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THE UNRUH CIVIL RIGHTS ACT: IS A PRIVATE
CLUB A BUSINESS ESTABLISHMENT AFTER
*O'CONNOR v. VILLAGE GREEN OWNERS
ASS'N?*

In O'Connor v. Village Green Owners Ass'n the California Supreme Court held the Unruh Civil Rights Act, which prohibits discrimination by "all business establishments of every kind whatsoever," prevents the exclusion of children from a condominium complex. The court's finding that a condominium owners association falls within the Unruh Act's reference to "business establishments" expands the Act's already broad reach. This Comment contends that most private clubs are also "business establishments" under the Unruh Act, making discrimination by them violative of the Act.

INTRODUCTION

The California Supreme Court's recent decision in *O'Connor v. Village Green Owners Ass'n*¹ has expanded the already broad area covered by the Unruh Civil Rights Act (Unruh Act or the Act).² The Unruh Act, which prohibits discrimination by "all business establishments of every kind whatsoever," was construed by the *O'Connor* court to prevent the exclusion of families with children in a condominium complex. The court held that the condominium owners association is a "business establishment" within the meaning of the Act, and therefore is prohibited from discriminating against families with children.³ In so holding, the California Supreme Court has stretched the meaning of the term "business establishment" beyond any previous judicial interpretation of the Unruh Act.

The Unruh Act provides in relevant part:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.⁴

1. 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (May 1983).

2. Ch. 1866, 1959 Cal. Stat. 4424 (codified as amended at CAL. CIV. CODE § 51 (West 1982)).

3. 33 Cal. 3d at 796, 662 P.2d at 431, 191 Cal. Rptr. at 324.

4. CAL. CIV. CODE § 51 (West 1982).

Unruh Act litigation has centered on two areas: the types of prohibited discrimination, and the scope of "business establishment."⁵ Both these areas have been broadly interpreted, giving the Act far-reaching effect. This Comment will focus only on the "business establishment" aspect of the Unruh Act, first explaining how the *O'Connor* decision served to broaden the term. This Comment will discuss whether, after *O'Connor*, a private club is a "business establishment" under the Unruh Act. Bringing private clubs within the reach of the Unruh Act would prohibit all arbitrary discrimination by these clubs in the admitting of applicants and the servicing of guests.⁶

*O'Connor v Village Green Owners Ass'n*⁷ AND THE BROAD INTERPRETATION OF "BUSINESS ESTABLISHMENT"

In *O'Connor*, the court held a condominium owners association had sufficient businesslike attributes to fall within the scope of the Unruh Act's reference to "business establishment."⁸ The Village Green Owners Association was therefore forbidden by the Act from arbitrarily excluding children from the complex.

The Village Green complex was converted into a condominium development in 1973. As part of the conversion, the developers drafted and recorded a declaration of covenants, conditions, and restrictions (CC&Rs) to run with the property.⁹ One such provision prohibited residency by anyone under the age of eighteen.¹⁰

5. Mohr & Weber, *The Unruh Civil Rights Act: Just How Far Does it Reach?*, 11 BEV. HILLS B.A.J. 32, 33 (1977).

6. Although the Unruh Act prohibits a "business establishment" from engaging in any form of arbitrary discrimination, it does not absolutely preclude such an establishment from excluding a customer in all circumstances. The California Supreme Court has stated that an entrepreneur need not tolerate persons who disrupt his business. "A business establishment may, of course, promulgate reasonable department regulations that are rationally related to the services performed and the facilities provided." *In re Cox*, 3 Cal. 3d 205, 217, 474 P.2d 992, 999, 90 Cal. Rptr. 24, 31 (1970).

7. 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983).

8. *Id.* at 796, 662 P.2d at 431, 191 Cal. Rptr. at 324. The court noted that the association, through a board of directors, is charged with employing a professional property management firm, obtaining insurance for the benefit of all owners, and maintaining and repairing common areas and facilities of the project. It is also charged with establishing and collecting assessments from all owners and with adopting and enforcing rules and regulations for the common good. In summary, it found the association to perform all the customary business functions which, in a traditional landlord-tenant relationship, rest on the shoulders of the landlord. It also noted that a common theme running through the description of the association's powers and duties is an overall function to protect and enhance the project's economic value. *Id.* at 796, 662 P.2d at 431, 191 Cal. Rptr. at 324.

9. *Id.* at 793, 662 P.2d at 428, 191 Cal. Rptr. at 321.

10. The court was cognizant of the fact the developer who established the CC&Rs operated a "business establishment" and would be subject to the Unruh Act. The court said it still needs to determine whether the association is itself a "business establishment" under the Act, as it could simply cancel the age restriction enacted by the developer and

The O'Connors, after giving birth to a son, were given written notice that his presence constituted a violation of the CC&Rs. After several unsuccessful attempts to find other suitable housing, the O'Connors sued the association, seeking to have the age restriction declared invalid. An action was also brought by the association to enjoin the O'Connor's from residing in the complex with their child.¹¹

The court first noted that because it had previously held that a blanket exclusion of children from residency is the *type* of arbitrary discrimination prohibited by the Unruh Act,¹² the only question to be decided was whether the condominium association was a "business establishment" within the scope of the Act.¹³ The majority reasoned that it was, relying heavily on their interpretation of "business establishment" in *Burks v. Poppy Construction Co.*¹⁴ *Burks*, the first case decided under the Unruh Act, involved discrimination by a construction company engaged in the business of building and selling tract housing. The *Burks* court held the company was a "business establishment" under the Unruh Act and, in interpreting the phrase

adopt such a restriction on its own. *Id.* at 795 n. 4, 662 P.2d at 430 n. 4, 191 Cal. Rptr. at 323, n. 4.

11. *Id.* at 793, 662 P.2d at 428-29, 191 Cal. Rptr. at 321-22.

12. The California Supreme Court had held the Unruh Act prohibits an owner of an apartment complex from refusing to *rent* any of the apartments to a family, solely because the family had a minor child. *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 736-40, 640 P.2d 115, 124-27, 180 Cal. Rptr. 496, 506-8, *cert. denied*, 103 S. Ct. 129 (1982).

In *Marina Point* the main issue was whether the Unruh Act, which expressly refers to discrimination based on "sex, race, color, religion, ancestry, or national origin," encompassed discrimination against children. In finding the Act does prohibit such discrimination, the court relied on their declaration in an earlier decision, that the identification of particular bases of discrimination in the Act is illustrative rather than restrictive, and the Act bars all arbitrary discrimination. *See In re Cox*, 3 Cal. 3d 205, 216, 474 P.2d 992, 999, 90 Cal. Rptr. 24, 31 (1970). The *Marina Point* court added that the Unruh Act also prohibits a "business establishment" from excluding an entire class of individuals based on a prediction that the class "as a whole" is more likely to commit misconduct than some other class of the public. 30 Cal. 3d at 739, 640 P.2d at 126, 180 Cal. Rptr. at 507.

13. 33 Cal. 3d at 794, 662 P.2d at 429, 191 Cal. Rptr. at 323. In *Marina Point Ltd. v. Wolfson*, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496, *cert. denied*, 103 S. Ct. 129 (1982), the court pointed out that for nearly two decades the Unruh Act has been held to apply to the business of *renting* housing accommodations, and therefore had no difficulty in finding the *Marina Point, Ltd.* apartment complex to be a "business establishment" under the Act. *Id.* at 731, 640 P.2d at 121, 180 Cal. Rptr. at 502. The *O'Connor* court was left to decide if a condominium association is also a "business establishment" under the Unruh Act, and therefore, like a landlord of an apartment complex, prohibited from maintaining an exclusionary policy against children.

14. 57 Cal. 2d 463, 370 P.2d 313, 20 Cal. Rptr. 609 (1962).

“all business establishments of every kind whatsoever,” the California Supreme Court pronounced a broad definition. The court said:

The Legislature used the words “all” and “of every kind whatsoever” in referring to business establishments covered by the Unruh Act (Civ. Code, § 51), and the inclusion of these words, without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term “business establishment” was used in the broadest sense reasonably possible.¹⁵

In subsequent cases the term “business establishment” has been held to include a physician,¹⁶ a real estate broker,¹⁷ a buyer and seller of tract houses,¹⁸ a landlord of a triplex apartment building,¹⁹ and now, in *O'Connor*, a condominium association.

In creating such a broad standard for “business establishments,” the *Burks* court analyzed the legislative history of the Unruh Act. The court focused on the original version of the bill as presented to the legislature. In addition to affording protection from discrimination in “business establishments” (which at that time was not preceded by the word “all” or followed by the phrase “of every kind whatsoever”), the bill referred specifically to other rights and entities, including the right “to purchase real property.”²⁰ Thus, although the Unruh Act as finally enacted in 1959 eliminated such specific references, the court in *Burks* found the construction company which built and sold housing accommodations came under the Act.²¹

The court explained that their decision was consistent with the legislature’s intent in omitting the specific references. The court in *Burks* stated “[t]hese deletions can be explained on the ground that the Legislature deemed specific references mere surplusage, unnecessary in view of the broad language of the act as finally passed.”²²

The California Supreme Court reaffirmed this declaration of legislative intent twenty-one years later in *O'Connor*. In *O'Connor*, the court reasoned that because “associations” were also one of the specific references in the original version of the bill, a condominium owners association falls under the purview of the Unruh Act.²³ The court declared “[t]he broadened scope of business establishments in the final version of the bill . . . is indicative of an intent by the Leg-

15. *Id.* at 468, 370 P.2d at 315-16, 20 Cal. Rptr. at 611-12.

16. *Washington v. Blampin*, 226 Cal. App. 2d 604, 38 Cal. Rptr. 235 (1964).

17. *Lee v. O'Hara*, 57 Cal. 2d 476, 370 P.2d 321, 20 Cal. Rptr. 617 (1962).

18. *Don Wilson Builders v. Superior Court*, 220 Cal. App. 2d 77, 33 Cal. Rptr. 621 (1963).

19. *Swann v. Burkett*, 209 Cal. App. 2d 685, 26 Cal. Rptr. 286 (1962).

20. *Burks v. Popyy Constr. Co.*, 57 Cal. 2d at 469, 370 P.2d at 316, 20 Cal. Rptr. at 612.

21. *Id.*

22. *Id.*

23. 33 Cal. 3d at 795-96, 662 P.2d at 430, 191 Cal. Rptr. at 323.

islature to include therein all formerly specified private and public groups or organizations that may reasonably be found to constitute 'business establishments of every type whatsoever.'"²⁴ The majority opinion concluded that, consistent with the legislature's intent to use the term "business establishment" in the broadest sense reasonably possible, the Village Green Owners Association is a "business establishment" within the meaning of the Unruh Act.²⁵

This holding expands the interpretation of a "business establishment" to its farthest point to date. Justice Mosk strongly stated in his dissenting opinion, "the transformation of such loosely knit protective association into a 'business' is stretching the concept of entrepreneurial venture beyond all reason."²⁶

PRIVATE CLUB²⁷ DISCRIMINATION AS A VIOLATION OF THE UNRUH ACT

The definition of "business establishment" declared by the *O'Connor* court, is broad enough to include most private clubs.²⁸ Clubs that are "truly private" have been allowed to discriminate in membership and guest policies in any manner they so choose.²⁹

24. *Id.*

25. *Id.* at 796, 662 P.2d at 431, 191 Cal. Rptr. at 324.

26. *Id.* at 802, 662 P.2d at 435, 191 Cal. Rptr. at 328 (Mosk, J., dissenting).

27. Private clubs refer to those groups or organizations whose memberships and guest policies are selective. This Comment will focus on the large, prestigious "country club" type of private club, because this is where discriminatory practices are most harmful to those excluded. *See infra* text accompanying notes 60, 61.

Other types of private clubs may also be "business establishments" under the Unruh Act, to the extent they display sufficient businesslike attributes. The factors addressed in this Comment pertaining to the "country club" type of private club are in no way exhaustive in making a determination on any other type of private club.

28. The California Supreme Court has discussed a private club as a business establishment within the meaning of a Los Angeles city ordinance. The court said that a bona fide social organization was not a business within the meaning of the ordinance, which required the payment of a license fee by persons engaged in the business of retail liquor dealers. *Cuzner v. The California Club*, 155 Cal. 303, 100 P. 868 (1909). The court in *Cuzner* used a much narrower definition of business than has ever been used under the Unruh Act. It should be emphasized that this Comment does not contend that a private club is a business establishment under any definition, or within the purview of any statute; only that it is a "business establishment of every kind whatsoever" under the Unruh Act.

29. The equal protection clause of the fourteenth amendment applies to private conduct only if it is sufficiently intermingled with the state, so as to allow a finding of state action. *The Civil Rights Cases*, 109 U.S. 3 (1883). *See also Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). In the leading case on the application of the equal protection clause to private clubs, the United States Supreme Court held that the state must have "significantly involved itself with the invidious discrimination" in order for the club's conduct to fall under the fourteenth amendment. *Moose Lodge No. 107 v. Irvis*, 407 U.S.

Bringing private clubs within the Unruh Act would prohibit such discrimination.³⁰

163, 173 (1972) (quoting *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967)). See generally Goodwin, *Challenging the Private Club: Sex Discrimination Plaintiffs Barred at the Door*, 13 Sw. L. Rev. 237 (1982) (an analysis of possible constitutional and statutory challenges to sex discrimination in private clubs; also an in depth discussion on what constitutes state involvement).

Discrimination by clubs claiming to be private has also frequently been challenged under Title II of the Civil Rights Act of 1964. See, e.g., *Nesmith v. Y.M.C.A. of Raleigh, N.C.*, 397 F.2d 96 (4th Cir. 1968); *Wright v. Cork Club*, 315 F. Supp. 1143 (S.D. Tex. 1970). Although the Civil Rights Act has constituted a sweeping prohibition of discrimination at places of public accommodations, it excluded private clubs from its reach. *Daniel v. Paul*, 395 U.S. 298 (1969). The exemption for private clubs in the Civil Rights Act of 1964 (codified at 42 U.S.C. § 2000a(e)(1976)) leaves a club free to discriminate if it can stand up to an inquiry of whether it is "truly private."

For a discussion of private clubs and the Civil Rights Act of 1964, see Note, *Civil Rights Act of 1964-Public Accommodations-Private Club Exemption*, 45 N.C.L. Rev. 498 (1967); Note, *The Private Club Exemption to the Civil Rights Act of 1964: A Study in Judicial Confusion*, 44 N.Y.U. L. Rev. 1112 (1969).

30. The question of whether discrimination by private clubs is in violation of the Unruh Act has not yet been determined by the California Supreme Court, but has arisen.

In 1974 some of the commissioners of the Coastal Zone Conservation Commission were invited to the Ingomar Club, a private club. A female commissioner who requested to join the tour was denied entry because women were generally disallowed on the premises. The Attorney General, after being notified of the incident, brought suit against the Ingomar Club, alleging violation of the Unruh Act. It was contended in the complaint that the club had become a "quasi-business establishment" by use of its facilities for business, civic, and political functions. *People v. Ingomar Club*, No. 56006 (Humboldt County, Cal. Super. Ct. 1974). The case was resolved pursuant to an Order in accordance with stipulation and agreement filed Feb. 28, 1978. Dismissal filed May 25, 1978. Letter from Donald R. Michael, County Clerk, June 22, 1983 (discussing pre-trial settlement of the case). See also Murphy, *Men-Only Club Policy Challenged*, L.A. Times, July 2, 1974, pt. IV, at 1, col. 2. More recently, several girls who were rejected for membership in a boys' club solely on the basis of their sex, brought suit against the club. In *Ibister v. Boys' Club of Santa Cruz*, 144 Cal. App. 3d 338, 192 Cal. Rptr. 560 (1983), review granted, No. S.F. 24623 (California Supreme Court August 25, 1983), the court of appeal determined this club was not a "business establishment" under the Unruh Act. In reversing the lower court's finding that this denial of membership was in violation of the Unruh Act, the court of appeal stated the club was merely a nonprofit agency which offers programs and facilities for a nominal fee to its members, and does not have a "businesslike purpose." *Id.* at 346, 192 Cal. Rptr. at 565. The court concluded the Unruh Act "does not apply generally to noncommercial entities (such as charitable, volunteer and community service agencies, fraternal societies, clubs and organizations that serve particular religious, ethnic or cultural groups)." *Id.* at 348, 192 Cal. Rptr. at 567. On August 25, 1983, the California Supreme Court granted review of the case. No. S.F. 24623.

In a similar case a California court of appeal stated the expulsion of a homosexual from the Boy Scouts violated both his common law right of fair procedure and the Unruh Act. The court in *Curran v. Mt. Diablo Council of the Boy Scouts of America*, No. 2 Civ. 66755 (1st Appellate Dist., California 1983), noted the Unruh Act's history of forbidding discrimination in public accommodations and said the legislature passed the Unruh Act with broad language in an effort to guard against restrictive interpretations. The court ruled the Act's reference to "all business establishments of every kind whatsoever" was meant to apply to noncommercial as well as commercial establishments. The court said because the Boy Scouts have substantial "business attributes" the organization falls within the scope of the Act.

The strongest and possibly the controlling argument in determining a private club to be a "business establishment" is found in examining the language of the original version of the assembly bill.³¹ The bill read in relevant part:

All citizens within the jurisdiction of this state . . . are entitled to the full and equal *admittance*, accommodations, advantages, facilities, *membership*, and privileges in, or accorded by, *all public or private groups*, organizations, associations, business establishments, schools, and public facilities; to purchase real property; and to obtain the services of any professional person, group or association.³²

As the bill demonstrates, the legislature specifically referred to admittance and membership in all private groups. The California Supreme Court stated in *Burks*,³³ and again in *O'Connor*,³⁴ that the deletion of the specific references in the bill as enacted indicates the legislature deemed them no longer necessary in light of the broad language of the Act as finally passed. The *O'Connor* court expressly declared legislative intent was to include "all formerly specified private and public groups or organizations that may reasonably be found to constitute 'business establishments of every type whatsoever.'" ³⁵

This expression of legislative intent mandates that if an entity was one of the specific references in the original version of the bill, it must be included under the Unruh Act if it can reasonably be found to constitute a "business establishment of every kind whatsoever." The *O'Connor* decision has added to this declaration of legislative

31. Cal. A.B. 594, 1959 Reg. Sess.

32. *Id.* (emphasis added). See also Horowitz, *The 1959 California Equal Rights in "Business Establishments" Statute: A Problem in Statutory Application*, 33 S. CAL. L. REV. 260 (1960). The article contains a comprehensive examination of the proposed drafts of the bill before its final adoption. The article was written just after the enactment of the Unruh Act, and before the courts had interpreted it. The author, in speculating on how the act would be applied, thought membership clubs did not fall within its scope, because the relationship between discriminator and discriminatee is essentially continuous, personal, and social. The California Supreme Court, in determining whether an entity is a "business establishment" under the Unruh Act, has not relied on these characteristics.

Additionally, the author mentions that legislative history might buttress his conclusion in that specific references to private groups and organizations in the first draft of the bill were eliminated in later drafts. The California Supreme Court has declared that the specific references were no longer necessary in light of the broad language of "all business establishments of every kind whatsoever" adopted in the statute as enacted. *Burks v. Poppy Constr. Co.*, 57 Cal. 2d 463, 469, 370 P.2d 313, 316, 20 Cal. Rptr. 609, 612 (1962).

33. 57 Cal. 2d at 469, 370 P.2d at 316, 20 Cal. Rptr. at 612.

34. 33 Cal. 3d at 795, 662 P.2d at 430, 191 Cal. Rptr. at 323.

35. *Id.* at 795-96, 662 P.2d at 430, 191 Cal. Rptr. at 323.

intent, in holding that a condominium owners association is such a "business establishment." Many private clubs have more businesslike attributes than a condominium owners association. Often these clubs contain restaurants, bars, golf courses, and lodgings. Operation of such facilities brings a private club within the Unruh Act's reference to "business establishments."

Even before *O'Connor*, legal scholars examined the business attributes of private clubs, and questioned how these attributes could make discriminatory policies by such clubs vulnerable to attack. One writer submits that any private club that leases its facilities to outside organizations, and allows members to bring in guests, would have sufficient business attributes to be subject to the Unruh Act.³⁶

Another writer considered various business activities undertaken by private clubs, such as the investment of the dues of its members, and the operation of a tennis or golf "pro shop."³⁷ The author questioned if such activities can make a club a "business establishment" under the Unruh Act. After *O'Connor*, it appears that this question can be answered affirmatively.

Holding private clubs amenable to the Unruh Act is also consistent with decisions in other jurisdictions that hold such clubs to be within their state public accommodation statutes. The Unruh Act replaced prior sections 51-54 of the California Civil Code, which covered places of public accommodation or amusement.³⁸ The California Supreme Court said the legislature enacted the Unruh Act with "business establishments" replacing "public accommodations" because of the legislature's concern that the courts of appeal were improperly curtailing the scope of public accommodations.³⁹ Because the Unruh Act's reach has been expanded beyond public accommodations, a finding that a club is within a state's public accommodation statute would bring such a club well within the reach of the Unruh Act.⁴⁰

36. O'Brien, *May Private Clubs Lawfully Discriminate?* 51 L.A.B.J. 9 (1975).

37. Mohr & Weber, *supra*, note 5.

38. Prior CAL. CIV. CODE §§ 51-52 were amended, and §§ 53-54 were repealed by the Unruh Act. Unruh Civil Rights Act, ch. 1866, 1959 Cal. Stat. 4424.

39. *In re Cox*, 3 Cal. 3d 205, 214, 474 P.2d 992, 997, 90 Cal. Rptr. 24, 29 (1970). Section 51 was amended to cover the broader area of all business establishments in response to a series of court of appeal decisions, where a cemetery, a gymnasium, and a private school were held not to be places of public accommodation. *See, e.g.*, *Gardner v. Vic Tanny Compton, Inc.*, 182 Cal. App. 2d 506, 6 Cal. Rptr. 490 (1960) (gymnasium); *Reed v. Hollywood Professional School*, 169 Cal. App. 2d Supp. 887, 338 P.2d 633 (1959) (private school); *Long v. Mountain View Cemetery Association*, 130 Cal. App. 2d 328, 278 P.2d 945 (1955) (cemetery).

40. The court in *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496, *cert. denied*, 103 S. Ct. 129 (1982), stated that the Unruh Act, "[e]manating from and modeled upon traditional 'public accommodations' legislation," has expanded the reach of such statutes from common carriers and places of public accommodation to include "all business establishments of every kind whatsoever." *Id.* at

One such case involved the refusal of a Pennsylvania chapter of the Moose Lodge organization to extend service to a black guest. The United States Supreme Court designated the club as private, and found there was insufficient state involvement to make the club's discriminatory policies within the purview of the equal protection clause of the fourteenth amendment.⁴¹ In a separate case, stemming from this same incident, the Pennsylvania Supreme Court held that this same so-called private club had brought itself within the ambit of a "public accommodation" with respect to its dining room and bar.⁴² The club did this by opening them to guests, subject only to the limitation they be invited and be of the Caucasian race.⁴³ The court found the Pennsylvania Human Relations Act⁴⁴ prohibited the club from denying service within those facilities to any person because of his race.⁴⁵

Similarly, in a Minnesota case,⁴⁶ that state's supreme court held the Jaycees Club's discriminatory conduct against women to be a violation of the Minnesota Human Rights Act.⁴⁷ In reaching this conclusion, the court said the intent of the legislature was to broaden the term "place of public accommodation" to include a business facility of any kind whose goods and privileges are sold or otherwise made available to the public.⁴⁸ The court used a three-step analysis in finding the Jaycees to be a public business facility.

731, 640 P.2d at 120, 180 Cal. Rptr. at 502. See also *Swann v. Burkett*, 209 Cal. App. 2d 685, 26 Cal. Rptr. 286 (1962). The court in discussing the phrase "all business establishments of every kind whatsoever" found it to cover a much broader field than "places of public accommodations." It concluded that the Unruh Act's reference to "business establishments" would "include the places of amusement and of public accommodation theretofore mentioned, as they undoubtedly are business establishments." *Id.* at 690, 26 Cal. Rptr. at 289. This language implies the Unruh Act includes places of public accommodation and beyond. A finding by a court in another state, that a private club is within the reach of their particular public accommodation statute, is a strong argument that the club is also within the reach of the broader Unruh Act. See *supra* notes 42-45 and accompanying text.

41. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972). See *supra* note 29 for further discussion of this case.

42. *Commonwealth Human Relations Comm'n v. Loyal Order of Moose, Lodge No. 107*, 448 Pa. 451, 294 A.2d 594 (1972).

43. *Id.* at 458, 294 A.2d at 597.

44. PA. STAT. ANN. tit. 43, §§ 951, 952, 954, 955 (Purdon 1964 & Supp. 1982).

45. 448 Pa. at 458, 294 A.2d at 597. The court was only deciding on the servicing of guests and said that fraternal organizations are immune from the Human Relations Act when related to membership and when that accommodation is distinctly private as to the members of that organization. *Id.* at 459, 294 A.2d at 598.

46. *United States Jaycees v. McClure*, 305 N.W.2d 764 (Minn. 1981).

47. MINN. STAT. § 363.03(3) (1980).

48. 305 N.W.2d at 766.

Most importantly, the court found the club offered a product by selling memberships in an organization whose aim is the advancement of its members.⁴⁹ The court concluded that by virtue of its sale of individual memberships, the organization was a business.

The court also found the club to be public for purposes of the statute because, although it is selective in granting privileges and benefits, it is unselective in choosing to whom it sells memberships.⁵⁰ In dictum the court noted that private associations which are selective in membership are not public and do not fall under the Minnesota statute.⁵¹ This is unpersuasive for decisions under the Unruh Act, as its scope is not limited to public accommodations. The Unruh Act, emanating from traditional public accommodation legislation, expanded the reach of the statute from common carriers and "places of public accommodation" to include "business establishments of every kind whatsoever."⁵²

These and other similar decisions⁵³ display how other states, in an effort to prohibit discrimination, have found "private clubs" to be public accommodations. The Unruh Act allows California courts to reach even further to prevent discrimination by clubs that, if not found to be a place of public accommodation, can be found to reasonably constitute a "business establishment of every kind whatsoever."

The Minnesota court, by emphasizing that a club can be called a business because it sells memberships, reveals another important factor in finding that a private club falls under the Unruh Act. In the case involving the Jaycees,⁵⁴ the court stated the club actively recruited their members and treated them as customers.⁵⁵ However, selling memberships does not have to be limited to this situation. Whenever a member pays an initial fee and membership dues for the privilege of joining a private club, there is a selling of that membership. The club is offering, for a price, goods and services such as the use of the facilities or an opportunity to make business contacts. This

49. *Id.* at 769.

50. The club allowed women to join, but they were only allowed to be associate members, who are afforded fewer privileges. *Id.* at 771.

51. *Id.*

52. *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 731, 640 P.2d 115, 120, 180 Cal. Rptr. 496, 502, *cert. denied*, 103 S. Ct. 129 (1982).

53. See Wenkart, *Private Club Discrimination: The Civil Rights Statutes and the Constitution*, 7 SAN FERN. V.L. REV. 77 (1978). But see *United States Jaycees v. Bloomfield*, 434 A.2d 1379 (D.C. 1981) (the court of appeal found the Jaycees not to be a place of public accommodation under the D.C. statute. This statute, in defining public accommodations, lists more than sixty places, and a voluntary membership organization was not one of them); *id.* at 1381 (*construing* D.C. CODE ENCYCL. §§ 6-2202(x), 6-2241(a)(1) (West Supp. 1978-1979)).

54. *United States Jaycees v. McClure*, 305 N.W.2d 764 (Minn. 1981).

55. *Id.* at 769.

business transaction provides another factor in enabling a club to be deemed a "business establishment."

If California courts are willing to adopt the theory that a private club engages in business by selling memberships, such a club would seem to satisfy even the much narrower definition of "business establishments" adhered to by the dissenting justices in the *O'Connor* opinion. In *O'Connor*, Justice Mosk, dissenting to a condominium owners association being called a "business establishment," quoted an earlier California Supreme Court decision in stating, "there is no indication that the Legislature intended to broaden the scope of section 51 to include discrimination other than those made by a 'business establishment' in the course of *furnishing goods, services or facilities to its clients, patrons or customers.*"⁵⁶ Certainly, a club that sells an individual a membership giving him access to the club's restaurant, bar, or golf course is furnishing facilities, goods, and services to its client members.

Justice Mosk also stated that organizations like homeowners associations, which are in no way commercial or profit-seeking, are not "business establishments."⁵⁷ A private club that partakes in a series of business transactions through membership sales, and operates a bar or restaurant, even if not profit-seeking, would be commercial in nature, and thus satisfy Justice Mosk's definition of a "business establishment."

The fact a private club is not seeking a profit in these transactions is no bar to finding it a "business establishment" under the Unruh Act. In *O'Connor*, the court easily disposed of the potential problem of the nonprofit status of the condominium association. "[W]e see no reason to insist that profit-seeking be a *sine qua non* for coverage under the act. Nothing in the language or history of its enactment calls for excluding an organization from its scope simply because it is nonprofit."⁵⁸

56. *O'Connor v. Village Green Owners Ass'n*, 33 Cal. 3d 790, 802, 662 P.2d 427, 435, 191 Cal. Rptr. 320, 328 (1983) (Mosk, J., dissenting) (quoting *Alcorn v. Anbro Engineering, Inc.*, 2 Cal. 3d 493, 500, 468 P.2d 216, 220, 86 Cal. Rptr. 88, 92 (1970)) (emphasis in original).

57. *Id.* at 802, 662 P.2d at 435, 191 Cal. Rptr. at 328.

58. *Id.* at 796, 662 P.2d at 430-31, 191 Cal. Rptr. at 323-24. The court used hospitals as an example of an entity that, while often nonprofit, is clearly a business establishment to the extent they "employ a vast array of persons, care for an extensive physical plant, and charge substantial fees to those who use the facilities." *Id.* at 796, 662 P.2d at 431, 191 Cal. Rptr. at 324. These business attributes are also found in the types of private clubs this Comment contends fall under the Unruh Act's reference to "business establishments."

Establishing that private clubs can be included under the Unruh Act still does not bring every such club in California within the grasp of the Act's long reach. Certainly some clubs have few or no business attributes, and are no more than a small group of close friends who have come together for social reasons. These are also the clubs where an excluded person would have the least need or justification to become a member.⁵⁹

The Unruh Act would prohibit exclusion from the large, prestigious clubs that have traditionally been a source of power and wealth in this country.⁶⁰ Many of these clubs are business oriented and are joined by individuals in an attempt to establish business contacts. While these clubs are not an official place of business transactions, members are professionals whose association with other professionals naturally results in business exchanges. Additionally, clubs whose membership fees qualify as business deductions for the individual serve career-related interests. Persons who are excluded contend they are denied business opportunities and enhanced professional status.⁶¹

The California courts have already taken the lead in compelling admission of individuals arbitrarily denied membership to formal trade and professional organizations.⁶² While courts in other juris-

59. In small clubs of close friends, a right to associate with those of one's own choosing would seemingly outweigh the right of any excluded person to be allowed admittance. The freedom of association and a right to privacy are common defenses used by private clubs when faced with allegations of discrimination.

While the freedom of association is not expressly guaranteed by the Constitution, the United States Supreme Court first recognized it as a constitutional right in *NAACP v. Alabama*, 357 U.S. 449 (1958).

Similarly, a constitutional right of privacy was recognized by the United States Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Freedom of association and the right of privacy in the private club context has been dealt with by many commentators. The consensus is the right is limited by its very nature to the most personal, social relationships and may be restricted by countervailing interests. See Wenkart, *Private Club Discrimination: The Civil Rights Statutes and the Constitution*, 7 *SAN FERN. V.L. REV.* 77 (1978); Note, *Sex Discrimination in Private Clubs*, 29 *HASTINGS L.J.* 417 (1977); Comment, *Association, Privacy and the Private Club: The Constitutional Conflict*, 5 *HARV. C.R.-C.L. L. REV.* 460 (1970).

In California the right to privacy became, after a 1972 amendment, an inalienable right preserved in article I, section I, of the California Constitution. The California Supreme Court in its first opportunity to interpret the privacy amendment, quoted from the state election brochure which said the right of privacy should be abridged only when there is a "compelling public need." *White v. Davis*, 13 Cal. 3d 757, 775, 533 P.2d 222, 234, 120 Cal. Rptr. 94, 106 (1975).

Again, the right is not absolute. Surely a "compelling public need" can be found in preventing arbitrary discrimination against California citizens by private clubs.

60. Goodwin, *supra* note 29, at 280-84. (discussion of the professional interest issue).

61. *Id.*

62. Although this Comment will not discuss formal trade and professional organizations such as medical or dental associations in any detail, courts generally will not interfere with admission to such organizations, no matter how arbitrarily a candidate has been rejected. However, based on common law principles and public policy considerations, judicial review may occur where membership is essential to the right to earn a

dictions have required a strict showing of "economic necessity," the California Supreme Court has not limited itself to this requirement in granting judicial review. The court has stated that a person who shows that exclusion from membership in an association deprives him of substantial economic benefits has a right to judicial intervention with respect to the denial of his application for membership.⁶³

It is but a slight extension of this rationale to argue that admission to certain business-oriented clubs, also important to one's profession, should also be non-discriminatory.⁶⁴ While a court may not be able to prevent discrimination by private clubs under the same common law principles it applies to formal trade and professional organizations,⁶⁵ it does not have to. The Unruh Act provides the perfect vehicle. Recognizing that these business-oriented clubs, in addition to their overall business purpose, partake in business transactions through membership sales, and operation of restaurants, bars, and golf courses, are "business establishments" under the Unruh Act, would force them to be non-discriminatory.

living. See, e.g., *Pinsker v. Pac. Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 526 P.2d 253, 116 Cal. Rptr. 245 (1974); *Pinsker v. Pac. Coast Soc'y of Orthodontists*, 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969); *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1944); *Kronen v. Pac. Coast Soc'y of Orthodontists*, 237 Cal. App. 2d 289, 46 Cal. Rptr. 808 (1965) cert. denied, 384 U.S. 905 (1966).

63. *Pinsker v. Pac. Coast Soc'y of Orthodontists*, 1 Cal. 3d 160, 165, 460 P.2d 495, 498, 81 Cal. Rptr. 623, 626 (1961) (*Pinsker I*). After the case was remanded and then again heard by the supreme court on appeal, the court stated its conclusion in *Pinsker I*, that "economic necessity" is not an indispensable prerequisite to judicial review, is the latest development of the proper role of the courts with respect to membership decisions reached by private associations. *Pinsker v. Pac. Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 552, 526 P.2d 253, 261, 116 Cal. Rptr. 245, 253 (1974).

64. A California court of appeal has rejected the argument that admission may be compelled to a voluntary organization in any situation where membership may enhance or affect one's professional or economic interest. *Blatt v. University of Southern California*, 5 Cal. App. 3d 935, 941-42, 85 Cal. Rptr. 601, 605 (1970).

65. The California Supreme Court first faced the issue of compelling admission to voluntary organizations in *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1944). In that case the court said that where a union has attained a monopoly supply of labor it obtains a position analogous to that of a public service business. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. *Id.* at 731, 155 P.2d at 335. Arguably, the court would not call these business-oriented clubs fraternal organizations. In any event, the court decided the case on a common law right to public services and the right to earn a living. This in no way would prevent a private club from being deemed a "business establishment" under the Unruh Act. In this case, the court discussed Civil Code §§ 51, 52, as they read prior to the current Unruh Act. The statutes at that time related only to specifically enumerated public accommodations such as inns and restaurants, and therefore the court did not base its decision on the statutes. *James v. Marinship Corp.*, 25 Cal. 2d at 740, 155 P.2d at 339-40.

CONCLUSION

The Unruh Act has for years affected more groups and entities than any other civil rights statute. The *O'Connor* decision serves to further this development. In *O'Connor* the California Supreme Court applied and expanded the broad interpretation of "business establishment" under the Unruh Act to include a condominium owners association.

This Comment, focusing on private clubs, contends that most of these clubs have sufficient businesslike attributes to reasonably constitute a "business establishment of every kind whatsoever." This brings such clubs within the reach of the Unruh Act, and makes any arbitrary discrimination practiced by them prohibited. Small clubs that lack sufficient businesslike attributes to fall within the scope of the Unruh Act's reference to "business establishments" should be excluded from the Act's mandate.

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