LOOK BEFORE YOU LEAP: NEW JERSEY'S EXPERIENCE WITH (COVERT) STRICT GENDER SCRUTINY

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When I was asked to participate in this forum, I assumed I was expected to oppose "strict scrutiny" for gender based classifications, and I do. I don't believe that women, a majority of our population, can possibly claim to face barriers to advancement comparable to those faced by the twelve percent of Americans who are descendants of slaves, and one of the basic principles of equal protection jurisprudence is that government need not, indeed should not, treat different classes as if they were the same. In another sense, however, my views are more ambivalent. If there's one thing Philip Howard's recent book, *The Death of Common Sense*,[1] has taught us (although the author denies it), it is that government can't be fair. Lacking the neutral standard of the market, government makes its decisions based on politics and pressure, and the result has the brute force of Law.[2] Whatever the Law decides about *United States v. Commonwealth of Virginia*,[3] that is, whether the Virginia Military Institute ("VMI") must admit women, it will not be fair. Is it "fair" for taxpayers of Virginia to be forced to support an institution that arbitrarily excludes a majority of the state's residents? I suppose not. Is it "fair" to force the dismantling of a tradition that is at the core of Virginia history and has produced some of that Commonwealth's most famous and distinguished citizens? I don't think so.

Since both results are inherently unfair, if I had to decide, I might find more rough justice in the plaintiffs' position. Plaintiffs in *V.M.I* are seeking

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[1]PHILIP HOWARD, THE DEATH OF COMMON SENSE (1994).

[2]Howard's most well known example was New York City's inability to install outdoor toilets as a convenience to the public, after disabled groups insisted the toilets be made handicapped-accessible. Howard argued the result defied "common sense" since, even among the disabled minority, "not 2 percent of the disabled are in wheelchairs, and many of those are confined to nursing homes." *Id.* at 153.

[3]44 F.3d 1229 (4th Cir.), *cert. granted*, 116 S. Ct. 281 (1995).

the kind of superficial, objective "fairness" that government is good at: If it's a public school, it's open to the public, period. That result at least has the benefit of not using the power of government to further a private end. If VMI is ordered to take women and doesn't want to, it may be forced to consider every libertarian's pet solution: privatize.

I'll be interested to hear from my fellow panelists whether they believe the law would permit VMI to exclude women if the Commonwealth of Virginia sold it at a fair price to its alumni, who continued to operate it as a private, all male academy. I would also like to know whether strict gender scrutiny would make their analysis any different and whether their conception of strict scrutiny would extend the power of courts to police discrimination in private behavior. That issue is especially pertinent with this panel in this state, because New Jersey is the home of the case that I consider to be the most intrusive extension of gender bias law to the private sphere, and Ms. Taub was one of the lawyers who helped achieve that result.

I am speaking, of course, of the once notorious case of the Princeton eating clubs, *Frank v. Ivy Club*.[4] I think it's worth discussing *Frank* today, because I have little doubt that the state supreme court in that case applied what amounts to a strict gender scrutiny standard to private conduct, even though it purported simply to be construing a statute. The *Frank* case is a cautionary tale showing how far some courts will go in implementing, not just the anti-discrimination goals of traditional feminism, but the far more sweeping "anti-subordination"[5] agenda of the non-traditional branch of feminism, if they think they have a mandate to do so.

In *Frank* the Supreme Court of New Jersey sustained a finding by the New Jersey Division of Civil Rights that the off-campus eating clubs patronized by students at Princeton University were subject to the New Jersey Law Against Discrimination ("LAD"),[6] which, among other things, prohibits discrimination on the ground of sex.[7] The two defendant clubs had maintained all-male admission policies and had refused to admit the female plaintiff, Sally Frank.

The decision is notable as an almost defiant exercise of raw judicial power, and for its indifference to traditional legal analysis. In a thirty page opinion discussing the right of social clubs to choose their own members, the

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[4]576 A.2d 241 (N.J. 1990), *cert. denied*, 498 U.S. 1073 (1991).

[5]The evolution of this theory is ably recounted in Owen M. Fiss, *What is Feminism?*, 26 ARIZ. ST. L. J. 413, 416-417 (1994).

[6]N.J. STAT. ANN. 10:5-1 to -42 (West 1993 & Supp. 1995).

[7]*Frank*, 576 A.2d at 244.

court, speaking through Justice Garibaldi, never once discussed the constitutional right of association,[8] nor did it make any attempt to distinguish Princeton eating clubs from the many single-sex fraternities and sororities at other New Jersey colleges. *Frank* suggests they too must open their doors to the opposite sex if anyone bothers to sue them.[9] Indeed, despite a plain exception in the LAD for "bona fide" private clubs,[10] and despite factual disputes about the extent of Princeton University's alleged support of the clubs, the court dismissed all factual issues as immaterial. The details of the clubs' relationship with the University did not matter because they merely "demonstrate either formalistic historical connections or the technical, legalistic independence of the clubs."[11] In other words, the clubs' legal independence from the University was of no importance. Once the Supreme Court of New Jersey declared the clubs to be public, they forfeited any right or power to "sever their ties to the University or remove themselves from the jurisdiction of the Division."[12]

The opinion's indifference to the facts and its unembarrassed focus on the result, single it out from other private club cases. In other cases, business clubs with essentially commercial roles or "clubs" that were in reality public accommodations have been barred from discriminating, but no such findings were made in *Frank*. On the contrary, Justice Garibaldi noted that "[i]n analyzing the materiality of the facts, it is critical to understand that the Division rejected the theory that the Clubs themselves were places of

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[8]The Court merely noted that "[t]he Division rejected the argument that the Club members' constitutional free-association rights would be violated if the Clubs were subject to LAD." *Id.* at 251. The Division's reasons are not explained, and the opinion makes no further reference to this issue. The opinion in *Frank* was so unsatisfactory from a constitutional point of view that Judge Lifland of the United States District Court agreed to hear the clubs' claim that the decision deprived them of their constitutional right of association. The parties settled without a decision in the federal court

[9]Fraternities, often located on the property of a public university and receiving public funds, are less "distinctly private" than the separately located, privately owned and operated Princeton eating clubs.

[10]"Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private." N.J. STAT. ANN. 10:5-5-*l* (West 1995).

[11]*Frank*, 576 A.2d at 257.

[12]*Id.* at 261.

accommodation."[13] It was enough that the eating clubs drew their students from Princeton University, which itself was "a place of public accommodation under LAD."[14] At one point Justice Garibaldi summed up her analysis as follows: "The University provides the students; the Clubs feed them. Formalistic discussion of rule derivations is immaterial to this analysis."[15]

The court did *not* require a showing that the two defendant clubs held a monopoly over acceptable dining facilities for Princeton undergraduates. The opinion recites that thirteen eating clubs existed at Princeton, eight of which were non-selective, and that three of the other five admitted both sexes.[16] The court found that all thirteen clubs offered "social, recreational and dining activities,"[17] and there was no suggestion that the defendants offered amenities or activities unavailable at the coeducational clubs.

The court noted that defendant Ivy Club "was found [*sic*] in 1879," that during its entire existence it had maintained premises on private property "independently of Princeton University," and that the history of defendant Tiger Inn "parallels that of the Ivy."[18] There was no suggestion that either club was open to male undergraduates generally. To the contrary, the court conceded that membership in the defendant clubs is "by invitation only" and that "[t]he general public is not invited to join Tiger or Ivy."[19] Anyone familiar with Princeton University would go further: both clubs, and Ivy in particular, have long and well earned reputations for social exclusivity, even

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[13]*Id.* at 256. Yet, despite that "critical" admonition, on the very first page of the opinion the Court states: "Central to the resolution of the jurisdictional issue is whether the Clubs are 'places of accommodation' within the meaning of LAD, or are exempt from LAD because they are 'distinctly private.'" *Id.* at 244. If that is the central issue, and if, as the opinion holds, the clubs are not "distinctly private," then, by the Court's own test, they must indeed be "places of accommodation" after all. And the Court recites the wrong statutory standard to begin with; the defined term is "place of *public* accommodation." N.J. STAT. ANN. 10:5-5*l*. Ironically, that same definitional section states that a mere "place of accommodation" may be exempt as "distinctly private." *Id.*

[14]*Frank*, 576 A.2d at 256.

[15]*Id.* at 259.

[16]*Id.* at 246.

[17]*Id.*

[18]*Id.*

[19]*Id.* at 247.

snobbery. That a court could find either of them not "distinctly private" would come as a revelation to the thousands of disappointed undergraduates they have rejected for membership in the past century (including me, I might add).

Facts establishing that the Princeton eating clubs were legally and geographically separate from the University likewise were of no interest to the court. The record showed that club dues were paid directly to the clubs and not as part of undergraduate tuition, that dues and contributions to the clubs were not tax deductible, that club employees were not University employees and did not enjoy University benefits, that the clubs had a separate zip code from the University, that the clubs could not use the University's non-profit mailing permit, that the University did not provide security for the clubs, and that the defendant clubs had not been listed as official student organizations since 1979.[20]

In short, the court conceded "the assiduously maintained legal separateness of the Clubs" from the University,[21] but held, despite such separation, that the Division of Civil Rights properly based its jurisdiction on a "gestalt," suggesting "an integral and symbiotic relationship" between the clubs and the University.[22] I may have heard the word "gestalt"[23] a few times in college, but until the *Frank* case I never thought of it as having legal significance. It is not listed in my copy of *Black's Law Dictionary*, and a computer search this afternoon revealed that no other New Jersey judge has ever used the word in a published opinion, much less based an entire holding on it. The *Frank* opinion is unclear as to precisely what facts supported this "gestalt." In Part I Justice Garibaldi recites eleven "factual conclusions" by the Division that were said to "negate[] the Clubs [*sic*] claims that they are 'distinctly private' entities."[24] Later, in Part II where the concept of

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[20]*Id.* at 247-48.

[21]*Id.* at 257.

[22]*Id.*

[23]"A structure, configuration, or pattern of physical, biological, or psychological phenomena so integrated as to constitute a functional unit with properties not derivable by summation of its parts." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 515 (1991).

[24]Frank v. Ivy Club, 576 A.2d 241, 250-51 (1990), *cert. denied*, 498 U.S. 1073 (1991).

"gestalt" appears, the court asserts that the Division relied on only "three factual conclusions."[25]

Despite the detailed set of eleven "factual conclusions" found by the court of appeals[26], the supreme court's decision was based on the three conclusions in Part II, constituting the so-called "gestalt":

> (1) The Clubs are held out as part of a club system which serves Princeton students;
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> (2) The Clubs draw their membership almost exclusively from Princeton University students; and

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[25]*Id.* at 256.

[26]The court summarized the appellate division's eleven factual conclusions as follows:

> 1. A Club system provides dining facilities for a majority of upperclass students attending Princeton University.
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> 2. Respondent Clubs are part of this Club system associated with Princeton University.
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> 3. Princeton University relies on these clubs to feed a majority of their upperclass students.
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> 4. Without the Clubs, Princeton University would incur substantial costs and would have to make major changes in the provision of dining services for upperclass students.
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> 5. Princeton University has an interest in the continued viability of the Club system and has taken actions based on that interest.
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> 6. The Clubs are characterized by the Clubs and Princeton University as servicing Princeton students and recruit members almost exclusively from Princeton University.
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> 7. The Clubs work with one another and with Princeton University through organizations like the C.B.A. and the Interclub Council.
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> 8. The link that ties the individual Clubs together is their association with Princeton University.
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> 9. The Clubs would not continue in their present form with [*sic*] Princeton University.
>
> 10. Princeton University and the Clubs are integrally connected in a mutually beneficially [*sic*] relationship.
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> 11. Non-members of respondent Clubs, particularly but not exclusively, Princeton University students, can participate in many of the respondent Clubs' activities and use the respondent Clubs' facilities.

Id. at 250-51.

> (3) Princeton relies on the club system to feed a majority of its upperclass students.[27]

Is there any club on earth that is not "part of" a larger community from which it draws its members? And of how many clubs can it be said that they provide a service that might not otherwise be provided by some public body? A golf club reduces the need for county golf courses, a tennis club preempts some demand for municipal courts, and a club with a swimming pool may do the same for municipal pools.

These conclusions led to the next step, a holding that Princeton eating clubs (and inferentially all college social clubs) can *never* be private, no matter what they do to dissociate themselves from the institution from which they draw members:

> It would be disingenuous for the Clubs to assert that they could ever exist apart from Princeton University. The Clubs gather their membership from Princeton and, in turn, provide the service of feeding Princeton students. Because of this, the Clubs lack the distinctly private nature that would exempt them from LAD.[28]

With all escape routes sealed, the court pronounced its ultimate holding, in essence expropriating all Princeton eating clubs for public use,[29] with no thought of just compensation:

> [T]he Clubs must obey this State's substantive legal prescriptions against discrimination and discontinue their practice of excluding women purely on the basis of gender.[30]

Under the *Frank* analysis, all private social clubs in New Jersey are now subject to a judicial directive to open their doors to the public.

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[27]*Id.* at 256.

[28]*Id.* at 257.

[29]The membership practices of all Princeton eating clubs must now conform to the full panoply of protected categories under LAD: "race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex." N.J. STAT. ANN. 10:5-4 (West 1995).

[30]Frank v. Ivy Club, 576 A.2d 241, 261 (N.J. 1990), *cert. denied*, 498 U.S. 1073 (1991).

I return to strict gender scrutiny, and the policy issue of whether we should give the federal judiciary this potent new weapon, one that was described in the New Republic as "enact[ing] the Equal Rights Amendment by judicial fiat."[31] Let me quote from two of the most "liberal" jurists ever to sit on the United States Supreme Court, on the subject of private clubs. First, Justice Arthur Goldberg, who in 1964, stated:

> Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person . . . solely on the basis of personal prejudice, including race.[32]

Eight years later, Justice William O. Douglas expressed similar views: "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed."[33] How hollow those assurances sound now, after *Frank*. When the judiciary was trying to convince itself that Congress had the power to regulate commercial aspects of arguably private conduct, judges promised us they would never extend that power to what is truly private: one's home and one's club. But once the power to regulate in the private sphere was safely established, the scope of that power grew inexorably, until now it is illegal for New Jersey college students to join single sex clubs that serve food, due to a nebulous "gestalt" divined by our Supreme Court.

My conclusion, therefore, is that we don't know the full agenda of the people who are arguing for strict gender scrutiny. I very much doubt it is limited to governmental classifications. If I were a member of the United States Supreme Court, I might very well vote in favor of the plaintiffs in the *VMI* case. I am quite sure I would not invoke strict gender scrutiny.

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[31]Jeffrey Rosen, *Like Race, Like Gender*, NEW REPUBLIC, February 19, 1996, at 21.

[32]Bell v. State of Maryland, 378 U.S. 226, 312 (1964) (Goldberg, J., concurring).

[33]Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179 (1972) (Douglas, J., dissenting).