Loyola of Los Angeles
Entertainment Law Review

Volume 16 | Number 2 Article 3

9-1-1995

Six Flags Magic Mountain: A Family Entertainment Park, but Only if You Wear the Right Clothes

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SIX FLAGS MAGIC MOUNTAIN: A FAMILY ENTERTAINMENT PARK, BUT ONLY IF YOU WEAR THE RIGHT CLOTHES

Shelan Y. Joseph[*]

I. INTRODUCTION

In 1985, six people were stabbed and twenty-one were arrested at the Six Flags Magic Mountain ("Magic Mountain") amusement park in Valencia, California.[1] The violence resulted from the gang-related activity of three San Fernando Valley gangs.[2] In an effort to prevent future violence in the park, Magic Mountain joined forces with the Los Angeles County Sheriff's Department to spot typical gang members.[3]

The Sheriff's Department provided Magic Mountain with a "gang member profile," identifying those types of behavior or dress generally linked to gangs.[4] The Sheriff's Department currently uses the profiles in its own efforts to crack down on gang activity in Los Angeles County.[5] Magic Mountain uses this set of police guidelines as a basis for its own screening policy, which was designed "to spot typical gang members."[6] Magic Mountain has not stated what criteria are included in its screening policy because announcing the policy would decrease security measures.[7] However, since 1985, this screening policy has generated several claims of racial discrimination against Magic Mountain.

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* J.D., Loyola Law School, 1995; B.A., University of California at Los Angeles, 1992. This Article is dedicated to the memory of Kimberley M. Horton. The author would like to thank those without whose love and support this Article would not have been possible: Professor Gary Williams, Mommy, Ron, and Sabra. Special gratitude to Carol Sobel of the American Civil Liberties Union for providing the author with all research documents relevant to Magic Mountain.

1. Steve Padilla, *ACLU, 4 Latinos Allege Bias, Sue Magic Mountain*, L.A. TIMES (Valley Ed.), Apr. 19, 1988, at F8.

2. *Id.*

3. *Id.*

4. Kim Kowsky, *Magic Mountain Sued Over Use of 'Gang Profile,'* L.A. HERALD EXAMINER, Apr. 19, 1988, at A13.

5. Padilla, *supra* note 1.

6. *Id.*

7. *Id.*

Magic Mountain's screening policy primarily affects young African Americans and Latinos, as those groups are considered greater "gang risks." When some members of these groups attempt to enter the park while wearing the "gang clothing" described in the profiles, they have been excluded while their Caucasian counterparts have not.[8]

This Article examines the park policy, which appears to be facially neutral, to determine if it has an unconstitutional or unlawful discriminatory impact. This Article discusses whether: (1) state action can be attributed to Magic Mountain as a private party; (2) the park's policy violates Constitutional rights; and (3) the policy violates the California Unruh Civil Rights Act.

II. STATEMENT OF THE PROBLEM

Since 1985, four cases have been brought against Magic Mountain by young African Americans and Latinos because of the policy for screening for possible gang members. The plaintiffs claimed that the policy, which is used to deter violence, is not applied uniformly to its guests. In particular, the plaintiffs claim that Magic Mountain has a policy of:

> refusing admission to their business establishment to anyone purportedly suspected of being a gang member, and that these suspicions are based solely upon improper racial and ethnic stereotyping, and upon the clothing, physical appearance, race and/or national origin of individuals seeking entrance to the business establishment and that this policy is not based on any reasonable criteria, including unlawful conduct or acts otherwise inconsistent with the proper use and enjoyment of an amusement park.[9]

The American Civil Liberties Union ("ACLU") describes as unreasonable the denial of admission to the park based on suspicion of gang membership.[10] "[T]he use of so-called 'gang-identifier' profiles only exacerbates these [class and racial] divisions, adding a layer of stereotyping based on dress and presumed associations. It stigmatizes blacks because they look like blacks, Latinos because they look like Latinos."[11]

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8. *See infra* notes 10, 12, 19.

9. First Amended Complaint at 5, Hernandez v. Six Flags Magic Mountain, Inc., (*filed in* Cal. Super. Ct., Apr. 18, 1988) (No. 683354) [hereinafter *Hernandez Complaint*].

10. Carol Sobel, *Screening the Crowds at Magic Mountain*, L.A. TIMES, May 29, 1988, at F10.

11. *Id.* at F5.

Preventing gang violence in an amusement park is a valid purpose for a screening policy. But Magic Mountain's policies are based on stereotypes that target African Americans and Latinos. Magic Mountain, by applying its policy without uniformity, violates the Constitutional rights of young Latinos and African Americans seeking access to the park.

III. BACKGROUND

A. Settled Cases

All of the foregoing cases have been settled subject to a non-admission clause. As the settlements are under seal, it is not known whether Magic Mountain admitted to any of the complaint's allegations. Since the complaints raise the basic arguments which are the foundation of this Article, they will be cited to as fact.

In *Hernandez v. Six Flags Magic Mountain*,[12] Magic Mountain refused entry to four Latino youths. After seeing the plaintiffs in their van, a Magic Mountain employee said, "Oh look, a bunch of Mexicans in [a] van . . . [s]end them over here."[13] Plaintiffs were then "directed to drive behind a wall and were ordered to get out of the vehicle."[14] Magic Mountain's security guards searched the plaintiffs without their consent, then interrogated them.[15] The guards subsequently denied the plaintiffs entry to the park and escorted them from the park. Deputies of the Los Angeles County Sheriff's Department then followed the plaintiffs to the nearest freeway on-ramp.[16]

The *Hernandez* plaintiffs claim that they were ejected from the facility because their physical characteristics "allegedly coincided with an overbroad and overinclusive physical description which [Magic Mountain] consider[s] as evidence of active gang membership."[17] Magic Mountain used "policies and practices relying impermissibly upon racial and ethnic stereotypes unrelated to the conduct or likely conduct of [p]laintiffs."[18]

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12. *Hernandez Complaint*, *supra* note 9.
13. *Id.* at 6.
14. *Id.* at 5.
15. *Id.* at 6-7.
16. *Id.* at 8.
17. *Hernandez Complaint*, *supra* note 9, at 2.
18. *Id.* at 8.

In *Gongura v. Six Flags Magic Mountain, Inc.*,[19] a group of seventeen people, including the Latino plaintiffs, went to Magic Mountain in three cars.[20] The group included the plaintiffs' friends and children.[21] Upon entering the park, one of the cars was motioned out of line by a Los Angeles County Deputy Sheriff.[22] Plaintiff Joe Hernandez told a Magic Mountain Security Guard that "two of his children and several of his grandchildren had been pulled out of line."[23] The Magic Mountain security guard responded that the children would not be allowed into the park unless they submitted to a search.[24] Pursuant to the search, the children were ejected from the park because they were suspected of participating in gang activity.[25] "Plaintiffs also observed a number of individuals, predominantly black and Latino, being searched."[26]

On July 16, 1988, plaintiff Anthony Perry, who is Latino, went to Magic Mountain with his mother, stepfather, two sisters, and girlfriend.[27] At the park's entrance gate, a Magic Mountain security guard approached Perry and told him that he "fit the profile of a suspected gang member."[28] Security informed Perry that he would be denied entrance into the park, unless he submitted to a search.[29] Perry was searched. He complained about being singled out for a search. Based upon his complaint, the guard denied him admission to the park.[30]

B. Pending Case Against Magic Mountain

One case currently awaiting resolution in the Los Angeles Superior Court is *Alarcon v. Six Flags Magic Mountain*.[31] On May 23, 1993, the Latino plaintiffs arrived together at Magic Mountain for an outing. Magic Mountain security guards approached them and ordered them "to a small

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19. First Amended Complaint, Gongura v. Six Flags Magic Mountain, Inc., (*filed in* Cal. Super. Ct., Aug. 24, 1988) (No. C691327) [hereinafter *Gongura Complaint*].

20. *Id.* at 4.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Gongura Complaint*, *supra* note 19, at 4.

25. *Id.* at 6.

26. *Id.* at 4.

27. *Id.* at 5.

28. *Id.*

29. *Gongura Complaint*, *supra* note 19, at 5.

30. *Id.* at 6.

31. Verified Complaint, Alarcon v. Six Flags Magic Mountain, Inc., (*filed in* Cal. Super. Ct., June 3, 1993) (No. 90-345) [hereinafter *Alarcon Complaint*].

room upon exiting the tram."[32] Plaintiffs were interrogated and then "ejected from the facility, and humiliated solely because their physical characteristics allegedly coincided with . . . [a] physical description or profile," which Magic Mountain considered evidence of active gang membership.[33] Plaintiffs were accused falsely of being gang members because Magic Mountain's profile "relies primarily on one's race, and/or national origin and upon other improper ethnic, cultural, and physical traits."[34] Plaintiffs were ejected from the park despite the fact that they were "acting lawfully and in a manner consistent with proper standards of behavior."[35] In addition, plaintiffs were told that they could "never return to the amusement park, and that if they dared to do so they would be arrested for trespass immediately."[36]

C. Discriminatory Searches Where No Case Was Filed

"Nine black members of a Christian youth organization [from San Diego] on an outing to Six Flags Magic Mountain were singled out by guards from a crowd of predominantly white teen-agers [sic] and searched for weapons and drugs before being admitted to the amusement park."[37] After the search, the youth were admitted into the park.[38]

In another incident, "six boys out of forty youths from a South Central Los Angeles group were stopped as they got off their bus and started to enter the park."[39] When asked by one of the adults why the boys could not enter the park, "park guards responded that they just did not like their looks."[40] There was "no search, [n]o unruly behavior, [n]o reason at all" to justify denying the boys entry to the park.[41] The six were, however, wearing their community baseball league's caps.[42]

Each of these cases carries a common element: Magic Mountain's screening policy, as applied, discriminates against African American and Latino youths. Although many youths, regardless of race, wear the "gang"

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32. *Id.* at 5.
33. *Id.* at 1.
34. *Id.* at 2.
35. *Id.*
36. *Alarcon Complaint*, *supra* note 31, at 2.
37. Stephanie Chavez, *Search of Black Christian Youths at Park Decried*, L.A. TIMES, Mar. 18, 1988, at II3.
38. *Id.*
39. Carol Sobel, *Point/Counterpoint*, L.A. TIMES, May 29, 1988, at D10.
40. *Id.*
41. *Id.*
42. *Id.*

clothing, there are no known cases of this type of discrimination against Caucasians.[43] Youths of all races wear the "gang" style clothing because the teen fashion world has embraced the "gang wear" trend.[44] Since gang clothing has become popular, the clothing by itself cannot adequately identify gang members. The increase in the popularity of gang clothing, coupled with an increased number of African American and Latino youths who wear this type of clothing creates an arena for discriminatory application of Magic Mountain's policy.

IV. CONSTITUTIONAL VIOLATIONS

A. Finding State Action As a Private Party

Prior to invoking the protections of the United States Constitution as opposed to statutory remedies, plaintiffs must show state involvement in the action which allegedly violated their rights. Since the Constitution primarily governs states and not individuals, it can be violated only by conduct that may be fairly characterized as state action.[45] The Constitution's wording clearly warrants this application: the Fourteenth Amendment states that "[n]o [s]tate shall make or enforce any law,"[46] and the First Amendment mandates that "Congress shall make no law."[47] As such, a plaintiff must establish that the defendant is a state actor before any claims of Constitutional rights violations may proceed.

There has been a transition over the years in the Supreme Court's analysis as to when state action may be attached to private parties.[48] The Supreme Court has significantly curtailed its finding of state action where private parties are concerned.[49] This increasingly restrictive application of the state action doctrine makes it difficult for plaintiffs to assert constitutional violations against private parties.[50] Further, the retreat from classifying private parties as state actors leaves no clear standard of analysis.[51] Theories surrounding state action and private parties remain largely incoherent.

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43. *See* parts II, III.
44. *See infra* text accompanying note 229.
45. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).
46. U.S. CONST. amend. XIV, § 1.
47. U.S. CONST. amend. I.
48. *See infra* notes 53-83 and accompanying text.
49. *See infra* notes 54, 62. *Cf.* note 15.
50. *See infra* note 75 and accompanying text.
51. *See infra* note 86 and accompanying text.

The first case that attempted to create a test for finding state action when a private party was involved was *Burton v. Wilmington Parking Authority*.[52] *Burton*'s decision was important for two reasons. First, the Supreme Court rejected a uniform standard for defining state action; rather, it recognized that "to fashion and apply a precise formula for recognition of state responsibility . . . is an 'impossible task' . . . . Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[53] Second, *Burton* has come to be identified with a state action rationale, the "symbiotic relationship" theory. State action arises when the affairs of a public and a private actor are interrelated in such a manner that each benefits from the relationship.[54]

Applying this analysis, the *Burton* Court attributed state action to the private party involved. The Supreme Court held that a privately owned restaurant which leased premises in a government-owned and government-maintained parking garage was a state actor subject to the Equal Protection Clause of the Fourteenth Amendment. In *Burton*, the defendant owned a restaurant that was located in a parking building owned by the government. The defendant refused to serve the plaintiff solely because he was African American.[55] The building in which the restaurant was located was built with public funds for public purposes, and it was owned and operated by an agency of the state of Delaware.[56] Applying the "symbiotic relationship" test, the Court held that the state was considered a joint participant in the operation of the restaurant.[57] The restaurant was physically and financially an integral part of the public building.[58] The court held that this intertwined relationship was sufficient to treat the privately-owned restaurant as a state actor.[59]

The Supreme Court's apparent retreat from equating private parties to state actors began in 1974 with its decision in *Jackson v. Metropolitan Edison Company*.[60] In *Jackson*, the plaintiff sued a privately owned and operated utility corporation. The utility corporation held a certificate of public convenience, in the form of a general tariff, issued by the Pennsyl-

52. 365 U.S. 715 (1961).
53. *Id.* at 722.
54. *See generally id.* at 722-25.
55. *Burton*, 365 U.S. at 716.
56. *Id.* at 718-19.
57. *Id.* at 724.
58. *Id.* at 723-24.
59. *Id.*
60. 419 U.S. 345 (1974).

vania Utilities Commission. The defendant allegedly terminated plaintiff's electrical utility service before giving plaintiff notice, a hearing, and an opportunity to be heard.[61] Plaintiff claimed that under state law she was entitled to continuous electric service and that the general tariff provision which permitted the defendant to terminate service for nonpayment constituted state action.[62]

The Court held that the relevant inquiry in determining whether the private entity is a state actor must be "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the [s]tate itself."[63] In describing its "nexus test," the Court stated:

> The purpose of this [nexus] requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains. . . . [A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. . . . Mere approval . . . or acquiescence . . . is not sufficient [for state action].[64]

In applying the nexus test, the Court rejected the plaintiff's claim that state action arose simply because the commission extensively regulated the private utility.[65] The Court determined that the State Public Utilities Commission's approval of the general tariff failed to establish the requisite nexus because the Commission had not explicitly considered the termination portion of the tariff.[66]

Four years after *Jackson* was decided, the Supreme Court narrowed its state action analysis in *Flagg Brothers, Inc. v. Brooks*.[67] In *Flagg Brothers*, the Supreme Court rejected a due process challenge to a warehouse's sale of the plaintiff's stored personal property. The New York Uniform Commercial Code ("UCC") governed the defendant's act in selling plaintiff's goods. The UCC provision allowed the warehouse to sell goods entrusted for storage in order to satisfy unpaid storage expenses.[68] The

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61. *Id.* at 348 n.2.
62. *Id.* at 348.
63. *Id.* at 351.
64. Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982).
65. *Jackson*, 419 U.S. at 358.
66. *Id.* at 351.
67. 436 U.S. 149 (1978).
68. *Id.*

Court concluded that the appropriate test assesses whether the private party's action may "[fairly be] attributed to the [s]tate."[69] In determining whether a state is responsible for the acts of a private party the court must examine whether a "[s]tate, by its law, has compelled the act."[70] The Court held that the State "merely announced the circumstances under which its courts will not interfere with a private sale."[71] Therefore, the state was "in no way responsible for Flagg Brothers' decision [to sell the goods], a decision which the state [via the statute] permits but does not compel."[72] Thus, when the warehouse sold plaintiff's goods, the state had not compelled the warehouse to do so. As such, the warehouse action could not be fairly attributed to the state.

Flagg Bros. remained the standard of analysis until 1982, when the Supreme Court decided *Lugar v. Edmonson Oil Co.*[73] The *Lugar* Court further restricted state action analysis by incorporating both the *Jackson* "nexus" theory and the "fairly attributable" analysis of *Flagg Bros.* into one test,[74] making it almost impossible for state action to be attributed to a private party. The Supreme Court now mandates a two-prong test to determine whether the action by a private party fairly can be attributed to the state. The *Lugar* test is stated as:

> a) The deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the State or by a person for whom the State is responsible; and
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> b) the party charged with the deprivation must be a person who may fairly be said to be a state actor, either because he [or she] is an official of the state, because he [or she] has acted together with or has obtained significant aid from state officials, or because his [or her] conduct is otherwise chargeable to the State.[75]

In *Lugar*, the plaintiff owed a debt to defendant Edmondson Oil. The defendant sued to collect the debt in Virginia state court.[76] Acting on a petition, "a [c]lerk of the state court issued a writ of attachment, which was

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69. *Id.* at 164.
70. *Id.* (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970)).
71. *Flagg Bros.*, 436 U.S. at 166.
72. *Id.*
73. 457 U.S. 922 (1982).
74. *Lugar*, 457 U.S. at 937-39.
75. *Id.* at 937.
76. *Id.* at 924.

then executed by the [c]ounty [s]heriff."[77] In *Lugar*, the link between the state and the private party was sufficient to find state action.[78]

By applying its new test, the Supreme Court found that a "private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment."[79] Prong one was satisfied because Edmondson had acted pursuant to a procedural scheme which was the product of state action.[80] Prong two was satisfied because Edmondson enlisted the help of the county sheriff to execute the writ.[81]

The Supreme Court currently uses the two-prong test enunciated in *Lugar*, but it remains unclear how the test will be applied. The two-prong test allows the court discretion in whether or not to find state action. The discretion is evinced in the varying applications of the test. As a result, when a plaintiff attempted to demonstrate that a private party should be deemed a state actor under *Lugar*, the plaintiff's only certainty is that *Lugar* analysis makes the process difficult.

The circuit courts are less stringent in their state actor analysis, and attribute state action to private parties with a more lenient hand.[82] For example, the Ninth Circuit's inquiry to find state action focuses on a "joint action" theory.[83] Joint action arises when "the state has 'so far insinuated itself into a position of interdependence with the [private entity] that it must be recognized as a joint participant in the challenged activity. . . .'"[84] "Joint action therefore requires a substantial degree of cooperative action" between the state and the private party.[85] This requires more than merely complaining to the police.

Applying the "Joint action" theory, the Ninth Circuit has attributed state action to private parties more frequently than the Supreme Court. In *Stypman v. City & County of San Francisco*,[86] the Ninth Circuit ruled that a private towing company was a state actor. The Court reasoned that a

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77. *Id.*
78. *Id.*
79. *Lugar*, 457 U.S. at 941.
80. *Id.*
81. *Id.* at 924.
82. *See infra* notes 88, 97, 102 and accompanying text.
83. *See infra* notes 88, 94, 102 and accompanying text.
84. Collins v. Womancare, 878 F.2d 1145, 1154 (9th Cir. 1989) (quoting Gorenc v. Salt River Project, 869 F.2d 503, 507 (9th Cir. 1989) (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961))).
85. *Id.*
86. 557 F.2d 1338, 1341 (9th Cir. 1977).

towing company is a "willful participant in a joint activity with the State or its agents" where:

> A police officer makes the initial determination that a car will be towed and summons the towing company. The towing company tows the vehicle only at the direction of the officer. The officer designates the garage to which the vehicle will be towed. . . . The towing company detains the vehicle and asserts the lien.[87]

In *Howerton v. Gabica*,[88] the court determined that repeated police assistance to a private party constituted state action. The defendant landlord repeatedly used police to assist in evicting tenants. In *Howerton*, tenants brought a 42 U.S.C. § 1983 action based on the landlord's alleged unlawful eviction. The landlord had asked the plaintiffs to leave their trailer house because they had not paid their rent.[89] The landlord requested a uniformed police officer to serve the eviction notice to the landlord's tenants.[90] On another occasion, a police officer accompanied the landlord when the landlord informed the plaintiffs that their water and power services would be terminated.[91] Upon the landlord's request, an officer went to the plaintiffs' residence to ask them to leave the premises.[92] Additionally, an officer accompanied the landlord when the landlord disconnected the plaintiffs' power services.[93]

The *Howerton* court stated that this case "involve[d] more than a single incident of police consent to 'stand by' in case of trouble. . . . The police officer 'actively intervened—[when] he privately approached the Howertons and recommended that they leave the trailer house.'"[94] The court further stated that "the actions of the [officer] created an appearance that the police sanctioned the eviction."[95] In conclusion, the court held that the landlord's repeated requests for police assistance and the "active intervention" by the police were sufficient to support a finding of state action.[96]

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87. *Id.*
88. 708 F.2d 380 (9th Cir. 1983).
89. *Id.* at 381.
90. *Id.*
91. *Id.*
92. *Id.* at 381.
93. *Howerton*, 708 F.2d at 381.
94. *Id.* at 384.
95. *Id.*
96. *Id.* at 385.

Similarly, in *Sable Communications of California, Inc. v. Pacific Telephone and Telegraph Co.*,[97] the court found state action when the telephone company "repeatedly requested" law enforcement agents to act on behalf of the company. Sable, a phone sex company, brought a section 1983 action against Pacific Telephone and Telegraph Company. Sable challenged the enforcement of a rule, implemented by the California Public Utilities Commission, which authorized the disconnection of telephone services that propagated sexually explicit messages.[98] Sable claimed that Pacific Telegraph acted under color of state law in seeking to implement the rule.[99]

The Ninth Circuit agreed. The court decided that for the purposes of section 1983, the telephone company acted under the color of state law by seeking to implement state regulatory procedures which required the company to withhold telephone service to sexually explicit message services.[100] The telephone company's repeated requests for law enforcement agents triggered procedures that violated customers' First Amendment rights. This satisfied the requirement of joint participation between state and private parties, which is necessary to find state action.[101]

In contrast, *Collins v. Womancare*[102] demonstrated failure to show sufficient joint participation between the state and a private party to justify a finding of state action. Employees of a women's health service facility placed the plaintiffs, who were anti-abortion picketers, under citizen's arrest. Plaintiffs sued under section 1983, charging that their civil rights were violated by this action.[103]

In determining whether or not there was state action, the Ninth Circuit focused its analysis on the "joint action" theory.[104] In using the "joint action" standard, the court held that "the facts alleged by Collins as a group fail as a matter of law to satisfy the joint activity test for state action."[105] The facts could not establish that the state had "so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity."[106] Several factors led the court to

97. 890 F.2d 184 (9th Cir. 1989).
98. *Id.* at 186.
99. *Id.* at 187.
100. *Id.* at 185.
101. *Id.*
102. 878 F.2d 1145 (9th Cir. 1989).
103. *Id.* at 1146.
104. *Id.* at 1154.
105. *Id.* at 1155.
106. *Id.* (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)).

hold that there was no state action: (1) the impetus for the arrest came from Womancare employees, and not from the police; (2) police officers refused to arrest protesters on the officers' own authority; (3) the police maintained a policy of neutrality in the dispute; and (4) no evidence indicated that the police encouraged Womancare employees to make the citizen's arrests.

The Eighth Circuit has also demonstrated leniency in attributing state action to private parties. In *El Fundi v. Deroche,*[107] the court found the evidence sufficient to result in state action. The plaintiffs were shopping in a Target Department store,[108] where they were detained by store security guards. Store employees physically restrained and threatened the plaintiffs until the city police arrived.[109] Upon their arrival, the police issued the plaintiffs a ticket summons for shoplifting.[110] The court ruled that state action existed "when private security guards act in concert with police officers or pursuant to customary procedures agreed to by police departments."[111] The security guards acted in accordance with these customary procedures: this "converted" the security guards into state actors.[112]

In the Magic Mountain disputes, a problem arises for plaintiffs in satisfying the two-prong test for equal protection claims: caselaw demonstrates that a federal constitutional claim requires plaintiffs to prove both that the park was a state actor when it screened for gang members, *and* that the park acted pursuant to a state-created right or privilege when executing its screening policy. These requirements pose difficulties for plaintiffs.

Relying on *Lugar*, Magic Mountain can argue that there was no state action. Under prong one, Magic Mountain did not act pursuant to a state rule of conduct or a state-created privilege. Instead, the park acted pursuant to its own security policy. Although the Los Angeles County Sheriff's Department assisted in creating the policy,[113] the policy is not a state-created measure. At its own initiative, Magic Mountain created, adopted, and implemented the screening policy. Therefore, Magic Mountain's screening cannot be deemed "state action."

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107. 625 F.2d 195 (8th Cir. 1980).
108. *Id.* at 196.
109. *Id.*
110. *Id.*
111. *Id.*
112. *El Fundi*, 625 F.2d at 196.
113. *Kowsky*, *supra* note 4.

Furthermore, under *Flagg Bros., Inc v. Brooks*,[114] Magic Mountain cannot be deemed a state actor. In *Flagg Bros.*, a private company acted pursuant to a state statute. As the state did not compel the acts of the private company, the action could not be attributed to the state. Similar to *Flagg Bros.*, the County Sheriff assisted Magic Mountain in forming its screening policy, but the park was not compelled by any state directive to adopt the policy.[115] The state was not responsible for the park's decision to implement the security policy. Therefore, Magic Mountain cannot fairly be said to be acting as the state.

Under prong two, Magic Mountain cannot be found to be a state actor. Magic Mountain, by favorable analogy to *Jackson v. Metropolitan Edison Co.*,[116] could argue that even when private corporations are heavily regulated by the state, the corporations are not considered state actors simply by virtue of the regulation. Therefore, the park's implementation of its own screening program is not one that is dictated by the state, and Magic Mountain cannot be found to be a state actor.

Since the two prongs of *Lugar* cannot be satisfied in a federal claim, Magic Mountain cannot be said to be a state actor. There is insufficient evidence to support a finding of state action. The use of the security policy cannot be said to be a policy of the state, and as such, a state action argument would likely fail.

On the other hand, plaintiffs could argue that there is sufficient evidence to sustain a claim for state action against Magic Mountain. First, under *Lugar*, plaintiffs can argue that the security policy is a state rule of conduct because it is a state security policy used by a state official. Use of the screening policy is state conduct because the policy was designed and executed by the Sheriff's Department—a subdivision of the state.[117] The president of Magic Mountain, Joseph R. Schillaci, stated that Magic Mountain uses "a screening profile developed in conjunction with the Los Angeles County Sheriff's department and their Operation Safe Streets gang unit."[118] Magic Mountain's incorporation of a state rule of conduct could satisfy prong one.

Under prong two, plaintiffs would rely on the facts set forth in *Lugar*. In *Lugar*, the court found a sufficient nexus between the private party and

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114. 436 U.S. 149 (1978).

115. *Chavez*, *supra* note 37.

116. 419 U.S. 345 (1974).

117. Interview with David Burcham, Associate Professor of Law at Loyola Law School, Los Angeles, Cal. (Nov. 7, 1993).

118. Joseph R. Schillaci, *Screening the Crowds at Magic Mountain*, L.A. TIMES (Valley Ed.), May 28, 1988, at D5.

the state based on the private party's use of the Sheriff to execute a writ. Magic Mountain enlisted the Sheriff's Department to aid the park in executing the security policy. Magic Mountain's President stated that the park occasionally "use[s] Los Angeles County sheriff's deputies to identify gang members who intend to use the park for other than recreation."[119] Further, in an interview with the Herald Examiner, a Magic Mountain spokesperson, Sherrie Bang, stated that Magic Mountain has received advice from the Los Angeles County Sheriff's Department on the proper way to use the profile.[120] Another spokeswoman for Magic Mountain, Courtney Brown, stated that "Magic Mountain security officials work with Los Angeles County Sheriff's Department officials to determine what types of gang insignia to look for and routinely search people whose clothes indicate gang membership."[121]

This relationship between the Sheriff's Department and Magic Mountain suggests a significant link which implies state action. This link could be used to impute state action to Magic Mountain and can satisfy both prongs of the *Lugar* analysis. Prong one is satisfied since Magic Mountain is acting pursuant to state rules of conduct. Prong two is satisfied through the apparent link between Magic Mountain and the state. Therefore, under *Lugar*, the park's action should be attributed to the state.

Since the application of *Lugar* remains unclear, plaintiffs will look to the circuit courts to support their state action arguments. Relying on *Howerton* and *Sable*, plaintiffs can argue that Magic Mountain is a state actor because the park "repeatedly enlists" the aid of sheriffs. Additionally, the Sheriff's Department "actively intervenes" in executing the park's security policy.

Plaintiff's strongest argument for finding state action is under a *Collins* analysis. First, the impetus for seizing potential park visitors arises from profits generated by the Sheriff's Department, not Magic Mountain. The park implements the Sheriff's Department policy.[122] Second, sheriffs seize and detain plaintiffs pursuant to the sheriffs' own authority. The sheriffs go to Magic Mountain and execute the security policy.[123] Third, the Sheriff's Department has *not* maintained a neutral stance in the park's decision to bar visitors; the sheriff's direct involvement disallows such an

119. *Id.*
120. Kowsky, *supra* note 4.
121. Chavez, *supra* note 37.
122. *See Kowsky*, *supra* note 4; *Chavez*, *supra* note 37.
123. *See Kowsky*, *supra* note 4; *Chavez*, *supra* note 37.

assertion.[124] Finally, evidence indicates that the Sheriff's Department encouraged Magic Mountain to use this policy.[125]

The foregoing analysis indicates that plaintiffs have sufficient evidence for a strong argument that the park policy constitutes state action. The Sheriff's Department's direct involvement and encouragement provides a strong nexus between the state and Magic Mountain. The sheriffs' enforcement of the park's security policy creates an appearance that the state is directly involved with the implementation and success of the policy. Magic Mountain is acting together with and obtaining significant aid from the Sheriff's Department. Therefore, the park's actions can be seen as "fairly attributable" to the state, and state action should be imputed.

B. Violation of Equal Protection Under the Fourteenth Amendment

The Constitution declares that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[126] This has been interpreted to mean that "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."[127] Under an equal protection analysis, race-based classifications are "suspect" and receive "strict scrutiny" analysis. To pass the strict scrutiny test, the state actor has the burden of proving that: 1) there is a compelling government interest for the state action; and 2) the state action is narrowly tailored to meet the state interest.[128]

Plaintiffs must allege that they are being discriminated against on the basis of race. Under an equal protection analysis, race is considered a suspect class for regulation.[129] If a statute or law is neutral on its face, plaintiffs must make a prima facie case of racial discrimination before the strict scrutiny analysis will be triggered. The prima facie case requires showing either that the actor had the purpose or intent to discriminate, or that the action had an extremely disproportionate impact on minorities.[130]

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124. *Chavez*, *supra* note 37.

125. *See Kowsky*, *supra* note 4; *Chavez*, *supra* note 37.

126. U.S. CONST. amend. XIV, § 1.

127. Washington v. Davis, 426 U.S. 229, 239 (1976).

128. *Hernandez Complaint*, *supra* note 9; *see infra* notes 170, 174 and accompanying text.

129. WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW 710-11 (9th ed. 1993).

130. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

1. Intent

Showing a violation of the Equal Protection clause has become increasingly difficult for plaintiffs. This is so because absent an express discriminatory purpose, intent is not easily proven.[131] Additionally, unless there is an intent to discriminate, disproportionate impact is irrelevant. "[C]ases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."[132]

In *Washington v. Davis*, the court held that "[a] statute otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race."[133] However, the court continued:

> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.[134]

2. Disproportionate Impact

In rare cases, the Supreme Court has found violations of the Equal Protection clause when there was an egregiously disproportionate racial impact.[135] Disproportionate impact must be evidenced by a "stark" pattern to be accepted as the sole proof of discriminatory intent under the Constitution.[136] Earlier cases indicated that the Supreme Court acknowl-

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131. *See generally* McCleskey v. Kemp, 481 U.S. 279 (1987).
132. Washington v. Davis, 426 U.S. 229, 239 (1976).
133. *Id.* at 241 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).
134. *Id.* at 242.
135. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886).
136. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

edged racial impact as sufficient to prove violations of the Equal Protection Clause.[137] However, recent cases have shown otherwise.

The issue in *Wright v. Council of Emporia*[138] involved whether the division of a school district was consistent with an outstanding order of a federal court to desegregate the area's dual school system. The court determined that in cases concerning racial impact, a law's effect, rather than its discriminatory purpose, is the critical factor.[139] The continued division along racial lines in the Emporia school district constituted a violation of the Equal Protection clause because Emporia enforced racial segregation.[140]

In *Yick Wo v. Hopkins*,[141] an ordinance prohibited the operation of laundries without a permit from the government. When laundry operators applied for permits, all but one of the Caucasian applicants received permits. None of more than two hundred Chinese applicants received their permits. The court held that:

> [t]hough the law itself be fair on its face and impartial in appearance, if it is applied and administered by public authority with an evil eye and unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.[142]

Similarly, in *Gomillion v. Lightfoot*,[143] the court held that despite the facially neutral terms in the state's zoning laws, evidence of a disproportionate impact was enough to prove a violation of the Equal Protection clause. The state legislature altered the boundaries of a particular city in a discriminatory fashion, "from a square to an uncouth twenty-eight-sided figure."[144] The alterations were alleged to have excluded 395 of 400 African American voters without excluding a single Caucasian voter.[145] The court found that this was a sufficient showing of a disproportionate impact to find a violation of the Equal Protection Clause.[146]

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137. *See infra* notes 138, 141, 143 and accompanying text.
138. 407 U.S. 451 (1972).
139. *Id.* at 462.
140. *Id.*
141. 118 U.S. 356 (1886).
142. *Id.* at 373-74.
143. 364 U.S. 339 (1960).
144. *Id.* at 340.
145. *Id.* at 341.
146. *Id.* at 348.

In contrast, however, the court found disproportionate impact alone insufficient to violate the Equal Protection Clause in *McCleskey v. Kemp*.[147] Here, an African American man was convicted in a Georgia trial court for killing a Caucasian police officer during the robbery of a store. Pursuant to a Georgia statute, McCleskey was sentenced to death. In arguing that his sentence was a violation of the Equal Protection Clause, McCleskey pointed to a statistical study that "purports to show a disparity in the imposition of the death sentence in Georgia based on the murder victim's race and, to a lesser extent the defendant's race."[148] The study was based on over 2000 murder cases that occurred in Georgia during the 1970s and involved data relating to the victim's race, the defendant's race, and the various combinations of such persons' races.[149] The study indicated that African Americans who killed Caucasians were more likely to be sentenced to death than Caucasians who killed African Americans. The study found that the prosecution sought death penalty sentences in seventy percent of cases involving African American defendants and Caucasian victims, but in only nineteen percent of cases involving Caucasian defendants and African American victims.[150] The study also found that African Americans were one hundred and ten percent more likely to receive the death penalty than Caucasian defendants.[151]

Yet, this evidence of a disproportionate impact in sentencing was held to be insufficient to find discriminatory intent. For a defendant to prevail, he or she "would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because* of an anticipated racially discriminatory effect."[152] There was no evidence that the "legislature either enacted the statute to further a racially discriminatory purpose, or maintained the statute because of the racially disproportionate impact."[153] Since the intent to discriminate was not explicit, the racially discriminatory effects were found to be insufficient to violate the Equal Protection Clause.[154]

It is difficult for plaintiffs to establish a prima facie case of discrimination because purpose or intent is difficult to demonstrate. In the Magic Mountain cases, the plaintiffs alleged that their right to equal

147. 481 U.S. 279 (1987).
148. *Id.*
149. *Id.* at 286.
150. *Id.*
151. *Id.*
152. *McCleskey*, 481 U.S. at 298.
153. *Id.*
154. *Id.* at 299.

protection under the law was violated because the park's policy leads to race-based discrimination. A prima facie case is difficult to prove in this instance because Magic Mountain asserts that its purpose is to implement a security policy.

In particular, the park's president, Joseph Schillaci, stated that the purpose of the profile "is to keep weapons and those who pose a threat to our guests and employees out of the park."[155] In addition, Six Flags Magic Mountain is a major regional entertainment attraction which provides quality family entertainment and recreation in Southern California. It has a commitment and responsibility to provide safety and security for its guests at all times.[156]

The plaintiffs' argument is that, despite the facially nondiscriminatory purpose of the profile, its application is discriminatory. This argument is supported by several factors. First, the suits brought against Magic Mountain all were brought by young African American or Latino youths. Second, the plaintiffs allege they were denied access to the park based on a "stereotypical image of Latino [and African American] youth" that characterizes them as potential gang members.[157] Finally, the plaintiffs were denied entrance into the park even though "no weapons, no drugs, [and] no unruly behavior" were present.[158] This arguably demonstrated a discriminatory purpose. Although the park's stated purpose was to ensure the absence of weapons, drugs, or potential violence, plaintiffs were excluded despite their having shown no signs that they might bring these into the park.

However, these facts alone may fall short of showing a "stark" disproportionate impact.[159] Plaintiffs can use *Yick Wo* and *Gomillion* to frame arguments regarding a stark pattern of racial discrimination. Notably, the argument under *Yick Wo* is unlikely to prevail because no subsequent plaintiff has prevailed by using the "stark pattern" theory.

Plaintiffs may still raise the argument that the policy is "particularly unjust" because it only affects African American and Latino youths. The result of excluding these individuals from the park has been to make unjust

155. Schillaci, *supra* note 118.

156. *Id.*

157. Sobel, *supra* note 10.

158. *Id.*

159. Plaintiffs could argue that the intent requirement exemplifies how the equal protection doctrine promotes an ideological imagery which fosters racism and prevents plaintiffs from receiving an adequate remedy. An extensive treatment of this argument is beyond the scope of this Article.

and illegal discriminations between persons in similar circumstances.[160] Plaintiffs can also analogize to *Gomillion* by pointing to the recent popularity of gang wear. Youths of all ethnicities currently wear gang-style clothing, yet only African American and Latino youths are targeted by the screening policy. Magic Mountain's policy as it is applied yields a stark pattern of racial discrimination.[161] However, as it is difficult to demonstrate a stark pattern which satisfies the Supreme Court, it is probable the claim would fail.

3. Compelling Interest

As previously discussed, the intent requirement poses serious hurdles for plaintiffs wishing to show an Equal Protection violation. However, assuming that the plaintiffs can establish their prima facie case, Magic Mountain must prove that it has a compelling interest in maintaining its policy—and that this policy is the least discriminatory way to achieve safety within the park.

> The Equal Protection Clause demands that racial classifications . . . be subjected to the "most rigid scrutiny," and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.[162]

Magic Mountain claims that it has a compelling interest in trying to keep the park free from violence. And, certainly, the safety of patrons is a compelling interest for the park: ethically, logically and economically, or the park would cease to draw patrons at all if it were known for being unsafe. Yet, plaintiffs have strong arguments that the park's policy is not the least discriminatory way to achieve its purpose.

Plaintiffs can argue that if Magic Mountain is truly trying to ensure safety, park security would search all who entered the park, rather than pick certain people out of the crowd. Plaintiffs can also argue that Magic Mountain could install metal detectors for all patrons to pass through since this would be more effective in keeping weapons out of the park. And finally, plaintiffs can argue that a dress code should be enforced against everyone, not just those who fit a gang profile. In sum, since alternate

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160. *See generally* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

161. *See supra* parts II, III.

162. Loving v. Virginia, 388 U.S. 1, 11 (1967) (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)).

protective measures are available and can be applied uniformly to all patrons, using the gang profile is not the least discriminatory way to achieve a safer park.

Although Magic Mountain clearly has a compelling interest in ensuring the safety of its guests and employees, it has not chosen the least discriminatory way to achieve its purpose. As such, the park violates the Equal Protection Clause of the Fourteenth Amendment.

C. Violations of the First Amendment

1. Freedom of Expression

Magic Mountain's gang profile restricts African American and Latino youths from entering the park based on their dress. Denying the youths entrance into the park raises two issues: (1) are youths entitled to the protections of the First Amendment; and (2) is dress a protected form of expression under the First Amendment?

a. First Amendment as Applied to Youth

Magic Mountain's gang profile primarily has been applied to African American and Latino youths. The Supreme Court has recognized that young people do have constitutional protections. However, in recent First Amendment cases, these protections have eroded.[163] *Tinker v. Des Moines*[164] set forth the constitutional baseline for the First Amendment protection provided for youths. *Tinker* created an implicit balancing test for determining which rights are protected and which are not. The Supreme Court held that an Iowa high school violated students' First Amendment rights by prohibiting students from wearing black armbands in protest of the Vietnam War.[165] The school attempted to suppress the demonstrations by suspending the students involved.[166]

In supporting students' First Amendment rights, the Court held that proscribing speech and expression is justified only if a school can show that the proscribed speech or expression "materially and substantially

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163. *See infra* notes 170, 174 and accompanying text. For plaintiffs to sustain an action against Magic Mountain for a First Amendment violation, they must first prove state action and then demonstrate how the park violates its guests' First Amendment rights. *See* discussion, part IV.A.

164. 393 U.S. 503 (1969).

165. *Id.* at 514.

166. *Id.* at 504.

interfere[s] with the requirements of appropriate discipline in the operation of the school;"[167] or, that the activity in question would "impinge upon the rights of other students."[168] The court explicitly acknowledged the constitutional rights of youths by stating that "[i]t can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[169]

Although *Tinker* clearly ruled that youths have the right to invoke First Amendment protections, recent Supreme Court cases indicate that these protections are decreasing. In *Bethel School District No. 403 v. Fraser*,[170] the Court announced a new standard for determining whether youths can invoke First Amendment protections. *Bethel* involved a high school student who, during a school assembly, delivered a speech containing a sexual metaphor.[171] As a result, the school suspended the student for three days.[172] The Court concluded that the "determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[173] This standard gave total deference to school administrators to define the First Amendment protections available to their students, thereby weakening *Tinker*'s distinct protections.

The standard in *Bethel* was further supported by the Supreme Court's decision in *Hazelwood School District v. Kuhlmeier*.[174] *Kuhlmeier* was "concern[ed with] the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum."[175] The Court found no First Amendment violation when the school principal deleted two pages of the school newspaper.[176] The Court articulated the following standard for evaluating students' rights: "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[177] This holding made clear that students' First Amendment protections were no longer

167. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
168. *Id.*
169. *Tinker*, 393 U.S. at 509.
170. 478 U.S. 675 (1986).
171. *Id.*
172. *Id.*
173. *Id.* at 683.
174. 484 U.S. 260 (1988).
175. *Id.* at 262.
176. *Id.* at 276.
177. *Id.* at 273.

explicit Constitutional rights, but instead were to be determined by the standard of a reasonable school administrator.

The park could try analogizing its position to that of the schools in preceding cases. Magic Mountain certainly has a compelling interest in maintaining its family environment, just as a school has a compelling interest in maintaining its educational environment. However, Magic Mountain's concerns clearly are distinguishable from those of the school: the park has no "pedagogical concerns."

The *Kuhlmeier* court specifically identified "pedagogical concerns" as one rationale which supported allowing schools to exercise First Amendment control over students. Therefore, under *Kuhlmeier*, the park's argument is less compelling to justify the right to control its patrons' dress. Yet, the argument is not without merit. The park has a compelling interest to maintain its safe atmosphere by banning patrons in gang-style clothing, due to the potential for violence such "statement-making" garb carries. The park's interest in maintaining a safe atmosphere parallels a school's interest in proscribing expression that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," as enunciated in *Kuhlmeier*.

Statistics show that, at "latest count, the gangs of Los Angeles County alone have grown to 600 with more than 70,000 members."[178] With an increase in gang membership comes an increase in potential violence. Magic Mountain adopted this particular profile to defuse a highly charged atmosphere, protect its clientele and enhance the family entertainment environment. These purposes support Magic Mountain's claim that it should have discretion in "determining what manner of speech is inappropriate"[179] within the park. On the other hand, plaintiffs may argue that schools are a special environment in which youths receive fewer Constitutional protections. Magic Mountain, as an amusement park, does not fall into this special category. In particular, plaintiffs can cite *Bethel* language which states that less exacting standards for the First Amendment must be implemented in schools because of the "role and purpose of the American public school system . . . ."[180] "Public education must prepare pupils for citizenship in the Republic . . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as

178. Schillaci, *supra* note 118.
179. Bethel School District No. 403 v. Fraser, 478 U.S. 675, 683 (1986).
180. *Id.* at 681.

indispensable to the practice of self-government in the community and the nation."[181]

Further, the *Kuhlmeier* holding specifically applied to "educators" and school sponsored activities. Magic Mountain does not play the same role as a public school. The park is not responsible for instilling any values in young people. Quite the contrary, Magic Mountain is an environment designed for young people to have *fun*; it is *not* designed to promote educational goals. Thus, Magic Mountain will not enjoy the less exacting standard of scrutiny applied to public school.

Assuming arguendo that Magic Mountain could be characterized as the equivalent of a school environment, it would be difficult to prove the park's actions are protected by the First Amendment. Even using the less rigid standard of *Kulhmeier*, Magic Mountain could not prove that its policy of discrimination is a reasonable practice. Its *purpose* to provide a safe environment is reasonable, but the *means* are not. The policy does not affect *all* youths. Instead, the policy as applied targets only African American and Latino youths.

b. Dress as a Protected Form of Expression

Because Magic Mountain denies entry to African American and Latino youths based on their choice of clothing, the question arises as to whether dress is a form of expression protected under the First Amendment. The Supreme Court has held that "[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties" of the First Amendment.[182] In recent Federal court decisions, *Roth* has been interpreted as acknowledging that dress is a form of expression.

In *McIntire v. Bethel School, Independent School District No. 3*,[183] a federal court held that dress is a protected First Amendment right.[184] In *McIntire*, students brought a section 1983 civil rights claim against the school district, school board, and superintendent, alleging violation of the First Amendment.[185] The students faced suspension from school and/or being removed from the school basketball team if they wore a T-shirt which said, "[T]he best of the night's adventures are reserved for those

181. *Id.*
182. Roth v. United States, 354 U.S. 476, 484 (1957).
183. 804 F. Supp. 1415 (W.D. Okla. 1992).
184. *Id.* at 1429.
185. *Id.* at 1418.

people with nothing planned."[186] The school's administration decided that the T-shirt would violate the school dress code, as the shirt carried a slogan associated with an alcoholic beverage.[187] The school believed that the students' wearing of these T-shirts would promote alcohol use and would substantially disrupt or interfere with class work and the discipline of the school.[188]

The *McIntire* court determined that the phrase on the T-shirt "is speech presumptively protected by the First Amendment."[189] The court additionally found that "[b]ecause the enforcement of the Bethel Public School Dress Code restricts the exercise of the students' First Amendment rights, [d]efendants bear the burden of establishing that the T-shirts are proscribed by the dress code and that the dress code as applied is constitutional."[190] The court held that "[d]efendants failed to prove by a preponderance of the evidence that the message on the T-shirts advertises an alcoholic beverage. Defendants failed to prove by a preponderance of the evidence that a reasonable student . . . would . . . understand the message as an advertisement for liquor."[191] The court, therefore, acknowledged that student dress is protected by the First Amendment and cannot be proscribed unless the school administration can prove that the dress disrupts the school environment.

In a similar case, another federal court laid out more succinct First Amendment analysis pertaining to dress. In *Jeglin v. San Jacinto Unified School District*,[192] students challenged the constitutionality of a dress code which prohibited clothing identifying any professional sports team or college.[193] The court determined that "[t]he interest of the state in the maintenance of its education system is a compelling one and provokes a balancing of First Amendment rights with the state's efforts to preserve and protect its educational process."[194] The court applied the following analysis:

> When a conflict arises between a public school student's right of free speech and the authority of officials to prescribe and control conduct in the schools, a student's free speech right may

186. *Id.*
187. *Id.*
188. *McIntire*, 804 F. Supp. at 1420.
189. *Id.* at 1424.
190. *Id.* at 1424-25.
191. *Id.* at 1425.
192. 827 F. Supp. 1459 (C.D. Cal. 1993).
193. *Id.* at 1460.
194. *Id.* at 1461.

> not be abridged in the absence of facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.[195]

In the absence of any such justification, the court held that the school may not discipline a student for exercising First Amendment rights.[196] The court stated that in this case, the school offered "no proof at all of any gang presence at [the school] or of any actual or threatened disruption or material interference," and therefore, the school violated the students' First Amendment rights by proscribing the clothing.[197]

These cases indicate that dress is a protected form of expression that schools may only proscribe with just cause. The courts have conceded that this lesser form of review may not necessarily be appropriate if it is not applied to a school. "Because of the state's interest in education, the level of disturbance required to justify intervention is relatively lower in a school than it might be on a street corner."[198]

Magic Mountain's arguments apply with equal force in this instance. Because of the special environment of Magic Mountain, the park can be analogized to a school. Magic Mountain is a family entertainment park, which is responsible for large numbers of patrons at a given time. Patron safety is potentially jeopardized by young people who choose to display gang paraphernalia. Gang style clothing can advertise membership in gangs which can cause material interference with the function of a family amusement park. As such, Magic Mountain may argue that it should have the power to proscribe the wearing of gang style clothing within park boundaries.

Plaintiffs could argue that Magic Mountain violates the First Amendment right to freedom of expression by denying guests entrance to the park on the basis of dress. Magic Mountain "uses a set of police guidelines to identify gang members, including styles and types of clothing, color of clothing, obvious gang insignia, such as a name written on a T-shirt or hat."[199] Magic Mountain has a "practice, pursuant to their policy, of refusing admission . . . to anyone purportedly suspected of being a 'gang' member, and that these suspicions are based . . . [on] a profile, or

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195. *Id.*
196. *Id.* at 1461-62.
197. *Jeglin*, 827 F. Supp. at 1461-62.
198. *Id.* at 1461.
199. *Kowsky*, *supra* note 4.

stereotype which relies predominantly upon . . . clothing [and] physical appearance."[200]

Based on what Magic Mountain and the Los Angeles County Sheriff assume to be gang style clothing or dress, non-gang members might be denied entrance into the park. Furthermore, some people who were denied access to the park "were acting lawfully and in a manner consistent with proper standards of behavior for attendance at Magic Mountain, and no different from other patrons permitted full access to Magic Mountain."[201] Therefore, there was no "material interference" with the operation of the park.

If Magic Mountain is trying to avoid another stabbing incident, the park instead should focus on finding weapons concealed in any patron's clothing. Park policy should not single out persons solely because of their dress. Such a policy runs contrary to the freedom of expression that is guaranteed in the First Amendment. "Forced dress . . . humiliates the unwilling complier, forces him [or her] to submerge his [or her] individuality in the 'undistracting' mass, and in general, smacks of the exaltation of organization over member, unit over component, and state over individual."[202]

V. VIOLATIONS OF THE UNRUH CIVIL RIGHTS ACT

The current language of the Unruh Act reads: "[a]ll 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."[203] The modern Unruh Act is based on early common law doctrine, in which merchants who provided a particular product or service to the community were charged with the duty to serve all customers in a nondiscriminatory manner.[204] In 1897, the California Legislature enacted the statutory predecessor of the Unruh Act. The 1897 statute provided all citizens with full and equal access to "all other places of public accommodation or amusement, subject only to the conditions and limitations established by

200. *Alarcon Complaint*, *supra* note 31, at 4.

201. *Id.*

202. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-15, at 1387, (2d ed. 1988) (quoting Karr v. Schmidt, 460 F.2d 609, 621 (5th Cir. 1972) (Wisdom, J. dissenting)).

203. CAL. CIV. CODE § 51 (West 1982).

204. *Id.* at Historical Note.

law and [are] applicable alike to all citizens."[205] Since the Unruh Act was broadened, by a 1959 Amendment, to include "all business establishments of every kind whatsoever," Magic Mountain clearly falls within the current version of the Act.[206]

The Unruh Act proscribes any form of arbitrary discrimination. A business generally open to the public may not arbitrarily exclude a would-be customer from its premises. According to the California Supreme Court: "The Unruh Act does not permit a business enterprise to exclude an entire class of individuals on the basis of a generalized prediction that the class as a whole is more likely to commit misconduct than some other class of the public."[207] Further, the Unruh Act prohibits arbitrary discrimination on the basis of group stereotypes:

> [A]n individual who has committed no such misconduct cannot be excluded solely because he [or she] falls within a class of persons whom the owner believes is more likely to engage in misconduct than some other group. Whether the exclusionary policy rests on the alleged undesirable propensities of those of a particular race, nationality, occupation, political affiliation or age, in this context the Unruh Act protects individuals from such arbitrary discrimination.[208]

Certain types of discrimination have been deemed to be "reasonable;" therefore, they cannot be challenged as arbitrary.[209] For example, the Unruh Act is inapplicable to discrimination between patrons based on the nature of the business enterprise and of the facilities provided.[210] Exclusionary policies may be upheld on the ground that the presence of the excluded group does not accord with the nature of a business enterprise and of the facilities provided.[211] To justify a discriminatory policy, the business enterprise must show that there is a strong public policy in favor of the discrimination.[212]

An example of reasonable discrimination is found in *Ross v. Forest Lawn Memorial Park*.[213] The plaintiff contracted with the defendant for

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205. *In re* Cox, 474 P.2d 992, (Cal. 1970) (quoting Stats. 1897, ch. 108, pt. 137, § 1).
206. CAL. CIV. CODE § 51, Historical Note (West 1982).
207. Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 125 (Cal. 1982).
208. *Id.* at 117.
209. O'Connor v. Village Green Owners Ass'n, 662 P.2d 427, 429 (Cal. 1983).
210. *Id.*
211. *Marina Point*, 640 P.2d at 127.
212. *See* Koire v. Metro Car Wash, 707 P.2d 195, 202-03 (Cal. 1985).
213. 203 Cal. Rptr. 468 (1984).

a private funeral and burial service.[214] The deceased, who was the plaintiff's daughter, had been a "punk rocker." The deceased's friends were also "punk rockers." Fearing that the "punk rocker" friends would disrupt the services, the plaintiff requested the defendant not to admit them at the services.[215]

> Many punk rockers attended both the funeral services in the chapel and the grave-site burial services. Neither their appearance nor comportment was in accord with traditional, solemn funeral ceremonies. Some were in white face makeup and black lipstick . . . . The uninvited guests were drinking and using cocaine, and were physically and verbally abusive to the family members and their guests.[216]

The plaintiff alleged that the defendant negligently failed to exclude "punk rockers" from the cemetery grounds during the services.[217] The defendant relied on the Unruh Civil Rights Act and countered "that it was prohibited by law from excluding anyone from the cemetery."[218] Thus, the defendant claimed to have no right or duty to exclude the friends of the deceased from the cemetery during the funeral.

The court disagreed, and held that "[g]iven the sensitive nature of the services offered by the cemetery, a policy permitting private funerals by which those who are not invited may not attend is a reasonable regulation 'rationally related to the services performed.'"[219] A business may ask persons who are disrupting the premises to leave.[220] Therefore, the defendant had a right and a duty to exclude the "punk rockers" from the services. The exclusion was not arbitrary. Given the circumstances, excluding "punk rockers" was a reasonable action that did not violate the Unruh Act.

Under *Ross*, then, Magic Mountain's policy of "refusing to admit customers and otherwise subject them to discriminating conduct based upon such stereotyping, [when it] relies heavily upon an individual's race and/or national origin, is unlawful and arbitrary" under the Unruh Act.[221]

Magic Mountain can argue that the use of its gang profile is "reasonable." The park may contend that the exclusionary policy should

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214. *Id.* at 470.
215. *Id.*
216. *Id.*
217. *Id.* at 471.
218. *Ross*, 203 Cal. Rptr. at 471.
219. *Id.* (citing Marina Point, Ltd. v. Wolfson, 640 P.2d 115 (Cal. 1982)).
220. *Id.*
221. *Alarcon Complaint*, *supra* note 31, at 8-9.

be upheld because the presence of gang members detracts from the atmosphere of a family entertainment park. Further, the park can argue that there is a strong public policy to keep the park safe and free from gang activity.

It is unlikely that Magic Mountain's policy will be considered "reasonable" by a court. First, courts have held expressly that individuals cannot be excluded unless they have committed prior misconduct.[222] All of the plaintiffs were excluded from Magic Mountain though they had committed no unlawful acts. The park's exclusionary policy focuses on arbitrary suspicions rather than unlawful activity. Second, few cases have held that discriminatory treatment was not arbitrary based solely on the nature of the business establishment.[223] Therefore, the attempt to maintain a family atmosphere cannot be the sole reason for arbitrary discrimination. Finally, "public policy exceptions to the Unruh Act are rare."[224] Although there is a strong public policy in favor of keeping the park safe, Magic Mountain's pattern of arbitrary discrimination is not the least discriminatory way of ensuring patron safety in the park. In Los Angeles, gang clothing has gained great popularity among all youths.[225] Consequently, gang attire may not be a true indicator of potential violence or of gang members. If the park's true purpose is to maintain a family environment, then more neutral precautions should be implemented. For example, Magic Mountain could install metal detectors, park security could search all guests seeking entrance or, more simply, Magic Mountain could post a sign indicating what clothes cannot be worn inside the park.

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222. *See* Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 125 (Cal. 1982).

223. Koire v. Metro Car Wash, 707 P.2d 195, 198 (Cal. 1985).

224. *Id.* at 198, n.8.

225. Many Los Angeles area schools are having to ban gang style clothing because "the styles that youth are drawn to are associated with gangs." Diane Seo, *Urban Fashion's Big Attraction*, L.A. TIMES, Nov. 21, 1993, at City Times 16.

In contrast to Magic Mountain's approach, Great America Park in Santa Clara has implemented a more sensitive policy. It states that "[c]ertain styles, colors, and insignia once common only to gang members have become fashion trends. The consequence is that some innocent people have been mistaken for gang affiliates and have been denied admission to Great America." Letter from Lise Shannon, Public Relation Manager, Great America Corporation, Santa Clara, Cal. (on file with author).

A. Discriminatory Denial of Access to Public Accommodations Based on Ancestry

The Unruh Act expressly prohibits discriminatory treatment on the basis of national origin.[226] The California Court of Appeal held in *Winchell v. English*[227] that "[s]tatutes such as the [Unruh Act] are declaratory of the state's public policy against racial discrimination whether it be private action, or public action . . . ."[228] "Discrimination on the basis of race or color is contrary to the public policy of the United States and of this state."[229] In *Suttles v. Hollywood Turf Club*,[230] the court found a violation of the predecessor to the Unruh Act when a clubhouse at a racetrack refused to allow African Americans to enter. The plaintiffs had purchased tickets for admission into the club and had reservations for box seats. The defendant refused the plaintiffs entry to the clubhouse because of their color.[231] The court held that the defendant's actions violated the Unruh Act by failing to grant "full and equal accommodations, advantages, facilities and privileges of . . . places of public accommodation or amusement . . . ."[232]

Admission policies which discriminate on the basis of race violate the Unruh Act.[233] The use of the policy has primarily affected only African American and Latino youths. Magic Mountain therefore:

> unlawfully discriminate[s] against [persons] by ordering them out of the public entrance line, searching them, detaining them, and then denying them admission. [Persons], due to their national origin, [are] thereby denied their rights to full and equal enjoyment of the goods, services, facilities and accommodations offered to the public-at-large by [Magic Mountain].[234]

In the cases brought against Magic Mountain by the African American and Latino plaintiffs, there was no evidence to indicate that the individuals who were subjected to the park's search were engaging in unlawful conduct.[235] Although Magic Mountain claims that the policy itself is

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226. CAL. CIV. CODE § 51 (West 1982).
227. 133 Cal. Rptr. 20 (1976).
228. *Id.* at 21 (citing James v. Marinship Corp., 155 P.2d 329 (Cal. 1944)).
229. *Id.* (quoting Burks v. Poppy Const. Co., 370 P.2d 313, 317 (Cal. 1962)).
230. 114 P.2d 27 (Cal. 1941).
231. *Id.* at 28.
232. *Id.* at 29.
233. *Winchell*, 133 Cal. Rptr. at 21-22.
234. *Alarcon Complaint*, *supra* note 31, at 8.
235. *Alarcon Complaint*, *supra* note 31; *Hernandez Complaint*, *supra* note 9.

race-neutral, park employees apply the policy in a facially discriminatory manner.

B. Discriminatory Denial of Access to Public Accommodations Based on Clothing

The Unruh Act prohibits particular kinds of discrimination, setting out categories which serve "as illustrative, rather than restrictive, indicia of the type of conduct condemned."[236] California courts have extended the Unruh Act to protect those who are discriminated against on the basis of physical characteristics and clothing.

In In re Cox,[237] the California Supreme Court held that before one who "wore long hair and unconventional dress" could be prohibited from patronizing a shopping mall, there must be a showing of cause. In *Cox*, the petitioner had been charged with violating a municipal trespass ordinance.[238] A mall security guard asked the petitioner to leave the premises because he wore long hair and unconventional dress.[239] When the petitioner refused, he was arrested by the police.[240] The petitioner defended against the prosecution for his violation of a municipal trespass ordinance, claiming that he could not be excluded arbitrarily from the mall on the basis of dress.[241] The Court stated in dicta that the Unruh Act does not permit the shopping mall to "arbitrarily exclude a would-be customer from its premises . . . ."[242]

Similarly, in *Hales v. Ojai Valley Inn and Country Club*,[243] the plaintiff and his family entered the defendant's place of business to purchase food and drink. Plaintiff was wearing a "leisure suit."[244] Defendant denied plaintiff entrance into the establishment stating that plaintiff could only be served if he wore a tie.[245] However, women wearing similar leisure suits were being served.[246] The court held that a claim for violation of the Unruh Civil Rights Act was adequately stated by

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236. *In re* Cox, 474 P.2d 992, 995 (Cal. 1970).
237. *In re* Cox, 474 P. 2d 992 (Cal. 1970).
238. *Id.* at 994-95.
239. *Id.* at 994.
240. *Id.*
241. *Id.* at 993.
242. *Id.* at 999 (upholding the mall's exclusion of the petitioner on other grounds).
243. 140 Cal. Rptr. 555 (1977).
244. *Id.* at 557.
245. *Id.*
246. *Id.*

allegations that male plaintiffs were denied service in defendant's public establishment solely because they were without a tie or coat.

On point with the Magic Mountain cases is the depublished opinion, *Renteria v. Dirty Dan's, Inc.*[247] As a depublished opinion, *Renteria* carries no precedential weight in California. Its issues, however, mirror those addressed in this Article. In *Renteria*, the court decided that the Unruh Civil Rights Act prohibited bar owners from denying service to individuals who wore motorcycle gang clothing and insignia. The court held that "[t]he Unruh Act does not permit a business enterprise to exclude an *entire class* of individuals on the basis of a generalized prediction that the class 'as a whole' is more likely to commit misconduct than some other class . . . ."[248] The plaintiff, Renteria, was denied entrance to bars owned by defendant because he wore motorcycle gang "colors" and patches. The defendant defended the unwritten dress code by stating:

> It is certainly a fact of common knowledge and beyond dispute that there are a number of motorcycle gangs operating within the County of San Diego which view themselves in competition with or as hostile toward one another . . . . [B]ased upon our knowledge gained from experience that competing or hostile motorcycle gang members often engage in violent confrontation with one another, we have included in our dress code requirements a prohibition as to the wearing of motorcycle gang insignia.[249]

The court found that Renteria was denied admission to and service at the bars "[b]ecause he wore motorcycle club insignia."[250] Yet, as the court noted, defendants failed to cite to a single confrontation in their bar which involved those who wore the insignia.[251] The court held that the Unruh Civil Rights Act protects every individual against arbitrary discrimination. As such, bars and restaurants are proscribed from arbitrarily discriminating against individual patrons.[252] Further, the "exclusion based on insignia cannot be justified as an attempt to maintain a certain ambiance [sic] by setting dress standards."[253] The court held

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247. 244 Cal. Rptr. 423 (1988). This case was denied review by the California Supreme Court, which ordered that the opinion not be officially published.

248. *Id.* at 424-25 (emphasis in original) (quoting Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 125 (Cal. 1982)).

249. *Id.* at 426.

250. *Id.*

251. *Id.* at 427.

252. *Renteria*, 224 Cal. Rptr. at 425.

253. *Id.* at 427.

that the defendants' exclusionary policy was, in fact, arbitrary because Renteria could have been wearing a tuxedo and would still be excluded if his cummerbund contained motorcycle club insignia.[254]

The court also stated that the test for arbitrary discrimination is not whether an exclusionary policy is "rational" but whether it is based on a stereotype.[255] "Exclusion of Renteria cannot be excused or justified on the basis of a rational good faith belief that persons wearing insignia denoting membership in motorcycle clubs may be "troublemakers." The Unruh Act was specifically designed to prohibit exactly such stereotyping."[256]

This holding, though depublished, follows the tradition of granting owners broad authority to adopt reasonable rules that regulate their patrons' or tenants' conduct. An owner still has the right to exclude any individual who violates such rules.[257] However, under the Unruh Act, "an individual who has committed no such misconduct cannot be excluded solely because he falls within a class of persons whom the owner believes is more likely to engage in misconduct than some other group."[258] Renteria "was not excluded from bars for misconduct . . . . There are no facts here which compel the conclusion he does not comport himself consistent with manners appropriate to a topless bar environment, whether wearing motorcycle club insignia or not."[259]

Two cases mirror the *Renteria* analysis regarding the exclusion of parties from business establishments when there is no showing of misconduct. In *Orloff v. Los Angeles Turf Club*,[260] the California Supreme Court held that an individual could not be excluded from a racetrack on the basis of character. The Los Angeles Turf Club sought to exclude Orloff from the racetrack because he was a bookmaker. He was thus considered a member of a class of persons with a reputation of "immoral character."[261] The defendant claimed that the bookmaker's class was more likely than the general population to engage in illegal activities which a public race track legitimately could seek to prevent.[262] However, the court held the classification to be arbitrary, because an

254. *Id.*
255. *Id.* at 427-28.
256. *Id.*
257. *Renteria*, 224 Cal. Rptr. at 428.
258. *Id.* (quoting Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 117 (Cal. 1982)).
259. *Id.*
260. 227 P.2d 449, 451 (Cal. 1951).
261. *Id.*
262. *Id.*

individual must be judged on the basis of his own conduct—not on a reputation for immoral behavior.[263] The court noted that judicial interpretations of the Unruh Act's predecessor "barred the manager of a race track from expelling a patron who had acquired a reputation as a man of immoral character."[264] The court further stated that to deny entry is a "restraint on a personal right, [and] is circumscribed by the same constitutional safeguards of equal protection and due process as are restraints under penal laws."[265]

In *Stoumen v. Reilly*,[266] the defendant excluded homosexuals from his restaurant bar because homosexuals as a class were more likely to engage in "immoral conduct" than heterosexuals. The court held that this class generalization did not constitute a proper basis for an exclusion of all homosexuals.[267] The court held that "[m]embers of the public . . . have a right to patronize a public restaurant and bar so long as they are acting properly and are not committing illegal or immoral acts; the proprietor has no right to exclude or eject a patron 'except for good cause.'"[268] The court said that simply because homosexuals frequent a restaurant, it does not imply the "doing of illegal or immoral acts on the premises, which would warrant exclusion."[269]

Because Magic Mountain has multiple violent incidents, including stabbings, the park could argue that it is reasonable to regulate guest attire. It is common knowledge that gang insignia on clothing has provoked violent incidents. Magic Mountain can argue that since violence erupted at the park because of gang members, (1) the prohibition of gang attire is rationally related to its purpose of keeping the park free from gang violence, and (2) the policy of excluding guests who fit into the gang profile is not an arbitrary regulation.

Plaintiffs may counter that the test for arbitrary discrimination is not determined by whether the exclusion was rational. The proper test considers whether the exclusion is based on group stereotypes.[270]

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263. *Id.* at 452.
264. *Id.*
265. *Orloff*, 227 P.2d at 453.
266. 234 P.2d 969 (Cal. 1951).
267. *Id.* at 971.
268. *Id.*
269. *Id.* The court contrasted the restaurant in *Stoumen* with establishments reputed to be used as houses of prostitution, where it is fair to imply that "illegal or immoral acts" occur.
270. *See generally* Orloff v. Los Angeles Turf Club, 227 P.2d 449, 452 (Cal. 1951); *Stoumen*, 234 P.2d at 971.

Plaintiffs may argue that Magic Mountain is stereotyping those groups wearing gang style clothing.

The park's argument is strengthened because gang clothing has become a strong trend among teenagers. Plaintiffs can argue that gang-wear has become such a prevalent fashion that Magic Mountain goes beyond simply assuming that all gang members will cause trouble. By using its profile, the park assumes that all who fit the profile are gang members. Although *Renteria* is depublished, and therefore has no precedential value, the plaintiffs can use arguments similar to those offered in *Renteria*: that the exclusion of gang insignia or clothing cannot be justified as an attempt to maintain a certain ambiance by setting dress standards.

The plaintiffs' strongest argument rests on the Unruh Act's protection of *individuals*. The Act states that when an individual does not violate rules of conduct, he or she may not be excluded from an establishment. The courts held in *Orloff* and *Stoumen* that one who commits no misconduct cannot be excluded solely because he or she falls within a class of persons which the owner believes is more likely to engage in misconduct than other classes. At the time they were searched, none of the plaintiffs had engaged in any misconduct. Therefore, their exclusion resulted from being part of a class of persons that the owner believed would cause trouble. Under the Unruh Act, such action is arbitrary regulation based on stereotyping.

C. *Discriminatory Denial of Access to Public Accommodation Based on Age*

The Unruh Act protects minors, as well as adults, from arbitrary discrimination. In *Marina Point Ltd. v. Wolfson*,[271] a landlord refused to renew defendant's lease because the landlord learned that the defendant had a child.[272] The landlord had implemented a "no-children" policy in an attempt to exclude children from his apartment complex.[273] He argued that since children were generally "rowdier, noisier, more mischievous and more boisterous than adults," the policy excluding all minors was reasonably related to the policy interest of preserving a serene environment for his tenants.[274] The California Supreme Court determined that the

271. 640 P.2d 115 (Cal. 1982).
272. *Id.* at 116.
273. *Id.*
274. *Id.* at 117.

policy contradicted a societal interest.[275] The landlord's argument "overlook[ed] the individual nature of the statutory right to equal access to business establishments . . . afforded [to] 'all persons' by the Unruh Act."[276] The court went further, ruling that "[a] society that sanctions wholesale discrimination against its children . . . engages in suspect activity. Even the most primitive society fosters the protection of its young. . . . Indeed, under the Unruh Act we have condemned *any* arbitrary discrimination against any class."[277]

The California court also has held that when fast food outlets and convenience stores treated students differently than other patrons, the merchants violated the Unruh Act.[278] Discriminatory practices, including limiting the number of student patrons, restricting students to certain hours or portions of the premises, or levying a minimum charge on student purchases were determined to be arbitrary and unlawful.[279]

Magic Mountain's position would be that its policy does not classify on the basis of age. Further, unlike *Marina Point*, the park does not exclude all teenagers. It only excludes those who happen to fit the characteristics of the gang profile. Magic Mountain will assert that it is a "family entertainment park," and that a large portion of those admitted are teenagers.[280] Magic Mountain also can argue that the gang profile, while it denies entrance to some teenagers, is necessary to maintain a safe environment. Therefore, the gang profile does not discriminate arbitrarily against teenagers.

However, Magic Mountain primarily excludes teenagers.[281] Those to whom the park denied entrance were all between the ages of 14 and 16.[282] This blanket discrimination against teenagers can be said to violate the Unruh Act. While the profile ignores teenagers as individuals, it classifies them according to dress. As a "family entertainment park,"[283] Magic Mountain's policies should be compatible with the styles of its teenaged guests—particularly when those teens are accompanied by adults.

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275. *Id.* at 129.

276. *Marina Point*, 640 P.2d at 117.

277. *Id.* at 129.

278. Koire v. Metro Car Wash, 707 P.2d 195, 197 (Cal. 1985) (discussing 59 Ops. Cal. Atty. Gen. 70 (1976)).

279. *Id.*

280. Padilla, *supra* note 1.

281. *See* Sobel, *supra* note 10.

282. *Id.*

283. Schillaci, *supra* note 118.

Yet, the park's practice is *in*compatible with its own business goals. It discriminates against the very people to whom the park seeks to appeal.

Magic Mountain's policy of excluding youths on the basis of dress, subjecting them to rules unrelated to guest conduct if they wish to enter the park, fails under the case law prohibiting discriminatory practices against teenagers. Magic Mountain has created an arbitrary class which affects teenagers.

VI. CONCLUSION

Magic Mountain implemented its gang screening policy to protect the family entertainment amusement park from gang violence.[284] The policy, as applied, allows the park to exclude African American and Latino youths based on their clothing.[285] However, gang style clothing has become increasingly popular among California youths. As such, the park policy violates the rights of teens. The park denies entrance on the basis of dress and race: guests who wear "gang" clothing are excluded only when the wearers are also members of suspect racial classes.

Magic Mountain, as a private corporation, is not subject to suit based on federal constitutional claims. However, this Article contends that the park's private party status is debatable. The Los Angeles County Sheriff's Department has been integral in forming and implementing the screening policy.[286] Magic Mountain is so interrelated with the Los Angeles County Sheriff's Department in executing its policy that the park should be considered a state actor. The park is also arguably acting pursuant to state regulations: the policy was created by the Sheriff's Department and the park sometimes uses sheriffs to assist park security in removing guests pursuant to the policy.

Once considered a state actor, Magic Mountain arguably violates the Equal Protection Clause of the Fourteenth Amendment. The screening policy is applied so as only to affect youths of African American and Latino descent. Yet, since all races wear the trendy gang clothing, the park actually discriminates on the basis of skin color, not clothing.

Magic Mountain also may be seen as a joint state actor which violates the First Amendment rights of youths who wish to wear gang dress. As long as the youths are not engaged in any unlawful action and are not in possession of any weapons upon entering the park, the youths should not

284. Padilla, *supra* note 1.
285. *See supra* part IV.B.2.
286. Schillaci, *supra* note 118.

be excluded. Gang members are not the only people who wear "gang" clothing.

Plaintiffs have an alternative argument: Magic Mountain may be subject to liability for violating the California Unruh Act. The park arbitrarily excludes youths on the basis of dress, and has no reasonable justification to use dress as the premise for exclusion.

Finally, this Article proposes that Magic Mountain has a valid claim to protect the park. The issue, however, is not the park's need to be protected, but the means by which its management protects it. The park could achieve its safety goals with less discriminatory means. The screening policy as applied does not further its purpose. *Anyone* can carry a weapon into the park—not just gang members or those dressed like gang members. Magic Mountain's arbitrary policy allows guests who do not dress in gang style garb, but who *do* carry weapons, to evade the screening and enter the park. To protect the park, all guests should be subject to the same searches.