A SHORT LEGAL TREATISE ON THE MEMBERSHIP POLICIES OF E CLAMPUS VITUS

"It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the 14th Amendment, which embraces freedom of speech."

Mr. Justice Harlan,
United States Supreme Court (1958).

INTRODUCTION

The Fourteenth Amendment to the United States Constitution provides that "No state shall make or enforce any law which shall...deny to any person within its jurisdiction the equal protection of the laws." This is commonly known as the "Equal Protection Clause." This clause requires that persons under like circumstances be given equal protection and security in the enjoyment of personal and civil rights, the acquisition and enjoyment of property, the enforcement of contracts, the prevention and redress of wrongs, and that they be subject to similar taxes and penalties. This includes discrimination on the basis of gender.

For E Clampus Vitus, the most important word in the Fourteenth Amendment is the second word in the sentence which contains the Equal Protection Clause: "No State shall...." What this means is that the Equal Protection Clause applies only to State action, and not private action. In other words, the State of California could not form an association for which membership was limited to men, but private individuals can. The key words are "State action," and if State action is present, discrimination is unconstitutional.

THE CONCEPT OF STATE ACTION

If State action is present, discrimination is unconstitutional. What this means is that if the State is significantly involved or participates in a private group's affairs, that private group will be held to the standards of the Equal Protection Clause. The private group will be looked to as an "agent" of the State. The group's acts will be imputed to the State. Therefore, the group can not discriminate. To do so would mean that, in the eyes of the law, the State was discriminating.

Thus, E Clampus Vitus can remain a men's association only if the State of California is not and does not become significantly involved nor participates in our activities and affairs.

Just exactly what constitutes State action is the subject of much debate. One of the most famous cases in this area is the case of Moose Lodge No. 107 v. Irvis (1972) 407 U.S. 715, 92 S.Ct. 1965, in which a Moose Lodge operated under discriminatory polices. The Lodge was sued, the theory being that since the State granted the Lodge a liquor license, State action was present and the discrimination was unconstitutional. The United States Supreme Court held that this was not State action.

Mr. Justice Douglas, even in dissent, stated that "[m]y view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups." He continued that "government has nothing to do with social...rights of individuals. No government ever has brought, or ever can bring, its people into social intercourse against their wishes. Whether one person will permit or maintain social relations with another is a matter with which government has no concern." In other words, the government cannot force a private association to admit members against the association's will.

The importance of this case in regards to E Clampus Vitus cannot be over exaggerated. Had this case gone the other way (ie. the issuance of a liquor license is State action), E Clampus Vitus would not be able to obtain a liquor license while maintaining its current membership policies.

A FINDING OF STATE ACTION

In another famous case, Burton v. Wilmington Parking Authority (1962) 365 U.S. 715, 81 S.Ct. 856, a private restaurant owner leased a parking lot from the City of Wilmington in Delaware. The restaurant operated under discriminatory policies.

The United States Supreme Court held that this was State action. Since the land and building of the parking garage were publicly owned, the Court held that the relationship of the

restaurant and the City was so close that the City (and thus the State) must be considered a participant. "What we hold today is that when a State leases public property...the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they are binding covenants written into the agreement itself."

This means that if E Clampus Vitus (or any other private association) leases public property, State action is present. Then, the alternatives would be for E Clampus Vitus to either continue to lease the public property and admit women, or to not lease the public property at all. Of course, there will be many times during which E Clampus Vitus will lease public property and continue to be a men's association. This can continue so long as the Constitutional objections are not raised.

Therefore, the outside parameters are as follows: If E Clampus Vitus merely obtains a liquor license, State action is not present. If E Clampus Vitus leases State property, State action is present. Anything in between (ie. E Clampus Vitus using State property on a continuous basis) would be a question of fact and would need to be decided on a case-by-case basis. A court would need to decide if the "use" was closer to a liquor license or to the leasing of property.

THE CALIFORNIA CONSTITUTION AND THE UNRUH ACT

The California Constitution provides additional protection against discrimination. Article I, section 8 states that "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex...." Furthermore, California has enacted the Unruh Civil Rights Act, which prohibits discrimination in the provision of accommodations and services in all business establishments. This means that discrimination can be prohibited even if there is no State action if it involves a "business." The question then becomes, of course, what constitutes a "business" for the purposes of the California Constitution and the Unruh Act.

Our attention should be focused on Board of Directors of Rotary International, et al. v. Rotary Club of Duarte, et al. (1987) 481 U.S. 537, 107 S.Ct. 1940. In this case, a local chapter of the Rotary Club admitted women despite the Standard Rotary Club Constitution which limited membership to men. Rotary International revoked the local chapter's charter, and the local chapter sued.

The California Court of Appeal found that the Rotary Club was a business establishment and therefore could no longer discriminate on the basis of sex. The reasons for the decision were that the Rotary Club itself states that it is "an organization of business and professional men united worldwide who provide humanitarian service, encourage high ethical standards in all vocations, and

help build goodwill and peace in the world." The Court also cited the Rotary Club's "complex structure, large staff and budget, and extensive publishing activities."

The Court stated that these factors leave "no doubt that business concerns are a motivating factor in joining local [Rotary] clubs" and that "business benefits [are] enjoyed and capitalized upon by Rotarians and their businesses or employers."

Thus, the Rotary Club was forced to admit women as members. However, the differences between E Clampus Vitus and the Rotary Club are paramount. E Clampus Vitus is not a business organization, does not have a complex structure, does not have a large staff and budget, and does not conduct extensive publishing activities. Business concerns are not a motivating factor in joining E Clampus Vitus, and business benefits do not accrue from E Clampus Vitus meetings or membership.

Thus, while the Court determined that the Rotary Club was a "business establishment," E Clampus Vitus is clearly a social club, and therefore not held to the standards proscribed by the California Constitution or the Unruh Civil Rights Act.

THE MOST RECENT CASE

In January of 1993, the California Court of Appeal decided the case of Mary Ann Warfield v. Peninsula Golf & Country Club, et al. (1993) 12 Cal.App.4th 178. In this case, a woman sued a Country Club which did not allow women to own memberships. The Court of Appeal held that the club was not a "business establishment" since its focus was on recreational and social activities, rather than on economic advancement.

Even though some business was conducted at the Country Club, the Court stated that they "do not consider the incidental business activities of some members to constitute sufficient 'business-like attributes' to bring the Club within the scope of the Unruh Act. Even the most privately and intensely recreational enterprise must endure the periodic transaction, discussion or solicitation of business by its members on the premises. The significant factor to us is that the Club is not operated to promote economic interests, and functions without substantial business activities infringing upon the social, recreational and personal interaction of Club members." The Court also considered the fact that the Club offers "continuous, personal, and social activities which are confined within a very private setting."

Clearly these standards also encompass E Clampus Vitus, and again we are left with the sole conclusion that E Clampus Vitus is a private organization, and not a "business establishment."

FREEDOM OF ASSOCIATION

The United States Supreme Court has recognized that individuals have a constitutional right to associate. Mr. Justice Powell states that "[t]he Court has recognized that the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." Thus, while non-members can use the Equal Protection Clause to attempt to force membership, private associations can use the constitutional right to Freedom of Association to continue selective membership. The result is a balancing test.

Rotary International appealed their State case to the United States Supreme Court, asserting that their right to Freedom of Association was violated by being forced to admit women under California law. The Court held that their rights were not violated, as they did not constitute a "private" association for constitutional purposes.

The Court used four factors to determine whether the association was "private" and thus could not be forced to admit members. The factors were size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship.

The Court found that the Rotary Club was too large to be considered "private," that its purpose was business, that it was not selective in its membership (all that was required to become a member was the sponsorship of a current member and the approval from a Membership Committee), and that the Rotary Club "does not give rise to a continuous, personal, and social relationship that takes place more or less outside public view."

E Clampus Vitus would probably be too large to be considered private, and its membership selectivity is much the same as the Rotary Club. However, our purpose is not business. And most importantly, E Clampus Vitus absolutely and unequivocally does "give rise to a continuous, personal, and social relationship that takes place more or less outside public view."

Thus, while the Rotary Club was found to be non-private, there could be no doubt that E Clampus Vitus is private and therefore entitled to the protection of the Freedom of Association guaranteed by the United States Constitution. E Clampus Vitus cannot be required to admit members, even if a California Court were to determine that E Clampus Vitus is a "business establishment." It would violate the United States Constitution.

CONCLUSION

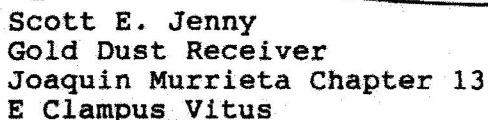
As long as E Clampus Vitus does not lease public property, or foster a relationship with the State which is closer to a lease than to a liquor license, State action is not present. Therefore, the Equal Protection Clause does not apply to E Clampus Vitus. E Clampus Vitus is not a "business" under the California Constitution or the Unruh Act, since business concerns are not a motivating factor for joining and business benefits do not accrue from meetings or membership.

Furthermore, E Clampus Vitus is a private association as its purpose is not business and its activities "give rise to a continuous, personal, and social relationship that takes place more or less outside public view." E Clampus Vitus therefore enjoys the protection of Freedom of Association afforded it by the United States Constitution.

If we operate under the above parameters, neither the State of California, the Federal government, nor any private individual can interfere with the membership policies of E Clampus Vitus.

And so recorded.

Respectfully Submitted,



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