DISCRIMINATION LAW—STATUTORY PROTECTION FOR VOLUNTEERS AGAINST DISCRIMINATION: QUINNIPIAC COUNCIL, BOY SCOUTS OF AMERICA, INC. v. COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES, 204 CONN. 287, 528 A.2d 352 (1987)

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INTRODUCTION

In Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights and Opportunities, the Connecticut Supreme Court held that the Boy Scouts of America did not discriminate under Connecticut’s public accommodation statute when it denied Catherine Pollard the opportunity to be scoutmaster because she is a woman. The court based its decision on its belief that the proffer of services is not an accommodation as that term is used in the statute. In rejecting Pollard’s offer to serve, the court concluded that the Boy Scouts did not refuse her any accommodation and thus did not violate the statute.

Quinnipiac Council presents a question much broader than whether Ms. Pollard should have been allowed to be a scoutmaster; it implicates the legal rights of all volunteers to serve free of discrimination. According to Quinnipiac Council, volunteers who suffer dis-
discrimination based on race, creed, color, national origin, ancestry, sex, marital status, age, or physical disability receive no protection or relief from the accommodation statute. Perhaps uncomfortable with the implications of its decision, the Quinnipiac Council court itself referred volunteers claiming discrimination to the labor employment statute for possible protection.7

Since the plaintiff’s challenge in Quinnipiac Council was under the Connecticut public accommodation statute, this note, in Part I, first discusses the legislative and judicial expansion of the public accommodation statute and the countervailing constitutional limitations to its scope. This section also considers the policy, statutory, and constitutional dimensions of the conflict between the protected classes’ claimed right to non-discriminatory treatment and the organization’s asserted freedom of selection. Against this background, Part II focuses on the Connecticut Supreme Court’s decision excluding the proffer of services from the scope of the public accommodation statute.8 Part III explores whether, despite Quinnipiac Council’s holding, volunteers can find protection from discrimination under a reinterpreted or an amended public accommodation statute.9 The note then addresses difficulties raised by broadening the coverage of the public accommodation statute to encompass volunteers. Protecting volunteers under the public accommodation statute runs the risk of infringing on the asserted rights of the organization—whether the boy scouts, a religious group or a political organization—to select its volunteers according to its own standards.10 On account of these incongruities, Part IV11 evaluates the Connecticut Supreme Court’s suggestion that

transportation, social welfare, health care, education, religion, recreation, the arts, environmentalism, justice, the military, civic and political activism, and foreign involvement. For an in-depth discussion of the various forms of voluntarism in each of these fields, see S. Ellis & K. Noyes, supra, at 227-50.


7. Quinnipiac Council, 204 Conn. at 302, 528 A.2d at 360. See Conn. Gen. Stat. Ann. § 46a-60(a)(1) (West 1986) (protects individuals from employment refusals, discharges, and unequal treatment in the terms and conditions of employment due to race, color, creed, age, sex, marital status, national origin, ancestry, present or past history of mental disorder, mental retardation, or physical disability). See infra note 187 for the full text of Connecticut’s Unfair Employment Practice Act.

8. See infra notes 149-98 and accompanying text.

9. See infra notes 199-205 and accompanying text.

10. See infra notes 228-33 and accompanying text.

11. See infra notes 211-98 and accompanying text.
the employment statute might safeguard volunteers' interests.\textsuperscript{12}

I. THE ACCOMMODATION STATUTES

A. History and Purpose

The public accommodation statutes have their origin in the common law obligation of innkeepers and "common carriers" to admit and serve all travellers.\textsuperscript{13} The statutes rested on the premise that these privately-owned businesses were in some degree public.\textsuperscript{14} Thus, the owners had a duty to provide equal access to all.\textsuperscript{15} The public accommodation statutes were enacted to protect this access.

As a reinforcement of the common law, the public accommodation statutes have a long history. Proscription of discrimination in public accommodations dates back to the Civil War period and the enactment of the Civil War amendments.\textsuperscript{16} After the ratification of the fourteenth amendment to the Constitution,\textsuperscript{17} Congress enacted the Civil Rights Act of 1875 in an attempt to protect blacks from discriminatory acts by state officials and private persons.\textsuperscript{18} The Act prohibited racial discrimination in motels, theaters, places of public amusements, and on public transportation.\textsuperscript{19}

When the United States Supreme Court, in the \textit{Civil Rights Cases}

\begin{itemize}
\item \textsuperscript{12} See infra notes 187-88 and accompanying text.
\item \textsuperscript{14} Tobriner \& Grodin, supra note 13, at 1249-50.
\item \textsuperscript{15} \textit{Id}.
\item \textsuperscript{16} See Stephenson, \textit{The Separation of the Races in Public Conveyances}, 3 AM. POL. SCI. REV. 180, 184 (1909).
\item \textsuperscript{17} The fourteenth amendment was ratified in 1868. The first section of it states: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
\textsuperscript{U.S. CONST. amend. XIV, § 1.}
\item Relying on the authority of this first section, Congress passed the Civil Rights Bill of 1875. \textit{See Stephenson, supra} note 16, at 184.
\item \textsuperscript{18} Civil Rights Act of 1875, 18 Stat. 335, ch. 114, §§ 1-2 (1875). This statute states in part: "[A]ll persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement . . . ." It prohibited discrimination based on race and color. \textit{Id}.
\item \textsuperscript{19} \textit{Id}.
of 1883, invalidated the enforcement of the Civil Rights Act of 1875 against private individuals, states soon began to enact their own public accommodation statutes, and, at present, thirty-nine states and the District of Columbia have such laws. Finally, in its most recent

20. The Civil Rights Cases, 109 U.S. 3 (1883). These cases involved four criminal indictments and one civil action under Section 1 of the Civil Rights Act of 1875. The section provided that anyone who racially discriminated against others so as to bar them from "full and equal enjoyment" of public facilities and conveyances was subject to criminal and civil penalties. 18 Stat. 335, ch. 114, § 1 (1875). The five defendants were individuals and railroads who had excluded blacks from their facilities on the basis of race. Since the Court determined that these claims did not involve state action, the plaintiffs were not protected by the Civil Rights Act of 1875. Even though the concept of state conduct is now broader, the Supreme Court continues to hold that there is no violation of the fourteenth amendment absent state action. Comment, The Fourteenth Amendment, Congressional Power, and Private Discrimination: United States v. Guest, 14 UCLA L. REV. 553, 578-79 (1967).

21. The Court held that the fourteenth amendment guaranteed protection only against governmental or state action and that legislative regulation of private wrongs under the Civil Rights Act of 1875 was an unwarranted and unconstitutional expansion of federal powers over individuals. The Civil Rights Cases, 109 U.S. 3, 11 (1883).

22. In the 1880's, a number of northern states including Connecticut, Indiana, Massachusetts, Michigan, Nebraska, New York, Ohio, Pennsylvania, and Rhode Island passed statutes which were near replicas of the federal act. Stephenson, supra note 16, at 186; Avins, supra note 13, at 14-22 (discussion of early state statutes modeled on the federal act).

response to this issue, Congress enacted a federal public accommodation statute in 1964.  

Although public accommodations were originally limited to the two general categories of innkeepers and "common carriers," the present meaning of public accommodation is much broader. It now encompasses any establishment which offers goods and services to the public.

B. The Connecticut Accommodation Statute

Like many states, Connecticut has followed the general trend and broadened the scope of its public accommodation statute. Prior to 1953, the Connecticut statute defined a "place of public accommo-
dation" by listing establishments which offered food, lodging, trans­
portation, or entertainment to the general public.28 In 1953, the
Connecticut legislature abandoned the list approach and adopted in­
stead a functional definition; a place of public accommodation is now
defined as any “establishment which caters or offers its services or fa­
cilities or goods to the general public . . . .”29

By defining “public accommodation” functionally in terms of
conduct engaged in by the establishment, the legislature expanded the
coverage of the Connecticut law. Most obviously, the class of persons
and businesses subject to the law is now much broader and hence more
inclusive. More importantly, the prohibition against discrimination
applies to all qualified “establishments” and is no longer limited to
specific places.30 In addition to the more expansive definition of
“place of public accommodation,” the Connecticut legislature also has
enlarged the scope of the statute by adding sex,31 physical disability,32
and marital status33 as additional classes of persons protected from

which caters or offers its services or facilities or goods to the general public . . . .” Id. at
§ 46a-63(1).

28. CONN. GEN. STAT. § 691a (Supp. 1949). Prior to 1953, the Connecticut legisla­
ture defined a “public accommodation” as: “[A]ll ... inns, taverns, roadhouses, hotels,
restaurants and eating houses or any place where food is sold for consumption on the
premises; railroad cars and stations, street railway cars and stations, public service busses
and taxicabs; and theaters, motion picture houses, music halls, amusement and recreation
parks.” Id.

29. CONN. GEN. STAT. ANN. § 46a-63(1) (West 1986).

30. “[T]he unconditional language of the statute, the history of its steadily expanded
coverage, and the compelling interest in eliminating discriminatory public accommodation
practices persuade us that physical situs is not today an essential element of our public
accommodation law.” Quinnipiac Council, Boy Scouts of Am., Inc. v. Commission on
Human Rights and Opportunities, 204 Conn. 287, 297, 528 A.2d 352, 358 (1987).

“[T]he amended Connecticut statute does not define a place of public accommodation
merely in terms of locale; it does not say 'any establishment where services or facilities or
goods are offered'. . . . Rather, 'place of public accommodation' is now defined as 'any
establishment which . . . offers its services or facilities or goods to the general public.' The
shift in emphasis and meaning is clear.” Brief for Defendant by Susan Bartholomew at 18,
Quinnipiac Council, Boy Scouts of America v. Commission on Human Rights and Oppor­
tunities, 204 Conn. 287, 528 A.2d 352 (1987) (quoting Boy Scouts of Am. v. Commission
on Human Rights and Opportunities, 204 Conn. 287, 297, 528 A.2d 352, 358 (1987)).

The defendant based her analysis on the interpretation of the Minnesota statute in United States
Jaycees v. McClure, 305 N.W.2d 764, 768 (Minn. 1981).

31. CONN. GEN. STAT. ANN. § 46a-64(a)(1) (West 1986). Sex was added as a pro­

32. Id. In 1973, the Connecticut legislature inserted: “or physical disability, includ­
ing but not limited to, blindness” into the public accommodation statute. See 1973 Conn.

33. Id. In 1974, the Connecticut legislature amended the accommodation statute by
discrimination.\textsuperscript{34}

As stated above, public accommodation laws of other states have evolved in a similar manner.\textsuperscript{35} As a result, the statutes of different states frequently resemble one another both with regard to the coverage encompassed by "place of public accommodation"\textsuperscript{36} and to the classes protected under the statutes.\textsuperscript{37} This similarity has permitted courts to refer to judicial interpretations of other states' public accommodation statutes in discussing the meaning and scope of their own.\textsuperscript{38}

\textsuperscript{34} For the full text of the Connecticut public accommodation statute, see supra note 27.

\textsuperscript{35} See Note, supra note 13. "Many public accommodations statutes have undergone frequent amendments and additions since their original appearance on the statute books. As legislative awareness of and hostility toward discrimination has grown, more accommodations were added, additional groups protected, and definitions of the offense expanded." \textit{Id.} at 245.

\textsuperscript{36} The Minnesota statute, which uses a general definition, states that "place of public accommodation" means a "business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." \textit{MINN. STAT. ANN.} § 363.01(18) (West 1966 & Supp. 1988).


\textsuperscript{37} Public accommodation statutes commonly protect against discrimination due to race, color, national origin, ancestry, religion, sex, marital status, and physical handicap. See Note, supra note 13, at 292-93.


The \textit{Quinnipiac Council} court stated that its understanding of the Connecticut public accommodation statute "accords with that of other courts in our sister states construing similar legislation." \textit{Quinnipiac Council}, 204 Conn. at 299. The citations include decisions based on the public accommodation statutes of California, Minnesota, and New Jersey. \textit{Id.}
C. Judicial Interpretations

This modern and broader definition of "place of public accommoda-
tion" presents courts with the challenge of re-interpreting the appli-
cable statute when confronted with new places, groups, and activities.
This section examines cases where individuals, for reasons based on
race, gender, and sexual orientation, have been denied membership in
various organizations, such as athletic teams, boys' clubs, and
men's business associations. The judicial decisions applying the re-
spective public accommodations statutes to each of these organiza-
tions illustrate the continued trend towards expanding the scope of
these statutes.

Ms. Pollard sought to continue this expansion and further
broaden the scope of Connecticut's public accommodation statute.
Like prior plaintiffs, Pollard was requesting a "male-only" position in
an association which the courts, in the following cases, had held was
subject to the public accommodation statute. However, unlike these
other plaintiffs, she was denied protection under the public accom-
modation statute. In order to understand and evaluate the Connecticut
Supreme Court's refusal to protect Pollard against discrimination by
the Boy Scouts, a general exposition of these fundamental cases is re-
quired. They provide the rationale for the court's distinguishing Ms.
Pollard from women granted relief from sex discrimination in prior
analogous situations.

1) Athletic Teams

National Organization for Women v. Little League Baseball, Inc.42
and the United States v. Slidell Youth Football Association43 were ac-
tions brought under public accommodation statutes for alleged dis-

crimination in athletics. In Little League, the club barred girls from

Like the Connecticut Supreme Court, this note supports its examination and discussion of
Quinnipiac Council by reference to other states' decisions based on similar public accom-
modation statutes.


40. Isbister v. Boys' Club of Santa Cruz, Inc., 40 Cal. 3d 72, 707 P.2d 212, 219 Cal.
Rptr. 150 (1985); Curran v. Mount Diablo Council of the Boy Scouts of Am., 147 Cal.

41. Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468 (3d Cir. 1986); United


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joining the team,\textsuperscript{44} while in \textit{Slidell}, the league excluded blacks from participation.\textsuperscript{45} In both of these cases, the courts were not confronted with a traditional place of public accommodation such as a restaurant,\textsuperscript{46} lodging,\textsuperscript{47} or golf course;\textsuperscript{48} instead, the courts faced a novel issue: whether a team or league was a place of public accommodation.

An organization is subject to the public accommodation statute only if it is a "place" within the meaning of the statute, and only if it is "public."\textsuperscript{49} The New Jersey Superior Court in \textit{Little League} stated that the term "place" is one "of convenience, not of limitation."\textsuperscript{50} Although "place" customarily meant a fixed site, such as a restaurant or a hotel, the court held that it also included a moving situs such as public transportation. To be a "place" did not require that the organization own or lease a specific parcel of real estate. The league's "place" was any ballfield at which it played.\textsuperscript{51}

The \textit{Little League} court placed more emphasis on the need to be public than on the need for a specific non-changing locus. "[M]embership organizations, although not having a 'specific pinpointable geographic area,' are nevertheless places of public accommodation if, as \textit{Little League} does, they offer advantages and facilities on the basis of a general, public invitation to join."\textsuperscript{52} As the court stated, "the hallmark of a place of public accommodation [is] that 'the public at large is invited.'"\textsuperscript{53}

The \textit{Slidell} court\textsuperscript{54} likewise found that a sports team was a public accommodation.

\textsuperscript{44} \textit{Little League}, 127 N.J. Super. at 526, 318 A.2d at 35.
\textsuperscript{45} \textit{Slidell}, 387 F. Supp. at 478, 480.
\textsuperscript{46} See \textit{Evans v. Fong Poy}, 42 Cal. App. 2d 320, 108 P.2d 942 (1941) (plaintiffs' rights violated when they were refused services by restaurant on racial grounds).
\textsuperscript{47} See \textit{Stout v. YMCA of Bessemer, Alabama}, 404 F.2d 687 (5th Cir. 1968) (YMCA, which provided lodging for transient guests, wrongfully discriminated when it refused to accommodate two men solely because they were black).
\textsuperscript{48} See \textit{Anderson v. Pass Christian Isles Golf Club}, 488 F.2d 855 (5th Cir. 1974) (in denying access on the basis of race, the court held that the club violated the Civil Rights Act of 1964).
\textsuperscript{49} \textit{Little League}, 127 N.J. Super. at 531, 318 A.2d at 37.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id. (emphasis added). \textit{Little League} was a "place of public accommodation" because its sites, though not fixed, were open to the public at large and because it invited all children, except girls, to join. \textit{Id.} It offered its "accommodations, advantages, facilities and privileges" which the court defined as "the entire agglomeration of the arrangements" for baseball playing by children to the general public. \textit{Id.}
\textsuperscript{54} In \textit{Slidell}, an organization of white families owned a field and supported a football league for young white males in the area. \textit{Slidell}, 387 F. Supp. at 476. The court ruled that since this organization was a public accommodation, it could not exclude blacks from membership and participation. \textit{Id.} at 486. The plaintiffs pled their claim under 42 U.S.C.,
accommodation because it offered all area youth the entertainment of playing football and provided a form of spectator entertainment to the general public. According to these decisions, an organization is public if membership is open to all. The absence of any membership requirements, save sex or race, made these organizations public accommodations subject to the statute.

2) Boys’ Clubs

Two recent California cases held that a Boy Scouts of America Council and a Boys’ Club Chapter were “business establishments” under the Unruh Act, California’s public accommodation statute. In Curran v. Mount Diablo Council of Boy Scouts, the Boy Scouts had expelled a scout member because he was a homosexual and therefore, supposedly, a poor moral example for the younger boys. In Isbister v. Boys’ Club of Santa Cruz, Inc., the Boys’ Club barred all young women from becoming members. Both cases were perplexing because neither the scouts nor the club was a “business establishment” in the ordinary sense of the term. However, the court continued the

Title II of the federal Civil Rights Act of 1964. This statute has been applied to recreational organizations which claimed they were private clubs not open to the public at large. The courts found that despite their contentions to the contrary, these clubs offered membership to the public at large and could not exclude a particular class protected by the statute. See Daniel v. Paul, 395 U.S. 298, 306-08 (1969) (recreational area which provided a snackbar, swimming, boating, miniature golf, and dancing); Smith v. Young Men’s Christian Ass’n of Montgomery, 462 F.2d 634, 649 (5th Cir. 1972) (men’s civic recreational organization); Nesmith v. Young Men’s Christian Ass’n of Raleigh, N.C., 397 F.2d 96, 100 (4th Cir. 1968) (YMCA health and athletic club). These cases held that segregation on the ground of race, color, or national origin was illegal. Title II does not cover gender discrimination. See 42 U.S.C. § 2000a (1982).

55. 387 F. Supp. at 483.


58. CAL. CIV. CODE § 51 (West 1982 & Supp. 1988). The Unruh Civil Rights Act provides in part: “All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or blindness or other physical disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” Id.


60. Id. at 718, 195 Cal. Rptr. at 328.

61. 40 Cal. 3d 72, 707 P.2d 212, 219 Cal. Rptr. 150 (1985).

62. Id. at 77, 707 P.2d at 215, 219 Cal. Rptr. at 153.

63. As noted in Burks v. Poppy Construction Co., 57 Cal. 2d 463, 370 P.2d 313, 20 Cal. Rptr. 609 (1962), a “business” is generally defined as a “calling, occupation, or trade, engaged in for the purpose of making a livelihood [or profit] [sic] or gain.” Id. at 468, 370 P.2d at 316, 20 Cal. Rptr. at 612 (quoting Mansfield v. Hyde, 112 Cal. App. 2d 133, 137,
trend towards a broad construction of public accommodation statutes and subjected these organizations to the requirements of the public accommodation law.

Both the Curran and Isbister courts noted that the legislature passed the Unruh Act in response to prior judicial decisions which improperly limited the meaning of "place of public accommodation" and intended in its 1959 revision to expand, not restrict, the scope of the statute. Focusing on the words "all" and "of every kind whatsoever" in referring to business establishments, the courts held that "business" included both commercial and non-commercial entities. Thus, despite their claims of being non-profit organizations exempt from the statute, both the Boy Scouts and the Boys' Club fit within a broad definition of a "business establishment." Since both organizations were open to all male youth and made no attempt to restrict or select members on any basis other than sex or sexual preference, they were public accommodations, forbidden by the Unruh Act from discriminating against a protected class. These two California cases further exemplify the trend to extend the coverage of public accommo-

245 P.2d 577, 581 (1952). The courts examined whether the club and the scouts as public recreational organizations were removed from the commercial world and therefore outside the Unruh Civil Rights Act. Isbister, 40 Cal. 3d at 78-79, 707 P.2d at 215-16, 219 Cal. Rptr. 153-54; Curran, 147 Cal. App. 3d at 729, 195 Cal. Rptr. at 335.


65. Isbister, 40 Cal. 3d at 78, 707 P.2d at 215, 219 Cal. Rptr. at 153; Curran, 147 Cal. App. 3d at 728, 195 Cal. Rptr. at 335. Nevertheless, the courts had yet to determine whether the phrase "business establishments" also included public accommodations and amusements of the pre-1959 statute. Curran and Isbister held that the legislature, in adopting the phrase "in all business establishments of every kind whatsoever," intended to go beyond, but not preclude, the earlier statutory public accommodations. Isbister, 40 Cal. 3d at 78, 707 P.2d at 215-16, 219 Cal. Rptr. at 153; Curran, 147 Cal. App. 3d at 728, 195 Cal. Rptr. at 335.

66. Isbister, 40 Cal. 3d at 82-83, 707 P.2d at 218, 219 Cal. Rptr. at 156-57; Curran, 147 Cal. App. 3d at 729, 195 Cal. Rptr. at 335.

67. Isbister, 40 Cal. 3d at 83, 707 P.2d at 219, 219 Cal. Rptr. at 157; Curran, 147 Cal. App. 3d at 730, 195 Cal. Rptr. at 336.

68. Isbister, 40 Cal. 3d at 81, 707 P.2d at 217-18, 219 Cal. Rptr. at 155; Curran, 147 Cal. App. 3d at 723-24, 195 Cal. Rptr. at 331-32.

69. Isbister, 40 Cal. 3d at 91, 707 P.2d at 224-25, 219 Cal. Rptr. at 162-63; Curran, 147 Cal. App. 3d at 734, 195 Cal. Rptr. at 339.
3) **Businessmen's Associations**

Another series of cases in the early and mid-1980's addressed the question of whether certain businessmen's associations were public accommodations. These cases posed an even greater challenge to the courts than did the athletic team or boys' clubs sex discrimination cases for three main reasons. First, it was not obvious whether men's associations offered goods and services, and under the statutes, establishments typically are public accommodations only if they offer goods, services, facilities, privileges, or advantages to the public.

Secondly, businessmen's associations varied more among themselves than did boys' clubs or athletic teams. The purpose, activities, and membership requirements were particular to each businessmen's club. Some had a permanent site at which to gather, while others were more like the Little League and alternated their meeting places. Some specified extensive criteria before admitting members, while others permitted entrance so long as the male applicant paid the minimal dues. Some opened their activities to the public while others did not. As a result of these differences among businessmen's associa-

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70. Moreover, *Isbister* illustrates the court's intention to protect women from discrimination in places of public accommodation. As a sex discrimination decision, *Isbister* was a case of first impression, holding that girls had a right of equal access to such clubs. Prior cases dealing with boys' clubs involved racial discrimination. *See* Smith v. Young Men's Christian Ass'n of Montgomery, 462 F.2d 634 (5th Cir. 1972); Nesmith v. Young Men's Christian Ass'n of Raleigh, 397 F.2d 96 (4th Cir. 1968).


72. Rotary Club, 178 Cal. App. 3d at 1059, 224 Cal. Rptr. at 227; McClure, 305 N.W.2d at 772.

73. *See infra* note 86 for Minnesota's definition of "place of public accommodation." *See supra* note 58 for California's Unruh Act.


75. *Compare* Kiwanis, 806 F.2d at 473-74 (local club, faced with expulsion from the international organization when it contravened the group's constitution by admitting women, was a private club because it had definite criteria for the screening and selection of members), *with* McClure, 305 N.W.2d at 771 (the Jaycees had no standards for the admission of new members).

76. Opening participation to the public is consistent with achieving the broad purposes of some groups. For example, the objective of the Jaycees is to pursue "such educational and charitable purposes as will promote . . . development of young men's civic organizations in the United States . . . [and] participation by young men in the affairs of their community, state and nation." *Roberts v. United States Jaycees*, 468 U.S. 609, 612-
tions, courts were precluded from applying a blanket rule. Instead, they scrutinized the characteristics and practices of each club before determining whether it was a public accommodation.\footnote{77}

Finally, the courts also confronted the argument that enforcement of the accommodation statute against the association violated the groups' right to freedom of association.\footnote{78} Though the latter claim is properly a federal issue,\footnote{79} the state courts nevertheless interpreted their state statutes in light of this first amendment concern.

In \textit{United States Jaycees v. McClure}\footnote{80} and \textit{Rotary Club of Duarte v. Board of Directors of Rotary International},\footnote{81} women brought actions against the organizations for excluding them from membership.\footnote{82} Both cases resolved the issue of whether the organization was a "place of public accommodation" by focusing on the conduct of the organizations,\footnote{83} the nature of the goods and privileges they offered to the pub-

\begin{footnotesize}

Similarly, the purposes of the Rotary Club are international and necessitate wide participation. Rotary International defines itself as "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." \textit{Rotary Club}, 178 Cal. App. 3d at 1044, 224 Cal. Rptr. at 216 (quoting \textit{Manual of Procedure 7} (1981), \textit{Manual of Procedure 7} (1978) of International Rotary, a non-profit organization composed of local Rotary Clubs).

\footnote{77} The court in \textit{McClure} rejected the plaintiff's suggestion that the court view the Jaycees as analogous to the Kiwanis International Organization, a private club. \textit{McClure}, 305 N.W.2d at 771. "[W]e [must] look at what this national organization is by itself." \textit{Id}.

\footnote{78} See Roberts v. United States Jaycees, 468 U.S. 609 (1984); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 107 S.Ct. 1940 (1987). These decisions addressed the conflict between the states' efforts to eliminate sex discrimination against women and the constitutional freedom of association claimed by members of male organizations. \textit{See infra} Part I, Section D, 2.

Freedom of association is protected by the first amendment of the constitution. \textit{See infra} notes 123-27 and accompanying text for the relationship between the right of freedom of association and the first amendment.

\footnote{80} 305 N.W.2d 764 (Minn. 1981).

\footnote{81} 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213 (Cal. Ct. App. 1986), \textit{aff'd}, 107 S. Ct. 1940 (1987). In affirming the California Court of Appeal, the U.S. Supreme Court held that requiring California Rotary Clubs to admit women under the state's Unruh Civil Rights Act did not violate the clubs' first amendment rights of freedom of private association or of expressive association. \textit{See infra} Part I, Section D, 2.

\footnote{82} The Jaycees welcomed women to all their functions but only admitted women as associate members. \textit{McClure}, 305 N.W.2d at 773. The Rotarians permitted women to attend meetings, give speeches, receive awards, and form auxiliaries, but denied women membership. \textit{Rotary Int'l}, 107 S. Ct. at 1941.

\footnote{83} \textit{Rotary Club}, 178 Cal. App. 3d at 1048, 224 Cal. Rptr. at 219; \textit{McClure}, 305 N.W.2d at 768, 772.
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lic, and the criteria required for them to satisfy the private club exemption.

In determining the meaning of "place of public accommodation," the Supreme Court of Minnesota in McClure noted that the phrase "whose goods . . . privileges [and] advantages . . . are sold or otherwise made available to the public" of the state's public accommodation statute focuses on the types of conduct or activity carried on by the establishment rather than on the physical site of the establishment. Defining a place of public accommodation by the term "whose" instead of "where" emphasizes the conduct in which discrimination is unlawful rather than the kinds of sites where discrimination is unlawful. The California Court of Appeal in Rotary Club also stressed the activity of the club rather than its geographical site. An establishment "includes not only a fixed location, such as the 'place where one is permanently fixed for residence or business,' but also a permanent 'commercial force or organization' or 'a permanent settled position (as in life or business)."

In examining the conduct of the Jaycees and the Rotarians, these courts determined that the organizations were public accommodations because they offered goods or privileges to the general public. According to both courts, the organizations provided substantial business benefits to their members in the form of leadership skills, business contacts, and employment promotions. The courts held these benefits to

84. Rotary Club, 178 Cal. App. 3d at 1059, 224 Cal. Rptr. 227; McClure, 305 N.W.2d at 772.
85. Rotary Club, 178 Cal. App. 3d at 1058-59, 224 Cal. Rptr. at 226-27; McClure, 305 N.W.2d at 770.
86. MINN. STAT. ANN. § 363.01(18) (West 1966 & Supp. 1988). The Minnesota statute defines "place of public accommodation" as "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." Id.
87. McClure, 305 N.W.2d at 768, 772.
88. Id.
89. Rotary Club, 178 Cal. App. 3d at 1048, 224 Cal. Rptr. at 219.
90. Id. (quoting O'Connor v. Village Green Owners Ass'n, 33 Cal. 3d 790, 795, 662 P.2d 427, 430, 191 Cal. Rptr. 320, 323 (1983)).
91. Rotary Club, 178 Cal. App. 3d at 1059, 224 Cal. Rptr. at 227; McClure, 305 N.W.2d at 772.
92. Rotary Club, 178 Cal. App. 3d at 1059, 224 Cal. Rptr. at 227; McClure, 305 N.W.2d at 772. Similarly, the purpose of New York City's Local Law 63, upheld by the U.S. Supreme Court in New York State Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988), was to ensure that clubs do not categorically exclude women and minorities from membership in "organizations where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed."
be privileges and advantages offered by the club.\textsuperscript{93}

Having found that the Jaycee and Rotary Clubs were places of public accommodations,\textsuperscript{94} the courts rejected the organizations' arguments that they were private establishments exempt from the statutes' coverage.\textsuperscript{95} Prior courts had enumerated certain minimum standards to determine whether a club was public or private for purposes of the accommodation statutes.\textsuperscript{96} The main criteria include the selectivity with which new members are admitted or the formality of membership procedures and the existence of limits on the size of the membership.\textsuperscript{97}

In adopting these criteria, both the Minnesota Supreme Court and the California Court of Appeal found the Jaycee and Rotary Clubs to be public, rather than private.\textsuperscript{98} With a recruitment policy stressing quantity, not quality, the Jaycees made no effort to be selective of members and placed no limit on the size of clubs' membership.\textsuperscript{99} This zealous concern for an unselective and ever-growing

\textit{Id.} at 2230 (quoting the New York City Council's statement in Local Law No. 63 of 1984, § 1, App. 14-15 (1984)).

\textsuperscript{93} Rotary Club, 178 Cal. App. 3d at 1059, 224 Cal. Rptr. at 227; McClure, 305 N.W.2d at 772.

\textsuperscript{94} Courts in two states and the District of Columbia have found that the United States Jaycees was not a place of public accommodation. See United States Jaycees v. Massachusetts Comm'n Against Discrimination, 391 Mass. 594, 463 N.E.2d 1151 (1984); United States Jaycees v. Richardet, 666 P.2d 1008 (Alaska 1983); and United States Jaycees v. Bloomfield, 434 A.2d 1379 (D.C. App. 1981). As noted in the Reply Brief for the Defendant by Susan Bartholomew at 13, Quinnipiac Council, Boy Scouts of America Inc. v. Commission on Human Rights and Opportunities, 204 Conn. 287, 528 A.2d 352 (1987), the statutes in these states all retain the list approach to define "place of public accommodation." \textit{Id.} This may account for their literal rather than broad interpretation of the statute.

\textsuperscript{95} Rotary Club, 178 Cal. App. 3d at 1059, 224 Cal. Rptr. at 227; McClure, 305 N.W.2d at 770-71.

\textsuperscript{96} Nesmith v. Young Men's Christian Ass'n, 397 F.2d 96, 101-02 (4th Cir. 1968); Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182, 1203 (D. Conn. 1974); Wright v. Cork Club, 315 F. Supp. 1143, 1153 (S.D. Tex. 1970). The district court in Cornelius summarized these criteria in the following list:

\begin{itemize}
  \item[(a)] the selectiveness of the group in the admission of members;
  \item[(b)] the existence of formal membership procedures;
  \item[(c)] the degree of membership control over internal governance, particularly with regard to new members;
  \item[(d)] the history of the organization, [for example], was it created or did it make insubstantial changes in its prior operation in order to avoid the impact of civil rights legislation?;
  \item[(e)] the use of club facilities by non-members;
  \item[(f)] the substantiality of dues;
  \item[(g)] whether the organization advertises; [and]
  \item[(h)] the predominance of profit motive.
\end{itemize}

Cornelius, 382 F. Supp. at 1203 (citations omitted).

\textsuperscript{97} McClure, 305 N.W.2d at 770. See supra note 96 for additional criteria established by the courts.

\textsuperscript{98} Rotary Club, 178 Cal. App. 3d at 1058-59, 224 Cal. Rptr. 226-27; McClure, 305 N.W.2d at 770-71.

\textsuperscript{99} McClure, 305 N.W.2d at 771.
membership undermined the Jaycees' claim to be a private organization. Likewise, the high membership turnover in the Rotary Club and the lack of "continuous, personal and social" relationships among Rotarians precluded them from being a private club.

These businessmen's association cases broadened the scope of the public accommodation statutes in two ways. First, they underlined the importance of the organization's conduct rather than its physical locus. Secondly, the courts expanded their respective statutes to include less material goods such as employment skills, benefits, and promotions.

D. Limitations On The Public Accommodation Statute

Broadening public accommodation statutes to include athletic teams, boys' clubs, and businessmen's associations presents the hazard of over-expanding the statutes. In general, laws prohibiting discrimination recognize and address the problem of over-enforcement by exempting certain groups and activities from their coverage and permitting discrimination by these exempted groups and activities.

100. Id. See also Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468 (3d Cir. 1986). The same criteria applied to the Kiwanis Ridgewood Club led the Third Circuit Court of Appeals to conclude that it was not a place of public accommodation since it had a selective, non-public membership policy. Id. at 475.


102. Rotary Club, 178 Cal. App. 3d at 1048, 224 Cal. Rptr. at 219; McClure, 305 N.W.2d at 768, 772.

103. Rotary Club, 178 Cal. App. 3d at 1059, 224 Cal. Rptr. at 227; McClure, 305 N.W.2d at 772.

104. Over-expanding statutes creates the hazard of including within their scope otherwise permissible discrimination. If the boundary of the statutes as established by their text, case law, and policy considerations is not properly delineated, then all discrimination becomes prohibited even though this proscription violates the challenger's greater competing rights. Thus, a danger of over-enforcement exists unless "[t]he determination of the scope of coverage of the statutes defines a boundary, a place where the prohibition against discrimination ends and permission to discriminate begins." Stonefield, Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination Law, 35 Buffalo L. Rev. 85, 96 (1986).

105. Stonefield, supra note 104, at 99-104.

106. For example, the Fair Housing Act generally prohibits discriminatory rental practices but exempts small landlords from its coverage. 42 U.S.C. §§ 3601-3619 (1982). A building occupied by the owner and meant to house no more than four families is exempt from the statute's coverage. This exemption reflects the law's esteem for personal autonomy which both enhances social welfare and is itself a moral value. Stonefield, supra note 104, at 100-01.

The federal employment statute permits employers of a small number of people to discriminate with impunity. 42 U.S.C. § 2000e(b) (1982) holds that a person with fewer than fifteen employees is not technically an "employer" for purposes of the statute.

Religious organizations in specific circumstances may also lawfully discriminate under
This section examines countervailing limitations to the public accommodation statutes' scope by looking at examples of arguably permissible discrimination against prospective members of various associations. These restrictions derive from two distinct sources: a concern with the "privateness" of private institutions and the implications of the constitutional right to freedom of association. Should the public accommodation statute be extended to include volunteers, an alternative examined in Part III, these two limitations would apply equally to them.

1) Private Institutions

The public accommodation laws of many states exempt private institutions from their coverage and permit private establishments to discriminate without penalty. However, the statutes generally do not list those institutions which qualify for the private exemption.


108. For example, New Jersey's statute states: "Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of [public] accommodation, which is in its nature distinctly private." N.J. Stat. Ann. § 10:5-5(l) (West 1976 & Supp. 1988).

Similarly, the District of Columbia's statute states that a place of public accommodation "shall not include any institution, club, or place of accommodation which is in its nature distinctly private." D.C. Code Ann. § 1-2502 (1981 & Supp. 1988).

A 1984 amendment to New York City's Local Law 63 specified criteria necessary to qualify as a private club. Any "institution, club or place of public accommodation," other than a benevolent order or religious corporation, "shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment . . . directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business." N.Y.C. Admin. Code § 8-102(9) (1986). This city ordinance was declared constitutional by the U.S. Supreme Court in New York Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988), and may influence states to incorporate similar distinguishing characteristics in their public accommodation statutes.
The courts, therefore, have established a number of criteria by which to determine whether an organization is private within the context of a public accommodation statute. The most important factors include the selectivity in admission of members and the existence of limits on the size of membership.

These factors, hence, measure the privateness of an institution and determine whether an establishment is a public accommodation. The requirement that a public accommodation be open to the public "undermines the significance of the private club exemption... [T]he exemption adds nothing to the statute and is substantively superfluous." In exempting the private institution, legislatures only seem to have specified what was not a public accommodation without restricting the statutes' scope in any way. Since the private exemption does not substantively alter the statute, it always is implicitly present in the statute, even if not expressly stated, and sets no new limit to the statutes' coverage.

The courts have noted that the purpose of the exemption is to safeguard the right of freedom of association. It permits organsi-
tions of a truly private character to discriminate in the selection of their members because of each individual's underlying right to freely associate. In fact, an accommodation statute which included private establishments within its scope could be attacked on constitutional grounds. The right to freedom of association respects "the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses." Since the private exemption was added to stress the individual's right to freedom of association, it is necessary to examine whether this right poses any limitations to the public accommodation statutes.

2) Constitutional Right to Freedom of Association

The United States Supreme Court, in Roberts v. United States Jaycees, balanced Minnesota's interest in prohibiting discrimination through its public accommodation statute against the Jaycees' right to freedom of association. In pursuing its analysis, the Court identified two distinct constitutional interests, the freedom of intimate association and the freedom of expressive association, and held that the enforcement of the state's public accommodation statute to compel the Jaycees to accept women as members did not infringe upon either interest. Although the constitutional right to freely associate did not limit the application of the public accommodation statute to the Jaycees, the following sections examine whether in certain circumstances the constitutional right of freedom of association might limit the statute's scope.

a) Intimate Association

The right of intimate association protects "the formation and

298 (1966) (it "is the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses."); NAACP v. Alabama, 357 U.S. 449, 462 (1958) ("Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association . . . ."); Wright v. Cork Club, 315 F. Supp. 1143, 1157 (S.D. Tex. 1970) ("If the government were allowed to regulate the membership of truly private clubs, private organizations, or private associations, then it could determine for each citizen who would be his personal friends and what would be his private associations, and the Bill of Rights would be for naught.").

118. Id. at 617-18.
119. Id. at 621, 626-29. See infra notes 140-43 and accompanying text.
preservation of certain kinds of highly personal relationships” best exemplified by the family as an association that is intimately linked and that requires personal choices for its creation and sustenance. To establish a right to freedom of association based on privacy and intimate association, a group must be private. Thus, an organization which is categorized as a public accommodation does not qualify as an intimate association. Therefore, virtually by definition, a public accommodation cannot assert a constitutional right of freedom of intimate association. The scope of the public accommodation statute and of the right to intimate association are mutually exclusive, and the freedom of intimate association, in and of itself, should never limit the application of a public accommodation statute.

b) Expressive Association

A right of expressive association exists only when linked to an expressive activity. Association for its own sake is not constitutionally protected. Rather, freedom of expressive association is related


121. Roberts, 468 U.S. at 619-20. Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.

See also Curran v. Mount Diablo Council of the Boy Scouts of America, 147 Cal. App. 3d 712, 730, 195 Cal. Rptr. 325, 336 (1983) (“[T]hose with a common interest may associate exclusively with whom they please only if it is the kind of association which was intended to be embraced within the protection afforded by the rights of privacy and free association.”). In Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182 (D. Conn. 1974), the district court upheld the private club defense established by the defendant and stated: “To have their privacy protected, clubs must function as extensions of members’ homes and not as extensions of their businesses.” Id. at 1204. See supra note 96 and accompanying text for the judicially-created criteria characterizing a private establishment.

122. Roberts, 468 U.S. at 620.

123. Id. at 627.

to first amendment rights.

An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . . Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.125

Thus, the right of expressive association safeguards the ability of members to express "those views that brought them together."126 The Court often has recognized that in a pluralistic society, association and organization are necessary for effectively advancing ideas and beliefs.127

While as so interpreted, the first amendment to the Constitution protects the right to associate for expressive purposes, this right is not absolute.128 A state may infringe upon it "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas,

125. Roberts, 468 U.S. at 622.
126. Id. at 623.
128. Roberts, 468 U.S. at 623. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." This is not to say, however, that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution.
that cannot be achieved through means significantly less restrictive of associational freedoms."  

The state has a compelling interest in eliminating discrimination. However, the state cannot pursue this interest if it results in the suppression of the association's expressive activity. Suppression occurs when there is a "direct relation between membership exclusion and the organization's advocacy." A group may engage in an expressive activity which is changed in some degree if an excluded class is included, yet fail to qualify for protection under the right to expressive association. For example, in Roberts, the Jaycees argued that the admission of women would alter their political positions and influence while a recreational club in Daniel v. Paul contended that black members would change their club's attendance and activities. Nevertheless, the organizations' expressive activities were not protected under the constitutional right of expressive association from the states' application of their anti-discriminatory legislation.

The state's intervention must suppress, not incidently alter, the


130. Id. at 625. The state's interest in eliminating discrimination rests on its obligation to protect citizens from serious social and personal harms . . . . [D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life . . . . That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.

Id.

In amending its Human Rights Law to prohibit discrimination in clubs that did not properly fall under the statute's private exemption, the city of New York stated that its compelling interest lay in providing all citizens with "'a fair and equal opportunity to participate in the business and professional life of the city.'" New York State Club Ass'n v. New York City, 108 S. Ct. 2225, 2230 (1988) (quoting Local Law No. 63 of 1984, § 1, App. 14-15). This goal is frustrated by the "discriminatory practices of certain membership organizations where business deals are often made and personal contacts valuable for business purposes, employment and professional advancement are formed." Id.

133. Roberts, 468 U.S. at 626-27.
134. 395 U.S. 298 (1969) (recreational club found to be a public accommodation and enjoined from denying admission to blacks solely on racial grounds).
135. Id. at 300 n.2. At trial, the defendant stated: "'[W]e refused admission to [blacks] because white people in our community would not patronize us if we admitted Negroes to the swimming pool.'" Id. (quoting testimony).
expressive goals of the association in order for the latter to claim a constitutional right. The organization’s discriminatory criteria must relate directly to its expressive activity for the group to be safeguarded by the right to freedom of expression. For example, a white supremacist group’s exclusion of blacks directly promotes its ideological position. A public accommodation statute that required the group to accept blacks would violate the group’s right to expressive association. The same would apply to a Nazi association compelled to accept Jews. The very goal of the association would be suppressed by the forced inclusion of the class it seeks to repress. Additionally, a radical women’s group seeking to make men second-class citizens would find its ideological goal countered by the acceptance of male members.

The Supreme Court in *Roberts v. United States Jaycees* made this same inquiry by examining whether the exclusion of women was the fundamental purpose of the Jaycees. Although the Jaycees argued that their aim was the promotion of young men’s interests, the

136. The *Curran* court stated:

Taking [the right to freedom of association] literally as “governing” would afford protection to the most flagrant form of discrimination under the canopy of the right of free association. The answer is, of course, that those with a common interest may associate exclusively with whom they please only if it is the kind of association which was intended to be embraced within the protection afforded by the rights of privacy and free association. *Curran*, 147 Cal. App. 3d at 730, 195 Cal. Rptr. at 336.

137. The U.S. Supreme Court, in New York State Club Ass’n v. City of New York, 108 S. Ct. 2225 (1988), stated:

It is conceivable that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion. *Id.* at 2234.

138. Under this analysis, the right of expressive association will limit public accommodation statutes only in the rare instance when a minority person attempts to join or volunteer services to an organization which seeks to eliminate the minority. Thus, in terms of practical impact, a claim for protection under the constitutional right to freedom of expression will seldom prevail over the state’s anti-discriminatory interests.


140. *Roberts*, 468 U.S. at 627. Justice O’Connor, in a concurring opinion, suggested a different test to determine the expressive rights of an association. Instead of adopting the majority’s test which balanced an association’s claim against the interest of the intruding state, Justice O’Connor focused on the commercial or expressive nature of the association. If the association were commercial, the state could enforce its anti-discrimination statute; if it was expressive, the association’s right to freedom of expression would overcome the state’s interest. *Id.* at 633-36, 638 (O’Connor, J., concurring). Justice O’Connor found the Jaycees to be a commercial organization and therefore agreed that their first amendment claim failed. *Id.* at 639-40 (O’Connor, J., concurring).
Court found that the organization did not primarily advance a gender-specific goal through its charitable and civic activities. Since the admission of women would not prevent the Jaycees from engaging in its principal activities or from disseminating its views, Minnesota's public accommodation statute did not violate the Jaycees' right of expressive association.

Association based on ethnicity or religion might present constitutional problems in certain circumstances. Where the purpose of a Hispanic heritage club or a Jewish fellowship group is to preserve its own culture or religion, the group may successfully claim a fundamental expressive goal which would be destroyed by the enforcement of anti-discriminatory statutes. In many cases, the issue raised by the challenges of these groups would be resolved by statutory construction, and the constitutional issue would not be presented. Where the associations are classed as private institutions, they would fall outside the statute's scope and would be free to discriminate. However, when ethnic or religious associations are public accommodations, they may still have a constitutional right to expressive association.

In evaluating that right, a significant difference exists between, for example, an all-French group and a non-French group. Those excluded from the latter are stigmatized, whereas those denied membership to the former suffer no significant ethnic rejection. The ethnic group inflicts no stigma on the excluded classes for two reasons. First, the nationality requirement in the ethnic group is more likely to be perceived as a means for preserving and fostering that group's culture rather than as a means of excluding classes subject to prejudice. Secondly, the many classes excluded from an ethnic group form a category that is both too large and too diverse to suffer any real stigma.

Thus, the state has a compelling interest in eliminating exclusionary groups which are open to all but specific nationalities. On the
other hand, it is in the state's interest to foster associations which limit membership to a specific nationality for the purpose of preserving and promoting a particular heritage.\textsuperscript{146} Each culture has its treasures that enrich the whole. "Cultural pluralism enriches the national culture, not only through the development of individuality, but also through diverse celebrations, traditions, communities, and heritage that form our national identity."\textsuperscript{147}

Thus, because the discrimination which results from ethnic or religious associations does not cause a stigmatizing evil and, because the government has a positive interest in protecting cultural pluralism, the state cannot demonstrate a compelling interest in eliminating the otherwise invidious discrimination by such groups. Without a compelling interest to eliminate discrimination in groups that foster their own heritages, the state cannot lawfully apply the public accommodation statute to them. These ethnic and religious groups can claim a right of expressive association. Consequently, in certain circumstances, the constitutional right of freedom of association can limit the scope of a state's public accommodation statute.\textsuperscript{148}

II. \textit{QUINNIPIAC COUNCIL, BOY SCOUTS OF AMERICA, INC. V. COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES}\textsuperscript{149}

When refused a scoutmaster position because of her sex, Catherine Pollard, relying on these prior judicial interpretations of other states' public accommodation statutes,\textsuperscript{150} had a number of reasons to

\textsuperscript{146} Sengstock & Sengstock, \textit{Discrimination: A Constitutional Dilemma}, 9 WM.

\textsuperscript{147} Marshall, \textit{supra} note 124, at 88.

\textsuperscript{148} Of course, certain associations might characterize themselves as ethnic or religious as a pretext to engage in some unrelated activity. An all-Catholic or all-Jewish association whose principal activities are bowling and golf has nothing to do with the preservation of a religion. Associations with no central practices which promote cultural or religious heritages should be put to the same test as others claiming a right to expressive association. This test prohibits exclusionary discrimination that does not directly affect the association's expressive activity. These superficially cultural or religious associations would not be granted constitutional protection because their discrimination has nothing to do with perpetuating a heritage.

\textsuperscript{149} 204 Conn. 287, 528 A.2d 352 (1987).

expect relief under the similar Connecticut statute.\textsuperscript{151} Cases in other jurisdictions supported both her contention that public accommodation statutes apply to membership organizations which are non-selective in their invitation to participate and that such application is constitutional.\textsuperscript{152}

Beginning with \textit{Little League}, the courts consistently have held that a place of public accommodation was not limited to a fixed site.\textsuperscript{153} Thus, the fact that the Boy Scouts gathered at various locations did not exclude them from being a public accommodation.\textsuperscript{154} As also noted in \textit{Little League}, an organization is a public accommodation if it offers advantages and goods on the basis of a general invitation to join.\textsuperscript{155} Therefore, considering the Boy Scouts' open, broad, and aggressive recruitment policy, including the use of the mass media, a positive finding that they offered their services to the general public was likely.\textsuperscript{156} Furthermore, \textit{Isbister} and \textit{Curran} precluded the Boy Scouts from escaping the statutes' coverage because of their non-profit character.\textsuperscript{157}

Pollard's claim also appeared to be an offshoot of the businessmen's association cases where the courts held that the "goods" which were wrongly denied women included leadership skills and promotion opportunities.\textsuperscript{158} It seemed plausible that the leadership skills ac-
quired from serving as scoutmaster and from training programs would similarly fall into the category of goods, privileges, and advantages, and that, therefore, under the public accommodation statute, the Boy Scouts could not deny voluntary leadership positions on a discriminatory basis.

In Roberts,159 the Supreme Court had stated that there are two types of constitutional rights that can limit the application of the public accommodation statute: a right of association based on intimate personal relationships, and a right to associate for expressive purposes.160 The admission of a qualified woman as scoutmaster did not appear to overstep either of these limits. A Boy Scout troop was not apparently the kind of highly personal association protected by the right of intimate association from unjustified interference by the state; nor would a woman as scoutmaster seem to suppress the goals of the Boy Scouts to train and educate youth. A male-only policy is not a goal set forth by the scout law in the way a white-only policy is the aim of the Ku Klux Klan. The installation of a woman as scoutmaster might incidentally alter the method of formation but, as discussed above,161 such insubstantial changes would be insufficient to protect the Boy Scouts under the right of expressive association.162

The Connecticut Supreme Court carefully considered this judicial background against which Quinnipiac Council arose. Nevertheless, it noted that the particular issue for decision was different from that presented in prior cases. In those cases, the defendant organizations had refused plaintiffs access to goods and services offered to the public. In Quinnipiac Council, the defendant organization denied plaintiff, not its services, but the opportunity for the plaintiff to offer her services to


160. Roberts, 468 U.S. at 617-18. See supra notes 120-48 and accompanying text for a discussion of these constitutional rights.

161. This facet of the right of freedom of association is discussed in supra notes 132-43 and accompanying text.

162. The court in Quinnipiac Council stated:
Although we need not reach those constitutional issues today, we note that those arguments have little merit in light of the United States Supreme Court's recent decisions in Roberts v. United States Jaycees, 468 U.S. 609 (1984), and Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 107 S. Ct. 1940 (1987). In both cases, the Supreme Court held that even if a public accommodation law infringes slightly on the constitutional rights of expressive association, that infringement is justified because such statutes serve a compelling state interest in eliminating discrimination.

Quinnipiac Council, 204 Conn. at 293 n.5, 528 A.2d at 356 n.5.
the organization.\textsuperscript{163} Thus, the central issue in \textit{Quinnipiac Council} was whether the proffer of services is an accommodation within the meaning of the Connecticut statute.

\textbf{A) Facts}

In 1974 and in 1976, the defendant, Catherine Pollard, applied to Quinnipiac Council for a commission as Scoutmaster of Boy Scout Troop 13 of Milford, Connecticut.\textsuperscript{164} On both occasions, she was refused on the ground that certain volunteer positions, such as scoutmaster, were limited exclusively to men.\textsuperscript{165}

Pollard's scouting skills were undoubted. In the years prior to her applications, Pollard had accumulated extensive experience in the Quinnipiac Council's scouting program. She had been a cub scout den mother, music merit badge counselor, and committee member of Troop 13.\textsuperscript{166} From 1972 to 1976, when Troop 13 lacked an official scoutmaster, she served as its de facto scoutmaster. The scouting program flourished under her direction; the boys in her troop advanced, and five attained the rank of eagle scout.\textsuperscript{167}

After rejection of her second application, Pollard filed a complaint with the Connecticut Commission on Human Rights and Opportunities in December of 1976, alleging discriminatory public

\textsuperscript{163} \textit{Quinnipiac Council}, 204 Conn. at 301, 528 A.2d at 360.

\textsuperscript{164} Although the Boy Scouts permitted women to assume numerous leadership roles (see infra note 193), they did not allow women to become scoutmasters, assistant scoutmasters, webelos den leaders, assistant webelos den leaders, lone scout friends, or counselors. \textit{Quinnipiac Council}, 204 Conn. at 291, 528 A.2d at 355.

\textsuperscript{165} \textit{Id.} at 290-91, 528 A.2d at 355. On April 29, 1974, the Chief Scout Executive of the Boy Scouts of America rejected Catherine Pollard's application in the following letter:

\begin{quote}
Your request to be commissioned as a scoutmaster is difficult to turn down. The credentials you present are all commendable. We feel that the boy of scouting age looks to a man to establish his own standards of character. It is my obligation to adhere to this policy and thereby not authorize your request.
\end{quote}


\textsuperscript{166} \textit{Quinnipiac Council}, 204 Conn. at 290, 528 A.2d at 355.

\textsuperscript{167} \textit{Id.} An eagle scout is defined as "a boy scout who has been awarded 21 merit badges." \textsc{webster's third new int'l dictionary} 713 (unabr. 1971). An eagle scout is a "boy scout of highest rank." \textsc{funk & wagnalls standard college dictionary} 414 (6th ed. 1977).
accommodation practices.\textsuperscript{168} In a January, 1984, decision, the Commission’s Hearing Examiner held that the Boy Scouts had violated the Connecticut public accommodation statute and required them to offer the position of scoutmaster to Catherine Pollard.\textsuperscript{169} In May of 1986, after finding that the Hearing Examiner had misconstrued the statute,\textsuperscript{170} the Superior Court of Connecticut reversed the Examiner’s decision.\textsuperscript{171} Catherine Pollard appealed the decision to the Appellate Division. Subsequently, the Connecticut Supreme Court transferred the appeal to itself.\textsuperscript{172}

\textbf{B) Issues Decided}

The Connecticut public accommodation statute defines “place of public accommodation, resort, or amusement” as “any establishment which caters or offers its services or facilities or goods to the general public . . . .”\textsuperscript{173} The initial question in \textit{Quinnipiac Council}, thus, was whether the organization was a “place of public accommodation” within the meaning of the statute.\textsuperscript{174}

Chief Justice Peters, writing for the court, began by examining the Connecticut statute’s language, legislative history, and remedial

\begin{itemize}
  \item \textsuperscript{168} Hearing Examiner’s Memorandum at 6, \textit{Quinnipiac Council}, 204 Conn. 287, 528 A.2d 352 (1987).
  \item \textsuperscript{169} \textit{Id.} at 34.
  \item \textsuperscript{170} The Hearing Examiner found that the Boy Scouts organization was open to the public and constituted a "place" within the meaning of the statute. Hearing Examiner’s Memorandum at 19-21, \textit{Quinnipiac Council}, 204 Conn. 287, 528 A.2d 352. Given these findings and declining to limit the application of the public accommodation statute to commercial, business, and profit-oriented organizations, the Hearing Examiner held that the Boy Scouts was a public accommodation and violated the public accommodation statute when it rejected Pollard’s application solely on the basis of her female gender. \textit{Id.} at 20, 28-29, 34.
  \item The trial court reversed the conclusion of the Hearing Examiner, holding that the term “establishment” in the state’s public accommodation statute “was intended to encompass ‘every possible type of business imaginable’ but not ‘a singular, unique, eleemosynary institution’ like the Boy Scouts of America.” \textit{Quinnipiac Council}, 204 Conn. at 291, 528 A.2d at 355. Furthermore, the trial court determined that the “position of scoutmaster does not fall within the rubric of ‘services,’ ‘goods’ or ‘facilities’ and hence is not a ‘public accommodation.’” \textit{Id.} at 291-92, 528 A.2d at 355.
  \item \textsuperscript{171} The Superior Court’s Memorandum of \textit{Quinnipiac Council} (Chernauskas, J.), May 19, 1986.
  \item \textsuperscript{172} The Connecticut Supreme Court, pursuant to Conn. Rules of Court § 4023 (1988), has the authority to transfer any appeal from the Appellate Division to itself.
  \item \textsuperscript{174} \textit{Quinnipiac Council}, 204 Conn. at 295, 528 A.2d at 357. Since the court resolved that the proffer of services was not an accommodation, it never reached the issue of whether the Boy Scouts had denied Pollard “full and equal accommodations in any place of public accommodation, resort or amusement . . . because of . . . sex . . . .” Conn. Gen. Stat. Ann. § 46a-64(a)(1) (West 1986).
\end{itemize}
The court first concluded that a physical site was not required in order to be a place of public accommodation. Drawing on the similar Minnesota statute that was applied broadly in *United States Jaycees v. McClure*, the court held that the Connecticut statute "now regulates the discriminatory conduct and not the discriminatory situs of an enterprise which offers its services to the general public."

The court next examined whether the Boy Scouts' admittedly discriminatory refusal to accept Pollard as a scoutmaster was an unlawful public accommodation practice. Unlawful discrimination occurs when an "establishment" which serves "the general public" withholds its goods and services from a member of a protected class. Thus, in order to discriminate in violation of the public accommodation statute, an organization must first satisfy the statutory definition of "establishment."

The court found that the term "establishment" includes business, commercial, non-profit, and private entities. The key factor in determining whether an organization is an "establishment" is whether it is held open to the public. Thus, any service provider, regardless of its organizational status, is an "establishment" if it is open to the general public. Even a private organization which has no obligation to

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175. *See supra* section I, B.
176. *Quinnipiac Council*, 204 Conn. at 298, 528 A.2d at 358.
177. 305 N.W.2d 764 (Minn. 1981). *See supra* notes 86-88 and accompanying text for the Minnesota Supreme Court's interpretation of that state's public accommodation statute.
178. *Quinnipiac Council*, 204 Conn. at 298, 528 A.2d at 358. The court did not elaborate on this interpretation but referred to United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981), whose interpretation was found to be constitutional in Roberts v. United States Jaycees, 468 U.S. 609 (1984). *See supra* notes 86-88 and accompanying text for a discussion of the Minnesota statute.
179. *Quinnipiac Council*, 204 Conn. at 298, 528 A.2d at 358.
180. *Id.*
181. *Id.* at 300, 528 A.2d at 359. The statute does not limit establishments to businesses, nor does it make any exceptions for private organizations. Unlike Connecticut's public accommodation statute, the California accommodation statute only lists "business establishments." It states: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or blindness or other physical disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." CAL. CIV. CODE § 51 (West 1982 & Supp. 1988).
182. *Quinnipiac Council*, 204 Conn. at 300, 528 A.2d at 359.
183. The *Quinnipiac Council* court illustrated the meaning of organizational status by the following examples. "A hospital . . . cannot refuse its services to a member of the general public simply because the hospital is a nonprofit corporation. . . . Similarly, a
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offer its services to all becomes bound by the public accommodation statute once it eschews selectivity. Therefore, to determine whether an organization is subject to the statute, it is necessary to analyze the facts of each case.

The court, therefore, closely examined the facts in Quinnipiac Council and focused on whether the proffer of services was an "accommodation." In response to Pollard's argument that the Boy Scouts had denied her access to an "accommodation" when they refused her the opportunity to give of her services, the court held that the statute does not protect the volunteering of services. "[A] statute that addresses a discriminatory denial of access to goods and services does not, on its face, incorporate an allegedly discriminatory refusal by an enterprise to avail itself of a claimant's desire to offer services." Accordingly, the court held that the Boy Scouts did not violate the statute—in the statute's awkward terms, did not deprive Pollard of an accommodation—in refusing her the opportunity to serve as scoutmaster of Troop 13.

C) Issues Not Decided

Although rejecting the public accommodation claim as not covered by the statute, the court suggested, without deciding, that the state's employment discrimination statute might protect those proffering their services from discrimination. The court deemed it "especially significant" that the employment statute contained an express exception for a "bona fide occupational qualification or need" (BFOQ), which would permit employers to discriminate if they

private university that opens its theater facilities for the entertainment of the general public cannot refuse admission for reasons . . . made illegal by [§ 46a-64(a)(1)]." Id. at 299, 528 A.2d at 359.

184. Id.
185. Id. at 301, 528 A.2d at 360.
186. Id.
187. CONN. GEN. STAT. ANN. § 46a-60(a)(1) (West 1986). Connecticut's Unfair Employment Practice statute states:
It shall be a discriminatory practice in violation of this section: (1) For an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against him in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disorder, mental retardation or physical disability, including, but not limited to, blindness.

Id. (emphasis added).
188. Quinnipiac Council, 204 Conn. at 302, 528 A.2d at 360.
189. Id. The court stated: "A review of our labor legislation discloses that our Gen-
could meet the heavy burden of proving that such discrimination was necessary to the operation of the business.\textsuperscript{190}

The Boy Scouts asserted this exception as part of their defense.\textsuperscript{191} They justified the male-only scoutmaster position on the need of boys, ages ten to fourteen, for a male role model.\textsuperscript{192} The Boy Scouts claimed that their general policy regarding women in leadership positions did not manifest gender discrimination since they invited women to assume numerous leadership positions.\textsuperscript{193} However, for this particular position and for this particular age group, the Boy Scouts argued that their sex requirement was a BFOQ.\textsuperscript{194}

Since the court decided that volunteering of services was not protected by the statute,\textsuperscript{195} it did not reach, and thus did not fully evaluate, the BFOQ issue. Moreover, because the accommodation statute does not contain an express BFOQ exception, it could not be asserted as a defense for violation of the public accommodation statute. However, the court did note that the BFOQ appears "to be as relevant to voluntary services as it is to paid employment,"\textsuperscript{196} and that a BFOQ provision would provide the proper framework for evaluating the organization's claim that the boys' need for male role models permitted it to refuse the services of a talented woman.\textsuperscript{197}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{190} See infra Section IV for a more detailed discussion of BFOQ.
\item \textsuperscript{191} Although the Boy Scouts did not place a BFOQ label upon their argument, the court acknowledged it as such. \textit{Quinnipiac Council}, 204 Conn. at 293, 302, 528 A.2d at 356, 360, see Brief for Quinnipiac Council, Boy Scouts of America, Inc. at 5, 7, \textit{Quinnipiac Council}, 204 Conn. 287, 528 A.2d 352.
\item \textsuperscript{192} Brief for Quinnipiac Council, Boy Scouts of America, Inc. at 5, 7, \textit{Quinnipiac Council}, 204 Conn. 287, 528 A.2d 352. The Boy Scouts offer three general categories of scouting programs: Cub Scouting, Boy Scouting, and Exploring. The Cub Scouts program is open to girls and boys ages eight through ten. The Explorer program admits both male and female teenagers from age fourteen years upwards. However, the Boy Scouts program for ages ten through fourteen is open only to boys. \textit{Id.} at 3-4.
\item \textsuperscript{193} \textit{Id.} at 6-7. At the time \textit{Quinnipiac Council} was decided, women were allowed to be Cubmaster, Assistant Cubmaster, Den Leader Coach, Den Leader, Assistant Den Leader, Explorer Advisor, Associate Explorer Advisor, Lone Cub Scout Friend and Counselor, Council Commissioner, Assistant Council Commissioner, District Commissioner, Assistant District Commissioner, Unit Commissioner, Roundtable Commissioner, and Roundtable Staff Member. Hearing Examiner's Memorandum of \textit{Quinnipiac Council} at 9. See supra note 164 for the positions that were closed to women.
\item \textsuperscript{194} Brief for Quinnipiac Council, Boy Scouts of America, Inc. at 5, 7, \textit{Quinnipiac Council}, 204 Conn. 287, 528 A.2d 352; \textit{Quinnipiac Council}, 204 Conn. at 293, 302, 528 A.2d at 356, 360.
\item \textsuperscript{195} \textit{Quinnipiac Council}, 204 Conn. at 301, 528 A.2d at 360.
\item \textsuperscript{196} \textit{Id.} at 302, 528 A.2d at 360.
\item \textsuperscript{197} \textit{Id.}
\end{enumerate}
\end{footnotesize}
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sion does exist in the employment statute but not in the public accommodation statute, the court stated that it "is more consistent with a legislative intent to leave such practices to be regulated by statutes that address employment discrimination rather than by statutes directed to discrimination in public accommodations."198

Quinnipiac Council leaves an important question unanswered: in the future, should volunteers bring their discrimination claims under the employment statute rather then under the public accommodation statute? Addressing this issue involves a two-fold examination. It first requires, in Part III, evaluating Quinnipiac Council and determining whether this decision should be rejected in favor of continuing the previous expansive judicial interpretations of the public accommodation statutes, either by adopting a different interpretation of the statutory language or by amending the statute itself. The question then necessitates, in Part IV, exploring the appropriateness of protecting volunteers from discrimination under the employment statute as the Connecticut Supreme Court suggested.

III. PROTECTION FOR VOLUNTEERS UNDER THE PUBLIC ACCOMMODATION STATUTE

While the Connecticut Supreme Court in Quinnipiac Council ruled that the proffer of services was not an accommodation under the Connecticut public accommodation statute, an amended statute,199 or a different interpretation of the same statute, would yield a different result. Several states, excluding Connecticut, have public accommodation statutes which contain the words "privileges" and "advantages."200 In United States Jaycees v. McClure,201 the Minnesota Supreme Court interpreted these words as meaning, among other things, that: 

"[l]eadership skills are 'goods,' business contacts and employment promotions are 'privileges' and 'advantages' . . . ."202

Using this new language and its broad construction, a court properly could regard the Boy Scouts' training in adult leadership skills as a "good," and the opportunity to serve as scoutmaster as a "privilege" and "advantage." From this perspective, Pollard's personal fulfill-

198. Id.
199. See infra note 203 for a suggested amended statute.
201. 305 N.W.2d 764 (Minn. 1981).
202. Id. at 772.
ment from the position of scoutmaster is a good, a privilege, and an advantage, each fully protected by the public accommodation statute.203

A revised interpretation of the existing Connecticut public accommodation statute would likewise afford protection for volunteers. The opportunity to serve could be considered a good.204 Volunteers offer their services because of the sense of fulfillment and reward that comes from gratuitous giving. The satisfaction derived from serving others is, at least for the volunteer, a good.205 Thus, the term "goods" in the present statute could be interpreted to include these non-material benefits. The addition of the terms "privileges and advantages" to the Connecticut public accommodation statute would clarify and support this broadened interpretation of the term "goods."

This analysis illustrates that it is possible to enlarge the meaning of goods, privileges, and advantages to include the proffer of services. However, broadening the definition of these terms in an effort to encompass volunteers within the public accommodation statute may violate the statute's intended purpose. As noted by the Quinnipiac Council court, the public accommodation statute focuses on the protected class' access to goods and services.206 It primarily safeguards recipients of goods and services against discrimination.207 On the other hand, profferers or providers of services compose the class protected by the employment statute. For this reason, enlarging the concept of goods, privileges, and advantages to encompass the proffer of

203. An amended statute as suggested in the text would read: "A place of public accommodation ... means any establishment which caters or offers its services or facilities or goods or privileges or advantages to the general public ...." CONN. GEN. STAT. ANN. § 46a-63(1) (West 1986) (suggested amendments italicized).

204. See Brief for Defendant by Susan Bartholomew at 28, Quinnipiac Council, 204 Conn. 287, 528 A.2d 352 (opportunity to become a scoutmaster and to work with young members between the ages of ten and fourteen on various projects and activities are "goods" denied women).

205. "[A] volunteer [is] ... an individual engaging in behavior ... that is essentially (primarily) motivated by the expectation of psychic benefits of some kind as a result of activities that have a market value greater than any remuneration received for such activities." Smith, Altruism, Volunteers, and Volunteerism, in VOLUNTEERISM IN THE EIGHTIES 25 (J. Harman ed. 1982). See also Van Til, Volunteering and Democratic Theory, in VOLUNTEERISM IN THE EIGHTIES 211 (J. Harman ed. 1982) ("[V]olunteering ... represents a significant contribution to the volunteer's own psychological health and self-actualization.") (quoting E. SCHINDLER-RAINMAN & R. LIPPITT, THE VOLUNTEER COMMUNITY: CREATIVE USES OF HUMAN RESOURCES 15 (1975)).

206. Quinnipiac Council, 204 Conn. at 301, 528 A.2d at 360.

207. Id. "[A] statute that addresses a discriminatory denial of access to goods and services does not, on its face, incorporate an allegedly discriminatory refusal by an enterprise to avail itself of a claimant's desire to offer services." Id.
services goes beyond the intent and nature of the public accommodation statute. It is an attempt to include a class traditionally protected by the employment statute. The distinct purposes of the public accommodation statute and employment statute correctly prompted the Quinnipiac Council court to refer volunteers to the employment statute.

The Quinnipiac Council court also found it significant that the accommodation statute lacked a BFOQ and regarded its presence in the employment statute as an indicium that volunteers more appropriately fall under this latter statute. As will become evident in the next section, a BFOQ provision would permit directors to refuse volunteer services for job-related reasons essential for the organization's operation. If the public accommodation statute could apply to volunteers, it would transfer to them the private exemption and constitutional limits discussed in Part I. However, the statute would still fail to represent the countervailing interest of volunteer organizers and directors. In order to relieve organizations of the obligation of accepting all volunteer services, a statute which protects volunteers must contain a BFOQ exception. The absence of this provision in the public accommodation statute is a second reason justifying Quinnipiac Council's recommendation that volunteers have recourse to the employment statute for protection against discrimination.

208. Id. at 302, 528 A.2d at 360. See supra notes 195-98 and accompanying text for the court's discussion.

209. See infra Section IV for a discussion of BFOQ and its application to volunteer organizations.

210. In Big Brothers, Inc. and Rimarcik v. Minneapolis Comm. on Civil Rights, 284 N.W.2d 823 (Minn. 1979), the court held that Big Brothers was permitted to inquire into the sexual preference of an adult male volunteer and to pass this information to mothers of boys in the program. The Minnesota Civil Liberties Union (MCLU), in an Amicus Brief, contended that

even if Big Brothers, Inc. is considered to be under the public accommodation section, the prohibition against any inquiry [into plaintiff's sexual preference] should still be required . . . [because] in most public accommodation situations inquiry does not occur. That is, a gas station attendant will not inquire as to one's affectional preference before serving him. Id. at 829 n.12.

This observation suggests that a BFOQ under the public accommodation statute would be peculiar to volunteers proffering their services and usually would not apply to persons receiving services from a public accommodation. The MCLU also noted that "the relationship of Johnson [a volunteer] to Big Brothers, Inc. is analogized to the relationship of a potential employee to an employment agency. Amicus thus conclude[d] that . . . it is impermissible for Big Brothers, Inc. to inquire into any of the protected criteria, including affectional preference, without showing that the criteria [sic] is a bona fide occupational qualification." Id. at 828-29. However, since the court found no discrimination, it had no need to resolve the BFOQ issue. See infra note 214.
IV. PROTECTION FOR VOLUNTEERS UNDER THE EMPLOYMENT STATUTE

A. Bona Fide Occupational Qualification

Developed in employment discrimination statutes and case law, a BFOQ is a job-related qualification essential for a business’ operation.211 An employer may refuse to hire an applicant if the exclusion is based upon a BFOQ, that is, a performance-related condition which would prevent the normal operation of the business.212

The BFOQ exception is an affirmative defense raised by employers only after the plaintiff has first proven unlawful employment dis-

211. Title VII of the Civil Rights Act of 1964 states that it is unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (1982). However,

[n]otwithstanding any other provision[s] of this subchapter, . . . it shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.


Applying Title VII, courts have held that discrimination based on either religion, sex, or national origin was permissible in certain circumstances because the imposed requirement was a bona fide occupational qualification “necessary to the normal operation of that particular business or enterprise.” Id. Sumitomo Shoji America v. Avigliano, 457 U.S. 176, 189, n.19 (1982) (although the issue was not before the Court, the Court stated that Japanese citizenship might be a BFOQ for certain positions at Sumitomo, a New York-based Japanese-controlled company); Dothard v. Rawlinson, 433 U.S. 321, 336-37 (1977) (Alabama’s regulation barring the hiring of women as guards in “contact” positions at the state’s maximum security male penitentiaries was a BFOQ); Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (employer’s requirement that female applicants not have preschool age children was a BFOQ issue precluding summary judgment); Kern v. Dynalectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983) (requirement that pilot convert to Islam was a BFOQ for job which necessitated flying over Mecca, a holy area prohibited to non-Moslems under penalty of death), aff’d mem., 746 F.2d 810 (5th Cir. 1984); Pime v. Loyola Univ. of Chicago, 585 F. Supp. 435 (N.D. Ill. 1984), aff’d, 803 F.2d 351 (7th Cir. 1986) (hiring Jesuits as philosophy professors was a BFOQ since that religious affiliation was reasonably necessary for the normal operation of the Jesuit Catholic university).

The primary legislative intent underlying the equal employment statute of the Civil Rights Act of 1964 was to close the gap existing between the social and economic positions of blacks and whites. President Kennedy stated that the federal equal opportunity legislation would “help set a standard for all the Nation and close existing gaps.” 109 Cong. Rec. 11,178 (1963). Consistent with the statute’s chief purpose of improving the status of the black community, the BFOQ provision does not justify employment discrimination based on race. 110 Cong. Rec. 2550-63 (1964). An amendment, proposed by Senator McClellan of Arkansas, to include race and color as additional BFOQs was rejected as an amendment that “would destroy the bill.” 110 Cong. Rec. 13,825 (1964).

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1989] crimation.213 If the plaintiff fails to prove discrimination, it is unnecessary to inquire into the existence of a BFOQ.214 However, if the plaintiff meets this burden, the employer can present a BFOQ defense, claiming that religion, nationality, or sex is a characteristic necessary for the successful performance of the job.215 Although the BFOQ is often called an "exception,"216 it is "more accurately described as a 'justification' " for discrimination.217

In cases of sex discrimination,218 there is either an "ability to perform" BFOQ or a "same sex" BFOQ.219 Employers have claimed an "ability to perform" BFOQ when they have been charged with discrimination for excluding women from physically strenuous jobs.220

213. Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038, 1043 (3d Cir. 1973), vacated and remanded on other grounds, 414 U.S. 970 (1973); Dodge v. Giant Food, Inc., 488 F.2d 1333, 1335 (D.C. Cir. 1973); Hodgson v. First Federal Savings and Loan Ass'n, 455 F.2d 818, 822 (5th Cir. 1972); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232 (5th Cir. 1969). See also Sirota, Sex Discrimination: Title VII and the Bona Fide Occupational Qualification, 55 Tex. L. Rev. 1025, 1026 (1977) ("Before the BFOQ provision becomes relevant, a party must first prove . . . discrimination by an employer.").

214. See Big Brothers, Inc. and Rimarcik v. Minneapolis Comm. on Civil Rights, 284 N.W.2d 823 (Minn. 1979). In Big Brothers, the court found no evidence of what it termed "actual" discrimination because the plaintiff's sexual preference, like any other distinguishing characteristic, was part of the information owed mothers of boys in the program. Consequently, the court did not consider the BFOQ exception. Id. at 828. See also Voyles v. Ralph K. Davies Medical Center, 403 F. Supp. 456, 457 n.3 (N.D. Cal. 1975), aff'd, 570 F.2d 345 (9th Cir. 1978); Bujel v. Borman Food Stores, Inc., 384 F. Supp. 141, 144 (E.D. Mich. 1974) (failure to prove discrimination made unnecessary an inquiry into the existence of a BFOQ).

215. See supra note 211. The Congressional debates on Title VII's BFOQ exception offered the example of a theology professor at a religious college as a religion BFOQ. Arguably, belief as well as knowledge is necessary for successful teaching of theology. On the other hand, a janitorial position at a religious institution does not carry a religion BFOQ. 110 Cong. Rec. 2585-93 (1964). For a nationality BFOQ, Congress gave the example of an Italian chef at an Italian restaurant where the chef's nationality reflected on the business' success. Id. at 2549.


217. Sirota, supra note 213, at 1026.

218. "Sex discrimination occurs when both men and women compete for a job, and an employer discriminates against members of one sex on the basis of cultural stereotypes." Id. at 1033.


The courts have held that employers cannot assume categorically that a woman, because of her sex, cannot perform the particular work.\(^{221}\) An employer may refuse an applicant on the basis of sex only upon proof of that individual's incapacity of performance.\(^{222}\)

A job requiring "contact" with the client or customer which could potentially invade the latter's privacy may give rise to a "same sex" BFOQ. In *Fesel v. Masonic Home of Delaware, Inc.*\(^{223}\) the court upheld the employer's refusal to hire a male nurse's aid to attend female nursing home patients.\(^{224}\) The court in *City of Philadelphia v. Pennsylvania Human Relations Comm.*\(^{225}\) permitted a juvenile center to restrict youth supervisors, whose duties among others included supervision of bathing, to persons of the same gender as those being supervised.\(^{226}\) An Oklahoma district court found a "same sex" BFOQ for the labor and delivery room nursing staff, when the evidence showed that male nurses caused harmful levels of stress in the women giving birth.\(^{227}\)

Directors of volunteer organizations placed in similar situations likewise should be able to assure the proper operation of their organizations and the privacy of their members through either a "same sex" or an "ability to perform" BFOQ. However, protecting volunteers under the present public accommodation statutes, which lack BFOQ exceptions, would require a volunteer director to accept all gratuitous services.\(^{228}\) On the other hand, since a BFOQ exception exists in the employment statutes, safeguarding volunteers under these statutes

\(^{221}\) The Fifth Circuit Court of Appeals in *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969) stated that if "all or substantially all women" are incapable of safely and efficiently performing the job's responsibilities then an employer can refuse every woman applicant. *Id.* at 235. The Ninth Circuit Court of Appeals in *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971) adopted the narrower test proposed by *Bowe v. Colgate-Palmolive Co.*, 272 F. Supp. 332 (S.D. Ind. 1967), *aff'd in part, rev'd in part*, 416 F.2d 711 (7th Cir. 1969), which necessitated an evaluation of the individual female applicant's ability to perform before permitting discrimination. *Rosenfeld*, 444 F.2d at 1225.


\(^{224}\) *Id.* at 1354. The nursing home refused to hire a male nurse's aid because the size of the home would require him to be on duty alone during certain shifts and twenty-two of its thirty retired guests were females who often objected to male care.


\(^{226}\)* Id.* at 513, 300 A.2d at 104.


\(^{228}\) More precisely, the public accommodation statutes make it unlawful for the director to discriminate on the basis of protected characteristics. See *supra* note 23.
would permit directors to reject volunteers for performance-related incapacities.

Although arising in the context of employment, the case of Harvey v. Young Women's Christian Ass'n\textsuperscript{229} supports the application of a BFOQ to volunteers. After the YWCA discharged her, a female employee proved employment discrimination based on sex by showing that her dismissal was due solely to her pregnancy.\textsuperscript{230} However, the YWCA established that it discharged the plaintiff because she actively sought to represent her condition of unwed pregnancy as an "alternative lifestyle" to the club's female youth.\textsuperscript{231} Since this role model was contrary to the ideals and philosophy of the YWCA, the court held that a legitimate reason existed for the employee's dismissal.\textsuperscript{232} The dismissal based on sex was justified by non-discriminatory motives, similar to a BFOQ, which made the termination lawful. If the woman had been a volunteer of the YWCA, rather than an employee, the same "ability to perform" BFOQ would, by analogy, also apply.

Litigating Quinnipiac Council under an employment statute which protects volunteers would permit the Boy Scouts to assert the "same sex" BFOQ defense and would thereby focus the decision on their reasons for prohibiting women from serving as scoutmasters. The Boy Scouts could then legally refuse Pollard's services only by proving that being male was a BFOQ for the position of scoutmaster.\textsuperscript{233}

\textsuperscript{229} Harvey, 533 F. Supp. at 954-55.
\textsuperscript{230} Id. at 956.

The requirements for proving a prima facie case of discrimination are established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The applicant must show:

[1] that he belongs to a racial minority; [2] that he applied and was qualified for a job for which the employer was seeking applicants; [3] that, despite his qualifications, he was rejected; and [4] that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

\textit{Id.} at 802.

In cases of "overt" discrimination where the defendant neither denies nor attempts to hide the existence of discrimination, the plaintiff need not first prove a prima facie case of discrimination before shifting the burden of proof to the defendant. See Bell v. Birmingham-
Thus, in such circumstances, the BFOQ arguments presented in *Quinnipiac Council*, but not evaluated by the court, would become central. The Boy Scouts justified their gender policy on the psychological need of adolescent boys, in rapid physical and emotional development stages, for a male role model. The Boy Scouts also claimed that boys of scouting age who are just beginning to participate in activities outside the family benefit greatly from association with a male scoutmaster. Moreover, with the number of households without a father increasing, the Boy Scouts asserted that the policy of providing boys with a male scoutmaster has even more importance.

Although the burden of proving a male-gender BFOQ would be a heavy one, a BFOQ defense would focus the decision on the main issue: whether the Boy Scouts wrongfully discriminated against Catherine Pollard when they denied her a scoutmaster position because of her sex. Instead of basing the legality of the discrimination on whether the refusal of a volunteer position is an accommodation, the court could base its decision on whether the rejection is justified by a male-gender BFOQ. No matter how the BFOQ issue is resolved, the

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234. Since *Quinnipiac Council* was litigated under the present public accommodation statute, which lacks a BFOQ, the Boy Scouts’ BFOQ arguments were irrelevant. *Quinnipiac Council*, 204 Conn. at 293 n.6, 528 A.2d at 356 n.6. Thus, the court did not determine “whether the plaintiff and its parent organization [were] justified or misguided in their view that the desirability of male role models outweighs the value of the services that talented women might provide to the boy scouts.” *Id.* at 302, 528 A.2d at 360.

235. *Id.* at 4.

236. *Id.* at 5.

237. *Id.* at 5.

238. The Boy Scouts would have the burden of proving that the need for male role models outweighed the value of the services of qualified women. *Quinnipiac Council*, 204 Conn. at 302, 528 A.2d at 360.

239. If the case had been decided by applying a BFOQ, Pollard could have relied on a digest decision of the Equal Employment Opportunity Comm., EEOC Dec. LA 68-535, 2 FEP 537, 537-38 (1969), which held that the Head Start program’s selection of a man rather than a woman who had previously adequately fulfilled the position was unjustified by the claim that the children needed a male image when the position involved minimum contact with the children. The Boy Scouts, however, might distinguish this case from *Quinnipiac Council* because the children in Head Start were not adolescent boys whose need for a male image is greater and because the position of scoutmaster may involve more contact with the boys than a Head Start position.
presence of a BFOQ serves a positive function by centering the decision on the real issue.

B. Are Volunteers "Employees"?

In addition to the similarity between volunteers and employees who both offer rather than receive services, the need for a BFOQ in a statute protecting volunteers is another reason for advancing the employment statute as the appropriate act under which to safeguard those proferring their services. However, the employment statute will properly protect volunteers only if they can be considered employees. The definitions of "employees" offered by Congress and the legislatures fail to provide the distinguishing characteristics of employees. An examination of judicial decisions reveals that, although courts are divided on the issue, volunteers cannot clearly be regarded as employees. Nevertheless, for purposes of discrimination, those decisions granting relief to volunteers under the employment statute appear more judicially equitable.

The division among the courts as to whether volunteers are employees stems from their emphasis on compensation of the person rather than control over that person. Those courts which focus on the fact that employees receive compensation for their services conclude that volunteers are not employees. On the other hand, courts which stress the fact that employees work under the control and supervision of an employer hold that volunteers are employees.

240. 42 U.S.C. § 2000e(f) (1982) defines "employee" in the following manner: The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

241. See infra notes 263-65 and accompanying text for an analysis justifying this position.

242. See infra notes 266-96 and accompanying text for a discussion of this position.

243. See infra notes 245-53 and accompanying text for the development and application of this characteristic.

244. See infra notes 254-62 and accompanying text for cases which support this position.
Compensation is a major factor that distinguishes employees from volunteers who render their services gratuitously.\(^{245}\) The dictionary definition of employee is "any worker who is under wages or salary to an employer."\(^{246}\) Courts have noted that "'An employee’ . . . means someone who works for another for hire."\(^{247}\) In *Smith v. Berks Community Television*,\(^{248}\) the court emphasized the distinction between paid and unpaid services and found no protection for volunteers under the employment statutes. In *Smith*, the court decided the issue of whether volunteers were "employees" within the meaning of the Civil Rights Act of 1964,\(^{249}\) and held that they were not.\(^{250}\) In the court's view, the purpose of Title VII was to eliminate the loss or diminution in one's means of livelihood because of that person's race, color, sex, religion, or national origin.\(^{251}\) Employee status requires an economic "relationship between the individual and the so-called principal" which makes the individual "susceptible to the discriminatory practices which the act was designed to eliminate."\(^{252}\) Volunteers, being unpaid, were not subject to the discrimination which the statute was designed to prevent. They were not denied access to a means of livelihood and thus were not protected by the statute.\(^{253}\)

A separate group of cases involving volunteer firefighters, however, held that volunteers were covered by the anti-discrimination statute.\(^{254}\) These cases relied on other factors which characterize


\(^{246}\) WEBSTER'S THIRD NEW INT'L DICTIONARY 743 (unabr. 1971).


\(^{250}\) *Smith*, 657 F. Supp. at 796.

\(^{251}\) *Id.* at 795.

\(^{252}\) *Id.* (quoting Armbruster v. Quinn, 711 F.2d 1332, 1340 (6th Cir. 1983)).

\(^{253}\) *Id.* at 795-96. See also Clorer v. Blessington, 19 N.J. Misc. 253, 18 A.2d 712 (1941), where the court likewise considered remuneration as the determining factor in differentiating an employee from a volunteer. The court held that the claimant, injured while assisting the alleged employer in changing a truck tire, was an employee and not a volunteer because he had received wages for his services. *Id.* at 255, 18 A.2d at 713.

employees. They emphasized the fact that employees are under the supervision and direction of an employer who controls the way the work is done and has the power of discharge for non-performance.\textsuperscript{255} In \textit{Harmony Volunteer Fire Co.} \& \textit{Relief Ass'n v. Pennsylvania Human Relations Comm.},\textsuperscript{256} the court held that the volunteers of the fire department were employees, notwithstanding the fact that they were unpaid.\textsuperscript{257} The court based its decision on the control which the company had over its volunteer members.\textsuperscript{258} The company selected its own firefighters, had the power to discharge them for non-performance, and directed both the work they did and the manner in which it was accomplished.\textsuperscript{259} In \textit{Hebard v. Basking Ridge Fire Co. No. 1},\textsuperscript{260} the court considered the fact that the fire department was a municipal service funded by the town as relevant to the analysis of whether a volunteer could be an "employee."\textsuperscript{261} This funding was another indicium of control, warranting the conclusion that volunteer firefighters were employees both of the town and of the company and were thus protected from discrimination by the employment statute.\textsuperscript{262}

The cases, though divided, complement one another and lead to a better understanding of the necessity, and difficulty, of protecting volunteers under the employment statute. If the question is approached purely theoretically, then, by the rules of logic, volunteers are not employees and do not fall under the employment statute. However, if the issue is approached practically with an eye to dispensing justice, volunteers, because of the many likenesses they share with employees, should be covered by the anti-discriminatory employment statute or a similar act specifically enacted for volunteers.

\begin{footnotes}
\item[257] \textit{Id.} at 442. In Shepherdstown Vol. Fire Dept. v. West Virginia Human Rights Comm., 309 S.E.2d 342 (W. Va. 1983), the court reached the same conclusion but under the state's public accommodation statute. The court found that the volunteer fire department was a "place of public accommodation[ ]" which had denied equal rights to women because of sex. \textit{Id.} at 351, 353-54.
\item[258] \textit{Harmony Volunteer Fire Co.}, 459 A.2d at 442.
\item[259] \textit{Id.}
\item[261] \textit{Id.} at 83-84, 395 A.2d at 873.
\item[262] \textit{Id.}
\end{footnotes}
Falling under the first approach, the cases which involve volunteer firefighters focused on the likeness between volunteers and employees\textsuperscript{263} without considering the compensation characteristic which distinguishes the two classes.\textsuperscript{264} However, it is a general rule of logic that a species is distinguished from another species by its differentiating characteristics.\textsuperscript{265} The fact that volunteers and employees both work under the control and supervision of an employer does not mean that volunteers are employees; it merely means that they have a similar characteristic, which must be considered along with the differentiating characteristic, the fact that volunteers receive no remuneration from the employer for their services. The conclusion of the cases involving the "volunteer" firefighters appears supportable only if one believes that this differentiating characteristic is unimportant to the meaning of the term "employee," a proposition which both the dictionary definition and longstanding case law make hard to accept.

Despite the fact that volunteers are not technically employees and consequently should fall outside the scope of the employment statute, there are several policy reasons for protecting volunteers under the employment statute. First, volunteers presently have no anti-discrimination statute protection; second, the purpose of the employment statute is not limited to pecuniary discrimination;\textsuperscript{266} and finally, volunteers share many likenesses with employees.

At present, there exists no legislation which specifically safeguards volunteers against discrimination.\textsuperscript{267} Nevertheless, it is impor-

\textsuperscript{263} There are other similarities between volunteers and employees that have not been noted in the cases. Sociologists note that voluntarism is frequently the road to employment. Women volunteer in order to consider the possibility of returning to work, and men thinking of second careers volunteer in order to experiment in a new area of interest. See Schwartz, The Rights of Volunteers: A Response, in VOLUNTEERISM IN THE EIGHTIES 73 (J. Harmon ed. 1982). Educators emphasize the value of career insights which teenagers acquire by volunteering. See THE VOICES OF VOLUNTEERS (R. Williams ed. 1980).

\textsuperscript{264} See supra notes 248-53 and accompanying text for a discussion of cases which support this as a distinguishing characteristic between employees and volunteers.

\textsuperscript{265} Aristotle, Categories, ch. 3, THE BASIC WORKS OF ARISTOTLE (1941). For example, to determine whether cats are dogs, one examines their distinguishing, not their similar, characteristics. Simply because both cats and dogs are four-footed does not mean that cats are dogs; the differences are more telling than the likenesses.

\textsuperscript{266} See infra notes 272-91 and the accompanying text for a discussion of the other purposes of the employment statute.

\textsuperscript{267} The Connecticut employment statute, however, could be amended to include volunteers. The suggested statute would state:

It shall be a discriminatory practice in violation of this section: (1) For an employer or volunteer director, by himself or his agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to accept volunteer services or to bar or to discharge from employment or voluntarism any individual or to discriminate against him in compensation or in terms, conditions
tant that volunteers be protected against discrimination which “both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.”268 Without this legislative protection, members of a minority class volunteering their services to the local library could be refused merely on account of their race or national origin. A hospital could deny a candy stripe position to a male teenager on the grounds that the work is more appropriate to women, or a male judge could refuse a judicial internship to any female applicant because of the judge’s conviction that the practice of law is not appropriate for women. Discriminatory conduct thus is illegal if practiced against employees but legally permissible if practiced against volunteers. Yet, because the same “stigmatizing injury” which accompanies the denial of equal opportunities269 ensues, and no statute facially includes volunteers as a protected class, the employment statute is presently the most appropriate act under which to safeguard volunteers against discrimination.

The Smith court stressed only one of the purposes of the employment statute.270 The court focused on the statute’s purpose to ensure an equal opportunity to a livelihood and to forbid disparities in income due to race, color, religion, sex, or national origin. Since volunteers are unaffected by discriminatory practices which bar access to a livelihood or which result in a diminution of income, the court concluded that volunteers were not protected by the employment statute.271

However, “Congress did not intend to confine the scope of [the employment statute] simply to instances of discrimination in pecuniary emoluments.”272 Employment discrimination exists equally when some people are treated less favorably than others in the “terms, conditions, or privileges of employment, because of . . . race, color, religion, sex, or national origin.”273 This discrimination can occur when

or privileges of employment or voluntarism because of the individual’s race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disorder, mental retardation or physical disability, including, but not limited to, blindness .... Conn. Gen. Stat. Ann. § 46a-60(a)(1) (West 1986) (suggested amendments italicized).

268. Roberts, 468 U.S. at 625.

269. Id.

270. The Smith court stated that the purpose of the employment legislation was to eliminate the loss or diminution in a person’s livelihood because of race, color, sex, religion, or national origin. Smith, 657 F. Supp. at 795. See supra notes 248-53 for a detailed discussion of Smith.

271. See supra note 253 and accompanying text for the court’s decision.


protected classes are subject to a hostile working environment,274 are
denied promotion opportunities,275 insurance276 and retirement ben­
efits,277 pregnancy leaves,278 or are unjustifiably discharged.279 Thus,
employers violate the employment statute if they refuse minority
workers promotion opportunities or equal working conditions despite
the fact that they hire them at a wage comparable to their counter­
parts. The purpose of the employment statute, consequently, extends
to eliminating inequality in non-monetary forms of compensation. It
prohibits all forms of discriminatory treatment even if that conduct

supra note 211. The Connecticut employment statute further protects the categories of age,
ancestry, present or past history of mental disorder, mental retardation, and physical disa­
bility, including but not limited to blindness. CONN. GEN. STAT. ANN. § 46a-6O(a)(I)

274. "[T]he phrase 'terms, conditions, or privileges of employment' in [Title VII] is
an expansive concept which sweeps within its protective ambit the practice of creating a
working environment heavily charged with ethnic or racial discrimination." Rogers v.
EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

Courts have applied this principle to hostile working environments due to race,
Firefighters Institute for Racial Equality v. City of St. Louis, 549 F.2d 506, 514-15 (8th
Cir.), cert. denied, 434 U.S. 819 (1977); Gray v. Greyhound Lines, East, 545 F.2d 169, 176
Young v. Southwestern Savings and Loan, 509 F.2d 140 (5th Cir. 1975), to national origin,
Cariddi v. Kansas City Chiefs Football Club, 568 F.2d 87 (8th Cir. 1977), and to sex,

a partner in a law firm was a "term, condition, or privilege" of employment granted to
those hired as associates); Lee v. Conecuh County Bd. of Educ., 634 F.2d 959 (5th Cir.
1981) (employer disregarded black male's superior job-related qualifications in promoting
others lacking the same).

276. Wambheim v. J.C. Penney Co., 642 F. 2d 362 (9th Cir. 1981), cert. denied, 467
U.S. 1255 (1984) (employer practice of providing dependent coverage only to persons
deemed "head of household" resulted in sex discrimination because only 37% of females as
opposed to 95% of males qualified for dependent coverage); EEOC v. Fremont Christian
School, 609 F. Supp. 344 (N.D. Cal. 1984) (religious school's policy of providing health
insurance only to full time "head of household" employees, whom it believed could only be
male, was invalidated).

277. City of Los Angeles v. Manhart, 435 U.S. 702 (1978) (employer violated Title
VII by requiring female employees to make larger contributions than males to the pension
benefit plan).

278. Greenspan v. Automobile Club of Michigan, 495 F. Supp. 1021, 1049-50 (E.D.
Mich. 1980) (discrimination occurs when pregnant employees are forced to terminate
rather than take sick leave); In re Southwestern Bell Tel. Co. Maternity Benefits Litig., 602
F.2d 845 (8th Cir. 1979) (policy which guaranteed reinstatement to all those returning
from disability leave except women disabled by pregnancy was a discriminatory practice).

279. Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975) (black employees wrongly dis­
charged when they refused to do work required of similarly situated white employees);
premature warnings and departure from normal practices showed racial discrimination in
discharge), aff'd, 472 F.2d 1210 (8th Cir. 1973).
denies no pecuniary advantage. 280

Volunteers receive a benefit analogous to the promotion opportunities afforded employees. The experience which volunteers acquire from proffering their services is, in many instances, the first step to employment or to a better volunteer position. 281 The denial of the opportunity to gain this experience is similar to refusing an employee promotion opportunities; both suffer a discrimination which the broad purpose of the employment statute seeks to eliminate.

Directors of volunteer organizations, like employers, can also subject minority classes to a hostile working environment. In an effort to discourage minority workers from applying or remaining, such organizations can harass them with discriminatory intimidation, ridicule, and insult. Such conduct, whether practiced against a volunteer or against an employee, fosters and perpetuates the same discrimination in the workplace proscribed by the employment statute and is equally "repugnant, unworthy, and contrary to . . . national policy." 282

Both volunteers and employees are also susceptible to unjustified discharges. Dismissed under pretext, these discharges heavily pollute the working and recreational environment with discrimination and substantially destroy the emotional and psychological well-being of minority classes, 283 a harm which legislatures intended to eradicate with employment statutes. 284

As noted above in the BFOQ discussion, 285 the employment statute was not aimed at assuring a job to everyone irrespective of their abilities. Nevertheless, it was intended "to eliminate artificial and arbitrary standards bearing no relationship to a person's job performance." 286 Employers who reject applicants with arrest records, 287

280. See Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). "[T]he language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." Id. at 64 (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (9th Cir. 1971).

281. See supra note 263.


284. Id.

285. See supra Part IV, Section A.


287. Gregory v. Litton Systems, 472 F.2d 631 (9th Cir. 1972) (denial of employment because of arrest record had illegal discriminatory effect on blacks); Carter v. Gallagher,
convictions of crimes which have no relation to the work,\textsuperscript{288} dishonorable military discharges,\textsuperscript{289} or poor credit records\textsuperscript{290} violate the employment statute which proscribes not only open discrimination but also conduct which may seem fair, but which has a discriminatory effect on minorities.\textsuperscript{291} Similar capricious and prejudicial requirements could provoke a director to turn away a volunteer from associations such as the Senior Citizens Club, the Historical Society, the Ukrainian Youth Association, or the Hospital Auxiliary. Because the employment statute aims at eliminating these discriminatory practices, its relief should extend to volunteers.

The court in \textit{Smith} not only failed to consider the secondary purposes of the employment statute which apply equally to volunteers, it also, by focusing only on the difference of paid and unpaid services between employees and volunteers, overlooked a number of additional similarities between the two classes.\textsuperscript{292} Both groups not only proffer services, they are also selected and trained by a director or an employer;\textsuperscript{293} both do work which is supervised and controlled;\textsuperscript{294} and both can be discharged for non-satisfactory performance.\textsuperscript{295} Stressing these considerable likenesses rather than singling out the difference tips the balance in favor of considering volunteers eligible for protection under the employment statute.\textsuperscript{296}

\textsuperscript{288} Green v. Missouri Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975) (practice of refusing consideration for employment to persons convicted of a crime other than minor traffic offense disqualified black applicants at a significantly higher rate than whites).


\textsuperscript{290} Wallace v. Debran Corp., 494 F.2d 674 (8th Cir. 1974) (employer's policy of discharge for two garnishments in one year disproportionately subjected blacks to discharge); Johnson v. Pike Corp. of America, 332 F. Supp. 490 (C.D. Cal. 1971) (employer prohibited from discharging a black person solely because his wages had been garnished to satisfy judgments).

\textsuperscript{291} See Cloherty, \textit{Discriminatory Employment Practices}, 54 CONN. BAR J. 523, 530 (1980) (job requirements which are facially neutral may have a disproportionate impact on protected classes).


\textsuperscript{293} McClure v. Salvation Army, 460 F.2d 553, 557 (5th Cir. 1972), \textit{cert. denied}, 409 U.S. 896 (1972).

\textsuperscript{294} Id. See \textit{supra} note 255 for further references.


\textsuperscript{296} It should be noted that the remedy available to volunteers under the statute would be limited to that of injunctive relief. Since volunteers are not compensated, the remedy of back pay, which is provided by the employment statute, is inapplicable to volunteers. \textit{Smith}, 657 F. Supp. at 795.
This judicially sound application of the employment statute to volunteers, however, does not negate the need for more specific legislation. On the contrary, this discussion should influence legislatures either to enact an anti-discrimination statute particularly safeguarding volunteers,\textsuperscript{297} or to amend the present employment statute to expressly include volunteers.\textsuperscript{298} Such legislation would eliminate the possible confusion ensuing from the inclusion of volunteers, who are not by definition employees, under an employment statute.

\section*{Conclusion}

\textit{Quinnipiac Council} addressed the question of whether volunteers are protected against discrimination under Connecticut’s public accommodation statute. The Connecticut statute’s legislative history and the judicial interpretations of other states’ similar statutes manifest a repeated broadening of public accommodation statutes to protect more classes from a larger number of offenses.\textsuperscript{299} This expansive trend seemed to predict a continued enlarging of the public accommodation statute to include volunteers. However, the Connecticut Supreme Court held that the proffer of services was not an accommodation because, in offering their services, volunteers are not denied access to goods and services. Thereupon, the court suggested, without deciding, that the employment statute might protect those volunteering their services from discrimination.\textsuperscript{300}

An examination of the characteristics of volunteers, and of the nature of both the public accommodation statute and the employment statute, justifies the court’s suggestion. As a result of the differences between these two statutes, the absence of any specific legislation covering the volunteering of services, the necessity of safeguarding volunteers from the sensitive injustice of discrimination, the broad purpose of the employment statute, and the many similarities between volunteers and employees, the employment statute is the appropriate act under which to safeguard volunteers from the refusal of positions on a discriminatory basis. Nevertheless, because confusion may ensue from the fact that volunteers are not by definition “employees,” the most unambiguous means of obtaining protection against discrimination for

\textsuperscript{297} Since there are many similarities between volunteers and employees, a statute specifically enacted for volunteers would in many respects resemble the employment statute.

\textsuperscript{298} See \textit{supra} note 267 for a possible amendment to the employment statute.

\textsuperscript{299} See \textit{supra} Part I, Sections B and C for a discussion of the legislative and judicial expansion of the scope of public accommodation statutes.

\textsuperscript{300} See \textit{supra} Part II for a discussion of \textit{Quinnipiac Council}. 
volunteers is the enactment of an anti-discrimination statute specifically safeguarding volunteers, or an amendment expressly including volunteers in the present employment statute.

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