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## *ARTICLES*

### VELVET ROPE DISCRIMINATION

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*Public accommodations are private and public facilities that are held out to and used by the public. Public accommodations were significant battlegrounds for the Civil Rights Movement as protesters and litigators fought for equal access to swimming pools, movie theaters, and lunch counters. These sites were also important for the Women's Rights Movement, which challenged sexist norms that prohibited their service in bars and restaurants if they were unaccompanied by men. Tragically, public accommodations receive less attention within the civil rights race and gender agenda today. This inattention exists despite media accounts, case law, and empirical data that demonstrate that discrimination based on race and sex thrives in these spaces. This Article focuses on two normalized practices that violate federal and state anti-discrimination laws yet have been undertheorized in the public accommodations context: dress codes and gender-based pricing*

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*in bars, restaurants, and nightclubs. It deploys legal history to illustrate how assumptions about race and sex have determined access to these public accommodations for more than a century. Statutory developments—mostly notably Title II of the Civil Rights Act of 1964 and similar state analogs—helped cabin racial and gender discrimination in public accommodations. Yet throughout the late 1960s, “velvet rope discrimination” evolved, which refers to the use of legally protected categories by public accommodations in their determinations of who is granted entry and in their provision of service. This Article examines public accommodations law through the lens of velvet rope discrimination and argues for the legal prohibition of dress codes and gender-based pricing. These policies traffic dangerous stereotypes about racial minorities, women, and the LGBTQ community and preclude their equal enjoyment of these facilities. By offering the first comprehensive account of two overlooked practices, this Article presents a new way of thinking about anti-discrimination law and democratic inclusion.*

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## INTRODUCTION

The legal trouble for Gaslamp, a beleaguered Houston-based nightclub, began in 2015. In May of that year, some women of color attempted to gain access into the club but were refused entry. A sympathetic white woman, clearly miffed by the refusal, attempted to intervene to no avail. By chance, someone happened to be recording the incident. “That is so racist,” the white woman exclaimed.<sup>1</sup> Commenting on what appeared to be textbook discrimination, she added, “I’m white, and I got in for free. They were right behind me, and they charged them 20 bucks. They’re [B]lack.”<sup>2</sup> One African-American woman added, “He didn’t even look at us. He didn’t even look at our IDs . . . He just said, ‘\$20.’”<sup>3</sup> The club’s gatekeepers made matters worse. After some laughs, waves, and blown kisses toward the camera, one of the doormen taunted, “How ‘bout this, Yelp it.”<sup>4</sup> Another teased, “Have a good night in the ‘hood’ . . . Tell Tyrone I said hi.”<sup>5</sup> In a world where legal remedies for civil rights violations are limited,<sup>6</sup> the incident would seemingly fade away.

In another encounter, three Black men sought entry into Gaslamp but were presented with a \$20 entry fee that they declined to pay.<sup>7</sup> When walking by a few minutes later, they saw white men entering Gaslamp

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<sup>1</sup> Joey Guerra, Video: Gaslamp Employee Says ‘Have a Good Night in the ‘Hood,’ Hous. Chron. (Sept. 28, 2016, 6:16 PM), <https://www.chron.com/entertainment/restaurants-bars/article/Video-Gaslamp-employee-says-have-a-good-night-6522262.php> [<https://perma.cc/VP5K-9FSM>].

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> See, e.g., Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 *Geo. L.J.* 1271, 1275–76 (2017) (discussing the inadequacies of public accommodations anti-discrimination laws in the platform economy business model); Stephen B. Burbank & Sean Farhang, *Rights and Retrenchment: The Counterrevolution Against Federal Litigation* 3 (2017) (recounting a successful movement beginning in the 1980s to undermine the possibility of the enforcement of individual rights through private litigation); Kate Sablosky Elengold, *Consumer Remedies for Civil Rights*, 99 *B.U. L. Rev.* 587, 598–99 (2019) (describing the difficulties in applying anti-discrimination statutes).

<sup>7</sup> Phaedra Cook, *Midtown Nightclub Accused of Discriminatory Practices*, Hous. Press (Sept. 14, 2015, 6:00 AM), <https://www.houstonpress.com/restaurants/midtown-nightclub-accused-of-discriminatory-practices-7762250> [<https://perma.cc/3KCW-X9AX>]; Grizzard, *Houston Bar Discriminates Against Blacks, Lawyer Tim Sutherland Lies, Says Federal Law Doesn’t Apply*, Daily Kos (Sept. 18, 2015, 1:38 PM), <https://www.dailykos.com/stories/2015/9/18/1422605/-Houston-Bar-Discriminates-Against-Blacks-Lawyer-Tim-Sutherland-Lies-Says-Federal-Law-Doesn-t-Apply> [<https://perma.cc/VL3C-JN3K>].

without paying the entry fee, while African Americans, Asian Americans, and Latinx people were being asked to pay the entry fee.<sup>8</sup> Again, suspicions of racial discrimination grew. Interracial corroboration was noteworthy here too. After observing how the club implemented its cover fee, a white ally revealed, “They were letting all white guys in for free and charging minority men a cover fee . . . It never had anything to do with dress code . . . If a minority male showed up with a bunch of women, sometime [sic] they’d let them in.”<sup>9</sup>

After these allegations went public, Gaslamp’s lawyer explained that the cover charge was not about race, but about gender and sexuality. “Our club doesn’t allow multiple males with no females, so our policy is to charge a cover for that group,” he explained.<sup>10</sup> He admitted that women’s payment of the cover charge was a discretionary decision made by bouncers and noted that “[s]ometimes the door guy thinks you’re a smokin’ hot babe, and you get in free.”<sup>11</sup> The attorney also acknowledged that there was no predetermined ideal ratio of men to women, and recommended, “[Y]ou’d want at least one [woman] for a group of three [men] and a one-to-one ratio is better.”<sup>12</sup> One of the bouncers who worked the door the night the men were excluded was less diplomatic. He described the three men in a subsequently deleted Facebook post as, “3 old, out of shape, with no girls dorks lol.”<sup>13</sup> Those three men happened to be lawyers.<sup>14</sup> They filed a lawsuit in federal court under Title II of the Civil Rights Act of 1964,<sup>15</sup> which prohibits racial discrimination in public accommodations.<sup>16</sup> President Obama’s Department of Justice intervened in 2016 and the agency settled with the club two years later under the Trump Administration.<sup>17</sup>

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<sup>8</sup> Grizzard, *supra* note 7.

<sup>9</sup> Cook, *supra* note 7.

<sup>10</sup> *Id.*

<sup>11</sup> Grizzard, *supra* note 7.

<sup>12</sup> Cook, *supra* note 7.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Cara Smith, *Houston Lawyers Sue Popular Midtown Bar, Support HERO*, *Hous. Bus. J.* (Nov. 2, 2015, 9:28 AM), [https://www.bizjournals.com/houston/morning\\_call/2015/11/houston-lawyers-sue-popular-midtown-bar-support.html](https://www.bizjournals.com/houston/morning_call/2015/11/houston-lawyers-sue-popular-midtown-bar-support.html) [<https://perma.cc/YBD7-YX22>].

<sup>16</sup> 42 U.S.C. § 2000a.

<sup>17</sup> Settlement Agreement, *United States v. Ayman Jarrah*, No. 4:16-cv-02906 (S.D. Tex. Feb. 1, 2018), <https://www.justice.gov/crt/case-document/file/1031751/download> [<https://perma.cc/L8DG-QET7>] (requiring the defendant to cease discriminating, engage in training on the substantive provisions of Title II, publicize a non-discrimination policy in its entrance, and develop a program to monitor compliance with Title II).

At the heart of the Gaslamp fiasco is a constellation of normalized social and legal practices that I refer to as “velvet rope discrimination.” I borrow and adapt this term from sociologist Reuben Buford May, who developed the term “velvet rope racism” to focus specifically on racial discrimination in nightlife.<sup>18</sup> The analysis here, which focuses specifically on bars, restaurants, and nightclubs expands the concept to focus on race as well as gender and sexuality. The practices that constitute velvet rope discrimination have gone relatively unnoticed by legal scholars despite ample litigation,<sup>19</sup> as well as varying treatments in social sciences, humanities, and journalism.<sup>20</sup> Far from an isolated set of incidents, the exclusion faced by the men and women at Gaslamp is part of a larger, jagged evolution of anti-discrimination law. Racial, gender, and sexual considerations thrive in public accommodations despite running afoul of a host of federal, state, and local anti-discrimination laws.<sup>21</sup>

<sup>18</sup> See Reuben A. Buford May, *Velvet Rope Racism, Racial Paranoia, and Cultural Scripts: Alleged Dress Code Discrimination in Urban Nightlife, 2000–2014*, 17 *City & Cmty.* 44, 45, 51–52 (2018).

<sup>19</sup> See, e.g., *supra* note 15; *infra* notes 295–99, 301–02.

<sup>20</sup> See, e.g., Reuben A. Buford May, *Urban Nightlife: Entertaining Race, Class, and Culture in Public Space* 8–9 (2014); Philip R. Kavanaugh & Tammy L. Anderson, *Managing Physical and Sexual Assault Risk in Urban Nightlife: Individual- and Environmental-Level Influences*, 30 *Deviant Behav.* 680, 706 (2009); James G. Fox & James J. Sobol, *Drinking Patterns, Social Interaction, and Barroom Behavior: A Routine Activities Approach*, 21 *Deviant Behav.* 429, 440–41 (2000); Emily Heil, *A Baltimore Restaurant Group Apologizes to a Black Woman and Son for Unequally Enforcing Its Dress Code*, *Wash. Post* (June 23, 2020, 7:00 PM), <https://www.washingtonpost.com/news/voraciously/wp/2020/06/23/a-baltimore-restaurant-group-apologizes-to-a-black-woman-and-son-for-unequally-enforcing-its-dress-code/> [<https://perma.cc/F7UC-K8EF>]; Emily Suzanne Lever, *Man Suing NYC Bar for \$50K Claiming They Discriminated Against Men by Hosting Ladies Night* (Oct. 15, 2019, 3:41 PM), <https://gothamist.com/news/man-sues-bar-ladies-night-discrimination> [<https://perma.cc/H4KR-BXLB>].

<sup>21</sup> See Wash. Rev. Code § 49.60.215 (2020) (“It shall be an unfair practice for any person . . . to commit an act which directly or indirectly results in any . . . discrimination . . . or the refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, *accommodation*, assemblage, or amusement . . . .”) (emphasis added); Or. Rev. Stat. § 659A.403 (2020) (“[A]ll persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of *any place of public accommodation*, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age . . . .”) (emphasis added); Conn. Gen. Stat. § 46a-64 (2017) (“It shall be a discriminatory practice . . . [t]o deny any person within the jurisdiction of this state full and equal accommodations *in any place of public accommodation*, resort or amusement because of race, creed, color, national origin, ancestry, sex, gender identity or expression, marital status, age, lawful source of income, intellectual disability, mental disability, physical disability,

Notwithstanding Richard Epstein's assertion a quarter century ago that "the law of public accommodations could be described as 'ancient history,'"<sup>22</sup> available descriptive and empirical accounts indicate that race and sex discrimination flourish in restaurants and nightlife.<sup>23</sup>

This Article fills a gaping hole in statutory anti-discrimination law scholarship. With the exception of Joseph Singer's work and an important article by Elizabeth Sepper and Deborah Dinner, anti-discrimination law is heavily centered on the veritable problems of housing and employment, with less attention given to public accommodations.<sup>24</sup> Alternatively,

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including, but not limited to, blindness or deafness, or status as a veteran, of the applicant . . .") (emphasis added).

<sup>22</sup> Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 128 (1995).

<sup>23</sup> Lauren A. Rivera, *Status Distinctions in Interaction: Social Selection and Exclusion at an Elite Nightclub*, 33 *Qualitative Socio.* 229, 239 (2010); Reuben A. Buford May & Kenneth Sean Chaplin, *Cracking the Code: Race, Class, and Access to Nightclubs in Urban America*, 31 *Qualitative Socio.* 57, 58, 60 (2007) (examining racial discrimination in Athens, Georgia through participant observation); David Grazian, *Urban Nightlife, Social Capital, and the Public Life of Cities*, 24 *Socio. F.* 908, 915–16 (2009) (offering empirical data about racial and class barriers, the normalization of gender differences, and the lack of inclusiveness in nightlife to argue that nightlife can serve as a bonding mechanism).

<sup>24</sup> Most generally, Joseph Singer has shaped recent legal thinking on race and public accommodations, whereas Elizabeth Sepper and Deborah Dinner have recently written about sex discrimination in public accommodations. See Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 *B.U. L. Rev.* 929, 930, 950 (2015); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 *Nw. L. Rev.* 1283, 1286, 1296 (1996); Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 *Yale L.J.* 78, 83 (2019). This Article is indebted to their work and extends their analyses. There are also some helpful but dated accounts of discrimination in bars and nightclubs in a few student notes. These various insights are all helpful but fail to capture the robustness of contemporary public accommodations discrimination. See, e.g., Lisa Gabrielle Lerman & Annette K. Sanderson, *Project, Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 *N.Y.U. Rev. L. & Soc. Change* 215, 250 (1978); Alan J. Hoff, *Note, A Proposed Analysis for Gender-Based Practices and State Public Accommodations Laws*, 16 *U. Mich. J.L. Reform* 135, 137 (1982) (arguing that gender-preferential practices are acceptable when applied reasonably); Joyce L. McClements & Cheryl J. Thomas, *Comment, Public Accommodations Statutes: Is Ladies' Night Out?*, 37 *Mercer L. Rev.* 1605, 1605 (1986) (discussing the use of public accommodations laws by men for sex discrimination claims in the 1980s); Heidi C. Paulson, *Note, Ladies' Night Discounts: Should We Bar Them or Promote Them?*, 32 *B.C. L. Rev.* 487, 489 (1991) (exploring "ladies night" events and gender-based pricing in relation to public accommodations laws and sex discrimination between the 1980s and the beginning of the 1990s); Jessica E. Rank, *Comment, Is Ladies' Night Really Sex Discrimination?: Public Accommodation Laws, De Minimis Exceptions, and Stigmatic Injury*, 36 *Seton Hall L. Rev.* 223, 225–28 (2005) (describing the variety of approaches to the issue of "ladies night" sex discrimination around the country). Some particularly instructive insights have been offered by scholars who have addressed these issues in a few pages of what are larger, book-length projects on anti-discrimination law. See

attention is given to public spaces, but primarily through the lens of disability law or the longstanding public accommodations clash between religion and sexuality.<sup>25</sup> This Article deploys the gifts of legal history to supplement these lines of inquiry and make the case that discrimination

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Nancy Levit, *The Gender Line: Men, Women, and the Law* 102–04 (1998) (providing examples of “ladies night” discrimination and examining various state sex discrimination laws); Richard Thompson Ford, *Rights Gone Wrong: How Law Corrupts the Struggle for Equality* 85–92 (2011) (discussing specific cases of gender discrimination and distinguishing between harmless and harmful gender distinctions); Joanna L. Grossman, *Nine to Five: How Gender, Sex, and Sexuality Continue to Define the American Workplace* 2–3 (2016) (analyzing a “ladies night” case in New Jersey in an exploration of sex discrimination). For helpful takes on housing discrimination, see Lee Anne Fennell, *Searching for Fair Housing*, 97 *B.U. L. Rev.* 349, 351–52 (2017) (exploring the underlying racial biases of home seekers as they relate to housing discrimination); Rachel D. Godsil, *The Gentrification Trigger: Autonomy, Mobility, and Affirmatively Furthering Fair Housing*, 78 *Brook. L. Rev.* 319, 324 (2013) (conducting a historical analysis of gentrification and offering alternative legal mechanisms for in-place residents facing gentrification); Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 *U. Pa. J. Const. L.* 1191, 1193, 1195–96 (2011) (examining the Fair Housing Act’s enforcement regime and its mandate to affirmatively further fair housing). For instructive treatments of employment discrimination, see Tristin K. Green, *Racial Emotion in the Workplace*, 86 *S. Cal. L. Rev.* 959, 969 (2013) (arguing that racial emotion is a source of discrimination in the workplace in order to advocate for more comprehensive laws that will better recognize and address this form of discrimination); Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 *B.U. L. Rev.* 713, 715 (2015) (providing an analysis of the role of intersectionality in the development and execution of Title II of the Civil Rights Act of 1964); Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 *Am. U. L. Rev.* 715, 718 (2014) (analyzing cases on gender stereotyping and sexual orientation claims in the workplace).

<sup>25</sup> For recent examinations of the interface of religion and sexual orientation in these sites, see Pamela S. Karlan, *Just Desserts?: Public Accommodations, Religious Accommodations, Racial Equality, and Gay Rights*, 2018 *Sup. Ct. Rev.* 145, 146; Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 *Sup. Ct. Rev.* 257, 257–58 (2018); Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 *St. Louis U. L.J.* 631, 636–37 (2016) (tracking religious exemptions in public accommodations law). The Americans with Disabilities Act goes further than Title II in that it requires an affirmative duty to remove physical barriers to access to ensure that people are not discriminated against on the basis of disability. See 42 U.S.C. § 12181. Some of the most helpful takes on disability and public accommodations include: Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 *Stan. L. Rev.* 1205, 1208–09 (2014); Elizabeth F. Emens, *Integrating Accommodation*, 156 *U. Pa. L. Rev.* 839, 843 (2008) (identifying certain benefits created for third parties by the Americans with Disabilities Act); Colin Crawford, *Cyberplace: Defining A Right to Internet Access Through Public Accommodation Law*, 76 *Temp. L. Rev.* 225, 227–28 (2003) (exploring whether to impose a public accommodations law framework onto cyberspace); Robert L. Burgdorf, Jr., *“Equal Members of the Community”: The Public Accommodations Provisions of the Americans with Disabilities Act*, 64 *Temp. L. Rev.* 551, 554 (1991).

in public accommodations matters in the context of racial, gender, and LGBTQ justice. Two intellectual moves are central to this endeavor.

First, the Article sketches out the terrain of velvet rope discrimination, which I define as the use of legally protected categories by public accommodations in their determinations of who is granted entry and in their provision of service. The legal categories I focus on are race and sex, and the public accommodations of interest in this Article are bars, restaurants, and nightclubs. I pay particular attention to gender-based pricing schemes, the use of dress codes as proxies for race, and the trafficking of stereotypes that come with these forms of vetting. This descriptive endeavor shows how law, in some ways, is well-suited to regulate velvet rope discrimination but in other ways is ill-equipped to satisfy the goal of equal access to public accommodations. Entry into these spaces is often granted or denied based on stereotypes that could be considered socially objectionable and legally impermissible if actually uttered. In ways that hark back to the 1970s critiques of romantic paternalism,<sup>26</sup> women are considered ideal customers because their presence ostensibly increases alcohol purchases by men (as gifts, courtship, and/or status displays).<sup>27</sup> Dress codes attempt to curate audiences by prohibiting styles associated with racial minorities or maintaining requirements that exclude gender non-conforming individuals. Most generally, the discretionary aspect of admission—which is lightly regulated as a legal matter<sup>28</sup>—is rife with potential discrimination along a host of categories (e.g., race, gender, sexual orientation, color, national origin).

The second move is normative and unsettles taken-for-granted assumptions about law, public accommodations, and leisure. Here, I argue that in the context of public accommodations, the use of dress codes

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<sup>26</sup> *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (“Traditionally, [sex] discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”).

<sup>27</sup> Rivera, *supra* note 23, at 239.

<sup>28</sup> Robert Bork foresaw the enforcement problems with Title II before it was passed.

Of what value is a law which compels service to Negroes without close surveillance to make sure the service is on the same terms given to whites? It is not difficult to imagine many ways in which barbers, landlords, lunch counter operators, and the like can nominally comply with the law but effectively discourage Negro patrons. Must federal law enforcement agencies become in effect public utility commissions charged with the supervision of the nation’s business establishments or will the law become an unenforceable symbol of hypocritical righteousness?

Robert Bork, *Civil Rights – A Challenge*, *New Republic*, Aug. 31, 1963, at 23.



and gender-based pricing—core features of velvet rope discrimination—should be prohibited. This prescriptive position is rooted in a close analysis of public accommodations jurisprudence and growing statutory developments. Unlike Title VII, which covers employment discrimination and contains a business necessity clause that allows employers to discriminate based on legally protected categories,<sup>29</sup> Title II of the Civil Rights Act of 1964 does not contain a business necessity defense<sup>30</sup> and courts have routinely rejected such arguments in the public accommodations context.<sup>31</sup> Moreover, jurisdictions are slowly adopting anti-discrimination provisions designed to combat velvet rope discrimination.<sup>32</sup> The combination of settled jurisprudence and a budding statutory shift suggests that the Article’s normative position, which may seem initially jarring, actually has bases in settled law.

This Article proceeds in four parts. Part I outlines the development of federal and state statutes that prohibit discrimination in public accommodations. These laws surfaced after the Civil War and became most notable when Congress passed the Civil Rights Act of 1875,<sup>33</sup> which the Court struck down in the 1883 *Civil Rights Cases*.<sup>34</sup> That decision, along with *Plessy v. Ferguson*,<sup>35</sup> led more states to pass public accommodations statutes. None of these laws prohibited sex-based segregation. Such discrimination was normalized as a reasonable feature of human relations.<sup>36</sup> Nevertheless, in the first half of the twentieth century, when there was no federally recognized right to equal access to public accommodations, minority leisure-seekers used state laws to contest their exclusion from this realm of social life.<sup>37</sup> These cases provided fodder for challenges to recreational segregation after the Court invalidated Jim Crow in *Brown v. Board of Education*<sup>38</sup> and presaged the passage of Title II of the Civil Rights Act of 1964, which prohibits discrimination in public accommodations based on race, color, religion,

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<sup>29</sup> 42 U.S.C. § 2000e-2(e).

<sup>30</sup> 42 U.S.C. § 2000a.

<sup>31</sup> See sources cited *infra* notes 372–73 (discussing cases).

<sup>32</sup> See sources cited *infra* notes 351, 360–63, 366 (discussing recent legislation designed to curtail velvet rope discrimination).

<sup>33</sup> Pub. L. No. 43-114, 18 Stat. 335–37, invalidated by *Civil Rights Cases*, 109 U.S. 3 (1883).

<sup>34</sup> 109 U.S. 3, 26 (1883).

<sup>35</sup> 163 U.S. 537, 550–51 (1896).

<sup>36</sup> See Barbara Y. Welke, *When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race, and the Road to Plessy, 1855–1914*, 13 *L. & Hist. Rev.* 261, 271 (1995).

<sup>37</sup> See e.g., *infra* notes 83, 103, 111, 118.

<sup>38</sup> 347 U.S. 483, 495 (1954).

or national origin. Gender again would be left out of public accommodations laws' purview. It would take approximately a decade for a majority of states to include sex in their anti-discrimination statutes.<sup>39</sup> This federal and state framework buoyed existing local agencies that developed their own municipal prohibitions on public accommodations discrimination.<sup>40</sup>

The accretion of laws prohibiting public accommodations discrimination should, in theory, regulate discrimination against protected groups in bars, restaurants, and nightclubs. However, Part II suggests otherwise and sketches the contours of velvet rope discrimination. I begin this Part by describing the myriad ways restaurants, bars, and nightclubs promote practices that, at first glance, contravene anti-discrimination laws and, in some instances, actually violate such laws based on determinations by courts and agencies. In the 1960s, some of these entities responded to the new civil rights landscape by mimicking other integration-resistant public accommodations. Some claimed private status or mandated the display of selectively furnished "membership cards."<sup>41</sup> Other public accommodations rigorously enforced real and unstated dress codes; this emerged as the more economically and socially defensible practice. Dress codes—which were tied to sartorial practices that preceded anti-discrimination law<sup>42</sup>—became a salient screening mechanism for innocent profit-seekers and bigots alike. Sex integration in public accommodations was also contested as women fought for access to exclusionary bars and restaurants.<sup>43</sup> But the socio-legal landscape evolved differently due to patriarchy's simultaneous degradation and valorization of women. Sex-based anti-discrimination laws surfaced at the closing of the 1960s and the beginning of the 1970s, when the notion of wage-earning women normalized, ideas about adult consensual sex liberalized, and women publicly asserted their independence.<sup>44</sup> Owners of public

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<sup>39</sup> Sepper & Dinner, *supra* note 24, at 104, 111.

<sup>40</sup> See Charles S. Rhyne & Brice W. Rhyne, *Civil Rights Ordinances* 71–89 (1963); Joseph Parker Witherspoon, *Administrative Implementation of Civil Rights* 531–38 (1968).

<sup>41</sup> See, e.g., *United States v. Jordan*, 302 F. Supp. 370, 374 (E.D. La. 1969); *United States v. Nw. La. Rest. Club*, 256 F. Supp. 151, 153 (W.D. La. 1966).

<sup>42</sup> Ruthann Robson, *Dressing Constitutionally: Hierarchy, Sexuality, and Democracy from Our Hairstyles to Our Shoes*, 8–27 (2013) (describing the historical development of laws regulating dress).

<sup>43</sup> See sources cited *infra* notes 204–11 (discussing early instances of discrimination in bars and restaurants in the mid-twentieth century).

<sup>44</sup> Sepper & Dinner, *supra* note 24 at 83; see also Julia Kirk Blackwelder, *Now Hiring: The Feminization of Work in the United States, 1900–1995*, 176–204 (1997); Susan Frelich

accommodations soon offered gender-based discounts that were in accord with this independence, but these deals would be challenged by men in the 1980s. At this point, state courts had a limited lexicon for gender discrimination and took different approaches to these schemes. Some states upheld gender-based pricing in public accommodations under the problematic logic that these arrangements were innocuous, while some courts invalidated these schemes in ways that troublingly validated men's weaponization of civil rights laws against women.<sup>45</sup> Ultimately, Part II describes how the 1970s and 1980s produced a public accommodations regime that was poorly equipped to regulate velvet rope discrimination.

Part III conceptually maps out the contemporary operation of velvet rope discrimination by detailing specific examples. It also explicates public accommodations owners' business justifications of gender-based pricing and dress codes. The most common explanations for gender-based pricing are profitability, establishments' desire to attract women to entice men, and chivalry.<sup>46</sup> In public accommodations law, courts have rejected business necessity-like arguments that use profit motives to justify discrimination. In addition to resting on heteronormative assumptions, chivalry-based defenses understand discrimination through the traditional and narrow lens of "hostile" sexism, yet ignore the "benevolent" versions of sexism that legal scholars, feminists, and social scientists have long described.<sup>47</sup> Meanwhile, dress codes are instituted because of owners' desire to attract a particular clientele, keep out troublemakers, and/or create a certain ambiance. These are undeniably legitimate business goals, but the noteworthy cases involving alleged discrimination by way of dress codes lead to reasonable inferences that these policies are crafted specifically to exclude minorities. Although men of color attract much of the attention in the discourse on discriminatory dress codes, overly vague

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Appleton, *The Forgotten Family Law of Eisenstadt v. Baird*, 28 Yale J.L. & Feminism 3 (2017) (arguing that the Supreme Court's 1972 declaration that laws criminalizing contraceptives are unconstitutional made family law "more inclusive, liberatory, sex-positive, and feminist"); Elana Levine, *Wallowing in Sex: The New Sexual Culture of 1970s American Television* 3 (2007) (explaining how television reflected shifting sexual mores in the 1970s); Daphne Spain, *Constructive Feminism, Women's Spaces and Women's Rights in the American City* 2 (2016) (describing the ways feminists challenged sex segregation in public institutions and thus changed the use of urban space).

<sup>45</sup> See Bethany M. Coston & Michael Kimmel, *White Men as the New Victims: Reverse Discrimination Cases and the Men's Rights Movement*, 13 Nev. L.J. 368, 373–74 (2013).

<sup>46</sup> See *infra* notes 368–71 and accompanying text (discussing different views).

<sup>47</sup> See sources cited *infra* notes 238, 376 (describing prominent accounts of "benevolent" sexism).

dress codes that prohibit “inappropriate attire” allow bouncers to deploy rules to exclude women of color and sexual minorities in ways that also run afoul of various anti-discrimination laws.<sup>48</sup> At the same time, considering the reality of recreational segregation, this Part complicates the story by pointing to the various *intraracial* implications of velvet rope discrimination and discusses the challenges that arise when minorities are excluded from bars and nightclubs that employ, are owned by, and/or predominantly service other minorities. Overall, this Part establishes how the economic and putatively rational logics used to defend dress codes often crumble upon deeper scrutiny yet thrive due to our inadequate anti-discrimination law regime. In this way, the Article joins a group of scholars who describe how entities evade anti-discrimination statutes and offers suggestions about how to think about these laws in the modern world.<sup>49</sup>

The Conclusion offers some normative thoughts on velvet rope discrimination. It does not purport to solve the aforementioned problems but offers a variety of suggestions that might help reframe public accommodations law. The prescriptions attempt to offer meaningful ways in which federal, state, and local governments can honor the underlying principles of anti-discrimination law.

Two quick points are worth offering before proceeding—one about why dress codes and gender-based pricing should be analyzed in tandem and the other about the significance of velvet rope discrimination. At first blush, gender-based pricing and dress codes may appear to be distinct practices that merit separate analytical treatment. Since the potential harms that flow from these practices are qualitatively different, our normative ideas about regulation might lead to different conclusions. The perceived differences between the two are not negligible. At the most basic level, dress codes seem to be animated by *keeping out* a particular

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<sup>48</sup> See sources cited *infra* 328–38 and accompanying text (discussing the operation of dress codes at bars and nightclubs).

<sup>49</sup> See Leong & Belzer, *supra* note 6, at 1275 (arguing that public accommodations laws must account for discrimination in the “platform economy”); David Brody & Sean Bickford, *Discriminatory Denial of Service: Applying State Public Accommodations Laws to Online Commerce* 1 (2020) (arguing the same for online commerce); Jonah Gelbach, Jonathan Klick & Lesley Wexler, *Passive Discrimination: When Does It Make Sense To Pay Too Little?*, 76 U. Chi. L. Rev. 797, 823–40 (2009); Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. Davis L. Rev. 1895, 1901 (2007); Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 Va. L. Rev. 437, 439–40 (2006); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 460–61 (2001).

group of people—people who do not conform to some ideal style guide—whereas gender-based pricing is inspired by *attracting* a specific group of people—cisgender heterosexual women. This is just one way of looking at such discretion. One could easily understand both practices as good-faith attempts to curate a particular ambiance. They could also be considered crude forms of racial and gender balancing.<sup>50</sup> Herein lies one of the many points of convergence that demonstrate why these practices should not be understood in silos: both are screening mechanisms that determine who has access to what are, in theory, *public spaces*, which raises weighty legal questions about inclusion.<sup>51</sup> These screening mechanisms are generally absent from other types of public accommodations (i.e., movie theaters, amusement parks, transportation services). The average reader would likely bristle at the idea of being subject to a dress code at a post office or gender-based pricing at a public park. These screening mechanisms differently promote the kinds of intimate discrimination that Elizabeth Emens has cautioned against; they can also limit romantic prospects and the possibility of relationship formation for socially marginalized groups such as racial minorities, women, people with disabilities, the LGBTQ community, and people at the intersections of some of these categories, to name a few.<sup>52</sup> Gender-based pricing and dress codes also defy ideas about inclusion and equality that are at the heart of anti-discrimination law but might get lost if they are understood in atomistic terms.

In addition to raising questions about inclusion, dress codes and gender-based pricing contribute to the *normalization* of ideas about race, class, gender, sexuality, and the intersections of these categories. This

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<sup>50</sup> Press Release, N.Y. State Off. Att’y Gen., Settlement with Manhattan Nightclub Ends Investigation of Discrimination Allegations (June 3, 2003), <https://ag.ny.gov/press-release/2003/settlement-manhattan-nightclub-ends-investigation-discrimination-allegations> [<https://perma.cc/72JE-82K7>] (announcing \$10,0000 settlement with a club that refused to admit a group of South Asians, who the doorman told: “It’s my responsibility to blend this club. There has to be a balance, there has to be.”).

<sup>51</sup> See Don Mitchell, *The Right to the City: Social Justice and the Fight for Public Space* 5 (2003) (outlining the history of inclusion in and exclusion from public space in American cities).

<sup>52</sup> Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 *Harv. L. Rev.* 1307, 1374–75 (2009) (discussing how people with disabilities have limited opportunities to form intimate relations and how race and gender can “intersect to create . . . subgroups who are relatively excluded in their intimate prospects”); see also Jasmine E. Harris, *The Aesthetics of Disability*, 119 *Colum. L. Rev.* 895, 941 (2019) (noting how ideas about aesthetics and appearance can impact access to public accommodations for people with disabilities).

normalization can impact the quality of life for marginalized people, as well as groups traditionally understood as privileged. For example, dress codes may be facially neutral, but nightclub litigation, along with a broader literature on fashion, appearance, and employment, demonstrate that such policies also smuggle pernicious ideas about whiteness that can be disadvantageous to racial minorities, as well as whites themselves.<sup>53</sup> The normalization that flows from dress codes is not just about men of color, who appear to be the subject of their implementation, but men more generally. For various reasons, some men do not conform to the standards that these dress codes demand—and sometimes their nonconformity manifests itself in disgruntlement or sexual violence.<sup>54</sup> Legally questionable dress codes in these public accommodations may also pathologize women's fashion choices by imposing disturbing norms about how women should dress, act, and behave.<sup>55</sup>

Similar kinds of reification abound in the context of gender-based pricing. As Richard Ford observes, gender-based pricing might be charitably understood as akin to the type of courting practices that have long defined modern urban romance or could be read less generously as extensions of a crude heteronormative hunter-gatherer logic that imagines women as available and present primarily for men's consumption.<sup>56</sup> Either framework positions women—some of whom are disinterested in romantic pursuits and go to these spaces simply for platonic sociality and

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<sup>53</sup> See Robson, *supra* note 42, at 119–20 (describing how proscriptions against saggy pants and gang-affiliated colors facilitated profiling against young males, despite their broad popularity in contemporary youth culture); Devon W. Carbado & Mitu Gulati, *Acting White?: Rethinking Race in “Post-Racial” America* 10–15 (2013) (explaining how President Obama navigated presenting his Black identity so as not to alienate white people uncomfortable with confronting racism and stereotyping); Deborah L. Rhode, *The Beauty Bias: The Injustice of Appearance in Life and Law* 6–7 (2010) (noting how a preference for white-European features has prompted exponential increases in spending on nonessential cosmetic procedures as well as psychological disorders in the United States).

<sup>54</sup> See Michael Kimmel, *Angry White Men: American Masculinity at the End of an Era* 25–26 (2013) (noting how perceptions of disenfranchisement have led white men to associate with misogynistic and white supremacist movements and militias).

<sup>55</sup> Sahar F. Aziz, *Coercing Assimilation: The Case of Muslim Women of Color*, 18 *J. Gender Race & Just.* 389, 398 (2016); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 *Geo. L.J.* 1079, 1106–08 (2010); Jennifer L. Levi, *Misapplying Equality Theories: Dress Codes at Work*, 19 *Yale J.L. & Feminism* 353, 364–65 (2008); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 *Duke L.J.* 365, 390–93 (1991).

<sup>56</sup> See Ford, *supra* note 24, at 85. For an instructive examination on the evolution of courting see Elizabeth Alice Clement, *Love for Sale: Courting, Treating, and Prostitution in New York City, 1900–1945*, at 22–43 (2006).

leisure—as sexually available. These assumptions and the larger project of patriarchy provide some explanatory power for the sexual violence that emanates from these spaces.<sup>57</sup> But men are straight-jacketed by gender-based pricing too, as this custom can make them unnecessarily competitive and compel them to perform crass versions of masculinity.<sup>58</sup> Ultimately, assumptions about race, gender, and sexuality become more visible by examining dress codes and gender-based pricing together.

Finally, dress codes and gender-based pricing highlight critical gaps and live controversies within anti-discrimination law. Some of these issues, like dress codes, have been deeply interrogated by scholars of gender and employment and have relevance for public accommodations.<sup>59</sup> Most basically, dress codes and gender-based pricing coincide with the kinds of appearance discrimination that are technically not covered by anti-discrimination law but often reliant on ideas about protected

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<sup>57</sup> See sources cited *infra* notes 384–87 and accompanying text (noting how gender-based pricing in bars and clubs perpetuates stereotypical versions of femininity while facilitating increased levels of sexual violence against their female patrons).

<sup>58</sup> See sources cited *infra* notes 389–92 and accompanying text.

<sup>59</sup> See Mary Anne Case, Legal Protections for the “Personal Best” of Each Employee: Title VII’s Prohibition on Sex Discrimination, the Legacy of *Price Waterhouse v. Hopkins*, and the Prospect of ENDA, 66 *Stan. L. Rev.* 1333, 1354–60 (2014) (exploring how federal courts have struggled to interpret different workplace grooming standards between men and women as a violation of Title VII’s sex stereotyping protections); William R. Corbett, Hotness Discrimination: Appearance Discrimination as a Mirror for Reflecting on the Body of Employment-Discrimination Law, 60 *Cath. U. L. Rev.* 615, 624–28 (2011) (explaining the inherent difficulty in establishing a legally viable appearance-based employment discrimination claim despite the pervasiveness of this discrimination in the United States); Deborah L. Rhode, The Injustice of Appearance, 61 *Stan. L. Rev.* 1033, 1067–69 (2009) (noting the popular pragmatic arguments against expanding Title VII protections to include appearance-based discrimination); Ann C. McGinley, Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes, 14 *Duke J. Gender L. & Pol’y* 257, 263 (2007) (exploring gendered hiring and expectations for cocktail servers in casinos); Gowri Ramachandran, Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing, 66 *Md. L. Rev.* 11, 55–58 (2006) (arguing that the government should interfere to protect freedom of dress in private workplaces in order to take the power from employers, but remain hands-off in other private settings); David B. Cruz, Making Up Women: Casinos, Cosmetics, and Title VII, 5 *Nev. L.J.* 240, 243–48 (2004) (analyzing how courts have interpreted Title VII’s BFOQ provision to uphold sex-discriminatory dress and appearance requirements); Katharine T. Bartlett, Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality, 92 *Mich. L. Rev.* 2541, 2556–59 (1994) (arguing that courts upholding gendered dress and appearance restrictions reinforces unexamined gender stereotypes and prejudices); Karl E. Klare, Power/Dressing: Regulation of Employee Appearance, 26 *New Eng. L. Rev.* 1395, 1418–21 (1992) (exploring permissible uses of gender discrimination in the context of gendered dress codes addressing hair length and pants).

categories such as disability, race, gender, and sexual orientation. More specifically, these screening mechanisms highlight bias against transgender individuals.<sup>60</sup> This issue is connected to the themes discussed herein and appears where relevant but warrants more in-depth treatment than this Article can offer. Gender-based pricing and dress codes generate the kinds of “administrative violence” Dean Spade has thoroughly detailed.<sup>61</sup> As Heath Fogg Davis similarly explains, “[S]ex-classification policies are unjust because they prompt and authorize administrative agents to use their own subjective gender judgments to target, inspect, and exclude transgender-appearing people from the public accommodations under their watch.”<sup>62</sup> But the sparsity of anti-discrimination laws protecting transgender individuals, along with law’s inability to grasp the velvet rope discrimination in this Article, render their treatment in these public accommodations invisible. Accordingly, this Article uses dress codes and gender-based pricing to provide alternative ways of thinking about enduring and new challenges in the anti-discrimination subfield of public accommodations law.

The political and social significance of discrimination is also worth emphasizing before proceeding. In a country where there is deep concern about the future of democracy, police violence toward unpopular groups, tenacious wage disparities, and a host of other maladies (including a pandemic), it is tempting to dismiss velvet rope discrimination as inconsequential. Put another way, it is easy to consider the issues described in this Article as a distraction from more dire issues facing marginalized groups. But this trivialization faces three problems.

As a sociological issue, this kind of diminishment ignores how discrimination in public accommodations can normalize ideas about race, gender, and sexuality for people who actively discriminate, as well as the individuals who are subject to unequal treatment. Throughout history, inequality has been able to thrive due to norms that are legally or socially sanctioned.<sup>63</sup> The velvet rope discrimination described in this Article is part of a doxa that, in many ways, endorses odious social distinctions.

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<sup>60</sup> Heath Fogg Davis, *Sex-Classification Policies as Transgender Discrimination: An Intersectional Critique*, 12 *Persps. on Pol.* 45, 45 (2014).

<sup>61</sup> Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* 9–10 (2015).

<sup>62</sup> Davis, *supra* note 60.

<sup>63</sup> Kate Manne, *Down Girl: The Logic of Misogyny* 13 (2017) (“Misogyny . . . visit[s] hostile or adverse social consequences on a certain (more or less circumscribed) class of girls or women to enforce and police social norms that are gendered either in theory (i.e., content)



Relatedly, derision toward this form of discrimination loosely resembles historical criticisms—from the left and the right—of mid-twentieth-century civil rights litigants who sought equal access to water fountains, pools, lunch counters, theaters, gyms, and recreational parks.<sup>64</sup> The National Association for the Advancement of Colored People (NAACP), which litigated many of the public accommodations disputes that went to the Supreme Court, managed these cases amidst a similar set of concerns around democracy, employment discrimination, police violence, criminal justice inequality, and a host of other issues.<sup>65</sup> The National Organization for Women (NOW) challenged men’s-only bars amidst concerns about reproductive rights, wage gaps, and sexual violence.<sup>66</sup> Trivialization of velvet rope discrimination implies that these organizations mismanaged their priorities in the past *or* suggests that the concerns these organizations had about public accommodations discrimination are relics of the past. The benefits of historical hindsight suggest that these were not worthless endeavors, but important steps toward attempting to extirpate bias in American society that still exists.<sup>67</sup>

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or in practice (i.e., norm enforcement mechanisms.”); Ruth Thompson-Miller, Joe R. Feagin & Leslie H. Picca, *Jim Crow’s Legacy: The Lasting Impact of Segregation* 157, 179 (2015) (noting how “[t]he racial norms of Jim Crow were firmly grounded in African Americans’ knowing ‘their place’ at the bottom of the racial hierarchy” and suggesting that the fragility of racial hierarchy “depends upon everyday individual acts to collectively uphold it”); Roberto Lovato, *Juan Crow in Georgia*, *The Nation* (May 8, 2008), <https://www.thenation.com/article/juan-crow-georgia/> [<https://perma.cc/38PH-Y3P9>] (describing Juan Crow as “the matrix of laws, social customs, economic institutions and symbolic systems enabling the physical and psychic isolation needed to control and exploit undocumented immigrants”).

<sup>64</sup> Dismissals of the fight for public accommodations desegregation came from outside and inside of the Black community. Strom Thurmond famously claimed, “[T]here’s not enough troops in the [A]rmy to force the [S]outhern people to break down segregation and admit the Negro race into our theaters, into our swimming pools, into our homes, and into our churches.” Nadine Cohodas, *Strom Thurmond and the Politics of Southern Change* 177 (1993). See also Malcolm X Speaks: Selected Speeches and Statements 9 (George Breitman ed., 1965) (“The only revolution in which the goal is loving your enemy is the Negro revolution. It’s the only revolution in which the goal is a desegregated lunch counter, a desegregated theater, a desegregated park, and a desegregated public toilet; you can sit down next to white folks—on the toilet. That’s no revolution.”).

<sup>65</sup> See generally Christopher W. Schmidt, *The Sit-Ins: Protest and Legal Change in the Civil Rights Era* 57–59 (2018) (describing the role of the NAACP in the sit-in movement).

<sup>66</sup> See Sepper & Dinner, *supra* note 24, at 111–14; Georgina Hickey, *Barred from the Barroom: Second Wave Feminists and Public Accommodations in U.S. Cities*, 34 *Feminist Stud.* 382, 385–88 (2008).

<sup>67</sup> Ella J. Baker, *Bigger than a Hamburger*, *S. Patriot*, May 1960, at 4 (“The Student Leadership Conference made it crystal clear that current sit-ins and other demonstrations are concerned with something much bigger than a hamburger or even a giant-sized coke . . . [they]

Finally, as a legal and political issue, such dismissals fail to appreciate the democratic and dignity concerns at the heart of anti-discrimination law.<sup>68</sup> In his comments to Congress on proposed civil rights legislation, President Kennedy insisted that “no action is more contrary to the spirit of our democracy and Constitution—or more rightfully resented by a Negro citizen who seeks only equal treatment—than the barring of that citizen from restaurants, hotels, theatres, *recreational areas* and other public accommodations and facilities.”<sup>69</sup> When the Senate Commerce Committee discussed the Civil Rights Act of 1964, it noted that “[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public.”<sup>70</sup> Echoing and building on Professor Regina Austin’s unheeded clarion call two decades ago for scholars to pay closer attention to leisure and the law as a civil rights matter,<sup>71</sup> this Article calls attention to the ways discrimination in public accommodations speaks to questions of democratic membership and inclusion.

### I. REGULATORY FRAMEWORK

This Part does a few things. First, it sifts through some of the definitional issues states wrestled with in their implementation of new public accommodations statutes. Initially, it was not clear whether bars, restaurants, and dance halls fell within these statutes’ purview. This uncertainty led to a host of battles between legal actors tasked with defining and interpreting the reach of these statutes. This included but was not limited to: intrastate disputes between intermediate courts and courts of last resort; battles between courts and legislatures; and different jurisdictional approaches between states that codified these laws. The

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are seeking to rid America of the scourge of racial segregation and discrimination—not only at lunch counters, but in every aspect of life.”); Jack Williams, *Lady Lawyer Fights for Women’s Rights*, Ithaca J., Feb. 5, 1969, at 4 (“I don’t particularly care if I ever go into a bar—not that I don’t drink—but the issue is one of being treated the same way as a first-class citizen.”).

<sup>68</sup> 3 Bruce Ackerman, *We the People: The Civil Rights Revolution* 127–53 (2014) (describing the anti-humiliation principle that has figured into constitutional law).

<sup>69</sup> *Daniel v. Paul*, 395 U.S. 298, 306 (1969) (quoting Special Message to the Congress on Civil Rights and Job Opportunities, 248 Pub. Papers 483, 485 (June 19, 1963)).

<sup>70</sup> S. Rep. No. 88-872, at 16 (1964).

<sup>71</sup> Regina Austin, “*Not Just for the Fun of It!*”: Governmental Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space, 71 S. Cal. L. Rev. 667, 711–12 (1998).

second goal of this Part is to impose some coherence on an area marred by difference and contestation. I illustrate how, in the absence of public accommodations statutes, parties challenged sex discrimination through other constitutional registers. These indeterminacies in sex and race discrimination helped set the stage for the public accommodations revolution of the 1960s that concludes this Part.

A month after the gunfire ceased and the Civil War ended, Massachusetts became the first state to pass a public accommodations law that prohibited discrimination based on race or color in 1865.<sup>72</sup> Other states followed,<sup>73</sup> as did Congress when it passed the Civil Rights Act of 1875.<sup>74</sup> The Act called for the “full and equal enjoyment of the accommodations” and included a variety of punishments that were considered heavy-handed after its enactment.<sup>75</sup> Violators and their abettors could spend anywhere from 30 days to a year in jail and pay a sum of \$500 to the aggrieved party.<sup>76</sup> The Act would have a short shelf life, as the Court would strike it down eight years later in the *Civil Rights Cases*.<sup>77</sup> In a consolidated decision involving African Americans seeking equal access to theaters and public transportation, the Court ruled that Congress was not empowered to regulate private discrimination under the Thirteenth and Fourteenth Amendments.<sup>78</sup> Thirteen years later, the Court

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<sup>72</sup> Act of May 16, 1865, ch. 277, § 1, 1865 Mass. Acts 650, reprinted in Milton R. Konvitz, *A Century of Civil Rights* 156 (1961); Wallace F. Caldwell, *State Public Accommodations Laws, Fundamental Liberties and Enforcement Programs*, 40 Wash. L. Rev. 841, 843 (1965); Kazuteru Omori, *Race-Neutral Individualism and Resurgence of the Color Line: Massachusetts Civil Rights Legislation, 1855–1895*, 22 J. Am. Ethnic Hist. 32, 37 (2002).

<sup>73</sup> See Act of Feb. 25, 1873, No. 12, § 3, 1873 Ark. Acts 15, 15–19 (prohibiting discrimination in public accommodations, dating back to 1873); Act of Feb. 27, 1874, ch. 49, § 1, 1874 Kan. Sess. Laws 82, 82–83, noted in Konvitz, *supra* note 72, at 156; Act of Apr. 9, 1873, ch. 186, § 1, 1873 N.Y. Laws 583–84 (1873), noted in Konvitz, *supra* note 72, at 156. For more on the history of state public accommodations statutes, see Lerman & Sanderson, *supra* note 24, at 238–40 (1978).

<sup>74</sup> Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 (1875).

<sup>75</sup> *Id.* See also *Sauvinet v. Walker*, 27 La. Ann. 14, 15 (1875), *aff'd*, 92 U.S. 90, 90–93 (1876) (describing a \$1000 judgment against defendant as a “penalty wholly disproportionate to the offense”).

<sup>76</sup> Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 (1875).

<sup>77</sup> 109 U.S. 3, 26 (1883). The Civil Rights Act of 1866 and the Fourteenth Amendment provided for equal protection under the law and supplied a basis for public accommodations claims, but nonenforcement and obstruction set the stage for the stronger legislative intervention that came with the 1875 Act. See A.K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 Law & Hist. Rev. 53, 58–59 (2005).

<sup>78</sup> 109 U.S. 3, 4, 25 (1883).

upheld the constitutionality of segregation in its infamous *Plessy v. Ferguson* decision.<sup>79</sup> The Court's ruling defined federal regulation of public accommodations for almost a half century and validated recreational segregation.<sup>80</sup>

In response to the creation and invalidation of the Civil Rights Act of 1875, as well as the *Plessy* decision, many states continued passing their own public accommodations statutes.<sup>81</sup> These laws mirrored the 1875 Act. Considering this Article's interest in bars, nightclubs, and restaurants, it is important to note that, with few exceptions,<sup>82</sup> restaurants were typically included in public accommodations statutes whereas places that served alcohol—like saloons and taverns—were not, which presented a variety of statutory interpretation challenges. Accordingly, between the enactment of the 1875 Act and the Court's decision in *Brown*, public accommodations cases involving bars, nightclubs, and restaurants might be carved into three categories: cases that wrestled with definitional issues (i.e., what constitutes a public accommodation); rulings that involved favorable decisions for patrons seeking equal access to public accommodations; and cases where courts either rejected equal access or undermined the anti-discrimination norms more generally.

#### A. Courts and Definitional Issues

Some of the definitional cases came early and typically included about-faces on whether bars, restaurants, and dance clubs are public accommodations. New York provides a perfect example. In *Lewis v. Hitchcock*, the only federal decision litigated before the *Civil Rights Cases* that falls within this Article's purview, the district court wrestled with whether a restaurant-inn was a public accommodation.<sup>83</sup> Since the Civil Rights Act did not enumerate restaurants as one of the covered establishments, the plaintiff—who was refused food and refreshments because of his race—argued that the New York restaurant was an inn. The court agreed and explained that the word “restaurant” had no “definite

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<sup>79</sup> 163 U.S. 537, 550–51 (1896).

<sup>80</sup> Robert B. McKay, Segregation and Public Recreation, 40 Va. L. Rev. 697, 697–707 (1954).

<sup>81</sup> Charles S. Mangum, Jr., The Legal Status of the Negro 28–36 (1940); see Pauli Murray, States' Laws on Race and Color 7–9 (1950).

<sup>82</sup> See Act of Feb. 27, 1874, ch. 49, § 1, 1874 Kan. Sess. Laws 82, 82–83; Mangum, supra note 81, at 50–51 (discussing states that did not cover restaurants).

<sup>83</sup> 10 F. 4, 6 (S.D.N.Y. 1882).

legal meaning.”<sup>84</sup> It indicated that the term “restaurant” did not mean “only, or chiefly, an eating-house” and noted the term’s interchangeability with other designations, such as taverns and inns.<sup>85</sup> After the Supreme Court struck down the 1875 Act, the remaining judicial engagements with definitional questions were on the state level.

Though the state already had an accommodations law on the books, New York’s Jewish community succeeded in getting a stronger public accommodations statute passed in 1913.<sup>86</sup> The law prohibited discriminatory advertising in an attempt to rid the city of bigoted “No Jews allowed” signs.<sup>87</sup> While this campaign was aimed at public accommodations discrimination outside the scope of this paper—in housing, hotels, and resorts that routinely discriminated against Jewish people across the country<sup>88</sup>—it is important for a few reasons.

First, Jewish legal advocacy attempted to get a better definitional grip on public accommodations discrimination. Print advertisements were understood as not sufficiently tied to discrimination. Legislative reform efforts, led by Jewish attorney and future NAACP director Louis Marshall, sought to enumerate “by name or title, every conceivable person, place, or instance covered under the law.”<sup>89</sup> B’nai B’rith’s Anti-

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 6–7.

<sup>86</sup> Evan Friss, *Blacks, Jews, and Civil Rights Law in New York, 1895–1913*, 24 *J. Am. Ethnic Hist.* 87, 87 (2005).

<sup>87</sup> Friss, *supra* note 86, at 89–91; see also M. Alison Kibler, *Censoring Racial Ridicule: Irish, Jewish, and African American Struggles over Race and Representation, 1890–1930*, at 117–20 (2015) (describing the relationship between African Americans and Jews, and their views on the New York public accommodations law).

<sup>88</sup> Peter Adams, *Politics, Faith, and the Making of American Judaism* 5 (2014) (“Jews were subject to discreet—and not so discreet—discrimination in employment and public accommodations.”); Friss, *supra* note 86, at 83 (“But for Jews, more likely to frequent upstate resorts, advertisements such as ‘No Dogs or Jews Allowed’ and ‘We do not cater to Hebrews or invalids’ had successfully offended Jewish travelers for years.”); John Higham, *Social Discrimination Against Jews in America, 1830–1930*, 47 *Publ’ns Am. Jewish Hist.* 1, 12–14 (1957) (describing how, beginning in the late nineteenth century, anti-Semitism “was more acute at resorts than elsewhere, for no other institution combined such indiscriminate social mingling with such ardent social aspirations,” and how discrimination in those establishments, along with “clubs and private schools increased during the years before the First World War”); Channele N. Rose, *Tourism and the Hispanicization of Race in Jim Crow Miami, 1945–1965*, 45 *J. Soc. Hist.* 735, 745 (2012) (“[D]uring the 1930s and 1940s, racial discrimination was not solely limited to [B]lacks since a number of Miami Beach hotels read: ‘Gentile Only’ or ‘No Jews, No Dogs.’”).

<sup>89</sup> Jeffrey Gurock, *The 1913 New York State Civil Rights Act*, 1 *Ass’n Jewish Stud. Rev.* 93, 95 (1976). The anti-discrimination norms of public accommodations law would remain elusive:

Defamation League replicated these efforts in other states, defined the larger context of public accommodations, and in the words of preeminent historian John Higham, represented “one of the small beginnings of the twentieth century movement to outlaw discrimination.”<sup>90</sup> Second, Jewish activism cast a broader spotlight on the economic rationales owners of public accommodations used to justify discrimination. Hotel owners were particularly prone to anti-Semitism. As one writer explains, these proprietors succumbed to “the economic pressure exerted upon them by prejudicial Gentile patrons” because they were “[f]earful of losing their clientele by being dubbed as ‘Hebrew’ hotels, proprietors expediently excluded Jews from their establishments.”<sup>91</sup> Similar rationales abound today, with proprietors not wanting their establishments to be understood as the “[B]lack club.”<sup>92</sup> Finally, Jewish organizing is important because it illustrates how courts narrowly understood *who* should benefit from public accommodations discrimination law. Despite efforts to broaden the understanding of discrimination in bars and restaurants, courts did not understand Jewish people, and whites more generally, as the beneficiaries of public accommodations laws.

This interpretation represents an understanding of public accommodations discrimination that this Article writes against: the idea that public accommodations statutes protect a specific group rather than prevent people from being denied access based on noxious racial considerations.

Notwithstanding the 1913 amendment, New York would struggle with the *who* and *what* of public accommodations discrimination. In 1914, a New York intermediate court concluded that saloons were public

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Enterprising hotelkeepers, capitalizing on the strict-constructionist attitude of the courts, circumvented the law by inventing several new ‘code words’ for exclusion. Such terms as ‘restricted clientele,’ ‘churches nearby,’ and ‘buses to church’ were added to the advertiser’s vocabulary. These euphemisms, which soon became intelligible to Jew and Gentile alike, stymied public officials and frustrated Jewish leaders in their attempts to have the law enforced.

*Id.* at 111.

<sup>90</sup> Higham, *supra* note 88, at 16.

<sup>91</sup> Gurock, *supra* note 89, at 97.

<sup>92</sup> Kalyn Oyer, ‘It’s Too Dark in Here’: Black Nightclub DJs in Charleston Speak Up About Discrimination, *Post & Courier* (June 17, 2020), [https://www.postandcourier.com/charleston\\_scene/its-too-dark-in-here-black-nightclub-djs-in-charleston-speak-up-about-discrimination/article\\_5dfa8cf4-acd8-11ea-a85e-db71746cc171.html](https://www.postandcourier.com/charleston_scene/its-too-dark-in-here-black-nightclub-djs-in-charleston-speak-up-about-discrimination/article_5dfa8cf4-acd8-11ea-a85e-db71746cc171.html) [<https://perma.cc/HQN6-T96K>] (describing the experience of a DJ who contended that that club owners attempt to limit the number of Black people in their venues).

accommodations when a Black defendant was overcharged for a drink while he was with two white companions.<sup>93</sup> New York courts would uphold the statute thereafter and rule for Black plaintiffs in cases challenging discrimination on a dancefloor and another barroom.<sup>94</sup> But the New York judiciary, perhaps influenced by the specter of interracial mingling, would retain a narrow view of *who* the law would extend to when it rejected a claim brought by Arthur Cohn, a white plaintiff. He entered a saloon with three companions—two Black and one white. The bartender refused to serve the party unless they paid the exorbitant price of 50 cents for a glass of beer and whiskey despite the regular charges of 5 cents and 15 cents, respectively.<sup>95</sup> The court rejected the public accommodations challenge and ruled that the statute could not be “availed of by a white man because of discrimination against him that is based upon his association with colored men.”<sup>96</sup> That same year, the same court declined to extend the law to a Jewish plaintiff who was refused service in a Harlem restaurant while with his Black companion.<sup>97</sup> Ignoring Jewish people’s interstitial racial status at the time (in which white Jewish people were often not considered white),<sup>98</sup> the court was satisfied by what would be a common justification for differential treatment in these spaces: that it was “against the rules of the house to serve a mixed party.”<sup>99</sup> As Paul Chevigny explained in his classic work on legal regulation of popular culture, concerns about the “social mixing of races” during the Harlem Renaissance played a role in structuring narrow understandings of these

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<sup>93</sup> *Babb v. Elsinger*, 147 N.Y.S. 98, 98–99 (N.Y. App. Div. 1914); *Court Holds It Unlawful to Draw Color Line in Saloons*, N.Y. Age, Apr. 23, 1914, at 1.

<sup>94</sup> *Johnson v. Auburn & Syracuse Elec. R.R. Co.*, 222 N.Y. 443, 446–47, (N.Y. 1918); *Springer v. McDermott*, 173 N.Y.S. 413, 413–14 (N.Y. App. Div. 1919); see also *Baer v. Wash. Heights Café*, 168 N.Y.S. 567, 567–68 (N.Y. Mun. Ct. 1917) (holding that the rear of a saloon where food and liquor were served was a place of public accommodation).

<sup>95</sup> *Matthews v. Hotz*, 173 N.Y.S. 234, 235 (N.Y. App. Div. 1918).

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

<sup>97</sup> *Cohn v. Goldgraben*, 170 N.Y.S. 407, 407–08 (N.Y. App. Div. 1918).

<sup>98</sup> Ian Haney López, *White by Law: The Legal Construction of Race* 151 (10th ed. 2006). See generally, Karen Brodtkin, *How Jews Became White Folks and What That Says About Race in America* 26–30 (1998) (describing the United States’ history of anti-Semitism at the turn of the twentieth century); Eric L. Goldstein, *The Price of Whiteness: Jews, Race, and American Identity* 1–2 (2006) (explaining the complicated relationship between Jewishness and whiteness and its development during the twentieth century).

<sup>99</sup> *Cohn*, 170 N.Y.S. at 407.

public accommodations.<sup>100</sup> When New York's highest court of appeal ruled that saloons were *not* contemplated by the statute,<sup>101</sup> the legislature responded by amending the public accommodations law to include saloons, ending a decade of battles between courts and the legislature about the law's reach.<sup>102</sup>

New York was not the only state with these definitional struggles; it was just the most conspicuous. Minnesota also wrestled with whether a saloon was a public accommodation at the turn of the century. A restrictive state supreme court ruling led to a statutory amendment of Minnesota's public accommodations law. In *Rhone v. Loomis*, the aggrieved patron was a former slave from Arkansas who was refused a beer by a saloonkeeper.<sup>103</sup> He prevailed at the trial level, but the saloonkeeper appealed and argued that the absence of the word "saloon" from the Minnesota public accommodations law made the trial judge's interpretation incorrect. The Supreme Court of Minnesota agreed. Amidst the growing temperance movement, the court feared enshrining a right to be served alcohol or understanding the legislature as wanting to criminalize bartenders' refusal to serve drinks.<sup>104</sup> It rejected the argument that saloons fell into the statute's language of "other places of public accommodation, refreshment, resort, or amusement."<sup>105</sup> Instead, it deployed the statutory rule of *ejusdem generis*, which limits the reach of general wording that follows a specific list.<sup>106</sup> The court concluded that the legislature enumerated all the covered places with "specificity" and even named "soda-water fountain[s]" and "ice-cream parlor[s]" but made no mention of saloons despite their prevalence.<sup>107</sup> For the court, this omission could not have been a mistake considering the prevalence of saloons. Going one policy step further, it believed the legislature likely omitted bars because it knew that "the promiscuous entertainment of persons of different races in places where intoxicating drinks are sold not

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<sup>100</sup> Paul Chevigny, *Gigs: Jazz and the Cabaret Laws in New York City* 33 (1991); see also Burton W. Peretti, *Nightclub City: Politics and Amusement in Manhattan* 18 (2007) (describing anti-Semitic understandings of nightlife in New York City).

<sup>101</sup> *Gibbs v. Arras Bros., Inc.*, 222 N.Y. 332, 332 (N.Y. 1918).

<sup>102</sup> *Equal Rights in Places of Public Accommodation, Resort or Amusement*, ch. 14, § 40, 1918 N.Y. Laws 61, 61–62 (adding saloons to Civil Rights Law § 40).

<sup>103</sup> 74 Minn. 200, 200 (1898); William D. Green, *Degrees of Freedom: The Origins of Civil Rights in Minnesota, 1865–1912*, at 244 (2015).

<sup>104</sup> Green, *supra* note 103, at 246–47.

<sup>105</sup> *Id.* at 247.

<sup>106</sup> *Rhone*, 74 Minn. at 204–05.

<sup>107</sup> Green, *supra* note 103, at 223, 246.



infrequently results in personal conflicts.”<sup>108</sup> One local Black newspaper would complain, “Since this damnable decision a number of saloons are refusing to serve Afro-Americans that did so before.”<sup>109</sup> The legislature would add saloons to the statute a year later.<sup>110</sup> Both Minnesota and New York demonstrate how some legislatures, despite their silence on saloons’ inclusion in public accommodations law, would respond immediately when courts attempted to eliminate these establishments from their purview.

Ohio followed Minnesota’s Supreme Court the next year in 1899 but would not have the same statutory modification. In a decision that spotlighted what would become the common practice of overcharging Blacks who now had access to public accommodations, the court rejected a discrimination challenge. The defendant was a Black man who was charged 30 cents rather than the standard 15 cents for a “whiskey cocktail,” for himself and his “colored companion.”<sup>111</sup> The Supreme Court of Ohio held that the establishment did not fall under the Ohio statute. Temperance concerns also informed this decision. The state’s tax on liquor, regulatory licensing scheme, and prohibition on sales to minors led the court to reason that alcohol consumption was “an evil” that the legislature sought to “discourage and restrict.”<sup>112</sup> Ohio courts were more flexible in other interpretations of the state’s public accommodations statute. Years later, a Black brother and sister were denied entry into a dancing pavilion that maintained separate hours for white and Black dancers.<sup>113</sup> The state’s intermediary court ruled that the establishment fell within the statute’s coverage even though it was not specifically enumerated.<sup>114</sup> A lower court also imposed liability in a case where the defendant dance hall owner refused entry to Jewish patrons and told them to “come some other day.”<sup>115</sup> In its recognition of the need for racial inclusion in these spaces, the court offered a statement that defied the anti-Semitic sentiments of the period when it noted that, “The most persistent race of which recorded history gives any account, has overcome too many

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<sup>108</sup> *Id.* at 245.

<sup>109</sup> *Id.* at 246.

<sup>110</sup> Act of Mar. 6, 1899, ch. 41, §1, 1899 Minn. Laws 38, 38–39.

<sup>111</sup> *Kellar v. Koerber*, 61 Ohio St. 388, 389 (1899).

<sup>112</sup> *Id.* at 391.

<sup>113</sup> *Youngstown Park & Falls St. Ry. Co. v. Tokus*, 4 Ohio App. 276, 277 (Ohio Ct. App. 1915).

<sup>114</sup> *Id.* at 276–82.

<sup>115</sup> *Anderson v. State*, 30 Ohio C.C. 510, 511 (Ohio Ct. App. 1918).

obstacles to be defeated of a right secured to it by statute by any of the excuses offered by the dancing master in this record.”<sup>116</sup>

Crucially, these questions about where bars and dance halls fit into public accommodations laws would reemerge decades later after Congress passed the Civil Rights Act of 1964, which was similarly silent on these establishments.<sup>117</sup> Besides these exceptions, state courts hearing discrimination claims in cases involving saloons, restaurants, and the like were surprisingly solicitous to the spirit of the laws and often ruled in favor of minority plaintiffs. Yet these successes were also tempered by a few limitations. First, they only entailed states that had public accommodations provisions, which were rare outside of the South. Second, these wins only capture instances that were actually litigated (which was prohibitive considering the paucity of civil rights lawyering). Third, they only reflect reported decisions. Still, the instances described in the next Section speak to the seriousness that courts and litigants brought to the issue of equality in public accommodations.

### *B. Early Successes*

Some of the early decisions involving bars and restaurants were surprisingly successful. The most notable challenge emanated out of a Reconstruction-Era revision to Louisiana’s public accommodations law. *Sauvinet v. Walker* involved an 1869 statute prohibiting discrimination in public accommodations.<sup>118</sup> Charles St. Albin Sauvinet was a fair-skinned, mixed-race civil sheriff in New Orleans. He was refused a drink at the defendant’s coffeehouse-saloon.<sup>119</sup> Using dignity-harm rhetoric of the day, the Supreme Court of Louisiana indicated that the plaintiff objected to the “indignity so wantonly offered to him” and noted how “his feelings have been greatly outraged” because of the “illegal and unwarranted act.”<sup>120</sup> The plaintiff requested an outstanding \$10,000 in damages.<sup>121</sup> The lower court rendered a judgment of \$1,000, which was upheld by the

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<sup>116</sup> *Id.* at 512; see also Leonard Dinnerstein, *Antisemitism in America* 58 (1994) (“Indeed, the racial components of antisemitic thought in America, always inherent yet mostly hidden, became obvious in the period known as the Progressive era.”).

<sup>117</sup> See *infra* Section I.D. (discussing Title II of the Civil Rights Act of 1964).

<sup>118</sup> 27 La. Ann. 14, 14–15 (1875), *aff’d*, 92 U.S. 90, 90–93 (1876).

<sup>119</sup> Justin A. Nystrom, *New Orleans After the Civil War: Race, Politics, and a New Birth of Freedom* 96–98 (2010).

<sup>120</sup> *Sauvinet*, 27 La. Ann. at 14.

<sup>121</sup> *Id.*

Supreme Court of Louisiana and drew the ire of the dissent.<sup>122</sup> Judge W.G. Wyly evoked the principle of equal treatment, the longstanding critique of anti-discrimination law's perceived racial preferences, and concern about the size of the awards all in one dissent. "I think the plaintiff had the right to be served at the barroom of the defendant," he wrote, "but I do not think the refusal ought to entitle him, a colored man, to greater damages than a white man ought to recover, it being no greater wrong to refuse a colored man than a white man."<sup>123</sup> Moreover, he reasoned:

I think the penalty wholly disproportionate to the offense. If, instead of refusing the plaintiff a drink merely, the defendant had seized a chair and beaten him half to death with it, the damages would probably not have exceeded \$250. Yet, is the right to enjoy the entertainment of a drinking saloon of greater moment or more sacred than the right of personal security from violence?

Grave offenders are rarely condemned to pay a larger penalty than \$1000, as the law is now administered; and yet, without any evidence of the ability of the defendant to pay the penalty, he is condemned to pay one thousand dollars for merely refusing to sell a drink, not probably worth more than twenty-five cents, and where no actual damage has resulted from the refusal.<sup>124</sup>

In 1875, the same year Congress passed the federal statute, the Supreme Court upheld the judgment in *Walker v. Sauvinet* and ruled that there was no federal question raised in the appeal.<sup>125</sup> Although the *Civil Rights Cases* mooted the Civil Rights Act of 1875, *Sauvinet* still stood for the proposition that states had the prerogative to pass anti-discrimination laws, which they continued to enact.

In 1887 when a Black plaintiff entered a Detroit establishment that consisted of a "restaurant side" and a "saloon side," he was instructed to go to the saloon side if he wanted to purchase anything.<sup>126</sup> The manager's instructions were rooted in internal guidelines that, again, would influence velvet rope discrimination for decades. "[T]he rules of the house" were that "colored people" could not be served at certain tables.<sup>127</sup>

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<sup>122</sup> Id. at 14–15.

<sup>123</sup> Id. at 15 (Wyly, J., dissenting).

<sup>124</sup> Id.

<sup>125</sup> *Walker v. Sauvinet*, 92 U.S. 90, 92–93 (1876).

<sup>126</sup> *Ferguson v. Gies*, 46 N.W. 718, 718 (Mich. 1890).

<sup>127</sup> Id.

In its ruling for the plaintiff, the court used language that was unfamiliar for a post-Reconstruction period typically defined as the “nadir” of race relations.<sup>128</sup> The court acknowledged that these laws sought to “modify and overcome the prejudices . . . of the white race against the colored race” and “place the latter upon an equal footing with the former.”<sup>129</sup> Using remedial language, the court stated: “if to be born [B]lack is a misfortune, then the law should lessen, rather than increase, the burden of the [B]lack man’s life.”<sup>130</sup>

A decade later, in 1897, the Supreme Court of Wisconsin came to a similar conclusion in a case that points to some of the features of velvet rope discrimination. The Black plaintiff sought service in “a public eating house and saloon” in Milwaukee with his white friend.<sup>131</sup> They experienced a version of waiting that can be race-neutral and happen in busy establishments but is also a feature of public accommodations discrimination that can be racially inflected. They waited “some 40 minutes for some one [sic] to take their order” to no avail, which caused them to leave and go elsewhere.<sup>132</sup> The defendant-proprietor presented a series of plausible arguments. He maintained that the place was busy and that they could not give personal attention to all their guests.<sup>133</sup> He pointed out that the plaintiff and his friend were served breakfast earlier that day.<sup>134</sup> He also argued that after the plaintiff’s initial complaint, he asked a waiter to serve them, but the waiter refused to do so for racial reasons.<sup>135</sup> The court rejected the circumstantial evidence and imposed the respondeat superior doctrine to find the defendant liable for the waiter’s act since it occurred during the course of his employment.<sup>136</sup> These early decisions seemed to portend a favorable set of conditions for state litigants challenging discrimination in public accommodations. However, the landscape would develop in a more mixed fashion.

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<sup>128</sup> See Rayford M. Logan, *The Negro in American Life and Thought: The Nadir, 1877–1901*, at 52 (1954).

<sup>129</sup> *Ferguson*, 46 N.W. at 719.

<sup>130</sup> *Id.* at 721.

<sup>131</sup> *Bryan v. Adler*, 72 N.W. 368, 368 (Wis. 1897).

<sup>132</sup> *Id.* at 369.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 369–70.

*C. Public Accommodations Wins and Losses in the Early Twentieth Century*

In the first half of the twentieth century, challenges to race and sex discrimination in saloons, restaurants, and nightclubs produced mixed outcomes. Importantly, these cases existed among a larger set of challenges to discrimination in public transportation, pools, parks, libraries, beaches, golf courses, department stores, skating rinks, and a host of other public spaces.<sup>137</sup> This Section briefly describes the legal world of velvet rope discrimination in the first half of the twentieth century. The varied outcomes during this period set the stage for federal intervention in the context of race discrimination and new state articulations of sex discrimination in the 1960s.

*1. Race*

In many instances, courts worked within anti-discrimination statutes and outside of them to uphold segregated public accommodations. A 1904 New York court would not provide relief to an African immigrant who was refused service at a saloon because the public accommodations law was interpreted as only covering citizens.<sup>138</sup> An Illinois court

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<sup>137</sup> See, e.g., Traci Parker, *Department Stores and the Black Freedom Movement: Workers, Consumers, and Civil Rights from the 1930s to the 1980s*, at 57–71 (2019) (discussing the “Don’t Buy Where You Can’t Work” movement); Wayne A. Wiegand & Shirley A. Wiegand, *The Desegregation of Public Libraries in the Jim Crow South: Civil Rights and Local Activism* 8 (2018) (explaining that *Brown v. Board of Education* “functioned as an open invitation to southern [B]lacks to serve as plaintiffs in a series of lawsuits to desegregate public facilities across the South”); David E. Goldberg, *The Retreats of Reconstruction: Race, Leisure, and the Politics of Segregation at the New Jersey Shore, 1865–1920*, at 18–21 (2017) (describing how Black protestors successfully integrated recreational venues at the Jersey shore through consumer protests); Victoria W. Wolcott, *Race, Riots, and Roller Coasters: The Struggle over Segregated Recreation in America* 88–89 (2012) (describing how, after *Brown v. Board of Education*, “activists became more emboldened to challenge recreational segregation nationally”); Jeff Wiltse, *Contested Waters: A Social History of Swimming Pools in America* 157–59 (2007) (describing efforts to desegregate pools in the North); George B. Kirsch, *Municipal Golf and Civil Rights in the United States, 1910–1965*, 92 *J. Afr. Am. Hist.* 371, 383–86 (2007) (explaining how the *Brown v. Board of Education* and *Dawson v. Mayor & City Council of Baltimore City* “decisions opened the door for a series of federal judicial rulings that outlawed racial discrimination on municipal golf courses in several southern cities”).

<sup>138</sup> *Fuller v. McDermott*, 87 N.Y.S. 536, 537 (N.Y. App. Term 1904). But see *Hubert v. Jose*, 132 N.Y.S. 811, 812 (N.Y. App. Div. 1912) (asserting in dicta that a showing of citizenship is not necessary for protection by the civil rights law without addressing its previous ruling on the issue).

problematized the state statute's use of the word "failure." That word, the court ruled, was passive, whereas a "denial" was active.<sup>139</sup> Rejecting a claim brought by a Black restaurant-goer alleging discrimination, it reasoned:

A failure upon the part of a restaurant keeper to serve a guest may be caused by physical inability, by a strike on the part of the cooks and waiters, by the demand being made outside of the hours when meals are prepared, or by some other sufficient reason not within the meaning of the statute.<sup>140</sup>

The Supreme Court of Louisiana not only upheld separate bars for white and Black patrons but ruled in 1909 that they could not be partitioned in the same building.<sup>141</sup> Kansas did not enumerate restaurants in its public accommodations statute,<sup>142</sup> and a 1924 court decision declined to read such an establishment into the law.<sup>143</sup> In 1944, a Utah court rejected the idea that restaurants could be collapsed into the common law category of innkeeper.<sup>144</sup> This decision precluded plaintiffs from bringing a swath of public accommodations discrimination suits in the state. In short, not only was there a lack of uniformity across states, but within specific jurisdictions, the boundaries of public accommodations laws were unclear.

At the same time, some courts ruled in favor of people who claimed that they did not receive equal access to bars, restaurants, and nightclubs. A 1934 Colorado court found discrimination where the Black plaintiff, upon entering a Denver restaurant with two white companions, was told, "It's no use of you all waiting here. I will serve these people, but you [the plaintiff] will have to eat in the kitchen if you want to eat here."<sup>145</sup> In 1939, a Connecticut court ruled in favor of the Black male plaintiff, who, along with his Black female companion, was overcharged for beer.<sup>146</sup> Two years later, an Ohio court would similarly strike down racial overcharging in public accommodations. In *McCrary v. Jones*, three Black plaintiffs went to a bar and ordered three beers to which the waiter

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<sup>139</sup> *Grace v. Moseley*, 112 Ill. App. 100, 102 (Ill. App. Ct. 1904).

<sup>140</sup> *Id.*

<sup>141</sup> *State ex rel. Tax Collector v. Falkenheiner*, 49 So. 214, 215 (La. 1909).

<sup>142</sup> Kan. Gen. Stat. § 3791 (1915) (repealed 1969).

<sup>143</sup> *State v. Brown*, 212 P. 663, 664 (Kan. 1923).

<sup>144</sup> *Nance v. Mayflower Tavern*, 150 P.2d 773, 774–75 (Utah 1944).

<sup>145</sup> *Crosswaith v. Bergin*, 35 P.2d 848, 848 (Colo. 1934).

<sup>146</sup> *Ross v. Schade*, 7 Conn. Supp. 443, 444–45 (Super. Ct. 1939).

responded, “Well, the place has changed hands and we don’t care to cater to mixed trade but if you persist in being served, I will serve you, it will cost you 50 [cents] a glass.”<sup>147</sup> The court rejected the defendant’s reference to the bar’s signage, which indicated that “[p]rices are subject to change without notice,” and ruled for the plaintiff.<sup>148</sup> That same year, a 1941 California court looked beyond the Black-white binary often found in these cases and awarded \$200 in damages to a Black couple who was refused service at a Chinese restaurant and bar.<sup>149</sup> The 1940s ended with a high-profile case involving a Washington restaurant’s denial of service to Black pianist Hazel Scott, who was also the wife of New York politician Adam Clayton Powell. The incident occurred in a small town in Washington after her train stopped because of snow.<sup>150</sup> It highlighted some of the interstate public accommodations challenges that minorities encountered and would be addressed by Title II of the Civil Rights Act. Scott and Powell filed the case in federal court, and although the tribunal rejected the Fourteenth Amendment claims for failure to state a cause of action, it found that the restaurant was a public accommodation.<sup>151</sup> The incident resulted in a \$325 judgment for the couple.<sup>152</sup>

Ultimately, the first half of the twentieth century produced a regulatory patchwork. Separate but equal dominated the South, whereas the rest of the country was comprised of differential statutory and judicial approaches to racial discrimination in public accommodations. The situation was arguably worse in the context of sex discrimination.

## 2. *Sex and Sexuality*

Legal challenges to discrimination based on sex and sexuality were minimal during the first half of the twentieth century. This is not because such discrimination did not exist, but because law and social norms made such challenges nonviable. As a matter of law, statutory protections against sex discrimination did not emerge until after the passage of the Civil Rights Act of 1964. As Deborah Dinner and Elizabeth Sepper

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<sup>147</sup> 39 N.E.2d 167, 169 (Ohio Ct. App. 1941).

<sup>148</sup> *Id.* at 171.

<sup>149</sup> *Evans v. Fong Poy*, 108 P.2d 942, 942–43 (Cal. Dist. Ct. App. 1941); *State Appeals Court Upholds Negro Rights*, S.F. Exam’r, Jan. 8, 1941, at B.

<sup>150</sup> *Suits Ask \$80,000 Under Civil Rights*, *Democrat & Chron.* (Rochester), Feb. 18, 1949, at 12.

<sup>151</sup> *Powell v. Utz*, 87 F. Supp. 811, 812–13, 816 (E.D. Wash. 1949).

<sup>152</sup> *Suit Defendants Ask Bankruptcy*, *Spokane Daily Chron.*, Aug. 9, 1950, at 3.

helpfully explain, sex-based discrimination in public accommodations was rooted in a host of social norms. Most notably, these norms included, amongst a host of other factors, a “separate-spheres ideology” that assigned women to the home and men to the market; the understanding of these places as masculine and only open to women to the extent that they were accompanied by men; and heteronormative ideas about the sexual vulnerability of white women.<sup>153</sup> But that is not to say that ideas about gender and sexuality did not filter through legal decisions during this period. The few decisions courts issued provide a window into this aspect of public accommodations discrimination.

Contemporary gender-based pricing in bars and restaurants is actually a recent development and stands in sharp contrast to early twentieth-century practices that often prohibited the sale of alcohol to women and excluded them from certain public accommodations unless they were in the company of men. Although such prohibitions received judicial endorsements as early as 1869,<sup>154</sup> the Supreme Court’s 1904 decision in *Cronin v. Adams* is illustrative.<sup>155</sup> In that case, a Denver ordinance prohibited “[e]ach and every liquor saloon, dram shop or tippling house keeper” from allowing women to enter and be supplied with liquor.<sup>156</sup> The Court ruled that the ordinance was a valid exercise of police powers and in its rejection of the appellee-saloonkeeper claim added, “What cause of action, then, has plaintiff in error? He is not a female nor delegated to champion any grievance females may have under the ordinance, if they have any.”<sup>157</sup> Herein laid a key issue in public accommodations law. Since no states prohibited discrimination based on sex, challenges were often brought by men and occasionally by women through other constitutional registers. Women of color lodged their own challenges, but they were typically through public accommodations laws that prohibited discrimination based on race.<sup>158</sup>

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<sup>153</sup> Sepper & Dinner, *supra* note 24, at 83.

<sup>154</sup> *Ex parte Smith*, 38 Cal. 702, 709–12 (1869) (upholding an ordinance prohibiting the presence of women in public drinking saloons after midnight as constitutional).

<sup>155</sup> 192 U.S. 108 (1904).

<sup>156</sup> *Id.* at 113.

<sup>157</sup> *Id.* at 114–15.

<sup>158</sup> See, e.g., *Wilson v. Razzetti*, 150 N.Y.S. 145, 145 (N.Y. App. Term 1914) (holding that restaurant owners who refused to serve a Black woman violated the New York Civil Rights Law and that the owners’ defense—that the reason they did not serve the plaintiff was that they were out of food—was “absurd and frivolous”); *Amos v. Prom, Inc.*, 117 F. Supp. 615, 618–19, 630 (N.D. Iowa 1954) (holding that a dance hall, which had refused to admit a Black woman, was a place of amusement under the Iowa Civil Rights Act); *Slack v. Atl. White*



There were two outliers to the Supreme Court's decision in *Cronin*. One preceded the decision, and one came immediately after it. Both rejected ordinances that restricted women's access to bars. While these decisions might be considered liberal for the period, they presaged how post-1960s courts would rely on paternalist logic even when they were striking down discriminatory practices. In 1900, Kentucky's highest court struck down a statute that made it unlawful for women to be in any establishment that sold alcohol, as well as "loaf or stand" within fifty feet of such establishments.<sup>159</sup> The ordinance punished by misdemeanor the bar owner as well as women who passed by the establishment. The purpose of the ordinance was to "regulate and control the sale of liquors" because "very disreputable, low, and vile women congregate in and about saloons . . ."<sup>160</sup> This kind of undesired assembly supposedly led to "affrays, fights, murder, and other crimes."<sup>161</sup> The court ruled that the ordinance was too sweeping because it captured women who happened to be walking by along with "well-behaved" women who had a lawful reason to go into such establishments.<sup>162</sup> Idaho's highest court also struck down a gender-based ordinance involving saloons. It used a similarly limiting line of reasoning when it stated, "[T]o say by an ordinance that a *wife or mother* may not enter a saloon, without subjecting herself to a fine . . . is beyond the legal power of the city."<sup>163</sup> These decisions were exceptions rather than the rule, as courts routinely upheld gender-based prohibitions in bars.

Judicial support of women's exclusion is unsurprising considering the gender norms of the early twentieth century. These decisions are significant not for shock value, but because of the sharp reversal these establishments and public accommodations law would undertake in the second half of the twentieth century. One tribunal insisted that "[t]he vicious tendency of the mingling of men and women in saloons" was "harmful to good morals."<sup>164</sup> Another court upheld a city ordinance that made it unlawful for a woman to drink in a saloon or be present in one for

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Tower Sys., Inc., 284 F.2d 746, 746 (4th Cir. 1960) (holding that the Interstate Commerce Act did not prohibit a privately owned restaurant from refusing to serve a Black woman).

<sup>159</sup> Gastenau v. Commonwealth, 56 S.W. 705, 705 (Ky. 1900).

<sup>160</sup> Id.

<sup>161</sup> Id.

<sup>162</sup> Id. at 705–06.

<sup>163</sup> State v. Nelson, 79 P. 79, 82 (Idaho 1905) (emphasis added).

<sup>164</sup> Laughlin v. Tillamook City, 147 P. 547, 547 (Or. 1915) (quoting State v. Baker, 92 P. 1076, 1078 (Or. 1907)).

more than five minutes. Violation of the law could lead to a fine or revocation of license unless it was shown that the woman was of “good repute,” sober, and had the consent of her husband.<sup>165</sup> When considered along with statutes and cases that prohibited women from being owners or employees in establishments that sold alcohol,<sup>166</sup> these decisions created an early twentieth-century environment that reinforced the idea that these public accommodations were inherently male. This kind of gendered orthodoxy could not be seriously challenged until the 1960s.

Before describing the tectonic shifts inaugurated by *Brown v. Board of Education*, an important set of comments about sexuality and its intersection with race and gender should be offered. In public accommodations where alcohol was served, long-standing assumptions about Black licentiousness and civility led courts to be overly gratuitous in their emphasis on Black plaintiffs’ conduct and respectability. Fears of sexual impropriety also surfaced. Judicial responses were mixed. In 1916, then-Judge Cardozo ruled that a restaurant’s liquor license could not be revoked because “women of loose character” dined or supped in the establishment.<sup>167</sup> But the Supreme Court of Florida upheld the jury verdict for slander against a defendant who claimed that the plaintiff, a “respectable” white man, “danced with negro women.”<sup>168</sup> *Stoumen v. Reilly* was not a challenge to discrimination, but about the suspension of a San Francisco bar’s liquor license.<sup>169</sup> The decision highlights how concerns about sexuality impacted the legal regulation of these spaces. The appellant, Sal Stoumen, was “a spunky straight man” who owned a popular gay bar and refused to pay the typical bribes such owners paid to

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<sup>165</sup> Commonwealth v. Price, 94 S.W. 32, 33 (Ky. 1906).

<sup>166</sup> Goesaert v. Cleary, 335 U.S. 464, 465–66 (1948) (validating a state law that only allowed men to be bartenders and stating, “The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic”); City of De Ridder v. Mangano, 171 So. 826, 827–28 (La. 1936) (upholding law prohibiting women’s employment in bars); State v. Mayor of Hoboken, 53 A. 693, 693 (N.J. 1902) (upholding a statute that prohibited women’s employment in saloons and stating, “It is difficult to imagine a course of conducting a liquor saloon more deserving of reprobation than the permitting the assembling there of women for the purpose of enticing customers”); Ex parte Felchin, 31 P. 224, 224 (Cal. 1892) (requiring a higher licensing fee for bars and saloons that employed women).

<sup>167</sup> In re Farley, 111 N.E. 479, 481 (N.Y. 1916).

<sup>168</sup> Sharp v. Bussey, 187 So. 779, 780 (Fla. 1939).

<sup>169</sup> Stoumen v. Reilly, 234 P.2d 969, 970 (Cal. 1951).

local police.<sup>170</sup> Stoumen utilized a more inclusive understanding of business owners' prerogatives and "fought police and liquor control inspectors for 18 years for the right to serve anyone he chose to in his establishment."<sup>171</sup> A local agency suspended the bar's license and found that he kept "a disorderly house" and that "persons of known homosexual tendencies patronized said premises and used said premises as a meeting place."<sup>172</sup> The court reversed the suspension of the license. It used public accommodations rationales to conclude that "[m]embers of the public of lawful age have a right to patronize a public restaurant and bar" and ruled that patrons could only be ejected for good cause.<sup>173</sup> A few years later, a District of Columbia court rejected the public accommodations challenge brought by an interracial couple consisting of a white woman and a Black man who entered a dance hall and were ordered to stop because "mixed dancing" was prohibited.<sup>174</sup> As the Civil Rights Movement took shape, activists and the federal government offered a more unified vision of public accommodations. The ensuing Women's Rights Movement helped produce independent and intersectional ideas about how sex, sexuality, gender, and race shaped state-level public accommodations laws.

#### *D. Title II and the New Public Accommodations Landscape*

*Brown v. Board of Education* overturned an almost six-decade-long judicial endorsement of "separate but equal" ideology and represented a watershed moment in American legal history.<sup>175</sup> Outside the worlds of constitutional law and anti-discrimination law, it is easy to both understate and overstate the magnitude of the opinion. The decision's focus on public education can overshadow the pervasive role of segregation across different areas of social life including but not limited to "movie theaters, dance halls, parks, swimming pools, beaches, barber shops and beauty parlors, drugstores, bowling alleys, restaurants, and

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<sup>170</sup> Tom Murray, *Preachers, Faggots, Perverts & Palaces*, S.F. Sentinel, Mar. 6, 1987, at 4. See generally Nan Alamilla Boyd, *Wide-Open Town: A History of Queer San Francisco to 1965* (2003) (discussing the hostile policing of bars and taverns, including harassment and intimidation by local police).

<sup>171</sup> Murray, *supra* note 170.

<sup>172</sup> *Stoumen*, 234 P.2d at 970.

<sup>173</sup> *Id.* at 971.

<sup>174</sup> *Tynes v. Gogos*, 144 A.2d 412, 413–15 (D.C. 1958).

<sup>175</sup> 347 U.S. 483, 488, 495 (1954).

cemeteries.”<sup>176</sup> Randall Kennedy adds, “[B]lack people were consigned to the back of the bus, directed to use distinct drinking fountains and telephone booths, excluded altogether from white schools and hospitals, permitted to visit zoos and museums only on certain days, confined to designated areas in courtrooms, and sworn in as witnesses using racially differentiated Bibles.”<sup>177</sup> But *Brown* was limited by a state action doctrine that focused on discrimination by public officials and did not necessarily extend to public accommodations.<sup>178</sup> This became one of the areas of struggle in the decade following *Brown*. The famous sit-ins, along with various boycotts and protests, drew attention to the issue. To be sure, this kind of direct action came much earlier, when a group of Black women in Washington, D.C., led in part by legal pioneer Pauli Murray, conducted sit-ins at a Washington D.C. restaurant in 1943 and 1944.<sup>179</sup> Civil rights leader and NAACP charter member Mary Church Terrell followed with a successful public accommodations suit brought under a District statute in 1953.<sup>180</sup> But the sit-ins of the 1960s were particularly effective because they produced a dizzying array of Supreme Court decisions in a short amount of time.<sup>181</sup> As Christopher Schmidt powerfully argues, sit-ins “exerted pressure on the cultural assumptions regarding the line between private and public action, expectations of government responsibility, and basic conceptions of social justice.”<sup>182</sup> The appalling images of young Birmingham students getting mauled by dogs and sprayed with firehoses—all because of a desire for equal access to public facilities—inspired an until-then reluctant President Kennedy into action.<sup>183</sup> He

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<sup>176</sup> Cybelle Fox & Thomas A. Guglielmo, *Defining America’s Racial Boundaries: Blacks, Mexicans, and European Immigrants, 1890–1945*, 118 *Am. J. Socio.* 327, 358 (2012).

<sup>177</sup> Randall Kennedy, *The Civil Rights Act’s Unsung Victory and How It Changed the South*, *Harper’s Mag.* (June 2014), <https://harpers.org/archive/2014/06/the-civil-rights-acts-unsung-victory/> [<https://perma.cc/M6EV-HM48>].

<sup>178</sup> *Id.*

<sup>179</sup> Lynne Olson, *Freedom’s Daughters: The Unsung Heroines of the Civil Rights Movement from 1830 to 1970*, at 19–20 (2001); Flora Bryant Brown, *NAACP Sponsored Sit-ins by Howard University Students in Washington, D.C., 1943–1944*, 85 *J. Negro Hist.* 274, 278 (2000).

<sup>180</sup> Olson, *supra* note 179, at 78–79.

<sup>181</sup> See, e.g., *Bell v. Maryland*, 378 U.S. 226 (1964); *Barr v. City of Columbia*, 378 U.S. 146 (1964); *Robinson v. Florida*, 378 U.S. 153 (1964); *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

<sup>182</sup> Christopher W. Schmidt, *The Sit-Ins: Protest and Legal Change in the Civil Rights Era* 182 (2018).

<sup>183</sup> Glenn T. Eskew, *But for Birmingham: The Local and National Movements in the Civil Rights Struggle* 312 (1997).

would go on to support a strong federal public accommodations law that became a signature feature of Lyndon Johnson's presidency: Title II of the Civil Rights Act of 1964.<sup>184</sup>

Title II would prohibit discrimination on the grounds of race, color, religion, or national origin in the “goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation.”<sup>185</sup> Sex was not included in this Title.<sup>186</sup> In addition to Title II's requirement that establishments offer full and equal access, three other aspects of the Title are relevant for this Article's discussion. First, Title II enumerated a list of establishments that were considered public accommodations. The Act specifically named “restaurant[s]” but did not mention clubs, bars, or taverns; the closest applicable language in the provision referred to establishments “principally engaged in selling food for consumption on the premises,” any “concert hall” or “place . . . of entertainment.”<sup>187</sup> The applicability of this language would be a subject of dispute immediately after Title II passed.<sup>188</sup> Second and relatedly, the Act was specific about covering establishments that affected interstate commerce. This was the constitutional hook that allowed Congress to evade the problem posed by the 1883 *Civil Rights Cases*.<sup>189</sup> The interstate commerce provision ultimately sustained the law when the Court rejected challenges brought by southern public accommodations owners the same year Title II was passed.<sup>190</sup> The operative language, particularly given the absence of language around bars and nightclubs, was the statute's coverage of establishments that “serve[] or offer[] to serve interstate travelers,” accommodations where “a substantial portion of the food which i[s] serve[d] . . . moved in commerce,” and entities that provide “sources of entertainment” that “move in commerce.”<sup>191</sup> This commerce component was also a heavily litigated issue in the 1960s and 1970s as

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<sup>184</sup> 42 U.S.C. § 2000a.

<sup>185</sup> *Id.* § 2000a(a).

<sup>186</sup> See *id.* § 2000a; discussion *infra* Section II.A. (describing the work of activists in response to the non-coverage of sex discrimination in the Act).

<sup>187</sup> 42 U.S.C. § 2000a(b).

<sup>188</sup> See sources cited *infra* note 195 (detailing the various cases in which the categorization of various bars, taverns, and establishments was disputed).

<sup>189</sup> Harry T. Quick, Note, Public Accommodations: A Justification of Title II of the Civil Rights Act of 1964, 16 *Case W. Rsrv. L. Rev.* 660, 683 (1965).

<sup>190</sup> 42 U.S.C. § 2000a(c); *Katzenbach v. McClung*, 379 U.S. 294, 298, 305 (1964); *Heart of Atl. Motel, Inc. v. United States*, 379 U.S. 241, 243, 247–48, 261–62 (1964).

<sup>191</sup> 42 U.S.C. § 2000a(c).

courts revisited the issue of what constituted a public accommodation.<sup>192</sup> Finally, Title II excluded private clubs and establishments that are “not in fact open to the public,” which is language some public accommodations owners attempted to find shelter in when they excluded minorities from their businesses.<sup>193</sup>

It was unclear whether Title II would extend to bars and nightclubs due to the provision’s reliance on the Commerce Clause and equivocal legislative history.<sup>194</sup> In a few instances, owners of bars and lounges seized on this ambiguity when accused of violating Title II. In a case that was denied certiorari, the U.S. Court of Appeals for the Tenth Circuit ruled that a tavern that sold beer, but not food, was not covered.<sup>195</sup> Like tribunals before them, courts used the statutory interpretation rule of *ejusdem generis*—in this instance Title II’s indefinite term of “places of entertainment”—to exclude bars from coverage.<sup>196</sup> Ultimately, these decisions would become outliers as the subsequent cases in federal courts rejected this view,<sup>197</sup> and the Supreme Court would subsequently call for

<sup>192</sup> See sources cited *infra* note 197 (discussing which establishments were deemed to be a place of public accommodation by various courts).

<sup>193</sup> 42 U.S.C. § 2000a(e).

<sup>194</sup> Senator Magnuson, a key shepherd of the bill, noted:

As a general rule, establishments of this kind will not come within the scope of the title. But a bar or nightclub physically located in a covered hotel will be covered, if it is open to patrons of the hotel. A nightclub might also be covered . . . if it customarily offers entertainment which moves in interstate commerce.

110 Cong. Rec. 7,407 (1964).

<sup>195</sup> *Cuevas v. Sdrales*, 344 F.2d 1019, 1020, 1023 (10th Cir. 1965), cert. denied, 382 U.S. 1014 (1966); see also *Robertson v. Johnston*, 249 F. Supp. 618, 620–21 (E.D. La. 1966) (holding that a bar or nightclub that served only drinks was not a “restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises” within the public accommodations provisions of the Civil Rights Act of 1964), rev’d on other grounds, 376 F.2d 43 (5th Cir. 1967); *Selden v. Topaz 1-2-3 Lounge, Inc.*, 447 F.2d 165, 165 (5th Cir. 1971) (holding that a lounge that did not serve food or offer entertainment did not fall under the Civil Rights Act of 1964). But see *United States v. DeRosier*, 473 F.2d 749, 750–52 (5th Cir. 1973) (ruling that a neighborhood bar-tavern that derived a small portion of its total business from mechanical amusement devices that had moved in interstate commerce was a “place of entertainment” within the meaning of the Civil Rights Act of 1964).

<sup>196</sup> See discussion *supra* Section I.A (discussing the conflicting approaches and disputes regarding interpretation between different courts and jurisdictions).

<sup>197</sup> *DeRosier*, 473 F.2d at 750–52; *United States v. Vizena*, 342 F. Supp. 553, 554 (W.D. La. 1972) (holding that a bar that provided a juke box and pool table for amusement of its patrons was a “place of entertainment” within the Civil Rights Act); *United States v. Deetjen*, 356 F. Supp. 688, 689–90 (S.D. Fla. 1973) (finding that a Florida bar was a public accommodation under Title II because the alcoholic beverages, television, piano, and juke box were manufactured out of state and affected commerce); *United States v. Purkey*, 347 F. Supp.

a robust understanding of Title II's place-of-entertainment provision.<sup>198</sup> The end of the 1960s provided more clarity about what constituted public accommodations discrimination, and the only outstanding issues seemed to be implementation and enforcement. Compliance—at least in the context of bars, restaurants, and nightclubs—would not come as easy. Meanwhile, an intrepid group of women activists would come to challenge gender politics as usual and fight to widen what was still a narrow understanding of public accommodations discrimination.

## II. THE FLOWERING OF VELVET ROPE DISCRIMINATION

The century between the Civil War and the Civil Rights Movement gradually produced the public accommodations landscape we have today. This area evolved from the common law's allowance of business owners' right to refuse service (with some exceptions) to a regime where governments designated race, color, sex, religion, national origin as categories that could not be used to deny equal access to and enjoyment of public space. This Part describes how new and modified prohibitions on race and sex discrimination in bars, restaurants, and nightclubs were developed, interpreted, and enforced. It begins by discussing how feminist legal advocacy spurred state-level prohibitions of sex discrimination in public accommodations due to Title II's non-coverage of the category. It also describes different ways states responded to these new laws. Integral to this discussion is how courts' varied treatment of gender-based pricing produced a status quo that allowed velvet rope discrimination to thrive. The second Section describes how resistance to Title II and state-based analogs similarly produced an environment where dress codes would emerge as a central feature of velvet rope discrimination.

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1286, 1287 (E.D. Tenn. 1971) (concluding that the Civil Rights Act extended to a neighborhood tavern that practiced racial discrimination and contained a "juke box, records, pinball machine and bowling machine which were manufactured out-of-state"); *Nanez v. Ritger*, 304 F. Supp. 354, 356 (E.D. Wis. 1969) (ruling that a tavern-restaurant is likely a "place of public accommodation" under a civil rights statute); *United States by Clark v. Fraley*, 282 F. Supp. 948, 952, 954 (M.D.N.C. 1968) (holding that a bar was covered under Title II because it had the characteristics of a restaurant and held itself out as one); *Fazzio Real Estate Co. v. Adams*, 396 F.2d 146, 149, 150 (5th Cir. 1968) (holding that although bars, per se, are not covered by the Civil Rights Act of 1964, they may be covered where beer is served in conjunction with food).

<sup>198</sup> *Daniel v. Paul*, 395 U.S. 298, 306 (1969).

*A. Sex Discrimination Laws and Gender-Based Pricing*

Title II did not include a prohibition on sex discrimination, and there are no agreed-upon reasons for why.<sup>199</sup> Nevertheless, after the passage of the Act, women’s rights activists wasted no time attacking the sex discrimination that went relatively unabated for more than a century. Bars, restaurants, nightclubs, and the assumptions that came with all three were important targets. Many of these activists “reasoned from race,” to use Serena Mayeri’s construction, and deployed race analogies in their political and legal advocacy for sex equality.<sup>200</sup> Faith Seidenberg was a public interest leader who embodied this strategy. She served as an attorney for the Congress of Racial Equality during the Civil Rights Movement, sat on the Executive Board of the ACLU (where she founded the Women’s Legal Defense Fund), and was a member of the National Organization for Women—an interracial group that included activists such as Pauli Murray, Betty Friedan, and Shirley Chisholm.<sup>201</sup> In an article that discussed one of NOW’s first major legal challenges—a discrimination case involving a Syracuse hotel bar that refused to serve a woman because she was not accompanied by a man—Seidenberg presented Title II-like racial and religious analogies and stated, “If the hotel put up a sign ‘No Jews Allowed’, or ‘No Negroes Allowed’ this would be offensive to a great many people, but ‘No Women Allowed’ somehow seems all right to most.”<sup>202</sup> In that case, the court refused to read

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<sup>199</sup> See Paulson, *supra* note 24, at 491 (citing Barbara Allen Babcock, Ann E. Freedman, Eleanor Holmes Norton & Susan C. Ross, *Sex Discrimination and the Law: Causes and Remedies* 1037 (1975)) (“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.”). Other speculative guesses point to civil rights leaders’ privileging of race, the existing state-based frameworks that focused on race, the uncertainty around whether the bill would pass, and fear about what including sex might mean for its passage. See generally Janet Dewart Bell, *Lighting the Fires of Freedom: African American Women in the Civil Rights Movement* (2018) (discussing the role of Black women in civil rights activism and the interplay between sex and race discrimination); Clay Risen, *The Bill of the Century: The Epic Battle for the Civil Rights Act* (2014) (explicating issues with the bill that stoked worries and uncertainty about its passing).

<sup>200</sup> Serena Mayeri, *Reasoning from Race: Feminism, Law, and the Civil Rights Revolution* 106–43 (2011).

<sup>201</sup> Sepper & Dinner, *supra* note 24, at 101; Maryann Barakso, *Governing NOW: Grassroots Activism in the National Organization for Women* 12, 45 (2004).

<sup>202</sup> Faith A. Seidenberg, *The Wave of the Future — NOW*, 21 *Cornell L. F.* 2, 2 (1969); see also Grossman, *supra* note 24, at 3 (“[N]o court would countenance a bar’s offering of ‘whites’ night’ as a legitimate means to entice white customers, nor would any court think that the



sex into Title II and curtly stated that it would “not gratuitously do what Congress has not seen fit to do.”<sup>203</sup> But this was only one of a few forthcoming challenges to discrimination in bars and restaurants.

A year later, Seidenberg and NOW commenced a successful § 1983 action against McSorley’s Old Ale House.<sup>204</sup> This Manhattan-based Irish saloon had a 115-year practice of only serving men. The court ruled that the state’s annual license renewal scheme for a public accommodation with an openly discriminatory practice constituted state action and held that the policy of excluding women violated the Equal Protection Clause.<sup>205</sup> The court found no rational basis for distinguishing between men and women as customers. It rejected the saloon’s argument that men had preferences “for a haven to which they may retreat from the watchful eye of wives or womanhood.”<sup>206</sup> The court’s opinion also reflected courts’ growing recognition of sexism. It added, “Outdated images of bars as dens of coarseness . . . and of women as peculiarly delicate and impressionable creatures in need of protection from the rough and tumble of unvarnished humanity will no longer justify sexual separatism.”<sup>207</sup> *Seidenberg v. McSorleys’ Old Ale House* provided a framework for future cases. Some courts relied on the decision to find discrimination in similar restaurant policies.<sup>208</sup> Others cited *Seidenberg* when adjudicating cases involving establishments that refused to serve women during lunch on business days.<sup>209</sup> The Supreme Court cited the decision when it invalidated a state alcohol law premised on invidious gender discrimination.<sup>210</sup> *Seidenberg* was an early example of cases in the 1970s that affirmed women’s right to equal enjoyment of bars—some of which existed outside of public accommodations law and entailed decisions involving women’s ownership and employment in these spaces.<sup>211</sup> In short, *Seidenberg*

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offering of ‘[B]lacks’ night’ on another day of the week would cure its discriminatory impact. Yet courts have entertained both these possibilities for sex-specific discounts.”)

<sup>203</sup> *DeCrow v. Hotel Syracuse Corp.*, 288 F. Supp. 530, 532 (N.D.N.Y. 1968).

<sup>204</sup> *Seidenberg v. McSorleys’ Old Ale House*, 317 F. Supp. 593, 594 (S.D.N.Y. 1970).

<sup>205</sup> *Id.* at 599.

<sup>206</sup> *Id.* at 605.

<sup>207</sup> *Id.* at 606 (footnote omitted).

<sup>208</sup> *Johnson v. Heinemann Candy Co.*, 402 F. Supp. 714, 718 (E.D. Wis. 1975); *Women's Liberation Union of Rhode Island v. Israel*, 512 F.2d 106, 108–09 (1st Cir. 1975).

<sup>209</sup> *Bennett v. Dyer’s Chop House*, 350 F. Supp. 153, 154–55 (N.D. Ohio 1972) (citing *Seidenberg*, 317 F. Supp. at 603); see also *Sepper & Dinner*, *supra* note 24, at 105–14.

<sup>210</sup> *Craig v. Boren*, 429 U.S. 190, 208 (1976) (citing *Seidenberg*, 317 F. Supp. 593).

<sup>211</sup> *White v. Fleming*, 522 F.2d 730, 731, 733, 736–37 (7th Cir. 1975) (ruling that a city ordinance that prohibited female employees from sitting with male patrons or standing behind

helped unsettle assumptions about women's unescorted presence in public spaces and accommodations.

Changing legal, economic, and social conditions also helped facilitate women's independent attendance at bars, restaurants, and nightclubs. Beginning with Pittsburgh and Colorado in 1969, and continuing through the 1970s, states and municipalities codified prohibitions on sex discrimination in public accommodations.<sup>212</sup> This was a far cry from the statutory amendment to Title II that feminist leaders desired, but created a regulatory framework where one did not previously exist. Supreme Court decisions that engaged questions of sexual freedom and bodily autonomy also had implications for bars, restaurants, and nightclubs—all of which historically served as important sites of courtship and romantic mating.<sup>213</sup> Women's increased entry into the workforce was noteworthy too.<sup>214</sup> This form of participation in the market diminished the financial dependency into which employment discrimination, confinement to the domestic field, and courtship practices often conscripted women, and shifted social norms. Though women have always worked,<sup>215</sup> this new economic freedom gelled neatly with the ideological independence that

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a bar was unconstitutional); *Daugherty v. Daley*, 370 F. Supp. 338, 340–41 (N.D. Ill. 1974) (striking down an Illinois statute that prohibited female employees from soliciting the purchases of drinks and prohibited anyone from serving female employees drinks purchased by male patrons); *Sail'er Inn v. Kirby*, 485 P.2d 529, 542–43 (Cal. 1971) (citing *Seidenberg*, 308 F. Supp. at 1260); *Commonwealth, Alcoholic Beverage Control Bd. v. Burke*, 481 S.W.2d 52, 54 (Ky. 1972); *Paterson Tavern & Grill Owners Ass'n v. Borough of Hawthorne*, 270 A.2d 628, 630–31 (N.J. 1970) (citing *Seidenberg*, 308 F. Supp. at 1260).

<sup>212</sup> *Sepper & Dinner*, supra note 24, at 104; *Lerman & Sanderson*, supra note 24, at 264–65.

<sup>213</sup> See Melissa Murray, *Griswold's Criminal Law*, 47 Conn. L. Rev. 1045, 1072 (2015) (noting that the 1965 decision *Griswold v. Connecticut* is “credited with helping to transform society from one in which the state demanded compliance with majoritarian sexual norms to one in which the state respected some degree of sexual autonomy”); see also Daphne Spain, *Constructive Feminism: Women's Spaces and Women's Rights in the American City* 12–16 (2016) (describing the 1970s development of feminists' “free spaces” such as bookstores, clinics, and women's centers, which reinforced feminists' independence and self-determination); Susan Frelich Appleton, *The Forgotten Family Law of Eisenstadt v. Baird*, 28 Yale J.L. & Feminism 1, 12–16 (2016) (arguing that the 1972 case *Eisenstadt v. Baird* challenged ideas about illegitimacy, family planning, and marriage).

<sup>214</sup> Julia Kirk Blackwelder, *Now Hiring: The Feminization of Work in the United States, 1900–1995*, at 177–204 (1997) (describing women's participation in the workforce in the 1970s).

<sup>215</sup> Alice Kessler-Harris, *Women Have Always Worked: A Concise History* 1–16 (2d ed. 2018); Vicki L. Ruiz, *From Out of the Shadows: Mexican Women in Twentieth-Century America* 72–98 (2008); Evelyn Nakano Glenn, *Unequal Freedom: How Race and Gender Shaped American Citizenship and Labor* 1–3 (2002); Tera W. Hunter, *To 'Joy My Freedom: Southern Black Women's Lives and Labors After the Civil War* 44–73 (1998).

the women's movement augmented.<sup>216</sup> Public accommodations owners seized on this economic and ideological autonomy by suddenly welcoming women in ways that would have seemed almost unfathomable two decades earlier.

In the 1970s, bars, restaurants, and "discotheques" responded to evolving sexual mores by using gender-based pricing schemes to induce women into their establishments.<sup>217</sup> Oftentimes referred to as "ladies' night," gender-based pricing typically manifests through reduced entry costs for women or lower prices for items such as food or drinks. Sometimes it takes shape through traditional marketing or through more informal mechanisms, as indicated in the example offered in the Introduction.<sup>218</sup> The public accommodations volte-face here cannot be understated.

Women went from being excluded or conditionally accepted when men accompanied them to being independently welcomed (with inclusion being subject to other social categories such as race or sexual orientation). These schemes were generally about drumming up business. Sometimes this business generation was motivated by an understanding that women were traditionally excluded from these spaces. In other instances, discounts were motivated by a recognition of women's new purchasing power. More often than not, these public accommodations' economic rationales were based on the heteronormative assumption that inducing women into these establishments would lead to increased presence by men, who would cross-subsidize the discounts.<sup>219</sup>

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<sup>216</sup> Sepper & Dinner, *supra* note 24, at 115 (2019) (noting that "[s]ex equality in public accommodations required independence from attachment to men" and describing how women who protested discrimination in these spaces "demanded legal recognition as individuals without sexual attachment to a man as a physical companion or economic proxy").

<sup>217</sup> Reginald G. Smart, *The Happy Hour Experiment in North America*, 23 *Contemp. Drug Probs.* 291, 292–93 (1996) (discussing how in the early 1970s, many bars, taverns, and restaurants "initiated a variety of sales programs to attract more customers and increase profits" and how some these included "[r]eductions in prices or free beverages for a particular type of patron, usually for women" and concluding how "[s]uch reductions may possibly have been based upon the assumption that many women would not go to bars without special inducements").

<sup>218</sup> See sources cited *supra* notes 10–12 (highlighting the discretion placed with bouncers to charge or not charge women cover to enter a club).

<sup>219</sup> Julia Bauer, *Despite Law, Bars Still Offer Women Free Booze*, *Herald*, Mar. 8, 1974, at 4 (offering comments from a female patron who observed, "The men probably drink enough to make up for the girls' free drinks"); Robert Schwartzman, *Ladies' Night Unfair—He Says*, *Fla. Today*, Dec. 16, 1974, at 10C (male employee discussing the subsidization); David Green, *Chivalry Lost: All Dinners May Be Created Equal-Cafe Official*, *Ithaca J.*, Feb. 7, 1976, at 3.

The emergence of this velvet rope discrimination was not lost on the media or the general public. Views spanned the ideological gamut and ranged from uncritical support to thoughtful skepticism. In 1971, one Iowa bar patron objected to being charged 85 cents for a drink at a ladies' night event when women were charged only 40 cents. He asked the bartender about this price differential and the server exploded, "It's for BROADS! . . . You might get it if you had more hair."<sup>220</sup> Some voiced concerns about the sex stereotyping that came with gender-based pricing. One Missouri man complained, "It's like the bars are pimping for men. One bar owner actually said ladies' night is a service to *me*. It centralizes the ladies. I could see myself riding in on my stallion and cutting me a nice little heifer out of the herd."<sup>221</sup> These reservations may have been hollow or sincere recognitions of the legal arguments feminist activists made in the 1960s and 1970s. They could have been pure weaponization of anti-discrimination logics by a group of people who were not considered the beneficiaries of public accommodations laws. A group of women in Miami questioned the underlying bases and veracity of ladies' night promotions. They highlighted the presumption of sexual availability—particularly in bars and nightclubs—that was implicit in these pricing arrangements. They noted how married women often felt uncomfortable in these spaces, which defied the essence of the promotions.<sup>222</sup> Questioning what some believed was a faux admiration via marketing, one woman queried, "Wouldn't it be great if 'ladies' night' really were ladies' night?"<sup>223</sup> Despite these varying views, the crucial question was what would the legal actors responsible for implementing and enforcing public accommodations laws think?

During the 1970s and 1980s, three approaches to the legal regulation of gender-based pricing emerged. First, some states did nothing. These jurisdictions either did not have prohibitions on sex discrimination in their public accommodations statutes or had such laws but did not have cases that worked their way to courts. These states left regulation to municipal authorities or administrative agencies tasked with regulating

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<sup>220</sup> William T. Kong, 'Ladies Night' Illegal, Rights Unit Rules, Des Moines Trib., Feb. 18, 1971, at 1.

<sup>221</sup> Elaine Viets, He Won't Drink to Ladies Night, St. Louis Post-Dispatch, Feb. 3, 1980, at 1–121 (emphasis added).

<sup>222</sup> Nancy Webb Hatton, Ladies' Night—No Hassle, Hustle, Mia. Herald, May 13, 1978, at 2D.

<sup>223</sup> *Id.*

discrimination. In these instances, agencies sometimes investigated gender-based pricing. However, they would only issue weakly worded pronouncements about the illegality of the practice while also admitting their inability or disinterest in regulating it.<sup>224</sup> The other two approaches, which comprise the next two Subsections, involved judicial validation of gender-based pricing and rejections of the practice. Although some of these cases specifically involved bars, restaurants, and nightclubs, they all had implications beyond these spaces.

### *1. Judicial Approval and Benevolent Sexism*

One set of states was unbothered by gender-based pricing and found the practice to be legally permissible. Michigan led things off. A little more than a week after the Supreme Court of the United States issued its own ruling on reverse discrimination,<sup>225</sup> a Michigan court considered a case involving a class of men who argued that a tennis club's lower annual membership fee for women violated the state's public accommodations statute. In *Magid v. Oak Park Racquet Club Associates*, the court glossed over the statute's requirement of "full and equal" access to public accommodations and ruled that the different pricing was not technically a "withholding, refusal or denial of accommodations" under the language of the statute.<sup>226</sup>

1981 generated three more important decisions that upheld gender-based pricing. These cases evolved from the semantic and incomplete readings of anti-discrimination statutes to slow concessions to business owners' gender-based economic rationales. In one, the same Michigan court upheld the decision in *Magid*. It accepted the defendant-racquet

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<sup>224</sup> Bar 'Ladies Nights' Illegal, Official Says, *Star Trib. (Minn.)*, Dec. 9, 1972, at 5 (quoting the Deputy Director of the Minneapolis Civil Rights Department claiming that the agency had "many, many, many more important priorities" than to devote much time to ladies specials, but would respond to discrimination as it is called to the agency's attention); 'Ladies Night' Soon May Not Be a Familiar Cry in Idaho's Bars, *Times-News (Twin Falls)*, Jan. 28, 1980, at 14 (discussing how the Idaho Commission on Rights would use informal means to persuade businesses to eliminate discriminatory practices and how the commission had failed to pursue cases because of "limited staff and funds" and because the damages were lower than other discriminatory activity brought to its attention).

<sup>225</sup> *Regents Univ. Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (holding that since the medical school could not "carry its burden of proving that, but for the existence of its unlawful special admissions program" the white applicant would not have been admitted, the applicant was entitled to admission).

<sup>226</sup> *Magid v. Oak Park Racquet Club Assocs.*, 269 N.W.2d 661, 622, 663–64 (Mich. Ct. App. 1978).

club's claim that the differential fee was justified by the "disparate costs of providing separate locker room, separate toilet and other gender-related facilities."<sup>227</sup>

Illinois followed Michigan's lead. The state had a dramshop statute that required full and equal enjoyment of public accommodations that served alcohol.<sup>228</sup> The court concluded that the ladies' night special in dispute was not designed to discourage men from patronizing the establishment, which would have denied them equal enjoyment.<sup>229</sup> Instead, the court reasoned that since men paid the regular established price there was no violation.<sup>230</sup> The price for women, the court noted, "[W]as a price reduced to a nominal sum and one obviously set for the purpose of encouraging their patronage."<sup>231</sup> The court added:

[T]o prohibit the practice of on occasion offering drinks at reduced prices to females would, by analogy, require holding it to prohibit a similar offering to (1) persons of Irish descent on St. Patrick's Day, (2) persons in the military or naval service on Armed Forces Day, (3) certain conventioners when conventions are being held in the city, (4) senior citizens, or (5) members of any other groups. Almost all businesses, on occasion, offer reduced prices to some sort of group, usually for the purpose of obtaining their business.<sup>232</sup>

Besides having an arguably narrow understanding of equal enjoyment, the court employed a parade of horribles rhetoric common in disputes about velvet rope discrimination that obscured the fact of legally protected categories.<sup>233</sup>

Washington completed this trifecta of 1981 decisions green-lighting gender-based pricing.<sup>234</sup> When the Seattle Supersonics basketball team offered a "ladies' night" discount to women for Sunday basketball games, one man attended the game with his wife and attempted to get two discounted tickets (one for her and one for himself). He was denied and sued. The court rejected the plaintiff's sex discrimination claim and ruled

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<sup>227</sup> *Tucich v. Dearborn Indoor Racquet Club*, 309 N.W.2d 615, 617 (Mich. Ct. App. 1981).

<sup>228</sup> *Civil Rights in Licensed Premises; Distributor Sales to Non-Licensees*, 235 Ill. Comp. Stat. 5/6-17 (1990).

<sup>229</sup> *Dock Club v. Ill. Liquor Control Comm'n*, 428 N.E.2d 735, 738 (Ill. App. Ct. 1981).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *MacLean v. First Nw. Indus. of Am., Inc.*, 635 P.2d 683, 686 (Wash. 1981).

that he benefitted from the scheme by receiving an overall price discount for his wife and himself. The court accepted the defendant's argument that "women do not manifest the same interest in basketball that men do."<sup>235</sup> The Washington court used the rationale offered by its sister tribunals in Michigan and Illinois: that there was no active discouragement of men's attendance, which made the gender-based pricing permissible. The court found "no reason for judicial intervention in ticket-pricing policies which are designed not to exclude anyone but to encourage attendance."<sup>236</sup>

Overall, these decisions produced advantages and drawbacks. The Washington and Michigan courts made gestures toward an understanding of women's historical exclusion—in tennis and basketball—and ruled that efforts to invite their participation in these areas were reasonable.<sup>237</sup> They also identified what some imagined to be vexatious litigation brought by plaintiffs eagerly seeking to use newly minted sex-based discrimination laws for their benefit. At the same time, these decisions embodied what some psychologists and gender scholars refer to as benevolent sexism, which refers to "a set of interrelated attitudes toward women that are sexist in terms of viewing women stereotypically and in restricted roles but that are subjectively positive in feeling tone (for the perceiver)."<sup>238</sup> Although these decisions did not create the justifications for gender-based pricing, they gave these explanations legal cover moving forward.

Although the Washington and Michigan courts ruled in public accommodations cases that did not involve bars, restaurants, or clubs,

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<sup>235</sup> Id. at 684.

<sup>236</sup> Id. at 687.

<sup>237</sup> See Dave Zirin, *What's My Name, Fool?: Sports and Resistance in the United States* 12 (2005) (noting that Billie Jean King "became a giant protesting the exclusion and second-class citizenship of female athletes"); Susan K. Cahn, *Coming on Strong: Gender and Sexuality in Twentieth-Century Women's Sport* 2–3 (1994) (describing the constraints that women athletes and women's sports have faced in modern American history).

<sup>238</sup> Peter Glick & Susan T. Fiske, *The Ambivalent Sexism Inventory: Differentiating Hostile and Benevolent Sexism*, 70 *J. Personality & Soc. Psych.* 491, 491 (1996); see also Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 *Va. L. Rev.* 1893, 1917 (2009) (suggesting that benevolent sexism satisfies "people's need to think of themselves as egalitarian, while at the same time helping them to rationalize or obscure their more negative or patronizing views"); Matthew D. Hammond, Chris G. Sibley & Nickola C. Overall, *The Allure of Sexism: Psychological Entitlement Fosters Women's Endorsement of Benevolent Sexism over Time*, 5 *Soc. Psych. & Personality Sci.* 422, 423–24 (2013) (arguing that the benefits of benevolent sexism lead women to endorse it).

their analyses of gender-based financial inducements gained purchase in these spaces. When considered with the Illinois court's specific consideration of bars, all of these decisions offered limited understandings of *who* benefits from gender-based pricing and the exclusionary implications of these schemes. As discussed in Part IV, these decisions provided legal fodder for public accommodations seeking to defend velvet rope discrimination.

## 2. *Judicial Rejection and Stringency*

Another set of cases struck down gender-based pricing with no misgivings. These decisions took an anti-classification approach to gender-based pricing. Anti-classification is a vision of equal protection law that condemns government classifications based on legally protected categories.<sup>239</sup> It is often juxtaposed with the anti-subordination principle, which suggests that it is wrong for the state to engage in practices that enforce the subjugation of historically oppressed groups.<sup>240</sup> Although both are typically understood in the world of constitutional law, as many scholars have highlighted, both have been transported to and applied in statutory anti-discrimination law.<sup>241</sup> Gender-based pricing decisions involving anti-classification principles began in 1984 and built on each other in consecutive years.

In the first case, the Pennsylvania Liquor Control Board suspended a bar's license because it exempted two women from the \$1 cover charge, among other reasons.<sup>242</sup> The trial court ruled that the board was "nit-picking" and ignored more substantial offenses; the court trivialized the discrimination charges as akin to "stomping on a mouse in the kitchen when there's a tiger at the door."<sup>243</sup> The Commonwealth Court of Pennsylvania—the court of last resort for these administrative claims—reversed. It offered a strict anti-classification approach that would be followed by other tribunals. It noted that the Pennsylvania legislature

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<sup>239</sup> See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 *Harv. L. Rev.* 1470, 1534 (2004).

<sup>240</sup> *Id.* at 1472–73.

<sup>241</sup> See Murray *supra* note 25, at 294–96; Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 *Ala. L. Rev.* 955, 957–58 (2012); Jessica A. Clarke, *Protected Class Gatekeeping*, 92 *N.Y.U. L. Rev.* 101, 141–42 (2017); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 *N.Y.U. L. Rev.* 83, 128 (2010).

<sup>242</sup> *Pa. Liquor Control Bd. v. Dobrinoff*, 471 A.2d 941, 943–44 (Pa. Commw. Ct. 1984).

<sup>243</sup> *Id.* at 943.



“mandated that certain minor matters, as well as major breaches of law, be treated as statutory violations” and ruled that “[a] court cannot reverse Liquor Code charges by declaring the violations to be de minimis.”<sup>244</sup> The court also rejected defendant’s socioeconomic argument of “chivalry and courtesy to the fair sex” as an explanation for its pricing scheme.<sup>245</sup> It indicated that when public accommodations make gender-based determinations that have “no legitimate relevance in the circumstances,” then the state’s anti-discrimination statute is violated.<sup>246</sup> Fifteen years after Pittsburgh passed the first piece of legislation banning sex discrimination, a strict reading of gender-based pricing emerged.

The Supreme Court of California explicitly followed suit the next year in *Koire v. Metro Car Wash*.<sup>247</sup> The plaintiff was a man who was denied the benefits of “Ladies Day” discounts to women at car washes and a nightclub.<sup>248</sup> With the help of an ACLU attorney who represented him in a private capacity, the man sued under California’s anti-discrimination statute and won.<sup>249</sup> In ruling for the plaintiff, the court applied the constitutional concept of sex as a “suspect classification” to anti-discrimination law and rejected the defendants’ attempts to analogize gender-based pricing with age-based pricing that benefits seniors and children.<sup>250</sup> The court also rebuffed a host of other arguments made by the defense that emphasized the business necessities of nightclubs,<sup>251</sup> the supposed social policy benefits of gender-based discounts,<sup>252</sup> and the

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> 707 P.2d 195 (Cal. 1985).

<sup>248</sup> *Id.* at 195–96.

<sup>249</sup> Steven Emmons & David Reyes, *He Stood Up Like a Man—and Won*, L.A. Times, Oct. 18, 1985, at 34.

<sup>250</sup> *Koire*, 707 P.2d at 202.

<sup>251</sup> *Id.* at 198 (“Most often, the nature of the business enterprise or the facilities provided has been asserted as a basis for upholding a discriminatory practice *only* when there is a strong public policy in favor of such treatment. . . . For example, it is permissible to exclude children from bars or adult bookstores because it is illegal to serve alcoholic beverages or to distribute ‘harmful matter’ to minors.” (citations omitted)).

<sup>252</sup> *Id.* at 199–200 (“However, the ‘social’ policy on which [the nightclub] relies—encouraging men and women to socialize in a bar—is a far cry from the social policies which have justified other exceptions to the [anti-discrimination statute]. For example, the compelling societal interest in ensuring adequate housing for the elderly which justifies differential treatment based on age cannot be compared to the goal of attracting young women to a bar. . . . The need to promote the ‘social policy’ asserted by [the nightclub] is not sufficiently compelling to warrant an exception to the [statute’s] prohibition on sex discrimination by business establishments.”).

economic rationality of these pricing arrangements.<sup>253</sup> Although gender-based pricing was and continues to be considered “of minimal importance or to be essentially harmless,” the court noted that “men and women alike . . . are greatly offended by such discriminatory practices” and stringently declared that the “legality of sex-based price discounts cannot depend on the subjective value judgments about which types of sex-based distinctions are important or harmful.”<sup>254</sup> This strict interpretation of the statute would become the most-cited case to reject gender-based pricing.

A year later, a Maryland appeals court came to a similar conclusion when a restaurant offered 50% discounts to women on Thursdays.<sup>255</sup> A male patron filed a complaint with the Human Relations Commission of Montgomery County after his “lady companion” received the discount and he did not.<sup>256</sup> The commission subsequently informed the owner that the practice was violative of a local ordinance. He responded by instituting a “Skirt and Gown” night that replicated the discount and received media attention. The trial court found that the new policy was facially neutral because it “did not burden men in any significant manner.”<sup>257</sup> In its reversal, the appellate court acknowledged the “superficially humorous backdrop” but insisted that “the matter involves an intrinsically substantive issue which, left unanswered, could serve to encourage far more serious methods of discrimination.”<sup>258</sup> It deferred to the agency’s factual findings that the promotion was “discriminatory subterfuge” and “merely an extension of Ladies’ Night.”<sup>259</sup>

Taken as a whole, these anti-classification cases had both productive and problematic features. Positively, these decisions stemmed from the growing tide of state courts simplistically concluding that gender-based pricing was innocuous. These anti-classification cases identified how

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<sup>253</sup> *Id.* at 199 (“[T]his court [has] held that the fact that a business enterprise was ‘proceed[ing] from a motive of rational self-interest’ [does] *not* justify discrimination. . . . It would be no less a violation of the Act for an entrepreneur to charge all homosexuals, or all nonhomosexuals, reduced rates in his or her restaurant or hotel in order to encourage one group’s patronage and, thereby, increase profits. The same reasoning is applicable here, where reduced rates were offered to women and not men.” (second alteration in original)).

<sup>254</sup> *Id.* at 204.

<sup>255</sup> *Peppin v. Woodside Delicatessen*, 506 A.2d 263, 267–68 (Md. Ct. Spec. App. 1986).

<sup>256</sup> *Id.* at 264.

<sup>257</sup> *Id.* at 265.

<sup>258</sup> *Id.* at 264–65.

<sup>259</sup> *Id.*; see also *Trends: Skirting the Law*, *Phila. Inquirer*, Apr. 13, 1986, at 3A (reporting on the case outcome and noting that some men showed up wearing skirts when the restaurant initiated its “skirts and gowns” discount).

such policies can harm both men and women. But these decisions were not unimpeachable. By rejecting gender-based pricing in toto, all of these decisions—which involved the public accommodations that are central to this Article—provided fodder for a men’s rights movement eager to “invert” animus, as Professor Murray describes it, and allowed male plaintiffs to “deploy the force of state antidiscrimination laws.”<sup>260</sup> This inversion was just one part of the new legal landscape of sex discrimination. Other judicial decisions, as discussed in the previous Subsection, approved sex-based discounts but sanitized the sex stereotypes that buoyed the practice, whereas some states did nothing. Overall, the 1980s produced a gender jurisprudence in this corner of public accommodations law that ranged from unconcerned to simplistic to stringent.

### *B. Dress Codes*

As the previous Part explained, the most immediate challenges to Title II focused on whether bars and clubs were considered public accommodations since they were not specifically identified in the statute. After courts rebuffed these claims by holding that these establishments implicated Commerce Clause issues within the statute’s ambit,<sup>261</sup> public accommodations proprietors would latch on to other parts of the statute to avoid compliance. One strategy was for owners to simply argue that they were private entities. This approach was as old as public accommodations statutes themselves,<sup>262</sup> but was repurposed after statutory and court-mandated integration. On June 30, 1964, a group of business owners who operated racially segregated restaurants banded together to form the Northwest Louisiana Restaurant Club. They

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<sup>260</sup> Murray, *supra* note 25 at 293.

<sup>261</sup> See *supra* note 197.

<sup>262</sup> See, e.g., *Everett v. Harron*, 110 A.2d 383, 385 (Pa. 1955) (noting that the defendant “frankly admit[ed] that a crude attempt to give the enterprise the character of a private club in order to justify a selective admission of applicants was but a device to keep Negroes from the swimming pool”); *Commonwealth v. Moore*, 32 Pa. D. & C. 630, 635 (1938) (rejecting the argument that the defendant-hotel was a place of public accommodation “which [is] in [its] nature ‘distinctly private’”); *Gilmore v. Paris Inn*, 51 P.2d 1103, 1103 (Cal. Dist. Ct. App. 1935) (affirming judgment for defendant who argued café was a private club); *Norman v. City Island Beach Co.*, 126 Misc. 335, 336 (N.Y. App. Term 1926) (rejecting defendant’s assertion that pool was private and not subject to state civil rights statute); *Bowlin v. Lyon*, 25 N.W. 766, 768 (Iowa 1885) (ruling that a skating rink that denied admission to Black person was essentially a private business).

developed this non-profit organization in an attempt to retain their segregationist practices and benefit from Title II's private club exemption, which was passed two days later.<sup>263</sup> In what would become a familiar pattern,<sup>264</sup> the organization engaged in a variety of strategies. According to a federal court:

- (a) They posted signs and decals, supplied to them by the Club, in conspicuous places to indicate that their establishments were private clubs open to members of the Northwest Louisiana Restaurant Club only;
- (b) They offered and issued membership cards as a matter of course to any white customer without any requirements or conditions whatsoever;
- (c) They excluded Negroes from membership in the Club regardless of their behavior or appearance;
- (d) They served white customers without regard to whether they were members of the Northwest Louisiana Restaurant Club;
- (e) They denied equal service to Negroes on the ground that they were not members of the Northwest Louisiana Restaurant Club;
- (f) They denied equal service to Negroes on the basis of their race or color.<sup>265</sup>

Though the federal district court found that the organization was a “sham” and existed only to evade the law and exclude Black patrons,<sup>266</sup> other courts continued to deal with this issue in a whack-a-mole fashion. A few years later, the Department of Justice brought another suit against a restaurant-lounge that attempted to similarly “privatize.” In response to integration and the white consumer resistance that came with it, Landry's

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<sup>263</sup> *United States v. Nw. La. Rest. Club*, 256 F. Supp. 151, 152 (W.D. La. 1966); *North Louisiana Assn.—Restaurant Club Outlawed*, Shreveport J., July 15, 1966, at 2C.

<sup>264</sup> “Segregation academies,” which were private schools designed to avoid desegregation, are a prominent example. See Anthony M. Champagne, *The Segregation Academy and the Law*, 42 *J. Negro Educ.*, 58, 58 (1973). See generally Mary Thornton, *A Legacy of Legal Segregation Returns to Haunt a Small Town*, *Wash. Post*, Apr. 21, 1983, at A2 (“In community after community, white officials during the 1960s transferred public property to private organizations as integration loomed. Schools, swimming pools, athletic playing fields, even school books, were given to private owners.”).

<sup>265</sup> *Nw. La. Rest. Club*, 256 F. Supp. at 153.

<sup>266</sup> *Id.*

Fine Foods Restaurant rebranded itself as a private organization replete with adopted bylaws to govern membership, membership cards, and fees; its membership roster included 988 people who joined over a two-week period—all of whom were white.<sup>267</sup> The district court saw through the transformation and found that the “club” violated Title II.<sup>268</sup> The Supreme Court addressed this insincere privatization trend in *Daniel v. Paul*, which rejected a recreational facility’s use of the same practice.<sup>269</sup> Nevertheless, in other parts of the country, variants of the privatization argument surfaced, among other strategies of exclusion.

Harkening back to courts’ evocations of and sympathies for “respectable” Black pleasure seekers in early public accommodations jurisprudence, lawyers, journalists, and other white-collar professionals became the voices against velvet rope discrimination in the 1970s. This was the case because, in addition to being subjected to it, they had the resources, outlets, and symbolic capital to convey the existence of these exclusionary strategies. In 1972, one Black lawyer noted how the terrain was evolving from outright exclusion to racial balancing. “Racial discrimination takes a different form in Pennsylvania than it did in the Deep South,” he explained.<sup>270</sup> “In Philadelphia, proprietors of white nightclubs and restaurants are more interested in maintaining a quota system, than in barring [B]lacks outright.”<sup>271</sup> Club owners, he added, “don’t mind a few [B]lacks patronizing their establishment, but they try to discourage too many from coming in, fearing that [B]lacks in large numbers will frighten white customers away.”<sup>272</sup> A Black *Boston Globe* journalist wrote, “Instead of blatantly telling [B]lacks they are not allowed to enter, or posting signs saying ‘Whites Only,’ some singles clubs and discotheques have devised more subtle means of maintaining this sick practice.”<sup>273</sup> He also saw behind the velvet rope:

Nowadays club owners, in attempts to limit the number of [B]lacks to zero or a small number, require [B]lacks to show membership cards when the club, in fact, has no such cards. Or they might tell [B]lacks

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<sup>267</sup> *United States v. Jordan*, 302 F. Supp. 370, 374, 377 (E.D. La. 1969).

<sup>268</sup> *Id.* at 379–80.

<sup>269</sup> 395 U.S. 298, 298, 307–08 (1969).

<sup>270</sup> Art Peters, LCB Card: A Way to Discriminate?, *Phila. Inquirer*, Sept. 6, 1972, at 31.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> Robert A. Jordan, *Cafe Bias Spotlight Spurs Progress*, *Bos. Globe*, Oct. 21, 1976, at 31.

that they do not meet the dress code, or that a “private party” is in progress, or that a place is simply full.<sup>274</sup>

The *Washington Post* also detailed the discrimination faced by Black professionals. In addition to including an unabashed admission by a nightclub owner about racial preferences in these spaces, the outlet provided stories about exclusion from a psychiatrist and an orthopedic surgeon.<sup>275</sup> The wife of the mayor was also subjected to velvet rope discretion. “Rarely is denial of admission put in racial terms,” the story explained. “Rather, the clubs start requiring membership cards or inaugurate dress codes or invoke the city fire marshal’s crowd capacity code.”<sup>276</sup>

Throughout the 1970s, state and local commissions, rather than the Department of Justice, identified velvet rope discrimination and punished it. Examples span across the country. Baltimore and Louisville bars violated anti-discrimination laws by refusing to serve minorities, with the defendant in the latter instance filing a lawsuit against the Kentucky Human Rights Commission and claiming that he was denied due process because the body was “composed substantially or entirely of avowed integrationists and civil rights zealots.”<sup>277</sup> Agencies in Phoenix and Pittsburgh fined bar owners for overcharging Black patrons for beer.<sup>278</sup> In Dallas, the city’s consumer affairs department had a team of six investigators between the ages of 24 and 33 who would visit different nightclubs to ensure that they were not “using fake dress codes to keep out minorities.”<sup>279</sup> In the coastal town of Groton, the Connecticut Commission on Human Rights and Opportunities found that a nightclub

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<sup>274</sup> *Id.*

<sup>275</sup> Courtland Milloy, *Some Doors Closed to Black Faces: Integration and ‘Chic’ in D.C. Clubs*, *Wash. Post*, May 31, 1979, at A1, A13 (quoting a nightclub owner as saying “clubs try to restrict their [B]lack clientele to about 10 to 25 percent”).

<sup>276</sup> *Id.* at A13.

<sup>277</sup> *Interracial Group Finds Discrimination by Tavern*, *Balt. Sun*, Mar. 28, 1968, at C7; *Suit Attacks Discrimination Hearing*, *Courier-J.*, June 24, 1967, at 7.

<sup>278</sup> Patrick Boyle, *Human Relations Report Hails State’s ‘67 Gains*, *Pitt. Press*, July 25, 1968 (“Typical of illegal acts stopped by the commission in the area of public accommodations was the case of a Negro charged 95 cents for a pitcher of beer in a Pennsylvania tavern while white patrons paid only 75 cents.”); *\$25 Fine for a \$1 Beer*, *Ariz. Rep.*, Jan. 17, 1968, at 55 (noting how a tavern owner was sentenced to pay a \$25 fine or spend eight days in a city jail for conviction under the Phoenix public accommodations ordinance for charging a Black person \$1 for a 35-cent beer).

<sup>279</sup> *Cops Who Dance the Night Away*, *S.F. Exam’r*, June 23, 1980, at B9; *Dallas Revises Law to Restrict Club Dress Codes*, *Tyler Courier-Times*, Dec. 23, 1979, at 5.

discriminated against minorities by claiming they lacked proper identification or were not in compliance with the dress code; the owner paid approximately \$3,150 in damages.<sup>280</sup> In Boston, one manager of a club confessed that it was “standard practice for his club to limit the number of [B]lacks admitted.”<sup>281</sup> The Boston Licensing Board suspended the license of a different nightclub for four days after the agency concluded that the bar discriminated against Black and interracial couples by asking for “membership cards” and denying entrance when they allegedly “did not meet the dress code.”<sup>282</sup> In addition to paying \$150 in restitution to each of the thirteen people denied entrance, the nightclub agreed to hire a Black doorman.<sup>283</sup>

The 1980s brought more cases and settlements. The decade exposed the robustness of velvet rope discrimination and its effect on women of color and non-Black subjects. In a case where a Black woman successfully alleged racial and gender discrimination at a nightclub, the Alaska court described a nakedly racial and gendered pricing structure that combined \$1.00 per person admission fees with \$2.50 drink ticket purchases.<sup>284</sup> Unescorted white women were excused from both the admission and drink ticket fees. In addition to individual admission fees, Black patrons were required to buy two tickets per person. White patrons, with the exception of unescorted white women, were required to buy one per person.<sup>285</sup> The pricing structure looked like this:

- 1) White, unescorted females / no tickets: \$0
- 2) Males ([B]lack or white) / two tickets: \$6.00
- 3) White couples / two tickets: \$7.00
- 4) Black female (alone) / two tickets: \$6.00
- 5) Black couples / four tickets: \$12.00<sup>286</sup>

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<sup>280</sup> Jack Kadden, Results Due in Month in Probe of Nightclub, *Hartford Courant*, June 9, 1978, at E24; *Disco Faces Bias Hearing*, *Hartford Courant*, Jan. 18, 1980, at 42.

<sup>281</sup> ABCC Invites Discrimination Complaints, *Bos. Globe*, Sept. 23, 1976, at 67.

<sup>282</sup> *Walter V. Robinson, Back Bay Disco Accused of Barring Blacks*, *Bos. Globe*, Sept. 22, 1976, at A1; *Walter V. Robinson, Whimseys Closing 4 Days as Discrimination Penalty*, *Bos. Globe*, Jan. 5, 1977, at 3.

<sup>283</sup> *Viola Osgood, Black Doorman To Be Hired: Whimsey's Settles Bias Dispute*, *Bos. Globe*, June 11, 1977, at 3.

<sup>284</sup> *McDaniel v. Cory*, 631 P.2d 82, 83 n.5 (Alaska 1981).

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

An early expose in the *Arizona Republic* titled, “Sophisticated Discrimination,” described how Mexican-Americans were barred from some nightclubs in Phoenix whereas African Americans reported being “turned away from a club because of their clothes, gone home and changed and, after being admitted, [saw] white people wearing the offending style.”<sup>287</sup> In 1986, an Iowa nightclub owner was forced to provide equal accommodations after patrons filed a claim with the Cedar Rapids Civil Rights Commission alleging that the club had a \$1 cover charge for whites and a \$6 cover charge for Blacks. The club allowed Black customers to pay the \$1 cover if they paid \$100 for a membership card. The manager claimed that they were “turning away both [B]lacks and whites” but “[t]he ones that would bitch were the [B]lacks.”<sup>288</sup> That same year, seventy Black, Latino, and Middle Eastern people filed complaints against Red Onion in southern California. They alleged that they were rejected from Red Onion because they did not look like the photographs in their driver’s licenses or because they failed to meet the dress code.<sup>289</sup> One employee claimed that bosses “instructed [workers] to ‘clean up the crowd’ when it became ‘too dark.’”<sup>290</sup> The remedy? \$500 to each of the thirty-nine complainants and a \$20,000 fund for people who filed complaints with the state by a certain date.<sup>291</sup> A multiracial coalition protested at one of the chain’s establishments, with one holding a sign saying “Something Smells at the Rotten” and another predicting, “[A]fter the media attention dies down, these people are going to start discriminating again.”<sup>292</sup> He was right. A mere two years later, the Red Onion coughed up a total of \$390,000 to twenty-six people who claimed they were denied admission into their nightclubs.<sup>293</sup> Employees were instructed to “use whatever excuse necessary to keep the racial balance predominantly, if not exclusively, white” and “selective enforcement of the dress code” served as a primary strategy.<sup>294</sup> In 1988, the VIP cards of

<sup>287</sup> Andrew Means, *Sophisticated Discrimination*, *Ariz. Republic*, Dec. 4, 1983, at H1.

<sup>288</sup> Dave Gosch, *Club Metro Now Offering Free Memberships to All*, *Gazette*, Aug. 1, 1986, at 5A.

<sup>289</sup> *Red Onion OKs Discrimination Settlement*, *Desert Sun*, July 30, 1986, at 1; A. Dahleen Glanton, *Red Onion Agrees To Pay \$390,000 in Racism Suit*, *L.A. Times*, Sept. 3, 1988, at 3.

<sup>290</sup> Glanton, *supra* note 289.

<sup>291</sup> *Red Onion OKs Discrimination Settlement*, *supra* note 289, at 1.

<sup>292</sup> Ray Perez & Heidi Evans, *Red Onion Promises to Prevent Discrimination*, *L.A. Times*, May 16, 1986, at Part II.

<sup>293</sup> Glanton, *supra* note 289.

<sup>294</sup> *Id.*



the post-Civil Rights movement were still in vogue, which led DOJ to bring a successful action against a Kentucky nightclub.<sup>295</sup> Doormen for Glass Menagerie admitted that they were instructed to “hinder, delay or prevent” the admission of Black club-goers, who “were perceived not to spend as much money as white patrons, to not be ‘big tippers,’ and to bother white female customers.”<sup>296</sup>

By the beginning of the 1990s, and thereafter, owners of bars, restaurants, and clubs would use old strategies and develop new ones in their efforts to exclude racial minorities. Some of these issues made it to state and federal courts whereas others led to settlements with the Department of Justice and local agencies. These include outright denials of service,<sup>297</sup> overcharging,<sup>298</sup> requiring unnecessary or excessive amounts of identification,<sup>299</sup> conditioning entry on how the demographics of the clientele evolved for the night,<sup>300</sup> claiming there was a private party,<sup>301</sup> and of course dress codes.<sup>302</sup> As discussed in the next Part,

<sup>295</sup> *United States v. Glass Menagerie*, 702 F. Supp. 139, 140 (E.D. Ky. 1988).

<sup>296</sup> *Id.*

<sup>297</sup> *Russo v. Corbin*, No. C.A. 01A-07-001, 2002 WL 88948, at \*2–\*3 (Del. Super. Ct. Jan. 8, 2002) (finding substantial evidence unlawful denial of service at a restaurant to racial minorities in violation of state law).

<sup>298</sup> Consent Decree, *United States v. Walker*, No. 7:01-0008 (M.D. Ga. June 26, 2001) (Dep’t of Just., Hous. & Civ. Enf’t Cases), <https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-591> [<https://perma.cc/D5JE-VS97>] (resolving allegations of racial overcharging in violation of Title II).

<sup>299</sup> Consent Decree, *United States v. Freeway Club* (N.D. Ala. May 13, 2002) (Dep’t of Just., Hous. & Civ. Enf’t Cases), <https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-421> [<https://perma.cc/B93H-S5FG>] (resolving allegations that a nightclub discriminated against Black patrons by demanding more forms of ID than from other patrons); Consent Order, *United States v. Black Wolf, Inc.* (N.D. W.Va. Nov. 20, 2003) (Dep’t of Just., Hous. & Civ. Enf’t Cases), <https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-303> [<https://perma.cc/Q6VY-Y5TQ>] (resolving allegations of racial discrimination by bar-restaurant that required Black patrons to show a membership card before being served while not requiring the same from others).

<sup>300</sup> See source cited supra note 50 (resolving a nightclub’s admission policies turning away certain patrons to achieve racial “balance”).

<sup>301</sup> U.S. Dep’t of Just., News Release, *West Virginia Nightclub Agrees Not To Turn Away African American Patrons, Under Agreement with Justice Department* (Jan. 27, 1998), <https://www.justice.gov/archive/opa/pr/1998/January/028.htm> [<https://perma.cc/G2ZG-GM47>] (resolving claims that club denied entry to Black patrons by telling them there was a private event).

<sup>302</sup> Consent Decree, *United States v. Candy II*, No. 05-C-1358 (E.D. Wis. Mar. 1, 2007) (Dep’t of Just., Hous. & Civ. Enf’t Cases), <https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-75> [<https://perma.cc/JK7M-JWPJ>] (decree resolving allegations that club discriminatorily applied dress code); Consent Order, *United States v. Badeen* (D. Kan. Mar. 8, 2002) (Dep’t of Just., Hous. & Civ. Enf’t Cases),

selective enforcement of dress codes became one of the more administrable, publicized, and contested practices of them all. Although other forms of velvet rope discrimination persisted (e.g., overcharging or refusal to serve), dress codes became akin to the kinds of “second generation” discrimination that Susan Sturm has described in the employment context.<sup>303</sup> These requirements came about during a moment when remedies for civil rights legislation became hotly contested, the enforcement vigor of the 1970s seemed to wane, and public accommodations discrimination—at least outside of the disability context—appeared to take a back seat. At the same time that this specific form of racial exclusion operated, public accommodations began to understand women as the kind of company they *wanted* to invite into their doors. By the end of the 1980s, some public accommodations would rely on the same strategies as their predecessors whereas others would develop modified techniques of exclusion.

### III. CONTEMPORARY VELVET ROPE DISCRIMINATION

The previous Parts have illustrated the heft of race and sex discrimination in bars, restaurants, and nightclubs in American history. This Part connects that history with the contemporary operation of velvet rope discrimination. It discusses the resilience of some exclusionary tactics as well as the modification and creation of new strategies. It continues with two Sections that describe the defenses of dress codes and gender-based discounts, respectively. Both Sections maintain that these

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<https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-321>  
[<https://perma.cc/RAH3-AD9D>] (resolving allegations of club's discriminatory enforcement of dress code against Blacks and Latinx persons); N.Y. State Off. Att'y Gen., A.G. Schneiderman Announces Agreement with Midtown Nightclub Ensuring Equal Access for All Patrons (June 27, 2013), <https://ag.ny.gov/press-release/2013/ag-schneiderman-announces-agreement-midtown-nightclub-ensuring-equal-access-all>  
[<https://perma.cc/MH89-JCEZ>] (addressing \$20,000 settlement to state and \$500 of restitution to each patron for club's discriminatory use of dress codes, along with other methods of exclusion); *People v. Peter & John's Pump House, Inc.*, 914 F. Supp. 809, 809, 811, 814 (N.D.N.Y. 1996) (finding that New York's allegation that a nightclub imposed a discriminatory dress code gave the state *parens patriae* standing); Stephen Labaton, Denny's Restaurants To Pay \$54 Million in Race Bias Suits, N.Y. Times, May 25, 1994, at A1 (describing the \$54 million settlement involving Denny's, which was accused of engaging in racial segregation in their restaurants, discriminatorily requiring Black patrons pre-pay, rude treatments toward them, and long waits for service).

<sup>303</sup> Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458, 460–61 (2001).

justifications are not only unpersuasive but violative of anti-discrimination norms. Both Sections also offer normative suggestions that focus on the elimination of these practices. The final Section offers a few remarks on enforcement.

Velvet rope discrimination is the use of legally-protected categories by public accommodations in determinations of who is admitted and provided service. The categories of interest in this Article are race and sex, and the public accommodations it focuses on are bars, restaurants, and nightclubs. But velvet rope discrimination is not necessarily restricted to these specific accommodations. History and case law show that velvet rope discrimination occurs at other sites such as swimming pools, movie theaters, cafes, and amusement parks, to name a few.<sup>304</sup> Nor is velvet rope discrimination limited to race and sex but is also applicable to other protected legal categories. Discrimination based on disability is a unique space for thinking about these issues, particularly considering case law and accounts of bias against this group in nightlife and restaurants.<sup>305</sup> Therefore, this Article is a provisional account that invites more investigation into the practice.

Velvet rope discrimination has synergies with other forms of discrimination that scholars across the disciplinary spectrum have

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<sup>304</sup> See sources cited *supra* note 137 (demonstrating examples of discrimination at swimming pools, movie theaters, cafes, and amusement parks).

<sup>305</sup> *Smith v. Bradley Pizza, Inc.*, 314 F. Supp. 3d 1017, 1020 (D. Minn. 2018) (finding standing for a plaintiff with a disability in a claim of lack of access to restaurant arising from architectural barriers); *Whitaker v. Firman*, No. 2:12-cv-224, 2013 WL 4498979, at \*2, \*6, \*9, \*11 (W.D. Pa. Aug. 20, 2013) (rejecting, on standing grounds, a Title III claim brought by a plaintiff who suffered from a rare joint disease that made it difficult to stand, and alleged that the defendant-nightclub did not allow her to sit on a stool on the dancefloor or sit in the VIP area); *Wilson v. Superclub Ibiza, LLC*, 931 F. Supp. 2d 61, 62–63 (D.D.C. 2013) (evaluating the admissibility of evidence brought by a patron who alleged a nightclub operator denied her entry in violation of the ADA); *Sharp v. Capitol City Brewing Co., LLC*, 680 F. Supp. 2d 51, 58–61 (D.D.C. 2010) (rejecting various claims brought by a restaurant patron alleging violations of Title III of the ADA); *MacDougal v. Catalyst Nightclub*, 58 F. Supp. 2d 1101, 1102, 1103 (N.D. Cal. 1999) (deciding attorney’s fees for plaintiffs who brought two lawsuits against defendant nightclub for failure to provide access to disabled patrons and food service in violation of the ADA); *Pinnock v. Int’l House of Pancakes Franchisee*, 844 F. Supp. 574, 578 (S.D. Cal. 1993); see also Beth Winegarner, *How Some Local Nightclubs Fail Their Disabled Patrons*, S.F. Weekly (Oct. 22, 2018, 6:53 AM), <https://www.sfweekly.com/music/how-some-local-nightclubs-fail-their-disabled-patrons/> [<https://perma.cc/45VB-JLHR>]; David Perry, *Restaurants Haven’t Lived Up to the Promise of the Americans with Disabilities Act*, Eater (May 31, 2017, 9:28 AM), <https://www.eater.com/2017/5/31/15701042/american-disabilities-act-restaurants-compliance> [<https://perma.cc/3QP8-GTPU>].

helpfully catalogued. While some forms of velvet rope discrimination—such as a long wait for service at a restaurant or bar—may seem race or gender-neutral, other versions of velvet rope discrimination, specifically “ladies’ night,” are quite overt. These explicit forms of discrimination underline Jessica Clarke’s warning that the focus on implicit bias may legitimate forms of explicit bias and leave the “homeland of equality law—norms against overt discrimination—undefended.”<sup>306</sup>

Velvet rope discrimination also parallels Angela Onwuachi-Willig’s discussion of “volunteer discrimination.”<sup>307</sup> The idea here is that members of a protected group may accede to or “volunteer” into discriminatory policies.<sup>308</sup> Women might reasonably prefer ladies’ night because it is an economic benefit. Racial minorities might prefer dress codes because it allows them to perform middle-class identity and prevents them from being stereotyped as part of the riff-raff that public accommodations owners often seek to exclude. One Black writer espoused this view when he complained:

There used to be a time in this country when people — especially [B]lack folks — took a lot more pride in their appearance and that of their children. . . . Anyone who has taken a commercial flight seated next to a man in a ‘wife-beater’ undershirt or sat in a pew as a woman in hot pants made a late entry into a packed church knows what I’m talking about.<sup>309</sup>

But as Onwuachi-Willig demonstrates, acceptance of such policies does not negate the realities of race and gender discrimination; instead, it highlights how women and racial minorities may have to perform identity in ways that are socially palatable, comply with institutional norms, and accept status hierarchies.<sup>310</sup>

Kenji Yoshino similarly discusses the phenomena of “covering,” which entails identity-based pressures to conform that can submerge identities that are protected by anti-discrimination law.<sup>311</sup> “Asian-Americans are told to avoid seeming ‘fresh off the boat’; . . . Jews are told not to be ‘too Jewish’; Muslims, especially after 9/11, are told to drop

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<sup>306</sup> Jessica A. Clarke, *Explicit Bias*, 113 *Nw. U. L. Rev.* 505, 510 (2018).

<sup>307</sup> Onwuachi-Willig, *supra* note 49, at 1895 (2007).

<sup>308</sup> *Id.*

<sup>309</sup> DeWayne Wickham, *Commentary, Dress Codes Restore Pride in Appearance*, *Ithaca J.*, July 6, 2004, at 7A.

<sup>310</sup> Onwuachi-Willig, *supra* note 49, at 1898–99.

<sup>311</sup> Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights*, at ix, 23–24 (2006).

their veils and their Arabic; the disabled are told to hide the paraphernalia they use to manage their disabilities.”<sup>312</sup> Onwuachi-Willig and Yoshino are not alone. Other scholars have described how areas of social life that are regulated by anti-discrimination law, such as the workplace, sometimes demand performances of identity that may be natural for some and coercive for others.<sup>313</sup> Velvet rope discrimination finds synergy with these works by centering public accommodations—which receive less attention in anti-discrimination scholarship on race and sex—and demonstrates how legally protected categories are not only imposed on patrons but can be performed in their quests for admission into these sites.

Law and economics scholars have also had helpful insights into discrimination. In housing law, Lior Strahilevitz has detailed how developers evade fair housing laws by creating amenities that discourage undesired populations from purchasing homes.<sup>314</sup> An example might be the creation of a religious temple in the middle of the development and the requirement that all homeowners share the expenses of the temple’s upkeep. This requirement would function as an exclusionary good for people who are not of that faith and likely discourage them from homeownership in the development.<sup>315</sup> In their discussion of employment law, Jonah Gelbach, Jonathan Klick, and Lesley Wexler have developed the concept of “passive discrimination” to describe how employer policies and benefits packages sort people in and out of jobs in ways that impact legally protected groups.<sup>316</sup> An example might be employers who seek to screen out female employees by exploiting men’s propensity for risk-taking through benefits packages. Here the employer would make employee compensation contingent on meeting variable performance goals, such as paying on a commission basis or through profit-sharing

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<sup>312</sup> *Id.* at 21.

<sup>313</sup> See sources cited *supra* notes 55, 59 (describing various situations in which identity performance takes place in the workplace and other social situations); see also Gowri Ramachandran, Intersectionality as “Catch 22”: Why Identity Performance Demands Are Neither Harmless Nor Reasonable, 69 *Alb. L. Rev.* 299, 300 (2006).

<sup>314</sup> Lior Jacob Strahilevitz, Exclusionary Amenities in Residential Communities, 92 *Va. L. Rev.* 437, 477–78 (2006).

<sup>315</sup> *Id.* (describing amenities strategies of Ave Maria Township, which was described as “America’s first gated Catholic community”).

<sup>316</sup> Gelbach, Klick & Wexler, *supra* note 49, at 818.

arrangements (which has been explained as a reason for women's underrepresentation in the field of mutual fund investment).<sup>317</sup>

In the contexts of gender-based pricing and dress codes, exclusionary practices could be animated by discriminatory intent or inspired by what makes sense economically. Gender-based pricing unabashedly advertises to women that they are generally welcome. For men, the message is also welcoming but can be conditional on being in the company with women (a sharp role reversal from decades ago). How one presents their race, sex, and sexual orientation can either enhance or mitigate the nature of these invitations and signals. We might think of dress codes as serving a similar kind of signaling or sorting function that might be good faith or might be pernicious. Dress codes can communicate exclusivity and status (i.e., luxury), sheer exclusion (discrimination), or some combination of both. Beyond actual dress codes, allegations of discrimination surrounding them may also function as a signal. Such controversies communicate to potential patrons that a public accommodation is determined to maintain a certain demographic.<sup>318</sup> Velvet rope discrimination contributes to these conversations by highlighting additional, hard-to-detect methods that regulated entities employ to evade anti-discrimination laws.

This discussion of velvet rope discrimination builds on and extends some of these insights by moving out of the employment and housing contexts—which have been the recent strongholds of anti-discrimination law—and situates discrimination in public accommodations.<sup>319</sup> What does the broader nature of velvet rope discrimination entail? In addition to the inclusion and exclusion of people based on race and sex, it can involve, as explained in the preceding Parts, overcharging, poor service, no service, ejection after admission, the use of formal and informal

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<sup>317</sup> Id. (citing Peggy D. Dwyer, James H. Gilkeson & John A. List, Gender Differences in Revealed Risk Taking: Evidence from Mutual Fund Investors, 76 *Econ. Letters* 151, 156 (2002)).

<sup>318</sup> David Martin, *Kansas City Officials Had Plenty of Warning that the Cordish Co. Would Impose a Discriminatory Dress Code*, *Pitch* (July 3, 2008), <https://www.thepitchkc.com/kansas-city-officials-had-plenty-of-warning-that-the-cordish-co-would-impose-a-discriminatory-dress-code/> [https://perma.cc/26N7-63LH] (describing the decade-long accusations of racial discrimination against a real estate company that maintains bars and restaurants and arguing that “what looks like bad publicity on the surface might, in [the company’s] dark way of doing business, be an inexpensive means of letting white suburbanites know that the Power & Light District is sensitive to their fears. *Not a fan of hip-hop style? Neither are we. So come on down and take a ride on our mechanical bull.*”).

<sup>319</sup> See sources cited *supra* notes 24–25 (outlining the literature on discrimination in public accommodations).

quotas, denials of entry based on the target's companions, and objections to the lack of company (i.e., women). It entails respondeat superior questions that involve owners' attempts to avoid liability for anti-discrimination violations by claiming that racist or sexist exclusion was the product of a bad actor (i.e., the promoter of the event) as well as bouncers' attempts to deflect by claiming that they were doing their job.<sup>320</sup> Velvet rope discrimination defies the white racist/Black victim dyad and features racial minorities being excluded from facilities that are owned and staffed by other racial minorities.<sup>321</sup> It considers how color—the under-thematized category that has been a longstanding feature of many public accommodations statutes—is slightly different from race, and cues a different set of inter and intra-racial considerations.<sup>322</sup> It is not confined to public accommodations that are ostensibly geared toward heterosexual

<sup>320</sup> In one incident, a nightclub disavowed the comments of a promoter who it claimed did not work for the company. In a captured text conversation with a Latinx patron who wanted entry into the club with an entourage, the promoter told him, “‘If you [have] any of their [Instagram] or pics send cuz they’re strict [at] the door.’ He then added: ‘Gotta be 8/10 no hood [B]lack or fat.’” Mona Holmes, *Hollywood Club Promoter Called Out for Racist, Sexist Door Policies*, *Eater LA* (May 3, 2018), <https://la.eater.com/2018/5/3/17315890/hollywood-club-promoter-discrimination-the-argyle> [<https://perma.cc/7FDW-N285>].

<sup>321</sup> Marlon Bishop, *East Village Bar Accused of Racist Door Policy*, *WNYC* (Jan. 31, 2011), <https://www.wnyc.org/story/112317-east-village-bar-accused-racist-door-policy/> [<https://perma.cc/4V58-D95E>] (describing a complaint leveled by a Black woman who was denied entry into a nightclub by a Black security guard while white women were allowed entry, to which the guard replied, “‘This is what the owner wants. Do you think I like denying my own people?’”); Caroline M. McKay, *Boston Club Will Pay Discrimination Fine*, *Harv. Crimson* (May 13, 2011), <https://www.thecrimson.com/article/2011/5/13/club-black-against-cure/> [<https://perma.cc/N52T-2FLW>] (discussing how a Boston club was forced to pay approximately \$28,000 after it discriminated against Black Harvard and Yale graduate students and alumni, Sherif Hashem, the head of security, a person of color, told them there was a concern about “weed smoking brothers from the other side of Massachusetts Avenue who will want to come in if they see beautiful [B]lack women in line, and it will be a problem if we try to turn them away”). This is not new. See Juan Williams, *The Discriminating Club*, *Wash. Post*, Nov. 9, 1979, at A21 (describing a Black club in Washington D.C. that tried to “create a discriminating mix”).

<sup>322</sup> Tanya Katerí Hernandez, *Multiracials and Civil Rights: Mixed-Race Stories of Discrimination* 67–74 (2018) (describing the paucity of legally recognized claims involving multiracial discrimination in public accommodations); Kimberly Jade Norwood, “If You Is White, You’s Alright. . . .” *Stories About Colorism in America*, 14 *Wash. U. Global Stud. L. Rev.* 585, 605 (2015) (discussing light-skin parties and “battle of the complexions” contests in Black nightclubs across America); Desiree Cooper, *Still, Blacks Struggle to Accept Selves*, *Detroit Free Press*, Nov 1, 2007, at 1 (discussing a Detroit promoter’s plan to have a “Light Skin Libra Birthday Bash,” which was intended to let “light skin” Black women into a downtown club for free).

customers, as LGBTQ bars have struggled with their own uses of legally protected categories.<sup>323</sup>

Velvet rope discrimination is inventive. The U.S. Court of Appeals for the Eighth Circuit, for instance, recognized the existence of “rabbit schemes.”<sup>324</sup> In this discriminatory tactic, a nightclub employee would instruct an individual (the “rabbit”) to instigate fights with Black patrons in an attempt to have them removed.<sup>325</sup> The security guard would remove both fighters from the club and allow the rabbit re-entry and compensate them with free drinks.<sup>326</sup> The rabbit scheme is the only strategy that the court recognized despite the appellant raising a host of other claims.<sup>327</sup>

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<sup>323</sup> The Philadelphia Commission on Human Relations, the local agency responsible for regulating anti-discrimination in the city, found that businesses in Philadelphia’s Gayborhood—a geographical area consisting of bars and nightclubs for the LGBTQ community—“create preferable environments for white, cisgender male patrons” and discriminate against women, racial minorities, and transgender individuals. This discrimination included “ad hoc, inconsistent, and arbitrary treatment of customers related to dress codes, ID policies, bar service, and treatment by staff [that] create[d] a climate of ‘unwelcomeness,’ exclusivity, and hostility” toward these groups. One lesbian commented, “[M]y partner and I, and our friends, have experienced feeling invisible in bars . . . and have watched on multiple occasions men who came up to the bar after us, get served before us.” Philadelphia Commission on Human Relations, *Inform, Monitor, Enforce: Addressing Racism and Discrimination in Philadelphia’s LGBTQ Community* 8, 10 (2017); see also Patrick Saunders, *Atlanta Gay Bar Blake’s Taking Heat over Dress Code Sign*, *Georgia Voice* (July 10, 2015, 11:36 AM), <https://thegavoice.com/news/georgia/atlanta-gay-bar-blakes-taking-heat-over-dress-code-sign/> [<https://perma.cc/AF5B-EPYG>]; Naomi Waxman, *Boystown Bar Called Racist for Banning Rap*, *Eater Chicago* (May 30, 2019, 2:55 PM), <https://chicago.eater.com/2019/5/30/18645763/progress-bar-boystown-gay-rap-ban-leaked-email-social-media> [<https://perma.cc/4F97-2JC4>].

<sup>324</sup> *Combs v. Cordish Companies*, 862 F.3d 671, 681 (8th Cir. 2017).

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* at 682.

<sup>327</sup> Others include:

Questioning African American patrons at the entrances to clubs and/or the district in general for the purpose of eliciting “annoyance” or some other response to be identified as “aggression,” all for the purpose of creating a rule violation which would serve as a basis for turning the individual away from the club or district or having him ejected from same;

Ignoring/failing to serve African Americans at tables, bars and other areas, all for the purpose of giving them an “unwelcome” message;

Keeping a head count on numbers of African Americans present in any one club or area of the District, so that when the “target” or limit number is reached, additional African Americans will be turned away or caused to leave by virtue of a change in the music genre or some other strategy;

Telling African Americans who call to reserve tables in a club that the reservations are all sold out for a particular night, when in fact same is not true;



While this Article focuses exclusively on dress codes and gender-based pricing, it is clear that there are various other tactics used to exclude, eject, and discourage particular groups from using public accommodations that warrant more scholarly and legal attention.

### *A. Rejecting Dress Codes*

What is the nature of these dress codes and the defenses of them? Noteworthy recent cases involving alleged discrimination by way of dress codes lead to reasonable inferences that owners craft these policies to specifically exclude racial minorities. Notable bans have prohibited plain white t-shirts,<sup>328</sup> high-top sneakers,<sup>329</sup> doo-rags,<sup>330</sup> work or construction boots,<sup>331</sup> excessive jewelry,<sup>332</sup> and baggy clothing (“tuck-ins not permitted”).<sup>333</sup> Some bans have focused on specific brands of sneakers

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Telling African Americans who have arrived at a club for their already-booked reservation that there is nothing on the books in their names, or that the computer must have messed up, or tables are double-booked and everyone else has already arrived. Original Class Action Complaint at 2–3, *Combs v. Lounge KC, L.L.C.*, No. 4:14-cv-00227, 2014 WL 939699 (W.D. Mo. Mar. 10, 2014).

<sup>328</sup> Erin Donnelly, *Is this Restaurant's Ban on Stilettos, Low-Hanging Pants, and Plain White T-Shirts Racist?*, Yahoo! (May 17, 2018), <https://www.yahoo.com/lifestyle/restaurants-ban-stilettos-low-hanging-pants-plain-white-t-shirts-racist-155438657.html> [https://perma.cc/RWZ8-X9BF].

<sup>329</sup> Deepa Lakshmin, *11 Times Hulk Hogan Broke His Own Restaurant's Dress Code*, MTV (Sept. 25, 2014), [www.mtv.com/news/1942900/hulk-hogan-broke-dress-code/](http://www.mtv.com/news/1942900/hulk-hogan-broke-dress-code/) [https://perma.cc/YRL8-AN4C].

<sup>330</sup> *Id.*; Stephen Romano, *Long Island Bar Turns Away Man for Wearing Turban*, Port Jefferson, NY Patch (May 16, 2019), <https://patch.com/new-york/portjefferson/long-island-bar-turns-away-man-wearing-turban> [https://perma.cc/KMD7-XM2P].

<sup>331</sup> Emily Heil, *Critics Say a New Baltimore Crab House is Targeting Minorities with Its Strict Dress Code*, Wash. Post (Sept. 17, 2019), <https://www.washingtonpost.com/news/food/wp/2019/09/17/critics-say-a-new-baltimore-crab-house-is-targeting-minorities-with-its-strict-dress-code/> [https://perma.cc/QY6B-TJTX].

<sup>332</sup> Aimee Green, *Black Man Told He Couldn't Enter Portland Bar Because of His Jewelry; Real Reason Was Racism, Lawsuit Says*, Oregonian (Aug. 21, 2019), <https://www.oregonlive.com/news/2019/08/black-man-told-he-couldnt-enter-portland-bar-because-of-his-jewelry-real-reason-was-racism-lawsuit-says.html> [https://perma.cc/4B53-AC62]; Theresa Braine, *New Jersey Restaurant Nixes Uber-Specific Dress Code Sign After Being Accused of Racism*, N.Y. Daily News (Jan. 16, 2019), <https://www.nydailynews.com/news/ny-news-ashford-jersey-city-restaurant-dress-code-racist-20190115-story.html> [https://perma.cc/637U-B9DQ].

<sup>333</sup> Gene Demby, *Dress Codes Are Open to Interpretation — And a Lot of Contention*, NPR (July 10, 2014), <https://www.npr.org/sections/codeswitch/2014/07/10/330422908/dress-codes-are-open-to-interpretation-and-a-lot-of-contention> [https://perma.cc/64SZ-MR5G].

(e.g., Michael Jordan’s brand).<sup>334</sup> Other codes are vaguely worded. Such ambiguity has led to claims that dress codes are too susceptible to discretionary bias because they prohibit gang colors,<sup>335</sup> “excessive[ly] matching” clothes,<sup>336</sup> “inappropriate attire,”<sup>337</sup> and “improperly fitting clothes.”<sup>338</sup> There is a strong case that these practices are racially discriminatory under Title II. Unlike Title VII, Title II does not have a “business necessity” defense that allows public accommodation owners to make arguments that invoke legally protected categories.<sup>339</sup> It is also important to note that the Department of Justice has exacted a surprising number of settlements with nightclubs and found racial discrimination under Title II on this precise issue.<sup>340</sup> Legal scholars, sociologists, and

<sup>334</sup> Jelisa Castrodale, *Pizzeria Accused of Racism over Ridiculously Restrictive Dress Code*, *Vice* (June 3, 2017), [https://www.vice.com/en\\_us/article/vbmg53/pizzeria-accused-of-racism-over-ridiculously-restrictive-dress-code](https://www.vice.com/en_us/article/vbmg53/pizzeria-accused-of-racism-over-ridiculously-restrictive-dress-code) [<https://perma.cc/GXM6-CS7Z>]; *River North Bar Releases Lengthy Dress Code*, *CBS Chi.* (May 30, 2017), <https://chicago.cbslocal.com/2017/05/30/dress-code-bottled-blonde/> [<https://perma.cc/M8JG-7PG5>].

<sup>335</sup> Hope Schreiber, *Sacramento Bar Under Fire for New Dress Code Which Critics Call a Modern-Day ‘WHITES ONLY’ Sign*, *Yahoo!* (Sept. 4, 2019), <https://www.yahoo.com/lifestyle/sacramento-bar-under-fire-for-new-dress-code-which-critics-call-a-modern-day-whites-only-sign-165735079.html> [<https://perma.cc/G4N7-WGFK>].

<sup>336</sup> Alex Zielinski, *Discriminatory Club Policies Are Pushing African Americans Out of Portland’s Nightlife*, *Portland Mercury* (July 4, 2019), <https://www.portlandmercury.com/news/2019/07/04/26745491/discriminatory-club-policies-are-pushing-african-americans-out-of-portlands-nightlife> [<https://perma.cc/ZK9Q-2ZDH>].

<sup>337</sup> See Heil, *supra* note 331 (discussing Baltimore restaurant’s ban on “inappropriate attire”).

<sup>338</sup> Jerod MacDonald-Evoy, *Bar with Eyes on Tempe Accused of Racial Discrimination at Texas Location*, *Ariz. Republic* (May 4, 2018), <https://www.azcentral.com/story/news/local/tempe/2018/05/04/bar-coming-tempe-accused-using-dress-code-discriminate-texas/546368002/> [<https://perma.cc/BYR4-QJBR>].

<sup>339</sup> 42 U.S.C. §§ 2000e-2(k)(1)(A)-(B).

<sup>340</sup> See *Settlement Agreement, United States v. Ayman Jarrah*, *supra* note 17, at 1–3 (resolving allegations of a bar’s discriminatory use of a cover charge to limit the number of minorities admitted); *Consent Decree, United States v. Candy II*, *supra* note 302, at 1 (resolving allegations that club discriminatorily applied dress code); *Consent Order, United States v. Badeen*, *supra* note 302, at 1 (resolving allegations of club’s discriminatory enforcement of dress code against Blacks and Latinx persons); see also *Williams v. Thant Co.*, No. 02-1214, 2004 WL 1397554, at \*1 (D. Or. June 22, 2004) (denying defendant’s motion for summary judgment arising out of plaintiffs’ allegation that nightclub selectively enforced dress code against them because of their race); *Consent Decree at 2, United States v. Routh Guys, L.L.C.*, No. 3:15-cv-02191 (N.D. Tex. June 30, 2015), <https://www.justice.gov/sites/default/files/crt/legacy/2015/07/06/kungfusettle.pdf> [<https://perma.cc/C4YH-7XP2>] (settling with bar and restaurant that denied African American and American patrons because of discriminatory enforcement of dress code).

journalists have also recognized that these prohibited items are overwhelmingly donned specifically by racial minorities.<sup>341</sup>

Although men of color attract much of the attention in the discourse on discriminatory dress codes, overly vague dress codes that prohibit “inappropriate attire” allow bouncers to deploy rules to exclude women of color and sexual minorities in ways that also run afoul of various anti-discrimination norms.<sup>342</sup> For example, hair requirements fell within a

<sup>341</sup> See May, *supra* note 18, at 51–53 (discussing how dress codes in nightclubs often prohibit the type of dress typically worn by African Americans); see also, May & Chaplin, *supra* note 23, at 60 (noting how, in hip-hop culture, “[A]thletic jerseys, baggy jeans, oversized plain white T-shirts, sweat-bands, do-rags (polyester head wraps), ‘wife beaters,’ (‘tank tops’) and thick gold chains are worn as a means of representing one’s identification with that culture. These clothing styles are typically adopted by young, [B]lack males in urban areas”); Tricia Rose, “Fear of a Black Planet”: Rap Music and Black Cultural Politics in the 1990s, 60 *J. Negro Educ.* 276, 277 (1991) (“Black teenage males sporting sneakers and other Hip Hop gear are perceived as criminal equivalents.”); Marc Gunther, Faith and Fortune: How Compassionate Capitalism Is Transforming American Business 149 (2004) (noting the popularity of Timberland boots in the African American community); Russell K. Robinson, Uncovering *Covering*, 101 *Nw. U. L. Rev.* 1809, 1825 (2007) (describing the association of doo-rags with “ghetto culture” and its association with African American men); Pancho McFarland & Leslie Baker Kimmons, Style, in 3 *Encyclopedia of Race, Ethnicity, and Society* 1125 (Richard T. Schaefer, ed., 2008) (describing how 1990s hip-hop style entailed hooded sweatshirts and Timberlands whereas the turn of the twenty-first century popularized large platinum chains, diamond studs, and doo-rags); D. Wendy Greene, Title VII: What’s Hair (And Other Race-Based Characteristics) Got to Do with It?, 79 *U. Colo. L. Rev.* 1355, 1383–94 (2008) (noting how doo-rags are “indicative of Blackness in the lay community”); Brian Josephs, Who Criminalized the Durag? *GQ* (Mar. 2, 2017), <https://www.gq.com/story/who-criminalized-the-durag> [<https://perma.cc/D3DM-2ZAL>] (discussing the relationship between doo-rags and Blackness, the NFL’s and NBA’s respective bans in 2001 and 2005, and suggesting that the stigma of this article of clothing is tied to the criminalization of Black expression); Emily Chertoff, The Racial Divide on . . . Sneakers, *Atlantic* (Aug. 20, 2012), <https://www.theatlantic.com/national/archive/2012/08/the-racial-divide-on-sneakers/261256/> [<https://perma.cc/LBA9-WV4C>] (“Jordans and Chucks come from the same originary sneaker, a canvas plimsoll from the mid-19th century. . . . How did the first become associated with [B]lack street culture and the second with white-dominated hipsterism?”).

<sup>342</sup> See Robert Wilonsky, Yet Again, Allegations Arise that in Some Uptown Bars, ‘Dress Code’ Means No Minorities, *Dallas Morning News* (June 29, 2017), <https://www.dallasnews.com/opinion/commentary/2017/06/29/yet-again-allegations-arise-that-in-some-uptown-bars-dress-code-means-no-minorities/> [<https://perma.cc/B47Z-K5MT>] (discussing incident where Black women were denied entry into bar for being out of dress code); Morgan Gstalter, Man Wearing Makeup Denied Entry to Texas Nightclub, *The Hill* (May 12, 2018), <https://thehill.com/blogs/blog-briefing-room/news/387438-man-wearing-makeup-denied-entry-to-texas-nightclub> [<https://perma.cc/557L-55A2>] (detailing incident wherein man wearing makeup was denied entry to Texas nightclub); Hollywood Club Accused of Discrimination After Promoter Allegedly Instructs: ‘No Hood Black or Fat’, *Fox L.A.* (May, 2, 2018), <https://www.foxla.com/news/hollywood-club-accused-of-discrimination-after-promoter-allegedly-instructs-no-hood-black-or-fat>

Virginia nightclub's dress code policy.<sup>343</sup> Kokoamos Island Bar & Grill refused entry to people with dreadlocks, and after a Black woman and Black man were separately refused entry, the Department of Justice filed a lawsuit against the club that resulted in a consent decree.<sup>344</sup> Bobby Rodriguez, a 21-year-old Texan who identified as male, was denied entry into a nightclub because he wore false lashes and makeup in violation of the dress code.<sup>345</sup> Rodriguez was told "men need to dress like men."<sup>346</sup> The nightclub responded to the ensuing media controversy by insisting that the "standard dress code . . . states everyone must dress [in] gender appropriate [clothing] to the gender stated on their state-issued driver's license."<sup>347</sup> The same thing happened to Ben Rios less than a year later when he attempted to enter a nightclub for a friend's birthday party wearing stiletto heel shoes.<sup>348</sup> The doorman scolded, "You're a man, you're not supposed to be wearing women's clothing or makeup," and refused to grant him entry.<sup>349</sup> Although dress codes invoke concerns about race, they also have intersectional consequences and implicate state laws banning discrimination based on sex and sexual orientation.

Assuming that these kinds of dress codes were not inspired by racial or sexual considerations, the common defenses of dress codes are public accommodations owners' desire to create a comfortable ambiance (i.e., a "classy environment") and compelling concerns about safety.<sup>350</sup> In these regards, dress code policies are imprecise tactics. To the extent that these policies are animated by race-neutral concerns about attracting

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[<https://perma.cc/7HCC-F8RX>] (describing Hollywood club accused of denying entry to anyone described as "hood [B]lack").

<sup>343</sup> Complaint at 3, *United States v. Davis*, No. 2:07cv430 (E.D. Va. Sep. 20, 2007), <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/kokocomp.pdf> [<https://perma.cc/4MKL-63CK>].

<sup>344</sup> Consent Decree at 1–2, *United States v. Davis*, No. 2:07cv430 (E.D. Va. Mar. 10, 2008); Duane Bourne, *Kokoamos Owner To Apologize for Barring Entry to Two Who Sued, Virginian-Pilot* (Mar. 12, 2008), [https://www.pilotonline.com/news/article\\_1b7467ce-39f5-51ff-af29-47aefa87e36c.html](https://www.pilotonline.com/news/article_1b7467ce-39f5-51ff-af29-47aefa87e36c.html) [<https://perma.cc/FGP2-6WSM>].

<sup>345</sup> See Gstalter, *supra* note 342.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> Elise Solé, 'You're a Man in Women's Clothing': 22-Year-Old Says He Was Dress Coded for Wearing Makeup and High Heels, *Yahoo!* (Mar. 27, 2019), <https://finance.yahoo.com/news/nightclub-denies-banning-gay-customer-wearing-stiletto-heels-makeup-000454296.html> [<https://perma.cc/2D3B-YC3W>].

<sup>349</sup> *Id.*

<sup>350</sup> See May, *supra* note 18, at 57–58 (discussing how owners of nightclubs often justify dress codes as a means of "maintaining a specific kind of atmosphere and clientele").

professionals or people who might be considered “classy,” such prohibitions exclude minority professionals who do not conform to typical ideas about what constitutes appropriate dress. Moreover, it is unclear that dress codes can perform the kinds of security-enhancing functions that people think they offer. For example, policies against “excessive matching” that seek to keep out gang members due to concerns about violence are underinclusive because they rest on outdated ideas about gang fashion and ignore the fact that gang members could simply conform to the dress code to ensure entry and still be socially disruptive.<sup>351</sup>

If one accepts this Article’s account about dress codes, a possible normative position—a strong one—would be legislating against the use of dress codes. Here I suggest that, unless dress codes are implemented for specific health or safety purposes (e.g., a requirement that people are clothed, prohibitions on bookbags), they should be prohibited in public accommodations. Dress codes are simply too ripe for abuse. Though they are sometimes about taste and cultural capital, dress codes often smuggle discrimination through sartorial requirements. A limited ban on dress codes may sound fanciful or like regulatory overkill, but Kansas City passed an ordinance that comes closest to this suggestion and serves as a model.<sup>352</sup>

After confronting problems tied to velvet rope discrimination, Kansas City passed an ordinance prohibiting the use of certain dress codes.<sup>353</sup> The ordinance stems from the conduct of the Cordish Company, a real estate organization with a checkered history involving allegations of racial discrimination.<sup>354</sup> Cordish Co. develops large scale urban projects that

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<sup>351</sup> See Aimee Green, *Lawsuit Claiming Portland Nightclubs Turned Away Black Customers Ends in Settlement*, *Oregonian* (June 19, 2019), <https://www.oregonlive.com/news/2019/06/lawsuit-claiming-portland-nightclubs-turned-away-black-customers-ends-in-settlement.html> [<https://perma.cc/VA9H-MYKU>] (recounting incident involving Portland nightclub that turned away Black patron for violating dress code that prohibited “excessive matching”); see also Jennifer Daley, *Bandana*, in *Ethnic Dress in the United States: A Cultural Encyclopedia* 17, 19 (Anette Lynch & Mitchell D. Strauss, eds., 2014) (discussing how gang members often wear the same color bandana that corresponds with their gang’s colors as a means of identification).

<sup>352</sup> See Kan. City, Mo., Mun. Code §§ 38-113(b), 38-1(a)(26) (2020), [https://library.municode.com/mo/kansas\\_city/codes/code\\_of\\_ordinances?nodeId=PTIICOR\\_CH38HURE](https://library.municode.com/mo/kansas_city/codes/code_of_ordinances?nodeId=PTIICOR_CH38HURE) [<https://perma.cc/XX5G-V486>] (making it an unlawful accommodation practice to use a prohibited dress code to deny anyone accommodations).

<sup>353</sup> *Id.*

<sup>354</sup> See Andrea K. Walker, *Dress Code Makeover at Cordish Venue in Ky.*, *Balt. Sun* (July 2, 2004), <https://www.baltimoresun.com/news/bs-xpm-2004-07-02-0407020158-story.html>

include shopping centers, entertainment districts, residential complexes, and gaming and lodging facilities.<sup>355</sup> In downtown Louisville, Kentucky, the company owns an entertainment district called 4<sup>th</sup> Street Live. Bars, restaurants, and nightclubs comprise the district. Three to four nights a week, the company would close off the district's streets, and the area would become a large, open-air bar.<sup>356</sup> Cordish Co. instituted a dress code that banned sports jerseys, sleeveless jerseys, backward worn ballcaps, and sleeveless shirts on men, while prohibiting women from "dressing in a way determined to be indecent."<sup>357</sup> For the next decade, this ban and similar policies implemented by other entities in the district spawned investigations, generated litigation, and drew the ire of the American Civil Liberties Union of Kentucky.<sup>358</sup> For our purposes, the point is that Kansas City, Missouri was on notice about the allegations when it issued approximately \$300 million in bonds in 2006 to help the Cordish Co. develop a similar entertainment venue—the Power and Light District—which was essentially an urban renewal project.<sup>359</sup> After various allegations of unevenly enforced dress codes, the City Council took matters into their own hands and passed an ordinance that prohibits

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[<https://perma.cc/U2JG-URNT>] (describing a dress code implemented by Cordish Co. that the ACLU and other local activists say unfairly discriminated against minorities and urban youth).

<sup>355</sup> *Id.*

<sup>356</sup> Joseph Gerth, *Activists Call 4th Street Live Dress Code Discriminatory*, *Courier-J.*, June 26, 2004, at B1.

<sup>357</sup> *Id.*

<sup>358</sup> See *Cary v. Cordish Co.*, 731 F. App'x 401, 402–03 (6th Cir. 2018) (lawsuit filed by several African-American men who claim they were denied entry to Cordish-owned 4th Street Live because of their race); Patrick T. Sullivan, *Men Allege Race Discrimination at 4th Street Live*, *Courier-Journal* (June 4, 2014), <https://www.courier-journal.com/story/news/crime/2014/06/04/men-allege-race-discrimination-th-street-live/9977255/>

[<https://perma.cc/WCD7-GRP8>] (detailing litigation against Cordish Co. related to discriminatory accommodation practices); *The Cordish Company Should Address Racial Discrimination Claims Immediately*, ACLU (Jan. 21, 2013), <https://www.aclu.org/press-releases/cordish-company-should-address-racial-discrimination-claims-immediately?redirect=racial-justice/cordish-company-should-address-racial-discrimination-claims-immediately> [<https://perma.cc/38NL-FVHJ>]; Amber Duke, *Coalition Concerned About Cordish Issues Points of Emphasis for Moving Community Forward*, ACLU KY (Dec. 1, 2015), <https://www.aclu-ky.org/en/news/coalition-concerned-about-cordish-issues-points-emphasis-moving-community-forward> [<https://perma.cc/6VQT-W5E8>].

<sup>359</sup> Lynn Horsley, *Despite Large Power & Light District Crowds, Taxpayers Are Still on the Hook*, *K.C. Star* (Feb. 7, 2015), <https://www.kansascity.com/news/politics-government/article9530081.html> [<https://perma.cc/3V63-926E>].

taxpayer-subsidized developments from arbitrarily using dress codes.<sup>360</sup> The ordinance has three key features. One part of the ordinance describes the covered entities and categories; in this regard, it looks similar to other anti-discrimination legislation and specifies protected legal categories.<sup>361</sup> Another portion of the ordinance, which is perhaps its defining feature, denominates the kinds of dress codes that cannot be implemented; it prohibits banning people based on jewelry, color of clothes, and the length of a specific article of clothing, amongst other specifications.<sup>362</sup> A final piece of the ordinance allows public accommodations to affirmatively require certain items of clothing.<sup>363</sup> The Kansas City ordinance is far from

<sup>360</sup> Sylvia Maria Gross, *Nightlife Area's Dress Code Seen as Discriminatory*, NPR (June 25, 2009), <https://www.npr.org/templates/story/story.php?storyId=105890577> [<https://perma.cc/RTZ4-RWHL>].

<sup>361</sup> Kan. City, Mo., Mun. Code § 38-113(a) (2020), [https://library.municode.com/mo/kansas\\_city/codes/code\\_of\\_ordinances?nodeId=PTIICOOR\\_CH38HURE\\_ARTIIIDIPR](https://library.municode.com/mo/kansas_city/codes/code_of_ordinances?nodeId=PTIICOOR_CH38HURE_ARTIIIDIPR) [<https://perma.cc/2ZW8-W9K4>].

<sup>362</sup> Kan. City, Mo., Mun. Code § 38-1(a)(26) (2020), [https://library.municode.com/mo/kansas\\_city/codes/code\\_of\\_ordinances?nodeId=PTIICOOR\\_CH38HURE\\_ARTIIIDIPR](https://library.municode.com/mo/kansas_city/codes/code_of_ordinances?nodeId=PTIICOOR_CH38HURE_ARTIIIDIPR) [<https://perma.cc/2ZW8-W9K4>] reads:

Prohibited dress code means a set of rules governing, prohibiting or limiting access to a place or business, or portion thereof, defined herein as a “public accommodation” because of any of the following:

- (a) The wearing of jewelry, the manner in which jewelry is worn or the combination of items of jewelry worn,
- (b) The wearing of a garment or headdress which is generally associated with specific religions, national origins or ancestry,
- (c) The length of the sleeve of a shirt or the leg of a pair of pants or shorts is too long, except that nothing herein shall be construed to prohibit a dress code that requires the wearing of a shirt,
- (d) The style, cut or length of a hair style,
- (e) The colors of the garments,
- (f) In conjunction with a major Kansas City sporting event, the wearing of athletic apparel which displays either a number, a professional or college team name or the name of a player;
- (g) The wearing of tee-shirts, except that nothing herein shall be construed to prohibit a dress code that requires such tee-shirts to have sleeves, or to prohibit a dress code that does not allow undershirts, undergarments, or tee-shirts of an inappropriate length. Designer tee-shirts, which are fitted and neat, cannot be banned.

<sup>363</sup> Kan. City, Mo., Mun. Code § 38-113(b)(2) (2020), [https://library.municode.com/mo/kansas\\_city/codes/code\\_of\\_ordinances?nodeId=PTIICOOR\\_CH38HURE\\_ARTIIIDIPR](https://library.municode.com/mo/kansas_city/codes/code_of_ordinances?nodeId=PTIICOOR_CH38HURE_ARTIIIDIPR) [<https://perma.cc/2ZW8-W9K4>] states it does not prohibit:

Any owner, agent, operator or employee of a business or facility within a redevelopment area from affirmatively requiring the wearing of specified articles of clothing, which may include collared shirts and ties, sports jackets, business suits, business casual, formal clothing or smart casual clothing in keeping with the ambiance

perfect. It does not capture the variety of ways dress codes are arbitrarily enforced.<sup>364</sup> Its enshrinement of affirmative dress requirements may not obviate the problem of exclusion that racial and sexual minorities face and may be subject to its own form of manipulation.<sup>365</sup> Nevertheless, it is an important step that does not exist in isolation.

In the past two years, there has been a proliferation of similar anti-discrimination laws in New York City, California, and New Jersey. These laws, often referred to as CROWN Acts, prohibit discrimination based on hairstyle.<sup>366</sup> Although they have garnered attention because of their bans in the employment contexts, the New Jersey and New York City laws also apply to public accommodations. The Kansas City ordinance is part of a larger legislative recognition of what feminist legal theorists and critical race scholars have argued for decades: ideas about professionalism are not always race- or gender-neutral and can shape how marginalized groups experience work and public space.<sup>367</sup> These laws, coupled with the steady media attention on dress codes, suggest that statutory reform is not far-fetched.

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and quality of the particular business or facility and formal footwear, so long as the requirements are enforced with regard to each and every patron, regardless of race, religion, color, ancestry, national origin, sex, marital status, familial status, disability, sexual orientation or gender identity.

<sup>364</sup> See sources cited *supra* notes 328–38.

<sup>365</sup> In fact, the history described in this paper suggests that some owners of public accommodations will be determined to find ways to evade anti-discrimination law. Still, one might argue that affirmative dress requirements impose a certain kind of uniformity that makes compliance easier for patrons whereas the status quo—loosely worded prohibitions—allow for more discretionary and arbitrary enforcement.

<sup>366</sup> Mariel Padilla, *New Jersey Is Third State To Ban Discrimination Based on Hair*, N.Y. Times (Dec. 20, 2019), <https://www.nytimes.com/2019/12/20/us/nj-hair-discrimination.html> [<https://perma.cc/M6WE-E5UV>]; Aris Folley, *New York Bans Discrimination Against Natural Hair*, Hill (July 13, 2019), <https://thehill.com/homenews/state-watch/452959-new-york-bans-discrimination-against-natural-hair> [<https://perma.cc/4HNV-E4KP>]; Phil Willon & Alexa Diaz, *California Becomes First State to Ban Discrimination Based on One's Natural Hair*, L.A. Times (July 3, 2019), <https://www.latimes.com/local/lanow/la-pol-ca-natural-hair-discrimination-bill-20190703-story.html> [<https://perma.cc/664D-FM5B>].

<sup>367</sup> See Erynn Masi de Casanova, *Buttoned Up: Clothing, Conformity, and White-Collar Masculinity* 144–46 (2015).



*B. Rejecting Gender-Based Pricing*

The nature of gender-based pricing has remained consistent, and the explanations for it typically revolve around profitability,<sup>368</sup> establishments' desire to attract women,<sup>369</sup> a hope to increase patronage more generally,<sup>370</sup> and the promotion of chivalry.<sup>371</sup> As a general matter, state anti-discrimination laws also do not have business-necessity-like provisions that would allow public accommodations owners to make gender-inflected arguments. Courts have rejected business arguments that use profit motives to justify discrimination.<sup>372</sup> Such dismissals similarly apply to gender-based pricing inspired by bringing in more women and men.<sup>373</sup> In addition to resting on heteronormative assumptions, chivalry-based defenses understand discrimination through the traditional and narrow lens of "hostile sexism" but ignore the "benevolent" version of sexism that legal scholars, feminists, and social scientists have long described.<sup>374</sup> This subtler sexism, they argue, is demeaning, can go unrecognized by both men and women, and can encourage more serious discrimination.<sup>375</sup> As one gender theorist recently explained, benevolent

<sup>368</sup> Chris Dixon, The "Ladies' Night" Strategy, *Bus. Insider* (Oct. 16, 2010), <https://www.businessinsider.com/the-ladies-night-strategy-2011-1> [<https://perma.cc/V8NM-S8SQ>].

<sup>369</sup> See *Koire v. Metro Car Wash*, 707 P.2d 195, 199 (Cal. 1985) (recounting argument by defendant that a "Ladies Night" promotion encouraged more women to attend the bar, thus promoting more interaction between men and women); *City of Clearwater v. Studebaker's Dance Club*, 516 So. 2d 1106, 1108 (Fla. Dist. Ct. App. 1987) (same).

<sup>370</sup> *Novak v. Madison Motel Assocs.*, 525 N.W.2d 123, 124, 127 (Wis. Ct. App. 1994) (rejecting the defendant-bar's argument that its "ladies drink free" special was designed to increase patronage by all groups and indicating that "intent is not relevant . . . promotions may not involve price differentials or other differential treatment based on the categories covered by the statute, whatever the intent").

<sup>371</sup> *Commonwealth Liquor Control Bd. v. Dobrinoff*, 471 A.2d 941, 943 (Pa. Commw. Ct. 1984) (highlighting how the trial court identified "chivalry and courtesy to the fair sex" as a purpose for some women's exemption from a bar's cover charge).

<sup>372</sup> See, e.g., *Easebe Enters., Inc. v. Rice*, 190 Cal. Rptr. 678, 681 (Ct. App. 1983) ("An entrepreneur's discriminatory practice based upon ostensible rational economic self-interest still violates public policy."); *Koire*, 707 P.2d at 199 (rejecting the defendants' arguments that gender-based discounts were permissible because they were profitable).

<sup>373</sup> *Ladd v. Iowa W. Racing Ass'n*, 438 N.W.2d 600, 602 (Iowa 1989) (rejecting the defendant's claim that its ladies' night promotion was animated by a desire to "stimulate business").

<sup>374</sup> See sources cited *supra* note 238 and *infra* note 376 and accompanying text (describing "benevolent sexism" and its documentation in the literature).

<sup>375</sup> Hoff, *supra* note 24, at 141.

sexism “undermines women’s resistance to male dominance” and is “disarming because it is technically favorable.”<sup>376</sup>

This is not to say that women who reap the benefits of gender-based pricing in these contexts are duped or devoid of agency. More likely than not, women enter these public accommodations with the precise understanding that the sites are fraught with assumptions about sex and sexuality.<sup>377</sup> Moreover, many women can enjoy these public spaces outside the male gaze and opt out of the sexual pursuit and rituals that these public accommodations engender.<sup>378</sup> Tammy Anderson, a social science expert in this field, offers instructive insights. She describes how contemporary popular culture is replete with messaging that promotes “going out at night” as a form of “sexual courtship,” but notes that there are places that deviate from this theme and focus on non-sexual priorities such as “music appreciation, dancing, [and] socializing with friends.”<sup>379</sup> Still, there are broader costs that come with gender-based pricing, particularly in bars and nightclubs.<sup>380</sup> Some social scientists have slowly unearthed these costs.<sup>381</sup> However, legal scholars have been less attentive to these costs, due in part to a lack of legal scrutiny of these public accommodations.

If one accepted the motives for gender-based pricing, the costs are not negligible. First, such policies condition entrance on gender performances that may be consonant with how a woman understands her gendered identity but also demand a version of femininity that is caricatured and contrived.<sup>382</sup> This presents the problem of sex stereotyping that anti-discrimination law and constitutional law have tried to regulate. Second, gender-based pricing in bars and nightclubs intensifies the sexual

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<sup>376</sup> Kristin J. Anderson, *Modern Misogyny: Anti-Feminism in a Post-Feminist Era* 108 (2015).

<sup>377</sup> Cf. Tammy L. Anderson, *Better to Complicate, Rather than Homogenize, Urban Nightlife: A Response to Grazian*, 24 Soc. F. 918, 923 (2009).

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> *Id.* (“I have seen the harassment of women and their risk for sexual assault increase where clubbing ethos and norms center on hooking up or being on the pull. Women are regularly exploited when clubs use sexual props and gimmicks to sell alcohol or provide entertainment.”).

<sup>381</sup> See Anderson, *supra* note 377, at 923; David Grazian, *Urban Nightlife, Social Capital, and the Public Life of Cities*, 24 Socio. F. 908, 913 (2009).

<sup>382</sup> Grazian, *supra* note 381, at 913 (“[Y]oung female nightlife patrons are similarly expected to perform hegemonic femininity by adhering to constraining gender norms that include wearing snug designer jeans, low-cut blouses, and stiletto heels.”).

violence that some social scientists show is pronounced in these spaces and occurs with regularity.<sup>383</sup> Such violence includes rape and attempted rape as well as other forms of unwanted sexual contact that receive less attention such as stalking, verbal harassment, touching, and groping.<sup>384</sup> One criminologist puts it plainly: “[D]rink specials and discounts intending to attract women to bars and other such nightlife venues also function to encourage heavy drinking and subsequently increase the risks for interpersonal victimization.”<sup>385</sup> To be sure, gender-based pricing is not the *cause* of sexual violence, and public accommodations are not the only *sites*; such behavior appears in public space, education, and at work.<sup>386</sup> But unlike the preceding settings, where social conventions, formal guidelines, and official workplace norms somewhat “censure sexually suggestive talk and behavior,” bars and nightclubs are seen as “direct sexual marketplaces” where such behavior is appropriate.<sup>387</sup> One qualitative empirical study specifies the problems with gender-based pricing and warrants extended quotation:

The novelty of “ladies night” was not only designed to attract females to certain venues, but also to lure males . . . to the venue so that they would spend more money. This was accomplished by creating an atmosphere centered on sex and the fetishization of females through the strategic use of alcohol. Males were lured to these venues, believing that intoxicated females would be easy marks. . . . [A]lcohol norms play an important role in shaping environments that became . . . conducive to sexual assault of females. . . . In commercial venues, this sense of levity was exaggerated to the point that physical and sexual assault were regarded as a normal, if unfortunate, aspect of nightlife. In this respect, victimization incidents were trivialized by club management, viewed

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<sup>383</sup> Philip R. Kavanaugh, *The Continuum of Sexual Violence: Women’s Accounts of Victimization in Urban Nightlife*, 8 *Feminist Criminology* 20, 22 (2013) (canvassing the research in this area).

<sup>384</sup> *Id.* at 21.

<sup>385</sup> *Id.* at 22.

<sup>386</sup> See generally Laura Beth Nielsen, *License to Harass: Law, Hierarchy, and Offensive Public Speech* (2004) (cataloguing misogynistic, harassing speech in public spaces); Peggy Reeves Sanday, *Fraternity Gang Rape: Sex, Brotherhood, and Privilege on Campus* (2d ed. 2007) (discussing sexual assault at college fraternity parties); Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979) (theorizing sexual harassment as sex discrimination and arguing that it is prohibited by Title VII).

<sup>387</sup> David Grazian, *On the Make: The Hustle of Urban Nightlife* 263 n.1 (2008).

merely as an expected hazard to be negotiated en route to maximizing alcohol sales and profit.<sup>388</sup>

Relatedly, gender-based pricing shapes the behavior of men who patronize these public accommodations—some of whom initiate sexual violence. One of the rationales that defenders of gender-based pricing offer is the desire to bring more men into these spaces by attracting women. Again, a chorus of scholars has shown that men move through the world with a general sense of entitlement. They perceive themselves as having entitlement in the home, at work, in school, in public space, in the digital world, and to women’s bodies.<sup>389</sup> There is no reason to believe that this entitlement to women’s bodies dissipates for men upon arrival into these public accommodations. As the above-excerpted language suggests, gender-based pricing likely augments this sense of entitlement, at least in bars and nightclubs. In these spaces, which are specifically structured as sexual<sup>390</sup>—from the pricing to the personnel<sup>391</sup>—men may assume that women’s reduced costs constitute barter for their own regularly-priced payments and infer entitlement to women’s bodies.<sup>392</sup> Gender-based pricing is certainly not the genesis of such assumptions, but it compounds the problem.

Courts’ negative treatment of gender-based pricing, along with the above-mentioned costs of such schemes, suggests that there are legal arguments in favor of its elimination. Normatively, this kind of

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<sup>388</sup> Philip R. Kavanaugh & Tammy L. Anderson, *Managing Physical and Sexual Assault Risk in Urban Nightlife: Individual- and Environmental-level Influences*, 30 *Deviant Behav.* 680, 706 (2009).

<sup>389</sup> See sources cited *supra* note 386 (discussing men’s verbal and physical abuse of women on the street, in the university, and in the workplace).

<sup>390</sup> Jennifer S. Hirsch & Shamus Khan, *Sexual Citizens: A Landmark Study of Sex, Power, and Assault on Campus* 81 (2020) (“The mystery here is not the persistence of drunk sex among students; rather, it is the persistent exoticization, among adults, of students’ recreational drinking and sex, especially considering their own well-accepted practice of drinking to have sex.”).

<sup>391</sup> Grazian, *supra* note 381, at 913 (“Nightclubs, restaurants, and cocktail lounges rely on the physical attractiveness and sexual magnetism of female service staff and the promise of eroticized interaction to recruit customers. Female workers in nightlife settings are often expected to ‘do gender’ by attempting an exaggerated performance of sexualized femininity that includes wearing tight and revealing clothing, and handling obnoxious and suggestive comments from groups of male customers with flirty come-ons and gracious humor.”) (citations omitted).

<sup>392</sup> For a different take on how bars and nightclubs shape romantic marketplaces and inform stereotypes about gay men and lesbians, see Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 *Fordham L. Rev.* 2787, 2800–02 (2008).

prohibition would rest on an anti-subordination approach that focuses on the sex stereotyping that comes with the practice. Unlike the case of dress code regulation, here, statutory reform is unnecessary because most states already prohibit discrimination based on sex in public accommodations. The anti-subordination approach would take shape through courts. There is a new wave of disputes brought by men's rights activists challenging ladies' night discounts, as well as a host of other gender-inspired initiatives that are outside the scope of this Article but rely on public accommodations law and anti-discrimination logics.<sup>393</sup> These men's rights groups have challenged Mothers' Day events, technology conferences for women, networking functions, and breast cancer awareness events.<sup>394</sup> The path here is twofold.

First, courts need to invalidate gender-based pricing in bars, restaurants, and nightclubs. Rather than relying on the anti-classification approaches taken by previous courts and posited by men's rights activists, decisions rest on anti-subordination principles. Courts and readers might feel uneasy supporting outcomes desired by someone like men's rights activist and ladies' night challenger Steve Horner, who once claimed that "[t]he real reason I'm doing this is to emulate Rosa Parks. And freedom fighters like her."<sup>395</sup> But the uncomfortable reality is that the identity of a person challenging a status hierarchy-enforcing practice should matter less than the illegitimate practice itself. As Jessica Clarke observes, it may seem like a member of a dominant group is not entitled to claim victim status, but such group formalism impedes subordination agendas.<sup>396</sup>

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<sup>393</sup> See Murray, *supra* note 25, at 288–92.

<sup>394</sup> Id; Matt Pearce, *That Time Donald Trump Got Sued by a California Men's Rights Activist*, L.A. Times (Nov. 1, 2016), <https://www.latimes.com/politics/la-na-pol-trump-mens-rights-20161027-story.html> [<https://perma.cc/U6GW-M52A>] (discussing a lawsuit brought by a men's right activist against Trump National Golf Club for a promotion it offered in recognition of breast cancer awareness month).

<sup>395</sup> David Harsanyi, *Man's Goal: Lights Out on Ladies Night*, Denver Post (Sept. 18, 2006, 5:07 PM), <https://www.denverpost.com/2006/09/18/mans-goal-lights-out-on-ladies-night/> [<https://perma.cc/RE23-HSHA>].

<sup>396</sup> Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. Rev. 101, 105 (2017). As Suzanne Goldberg put it in a recent controversy involving a women's workspace in New York City, "Anti-discrimination laws don't only protect groups that have experienced histories of discrimination . . . . These laws protect everyone from discrimination based on specified aspects of their identity." Karen Matthews, *Can a Club for Women Legally Exclude Men? NYC Launches Probe*, AP News (Mar. 29, 2018), <https://apnews.com/article-/90b8bbab98a24a15a44aef9814210c2c> [<https://perma.cc/CH2T-59PS>] (internal quotation marks omitted). In this same controversy, Katherine Franke added, "We can't say it's illegal for the men to keep women out of their clubs and say it's legal for the women to keep the men

Equality principles should be the organizing principle for considering claims of discrimination and not the victim's status. Gender-based pricing quintessentially reinforces sexism and sex stereotypes.

Second, in cases involving this form of velvet rope discrimination, courts need to specify anti-subordination principles. To be sure, the application and specification of the anti-subordination ideal is not straightforward and can vary depending on the social practice in dispute. As Jack Balkin and Reva Siegel observe, “[T]here are a host of contestable value judgments entailed in determining what dignitary distinctions or distributive arrangements are unjust, and how the legal system should integrate the pursuit of antisubordination commitments with other social goals.”<sup>397</sup> When examining the legal permissibility of a practice under public accommodations laws, courts’ analysis of gender-based pricing might look different than their evaluation of Mother’s Day functions. The analysis probably should be different. Such functions, along with the women’s-only networking events, and breast cancer awareness events that have come under legal scrutiny, deserve their own intellectual treatment beyond the scope of this project. But what can be said briefly is that these initiatives are not premised on the maintenance of status hierarchies but on a recognition of the unique harms, histories, and exclusion that women have faced. As the preceding Parts of this Article have shown, gender-based pricing has typically been animated by more problematic concerns, and to the extent that such cases make their way to courts, anti-subordination principles call for the invalidation of this practice.

### *C. Enforcement*

This Article does not argue for a form of public accommodations primacy. Instead, it seeks to reposition the issue in the civil rights race and gender agenda. Nevertheless, there is still the outstanding question:

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out of their clubs.” See Maura Barrett & Jo Ling Kent, *Despite Success, Women’s Work Sanctuaries May Break the Law*, NBC News (May 21, 2018, 10:12 AM), <https://www.nbcnews.com/business/business-news/despite-success-women-s-work-sanctuaries-may-break-law-n875551> [<https://perma.cc/GW8Q-F6W2>].

<sup>397</sup> Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 *U. Miami L. Rev.* 9, 14–15 (2003) (“[T]he question whether a practice violates an antisubordination principle depends heavily on factual and historical contexts, and, in particular, on the laws and social mores that prevail in a given society at a given moment in history . . . . Few would characterize the anticlassification principle as similarly flexible.”).

How aggressively should we care about and regulate public accommodations? Such questions are impossible to answer in a one-size-fits-all fashion and are conditional on a host of issues, including the existing regulation of public accommodations; resource allocation questions amongst regulatory bodies and the civil rights bar; the jurisdiction's warmness to civil rights claims; and other place-specific idiosyncrasies. Still, there are at least two general and tentative considerations that might speak to the enforcement question which are worth addressing in detail.

First, regulatory bodies might shore up their efforts in the regulation of public accommodations discrimination. The 1970s and 1980s provide a historical template for such enforcement. During those decades, agencies suspended liquor licenses as deterrence signals, sent out testers to ensure equal access, and obtained modest settlements with violators of public accommodations laws.<sup>398</sup> Today, agencies often treat public accommodations discrimination as a low priority.<sup>399</sup> But the tripartite combination of regulatory underenforcement, low damages awards for violations, and the well-documented municipal extraction of money from poor Black and brown people suggests that states and cities might engage in legislative and ordinance reform that better regulates the subtle ways velvet rope discrimination operates. To the extent that municipalities are mercenary about revenue generation—through policing,<sup>400</sup> illegal tax

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<sup>398</sup> See discussion *supra* Section II.B; *Cops Who Dance the Night Away*, *supra* note 279, at B9; *Dallas Revises Law to Restrict Club Dress Codes*, *Tyler Courier-Times*, Dec. 23, 1979, at 5.

<sup>399</sup> The most noteworthy exception to this point is the New York City Commission on Human Rights, which has been recently active in this area, uniquely organized, and has “one of the broadest and most protective anti-discrimination laws” at its disposal: the New York City Human Rights Law. Gurjot Kaur & Dana Sussman, *Unlocking the Power and Possibility of Local Enforcement of Human and Civil Rights: Lessons Learned from the NYC Commission on Human Rights*, 51 *Colum. Hum. Rts. L. Rev.* 582, 598 (2020). For a general discussion on the role of these agencies, see *Columbia Law Sch. Human Rights Inst., Columbia Law Sch. & Int’l Ass’n of Official Human Rights Agencies, State and Local Human Rights Agencies: Recommendations for Advancing Opportunity and Equality Through an International Human Rights Framework* (2010).

<sup>400</sup> Devon W. Carbado, *Predatory Policing*, 85 *UMKC L. Rev.* 545, 556–58 (2017) (describing fines and citations as sources of revenue that use police officers as their front-line agents).

assessments,<sup>401</sup> asset forfeiture,<sup>402</sup> and court fees<sup>403</sup>—they might instead consider the deep-pocketed, anti-discrimination-law-flouting nightlife industry as a site for regulation that could augment their coffers.<sup>404</sup>

Second, law schools might develop administrative law school clinics—which are rarities in legal education notwithstanding their potential social justice and pedagogical value.<sup>405</sup> Such clinics could focus on public accommodations discrimination as well as the host of civil rights issues that local government agencies regulate but go unaddressed in the school’s clinical offerings (e.g., employment discrimination, disability law, education law). These suggestions in the aggregate, or in isolation, are not enough to resolve the problem of public accommodations law, but they would be fruitful steps in mitigating a form of dignity degradation that has been underattended to for too long.

#### CONCLUSION

Although public accommodations served as crucial battlegrounds for the Civil Rights Movement and the Women’s Rights Movement, they are overshadowed by other spheres of social life that these campaigns sought to equalize: criminal procedure, housing, education, voting, and employment. These fields maintain a certain kind of significance in civil rights thinking. Many people reasonably understand these areas as more material and urgent legal priorities for marginalized groups. These domains have spawned book-length legal treatments, casebooks, and corresponding law school courses in ways public accommodations law

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<sup>401</sup> Bernadette Atuahene & Christopher Berry, *Taxed Out: Illegal Property Tax Assessments and the Epidemic of Tax Foreclosures in Detroit*, 9 U.C. Irvine L. Rev. 847, 849, 851 (2019) (providing empirical evidence of a systemic and unconstitutional pattern of over-assessment of home values in Detroit, leading to inflated property taxes).

<sup>402</sup> Adam Crepelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems It Creates*, 7 Wake Forest J.L. & Pol’y 315, 315–16 (2017) (describing the poor incentive effects of law enforcement revenue generation from civil asset forfeiture).

<sup>403</sup> See generally Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* (2016) (theorizing court sanctions as a form of social control of the poor).

<sup>404</sup> See *Nightlife Industry Overview*, Am. Nightlife Ass’n, <https://www.nightlifeassociation.org/market-overview/> [<https://perma.cc/9XPM-PFQ2>] (last visited Jan. 18, 2021) (noting that the larger nightlife industry, of which bars and nightclubs are a part of, brings in in roughly \$26 billion annually in revenue).

<sup>405</sup> See Michael Hunter Schwarz & Jeremiah A. Ho, *Curriculum Reforms at Washburn University School of Law*, in *Reforming Legal Education: Law Schools at the Crossroads* 41, 42–43 (David M. Moss & Debra Moss Curtis eds., 2012).



has not.<sup>406</sup> But public accommodations are important sites for inclusion into society. The relative paucity of work in this area highlights the limited vocabulary legal scholarship has for thinking about law, recreation, and leisure. Regina Austin puts it best: it is difficult to imagine a conception of good life that does not entail a fair measure of leisure—much of which occurs in public accommodations.<sup>407</sup>

This Article focuses on a limited category of public accommodations (bars, restaurants, and nightclubs) that some people may not frequent. Yet the focus on a specific subset still highlights how these spaces, and public accommodations more generally, have been and continue to be important sites of meaning-making, group formation, and political mobilization.<sup>408</sup> Whether it be nightlife, amusement parks, beaches, swimming pools, movie theaters, or the like, public accommodations are important places people visit for “the purpose of engaging in pleasurable, generally nonwork-related or after-hours pursuits.”<sup>409</sup> Such leisure pursuits are important features of modern living.<sup>410</sup> But as history has shown, public

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<sup>406</sup> For voting rights see Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* (4th ed. 2012); James A. Gardner & Guy-Uriel Charles, *Election Law in the American Political System* (2d ed. 2018). For employment law and discrimination see Mark Rothstein & Lance Liebman, *Employment Law* (6th ed. 2007). For education law see Michael J. Kaufman & Shereyn R. Kaufman, *Education Law, Policy, and Practice: Cases and Materials* (4th ed. 2018); Charles J. Russo, Reutter’s *The Law of Public Education* (6th ed. 2006). Housing falls within property and/or land use law and casebooks. See Stewart E. Sterk, Eduardo M. Peñalver & Sara C. Bronin, *Land Use Regulation* (2d ed. 2016); Joseph William Singer, Bethany R. Berger, Nestor M. Davidson & Eduardo Moisés Peñalver, *Property Law: Rules, Policies, and Practices* (6th ed. 2014). For book-length treatments on housing and discrimination by legal scholars see Richard R. W. Brooks & Carol M. Rose, *Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms* (2013); Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017). The criminal procedure story is well-told. See Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (2004).

<sup>407</sup> Austin, *supra* note 71, at 667.

<sup>408</sup> *Id.* at 670.

<sup>409</sup> *Id.* at 668. See generally John Wilson, *Politics and Leisure* (1988) (discussing how leisure is treated by differently-structured political states); *A Handbook of Leisure Studies* (Chris Rojek, Susan M. Shaw & A.J. Veal eds., 2006) (collecting a variety of essays on the origins, nature, and analysis of leisure); Robert A. Stebbins, *Serious Leisure, Society*, May 2001, at 53 (comparing a light-hearted, simple, and unsatisfying “casual leisure” with a more substantial “serious leisure” which requires time and effort to master and generates more lasting rewards); *Sociology of Leisure: A Reader* (C. Critcher, P. Bramham & A. Tomlinson eds., 1995).

<sup>410</sup> *A Handbook of Leisure Studies*, *supra* note 409, at 1–2.

accommodations are not insulated from the vagaries of social identity.<sup>411</sup> And while this Article has focused primarily on race and sex, there are a host of other relevant categories that are important to consider in the public accommodations context, as the enduring battle for disability rights and the thorny questions around religious freedom and sexual orientation teach us.<sup>412</sup> This Article's excavation of velvet rope discrimination supplies a history, analyses, and tangible normative suggestions that might bring us closer to the equality norms embodied in our anti-discrimination laws.

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<sup>411</sup> See sources cited *supra* note 137 (describing movements to desegregate American public accommodations); Ricard Gil & Justin Marion, Residential Segregation, Discrimination, and African-American Theater Entry During Jim Crow, 108 *J. Urb. Econ.* 18, 18–19 (2018).

<sup>412</sup> See sources cited *supra* note 25 (noting recent scholarship on sexual orientation, religion, and disability in the context of public accommodations law).