



VOLUME XI

PUBLIC ACCOMMODATIONS:

HISTORICAL RECORD OF MINORITY  
AND WOMEN-OWNED BUSINESS  
ENTERPRISES  
IN  
PUBLIC AND PRIVATE CONTRACTING IN  
NEW JERSEY

A Report Submitted to  
NJ TRANSIT  
and the  
Governor's Study Commission on Discrimination in  
Public Works Procurement and Construction Contracts

by  
The Afro-American Studies Program  
University of Maryland at College Park

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## **PUBLIC ACCOMMODATIONS<sup>1</sup>**

### **EXECUTIVE SUMMARY PUBLIC ACCOMMODATIONS**

Membership in various New Jersey clubs offer significant business and career enhancing benefits. In addition to the status membership conveys, active membership provides access to personal and business contacts through which invaluable networks function. Membership also affords a forum for self and business promotion wherein one's reputation and a firm's good is established.

While business, commercial and career enhancing advantages of clubs are difficult to quantify, these benefits have been identified by the United States Supreme Court, regardless of whether they are incidental to the club's stated objectives. Likewise, commercial benefits are acknowledged to be a major incentive of membership in certain clubs. In order to identify those specific New Jersey clubs which offer such benefits, and to quantify which benefits are offered, researchers must rely on club members' and/or officers' cooperation. This methodology becomes problematic when the members have a vested interest in perpetuating exclusion.

Discrimination by certain New Jersey club members against women and minorities is common. Whereas some clubs blatantly exclude women members, more often discrimination is more subtle. Some clubs, with no female or minority members, claim they do not exclude such members, however nor do they invite or encourage membership among women or minorities. Several clubs limit membership to a token representation of women or minorities. Women and/or minority members of such clubs complain of having reached a sort of "glass ceiling" wherein the quality of membership is limited. Women and minorities are distinctly absent from office holding or policy making positions. Regardless of policy or actual practice, the predominantly white male clubs do not adequately meet the special needs of women and minorities.

Club practices of overt and subtle discrimination, combined with the failure to represent female and minority interests have resulted in increased formation of and participation in all-female and all-minority club counterparts. Although these clubs enjoy strong memberships, they have not been able to duplicate the status of contacts and networking of their majority counterparts.

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<sup>1</sup> The New Jersey Law Against Discrimination, N.J.S.A. section 10:5-1, et. seq. (hereinafter "LAD") prohibits discrimination in places of public accommodation. Current issues involve determination of whether a club is "private" and therefore excluded from LAD.

Past exclusion of women and minorities in the majority clubs has placed them at a disadvantage in competing against mostly white, male members for state contracts. Continuing exclusion and discriminatory memberships exacerbates the obstacles and perpetuates the disadvantages. The result is a significant disparity in success of women and minority businesses. This disparity is evidenced in the under representation in the pool of qualified bidders and those contractors awarded the more lucrative prime contracts.

Due to the fact that many clubs have been protected in effectuating their discriminatory practices by the constitutional right to freedom of association, the state's role is limited. However, several states have found innovative methods to discourage this discrimination and New Jersey has been inactive in this area.

According to the U.S. Supreme Court, the state's interest in providing equal access to commercial opportunities exceeds its interest in seeking equal access to other intangible benefits. State action in enforcing laws against discrimination has been proven to be an effective incentive for clubs to change their exclusionary practices and as such, the state must assume a more aggressive role against offending clubs via legislation, regulatory authority and litigation.

## INTRODUCTION

This paper explores the role and value of various human associations (hereinafter, "clubs") in providing business, professional and commercial opportunities. The paper focuses on those clubs which impact most upon business, professional and commercial development. The impact of membership in such clubs will be analyzed in terms of the specific benefits and advantages offered. The nature of the relationships between minorities and women vis-a-vis such clubs throughout New Jersey will be discussed and in conclusion, the ramifications of this relationship as it is found to exist today will be summarized in terms of its affect on women and minority-owned businesses in New Jersey.

### I. Commercial Activities of Clubs

Justice O'Connor characterizes the states' interest in eradicating discrimination by club's as a "profoundly important goal". Further, she equates access to certain club memberships with "access to commercial opportunities ....in our society" thereby acknowledging the commercial value of membership in certain clubs.<sup>2</sup>

A principal purpose for the proliferation of many "private" clubs is evidenced by the exceptional amount of commercial activity occurring within their confines.

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<sup>2</sup> Roberts v. United States Jaycees, 468 U.S. 609 (1984), O'Connor concurring.

Business deals and political opportunities are frequently consummated within the confines of all-male clubs.<sup>3</sup>

According to Supreme Court Justice Sandra Day O'Connor, the effect of denying women access to the goods, services, privileges and advantages associated with club membership, "perpetuates barriers to economic advancement which have historically plagued women to society's detriment."<sup>4</sup>

Although referring to the exclusion of women from the Jaycees, Justice O'Connor's comment is equally applicable to minorities in that it was not too long ago that racially segregated clubs were the norm.<sup>5</sup>

Regarding access to commercial opportunities, the Supreme Court has found, "...[t]he interest in providing equal access to commercial opportunities is much greater than that in providing equal access to other types of advantages or intangible benefits."<sup>6</sup> The court also noted, "The harm resulting from exclusion from commercial opportunities and publicly available goods and services is objective and quantifiable. The impositions of anti-discrimination legislation are therefore easier for

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<sup>3</sup> For example, Nixon's change in his presidential strategy came about after a discussion with fellow club member Ronald Reagan at the prestigious Bohemian Club in San Francisco. G. Will, *Nixon Agnosties* 256 (1970) cited in Rhode, Private Clubs and Public Values, 22 *Stan. L. Rev.* 15, 15-16 (1987).

<sup>4</sup> Roberts v. U.S. Jaycees, 104 S.Ct. 3244, (1984).

<sup>5</sup> One respected author characterized widespread racial and religious discrimination in private social clubs in 1952 as, common knowledge, claiming, "American lodges and secret societies in the North, (including New Jersey) rarely, if ever, include Negroes." This is also true of most social clubs, particularly and obviously those that have to do with helping to maintain the status of the white elite." W. Warner, Structure of American Life, 22 (1952).

<sup>6</sup> New York Club Association v. City of New York, 4876 U.S. 1 (1980).

all citizens to understand and accept. Moreover, the harm of exclusion from commercial life is more severe. Access to the markets for jobs, goods and services provides the means to achieve self-sufficiency and economic success. Finally, an anti-discrimination norm in the public markets enhances the overall health and efficiency of the national economy."<sup>7</sup>

## II. Types of Business and Career Enhancing Clubs in New Jersey

### A. Clubs<sup>8</sup>

Notwithstanding the fact that there are an overwhelming number of private clubs within the state of New Jersey, categorization according to a club's objectives and constituency simplifies an analysis of the various career enhancing attributes. The variation among clubs' objectives in New Jersey is tremendous: business and trade; professional; social; fraternal; ethnic; civic; social service; political; religious; labor; athletic; recreational; veterans and military; youth.

### B. The Status of Membership

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<sup>7</sup> Id.

<sup>8</sup> A working definition of an "association" according to Black's Law Dictionary is, "The act of a number of persons in uniting together for some special purpose or business. It is a term of vague meaning used to indicate a collection or organization of persons who have joined together for a certain or common object." One court has defined a "private club" as one which customarily consists of individuals who, through committee action or membership action or both, approve and select membership." Bradshaw v. Whigam, 2 Race Rel. L. Rep. 934, 936 (S.D.Fla. 1966).

The propensity of Americans to form and join a variety of "voluntary social associations" has been noted by various researchers.<sup>9</sup> These experts conclude that aside from membership in clubs being a social norm, memberships are often indicative of status.

A well established principle of sociology is that people tend to associate with like kinds for purposes of self-preservation and perpetuation.<sup>10</sup> In addition to club activities, club members tend to associate with other club members. Outsiders, (i.e., women and minorities) are by definition those excluded. Often those excluded form and join clubs of their own however even though these minority clubs are commercially important, they do not share the same status nor do they duplicate the contacts known to exist in exclusionary clubs.

Since the value of club memberships varies according to the "type of club" involved and its constituency, each of these factors will be looked at in order to analyze business benefits. A description of a club's members is also probative of a club's benefits as personal contacts, (i.e., "who you know") provide a multitude of business, commercial and professional advantages.<sup>11</sup>

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<sup>9</sup> "Nothing could be more natural to an American than to join an association in the pursuit of interests shared by others..." W. Warner, *The Emergent American Society* 276 (1967). See also, Shelsinger, *Biography of a Nation of Joiners*, 50 *Am. Hist. Rev.* 1 (1944).

<sup>10</sup> T. Parsons, "Conflicts of Power in Modern Culture--A Symposium," 45 (L. Bryson, L. Finkelstein & R. Maciver 1947). Other social scientists have established that social status is usually positively associated with group membership. See, e.g., R. Presthus, "Men at The Top--A Study in Community Power 246 (1964); W. Warner, "American Life 229 (1952).

<sup>11</sup> How membership is obtained may be probative of whether a club's policies and practices are covered by LAD.

### III. Problems In Assessing Business Attributes of Clubs

#### A. Stated Objective Compared to Actual Practice

It is important to note that a club's stated purpose is not always consistent with the club's actual practice. As such, both policy and practices will be considered.

This paper focuses on those New Jersey clubs known or believed to: (1) provide its members with business, commercial and professional benefits/advantages and opportunities; and (2) have excluded women and/or minorities.

Although the club's own self-described charter would seem to be a good indicator of what the intended advantages of membership will be, in fact the typical membership activities of many clubs differ significantly from those enumerated in the club's original charter.

In determining the commercial characteristics of an association, courts requires that the club's actual activities must be examined in addition to those activities the club admits to conducting.<sup>12</sup>

Rotary Club of Duarte v. Board of Directors<sup>13</sup> demonstrates the significant differences between the club's manual of procedure and the actual membership activities.<sup>14</sup>

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<sup>12</sup> Roberts v. U.S. Jaycees, 104 S.C. 3244 (1984), O'Connor concurring.

<sup>13</sup> 178 Cal. App.3d 1035; 224 Cal. Rptr. 213 (March 1986).

<sup>14</sup> While the membership directory purports to proscribe the use by a Rotarian of the official directory for commercial reasons, part of the official directory used on a daily basis "is a hotel directory carrying the advertising cards of a partial list of hotels which are owned or operated by Rotarians or which are meeting places or headquarters of Rotary clubs", Id. at 1055.

There are substantial business benefits to be gained by belonging to an organization such as Rotary which is comprised of community business and professional leaders, regardless of whether these benefits are "incidental to the principal purposes of the association".<sup>15</sup>

The history of the Rotary Organization makes it clear that the primary purpose for the formation of the Rotary movement was commercial advantage.<sup>16</sup> Thus, the Rotary originated many years ago from self-seeking "commercial purposes." However, the International's current official policy "specifically prohibits any attempt to use the privilege of membership for commercial advantage."<sup>17</sup> Regarding this inconsistency, the court concluded that, despite the mere fact that the use of Rotary membership for commercial purposes is proscribed in a written policy statement promulgated by the Board does not mean that commercial advantages and business benefits have in actuality ceased to flow from Rotary membership or that they are not significant motivating factors in joining local clubs. In fact, the value and import of the written policy, or member's assertions can only be ascertained by measuring

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<sup>15</sup> The court found the club's objectives are to promote fellowship for non-commercial and non-economic objectives and to secure the voluntary uncompensated participation of business and professional men" in services and activities performed on a local, national and international level. Id. at 1055 (7a).

<sup>16</sup> Volume 1 of the Rotary Basic Library, Focus on Rotary, p.5. From a discussion held among four men "came the idea of a men's club whose membership would be limited to one representative from each business and profession." Weekly meetings were to be held at each member's place of business in turn. The rotation of meetings was designed to acquaint the members with one another's vocations and to promote business. The earliest meetings of the Rotarians were held in the manner of good fellowship, and they were designed to produce increased business for each member." The men who joined were "motivated primarily by the business they expected to receive from other club members". Id. at p.2.

<sup>17</sup> 1 Rotary Basic Library, Focus on Rotary, p.2.

compliance with the proscription.<sup>18</sup> The evidence established that memberships in local clubs had a relation to business and that there was no doubt that business concerns are a motivating factor in joining the local clubs. Business opportunities are both enjoyed and capitalized upon, in addition to the club's numerous and commendable charitable services.<sup>19</sup>

#### B. Problems in Accurately Ascertaining Benefits

Since many business, commercial and professional benefits of membership are ancillary to a club's acknowledged attributes, they are also more difficult to identify and quantify without member cooperation. In short, information which is necessary to determine the extent of ancillary benefits remains within exclusive possession of the clubs' members. It is only to the extent that members are willing to cooperate

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<sup>18</sup> Id. at 1056.

<sup>19</sup> Among the evidence considered was: The president of Duarte's local club, also an assistant school superintendent, testified that he joined Duarte because all of the superintendents he knows belong to Rotary clubs and had benefitted by becoming acquainted with business and industrial leaders in the community. He pays for his dues personally and then deducts them as a business expense on his income tax forms. Despite having been audited, the Rotary deduction was allowed. Another member, a City Manager of Duarte, testified that he felt membership would provide him with professional opportunities to meet with the business communities of both of the city of Duarte and the adjacent areas. He believed his membership would help the city in its push for economic development and that prior city managers belonged to local Rotaries (the city paid his membership fees.) Another member, also an office holder of International, testified that it was a condition of his employment in International that he be a member of a Rotary club. Yet another member, a president of California State College, believed that Rotary membership was essential for a college president to raise funds. All members of his cabinet were members and were encouraged to join as part of their employment. This member, also a former treasurer of an adjacent Rotary, estimated that of 200 members, only 8 or 10 paid dues personally; the others were paid by their companies or businesses (approximately 95%). Rotary Club of Duarte v. Board of Directors 178 Cal. App.3d 1035; 224 Cal. Rptr. 213 (March 1986) 1057.

with sincerity that this information can be obtained. Such cooperation becomes doubtful when the "club's" interest in self-preservation is threatened by litigation and legislation aimed at eradicating discrimination among membership selection. For instance, one of New Jersey's federal circuit cases, Contractors Association of Eastern Pennsylvania, et. al., v. City of Philadelphia,<sup>20</sup> challenges the City of Philadelphia's MBE program (including set-aside contracts). The case was initiated by the Contractors' Association (of Eastern Pennsylvania) among other associations. The Third Circuit vacated the district court's order granting summary judgment for plaintiffs based on the actions of the intervening defendant, United Minority Enterprise Associates. The United Minority Enterprise Associates claimed it had not been afforded an opportunity to conduct discovery of the plaintiffs (an association of predominately majority owned contractors). It was hoped that discovery would yield information regarding "past and current practices and/or instances of discrimination by plaintiffs and their members in both the public and private construction industries..."<sup>21</sup> The court remanded the case to allow the defendants to seek this information from the plaintiffs along with requests for the production of additional documents.<sup>22</sup> Such evidence of past discrimination could preclude summary judgment (if the City Council's purpose in creating the various set-asides was to

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<sup>20</sup> ( \_\_\_ F.2d \_\_\_, 1991 WL 190731 (3d Cir. 1991)

<sup>21</sup> Id. at 6-7.

<sup>22</sup> Id. at 6.

remedy such discrimination.) The case illustrates the tension between contracting associations regarding the issue of set-aside contracts.

### C. Ancillary, Incidental Benefits

The National Club Association, the industry lobby group, has taken the position that its member clubs are in no way business related.<sup>23</sup> Despite the requirement that member clubs be "private", many of its member clubs have their fees characterized as business deduction expenses. The National Club Association's position is manifested in efforts to exempt its clubs from various public accommodations statutes.

Although the Supreme Court has found that certain clubs are essentially marketplaces for the promotion of business,<sup>24</sup> many private club members defend such clubs as purely social entities. Their argument continues that, to the extent political and commercial activity exists within the club's confines, it is unplanned and inconsequential.<sup>25</sup> Although such benefits may be unintended, they exist only for those fortunate enough to be members of such clubs.

## IV. Business and Professional Attributes of Membership

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<sup>23</sup> See, Elliot & Susco, Challenging the All-Male Private Clubs, Working Woman, April, 1981 at 24. (The National Club Association will not provide non-members with a list of its club members).

<sup>24</sup> New York Club Ass'n v. City of New York, supra.

<sup>25</sup> See, J. van der Zee, The Greatest Men's Party on Earth: Inside the Bohemian Grove, note 240 at 95-96 (1974).

Legislation to ensure equal opportunity in education and the work place, has resulted in some advances by minorities and women in education and training, However, when it comes to achieving success in business and managerial, supervisory and executive positions in employment, minorities and women have reached a "glass ceiling"<sup>26</sup> wherein they are severely under represented in the upper echelons of business, corporate and government, relative to their population in the state.<sup>27</sup>

Business, commercial and professional success are requisite to contract procurement and bidding in New Jersey. Many of the attributes of successful business persons, professionals and entrepreneurs are either fostered or made available through active memberships in certain types of New Jersey clubs.<sup>28</sup>

Limited access to the "entrenched old boy networks" of the state's many clubs has been found to be among the barriers which prevent minorities and women from pursuing self-employment.<sup>29</sup> The disparity in representation in the larger and more capital intensive businesses results in under representation of minorities and women in state contracting.

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<sup>26</sup> Julia Lawlor, "Labor Department Shrugs Off 'Glass Ceiling' Study", The USA Today, August 9, p.1B.

<sup>27</sup> U.S. Department of Labor Statistics, Bureau of Labor Statistics.

<sup>28</sup> Bates, Dr. Timothy, "Availability, Utilization, and Disparity: An Analysis of New Jersey Procurement Data in Light of Minority and Women-Owned Business Availability," Graduate School of Management and Urban Policy, New School for Social Research, January 1992.

<sup>29</sup> Bates, Dr. Timothy, "Discrimination and the Capacity of New Jersey Area Minority and Women-Owned Businesses," Graduate School of Management and Urban Policy, New School for Social Research, August 1991.

Minorities and women in New Jersey are under represented in the larger, more lucrative and capital intensive businesses; in the pool of qualified bidders; and in the actual procurement of sub and prime contracts with the state.<sup>30</sup>

#### A. Career-Enhancing Attributes of Membership

Membership in certain types of clubs, (i.e., traditionally private, white men's clubs) can be essential to professional achievement.

A business and/or career enhancing benefit is one which may advance the business and/or career interests of the entrepreneur or employee. Such career enhancing benefits include: access to contacts and meetings with members of the entrepreneur's business or the employee's profession; participating in activities which provide information on business related or professional fields; attending lectures on the employee's profession or on local business or the economy or participating in activities designed to improve the business or career opportunities of the employee (such as use of job banks, directories, libraries, participation in job seminars, and other job resources).<sup>31</sup>

##### 1. Membership as a Factor In Promotion

Social credentials such as memberships in certain clubs are common substitutes for ability measures in management positions. One university research team identified

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<sup>30</sup> Id. and U.S. Dept. of Labor Statistics, supra.

<sup>31</sup> Office of Federal Contract Compliance Programs, 41 C.F.R. Section 60.1-11 (1981), appearing in re: 11 C.F.R. Part 60-1: Payment of Membership Fees and Other Expenses to Private Organizations.

a number of forms of "non ability" traits and social credentials that were important in executive selection in certain firms: having the right social background; living in a good section of town; belonging to the right club or lodge; being white; graduating from a high-prestige college; being native-born and so forth.<sup>32</sup>

There is ample evidence from organizational studies to prove that leaders in a variety of situations are more likely to show preference for socially similar subordinates, including those with similar club memberships, and help them get ahead.<sup>33</sup>

Clark Kerr and his colleagues agree: "Incumbents in the managerial hierarchy seek as new recruits those they can rely upon and trust. They demand that the newcomers be loyal, that they accept authority, and that they conform to a prescribed pattern of behavior".<sup>34</sup>

The OFCCP<sup>35</sup> found that contractors pay membership fees to further the interests of business or to provide benefits to employees and that both types of actions have employment effects. The interests of the business may be furthered by the use of a club or organization in activities such as the following:

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<sup>32</sup> Quinn, R., Kahn, R., Taylor, J. and Gordon, L., "The Chosen Few: A Study of Discrimination in Executive Selection," (Ann Arbor: Survey Research Center, 1968).

<sup>33</sup> Kanter, R. "Men, Women, and the Corporation" (New York: Basic Books, 1977), p. 48.

<sup>34</sup> Kerr, C., Dunlop, F., and Myers, C. Industrialism and Industrial Man (Cambridge: Mass: Harvard University Press, 1960).

<sup>35</sup> Office of Federal Contract Compliance Programs, supra.

1. Use of a club to confer with, transact business with or to entertain clients;
2. Use of a club to hold business meetings and company functions;
3. Use of the social activities of an organization to establish and maintain contacts on behalf of the contractor;
4. Participation in activities of the organization to enhance the goodwill of the employer within the community.<sup>36</sup>

Contacts, networking, exposure and business opportunity information are especially valuable to new businesses or professionals seeking opportunities and/or advancement in new areas. Women and minorities are more likely to be among first generation business people and professionals<sup>37</sup> who otherwise do not have access to resources through family and friends from whom they can learn about new business and professional opportunities. Active membership in certain clubs provides such resources in addition to the forums in which to display one's talents (or to advertise one's business). Membership also affords a network through which to keep abreast of current and developing political and business ventures/opportunities. For these reasons, club memberships are that much more valuable to first generation minorities and women entrepreneurs/professionals, especially in smaller communities, with fewer minority and women representatives. The affect of club membership in business, commercial and professional achievement has been well documented.<sup>38</sup>

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<sup>36</sup> 46 Federal Register No. 11, Friday January 16, 1981, 3892 at 3893.

<sup>37</sup> Refer Bates, infra.

<sup>38</sup> J. Slawson & L. Bloomgarden, The Unequal Treatment of Equals, (1965) at 22 and Rabinove, Private Clubs Under Siege, Perspectives, Fall 1980-Winter 1981.

"At the upper levels of the administrative pyramid, when the opportunities for promotion are drastically reduced, managerial capability loses some of its significance as a distinguishing element in selection."<sup>39</sup>

Studies indicate that membership in the right social club may be crucial to promotion.<sup>40</sup>

"[T]oday, and especially in the years since the end of the Second World War, membership in one or two of the leading men's clubs, which lie at the center of commercial power in most large cities in the nation, has become a tacit prerequisite for promotion to the top positions in the executive suites of our large national corporations."<sup>41</sup>

One study concludes that the ability to belong to a club may control access to job promotion, although most executives will claim publicly to rely solely on managerial capability in promotion policies.<sup>42</sup>

## 2. Elite discussion

There is considerable evidence of a correlation between exceptional financial success in the United States and membership in certain institutions, day and prep

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<sup>39</sup> Powell, Elements of Executive Promotion, Cal Mgr. Rev., Winter, 1963, at 85.

<sup>40</sup> Id. at 85-86. See also, Bowman, What Helps or Harms Promotability?, Harvard Bus. Rev., Jan-Feb. 1964 at 6, 16-18.

<sup>41</sup> E. Baltzell, The Protestant Establishment, 362 (1964). (Non membership means not only the loss of contacts but also the exclusion from daily business meetings held at the clubs.) Id. at 367.

<sup>42</sup> See, e.g., Who Do You Promote? Dun's Review and Modern Industry, May, 1964 at 50.

schools, colleges, fraternities, graduate schools, firms, neighborhoods, and social clubs.

Demonstrating the social cohesiveness of the American ruling class, sociologist G. William Domhoff has presented evidence of interregional private school attendance, overlapping club memberships, and interlocking corporate directorships.<sup>43</sup> Although Domhoff focuses on national elites, group stratification is a consequence of social gathering, occurring on every level, both local and regional. The same analysis of elitism pertains to communities throughout the state as each community has its "right clubs" and social registers. Elitism is manifested by the presence of a stratum of private social and service clubs such as the Elks, Jaycees, Kiwanis, etc.

"Few would deny that there exists in the United States a definable upper class comprised of those who are listed in the Social Register, who attended certain private preparatory schools, who belong to exclusive gentlemen's clubs, who have inherited wealth, and who maintain a professional station."<sup>44</sup>

During the three decades ending in 1969, the richest one-half of one percent of the national population held twenty-two percent of the personal wealth.<sup>45</sup>

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<sup>43</sup> In a study of the number of overlapping members among six social clubs and three policy-planning groups in America, the authors found that the six major social clubs in America and the three policy-planning groups share interlocking members to such a degree that "the dominant portions of the American business community [interlock] into a social and communication network." G. Domhoff, *The Powers That Be: Processes of Ruling Class Domination in America*, (1978), p. 105.

<sup>44</sup> G. Domhoff, *The Powers That Be: Processes of Ruling-Class Domination in America*, *supra*.

<sup>45</sup> Turner, J. and Staines, C. "Inequality: Privilege and Poverty in America, 38, 1976.

This national upper class has been said to control the major banks and corporations, which dominate the American economy, as well as the foundations, the elite universities, the mass media, and virtually all levels and branches of government.<sup>46</sup>

"The final door to professional advancement remains closed to many because they are denied membership in the most prestigious "social" clubs, either explicitly in club bylaws or implicitly by custom and practice."<sup>47</sup>

A five year study based on confidential informants, interviews and questionnaires shows that social clubs are important business and policy-forming environments of the upper class. According to sociologist Reed Powell, "the clubs are a repository of the values held by the upper-level prestige groups in the community and are a means by which the values are transferred to the business environment."<sup>48</sup>

Social psychology research identifies the internal and external social forces which affect group functioning such as those which typically occur in private clubs

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<sup>46</sup> See G. Domhoff, "Who Rules America," p. 12-37, 1967. Domhoff also demonstrates that the ruling class comprises one percent of the total population, owns 30 percent of the privately held wealth in America, 70 percent of the corporate wealth and direct and dominate the country's largest corporations and dominate the federal government. Domhoff, G. "The Bohemian Grove and Other Retreats", Harper and Row, New York 1974, p 82.

<sup>47</sup> Burns, *ibid.*, p. 323.

<sup>48</sup> Powell, R. "Race Religion, and Promotion of the American Executive," (College of Administrative Science Monograph, No. AA-3, Ohio State University, 1969), p.50.

throughout the state. This research regarding group cohesiveness<sup>49</sup> suggests the following:

- (1) Physical proximity is likely to lead to group solidarity. Thus, as Domhoff asserts, "the mere fact that these men gather together in such intimate physical settings implies that a cohesiveness will develop.
- (2) The more people interact, the more they will like each other.
- (3) Groups seen as high in status are more cohesive. Members are likely to think of themselves as "special people; which heightens their attractiveness to each other.
- 4) The best atmosphere for increasing group cohesiveness is one that is relaxed and cooperative.

Thus, basic group dynamics theory and studies of group behavior indicate that the characteristics of exclusive associations (e.g., clubs) contribute to an environment of social and economic empowerment of elites and the consequent disenfranchisement of the non-elites.

The process is doubly insidious because the very process also perpetuates a belief of entitlement. As organizational psychologist Rosabeth Kanter says, "keeping leadership positions in the hands of people like oneself provides a kind of reinforcement for the belief that people like oneself actually deserve such authority."<sup>50</sup> It is important to appreciate the fact that the self-defined status of elites cannot function without the effectuation of exclusion.

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<sup>49</sup> Cartwright, D and Zander, A. *Group Dynamics* (New York: Harper and Row, 1960), pp. 74-82. Lott A.J. and Lott, B.E. "Group Cohesiveness and Interpersonal Attraction", *Psychological Bulletin*, 64, 1965, pp. 259-309. Argyle, M. *Social Interaction*, (Chicago: Aldine Publishing Company, 1969), pp.220-23.

<sup>50</sup> Kanter, R. "Men, Women, and the Corporation", p.48.

Kanter provides an historical analysis of the emergence of a class of elite managers who protected the elite owners of America's first corporations at the turn of the century. In these kinds of closed inner circles of powerful business leaders, trust is shared and limited to those sharing similar backgrounds.

The social homogeneity of big business leaders from the early to middle twentieth century has been noted by C. Wright Mills. Their class backgrounds and social characteristics tended to be similar: largely white, Protestant men from elite schools.<sup>51</sup> This reliance on men of similar social background through a process of "homosocial reproduction" confines elites to a closed circle of homogeneous peers. Wilbert Moore coined the term "bureaucratic kinship system" to describe the corporate system based on homosocial reproduction, in which men reproduce themselves in their own image.<sup>52</sup> These networks in turn create broad private "social trusts."

Elites tend to "carefully guard power and privilege for those who fit in, for those they see as 'their kind.'"<sup>53</sup> Power sets into motion a process in which elites reproduce themselves in kind as a means of developing trust. Inner circles are tightened, excluding social strangers to keep control in the hands of socially homogeneous peers; to stress conformity and insist upon a diffuse, unbounded

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<sup>51</sup> Kanter, *ibid.*, p. 54.

<sup>52</sup> Moore, W. *The Conduct of the Corporation* (New York: Random House, 1962), p. 109.

<sup>53</sup> Kanter, *ibid.*, p. 48.

loyalty; and to strengthen social certainty over the strains of people who are 'different.'<sup>54</sup>

This process of inclusive self-perpetuation obviously extends not only within the business organization but between organizations. Executives within business organizations seek out homosocial networks of men like themselves to contract with for goods and services. This behavior is customary within the environment of private clubs at great cost to nonmembers, e.g., women and minorities.

### 3. The Value of Personal Contacts

The Bureau of Labor Statistics revealed that almost one-third of males get their jobs through personal contacts and that this figure increases with higher level positions.<sup>55</sup> Certain clubs strive to create an atmosphere which cultivates business deals and contacts.<sup>56</sup>

The business and career enhancing role of private clubs is described as:

"[providing] men with knowledgeable allies who help them to advance in their careers, to quickly learn who the cast of characters is and how to behave in a new position, and to get the earliest news of job openings, business opportunities and grants to be awarded."<sup>57</sup>

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<sup>54</sup> Kanter, *ibid*, p. 49.

<sup>55</sup> See, Job Seeking Methods Used by American Workers, Bull. No. 1886, Table III, U.S. Bureau of Labor Statistics, Dept. of Labor (1982).

<sup>56</sup> See, Rhode, *supra*.

<sup>57</sup> Brief Amicus Curiae of the Minnesota Chapter, Nat'l Org. for Women at 21-222, United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981) (No. 51171).

Additional advantages are gained in learning the names of important contacts regarding these projects. The ability to form relationships with such persons is greatly enhanced if such persons happen to be members. The benefits of establishing relationships with successful business persons and members in the community who are cognizant of upcoming projects and contracts is particularly valuable to women and minorities. In addition to the loyalty inherent within club memberships, networking is an essential tool to success in business.

A large part of the benefits of membership are in the form of personal contacts and are thereby dependent upon one's ability to interact socially. Being a member of a group to whom membership was not even offered puts one at a serious disadvantage in one's ability to access, cultivate and form relationships and the networking necessary to capitalize upon such relationships.

The ability to establish and nurture relationships and personal contacts with bankers and financial lenders through active membership participation is invaluable to women and minority businesses in that access to capital has been proven to be a major obstacle to procuring contracts with the state.<sup>58</sup>

#### 4. Benefits in Small Towns

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<sup>58</sup> Bates, Dr. Timothy, "Availability, Utilization and Disparity: An Analysis of New Jersey Procurement Data in Light of Minority and Women-Owned Business Availability", Graduate School of Management and Urban Policy, New School for Social Research, January 1982.

The benefits of club membership in small towns are even more valuable to women and minorities. The primary reason young entrepreneurs join clubs is to further their business interests within small towns. Young entrepreneurs meet other professionals and business people who will need and refer business and who will be available to the young entrepreneur/member. Club members include bankers (who will lend capital) and customers. Another advantage of membership in clubs for young entrepreneurs of small communities is an abundance of free, positive publicity. To the extent a club denies women and minorities access to business and professional avenues via membership in these clubs, they are disadvantaged in competing for business, especially in smaller communities where there are fewer minorities.<sup>59</sup>

#### V. Description of Benefits by Certain Clubs

Membership in certain popular, nationally organized social service clubs which, until recently were exclusionary, is extensive throughout New Jersey.<sup>60</sup> Among these clubs are the Rotary International; Kiwanis International, United States Jaycees; (i.e., various Chambers of Commerce), etc. Certain business and career enhancing benefits are associated through membership in these clubs, despite the fact that these clubs are often self-described as "social service oriented and/or self-help

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<sup>59</sup> Letter to the Editor, Newtown Bee, Newtown, Connecticut, January 30, 1981.

<sup>60</sup> The more "fraternal" organizations, which are also more inclined to find protection under the "private club" exemption in the state's LAD include: Benevolent Order of Elks; Fraternal Order of Eagles; International Association of Lions Clubs.

organizations".<sup>61</sup> Club memberships are especially valuable regarding access to developing projects involving the state. A potential contractor is at a significant advantage if he/she has knowledge of an upcoming project in that timely knowledge affords one more time to consider, plan and prepare bids. The informational advantage is especially valuable to women and minorities in that studies have identified the lack of information (including access to various sources of information) regarding state contracts as an obstacle which disadvantages minorities in competing for state contracts.<sup>62</sup>

## VI. Employer-Paid Dues

In recognizing the importance of professional contacts and other business enhancing attributes of club memberships, employers routinely pay the membership dues of its executive employees. The National Club Association reports approximately 37% of its members' dues are paid directly by businesses.<sup>63</sup> In paying the dues of exclusive and discriminatory clubs, employers perpetuate the affects of discrimination.

Ruth Baum of the American Management Association reported that a 1975 study of "executive perquisites" showed nearly two-thirds of all companies surveyed

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<sup>61</sup> Encyclopedia of Associations, 22 Ed. Volume 1, Part 1 (1988), pps. 11309-11354.

<sup>62</sup> See, e.g., José E. Sanchez, Summary Research Report, A Needs-Assessment Survey of Hispanic-Owned Businesses in New Jersey: A Look At Union and Hudson Counties (May, 1991).

<sup>63</sup> Schafran, Private Clubs (Women Need Not Apply), 23 Foundation News 3,4 (1982).

paid some sort of club fees. The typical company pays up to of \$1,000 per year, per individual toward a club membership.<sup>64</sup>

Costs associated with membership dues in various clubs are deductible as business expenses and as such would seem to qualify such clubs as "commercial" or "business-related". At the very least, the deduction serves as an incentive to employers to assume responsibility for payment.

#### A. OFCCP

In the late 1970's, a proposed federal regulation was submitted which sought to prohibit employers from paying club dues to discriminatory clubs. The proposal originated from the Office of Federal Contract Compliance Programs as a means of enforcing its objectives of assuring equal opportunity for all persons employed by government contractors and subcontractors.<sup>65</sup>

The regulation was preceded with a general acknowledgement that membership fees are generally paid "as a perquisite and adjunct to the company's compensation program" or "for business purposes to contact officers [of other businesses] with the understanding that the membership will be used for business cultivation and direct business purposes." From this, the OFCCP concluded, "...in furthering its business through membership, company sponsored members further their own careers as well. Those excluded from membership in clubs or organizations (used to further the

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<sup>64</sup> Berry, *supra*. at note 19.

<sup>65</sup> Appearing in 46 Federal Register No. 11, Friday January 16, 1981, 3892 re: 11 C.F.R. Part 60-1: Payment of Membership Fees and Other Expenses to Private Organizations.

business) are correspondingly impeded in advancing their careers in the same manner as their company sponsored member colleagues".<sup>66</sup>

Among the difficulties contained within the proposed regulation was the section which shifted to the dues paying employers/contractors the burden of determining whether, by paying membership fees in various clubs, employment advantages were being unfairly generated. The regulation left it up to the contractor to determine whether "employment advantages" were conferred in the club membership and/or whether the club's membership policies were "discriminatory".

#### B. Reactions to the Regulation

The proposed regulation stimulated much reaction on the part of several organizations,<sup>67</sup> which included the American Club Association and the American Bar Association.<sup>68</sup>

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<sup>66</sup> Id.

<sup>67</sup> Of the 202 comments received, 161 opposed and 41 supported the proposal. Only 6 women's groups and 2 minority groups were included as respondents/commentators (all eight groups were in support of the regulation); (82 individuals responded with comments); "other club" and service club comments were the largest group (52); followed by banks and savings and loan associations (20) contractors and companies (15).

<sup>68</sup> The ABA initially endorsed the regulation in 1982 but the delegates made a controversial decision to rescind support at the 1982 annual meeting in San Francisco. In rescinding, The Illinois State Bar Association, characterized the policy as, "an unfortunate misconceived proposal which poses a grave threat to the rights and liberties of private organizations." However, a major factor in its decision to back rescission was the discovery that the Jaycees and Elks clubs (where many lawyers enjoy active memberships) were among the clubs included in the proposal. ABA Journal 1204. Among the reasons the regulation was not endorse, was the fact that opposition was led by a "well-financed lobbying campaign." Following its rescission, the ABA voted by 183 to 152 to adopt a recommendation to include private clubs that obtain a substantial portion of their income from business sources within the definition of a "public accommodation". The ABA went on record in 1980 in favor of

If employers were forced to withdraw their financial support, the National Club Association predicted, the average club would lose more than \$350,000 per year and the club industry might lose as much as \$1.6 billion nationwide.<sup>69</sup>

One interest group responding to the proposed regulation represented approximately 600,000 federal contractors to whom much of the proposed regulations were directed. The National Club Association argued that the regulations could force these contractors to stop legitimate business dealings with clubs which would ultimately cost clubs support totaling hundreds of thousands of dollars in lost revenues.

The Proposed Rule still remains in the 41 C.F.R. Part 60-1 OFCCP and has not been withdrawn, but it remains without effect due to the combined influences of a strong lobby<sup>70</sup> and a change in administrations.

## VII. The Damage of Exclusion

While recent litigation has focused on the explicit exclusion of women from membership into clubs, via blatant exclusionary policies and practices, other minorities are discriminated against through more subtle and sophisticated methods. These methods are much more difficult to identify, quantify and document. Despite the

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adding sex as one of the discriminatory bases. Vickie Quade and Marth Middleton, "Private Clubs: Second Proposal Passes House", ABA Journal, October 1983, p.1369.

<sup>69</sup> Elliot & Susco, Challenging the All-Male Private Clubs, Working Woman, April 1981 note 219, at 23.

<sup>70</sup> Response to this regulation is indicative of the pervasiveness of clubs and associations and the strength of their interests.

difference in practices, the results are no less consequential in that minorities are humiliated, intimidated, felt to be token members; and are denied office holding and policy making positions. Many of the clubs and organizations which close their doors to minorities and women insist they do no harm because they are strictly social or purely altruistic. In fact, more often than not they are places for profitable exchange with business and professional colleagues and clients. These clubs provide settings where individuals pursuing business or career-related ventures have opportunities to display their talents and receive business and career development assistance. When minorities and women are denied equal access to these clubs, when they are not welcomed as full members, they are also denied access to a traditional avenue of self-growth, economic empowerment and political opportunity and advancement.<sup>71</sup>

"The harm to the professional advancement of women [and minorities] ...caused by the exclusion from this critical aspect of market place activity is...widely recognized. Women [and minorities] excluded by discriminatory policies [and practices] are denied opportunities for contacts and professional betterment available in "private" business clubs. These invidious effects are exacerbated by the clear message to the larger community that the groups excluded ... are inherently inferior or are not entitled to equal professional opportunities".<sup>72</sup>

In testimony before the New York City Commission on Human Rights, Edith Lynton explained:

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<sup>71</sup> NOW's brief (amicus), challenging Jaycees' exclusionary policies, See, Ginsburg, Women As Full Members of the Club: An Evolving American Ideal, 6 Hum. Rts. 1, 19 (1975).

<sup>72</sup> See, Brief Amicus Curiae of the American Bar Association in support of appellees at 5, New York State Club Ass'n v. City of New York, 108 S.Ct. 2225 (1988) (NO. 86-1386).

"As more [members of minority groups] and women have been aspiring to and attaining positions in middle and upper management and public office and have been engaging in wider ranges of professional activities, they are becoming aware of the significant role played by private clubs and associations in business and professional advancement as well as community leadership. Those who formerly were excluded by now have achieved a modicum of equal opportunity in education and employment are discovering these gains to be partially nullified when access to the clubs and organizations that their colleagues with similar interests, qualifications, and career goals enjoy are denied them solely because of race and sex."<sup>73</sup>

When private clubs whose members are highly influential in business, government and professions, limit or restrict membership based upon race, color, ethnicity, religion or sex, society suffers. Denying certain minorities and/or women the right to associate in this context inhibits their professional advancement, and, in turn restricts their contribution to society.

Discrimination among clubs which provide commercial and career enhancing opportunities has been found to disadvantage individuals who are seeking to further their careers and/or expand their businesses.<sup>74</sup> Career achievement and success in business are attributes of those who are successful in seeking contracts with the state. Further, such discrimination has an unhealthy effect on the efficiency of the state's economy as well as negative social cost in limiting the business, commercial and professional aspirations and achievements of women and minorities.

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<sup>73</sup> Lynton, "Behind Closed Doors: Discrimination by Private Clubs", A Report Based on the City Commission on Human Rights Hearings, 3 (1975).

<sup>74</sup> Bates, Dr. Timothy, supra.

## VII. Quality of Memberships for Women and Minorities

Present effects of overt past discrimination in club memberships throughout the state are almost impossible to quantify because clubs do not share information regarding the sex, race or national origin of its members.<sup>76</sup> However, two factors indicate that current discrimination and past discrimination by New Jersey clubs which offer career-enhancing memberships continues to exist today: (1) increasing formation of the state's all-minority and all-women club counterparts; and (2) minority and women membership in these organizations is thriving. Minority and women members of these clubs attest to the unsatisfactory quality of membership and latent discrimination in larger majority clubs.<sup>78</sup>

Those women and minorities who have the inclination, courage and tenacity to seek membership in certain white male-dominated clubs find they are victims of more subtle and invidious discriminatory practices. "Getting women [and minorities] into the right clubs is far easier than getting them to the right tables."<sup>77</sup> In other words, admission is not enough. It is the quality of membership that determines its value. If women and minorities are allowed to join previously exclusive clubs only upon

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<sup>76</sup> Upon requesting membership registers and information regarding membership attributes of various New Jersey clubs and associations, an overwhelming majority responded that such information was not maintained and/or available. (Although note that New Jersey Kiwanis reports that approximately 5% of its members are women.)

<sup>78</sup> See, e.g., Interview with Daniel Jara, President, Statewide Hispanic Chamber of Commerce, April 1992.

<sup>77</sup> Rhode, *supra*. at 158.

judicial intervention, it is often over the objection of the members who do not make them feel welcome. Although minorities and women are no longer blatantly denied admission into some clubs, the value and extent of their memberships is negligible. They are frequently denied substantive participation as policy makers and have not successfully gained access to leadership or office-holding positions within these clubs.

To the extent women and minorities are admitted, the effectiveness of their roles are limited in that they are not permitted to gain access to the club's power base, the source of influence and prestige. In essence, they become minorities again, their interests subordinated to those of the majority members.

Several fraternal and service clubs have typically maintained women's auxiliaries with diminutive names, i.e., Kiwaniannes; Rotary-Annes; Jaycettes, others have allowed women to join as "associate members". Prior to recent litigation condemning exclusion of women, the Jaycees allowed women as associate members. Although their dues were almost equal to the fees for full membership, associate members were allowed no voting rights; they were not permitted to stand for office or receive any of the revered "achievement" awards.<sup>78</sup>

The special treatment of women exemplified in the Jaycees' practice is typical of the practices encountered by women and minorities today. The fact that they are admitted does not guarantee treatment as equals, or that the quality of membership will be respected. An analogy between the "glass ceiling"<sup>79</sup> found to exist among

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<sup>78</sup> U.S. Jaycees v. McClur, 534 F. Supp 769.

<sup>79</sup> Julia Lawlor, "Labor Department Shrugs Off 'Glass Ceiling' Study", The USA Today, August 9, p.1B.

females and minorities seeking entry into corporate hierarchies can be made by the fact that there are very few female or minorities representative of office-holding positions in the traditionally white, male social service clubs of New Jersey today.<sup>80</sup>

#### **B. All Women and Minority Clubs**

In New Jersey, women and minorities have elected to organize and form their own clubs which seek to compensate for the exclusion or inadequacies of their membership in the larger counterparts. There are several active minority and womens' associations throughout New Jersey, e.g., National Association of Women in Construction; Hispanic Chamber of Commerce; Association of Black Women Lawyers of New Jersey; Burlington County Black Business & Professional Association; National Association of Minority Contractors; etc.

The formation of these organizations also indicates the failure of the larger associations to adequately address and/or represent minorities and womens' interests. For example the Hispanic Chamber of Commerce's descriptive objective, as compared with that of the Chamber of Commerce, U.S.'s contains many overlapping areas. The major difference is that the Hispanic Chamber of Commerce is specifically dedicated to promoting "Hispanic businesses", while the Chamber of Commerce, U.S. does not make any distinction. The Hispanic Chamber of Commerce's descriptive objective is to "[p]romote a positive image of Hispanics and to encourage involvement with

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<sup>80</sup> Although membership and office holding positions breakdowns according to race, gender and ethnicity could not be obtained from the various New Jersey clubs, the names of office holders were unanimously non-Hispanic surnamed males. The inference is that women and Hispanics are under represented among office holding positions of these clubs.

Hispanic firms."<sup>81</sup> The Hispanic Chamber of Commerce also holds business related workshops, conferences and management training. Local New Jersey chapters of the national Chamber of Commerce have objectives which are somewhat redundant in that they seek also to promote the "business community's interests on those [issues] affecting the economy and the future". The national Chamber of Commerce also claims to offer information, training, equipment and encourage member participation in political policy making.<sup>82</sup>

Various all-women and all-minority associations are characterized as, "merely a consolation prize, a defensive identification in response to exclusion. Both the Nation's need for unity and the individual's need for connection will best be served when our constitutional law makes it possible for everyone, whatever his or her cultural identity, to participate as a full member of the larger American community, knowing that he or she belongs to America."<sup>83</sup>

Women and minority-formed clubs are a means to preserve the pride and progress while empowering its members with control over their own affairs. The price they paid for diminished unity with their larger majority counterparts is obviously outweighed by the value of a known quantity and quality of control over their objectives.

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<sup>81</sup> Encyclopedia of Associations, supra. at 20216.

<sup>82</sup> Id. at 20223.

<sup>83</sup> Note, "Private Club Discrimination", 61 St. John's Law Review, 474, at 501 (1987)

## VIII. The Impact of Litigation

### A. Conflict of Rights/Balancing of Interests

The fierce defense of a private right to discriminate in club membership is among one of the glorious contradictions of our constitutional system.<sup>84</sup>

The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be.<sup>85</sup>

When a certain type of "club" excludes from membership certain people because of their racial, ethnic, sexual [or religious] identity, a conflict of the right of freedom of association and the right to be free from discrimination emerges.

Many law commentators argue that the right to associate in exclusionary clubs (especially those whose capacity exceeds private and social) must give way to the right of minorities and women to associate at levels where contacts are made, relationships are fostered and deals are struck.<sup>86</sup>

### B. United States Supreme Court

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<sup>84</sup> See, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, (1972).

<sup>85</sup> Justice William O. Douglas dissenting in Moose Lodge, Id. at 179-80.

<sup>86</sup> See, e.g., Burns, supra.

The three cases dealing with gender discrimination in private clubs<sup>87</sup> decided by the United States Supreme Court demonstrate the Court's sympathy in supporting state efforts to combat discrimination and its willingness to uphold the constitutionality of state anti-discrimination laws.<sup>88</sup> The Supreme Court's support of state anti-discrimination statutes has effected some movement within the all-male private clubs toward a more open admission policy. The Court's decisions have also encouraged more cities to pass laws against gender discrimination and prosecute clubs refusing to adhere to these laws.<sup>89</sup> Another example of the Court's influence is evidenced in the Century Association agreement to admit women if the Supreme Court upheld Local Law 63.<sup>90</sup>

### C. New Jersey, Law Against Discrimination

The Law Against Discrimination (LAD),<sup>91</sup> prohibits public accommodations from discriminating on the basis of race, sex, ethnic origin.<sup>92</sup>

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<sup>87</sup> But, the court suggested that certain clubs, though falling within the coverage of various laws, may nonetheless be exempt and it expressed willingness to grant intimate association rights to groups other than those involved in family relationships. The key factor is the "intimacy" of the club. See, Roberts supra.

<sup>88</sup> Roberts, id.; Duarte, id.; and New York State Club Association v. City of New York, 487 U.S. 1 (1988)

<sup>89</sup> See, All-Male Clubs Give Ground, N.Y. Times, Jan 31, 1988, Section 1 (Northeast Journal), at 42, col. 5; See, Himelstein, Bias Suit Defense Fees Loom, The Recorder, Feb. 23, 1989 at 1, col 2.

<sup>90</sup> See, Norman, Century Club Says It Will Admit Women If City Bias Law Is Upheld, N.Y. Times, Sept. 11, 1986, at B6, col.3.

<sup>91</sup> N.J.S.A. 10:5-1 et seq.

<sup>92</sup> N.J.S.A. 10:5-12, et. seq.

N.J. Stat. Ann. Sections provides in pertinent part:

"A place of public accommodation" shall include, but not be limited to: any tavern, road house, hotel, motel, ...restaurant, eating house or place where food is sold for consumption on the premises ... Nothing herein contained shall be construed to include or apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private...<sup>93</sup>

By and large, a wide variety of New Jersey's "distinctly private, social clubs" which exist in the form of country clubs, fraternal societies, athletic clubs and downtown or city clubs have been left untouched by the various public accommodations laws and the evolving judicial definition of the "private club". Whether New Jersey's traditionally "private" clubs meet the "exclusiveness" and "internal control" criteria of exemption from public accommodations statutes is ultimately a matter of judicial concern.

#### D. New Jersey Courts

In Kiwanis International v. Ridgewood Kiwanis Club,<sup>94</sup> the court held that the Kiwanis International had the legal right to suspend its Ridgewood, New Jersey chapter for violating its bylaws, specifically, the bylaw which limited its membership to men.<sup>95</sup>

In 1986, the Ridgewood, New Jersey chapter of Kiwanis International admitted Ms. Julie Fletcher, a business woman, into the chapter and had, upon notification of

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<sup>93</sup> 10:5-5(l) West Supp. (1987), Section 10:5-5(l).

<sup>94</sup> 811 F.2d at 248 (1987)

<sup>95</sup> Id. at 248

its violation by the International, refused to rescind Ms. Fletcher's membership on the grounds that she met all of the criteria for membership, except gender.<sup>96</sup>

As discussed above, the Kiwanis International is an organization whose purposes are, according to their self-reported description to support, "local clubs of business and professional development of community facilities, creation of international understanding and good will, support of agriculture and conservation, and programs aimed at safeguarding against crime and the elimination of alcohol and drug abuse".<sup>97</sup>

The International sued the Ridgewood Chapter on the grounds that it had violated its service mark agreement, and asked the court for a preliminary and permanent injunction barring it from using the Kiwanis service marks.<sup>98</sup> The case was now cast as an issue of trademark infringement however, the Ridgewood Chapter sued on the grounds that the International was seeking to revoke its license on the basis of Ms. Fletcher's membership; it alleged sex discrimination.<sup>99</sup>

The court initially found for the Ridgewood Chapter, noting that the International was attempting to directly or indirectly enforce its policy of discrimination in the guise of a trademark complaint.<sup>100</sup> However, upon appeal the United States Court of

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<sup>96</sup> *Id.*

<sup>97</sup> Charter, Kiwanis International, *supra*.

<sup>98</sup> 811 F. 2nd at 248

<sup>99</sup> Kiwanis, 627 F. Supp, 1381 at 1385

<sup>100</sup> Kiwanis, 811 F. 2nd 247 at 248

Appeals for the Third Circuit reversed and held that the International may discriminate on the basis of sex by denying membership to women and may force unwilling New Jersey licensed clubs to do the same because the organizations are not places of "public accommodation."<sup>101</sup>

This conclusion was reached because, per the court, the "evidence of membership practices and policies does not reflect an open and unrestricted invitation to the community at large to join Kiwanis Ridgewood."<sup>102</sup> The decision contained a stinging dissent and has been vehemently criticized by legal scholars.<sup>103</sup>

Though Kiwanis prevailed in continuing its exclusionary membership policy against women, the international organization has since rescinded this practice. The assembled delegates, at its July, 1987 72nd annual International convention, voted to permit women to be sponsored for membership in the Kiwanis Club.<sup>104</sup>

The state of New Jersey forged early ground in 1966 in Clover Swimming Club v. Goldsboro, when the New Jersey District Court held that the Clover Hill Swimming Club was not a private association within the meaning of New Jersey's Laws Against Discrimination, and could not, therefore discriminate against black applicants in it's

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<sup>101</sup> Id.

<sup>102</sup> Id.

<sup>103</sup> See, Kiwanis International v. Ridgewood Kiwanis Club, 811 F.2d 248 (1987) \_\_\_\_\_ dissenting at p. \_\_ See also \_\_ Duke L. Rev \_\_ (198\_).

<sup>104</sup> Although note that New Jersey Kiwanis reports that approximately 5% of its members are women. This relatively small percentage is no doubt due to the fact that women were only admitted into membership as of 1987. Nevertheless, it will take time for women memberships to increase.

membership process. The court noted that rather than being an organization which offered membership to an open and unselected group, the necessity of personal interviews made the membership offer selective, thereby creating an offer not available to applicants on the basis of their particular race.<sup>105</sup>

New Jersey Courts have continually reaffirmed that fact that the "eradication of the 'cancer of discrimination' has long been one of our state's highest priorities."<sup>106</sup> Indeed, the legislature, in enacting LAD has declared "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions of a free democratic state."<sup>107</sup>

In 1990, the N.J. Supreme Court heard an appeal of the Division of Civil Rights in the case of Frank v. Ivy,<sup>108</sup> on behalf of Sally Frank, a Princeton University student (currently a law professor) who sued the Ivy Club (a Princeton University eating club which adhered to a policy excluding women members).<sup>109</sup>

After appeals and more than eleven years of protracted litigation, the court held that (1) the eating clubs<sup>110</sup> were subject to the Laws against Discrimination,<sup>111</sup>

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<sup>105</sup> Clover Hill Swimming Club v. Goldsboro, 47 N.J. 25, 219 A. 2nd 161-62.

<sup>106</sup> Frank v. Ivy Club, 120 N.J. 73 (1990) at 110, Dixon v. Rutgers, The State University of N.J., 110 N.J. 432, 451 (1988), Fuchilla v. Laymen, 109 N.J.319, 334 (1988) and Pepper v. Trustees of Princeton University, 77 N.J. 55, 80 (1978).

<sup>107</sup> N.J.S.A. 10:5-3.

<sup>108</sup> 120 N.J. 73 (1990); 576 A.2d. 241 (N.J. 1990); cert. denied, 111 S. Ct. 799 (1991).

<sup>109</sup> Id.

<sup>110</sup> The complaint against another Princeton University eating club, The Tiger Inn was consolidated with that of the Ivy Club.

based on their "symbiotic relationship with the university"; (2) the clubs illegally discriminated against women by their policy of rejecting female applicants for membership; and (3) clubs could not be offered the option of disassociating themselves from the university in lieu of abandoning their discriminatory policy.

Judge Garibaldi spoke in terms of a "gestalt" of relationship between the university and the club which may have implications for other seemingly "private" clubs. The opinion states:

"Where a place of public accommodation and an organization that deems itself private share a symbiotic relationship, particularly where the alleged "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."<sup>112</sup>

It is also worth noting that both the Tiger Inn and the Ivy Clubs voted to end their exclusionary policies in 1990, though final approval required a confirmation vote of the membership within one year of the initial vote and subsequent approval from the clubs' graduate boards which are composed of alumni.<sup>113</sup> However, the undergraduate members of the Tiger Club have overwhelmingly voted to continue to deny membership to women, despite a court order to the contrary.<sup>114</sup> Ivy and Tiger

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<sup>111</sup> N.J.S.A. 10:5-1 et seq.

<sup>112</sup> Frank v. Ivy, 120 N.J. 73 (1990) at 104, citing Hebard v. Basking Ridge Volunteer Fire Company, 164 N.J. Super. 77, 395 A.2d 870 (App.Div.1978), cert. den. 81 N.J. 294l, 405 A.2d 838 (1979) (volunteer fire department that refused to admit women had sufficient ties to municipality to make it subject to LAD).

<sup>113</sup> 120 N.J. at 96, fn. 2

<sup>114</sup> Tiger Inn Fetes 100th Anniversary Amid Pickets, Trenton Times Newspaper, October 21, 1990, A1

Clubs have reaffirmed their desire to continue litigation in pursuit of reversing the state court order which ordered the club to cease their membership policy of discrimination against women.<sup>115</sup>

Due to the peculiar procedural posture of the case, litigation continues and a full trial is expected in the near future.

The ultimate outcome of Frank v. Ivy Club,<sup>116</sup> is unknown. The appellate opinion cautions as to the possibility of having college fraternities and sororities deemed "public accommodations". Despite the fact the eating clubs were found to be highly selective in membership, it was through their "symbiotic relationship" with Princeton University (considered together with the fact that the clubs supplied "an essential service which was not provided by the public accommodation") that the clubs lost their private character and were considered places of public accommodations.

The case may have opened up a new arsenal for the state in its ability to reach those private clubs which maintain a "symbiotic" relationship with a public accommodation, i.e., schools, police, fire department, etc. However, the response of the Tiger and Ivy clubs in reaffirming their exclusionary policies toward women indicates the extreme commitment to discriminatory treatment of women, notwithstanding judicial discouragement.

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<sup>115</sup> Trenton Times Newspaper, August 23, 1991, p.A2

<sup>116</sup> 120 N.J. 73, 576 A.2d 241 (1990), cert. denied 111 S. Ct. 799 (1991).

F. Legal Analysis: Factors to Consider in Meeting Private Club Exemption

United States v. Lansdowne Swim Club<sup>117</sup> provided a thorough enumeration of the variables to be examined by New Jersey courts in determining whether an establishment is in fact a "private club". The following relevant factors were delineated by the Lansdowne court:

1. The genuine selectivity of the group in the admission of its members;
2. The membership' control over the operations of the establishment;
3. The history of the organization;
4. The use of the facilities by nonmembers;
5. The purpose of the club's existence;
6. Whether the club advertises for members;
7. Whether the club is profit or nonprofit; and
8. The formalities observed by the club, e.g., by-laws, meetings, membership cards, dues, etc.<sup>118</sup>

By far, the most relevant factor as to whether the club is truly private involves the selectivity of the organization in admitting new members.<sup>119</sup>

Regarding the determination of "selectivity", the fact that a club exercises "some selectivity" (i.e., by limiting membership admission to whites only) does not, in itself, overcome the "private club" selectivity requisite.<sup>120</sup>

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<sup>117</sup> 713 F. Supp. 785 (E.D.Pa. 1989), aff'd., 894 F.2d 83 (3rd Cir. 1990).

<sup>118</sup> Id. at 795.

<sup>119</sup> Lansdowne, supra. at 796-97.

<sup>120</sup> See, Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431, 458 (1973) (where the selective element was race, organization was not a private club; Durham v. Red Hunting and Fishing Club, 666 F. Supp., 954, 960 (W.D.Tex. 1987) (while a truly private club can discriminate on the basis of race, a club is not truly private if the only criteria for membership is that one is white).

A number of features reflect a club's genuine selectivity in membership practices; the substantiality of the membership fee; the numerical limit on club membership (apart from the capacity of the facilities); the membership's control over the selection of new members; the formality of the club's admission procedures; the standards or criteria for admission; and whether and how many otherwise eligible white applicants have been denied membership relative to the total number of white applicants.<sup>121</sup>

Clubs frequently assert as a defense to discrimination charges the fact that they have rejected one or more non-minority members. Courts have held, however, that the rejection of one or more non-minority members is inconclusive as to whether discrimination has occurred.<sup>122</sup>

In addition to selectivity, private clubs lose protection against discriminatory practices as their activities become increasingly commercial. In order to determine whether a club is within the protective confines of a private social club, i.e., whether it begins to resemble a business in its organization and/or operations, various inquiries are made, including: the proportion of membership drawn from a particular profession, industry or occupation; the subsidization of membership costs by employers; the extent to which membership costs are considered deductible as business expenses for tax purposes; the regular or frequent use of club facilities for

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<sup>121</sup> Lansdowne, *supra*. at 573, F.Supp. at 979 (citations omitted).

<sup>122</sup> U.S. v. Lansdowne Swim Club, 894 F. Supp., 399, 403 (E.D.Pa. 1983) (where only four white members were denied membership in 15 years, club was not truly "selective about its members) and Nesmith v. YMCA, 307 F.2d 96, 101 (4th Cir. 1968) (over 99% of white applicants accepted).

informal or formal meetings by individual firms or businesses and professional groups; and/or the routine scheduling of programs and functions focusing on a specific profession, business or industrial interest.<sup>123</sup>

#### **IX. Enforcement Through State Licensing and Taxation Authority**

A significant and unique inroad to reaching protected forms of racial and religious discrimination by "private social clubs" was made by the state of Maine. Maine legislated an additional provision to its legislation forbidding discrimination in places of public accommodation. The provision effectively prohibits racial and religious discrimination in any private social clubs holding licenses to dispense food, liquor or any service or being a state of Maine corporation authorized to do business within the state.<sup>124</sup>

New Jersey has the option, in exercising its legitimate regulatory powers, to promulgate or amend licensing legislation aimed at curbing discrimination by private social clubs which dispense food, liquor or other licensed services.

Likewise, the state has the option of disallowing tax deductions for membership fees and other expenses involving clubs which discriminate.<sup>125</sup>

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<sup>123</sup> E. Lynton, Behind Closed Doors: Discrimination by Private Clubs: A Report Based On the City Commission on Human Rights, Hearings 3 (1975).

<sup>124</sup> Me. Rev. State. Ann. tit. 17, Section 1301(A) (Supp. 1969) (A very expansive/broad statute was also promulgated which affects virtually all clubs which are eating establishments, Title 28, Section 1055 as well as those selling liquor, Id., Section 701).

<sup>125</sup> See, State v. Burning Tree Club, Inc., 315 Md. 254, 554 A2d 366, cert. denied, 110 S.Ct. 66 (1989) (tax deduction was disallowed due to discrimination.)

Another possible method for reaching "private clubs" which discriminate against women and minorities can be acquired through passage of regulations resembling that of OFCCP's in which employers who contract with the state are prohibited from paying membership dues in clubs which discriminate. The regulation proposed by the OFCCP had many shortcomings, especially in that the burden of determining whether a particular club was discriminatory was left to the firm/employer claiming the expense. This burden can be partially alleviated by shifting the burden onto the club (whose related expenses are being paid by various employers) to prove whether it does or does not discriminate against women and/or minorities.

#### X. Effects of Legal Action

Discriminatory clubs are faced with a choice: if they elect to consider membership expenses as business deductions they cannot then operate to deny women and minorities access to same. If they elect to continuing exclusionary policies, they must operate as private social clubs of intimate association, and relinquish the right to special tax treatment of club related expenses.

There are at least two published incidents where clubs have responded to the threat of litigation, judicial decisions; or legislative action by terminating exclusionary policies and admitting women and minorities. Largely as the result of litigation in Board of Directors of Rotary International v. Rotary Club,<sup>126</sup> Rotary clubs decided

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<sup>126</sup> 481 U.S. 537, 541-42 (1987).

to admit women in late 1987. Also, the Century Association agreed to admit women if the Supreme Court upheld Local Law 63.<sup>127</sup>

As a result of the decision in New York City Club Association,<sup>128</sup> more cities have been encouraged to pass laws against gender discrimination and prosecute clubs refusing to adhere to these laws.<sup>129</sup>

Although there has been some movement within a few clubs to eradicate female exclusive policies, (i.e., Jaycees and Rotary), the state should not rely on voluntary action to eradicate the problem of discrimination.<sup>130</sup>

One result of the negative publicity generated in publishing the names of members in exclusive and discriminatory clubs has been the disaffiliation by public officials, i.e., judges and political officeholders with membership in these clubs. For example, the Senate Judiciary Committee has indicated that judicial nominees could be hurt by membership in exclusionary clubs.<sup>131</sup> Supreme Court Justices Blackmun and Kennedy have resigned from men's clubs which is indicative of the pressure within the legal community to avoid conflict on this issue.

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<sup>127</sup> See, Norman, Century Club Says It Will Admit Women If City Bias Law Is Upheld, N.Y. Times, Sept. 11, 1986, at B6, col.3.

<sup>128</sup> New York City Club Association v. City of New York

<sup>129</sup> See, All-Male Clubs Give Ground, N.Y. Times, Jan 31, 1988, Section 1 (Northeast Journal), at 42, col. 5; See, Himelstein, Bias Suit Defense Fees Loom, The Recorder, Feb. 23, 1989 at 1, col 2.

<sup>130</sup> Recall the response of the Ivy and Tiger Clubs in voting to continue the practice of excluding women members, despite years of litigation, supra.

<sup>131</sup> Lewis, "Judicial Nominee May Be Imperiled," New York Times, March 20, 1991, A14, col. 1



## **CONCLUSION**

Denying club membership via discrimination against women and minorities inhibits professional and business advancement. This inhibition results in the under representation of women and minorities in the business and professional communities. Even when various clubs have allowed some representation of women and minorities, the quantity is nominal and the quality of membership it is unsatisfactory. Moreover, there is a significant under representation of women and minorities in both the higher paying, more prestigious administrative and executive positions and in the more lucrative, capital intensive businesses (those firms qualified to bid for, and those firms actually awarded prime contracts with the state).

The commercial, professional and business advantages which are gained by active membership in certain clubs are impossible to duplicate or manufacture. To the extent the state of New Jersey cannot reach the discrimination among private clubs due constitutional protection of the right to associate, these benefits will continue to be denied to the victims of discrimination, women and minorities. Although the state may be powerless to open certain doors to women and minorities, it is not powerless in its ability to compensate for lost opportunities and disadvantages. Innovative measures are called for such as the state's set-aside programs and other forms of preferential assistance for women and minority owned businesses. Such viable remedies represent the appropriate state response to compensate for the disadvantages and lost opportunities of past and present discrimination.

It is often difficult for new and small businesses to obtain the surety bonds required of bidders on public contracts. The State could waive the bond requirements for pre-qualified bidders on small contracts.<sup>53</sup> Such a procedure is utilized by the federal government pursuant to the Small Business Act.<sup>54</sup> Alternatively, the State could adopt a bonding assistance program whereby it would guarantee a portion for the bond provided to a small and emerging business.

Another significant obstacle to the participation of women and minority businesses in public contracting is the inadequacy of capital necessary to support an emerging business. Information concerning programs of financial assistance should be disseminated. The State of New Jersey created the New Jersey Economic Development Authority ("EDA") as a lending agent in order to accomplish several specific economic development goals. The criteria used by EDA is sometimes not as difficult to meet as the parameters of private lending institutions. In return, the successful applicant agrees to certain job creation requirements as well as the creation real estate rates. In addition the Small Business Administration is a federal program

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<sup>53</sup> Securing a surety bond is similar to obtaining a bank line of credit. The surety company must be satisfied that the contractor/vendor has met certain criteria. The firm must:

- Be of good character;
- Have the capacity to meet the requirements of the project;
- Have the necessary capital to support expected project costs;
- Be in good standing with a bank, i.e. have an established a line of credit; and
- Be a business that is well managed.

For emerging businesses, the greatest obstacle to obtain a bond is having the necessary capital to support the expected project costs.

<sup>54</sup> 15 U.S.C. section 635 (j).

## **EXECUTIVE SUMMARY**

### **Task 3: Demographic Trends-Myers**

This report summarizes the body of historical evidence regarding ongoing effects of past and present race and gender discrimination upon African Americans, Hispanic Americans, Asian Americans, members of other racial minority groups and women in New Jersey's market place. The goal was to identify with specificity the factors (racial and non-racial) affecting the formation, development, availability, and participation of M/WBE'S in New Jersey's market place.

Eight factors are identified in this report that contribute to the distribution of the ownership of business firms in New Jersey. Most are related to the acquisition and the transmission across generations of social and economic assets. Population shifts and patterns of segregation, housing ownership, educational options, employment opportunities, entrepreneurial experiences, income inequalities, political participation limitations, and business ownership outcomes all contribute to the accumulation of wealth needed in order for a group to prosper in business enterprises.

We find that the size of the group plays an important role. In the most elementary sense, the numbers of persons from particular groups constrain the numbers of firms owned by members of those groups. But in a more fundamental sense the population size, its shifts, and its sources of growth help us understand the nature of the utilization of business firms owned by women and minority group

members.

One of the most important sources of wealth in America is home ownership. It provides a means to accumulate equity that can be used as collateral in credit markets, and it represents an important route by which wealth can be transferred from one generation to the next. Here is sketched the reality of a legacy of housing barriers in New Jersey that have resulted in the current generation of vast racial disparities in home ownership and in housing values for those who own homes.

In contrast to the dismal effects of lack of home ownership is the relative gains in educational achievement among blacks and other minorities in New Jersey. These improvements date to the earliest years of the century and confirm that there existed huge pockets of human capital in the black community by World War II. Yet, by the 1980s, when blacks remained concentrated in the central cities, this human capital had depreciated.

For the vast majority of New Jerseyans, employment is the most important source of income. Variations in employment experiences across groups help to explain the historic disparities in incomes as well as inequalities in business ownership in subsequent generations. Good jobs and relevant occupational and industrial experience are often the stepping stones toward the creation of business enterprises and participation in public and private contracting activities.

The rates of business participation vary widely among various groups in society. Not every one is suited to be an entrepreneur. Many persons have an aversion to the risks and the uncertainties associated with being a successful business person. For those reasons, the vast majority of New Jerseyans receive the bulk of their incomes from wages and salaries. Nevertheless, blacks and certain other minority group members do not have the same access to such important sources of income as self-employment earnings and rents, dividends or interest income.

Inequalities in the present generation in wealth and assets are rooted in inequalities in previous generations. The ability to accumulate wealth and transfer it from father to son (or father to daughter or mother to son or daughter) depends on the level of earnings. Blacks have particularly suffered from past inequalities in income. Asians and certain segments of the Hispanic population seem to have been able to overcome at least parts of the legacy of previous inequality. These other groups, however, have traditionally represented a very small portion of the New Jersey population.

Political participation among blacks and women in New Jersey historically has been constrained. Even though women, for example make up the majority of the voting age population in the state, the majority of elected officials are white men. Blacks and Hispanics are also underrepresented at all levels of elective office.

The recent experiences of business ownership among women and minority

firms show contradictory trends. Among women owned firms for example, there has been a phenomenal growth in the area of finance, insurance, and real estate. The total numbers of women owned firms in every industry in New Jersey has increased markedly. And yet, their real sales per firm have declined over the years. Black owned firms, as another example of contradictory trends, have experienced steady growth in their real sales per firm, but still lag considerably behind many other minority-owned firms.

Eight barriers to business ownership among women and minority group members in New Jersey were considered: Population shifts, housing segregation, educational inequalities, employment disparities, entrepreneurship imbalances, political participation limitations and business ownership experiences over the past two decades. The New Jersey experience of women and minority-owned firms reflects a long legacy of inequality and unequal access to some of the most fundamental resources needed for successful participation in the market place. The success in overcoming these barriers is uneven across the groups examined.