted that the court's neglect in defining "what, exactly, constitutes a personal characteristic" would hinder future courts and practitioners in attempting to apply the Unruh Act.[139] The examination of prior case law does little to clarify the *Harris* court's "personal characteristic" distinction. Where prior courts have invalidated discriminatory policies on the basis of one's appearance,[140] association with others,[141] sexual orientation,[142] age,[143] occupation,[144] and families with children,[145] the *Harris* court would presumably assert that those classifications are based on "personal characteristics." Even in cases where discriminatory policies have been upheld under the legitimate business exception, courts have not held that the Unruh Act did not apply. Accordingly, the Act's protections have not been denied to "punk rockers,"[146] realtors,[147] and gamblers;[148] and thus, again according to the *Harris* court, these persons have been classified by their "personal characteristics."[149] Such covered classifications, however, do not provide a clear picture of what would constitute a "personal characteristic" and what would not. Consequently, the *Harris* court left the definition of "personal characteristic" ambiguous. This uncertainty shifted the determination of coverage under the Unruh Act to whether the classification was based on a "personal characteristic."

137. *Id.* at 894.

138. *Id.* at 895.

139. *Id.* at 897.

140. *See In re* Cox, 474 P.2d 992, 1000 (Cal. 1970).

141. *See* Winchell v. English, 133 Cal. Rptr 20, 22 (1976).

142. *See* Rolon v. Kulwitzky, 200 Cal. Rptr. 217, 217 (1984); Hubert v. Williams, 184 Cal. Rptr. 161, 164 (1982).

143. *See* O'Connor v. Vill. Green Owners Ass'n, 662 P.2d 427, 428 (Cal. 1983).

144. *See* Long v. Valentino, 265 Cal. Rptr. 96, 98 (1989).

145. *See* Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 129 (Cal. 1982).

146. *See* Ross v. Forest Lawn Mem'l Park, 203 Cal. Rptr. 468, 470 (1984).

147. *See* Frantz v. Blackwell, 265 Cal. Rptr. 178, 179 (1987).

148. *See* Wynn v. Monterey Club, 168 Cal. Rptr. 878, 881 (1980).

149. *See* Harris v. Capital Growth Investors XIV, 805 P.2d 873, 897 (Cal. 1991).

B. Lower California Court Decisions in the Aftermath of *Harris*

Since the *Harris* decision in 1991, a few lower courts have interpreted the opinion in even more restrictive ways, seriously impacting the protection provided by the Unruh Act. In 1992, in *Beaty v. Truck Insurance Exchange*[150] the California Court of Appeal for the Third Appellate District improperly narrowed the scope of the Unruh Act's protections by concluding that any further expansion of the statutory protections beyond the specifically enumerated classifications was contrary to the intention of the California legislature.[151] The court interpreted *Harris* as requiring careful weighing when considering further expansion of protected categories beyond those expressly enumerated in the Act so that expansion would be consistent with legislative intent.[152] The court then incorrectly stated that the legislature intended to confine the Act's coverage to those categories already expressly enumerated within the statute. As a result, the court in *Beaty* refused to extend the Act's protections to classifications based on marital status. "The court reason[ed] that if the Legislature had intended to include marital status in the list of protected categories, it would have done so explicitly since it used a specific list in two separate code sections of the Unruh Act."[153]

Beaty misreads the *Harris* decision—it says that *Harris* confined the Unruh Act *only* to the types of discrimination specifically enumerated therein. As discussed above, *Harris* did uphold the decisions which involved a "personal characteristic" even when they involved discrimination against persons not specifically enumerated in the Act. If the court in *Beaty* followed *Harris* correctly, it would have tried to determine whether marital status involved any personal characteristics.[154] Only if the court determined that marital status was not a personal characteristic, could it then have refused to expand the protection of the Unruh Act.[155] *Harris* does not narrow the scope of the Unruh Act to prohibit *any* expansion of the statutory protections beyond the specifically enumerated classifications, as suggested by *Beaty*.[156] In fact, the court in *Harris* upheld decisions such as *Marina*

150. 8 Cal. Rptr. 2d 593, 597 (1992).

151. *See id.* at 597.

152. *See id.*

153. Helen Silva, *Survey: Women and California Law*, 23 GOLDEN GATE U. L. REV. 1103, 1107 (1993).

154. *See id.*

155. *See id.*

156. *See id.*

Point, Ltd. and *Cox* which expanded the listed categories, only if the new categories involved personal characteristics.

In 1994, the California Court of Appeal for the Fourth District utilized the ambiguous "personal characteristic" distinction left by the *Harris* court to further restrict the scope of the Unruh Act's protection. In *Roth v. Rhodes*,[157] the appellate court found that a person's occupation was not a personal characteristic, and held that occupation based discrimination was not covered by the Unruh Act.[158] The plaintiff in *Roth*, a podiatrist, attempted to lease office space in a medical building occupied solely by medical doctors.[159] The owners of the building refused to rent the space to the plaintiff based on a business policy of only renting to occupants with medical degrees.[160] As a podiatrist, the plaintiff did not hold a medical degree, but rather a degree of doctor of podiatry.[161] The court found the defendant owners' discriminatory policy to be based on sound business reasons, indicating that "[i]f operators of an office building perceive a niche in the market for a particular type of tenant, no useful purpose is to be served by [the court] interfering with their economic decision to so limit the tenancy."[162] While the court found that this business reason justified the application of the legitimate business exception, it based its holding instead on the finding that the Unruh Act simply did not apply.[163]

Relying on *Harris*, the appellate court in *Roth* reasoned that despite the broad language of earlier cases, all of the cases that expanded the coverage of the Unruh Act involved discrimination based on personal characteristics similar to the enumerated statutory classifications.[164] The court further noted that in *Harris*, the California Supreme Court limited the expansion of the statute with a line between personal characteristics and economic discrimination.[165] The court in *Roth* then concluded that "[t]he election to practice a particular pro-

157. 30 Cal. Rptr. 2d 706 (1994).

158. *See id.* at 710.

159. *See id.* at 707–08.

160. *See id.* at 708.

161. *See id.*

162. *Id.* at 710. The court, in its finding that the defendants had legitimate business reasons to limit their choice of tenants to certain occupations or professions, went so far as to suggest that the prestige attributed to the defendants' medical building, upon which the plaintiff sought to take advantage of, may be partially the result of the discriminatory leasing policy. *See id.* The court further suggested that it "should not insinuate itself into the market place to prohibit [defendants] from maintaining such policies as have resulted in the commercial success attributed to [them] by [plaintiff]." *Id.*

163. *See id.*

164. *See id.*

165. *See id.*

fession represents a professional, and frequently, an economic choice" and occupational status is not the type of personal characteristic that is protected by the Unruh Act.[166] Thus, the court permitted "discrimination in leasing office space based on profession, as long as it is not a stratagem designed to disguise discrimination based on personal characteristics protected under the Unruh Civil Rights Act."[167]

The *Roth* decision, though arguably in line with *Harris*, directly contravened past case law, where courts had interpreted the Unruh Act's proscription as covering discrimination based on occupation.[168] Prior to *Roth*, in 1989, the California Court of Appeal for the Fourth District, in *Long v. Valentino*, explicitly found that occupational status was covered by the Unruh Act.[169] There, the court found the American Civil Liberties Union to be in violation of the Act when it forcibly requested a police officer to leave a conference on police espionage.[170] The court concluded that police officers "are as much entitled to the protections of the Unruh Act as any other citizen," and therefore "may not be refused service in a restaurant, denied an apartment, or ejected from a public meeting merely because of their occupation . . . ."[171] Thus, the appellate court in *Roth*, in direct contravention with *Long*, incorrectly narrowed the scope of the Unruh Act's protections by holding that occupational status represents an economic choice rather than a personal characteristic and therefore is not protected under the Act.[172]

In *Liebaert v. Biltmore Properties*,[173] the Superior Court for Kern County reaffirmed the ruling in *Roth* that occupation is not a personal characteristic as intended by *Harris* and therefore is not covered by the Unruh Act.[174] In *Liebaert*, the real estate developer Biltmore refused to sell the plaintiff a new home because of the plaintiff's occupation as a Bakersfield attorney.[175] The plaintiff, Timothy Liebaert, filed

166. *Id.*

167. *Id.*

168. *See* Long v. Valentino, 265 Cal. Rptr. 96, 102–03 (1989); *see also* 58 Op. Cal. Att'y Gen. 608, 613 (1975) (indicating that the protections of the Unruh Act properly extend to occupation).

169. *See Long*, 265 Cal. Rptr. at 102–03.

170. *See id.* at 102.

171. *Id.* at 102–03.

172. *See Roth*, 30 Cal. Rptr. 2d at 707–08 (1994).

173. Liebaert v. Biltmore Props., No. 238402 SPC (Sup. Ct. Kern Cty. May 19, 1999).

174. *See id.*

175. *See* Plaintiff's First Amended Complaint for Damages, *Liebaert* (No. 238402 SPC). The facts of this case are assumed as stated in Plaintiff's First Amended Complaint for Damages, *Liebaert* (No. 238402 SPC). *See id.* In February of 1999, Liebaert and his wife put down $3,000 for a home in a new Bakersfield housing development under construction by

suit against Biltmore, alleging unlawful arbitrary discrimination in violation of the Unruh Act.[176] In his suit, plaintiff sought actual and punitive damages as well as an injunction to prevent the developer from "arbitrarily discriminating in refusing to deal with, sell, or lease to any member of a class, in accordance with the Unruh Act."[177]

Biltmore claimed that its policy not to sell homes to attorneys was based on the legitimate business reason that lawyers are prone to sue and refusing to sell to lawyers keeps business expenses and home costs down.[178] Biltmore asserted that its "policy is not arbitrary based on a dislike for either the legal profession or of those members who are members of it . . . ."[179] Rather, they argued that the policy:

> [S]erves a legitimate business interest . . . [because] homebuyers who are also lawyers threaten litigation (requiring significantly greater management time as well as legal fees and resolution costs) at a dramatically higher rate than home buyers who are not lawyers . . . . [Not selling to lawyers] enables [Biltmore] to continue to offer its homes at more attractive prices.[180]

Rather than claiming that the legitimate business exception should apply, Biltmore asserted that the decisions in both *Harris* and *Roth* compel the court to hold that "[t]he Unruh Civil Rights Act does not protect those that are allegedly discriminated against because they practice a certain profession or occupation."[181] Biltmore further noted that in *Beaty*,[182] the court interpreted the *Harris* holding to for-

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Biltmore. *See id.* at 7. Biltmore's representative assured the Liebaerts that the house would be ready to move in by August. *See id.* at 7–8. About a week later, the couple again met with Biltmore's representative to pick out amenities and upgrades for their new home. *See id.* at 9–10. During this meeting, Liebaert mentioned that he was a lawyer. *See id.* at 10. Upon hearing this, the representative responded by stating: "Oh, I am going to have to warn you up-front, sometimes the builder refuses to sell to attorneys." *See id.* at 10–11. A few days later the representative phoned Liebaert to inform him that Biltmore was canceling the sale. *See id.* at 13. Then in early March, the Liebaerts received in the mail their $3,000 check with the word "void" scrawled across it. *See id.* at 14.

176. *See id.* at 19–21.

177. *Id.* at 23–24.

178. *See* Letter from Susan E. Bonanno, Attorney, Greg D. Judkins, PLC (attorneys for Biltmore Properties), to Raymond G. Robinson, Attorney, Borton, Petrini & Conron, LLP (attorneys for Liebaert) (March 15, 1999) ("[W]hile [Biltmore's] efforts to avoid selling homes to lawyers reduces the field of potential buyers for its homes it is willing to accept this reduction in order reduce the frequency of threatened and actual litigation.") (on file with the author).

179. *Id.* at 2.

180. *Id.*

181. Memorandum of Points & Authorities in Support of Demurrer to Complaint of Timothy B. Liebaert and Kelly Liebaert at 10 (No. 238402 SPC) (on file with the author).

182. 8 Cal. Rptr. 2d 593 (1992). The court held that the denial of a joint insurance policy to an unmarried couple does not violate the Unruh Act. *See id.* at 1466. The court further held that the protections of the Unruh Act do not extend to marital status. *See id.*

bid any expansion of the Unruh Act's classifications beyond those specifically enumerated in the statute.[183]

The trial court, finding that occupation is not a type of personal characteristic covered by the Act, concluded that the Unruh Act "only applies to race, color, creed or national origin, not profession."[184] The court never reached the issue of whether the developer's anti-lawyer policy was a legitimate business practice under the legitimate business exception.[185] The court reasoned that it need not inquire into the legitimacy of a discriminatory business practice unless the discriminated individual is first found to be unquestionably covered by the Act.[186]

C. Consequences of the Narrower Interpretation of the Statute

The original intent behind the enactment of the Unruh Act was to prevent arbitrary discrimination at places of public accommodation and service.[187] Accordingly, the statute's history indicates that "the Unruh Act prohibits business establishments from withholding their services or goods from a broad class of individuals in order to 'cleanse' their operations from the alleged characteristics of members of an excluded class."[188] Accordingly, prior interpretations of the Act suggest that any exclusion of a particular person by a business can only be justified by that individual's specific characteristics and not on the basis of class stereotypes.[189] A purveyor may not institute an exclusionary business policy that excludes individuals simply because they fall within a class of persons that the proprietor believes to be more likely to engage in disruptive or damaging conduct than a member of another group.[190] A discriminatory business policy may not, under the Unruh Act, "rest on the alleged undesirable propensities of those of a particular race, nationality, occupation, political affiliation, or age.

183. *See* Defendant's Memorandum of Points & Authorities at 9, *Liebaert* (No. 238402 SPC).

184. *Developer: No Lawyers Need Apply, Refusal to Sell House to Attorney Upheld*, SAC. BEE, May 20, 1999, at A1 [hereinafter *Developer*].

185. *See* Petition for Writ of Mandate/Prohibition or other Appropriate Writ; Memorandum of Points & Authorities—Immediate Temporary Stay Requested at 23–25, *Liebaert* (No. 238402 SPC) (on file with the author).

186. *See Developer* at A1.

187. *See* Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 122 (Cal. 1982); *In re* Cox, 474 P.2d 992, 995 (Cal. 1970).

188. *Marina Point, Ltd.*, 640 P.2d at 117.

189. *See id.*

190. *See id.*

The Unruh Act is designed to protect individuals from such arbitrary discrimination."[191]

The protection afforded by the Act, therefore, focuses on the individual right to equal access to services and facilities provided by public businesses and enterprises.[192] The purpose of the Unruh Act is to compel public accommodations covered under the statute to recognize the "equality of citizens" in the right to access particular services or facilities offered by such establishments.[193] "[T]he exclusion of individuals from places of public accommodation or other business enterprises covered by the Unruh Act on the basis of class or group affiliation basically conflicts with the individual nature of the right afforded by the act of access to such enterprises."[194]

The decisions in *Liebaert* and *Roth* holding that occupations are not protected under the Unruh Act are, therefore, in direct contradiction with the historical interpretations and construction of the Act.[195] As the plaintiff in *Liebaert* argued on appeal, the practical ramifications of upholding the extremely narrow rulings would in effect insert a "sweeping parenthetical exception" into the Unruh Act.[196] If such an exception were allowed, the Act would provide "[a]ll persons within the jurisdiction of this state are free and equal . . . [except lawyers, bricklayers, IRS agents, postal employees, or other persons employed in unpopular professions, etcetera.]" to access particular services or facilities of a business enterprise.[197] As a result, "members of entire occupations or avocations . . . might find themselves excluded as a class from some places of public accommodation simply because the proprietors could show that, as a statistical matter, members of their occupation or avocation were more likely than others to be involved in a disturbance."[198] The consequence of this interpretation would be to completely frustrate the meaning of the statute, which provides "all persons" be treated equally, by rendering the word

191. *Id.*

192. *See id.* at 125–26.

193. *Id.* at 172 (citing Piluso v. Spencer, 36 Cal. App. 416, 419 (1918)).

194. *Id.* at 126.

195. *See* Roth v. Rhodes, 30 Cal. Rptr. 2d 706, 710 (1994); Petition for Writ of Mandate/Prohibition or Other Appropriate Writ; Memorandum of Points & Authorities—Immediate Temporary Stay Requested at 25–26, *Liebaert* (No. 238402 SPC).

196. Liebaert v. Biltmore Props., No. 238402 SPC (Sup. Ct. Kern Cty. May 19, 1999).

197. Petition for Writ of Mandate/Prohibition or Other Appropriate Writ; Memorandum of Points & Authorities—Immediate Temporary Stay Requested at 22, *Liebaert* (No. 238402 SPC).

198. *Marina Point, Ltd.*, 640 P.2d at 126.

"all" meaningless and ignoring the individual nature of the right protected under the Unruh Act.

Accordingly, the court in *Liebaert*, by holding that the Unruh Act did not cover Biltmore's discriminatory policy, effectively sanctioned discriminatory policies based on occupation as a valid business practice.[199] Plaintiff Liebaert explained, "the trial court's ruling stands for the proposition, *as a matter of law*, that it is a legitimate business purpose to blacklist or boycott a person, simply because of his or her occupation."[200] Thus real estate developers may now refuse to sell homes to persons of any occupation. Any person could be prevented from owning a new home, despite the particular individual's ability to afford one.[201] Furthermore, the practical implications of such a ruling are not only confined to the area of housing.[202] "Hospitals could refuse to treat lawyers for fear of being sued. Restaurants could refuse to serve reporters or food critics for fear of a 'bad review.' Hotels, apartments, and restaurants could refuse to serve police officers fearing that a crime may be exposed."[203] Ultimately, "a 'caste' system [may] result where only persons of certain occupations would be entitled to purchase necessaries, goods, and services."[204]

Another practical ramification of the recent trend of cases narrowly interpreting the Unruh Act is the broad application of the legitimate business exception to justify discriminatory policies. Both *Roth* and *Liebaert* opened the door for a more liberal application of the legitimate business exception. Thus, legitimate business reasons may justify discriminatory policies against the classes of persons specifically protected by the Act,[205] despite prior judicial interpretations that such an exception may only apply to those instances involving classes of

199. *See* Petition for Writ of Mandate/Prohibition or other Appropriate Writ; Memorandum of Points & Authorities—Immediate Temporary Stay Requested at 24, *Liebaert* (No. 238402 SPC) (indicating that because the trial court failed to inquire into the legitimate business reasons for the defendants' discriminatory policy, the court's ruling "stands for the proposition, *as a matter of law*, that it is a legitimate business purpose to blacklist or boycott a person, simply because of his or her occupation."); Plaintiff's Brief in Opposition at 8, *Liebaert* (No. 238402 SPC).

200. Petition for Writ of Mandate/Prohibition or other Appropriate Writ; Memorandum of Points & Authorities—Immediate Temporary Stay Requested at 24, *Liebaert* (No. 238402 SPC).

201. *See id.* at 23; Plaintiff's Brief in Opposition at 8, *Liebaert* (No. 238402 SPC).

202. *See* Plaintiff's Brief in Opposition at 2, *Liebaert* (No. 238402 SPC).

203. *Id.*

204. *Id.*

205. *See* Roth v. Rhodes, 30 Cal. Rptr. 2d 706, 710 (1994); Plaintiff's Memorandum of Points & Authorities in Support of Petition for Writ of Mandate at 24, *Liebaert* (No. 238402 SPC).

individuals not specifically enumerated within the Act.[206] In *Roth* and *Liebaert*, discrimination on the basis of a person's occupation was held to be not covered by the Act, and thus a legitimate business reason need not justify those discriminatory polices.[207] The implication of these rulings is that the legitimate business exception need only be applied to justify discrimination based on those classifications protected under the Act—those classifications expressly enumerated and other similar classifications based on personal characteristics. If the discriminatory practice is aimed at classes not covered by the statute's protections the courts need not inquire into the legitimacy of the business reason for the policy because the discriminating practice will be regarded as legitimate as a matter of law.

These recent court decisions have incorrectly led to the narrowing of the scope of protection provided by the Unruh Act. It appears that businesses may now freely adopt discriminatory policies against any class of person not specifically enumerated in the Act and not classified on the basis of a personal characteristic as defined by *Harris*. Under such an approach, the discriminatory policies will be upheld and allowed by the courts as legitimate as a matter of law. Moreover, the new, narrower interpretation of the statute may allow for the more expansive application of the legitimate business exception. Such a restricted construction of the protections provided by the statute contravenes the original intent of the Act to protect an individual's right to equal access to public accommodations.

III. The Scope of the Unruh Civil Rights Act Must Be Interpreted to Meet Its Original Intent of Preventing All Forms of Arbitrary Discrimination

As previously discussed, prior to the *Harris* decision, the cases interpreting the Unruh Act suggested that all forms of discrimination were strictly proscribed. Under the earlier interpretation, "[t]he fundamental purpose of the Unruh Civil Rights Act [was considered to be] the elimination of anti-social discriminatory practices,"[208] whereby the Act should be construed with "a liberal construction with a view to

206. *See* Koire v. Metro Car Wash, 707 P.2d 195, 199 (Cal. 1985); Engel v. Worthington, 23 Cal. Rptr. 2d 329 (1993).

207. *See Roth*, 30 Cal. Rptr. 2d at 709; *Developer*, *supra* note 184, at A3; Plaintiff's Memorandum of Points & Authorities in Support of Petition for Writ of Mandate at 24, *Liebaert* (No. 238402 SPC).

208. Sargoy v. Resolution Trust, 10 Cal. Rptr. 2d 889, 895 (1992).

effectuating its purposes."[209] Thus, prior case law has extended the Act's coverage to classifications beyond those specifically enumerated in the statute.[210] Moreover, no court has permitted business reasons to justify discrimination against the explicitly protected classes. The only context in which courts have upheld discriminatory policies on the basis of the legitimate business exception is when they have applied the Act to persons not expressly protected by the Act.[211]

Recent court decisions, however, have misread the Unruh Act, resulting in a dramatic step backward in the prevention of all forms of arbitrary discrimination. Under the current construction of the Act, businesses may freely exclude and discriminate against broad categories of persons based on generalized stereotypes regarding their shared economic or financial characteristics. These are precisely the types of discriminatory practices the Unruh Act was intended to prevent. In enacting the statute, the California legislature had aimed at prohibiting such discriminatory business policies which rest on supposed undesirable propensities of a particular class or group of persons.[212] Considering the nearly unlimited range of new categories of persons that businesses may now freely discriminate against, the urgent need to return to the original broad judicial interpretation of the protections of the Unruh Act now becomes abundantly clear.

In order for the original intent of the Unruh Act to be preserved,[213] courts should not follow the approach of the lower courts discussed above because they are not bound by them. Instead, these

209. *Koire*, 707 P.2d at 196 (1985).

210. *See* Long v. Valentino, 165 Cal. Rptr. 96 (1989).

211. *See, e.g., In re* Cox, 474 P.2d 992 (Cal. 1970).

212. *See* Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 117 (Cal. 1982).

213. Of course, one possible way to protect the original intent of the Unruh Act would be for the Legislature to amend the statute to make it clear that the intent was to protect *all* persons from arbitrary discrimination without limiting that protection to a short list. This could be accomplished by simply inserting a phrase such as "all persons are protected against arbitrary discrimination," followed by a second phrase stating that "the listed categories are illustrative and not exclusive," without contradicting existing case law.

This proposed amendment is consistent with earlier court decisions. Since 1897, when the Civil Rights Act was enacted, courts interpreted the Act to protect against *all* arbitrary discrimination. In *Orloff*, the court noted, "under our institutions the freedom to pursue the declared right [to public accommodations] on an equal basis is just as precious as many other freedoms and rights." Orloff v. Los Angeles Turf Club, 227 P.2d 449, 453 (Cal. 1951). The court in that case held that a race track manager was barred from discriminating against a man who had a reputation of having an immoral character. *See id.* at 454. The court also protected the right of homosexuals to obtain food and drink in a bar and restaurant. In *Stoumen* both of these decisions protect against arbitrary discrimination against groups not specifically listed in the Unruh Act and therefore, are not overturned by the proposed amendment. *See* Stoumen v. Reilly, 234 P.2d 969 (Cal. 1951).

courts should follow the California Supreme Court's rulings in both *Cox* and *Harris.*

A. The Lower Court Decisions Interpreting the Scope of the Unruh Civil Rights Act Protections Should Not Be Considered Precedential Authority

Despite recent court interpretations that the protections provided by the Unruh Civil Rights Act are to be applied narrowly, California appellate courts still have the opportunity and the authority to reverse the current trend. By reconsidering the issue of whether the Act's protections are to be afforded only to those classes explicitly enumerated or to those persons classified based on personal characteristics as defined by *Harris,* the trend can be reversed. In *Harris,* the California Supreme Court did not expressly overrule prior case law in which the protections of the Unruh Act were extended beyond the enumerated categories, nor did the court expressly hold that persons classified by their occupation are not covered by the Act.[214] The court did find that the statute covers only those classes specifically enumerated in the Act as well as persons classified on the basis of certain personal characteristics as opposed to economic characteristics.[215] Such personal characteristics were said to include "a person's geo-

The proposed language is also consistent with the 1959 amendment, as well as decisions following that amendment. *See* Harris v. Capital Growth Investors XIV, 805 P.2d 873, 875–78 (Cal. 1991). The 1959 amendment specifies "color, race, religion, ancestry, and national origin." *In re* Cox, 474 P.2d 992, 995 (Cal. 1970). In *In re Cox,* the court interpreted this new amendment to be the result of the concern for the "plight of racial minorities within the United States." *Id.* at 998. The court went on to say that no evidence existed to show that the intent was to restrict the Act to only the categories listed, but *instead* to make sure these categories would be included. *See id.* at 998–99. Later in 1991, the court in *Harris,* interpreted the 1959 amendment to illustrate a "personal characteristic" standard used to decide whether to apply the Act or not. *See Harris,* 805 P.2d at 883. The court found that the categories could be expanded only when a "personal characteristic" is to be protected. *See id.* at 882. Therefore, the proposed language would continue to include the categories that the 1959 Legislature wanted to include as well as the categories of "personal characteristics" that the *Harris* court wanted to protect.

Thus, a new amendment to the Act can be enacted without contradicting any of the existing decisions applying the Act. The intent of the Legislature—to insure that every citizen be protected—must be upheld by the courts. As the Chairman of the Select Committee on Housing and Urban Affairs explained when sending to the Governor the 1974 amendment to add "sex" to the Act, "[t]he listing of possible bases of discrimination has no legal effect, but is merely illustrative." Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 122 (1982). This intent, expressed by the Chairman, must be made clear in the language of the Act for the legal profession and the courts to follow. The proposed language would do exactly that.

214. *See* Harris v. Capital Growth Investors XIV, 805 P.2d 873, 879, 881–83 (Cal. 1991).

215. *See id.* at 883–84.

graphic origin, physical attributes, and personal beliefs."[216] Although the court's holding limited the scope of the statute's protections, it did not expressly overrule precedent that applied the Act to nonenumerated classes.

On the other hand, the courts in *Roth*, *Liebaert*, and *Beaty* improperly expanded upon the narrower interpretation of the Unruh Civil Rights Act used in *Harris*. The courts in both *Roth* and *Liebaert* held that discrimination on the basis of an individual's occupation does not violate the statute.[217] Furthermore, relying on *Harris*, the court in *Beaty* concluded that any expansion of the Act beyond the classifications specifically mentioned in the statute was contrary to legislative intent.[218] The *Liebaert* decision, however, was issued at the trial level and both *Roth* and *Beaty* were at the intermediate appellate level. Thus, *Liebaert*, *Roth*, and *Beaty* would lack controlling authority at the appellate level.

Under the principles of *stare decisis*, no California appellate court is bound to follow appellate division decisions.[219] "One district or division may [thus] refuse to follow a prior decision of a different district or division."[220] The courts of appeal or the supreme court may look to prior appellate decision for guidance in interpreting the scope of the Unruh Act, but they are not compelled to follow any of those decisions.[221] Opinions that are ordered published by appellate judges have no controlling or binding effect on either the appellate courts or higher reviewing courts.[222] An appellate court's review of a trial court's decision and the appellate court's holdings are deemed binding on the trial courts.[223] Trial court decisions have no binding effect under stare decisis.[224] Hence, only the decision of the state supreme court "is considered absolutely binding on a trial court or lower appellate court" in the state of California.[225]

216. *Id.* at 883.

217. *See* Petition for Writ of Mandate/Prohibition or other Appropriate Writ; Memorandum of Points & Authorities—Immediate Temporary Stay Requested at 24, *Liebaert* (No. 238402 SPC); *Roth*, 30 Cal. Rptr. 2d 710; *Developer*, *supra* note 184, at A3.

218. *See* Beaty v. Truck Ins. Exch., 8 Cal. Rptr. 2d 593, 597 (1992).

219. *See* 9 B.E. WITKIN, WITKIN CALIFORNIA PROCEDURE § 934 (4th ed. 1997).

220. *Id.*

221. *See id.* § 935.

222. *See id.*

223. *See* id. § 933.

224. *See id.* § 992.

225. *Id.* § 928 ("[A] Supreme Court decision must be followed by trial judges, Courts of Appeal and appellate departments of the superior court.").

Accordingly, since there is no California Supreme Court opinion directly addressing the issue of whether occupation is or is not protected under the Act, the California appellate courts are not constrained by the decisions of *Roth, Beaty,* and *Liebaert.* The appellate courts can also consider whether the Unruh Act should be interpreted to be strictly limited to the categories of persons specifically enumerated. Considering the original intent of the statute, the historically broad interpretation of the Act's protections, and the public policy reasons for proscribing all forms of arbitrary discrimination, it becomes clear that future courts should reverse the current trend of restricting the scope of the Unruh Act and find that the Unruh Act is not limited "to race, color, creed, or national origin" as held by the *Liebaert* court.[226]

B. A Proper Interpretation of *Harris*

Early interpretations of the Unruh Act broadly construed its coverage to prohibit all forms of arbitrary discrimination regardless of whether the discriminated person fell within specifically enumerated classifications. In 1991, the court in *Harris* limited the protections of the Unruh Act to those statutorily enumerated categories and similar classifications based on "personal characteristics."[227] The court reasoned that economic characteristics were not on the same level with the "personal characteristics" of classes specifically protected by the statute or in prior court holdings. Therefore, classifications based on financial status or capability were not covered by the Act.[228] The court in *Harris* further reasoned that economic criteria "by their nature seek to further the legitimate interest of business establishments in controlling financial risk while providing goods and services on a non-discriminatory basis."[229] Accordingly, the court found that a policy establishing a minimum income criteria to be eligible to rent an apartment was not arbitrary discrimination under the Unruh Act.[230]

The court in *Harris* intended to limit the application of the Unruh Act. In its ruling, the court clearly expressed disapproval of previous broad interpretations of the Act's protections.[231] The decision did not nullify previous decisions protecting classifications not specifically

226. *Developer, supra* note 184, at A1.
227. *See* Harris v. Capital Growth Investors XIV, 805 P.2d 873, 881–83 (Cal. 1991).
228. *See id.*
229. *Id.* at 874.
230. *See id.* at 882.
231. *See id.*

enumerated.[232] The court "expressly declined to overrule prior case law" leaving "intact a court's authority to recognize previously protected unexpressed classifications."[233] Furthermore, not only did *Harris* refuse to overrule *Cox* and its progeny, but the court recognized that the legislature tacitly approved of prior decisions by not legislating to the contrary.[234] Therefore, any expansion of who is covered under the Act prior to *Harris* remains protected.

> We generally presume the Legislature is aware of appellate court decisions. It has not taken specific action to overrule these cases. Moreover, the Legislature has amended the Act several times in the 20-year period since *Cox* was decided. When the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction. Accordingly, reenacted portions of the statute are given the same construction they received before the amendment.
>
> Thus, [any] suggestion that the *holdings* of *Cox, Marina Point, Ltd., O'Connor,* and similar appellate court decisions [that extend] the Unruh Act beyond its specified categories of discrimination have somehow been repudiated by the Legislature is [unsound]; the absence of any specific legislative action designed to alter those holdings belies any such inference.[235]

Hence, the limitation on the scope of the Unruh Act's protections should be interpreted to apply only to persons who were not previously considered protected by the Act. The court in *Harris* clearly did not intend to overrule past expansions of the statute's protections. Instead, the court's decision merely implies that any future expansion of the Act should be considered carefully and conservatively.[236]

Support for such an application of *Harris* is found in several subsequent decisions. *Beaty v. Truck Insurance Exchange*,[237] involved the issue of whether an insurer should be compelled to provide insurance for a homosexual couple.[238] While the court, citing *Harris*, refused to extend protection to an unmarried couple, it emphasized that *Harris* is to be applied prospectively, and careful consideration of legislative intent must be undertaken when considering each future expansion of the Act.[239] "While the *Harris* court refused to overrule prior case

232. *See id.*
233. *Id.*
234. *See id.* at 879.
235. *Id.* at 879–80.
236. *See* Beaty v. Truck Ins. Exch., 8 Cal. Rptr. 2d 593, 597 (1992).
237. 8 Cal. Rptr. 2d 593 (1992).
238. *See id.* at 593.
239. *See id.* at 597.

law which extended the Unruh Act to classifications not expressed in the statute . . . , the court made it clear that the *future expansion* of prohibited categories should be carefully weighed to ensure a result consistent with legislative intent."[240]

In *King v. Hofer*,[241] non-smokers were denied protection under the Unruh Act.[242] Respondent business owner had informed petitioner that he would no longer be welcomed or served at the restaurant after petitioner had complained to the city manager that the respondent allowed smoking in his restaurant.[243] The court affirmed the order granting summary judgment in favor of respondent, ruling that, based on the statutory language and history of the Act, legitimate business interests, and adverse consequences of inclusion, non-smokers were not a protected class.[244] Similar to *Beaty*, the *King* court denied expansion of the Act's protections to a new classification.[245] On the other hand, despite the court's unwillingness to recognize new classifications, it construed *Harris* to allow for the coverage of unexpressed categories:

> The Act applies by its terms to discrimination in public accommodations based on "sex, race, color, religion, ancestry, national origin, or disability . . . ." Nevertheless, courts have deemed those categories "illustrative rather than restrictive" . . . and have construed the Act to apply to several unexpressed classifications—namely, unconventional dress or physical appearance, families with children, persons under age 18, and homosexuality . . . . In *Harris*, the Supreme Court questioned whether it would so expand the Act were it "writing on a clean slate" . . . ; nevertheless, given legislative acquiescence in those case holdings—if not in broader language condemning all arbitrary, unreasonable or stereotyped discrimination . . . the Supreme Court chose to honor those holdings while reigning in the broader language and setting guidelines for future construction.[246]

The reference to a limitation on future expansion suggests that while pre-*Harris* expansions should remain protected, any future expansion of the Act's coverage should be considered carefully.

To determine whether the protections provided by the Unruh Act should be afforded to new non-enumerated classifications, the

240. *Id.* (emphasis added).

241. 49 Cal. Rptr. 2d 719 (1996).

242. *See King*, 49 Cal. Rptr. 2d at 722 ("concluding that the Act does not afford protection to business patrons allegedly discriminated against for their status as nonsmokers").

243. *See id.* at 719.

244. *See id.* at 721–22.

245. *See id.*

246. *Id.* at 720.

court in *King* derived a "three-part test."[247] The test requires the examination of "(1) the language and history of the Act; (2) any legitimate business interests justifying limitations on consumer access; and (3) the consequences of expanding class recognition."[248] According to the court, these three factors should be considered when determining if expansion of the Unruh Act's protections to new classifications is warranted.[249]

As previously discussed, the decision in *Harris* has been interpreted to imply that the legitimate business exception could be applied to justify discrimination against the expressly protected classes and similar classes based on personal characteristics. Relying on *Harris*, the court in *Roth* noted that the application of the exception need only be considered when the discriminatory policy or conduct involves a class of persons covered under the Act.[250] Subsequently, the court in *Liebaert* suggested that since classifications based on economic characteristics are not protected, the issue of whether the discriminatory practices based on financial criteria are justified by legitimate business reasons need not be reached.[251] Thus, it may be inferred that the exception need only be considered when the discrimination involves classifications specifically enumerated in the statute and those based on personal characteristics. Consequently, the court in *Liebaert*, finding that occupation was not a personal characteristic intended to be protected under the Act, did not need to inquire whether the policy discriminating on the basis of occupation was justified by any legitimate business reasons.

To reconcile the *Harris* decision with the earlier interpretations of the Act, the "personal characteristic" distinction of the *Harris* court can be interpreted as drawing a line between two levels of protection under the Unruh Act, rather than as drawing a line between those that are covered by the Act from those that are not. Under this interpretation of the *Harris* decision, the classes of persons specifically enumerated and similar classes based on "personal characteristics" are afforded the highest level of protection under the Act. At this level, discriminatory conduct may only be justified by a specific characteristic or conduct of a particular individual and not by the presumed con-

247. *Id.*

248. *Id.*

249. *See id.* at 720.

250. *See* Roth v. Rhodes, 30 Cal. Rptr. 2d 706, 710 (1994).

251. *See* Petition for Writ of Mandate/Prohibition or other Appropriate Writ; Memorandum of Points & Authorities—Immediate Temporary Stay Requested at 23–24, *Liebaert* (No. 238402 SPC).

duct or characteristic of the class as a whole. A lower level of protection is provided to other classifications, such as economic characteristics. At this lower level, discrimination may be justified by legitimate business reasons. Thus, this broader interpretation of *Harris* views the "personal characteristic" distinction as distinguishing those classes where the legitimate business exception may not be applied from those classes in which it may be applied.

This two-tiered level of protection under the Unruh Act reconciles the *Harris* decision with the prior case history of the Act. Thus, in *Cox*, although the discriminatory act at issue was directed toward the companion of a long haired and unconventionally dressed man, the court held that the offending establishment could not justifiably discriminate on the basis of characteristics associated with such an individual, even though unconventional appearance is not expressly protected under the statute.[252] Similarly, in *Marina Point, Ltd.*, the court held that a rental policy excluding all families with children from rental housing constituted the kind of arbitrary discrimination prohibited by the Unruh Act.[253] "[T]he fact that the landlord's exclusionary policy in this case discriminated against children and families with children, rather than a specific racial or religious group or some other classification specifically involved in a prior judicial decision, does not place the exclusionary practice beyond the reach of the Unruh Act."[254] However, in both *Cox* and *Marina Point, Ltd.*, the courts recognized that a legitimate business exception may justify certain kinds of discrimination.[255] Nevertheless, decisions prior to *Harris* had not accepted any legitimate business reasons to justify discriminatory policies directed toward the expressly protected classifications enumerated in the Act.[256] Thus, in *Koire*, a gender discrimination case, the court found that discriminatory policies do not qualify as reasonable simply because they are profitable or otherwise in the interest of business. The court refused to apply the legitimate business exception to the offering of discounts and free admissions on the basis of gender, an expressly protected classification.[257]

The language of *Harris* itself supports the new proposed rule of interpretation. In *Harris*, the court focused on the enumerated statu-

252. *See In re* Cox, 474 P.2d 992, 1000 (1970).
253. *See* Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 116 (Cal. 1982).
254. *Id.* at 117.
255. *See Cox*, 474 P.2d at 995; *Marina Point, Ltd.*, 640 P.2d at 124–27.
256. *See, e.g.*, Koire v. Metro Car Wash, 707 P.2d 195 (Cal. 1985).
257. *See id.* at 199.

tory classifications and noted that "[i]n order to give significance to the Legislature's specific and repeated emphasis on these categories, we must ascertain their common element. The categories involve personal as opposed to economic characteristics."[258] By finding that prior expansions of the Act all involved classifications based on "personal characteristics," it follows that the court intended that such classifications be protected to the same extent as those expressly enumerated in the statute. The court declined to overrule the case precedent, recognizing the validity of prior decisions expanding statutory protections to classes of persons not specifically protected under the Act.[259] Accordingly, any discriminatory practice aimed at someone based on a personal characteristic, whether enumerated in the Act or not, is strictly prohibited and may not be justified by any business reason.

Considering the *Harris* court's emphasis on business justifications for certain discriminatory practices, it can be inferred that the court understood that classifications based on non-personal characteristics would violate the Unruh Act unless justified by legitimate business reasons. Read in this context, the message of *Harris* becomes clear. Therefore discriminatory practices which affect those categories specifically protected by the Act, *or* those which are based on personal characteristics, are disallowed. Practices aimed at a group not so protected are not violative of the Act, provided there is a legitimate business reason for such practices.

C. A Proper Definition of "Personal Characteristics" As Set Forth in *Harris*

Personal characteristics are those qualities that help shape and define a person's societal qualifications. Defining a personal characteristic is a complicated task. Sociological studies have shown that people incorporate their own definitions of personal identity when describing themselves. Research has shown that traits and qualifications other than race, sex, and religion can be classified as personal characteristics as well. For example, someone's ethnic background can be considered a personal characteristic and a person's economic status is included as well.[260] A person's ethnicity is shaped by their social and economic status.[261] A personal characteristic is shown to

258. Harris v. Capital Growth Investors XIV, 805 P.2d 873, 883 (Cal. 1991).

259. *See id.* at 882–83.

260. *See* Joane Nagel, *Constructing Ethnicity: Creating and Recreating Ethnic Identity and Culture*, 41 SOC. PROBS. 152 (1994).

261. *See id.* at 154.

carry with it social variables that individuals use in creating their own self-identity, namely education, occupation, and religion.[262] These factors should be considered when defining what a personal characteristic is. The definition of "personal characteristic" should be inclusive of certain and ever changing social variables.

Many factors make up our self-definition and can be considered personal characteristics. For example, officers of the law, when asked to describe a suspect's characteristics, state the suspect's hair and eye color, height, weight, ethnicity, gender, and if any, bodily scars, and/or tattoos. Likewise, from a social standpoint, these are some of the same characteristics one uses to describe oneself. Some of these characteristics are not enumerated in the Act, but are nevertheless necessary when describing an individual. Thus, it is important for the courts to focus on the fully inclusive definition of "personal characteristic" when determining whether a person is a member of a protected class under the Unruh Act.

D. Maintaining Limits on the Legitimate Business Exception to Protect the Intent of the Unruh Civil Rights Act

Historically, courts have indicated a need to place limits on the application of the legitimate business exception in order to protect the intent of the Unruh Act, which is to prevent arbitrary discrimination. Courts have held that discriminatory business practices based on a class-based generalization do not qualify as reasonable or justifiable merely because they are profitable.[263] To hold otherwise would eviscerate the protections of the Act.[264] An examination of prior court decisions addressing the legitimate business exception reveal several restrictions and limits that should be imposed on its use.

1. The Discriminatory Business Policy Must Be Reasonable and Rationally Related to a Legitimate Business Interest

One limitation of the legitimate business exception is that the business policy at issue must be "reasonable . . . [and] rationally related to the services performed and the facilities provided."[265] The court in *Harris* provided further guidance by requiring that such business policies bear "a reasonable relation to commercial objectives ap-

262. *See* Vira R. Kivett et al., *The Relative Importance of Physical, Psychological, and Social Variables to Locus of Control Orientation in Middle Age*, 32 J. GERONTOLOGY 203, 204 (1977).

263. *See* Koire v. Metro Car Wash, 707 P.2d 195, 199 (Cal. 1985).

264. *See id.*

265. Harris v. Capital Growth Investors XIV, 805 P.2d 873, 877 (Cal. 1991).

propriate to an enterprise serving the public."[266] According to relevant Attorney General opinions, discrimination against a particular class by an establishment is unwarranted when such a classification does not serve to further a legitimate business reason or does not disrupt a particular atmosphere that the establishment is striving to maintain.[267]

Other situations, such as the denial of housing accommodations because of one's occupation, marital status, or number of children, may or may not be violative of the Unruh Act depending on whether those regulations denying such accommodations are reasonable and rationally related to the services performed and the facilities provided. For example, an apartment complex could justifiably establish itself to serve elderly people, have special facilities for them, and design the complex for maximum quiet and restfulness.[268] Under these circumstances, the denial of an apartment complex to people with children would not be "arbitrary" and would not violate the Act. On the other hand, it is doubtful that such an apartment complex could justify denying an apartment to a person because of his or her occupation or marital status because such a status may upset the atmosphere the complex is trying to maintain. Of course, individual tenants who disrupt the atmosphere, not because of their occupation or marital status, but because of their own personalities or predilections could be denied the accommodations.[269]

Therefore, the discrimination must serve to protect a particular atmosphere that an establishment is attempting to maintain in order to be justified. For instance, numerous cases have upheld employer policies requiring men to have short hair while not imposing the same requirement on women.[270] In such situations, courts have been reluctant to hold employers liable for imposing different appearance guidelines on men and women as long as the policies are found to be rationally related to business interests. Thus, establishments may adopt dress standards, such as no earrings for males, if the restrictions serve a legitimate business purpose such as benefiting health, safety, productivity, a desire to convey a certain image to the public, or to

266. *Id.* at 886.

267. *See* 58 Op. Cal. Att'y Gen. 608, 613 (1975).

268. *See* Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 127–28 (Cal. 1982).

269. *See id.* at 117.

270. *See* Willingham v. Macon Tel. Publ'g Co., 482 F.2d 535 (1973); Doyle v. Buffalo Sidewalk Cafe, 333 N.Y.S.2d 534 (1972); Boyce v. Safeway Stores, Inc., 351 F. Supp. 402 (1972); Shardron v. Seaboard Coastline R.R. Co., No. 574-45., 11 Fair Empl. Prac. Cas. (BNA) 850 (1975).

create a professional atmosphere. In many instances, the rational relationship of the discriminatory practice to the business performed is easily identified. For instance, a chic restaurant's policy of requiring its patrons to wear shirts and shoes can be shown to be reasonably related to the establishment's goal of providing fine dining to upscale patrons. Likewise, in certain establishments, clothing bearing any gang resemblance, such as bandannas, is prohibited and patrons wearing such clothing may be asked to leave or will be refused service. Establishments such as Magic Mountain, a southern California amusement park, practice this form of discrimination as a legitimate business exception where these practices are reasonably related to their goals of providing an enjoyable and safe environment.[271]

In *Hessians Motorcycle Club v. J.C. Flanagans*,[272] members of two motorcycle clubs were refused service by a sports bar because their outfits consisted of a patch signifying allegiance to a particular club.[273] In ruling for the sports bar, the California court of appeal found there was no discrimination because the sports bar's "no colors" rule was equally applicable to all persons, regardless of their race, color, sex, etc.[274] Moreover, the court found that the rationale behind the policy was due in part to security considerations. Because of the magnitude of the loss that could result from a brawl, the bar's policy was not irrational.[275] In other words, the challenged admission policy served a legitimate business interest. Discriminatory policies may be necessary in certain situations where a business purpose is either being frustrated or impeded. For example, a business may refuse service to a patron carrying a weapon, just as it may refuse service to a patron who is underage or exhibiting perverse behavior. In these instances, discriminatory policies can be easily identified as rationally related to the business's interests and goals.

In other instances, however, the relationship of a business policy to the services provided may be more difficult to discern. In such cases, the business may be required to call on expert opinion and statistical data to justify the challenged policy. The court in *Marina Point, Ltd.*, in examining whether an adult-only business policy was rationally related to the operation of an apartment complex, noted that the bus-

271. *See* Metro Digest, *Magic Mountain Settles Bias Suit*, L.A. TIMES, May 20, 1989, at Metro 10. *See also* Steve Hudis, Letters to the Editor, *Martinez Distortions on Magic Mountain*, L.A. TIMES, April 22, 1988, at A10.

272. 86 Cal. App. 4th 833 (2001).

273. *See id.* at 835.

274. *See id.* at 838.

275. *See id.*

iness's "witnesses presented no statistical data in support of their conclusion, but simply testified on the basis of their general experience."[276] The court further indicated that the legitimate business exception may not be invoked simply on the basis of the establishment owner's or operator's general experience that a particular class of consumers is more problematic or difficult. Otherwise, "[individuals] might find themselves excluded as a class from some places of public accommodation simply because the proprietors could show that, as a statistical matter, members of their [class] were more likely than others to be involved in a disturbance."[277] Thus, where the rational relationship is not clear, *Marina Point, Ltd.* implies that the enterprise must statistically prove that its discriminatory policy does not merely exclude those classes of persons that may be considered disruptive or problematic, but actually furthers a legitimate business interest.

2. The Discriminatory Business Practice Should Be the Least Discriminatory Means to Further the Legitimate Business Interest

Even if the discriminatory practice is found to be rationally related to the furtherance of a legitimate business interest, the discriminatory policy should nonetheless be the least discriminatory means available to achieve that business purpose. Thus, in *Marina Point, Ltd.*, when the court held that an adult-only apartment rental policy violated the Unruh Act, it took notice that the apartment manager "did not indicate . . . what steps, short of the blanket exclusionary policy, the landlord had implemented to deal with the problem, such as promulgating general rules as to permissible and impermissible conduct or excluding from the complex those families whose children repeatedly committed disruptive or destructive acts."[278] On the contrary, the court in *Harris* considered several alternatives the landlord could have utilized to achieve the business interest of minimizing the costs of a renter defaulting on rent payments, other than the existing practice of requiring a minimum level of income.[279] The court explored the landlord's option to charge higher rent to all tenants to offset the costs of failed rent payments, but found that such a policy would discriminate against "the majority of tenants who pay their

276. Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 119 (Cal. 1982).
277. *Id.* at 126.
278. *Id.* at 118.
279. *See* Harris v. Capital Growth Investors XIV, 805 P.2d 873, 885 (Cal. 1991).

rents on a regular basis" and "excludes even more low income persons from tenancy."[280] The court also examined the possibility of requiring higher initial deposits, but concluded that this practice would also be discriminatory as it "imposes additional burdens on the paying tenants."[281] Therefore, both *Harris* and *Marina Point, Ltd.* illustrate that if a discriminatory practice is rationally related to a legitimate business purpose, it must still be the least discriminatory means available to achieve that purpose.

3. The Discriminatory Business Policy Must Not Classify Persons on the Basis of the Statutorily Protected Categories

Another limit that has been developed by courts considering the legitimate business exception is that the policy must be facially and effectively neutral with regard to the strictly protected statutory classifications. As emphasized in the *Harris* decision, a business practice must "not make distinctions among persons based on the classifications listed in the Act (e.g., race, sex, religion, etc.) or similar personal traits, beliefs, or characteristics that bear no relationship to the responsibilities of consumers of public accommodations."[282] Legitimate business policies must "appl[y] uniformly and neutrally to all persons regardless of personal characteristics."[283] Moreover, as the court in *Roth* concluded, such policies must not be "a stratagem designed to disguise discrimination based on personal characteristics protected under the Unruh Civil Rights Act."[284]

4. The Discriminatory Business Practice Must Not Contravene Public Policy

Furthermore, even if a discriminatory business practice can be justified by legitimate business reasons, the courts still may invalidate it if it contravenes public policy. Thus, the court in *Marina Point, Ltd.* found that the business interest of excluding children from housing was against the compelling societal interest of providing "moderate and low income households *with children* [with] . . . decent, safe, and suitable housing . . . they can afford."[285] Furthermore, because there existed a paramount social and legitimate state interest in assuring

280. *Id.*
281. *Id.*
282. *Id.* at 889.
283. *Id.*
284. Roth v. Rhodes, 30 Cal. Rptr. 2d 706, 710 (1994).
285. Marina Point, Ltd v. Wolfson, 640 P.2d 115, 128–29 (1982) (citing 1979 Cal. Stat., ch. 1043, §§ 1–2, pp. 3643–44).

available housing for families with children, a rental policy refusing rental housing to families with children was in violation of the Unruh Act.[286]

Similarly, rental policies refusing rental housing to a prospective tenant solely for the reason that she is or was a defendant in an unlawful detainer action are considered "unlawful because [they are] in derogation of the public policy encouraging tenants to use courts to resolve disputes with their landlords."[287] The business justification for such a policy that results in the blacklisting of a certain group of tenants from renting housing is based on the assumption that defendants in unlawful detainer actions present poor credit risks.[288] This assumption, however, is founded upon a generalization that may not apply to many members within that class.[289] Furthermore, such an assumption creates the adverse effect of discouraging tenants to utilize the judicial system to resolve disputes with landlords.[290] Consequently, "[r]efusing to rent to a prospective tenant on that basis is . . . arbitrary discrimination, and unlawful under the Unruh Civil Rights Act."[291]

5. The Impact of the Business Decision Should Be Considered

Neutral rules of conduct, such as requiring patrons to wear shoes and shirts, are acceptable because these types of rules usually have no undue impact on any specific person or groups of people. In addition, such neutral rules are easy to enforce and comply with. In some cases, however, the rule may have consequences that would have great impact on an individual's personal freedom. Rules that cover only the appearance of a person, such as a rule prohibiting the wearing of gang clothing might be appropriate, but a prohibition against gang members would not. A person might easily change their clothing, but requiring someone to change their association goes too far. A rule prohibiting the wearing of hats in a restaurant would have a minimal impact on persons who wished to wear such articles. However, if someone needed to keep their head covered by a yarmulke for religious reasons, the rule would have a much more serious impact on the personal freedom of that customer. All of these considerations require a

286. *See id.* at 129.

287. Gary Williams, *Can Government Limit Tenant Blacklisting?*, 24 SW. U. L. REV. 1077, 1114 (1995) (noting that such business practices are contrary to public policy and therefore are considered unlawful in California and at least two other states).

288. *See id.* at 1114–15 n.285.

289. *See id.*

290. *See id.* at 1114.

291. *Id.* at 1114–15 n.285.

careful scrutiny of legitimate business exceptions. These exceptions must be reasonable and specifically related to the business interests they allegedly protect.

Conclusion

California's history of protecting people from all arbitrary forms of discrimination should be furthered. The intent of the California legislature in promulgating the Unruh Act was to ensure freedom from discrimination for all persons. This goal can be accomplished with careful interpretation of the Act and California Supreme Court jurisprudence. Resolution of the problems posed by California's approach is important. The value this unique approach protects—the right of self-definition—is universal, although not universally protected. If the Unruh Act can be made to work, it may well become a model for future anti-discrimination legislation. If, on the other hand, recent developments signal the Act's ultimate fate, an important experiment will have failed. The people of California, and indeed, people in other states, deserve protection from arbitrary discrimination.