

LADIES' NIGHT DISCOUNTS: SHOULD WE BAR THEM OR PROMOTE THEM?

Sex discrimination continues to be a serious problem in modern society. Despite greater public awareness, commentators report that sexism still exists in many different areas and in many different ways.¹ Sometimes sex discrimination occurs subtly without much public outcry, such as when owners of businesses offer price discounts to women, but not to men. Some of these sex-based discounts, however, have been the focus of lawsuits throughout the country.²

For instance, in April of 1989, the Iowa Supreme Court held that a racetrack's "Ladies' Day" promotion of admitting women free of charge and giving them reduced prices on concessions violated Iowa's civil rights act because it discriminated against men in the furnishing of facilities and services.³ This Iowa decision is the most recent case in the nation in which male plaintiffs or administrative agencies have accused owners of public restaurants, bars, and other places of amusement or accommodation of denying males full and equal enjoyment of the owners' facilities.⁴ The rationale in these cases is that owners of establishments discriminate against men by giving women preferential pricing treatment.⁵

Some earlier courts maintained that such lawsuits were trivial because female-oriented price discounts did not harm men and

¹ E.g., Wolman, *Verbal Sexual Harassment on the Job as Intentional Infliction of Emotional Distress*, 17 CAP. U.L. REV. 245 (1988) (workplace); Griffith, *Sexism, Language, and the Law*, 91 W. VA. L. REV. 125 (1988) (legal writing).

² E.g., *City of Clearwater v. Studebaker's Dance Club*, 516 So. 2d 1106 (Fla. Dist. Ct. App. 1987); *Peppin v. Woodside Delicatessen*, 67 Md. App. 39, 506 A.2d 263 (1986).

³ *Ladd v. Iowa W. Racing Ass'n*, 438 N.W.2d 600, 602 (Iowa 1989).

⁴ See, e.g., *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 27-28, 707 P.2d 195, 196, 219 Cal. Rptr. 133, 134 (1985); *MacLean v. First N.W. Indus. of Am.*, 96 Wash. 2d 338, 340, 635 P.2d 683, 684 (1981). Most of the cases were brought under state public accommodation statutes. Note, *Public Accommodation Statutes: Is Ladies' Night Out?*, 37 MERCER L. REV. 1605, 1605 (1986) [hereinafter Note, *Is Ladies' Night Out?*]; see also Comment, *The Unruh Civil Rights Act: An Uncertain Guarantee*, 31 UCLA L. REV. 443, 443-49 (1983) [hereinafter Comment, *An Uncertain Guarantee*] (discussing state public accommodation statutes). Generally, most public accommodation statutes prohibit amusement or entertainment establishments that offer goods, services, or facilities to the public from discriminating against patrons on the basis of race, religion, national origin, or other personal characteristics, such as sex. *Id.* at 443.

⁵ See, e.g., *Ladd*, 438 N.W.2d at 601 (male plaintiff); *MacLean*, 96 Wash. 2d at 340, 635 P.2d at 684 (class action suit on behalf of men).

worked only to encourage greater female patronage.⁶ The more recent courts, however, have taken the claims seriously and have invalidated ladies' night promotions, often noting that such schemes injure both sexes.⁷ Despite these more recent decisions, however, skepticism about the importance of striking down ladies' night promotions remains.⁸

In order to understand more clearly the issues raised in ladies' night cases and to decide whether the cases should be taken seriously, it is helpful to examine how courts and legislatures have reacted to gender discrimination in general. Legislatures have enacted statutes⁹ and courts have chosen standards of review¹⁰ that reflect the policies of these two governmental bodies regarding sex discrimination. As courts apply these laws and standards, plaintiffs repeatedly demand that courts give the sexes equal treatment.¹¹

⁶ See, e.g., *Dock Club, Inc. v. Illinois Liquor Control Comm'n*, 101 Ill. App. 3d 673, 676, 428 N.E.2d 735, 738 (1981) (tavern owner's sex-based discount caused no harm to men); *Tucich v. Dearborn Indoor Racquet Club*, 107 Mich. App. 398, 402-04, 309 N.W.2d 615, 618 (1981) (racquet club's reduced membership price for women did not harm men within meaning of state statute); *Magid v. Oak Park Racquet Club Assocs.*, 84 Mich. App. 522, 528, 269 N.W.2d 661, 664 (1978) (same); *MacLean*, 96 Wash. 2d at 342, 348, 635 P.2d at 685, 688 (half-price charge for women at professional basketball game caused no harm to men because claim not serious).

⁷ See, e.g., *Koire*, 40 Cal. 3d at 34, 707 P.2d at 201, 219 Cal. Rptr. at 139 (price discounts for females at bars and car washes injured both sexes); *City of Clearwater v. Studebaker's Dance Club*, 516 So. 2d 1106, 1108 (Fla. Dist. Ct. App. 1987) (dance club's promotion giving women reduced prices on drinks discriminatory); *Ladd*, 438 N.W.2d at 602 (racetrack's discount for women a violation of civil rights act); *Peppin v. Woodside Delicatessen*, 67 Md. App. 39, 48, 506 A.2d 263, 267-68 (1986) (deli's "Skirt and Gown Night" violation of dramshop act); *Abosh v. New York Yankees*, No. CPS-25284, Appeal No. 1194 (N.Y. State Human Rights Appeal Bd., July 19, 1972), reprinted in B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *SEX DISCRIMINATION AND THE LAW* 1069, 1070 (1975) [hereinafter *BABCOCK*] (New York Yankees sex-based admission price stereotyped females); *Pennsylvania Liquor Control Bd. v. Dobrinoff*, 80 Pa. Commnw. 453, 457, 471 A.2d 941, 943 (1984) (tavern's discount for women violated anti-discrimination law).

⁸ See Stoltz, *Trivial Pursuits*, *STUDENT LAW.*, Feb. 1986, at 7 (Council member in Maryland county where such a suit was brought stated, "I don't think there's a man on the street who doesn't think this sort of case is ridiculous."); Comment, *State Equal Rights Amendments: Models for the Future*, 1984 ARIZ. ST. L.J. 693, 702-06 [hereinafter Comment, *Models for the Future*] (discussing seriousness of ladies' night claim in Washington).

⁹ See, e.g., 42 U.S.C. §§ 2000a to 2000a-6 (1982) (Title II, the federal public accommodation statute).

¹⁰ See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (stating standard of review for sex discrimination in an equal protection context).

¹¹ E.g., *Frontiero v. Richardson*, 411 U.S. 677, 680 (1973) (plaintiff demanding that Court strike down statute presuming that only men are breadwinners); *Allyn v. Allison*, 34 Cal. App. 3d 448, 450, 110 Cal. Rptr. 77, 78 (1973) (plaintiff demanding court to hold that, like men, women should be able to register to vote without being required to disclose marital status).

Themes of paternalism, sexual stereotyping, and triviality of the classification often appear in judicial opinions as the judges attempt to mold policies regarding equality of the sexes.¹² A special situation exists when males or representatives for males, such as administrative bodies, are initiating the gender discrimination suits on behalf of men, because men do not share the same history of discrimination that women do.¹³ Again, the issue reverts back to what sorts of classifications courts should invalidate.

This note explores whether the social consequences of allowing gender-based pricing schemes to continue are trivial or serious, and whether courts should invalidate such pricing schemes. Section I provides an overview of gender discrimination, focusing on the policies and themes surrounding this type of discrimination.¹⁴ Part A briefly examines some of the congressional statutes on discrimination, as well as the Supreme Court's standard of review in gender discrimination cases.¹⁵ Part B examines three recurring themes in gender discrimination cases: paternalism, sexual stereotypes, and triviality.¹⁶ Part C focuses on the judicial reaction to male-initiated gender discrimination suits.¹⁷ Section I does not provide a comprehensive historical account of the law, but rather emphasizes some of the policies and themes surrounding gender discrimination in order to build a foundation for a later discussion of ladies' night cases.

Next, section II examines some of the more recent ladies' night cases.¹⁸ Part A focuses on the reasoning of some courts holding that sex-based price discounts are legal.¹⁹ Part B identifies the reasoning of the courts holding that ladies' night promotions constitute illegal sex discrimination.²⁰

Finally, section III of this note analyzes the ladies' night cases in light of the policies and themes examined in section I.²¹ This note will conclude that courts should continue the trend of striking down gender-based promotions, even where the disparities in price

¹² See *infra* notes 46-82 and accompanying text for a discussion of these themes.

¹³ See *infra* notes 83-106 and accompanying text for a discussion of male-initiated lawsuits.

¹⁴ See *infra* notes 22-117 and accompanying text.

¹⁵ See *infra* notes 22-45 and accompanying text.

¹⁶ See *infra* notes 46-82 and accompanying text.

¹⁷ See *infra* notes 83-106 and accompanying text.

¹⁸ See *infra* notes 118-218 and accompanying text.

¹⁹ See *infra* notes 131-173 and accompanying text.

²⁰ See *infra* notes 174-218 and accompanying text.

²¹ See *infra* notes 219-275 and accompanying text.

that owners charge male and female patrons are small. Although ladies' night promoters appear to treat females favorably, they actually encourage paternalism toward women and stereotypical attitudes about both men and women. Under the states' broadly-worded sex discrimination statutes, sex-based discounts must fail. In short, this note demonstrates that single-sex price discounts disadvantage both males and females and, as such, both sexes should contribute to prohibiting the business practice.

I. AN OVERVIEW OF GENDER DISCRIMINATION

Both the courts and legislatures have developed policies in handling gender discrimination. Congressional statutes and the Supreme Court's standard of review shed light on the traditional treatment of gender discrimination as opposed to other forms of discrimination. In addition, examining recurring themes in gender discrimination cases, such as paternalism, sexual stereotypes, and triviality or seriousness of the violation, further clarifies societal attitudes surrounding equality of the sexes. The judicial response to male plaintiffs in gender discrimination suits is also an issue because this response may influence our own ideas of which gender classifications need to be invalidated.

A. *Legislative and Judicial Responses*

Twenty-six years ago, the United States Congress passed the Civil Rights Act of 1964 (the "Act").²² Congress designed Title II of the Act to combat discrimination in enumerated places of public accommodation.²³ Under the statute, discrimination is prohibited if based upon race, color, religion, or national origin.²⁴ Title II allows owners of certain public establishments to treat the sexes differently,

²² 42 U.S.C. §§ 2000a-2000h(6) (1982).

²³ *Id.* at §§ 2000a to 2000a-6. Title II states in part, "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin." *Id.* at § 2000a.

Title II defines a place of public accommodation to include establishments that provide lodging for transient guests, facilities that sell food for consumption on the premises, gas stations, places of exhibition or entertainment, and any establishment located in or within the premises of any other covered establishment and that holds itself out to serve patrons of that covered establishment. *Id.* at § 2000a(b)(1)-(4).

²⁴ *Id.* at § 2000a.

however, without fear of retaliation.²⁵ One author explained that this omission was due to the low consciousness level of sex bias, and because at the time the Act was passed, most of the exclusions from public accommodations were based on race.²⁶ In addition, Title VII of the Act prohibits discrimination in employment.²⁷ Title VII proscribes discrimination based on sex as well as other classifications.²⁸ Southern legislators, however, added the word "sex" to the bill mainly to defeat the bill's enactment.²⁹

The state legislators' responses to discrimination, on the other hand, have not always paralleled the United States Congress. Many of the states that have public accommodation statutes, the state counterparts to Title II, do consider sex discrimination to be illegal under their acts.³⁰ In many states, broadly-phrased statutes mandate that owners of public restaurants and bars, for example, treat male and female patrons equally.³¹ In addition, several states have passed equal rights amendments to their state constitutions requiring equal treatment of the sexes.³²

In addition to legislatures, the United States Supreme Court has also played a role in the struggle to erase gender discrimination. Until 1976, the Supreme Court measured discrimination using one of only two standards of review.³³ One standard, the rational basis test, requires only that the challenged law or governmental action bear a rational relation to a valid state purpose to pass constitutional

²⁵ See *id.* (does not include sex as a protected category); *DeCrow v. Hotel Syracuse Corp.*, 288 F. Supp. 530, 532 (N.D.N.Y. 1968) (holding that sex discrimination is not illegal under Title II).

²⁶ See *BABCOCK*, *supra* note 7, at 1037.

²⁷ 42 U.S.C. § 2000e-2(a) (1981).

²⁸ *Id.*

²⁹ *Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 404 n.4 (6th Cir. 1977) (McCree, J., dissenting); see also Note, *Sexual Harassment and Title VII—A Better Solution*, 30 B.C.L. REV. 1071, 1076 (1989) (discussing last minute addition of sex as protected category under Title VII).

³⁰ *BABCOCK*, *supra* note 7, at 1037; see *infra* note 174 (discussing Massachusetts adding "sex" to its public accommodation statute).

³¹ See, e.g., IOWA CODE ANN. § 601A.7 (West 1988) (stating that it is unlawful for "any owner . . . of any public accommodation . . . [t]o . . . deny to any person because of . . . sex . . . the accommodations, advantages, facilities, services, or privileges thereof . . ."); WASH. REV. CODE ANN. § 49.60.030 (Supp. 1989) (stating that the protection against sex discrimination "shall include, but not be limited to: . . . [t]he right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement . . .").

³² Comment, *Models for the Future*, *supra* note 8, at 695 n.12 (listing 16 states with ERAs as of 1984).

³³ See Sager, *Some Observations About Race, Sex, and Equal Protection*, 59 TUL. L. REV. 928, 928-29 (1985).

muster.³⁴ Under this test, government action is rarely unconstitutional. On the other end of the spectrum, the Supreme Court applies strict scrutiny to certain laws and regulations, a standard that prohibits classifications unless necessary to achieve a compelling state interest.³⁵ Groups entitled to this, the strictest of scrutiny, are considered "suspect" classes.³⁶ The Supreme Court considers classifications based on race and national origin to be suspect and thus applies strict scrutiny to them.³⁷

Unprecedented, the United States Supreme Court in the 1976 case of *Craig v. Boren* chose to apply a third standard of review to sex discrimination cases, the intermediate test.³⁸ In *Craig*, the Supreme Court held that an Oklahoma statute prohibiting the sale of 3.2% beer to males under twenty-one, although allowing females eighteen and above to purchase the beer, violated the equal protection clause of the fourteenth amendment.³⁹ The Court, in applying an "intermediate" test, noted that to withstand constitutional challenge, the gender classification in a statute must further important governmental purposes and be substantially related to meeting those purposes.⁴⁰ In *Craig*, the Court rejected the state's argument that the statute furthered the objective of increasing traffic safety. As such, the Court held that under the intermediate test, the statute unconstitutionally discriminated against eighteen- to twenty-year-old males.

In short, courts and legislatures have established policies to handle gender discrimination. For example, under Title II, federal courts prohibit some forms of discrimination in places of public accommodation, but not if it is based on sex.⁴¹ Some states, however, do proscribe sex discrimination under their public accommodation statutes.⁴² In addition, some states have passed equal rights amendments mandating equal treatment of the sexes in all areas.⁴³ Finally, the Supreme Court has chosen to review sex discrimination cases

³⁴ See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

³⁵ See *Sager*, *supra* note 33, at 928-29.

³⁶ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-25, at 1558 (2d ed. 1988).

³⁷ *Id.*

³⁸ 429 U.S. 190, 197 (1976).

³⁹ *Id.* at 210.

⁴⁰ *Id.* at 197.

⁴¹ See *supra* notes 22-25 and accompanying text for a discussion of Title II.

⁴² See *supra* notes 30-31 and accompanying text for a discussion of states adding sex as a protected category.

⁴³ See *supra* note 32 and accompanying text for a discussion of state ERAs.

with an intermediate test.⁴⁴ This standard of review is more intense than the rational basis test; the Supreme Court, however, does not subject sex discrimination to the highest level of review, strict scrutiny.⁴⁵ After deciding which level of scrutiny to accord gender cases, courts still struggle with devising a solution for the recurring problems that surround differential treatment of the sexes.

B. Recurring Themes in Gender Discrimination Cases: Paternalism, Sexual Stereotypes, and Triviality

Through the fourteenth amendment, as well as federal and state statutes, plaintiffs have attacked gender discrimination in many areas of society. Some courts, when hearing these cases, express concern about justifying special treatment for women based on the view that women are weak or needy of protection.⁴⁶ Often, this paternalism is intertwined with sexual stereotyping inherent in so-called favorable treatment.⁴⁷ In addition, another issue that troubles many courts is whether they should distinguish between serious and trivial infractions by being more inclined to uphold the latter.⁴⁸

Courts, therefore, have often faced the recurring themes of paternalism and stereotyping when hearing gender discrimination cases. One case addressing the stereotype that only husbands are the breadwinners is the 1973 case of *Frontiero v. Richardson*.⁴⁹ In *Frontiero*, the United States Supreme Court held that statutes presuming that spouses of male members of the military were dependents of their husbands, but not vice versa, violated the equal protection clause of the fourteenth amendment as incorporated through the due process clause of the fifth amendment.⁵⁰ In *Frontiero*, a married female Air Force officer applied for increased benefits for her husband, claiming him as a dependent. The Air Force denied her application because the appellant did not demonstrate that her husband depended on her for more than fifty percent of his support.

⁴⁴ See *supra* notes 38-40 and accompanying text for a discussion of the intermediate test.

⁴⁵ See *supra* notes 33-37 and accompanying text for a discussion of the rational basis and strict scrutiny tests.

⁴⁶ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

⁴⁷ See, e.g., *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235-36 (5th Cir. 1969).

⁴⁸ See, e.g., *Allyn v. Allison*, 34 Cal. App. 3d 448, 454, 110 Cal. Rptr. 77, 80-81 (1973) (Roth, J., concurring).

⁴⁹ 411 U.S. 677 (1973).

⁵⁰ *Id.* at 690-91.

The Supreme Court rejected the administrative convenience argument that the district court relied on to uphold the statute. The district court had reasoned that because husbands were generally the breadwinners in the family, administrative economy justified the presumption of dependency for male spouses, but not female spouses.⁵¹ In its reasoning, the *Frontiero* Court established that it wished to avoid furthering such sexual stereotypes because "[t]raditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."⁵² Thus, the Court concluded that statutes presuming that only the spouses of male military members were dependents violated the equal protection clause of the fourteenth amendment as incorporated through the due process clause of the fifth amendment.

Another common stereotype courts have addressed in many cases is the paternalistic notion that women are weak and in need of protection. For example, courts at one time upheld statutes excluding women from establishments selling liquor based on the rationale that such laws protected women and enforced high morals.⁵³ Historically, paternalism also abounded in the area of employment.⁵⁴ After the passage of Title VII, however, courts began striking down sex-based restrictions in employment.⁵⁵ Courts have invalidated protectionist laws and rules such as sex-based weight-lifting restrictions,⁵⁶ sex-based hours limitations,⁵⁷ and male-only job categories.⁵⁸

One such employment decision invalidating a protectionist practice was the 1969 case of *Weeks v. Southern Bell Telephone &*

⁵¹ *Id.* at 681-82.

⁵² *Id.* at 684.

⁵³ See, e.g., *Hoboken v. Greiner*, 68 N.J.L. 592, 593-94, 53 A. 693, 693 (1902) (ordinance valid that prohibited saloon keeper from permitting females from gathering in establishment for purpose of enticing customers) (overruled by *Paterson Tavern & Grill Owners Ass'n v. Hawthorne*, 57 N.J. 180, 189, 270 A.2d 628, 633 (1970)); *Laughlin v. Tillamook County*, 75 Or. 506, 508, 147 P. 547, 548 (1915) (ordinance valid that prohibited liquor licensee from permitting women to visit, frequent, or loiter in place of business selling liquor).

⁵⁴ See *BABCOCK*, *supra* note 7, at 247-82 (discussing history of "protective" state labor laws).

⁵⁵ See *id.* at 268-82.

⁵⁶ See, e.g., *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 712 (7th Cir. 1969); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338, 340 (D. Or. 1969); *Rosenfeld v. Southern Pac. Co.*, 293 F. Supp. 1219, 1224 (C.D. Cal. 1968).

⁵⁷ See *Caterpillar Tractor Co. v. Grabiec*, 317 F. Supp. 1304, 1307 (S.D. Ill. 1970).

⁵⁸ See, e.g., *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 236 (5th Cir. 1969) (switchman).

*Telegraph Co.*⁵⁹ In *Weeks*, the United States Court of Appeals for the Fifth Circuit held that offering a switchman's position exclusively to men violated Title VII.⁶⁰ The plaintiff, Mrs. Weeks, applied for the switchman's position, but Southern Bell responded with a letter stating that it had decided not to offer the position to women.⁶¹ Instead, Southern Bell gave the job to a less senior male employee, the only other applicant, despite the contract terms with Weeks which stated that the senior bidder, if qualified, would get the job. Southern Bell contended that the switchman's job was too strenuous for women.

The *Weeks* court, however, rejected Southern Bell's argument, noting that simply labeling a position strenuous was not enough to justify the sex-based classification.⁶² In effect, the *Weeks* court disputed the stereotyped characterization that women could not lift thirty pounds without harming themselves or others.⁶³ Reasoning that the real harm in situations similar to *Weeks* is that employers deny women access to higher paying and more desirable positions, the court rejected adhering to Victorian, paternalistic justifications for keeping women at their present employment levels.⁶⁴ The *Weeks* court thus held that denying the switchman's position to females violated Title VII.

Another theme recurring in gender discrimination cases is the suggestion that some types of discrimination are too trivial to merit concern. Triviality was a factor in the 1973 case of *Allyn v. Allison*.⁶⁵ In *Allyn*, the California Court of Appeal held that a code provision

⁵⁹ See *id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 230. The switchman's job description read as follows:

Engaged in the maintenance and operation of dial central office equipment, test, power, frame, switch, and other telephone equipment, including the locating and correcting of faults; making adjustments, additions, repairs, and replacements; performing routine operation tests, etc., and working with test-desk, field, and other forces connected with central office work. Also operates and maintains, including adjusting and making repairs to or replacement of, air conditioning equipment, and performing other work as assigned in accordance with local circumstances and the current needs of the business.

Id. at 232.

⁶² *Id.* at 234.

⁶³ See *id.* at 235-36.

⁶⁴ *Id.* at 236. The court noted that men were never denied the opportunity to receive more pay by accepting "strenuous, dangerous, obnoxious, boring or unromantic" jobs. *Id.* Title VII mandates that women have that equal choice, the court concluded. *Id.*

⁶⁵ See *Allyn v. Allison*, 34 Cal. App. 3d 448, 454, 110 Cal. Rptr. 77, 80-81 (1973) (Roth, J., concurring); Karst, "A Discrimination So Trivial": A Note on Law and the Symbolism of Women's Dependency, 49 L.A.B. BULL. 499 (1974) (critical discussion of this case).

requiring females to register to vote using the designation "Miss" or "Mrs.," but exempting males from indicating their marital status, did not violate the California constitution.⁶⁶ In *Allyn*, two women attempted to register using "Ms.," but the Registrar of Voters refused to accept and process their registrations. The majority reasoned that the provision did not impair the women's right to vote. The court further reasoned that requiring women to register as "Miss" or "Mrs." was reasonable because it furthered the governmental objective of preventing double voting.⁶⁷ The *Allyn* court also noted that a woman is not disadvantaged by disclosing her marital status because this information is of public record.

A concurring opinion noted that if marital status is important to registration, then both males and females should be asked to state if they are married.⁶⁸ The concurring judge argued, however, that the differential treatment in question was so trivial that he was not willing to correct the problem through judicial means, but rather, would give the legislature the first opportunity to do so.⁶⁹ Thus, the *Allyn* court held that the statute did not violate the equal protection clause.

Similarly, another example of a case in which a court maintained that a sex-based classification was trivial was the 1977 case of *Barker v. Taft Broadcasting Co.*⁷⁰ In *Barker*, the United States Court of Appeals for the Sixth Circuit held that an employer's grooming code mandating shorter hair for males than females did not violate Title VII.⁷¹ The defendant, an amusement park, discharged Barker,

⁶⁶ *Allyn*, 34 Cal. App. 3d at 453, 110 Cal. Rptr. at 80. The plaintiffs also brought a claim under the nineteenth amendment to the U.S. Constitution.

⁶⁷ *Id.* at 452, 110 Cal. Rptr. at 80. The court stated that the designation "Mrs." indicates that a woman might have previously used a different name when voting. Thus, using "Mrs." would be helpful in assuring that the old registrations are cancelled, and that no one votes twice. The court mentioned that male names, however, do not change after marriage and, therefore, it is unnecessary for them to use any designation at all. *Id.* at 452, 110 Cal. Rptr. at 80.

⁶⁸ *Id.* at 453, 110 Cal. Rptr. at 80 (Roth, J., concurring).

⁶⁹ *Id.* at 454, 110 Cal. Rptr. at 80-81 (Roth, J., concurring). Justice Roth stated: [T]he difference complained of . . . has had so little effect upon the allegedly wronged party, that even though it could be probably whipped and beaten into constitutional proportions, I cannot engender sufficient provocation to attempt to correct through the judicial process a discrimination so trivial without giving the first opportunity to the Legislature to satisfy all those truly interested.

Id.

The California legislature did later pass a bill correcting this situation. Karst, *supra* note 65, at 499.

⁷⁰ See *Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 401 (6th Cir. 1977).

⁷¹ *Id.*

a male artist-craftsman, for having long hair. The *Barker* court noted that upholding the hair length regulation would comport with the decisions of the other appeals courts that had considered the issue.

The *Barker* court maintained that employer hair length regulations bore such a "negligible relation" to Title VII's purposes that the code could not be what Congress intended to invalidate.⁷² In attempting to determine the legislative purposes of the statute, the court concluded that in the absence of a clear expression of the legislature's intent, courts should not infer that Congress intended to strike down something other than traditional discrimination.⁷³ Reasoning that regulating hair length is not traditionally regarded as discriminatory, the *Barker* court held that the employer's regulation did not violate Title VII.⁷⁴

The dissent, however, argued that courts should grant great deference to the Equal Employment Opportunity Commission, which has consistently ruled that in most situations, hair regulations are illegal under Title VII.⁷⁵ The dissent also argued that the majority failed to explain adequately why sex-based grooming codes would not be discriminatory. The dissent further noted that when analyzing a Title VII case, the United States Supreme Court does not distinguish between the subjective significance or insignificance of the characteristic being regulated, in this case, hair length, and that therefore, the majority in *Barker* had no authority to make such distinctions.⁷⁶ Finally, the dissent maintained that, in any event, hair length is not a *de minimis* characteristic. Rather, the dissent argued that hair length reflects individual choice and, in that respect, individuals place great value in maintaining control over their hair-styles.⁷⁷ The dissent, therefore, unsuccessfully argued that sex-based hair length regulations violated Title VII.⁷⁸

In summary, many courts, when hearing sex discrimination cases, face recurring claims of stereotyping and paternalistic attitudes toward one sex.⁷⁹ In addition, some courts uphold lesser

⁷² *Id.*

⁷³ *Id.* at 401-02 (citing *General Elec. v. Gilbert*, 429 U.S. 125, 145 (1976)).

⁷⁴ *Id.* at 401.

⁷⁵ *Id.* at 403 (McCree, J., dissenting).

⁷⁶ *Id.* at 404 (McCree, J., dissenting) (citing *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971)).

⁷⁷ *Id.* at 405 (McCree, J., dissenting).

⁷⁸ *Id.* at 402-05 (McCree, J., dissenting).

⁷⁹ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (discussing the pedestal-turned-into-cage problem); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235-36 (1969) (rejecting stereotype that women cannot hold a switchman's job).

violations of sex discrimination.⁸⁰ These courts may not view the violations as being so serious that they require judicial correction.⁸¹ Also, courts may question whether the legislature intended to invalidate what society has not historically considered to be discrimination.⁸² Many courts, therefore, look at paternalism, sexual stereotyping, and the seriousness of the discrimination before deciding whether to strike it down.

C. Male-Initiated Gender Discrimination Suits

Commentators have debated the issue of whether men are just as deserving as females of winning sex discrimination cases.⁸³ Some courts choose to strike down only discrimination against women because of women's past history of being disadvantaged.⁸⁴ Other courts view equal protection as inuring to both sexes, despite the divergent female-male history.⁸⁵

One male-initiated lawsuit with an unfavorable ruling for the male plaintiff was the 1981 case of *Michael M. v. Superior Court*.⁸⁶ In *Michael M.*, a five-member majority of the United States Supreme Court upheld over an equal protection challenge California's statutory rape law, which only incriminated male actors.⁸⁷ The plaintiff, Michael M., was a seventeen-year-old male who had had sexual relations with a sixteen-year-old female. Michael M. appealed his statutory rape conviction on the theory that the statute unconstitutionally discriminated against men because they alone were criminally liable under the act.⁸⁸ All three levels of California state courts upheld the statute.⁸⁹

In its reasoning, the majority in *Michael M.* noted that the basis of the case was discrimination against men. The *Michael M.* Court stated that although males were burdened under the statute, they were not in need of the Court's protection because men as a group

⁸⁰ See, e.g., *Barker*, 549 F.2d at 405 (upheld employer male-only hair length regulation); *Allyn v. Allison*, 34 Cal. App. 3d 448, 453, 110 Cal. Rptr. 77, 80 (1973) (upheld law requiring women to use "Miss" or "Mrs." when registering to vote).

⁸¹ E.g., *Allyn*, 34 Cal. App. 3d at 454, 110 Cal. Rptr. at 80-81 (Roth, J., concurring).

⁸² E.g., *Barker*, 549 F.2d at 401-02.

⁸³ See, e.g., Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265, 299 (1984).

⁸⁴ See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464, 475-76 (1981).

⁸⁵ See, e.g., *Orr v. Orr*, 440 U.S. 268, 272 (1979).

⁸⁶ 450 U.S. at 476.

⁸⁷ *Id.*

⁸⁸ *Id.* at 466-67.

⁸⁹ *Id.* at 467.

had not suffered from historical sexual discrimination or past disadvantages.⁹⁰ Thus, the majority held that the statutory rape law did not violate the equal protection clause.

On the other hand, in the 1979 case, *Orr v. Orr*, the male plaintiff received a favorable verdict.⁹¹ In *Orr*, the United States Supreme Court held that an Alabama statute providing that husbands, but not wives, be required to pay alimony after divorce violated the equal protection clause of the United States Constitution.⁹² Upon divorce, the probate court ordered Mr. Orr to pay his ex-wife alimony. Two years later, the ex-wife brought contempt charges against Orr alleging nonpayment. Orr defended by arguing that Alabama's alimony statute was unconstitutional because it allowed courts to order the ex-husband to pay alimony, but not the ex-wife. The Circuit Court of Lee County, Alabama, decided against Orr. After the Alabama Court of Civil Appeals sustained the lower court's holding and the Alabama Supreme Court quashed its earlier grant of certiorari, the United States Supreme Court granted certiorari and reversed.⁹³

In holding that the statute violated the equal protection clause, the *Orr* Court maintained that it must review discrimination against men with the same intermediate test that it applies for discrimination against women.⁹⁴ As such, the Court examined three governmental objectives that the state might have arguably advanced for the differential alimony policy. First, the Court agreed with Orr that the state may have been announcing its preference for a dependent female role in the family.⁹⁵ The *Orr* Court rejected this objective due to the reality that women were no longer destined to spend their lives at home rearing a family.⁹⁶ A second objective, the Court surmised, might have been to provide aid to needy spouses upon divorce, whereupon the state used the female sex as a proxy for need.⁹⁷ Third, the Court noted another possible goal of compensating ex-wives for discrimination that they may have suffered during marriage, which made them unprepared to cross over to the job market upon divorce.⁹⁸ The Court recognized the validity

⁹⁰ *Id.*

⁹¹ 440 U.S. 268, 283 (1979).

⁹² *Id.* at 283.

⁹³ *Id.* at 271.

⁹⁴ *Id.* at 272.

⁹⁵ *Id.* at 279.

⁹⁶ *Id.* at 280.

⁹⁷ *Id.*

⁹⁸ *Id.*

of the latter two objectives but held that, under the statute, even if women were needy or discriminated against in marriage, individual hearings that identified the relative financial statuses of the husband and wife were already occurring.⁹⁹ The Court thus reasoned that determining if a spouse needs alimony was an insubstantial burden on the state, unjustified by any of the possible objectives behind enacting the law.¹⁰⁰

Finally, the *Orr* Court discussed legislative classifications that favor one gender, but burden another.¹⁰¹ The Court supported a view that these classifications carry the risk of reinforcing stereotypes regarding women's proper place or need of protection.¹⁰² Thus, the *Orr* Court reasoned that even a statute designed to compensate women for past discrimination must be carefully tailored to determine if gender-neutral distinctions, such as need, could instead be used as a stepping stone to an appropriate state purpose.¹⁰³ Therefore, the Court held that Alabama's law granting courts the authority to require men to pay alimony, but not women, violated the equal protection clause.

Summarizing, some courts hold that protection against sex discrimination should inure to women more than to men.¹⁰⁴ These courts recognize burdens to males, yet still uphold sex-based classifications that favor women over men.¹⁰⁵ Other courts, however, regard sex discrimination against males to be just as deserving of court invalidation.¹⁰⁶

In conclusion, several policy issues and themes surround gender discrimination cases. Under federal law, Congress has decided not to protect the sexes from discrimination in places of public accommodation under Title II; several state legislatures, however, have extended such protection in their Title II counterparts.¹⁰⁷

⁹⁹ *Id.* at 280-281.

¹⁰⁰ *Id.* at 281.

¹⁰¹ *See id.* at 283.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *See, e.g., Michael M. v. Superior Court*, 450 U.S. 464, 475-76 (1981) (Court reasoned that men needed protection less than women). *See supra* notes 86-90 and accompanying text for a discussion of *Michael M.*

¹⁰⁵ *See, e.g., Michael M.*, 450 U.S. at 476.

¹⁰⁶ *See, e.g., Orr v. Orr*, 440 U.S. 268, 279 (1979) (Court reasoned that both men and women should be protected from discrimination equally). *See supra* notes 91-103 and accompanying text for a discussion of *Orr*.

¹⁰⁷ *See supra* notes 23-25, 30-31 and accompanying text for an overview of state and federal public accommodation statutes.

Similarly, some individual states have also passed equal rights amendments to their state constitutions, aiming to combat sex discrimination.¹⁰⁸ As for standards of review in gender discrimination cases, the United States Supreme Court has determined that courts should use an intermediate standard of review rather than the strictest of reviews when hearing equal protection cases.¹⁰⁹

While analyzing gender discrimination cases, many courts have addressed stereotyping and paternalistic attitudes toward one sex, as well as whether distinctions should be made between trivial or serious infractions of the law.¹¹⁰ Some courts avoid paternalistic or protectionist attitudes toward one sex.¹¹¹ In addition, the judiciary sometimes acknowledges that the furtherance of sexual stereotypes should constitute discrimination.¹¹² Other courts, however, do not.¹¹³ In addition, some courts will distinguish subjectively between major and minor sex discrimination by upholding the latter.¹¹⁴

Finally, policies about whether males as well as females should be protected from gender discrimination may vary.¹¹⁵ Courts may reason that men as a class do not need the court's protection because only women have been the historical victims of sex discrimination.¹¹⁶ Other courts, however, have combatted sex discrimination against men as well.¹¹⁷ In short, courts considering how to handle gender discrimination cases address a multitude of issues before deciding whether to strike down a certain classification.

¹⁰⁸ See Comment, *Models for the Future*, *supra* note 8, at 695 n.12 (listing the sixteen states with ERAs as of 1984).

¹⁰⁹ See *supra* notes 33-45 and accompanying text for a discussion of the equal protection standards of review.

¹¹⁰ See *supra* notes 46-82 and accompanying text for a discussion of paternalism, stereotyping, and triviality.

¹¹¹ See *supra* notes 49-52 and accompanying text for a discussion of paternalism and gender discrimination.

¹¹² See *id.*

¹¹³ See *supra* notes 53 & 54 and accompanying text discussing courts not willing to reject stereotypes.

¹¹⁴ See *supra* notes 65-82 and accompanying text for a discussion of triviality and gender discrimination.

¹¹⁵ See *supra* notes 83-106 and accompanying text for a discussion of male-initiated gender suits.

¹¹⁶ See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464, 476 (1981) (Court reasoned that men needed protection less than women). See *supra* notes 86-90 and accompanying text for a discussion of *Michael M.*

¹¹⁷ See, e.g., *Orr v. Orr*, 440 U.S. 268, 279 (1979) (majority of justices reasoned that both men and women should be protected from discrimination equally). See *supra* notes 91-103 and accompanying text for a discussion of *Orr*.

II. CHALLENGES TO LADIES' NIGHT PRICE DISCOUNTS

Plaintiffs have challenged gender-based promotions or "ladies' nights" in a number of settings, including sporting events,¹¹⁸ bars and nightclubs,¹¹⁹ restaurants,¹²⁰ and car washes.¹²¹ In several early cases, courts held that the ladies' night promotions did not violate any state law.¹²² Some of the courts reasoned that the discounts did not harm men under the sex discrimination statutes.¹²³ They also noted the minor deviations in price charged to men and women when upholding the discounts.¹²⁴ Recognizing a valid business purpose in encouraging female patronage, the courts denied verdicts for the men because the owners had not discouraged the men from patronizing the establishments and had not made the men feel unsolicited.¹²⁵

¹¹⁸ *E.g.*, *Ladd v. Iowa W. Racing Ass'n*, 438 N.W.2d 600, 601 (Iowa 1989) (racetrack); *Tucich v. Dearborn Indoor Racquet Club*, 107 Mich. App. 398, 399, 309 N.W.2d 615, 617 (1981) (racquet club); *Magid v. Oak Park Racquet Club Assocs.*, 84 Mich. App. 522, 524, 269 N.W.2d 661, 662 (1978) (same); *Abosh v. New York Yankees*, No. CPS-25284, Appeal No. 1194 (N.Y. State Human Rights Appeal Bd., July 19, 1972), reprinted in *BABCOCK*, *supra* note 7, at 1069-70 (baseball stadium); *MacLean v. First N.W. Indus. of Am.*, 96 Wash. 2d 338, 340, 635 P.2d 683, 684 (1981) (basketball arena).

¹¹⁹ *E.g.*, *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 27, 707 P.2d 195, 195, 219 Cal. Rptr. 133, 133-34 (1985) (bar); *City of Clearwater v. Studebaker's Dance Club*, 516 So. 2d 1106, 1107 (Fla. Dist. Ct. App. 1987) (dance club); *Dock Club, Inc. v. Illinois Liquor Control Comm'n*, 101 Ill. App. 3d 673, 673, 428 N.E.2d 735, 736 (1981) (tavern); *Pennsylvania Liquor Control Bd. v. Dobrinoff*, 80 Pa. Commnw. 453, 454-55, 471 A.2d 941, 942 (1984) (tavern).

¹²⁰ *E.g.*, *Peppin v. Woodside Delicatessen*, 67 Md. App. 39, 41, 506 A.2d 263, 264 (1986) (delicatessen).

¹²¹ *E.g.*, *Koire*, 40 Cal. 3d at 27, 707 P.2d at 195, 219 Cal. Rptr. at 133-34 (car washes).

¹²² *See, e.g.*, *Dock Club*, 101 Ill. App. 3d at 677, 428 N.E.2d at 738 (sex-based discount did not violate civil rights portion of Illinois dramshop act); *Tucich*, 107 Mich. App. at 402-03, 309 N.W.2d at 618 (sex-based discount did not violate Michigan's public accommodation statute); *Magid*, 84 Mich. App. at 528, 269 N.W.2d at 664 (same); *MacLean*, 96 Wash. 2d at 343, 347-48, 635 P.2d at 685, 687-88 (sex-based discount did not violate Washington's anti-discrimination law or its ERA).

¹²³ *E.g.*, *Dock Club*, 101 Ill. App. 3d at 676, 428 N.E.2d at 738; *MacLean*, 96 Wash. 2d at 342, 635 P.2d at 685.

¹²⁴ *See, e.g.*, *Koire v. Metro Car Wash*, 164 Cal. App. 3d 298, 209 Cal. Rptr. 233, 234-35 (1984) (court referred to ladies' night promotion as "merely preferred treatment for women . . . in the form of petty price discounts"), *rev'd*, 40 Cal. 3d 24, 707 P.2d 195, 219 Cal. Rptr. 133 (1985); *MacLean*, 96 Wash. 2d at 340, 635 P.2d at 684 (court noted that women paid \$2.50 for admission, while men paid \$5.00). *But see Tucich*, 107 Mich. App. at 400, 309 N.W.2d at 617 (price difference for membership at racquet club amounted to twenty dollars).

¹²⁵ *See, e.g.*, *Dock Club*, 101 Ill. App. 3d at 676-77, 428 N.E.2d at 738 (discount upheld because owners did not exact men's higher price in order to discourage men from patronizing

Later courts, however, rejected the reasoning that such discounts were trivial and justified by profit potential.¹²⁶ These courts held that ladies' night promotions violated state anti-discrimination laws by denying males equal treatment in places of public amusement.¹²⁷ Part of the reason for this trend is that courts recognize both financial and psychological harm to the male plaintiffs under the statutes.¹²⁸ Also, some courts have demonstrated that upholding ladies' nights perpetuates dangerous sexual stereotypes such as men being the breadwinners, or women being sex objects.¹²⁹ Finally, courts striking down the discounts fear the repercussions of judges incorporating their subjective views into the standard for sex discrimination.¹³⁰ These courts foresee that allowing the discounts to continue will result in additional exceptions to statutes proscribing

establishment, nor did it have that effect); *Tucich*, 107 Mich. App. at 402, 309 N.W.2d at 618 (discount upheld because owners did not withhold, refuse, or deny accommodations to men); *Magid*, 84 Mich. App. at 528, 269 N.W.2d at 664 (same); *MacLean*, 96 Wash. 2d at 344, 635 P.2d at 686 (discounts upheld because they were not calculated to cause male plaintiff to feel unwelcome or unaccepted).

¹²⁶ See, e.g., *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 39, 707 P.2d 195, 204, 219 Cal. Rptr. 133, 142 (1985).

¹²⁷ See *id.* at 39, 707 P.2d at 204, 219 Cal. Rptr. at 142 (sex-based discounts violated California's public accommodation statute); *City of Clearwater v. Studebaker's Dance Club*, 516 So. 2d 1106, 1108-09 (Fla. Dist. Ct. App. 1987) (sex-based discount violated Clearwater city ordinance); *Ladd v. Iowa W. Racing Ass'n*, 438 N.W.2d 600, 602 (Iowa 1989) (sex-based discount violated Iowa's civil rights act); *Peppin v. Woodside Delicatessen*, 67 Md. App. 39, 48, 506 A.2d 263, 267-68 (1986) (sex-based discount violated Montgomery county anti-discrimination law); *Abosh v. New York Yankees*, No. CPS-25284, Appeal No. 1194 (N.Y. State Human Rights Appeal Bd., July 19, 1972), reprinted in *BABCOCK*, *supra* note 7, at 1070 (sex-based discount violated New York human relations law); *Pennsylvania Liquor Control Bd. v. Dobrinoff*, 80 Pa. Commnw. 453, 457, 471 A.2d 941, 943 (1984) (sex-based discount violated Pennsylvania Human Relations Act).

¹²⁸ See, e.g., *Koire*, 40 Cal. 3d at 34, 707 P.2d at 200, 219 Cal. Rptr. at 138-39 (court pointed to economic injury to male plaintiff, as well as discount's effect of making plaintiff feel unfairly treated); *Peppin*, 67 Md. App. at 46, 506 A.2d at 266 (court held half-price discount on food placed significant burden upon men).

¹²⁹ See, e.g., *Koire*, 40 Cal. 3d at 34-35, 707 P.2d at 201-02, 219 Cal. Rptr. at 139-40 (discussing how ladies' nights further stereotypes); *Abosh*, No. CPS-25284, Appeal No. 1194 (N.Y. State Human Rights Appeal Bd., July 19, 1972), reprinted in *BABCOCK*, *supra* note 7, at 1070 (discusses female stereotypes surrounding ladies' day at New York Yankees baseball games).

¹³⁰ See, e.g., *Ladd*, 438 N.W.2d at 602 ("[W]e . . . do not believe . . . a de minimis exception for discrimination is viable. Nor does the statute suggest we should attempt to make such distinctions."); *Peppin*, 67 Md. App. at 43, 506 A.2d at 265 ("We believe the matter involves an intrinsically substantive issue which, left unanswered, could serve to encourage far more serious methods of discrimination.").

sex discrimination, resulting in the maintenance of inequality between sexes in our society.

A. Cases Permitting Sex-Based Discounts

Many early decisions held that sex-based discounts do not constitute sex discrimination under state statutes.¹³¹ These decisions recognized the validity of businesses using price discounts to encourage female attendance, as long as the discounts do not at the same time discourage male patronage.¹³² The courts also noted the trivial differences in male versus female prices and concluded that men are not victims of discrimination.¹³³

One such ladies' day case was the 1981 decision of *MacLean v. First Northwest Industries of America*.¹³⁴ In *MacLean*, the Supreme Court of Washington held that management's practice of admitting females at half-price on Sundays to Seattle Supersonic basketball games did not violate either Washington's anti-discrimination law or its equal rights amendment ("ERA").¹³⁵ In *MacLean*, the male

¹³¹ See *infra* notes 134-173 and accompanying text.

¹³² E.g., *Dock Club, Inc. v. Illinois Liquor Control Comm'n*, 101 Ill. App. 3d 673, 676-77, 428 N.E.2d 735, 738 (1981) (owners did not exact men's higher price in order to discourage men from patronizing establishment, nor did it have that effect, so discount upheld).

¹³³ E.g., *MacLean v. First Northwest Indus. of Am.*, 96 Wash. 2d 338, 340, 635 P.2d 684, 688 (1981) (court noted that women paid \$2.50 for admission, while men paid \$5.00).

¹³⁴ *Id.*

¹³⁵ *Id.* at 343, 347-48, 635 P.2d at 685, 687-88. Washington's law against discrimination provides:

(1) The right to be free from discrimination because of . . . sex . . . is recognized as and declared to be a civil right. This right shall include, but not be limited to:

...

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement . . .

WASH. REV. CODE ANN. § 49.60.030 (Supp. 1989).

The statute defines "full enjoyment" as follows:

"Full enjoyment of" includes the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any particular . . . sex . . . to be treated as not welcome, accepted, desired, or solicited.

Id. at § 49.60.040.

At the time of the *MacLean* case, this definition did not include "sex" as a protected category. The *MacLean* court, however, read "sex" into the provision to make it consistent with section 49.60.030(1)(b), which did give the right of full enjoyment in these places of public assemblage or amusement to members of both sexes. See *MacLean*, 96 Wash. 2d at

plaintiff requested, and was denied, the females' half-price admission charge of \$2.50 at a basketball game in the Seattle Coliseum.¹³⁶ MacLean filed suit in the Superior Court of King County, Washington, alleging that the sex-based price discount violated a Washington statute against discrimination.¹³⁷ The superior court dismissed the action on a motion for summary judgment and refused to allow an amendment to the complaint alleging a violation of Washington's ERA.¹³⁸ The court of appeals, reaching the ERA issue on its own initiative, held that the promotion violated the Washington ERA.¹³⁹

The Supreme Court of Washington reversed the appeals court decision and held that the sex-based discount did not violate the ERA or the state anti-discrimination statute.¹⁴⁰ The *MacLean* court determined that management did not intend to discriminate against men in a men's professional basketball arena, a place the court called a "citadel of masculine dominance."¹⁴¹ The court emphasized that First Northwest Industries (FNI) offered several other pricing promotions in addition to ladies' night, and that the men who were required to pay the regular prices were just those men who did not fall into any of these special pricing categories.¹⁴² Also important to the *MacLean* court was the lack of evidence that other men shared MacLean's disgruntlement.¹⁴³ Thus, the court concluded that FNI's pricing schemes did not discriminate on the basis of sex.

To support its holding, the Supreme Court of Washington determined that, because the ticket policy did increase attendance,

343, 635 P.2d at 685. The court reasoned that the omission of any reference to sex in section 49.060.040 was inadvertent. *Id.*

¹³⁶ *MacLean*, 96 Wash. 2d at 340, 635 P.2d at 684.

A number of student authors have discussed *MacLean*. See Comment, *Models for the Future*, *supra* note 8, at 702-06; Note, *Is Ladies' Night Out?*, *supra* note 4, at 1605-10; Note, *Washington's Equal Rights Amendment and Law Against Discrimination—The Approval of the Seattle Sonics' "Ladies' Night"*, 58 WASH. L. REV. 465 (1983); *Survey of Washington Law*, 17 GONZ. L. REV. 913 (1982); *Survey of Washington Law*, 15 GONZ. L. REV. 1093 (1980); *Recent Developments, Gender Discrimination—The ERA v. "Ladies Night," One State's Perspective*, 15 TULSA L.J. 366 (1979).

¹³⁷ *MacLean*, 96 Wash. 2d at 340, 635 P.2d at 684.

¹³⁸ *Id.* at 340-41, 635 P.2d at 684.

¹³⁹ *Id.* at 341, 635 P.2d at 684 (citing *MacLean v. First Northwest Indus. of Am.*, 24 Wash. App. 161, 600 P.2d 1027 (1979)).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 346, 635 P.2d at 687.

¹⁴² *Id.* at 341-42, 635 P.2d at 687. The other groups given lower admission prices were senior citizens, military members, students, low-income citizens, and groups of 30 or more. *Id.*

¹⁴³ *Id.* at 347, 635 P.2d at 687. The court referred to an affidavit stating that a "sizable majority" approved of promotional programs such as ladies' night. *Id.*

a business purpose justified the continuance of the ladies' night promotion.¹⁴⁴ Noting that women are not as interested in basketball as men, the *MacLean* court reasoned that the defendants had a valid business reason for attracting female attendance with discounts and other special programs aimed at women.¹⁴⁵ The court also pointed out that the regular ticket price of \$5.00 FNI charged to male spectators was reasonable and fair, considering the high cost of paying quality professional basketball players.¹⁴⁶

The court also noted that MacLean had not shown that he suffered any damage due to the special discount for women. Emphasizing that Washington is a community property state, the *MacLean* court reasoned that MacLean, because he was married and had paid for his wife's ticket, actually benefited from the pricing schemes.¹⁴⁷ The court further stated that had MacLean purchased the tickets out of his separate funds, he still would not have been damaged because he would be in a better financial position than if women had not been admitted at half-price.¹⁴⁸ Finally, the court maintained that even if the plaintiff had attended the game alone or with other males, he again would not have been injured because the financial benefit would have been open to him at his option had he chosen to invite a female companion.¹⁴⁹

¹⁴⁴ See *id.* at 342, 635 P.2d at 684-85.

¹⁴⁵ *Id.* at 342, 635 P.2d at 684. Women constituted only 35% of the spectators before FNI introduced the program. *Id.* The other attractions for women included Seattle Symphony performances before the game and at half-time, women's fashion shows and basketball shooting at half-time, and the sale of gifts and souvenirs. *Id.* at 342, 635 P.2d at 685.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 342-43, 635 P.2d at 685. Two justices in dissent disputed the majority's holding that the respondent suffered no harm. See *id.* at 352, 635 P.2d at 690 (Utter, J., dissenting); *id.* at 355, 635 P.2d at 691-92 (Dolliver, J., dissenting). Justice Utter reminded the court that no actual damage to the plaintiff need be shown because Washington's statute provides that gender discrimination can be *per se* injurious. *Id.* at 351, 635 P.2d at 690 (Utter, J., dissenting). This is so, he noted, because the preamble states that discrimination injures not only the victim but the state and public as well. *Id.* at 352, 635 P.2d at 690 (Utter, J., dissenting). Justice Utter also argued that actual damages were present because damages can include noneconomic injury such as injury to one's psyche and to interpersonal relationships. *Id.* In this case, MacLean had alleged that the ladies' night promotion made him feel like his wife's "keeper" and injured his psychic well-being. *Id.*

Justice Dolliver pointed out that the majority's determination that the plaintiff suffered no damage ignored the fact that the plaintiff also sought injunctive relief. *Id.* at 354, 635 P.2d at 691 (Dolliver, J., dissenting).

¹⁴⁸ *Id.* at 343, 635 P.2d at 685. The court noted that a valid purpose of the promotion was to make family attendance cheaper, and that insofar as the spectators were married, the discount fulfilled that purpose. *Id.*

¹⁴⁹ *Id.*

The *MacLean* court then interpreted Washington's law against discrimination and held that the discount was not objectionable under the act. Reasoning that the legislature's concern was that no person be treated as unwelcome, the court concluded that this evil was not present in *MacLean*.¹⁵⁰ The court maintained that the discount to women was not calculated to, nor was it contended that it did, cause the plaintiff to feel undesired or unsolicited.¹⁵¹

Lastly, the *MacLean* court expressed concern about the plaintiff's actual reason for bringing the allegations.¹⁵² In the opinion, the *MacLean* court suggested that the plaintiff's female attorney, who believed that the discounts tended to stereotype women, was the catalyst for bringing the lawsuit.¹⁵³ The court reasoned that even if the attorney was right, the objection nevertheless did not cause the male plaintiff any injustice.¹⁵⁴ Finally, in the discussion of

¹⁵⁰ *Id.* at 343-44, 635 P.2d at 685-86.

¹⁵¹ *Id.* at 344, 635 P.2d at 686. The court quoted the United States Supreme Court in *Burton v. Wilmington Parking Authority*, where black customers were refused service, and reasoned that invidious discrimination was what the legislature intended to address. *Id.* (citing *Burton*, 365 U.S. 715, 724 (1961)). The court acknowledged that the statutory definition of "full enjoyment" used the word "includes," which may indicate that it was non-exhaustive; the court reasoned, however, that the statute as a whole contemplated the forbidden discrimination to be damaging in effect. *Id.* See *supra* note 135 for the statutory language defining "full enjoyment."

¹⁵² *MacLean*, 96 Wash. 2d at 345, 635 P.2d at 686.

¹⁵³ *Id.* The court quoted the attorney's statement that appeared in an issue of the American Bar Association Journal that the attorney had cited in her brief: "The major concern has always been male and female stereotypes, which have the effect of perpetuating sex discrimination." The promotion . . . 'is a come-on just to make money, because women are viewed as sex objects. It wasn't just to be nice to the ladies.'" *Id.* at 345, 635 P.2d at 686-87 (quoting *Civil Rights: Blow Whistle on NBA Champs' Ladies' Nights*, 65 A.B.A. J. 1619, 1619 (Nov. 1979)).

¹⁵⁴ *Id.* at 345, 635 P.2d at 687. The court distinguished this case from *Abosh v. New York Yankees*, a case that struck down a 100 year practice of allowing admission to women at half price on certain days of the baseball season. *Id.* at 346 n.3, 635 P.2d at 687 n.3 (citing *Abosh*, No. CPS-25284, Appeal No. 1194 (N.Y. State Human Rights Appeal Bd., July 19, 1972), reprinted in *BABCOCK, supra* note 7, at 1069-70). The *MacLean* court noted that the New York Board was more concerned with whether the promotion worked to promote family bonds and stimulate female attendance than with its discriminatory effect. *Id.*

The *MacLean* court also quoted a sociologist at a New York Commission Hearing who testified that ladies' day reinforces stereotypes of women being silly in public, unathletic, and improvident. *Id.* After studying the discount's success, however, the court judged that not all women found this type of inducement offensive. *Id.* Also, the court noted the omission in the sociologist's testimony of any assertion that the promotional device had an adverse effect on men. *Id.*

Justice Utter in dissent, however, stated that the idea of harm from stereotyping women did have merit in this case: "[Ladies' Day] can suggest that [women], as a class, have an antipathy to sports and that, absent an economic 'bribe,' they will not attend." *Id.* at 353, 635 P.2d at 690 (Utter, J., dissenting).

the ERA issue at the end of the opinion, the court stated that the ladies' night issue was not of constitutional import, and predicted that the public would lose respect for the ERA if the court would use it in the ladies' night context.¹⁵⁵ As such, the *MacLean* judiciary held that ladies' night at Seattle Supersonic basketball games should be upheld.¹⁵⁶

The Appellate Court of Illinois followed a similar approach in the 1981 case of *Dock Club, Inc. v. Illinois Liquor Control Commission* by holding that the practice of giving females price discounts did not violate the civil rights provision of Illinois's dramshop act.¹⁵⁷ In *Dock Club*, the owners of the club permitted females to purchase drinks at reduced prices without permitting males to do the same.¹⁵⁸ After the Illinois Liquor Control Commission ("Commission") issued a citation and notice of hearing against the owners, Dock Club filed suit in the circuit court of Sangamon County in hopes of obtaining a declaratory judgment approving of its ladies' night promotion.¹⁵⁹ The circuit court issued an interlocutory order prohibiting the Commission from pursuing the citation process and the Appellate Court of Illinois affirmed.¹⁶⁰

Noting the lack of precedent on point, the appellate court stated that the proper test for the existence of a dramshop act violation is whether the sex-based price differentials deny "equal enjoyment" of the facilities to persons not allowed to benefit from the lower price.¹⁶¹ The *Dock Club* court indicated that if the owners had designed the higher price to discourage men from patronizing the business establishment, or if the higher price had had that effect, then the owners had denied men "equal enjoyment."¹⁶² In the case

¹⁵⁵ *Id.* at 348, 635 P.2d at 688. Justice Dolliver dissented on this point, asserting that the basic principle of the ERA was to assure equal treatment of the sexes. *Id.* at 354-55, 635 P.2d at 691 (Dolliver, J., dissenting). Justice Dolliver stated that there was no alternative to the finding that the Washington ERA proscribed the ladies' night promotion. *Id.* at 358, 635 P.2d at 693 (Dolliver, J., dissenting). He criticized the majority for avoiding the plain language of the ERA by speculating about the intent of the people in adopting the amendment. *Id.*

¹⁵⁶ *Id.* at 341, 635 P.2d at 684.

¹⁵⁷ 101 Ill. App. 3d 673, 673, 428 N.E.2d 735, 736 (1981). The statute states: "No licensee . . . shall deny . . . any person the full and equal enjoyment of the accommodations, advantages, facilities and privileges of any premises in which alcoholic liquors are . . . sold . . ." ILL. REV. STAT. ch. 43, para. 133 (1986). Dram shop acts are statutes that regulate the sale and distribution of alcoholic liquors. *See id.* at para. 94.

¹⁵⁸ *Dock Club*, 101 Ill. App. 3d at 673, 428 N.E.2d at 736.

¹⁵⁹ *Id.* at 674, 428 N.E.2d at 736.

¹⁶⁰ *Id.* at 677, 428 N.E.2d at 738.

¹⁶¹ *Id.* at 676, 428 N.E.2d at 738.

¹⁶² *Id.*

of ladies' night discounts, however, the court concluded that the purpose of the pricing scheme was not to discourage male patronage, but to encourage female patronage.¹⁶³ Because the owners had not prevented men from equally enjoying the facilities, the *Dock Club* court held that ladies' night discounts did not violate the dramshop act.

In addition, the *Dock Club* court expressed concern that striking down ladies' night would jeopardize other similar business pricing discounts.¹⁶⁴ The court noted that most companies offer reduced prices to encourage increased business. The court noted the lack of litigation about any of these price discounts in the past 100 years, and held that no violation of the Illinois dramshop act existed in *Dock Club* because the owners did not deny men equal enjoyment.¹⁶⁵

Another case allowing preferential pricing for women to continue was the 1978 case of *Magid v. Oak Park Racquet Club Association*.¹⁶⁶ In this case, the Michigan Court of Appeals held that charging women lower annual membership fees to a racquet club did not violate the state's public accommodation statute.¹⁶⁷ Although the statute expressly required uniform pricing practices, the *Magid* court interpreted that provision to be modified by another provision requiring plaintiffs to allege a denial of accommodations before having a valid claim.¹⁶⁸ Because the male plaintiff had not claimed that the racquet club denied him admittance to the club or use of its facilities, the *Magid* court held that his claim failed.¹⁶⁹

In summary, courts upholding ladies' night promotions consider several similar factors in their reasoning. As long as businesses use the discounts to encourage female patronage, most of these courts indicate that ladies' nights are legal if the promotion does

¹⁶³ *Id.* The court also noted that the dramshop act did not treat any class as a suspect class, but rather spoke of dealing with "any person." *Id.*

¹⁶⁴ *Id.* at 676-77, 428 N.E.2d at 738. The court spoke of the dangers of outlawing promotions to Irish people on St. Patrick's Day, military people on Armed Forces Day, conventioners, senior citizens, or members of any other group. *Id.*

¹⁶⁵ *Id.* at 677, 428 N.E.2d at 738.

¹⁶⁶ 84 Mich. App. 522, 528, 269 N.W.2d 661, 664 (1978). A later Michigan case followed the reasoning in *Magid* in holding that lower prices for female racquet club members were legal. *Tucich v. Dearborn Indoor Racquet Club*, 107 Mich. App. 398, 402, 309 N.W.2d 615, 618 (1981).

¹⁶⁷ *Magid*, 84 Mich. App. at 528, 269 N.W.2d at 664. The relevant statute in part states, "All persons . . . shall be entitled to full and equal accommodations, advantages, facilities and privileges . . . in all . . . places of public accommodation, amusement, and recreation . . . with uniform prices." MICH. STAT. ANN. § 28.343 (Callaghan 1981).

¹⁶⁸ *Magid*, 84 Mich. App. at 528, 269 N.W.2d at 664.

¹⁶⁹ *Id.*

not incidentally deny males access to public facilities or make men feel unsolicited.¹⁷⁰ Some opinions also note the lack of precedent and the apparent lack of concern about these discounts from similarly-situated males in support of the conclusion that gender-based discounts are not the type of discrimination legislatures intended to invalidate.¹⁷¹ Most courts also favor maintaining traditional business owner discretion in the types of pricing promotions offered, especially, as here, where courts conclude that owners do not intend to discriminate against men.¹⁷² In addition, many courts are unable to recognize any actual harm to the individual plaintiffs resulting from ladies' nights.¹⁷³

B. Cases Invalidating Sex-Based Discounts

Unlike the courts upholding sex-based pricing, recent courts have held that ladies' nights do violate anti-discrimination laws.¹⁷⁴

¹⁷⁰ See, e.g., *Dock Club*, 101 Ill. App. 3d at 676-77, 428 N.E.2d at 738 (discount upheld because owners did not exact men's higher price to discourage men from patronizing establishment, nor did it have that effect); *Tucich*, 107 Mich. App. at 402, 309 N.W.2d at 618 (discounts upheld because owners did not withhold, refuse, or deny accommodations to men); *Magid*, 84 Mich. App. at 528, 269 N.W.2d at 664 (same); *MacLean v. First Northwest Indus.*, 96 Wash. 2d 338, 344, 635 P.2d 683, 686 (1981) (discounts upheld because they were not calculated to cause male plaintiff to feel unwelcome or unaccepted).

¹⁷¹ E.g., *Dock Club*, 101 Ill. App. 3d at 677, 428 N.E.2d at 738 (stated that the lack of litigation on the issue in the past fifty to one hundred years indicates "no evil sought to be remedied occurred here.").

¹⁷² E.g., *id.* at 676-77, 428 N.E.2d at 738 (court feared similar offerings would be invalidated if ladies' nights were not upheld).

¹⁷³ E.g., *Magid*, 84 Mich. App. at 528, 269 N.W.2d at 664 (males needed to allege a "withholding, refusal or denial of accommodations").

¹⁷⁴ See, e.g., *Ladd v. Iowa W. Racing Ass'n*, 438 N.W.2d 600, 602 (Iowa 1989) (sex-based pricing violates state civil rights act).

In addition, in a 1967 case concerning racially-based pricing, the Massachusetts Appellate Court held that charging black patrons more for drinks at a tavern than white patrons violated Massachusetts's public accommodation statute. *Ferguson v. Windsor Court Restaurant*, 38 Mass. App. Dec. 120, 122 (1967). In *Ferguson*, the restaurant charged Ferguson and his Afro-American friends forty cents for each bottle of ale or beer, but charged white patrons only thirty-five cents each. *Id.* at 121-22. The court reasoned that this situation violated the statute because the black plaintiffs were protected under the statute, because the defendant's place of business constituted a public accommodation, and because the defendant discriminated against the plaintiffs based on their skin color. *Id.* at 122. Consequently, the court held that Windsor's practice violated the Massachusetts law. *Id.*

The Massachusetts public accommodation statute in question stated in part,

Whoever makes any distinction . . . on account of religion, color, national origin or race, except for good cause . . . relative to the admission of any person to, or his treatment in, any place of public accommodation . . . shall be punished

Most of the courts striking down ladies' nights applied the statutes strictly.¹⁷⁵ These courts note the repercussions of not strictly applying anti-discrimination statutes, such as maintaining inequality in our society or imposing an individual justice's view into determining what constitutes sex discrimination.¹⁷⁶

A case addressing and invalidating sex-based price discounts under a public accommodation statute was the 1984 case of *Pennsylvania Liquor Control Board v. Dobrinoff*.¹⁷⁷ In *Dobrinoff*, the Commonwealth Court of Pennsylvania held that temporarily exempting female patrons from cover charges in a bar violated the Pennsylvania Human Relations Act.¹⁷⁸ The plaintiff, the Pennsylvania Liquor Control Board, suspended Dobrinoff's liquor license because of violations of the act. Thereafter, the Court of Common Pleas of Dauphin County vacated the suspension, reasoning that the bar's temporary cover charge exemption for women was only a trivial infraction.¹⁷⁹ The lower court reprimanded the Board for not taking actions against more substantial offenses than the unintentional, *de minimis* offense in question here.¹⁸⁰ The court analogized the Board's actions to "stomping on a mouse in the kitchen when there's a tiger at the door."¹⁸¹

by a fine . . . and shall forfeit to any person aggrieved thereby not less than \$100.00 nor more than \$500.00

Id. at 120-21 (citing MASS. GEN. L. ch. 272, § 98).

The Massachusetts public accommodation statute added "sex" as a category in 1971. 1971 ANN. SURV. MASS. L. § 20.4, at 569 (citing 1971 MASS. ACTS ch. 418, §§ 1, 2 (amending MASS. GEN. L. ch. 272, §§ 92A, 98)). One commentator has suggested that the effect was to repeal by implication other statutory provisions that limited barbers from providing services to women and that limited hairdressers from serving male customers. *See id.* The new provision also affected men-only taverns that were to be exempt from the act until 1973, in response to owners' requests. *Id.* at 570.

¹⁷⁵ *See, e.g., Ladd*, 438 N.W.2d at 602 ("[W]e . . . do not believe a *de minimis* exception for . . . discrimination is viable. Nor does the statute suggest we should attempt to make such distinctions.").

¹⁷⁶ *See, e.g., id.*

¹⁷⁷ 80 Pa. Commnw. 453, 457, 471 A.2d 941, 943 (1984).

¹⁷⁸ *Id.* The Pennsylvania law prohibits "place[s] of public accommodation, resort or amusement" from discriminating on the basis of sex. *Id.* at 455, 471 A.2d at 942 (citing PA. STAT. ANN. tit. 43, § 955(i)(1) (Purdon)).

¹⁷⁹ *Id.* at 455, 456-57, 471 A.2d at 942, 943. The trial court referred to the situation in this way: "[O]n two occasions, when go-go girls were the 'entree' of the evening, a female patron was exempted from the \$1.00 cover charge . . . requested of the male voyeurs." *Id.* at 455-56, 471 A.2d at 942. Other charges against the Flinrock Inn included tap mislabeling and failure to serve food as required by statute. *Id.* at 455, 471 A.2d at 942.

¹⁸⁰ *See id.* at 456-57, 471 A.2d at 943.

¹⁸¹ *Id.*

On appeal, the Commonwealth Court of Pennsylvania reversed, reinstating the liquor license suspension.¹⁸² The court held that the Pennsylvania statute did not distinguish between major and minor violations and did not require intent in order to be prohibited as discriminatory.¹⁸³ Therefore, because the statute was unambiguous and proscribed all sex discrimination in public accommodations, the *Dobrinoff* court held that giving unisex price discounts violated the Pennsylvania statute as a matter of law.¹⁸⁴

Similarly, the Supreme Court of California held in the 1985 case of *Koire v. Metro Car Wash* that giving women reduced prices at bars and car washes on specified days of the week violated California's Unruh Act, an act prohibiting discrimination in businesses based on, among other classifications, sex.¹⁸⁵ In *Koire*, the male plaintiff filed suit against seven car washes and one bar alleging that the sex-based discounts violated the California law.¹⁸⁶ The trial court held for the defendants, denying Koire statutory damages and injunctive relief.¹⁸⁷

The California Supreme Court reversed, holding that the defendants engaged in discriminatory practices. The *Koire* court reasoned that the Unruh Act prohibited not only the outright exclusion of prospective patrons from business establishments, but also required equal treatment of the patrons as well.¹⁸⁸ The court rejected the business argument that rational self-interest such as increased profitability justified the sex-based price differences.¹⁸⁹ Analogizing

¹⁸² *Id.* at 458-59, 471 A.2d at 944.

¹⁸³ *Id.* at 457, 471 A.2d at 943. The court noted that the trial court's suggestion regarding the reason for the pricing scheme being "chivalry and courtesy to the fair sex," rather than discrimination against men, even if true, was irrelevant. *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ 40 Cal. 3d 24, 707 P.2d 195, 219 Cal. Rptr. 133 (1985). The Unruh Act states: "All persons . . . are free and equal, and no matter what their sex . . . 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 Supp. 1990).

¹⁸⁶ *Koire*, 40 Cal. 3d at 27-28, 707 P.2d at 196, 219 Cal. Rptr. at 134. The discounts for women ranged from 4% to 38%. *Id.* at 27 n.2, 707 P.2d at 195 n.2, 219 Cal. Rptr. at 133 n.2.

Student authors have written on this case. See Note, *Is Ladies' Night Out?*, *supra* note 4, at 613-15; Note, *Koire v. Metro Car Wash: Gender Based Promotional Procedures Okay With Unruh*, 12 W. ST. U.L. REV. 895 (1985); *California Supreme Court Survey*, 13 PEPPERDINE L. REV. 861, 887-89 (1986); 1985 *California Supreme Court and Courts of Appeal Survey: Entertainment Law*, 8 WHITTIER L. REV. 157, 158-60 (1986).

¹⁸⁷ *Koire*, 40 Cal. 3d at 27-28, 707 P.2d at 196, 219 Cal. Rptr. at 134.

¹⁸⁸ *Id.* at 29, 707 P.2d at 197, 219 Cal. Rptr. at 135.

¹⁸⁹ *Id.* at 32, 707 P.2d at 199, 219 Cal. Rptr. at 137 (citing *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982)).

to another type of sex discrimination, the court reasoned that entrepreneurs may find it economically advantageous to exclude homosexuals or heterosexuals from their business premises, but that this rational economic motive would not make the practice valid under California's anti-discrimination act.¹⁹⁰ The *Koire* court further stated that it would be no less a violation of the act to charge homosexuals or heterosexuals reduced rates to encourage their patronage solely because it was profitable to do so. The *Koire* court also noted that few courts have held discriminatory treatment to be nonarbitrary based solely on the special nature of the business establishment, especially when no strong public policy supports the treatment.¹⁹¹

In addition, the court dismissed the bar owner's argument that Ladies' Nights were justified because they promoted interaction between the sexes. Because the *Koire* court reasoned that such interaction is not deemed to be a socially desirable goal of the state, it held that ladies' nights do not fall within a social policy exception to discrimination.¹⁹² As an example of a practice that would fit under the social policy exception, the *Koire* court pointed out that the state's interest in ensuring adequate housing for the elderly justified differential treatment in housing rentals based on age. The court held that the state had much less interest in encouraging mixed male and female patronage at a bar.¹⁹³

The *Koire* court also rejected an argument that the ladies' day discounts injure neither men nor women. First, the court noted that the legislature intended arbitrary sex discrimination in businesses

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 31, 707 P.2d at 198, 219 Cal. Rptr. at 136. The court also addressed the argument that a rejection of ladies' nights would affect all promotional discounts. The court noted that discounts are legal as long as they are applied alike to all persons. For instance, the court mentioned the validity of discounts to all customers once a week, or allowing discounts based on having a coupon or wearing a certain colored shirt.

The court also distinguished sex-based pricing from age-based pricing. The court stated that age-based pricing is supported by other state laws promoting differential treatment because of the limited earning powers of children and elderly persons. *Id.* at 37, 707 P.2d at 203, 219 Cal. Rptr. at 141. No such justification, the court reasoned, exists for sex-based discounts. The court said that although women do generally earn less than men, the societal remedy for this inequity is equal employment opportunities, not sex-based pricing. The argument that the practice was designed to be "remedial" to women due to lower income was especially without merit because the court found the night club's profit motive to be obvious. *Id.* at 37 n.18, 707 P.2d at 203 n.18, 219 Cal. Rptr. at 141 n.18.

¹⁹² *Id.* at 33, 707 P.2d at 199, 219 Cal. Rptr. at 137-38.

¹⁹³ *Id.* at 33, 707 P.2d at 200, 219 Cal. Rptr. at 138. The court likewise disagreed with the argument that the gender-based discounts were valid because they did not exclude men or make them feel unwelcome. *Id.* at 33 n.12, 707 P.2d at 200 n.12, 219 Cal. Rptr. at 138 n.12.

to be *per se* injurious.¹⁹⁴ Second, the court recognized actual damage to the plaintiff because he had to pay more than female patrons, and was angered by the unfair treatment.¹⁹⁵ The *Koire* court noted that the Unruh Act focuses on individuals rather than classes of persons and concluded that this focus supported individual claims for damages. In addition, the court emphasized that sex-based price differences are generally injurious to both men and women because they reinforce harmful stereotypes.¹⁹⁶ The court stated that as long as the legal system continues to uphold differential treatment between the sexes, such as female-oriented discounts, men and women will not perceive each other as equals.¹⁹⁷

Finally, the *Koire* court discussed differing views on the importance of striking down sex-based price discounts.¹⁹⁸ The court mentioned that the judiciary is often hesitant to strike down traditional practices such as ladies' nights because the practices seem harmless. The court noted that some persons, however, take great offense to such practices. As such, the *Koire* court concluded that the final decision regarding the legality of a ladies' night should not be based on a judge's subjective value judgment regarding the seriousness of the discrimination. Therefore, the *Koire* court held that charging females reduced prices at bars and car washes violated California's Unruh Act.¹⁹⁹

In addition, the Maryland Court of Special Appeals, in the 1986 case of *Peppin v. Woodside Delicatessen*, held that ladies' night

¹⁹⁴ *Id.* at 33, 707 P.2d at 200, 219 Cal. Rptr. at 138. Section 52 of the act provides for minimum statutory damages of \$250 for each violation of section 51, without regard to actual damages. *Id.*

¹⁹⁵ *Id.* at 34, 707 P.2d at 200, 219 Cal. Rptr. at 138-39. The court referred to the plaintiff's testimony at trial in which he spoke of how he felt when he heard advertisements promoting free admission for girls 18-21 years of age at Jezebel's. The plaintiff testified, "It just smoked me." *Id.* at 34 n.15, 707 P.2d at 200-01 n.15, 219 Cal. Rptr. at 139 n.15. The plaintiff also testified that he was ridiculed and treated with hostility when he asked to be charged a woman's rate at the car washes. *Id.*

¹⁹⁶ *Id.* at 34, 707 P.2d at 201, 219 Cal. Rptr. at 139 (citing BABCOCK, *supra* note 7, at 1069, and Note, *Washington's Equal Rights Amendment and Law Against Discrimination—The Approval of the Seattle Sonics' "Ladies' Night"*, 58 WASH. L. REV. 465, 473 (1983)).

¹⁹⁷ *Id.* at 34-35, 707 P.2d at 201, 219 Cal. Rptr. at 139 (citing KANOWITZ, *WOMEN AND THE LAW* 4 (1969)). The court said that whether these particular defendants consciously based their discounts on sexual stereotypes, the practice, nonetheless, had traditionally been of that character. *Id.* at 35, 707 P.2d at 201, 219 Cal. Rptr. at 139. See generally CAVANAGH, "A Little Dearer than His Horse": Legal Stereotypes and the Feminine Personality, 6 HARV. C.R.-C.L. L. REV. 260 (1971) (discussing traditional stereotyping of women).

¹⁹⁸ *Koire*, 40 Cal. 3d at 39, 707 P.2d at 204, 219 Cal. Rptr. at 142.

¹⁹⁹ *Id.*

discounts violated a Montgomery County Ordinance.²⁰⁰ After receiving a complaint from Mr. Peppin, the Montgomery County Human Relations Commission informed the owner of Woodside that they had reason to believe that Woodside's ladies' night promotion violated the county's public accommodation law because it treated the sexes unequally. The owner abolished the "Ladies' Night" promotion and immediately began a "Skirt and Gown Night" entitling Thursday night patrons—male or female—wearing skirts or gowns, a fifty percent price reduction on meals.²⁰¹

Thereafter, the Commission's Public Accommodation Panel held a hearing to decide if the two promotions, "Ladies' Night" and "Skirt and Gown Night," violated the Montgomery County Code that makes it illegal to discriminate based on sex.²⁰² The panel unanimously found that "Ladies' Night" violated the code. In a split decision, it also held that "Skirt and Gown Night" was a violation as it was essentially a ladies' night in disguise. On appeal, the Circuit Court for Montgomery County affirmed the finding regarding "Ladies' Night," but reversed on the "Skirt and Gown" issue. The circuit court reasoned that men wear pants only because they choose to do so and that therefore, "Skirt and Gown Night" was facially neutral and non-discriminatory.²⁰³

Mr. Peppin appealed this decision to the Maryland Court of Special Appeals. The court agreed with Peppin that the case was not trivial, explaining that it feared repercussions of not addressing the case presently, such as encouraging the practice of more serious discrimination.²⁰⁴ The *Peppin* court noted that females constituted

²⁰⁰ 67 Md. App. 39, 48, 506 A.2d 263, 267-68 (1986). The human relations law states:
It shall be unlawful for any owner . . . of any place of public accommodation, resort or amusement within this county:

(a) To make any distinction with respect to any person based on . . . sex . . . in connection with admission to, service or sales in, or price, quality or use of any facility or service of any place of public accommodation, resort or amusement in the county.

Id. at 41, 506 A.2d at 264 (citing MONTGOMERY COUNTY CODE § 27-9).

²⁰¹ *Id.* at 41-42, 506 A.2d at 264. This new promotion captured great media attention. *Id.* at 42 n.1, 506 A.2d at 264 n.1 (newspapers reported on the new promotion, covering how Woodside planned to "skirt the [sex discrimination] issue."); see Stoltz, *supra* note 8, at 7 (question in television's *Hollywood Squares* asked, "Where in the nation would wearing a dress earn a man a half-price dinner?").

²⁰² *Peppin*, 67 Md. App. at 42, 506 A.2d at 264.

²⁰³ *Id.* at 42, 506 A.2d at 265. The circuit court said that the promotion did not "impact or burden men in any significant manner, [and that it] is not an immutable characteristic of the male gender [to wear pants.]" *Id.* at 42-43, 506 A.2d at 265.

²⁰⁴ *Id.* at 43, 506 A.2d at 265.

the overwhelming majority of patrons benefiting from a discount given to patrons wearing skirts and gowns.²⁰⁵ The court also reasoned that "Skirt and Gown Night" discriminated against men because it was intended to function and did function as a ladies' night.²⁰⁶ The *Peppin* court thus held that the Human Relations Commission's finding of discrimination should be reinstated.²⁰⁷

The 1989 case of *Ladd v. Iowa West Racing Association* also held that sex-based price differentials constitute discrimination under its anti-discrimination statute.²⁰⁸ In *Ladd*, the Supreme Court of Iowa held that a racetrack's "Ladies' Day" promotion granting women free admission and providing discounted prices on concessions violated Iowa's civil rights act.²⁰⁹ The defendant, Bluffs Run, argued that the statute did not proscribe all disparate treatment, but only treatment that denied persons access to public accommodations or services. The trial court sustained Bluffs Run's motion to dismiss after *Ladd* had submitted his case.²¹⁰

The Iowa Supreme Court, however, refused to accept Bluffs Run's defense, noting that the legislature mandated in unambiguous statutory language a broad application of the law.²¹¹ The *Ladd*

²⁰⁵ *Id.* at 45, 506 A.2d at 266.

²⁰⁶ *Id.* at 46, 506 A.2d at 266. Regarding the circuit court's idea that men wear pants because they exercise a fashion preference to do so, the court of special appeals stated, "Although it is conceivable that some men may fantasize their appearance of frolicking about in a skirt or gown, those items normally remain in the closets—of their wives." *Id.*

²⁰⁷ *Id.* at 48, 506 A.2d at 267–68. The court stated that the pertinent language of the ordinance was that the owner could not "make any distinction with respect to . . . sex . . . in connection with admission to, service, or sales in, or price, . . . of any place of public accommodation" *Id.*, 506 A.2d at 267 (emphasis in original).

²⁰⁸ 438 N.W.2d 600, 602 (Iowa 1989).

²⁰⁹ *Id.* Iowa's Civil Rights Act stated:

It shall be an unfair or discriminatory practice for any owner . . . of any public accommodation . . . [t]o refuse or deny to any person because of . . . sex . . . the accommodations, advantages, facilities, services, or privileges thereof, or otherwise to discriminate against any person because of . . . sex . . . in the furnishing of such accommodations, advantages, facilities, services, or privileges.

IOWA CODE ANN. § 601A.7 (West 1988).

²¹⁰ *Ladd*, 438 N.W.2d at 601. Before going to the district court, *Ladd* received a release to sue from the Iowa Civil Rights Commission. *Id.*

²¹¹ *Id.* at 602. *City of Clearwater v. Studebaker's Dance Club* also determined that considerations such as whether the classification is innocuous or designed to benefit males are irrelevant when construing an unambiguous ordinance. 516 So. 2d 1106, 1108–09 (Fla. Dist. Ct. App. 1987). In this case the owners of a dance club denied males membership in a "Pink Ladies Club" that gave women discounted drinks. *Id.* at 1107. The Florida District Court of Appeal found Clearwater's ordinance unambiguous and struck down the practice. *Id.* at 1108.

The relevant ordinance reads: "It shall be unlawful discriminatory practice for any . . . place of public accommodation, resort or amusement, because of the . . . sex . . . of any

court reasoned that discrimination may exist in varying degrees of seriousness and that it may often accompany a legitimate purpose.²¹² The court maintained, however, that carving a *de minimis* exception to the civil rights act would not be viable because of difficult line-drawing. The *Ladd* court also noted that distinguishing between intentional and unintentional violations would destroy the effectiveness of the statute. Thus, the *Ladd* court held that allowing price discounts to women at the racetrack violated the Iowa act.²¹³

In conclusion, courts invalidating ladies' nights utilize similar reasoning. The courts interpret their state laws as prohibiting more than just denial of access to public facilities or making men feel unwanted.²¹⁴ Some courts also reason that creating *de minimis* exceptions to broadly-reaching and unambiguous statutes, or exceptions for unintentional acts, would involve difficult line-drawing and thus would defeat the statutory purpose of combatting arbitrary discrimination.²¹⁵ In addition, most recent courts have rejected a business profitability defense and note that invalidating ladies' nights would not prohibit the use of other discounts made equally available to all patrons.²¹⁶ As for injury due to the discounts, some judges are concerned with the stereotypes involved in ladies' night promotions, as well as economic harm to men.²¹⁷ Finally, many courts state that ladies' night claims are not trivial because judicial approval of sex-based discounts may set precedents that encourage ever-increasing exceptions to illegal sex discrimination, as well as

person . . . to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, that are afforded the other customers . . . *Id.* at 1108 (citing CITY OF CLEARWATER CODE, § 99.11(a)).

²¹² *Ladd*, 438 N.W.2d at 602.

²¹³ *Id.*

²¹⁴ *E.g.*, *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 30, 707 P.2d 195, 197, 219 Cal. Rptr. 133, 135 (1985) (statute's proscription broad enough to cover sex-based price discounts).

²¹⁵ *E.g.*, *Ladd v. Iowa W. Racing Ass'n*, 438 N.W.2d 600, 602 (Iowa 1989) ("[W]e . . . do not believe . . . a *de minimis* exception for . . . discrimination is viable. Nor does the statute suggest we should attempt to make such distinctions.").

²¹⁶ *E.g.*, *Koire*, 40 Cal. 3d at 32, 36, 707 P.2d at 199, 202, 219 Cal. Rptr. at 137, 140 (court stated that profitability did not override discrimination concerns, especially when businesses could use neutral discounts instead).

²¹⁷ *See, e.g., id.* at 34, 707 P.2d at 200-01, 219 Cal. Rptr. at 138-39 (court pointed to the economic injury to the male plaintiff, as well as the discount's effect of making him feel unfairly treated); *Peppin v. Woodside Delicatessen*, 67 Md. App. 39, 46, 506 A.2d 263, 266 (1986) (court held half-price discount on food placed significant burden upon men); *Abosh v. New York Yankees*, No. CPS-25284, Appeal No. 1194 (N.Y. State Human Rights Appeal Bd., July 19, 1972), reprinted in *BABCOCK*, *supra* note 7, at 1070 (discusses female stereotypes surrounding ladies' day at New York Yankees baseball games).

results contrary to the broad policy found in anti-discrimination statutes.²¹⁸

III. LADIES' NIGHT PROMOTIONS SHOULD BE BARRED

The recent courts that bar the use of ladies' night discounts are correct in recognizing the harm in such promotions. The early courts' and the public's apparent amusement in the subject matter of ladies' night lawsuits, however, is problematic. To understand why people may incorrectly consider the effects of sex-based discounts to be trivial, and to counter this attitude, legal attempts to combat gender discrimination in general must be examined before focusing on the ladies' night cases themselves.

One pitfall to equalizing the sexes is that the Supreme Court and Congress have ranked combatting sex discrimination lower in priority than striking down other forms of discrimination. For example, Title II does not address sex discrimination, but it does protect many other categories of persons.²¹⁹ In addition, the Supreme Court, when hearing a fourteenth amendment equal protection challenge to sex discrimination, applies only an intermediate standard of review, rather than the strict scrutiny review.²²⁰ The Court appears to soften the harm of sex discrimination, thereby perpetuating discriminatory and stereotypical attitudes.²²¹ Although some states have chosen to be much tougher on sex discrimination,²²² the Supreme Court and Congress are still sending out strong signals that sex discrimination is of secondary importance.

Beyond which law or standard to apply, several themes recur in gender cases which, if not addressed seriously, could be harmful to women. One common theme is that of romantic paternalism.²²³

²¹⁸ See, e.g., *Ladd*, 438 N.W.2d at 602 (court feared overriding the statutory purpose with exceptions); *Peppin*, 67 Md. App. at 43, 506 A.2d at 265 (court feared encouraging more serious methods of discrimination by creating exceptions).

²¹⁹ See *supra* notes 23-25 and accompanying text for a discussion of Title II.

²²⁰ See *supra* notes 33-45 and accompanying text for a discussion of the standard of review. See also L. TRIBE, *supra* note 36, § 16-26, at 1561-65 (background of intermediate test); Wildman, *supra* note 83, at 276-87 (discussing cases leading to intermediate standard of review).

²²¹ Wildman, *supra* note 83, at 286; see Aiken, *Differentiating Sex From Sex: The Male Irresistible Impulse*, 12 N.Y.U. REV. L. & SOC. CHANGE 357, 357 (1983-84) (arguing that courts have not "wholeheartedly embraced the idea of equality of the sexes").

²²² See, e.g., *BABCOCK*, *supra* note 7, at 1037 (noting inclusion of sex in state counterparts to Title II). See *supra* note 174 for a discussion of the addition of "sex" to Massachusetts' public accommodation statute.

²²³ See *supra* notes 49-52 and accompanying text for a discussion of paternalism and gender discrimination.

The Supreme Court in *Frontiero v. Richardson* recognized this as the pedestal-turned-into-cage problem.²²⁴ Labeling their actions as care, protection, or humanitarianism, some legislatures and judges, the majority of whom were male, "protected" women by controlling the areas in which women could take active roles.²²⁵ For instance, in *Weeks v. Southern Bell Telephone & Telegraph Co.*, an employer denied a woman the opportunity to receive increased pay by rejecting her application for a switchman's job because the company thought that the job was too strenuous for a woman.²²⁶

Often intertwined with the theme of paternalism is the problem of sexual stereotyping. For example, in *Frontiero*, the court addressed a statute that presumed the stereotype that women were dependent on their husbands.²²⁷ Apparently, the legislature decided that women would automatically require financial support and paternalistically set out to provide that support.²²⁸ In addition, in *Weeks*, the employer stereotyped women to be too weak to handle the switchman's position.²²⁹ In effect, the male decisionmakers stigmatized the women as weak and dependent, further contributing to keeping women in their places. Fortunately, the courts in both of those cases struck down the respective sex-based classifications.²³⁰

Along with the themes of paternalism and stereotyping, courts have also addressed the issue of so-called trivial violations of sex discrimination laws.²³¹ Judges may experience difficulty identifying the harm in classifications which appear insignificant because many judges are short-sighted. Instead of trying to identify the harm, judges and citizens at large may abruptly label a cause of action frivolous or trivial.²³² A concurring justice in *Allyn v. Allison* did just that. The justice admitted that requiring only women to use certain designations ("Miss" or "Mrs.") reflecting marital status when registering to vote may be unconstitutional, but thought that the in-

²²⁴ See *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). See *supra* notes 49-50 for a discussion of *Frontiero*.

²²⁵ See Cavanagh, *supra* note 197, at 262.

²²⁶ 408 F.2d 228, 230 (5th Cir. 1969). See *supra* notes 59-64 and accompanying text for a discussion of *Weeks*.

²²⁷ *Frontiero*, 411 U.S. at 681.

²²⁸ See *id.*

²²⁹ See *Weeks*, 408 F.2d at 234.

²³⁰ *Frontiero*, 411 U.S. at 690-91; *Weeks*, 408 F.2d at 236.

²³¹ See *supra* notes 65-82 and accompanying text for a discussion of triviality and gender discrimination.

²³² See, e.g., *Allyn v. Allison*, 34 Cal. App. 3d 448, 454, 110 Cal. Rptr. 77, 80-81 (1973) (Roth, J., concurring).

fraction was too insubstantial to address.²³³ Rather than reaching the correct result, that justice refused to look beyond his own subjective views regarding triviality.²³⁴ A much safer avenue for the judiciary than infusing subjective views into opinions is to utilize a bright-line rule of no sex discrimination. In doing so, judges will alleviate the risk of perpetuating dangerous, but oftentimes hard to recognize, injuries to the sexes. One author suggested the true danger of the voter registration law in *Allyn*. He believed that the law's main effect was symbolic: telling a woman that before she can vote, she must declare how she relates to men.²³⁵

The problem of perceived triviality in sex discrimination cases occurs for both male and female plaintiffs. A male plaintiff lost in *Barker v. Taft Broadcasting Co.* because the majority abruptly labeled a male-only hair length regulation trivial.²³⁶ The court noted that, in its view, employer male-only hair length codes were not traditionally-flagged sources of discrimination. The *Barker* court refused to look at the case from the male plaintiff's point of view, despite the obvious difference in treatment between male and female employees. The dissent, however, correctly recognized that individuals greatly value being able to control their own hairstyles.²³⁷

Tradition and the problem of looking at a sex discrimination case from a male plaintiff's point of view goes beyond cases with arguable trivial undertones. Male-initiated cases, in general, capture much attention.²³⁸ As Justice Rehnquist noted in *Michael M. v. Sonoma County*, part of the controversy is because men do not share the history that women do of being victims of discrimination.²³⁹ As the Court in *Orr v. Orr* pointed out, however, many times the abundance of male plaintiffs is due to legislation designed to compensate

²³³ *Id.* (Roth, J., concurring).

²³⁴ *Id.*

²³⁵ Karst, *supra* note 65, at 505.

²³⁶ See *Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (6th Cir. 1977).

²³⁷ See *id.* at 405 (McCree, J., dissenting).

²³⁸ See generally Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQUALITY 33 (1984) (focusing on male-initiated cases); Wildman, *supra* note 83, at 299-300 (discussing male-initiated cases).

²³⁹ 450 U.S. 464, 475-76 (1981). Regarding his belief whether discrimination against men might hurt females, Justice Rehnquist, dissenting in *Craig v. Boren*, stated that he was skeptical of the proposition that discrimination against men "redound[s] to the detriment of females, because [it] tend[s] to reinforce 'old notions' restricting the roles and opportunities of women." 429 U.S. 190, 220 n.2 (1976) (Rehnquist, J., dissenting). One commentator concluded that Justice Rehnquist believed discrimination against men did not count for constitutional purposes. See Wildman, *supra* note 83, at 293.

women for past discrimination.²⁴⁰ This legislation has the effect of denying males the favored treatment given to females. Interestingly, the Court's rationale in *Orr* was geared to striking down protectionist stereotypes about women rather than to reaching the harm to males.²⁴¹ One author suggested that in many of the male-initiated cases, female attorneys seek male plaintiffs to aid the attorneys in gaining equality for females in situations where the laws favor women.²⁴²

These policies and themes that recur in many of the traditional gender discrimination cases are equally apparent in the ladies' night cases. Through these gender-based promotions, females receive financial benefits not given to men that have stereotypical and paternalistic undertones. Similarly, ladies' nights represent a form of discrimination that some may argue has trivial consequences and should be left untouched, perhaps due to the great number of years that the discounts have been in place. A closer examination, however, reveals that allowing the promotional practice has serious detrimental consequences for both sexes.

In general, courts appear willing to allow challenges to stereotypes only after the stereotypes have become outdated.²⁴³ Some commentators call this phenomenon "judicial lag." For example, the court in *Barker v. Taft Broadcasting Co.* used traditional sources of discrimination, rather than present standards of discrimination as its reference point when upholding an employer male-only hair length regulation.²⁴⁴ This suggests that only after the long hair stereotype is outmoded will the court strike down such a regulation. The judicial lag criticism is valid in ladies' night cases, as well. At least one court has noted that it had heard of no other plaintiff bringing a similar ladies' night case in its jurisdiction to boost its support of upholding the practice.²⁴⁵

In addition to judicial lag, another reason that stereotypes continue is because the general public does not realize that sex bias is occurring. For instance, ladies' day at New York Yankees' baseball games continued for 100 years before anyone challenged the pro-

²⁴⁰ See *Orr v. Orr*, 440 U.S. 268, 283 (1979).

²⁴¹ See *id.*

²⁴² Cole, *supra* note 238, at 37.

²⁴³ See Aiken, *supra* note 221, at 358 (supporting judicial lag criticism).

²⁴⁴ See *Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 401-02 (6th Cir. 1977). See *supra* notes 70-78 for a discussion of *Barker*.

²⁴⁵ E.g., *Dock Club, Inc. v. Illinois Liquor Control Comm'n*, 101 Ill. App. 3d 673, 677, 428 N.E.2d 735, 738 (1981).

motion.²⁴⁶ The plaintiffs who brought ladies' night cases, however, did attack the gender-based stereotypes.²⁴⁷

These plaintiffs correctly recognized that several stereotypes are present when owners promote ladies' nights. First, these discounts assume that males are the breadwinners and that females need price breaks due to lower economic status.²⁴⁸ An examination of the other categories of people offered price breaks reveals that courts are operating under this assumption. These other groups tend to be needy and indigent.²⁴⁹

Second, price discounts stereotype women as sex objects.²⁵⁰ In bars, the "pedestal-turned-into-cage" metaphor is especially appropriate. Bars use discounts to entice women to gather at their businesses, which in turn is used to encourage male patronage. As such, business owners also view men stereotypically. The men are assumed to have animalistic sex drives and irresistible impulses to be where women gather.²⁵¹ Neither men nor women are treated with respect in these situations. Instead the discounts have the effect of degrading the individual dignity and humanity of both sexes.

Third, price discounts in a sports context may cause women to be viewed as less interested in and less knowledgeable about sports than men by suggesting that women need an extra nudge to attend

²⁴⁶ *Abosh v. New York Yankees*, No. CPS-25284, Appeal No. 1194 (N.Y. State Human Rights Appeal Bd., July 19, 1972), reprinted in, *BABCOCK*, *supra* note 7, at 1070.

²⁴⁷ *E.g.*, *MacLean v. First Northwest Indus. of Am.*, 96 Wash. 2d 338, 345, 635 P.2d 683, 686-87 (1981) (plaintiff maintained that ladies' nights stereotype women); *see also* *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 35, 707 P.2d 195, 201, 219 Cal. Rptr. 133, 139 (1985) (court criticized as stereotypical reasoning the *MacLean* court's statement that women might not have as much interest in sports as men do).

²⁴⁸ *See Koire*, 40 Cal. 3d at 37 n.18, 707 P.2d at 203 n.18, 219 Cal. Rptr. at 141 n.18; *Abosh v. New York Yankees*, No. CPA-25284, Appeal No. 1194 (N.Y. State Human Rights Appeal Bd., July 19, 1972), reprinted in *BABCOCK*, *supra* note 7, at 1070.

²⁴⁹ *See, e.g.*, *MacLean*, 96 Wash. 2d at 341-42, 635 P.2d at 687. Some of these groups were senior citizens, low-income citizens, and students. *Id.*

²⁵⁰ *See Civil Rights: Blow Whistle on NBA Champs' Ladies' Nights*, 65 A.B.A. J. 1619, 1619 (Nov. 1979) (speaking of how discounts treat women as sex objects); *see also* *City of Clearwater v. Studebaker's Dance Club*, 516 So. 2d 1106, 1108 (Fla. Dist. Ct. App. 1987) (lower court determined that design of promotion was to "increase the enjoyment of males by enticing the attendance of more females . . ."); *Pennsylvania Liquor Control Bd. v. Dobrinoff*, 80 Pa. Commnw. 453, 455-56, 471 A.2d 941, 942 (1984) (lower court described the facts as "on two occasions, when go-go girls were the 'entree' of the evening, a female patron was exempted from the \$1.00 cover charge, which was requested of the male voyeurs.").

²⁵¹ *See Dobrinoff*, 80 Pa. Commnw. at 456, 471 A.2d at 942 (lower court referred to male patrons as "voyeurs"); *Aiken*, *supra* note 221, at 375 (stereotype may be that "the mixing of the sexes inherently causes strong and sometimes uncontrollable impulses in men [and that] unscrupulous and nonvirtuous women can take advantage of these impulses and . . . men are 'victims' of their own urges.").

these events.²⁵² A sociologist also mentioned that men may equate ladies' day at a sporting event with silliness because many men expect women to shriek loudly and act immature in such contexts.²⁵³ Many stereotypes, therefore, are embodied in ladies' night promotions. When the legal system fails to strike down these stereotypical practices, the more likely result will be that men and women will not perceive each other as equals.

Another issue courts traditionally address in gender discrimination cases is whether they should distinguish between serious and trivial infractions. A commentator criticized the *Allyn v. Allison* opinion for trivializing the requirement that women register to vote using "Miss" or "Mrs."²⁵⁴ Likewise, criticism is appropriate for those ladies' night courts that avoided the obvious discrimination of sex-based pricing by reasoning that the discounts are *de minimis* infractions and too trivial to attack seriously.²⁵⁵

To the contrary, because of the dangerous stereotypes and harm to both sexes, the discounts are not too trivial to address and courts should not create *de minimis* exceptions for this otherwise discriminatory practice. When courts strike down ladies' nights, they strike down arbitrary discrimination—which the statutes are designed to combat. On the other hand, when courts create exceptions for *de minimis* infractions, they risk perpetuating the idea that a little sex discrimination is acceptable, and risk creating more exceptions that could eventually defeat the statutory purpose.²⁵⁶

As pointed out previously, however, some judges are more lax in invalidating gender discrimination when men are the plaintiffs.²⁵⁷ Judges should not treat such a case differently, however, just because the plaintiff is male. Even though males do not have a history

²⁵² See *BABCOCK*, *supra* note 7, at 1069 (referring to sociologist's testimony at New York City Commission hearings); see also *MacLean*, 96 Wash. 2d at 353, 635 P.2d at 690 (Utter, J., dissenting) ("[ladies' day] can suggest that [women] . . . have an antipathy to sports and that, absent an economic 'bribe,' they will not attend.").

²⁵³ See *BABCOCK*, *supra* note 7, at 1069.

²⁵⁴ *Karst*, *supra* note 65, at 501. See *supra* notes 65–69 and accompanying text for a discussion of *Allyn*.

²⁵⁵ See, e.g., *Koire v. Metro Car Wash*, 164 Cal. App. 3d 298, 209 Cal. Rptr. 233, 234–35 (1984) (court referred to ladies' night promotion as "merely preferred treatment for women . . . in the form of petty price discounts"), *rev'd*, 40 Cal. 3d 24, 707 P.2d 195, 219 Cal. Rptr. 133 (1985); *MacLean v. First Northwest Indus. of Am.*, 96 Wash. 2d 338, 340, 635 P.2d 683, 684 (1981) (court noted that women paid \$2.50 for admission, while men paid only \$5.00).

²⁵⁶ See *Ladd v. Iowa W. Racing Ass'n*, 438 N.W.2d 600, 602 (Iowa 1989).

²⁵⁷ See *supra* notes 83–106 and 238–239 and accompanying text for discussions of male-initiated cases.

of discrimination, they are clearly treated unequally and harmed in many situations, including ladies' night cases.

No one can deny that males have to pay more for admission or drinks in these public places than women do when women get a special discount. In *MacLean v. First Northwest Industries of America*, where the court upheld half-price ticket prices for women at Seattle Supersonic basketball games, the court reasoned that men actually benefit from ladies' nights because when they pay for their wives or girlfriends, the men pay less overall than if the promotion had not been in effect.²⁵⁸ The court also emphasized that because a sole male patron paying full price had the option of bringing along a female, he prevented himself from benefiting from the ladies' discount.²⁵⁹

The main problem with this argument is that the court's very reasoning embodies harmful stereotypes by implying that men bring and pay for women. One also wonders how a man inures a "benefit" from paying for two people. In addition, in a tavern context, owners promoting ladies' nights reinforce a stereotype that men are ruled by their sex drives.²⁶⁰

Further, although males are harmed and have initiated the ladies' night cases, much of the problem with the discounts is the effect that they have on women. Because women are treated, at least ostensibly, with favor, they may have trouble bringing legal actions themselves.²⁶¹ Women should not, however, be content with passively watching from the sidelines. In order to ensure that the judges striking down the discounts recognize the harmful nature of stereotypes and paternalism toward women, one recommendation is that women continue attacking the sex-based practices and attitudes as *amici curiae*.²⁶² Otherwise, judges may note the economic harm to men when striking down the discounts, but will overlook the harm to women.²⁶³ As a consequence of pointing out harmful

²⁵⁸ See *MacLean*, 96 Wash. 2d at 343-44, 635 P.2d at 685. See *supra* notes 134-156 and accompanying text for a discussion of *MacLean*.

²⁵⁹ *MacLean*, 96 Wash. 2d at 343, 635 P.2d at 685.

²⁶⁰ See *Pennsylvania Liquor Control Bd. v. Dobrinoff*, 80 Pa. Commw. 453, 456, 471 A.2d 941, 942 (1984) (lower court referred to male patrons as "voyeurs"); Aiken, *supra* note 221, at 375 (stereotype may be that "the mixing of the sexes inherently causes strong and sometimes uncontrollable impulses in men [and that] unscrupulous and nonvirtuous women can take advantage of these impulses and . . . men are 'victims' of their own urges.").

²⁶¹ See Cole, *supra* note 238, at 37, 53 (discussing difficulty of women plaintiffs bringing suits when women are given favorable treatment).

²⁶² See *id.* at 37 (discussing how women participated as attorneys or *amici curiae* in cases with male plaintiffs).

²⁶³ See Wildman, *supra* note 83, at 299-300 (concerned that courts never consider the

stereotypes in ladies' night cases, judges may be more apt to transfer their enlightened attitudes to other cases as well. This would be a good start in combatting sex-based attitudes overall.

Present attitudes about sex discrimination are captured in anti-discrimination statutes.²⁶⁴ Although federal law does not protect the sexes from discrimination in public accommodations, many states were dissatisfied with Title II in a sex discrimination context.²⁶⁵ Many states expanded their state public accommodation statutes, or their equivalents, to include gender.²⁶⁶ In states with gender as a protected category in their statutes, then, even a practice that appears harmless, such as sex-based pricing should be treated seriously and struck down.

The various state statutes used in the ladies' night cases were often similarly phrased.²⁶⁷ The primary purpose of enacting the public accommodation laws was to prohibit establishments that serve the public from practicing arbitrary discrimination, and to combat the humiliation and psychological harm to persons who experience such arbitrary discrimination.²⁶⁸ Many statutes had broad language

harm to women along with the harm to men when deciding to strike down sex discrimination against men). Wildman noted that, ironically, most cases in which the U.S. Supreme Court has combatted sex discrimination by striking down gender-based classifications have involved discrimination against men. *Id.* at 299. The author says to the extent that these decisions also stand for women being economically self-sufficient, the Court is also combatting sex discrimination against women. *Id.* However, she argues that the main thrust of this line of decisions is not ending sex discrimination against women, but rather ending the harm of discrimination as it hurts male plaintiffs. *Id.* Further, she believes that although sexually discriminatory attitudes hurt men, the "overwhelming evidence is that women are the real victims of sex discrimination," and that the lack of Court attention to the fact that women are the real victims, enables the Court to preserve the existing ideology of equality without making any significant changes in the status quo of sex discrimination. *Id.* at 300.

²⁶⁴ See, e.g., 42 U.S.C. §§ 2000a to 2000a-6 (1982) (Title II of the Civil Rights Act of 1964); 42 U.S.C. § 2000e to 2(a) (1981) (Title VII of the Civil Rights Act of 1964).

²⁶⁵ See *BABCOCK*, *supra* note 7, at 1037.

²⁶⁶ See *supra* note 174 for a discussion of the addition of "sex" to Massachusetts' public accommodation statute.

²⁶⁷ The California Court of Appeal, in upholding a ladies' night promotion, noted that the relevant California statute was "strikingly similar" to the Washington statute that had been interpreted to uphold ladies' nights. See *Koire v. Metro Car Wash*, 164 Cal. App. 3d 298, 209 Cal. Rptr. 233, 236 (1984), *rev'd*, 40 Cal. 3d 24, 707 P.2d 195, 219 Cal. Rptr. 133 (1985). The Supreme Court of California later reversed the lower court's decision noting that, under the relevant California statute, ladies' nights were unlawful. See *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 39, 707 P.2d 195, 204, 219 Cal. Rptr. 133, 142 (1985). At least one court, however, reached its decision based on the uniqueness of its state's statutory language. See *Ladd v. Iowa W. Racing Ass'n*, 438 N.W.2d 600, 601 (Iowa 1989) (court stated that because "significant differences" exist between Iowa's act and acts of other states, the court did not find similar decisions from other jurisdictions to be helpful).

²⁶⁸ See Comment, *An Uncertain Guarantee*, *supra* note 4, at 465 & nn.110-11 (stating

mandating much more than simply access to the public facilities.²⁶⁹ In addition, the statutes involved in the ladies' night cases did not mention that only "serious" discrimination should be prohibited, nor did they expressly require intent.²⁷⁰ Although some courts upholding the promotions stated that they were basing their decisions on statutory interpretation,²⁷¹ in reality, subjective judicial differences in what constitutes sex discrimination played a major role in causing the discrepancies among states.

These courts could more reasonably have interpreted the statutes to prohibit ladies' night discounts rather than allowing their subjective judicial opinions to govern what is considered discriminatory under the clearly-worded statutes.²⁷² Instead, the courts agreed with the owners in these cases that businesses should be able to continue promoting ladies' nights because, otherwise, they will have to end all promotional discounts to their detriment.²⁷³ That

purpose of anti-discrimination laws of some states and policy behind enacting Title II); Note, *Is Ladies' Night Out?*, *supra* note 4, at 1616-17 (stating purpose of statutes of Washington, Michigan, Illinois, and California which were involved in ladies' night cases).

²⁶⁹ See, e.g., IOWA CODE ANN. § 601A.7 (West 1988) (states that it is unlawful for "any owner . . . of any public accommodation . . . [t]o . . . deny to any person because of . . . sex . . . the accommodations, advantages, facilities, services, or privileges thereof . . ."); MICH. STAT. ANN. § 28.343 (Callaghan 1981) (states that "[a]ll persons . . . shall be entitled to full and equal accommodations, advantages, facilities and privileges . . . in all . . . places of public accommodation, amusement, and recreation . . . with uniform prices."); WASH. REV. CODE ANN. § 49.60.030 (Supp. 1989) (states that the protection against sex discrimination "shall include, but not be limited to: . . . [t]he right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement . . .").

However, many courts upholding the sex-based discounts circumvented the plain meaning of their statutes by interpreting them to require more than "mere" price differentials, but also feelings of unwelcomeness, as well. See, e.g., *Dock Club, Inc. v. Illinois Liquor Control Comm'n*, 101 Ill. App. 3d 673, 676-77, 428 N.E.2d 735, 738 (1981) (discount upheld because owners did not exact higher price for men to discourage men from patronizing establishment, nor did it have that effect); *Tucich v. Dearborn Indoor Racquet Club*, 107 Mich. App. 398, 402, 309 N.W.2d 615, 618 (1981) (discount upheld because owners did not withhold, refuse, or deny accommodations to men); *Magid v. Oak Park Racquet Club Assocs.*, 84 Mich. App. 522, 528, 269 N.W.2d 661, 664 (1978) (same); *MacLean*, 96 Wash. 2d at 344, 635 P.2d at 686 (discounts upheld because they were not calculated to cause male plaintiff to feel unwelcome or unaccepted).

²⁷⁰ See, e.g., statutes cited *supra* note 269.

²⁷¹ E.g., *Tucich v. Dearborn Indoor Racquet Club*, 107 Mich. App. 398, 402, 309 N.W.2d 615, 618 (1981) (interpreting statute requiring uniform pricing to be qualified by another provision of state act); *Magid v. Oak Park Racquet Club Assocs.*, 84 Mich. App. 522, 528, 269 N.W.2d 661, 664 (1978) (same).

²⁷² See *Pennsylvania Liquor Control Bd. v. Dobrinoff*, 80 Pa. Commnw. 453, 457, 471 A.2d 941, 943 (1984).

²⁷³ See, e.g., *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 36, 707 P.2d 195, 202, 219 Cal. Rptr. 133, 140 (1985).

defense, however, does not justify the price differences. Excluding a category of protected persons because of greater profitability in doing so would not make exclusions legal.²⁷⁴ Similarly, using sex-based pricing because the practice is profitable will also not make the promotion justifiable. Businesses are not hurt when ladies' nights are discontinued because they can still use a variety of neutral discounts, such as "two-for-ones," to encourage patronage without discriminating on the basis of sex.

Proponents of gender-based price discounts also incorrectly rely on the lack of public outcry against such discounts. What the majority of males or females think about ladies' night, however, is of no concern, especially when the relevant anti-discrimination statutes focus on wrongs to individuals rather than to classes of persons.²⁷⁵ Generalizations about the opinions of classes as a whole are unimportant, even if true, to the individual who is the victim of sex discrimination.

Therefore, in order for our society to achieve true equality, attitudinal ideas about even so-called minimal violations of sex discrimination statutes must change. People must come to recognize that striking down small distinctions in treatment between the sexes, such as in ladies' night contexts, serves an important role in ridding our country of gender discrimination. Attitudes about the importance of applying broad sex discrimination statutes should not differ based on the magnitude of the violation. Unless persons realize what is wrong with ladies' nights, required changes in other areas such as employment will not be accompanied by healthy attitudes supporting the improvement, and as such, will only amount to a facade of equality.

If persons are aware of the harm in ladies' nights, however, they will be able to transfer their enlightened attitudes to other areas more quickly and easily. Tradition will no longer be the ruling factor, and the sexes will be more apt to respect one another. In effect, our society will be one step closer to equality. Important to changing attitudes, then, is a clear realization of what is wrong with them now and, as demonstrated, much is wrong with the attitude that ladies' night promotions are acceptable.

²⁷⁴ *Id.* at 32, 707 P.2d at 199, 219 Cal. Rptr. at 137.

²⁷⁵ See *Carroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028, 1031 (7th Cir. 1979) (citing *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978)); see also *Karst*, *supra* note 65, at 505 (maintaining that even if victims of discrimination accept their treatment, the discrimination is still not lawful: "Even today some blacks may choose to ride in the back of the bus.").

IV. CONCLUSION

Courts have split on the issue of whether ladies' night discounts violate state public accommodation laws or their equivalents. Although the trend in the past five or so years has been to invalidate the promotions as unlawful sex discrimination, earlier courts interpreted broad anti-discrimination statutes to uphold sex-based pricing. Most of the earlier courts noted the validity of businesses using sex-based pricing to encourage female patronage when upholding the discounts, and pointed to the lack of harm to the male plaintiffs.

Ladies' nights, however, do unlawfully discriminate on the basis of sex. Courts and society at large should be aware of the harm from the discounts. If courts uphold ladies' nights, they will be reinforcing sexual stereotypes and paternalism, and as such, needed overall changes in attitudes regarding the importance of striking down so-called minor violations of sex discrimination will not occur. This being the case, judges should recognize that both the male plaintiffs and the potential female discount recipients are victims of sex discrimination. When persons begin identifying the harmful stereotypes resulting from the discounts, they will also recognize that the discrimination involved in sex-based pricing is not trivial. Finally, because many states have enacted broadly-worded anti-sex discrimination statutes, courts have clear mandates requiring the prohibition of sex-based pricing regardless of the promotion's profitability or the difference in price owners offer the male and female patrons. As a result, all sex-based pricing should be prohibited.

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