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Antidiscrimination Statutes and Women-Only Spaces in the #MeToo Era

Anna Porter[†]

I. INTRODUCTION

In response to the #MeToo Movement, many organizations began attempting to find creative ways to address the realities people who identify as women face both at work and in public spaces.¹ These organizations often focus on closing the gender pay gap and increasing representation in leadership, both indicators tied to sexual harassment in the workplace.² Although the organizations discussed below are open to female-identifying and non-binary people, they exclude men.³ Organizations argue that providing women-only events “offer forums for discussing discrimination, a haven for people who may feel excluded by the dominant culture of broader professional groups, and career advancement opportunities for demographics at a statistical disadvantage.”⁴ From co-working spaces to empowerment seminars to women-only showings of *Wonder Woman*, the popularity of these spaces suggests that women respond to the idea of having a space where they know they

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¹ Leigh Stringer, *Where is the Demand for Women-Only Co-Working Spaces Coming From?*, SLATE (May 17, 2018), <https://slate.com/human-interest/2018/05/the-wing-demand-for-women-only-co-working-spaces-is-high.html> [<https://perma.cc/S8MZ-H63Q>].

² See Jennifer Calfas, *Inside Sexual Harassment's Hidden Toll on Equal Pay*, TIME (April 9, 2018), <http://time.com/5227742/sexual-harassment-equal-pay-wage-gap>; Karen Higginbottom, *The Link Between Power and Sexual Harassment in the Workplace*, FORBES (June 11, 2018), <https://www.forbes.com/sites/karenhigginbottom/2018/06/11/the-link-between-power-and-sexual-harassment-in-the-workplace/#487cd27b190f> [<https://perma.cc/8R9D-3HA8>].

³ In discussing women-only spaces, this Comment is not referring to events held by Trans-Exclusionary Radical Feminists.

⁴ Christina Cauterucci, *Members of a Men's Rights Group Sued a Women's Networking Group for Sex Discrimination*, SLATE (Jan. 15, 2016), <https://slate.com/human-interest/2016/01/members-of-a-men-s-rights-group-sued-a-women-s-networking-group-for-sex-discrimination.html> [<https://perma.cc/RZZ8-GXFU>].

will only be surrounded by other women.⁵ However, because these initiatives are by nature segregated by gender (excluding men), they risk coming into contact with state antidiscrimination statutes.⁶ For this reason, many of these organizations have recently come under fire by men bringing charges of discrimination.⁷

Title II of the Civil Rights Act of 1964, which addresses discrimination in public accommodations, does not include sex or gender as a protected category.⁸ Because there is no national standard with respect to sex discrimination in public accommodations, plaintiffs rely on state statutes in the majority of these cases.⁹ The amount of protection afforded by various states changes depending upon “legislative definitions and judicial interpretations of what constitutes a public accommodation.”¹⁰ California’s Unruh Civil Rights Act is one example of an expansive antidiscrimination statute.¹¹ Enacted by the California legislature in 1959 as an amendment to the Civil Code, the Unruh Civil Rights Act prohibits California businesses from discriminating based on protected characteristics.¹² Sex was added as a protected characteristic through a 1974 amendment to the law.¹³

While the tension between sex-segregated spaces and laws prohibiting discrimination is not new, in the past the vast majority of these lawsuits targeted men-only organizations (and laws prohibiting it envisioned men-only organizations discriminating against women).¹⁴ Today, male plaintiffs in California suing women’s organizations for sex discrimination argue that these cases should not be treated any differently than other cases of discrimination brought under the Unruh Act.¹⁵ The

⁵ Stringer, *supra* note 1.

⁶ Rebecca Gale, *When Men Sue Women’s Empowerment Orgs for Gender Discrimination*, SLATE (July 3, 2018), <https://slate.com/human-interest/2018/07/men-are-suing-womens-empowerment-organizations-for-gender-discrimination.html> [<https://perma.cc/EGB8-W7VA>].

⁷ *Id.*

⁸ 42 U.S.C. § 2000a.

⁹ Jessica E. Rank, *Is Ladies’ Night Really Sex Discrimination?: Public Accommodation Laws, De Minimis Exceptions, and Stigmatic Injury*, 36 SETON HALL L. REV. 223, 225 (2005). This Comment refers to sex discrimination, rather than gender discrimination, in keeping with the way legislatures and the courts use the term. The statute at issue in California clarifies that “sex” includes gender identity and gender expression. CAL. CIV. CODE § 51(e)(5).

¹⁰ Marissa L. Goodman, *A Scout is Morally Straight, Brave, Clean, Trustworthy . . . and Heterosexual? Gays in the Boy Scouts of America*, 27 HOFSTRA L. REV. 825, 830 (1999).

¹¹ Cal. Civ. Code § 51.

¹² *Id.*

¹³ Jean Douglas Murphy, *Women’s Rights Legislation—A Vintage Year*, L.A. TIMES, Oct. 3, 1974, at H1.

¹⁴ Deborah Rhode, *Association and Assimilation*, 81 NW. U.L. REV. 106, 114 (1986).

¹⁵ Complaint at 3, *Rich Allison v. Red Door Epicurean, LLC*, No. 2017-00036282, Cal. Super. Ct. (2017) (“For a business operating in the progressive state of California, in the year 2017, to provide accommodations, advantages, privileges, or services to only female patrons, is as repugnant and unlawful as businesses being involved in a “Caucasian Night” or a “Heterosexual Night”

extent to which a California court would agree is as yet unclear, as organizations to this point have settled these cases rather than face expensive legal defense fees.¹⁶

This Comment will analyze the application of California's Unruh Civil Rights Act to women-only organizations and events in the #MeToo Era. California provides an especially interesting case study because of the wide protections against discrimination under its civil rights law. In part because discrimination under the law is *per se* injurious, there is a plethora of available cases to review.¹⁷ Further, in the past few years, several California men have brought lawsuits against women's empowerment organizations for hosting women-only events. Given the current appeal of these types of organizations, as well as the media attention on #MeToo, it is an interesting time to engage in a discussion about the scope of state antidiscrimination statutes and the ways courts might or should apply the law to these new organizations. As California has such broad protections, outlining more clearly the scope of the law and providing strategies for ways to defend against allegations is important for organizations seeking to promote women's empowerment. Further, as the statute's protections are broad, it can serve as an example for other state legislatures and courts.

Part II of this Comment will track the jurisprudence surrounding the Unruh Act in order to highlight how California courts have interpreted the law in cases of sex discrimination claims to this point. Part III will look to the purpose of the Unruh Act to analyze whether the California legislature contemplated these types of suits under the law. The law has primarily expanded to protect different identified marginalized groups. The fact that it might be wielded by more privileged groups against organizations seeking to promote gender equality highlights potential inconsistencies with the Unruh Act and its application. Part IV will argue that courts in California should follow Supreme Court jurisprudence in Fourteenth Amendment cases, limiting application to discrimination that perpetuates irrational stereotypes. Finally, Part V will suggest a legislative alternative to judicial action, carving out an exception to the Unruh Act for remedial actions taken by historically marginalized groups.

and denying admission and discounted drinks and other accommodations, advantages, privileges, or services to patrons of color or to gay or lesbian patrons, respectively.”)

¹⁶ Rebecca Gale, *When Men Sue Women's Empowerment Orgs for Gender Discrimination*, SLATE (July 3, 2018), <https://slate.com/human-interest/2018/07/men-are-suing-womens-empowerment-organizations-for-gender-discrimination.html> [<https://perma.cc/EGB8-W7VA>].

¹⁷ *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 33 (1985) (“[B]y passing the Unruh Act, the Legislature established that arbitrary sex discrimination by businesses is *per se* injurious.”)

II. JURISPRUDENCE SURROUNDING THE UNRUH CIVIL RIGHTS ACT

This section will first consider California courts' interpretation of the Unruh Act and the way that interpretation has been used in the past to combat discrimination against women in places of public accommodation. Most of the early cases of sex discrimination in California involve women seeking access to men-only spaces. This section will show how the courts in California expanded the definition of "business establishments" to include things like a nonprofit Boys' Club¹⁸ and the Rotary Club,¹⁹ but not the Boy Scouts of America²⁰ or a local private high school.²¹ This sometimes-fine line the courts have drawn makes it potentially difficult for defendants to know when they might be subject to provisions of the Unruh Act. The section then turns to cases brought over the past decades by men against businesses offering promotions to women, largely in the form of "Ladies' Night" discounts. Finally, it considers recent examples of men suing organizations that host women's empowerment events.

A. California's Unruh Civil Rights Act and "Business Establishments"

Enacted in 1959, the Unruh Civil Rights Act provides broad protections against discrimination. As most recently amended in 2015, the Unruh Act currently provides:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, privileges, or services in all business establishments of every kind whatsoever.²²

The Unruh Act provides a private cause of action and either a maximum of three times the actual damages or statutory damages of at least

¹⁸ *Ibister v. Boys' Club of Santa Cruz, Inc.*, 707 P.2d 212 (Cal. 1985).

¹⁹ *Rotary Club of Duarte v. Bd. Of Dirs.*, 178 Cal. App. 3d 1035, *aff'd* Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).

²⁰ *Curran v. Mount Diablo Council of the Boy Scouts*, 952 P.2d 218, 237 (Cal. 1998).

²¹ *Doe v. California Lutheran High Sch. Assn.*, 170 Cal. App. 4th 828, 838 (2009).

²² CAL. CIV. CODE § 51(b); The Act further clarifies that "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. "Sex" also includes, but is not limited to, a person's gender. "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." CAL. CIV. CODE § 51(e)(5).

\$4,000 for each violation.²³ It further allows a court to award attorney's fees to prevailing plaintiffs.²⁴

To avoid First Amendment concerns related to the freedom of private association, state statutes follow the Supreme Court in providing exceptions for private clubs.²⁵ They prohibit discrimination only in places of public accommodation, which is defined slightly differently from state to state.²⁶ The Supreme Court has noted that the First Amendment "afford[s] constitutional protection to freedom of association in two distinct senses."²⁷ First, the Court has held that individuals are protected in their intimate or private relationships.²⁸ In order to determine whether a given relationship qualifies for this type of protection, the Court looks to "factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship."²⁹ Second, the Court has defined the rights of individuals to expressive association, "to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."³⁰ In attempting to square First Amendment freedom of association concerns with state public accommodation statutes prohibiting discrimination, the Supreme Court uses a balancing test that weighs "the infringement upon a group's right to freedom of expressive association against the state's compelling interest in eradicating and preventing discrimination."³¹

The Unruh Act prohibits discrimination "in all business establishments of any kind whatsoever."³² In interpreting this language, California courts have recognized a legislative "intent to use the term 'business establishments' in the broadest sense reasonably possible."³³ In keeping with First Amendment freedom of association rights, the California Supreme Court has concluded that the provisions of the Unruh Act "do not apply to the membership decisions of a truly private social club."³⁴

Although "truly private" clubs are not subject to the Unruh Act, merely stating that a club is private does not preclude enforcement of

²³ *Id.* at § 52(a).

²⁴ *Id.*

²⁵ Goodman, *supra* note 10.

²⁶ *Id.*

²⁷ Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 544 (1987).

²⁸ *Id.*

²⁹ *Id.* at 546, citing Roberts v. United States Jaycees, 468 U.S. 609 (1984).

³⁰ *Id.* at 549.

³¹ Goodman, *supra* note 10.

³² CAL. CIV. CODE §51(b).

³³ Warfield v. Peninsula Golf & Country Club, 896 P.2d 776, 786 (1995).

³⁴ *Id.* at 791.

the Unruh Act against it.³⁵ The California Supreme Court faced the issue of the application of the Unruh Act to “private” clubs when a woman sued a nonprofit private country club in *Warfield v. Peninsula Golf & Country Club*.³⁶ There, the court discussed the legislative history of the Unruh Act and concluded that the term “business establishment” was designed “to include any entity that would have been considered a ‘place of public accommodation or amusement’ under the pre-1959 version of section 51.”³⁷ As private social clubs were typically excluded from public accommodation statutes based on First Amendment freedom of association rights, the court determined that they would similarly be excluded under the Unruh Act, so long as they “are genuinely selective in their membership and in which the relationship among members is continuous, personal, and social.”³⁸ That is, an entity does not avoid liability under the Unruh Act simply by naming itself a private social club. In *Warfield*, although the nonprofit country club at issue purported to be a private social club, the court determined that it was a “business establishment” subject to the Unruh Act because of its “regular business transactions with nonmembers” that made it the functional equivalent of a commercial enterprise.³⁹

In *Ibister v. Boys’ Club of Santa Cruz, Inc.*,⁴⁰ the California Supreme Court further extended the understanding of what might be considered a business establishment under the Unruh Act. There, girls sued after the Boys’ Club rejected their membership applications based on sex.⁴¹ The Boys’ Club, “a private charitable organization which operates a community recreational facility,”⁴² argued that it was not subject to the Unruh Act. The Club reasoned that, as a non-profit without an economic function, it should not be viewed as a “business establishment” covered by the Unruh Act.⁴³ The court disagreed, finding that the Club was primarily a “place of public accommodation or amusement” under the Unruh Act, as “relations with and among its members are of a kind which take place more or less in ‘public view,’ and are of a ‘relatively nongratiuitous, continuous, nonpersonal, and nonsocial sort.’”⁴⁴ For the California Supreme Court, membership in the Boys’ Club was

³⁵ *Id.*

³⁶ 896 P.2d 776 (Cal. 1995).

³⁷ *Id.* at 789.

³⁸ *Id.* at 790.

³⁹ *Id.* at 793.

⁴⁰ *Ibister v. Boys’ Club of Santa Cruz, Inc.*, 707 P.2d 212 (Cal. 1985).

⁴¹ *Id.*

⁴² *Id.* at 214.

⁴³ *Id.* at 218.

⁴⁴ *Id.* at 218.

“equivalent to admission to a place of public amusement,”⁴⁵ which would have been covered by the previous public accommodations statute. A dissenting justice in *Ibister* cautioned that this reasoning would threaten “many traditionally sex-segregated institutions, such as fraternities and sororities, private schools, and scouting organizations.”⁴⁶

The California Supreme Court responded to that dissent in *Curran v. Mount Diablo Council of the Boy Scouts*⁴⁷ by distinguishing those institutions, which it viewed as truly private, from the case in *Ibister*. The Boy Scouts in that case denied a leadership position to a gay man, who sued under the Unruh Act.⁴⁸ Unlike the Boys Club, the California Supreme Court found that the Boy Scouts “is an organization whose primary function is the inculcation of a specific set of values in its youth members, and whose recreational facilities and activities are complementary to the organization’s primary purpose.”⁴⁹ The Court argued that this was distinct from *Ibister*, as membership in the Boy Scouts is more than “simply a ticket of admission to a recreational facility that is open to a large segment of the public and has all the attributes of a place of public amusement.”⁵⁰

Similarly, the California Supreme Court determined in *Doe v. California Lutheran High School Association*⁵¹ that a private all boys high school was not a business establishment for purposes of the Unruh Act as its primary function was not commercial but instead “an expressive social organization whose primary function was the inculcation of values in its youth members.”⁵² In both this case and *Curran*, the court found that some business activities with nonmembers would not make the Boy Scouts or the high school business establishments as under *Warfield* because the transactions with nonmembers “do not involve the sale of access to the basic activities or services offered by the organizations.”⁵³ Whereas in *Warfield* the country club sold to nonmembers access to the services provided members, the Boy Scouts or high school sales of goods to nonmembers is distinct. That is, while the Boy Scouts sold goods to nonmembers through its stores, it did not sell “entry to pack or troop meetings, overnight hikes, the national jamboree, or any portion of the Boy Scouts’ extended training and educational process.”⁵⁴

⁴⁵ *Curran v. Mount Diablo Council of the Boy Scouts*, 952 P.2d 218, 237 (Cal. 1998).

⁴⁶ *Ibister*, 707 P.2d at 226 (Mosk, J. dissenting).

⁴⁷ *Curran*, 952 P.2d at 237.

⁴⁸ *Id.*

⁴⁹ *Id.* at 236.

⁵⁰ *Id.*

⁵¹ *Doe v. Cal. Lutheran High Sch. Assn.*, 170 Cal. App. 4th 828, 838 (2009).

⁵² *Id.* at 838 (citing *Curran*, 952 P.2d at 238).

⁵³ *Curran*, 952 P.2d at 238 (emphasis in original).

⁵⁴ *Id.*

The California Supreme Court noted that the nonmember transactions (at sporting events or through the retail stores) would be subject to the Unruh Act.⁵⁵

A California Court of Appeals found a local rotary club to be a business establishment subject to the Unruh Act in *Rotary Club of Duarte v. Board of Directors*.⁵⁶ In that case, two women and a local rotary club charged that the male-only policy of the International Rotary Club violated the Unruh Act after the International Rotary Club revoked the local club's charter for its policy of admitting women.⁵⁷ There, the California Court of Appeals looked to the commercial aspects of the Rotary Club, the business benefits it offered to members, and the public nature of the community services done by Rotary members.⁵⁸ In determining that the Rotary was not a private organization exempt from the Unruh Act, the Court of Appeals concluded that "[t]he relationship among Rotarians is not continuous, personal and social."⁵⁹ The Supreme Court affirmed this decision, finding that "rather than carrying on their activities in an atmosphere of privacy, [Rotary Clubs] seek to keep their windows and doors open to the whole world."⁶⁰

The defendants in that case further alleged that disallowing its male-only policy infringed upon their rights to freedom of expressive association under the Constitution.⁶¹ However, that the "the male-only-membership policy [was] valued by a substantial majority of Rotarians throughout the world and . . . ha[d] enabled the organization to work effectively on a worldwide basis" did not persuade the Court of Appeals.⁶² The United States Supreme Court addressed this question after the California Supreme Court denied the petition for review.⁶³ The United States Supreme Court found that the Unruh Act did not violate the First Amendment rights of the Rotary Club by forcing them to admit women.⁶⁴ The Unruh Act did not violate the Rotary Clubs right to expressive association because admitting women to the Clubs would not "affect in any significant way the existing members' ability to carry out

⁵⁵ *Id.*

⁵⁶ *Rotary Club of Duarte v. Bd. of Dirs.*, 178 Cal. App. 3d 1035 (1986), *aff'd* Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).

⁵⁷ *Id.*

⁵⁸ *Id.* at 1058.

⁵⁹ *Id.* at 1059.

⁶⁰ *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 547, quoting 1 Rotary Basic Library, Focus on Rotary 60–61 (1981) (internal quotations omitted).

⁶¹ *Id.* at 1060.

⁶² *Rotary Club of Duarte*, 178 Cal. App. 3d at 1060.

⁶³ *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 543.

⁶⁴ *Id.*

their various purposes.”⁶⁵ Further, the Court found that even should the members suffer a small infringement in their rights to expressive association, it was “justified because it serve[d] the State’s compelling interest in eliminating discrimination against women.”⁶⁶

B. Ladies’ Night Discounts and Men’s Early Claims of Sex Discrimination under the Unruh Act

Whereas in the past women seeking access to establishments that catered to men brought the majority of sex-discrimination claims under the Unruh Act, more recently, men have also brought claims under the Act against businesses or organizations that host women’s only events or provide discounts for women.⁶⁷ Once established that the discrimination takes place in a “business establishment,” the act forbids “all unreasonable, arbitrary, or invidious discrimination.”⁶⁸ California courts have found this discrimination “where the policy or action emphasizes irrelevant difference between men and women or perpetuates any irrational stereotypes.”⁶⁹

In *Koire v. Metro Car Wash*,⁷⁰ the plaintiff successfully brought claims under the Unruh Act against several car washes and nightclubs that offered discounts to women.⁷¹ The defendants in that case tried to argue that the sex-based discount policies were not “arbitrary” in violation of the Act as they were motivated by “substantial business and social purposes.”⁷² Further, one defendant nightclub argued that its Ladies’ Night promotions encouraged more women to come to the bar, “thereby promoting more interaction between the sexes,” which it considered a “socially desirable goal.”⁷³ The California Supreme Court disagreed that this was a sufficient policy interest warranting an exception to the Act, distinguishing it from “the compelling societal interest in ensuring adequate housing for the elderly which justifies differential treatment based on age.”⁷⁴ Instead, it maintained that a business’s economic interest would not be enough to warrant an exception.⁷⁵

⁶⁵ *Id.* at 548.

⁶⁶ *Id.* at 549.

⁶⁷ Gale, *supra* note 6.

⁶⁸ *Cohn v. Corinthian Colleges, Inc.*, 86 Cal. Rptr. 3d 401 (2008).

⁶⁹ *Id.* at 404 (internal quotations omitted).

⁷⁰ 40 Cal. 3d 24 (1985).

⁷¹ *Id.*

⁷² *Id.* at 32.

⁷³ *Id.* at 33.

⁷⁴ *Id.*

⁷⁵ *Id.*

Considering damages, the defendants further raised the argument that the plaintiff was not injured by the price differences.⁷⁶ The court however stated that “by passing the Unruh Act, the Legislature established that arbitrary sex discrimination by businesses is *per se* injurious.”⁷⁷ Statutory damages are provided under the Act for each violation “regardless of the plaintiff’s actual damages.”⁷⁸ The California Supreme Court cautioned that “differential pricing based on sex may be generally detrimental to both men and women, because it reinforces harmful stereotypes.”⁷⁹ The court was critical of a Washington Supreme Court decision on the same issue.⁸⁰ The Washington Supreme Court had previously ruled that a Ladies’ Night promotion at a basketball game did not violate the state’s antidiscrimination law precisely because the male plaintiff in that case suffered no damages as a result.⁸¹ In *Koire*, the California Supreme Court favorably cited law review articles that discussed the danger in allowing legal systems to treat men and women differently.⁸² The court further chastised the Washington Supreme Court for “succumb[ing] to sexual stereotyping in upholding the Seattle Supersonics’ ‘Ladies’ Night,’” a decision in which it found that discounts for women were reasonable because “women do not manifest the same interest in basketball that men do.”⁸³ According to the California Supreme Court, this kind of sexual stereotyping “is precisely the type of practice prohibited by the Unruh Act.”⁸⁴

The California Supreme Court upheld the understanding that arbitrary discrimination was *per se* injurious under the Unruh Act in *Angelluci v. Supper Club*.⁸⁵ In that case, another situation where a man was charged higher price for admission than women for entry into a nightclub, the court further held that plaintiffs did not have to affirma-

⁷⁶ *Koire*, 40 Cal. 3d at 33.

⁷⁷ *Id.*

⁷⁸ *Id.* (emphasis in original).

⁷⁹ *Id.* at 34.

⁸⁰ *Id.*

⁸¹ *Maclean v. First Nw. Indus. of Am., Inc.*, 635 P.2d 683, 685 (Wash. 1981) (“RCW 49.60.030 authorizes private actions for violations of the chapter, but only for the “actual damages sustained.”).

⁸² *Koire*, 40 Cal. 3d at 34–35 (“As long as organized legal systems, at once the most respected and most feared of social institutions, continue to differentiate sharply, in treatment or in words, between men and women on the basis of irrelevant and artificially created distinctions, the likelihood of men and women coming to regard one another primarily as fellow human beings and only secondarily as representatives of another sex will continue to be remote.”).

⁸³ *Id.* at 35, citing *MacLean*, 635 P.2d at 684.

⁸⁴ *Id.* at 35.

⁸⁵ 158 P.3d 718 (Cal. 2007).

tively seek nondiscriminatory treatment in order to have standing under the Unruh Act.⁸⁶ In dicta, the court suggested that there may be constitutional or equitable relief available for a business facing abusive litigation under the Unruh Act.⁸⁷ In that case, both the trial and appellate courts expressed concerns about the potential for abusive litigation. In the case, the defendant complained that the “plaintiffs made *repeated* unannounced visits to defendant’s business establishment in order to increase the statutory damages they could seek for multiple violations of the Act.”⁸⁸ However, the court chose to leave it to the legislature to “determine whether to alter the statutory elements of proof to afford business establishments’ protection against abusive private legal actions and settlement tactics.”⁸⁹

A California appeals court similarly raised concerns about the potential for abusive litigation in *Cohn v. Corinthian Colleges, Inc.*⁹⁰ The court expressed a distaste for the repeat-player plaintiffs in the case, who it viewed as being involved in shake-down lawsuits.⁹¹ It upheld a Mother’s Day special at an Angels baseball game that gave away gift bags to all women over age eighteen.⁹² Rather than the kind of “arbitrary discrimination the Unruh Act is meant to protect,” the court found that the promotion was intended to honor mothers.⁹³ Gender was a secondary consideration, as the goal was to provide gifts to mothers.⁹⁴ Providing gifts to all women in attendance, rather than attempting to find out which women at the game were mothers, was an acceptable method of giving gifts to mothers.⁹⁵ Unlike in *Koire*, the promotion here was less egregious as it did not “emphasize an irrelevant difference, nor perpetuate an irrational stereotype.”⁹⁶

⁸⁶ *Id.* at 719.

⁸⁷ *Id.* at 729.

⁸⁸ *Id.* at 728 (emphasis in original).

⁸⁹ *Id.* at 729.

⁹⁰ 86 Cal. Rptr. 3d 401 (Cal. Ct. App. 2008); (“No other fans complained about the giveaway, and Cohn’s complaint only came after he went to the game to deliberately generate his “injury.” Cohn’s complaint gathers further suspicion because Cohn, his friends, and his counsel have been involved in numerous of what have been characterized as “shake down” lawsuits. (E.g., *Angelucci v. Century Supper Club* (2007) 41 Cal. 4th 160, 178 [158 P.3d 718 (Cal. 2007)].) They proclaim themselves equal rights activists, yet repeatedly attempted to glean money from the Angels through the threat of suit. The Act is a valuable tool for protecting our citizens and remedying true injuries. We are not convinced the Angels’ tote bag giveaway was in any way unreasonable, arbitrary, or invidious discrimination.”)

⁹¹ *Id.* at 405.

⁹² *Id.*

⁹³ *Id.* at 404–05.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Cohn*, 86 Cal. Rptr. 3d at 404.

C. Recent Lawsuits Targeting Women-Only Events

In California, several lawsuits in recent years have been brought by male plaintiffs against women's empowerment organizations alleging violations of the Unruh Act. Because these lawsuits have settled without judicial opinion, it is unclear how California courts might deal with these charges. Apart from seeking statutory damages, many of these settlements require the organizations to change their admission policies.⁹⁷

Some of the events describe the need for women-only admission policies in order to provide safe spaces for women. In 2017, two men refused entry to her show "Girls Night In" sued comedian Iliza Shlesinger.⁹⁸ A comedy show at a theater, open to the public, that charges a fee for entry would clearly fall under the Unruh Act. In this case, the only limitation was based on gender. In the wake of breaking allegations against Harvey Weinstein and Louis C.K., the event was marketed as:

[A] hybrid stand up show and interactive discussion between Iliza and the women in the audience aimed at giving women a place to vent in a supportive, fun and inclusive environment.⁹⁹

Shlesinger described the event as an opportunity for "women to get together, talk and laugh about the things we go through."¹⁰⁰ The complaint charges against what it refers to as the defendants' "War on Men," comparing the admission policy "as being akin to the Montgomery City Lines bus company in Montgomery, Alabama circa 1955."¹⁰¹ Although the plaintiff in this case withdrew the complaint without prejudice, the same attorney refiled the case as a putative class action in 2018.¹⁰² The named plaintiff in the first case is named in the second, and the complaint is very similar to the original.¹⁰³

With regards to the alleged Unruh Act violations, the defendants requested that the court dismiss the complaint on the grounds that the

⁹⁷ Iman Hariri-Kia, *Ladies Get Paid Was Sued for Gender Discrimination – But It's Not Giving up Its Mission*, BUSTLE (June 1, 2018), <https://www.bustle.com/p/ladies-get-paid-was-sued-for-gender-discrimination-but-its-not-giving-up-its-mission-9229052> [<https://perma.cc/5H7H-GCKV>].

⁹⁸ *St. George v. Shlesinger*, No. B687568 (Cal. Super. Ct. Dec. 22, 2017).

⁹⁹ Complaint at 16, Exhibit I, *supra* note 98.

¹⁰⁰ Gene Maddaus, *Iliza Shlesinger Sued for Banning Men from Comedy Show*, VARIETY (Dec. 27, 2017), <https://variety.com/2017/biz/news/iliza-shlesinger-girls-night-mens-rights-lawsuit-1202649230/> [<https://perma.cc/HA5M-Z4NV>].

¹⁰¹ Complaint at 3, *supra* note 98.

¹⁰² *Pollister v. Shlesinger*, No. Bc705961 (Cal. Super. Ct. May 14, 2018).

¹⁰³ *Id.*

discrimination was “neither unreasonable nor arbitrary.”¹⁰⁴ The defendant argued that any discrimination did not perpetuate stereotypes or “emphasize irrelevant differences.”¹⁰⁵ Instead, the defendants argued that the admissions policy served to create “a safe space for women to discuss issues uniquely facing this sector of society.”¹⁰⁶ This purpose, the defendants argued, “would be hindered by the presence of men.”¹⁰⁷ The court denied the defendants’ demurrer, finding that it did not have enough information from the complaint to determine whether the admission policy emphasized irrelevant differences or perpetuated irrational stereotypes.¹⁰⁸

Other organizations have focused on women’s networking and providing opportunities for women to meet and discuss realities they face in the workplace. These organizations attempt to address barriers women face, including sexual harassment, in spaces without men. The women’s empowerment organization Ladies Get Paid was sued for violations of Unruh after it held women-only “Ladies Get Drinks” events at California bars, which were also sued.¹⁰⁹ Ladies Get Paid settled the lawsuit rather than risk potential bankruptcy.¹¹⁰ As the attorney representing the organization said, “[i]f you are a young company, you are not going to test the merits. You are going to wind up paying the plaintiff to go away.”¹¹¹ This is especially true because the Unruh Act provides for fee-shifting for prevailing plaintiffs in civil rights cases, creating a greater risk for defendants unsure about their chances in litigation.¹¹² As a part of the settlement, it had to change its policy to allow men to attend their events.¹¹³ Similarly, a women’s networking group that held “Clinics and Cocktails” events to teach women golf was sold after settling a lawsuit alleging Unruh Act violations.¹¹⁴

In 2018, the San Diego Fire Rescue Foundation cancelled a free, city-sponsored Girls’ Empowerment Camp meant to teach girls about firefighting after being threatened with suit for alleged violations of the

¹⁰⁴ Demurrer to First Amended Complaint at 8, *supra* note 102.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 25.

¹⁰⁸ *Pollister v. Shlesinger*, No. Bc705961 (Cal. Super. Ct. May 14, 2019).

¹⁰⁹ *Allison v. Red Door Epicurean, LLC*, No. 2017-00036282 (Cal. Super. Ct. Sept. 28, 2017); *St. George v. Ladies Get Paid, LLC*, No. Sc128611 (Cal. Super. Ct. Dec. 27, 2017).

¹¹⁰ Judith Ohikuare, “*Ladies Get Sued*”: *How A Civil Rights Law Could End Women-Only Events*, REFINERY 29 (May 25, 2018), <https://www.refinery29.com/en-us/2018/05/199558/ladies-get-paid-unruh-civil-rights-act-lawsuit> [<https://perma.cc/W28P-VVRF>].

¹¹¹ Gale, *supra* note 6.

¹¹² CAL. CIV. CODE § 52.

¹¹³ *Hariri-Kia*, *supra* note 97.

¹¹⁴ *Crouch v. Maderas*, No. 37-2013-00060313-CU-CR-CTL (Cal. Super. Ct. July 30, 2013).

Unruh Act.¹¹⁵ The San Diego Fire Rescue Foundation started the camp in efforts to address the gender disparity among firefighters in the city, where women comprise only four percent of the department.¹¹⁶ The city of San Diego pulled funding for the camp after receiving a complaint letter from an attorney representing a man who wanted to enroll his son in the camp.¹¹⁷ Although originally cancelled, the mayor directed city staff to reschedule the event as planned, changing the event to invite both boys and girls to participate in the Girls Empowerment Camp.¹¹⁸

Some challengers have gone beyond events that actually exclude men to raise objections to events designed for or marketed towards women.¹¹⁹ Los Angeles craft beer company Eagle Rock Brewery was sued over their Women's Beer Forum, a monthly event for women who are interested in beer.¹²⁰ The event allowed men to attend, but it aimed to be a "space where the women would outnumber the men while discussing craft beer, a rarity."¹²¹ One man filed a claim with California's Department of Fair Employment and Housing after a staff member mistakenly told him the event was for women only when he emailed requesting a ticket.¹²² The Brewery settled with the man after the Department told the Brewery that it believed the claim had merit.¹²³ Brewery owner Ting Su regretted having to settle and continues to work to "elicit some form of change at the legislative level to minimize the exploitation of the Unruh Act by career plaintiffs."¹²⁴

¹¹⁵ Karen Kucher, *Girls Empowerment Camp Canceled after Attorney Claims It Violates Anti-Discrimination Laws*, SAN DIEGO TRIBUNE (Feb. 27, 2018) <http://www.sandiegouniontribune.com/news/public-safety/sd-me-camp-cancelled-20180226-story.html> [<https://perma.cc/6D4P-3ZGF>].

¹¹⁶ Jade Hindmon, *San Diego Mayor Says Girls Empowerment Camp Will Go on Despite Discrimination Complaint*, KPBS (Mar. 1, 2018), <https://www.kpbs.org/news/2018/mar/01/san-diego-cancels-girls-empowerment-camp-after-dis/> [<https://perma.cc/3HJT-5NB2>].

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Farley Elliott, *LA Brewery Owner Fights Men's Rights Activist over Women's Beer Forum*, EATER LOS ANGELES (Oct. 18, 2018), <https://la.eater.com/2018/10/18/17995464/la-brewery-women-beer-forum-mens-rights-activist-eagle-rock> [<https://perma.cc/NC3Z-V6HW>].

¹²⁰ *Id.*

¹²¹ Rebecca Jennings, *A Men's Rights Activist Sued a Women's Beer Event*, VOX (Oct 24, 2018), <https://www.vox.com/the-goods/2018/10/24/18014276/mens-rights-activist-eagle-rock-brewery-law-suit> [<https://perma.cc/8PEE-9JK3>].

¹²² *Id.*

¹²³ Elliott, *supra* note 119.

¹²⁴ *Id.*

III. COURTS SHOULD LOOK TO THE PURPOSE OF THE UNRUH ACT IN DECIDING THESE CASES

When the legislature added sex as a protected category under the Unruh Act in 1974, people understood the move to be aimed at protecting women.¹²⁵ The *Los Angeles Times* ran an article titled “Women’s Rights Legislation—A Vintage Year,” in which it discussed the “landmark legislation in the field of women’s rights” the California legislature passed during the 1973–74 session.¹²⁶ Jan Baran, of the California Commission on the Status of Women, described it as “the most productive and exciting in terms of women’s issues in the history of the state.”¹²⁷ As discussed above, the law has expanded since that time. Still, it is perhaps troubling that groups with the same goals as the Unruh Act are now being targeted by men for lawsuits charging discrimination.

As of September 2019, no sex discrimination case against these women’s empowerment agencies has been decided by a California court. Some recent California cases have settled rather than face expensive litigation, suggesting possibly that the organizations did not feel that their cases were strong enough to prevail under California law. Yet, it is unclear exactly how the courts would apply the law to these cases. As discussed above, the Unruh Act seems pretty clear in its prohibitions against discrimination, and courts apply it liberally. In many respects, women’s empowerment agencies appear different from previous instances of discrimination through “Ladies’ Night” promotions that were motivated purely by business interests. Organizations that seek to provide space for women to address sexual harassment or particular difficulties women face in the workplace seem very different from those promotions. It seems incongruous that courts would find that organizations focused on gender equality have violated antidiscrimination statutes. Indeed, this section argues that the purpose of the Unruh Act weighs against finding violations in these cases.

In *Rotary Club of Duarte*,¹²⁸ the appellate court discussed that the Unruh Act “must be construed in the light of the legislative purpose and design.”¹²⁹ The court there maintained that “[i]n enforcing the command

¹²⁵ Murphy, *supra* note 13.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ 178 Cal. App. 3d 1035 (1976).

¹²⁹ *Id.* at 1046, citing *Winchell v. English*, 62 Cal. App.3d 125, 128 (1976).

of a statute both the policy expressed in its terms, and the object implicit in its history and background, should be recognized.”¹³⁰ California’s Unruh Act was drafted to address inequalities in society and the harms of discrimination.¹³¹ The California legislature has discussed how the Unruh Act’s protections go beyond the listed categories, as “the California Supreme Court has consistently interpreted the Unruh Act in an expansive way.”¹³² Rather than limit its application to the categories explicitly in the text, the Legislature recognized that the courts have interpreted it as “cover[ing] all arbitrary and intentional discrimination by business establishments.”¹³³ That said, the legislature has added protected categories through amendments several times throughout the Unruh Act’s history.

The California Supreme Court has stated that the Unruh Act is “clear and unambiguous.”¹³⁴ In *Koire*, the California Supreme Court said that “[t]he express language of the Unruh Act provides a clear and objective standard by which to determine the legality of the practices at issue.”¹³⁵ In that case, the sex-based price differentials clearly violated the “plain language of the Unruh Act.”¹³⁶ However, that court left open that “a compelling social policy” might persuade the court to look beyond the statute’s text.¹³⁷

As seen above, the plain language of the Unruh Act provides extremely broad protections. On its face, the majority of the sex-segregated events and programs mentioned above that have recently been charged with violating the Unruh Act seem to do so. The example of the girls’ empowerment camp might be distinct as it could be compared to sex-segregated schools or the Boy Scouts, which California courts have held not to violate the Unruh Act. Similarly, events like the Women’s Beer Forum that market themselves to women but do not actually exclude anyone also do not violate the text of the Unruh Act. Attempting to create spaces for women, without excluding anyone based on protected characteristics, should not be made to be in conflict with the state’s antidiscrimination statute.

¹³⁰ *Id.*

¹³¹ *Hearing on SB 600 Before the S. Assemb. Comm. On Judiciary* (Ca. 2015) (bill analysis of Mark Stone, Chair) (enacted).

¹³² *Id.* at 6.

¹³³ *Id.*

¹³⁴ *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 28 (1985).

¹³⁵ *Id.* at 39.

¹³⁶ *Id.* at 38.

¹³⁷ *Id.*

Beyond the text, the California Supreme Court consistently discusses the purpose of the Unruh Act in its decisions, taking into consideration the legislative intent in drafting the statute.¹³⁸ This interpretation has been used in cases to attempt to define “business establishment” in line with legislative intent. In determining that the Mother’s Day giveaway did not violate the Act, one California appellate court looked to the policy behind the Unruh Act in determining that the giveaway did not “emphasize an irrelevant difference, nor perpetuate an irrational stereotype.”¹³⁹ A willingness to consider the purpose behind the statute might help women’s empowerment organizations convince courts that disallowing men is not “unreasonable, arbitrary, or invidious discrimination.”¹⁴⁰ Organizations aimed at women’s empowerment or helping women get ahead in the work force have the goal of creating equality between men and women, in keeping with the spirit of the Unruh Act. Lawsuits bringing these organizations into conflict with the Unruh Act thus seem in tension with its purpose.

One recent amendment to the Unruh Act, passed in 2005, added “sexual orientation” and “marital status” to the list of protected categories.¹⁴¹ The legislature started the amendment with the recognition that, “[e]ven prior to the passage of the Unruh Civil Rights Act, California law afforded broad protection against arbitrary discrimination by business establishments.”¹⁴² The purpose of the Unruh Act was thus “to provide broader, more effective protection against arbitrary discrimination.”¹⁴³ Legislators discussed how the addition of these protected characteristics did not “break new ground in expanding the scope of protection provided by the Act.”¹⁴⁴ This is because the California Supreme Court “has rejected the argument that the Unruh Act’s ban on discrimination reaches only the classifications specified in the Act’s text.”¹⁴⁵

¹³⁸ *Rotary Club of Duarte v. Bd. of Dirs.*, 178 Cal. App. 3d 1035, 1046 (“The Unruh Act is to be liberally construed with a view for effectuating the purposes for which it was enacted and to promote justice); *Cohn v. Corinthian Colleges, Inc.*, 86 Cal. Rptr. 3d 401, 404 (Cal. Ct. App. 2008) (“Cohn’s allegations . . . are not supported by the interpretation of, or policy behind, the Act.”); *Koire*, 40 Cal. 3d at 28 (“The Act is to be given a liberal construction with a view to effectuating its purposes.”).

¹³⁹ *Cohn*, 86 Cal. Rptr. 3d at 405.

¹⁴⁰ *Id.*

¹⁴¹ CAL. CIV. CODE § 51.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ S. RULES COMM., AB-1400 Civil Rights Act (2005), available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200520060AB1400 [<https://perma.cc/8DAJ-ZKPP>].

¹⁴⁵ *Id.*

The purpose in including these explicitly was to avoid litigation and “encourage better compliance with the law.”¹⁴⁶

It is unclear how a California court would view an argument that excluding men from women’s empowerment events is not arbitrary discrimination. In the case *Easebe Enterprises v. Alcoholic Beverage Control Appeals Board*,¹⁴⁷ the defendant tried to argue that excluding men from a show featuring male dancers was not arbitrary discrimination as prohibited by the Unruh Act.¹⁴⁸ The defendant nightclub argued that:

[C]hanging social perspectives recognize that in some situations a policy founded on gender-based discrimination is consistent with everyday realities and in fact inures to the benefit of those who have been the victims of past societal and legal discrimination.¹⁴⁹

The California Court of Appeals ultimately upheld the Department of Alcoholic Beverage Control’s decision to revoke the club’s license for its discriminatory practice.¹⁵⁰ It said that the argument that the practice of excluding men was “benignly inspired” was not enough to create an exception to the Unruh Act as a matter of law in this case.¹⁵¹ It stated that it was not “within the purview of an intermediate appellate court, at this late date, to substitute its perspective for that of the Department.”¹⁵² That said, the court noted that “were we the triers of fact, or were we writing on an entirely clear slate, we might find such theory persuasive.”¹⁵³ However, the court felt restricted by the judgment previously made by the Department. This suggests that, given a clean slate, a court may be willing to accept a women’s empowerment organization’s claim that its policy of excluding men should be exempt from the Unruh Act on these grounds. Or, as discussed below, this logic might be more cleanly adopted through a legislative exemption to the Unruh Act.

¹⁴⁶ *Id.*

¹⁴⁷ 141 Cal. App. 3d 981, 987 (1983).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Easebe*, 141 Cal. App. 3d at 987.

IV. FOURTEENTH AMENDMENT EQUAL PROTECTION AND PERPETUATING GENDER STEREOTYPES

As discussed above, California courts state one purpose of sex-discrimination bans is a concern that they perpetuate irrational stereotypes. This is taken from Supreme Court Fourteenth Amendment equal protection understanding of sex discrimination, which has traditionally focused on eradicating stereotypes. Although these events are held by private actors, the Supreme Court's discussion of sex discrimination by state actors in violation of the Equal Protection Clause of the Fourteenth Amendment can provide some insight into how courts should consider these issues. California courts should follow the Supreme Court in deciding whether discrimination is arbitrary (in violation of the Unruh Act) based on whether the organizations' policies are founded on gender stereotypes.

In *United States v. Virginia*,¹⁵⁴ the Supreme Court held that Virginia Military Institution's (VMI) categorical exclusion of women denied them equal protection in violation of the Fourteenth Amendment.¹⁵⁵ The Supreme Court discussed that, in order to defend gender-based state action, the state would have to show "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."¹⁵⁶ The Court said that sex classifications by government actors would be allowed in some cases in order to, for example, "compensate women for particular economic disabilities [they have] suffered . . . promote equal employment opportunity . . . advance full development of the talent and capacities of our Nation's people."¹⁵⁷ They would not be allowed, however, "to create or perpetuate the legal, social, and economic inferiority of women."¹⁵⁸ In both this case and *Mississippi University for Women v. Hogan*,¹⁵⁹ the Court highlighted that single-sex policies may not be based on stereotypes.¹⁶⁰ That is, classifications must avoid "fixed notions concerning the roles and abilities of males and females."¹⁶¹ The Supreme Court highlighted that this distinction is important in order to avoid "perpetuat[ing] historical patterns of discrimination."¹⁶²

¹⁵⁴ 518 U.S. 515 (1996).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 533.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 34.

¹⁵⁹ 458 U.S. 718 (1982).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 725.

¹⁶² *Virginia*, 518 U.S. at 542.

As discussed in the debate between the California and the Washington Supreme Courts, California courts similarly forbid single-sex policies that are based on irrational stereotypes. Unlike older “Ladies’ Night” promotions that California courts have seen as focusing on arbitrary distinctions between men and women and thus advancing irrational stereotypes of women, women’s empowerment organizations do not seem to evoke the same ideas. Instead, organizations that coach women to ask for higher salaries or offer space to discuss experiences with sexual harassment would work to combat stereotypes women face in their workplaces. Under this understanding, the situations in the new cases mentioned above would not violate the Unruh Act.

This can be a complicated argument because, as one California Appeals Court discussed, “few cases have held discriminatory treatment to be nonarbitrary based solely on the special nature of the business establishment.”¹⁶³ The examples the court gave were limited: (1) a gambling club’s exclusion of one individual woman who was found to be a compulsive gambler;¹⁶⁴ and (2) a cemetery’s exclusion of “punk rockers” from a private funeral at the request of the deceased’s family.¹⁶⁵ The court discussed that the exceptions are generally only allowed “when there is a strong public policy in favor of such treatment.”¹⁶⁶ There, the court cited examples of excluding minors from bars and ensuring affordable housing for the elderly.¹⁶⁷

The court left open that there “may also be instances where public policy warrants differential treatment for men and women,” discussing sex-segregated facilities like restrooms justified by a right to personal privacy.¹⁶⁸ The court suggested that even some sex-based price differentials may be warranted by a “compelling social policy.”¹⁶⁹ Further, it stated that public policy can occasionally be gleaned from viewing other statutory enactments.¹⁷⁰ A women’s networking organization may be able to point to statutes like the Equal Pay Act to suggest that public policy supports efforts to close the gender pay gap. Insofar as these organizations seek to equal the playing field between men and women, they do not seem to advance irrational stereotypes against women. The California legislature, spurred by the #MeToo Movement, further passed several laws that took effect January 1, 2019, to combat sexual

¹⁶³ *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 30 (1985).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 31.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 33.

¹⁶⁸ *Id.* at 38.

¹⁶⁹ *Koire*, 40 Cal. 3d at 38.

¹⁷⁰ *Id.* at 31.

harassment.¹⁷¹ Jennifer Barrera, executive vice president with the California Chamber of Commerce, recognized this explicitly, stating, “#Me-Too was a dominating topic at the Capitol this year.”¹⁷² These statutory enactments give more weight to women’s empowerment organizations’ claims that their goals are supported by a “compelling social policy.” This distinction would also combat the possibility of historically privileged groups attempting to discriminate against historically marginalized groups, as there will not be the same compelling social policy.

V. LEGISLATIVE ALTERNATIVES: EXCEPTIONS FOR HISTORICALLY MARGINALIZED GROUPS

As it stands, women-only organizations have a difficult time of avoiding the Unruh Act in California. Courts can read the law narrowly to avoid applying the Unruh Act to events that are designed for or marketed towards women, but that do not exclude men. Beyond that, it is not obvious that a solution like the one the Supreme Court in Washington gave in *MacClean*, of requiring the plaintiff to prove damages, would be better. The flexibility of the Unruh Act allowed it to expand to cover protected characteristics (like gender identity or sexual orientation) that were not considered by the legislators drafting it. Allowing that discrimination is per se injurious under California law and having statutory damages encouraged the filing of civil rights lawsuits in order to benefit the society as a whole. Rather than changing that jurisprudence, which could limit the Unruh Act’s application in other situations, the legislature could act to carve out an exception for these organizations.

If legislatures want to leave space for these types of events, they could carve out exceptions in their Civil Rights Laws. One potential way to distinguish between whether groups are in line with the laws or not could be to analyze the power dynamics. As an example, under the Canadian Human Rights Code:

It is not a discriminatory practice for a person to adopt or carry out a special program designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohib-

¹⁷¹ Kathleen Pender, *New California Harassment Laws Take Effect Jan. 1*, S.F. CHRON. (Dec. 31, 2018), <https://www.sfchronicle.com/business/networth/article/New-California-harassment-law-s-take-effect-Jan-1-13499089.php> [<https://perma.cc/5NZU-EZNE>].

¹⁷² *Id.*

ited groups of discrimination by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.¹⁷³

As an example of a “special program” thus protected, the Canadian Human Rights Commission points out that the Convention on the Elimination of All Forms of Discrimination against Women provides for temporary “special measures aimed at accelerating de facto equality between men and women.”¹⁷⁴ Language like this would still prohibit arbitrary discrimination while allowing historically marginalized groups to attempt to reduce disparities. An exception like this would likely protect networking and empowerment groups. It would also prevent historically privileged groups from using the Unruh Act to attack women’s organizations.

VI. CONCLUSION

One California appellate court expressed an aversion to finding violations of the Unruh Civil Rights Act in cases of what it was concerned were men “involved in numerous of what have been characterized as ‘shake down’ lawsuits.”¹⁷⁵ This is especially concerning given that the settlements mentioned above threaten to shut down the organizations completely. To the extent these laws are used as a tool to harass women or attempt to get money through the threat of a lawsuit, their application to these types of organizations seems inherently in conflict with the laws. Especially given recent statutory enactments by the California legislature focused on helping women gain power in the workplace and eliminating sexual harassment, these organizations have a strong argument that they do not arbitrarily discriminate in violation of the Unruh Act. In keeping with the U.S. Supreme Court’s Fourteenth Amendment jurisprudence, the examples given above do not perpetuate stereotypes by excluding men.

It is not clear the extent to which courts might accept an argument that organizations seeking to ameliorate gender inequality should be treated differently under the law than organizations that perpetuate inequality. This space could be filled by legislative efforts to provide exemptions for these organizations, focusing on power dynamics and historically marginalized groups. Given that the majority of these organizations have chosen to settle their cases rather than face potentially devastating legal fees, a legislative carveout might be needed.

¹⁷³ Canadian Human Rights Act, R.S.C., 1985, c. H-6, Section 16(1).

¹⁷⁴ *Policy on Special Programs*, CANADIAN HUMAN RIGHTS COMM’N, https://www.chrc-ccdp.gc.ca/sites/default/files/policyspecialprograms_eng_0.pdf.

¹⁷⁵ *Cohn v. Corinthian Colleges, Inc.*, 86 Cal. Rptr. 3d 401, 405 (Cal. Ct. App. 2008).

As one California court of appeals reasoned, “[t]his important piece of legislation provides a safeguard against the many real harms that so often accompany discrimination. For this reason, it is imperative we not denigrate its power and efficacy by applying it to manufactured injuries. . . .”¹⁷⁶ Limiting its application to cases of arbitrary discrimination that perpetuate stereotypes would serve to better meet the goals of the Unruh Act itself.

¹⁷⁶ *Id.* at 403.