CIVIL RIGHTS—LAW AGAINST DISCRIMINATION—PRINCETON EATING CLUBS MUST ADMIT WOMEN BECAUSE SYMBIOTIC RELATIONSHIP WITH PRINCETON UNIVERSITY SUBJECTS THEM TO LAW AGAINST DISCRIMINATION AS PUBLIC ACCOMMODATIONS—*Frank v. Ivy Club*, 120 N.J. 73, 576 A.2d 241 (1990), *cert. denied*, 111 S. Ct. 799 (1991).

New Jersey's Law Against Discrimination (LAD) recognizes every person's civil right to equal opportunity.[1] Predicated on the state legislature's finding that discrimination "menaces the institutions and foundations of a free democratic State,"[2] the LAD is a comprehensive statutory scheme prohibiting discrimination based on race, gender, or other invidious criteria.[3] Among its various proscriptions, the statute forbids discriminatory exclusion from "place[s] of public accommodation."[4] Thus, because the LAD explicitly exempts "bona fide clubs" and other establishments which are found to be "distinctly private," it applies only to those facilities which are deemed public.[5]

While providing a nonexclusive list of "public" accommodations, the LAD does not provide a definitive standard for discerning the exempted private organizations that may lawfully

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[1] N.J. STAT. ANN. § 10:5-4 (West 1986 & Supp. 1990) provides:

> All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

[2] *Id.* at § 10:5-3 (West Supp. 1990). The statute provides, in pertinent part:

> The Legislature finds and declares that practices of discrimination against any of its inhabitants, because of race, creed, color, national origin, ancestry, age, sex, marital status, liability for service in the Armed Forces of the United States, or nationality, are a matter of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundations of a free democratic State . . . .

Id.

[3] *Id.* at § 10:5-4 (West 1986 & Supp. 1990).

[4] *Id.*

[5] *Id.* at § 10:5-5(l) (West 1986 & Supp. 1990). In defining the term "public accommodation," the statute states that the LAD does not "apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private . . . ." *Id.*

discriminate.[6] Consequently, New Jersey courts have struggled to judicially distinguish "distinctly private" clubs from public accommodations in those instances where an organization is accused of discriminatory practices.[7] Traditionally, courts have looked to a club's membership selection process to determine whether it has adequately opened its doors to the public.[8] Thus, organizations have been subjected to the LAD as "places of public accommodation" when they invite anyone from the general public to become a member without imposing any selective criteria.[9]

In the recent decision of *Frank v. Ivy Club*,[10] however, the New Jersey Supreme Court found two of Princeton University's allegedly private "eating clubs" to be public accommodations by focusing not on the selectiveness of the clubs' memberships, but rather on their nexus to a public accommodation.[11] Specifically,

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6 *See id. See also* § 10:5-5(l), which provides:

> 'A place of public accommodation' shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof, any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey.

Id.

7 *See, e.g.*, Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468, 472 (3d Cir. 1986) (observing that "our primary task is to determine whether the Kiwanis Club of Ridgewood is a 'place of public accommodation' within the meaning of N.J.S.A. 10:5-5(l)").

8 *See id.* at 473; Clover Hill Swimming Club v. Goldsboro, 47 N.J. 25, 219 A.2d 161 (1966); National Org. for Women v. Little League Baseball, Inc., 127 N.J. Super. 522, 318 A.2d 33 (App. Div. 1974) *aff'd*, 67 N.J. 320, 338 A.2d 198 (1974).

9 *See Kiwanis*, 806 F.2d at 476.

10 120 N.J. 73, 576 A.2d 241 (1990), *cert. denied*, 111 S. Ct. 799 (1991).

11 *Id.* at 104, 576 A.2d at 257.

the court sustained the plaintiff's claim of gender discrimination and held that the eating clubs' "symbiotic relationship" with Princeton University deprived them of "distinctly private" status under the LAD.[12]

The supreme court referred to the proceedings surrounding the complaint as a "saga" with a "protracted history."[13] Now an attorney acting on her own behalf, plaintiff Sally Frank (Frank) originally filed the claim in 1979 when she was still a Princeton undergraduate.[14] As a Princeton student, Frank was familiar with the University's thirteen fraternal eating club organizations.[15] Although all freshmen and sophomores at Princeton are required to dine at the University, these clubs provide meals and recreational activities for a majority of Princeton's upperclass students.[16] While club members are almost exclusively Princeton undergraduates and alumni, the clubs are separated from the University in many ways.[17] Specifically, Princeton does not officially recognize the clubs as student organizations, nor does it own or operate the club's land or facilities.[18]

While most of the eating clubs are non-selective and utilize a lottery system to determine membership,[19] five clubs choose new

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[12] *Id.* at 110-11, 576 A.2d at 260-61.

[13] *Id.* at 79, 576 A.2d at 244.

[14] *Id.*

[15] *Id.* at 83, 576 A.2d at 246. The eating clubs have a long and varied history at Princeton. *Id.* In 1856, the University's refectory burned down and forced students to eat their meals at boarding houses. *Id.* Concomitantly, some students formed "select associations" to lower the cost of living and eating off-campus. *Id.*

[16] *Id.* at 86-87, 576 A.2d at 248.

[17] *Id.* at 88-89, 576 A.2d at 248-49.

[18] *See id.* at 84-88, 576 A.2d at 246-49. According to the supreme court, the Ivy Club owned its own land and clubhouse and paid its own taxes and utility costs. *Id.* at 84, 576 A.2d at 246. In addition, all eating clubs conducted their own fund raising activities and financed the costs of selecting new members. *Id.*, 576 A.2d at 247. The clubs, moreover, did not utilize Princeton's zip code or have campus mail delivery. *Id.* at 86, 576 A.2d at 248. Club employees were not considered University employees and did not receive Princeton employee benefits. *Id.*, 576 A.2d at 247-48.

Nevertheless, Princeton invoked disciplinary action against students involved in disturbances at the eating clubs. *Id.* at 88, 576 A.2d at 248. The University also endeavored on occasion to help clubs in financial straits and utilized the clubs in its freshman orientation. *Id.* at 90, 576 A.2d at 250. Furthermore, Princeton engaged in a meal exchange program with the clubs whereby the University reimbursed the clubs for providing meals to non-member students. *Id.* at 87-88, 576 A.2d at 248.

[19] *Id.* at 83-84, 576 A.2d at 246. The eight co-ed, non-selective clubs were the Campus, Charter, Cloister Inn, Colonial, Dial Lodge, Elm, Quadrangle, and Terrace eating clubs. *Id.* At one time these clubs excluded women, but now extend membership to both males and females. *Id.* Members are accepted into these clubs through a lottery system. *Id.*

members through a "bicker" process whereby students visit each club and are evaluated by current members.[20] During Frank's enrollment at Princeton, the Ivy, Tiger Inn, and Cottage eating clubs extended full membership to men only.[21] During her Spring 1979 semester, Frank attempted to obtain membership in the Ivy Club through the bicker process.[22] After failing to receive a "bid," or invitation to join, she filed a gender discrimination claim with the New Jersey Civil Rights Division (Division) against the three all-male eating clubs and Princeton University.[23] While Frank eventually settled her claims with the Cottage Club and the University, the Ivy and Tiger Inn clubs claimed immunity from the LAD's anti-discrimination laws through the "distinctly private" exemption.[24]

Following two fact-finding conferences,[25] the Division ruled that it had jurisdiction over the clubs because they constituted places of public accommodation under the LAD.[26] In holding that the eating clubs failed to fall under the private club exemption, the Division found that the clubs maintained a relationship of "integral connection and mutual benefit" with Princeton and

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20 *Id.* at 84, 576 A.2d at 247. The Ivy, Cottage, Tiger Inn, Cap & Gown, and Tower clubs are the five selective organizations. *Id.* According to the court, the bicker process consists of registration, bicker sessions, and bid sessions. *Id.* at 85, 576 A.2d at 247. After registration, students interested in joining a selective club visit the clubs and talk with members. *Id.* At the end of the process, each club holds a membership meeting to decide which students will be given "bids," or invitations to join. *Id.*

21 *Id.* at 79-80, 576 A.2d at 244.

22 *Id.* at 91, 576 A.2d at 250. Ivy permitted Frank to bicker, but only allowed her to talk to club members when no prospective male candidates were waiting. *Id.* Frank also bickered at the Cap & Gown and the Tower clubs, both selective, co-ed eating clubs, but was not invited to join. *Id.* Additionally, the Ivy, Tiger Inn, and Cottage clubs did not allow Frank to participate in their bicker processes. *Id.*

23 *Id.* at 79-80, 576 A.2d at 244.

24 *Id.* at 95, 576 A.2d at 252. *See supra* note 5 and accompanying text. The Cottage Club settled with Frank in February 1986 and agreed to open its membership to women. *Id.* The University reached a partial settlement with Frank but still remained in the proceedings because of its interest in any remedies that might be ordered by the court. *Id.*

25 *Id.* at 81, 576 A.2d at 245. The Division did not process Frank's original complaint. *Id.* at 80, 576 A.2d at 244. Subsequently, Frank filed a second complaint, making a "public accommodations" argument, which the Division processed, but later dismissed. *Id.* The appellate division vacated the dismissal order and remanded to the Division for findings of fact. *Id.* The Chief of the Bureau of Enforcement for the Division, James Sincaglia, held the two conferences in March and April 1984. *Id.* at 81, 576 A.2d at 245.

26 *Id.* at 83, 576 A.2d at 246. The determination that the Division maintained jurisdiction over the clubs was issued in the Division's May 1985 "Finding of Probable Cause." *Id.*

thereby assumed the University's public status.[27] Thus establishing jurisdiction under the LAD, the Division found the eating clubs liable for their discriminatory all-male membership policies.[28] The Division accepted a recommendation by the Office of Administrative Law (OAL) that the clubs pay Frank compensatory damages rather than be ordered to admit her.[29] Accordingly, the Division awarded Frank $5,000 in humiliation damages.[30] The Division also ordered the clubs to expunge their existing discriminatory policies and extend membership to women.[31]

The appellate division reversed the Division ruling in part and held that material facts remained in dispute.[32] Accordingly, the appellate division remanded the case to the Division for a plenary hearing.[33] The New Jersey Supreme Court, however, granted Frank's petition for certification and reinstated the Division's jurisdictional finding.[34] The supreme court maintained that the Division was correct in ruling that the clubs' "symbiotic" association with Princeton stripped them of their distinctly private status.[35] The court, therefore, adopted the Division's findings and ordered the eating clubs to open their membership to

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27 *Id.* at 92, 576 A.2d at 251.

28 *Id.* This determination was part of the Division's May 1985 "Finding of Probable Cause." *Id.*

29 *Id.* at 96, 576 A.2d at 253. After the Division issued its probable cause finding, the case was transferred to the OAL at Frank's request. *Id.* at 92, 576 A.2d at 251. The OAL found that there were no materially disputed facts and, therefore, the Division's "Finding of Probable Cause" would be the final agency decision on the jurisdictional issue. *Id.* at 93, 576 A.2d at 251. The Director of the Civil Rights Division then adopted these recommendations in his "Order of Partial Summary Decision." *Id.* The Order declared that, because there were disputed material facts, a full jurisdictional hearing would be "time consuming and wasteful." *Id.* The Division remanded the case to the OAL for determinations concerning the clubs' liability and possible remedies. *Id.* at 95, 576 A.2d at 252.

The Administrative Law Judge (ALJ) issued an "Initial Decision of Partial Summary Decision" which held the Ivy and Tiger Inn clubs liable. *Id.* The ALJ did not suggest that either club extend membership to Frank, but did recommend that she be awarded $2500 in compensatory damages. *Id.* at 96, 576 A.2d at 253. The Director subsequently adopted the decision. *Id.* at 95, 576 A.2d at 252.

30 *Id.* at 96, 576 A.2d at 253.

31 *Id.* The Division director's "Final Administrative Decision and Order" doubled the compensatory damages suggested by the ALJ, and rejected the ALJ's proposal which allowed the clubs to "sever their ties" with the University instead of opening their doors to women. *Id.*

32 *Id.* at 97, 576 A.2d at 253.

33 *Id.* The appellate division held that the Division had abused its discretion in relying on Chief Sincaglia's resolution of disputed facts regarding jurisdiction. *Id.*

34 *Id.* at 111, 576 A.2d at 261.

35 *Id.* at 110, 576 A.2d at 260.

women.[36]

Invidious discrimination by organizations has proven to be inherently problematic for the New Jersey courts.[37] The LAD does not provide clear statutory guidance and courts have faced difficulties in resolving whether "members only" societies are private enough to warrant exemption from the LAD's prohibitions, or sufficiently "public" to compel statutory conformity.[38] Nevertheless, courts have fashioned judicial interpretations of the LAD exemption and have vigorously scrutinized an organization's claim of a "distinctly private" license to discriminate.[39]

The New Jersey Supreme Court set the analytical stage for the treatment of clubs in *Clover Hill Swimming Club v. Goldsboro*,[40] by positing that a swimming club was a public accommodation within the meaning of the LAD when it extended to the general public an invitation to take advantage of its services.[41]

In *Clover Hill*, the plaintiff-respondent, a black male, brought a discrimination claim against a Passaic Township swimming club that denied him membership.[42] The club had advertised in several newspapers and placed a large sign outside its entrance which provided information about the facility.[43] Justice Proctor, writing for a unanimous court, found that through these activities

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36 *Id.* at 111, 576 A.2d at 261.

37 *See supra* notes 6-7 and accompanying text.

38 *See id.*

39 *See* Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468 (3d Cir. 1986); Clover Hill Swimming Club v. Goldsboro, 47 N.J. 25, 219 A.2d 161 (1966); National Org. for Women v. Little League Baseball, Inc., 127 N.J. Super. 522, 318 A.2d 33 (App. Div. 1974) *aff'd*, 67 N.J. 320, 338 A.2d 198 (1974).

40 47 N.J. 25, 219 A.2d 161 (1966).

41 *Id.* at 33, 219 A.2d at 165.

42 *Id.* at 30, 219 A.2d at 164. The respondent, Dr. Goldsboro, was a resident of Passaic Township and wished to join the club so that he and his wife could swim and teach their son to swim. *Id.* at 29, 219 A.2d at 163. After applying for membership, Goldsboro waited approximately a month and a half, during which there was no response from the club. *Id.* at 30, 219 A.2d at 164. When he called the club, Goldsboro was informed that his application had been denied, but no explanation was given. *Id.* The club later wrote to Goldsboro, stating that his application had been lost. *Id.* at 31, 219 A.2d at 164. When Goldsboro reapplied, the club told him that his two listed references, his minister and another doctor, were unsatisfactory because they did not know him socially. *Id.* After Goldsboro filed a complaint with the Civil Rights Division, a Division investigator learned that Clover Hill did not have any black members. *Id.* at 32, 219 A.2d at 164.

43 *Id.* at 29, 219 A.2d at 163. The court noted that the newspaper advertisements "prominently displayed the club's name, address and post-office box number," and that the sign over the entrance read: "Clover Hill. On this 170 acre site a private family club with complete recreational facilities. Lake swimming, tennis, skating, golfing. For information write or call P.O. Box 222, Millington, N.J., Fr7-0658, Millington 7-9779." *Id.*

Clover Hill had solicited membership from the general public.[44] The justice stated that once such a solicitation was in effect, a club could not, on the basis of race, exclude "members of the public who have accepted the invitation."[45] Finding the club to be a public accommodation subject to LAD regulations, the court sustained Goldsboro's race discrimination claim.[46]

Applying the *Clover Hill* standard several years later, the New Jersey Superior Court Appellate Division had the opportunity to clarify whether an accommodation is "distinctly private" in the context of gender discrimination.[47] In *National Organization for Women v. Little League Baseball*,[48] the complainants alleged that Lit-

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[44] *Id.* at 33, 219 A.2d at 165. The court stated:

> Although these advertisements contained ice skating safety advice, it is hard to imagine that the printing of the post office box number could have had a purpose other than providing potential applicants with a means of communicating with the club. Persons who did write to the club were sent not only application forms but also extensive promotional literature which extolled the virtues of membership.

Id.

[45] *Id.* The court stressed that just because Clover Hill "operate[d] in the form of a private club [it] should not be permitted to obscure the accommodation's non-private nature." *Id.* at 34, 219 A.2d at 166.

Interestingly, the court added that the "exemption for distinctly private organizations is designed to protect the personal associational preferences of their members." *Id.* Indeed, the reason that New Jersey and many other states exempt private clubs from public accommodation laws is based, in part, on the right to freedom of association contained in the United States Constitution. Project, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Law*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 250-51 (1978).

Although not explicitly granted in the Constitution, the freedom of association has been declared a fundamental right by the Supreme Court. New York State Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988) (upholding a New York law against a freedom of association challenge, which included in its definition of "public accommodation" any club with over 400 members, that provided meals regularly, and that was paid on a regular basis by nonmembers "for the furtherance of trade or business"). When adjudicating lawsuits brought by club members who contend that a state anti-discrimination statute violates their freedom of association, the Supreme Court inquiries into the organization's intimacy, as displayed by its size and selectivity, as well as its tendency to disseminate political and other expressive messages protected by the first amendment. *See id. See also* Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) (holding that California's Unruh Civil Rights Act was not violative of the Rotary Club's associational freedoms); Roberts v. United States Jaycees, 468 U.S. 609 (1984) (upholding Minnesota's Human Rights Act against a freedom of association claim).

[46] *Clover Hill*, 47 N.J. at 35, 219 A.2d at 166. The court clarified its holding by emphasizing: "we do not mean to imply that it cannot limit the use of its facilities to club members; we mean only that in the selection of such members there can be no discrimination because of race." *Id.*

[47] *See* National Org. for Women v. Little League Baseball, Inc., 127 N.J. Super. 522, 318 A.2d 33 (App. Div. 1974), *aff'd*, 67 N.J. 320, 338 A.2d 198 (1974).

[48] *Id.*

tle League Baseball (League) unlawfully excluded young females.[49] Judge Conford's majority opinion focused its inquiry on the LAD's applicability and whether the League had invited the public at large to take advantage of its services.[50] Pointing toward the League's membership policies, Judge Conford emphasized that the League invited all young males from the general public to participate without employing any selective criteria at all.[51] According to the court, the League's casual method of choosing new members was fatal to its declaration of "private" status.[52]

In reaching its conclusion that the evidence of non-selectiveness made the League a "public accommodation," the court stressed that the LAD's remedial nature required a liberal interpretation of the statute.[53] Thus, Judge Conford reasoned that the statutory term "place" could not be given such a rigid construction as to exclude organizations like Little League Baseball simply because there was no fixed facility or place of operation.[54] The court, therefore, interpreted the word "place" to encompass any playing field or facility at which the League conducted its activities.[55]

The court also focused on the curative policy underlying the LAD in addressing whether the League fit within the LAD's exemption for those public places which by nature are "reasonably restricted exclusively to individuals of one sex."[56] Noting that

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49 *Id.* at 526, 318 A.2d at 35.

50 *Id.* at 531, 318 A.2d at 37-38.

51 *Id.*

52 *Id.*

53 *Id.* at 530, 318 A.2d at 37. The court stated: "[t]he law is remedial and should be read with an approach sympathetic to its objectives." *Id.* Additionally, the court noted that it was "warranted in placing considerable weight on the construction of the statute . . . by the administrative agency charged by the statute with the responsibility of making it work." *Id.* (citing Passaic Daily News v. Blair, 63 N.J. 474, 484, 308 A.2d 649, 654 (1973)).

54 *Id.* at 531, 318 A.2d at 37. The court emphasized that "[t]he statutory noun 'place' (of public accommodation) is a term of convenience, not of limitation." *Id.*

55 *Id.*

56 *Id.* at 532, 318 A.2d at 38. Little League contended that its organization could lawfully discriminate against girls because of an LAD exception which provides:

> [N]othing contained herein shall be construed to bar any place of public accommodation which is in its nature reasonably restricted exclusively to individuals of one sex, and which shall include but not be limited to any summer camp, day camp, or resort camp, bathhouse, dressing room, swimming pool, gymnasium, comfort station, dispensary, clinic or hospital, or school or educational institution which is restricted exclusively to individuals of one sex . . . .

the majority interpreted the term "reasonable" with an eye toward the purpose of anti-discrimination statutes "as a current social phenomenon,"[57] Judge Conford declared that this exception to the LAD was enacted to safeguard acts involving bodily exposure such as the changing of clothes.[58] Finding that the activities of Little League implicated no transgression of bodily privacy, the court held that the exclusion of women was not a reasonable restriction.[59] Because Little League Baseball was a public accommodation that did not fall under any LAD exemptions, the court held that it could no longer confine its ball playing to young males.[60] The New Jersey Supreme Court summarily affirmed this holding.[61]

Notwithstanding the results in *Little League* and *Clover Hill*, the "distinctly private" exemption retains a residuum of meaning, and a 1986 Third Circuit decision provided guidance on the type of selective membership policy required for a New Jersey organization to discriminate.[62] In *Kiwanis International v. Ridgewood Kiwanis Club*,[63] the Ridgewood, New Jersey chapter of Kiwanis International (Ridgewood Kiwanis) brought suit to stop the charter organization (Kiwanis International) from enforcing its all-male membership policy.[64]

N.J. STAT. ANN. § 10:5-12(f) (West Supp. 1990).

57 *Little League*, 127 N.J. Super. at 533, 318 A.2d at 38. According to Judge Conford, the LAD was enacted "mainly to emancipate the female sex from stereotyped conceptions as to its limitations embedded in our *mores* but discordant with current rational views as to the needs, capabilities and aspirations of the female, child or woman." *Id.*, 318 A.2d at 38-39.

58 *Id.* at 532, 318 A.2d at 38. Judge Conford was quick to note, however, that this view did not at all imply that "only in the area of bodily privacy does the statute contemplate that the 'nature' of the place of public accommodation may reasonably justify its restriction to one sex." *Id.* at 533, 318 A.2d at 38.

59 *Id.* at 534, 318 A.2d at 39. The court found that there were no privacy concerns because the "changing of clothing for play or after play invariably takes place at home." *Id.* at 532, 318 A.2d at 38. Judge Meanor dissented from the opinion, however, because of his differences with the majority over the bodily privacy issue. *Id.* at 538-41, 318 A.2d at 41-43 (Meanor, J., dissenting). In Judge Meanor's view, the section 10:5-12(f) exemption "permitt[ed] any reasonable sex discrimination," and Little League Baseball certainly passed the test for reasonableness. *Id.* at 539-40, 318 A.2d at 42 (Meanor, J., dissenting). According to Judge Meanor, men could continue playing baseball into adulthood, and there was "nothing unreasonable in the position of Little League in desiring not to teach girls a skill that is only temporarily useful." *Id.* at 540-41, 318 A.2d at 43 (Meanor, J., dissenting).

60 *Id.* at 538, 318 A.2d at 41.

61 National Org. for Women v. Little League Baseball, 67 N.J. 320, 338 A.2d 198 (1974).

62 *See* Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468 (3d Cir. 1986).

63 806 F.2d 468 (3d Cir. 1986).

64 *Id.* at 471. The Ridgewood Club admitted Julie Fletcher in 1984, and sent her

Citing *Little League*, the court of appeals endorsed the "standard of open invitation to all" as the controlling factor in determining whether a club was essentially public or private.[65] The court scrutinized the Ridgewood Kiwanis membership practices and found that the club was very selective in its choice of members.[66] The court noted that the Ridgewood Kiwanis membership was very small and mailed membership solicitations only to candidates who were known by current members.[67] Furthermore, potential members had to be sponsored by a current member and be willing to recite the pledge of allegiance and pray at meetings.[68] According to the court, this selective screening process put the club within the distinctly private exemption,[69] and the LAD could not be used to enjoin Kiwanis International from enforcing discriminatory practices on its local chapters.[70]

During this trend of scrutinizing the selectivity of club membership policies when faced with complaints brought under the LAD, a New Jersey appellate court took a novel approach in *Hebard v. Basking Ridge Fire Co. No. 1*.[71] In *Hebard*, a female applicant was denied membership in a volunteer fire company that claimed to be a fraternal organization outside the scope of the LAD.[72] In rejecting the fire company's distinctly private claim, the court did not consider the selectivity of the company's membership invitations, but rather its links to the municipal government.[73] Specifically, the company received funding from the township, including workers' compensation, and was subject to its ordinances.[74] According to the appellate division, such "indi-

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application and processing fee to Kiwanis International. *Id.* at 470. Kiwanis International informed Ridgewood that by admitting Ms. Fletcher it had violated the Kiwanis bylaws. *Id.* at 471. After Kiwanis Ridgewood refused to exclude Ms. Fletcher, Kiwanis International filed a counter suit seeking an injunction that would prevent Ridgewood from using the Kiwanis service marks. *Id.* Kiwanis Ridgewood then brought suit, claiming that revocation of its Kiwanis license because it admitted a woman was a violation of the LAD. *Id.*

65 *Id.* at 473.

66 *Id.* at 475-76.

67 *Id.* at 475. The court noted that the membership of Kiwanis Ridgewood consisted of only twenty-eight members and that the Club "has admitted no more than twenty members over the course of the past decade." *Id.*

68 *Id.*

69 *Id.* at 477.

70 *Id.* at 478.

71 164 N.J. Super. 77, 395 A.2d 870 (App. Div. 1978), *certif. denied*, 81 N.J. 294, 405 A.2d 838 (1979).

72 *Id.* at 79, 395 A.2d at 871.

73 *Id.* at 83-84, 395 A.2d at 873.

74 *Id.* at 83, 395 A.2d at 873.

cia of control" supported a finding that fire company members were, in fact, employees of the municipality and that the fire company itself was a municipal employer within the scope of the LAD.[75] Finding the fire company to be an employer for LAD purposes, the court declared its gender-based exclusion policy to be unlawful.[76]

When faced with the choice between applying "distinctly private" or "public accommodation" status, the courts had frequently focused on an organization's invitation to the general public, as expressed through its membership selectivity.[77] Yet the *Hebard* court, while not addressing the public accommodation issue, provided an alternate route by subjecting an allegedly private organization to the LAD's anti-discrimination mandates by focusing on the organization's links to a public entity.[78] Thus, in *Frank*, the New Jersey Supreme Court was presented with an opportunity to strike down the discriminatory practices of highly selective clubs because of their relationships to public accommodations, irrespective of the nature of their own public invitations. It was against this backdrop of statutory interpretation that *Frank v. Ivy Club*[79] was adjudicated.

Justice Garibaldi, writing for the majority in *Frank*, first considered whether there remained material questions of fact which would have required the Civil Rights Division to hold a plenary hearing before making its finding of probable cause.[80] The justice began by articulating the three principles the Division relied upon in finding that the clubs were public accommodations and

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75 *Id.* at 83-84, 395 A.2d at 873.

76 *Id.* at 84, 395 A.2d at 874. Having established the LAD jurisdiction in the context of employment discrimination, the court declined to rule on whether the company was a LAD "public accommodation." *Id.* at 86, 395 A.2d at 875.

77 *See supra* notes 40-70 and accompanying text.

78 *See supra* notes 71-76 and accompanying text.

79 120 N.J. 73, 576 A.2d 241 (1990), *cert. denied*, 111 S. Ct. 799 (1991).

80 *Id.* at 98-102, 576 A.2d at 254-56. Noting that an administrative agency has to hold a plenary hearing only if there are material facts still in dispute, the court held that the Civil Rights Division's fact finding procedures afforded the parties their due process rights even though no plenary hearing was held. *Id.* at 98, 576 A.2d at 254. The court also rejected the clubs' argument that they did not know that the two-day fact finding conference would resolve the jurisdictional issue. *Id.* at 99, 576 A.2d at 254. While admitting that there was "some uncertainty about these unusual proceedings," Justice Garibaldi acknowledged that both parties were made aware of the possibility of the jurisdictional question being resolved. *Id.* at 100, 576 A.2d at 255. The court reasoned that "[i]f there was some confusion about the scope of the Conference it only galvanized the parties to investigate thoroughly the potential ramifications of this fact-finding process." *Id.*

not "distinctly private."[81] Justice Garibaldi observed that in order to advance the legislature's scheme to eradicate discrimination, the Division and courts had to closely scrutinize a club's claim of distinctly private status.[82] Similarly, the justice stressed that substance had to prevail over form and that the important policies underlying the LAD should not be impeded by legal artifices.[83] The justice further noted the Division's recognition that even an essentially private organization could lose that status if it significantly altered its private nature,[84] and that such an alteration could occur as a result of a close relationship with a public establishment.[85]

The supreme court agreed with the Division that the eating clubs had indeed altered their private status through their close association with Princeton.[86] The court asserted that the clubs maintained a "symbiotic" relationship with the University, evidenced in particular by the dining service that the clubs provided for Princeton.[87] Moreover, the court recognized that the Divi-

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81 *Id.* at 102, 576 A.2d at 256.

82 *Id.* The justice declared that "[a]ll facts must be carefully reviewed so that '[no] device, whether innocent or subtly purposeful, can be permitted to frustrate the legislative determination to prevent discrimination.' " *Id.* (quoting Clover Hill Swimming Club v. Goldsboro, 47 N.J. 25, 34, 219 A.2d 161, 165 (1966)).

83 *Id.* at 103, 576 A.2d at 256. The majority opinion noted: "the Division must 'deal with the substance, rather than the form of transactions, and not permit important legislative policies to be defeated by artifices affecting legal consequences of the existing situation.' " *Id.* (quoting United States v. Beach Assocs., Inc., 286 F. Supp. 801, 807 (D. Md. 1968)).

84 *Id.* at 102-03, 576 A.2d at 256 (citing Franklin v. Order of United Commercial Travelers, 590 F. Supp. 255, 260 (D. Mass. 1984)).

85 *Id.* at 104, 576 A.2d at 257.

86 *Id.*

87 *Id.* The opinion stated:

> Where a place of public accommodation and an organization that deems itself private share a symbiotic relationship, particularly where the allegedly 'private' entity supplies an essential service which is not provided by the public accommodation, the servicing entity loses its private character and becomes subject to laws against discrimination.

Id. (citing Adams v. Miami Police Benevolent Ass'n, 454 F.2d 1315 (5th Cir. 1972), *cert. denied*, 409 U.S. 843 (1972); Franklin v. Order of United Commercial Travelers, 590 F. Supp. 255 (D. Mass. 1984); Hebard v. Basking Ridge Volunteer Fire Co., 164 N.J. Super. 77, 395 A.2d 870 (App. Div. 1978), *cert. denied*, 81 N.J. 294, 405 A.2d 838 (1979)). For a discussion of *Hebard*, *see supra* notes 71-76 and accompanying text.

The two other cases cited by the court in its discussion of symbiosis, *Adams* and *Franklin*, were both adjudicated in other jurisdictions. In *Franklin*, a federal district court in Massachusetts held that a fraternal benefit society was subject to the state law against discrimination and could not exclude women. 590 F. Supp. at 260. Noting that "[t]he rationale for giving special treatment to fraternal societies is that such organizations are primarily private groups, dedicated to social, recreational or

sion's finding of an integral connection between Princeton and the clubs was not based on whether the clubs were legally independent of Princeton University.[88] Instead, Justice Garibaldi pointed out that the Division had focused on the "gestalt" of the clubs' connection to the University.[89] Specifically, the court emphasized three facts about the general nature of the relationship which the Division had relied on in finding jurisdiction.[90] The court took notice that club members were almost exclusively Princeton students[91] and that Princeton relied on the eating clubs to provide meals for most of its students.[92] Furthermore, the majority recognized that Princeton "held out" the clubs as part of the eating club system.[93]

Justice Garibaldi stressed that these facts supported the Divi-

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philanthropic activities," the court found that the fraternal club had lost its private nature through its close association with the city police department. *Id.* at 259. The court observed that the club derived its membership from the police department and that it provided insurance that was not supplied by the city. *Id.* In essence, this fraternal organization could not be deemed private because it was "the only potential source of a significant insurance benefit for municipal employees." *Id.* at 260.

In *Adams*, the Fifth Circuit ruled that a Miami police benevolent association was subject to the equal protection clause and could not exclude blacks. *Adams*, 454 F.2d at 1319. The court held that the association was not private but was "closely entwined with the City of Miami Police Department." *Id.* at 1318. Among other factors, the court recognized that the organization drew its membership from the police department and that it was represented at city meetings where police policy was determined and wages were bargained for. *Id.*

Thus, it is apparent from *Adams* and *Franklin* that the two major factors that led to a finding of symbiosis were that the allegedly private club drew its membership almost exclusively from the public entity and that the club provided some service for the public entity. Indeed, these were precisely the two factors emphasized by the New Jersey Supreme Court in its finding of a symbiotic relationship in *Frank*. *Frank*, 120 N.J. at 104, 576 A.2d at 257. Thus, the eating clubs shared a symbiotic relationship with Princeton because they drew their membership from the University and because they provided a dining service for Princeton undergraduates. *Id.* While the fraternal society in *Franklin* provided members with insurance that could not be received through the city, and the service club in *Adams* provided bargaining for wages, the eating clubs in *Frank* supplied the essential service of providing meals to a large portion of Princeton students. *Id.*

88 *Id.* at 103, 576 A.2d at 256-57. Justice Garibaldi noted: "the Clubs' dissatisfaction with the Director's jurisdictional decision stems from the fact that the Director did not focus on the assiduously maintained legal separateness of the Clubs." *Id.* The clubs apparently felt that even if there were no material disputed facts relevant to the jurisdictional issue, they were sufficiently independent of Princeton so as not to be subject to the LAD as a public accommodation. *Id.*

89 *Id.*, 576 A.2d at 257.

90 *Id.*, 576 A.2d at 256.

91 *Id.*

92 *Id.*

93 *Id.*

sion's ruling that, despite evidence of legal detachment, the eating clubs were "integrally connected" to Princeton.[94] According to the supreme court, because the clubs drew all of their members from the University and assisted Princeton in providing meals to University students, the clubs would have no real existence independent of Princeton.[95] The court, therefore, held that the symbiotic relationship between the clubs and the University transformed the clubs from private to public accommodations and subjected the clubs to the anti-discrimination mandates of the LAD.[96]

Having affirmed the jurisdiction of the Civil Rights Division over the Ivy and Tiger Inn clubs, the supreme court next declared that the clubs' all-male policies were in violation of the LAD.[97] The court commented that, indeed, the clubs admittedly discriminated against women and excluded Frank on that basis.[98] Justice Garibaldi stressed that the elimination of discrimination was of paramount importance to the state of New Jersey and that ridding educational settings of prejudice was "particularly critical."[99] Accordingly, the court ordered the clubs to cease their discriminatory policies and ruled that the clubs could not alternatively separate themselves from the University.[100]

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94 *Id.* The majority observed:

> [T]he Division gave little weight to the Clubs' present financial and legal independence from the University. Neither did it rely heavily on evidence of historical connections between the Clubs and the University. Instead, the Division drew from undisputed facts demonstrating that 'the University and the Clubs are in reality integrally connected.'

Id.

95 *Id.* at 104, 576 A.2d at 257. The court declared that "[i]t would be disingenuous for the Clubs to assert that they could ever exist apart from Princeton University." *Id.*

96 *Id.* Justice Garibaldi went on to analyze the eighteen disputed facts that the clubs argued were relevant to the jurisdictional issue. *Id.* at 105-10, 576 A.2d at 257-60. Basically, the court found each stipulation to be irrelevant either because they concerned whether the clubs were places of public accommodations or dealt with a specific instance of legal separateness and not the general relationship between Princeton and the clubs. *Id.*

97 *Id.* at 111, 576 A.2d at 261.

98 *Id.* Justice Garibaldi remarked: "the Clubs have fiercely contested the threshold issue of jurisdiction because, once jurisdiction is established, there is no question that the Clubs discriminated against women." *Id.*

99 *Id.* at 110-11, 576 A.2d at 260 (citing Dixon v. Rutgers, The State University of New Jersey, 110 N.J. 432, 541 A.2d 1046 (1988); Fuchilla v. Layman, 109 N.J. 319, 537 A.2d 652 (1988); Peper v. Trustees of Princeton University, 77 N.J. 55, 389 A.2d 465 (1978)).

100 *Id.* at 111, 576 A.2d at 261. The court stated: "the Clubs must obey this State's substantive legal proscriptions against discrimination and discontinue their practice of excluding women purely on the basis of gender." *Id.* The issue of what

Justice Clifford, joined by Justice O'Hern, concurred in the court's judgment and agreed that the clubs' relationship with Princeton deprived them of their private status and that, therefore, their exclusionary policies violated the LAD.[101]

By expanding the scope of the LAD's "public accommodation" clause to include those private clubs with links to public entities, the *Frank* case marks a significant departure from prior

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remedy should be imposed was sharply debated at the administrative level. The ALJ, in his initial decision on remedies, recommended that the two eating clubs sever all ties to Princeton in order to become "distinctly private." *Id.* at 96, 576 A.2d at 253. Noting that "the only reason respondent clubs have been held subject to the LAD is their 'symbiotic relationship' with Princeton, the ALJ ruled that it would be "inappropriate, if not unreasonable, to compel the clubs to maintain their symbiotic ties and to retain a status which the law would otherwise not require." Frank v. Ivy Club, No. CRT-5042-85, slip op. at 45 (N.J. Office of Admin. Law, Jan. 28, 1987) (initial decision).

Citing the constitutional freedom of association, the ALJ opined that:

> [U]nder the United States Constitution, if a group of female students, black students, Hispanic students or Jewish students desired to establish an exclusive ("discriminatory") eating club near the campus of Princeton University, they are permitted to do so. Male students have no less a right. Unlike the inhabitants of Orwell's *Animal Farm*, in this country no group is "more equal" than any other.

Id. at 44. The ALJ then agreed with the observation that:

> Students must have the opportunity to leave the university context to exercise that right of privacy, including the right to associate freely with their peers. Simply by virtue of their enrollment in a university, a group of men or women should not forfeit rights of association that they would otherwise enjoy.

Id. at 45 (quoting Note, *Freedom of Association: The Attack on Single-Sex College Social Organizations*, 4 YALE L. & POL'Y REV. 426, 440 (1986)).

In its "Final Administrative Decision and Order," however, the Division refused to adopt the ALJ's recommendation that the clubs be allowed to sever their ties. *Frank*, 120 N.J. at 96, 576 A.2d at 253. In rejecting the ALJ's reasoning, the Division stated that the issue was:

> [N]ot whether the clubs should be *compelled* to remain tied to Princeton but whether the Director should be *ordering* the severance of those ties so that the clubs can continue to discriminate. The clubs could have already severed those ties suggested by the ALJ on their own but have chosen not to do so.

Frank v. Ivy Club, Nos. PL-05-1678, 1679, 1680, slip op. at 12 (N.J. Div. on Civil Rights, May 26, 1987) (findings, determination and order) (emphasis in original). Emphasizing that the LAD was enacted to eliminate discrimination, the Division stressed that "ordering these clubs out of the jurisdiction of the Division would undermine rather than effectuate the purposes of the statute." *Id.* at 14. The Division added that it would be "beyond the scope of this cease and desist order to offer Respondents an advisory opinion as to possible ways by which they might avoid compliance with the LAD." *Id.* at 15.

[101] *Frank*, 120 N.J. at 111-12, 576 A.2d at 261 (Clifford, J., concurring). Justice Clifford stated that he "agree[d] with the Court's ultimate conclusions," but did not explain why the justices refused to join the majority opinion. *See id. See also supra* note 100.

New Jersey civil rights law. The New Jersey Supreme Court applied the state's anti-discrimination mandates to two clubs whose selective membership would have, under prior decisions, placed them within the protection of the LAD's "distinctly private" exemption. The symbiotic relationship forming the basis of the decision, moreover, was recognized by the court despite strong evidence of the clubs' legal separateness from the University.[102]

Furthermore, the remedy imposed by the court forces the clubs to comply with the LAD and admit women even if all of the clubs' ties to the University were severed. In essence, besides affecting all private clubs with public connections, the *Frank* decision appears to completely restrict the ability of college students in New Jersey to form single-sex social organizations. As a result, fraternities, sororities, and other single-sex college social organizations (CSOs) are in a very precarious position under *Frank*.

Despite its far-reaching implications, however, the *Frank* decision left unanswered the question of whether such an application of the LAD violated the constitutionally protected freedom to associate. Justice Garibaldi did not address the club members' freedom of association, most likely because of the inherent reasoning of the court's symbiotic relationship theory: the clubs were subject to the LAD not as individual organizations, but as components of a larger public accommodation University.[103] The freedom of association argument is necessarily triggered, however, by the court's remedy which prevents university students from venturing outside Princeton's jurisdiction to form single sex organizations.[104]

The United States Supreme Court has held that the first amendment implicitly guarantees the freedom of all persons to associate, and the corresponding right not to associate.[105] When determining whether a state civil rights law violates this fundamental right, the Court has divided associational rights into two distinct freedoms: the right of expressive association and the right of intimate association.[106] The Court has defined an organ-

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102 *See supra* notes 17-18 and accompanying text.

103 *See Frank*, 120 N.J. at 102, 576 A.2d at 256. The court in its opinion stated, "it is critical to understand that the Division rejected the theory that the Clubs themselves were places of accommodation." *Id.* The court emphasized that "[j]urisdiction over the Clubs is, essentially, based on jurisdiction over Princeton." *Id.*

104 *See supra* note 100.

105 *See supra* note 45.

106 *See id.*

ization's expressive associational freedoms according to the club's tendency to engage in first amendment protected activities.[107] The right of intimate association, moreover, protects the members of intimate groups, such as families, from state anti-discrimination laws.[108] The Court has classified intimate groups in terms of their size and selectivity.[109]

The application of the LAD to the Princeton eating clubs appears to comport with the current constitutional freedom of association doctrine.[110] The eating clubs, like all CSOs, are organized chiefly for social purposes, and do not engage in the type of first amendment activities that would implicate the right of expressive association.[111] Furthermore, although the clubs are highly selective in choosing new members, the size of their membership does not evince a true intimate relationship.[112] Averaging about 100 members per club,[113] the Princeton eating clubs are not small enough to form the close, family-type bonds between members that are characteristic of an intimate association.[114] Moreover, a claim of intimacy is undermined by the evidence of nonmembers participating in meals and other social activities at the clubs.[115]

To assert a successful freedom of association defense, New Jersey CSOs should limit their membership size. While the United States Supreme Court has not laid down specific numbers,[116] it seems that a CSO with twenty to thirty members would meet the required standard.[117] CSOs could additionally bolster their constitutional arguments by concealing most of their activities and limiting the number of functions to which non-members are invited.

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107 *See id.*

108 *See id.*

109 *See id.*

110 *But see* Note, *Freedom of Association: The Attack on Single-Sex Social Organizations*, 4 YALE L. & POL'Y REV. 426 (1985) (arguing that most CSOs are selective and small enough to fall under the constitutional protection of the freedom of association).

111 *See* Note, *Discrimination on Campus: A Critical Examination of Single-Sex College Social Organizations*, 75 CALIF. L. REV. 2117 (1987).

112 *See id.*

113 *See id.*

114 *See id.*

115 *See id.*

116 Although the Court upheld a state law forbidding discrimination by clubs with over 400 members, *see New York State Club*, 108 S. Ct. 2225 (1988), it has never enunciated the precise number of members needed to successfully assert a freedom of association defense.

117 *See id.*

Alternatively, CSOs on other college campuses may be able to distance themselves from the *Frank* ruling by establishing that they provide housing as well as food. In other words, CSOs with houses can assert that privacy concerns place their organizations within the LAD's exemption for accommodations that are "reasonable restricted exclusively to individuals of one sex."[118] The New Jersey judiciary, however, is not likely to perceive such a claim as meritorious because privacy concerns are readily resolved through private bathrooms and bedrooms.[119] Indeed, privacy concerns on college campuses have already been successfully dealt with in co-ed dormitories.

There is not much likelihood of a CSO successfully defending an LAD claim under a constitutional or privacy argument considering the liberal, expansive interpretation of the LAD that has pervaded New Jersey civil rights law.[120] While representing a departure from the prior decisional emphasis on selectivity, the *Frank* court nonetheless continued the New Jersey Supreme Court's trend of interpreting the LAD in a manner which best effects its remedial purposes.[121] The New Jersey legislature has declared war on discrimination through the enactment of the LAD and the courts have construed that statute to fulfill this mandate.[122] Accordingly, the courts emphasize the substance of this policy over the form that some organizations may take.[123]

In light of the menacing and ever-seemingly intractable problem of invidious discrimination, such an interpretation of the LAD is generally praiseworthy. Far from being frivolous or trivial, an all-male club can be the situs of professional contact and business deals. Overall, the economic decision making associated with private clubs can translate into employment and monetary opportunities for men, while perpetuating economic disadvantages for women.[124]

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118 *See supra* notes 56-59 and accompanying text.

119 *See id. See also* Note, *supra* note 111, at 2123 n.31.

120 *See* Note, *Preferential Quota on Hiring and Promotion Held to be an Unconstitutional Remedy for Past Discriminatory Employment Practices in New Jersey* , 8 SETON HALL L. REV. 539, 546 (1977) (a "broad spectrum of remedial action pursuant to the LAD has been approved by the supreme court, which traditionally has given the act an interpretation which would best implement its underlying policy").

121 *Id.*

122 *See supra* notes 96-97 and accompanying text.

123 *See supra* notes 80-81 and accompanying text.

124 *See* Rogers, *The Private Clubs Problem: Getting in the Front Door*, 4 GEO. J. LEGAL ETHICS 129 (1990). Rogers argues: "[d]iscriminatory clubs convey the message that certain groups of people are *per se* not worthy of the full benefits of profes-

The *Frank* decision, however, extends much further than simply forcing open the doors of an all-male business club. Unlike the traditional all-male club, CSOs are essentially social clubs and are generally not the location of business contacts and deal making.[125] Fraternities, sororities, and other CSOs organize for the congeniality and relaxed atmosphere that result from association with one's own gender.[126] The exclusion of students from social organizations does not, by itself, translate into missed opportunities for advancement.[127] On the contrary, persons barred from gregarious CSO activities may benefit from better grade point averages and academic pursuits.

Because the integration of CSOs lacks a tangible economic justification, unlike business clubs, it is possible that the New Jersey legislature will overturn *Frank* by creating a specific LAD exemption for single-sex CSOs. Indeed, the United States Congress has already done so, excluding CSOs from federal civil rights laws that prohibit gender discrimination.[128] A primary reason for this action was the congressional belief that CSOs do not pose serious obstacles to economic advancement.[129]

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sional and financial achievement and, in fact, should be prevented from attaining them." *Id.* A New York Times article observed:

> In theory, private clubs may be extensions of a person's home, and therefore thoroughly private places. But in practice . . . they are often extensions of the marketplace and world of affairs. The current effort in many places to strike down barriers against . . . women and others is not just an effort by once excluded groups to find new company where they aren't wanted. It is an effort to throw open the meeting grounds of business and politics, and to eliminate, once and for all, barriers that are unquestionably rooted in discrimination.

Id. at 133 (quoting N.Y. Times, June 3, 1980, at A18, col. 1). *See also* Note, *Prying Open the Clubhouse Door*, 68 WASH. U.L.Q. 371, 373 (1990) ("exclusion of women from business-oriented clubs impedes women from gaining equal opportunities in commercial and community activities").

125 *See* Note, *supra* note 110, at 442-43 (contending that there is much less opportunity making business contacts at CSOs than at professional clubs). *But see* Note, *supra* note 111, at 2119-21 (claiming that "through their alumni associations and general reputations, CSOs are an important link in the business contact networks of many young professionals").

126 *See* Note, *supra* note 110, at 436-37.

127 *See id.* at 442-43.

128 20 U.S.C. § 1681(a)(6) (1978) (providing exemption for CSOs from Title IX of the Civil Rights Act which prohibits sex-based discrimination in federally funded educational institutions).

129 *See* Note, *supra* note 110, at 442-43, noting:

> Congress felt that college social organizations do little, if anything to perpetuate discrimination against women — a charge that often is leveled against private clubs that serve exclusively businessmen and other professionals. Senator Bayh emphasized that his exemption

If New Jersey chooses not to amend the LAD so as to exempt the discriminatory practices of CSOs, the *Frank* decision could lay the groundwork for the eventual proscription of all single-sex CSOs, although integration of social organizations will not provide any clear economic advantages for women. It can be argued that such a result unnecessarily tramples upon the associational rights of the individual. For if civil rights laws like the LAD have thus struck a delicate balance between society's interest in crushing invidious discrimination and the individual's freedom to selectively associate, the lack of an economic gain by the protected group would seem to make society's interest less compelling. In other words, the integration of social organizations for the sake of integration alone is arguably outweighed by the individual's rights of privacy and association. Indeed, if separate experiences have any place whatsoever in an equal society, it is in the realm of the purely social setting, where sexual segregation can further comraderie, community, and other important societal values traditionally imparted by CSOs, without causing any more than a *de minimis* economic effect.[130]

Even though no immediate economic advantage is invoked, however, sexual integration at campus social clubs may enhance opportunities for women simply by removing the damaging perceptions of inferiority that accompany any type of exclusion.[131] Moreover, integration of CSOs could provide enormous sociological benefits to society by improving understanding and enriching relationships between men and women, and by excising the harmful stereotypes and ignorance about sexual differences which can be ingrained in the minds of young men at impressionable ages.[132] Such achievements are inexorably linked to the basic objectives of civil rights. Thus, while cloaked in an image of innocence and triviality, the admission practices of CSOs may

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> 'covers only social . . . organizations; it does not apply to professional fraternities or societies whose admissions practices might have a discriminatory effect upon the future career opportunities of a woman.'

Id. (quoting 120 CONG. REC. 39993 (1974)(statement of Sen. Bayh)). Senator Bayh also stressed: "[f]raternities and sororities have a tradition in the country for over 200 years. Greek organizations, much like the single-sex college, must not be destroyed in a misdirected effort to apply Title IX." *Id.* (quoting 120 CONG. REC. 39993 (1974)(statement of Sen. Bayh)).

130 *See* Note, *supra* note 110, at 444 ("the existence of over 9000 single-sex CSOs in the United States shows that many persons value the tradition, comraderie, relaxed atmosphere, and other aspects of a single-sex environment").

131 *See* Note, *supra* note 111.

132 *Id.*

constitute subtle pockets of invidious discrimination that ought to be fair game for civil rights laws. Furthermore, as long as the first amendment provides a check on civil rights statutes through the freedom of association, and in the absence of a strong federal public accommodations law,[133] it is commendable that states like New Jersey vigorously push the enforcement of their own laws to the constitutional limit.

At a time when many civil rights goals have been met, and there is much dispute over what remains to be accomplished, the *Frank* decision raises fundamental questions about the nature and purposes of this nation's anti-discrimination laws. While bringing to an end an eleven-year battle between Frank and the eating clubs, the *Frank* decision is perhaps just the beginning of a debate about how far society should go to eliminate discrimination.

Randall J. Peach

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[133] *See supra* note 44. The federal accommodations statute does not include gender as a prohibited form of discrimination. *Id.*