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COMMENTARY

PRIVATE CLUBS AND PUBLIC INTERESTS: A VIEW FROM SAN FRANCISCO*

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The issue of sex segregation in private clubs has become a particularly heated one in San Francisco. Virtually all of the city's exclusive all-male clubs have experienced internal debates over whether to admit women during the past two years. Some have held membership votes on the matter as well. A few of these clubs have voted to end their discriminatory admission policies, but others, including the Olympic Club, have voted to continue their exclusionary practices. San Francisco is also the home of several elite all-female clubs. Although the issue of excluding men as members has been discussed by the boards of directors of some of these clubs, no membership vote has been taken on the question.

Professor Buss has clearly set out the constitutional principles developed in the United States Supreme Court's recent decisions concerning "public private" clubs.¹ As he noted, these principles have been developed against the factual background of two men's civic and service clubs, the Junior Chamber of Commerce (Jaycees) and Rotary International.² The Court's most recent decision, *New York State Club Association v. City of New York*,³ dealt only with the facial validity of New York City's Local Law No. 63, which defined as "not distinctly private" any club that "has more than 400 members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business."⁴ The Court sustained the New York law against a facial constitutional attack. It noted, however,

* This commentary was given at Washington University School of Law on September 30, 1988, as part of a conference commemorating the fortieth anniversary of *Shelley v. Kraemer*, 334 U.S. 1 (1948).

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1. Buss, *Discrimination by Private Clubs*, 67 WASH. U.L.Q. 815 (1989).

2. *Id.* at 828-32.

3. 108 S. Ct. 2225 (1988).

4. *Id.* at 2230.

that any individual club will have the opportunity "to contest the constitutionality of the Law as it may be applied against them" in judicial review of the administrative enforcement proceedings on a "case-by-case review of specific facts."⁵ Several San Francisco clubs have chosen to "privatize" their operations in the hope of making a favorable showing in the event they are required to undergo such a "case-by-case review." I will briefly comment on some of these strategies for compliance with the laws prohibiting discriminatory membership practices because they may have application in other communities. I will conclude with a brief examination of whether it is legally possible, or wise, to draw a distinction between all-female and all-male clubs in this context.

Two laws bear on the membership practices of San Francisco clubs. City Attorney Louise Renne has invoked both provisions in the city's suit challenging the Olympic Club's discriminatory practices. The first is a state statute known as the Unruh Civil Rights Act.⁶

The Unruh Act provides in part that "[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."⁷ The California Supreme Court has interpreted the Unruh Act very expansively. In *Isbister v. Boys' Club of Santa Cruz, Inc.*,⁸ the court held that the statutory phrase "business establishments of every kind whatsoever" included non-profit places of public accommodation. The Boys' Club of Santa Cruz had been established by private gift; it was chartered as a private non-profit corporation, and was affiliated with the Boys' Clubs of America, a congressionally chartered organization. The Boys' Club of Santa Cruz owned and operated a building which included such recreational facilities as a gymnasium, an indoor competition-size swimming pool, a snack bar, and a craft and game room. Its membership was open to all Santa Cruz boys between the ages of eight and eighteen, upon payment of a \$3.25 annual fee. The California Supreme Court reasoned that the Club was a place of public accommodation and amusement with unrestrictive membership policies, except for the exclusion of females, and was therefore

5. *Id.* at 2235.

6. CAL. CIV. CODE § 51 (West 1982).

7. *Id.*

8. 40 Cal.3d 72, 707 P.2d 212, 219 Cal. Rptr. 150 (1985).

subject to the Unruh Act.⁹ In *Rotary Club of Duarte v. Board of Directors*, affirmed on constitutional grounds by the United States Supreme Court, the California Court of Appeals invoked *Boys' Club* to hold as a matter of state law that the Rotary Club of Duarte was also covered by the Unruh Act.¹⁰

In the Olympic Club litigation, Judge Maxine Chesney denied the city's motion for a preliminary injunction against the Club on October 5, 1988, holding that the question whether the Club is public or private under the Unruh Act could be decided only after trial.

The second provision that applies to San Francisco clubs is San Francisco Municipal Code Article 33B.¹¹ City Attorney Renne stated in her amicus curiae brief filed with the United States Supreme Court in *New York State Club* that Article 33B, like New York's Local Law No. 63, "is a measured and carefully crafted effort to prohibit discrimination by clubs whose activities in promoting business are invested with the same public nature and interests as business establishments now subject to other anti-discrimination measures."¹² Like Local Law No. 63, Article 33B defines as "not distinctly private" any club which:

1. Has membership of whatever kind totalling 400 or more; and
2. Provides regular meal service by providing, either directly or indirectly under a contract with another person, any meals on three or more days per week during two or more weeks per month during six or more months per year; and
3. Regularly accepts payments:
 - (a) from non-members for dues or expenses incurred at the club by members or non-members in furtherance of trade or business, or
 - (b) on behalf of non-members for expenses incurred at the club by non-members in the furtherance of trade or business.¹³

The City Attorney's office decided to await the United States Supreme Court decision in *New York State Club* before commencing proceedings to enforce Article 33B. When the Supreme Court handed down its decision on June 20, 1988, however, Renne indicated to the press that she was confident that the San Francisco provision would be sustained by the Court's reasoning. Her office has sent interrogatories to the San Fran-

9. *Id.* at 91, 707 P.2d at 224-25, 219 Cal. Rptr. at 163.

10. 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213 (1986), *aff'd*, 481 U.S. 537 (1987).

11. SAN FRANCISCO, CALIF., MUN. CODE art. 33B (1987).

12. Brief for the City and County of San Francisco as amicus curiae at ii. *New York State Club Assoc. v. City of New York*, 108 S. Ct. 2225 (1988).

13. *Id.*

cisco clubs to obtain detailed information about their financial operations. Early in January, 1989, the city amended its complaint against the Olympic Club to include a charge that the Club is in violation of the San Francisco ordinance.

Article 33B was enacted by the San Francisco Board of Supervisors on November 12, 1987. The vote was preceded by public hearings which received wide press coverage. City Attorney Renne stated in her amicus brief that "Article 33B represents the manifest policy of San Francisco to eliminate the barriers of discrimination that impede the professional advancement of women and minorities."¹⁴ The testimony and news stories identified the prominent San Francisco men's clubs, particularly the Bohemian Club, the Pacific-Union Club, and the Olympic Club, as the primary targets of Article 33B. Those clubs naturally began considering possible avenues of response, and the largest all-female club, the Metropolitan Club, did so as well. A few of the men's clubs, after lengthy internal debate, voted to admit women as members. These clubs include the University Club, which voted in September 1988 to admit women, and the Concordia-Argonaut Club, which took similar action in 1987. The Olympic Club, however, took a membership vote and decided to retain its exclusionary policy.

The Bohemian Club, oddly enough, is the only one of the men's clubs to have its exclusionary policy explicitly stated in its club by-laws. A vote of 90% of the total membership, approximately 2300 men, is necessary to amend the by-laws. The Bohemian Club has attempted to enjoin the enforcement of Article 33B.

Two clubs, the all-male Pacific-Union Club and the all-female Metropolitan Club, have taken the lead in an effort to comply with Article 33B by becoming "distinctly private." These clubs no longer accept payment of either club dues or bills for food and entertainment from non-members. Nor do they permit the use of club facilities for business meetings. The clubs urge members not to seek reimbursement from their employers for club expenses. Such a policy prevents members from treating the costs of membership as a business expense and therefore may result in a severe loss of income to the clubs. Since all of the San Francisco clubs maintain large buildings in expensive areas of the city, complete with dining facilities, overnight accommodations, athletic facilities, and function rooms, this policy will put an increased burden on members to sus-

14. *Id.* at i-ii.

tain each club. The financial pressure of a sincere effort to “privatize” is thought to have been one of the primary factors that led to the University Club’s decision to admit women members.

The smaller women’s clubs, with membership hovering around the 400 level, include the Francisca Club, the Town and Country Club, and the Century Club. These clubs are primarily luncheon clubs; they do not have as large a financial overhead as most of the other organizations.

Neither the Unruh Act nor Article 33B exempt all-female clubs from their coverage. Both provisions speak broadly of exclusion based on “sex.” Is there legal justification for a decision to limit enforcement of these provisions to men’s clubs? In considering that question, it is helpful to begin with the theme of this conference: the competing interests of individual freedom and governmental power. As Professor Buss made clear, the justification for the use of governmental power to limit the right of individuals to choose their intimate associates is the overriding public policy of ending discrimination based on sex.¹⁵ Professor Deborah Rhode succinctly phrased the problem: “The exclusion of women from spheres conventionally classified as private contributes to women’s exclusion from spheres unquestionably understood as public.”¹⁶ The context of female exclusion from clubs like the Bohemian Club or the Olympic Club—with memberships numbering in the thousands and where business contacts are made at the highest level, even if no deals are made at the table—is quite different from male exclusion from clubs like the Metropolitan Club—where a membership base among younger business and professional women is only recently developing. This context reflects the division of power between men and women in the business world and the larger society. To quote Rhode again: “In a male-dominated society, the price of male cohesiveness is substantial [I]n the current social order, we cannot maximize both male intimacy and female opportunity.”¹⁷

This line of argument suggests that women are free to continue to associate with each other in female-only clubs so long as the sexual balance of power remains unchanged. Whether women should continue to exercise that right, however, is a different matter. Once again, the context in which the decision is made is significant. Women’s networking groups are a valuable source of business and professional contacts. Very few of

15. Buss, *supra* note 1, at 839-41.

16. Rhode, *Association and Assimilation*, 81 NW. U.L. REV. 106, 120 (1986).

17. *Id.* at 124-25.

these groups have club buildings and physical facilities to maintain. Truly social clubs, like some of the San Francisco women's luncheon clubs, are not places where business contacts are initiated or cultivated. Conversely, when a club counts among its membership large numbers of wealthy and powerful men, like the Pacific-Union Club, even a sincere effort to become "privatized" cannot remove the fact that access to the powerful is a valuable asset. Until there are large numbers of wealthy and powerful women, the exclusion of men from their table conversation will not be a disadvantage.

Let me say a final word about the implementation of decisions recognizing that women cannot be excluded from men's clubs. We are at present witnessing efforts on the part of men in New York, Washington, San Francisco and Los Angeles, as well as in other cities, to attract women to formerly all-male clubs. Women who accept these invitations should realize that getting in the door is only the first step. As Irene Vacchina has learned from the Press Club in San Francisco and Gloria Allred has learned from the Jonathan Club in Los Angeles, getting into the steam room or the swimming pool may be much harder. Defiant male members of the Press Club began swimming in the nude to protest a San Francisco judge's order that the Club cease its practice of restricting the hours that women could use the pool and locker room. Allred has gone to court to compel the Jonathan Club to permit her to use the steam room, after she was allegedly informed by the manager that she could only go in naked, just as the men did. It seems clear that, as we move toward the integration of men's clubs, unexpected problems may arise that will test still further the meaning of privacy.