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Sex in Public

ABSTRACT. This Article recounts the first history of sex in public accommodations law—a history essential to debates that rage today over gender and sexuality in public. Just fifty years ago, not only LGBTQ people but also cisgender women were the subject of discrimination in public. Restaurants and bars displayed “men-only” signs. Women held secondary status in civic organizations, such as Rotary and Jaycees, and were excluded altogether from many professional bodies, such as press clubs. Sports—from the Little League to the golf club—kept girls and women from achieving athletic excellence. Financial institutions subsumed married women’s identities within those of their husbands. Over the course of the 1970s, the feminist movement protested and litigated against sex discrimination in public accommodations. They secured state laws opening up commerce and leisure for “full and equal enjoyment” by both sexes. When “sex” was added to state public accommodations laws, feminists, their opponents, and government actors understood sex equality in public to signify more than equal access to public spaces. It also implicated freedom from the regulation of sexuality and gender performance and held the potential to transform institutions central to dominant masculinity, like baseball fields and bathrooms. This history informs the interpretation of public accommodations laws in controversies from same-sex couples’ wedding cakes to transgender people’s restroom access.

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INTRODUCTION

One winter's evening in 1970, Carolyn Anderson suffered humiliation over a perfectly ordinary cocktail. Anderson planned to meet her husband at P.J. Clarke's, a New York City establishment. She was early; upon entering, she saw a familiar "RESERVED" card, a signal that women were "not wanted" at the bar.¹ Anderson sat down at a table but, after a few minutes, approached the bar to ask for a cocktail. "From then on," Anderson explained in a letter to feminist attorney Faith Seidenberg, "the bartender subjected me to most viciously hostile treatment."² She eventually left, telling the bartender she preferred her money to the drink. The treatment was not new to Anderson, but the insult stung, perhaps because she found the bartender "unusually threatening."³ Maybe the date made a difference: just four years earlier, advocates had founded the National Organization for Women (NOW) to pursue equal opportunity under law.⁴ Radical activists had begun public protests, a broad range of women had joined "consciousness-raising" groups, and women's liberation was often in the news. Anderson decided to "educat[e] [her]self concerning [her] rights," and she asked Seidenberg, "[W]hat are the laws governing the serving of a lone woman at a commercial bar?"⁵

The answer to Anderson's question would have disappointed her: at the time, only one state offered recourse against sex discrimination in public accommodations – the legal term for public-facing entities other than the workplace.⁶

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1. Letter from Carolyn M. Anderson to Faith Seidenberg 1 (Apr. 16, 1970) (on file with Schlesinger Library, Harvard University, Faith Seidenberg Papers [hereinafter Seidenberg Papers]). While Anderson's letter spells the restaurant P.J. Clark's, it appears to have always been spelled P.J. Clarke's. See HELEN MARIE CLARKE, *OVER P. J. CLARKE'S BAR: TALES FROM NEW YORK CITY'S FAMOUS SALOON* (2012).
 2. Letter from Carolyn M. Anderson to Faith Seidenberg, *supra* note 1, at 1-2.
 3. *Id.*
 4. *Founding*, NAT'L ORG. FOR WOMEN (July 2011), <https://now.org/about/history/founding-2> [<https://perma.cc/JR4H-D9P6>].
 5. Letter from Carolyn M. Anderson to Faith Seidenberg, *supra* note 1, at 1-2.
 6. See Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 217-18 (1978) ("Public accommodations' is a term of art which was developed by the drafters of discrimination laws to refer to places other than schools, work places, and homes."). Like Lerman and Sanderson, we exclude schools from our discussion. Only eleven states explicitly include schools within the definition of public accommodations, and even those states often have freestanding education antidiscrimination statutes. Note also that although Iowa, New Jersey, and New York passed statutes banning sex discrimination in public accommodations in 1970, these laws were not yet in effect when Anderson wrote her letter. 1970 Iowa Acts 83; 1970 N.J. Laws 296; 1970 N.Y. Laws 3107. Minnesota's antidiscrimination statute was not

State laws passed after the Civil War and Title II of the newly enacted Civil Rights Act of 1964 barred race, national origin, and religious discrimination in public accommodations. But neither the federal law nor the states' laws included "sex" until Colorado became the first to do so in 1969.⁷ In the late 1960s, women confronted rampant sex discrimination in commerce, leisure, and civic life. The kinds of commercial spaces where the *Mad Men* of the business world congregated refused to open their doors to women. Bars and diners hung signs: "No unescorted women."⁸ Professional organizations often confined women to second-class membership. Credit institutions would not lend married women money in their own names. Civic institutions from Little League baseball to the Junior Chamber of Commerce excluded girls and women. United Air Lines even flew "Executive Flights" reserved for male customers.⁹

In less than a decade, the legal landscape changed dramatically. Building explicitly on the civil rights sit-ins of the 1960s, NOW, often joined by other groups, protested in the streets, litigated in the courts, and lobbied in legislatures for state laws prohibiting sex discrimination. By the end of the 1970s, thirty-one states and many more cities barred sex discrimination in public accommodations.¹⁰ Today, all forty-five state public accommodations laws encompass sex discrimination.¹¹ Although statutory language varies, a representative statute references any "business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public."¹² As a general principle, public accommodations laws apply to any entity that enters commerce and opens to the world at large.¹³

amended to ban sex discrimination in public accommodations until 1973. 1973 Minn. Laws 2164. Only Colorado banned sex discrimination in public accommodations at the time. 1969 Colo. Sess. Laws 200.

7. Lerman & Sanderson, *supra* note 6, at 224, 260-61.

8. See, e.g., *infra* note 252 and accompanying text.

9. Patricia Trainor, 'Friendly Skies' of United Hostile to Women, NOW ACTS (NOW), Fall 1968, at 3 (on file with Northwestern University Library, Karen DeCrow Papers [hereinafter DeCrow Papers]).

10. See *infra* notes 140-147 and accompanying text.

11. *State Public Accommodation Laws*, NAT'L CONF. ST. LEGISLATURES (Apr. 8, 2019), <http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx> [<https://perma.cc/HPD4-PA9B>].

12. MINN. STAT. ANN. § 363A.03(34) (West 2019).

13. A term of art, "place of public accommodation" does not require that an entity have a fixed physical location and thus could apply, for example, to a food truck or a recreational tennis organization holding tournaments at various courts. The term also applies to public-facing

This Article provides the first history of sex in public accommodations, drawing on original archival and case-law research. Public accommodations emerged in the late 1960s and '70s as a central battleground over sex classification, sexuality, and gender roles. For feminists, their opponents, and state actors, sex equality in public came to mean more than formal equal treatment of males and females. Rather, this Article argues, equality in public accommodations had three dimensions—access to the public sphere, freedom from sexual norms, and transformation of institutions. Women demanded a legal right to enter public space, but equality was not limited to mere access. It required freedom from dominant heterosexual norms that made women's attachment to men determinative of their movement and activities, in exchanges from ordering a cocktail at a bar to requesting a loan to buy a car. Sex integration, its supporters hoped and its opponents feared, would transform institutions central to dominant masculinity, from baseball fields to bathrooms.

The history recounted in this Article provides a new and important touchstone for contemporary legal controversies. Today, debates continue to rage over sex in public, from same-sex wedding cakes and bathroom wars to sex-segregated sports and breastfeeding in public. But little historical or legal scholarship exists to inform the interpretation of the public accommodations statutes at the core of these disputes.¹⁴ Formal legislative history that might explain statutory

commerce of otherwise private clubs, for example, a bake sale at an otherwise exclusive private membership club.

14. The single piece of historical scholarship on point, Georgina Hickey, *Barred from the Barroom: Second Wave Feminists and Public Accommodations in U.S. Cities*, 34 FEMINIST STUD. 382 (2008), focuses narrowly on the barroom, ignoring broader practices of exclusion, and on social protest rather than legal disputes in judicial and legislative fora. While constitutional challenges to public accommodations laws have generated large volumes of constitutional law scholarship over the last fifty years, legal scholars have not explored the contours of sex discrimination under public accommodations statutes.

meaning is typically lacking.¹⁵ And the cultural memory of this sex-segregated public and its (partial) undoing has faded.¹⁶

By analyzing the legal reforms of the 1970s, this Article illuminates the meaning of “sex” in public accommodations laws. As Part I explains, the sex discrimination that the feminist movement confronted originated in older periods of anxiety over gender roles and sexuality. The sex segregation of public spaces derived from three sources: the separate-spheres ideology of the mid-nineteenth century, which assigned women to the home and men to the market; heterosexual norms that emphasized the sexual vulnerability of respectable white women while simultaneously constructing other women as sources of sexual disorder; and defensive impulses to preserve dominant masculinity in male-only spaces such as gyms and barber shops.

Beginning in the late 1960s and through the 1970s, feminist advocacy challenged these ideologies to dismantle much of the sex segregation and exclusion that characterized public accommodations—as Part II details. Women of color had pioneered feminist public accommodations activism in the early ’60s, when they challenged the intersections of race and sex discrimination. Just as it did for the civil rights struggle, public accommodations served as kindling for feminist mobilization later in the decade. Sex discrimination in public was pervasive,

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15. See *White v. Fleming*, 522 F.2d 730, 736 n.8 (7th Cir. 1975) (remarking on the lack of legislative history for a Wisconsin statute); *Human Rights Comm’n v. Benevolent & Protective Order of Elks of the U.S.*, 839 A.2d 576, 582 n.4 (Vt. 2003) (“[W]e have been unable to ascertain whether there was legislative debate in the 1987 session . . . which added ‘sex’ as a protected classification.”); *State v. U.S. Jaycees*, No. 1800-7802, 1979 WL 61037, at *10 (Minn. Off. Admin. Hrgs. Oct. 9, 1979) (same for Minnesota statute); Alan J. Hoff, *A Proposed Analysis for Gender-Based Practices and State Public Accommodations Laws*, 16 U. MICH. J.L. REFORM 135, 144 n.53 (1982) (noting that state legislative histories are “notoriously scarce,” a search regarding the Michigan public accommodations statute “disclosed only procedural data,” and direct inquiries to several state human rights commissions yielded no relevant legislative history). After thorough searches, we have concluded that there are no extant legislative histories of public accommodations statutes in early-acting states including Colorado, Iowa, New York, and Pennsylvania.
 16. Feminist public accommodations activism has been overlooked in the legal history scholarship, which has focused on employment discrimination, reproductive freedom, and equal protection under the Fourteenth Amendment. See, e.g., SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* (2011) (discussing the import of the race-sex analogy in these campaigns); KATHERINE TURK, *EQUALITY ON TRIAL: GENDER AND RIGHTS IN THE MODERN AMERICAN WORKPLACE* (2016) (analyzing working women’s vision of justice under Title VII); Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law*, 91 WASH. U. L. REV. 453 (2014) (analyzing feminist advocacy combatting pregnancy discrimination in the workplace); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010) (examining the intellectual history of Ruth Bader Ginsburg’s constitutional sex equality litigation); Reva B. Siegel, *Roe’s Roots: The Women’s Rights Claims That Engendered Roe*, 90 B.U. L. REV. 1875 (2010) (exploring the early reproductive rights campaign).

structuring interaction between the sexes and shaping relations among women. Women of varying backgrounds recognized its injustice and sought equality.

Though women of color played important roles in public accommodations advocacy, activists were predominantly white middle-class women. Class and race privilege shaped their sense of entitlement to public spaces and resources. Through the addition of “sex” to state statutes, activists hoped to achieve “full and equal enjoyment” for both women and men of accommodations ranging from the commercial (restaurants, bars, and credit unions) to the social (athletic organizations, civic groups, and children’s activities). Not everyone easily accepted the laws, however, and their precise meaning was up for grabs.

Debates took place along three dimensions: (1) challenges to the notion of a “woman’s place,” (2) rejection of heterosexual dependency, and (3) the destabilization of dominant masculinity. Although these dimensions cut across market sectors, we focus on salient case studies: the business lunches and men’s clubs that relegated women to subordinate places in the market; the credit practices, bar customs, and dress codes that enforced compulsory heterosexuality; and the sex-segregated sports and restrooms that reified dominant masculinity.

Sex discrimination in public imposed both material and dignitary harms, as Part III argues. Middle-class women who had begun to advance in professional careers resented their exclusion from men-only business lunches, clubs, and professional organizations – public spaces that buttressed the glass ceiling. Beyond any economic effect, the denial of rights of access acted as a vivid symbol of women’s subordination and second-class citizenship. Crossing into public spaces and roles that had belonged to men, feminists demanded these harms be remedied, even as business owners, male patrons, and some courts sought to preserve the status quo.

The advent of laws prohibiting sex discrimination in public accommodations began to deconstruct the legal architecture of compulsory heterosexuality. As Part IV reveals, equality in public accommodations meant delinking women’s identity as market actors from their sexuality and marital status. Women, feminists averred, should be able to drink alone, borrow credit in their own names, and join clubs as full members. Administrative agencies, courts, and lawmakers often agreed, rejecting policies justified by the construction of men as sexual predators and of women as, alternatively, sexual threats or sexual prey.

Public accommodations laws also held the potential to transform institutions through sex integration, as Part V contends. Feminist public accommodations activists aspired to use the laws to destabilize prevailing understandings of bodily sex difference, to challenge assumptions about the need for sexual privacy, and to reconfigure institutions ranging from athletic fields to bathrooms. Business owners, politicians, and courts all struggled with the implications of sex integration for masculinity. Ultimately, however, resistance from legislatures,

courts, and the public blunted the meaning of sex equality in public at its most radical edges – yielding “separate but equal” in sports, restrooms, and other significant spaces of socialization.¹⁷

Today, the meaning of sex in public remains hotly contested. Flashpoints include the ongoing regulation of cisgender women in contexts ranging from public breastfeeding¹⁸ to sex-segregated sports,¹⁹ of transgender individuals’ use of public facilities consistent with their identities,²⁰ and of gay and lesbian people’s access to commercial goods and services.²¹ The Conclusion identifies insights from the history of sex in public accommodations law that the burgeoning scholarly literature in this field should pursue.²² In the absence of a history of sex in public, legal scholars and courts have drawn strained comparisons between the

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17. See generally David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 COLUM. J. GENDER & L. 51 (2011) (analyzing sex segregation). For a recent example, see Katherine Rosman, *Is Women-Only Club the Wing Discriminating in a Bad Way?*, N.Y. TIMES (Mar. 28, 2018), <https://www.nytimes.com/2018/03/28/style/the-wing-investigation.html> [<https://perma.cc/82QH-83RS>] (describing women-only workspaces).
 18. See *Derungs v. Wal-Mart Stores, Inc.*, 162 F. Supp. 2d 861, 864 (S.D. Ohio 2001), *aff’d*, 374 F.3d 428 (6th Cir. 2004) (holding that requiring nursing women to go to the restroom or leave was not sex discrimination under state public accommodations law); see also Danielle M. Shelton, *When Private Goes Public: Legal Protection for Women Who Breastfeed in Public and at Work*, 14 L. & INEQ. 179, 181-82 (1995) (describing incidents of women asked to leave public places).
 19. See generally Helen J. Carroll, *The Present Explosion of LGBT Sports*, 34 LAW & INEQ. 499 (2016) (analyzing the LGBT sports movement).
 20. See, e.g., Stephen Rushin & Jenny Carroll, *Bathroom Laws as Status Crimes*, 86 FORDHAM L. REV. 1, 8-15 (2017) (describing the emergence of bathroom bills as a legislative priority and these bills’ treatment in electoral and judicial processes).
 21. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (finding that the government had shown religious animus toward a baker but not resolving broader challenges).
 22. Unlike the prohibition on sex discrimination in employment that has been the subject of thorough scholarly analysis, state public accommodations law has received far less attention from legal scholars until recently. See generally Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205 (2014) (historicizing conflicts over public accommodations); Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 636 (2016) (reviewing state laws); Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL’Y REV. 25 (2015) (discussing and critiquing same-sex marriage religious exemptions). Some remarkable earlier pieces exist. See, e.g., Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1617-36 (2001) (discussing the broader context of public accommodations laws for constitutional doctrine); Daphna Renan, “*To the Tables Down at Mory’s*”: *Equality as Membership and Leadership in Places of Public Accommodations*, 16 YALE J.L. & FEMINISM 241 (2004) (exploring the sex integration of a Yale club); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996) (demonstrating the common-law foundation of an equal-access norm).

experiences of LGBTQ people in contemporary market conditions and African Americans in the 1960s South.²³ From this reference point, challengers to public accommodations law often characterize the governmental interest in nondiscrimination as confined to eradicating monopolies to ensure some market access for minorities.²⁴ But the addition of “sex” to public accommodations laws occurred in markets where women typically had robust alternatives for dining, drinking, and relaxing. The history recounted here makes manifest that public accommodations statutes remedy not monopolistic exclusion but the dignitary and material harms of less-than-full inclusion in public life.

This Article provides a missing link between the African American civil rights movement and the LGBT rights movement: the women’s liberation movement. When “sex” was added to public accommodations statutes, discrimination was widely understood to encompass the regulation of sexuality, the requirement of attachment to a man, and the enforcement of gendered dress. Each of these understandings track what we currently define as sexual orientation, marital status, and gender identity discrimination. As scholars, legislators, and courts look to public accommodations law, this history suggests they consider the intriguing possibility that existing prohibitions on sex discrimination might already protect some forms of sexual identity and expression in public, from breastfeeding to sexual orientation and gender nonconformity.

I. SEX SEGREGATION IN LAW AND CUSTOM

Sex segregation in both law and custom was rampant in the late 1960s. Restaurants, ranging from the expensive Whyte’s Restaurant on Wall Street to the middle-class Stouffer’s Grills across the Midwest, did not admit women during lunch—considered the time for the business meetings of male executives.²⁵

23. See, e.g., ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 29 (2010) (using Jim Crow as the reference point for whether public accommodations acts should apply today); Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1284-85 (2014) (arguing by reference to the Deep South in 1964 and observing that the overarching societal impulse toward segregation justified Title II even though discriminatory businesses were small).

24. See, e.g., Brief for Petitioners at 50-61, *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 3913762 (arguing that the existence of other bakeries renders the government interest in public accommodations law less than compelling).

25. New York City Goals: National Organization for Women 2 (1969) (on file with DeCrow Papers); see also Deborah Harkins, *Sex and the City Council*, N.Y. MAG., Apr. 27, 1970, at 10, 11 (reporting that Carol Greitzer, who sponsored the New York City ordinance, received eighty letters from lawyers protesting Wall Street restaurant segregation).

Other places, both working-class taverns and department-store men's grills, kept women out altogether to preserve a space for homosocial conviviality.²⁶ Often, a woman could access commerce—a room at a hotel, a coffee at a diner late at night, or a cocktail at a bar—only when accompanied by a male “escort.”²⁷ Eating and drinking establishments in cities across the United States posted signs, “No Unescorted Ladies Allowed,” fearing prostitution and single women’s sexual immorality.²⁸

Many organizations central to civic life subordinated women and girls. Dining, professional, and athletic clubs, although nominally private, often were open to all men yet no women. Organizations designed to fuel business connections, such as Junior Chambers of Commerce, frequently banned women or granted them second-class memberships.²⁹ Leisure activities were often separate and radically unequal. Boys’ scouting and sports received significantly more funding and were “vastly superior.”³⁰ Athletic facilities restricted women’s admission, and where they existed, girls’ and women’s teams received worse playing times and facilities.³¹ Financial institutions discriminated in ways that undermined women’s economic independence, treating single women as poor credit risks and subsuming married women’s economic identities under those of their husbands.

This Part explains the origins of sex segregation of public accommodations. As Section I.A shows, as women increasingly entered public places from the mid-nineteenth through the twentieth centuries, sex segregation preserved male dominance in spheres of public power. This ideology treated respectable women (usually defined as white and middle-class) as vulnerable and in need of protection outside of domestic spaces. As Section I.B explains, concerns about sexual

26. See, e.g., Janet Chusmir, *Two Stores to De-Sexregate*, MIAMI HERALD, Oct. 15, 1969 (on file with DeCrow Papers) (discussing department stores); John Toscano, *14 High Heels Stir the Sawdust at McSorley’s*, N.Y. DAILY NEWS, Aug. 11, 1970, at 6 (noting “hundreds of restaurants and hotels which discriminate against women” in New York City).

27. See Harkins, *supra* note 25, at 10.

28. New York City Goals: National Organization for Women, *supra* note 25, at 2.

29. See Dorothy Nickerson, *Out from Under: National Organization of Women Spawns Modern Suffragettes* (n.d.) (on file with DeCrow Papers).

30. Memorandum from Gerry O’Kane, ACLU Women’s Rights Project, to Affiliate Directors 1 (n.d.) (on file with Minnesota Historical Society Archives, Minnesota ACLU Records [hereinafter MNCLU Records]).

31. Gerald Gardner, *We Won We Won We Won We Won: Pennsylvania Girls Gain Equal Rights in Public School Sports*, PA. NOW, Oct. 1974, at 3, 5 (on file with University of Pittsburgh, Jean Witter Papers [hereinafter Witter Papers]) (reporting an almost ten-fold discrepancy between boys’ and girls’ sports).

morality underscored policies in bars, restaurants, and hotels that treated uncourted women as sexual nuisances. Women's relationship with the public was frequently constructed by reference to their attachment to a man. As Section I.C demonstrates, male-only bars, organizations, and sports represented the preservation of traditional masculinity against the feminization of the public. These three interrelated rationales served to justify sex segregation into the 1970s and persist, albeit in weaker forms, into the present.

A. *"The Last Great Piece of Americana"*³²: *Preserving the Male Public*

In 1969, the Connecticut Intercollegiate Student Legislature—a mock legislature—debated amending state law to allow women to sit at bars. Speaking to the majority male body, a student “delivered the bill’s eulogy” when he asked “where the country might be if their local pub had permitted women to sit in and distract the discussions of John Adams and George Washington.”³³ A woman student congratulated the gentlemen who “preserved their shaky masculinity.”³⁴

This exchange highlights the first rationale for sex segregation in public spaces: that sex-segregated masculine spaces were pivotal both to male power and to the political order. The “separate-spheres” ideology, which accompanied the advent of industrialization in the mid-nineteenth century, rigidified previously more fluid boundaries between the public and private. It assigned men to the economic and political realms and women to the domestic realm.³⁵ Middle-class white women were assumed to be caregiving and dependent, whereas men sought competition and individualism in the world of industrial capitalism.³⁶ Women’s confinement to the home was always a myth even in the nineteenth century;³⁷ separate-spheres ideology was never uniform across the nation and morphed and evolved over time. The ideal of sex-separated roles, places, and

32. *Male Students Win: Limit Bars to Men*, HARTFORD COURANT, Mar. 9, 1969 (on file with DeCrow Papers) (quoting a male student from Fairfield University “[b]emoaning the passing of the buffalo herds, the wide open spaces and the last great piece of Americana—the men’s bar”).

33. *Id.*

34. *Id.*

35. See Linda K. Kerber, *Separate Spheres, Female Worlds, Woman’s Place: The Rhetoric of Women’s History*, 75 J. AM. HIST. 9, 10 (1988).

36. See NANCY F. COTT, *THE BONDS OF WOMANHOOD: “WOMAN’S SPHERE” IN NEW ENGLAND, 1780-1835*, at 20-23, 60-62 (2d ed. 1997).

37. See KATHY PEISS, *CHEAP AMUSEMENTS: LEISURE IN TURN-OF-THE-CENTURY NEW YORK* 39-40 (1985).

interests, however, lived on well into the twentieth century and shaped the law and custom of public accommodations.

The growth of mass leisure and commerce from the late nineteenth century through the post-World War II era threatened this ideology. Although some nineteenth-century women spoke, drank, and moved freely in public, most middle-class women socialized largely at home and utilized public accommodations only on a highly segregated basis prior to the late 1800s.³⁸ Working- and middle-class men, by contrast, had “a highly visible and extensive network of leisure institutions to which women had marginal or problematic access,” including poolrooms, gyms, barber shops, sports teams, lodges, and saloons.³⁹ In the mid-nineteenth century, entrepreneurial businesses began to see opportunities in building leisure spaces for wealthy women. Department stores first brought significant numbers of women into city centers by offering dining rooms and restrooms at a time when most places would not permit unescorted women.⁴⁰ By the beginning of the twentieth century, more and more women went downtown as shoppers and, increasingly, as workers.⁴¹ Mixed-sex socializing in dance halls, cafés, and amusement parks took off in an urban culture developed around unmarried working women.⁴² As the workday radically shortened, these leisure-time activities grew in importance.⁴³

Social anxieties about gender integration led to the creation and expansion of male-only venues. Department stores and hotels, for example, opened grills that served only men.⁴⁴ Perhaps nowhere was the male public culture so evident

38. See CATHERINE GILBERT MURDOCK, *DOMESTICATING DRINK: WOMEN, MEN, AND ALCOHOL IN AMERICA, 1870-1940*, at 84 (1998); MARY P. RYAN, *WOMEN IN PUBLIC: BETWEEN BANNERS AND BALLOTS, 1825-1880*, at 58-60 (1992).

39. PEISS, *supra* note 37, at 16; *see also id.* at 188 (“[S]ociological studies of working-class family life suggest the persistence of separate worlds for men and women into the 1970’s.”).

40. See JAN WHITAKER, *SERVICE AND STYLE: HOW THE AMERICAN DEPARTMENT STORE FASHIONED THE MIDDLE CLASS* 222 (2006) (observing that before department stores, “toilets for women in business districts were scarce, if they existed at all”).

41. Dora L. Costa, *From Mill Town to Board Room: The Rise of Women’s Paid Labor*, 14 J. ECON. PERSP. 101, 107-08 (2000).

42. See PEISS, *supra* note 37, at 6-7 (describing how working-class young men and women drove the development of heterosocial amusements at the turn of the twentieth century).

43. JEFF WILTSE, *CONTESTED WATERS: A SOCIAL HISTORY OF SWIMMING POOLS IN AMERICA* 92 (2007).

44. WHITAKER, *supra* note 40, at 49.

as in the professional and civic organizations that barred women, from bar associations to press clubs to fraternal organizations.⁴⁵ As social life grew more sex-integrated, ongoing separation preserved business as a masculine sphere.

The creation of women-only spaces reflected perceptions of women's vulnerability rather than men's dominance. Late-nineteenth-century establishments – from railroads and hotels to photography studios and public libraries – endeavored to preserve feminine domesticity within the hustle and bustle of the public.⁴⁶ The separation of restrooms during this period, for example, derived from concerns about women's physical weaknesses and modesty as well as sexual morality between the sexes.⁴⁷ Sex segregation in public accommodations aimed to protect "good" women from the dangerous company of "crude" men.⁴⁸ As the next Section shows, the purported fragility of women and girls coexisted with fears of their predatory sexuality.

B. *"The Myth of the Evil Female"*⁴⁹: *Regulating Sexuality*

A 1969 letter from Charles Frowenfeld, director of catering at the Belmont Plaza Hotel, showcases the salience of sexuality to gendered regulation. Responding to a complaint from Ira Glasser of the New York Civil Liberties Union, Frowenfeld defended the Belmont's policy: "[R]efusing to serve unescorted ladies at the stand up bar is motivated by the desire to protect our bar patrons from

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45. CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 257-61 (1981) (discussing the development of women's bar associations due to women's exclusion from existing organizations).
46. For histories of women-only spaces, see Katherine C. Grier, *Imagining the Parlor, 1830-1880*, in *PERSPECTIVES ON AMERICAN FURNITURE* 233-39 (Gerald W. R. Ward ed., 1988) (various establishments); Abigail A. Van Slyck, *The Lady and the Library Loafer: Gender and Public Space in Victorian America*, 31 *WINTERTHUR PORTFOLIO* 221 (1996) (libraries); and 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 *LAW & HIST. REV.* 261 (1995) (railroads).
47. Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 *MICH. J. GENDER & L.* 1, 40-55 (2007); see also Alexander Kyle Davis, *Equal but Separate? Building Gender, Sex, and Status into Public Restrooms in the United States, 1883-2015*, at 54-55 (May 2016) (unpublished Ph.D. dissertation, Princeton University) (on file with authors) (suggesting that gendered patterns of commerce and sociability led businesses to adopt sex-segregated restrooms by custom initially).
48. Linda K. Kerber, *Writing Our Own Rare Books*, 14 *YALE J.L. & FEMINISM* 429, 434-35 (2002).
49. Faith A. Seidenberg, *The Myth of the "Evil" Female as Embodied in the Law*, 2 *ENVTL. L.* 218 (1971).

being accosted and solicited by streetwalkers.”⁵⁰ Maintaining a “better establishment” required this custom. Law, however, was “one more serious consideration,” Frowenfeld explained.⁵¹ To retain his liquor license, “a licensee must take all and every precaution to safeguard his premises i.e. not to let them be used for illegal purposes.”⁵² Regulating women at the bar was necessary to meet these obligations: “In very simple words, a ‘single’ lady could proposition a gentleman at our bar and this act can lead to a suspension and/or revocation of our liquor license, not to mention the loss of reputation and the distasteful experience to which other couples frequenting the bar would be exposed.”⁵³

A long legal tradition underpinned the exclusion and regulation of women to avoid sexual impropriety. In the late nineteenth and early twentieth centuries, some states enacted laws prohibiting women from drinking at, or loitering in, a saloon.⁵⁴ The object of such laws, the Oregon Supreme Court explained, was “to suppress the evils incident to the frequenting of saloons by women,” in particular prostitution.⁵⁵ At the time, even entering a saloon, restaurant, dance hall, or amusement park could mark a woman as a prostitute and risk her reputation.⁵⁶ Race and ethnicity often delineated between realms of respectability and vice. Police viewed young women of color as inherently licentious.⁵⁷ Cities from New

50. Letter from Charles E. Frowenfeld, Dir. of Catering, Belmont Plaza, to Ira Glasser, N.Y. Civil Liberties Union (June 9, 1970) (on file with DeCrow Papers).

51. *Id.*

52. *Id.*

53. *Id.*

54. *See, e.g.*, Commonwealth v. Price, 94 S.W. 32, 33 (Ky. 1906) (discussing a municipal ordinance that made it unlawful for any infant or female to drink in a saloon or remain in the saloon for more than five minutes).

55. State v. Baker, 92 P. 1076, 1078 (Or. 1907); *see also* White v. Fleming, 522 F.2d 730, 736-37 (7th Cir. 1975) (noting that the interest in prohibiting women employees from sitting or standing at the bar was “the protection of employees, customers, and society generally against promiscuous sexual activity”).

56. MURDOCK, *supra* note 38, at 76, 83 (noting the association between prostitution and saloons, dances, and amusement parks); JAN WHITAKER, TEA AT THE BLUE LANTERN INN 5 (2002) (showing that pre-Prohibition, a woman entering a restaurant even with an escort risked her reputation).

57. JULIO CAPÓ JR., WELCOME TO FAIRYLAND: QUEER MIAMI BEFORE 1940, at 35-36 (2017); CHERYL D. HICKS, TALK WITH YOU LIKE A WOMAN: AFRICAN AMERICAN WOMEN, JUSTICE, AND REFORM IN NEW YORK, 1890-1935, at 205, 211-13 (2010).

York to Chicago to Miami constructed African American and immigrant neighborhoods at once as sexual playgrounds for white voyeurs and as sites of criminality.⁵⁸

The association between leisure and sexual immorality partially eroded in the first decades of the twentieth century as public socializing between the sexes took off.⁵⁹ After the repeal of Prohibition in 1933, states no longer banned women from drinking establishments altogether.⁶⁰ And by mid-century, “women of good character” could enjoy libations and meals out without “besmirch[ing] their reputations.”⁶¹ But, said the Supreme Court in *Goesaert v. Cleary* in 1948, “[t]he fact that women may 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.”⁶²

As late as the mid-1970s, cities and states drew such sharp lines, prohibiting women’s presence in certain establishments and regulating where, when, and how women could be served in others.⁶³ Many municipalities enacted laws during World War II, when cultural anxieties escalated regarding young women’s casual sex with servicemen and venereal disease.⁶⁴ For example, Bayonne, New Jersey—a coastal town with “some unfortunate experiences” involving women and male naval personnel—put in place an ordinance disallowing the sale of alcohol and food to women sitting or standing at a bar, a law that stood until

58. CYNTHIA M. BLAIR, I’VE GOT TO MAKE MY LIVIN’: BLACK WOMEN’S SEX WORK IN TURN-OF-THE-CENTURY CHICAGO 86–94 (2010); CAPÓ, *supra* note 57, at 24–27, 46–57; HICKS, *supra* note 57, at 204–05.

59. PEISS, *supra* note 37, at 91; *see also* MURDOCK, *supra* note 38, at 5 (noting that by the 1920s “[g]rowing acceptance of women’s drinking” in public “dismantled the traditional linking of masculinity with drink”).

60. CHRISTINE SISMONDO, AMERICA WALKS INTO A BAR: A SPIRITED HISTORY OF TAVERNS AND SALOONS, SPEAKEASIES AND GROG SHOPS 234 (2011) (observing that having ventured out to speakeasies, many middle- and upper-class women were reluctant to return to the past).

61. *Anderson v. City of St. Paul*, 32 N.W.2d 538, 550–51 (Minn. 1948) (Loring, C.J., dissenting).

62. 335 U.S. 464, 466 (1948) (upholding the constitutionality of a Michigan law that prohibited a woman from bartending unless she was the wife or daughter of the licensed liquor establishment’s owner).

63. Compare Massachusetts, which prohibited particular liquor license-holders from admitting women, *Laws Will Free Women’s Spirits (In Male Bars)*, BOS. GLOBE, July 17, 1971, at 3, with Kentucky, which provided that “no distilled spirits or whiskey shall be sold, given away or served to females” “except at tables where food may be served”—even though women could sit and consume other alcoholic beverages at the bar, *Commonwealth Alcoholic Beverage Control Bd. v. Burke*, 481 S.W.2d 52, 53–54 (Ky. 1972).

64. PIPPA HOLLOWAY, SEXUALITY, POLITICS, AND SOCIAL CONTROL IN VIRGINIA, 1920–1945, at 152–59 (2006); AMANDA H. LITTAUER, BAD GIRLS: YOUNG WOMEN, SEX, AND REBELLION BEFORE THE SIXTIES 19 (2015).

1968.⁶⁵ In many other states, no law specifically regulated women, but extensive liquor-licensing regulation required licensees to avoid “disorderly” conduct at their establishments.⁶⁶ Disorder took the form of having on their premises “prostitutes, female impersonators, or other persons of ill repute.”⁶⁷

Especially in places subject to licensing, women’s sexuality and dependency became closely linked in custom and law. As historian Kathy Peiss argues, restaurants, bars, and other amusements invited women into the public, but then simply “reformulated women’s subordination,” requiring women to define themselves by “heterosexual and marital relationships.”⁶⁸ Between the two world wars, “[t]he ‘couple on a date’ became an increasingly important cultural construct,” offering a way to avoid the appearance of promiscuous mixing.⁶⁹ To avoid scrutiny from licensing authorities, proprietors policed the line between women subject to male supervision, whose sexual propriety could be assumed, and unescorted women, whose presence suggested sexual risk and disorder.⁷⁰

Sex segregation was thus justified both to protect good women from men and to insulate men from evil women. As the next Section shows, it also preserved dominant masculinity.

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65. *Gallagher v. City of Bayonne*, 245 A.2d 374, 374-77 (N.J. Super. Ct. Ch. Div. 1968).
66. William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 FLA. ST. U. L. REV. 703, 762 (1997). Many of the laws that regulated women’s gender performance were used to suspend or revoke liquor licenses of establishments where gay people or gender nonconformists congregated. GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890-1940*, at 331-54 (1994); Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 913-14 (1979).
67. *One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control*, 235 A.2d 12, 14 (N.J. 1967).
68. PEISS, *supra* note 37, at 8; *see also* LEWIS A. ERENBERG, *STEPPIN’ OUT: NEW YORK NIGHTLIFE AND THE TRANSFORMATION OF AMERICAN CULTURE, 1890-1930*, at 136 (1981) (noting that middle-class establishments required escorts or placed physical barriers between unacquainted men and women).
69. PEISS, *supra* note 37, at 105. *See generally* CHRISTINA SIMMONS, *MAKING MARRIAGE MODERN: WOMEN’S SEXUALITY FROM THE PROGRESSIVE ERA TO WORLD WAR II* (2009).
70. *See, e.g.*, LITTAUER, *supra* note 64, at 58 (“Under intense government pressure to reduce bar-based sexual exchange, many bar owners banned ‘unescorted’ women from bars entirely.”).

C. “*Man’s Last Retreat*”⁷¹: *Safeguarding Masculinity*

In 1973, twelve-year-old Carolyn King, the first girl to join her local Little League team in Ypsilanti, Michigan, stepped up to bat. The crowd booed. “Why don’t you go home and play with your dolls?,” someone yelled. “You don’t belong here.”⁷² The national Little League agreed; if King kept playing, all the teams in town—not just hers—would be out. Baseball, the League argued, should be “an island of privacy” for “citizenship, sportsmanship, and manhood.”⁷³ The League invoked a theme that sounded throughout the twentieth century: the loss of dominant masculinity to feminine siege.⁷⁴

The gender crisis of early twentieth-century America sparked sex segregation to preserve masculinity. The shift in economic roles, the increasingly sedentary nature of middle-class men’s work, the movement for women’s suffrage, and the rise in immigration all threatened dominant conceptions of white masculinity and femininity.⁷⁵ Everywhere men looked, it seemed, women had taken pursuits and traits previously deemed masculine, from wage-earning to athletics to short hair.⁷⁶ Americans generally agreed that men, too, had changed, replacing their “instinct of pugnacity” with an “effete” nature.⁷⁷

In response, men and the places that served them self-consciously reclaimed masculinity. Men’s grills, for example, adopted menus with heavy food and décor of dark wood in contrast to the light meals and colorful decoration popular with women.⁷⁸ Barbershops hung “men-only” signs to avoid the flock of women

71. MURDOCK, *supra* note 38, at 72 (quoting a contemporaneous news-writer describing women going to barber shops for bobs in the 1920s).

72. Jeff Arnold, *Long After She Helped Change Little League, Carolyn King’s Legacy Remains Alive and Well*, ANN ARBOR NEWS (Aug. 19, 2010, 6:04 AM), <http://www.annarbor.com/sports/long-after-her-little-league-moment-in-the-sun-carolyn-kings-legacy-remains-alive-and-well> [https://perma.cc/K2CB-J7EF].

73. Jack Thomas, *Play Ball, Girls Told; Men Cry Foul*, BOS. GLOBE, Apr. 7, 1974, at 1, 79.

74. While Georgina Hickey suggests that the safeguarding of male spaces was adopted as a rationale for male-only bars only after feminist protests began, Hickey, *supra* note 14, at 396, this rhetoric predates the feminist movement.

75. See GAIL BEDERMAN, *MANLINESS AND CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES, 1880-1917*, at 10-15 (1995); Jennifer Ring, *America’s Baseball Underground*, 33 J. SPORT & SOC. ISSUES 373, 380 (2009).

76. NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 13, 40-41, 215-17 (1987).

77. RICHARD STOTT, *JOLLY FELLOWS: MALE MILIEUS IN NINETEENTH-CENTURY AMERICA* 258-59 (2009).

78. WHITAKER, *supra* note 56, at 136-37.

seeking bobbed hair in the 1910s and '20s.⁷⁹ Men's clubs and fraternal organizations became immensely popular, in part in reaction to the women's temperance movement's attack on taverns, another site of male camaraderie.⁸⁰ Through homosocial spaces, men could escape the formal rules of dress and decorum that interaction with women required.⁸¹ At a time when the sexes were beginning to seem similar, smoking and cursing – masculine behaviors considered unseemly for women – filled men's spaces.⁸²

The development of modern sports and children's activities proved an essential tool to “remasculinize” middle-class men.⁸³ Organizations such as the Boy Scouts and YMCA formed with the explicit goal of countering the “feminization” of boys.⁸⁴ For “normal” men and boys, participation in sports became “virtually mandatory.”⁸⁵ Popular adventure novelist Zane Grey proclaimed: “All boys love baseball. If they don't they're not real boys.”⁸⁶

The construction of sports as masculine, and therefore by definition “unfeminine,” inhibited women's play.⁸⁷ The science of sex difference, which emerged in the early twentieth century, led to sex-differentiated physical education and sports rules. For example, a woman basketball player was “confined to a small zone on the court and was not allowed to bounce the ball more than once, lest she overexert herself or dislodge her uterus”; nor could she snatch the ball away

79. MURDOCK, *supra* note 38, at 72 (noting that male customers felt overwhelmed by women's magazines).

80. Mary Ann Clawson, *Nineteenth-Century Women's Auxiliaries and Fraternal Orders*, 12 *SIGNS* 40, 41-42 (1986); see also Mark A. Swiencicki, *Consuming Brotherhood: Men's Culture, Style and Recreation as Consumer Culture, 1880-1930*, 31 *J. SOC. HIST.* 773, 784 (1998) (“40 percent of all males over 20 years of age held membership in at least one secret society in 1896.”).

81. WHITAKER, *supra* note 56, at 136 (“The comfortable unself-consciousness of a man in a man's world disappeared when he entered a women's restaurant, and he became tensely focused on his bodily movements and table manners.”).

82. See MICHAEL S. KIMMEL, *THE HISTORY OF MEN: ESSAYS ON THE HISTORY OF AMERICAN AND BRITISH MASCULINITIES* 48 (2005) (discussing men's avoidance of behaviors seen as feminine); WHITAKER, *supra* note 56, at 181 (noting that tea rooms barred women from smoking while men's grills permitted it).

83. STOTT, *supra* note 77, at 259.

84. CHAUNCEY, *supra* note 66, at 113.

85. Ring, *supra* note 75, at 381; see also KIMMEL, *supra* note 82, at 66, 71 (discussing sports' role in gender role formation).

86. KIMMEL, *supra* note 82, at 61.

87. See Martha H. Verbrugge, *Gender, Science & Fitness: Perspectives on Women's Exercise in the United States in the 20th Century*, 4 *HEALTH & HIST.* 52, 55-56 (2002) (showing that women's increasing athleticism in the early twentieth century challenged male dominance by suggesting women could acquire physical strength and psychological characteristics ascribed to men, such as self-discipline).

when playing defense as grabbing was “unladylike.”⁸⁸ Sex-differentiated rules further entrenched prevailing assumptions about female physical weakness, lack of skill, and disinterest in sports. By the 1930s, “women’s burgeoning athleticism” had been quashed, and men’s sports were restored to “the unquestioned center of athletics.”⁸⁹

When girls and women did attempt to make inroads into masculinized sports, sporting organizations, social commentators, and the courts blocked them. For example, in 1937, when an eleven-year-old girl wrote a letter pleading to race in the All-American Soap Box Derby, legendary sports editor Jim Schlemmer replied that if she were to build the winning car, “100,000 or more boys would be humiliated to no end.”⁹⁰ “[T]he only thing left for the American boy would be for him to take up a cake baking contest or embroidery competition.”⁹¹ Approximately twenty years later, upholding a state law barring women from wrestling and boxing, the Oregon Supreme Court echoed Schlemmer’s column, reasoning that the legislature “intended that there should be at least one island on the sea of life reserved for man that would be impregnable to the assault of woman.”⁹² Each intrusion by women prompted a defense that asserted the fragility of masculinity and raised fears that coeducational pursuits would collapse gender distinctions between boys and girls and, eventually, men and women. As we shall see, in the 1970s, similar arguments held sway.⁹³

Sex segregation was still widely accepted in the late 1960s, even as changing social patterns rendered some of its justifications less convincing. In their campaign for equality in public accommodations, feminists would have to dismantle the remnants of sex segregation, resist regulation of sexuality, and confront norms of masculinity and femininity.

88. *Id.* at 53, 57. Different rules continued into the late 1970s. See, e.g., *Dodson v. Ark. Activities Ass’n*, 468 F. Supp. 394, 396 (E.D. Ark. 1979) (noting and striking down state-imposed restraints under which “girls simply do not get the full benefit and experience of the game of basketball”).

89. MICHAEL A. MESSNER, *TAKING THE FIELD: WOMEN, MEN, AND SPORTS* 138 (2002).

90. Mark J. Price, *Local History: Boys Only?!? Girl Pleaded to Race in Soap Box Derby in 1937*, AKRON BEACON J. (July 24, 2017, 12:01 AM), <https://www.ohio.com/akron/lifestyle/local-history/local-history-boys-only-girl-pleaded-to-race-in-soap-box-derby-in-1937> [<https://perma.cc/RYH7-KHS6>] (quoting Schlemmer’s July 26, 1937 column).

91. *Id.*

92. *State v. Hunter*, 300 P.2d 455, 458 (Or. 1956).

93. See *infra* Section V.A.

II. THE FIGHT TO “DE-SEXIGRATE” PUBLIC ACCOMMODATIONS

When feminists took on public accommodations discrimination in the late 1960s, they built upon a long civil rights tradition. Public accommodations were central to campaigns for black freedom, from the end of slavery through the passage of the Civil Rights Act of 1964 and beyond. During Reconstruction, the federal government and a number of states codified and extended the common-law “duty to serve” imposed on businesses open to the public—ranging from inns and common carriers to barbershops and theaters—to provide equal access to African American patrons.⁹⁴ But after the federal government withdrew its oversight under the Compromise of 1877 and the Supreme Court struck down the Civil Rights Act of 1875 in 1883,⁹⁵ southern states legislated Jim Crow. In the North, meanwhile, segregation and subordination reigned by custom in many public accommodations—even where statutes precluded it. The 1920s saw sporadic efforts to resist racial segregation, but during World War II, African American activists and their allies escalated protests in cities across the North.⁹⁶ They lobbied for, strengthened, and litigated under state laws barring race discrimination in public accommodations.⁹⁷ In the early 1960s, African Americans faced violence during sit-ins at lunch counters across the South and, at long last, won the passage of Title II of the Federal Civil Rights Act.⁹⁸ By 1968, most states barred discrimination based on race, color, national origin, and religion.⁹⁹

94. See Singer, *supra* note 22, at 1374-75.

95. The Civil Rights Cases, 109 U.S. 3 (1883) (striking the substantive sections of the Civil Rights Act of 1875, ch. 114, 18 Stat. 335, as they applied to the states, though not the District of Columbia or the U.S. territories).

96. See generally THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* 130-62 (2008) (exploring public accommodations activism).

97. See David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 STAN. L. REV. 1071, 1101-02 (2011) (discussing numerous successful suits under state public accommodations laws against racial segregation in Northern and Western states in the 1930s and 1940s).

98. See Claudrena N. Harold, *The Civil Rights Movement in the Urban South*, OXFORD RES. ENCYCLOPEDIAS 10-11 (2018), <https://oxfordre.com/americanhistory/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-594> [https://perma.cc/JVE3-RQQF]. See generally CHRISTOPHER W. SCHMIDT, *THE SIT-INS: PROTEST AND LEGAL CHANGE IN THE CIVIL RIGHTS ERA* (2018).

99. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 259-60 & n.8 (1964) (noting the existence of thirty-one states with public accommodations laws). For laws passed from 1964 to 1969, see 1965 Ariz. Sess. Laws 39; 1966 Ky. Acts 48; 1965 Mo. Laws 505; 1965 Nev. Stat. 689; 1968 Okla. Sess. Laws 627; and 1965 Utah Laws 634.

State statutes prohibited exclusion, segregation, and mistreatment in the public square, in spaces as varied as restaurants, saloons, roller skating rinks, dances, salons, banks, and theaters.¹⁰⁰ Racial minorities in southern states lacking public accommodations laws had recourse against only the more narrow list of public accommodations enumerated in Title II – hotels, eateries, gas stations, and places of entertainment.¹⁰¹ Courts, however, interpreted the federal statute liberally, consistent with its aims. A snack bar on the premises, for example, meant hospitals fell within the scope of federal law.¹⁰² Relying on Title II’s reach to “places of entertainment,” African Americans successfully gained access to membership in clubs such as the YMCA and in youth sports like football.¹⁰³ Litigation under state and federal law achieved some measure of progress toward reducing racial, ethnic, and religious discrimination in commerce and leisure.

The addition of “sex” to state public accommodations laws came later, as a result of a feminist movement reinvigorated by the black freedom struggle.¹⁰⁴ The 1963 March on Washington prompted African American activists’ pioneering protest of sex subordination in public. Black women such as Rosa Parks, secretary of the Montgomery NAACP, and Diane Nash, leader of the SNCC’s direct action activities, had risked their lives in the struggle for black freedom. Nonetheless, A. Philip Randolph and other male organizers refused to give them more than token representation.¹⁰⁵ Randolph’s decision to advertise the March by speaking at the National Press Club outraged civil rights attorney and activist Pauli Murray. The Press Club excluded women from membership, confined women to the balcony, and prohibited them from asking questions – practices that would soon face broader protest as part of the soon-to-come feminist public

100. See, e.g., *Local Fin. Co. of Rockland v. Mass. Comm’n Against Discrimination*, 242 N.E.2d 536 (Mass. 1968) (bank); *Ferguson v. Gies*, 46 N.W. 718 (Mich. 1890) (saloon and restaurant); *Johnson v. Auburn & Syracuse Elec. R.R. Co.*, 119 N.E. 72 (N.Y. 1918) (dance); *Puritan Lunch Co. v. Forman*, 29 Ohio Ct. App. 289 (1918) (restaurant); *Browning v. Slenderella Sys. of Seattle*, 341 P.2d 859 (Wash. 1959) (salon); *Jones v. Broadway Roller Rink Co.* 118 N.W. 170 (Wis. 1908) (roller skating rink); Max W. Turner & Frank R. Kennedy, *Exclusion, Ejection, and Segregation of Theater Patrons*, 32 IOWA L. REV. 625 (1947) (reviewing theater cases).

101. See 42 U.S.C. § 2000a(b) (2018).

102. *United States v. Med. Soc’y of S.C.*, 298 F. Supp. 145, 152 (D.S.C. 1969).

103. E.g., *Nesmith v. YMCA of Raleigh*, 397 F.2d 96 (4th Cir. 1968); *United States v. Slidell Youth Football Ass’n*, 387 F. Supp. 474 (E.D. La. 1974); *Smith v. YMCA of Montgomery*, 316 F. Supp. 899 (M.D. Ala. 1970); see also *Daniel v. Paul*, 395 U.S. 298, 301 (1969) (concluding that Title II meant to reach participation in recreational activities such as swimming, boating, and golf).

104. See SARA EVANS, *PERSONAL POLITICS: THE ROOTS OF WOMEN’S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT* 83–90, 167–86 (1979).

105. Carol Giardina, *MOW to NOW: Black Feminism Resets the Chronology of the Founding of Modern Feminism*, 44 FEMINIST STUD. 736, 740–48 (2018).

accommodations campaign. Murray wrote an open letter to Randolph arguing that, like race discrimination, sex discrimination did “violence to the human spirit.”¹⁰⁶ She explained, “It is as humiliating for a woman reporter assigned to cover Mr. Randolph’s speech to be sent to the balcony as it would be for Mr. Randolph to be sent to the back of the bus.”¹⁰⁷

In the days and months following the March, Murray and other female civil rights leaders developed plans to fight race and sex discrimination.¹⁰⁸ Their vision for an NAACP for women came to fruition in the formation of NOW in 1966 with Murray and Anna Arnold Hedgeman, who had served as the only woman on the March on Washington planning committee, as founding members.¹⁰⁹ As women’s liberationists challenged the subordination of women in public accommodations, they built on the activist precedents of these black women leaders.¹¹⁰

Public accommodations held a prominent place in NOW’s early agenda, on par with employment opportunity; the Equal Rights Amendment (ERA); child-care; and women’s representation in the media, politics, and religion.¹¹¹ Feminists highlighted the injustice of sex segregation in public places by invoking racial segregation of the trains and restaurants in the South.¹¹² A wide cross-section of women and girls across class and racial backgrounds recognized the wrong of public accommodations denial—whether in a bank, tavern, baseball diamond, or diner—and the importance of winning sex equality. Younger women’s liberationists and unaffiliated activists joined cause with NOW.

Although the black feminist organizations that emerged in the early 1970s did not prioritize public accommodations, African American women played a role in NOW and women’s liberation protests at the decade’s turn. Intersectional discrimination made it essential for women of color to secure laws guaranteeing sex equality, lest their sex serve as an excuse for race-based subordination. Flo-ryn- ce Kennedy, another of NOW’s founders, understood this reality well. Before

106. *Id.* at 746 (quoting Pauli Murray, Letter to the Editor, WASH. POST, Aug. 24, 1963, at A8).

107. *Id.*

108. *Id.* at 741-43.

109. *Id.* at 737, 753, 756; see also DOROTHY SUE COBBLE ET AL., FEMINISM UNFINISHED: A SHORT, SURPRISING HISTORY OF AMERICAN WOMEN’S MOVEMENTS 61 (2014) (describing NOW as “an ‘NAACP for women,’ devoted to women’s rights much the same way as the NAACP pursued the rights of African Americans”).

110. See Giardina, *supra* note 105, at 755.

111. Letter from Betty Friedan, President, Nat’l Org. for Women, to NOW Members (n.d.) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Dolores Alexander Papers [hereinafter Alexander Papers]).

112. See Letter from Karen DeCrow to Nancy Wood (July 24, 1968) (on file with DeCrow Papers).

she threatened a lawsuit, Columbia Law School had denied her admission in the mid-1940s, explicitly justifying the denial as based on her sex and not her race. Kennedy ultimately became one of the first African American female graduates of Columbia Law and a ground-breaking criminal and civil rights attorney.¹¹³ She participated in feminist public accommodations activism, sometimes schooling white women in protest tactics.¹¹⁴ Likewise, Aileen Hernandez, another NOW leader, recognized that the subordination she faced in public stemmed from both her race and sex. She remembered waiting for the “‘Negro taxi’ . . . always ‘last in line’” as a student at Howard University in Washington, D.C. A union organizer and civil rights activist, Hernandez led NOW as president through the key early years of the public accommodations campaign.¹¹⁵

Although it is crucial to recognize the foundational role that women of color played, it is also important to acknowledge that white, middle-class, and married women predominated in the feminist public accommodations campaign of the late sixties and early seventies. Their career aspirations, fueled in part by Title VII of the Civil Rights Act, rendered salient the injuries of exclusion from public spaces, realms of commerce, and professional clubs. Moreover, to experience discrimination in public accommodations in the first instance, one had to have money to spend. Middle-class white women’s marital status and racial privilege, as Kennedy admonished a group to whom she was teaching protest tactics, also protected their physical security.¹¹⁶

Typical of these women was Karen DeCrow, a founding member of the NOW Central New York Chapter, who led local and national campaigns against discrimination in public places.¹¹⁷ Employed as an educational researcher,¹¹⁸ DeCrow found herself the only woman in the class when she began law school

113. See Douglas Martin, *Flo Kennedy, Feminist, Civil Rights Advocate and Flamboyant Gadfly, Is Dead at 84*, N.Y. TIMES (Dec. 23, 2000), <https://www.nytimes.com/2000/12/23/us/flo-kennedy-feminist-civil-rights-advocate-and-flamboyant-gadfly-is-dead-at-84.html> [https://perma.cc/VZ9W-AFJ6].

114. See Francine Achbar, *'71 Scene: Women in Pants, Jeans, Dine at the Ritz*, HERALD TRAVELER, Apr. 1, 1971 (on file with Schlesinger Library, Harvard University, Nancy Williamson Papers [hereinafter Williamson Papers]); Martin, *supra* note 113.

115. See Aileen C. Hernandez, Personal History 2 (May 1970) (unpublished biographical data) (on file with DeCrow Papers).

116. Lisa Hammel, *A Class of Fledgling Pickets Gets the Word: 'Make It Exciting, Make It Swing!'*, N.Y. TIMES, Aug. 24, 1968, at 33.

117. See, e.g., Minutes of Central N.Y. NOW Chapter (Jan. 10, 1967) (on file with DeCrow Papers) (placing public accommodations on the agenda at one of the chapter’s earliest, perhaps inaugural, meetings).

118. Letter from Karen DeCrow to Joseph Hawley Murphy, N.Y. Comm’r of Tax (Oct. 16, 1968) (on file with DeCrow Papers).

in 1969.¹¹⁹ She wrote to her mother, “The fellows in my class . . . tell me I should go home and cook. It is enough to inspire me to get all A’s and be first in the class!”¹²⁰ Faith Seidenberg, another NOW member and civil rights lawyer, was another key figure. By the late 1960s, Seidenberg had worked as a public defender, safeguarded registration of black voters in the South, and served on the Executive Board of the American Civil Liberties Union.¹²¹ DeCrow, Seidenberg, and other activists were incensed by women’s subordination in bars (for example, at the Hotel Syracuse, which denied service without an escort) and in social networks (like the Syracuse Breakfast Roundtable, a group of community leaders that would not admit even the (female) Executive Director of Syracuse’s human rights commission).¹²²

In 1969 and 1970, NOW, often joined by other groups, conducted nationwide protests.¹²³ Not limited to the metropolises of the Northeast, the protests reached more than twenty cities, extending to the Midwest in Minneapolis and Chicago, the South in Miami and Atlanta, and the West in Albuquerque and Seattle.¹²⁴ Beyond bars and restaurants, feminist activists targeted a range of practices that assigned women and girls secondary status—including youth events, credit practices, and men-only civic networks—through letter-writing campaigns, picketing, and investigations.¹²⁵

119. Carolyn Jay, *Her Big Campaign—Winning Women’s Rights*, MIAMI NEWS, Dec. 19, 1968, at 2-D.

120. Letter from Karen DeCrow to Juliette Lipschultz (Feb. 14, 1969) (on file with Northwestern University, Juliette Lipschultz Papers [hereinafter Lipschultz Papers]).

121. CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 130 (2012); Sam Roberts, *Faith Seidenberg, 91, Dies; Took On McSorley’s, An All-Male Haven*, N.Y. TIMES (Jan. 20, 2015), <https://www.nytimes.com/2015/01/21/nyregion/faith-seidenberg-91-dies-took-onmcsorleys-an-all-male-haven.html> [https://perma.cc/7XSJ-K64W].

122. Jay, *supra* note 119; Minutes of Central N.Y. NOW Chapter (Mar. 13, 1968) (on file with DeCrow Papers).

123. *See, e.g.*, Memorandum from Chi. NOW to All News Media 1 (Feb. 14, 1969) (on file with Alexander Papers).

124. *See, e.g.*, Chusmir, *supra* note 26; Memorandum from Chi. NOW, *supra* note 123, at 1; Memorandum from Karen DeCrow to Aileen Hernandez (Mar. 6, 1971) (on file with DeCrow Papers) (reporting demonstrations in twenty cities); Memorandum from Karen DeCrow to NOW Bd. of Dirs. (Mar. 21, 1969) (on file with DeCrow Papers) (noting demonstrations in Atlanta and other cities); Note of Karen DeCrow (on file with DeCrow Papers) (noting demonstrations in Albuquerque, Oregon, Boston, Los Angeles, Seattle, and Minneapolis).

125. For investigations of scouting and YMCA/YWCA, see THE SPOKESWOMAN, Dec. 1, 1970, at 8 (Sacramento) (on file with Witter Papers); and Memorandum from Gerry O’Kane, *supra* note 30, at 1 (describing the Des Moines NOW Chapter report).

By the spring of 1970, feminist activists had made significant progress. United Air Lines discontinued its men-only flight.¹²⁶ Bars from the Yankee Doodle Tap Room in Princeton to the Squire Room of the Fairmont Hotel in San Francisco integrated.¹²⁷ Department stores from Miami to Chicago succumbed.¹²⁸ Feminists broke down barriers at a number of community and professional organizations. Public accommodations protests also raised awareness of the feminist movement. Media coverage “put us on the map,” one NOW member explained.¹²⁹

The campaign against public accommodations made discrimination visible. As Patsy Mink, the first woman of color elected to Congress, wrote, critics at the time often argued that the women’s rights movement was unable “to provide concrete evidence of discrimination in any but the field of employment.”¹³⁰ NOW’s protests produced just such evidence.¹³¹

Feminists combined protest with litigation. The most advantageous doctrinal route was unclear. Following the path trod by civil rights lawyers in the 1940s and ’50s, feminist lawyers brought early challenges that relied on state statutes codifying common-law requirements of equal access to public accommodations.¹³² Feminist lawyers also brought claims under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, hoping to ensure equal access across the nation. Their litigation pursued expansive conceptions of state action, linking the customary practices of private businesses to state regulatory and licensing authority.¹³³ They also challenged the gender ideologies underpin-

126. See Letter from Richard J. O’Melia, Dir., Bureau of Enft, Civil Aeronautics Bd., to Betty Friedan, President, NOW (Dec. 9, 1969) (on file with Alexander Papers).

127. Report from Karen DeCrow, Task Force on Pub. Accommodations, to NOW Nat’l Conference 2-3, 5 (Mar. 16, 1970) (on file with DeCrow Papers).

128. *Id.* at 2-3.

129. Elizabeth Wasserman, *NOW Chapter Measures the Strides of 20 Years*, SYRACUSE HERALD-J., Mar. 19, 1987 (on file with DeCrow Papers).

130. Patsy T. Mink, *Federal Legislation to End Discrimination Against Women*, 5 VAL. U. L. REV. 397, 407 (1971).

131. See Memorandum from Karen DeCrow, Coordinator, NOW Pub. Accommodations Week, to NOW Officers, Bd. Members, & Chapter Conveners, re Week of Feb. 9-15, 1969, at 2 (n.d.) (on file with DeCrow Papers).

132. See, e.g., Faith A. Seidenberg, *The Federal Bar v. the Ale House Bar: Women and Public Accommodations*, 5 VAL. U. L. REV. 318, 319 (1971) (discussing her approach as lead attorney in these cases).

133. See *Fortin v. Darlington Little League, Inc.*, 376 F. Supp. 473, 477-78 (D.R.I. 1974) (finding state action in the Little League’s use of city park facilities, including receiving the benefit of preferential scheduling); *N.Y.C. Jaycees, Inc. v. U.S. Jaycees, Inc.*, 377 F. Supp. 481 (S.D.N.Y.

ning such practices, anticipating the Supreme Court's move to heightened scrutiny for sex under the Equal Protection Clause.¹³⁴ Although they experienced many setbacks in the courts, feminist lawyers won some important victories—and publicity—that attracted public support and catalyzed legislative change.¹³⁵

Across the country, feminists mobilized for federal, state, and local legislation.¹³⁶ Because federal law would achieve uniform legal change, NOW sought to add “sex” as a prohibited basis for discrimination under Title II, the public accommodations provision of the Civil Rights Act.¹³⁷ Due to NOW's advocacy, the Women's Equality Act—a bill that would have amended several federal statutes to advance women's rights, including Title II—was introduced in 1970 and reintroduced in 1971.¹³⁸ Nonetheless, the Act failed to progress. Once the ERA passed in 1972, the feminist movement turned its energies toward state ratification.¹³⁹

1974) (finding that the national Jaycees's revocation of the local chapter's charter constituted state action and its sex discrimination violated the Fifth Amendment), *rev'd*, 512 F.2d 856 (2d Cir. 1975); *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593, 596, 599, 605 (S.D.N.Y. 1970) (finding state action in a bar's exclusion of women due to the state's regulation of alcohol sales and finding defendant's discrimination on the basis of sex to violate rational basis review under the Equal Protection Clause); *see also* *Junior Chamber of Commerce of Rochester, Inc. v. U.S. Jaycees*, 495 F.2d 883 (10th Cir. 1974) (finding no state action). (Note that McSorley's Old Ale House usually places the apostrophe between the *y* and the *s*, not after *s*, but the official name of this case places the apostrophe after the *s*. Hence, we do the same when citing this case.)

134. *See* *Women's Liberation Union, Inc. v. Israel*, 379 F. Supp. 44, 45-46, 51 (D.R.I. 1974) (finding as unconstitutional state reliance on gender stereotypes); *McSorleys'*, 317 F. Supp. at 606 (rejecting stereotypes “of women as peculiarly delicate and impressionable creatures in need of protection”).
135. *See* Letter from Karen DeCrow to Juliette Lipschultz (July 5, 1970) (on file with Lipschultz Papers) (describing media coverage).
136. *See* *Priorities for Action: Public Accommodations*, NOW ACTS (NOW), Winter/Spring 1969, at 10 (on file with Alexander Papers).
137. *See, e.g.*, NOW, *Legislative Goals 1970*, at 1 (on file with Seidenberg Papers) (making Title II a priority).
138. *See* 116 CONG. REC. 32,685-86 (1970) (statement of Rep. Mikva); *see also* 117 CONG. REC. 73 (1971) (statement of Rep. Mikva); 117 CONG. REC. 22,735-43 (1971) (statement of Sen. Bayh).
139. Memorandum from Leadership Conference for Civil Rights to Brenda Fasteau, Faith Seidenberg & Jean Witter (June 7, 1970) (on file with Seidenberg Papers).

City councils and state legislatures proved more responsive.¹⁴⁰ In June 1969, Pittsburgh passed the nation's first law against sex discrimination in public accommodations,¹⁴¹ thanks to an alliance of women's groups spearheaded by Wilma Scott Heide, a nurse educator and NOW leader.¹⁴² Chicago followed later that year and New York City in 1970.¹⁴³ Cities near and far enacted similar ordinances.¹⁴⁴

State legislative change occurred swiftly. Colorado amended its public accommodations statute to reach sex discrimination in 1969.¹⁴⁵ Iowa and New Jersey adopted similar statutes in 1970.¹⁴⁶ Bills passed steadily in states as geographically diverse as New York, West Virginia, Nebraska, and Utah. By the end of the 1970s, thirty-one out of thirty-nine state statutes banned sex discrimination in public accommodations.¹⁴⁷ Title II was never amended. As a result, struggles over the meaning of sex equality under public accommodations law took place primarily in city and state legislatures, not Congress, and in human rights commissions, rather than courts.

140. NOW sent surveys to elected officials, Press Release, NOW (Oct. 30, 1969) (on file with Seidenberg Papers), offered model legislation, Letter from John J. Murray, 5th Dist. Councilman, to Jean Reeves, Chairman, City-County Human Rights Comm. (Mar. 9, 1970) (on file with Seidenberg Papers), lobbied, and testified at legislative hearings, Report from Lucy Komisar to N.Y. Now (1970) (on file with Schlesinger Library, Harvard University, Lucy Komisar Papers).

141. Minutes, Pittsburgh NOW Chapter (Oct. 17, 1968); Activities and Agenda for Meeting, NOW Greater Pittsburgh Area Chapter (Feb. 20, 1969) (on file with Schlesinger Library, Radcliffe Institute, Harvard University, Wilma Scott Heide Papers [hereinafter Heide Papers]).

142. See Report from DeCrow to NOW Nat'l Conference, *supra* note 127, at 3.

143. See Harkins, *supra* note 25, at 10 (New York); *Men Only*, RESTAURANT-ING THROUGH HIST. (Feb. 6, 2010), <https://restaurant-ingthroughhistory.com/2010/02/06/men-only> [<https://perma.cc/S3JN-W67Y>] (Chicago).

144. See, e.g., Memorandum from Robert E. Hagemann, City Attorney, to City of Charlotte Mayor and City Council 1 (Feb. 3, 2015), https://www.ncfamily.org/wp-content/uploads/2015/02/150203_Charlotte_Attorney_Memo.pdf [<https://perma.cc/KJZ4-XXFL>] (noting that Charlotte amended its ordinance to include "sex" in 1972).

145. 1969 Colo. Sess. Laws 200.

146. See 1970 Iowa Acts 83; 1970 N.J. Laws 296.

147. 1979 Ill. Acts 4854; 1979 R.I. Acts 494; 1978 Pa. Acts 1293; 1978 Tenn. Pub. Acts 698; 1976 Mich. Pub. Acts 1701; 1975 Alaska Sess. Laws ch. 104 § 10 3; 1975 Mo. Laws 564; 1975 N.H. Laws 26; 1975 Wis. Sess. Laws 862; 1974 Cal. Stat. 2568; 1974 Mont. Laws 693; 1973 Me. Laws 635; 1973 Minn. Laws 2158; 1973 N. M. Laws 533; 1973 Ohio Laws 1884; 1973 Or. Laws 1644; 1973 Utah Laws 35; 1973 Wash. Sess. Laws 418; 1972 Idaho Sess. Laws 980; 1972 Kan. Sess. Laws 761; 1972 S.D. Sess. Laws ch.9 § 11 51; 1971 Conn. Pub. Acts 399; 1971 Del. Laws 286; 1971 Ind. Acts 1444; 1971 Mass. Acts 241; 1971 Md. Laws 987; 1971 N.Y. Laws 3107; 1971 W. Va. Acts 373; 1970 Iowa Acts 83; 1970 N.J. Laws 296; 1969 Colo. Sess. Laws 200.

III. CHALLENGING “A WOMAN’S PLACE”

Debates over sex segregation in public centered on a “woman’s place” in the market. By the late 1960s, middle-class women increasingly participated in the paid labor force, but sex segregation persisted. As Section A argues, “business lunches,” men’s grills, and male-only professional organizations relegated women by custom to subordinate places and roles in the market. Middle-class and professional women connected the discrimination they faced in these spaces to their inequality in the workplace. They began to fight for sex integration in public accommodations as part of their broader efforts toward economic equality. As Section B contends, the denial of rights of access also expressed women’s social subordination. Even as women began to knock down educational and professional barriers, discrimination in public accommodations reminded them of their second-class citizenship.

A. Accessing Economic Opportunities

As growing numbers of women entered the workforce, sex segregation in public accommodations helped to preserve higher career echelons for men. By 1968, twenty-eight million women were in the workforce, but rarely in positions of power. Indeed, there were “so few women executives that when the Harvard Business Review planned to ‘study’ them in 1966, the editors gave up because ‘there were not enough to study.’”¹⁴⁸ Women were only seven percent of doctors and three percent of attorneys, although their numbers in these professions would soon rise.¹⁴⁹

Sex-based exclusions denied middle-class women access to the social networks that might help them climb the career ladder.¹⁵⁰ Professional clubs constituted a significant site of exclusion. In particular, press clubs—buildings in major cities that housed media-industry organizations—barred women entirely or restricted their access to the most desirable lounges. Female journalists thus labored under “a professional handicap.”¹⁵¹ Because so many events were held at men’s clubs, female journalists might be preemptively removed from their

148. Memorandum from Karen DeCrow to Timothy Costello, Vice Chairman, Liberal Party of N.Y. State 2 (May 9, 1970) (on file with DeCrow Papers).

149. *Id.*

150. Nickerson, *supra* note 29 (noting that “women ensconced in male-dominated situations” who were “at a decided disadvantage in comparison with their male colleagues” brought public accommodations complaints to NOW).

151. Letter from Karen DeCrow to Juliette Lipschultz (May 24, 1968) (on file with Lipschultz Papers).

coverage.¹⁵² They could not participate in events where news leads and accolades were exchanged. At the annual awards ceremony sponsored by the National Press Club in Washington, D.C., female journalists were seated with the wives in a separate room – sending a clear message about their proper place, as African American activists had recognized in the early 1960s.¹⁵³

Discrimination in bars and restaurants also had consequences for women's careers. The widespread practice of excluding women from the "business lunch" drew particular ire. NOW's famous founder, Betty Friedan, author of the 1963 bestseller *The Feminine Mystique*, wrote to the manager of the Oak Room at the Plaza: "Several of our members, including myself, have at one time or another tried to enter . . . for business luncheons with male colleagues, only to face the embarrassment and insult of being informed that the men alone could enter."¹⁵⁴ As late as 1970, hotels were opening "men only grills" that often hosted business meetings.¹⁵⁵ Women workers, limited to "brown-bagging it or doggie-diner type establishments," missed out on the social capital built when their male colleagues lunched together.¹⁵⁶

Exclusion from bars and restaurants at first mattered more to middle-class white women who had the class and race status that would enable them to enjoy these spaces but for sex discrimination. Shirley Chisholm, the first black woman elected to Congress, who also ran for president in the 1972 election, commented on this dilemma: "Black women don't exactly see themselves as hung up in de-sexing all-male bars."¹⁵⁷ Chisholm emphasized that black women are "just concerned about day-to-day survival, which has to do with such things as the fight for day care centers and the minimum wage."¹⁵⁸ In this sense, Chisholm aligned with many white critics of public accommodations protests, who chided activists for not focusing on weightier issues. Not all black women agreed. Pauli Murray, for example, argued that winning inclusion in professional organizations was

152. *Men's Clubs and Women Reporters: A Unique Case in Sacramento*, 3 EVERYWOMAN 6 (1972).

153. See Rachel Scott, *Gridiron Protest*, 1 OFF OUR BACKS 5 (Feb. 27, 1970) (protesting the Gridiron dinner for male journalists from which women in press and politics were excluded). See also *supra* notes 104–110 and accompanying text for a discussion of earlier press club activism.

154. Letter from Betty Friedan to Arthur D. Dooley, Vice President, Gen. Manager, The Plaza (Feb. 6, 1969) (on file with Alexander Papers).

155. *Public Accommodations*, NOW ACTS, 1970 (on file with DeCrow Papers).

156. *Id.*

157. SHERIE M. RANDOLPH, FLORYNCE "FLO" KENNEDY: THE LIFE OF A BLACK FEMINIST RADICAL 207 (2015).

158. *Id.*

important for African American women precisely because they were more likely than white women to serve as the primary wage earners.¹⁵⁹

Class shaped activists' experiences of sex discrimination. Sometimes, feminists became aware of the gendered patterns of exclusion only after obtaining entrée to elite culture. Activist Judith Nies, for example, recalled experiencing "WASP culture for the first time" as a college student when, invited to attend a dinner at Washington's Cosmos Club, she encountered a greeter who told her to go around back to the "Ladies' Entrance."¹⁶⁰ Feminists strategically performed and deployed class identity to demand inclusion in spaces of middle- and upper-class sociability. When NOW targeted the Oak Room, Friedan instructed women to wear fur coats to manifest their belonging and avoid being excluded by management for "improper dress."¹⁶¹ In this respect, the feminist movement did not differ much from previous campaigns by minorities in the South and the North, which required protestors to dress in suits and ties or dresses and showcase class-appropriate respectability.¹⁶² Class privilege sometimes manifested in activists' disdain for the masculinity exhibited in working-class taverns. NOW Vice President Lucy Komisar, for example, described the male patrons of McSorley's Old Ale House, a more-than-century-old institution in New York City that Seidenberg and DeCrow targeted in litigation, as "boorish," "lower-class men."¹⁶³

Activists often flexed their economic muscle as consumers. Roxey Bolton, president of the Miami NOW chapter, noted that the exclusion of women from men's grills in department stores was "especially insulting . . . where most of the shoppers are women."¹⁶⁴ She asked management "to consider what would happen if women boycotted the store for a day."¹⁶⁵ Middle-class women took similar

159. Giardina, *supra* note 105, at 748-49.

160. Suzanne McCormack, *The Ladies' Entrance*, 26 *WOMEN'S REV. BOOKS* 28 (2009) (reviewing JUDITH NIES, *THE GIRL I LEFT BEHIND: A NARRATIVE HISTORY OF THE SIXTIES* (2008)).

161. *We Will Not Be Barred!*, 2 *NOW ACTS*, Winter/Spring 1969, at 7 (on file with Alexander Papers).

162. Marisa Chappell, Jenny Hutchinson & Brian Ward, "Dress Modestly, Neatly . . . As If You Were Going to Church": *Respectability, Class and Gender in the Montgomery Bus Boycott and the Early Civil Rights Movement*, in *GENDER AND THE CIVIL RIGHTS MOVEMENT* 83-96 (Peter J. Ling & Sharon Monteith eds., 1999); see also Tanisha C. Ford, *SNCC Women, Denim, and the Politics of Dress*, 79 *J.S. HIST.* 625 (2013) (demonstrating that the Student Nonviolent Coordinating Committee, the younger and more radical group of civil rights activists, embraced denim in resistance to race, class, and gender oppression in their protests of the early 1960s).

163. Grace Lichtenstein, *Stein Song Hits a Sour Note: Coed Brawl Erupts After McSorley's 116 Stag Years*, *SYRACUSE HERALD-J.*, Aug. 11, 1970, at 1.

164. Jo Anne Werne, *Don't Rely on Legislation for Equality*, *NOW Told*, *MIAMI HERALD*, Oct. 6, 1969.

165. Chusmir, *supra* note 26.

actions across the nation. Perhaps the most dramatic example was the campaign against United's "executive flight" between Chicago and Newark. The flight showcased the construction of the executive as male, even as the airline sexualized the services of female stewardesses to market air travel.¹⁶⁶ Friedan warned United's president that "growing numbers of the 28,000,000 working American women 'will no longer tolerate less than equal treatment and are beginning to understand their power'"—she herself would be shunning United's "friendly skies."¹⁶⁷

Activists were willing to bear additional economic costs to realize equality as consumers.¹⁶⁸ Feminist advocates "complained that Ladies' Day was an occasion to encourage women to act in a silly way and to encourage men to treat women as though they were silly."¹⁶⁹ They expected that state public accommodations law would "require that men and women be charged the same amount to enter movies, race tracks, car washes, etc. . . . on 'Ladies' Day' or ['Gentlemen's Day'] or any other day."¹⁷⁰ Legal scholar William Eskridge calls such activism "women's politics of recognition," "demanding the same duties as well as benefits that men had."¹⁷¹ Across the nation, administrative agencies, and in later years, courts, tended to agree that ladies' discounts could be no more.¹⁷²

166. Trainor, *supra* note 9, at 3-4 (noting coordinated protests in Chicago and New Jersey). On the gendered construction of airline attendants' work, see generally RYAN PATRICK MURPHY, *DE-REGULATING DESIRE: FLIGHT ATTENDANT ACTIVISM, FAMILY POLITICS, AND WORKPLACE JUSTICE* (2016), connecting flight attendant activism to workers' desires to provide for themselves and their kin outside of normative heterosexual families.

167. Trainor, *supra* note 9, at 3.

168. From their origins at the beginning of the twentieth century, ladies' discounts "implicitly recognized the subordinate economic status of women," which left them unable to pay full price. PEISS, *supra* note 37, at 97.

169. Kerber, *supra* note 48, at 436.

170. NOW NEWSL. (Greater Pittsburgh Area NOW Chapter, Pittsburgh, Pa.), June 1972, at 9 (on file with Witter Papers).

171. William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2127 (2002).

172. The Minnesota Civil Liberties Union successfully pushed the Minneapolis Park and Recreation Board to equalize season ticket prices at a local tennis center, which had previously charged women ten dollars less annually. Press Release, Minnesota Civil Liberties Union, Park Board Drops Sex Discrimination (July 9, 1974) (on file with MNCLU Records). The New York City Commission on Human Rights, led by Eleanor Holmes Norton, rejected the bid by the New York Yankees, and others, to wield a "public policy" exception to the city's ordinance to continue hosting Ladies' Day and offering discounts. Kerber, *supra* note 48, at 435-36; see also Bar "Ladies Nights" Illegal, Official Says, MINNEAPOLIS STAR, Dec. 9, 1972, at 5A (noting that the Minneapolis City Council amended the city's human rights ordinance, "clearing the way for prosecution" of restaurant and bar ladies' discounts as discriminatory in response to

The demise of Ladies' Day illustrates the significance of administrative agencies to robust interpretations of public accommodations law. Consider the work of Eleanor Holmes Norton, appointed as Chair of New York City's Commission on Human Rights by Mayor John Lindsay in 1970. Previously a Student Nonviolent Coordinating Committee organizer fighting for civil rights in the South during the early 1960s, Norton had been the assistant legal director for the American Civil Liberties Union and fought sex discrimination, successfully litigating against Newsweek's policy of hiring only male reporters.¹⁷³ As Commission chair, Norton held pivotal hearings on sex discrimination.¹⁷⁴ Exchanges between Norton and public accommodations activists reflected a familiarity and sense of mutual purpose.¹⁷⁵ Under Norton's early leadership, the Commission narrowly interpreted the exemption from New York's public accommodations ordinance, which permitted sex discrimination based on "bona fide considerations of public policy."¹⁷⁶ The law would force integration of "men's bars," require clubs to offer women full service, and end Ladies' Day discounts at the New York Yankees.¹⁷⁷

As feminists sought full access to commerce, business owners and some members of the public sought to barricade the doors. Resistance to sex integra-

complaints); *Liberated, Women to Pay Full Price*, N.Y. TIMES, Dec. 29, 1972, at 55 (noting that a Philadelphia racetrack would charge women full-price to comply with a new city antidiscrimination ordinance); *Paper Drops Ads As Unfair to Men*, HARTFORD COURANT, Oct. 2, 1974, at 2 (noting that Newsday would discontinue advertisements for ladies' discounts).

For court cases finding ladies' discounts discriminatory, see, for example, *Koire v. Metro Car Wash*, 707 P.2d 195 (Cal. 1985); *City of Clearwater v. Studebaker's Dance Club*, 516 So. 2d 1106, 1109 (Fla. Dist. Ct. App. 1987); *Ladd v. Iowa West Racing Ass'n*, 438 N.W.2d 600, 602 (Iowa 1989); *Peppin v. Woodside Delicatessen*, 506 A.2d 263, 267 (Md. Ct. Spec. App. 1986); and *Pennsylvania Liquor Control Board v. Dobrinoff*, 471 A.2d 941, 943 (Pa. Commw. Ct. 1984). *But see* *MacLean v. First Nw. Indus. of Am., Inc.*, 635 P.2d 683 (Wash. 1981); *Magid v. Oak Park Racquet Club Assocs.*, 269 N.W.2d 661 (Mich. Ct. App. 1978). (Note, however, that the plaintiffs in both of these cases were men.)

173. ELEANOR HOLMES NORTON & JOAN STEINAU LESTER, *FIRE IN MY SOUL* 110-20, 139-50 (2003).
174. See Lucille Iverson, *Women's Rights Hearings Indict Men*, MANHATTAN TRIB., Oct. 3, 1970, at 3.
175. See, e.g., Letter from Faith A. Seidenberg to Eleanor Holmes Norton (Jan. 21, 1971) (on file with Seidenberg Papers) (commenting on the argument that public safety necessitated the denial of service to women, unaccompanied by men, at a bar: "You and I both know that this a smoke screen to allow a public accommodation to continue its illegal and discriminatory practices").
176. Kerber, *supra* note 48, at 435-36 (citation and quotation omitted).
177. Press Release, City of N.Y. Comm'n on Human Rights, "21" Club and Biltmore Hotel Are Charged with Sex Discrimination by Human Rights Commission; Six Manhattan Restaurants Agree to Comply with New City Law, May 28, 1971 (on file with Seidenberg Papers), at 1. See generally *supra* note 172 and accompanying text.

tion of professional forums and meeting places often acknowledged their significance for economic and political life. Journalist Jack Kofoed expressed his resentment of the “lassies” whose protest of the Roosevelt Hotel “came a little closer to home,” threatening his professional privilege of “drop[ping] into the men’s bar” at “five in the evening” whenever he “wanted to catch somebody in the publishing, advertising, public relations or related fields.”¹⁷⁸ When in a “most prominent victory,” the exclusively male National Press Club voted to admit women in 1971, the bartender Harry Kelly served cocktails to female journalists for the first time: “Here you are, and I hope you choke on it.”¹⁷⁹

Some argued that if women could pay, they should be served,¹⁸⁰ but more commonly the feminist movement against public accommodations discrimination was denied the moral high ground of the sit-ins of the 1960s. “The stigma of silliness” attached instead to their public protests.¹⁸¹ In a letter to the editor, Mrs. A.S. Rugare called the picketing of men’s bars “[r]idiculous.” Rugare, like feminists, saw economic power and consumer access as linked, but she concluded: “If women were as good spenders as men (better tippers) and otherwise offered a market for a women’s bar there would be such.”¹⁸² To some, the subordinate place of women in the consumer market seemed justified.

B. *Moving Freely Within Public Space*

Full and equal access to the public meant the freedom to move through public space and participate in leisure and civic life. Friedan emphasized that “people take this bar issue far too lightly. They fail to see that it symbolizes a fundamental prejudice that must be overcome before women can truly be free.”¹⁸³

Activists argued that sex equality in public accommodations implicated women’s citizenship. DeCrow wrote,

178. Jack Kofoed, *Sometime Long Ago, Guzzling Gals Goofed*, MIAMI HERALD, Aug. 30, 1972 (on file with DeCrow Papers).

179. *Public Accommodations*, NOW ACTS (NOW, Wash., D.C.), Spring 1971, at 17 (on file with Witter Papers).

180. Hearing that Connecticut law kept women from the bar, a bar customer said, “Hey, if they got money to pay, let them drink.” Carol Miller, *They’d Make Public Bars Coed*, NEW LONDON DAY, at 4 (on file with DeCrow Papers).

181. Mary Wieggers, *Women’s Lib Aggravates Both Sexes*, MIAMI HERALD, Mar. 26, 1970 (on file with DeCrow Papers).

182. A.S. Rugare, Letter to the Editor, SYRACUSE HERALD-J., Oct. 6, 1968 (on file with DeCrow Papers).

183. Press Release, Cent. N.Y. NOW Chapter (1968) (on file with DeCrow Papers).

[T]he most basic right of all may be the right to equal treatment in places of public accommodation. It means the right to human dignity, the right to be free from humiliation and insult, and the right to refuse to wear a badge of inferiority at any time or place.¹⁸⁴

The language of this oft-repeated message linked equality in public accommodations to Congress's power to enforce the Thirteenth Amendment and to "abolish[] all badges and incidents of slavery in the United States."¹⁸⁵ It emphasized women's second-class citizenship, reminding the audience that—as Nan Hunter puts it—"state public accommodations statutes literally grew out of debates over the scope of an individual's civil rights as a citizen."¹⁸⁶

NOW members explicitly reasoned from race in articulating the harm of sex discrimination in public accommodations.¹⁸⁷ "Although it would be a very unusual situation to walk anywhere in this country today and see a sign that says 'no Jews allowed' or 'blacks keep out,'" activists said, "we find in all our major cities that there are places that say, 'for men only.'"¹⁸⁸ By 1969, "such a practice—in a nation made so conscious by the black movement of the consequences of denying individual dignity and rights—clearly is outmoded and un-American," claimed New York City NOW.¹⁸⁹

Public accommodations also sometimes served as catalyst for cross-racial alliances. The story of Anna Mae Williams, a black woman who was not formally a member of the Syracuse NOW chapter but often joined the group's protests, is illustrative. One autumn day in 1968, she found herself the only African American person at the bar, denied service by the Hotel Syracuse staff. She filed a race-discrimination complaint with the New York State Human Rights Commission. The Commission told her that she had not faced race discrimination, because if she were a black man, the bar might have served her.¹⁹⁰ Then lacking jurisdiction over sex discrimination in public accommodations, the Commission denied her

¹⁸⁴. Report from DeCrow to NOW Nat'l Conference, *supra* note 127, at 1.

¹⁸⁵. The Civil Rights Cases, 109 U.S. 3, 20 (1883); *see also* Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 563-64 (2012).

¹⁸⁶. Hunter, *supra* note 22, at 1620.

¹⁸⁷. *See* MAYERI, *supra* note 16, at 9-11 (analyzing how feminists analogized to race to advance antidiscrimination law).

¹⁸⁸. Remarks at the Meeting on Public Accommodations 79 (1968) (on file with Alexander Papers); *see also* Memorandum from Karen DeCrow, Coordinator, NOW Pub. Accommodations Week, to NOW Officers et al., re Week of February 9-15, 1969 (on file with DeCrow Papers) (analogizing sex discrimination in public accommodations to that based on race or ethnicity).

¹⁸⁹. New York City Goals, *supra* note 25, at 2.

¹⁹⁰. Remarks at the Meeting on Public Accommodations, *supra* note 188, at 83.

complaint. Williams voiced her frustration in a letter to the editor: “How do black people legally complain about discrimination? They say we should follow the law but, when we try, the law isn’t there.”¹⁹¹ Responding to Williams’ call for actions, NOW members from across the state, Syracuse University students, and civil rights activists rallied by Williams planned to “pack the bar” at the Hotel Syracuse in late October.¹⁹² Once the women’s movement won prohibitions on sex discrimination in public accommodations, moreover, racial minorities and working-class women and girls democratized their meaning as they pursued equality in commerce and leisure.¹⁹³

A pint of beer in the local pub meant far more than a cool drink, and feminists acknowledged that they desired rights of equal access more than the experience of socializing in any given bar. The social practices of public discrimination, the NOW Pittsburgh chapter said, represented the “thousands of ways females are told that the male and his time [are] more important.”¹⁹⁴ Explaining her sustained efforts to open men-only bars to women, Faith Seidenberg said, “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.”¹⁹⁵ Some men agreed that these important sites of social and economic participation should be open to women. At the Oak Room, several men even signed a petition, condemning women’s exclusion as “unfair, undemocratic, and un-American.”¹⁹⁶

First-class citizenship necessarily entailed freedom of movement within public space. As the Pittsburgh NOW chapter testified, public accommodations discrimination sent the message that “activities of females can and should be regulated by others, because . . . females . . . have and always will be secondary to

191. Anna Mae Williams, Letter to the Editor, *Where to Go?*, SYRACUSE HERALD-J., Oct. 9, 1968.

192. Memorandum from Karen DeCrow on the Weekend of Oct. 26-27, 1968 (Oct. 22, 1968) (on file with DeCrow Papers).

193. See *infra* text accompanying notes 315-325 (describing the story of Maria Pepe, a working-class girl from New Jersey who fought for inclusion in Little League Baseball).

194. Greater Pittsburgh Area NOW Chapter, Presentation to the Pittsburgh City Comm’n on Human Relations 12 (Oct. 23, 1968) (on file with Heide Papers).

195. Jack Williams, *Champion of Women: Lady Lawyer Leads Modern Crusade*, Jan. 30, 1969 (on file with Seidenberg Papers) (clipping from unknown publication); see also Nancy Baltad, *Women Stage Protest Demonstration in Bar*, HOLLYWOOD CITIZEN-NEWS, Feb. 21, 1969, at B7 (“I’d ordinarily not dream of going into a bar unescorted . . . but where management discriminates against women, we are seeking to prove we are not second class citizens.”); Lichtenstein, *supra* note 163, at 5 (quoting a woman unaffiliated with the feminist movement who said she came to have a drink at McSorley’s as “a matter of principle”).

196. Petition to Arthur D. Dooley, Gen. Manager, The Plaza, Feb. 12, 1969 (on file with Alexander Papers).

men.”¹⁹⁷ Ending the men’s business lunch at the 700 Club, a group of young black and white feminists in Florida framed their objection in these terms: “[O]ur biological structure will not determine when and where we must purchase food and drink. We will not go ‘downstairs’ or ‘next door.’”¹⁹⁸

Activists tied women’s movement in public space to the broader freedom to occupy new social roles. Public accommodations law proved a tool to attack sex separation well beyond restaurants and clubs—in institutions ranging from credit to adult and youth athletics, sectors we explore further in Parts IV and V. By integrating these spaces, feminists aimed “to ‘liberate’ peoples[’] minds from the outmoded conception about women having only one place in this world.”¹⁹⁹ A fundraising letter for the Women’s Rights Project at the ACLU, written by Ruth Bader Ginsburg, exemplified this vision. It showed a little girl playing baseball and read, “She should have the right to do anything, be anyone. Her place is everywhere.”²⁰⁰

Legislative retrenchment of some forms of public accommodations discrimination frequently aimed to safeguard space for men. Massachusetts’s passage of a public accommodations law in 1971, for example, triggered considerable cultural anxiety. The *Boston Globe* reported that when “[t]ipping in taverns becomes a women’s right,” it “jeopardize[s] 330 all-male sanctuaries across the state.”²⁰¹ *Globe* editors queried “why the ladies would even want to invade,”²⁰² suggesting that sex-segregated spaces in public as in the home, where men’s “dens” and women’s “sewing rooms” preserved “domestic felicity,” were a social necessity.²⁰³ The Massachusetts legislature agreed. Just three months after enacting a ban on sex discrimination in public accommodations, it swiftly and without dissent exempted taverns from the law until 1973.²⁰⁴

The legislative battle in Michigan, like Massachusetts, demonstrated concerns about maintaining separate preserves for the sexes defined by sex-stereo-

197. Greater Pittsburgh Area NOW Chapter, *supra* note 194, at 11.

198. *700 Club: Women Protest ‘Lock Out,’* MIAMI HERALD, Nov. 18, 1970 (on file with DeCrow Papers); see also Margaria Fichtner, *Women Served After the Siege*, MIAMI HERALD, Nov. 19, 1970 (on file with DeCrow Papers) (describing the protestors).

199. Diane Hypes, *Women Demand Equal Rights NOW*, PITT. POINT, Nov. 28, 1968, at 1, 3.

200. Letter from Ruth Bader Ginsburg, ACLU Gen. Counsel, to Supporters (on file with MNCLU Papers).

201. *Laws Will Free Women’s Spirits (in Male Bars)*, BOS. GLOBE, July 17, 1971, at 3.

202. *Out with the Ladies?*, BOS. GLOBE, Aug. 25, 1971, at 16.

203. *Id.*

204. *House Allows Taverns to Ban Women in 1972*, BOS. GLOBE, Oct. 5, 1971, at 8.

typed interests and roles. In December 1971, the Michigan House of Representatives rejected a nondiscrimination bill that, unlike earlier versions, did not include exemptions for educational, religious, and charitable institutions.²⁰⁵ Those in opposition, however, did not only cite the fraught issues of sex integration in religious institutions or in public restrooms. They were also concerned about preserving homosocial sites of commerce and entertainment. “Do equal rights for women mean an end to Ladies Day at the ball park? How about the custom of women’s fashion shops[,] which hold a man’s night for male Christmas shoppers? Is that out, too?”²⁰⁶ The appeal to exemptions seemed to stand in for cultural anxieties about whether sex segregation would be eradicated altogether under antidiscrimination law’s assault.

Feminist efforts to dismantle the idea of “a woman’s place” shed light on the economic and social harms of sex discrimination in public accommodations. While entrance to restaurants and civic organizations might help women’s professional prospects, employment opportunity was not the only interest. Feminists pursued the dignity that accompanied equal treatment in public. They understood exclusion and segregation to constitute a harm, even when they had other places to eat and to socialize. Nothing less than full and equal citizenship as workers and consumers was on the line. Such citizenship would involve not only access but also freedom in public, as Part IV demonstrates.

IV. ASSERTING FREEDOM FROM SEXUALITY AND HETERONORMATIVITY

As they accessed public space, feminist activists also claimed freedom within it. They fought against the customs and laws that made women’s sexual identity determinative of their access to public accommodations. During this period, feminists and their opponents understood sex discrimination in public to encompass the requirement of attachment to a man, the regulation of sexuality, and the enforcement of gendered dress. As Section IV.A demonstrates, into the early 1970s, sexual attachment to a man structured women’s access to public accommodations as varied as financial instruments and hotel bars. Feminists contended that sex equality required public accommodations instead to treat women as individuals. As Section IV.B argues, feminist activists, their opponents, and legal bodies all recognized that an impulse to regulate sexuality motivated sex

205. See Roger Lane, *Sex Equality Puts House in a Quandary*, DET. FREE PRESS, Dec. 2, 1971, at 1A, 4A (explaining that the Michigan House passed a public accommodations bill barring sex discrimination in March 1971 by extremely wide margins, but rejected a Senate version in December).

206. *Id.* at 1A (rhetorically posing the questions that animated the opposition).

segregation. Public accommodations law targeted the construction of men as sexual predators and women as, alternatively, sexual threats or sexual prey. As Section IV.C contends, public accommodations law also disrupted gendered norms of dress and grooming.

A. Attachment to a Man

Sex equality in public accommodations required independence from attachment to men. Many public accommodations allowed women access but only via their husbands or male partners. Women protesting this discrimination demanded legal recognition as individuals without sexual attachment to a man as a physical companion or economic proxy.

Credit practices presumed women's dependence and perpetuated the common law of coverture well into the 1970s (and beyond).²⁰⁷ Whether she was single, divorced, or married, a woman's credit was determined by a man. Lenders, including retail stores, assumed single working women were only temporarily in the workforce and thus poor credit risks. As a result, they denied credit to and charged higher rates of interest for single women.²⁰⁸ Banks and stores also refused to issue credit to married women in their own names.²⁰⁹ Any woman who married found her credit canceled.²¹⁰ Instead, companies defined married

207. No less than the Congressional Research Service drew this connection in 1973. See Courtney G. Joslin, *Discrimination in and out of Marriage*, 98 B.U. L. REV. 1, 25 n.161 (2018). Under coverture, "the very being or legal existence of the woman is suspended during the marriage." 1 WILLIAM BLACKSTONE, COMMENTARIES *430. While the Married Women's Property Acts of the 1830s and 1840s formally granted married women rights to contract and control their property, coverture continued to influence various areas of the law. See generally Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 841-48 (2004) (describing the persistence of coverture principles within family law); Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994) (showing that the "marital service" doctrine gave husbands rights in their wives' labor after the Married Women's Property Acts).

208. *Hearing of the Econ. Dev., Manpower, and Labor Comm. of the D.C. City Council* (1973) [hereinafter *D.C. City Council Hearing*] (statement of Sharyn Campbell, D.C. Comm'n on the Status of Women).

209. Letter from L.A. Zunu, Gulf Oil Co. Customer Representative, to Teri K. Milton (Mar. 30, 1971) (on file with Seidenberg Papers); *D.C. City Council Hearing*, *supra* note 208, at 4 (statement of Sharyn Campbell, D.C. Comm'n on the Status of Women) ("When a woman marries, her credit history is merged into her husband's file and she ceases to have an independent identity for credit bureau purposes.").

210. See *D.C. City Council Hearing*, *supra* note 208, at 1 (statement of Sharyn Campbell, D.C. Comm'n on the Status of Women) ("Single women with credit accounts have traditionally lost their credit status upon marriage, even if nothing changed but their last name.").

women's credit histories by their husbands' records. When issuing credit to a married couple, credit agencies often discounted the wife's wages on the assumption that she might quit at any time. This practice disproportionately harmed African Americans, who were more likely than white couples to form dual-earner marriages with relatively commensurate salaries.²¹¹ Companies' discriminatory credit practices prevented women from establishing independent credit, reinforced their dependence, impeded their ability to exit bad marriages, and contributed to the economic hardship of divorced women.²¹²

In campaigning for public accommodations laws, activists often identified their most important effect to be "eliminating the inequities in the extension of credit to women by banks and retail establishments."²¹³ Banks, retail stores, and other financial institutions typically constitute public accommodations in that they offer goods and services to the public. A wide range of women recognized as discriminatory these institutions' failure to treat them as independent economic agents. Many women challenged coverture's persistence in credit. As Teri Milton wrote to one company, she and her husband had "excellent credit, but credit is not the point. The NAME is the point. Surely you must grant that I, a female, possess a name, and the right to use it."²¹⁴ Other credit practices made the need for a woman's attachment even clearer. State commissions on the status

211. See, e.g., PA. COMM'N ON THE STATUS OF WOMEN, CREDIT REPORT 2 (1973) (discussing this type of credit discrimination); Maureen Ellen Lally, Comment, *Women and Credit*, 12 DUQ. L. REV. 863, 870 (1974).

212. *D.C. City Council Hearing*, *supra* note 208, at 4 (statement of Sharyn Campbell, D.C. Comm'n on the Status of Women); Margaret J. Gates, *Credit Discrimination Against Women: Causes and Solutions*, 27 VAND. L. REV. 409, 409 (1974).

213. NOW, Massachusetts Legislative Program 3 (n.d.) (on file with Williamson Papers).

214. Letter from Teri Milton to R.M. Lawson, Manager, Hous. Travel Card Center, Gulf Oil Co. (Apr. 1, 1971) (on file with Seidenberg Papers); see also Minutes, Twin Cities NOW Board 2 (Jan. 15, 1972) (on file with Minn. NOW) (discussing West Suburban Women's Liberation and NOW policing department store's compliance with its promise to issue credit in women's own names).

of women investigated policies requiring a husband to cosign in order for a married woman to open a credit line.²¹⁵ Feminists argued that making access contingent on marital status was unlawful, akin to closing store doors or refusing to provide women goods or services.²¹⁶

In the mid-1970s, newly enacted public accommodations laws provided a tool to fight for individual access to financial products – with mixed success. Human-rights commissions were frequently willing to use public accommodations statutes against sex discrimination in credit.²¹⁷ But it was often unclear whether, and to what degree, public accommodations law applied to consumer credit. For example, as the Ohio Task Force observed in 1974, although the Ohio Civil Rights Commission took the law to encompass credit discrimination (and other states had as well), no court had had the opportunity to interpret the law.²¹⁸ States often combined efforts under public accommodations laws with more specific credit-discrimination legislation, banking regulations, or amendments of public accommodations laws to specify credit.²¹⁹

Women subjected to procedures and limitations not imposed on men often prevailed. For example, in 1971, Esther Kegan, a wealthy and successful attorney and businessperson, filed a complaint with the New York City Commission against Walston & Company, Inc., a brokerage firm.²²⁰ The firm had refused to approve her application for a commodity futures trading account unless she signed a “Woman’s Commodity Account” form waiving any right to hold the

215. CSW NEWS (Pa. Comm’n on the Status of Women), Apr. 1973, at 2 (reporting as an example from credit discrimination hearings “a woman who has been employed for 14 years was denied a charge account because she refused to have her husband co-sign”); Carole Shifrin, *Women Allege Credit Bias*, WASH. POST, May 23, 1972, at B1 (discussing hearings of the Minnesota Human Rights Division Women’s Affairs office).

216. Ann F. Hoffman, *Sex in the Money Market*, 2 MD. L.F. 135, 142 (1971-72); see also Meeting Agenda, Central N.Y. NOW Chapter (Nov. 13, 1968) (on file with DeCrow papers); Memorandum from Karen DeCrow to Central N.Y. NOW Chapter Steering Committee (Nov. 7, 1968) (on file with DeCrow Papers).

217. IO-WOMAN (Iowa Comm’n on the Status of Women, Des Moines, IA), Mar. 1973, at 2 (on file with Minnesota Historical Society Archives, Minnesota Department of Human Rights Records [hereinafter Minn. Dep’t of Hum. Rts. Records]) (noting that the “Minnesota Human Rights Commission is effectively using the public accommodations section of their Civil Rights Laws to eliminate credit discrimination”).

218. FINAL REPORT OF THE OHIO GOVERNOR’S TASK FORCE ON CREDIT FOR WOMEN 15 (Oct. 25, 1974).

219. *Id.* at 15-16.

220. *Kegan v. Walston & Co.*, No. 5095-PA, 1971 WL 33002 (N.Y.C. Comm’n on Human Rights 1974).

firm liable for losses—a waiver not required of men.²²¹ Kegan “was humiliated by her inability to secure an account which would have been automatically granted to any man with her qualifications” and, unwilling to sign, could not hedge her investment in citrus groves by purchasing orange juice concentrate futures; after a severe freeze in Florida, she suffered \$87,000 in losses against which she was unprotected.²²² The Commission easily concluded that the imposition of differing requirements for women violated the public accommodations ordinance. Some courts similarly held that credit discrimination, involving the “refusal or withholding of certain advantages” because of sex, fell within these laws’ clear terms.²²³

Attacking credit discrimination comprehensively, however, proved a hard target for public accommodations law. The statutes clearly reached facially discriminatory policies requiring different procedures and products for men and women—for example, requirements of spousal consent. But the pricing of financial products was defended as rational differentiation, unlike barring the doors to a class of paying restaurant customers. As credit institutions pointed out, women earned less than men and more frequently left the paid labor force to care for children.²²⁴ Some policies—such as that against counting alimony as income—applied evenly to potential borrowers of all sexes but affected far greater numbers of women.²²⁵ Other credit practices simply fell outside the scope of public accommodations laws. For example, credit bureaus merged married women’s credit histories into their husbands, dramatically affecting their future independent access to credit.²²⁶ But these agencies provided services, not to the general public, but to credit issuers. For a number of reasons then, the eradication of systemic sex discrimination in credit would ultimately require additional legislation.²²⁷

221. *Id.* at *1.

222. *Id.* at *11, *12.

223. *Equitable Tr. Co. v. Md. Comm’n on Human Relations*, 411 A.2d 86, 90 (Md. 1980); *see also Kan. Comm’n on Civil Rights v. Sears, Roebuck & Co.*, 532 P.2d 1263, 1268 (Kan. 1975) (concluding in a race discrimination case that “unfair credit practices” violate public accommodations law); *Schwenk v. Boy Scouts of Am.*, 551 P.2d 465, 469 (Or. 1976) (noting that public accommodations law clearly “includes the services of credit, financing mortgages, loans, and insurance”).

224. *Joslin*, *supra* note 207, at 29-30.

225. *Id.* at 28.

226. *See, e.g., PA. COMM’N ON THE STATUS OF WOMEN*, *supra* note 211, at 17-18.

227. *See Joslin*, *supra* note 207, at 8-9 (discussing the 1974 enactment of the federal Equal Credit Opportunity Act).

The practice of regulating women's access to public accommodations via their heterosexual dependency extended beyond the economic arena to the leisure realm. Golf clubs, country clubs, and other groups frequently granted women access through a male head of household. Testifying in favor of public accommodations law in Minnesota, the Women's International League for Peace and Freedom noted that country clubs issued individual memberships only to men and made family memberships parasitic on them.²²⁸ Such practices represented not mere administrative convenience, but rigid gender hierarchy. Consider, for example, the Piedmont Driving Club of Atlanta, where only men and a small group of "privileged widows" could be members.²²⁹ Members' wives and children could play tennis, but "should a group of men wish to use a tennis court on which women are playing, the men simply step onto the court, say, 'Thank you very much, ladies,' and the women depart."²³⁰ Adjudicating complaints under public accommodations laws, courts precluded some such clubs from issuing membership to women only through male heads of household.²³¹

A lawsuit that NOW brought against U.S. Power Squadrons, a boating school and organization, provides an example of the use of coverture in leisure. Women could take courses and become certificate holders, but they could not become members.²³² Defending against women's claims, Power Squadrons attempted to reconfigure itself into a "private" club rather than a public accommodation—a legal distinction that turns on the relative exclusivity or openness of membership.²³³ To appear more private, the Squadrons named itself a "fraternal" organization and stripped women of their certificates with a bylaw smacking of coverture: only the surviving wife or daughter of a deceased member could

228. Minn. Women's Int'l League for Peace & Freedom Testimony to Minn. Human Rights Dep't. 3 (July 12, 1973) (on file with Minn. Dep't of Hum. Rts. Records) (noting that at golf clubs and country clubs, "[t]here is one price for a man, and an additional price for his wife and family").

229. *Id.*

230. Stephen Birmingham, *The Clubs Griffin Bell Had to Quit*, N.Y. TIMES (Feb. 6, 1977), <https://www.nytimes.com/1977/02/06/archives/the-clubs-griffin-bell-had-to-quit-our-club-is-an-extension-of-our.html> [<https://perma.cc/M5EL-V2QU>].

231. See, e.g., *Warfield v. Peninsula Golf & Country Club*, 896 P.2d 776, 797 (Cal. 1995) (involving membership dating from the 1970s that was terminated upon a woman's divorce).

232. See *U.S. Power Squadrons v. State Human Rights Appeal Bd.*, 452 N.E.2d 1199, 1202 (N.Y. 1983) (reporting women's participation in courses but exclusion from membership).

233. See Barry Cadigan, *A 'Dues Paying Member' of USPS Wonders Why . . .*, BOS. GLOBE, June 22, 1975, at 85, 85.

continue to hold a certificate, and even then only until marriage (or remarriage).²³⁴ Although the New York Court of Appeals rejected the Power Squads' maneuver, policies granting women club memberships via their attachment to men persist in some bona fide private clubs today.²³⁵

B. Disorderly Bodies and Sexuality

The segregation of bars, social clubs, and sporting organizations did more than create sex-differentiated gender roles; it aimed to create “sexuality-free zones” to avoid immoral or unwanted sex.²³⁶ As legal scholar David Cohen argues, this goal can only be realized if heterosexuality is assumed, and men desire and seek out sex only with women.²³⁷ Sex segregation of public places thus buttressed compulsory heterosexuality, with the effect of contributing to the sexual objectification of cisgender women and the harassment of gender nonconformists of both sexes.²³⁸

Nowhere was sexual regulation so fraught as in bars. As historian Georgina Hickey argues in her study of barroom protests, women in the late 1960s had to perform heterosexual dependency to establish their respectability. They could appear in public drinking and eating establishments only when escorted by men.²³⁹ In 1970, the owner of Danny's Hideaway in New York explained that a woman could sit at his bar “[o]nly if I know her and she's waiting for her husband or boy friend” – any other woman might start talking with a man and “then

234. *Id.*

235. E.g., Nancy Kamp, *Gender Discrimination at Private Golf Clubs*, 5 *SPORTS LAW. J.* 89, 90 (1998); Jim Baumbach, *Male-Only Garden City Golf Club Stands by 'Tradition,'* *NEWSDAY* (June 14, 2018), <https://www.newsday.com/sports/golf/male-only-garden-city-golf-club-stands-by-tradition-1.19215153> [<https://perma.cc/R4MA-ZZEP>].

236. Laurel Westbrook & Kristen Schilt, *Doing Gender, Determining Gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System*, 28 *GENDER & SOC'Y* 32, 49 (2014).

237. David S. Cohen, *Keeping Men "Men" and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 *HARV. J.L. & GENDER* 509, 529 (2010); see also Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 *YALE J.L. & HUMAN.* 187, 271 (2006) (“[A]rguments both for and against sex segregation were premised on an assumption of normative heterosexuality.”); Naomi Schoenbaum, *Heteronormativity in Employment Discrimination Law*, 56 *WASHBURN L.J.* 245, 248–52 (2017) (discussing how employment law assumes heterosexuality in same-sex spaces); Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 *UCLA L. REV.* 581, 594 (1976) (indicating that bathroom sex segregation supports heterosexuality).

238. See Cohen, *supra* note 237, at 535–52.

239. *Id.*

[the liquor commission] can say she's 'soliciting.'"²⁴⁰ A woman without a man lost respectability and raised sexual risks. Male-escort requirements also limited the ways in which women could associate with each other in public, preventing women from grabbing a drink with a female friend, platonic or romantic.²⁴¹

Feminist protests of bars opened public contestation over whether the mere presence of an unescorted woman—or a woman in a male enclave—suggested disorder and disruption. In a letter to the editor, “A Proud Taxpayer” — calling herself one of the “GOOD women” — wrote that “a pick-up” was the only reason for “women wanting the right to go into a men’s sanctuary.”²⁴² Requesting exemption from New York City’s public accommodations ordinance, the attorney for the Hotel Association of New York, representing 186 hotels, said that barring unescorted women from hotel bars was “a policy of public safety’ designed to prevent prostitution.”²⁴³ The owner of the men-only Clam Broth House in New Jersey put it more forcefully: letting women in would mean being “overrun” with “hookers.”²⁴⁴ Protestors carried signs resisting this vision of predatory sexuality: “Women Who Drink Cocktails Are Not All Prostitutes.”²⁴⁵

Closely related to the idea of women as sexual prowlers was the notion that men required spaces free of (implicitly, hetero-) sexual distraction. The men’s grill at New Orleans’s Hotel Monteleone—the defendant in a lawsuit filed by the ACLU’s Ruth Bader Ginsburg in 1973—advertised, “there are times when a man prefers the company of other men. To discuss business, politics, sports, or, of course, women.”²⁴⁶ Officers of clubs justified sex-based exclusions in terms that

240. Earl Wilson, *Barkeeps Don't Want Lone Women*, HARTFORD COURANT, May 27, 1970, at 33, 33.

241. See Memorandum from Karen DeCrow to Timothy Costello, *supra* note 148, at 3 (“[T]o be blunt, . . . I cannot eat lunch in the Oak Room of the Plaza alone, or with a female friend, but I can eat there with a man I pick up two minutes before in the lobby.”).

242. Letter from “A Proud Taxpayer” to Karen DeCrow & Faith Seidenberg (June 29, 1970) (on file with DeCrow Papers); see also Baltad, *supra* note 195, at B7 (noting that a woman at a bar must be “looking for something”); Nickerson, *supra* note 29 (reporting critiques including “[a] women’s place is at a table” and “[i]t’s because they can’t get a man any other way”).

243. Lacey Fosburgh, *City Rights Unit Ponders Sex Law*, N.Y. TIMES, Jan. 15, 1971, at 87.

244. *Jersey Clam House to Fight Opening of Bar to Women*, NEWSL. (NOW, Central N.J. Chapter), Nov. 1971, at 13 (on file with Schlesinger Library, Harvard University, NOW Newsletter Collection); see also Wilson, *supra* note 240, at 33 (recounting a number of bar-owners stating resistance to admitting unescorted women).

245. Photograph of Karen DeCrow by Robert Seidenberg at Hotel Syracuse Protest (on file with DeCrow Papers).

246. Vernon A. Guidry, Jr., ‘Men Only’ Grills Face Test, DET. FREE PRESS, Nov. 11, 1973, at 5-D; see also Bill Stokes, *Women Behind Bars—It’s Not So Tender*, Sept. 1966, reprinted in NEWS RECORD OF WISCONSIN GOVERNOR’S COMMISSION ON THE STATUS OF WOMEN 135 (Kathryn F. Clarenbach ed., 1966) (arguing that women should not be allowed to tend bar because men go to

sexualized women. For example, officers testified to human-rights commissions: “I wouldn’t want to meet last night’s date at lunch” or “wives would not want their husbands attending club meetings if other women were members.”²⁴⁷ Women sometimes understood their sexual identity to drive their rejection by private clubs. When the Renton, Washington, Jaycees chapter voted in 1974 to drop its first and only woman member, Pamela Backus, she retorted, “I’m not going to seduce you. I want to learn to run committees, self-confidence and public speaking.”²⁴⁸

Even as they decried some women’s sexual aggression, proponents of sex segregation also emphasized others’ alleged sexual vulnerability. A *National Review* writer warned that without “a place or two of our own to swagger around in,” men would be “prowling through go-go joints.”²⁴⁹ Ironically, however, sex segregation itself could deepen the vulnerability of women to sexual violence. As historian Linda Kerber observes, in the 1960s male-only bar space “marked women who moved into it as sexually promiscuous, inviting what we would now call harassment.”²⁵⁰

People came to question norms requiring women to appear in many bars and restaurants only as part of a heterosexual couple. After protests, customers at a Los Angeles bar noted that policies against unescorted women meant a woman waiting for her date could be caught between two gendered norms, unable to sit at the bar but unwilling to “take a table alone.”²⁵¹ Ordinary women expressed indignation that their opportunities to dine or drink would be limited to the construct of the heterosexual couple on a date. Protests led lawmakers to recognize the irrationality of sexual stereotypes requiring the physical companionship of a man. New York City councilperson Carol Greitzer, for example, described being motivated to introduce a public accommodations ordinance by the experience of “a neighborhood woman—older, ‘hefty,’ and clearly not a prostitute—who was refused service at a drug store lunch counter over which hung a sign reading, ‘No unescorted women served at the counter after midnight.’”²⁵²

bars to complain about their wives and women bartenders might encourage wives to drink and complain about husbands).

247. EDITH LYNTON, BEHIND CLOSED DOORS: DISCRIMINATION BY PRIVATE CLUBS, A REPORT BASED ON NEW YORK CITY COMMISSION ON HUMAN RIGHTS HEARINGS 2 (1975).

248. *Id.* at 1.

249. John R. Coyne, Jr., *Ale, Cheese, Onions and Women*, NAT’L REV., Sept. 22, 1970, at 997.

250. Kerber, *supra* note 48, at 435.

251. Baltad, *supra* note 195, at B7.

252. Hickey, *supra* note 14, at 401.

Litigation predating and inspiring public accommodations laws contested ideas of female seductive threat, male sexual aggression, and feminine vulnerability underpinning sex segregation. In 1968 and 1969, Faith Seidenberg filed a string of lawsuits against Hotel Syracuse based on its policy requiring women to have an escort to be served in the bar.²⁵³ Hotel Syracuse defended the rule as necessary “to maintain the dignity of the room.”²⁵⁴ The plaintiff’s memorandum of law posed the question: “Is being simply a female, with no showing of loudness, lewdness, or any other disturbing conduct, in and of itself sufficient cause to exclude plaintiff from service?”²⁵⁵ Using a New York innkeeper law, plaintiff argued that the statute set a requirement of equal treatment that Hotel Syracuse violated by giving men, but not women, the right to take any seat.²⁵⁶ The judge proved unsympathetic. He held that the hotel had not “refuse[d] to receive or entertain the plaintiff but simply conditioned their reception and entertainment of her by requiring that she be escorted to the bar or be seated at a table removed therefrom.”²⁵⁷ His acceptance of extant sexual norms, Seidenberg said, was “in accord with public opinion.”²⁵⁸

Despite the loss at Hotel Syracuse, courts came to reject the stereotypes about women’s sexuality underlying sex segregation. For example, in 1968, with the aid of New Jersey NOW leader Betty Farians, a tavern owner and a female resident argued that Bayonne, New Jersey’s ordinance prohibiting sale of liquor to women sitting or standing at a bar contravened the state civil rights act.²⁵⁹ In treating women as a “[p]otential [n]uisance [that m]ay lead to vice [and] immorality,” plaintiffs said, the law was “archaic, and totally unrelated to any realistic public need or danger.”²⁶⁰ In a decision affirmed by the Supreme Court of New Jersey, the trial court agreed. Chiding the “City fathers of Bayonne” for

253. See *DeCrow v. Hotel Syracuse Corp.*, 288 F. Supp. 530, 530-31 (N.D.N.Y. 1968); *DeCrow v. Hotel Syracuse Corp.*, 298 N.Y.S.2d 859, 860 (Sup. Ct. 1969).

254. *An Absurd Campaign*, SYRACUSE POST-DISPATCH, Nov. 8, 1968 (on file with DeCrow Papers).

255. Plaintiff’s Memorandum of Law at 3, *DeCrow*, 298 N.Y.S.2d 859 (Sup. Ct. 1969) (no docket no.) (on file with DeCrow Papers).

256. *Id.* at 3.

257. *DeCrow*, 298 N.Y.S.2d at 862-63.

258. Faith A. Seidenberg, *The Submissive Majority: Modern Trends in the Law Concerning Women’s Rights*, 55 CORNELL L. REV. 262, 269 n.40 (1970).

259. *Gallagher v. City of Bayonne*, 245 A.2d 373, 374 (N.J. Super. Ct. Ch. Div. 1968), *aff’d*, 256 A.2d 61 (N.J. Super. Ct. App. Div.), *aff’d per curiam*, 55 N.J. 159 (1969). The act speaks broadly: “All persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . .” N.J. STAT. ANN. § 10:5-4 (West 2019). “A place of public accommodation” is defined to include taverns. *Id.* § 10:5-5(l).

260. Brief on Behalf of Plaintiff at 4, 13, *Gallagher*, 245 A.2d 373 (No. C-1956-65) (on file with Farians Papers).

treating “a woman standing or sitting at a bar in the company of men” as “an occasion of sin,” the court found no legal necessity for the ordinance.²⁶¹

Courts also began to repudiate the protectionist rationales for excluding women from bars. In early litigation brought by feminist lawyers under the Equal Protection Clause against McSorley’s Old Ale House, the district court used rational basis scrutiny to conclude that stereotypes “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. At least to this extent woman’s ‘emancipation’ is recognized.”²⁶² Within a few years, striking down such a sex classification became an easier task. The Supreme Court had begun for the first time to strike down differential regulation of the sexes as a violation of equal protection,²⁶³ and a plurality of the Court had even indicated sex merited strict scrutiny.²⁶⁴ So, in 1974, deciding a challenge to a state law that prohibited saloons or bars from serving women in *Women’s Liberation Union of Rhode Island, Inc. v. Israel*, the district court remarked: “It is an odd sort of ‘protection’ which denies a woman access to a public convenience ‘for her own good.’”²⁶⁵ Affirming the district court, the U.S. Court of Appeals for the First Circuit strongly rejected protectionism: no evidence suggested that women needed greater protection than men or that prohibiting serving beverages to women protected them from harm.²⁶⁶ For women to attain equality in public, courts recognized, the long-standing rationales for sex segregation – avoiding illicit sexual relations and protecting women from undisciplined masculinity – could not stand.

Beyond bars, women’s perceived sexual vulnerability and the threat of heterosexual interaction justified the exclusion of women from youth and adult athletics. Legal scholar Mary Anne Case reveals that such perceptions are relatively recent in human history.²⁶⁷ Only after what theorist Thomas Laqueur terms the

261. *Gallagher*, 245 A.2d at 375-76. For cases striking down similar laws on equal protection grounds, see *White v. Fleming*, 522 F.2d 730, 737 (7th Cir. 1975); and *Commonwealth Alcoholic Beverage Control Board v. Burke*, 481 S.W.2d 52, 54 (Ky. 1972).

262. *Seidenberg v. McSorleys’ Old Ale House, Inc.*, 317 F. Supp. 593, 606 (S.D.N.Y. 1970) (citation omitted).

263. *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (striking down the preference under Idaho law for male over female kin as estate administrators).

264. *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (Brennan, J.) (plurality opinion).

265. 379 F. Supp. 44, 51 (D.R.I. 1974), *aff’d*, 512 F.2d 106 (1st Cir. 1975).

266. *Women’s Liberation Union of R.I.*, 512 F.2d at 108-09.

267. Mary Anne Case, *Heterosexuality as a Factor in the Long History of Women’s Sports*, 80 LAW & CONTEMP. PROBS. 25, 26-27 (2017) (arguing that women’s involvement in athletics depended

late-eighteenth-century “invention of sex” – the historical processes that constructed women as the physiological and psychological opposites of men – did western society come to view athletics as fraught with sexual danger.²⁶⁸

Notions that athletics harmed female reproductive capacity and yielded illicit sexuality persisted into the 1970s and beyond. Opponents of integrating children’s sports echoed arguments from a century earlier when they warned, for example, that girls risked getting “hurt in their vital parts.”²⁶⁹ Injury to girls’ bodies also were taken to have different social consequences, given the sexual and marital market. Unlike boys, one Little League umpire opined, “girls are disfigured for life” if they break their noses or a tooth in the game.²⁷⁰ Sex integration of sports presented the possibility of sexual intimacy and provoked invocations of female sexual vulnerability. New Jersey Little League officials fretted that intimate contact might accompany a close call at second base.²⁷¹ “I don’t want my 10-year-old girl sliding into a base and having your 12-year-old boy tag her on the breast,” one official said.²⁷² The threat came as much from male coaches as from baseballs and bats. The League president, Dr. Creighton Hale, argued, “It just wouldn’t be proper for coaches to pat girls on the rear end the way they naturally do boys.”²⁷³

This “[u]ndercurrent” of heterosexuality, Case argues, generally characterized sports into the twentieth century.²⁷⁴ As girls sued for access to boys’ sports teams under both the Equal Protection Clause and public accommodations laws, judges’ responses reflected the ongoing construction of athletics as a realm fraught with sexual danger. They set up a dichotomy, permitting girls access to noncontact sports, while denying them participation in sports that “placed [them] in physical contact with boys”²⁷⁵ – a category that for a time included baseball.²⁷⁶ Even as girls increasingly competed in school sports or in extracur-

on society’s views of whether athletic play diminished women’s reproductive capacity and heterosexual appeal).

268. *Id.* at 25, 33-35.

269. Frank Deford, *Now Georgy-Porgy Runs Away*, SPORTS ILLUSTRATED, Apr. 21, 1974, at 26.

270. *Id.* at 32.

271. *Id.* at 28.

272. Thomas, *supra* note 73, at 1.

273. Deford, *supra* note 269, at 28.

274. Case, *supra* note 267, at 35.

275. *Magill v. Avonworth Baseball Conference*, 364 F. Supp. 1212, 1216 (W.D. Pa. 1973); *see also id.* at 1217 (“[W]e hold that sex is a rational distinction where a contact sport is involved.”).

276. *Federal Court Rules Ban Legal; Little League Barring of Girl Player Upheld*, PITTS. POST-GAZETTE, July 6, 1973, at 1 (on file with Witter Papers); *Fortin v. Darlington Little League, Inc.*, 376 F.

ricular organizations subject to public accommodations laws, disparate regulations for boys' and girls' teams—such as statewide prohibitions on female athletes' overnight travel—reinforced a perception of (hetero)sexual risk into the 1970s.²⁷⁷ As in bars, sexualization of female bodies justified the regulation and exclusion of the “fairer sex.”

C. Dress and Decorum

Throughout this period, public accommodations rigorously policed normative masculinity and femininity through dress and grooming requirements. Into the 1970s, restaurants and clubs would turn away women for wearing pantsuits—dressing “like a man”—or sporting miniskirts—dressing “like a prostitute.” Feminists often flouted these codes in their protests, most notably dining at the Boston Ritz-Carlton Hotel reportedly in “all manner of attire from dresses to dirty blue jeans.”²⁷⁸ Flo Kennedy was likely among them sporting her trademark look: long red nails, a cowboy hat, and pink sunglasses.²⁷⁹

Rigid constraints on dress and decorum also confronted men, especially in mixed-sex spaces. Thus, as NOW aspired to liberate women to make “a free choice of what to wear and how to look,”²⁸⁰ their opponents argued that only through sex segregation could such freedom exist for men. Members of men's clubs often claimed the presence of women would “destroy the casual atmosphere” and require men to modify their dress.²⁸¹ Perhaps more shocking is the explanation given for United's men-only flight in 1969: “[B]usinessmen could

Supp. 473, 479 (D.R.I. 1974) (“[B]aseball is a contact sport.”), *rev'd*, 514 F.2d 344 (1st Cir. 1975).

277. See, e.g., *Bucha v. Ill. High Sch. Ass'n*, 351 F. Supp. 69, 71, 75 (N.D. Ill. 1972); Nat'l Org. for Women, Statement of Complaint Against Gil Hodges Little League 2 (Apr. 7, 1978) (on file with NOW LDEF Records) (challenging regulations allowing boys to wear t-shirts in warm weather while requiring girls to remain in full uniform).

278. Achbar, *supra* note 114. On the significance of the cultural politics of dress and hairstyles to the women's liberation movement, see BETTY LUTHER HILLMAN, *DRESSING FOR THE CULTURE WARS: STYLE AND THE POLITICS OF SELF-PRESENTATION IN THE 1960S & 1970S*, at 63-74 (2015).

279. Martin, *supra* note 113. We say “likely” because the lunch followed a press conference by Kennedy and her co-author Diane Schulner on their new book and involved women's liberationists, including Kennedy's close collaborator Gloria Steinem. Achbar, *supra* note 113. Kennedy is not mentioned or pictured, but the media of the time is known to have engaged in racist practices, whitewashing her from other events where she was key. See, e.g., RANDOLPH, *supra* note 157, at 159-60 (describing the media's ignoring of Kennedy in favor of younger white feminists, even when she served as a spokesperson to the media).

280. NAT'L ORG. FOR WOMEN, *NOW ACCOMPLISHMENTS 1966-1973*, at 7 (1973) (on file with Witter Papers).

281. LYNTON, *supra* note 247, at 20.

take off their coats, loosen their ties, remove their shoes, light up their favorite cigar or pipe—and generally make themselves at home.”²⁸² The presence of women (as customers but not stewardesses), United suggested, required men to chafe (quite literally) under restrictions on their dress.

Newly enacted public accommodations statutes destabilized norms of gender presentation and dress. NOW considered legal action against the Saratoga Raceway, for example, where women in pantsuits were not welcome.²⁸³ In 1972, Colleen DiMicco, ordered to leave a restaurant because she attempted to order food while not wearing a bra, resisted the disciplinary sexualization of her fully clothed body. She “was wearing slacks and ‘a non-transparent 100 percent cotton top,’ she declared, and her appearance was ‘certainly neither titillating nor obscene.’”²⁸⁴ DiMicco filed a complaint with the local human-rights commission, reasoning that men were not told what undergarments to wear; the commission found probable cause of sex discrimination.²⁸⁵ In Pennsylvania, NOW brought one of its first complaints against a pool where only women, regardless of hair length, were required to wear swim caps.²⁸⁶

Equality principles challenged dominant conceptions of masculinity as well as femininity. When law students complained that dress codes violated formal equality by welcoming women but not men dressed in only shirts and pants, a *Washington Post* columnist argued that men who were allowed to remove their jackets would be more likely to misbehave and that the natural consequence of equal dress standards would be to allow men in dresses.²⁸⁷ The same year DiMicco gained admission to the Raceway, a New York court held that a restaurant discriminated unlawfully when it admitted women, but not men, with long hair.²⁸⁸ In Boston, the enactment of public accommodations law yielded the sex integration of previously segregated barber shops and hair salons, which in turn

²⁸². Letter from WA Heath, Manager of Customer Relations, United, to Karen DeCrow (Apr. 21, 1969) (on file with DeCrow Papers).

²⁸³. Letter from Marjorie Karowe to Faith Seidenberg (June 9, 1971) (on file with Seidenberg Papers); see also Hickey, *supra* note 14, at 402 (“With language, tactics, and in some cases laws built around public accommodations, feminists began questioning dress codes . . .”).

²⁸⁴. *The Bearded Nurse and Other Tales*, CIV. LIBERTIES IN N.Y. (NYCLU), Mar. 1973, at 8 (on file with DeCrow Papers).

²⁸⁵. *Id.*

²⁸⁶. NOW NEWSL., *supra* note 170, at 9.

²⁸⁷. Henry Fairlie, *Clothes, Clubs and the Trivialization of Civil Rights*, WASH. POST, Nov. 23, 1980, at C2.

²⁸⁸. *Braun v. Swiston*, 340 N.Y.S.2d 468, 469 (Sup. Ct. 1972).

meant greater flexibility in hair styles.²⁸⁹ Dress codes requiring ties or prohibiting hats on men alone fell before public accommodations law.²⁹⁰ With legal reform, what was once shocking – women in pantsuits or men loosening their ties in front of women – quickly became normal.

As legal advocacy dismantled the sexual regulation of public accommodations, it also undermined the legal architecture of heteronormativity. Businesses could no longer act on the presumption that women in the market were dependent on men. Nor could these public accommodations engage in sex segregation on the notion that opposite-sex interaction was necessarily sexual. This legal reform explicitly enhanced women's freedom from sexualization in public and implicitly allowed for the possibility of forms of sexual expression other than heterosexuality. Restricting public accommodations' capacity to regulate gendered comportment and decorum, these new laws also undermined norms of gender performance.

V. PURSUING TRANSFORMATIVE INTEGRATION

Public accommodations were an important site for the fight for women's equality, opening up possibilities for women's inclusion within a wide array of social and cultural institutions with a radicalism since lost. As Section V.A argues, the use of public accommodations law to challenge sex-based discrimination in athletics posed a revolutionary alternative to the "separate but equal" framework that came to dominate under Title IX of the Education Amendments of 1972. Section V.B shows that the feminist movement initially welcomed restroom integration, but eventually retreated in the face of public opposition to this application of public accommodations law and, more forcefully, the ERA. A geography of sex segregation was left in place that is presumed valid and defended to this day.

289. Nanci Robb, *He's at the Beauty Parlor!*, CHRISTIAN SCI. MONITOR, Oct. 5, 1971, at 6.

290. See *In re Cox*, 474 P.2d 992, 1000 (Cal. 1970) (holding that shopping centers may not bar "individuals who wear long hair or unconventional dress" under California's broad-based Unruh Act); *Powell v. Reds Lounge*, No. PAse77050257, 1979 WL 392536, at *2 (Ind. Civ. Rts. Comm'n Aug. 24, 1979) (holding that requiring men but not women to remove their hats was discriminatory); see also *The Bearded Nurse*, *supra* note 284, at 8 (discussing the complaint of a man ejected from a New York town's council meeting for refusing to remove his beret); cf. *Hales v. Ojai Valley Inn & Country Club*, 140 Cal. Rptr. 555, 557-58 (Ct. App. 1977) (allowing the claim that requiring ties only of men is sex discrimination to proceed).

A. *Against the “Masculine Rites and Rights” of Sports*

That the dominant interpretation of sex equality allows for sex segregation in sports appears inevitable, even natural, today. Embedded in our current system of sex segregation, however, is an implicit, yet often unacknowledged, hierarchy. Consider a recent example. On an unseasonably warm fall day in 2018, the Rowan University cross-country teams were practicing. The male runners removed their shirts, and some members of the women’s team did too, continuing their run in sports bras. That simple action ignited simmering tensions between the cross-country teams and the football team, which practices on the field inside the track. The women runners, the football coach insisted, distracted his players. Three days later, the athletic department moved cross-country practice elsewhere.²⁹¹

The incident embodied themes familiar from the history of sex in public. It involved sex-separated spheres and sexual stereotypes of women as seductresses and men as susceptible to temptation. The women’s cross-country team, angry but unsurprised, recognized that Rowan’s sex-segregated athletics also reflected inequalities in funding and institutional power.²⁹² Football’s prioritization extended beyond practice locations to better locker rooms and transportation.²⁹³ As the example illustrates, women and men in athletics are separate but not yet equal.

Notwithstanding persistent inequalities, Title IX has undeniably done much to dismantle a cultural binary of athleticism and femininity. It dramatically increased female athletic participation at all levels of education. The number of girls playing high school sports, for example, went up from one in twenty-seven in the early 1970s to one in three by the end of the twentieth century.²⁹⁴ Most significantly, Title IX legislates a parity model that preserves distinct resources and opportunities for female participation in sports.²⁹⁵ That model reflected the

291. Talya Minsberg, *Runners Practiced in Sports Bras. Rowan University Told Them to Go Elsewhere*, N.Y. TIMES (Nov. 9, 2018), <https://www.nytimes.com/2018/11/09/sports/rowan-sports-bra-controversy.html> [<https://perma.cc/ASJ8-5UR2>].

292. A senior member of the team commented, “[T]he football team gets what they want.” *Id.*

293. *Id.*

294. Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 15 (2001).

295. Title IX requires proportional “participation opportunities,” Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979), and allows sex-separated teams when “competitive skills” are implicated, 34 C.F.R. § 106.41(b) (2019). Title IX requires sufficient funding to allow for equal athletic opportunities for men and women, not identical funding for male and female sports. Brake, *supra* note 294, at 124.

advocacy of female athletic administrators, who, from the early 1960s, argued in favor of sex-segregated teams to preserve the distinct values of women's sports.²⁹⁶ Feminists who shared these views worried that mere formal equal treatment might undermine women's sports programs and reduce meaningful opportunities for participation.²⁹⁷ At its most ambitious, the parity model holds the potential to reshape athletic culture in ways that enhance women's interest in sports and disrupt notions of gender difference.²⁹⁸

Prior to the enactment of Title IX, however, some feminist public accommodations activists pursued alternatives both to the parity model and to formal equality: what is best described as the transformative integration of athletics.²⁹⁹ NOW activists aspired not merely to gain access for exceptional girls and women, but also to use sex integration to change athletic play and competition. Doing so, they believed, would transform gender relations and ideas about sex difference.³⁰⁰

During the first half of the 1970s, a cross section of girls and women invoked public accommodations laws to enter youth sports and adult recreational athletics. Before the Title IX regulations, public accommodations laws, as well as the Equal Protection Clause, provided the basis for claims of sex integration. Women students mobilized to compete directly against (or together with) their male peers in sports such as golf, tennis, and swimming.³⁰¹ Girls won admission to sex-segregated events such as the Soap Box Derby.³⁰² Women demanded to

296. DEBORAH L. BRAKE, *GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORTS REVOLUTION* 23 (2010).

297. *Id.* at 20.

298. See generally Brake, *supra* note 294, at 106-07 (discussing how schools should implement the Title IX theory of equality to change the culture of sport).

299. For the formal equality argument for sex integration of athletics, see Karen L. Tokarz, *Separate But Unequal Educational Sports Programs: The Need for a New Theory of Equality*, 1 *BERKELEY WOMEN'S L.J.* 201 (1985).

300. On the role that sports play in constructing sex difference, see Verbrugge, *supra* note 87, at 62 (arguing that athletics are "a decisive mechanism for differentiating between the sexes and inscribing 'womanhood'").

301. *P.G. Sports*, OFF OUR BACKS, Apr. 15, 1971, at 16; *Swimmer Charges Bias, 1972-73 SCRAPBOOK* (Minn. Dep't of Hum. Rts.) (on file with Minn. Dep't of Hum. Rts. Records) (reporting that a twelve-year-old female competitive swimmer barred from a junior high swimming team filed a complaint with St. Paul Human Rights Department). State administrative agencies charged with enforcing antidiscrimination law sometimes reached out to NOW chapters for help in ending sex discrimination in athletics. See, e.g., *Sports*, NOW NEWSL. (Cent. N.Y. NOW Chapter, Syracuse, N.Y.), May 1, 1974, at 6 (on file with DeCrow Papers).

302. *Public Accommodations*, *supra* note 179, at 17.

run on tracks and play on racquetball courts with and at the same time as men.³⁰³ By the late 1970s, Title IX, public accommodations statutes, and constitutional provisions sometimes overlapped in their scope—for example, with regard to statewide interscholastic organizations. Sometimes, equal protection provided no assistance, as, for example, in private schools. In other contexts, such as recreational sports or boys' clubs that did not receive federal funding, only public accommodations law applied.

Youth sports held particular significance because of their role in gender development. Opponents argued that baseball was too competitive for girls.³⁰⁴ NOW leader Betty Farians, herself a talented athlete, countered that improving girls' access to sports would “boost girls' self-confidence in a world that told them not to play or think too hard.”³⁰⁵ Feminists argued, too, that if boys were raised to see girls as “inferior,” they would be “unlikely later on to treat women employees, co-workers, or wives as equals.”³⁰⁶ Faced with claims that feminizing boys and masculinizing girls was a reason to avoid sex integration, feminists insisted “that role blurring is not bad, it is what we need in America.”³⁰⁷

Activists argued that sex was not a proxy for athletic talent and that sex-based exclusions were both over- and underinclusive. The mother of a Los Angeles girl who had been excluded from baseball argued: “My daughter is a big, strong, healthy child. I know that skinny boys who wear thick glasses have been allowed to play Little League ball.”³⁰⁸ As activists often observed, sex segregation existed in sports such as golf and cross country, where boys and girls might equally compete, as well as in wrestling, where classification by weight and age diminished the utility of sex as a proxy for skill.³⁰⁹ They pointed to the fact that women's

303. See Letter from Faith Seidenberg to Sonja Sorkin (Nov. 29, 1971) (on file with Seidenberg Papers) (discussing women's exclusion from running track); 1974-75 SCRAPBOOK (Minn. Dep't of Hum. Rts.) (including an article explaining that the Human Rights Commission ordered the YMCA to allow women to play racquetball against men) (on file with Minn. Dep't of Hum. Rts. Records).

304. Deford, *supra* note 269, at 26 (discussing attempts by the Little League to muster physical evidence of “a clear masculine superiority” and risk that integrated sports will reduce girls' opportunities because “[m]ore girls can play softball than ever play baseball”).

305. Patricia Miller, *Elizabeth Farians: Catholic Feminist Pioneer*, FEMINIST STUD. RELIGION (July 15, 2014), <http://www.fsrinc.org/elizabeth-farians> [<https://perma.cc/LM8R-GJDW>].

306. Marilyn Mosier, *Integrating the Boys' Club*, NOTES FROM WOMEN'S RTS. PROJECT (ACLU, New York, N.Y.), Apr. 15, 1977, at 4 (on file with MNCLU Records).

307. Deford, *supra* note 269, at 30.

308. *Little League Is Sexist*, 3 NOW NEWS (L.A.), May 1971, at 1 (on file with NOW Newsletter Collection).

309. See, e.g., *Pennsylvania Girls Gain Equal Rights in Public School Sports*, 2 PA. NOW, Oct. 1974, at 3-5 (on file with Witter Papers) (parsing justifications for sex-segregated youth sports).

teams sometimes won against men's teams—disproving stereotypes about sex difference.³¹⁰

Activists did not, however, pretend that sex differences were nonexistent. While they argued that many girls and adult women could compete on the same terms as men, they also suggested that transformative integration would require revising the gendered rules of the game. As the Minnesota ACLU explained, “with open competition there might be not only an equality of achievement by men and women but also a change in the standards of excellence—present standards being defined primarily in accordance with the past achievements of men—from an emphasis on strength to an emphasis on skill.”³¹¹

Contemplating difficult questions about public accommodations and sports, many feminists rejected sex segregation. The Pennsylvania NOW Chapter, for example, reflected on whether advocates might achieve sex equality in interscholastic athletics “by pushing affirmative action programs for girls in a separate system or . . . by advocating integrated sports directly.”³¹² The chapter decided that separate could never be equal. Instead, the creation of “catch-up program[s]” could improve the skills of girls previously denied access to sports.³¹³ Others shared this view. Carol Forbes, a law student who sued the Soapbox Derby on behalf of her daughter, argued, “of course the men want to buy us off with separate but equal. We will not accept that. The failure to compete with men in sports infiltrates every facet of our lives.”³¹⁴

The case of *National Organization for Women, Essex County Chapter v. Little League Baseball, Inc.* was a landmark for sports and public accommodations law.³¹⁵ In 1972, a group of twelve-year-old boys approached the coach of a Hoboken, New Jersey Little League team. They told him that Maria Pepe, a young girl who had been playing with the boys since they were all five or six, batted and fielded better than them. Persuaded, the coach let Pepe try out for the

310. See, e.g., Minutes, Cent. N.Y. NOW Chapter 2 (Mar. 28, 1974) (on file with DeCrow Papers) (highlighting women's ice-hockey team wins).

311. Memorandum from Free Speech/Ass'n & Equal. Comm. to Am. Civil Liberties Union Bd. of Dirs. 16 (Jan. 27, 1972) (on file with MNCLU Records). Some Minnesota ACLU members argued that some contact sports could separate men and women “so long as everyone has the opportunity to engage in such sports.” *Id.*

312. *Pennsylvania NOW Sports Position-Adopted May 31 by the Pennsylvania NOW Board*, 3 PA. NOW (Pa. NOW Chapter), July 1975, at 2 (on file with Witter Papers).

313. *Id.* at 2, 9.

314. Deford, *supra* note 269, at 37.

315. 318 A.2d 33 (N.J. Super. Ct. App. Div. 1974), *aff'd*, 338 A.2d 198 (N.J. 1974).

team.³¹⁶ When Pepe pitched briefly, 2.25 million boys worldwide played Little League; she was the only girl.³¹⁷ Deploying what was by then its standard tactic when girls wanted to play, Little League demanded Pepe's removal and revoked the charters of all of Hoboken's teams.³¹⁸ NOW filed suit. The New Jersey Division on Civil Rights determined that there is "no reason why that part of Americana should be withheld from girls,"³¹⁹ even as the League prevailed against claims of sex discrimination in Michigan, Massachusetts, and Delaware.³²⁰

The entry of girls into a male space sparked outrage among those who sought to defend boys' sports as an "island of privateness" and training ground for masculinity.³²¹ On the pages of *Sports Illustrated*, writers bemoaned the effects of allowing "bisexual baseball."³²² The prospect of girls and boys playing together unleashed a "wave of chauvinism and hysteria," as outraged parents, players, and coaches marched on the capitol clamoring for the state legislature to nullify the ruling.³²³ Many baseball teams suspended play – affecting over one hundred thousand boys, rather than "be intimidated by the National Organization for Women," as one Little League leader said.³²⁴ Nonetheless, the New Jersey courts affirmed the order, holding that the League violated the state public accommodations law when it excluded girls.³²⁵

316. Douglas E. Abrams, *The Twelve-Year-Old Girl's Lawsuit That Changed America: The Continuing Impact of NOW v. Little League Baseball, Inc.* at 40, 20 VA. J. SOC. POL'Y & L. 241, 247 (2012).

317. *Id.* at 242.

318. *Id.*

319. *Id.* at 252.

320. See Paula H. Bradway, *Little League – Separate and Unequal*, NOW! (L.A.), May 1974, at 2 (on file with NOW Newsletter Collection) (noting defeats before the New Jersey case).

321. See, e.g., Thomas, *supra* note 73, at 1, 79.

322. Deford, *supra* note 269, at 32.

323. Thomas, *supra* note 73, at 1; see also Joseph B. Treaster, *Judge Chides Little League Lawyer as Out of Tune on Girls*, N.Y. TIMES, Mar. 26, 1974, at 87 (reporting that Little League supporters marched to Trenton to deliver petitions with fifty thousand signatures).

324. Thomas, *supra* note 73, at 1.

325. Nat'l Org. for Women v. Little League Baseball, Inc., 318 A.2d 33 (N.J. Super. Ct. App. Div. 1974), *aff'd*, 338 A.2d 198 (N.J. 1974). Among other things, the League had argued that it was not a "place of public accommodation" because "it is a membership organization which does not operate from any fixed parcel of real estate in New Jersey of which it had exclusive possession by ownership or lease." *Id.* at 37. The court rejected this claim, noting that the open invitation to the "children in the community at large, with no restriction (other than sex) whatever" established the League as a public accommodation. *Id.* at 37-38. It noted that conveyances may have no fixed place but constitute public accommodations and that the place of the League are the ballfields in the state where practice and competitions are held. *Id.* at 37.

The aftermath of the case shows that legal norms shape girls' interest in sports, as well as boys' ideas about gender. Many boys proved supportive of sex-integrated teams, especially when they learned that girls could hit with the best of them.³²⁶ Inspired by NOW's success in baseball, advocates used public accommodations law to pursue sex integration of other childhood activities.³²⁷ For a moment, it looked like feminists might succeed in changing the organization of athletic play and perhaps the construction of normative gender.

In short order, however, opponents turned toward "separate but equal" as a defense against total integration. When Representative Martha Griffiths introduced a bill to amend Little League's federal charter to include girls in 1973, the League set up a separate softball program for girls, so it could claim to be formally sex neutral.³²⁸ After Congress amended its charter, the League continued to operate the softball league—fostering ongoing sex segregation.³²⁹

The enforcement of Title IX also shifted prevailing paradigms for gender equity in the direction of segregation.³³⁰ The regulations issued in 1975, which still govern athletics today, require equal athletic opportunities for men and women but allow for sex-separate athletic teams in two instances: when selection is based on competitive skill or a "contact sport" is at issue.³³¹ The competitive-

326. See Robert W. Peterson, 'You Really Hit That One, Man!' Said the Little League Boy to the Little League Girl, N.Y. TIMES, May 19, 1974, at 284.

327. Mosier, *supra* note 306, at 3. For successful cases, see *Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal. 3d 72 (1985), which holds that Boys' Clubs had engaged in sex discrimination under state law in excluding girls; *Michigan Dep't of Civil Rights v. Waterford Twp. Dep't of Parks & Recreation*, 335 N.W.2d 204 (Mich. Ct. App. 1983), which holds that the sex segregation of an elementary-level basketball league violated the state's Civil Rights Act; *Hinfey v. Matawan Reg'l Bd. of Educ.*, 371 A.2d 78 (N.J. Super. Ct. App. Div. 1977), which allowed a sex-discrimination claim against a school district to proceed as a public accommodations complaint; and *Bilotta v. Palmer Twp. Athletic Ass'n*, 33 Pa. D. & C. 3d 402 (1984), which upheld the claim of a plaintiff denied the opportunity to coach a girls' softball league because of his sex). For unsuccessful cases, see *B.C. v. Cumberland Reg'l Sch. Dist.*, 531 A.2d 1059 (N.J. Super. Ct. App. Div. 1987), which rejects a complaint that prohibiting males from playing on the girls' field hockey team violated state civil rights law; and *Schwenk v. Boy Scouts of America*, 551 P.2d 465 (Or. 1976), which rejects the claim of a girl who wanted to join Boy Scouts, on the basis that the Scouts were not a public accommodation.

328. Bradway, *supra* note 320, at 2. With twenty-two cases across the country pending against it, the League ultimately asked Congress to adopt Griffiths's bill, Mosier, *supra* note 306, at 6, which it did in 1974, Abrams, *supra* note 316, at 256.

329. Ring, *supra* note 75, at 386-87.

330. The statutory language of Title IX does not reference athletics, speaking broadly to education. 20 U.S.C. § 1681(a) (2018) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.").

331. 34 C.F.R. § 106.41(b) (2019).

skills provision in particular aims to preserve all-female teams by preventing male athletes from trying out for and potentially decimating women's teams.³³² Title IX does mandate integration in limited instances. If a school maintains a team for only one sex, and past opportunities for the excluded sex "have previously been limited," then members of the excluded sex must be allowed to try out unless the sport is a "contact sport."³³³ On the whole, however, Title IX's regulations embraced a parity model that accommodated sex difference. As the decade progressed, this model displaced the vision of transformative integration in sports beyond the educational institutions under Title IX's jurisdiction. Activists came to advance, and some human rights commissions to accept, equal access rather than complete sex integration.³³⁴

Despite its considerable achievements, the parity model's eclipse of the earlier vision for transformative integration came with often unacknowledged costs. Most obviously, Title IX's contact-sports exception justifies the exclusion of qualified individual women from participation in sports dominated by men (or offered exclusively to them).³³⁵ More generally, a sports culture of male dominance has survived Title IX in masculine-gendered contact sports in particular. As the moniker "locker-room talk" suggests, male coaches and athletes connect masculine athleticism to heterosexual aggression and entitlement to women's bodies.³³⁶ Finally, educational institutions regulated by Title IX and athletic clubs governed by public accommodations law segregate even young children, at ages when sex differences are largely irrelevant to athletic capacity. Such segregation instructs children in gender differentiation.

A vision of transformative integration could be a powerful complement to advances under Title IX. More than formal equal access, true integration—activists believed—would require implementing rules that reflected female and male

332. Jamal Greene, *Hands Off Policy: Equal Protection and the Contact Sports Exemption of Title IX*, 11 MICH. J. GENDER & L. 133, 151-52 (2005).

333. 34 C.F.R. § 106.41(b) (2019).

334. See Letter from Carol Lefcourt, Deputy Dir., N.Y. State Temp. Comm'n to Recodify the Family Court Act, to Robert Marks, Research Assistant, NOW Legal Def. & Educ. Fund (Aug. 27, 1981) (on file with Schlesinger Library, Harvard University, NOW LDEF Records) (reporting the settlement of a sex-discrimination case against a baseball team in return for its giving female players equal access to playing fields).

335. Greene, *supra* note 332, at 142 (arguing that fears of injury to petite women from contact with three-hundred-pound linebackers or seven-foot-tall basketball players is overblown, because of the competitive-skills exemption).

336. Brake, *supra* note 294, at 93-97.

excellence. Transformative integration would hold the potential to disrupt a primary site for sex differentiation, hegemonic masculinity, and gender power inequalities: the body and its feats.

How might we synthesize the transformative-integration and parity approaches? Young girls and boys might play together until an age when sex-differentiated strength manifests more clearly. This might result in more egalitarian interaction between the sexes and more fluid gender identities.³³⁷ Sex-separated high school teams might still exist, but exceptional female athletes might join boys' teams.³³⁸ Teams might practice together, even if they do not compete against one another. Locker rooms might be integrated or switched every year, ensuring that male athletes are not favored. The possibilities are endless.

B. *The Sanctuary of Restrooms*

Signs designating the “sex” of restrooms—a woman in a dress and a man in pants—are so pervasive in the public landscape that their absence can provoke confusion.³³⁹ As public accommodations laws barred sex discrimination, an alternative appeared possible: unisex, multiuser restrooms. But the range of possibilities quickly narrowed. Separation remained and fostered many subsequent controversies over issues from pay toilets to gender nonconformity.

Until the mid-1970s, feminist advocates and their opponents alike thought sex equality might yield integrated restrooms. Feminists saw sex-segregated bathrooms—rooted in norms about sexual privacy and feminine vulnerability—as connected to the subordination of women in economic, political, and civic

337. Cf. Note, *Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression*, 110 HARV. L. REV. 1627, 1627 (1997) (arguing that “women’s and girls’ participation in sports challenges the systemic gender role oppression that perpetuates gender inequality”).

338. See, e.g., B. Glenn George, *Fifty/Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L.J. 1107, 1107 (2002) (proposing that all college sports covered by Title IX be half men and half women); Nancy Leong, *Against Women’s Sports*, 95 WASH. U. L. REV. 1249, 1284-89 (2018) (arguing for a default of sex-integrated sports and identifying gymnastics, figure skating, wrestling, fencing, and long-distance swimming as candidates for integration).

339. See, e.g., Elizabeth Aura McClintock, *Why Some Welcome Unisex Bathrooms, and Some Steer Clear*, PSYCHOL. TODAY (Sept. 17, 2015), <https://www.psychologytoday.com/us/blog/it-s-man-s-and-woman-s-world/201509/why-some-welcome-unisex-bathrooms-and-some-steer-clear> [<https://perma.cc/L6PD-4MHZ>] (noting that where a multiuser bathroom was designated as unisex, “[b]oth women and men often hesitated upon seeing the unisex restroom sign,” although women generally entered the restroom while “the majority of men turned away”).

spheres. When they protested sex-segregated restaurants and bars, NOW members sometimes occupied the men's room.³⁴⁰ Opponents predicted that the end of sex segregation in bars and restaurants signaled the demise of single-sex restrooms. In 1968, the editorial pages of the *Syracuse Herald-Journal* quipped, “[T]hey’ll want to remove the ‘Men’ and ‘Women’ designations from lavatory rooms and powder rooms, thus achieving an even ‘finer’ state of equal treatment.”³⁴¹ Activists observed, “All over the world rest rooms are integrated—‘bathrooms’, as distinguished from ‘rest rooms’ are integrated, even here.”³⁴²

The law was unsettled as to whether sex-discrimination law, under either the ERA or state statutes, mandated integrated toilet facilities.³⁴³ Legislators sometimes acknowledged that public accommodations law might require equal access to restrooms. For example, Kathleen Watson Goodwin, a Democratic representative to the Maine State House, noted that the state ERA she sponsored had failed in part because of the “fear expressed that women were about to invade the men’s room.”³⁴⁴ Ironically, “in their haste to do penance for the ERA defeat,” the same legislature had passed a public accommodations law with further reach than the ERA that was at least as likely to result in sex-integrated restrooms.³⁴⁵ Like Goodwin, other legislators recognized the precarity of the men’s room under new public accommodations laws.³⁴⁶ Thus, approximately one-third of states explicitly qualified obligations of nondiscrimination to allow sex segregation in restrooms, locker rooms, and changing areas.³⁴⁷

340. Photograph of Nat’l Org. of Women, Sacramento Chapter (Aug. 26, 1972) (on file with NOW Newsletter Collection) (showing Sacramento NOW activists with “Liberate Men’s Rooms NOW” signs at a 1972 celebration of suffrage).

341. Editorial, SYRACUSE HERALD-J., Oct. 31, 1968; see also Letter from “A Proud Taxpayer,” *supra* note 242 (“One of these days you will probably try to remove the ‘Ladies’ and ‘Men’ signs from these little private rooms, and have a community bathroom.”).

342. Some Answers to Stock Questions (n.d.) (on file with Alexander Papers).

343. *Out of Absurdity May Come Strong, Clear Bill*, CHARLOTTE OBSERVER, Sept. 14, 1970, at B3 (quoting University of Chicago Professor Philip Kurland as saying “the courts could go either way on the restroom question in light of the amendment’s wording”); *Separate Toilets ‘Legal,’* WASH. POST, Nov. 3, 1978, at C7 (reporting on a Maryland Attorney General advisory opinion that the state ERA does not bar separate toilet facilities for men and women).

344. *Legislator Retracts Equal Rights Bill, Says Maine Women Lose to Coyotes*, BOS. GLOBE, May 16, 1973, at 62.

345. *Id.*

346. See Lane, *supra* note 205, at 1A (querying whether a public accommodations law in Michigan would mean “women have a legal right to patronize men’s restroom[s]”).

347. See Sepper, *supra* note 22, at 643 n.48 (compiling statutes). The New York City Human Rights Commission similarly interpreted the exemption in its ordinances to permit discrimination only in places where people customarily undress. Kerber, *supra* note 48, at 436.

The exclusion of toilets from public accommodations law had the unintended consequence of authorizing blatant sex inequities. In the 1970s, pay toilets—requiring coins for entry—were common in bars, restaurants, and transportation centers, and were disproportionately designated for women, while men enjoyed free facilities.³⁴⁸ Some traced the differential treatment to biology: men’s “natural privacy” allowed them to use urinals, while women required stalls.³⁴⁹ Many women found this argument specious; they had no recourse, however, in states where the statute excluded restrooms. Mary Donlon’s complaint to the Massachusetts Commission Against Discrimination about the amusement park where she worked is exemplary. The park provided only one free and twenty-two pay restrooms for women, while providing thirteen free and eleven pay restrooms for men.³⁵⁰ Chair Glendora Putnam shared Donlon’s indignation but had to explain that the Commission had no jurisdiction, because the state statute had an exception for restrooms.³⁵¹ Excepting restrooms continued the custom of limiting the number and accessibility of women’s restrooms more generally. For example, in 1973, women seeking entrance to Harvard had to take their exams in a building with one bathroom, reserved for men. With the assistance of Flo Kennedy, they protested by pouring jars of (fake) urine on the building steps.³⁵² Access to equal restrooms—rather than, or together with, sex-integrated restrooms—represented a demand for meaningful integration of the broader public institution.

As the debate over the ERA intensified, the possibility of sex-integrated bathrooms receded. Leading conservative activist Phyllis Schlafly made unisex bathrooms, and the danger that would supposedly lie therein, a key trope of her STOP-ERA campaign.³⁵³ Pro-ERA activists worried that the toilet issue would

348. Taunya Lovell Banks, *Toilets as a Feminist Issue: A True Story*, 6 BERKELEY WOMEN’S L.J. 263, 263-64 (1991) (discussing the prevalence and disparity of pay toilets); Davis, *supra* note 47, at 63 (demonstrating that feminists and a “group of college students who branded themselves as the Committee to End Pay Toilets in America” persuaded local and state lawmakers to ban pay toilets).

349. Letter from Mary Donlon to Thomas Cody, Executive Dir., Equal Emp’t Opportunity Comm’n 1, 4 (n.d.) (on file with Boston NOW Records).

350. *Id.* at 1-2.

351. Letter from Glendora M. Putnam, Chair, Commonwealth of Mass. Comm’n Against Discrimination, to Mary Donlon (June 19, 1973) (on file with Boston NOW Records).

352. Eric Grundhauser, *The Great Harvard Pee-In of 1973*, ATLAS OBSCURA (Dec. 23, 2016), <https://www.atlasobscura.com/articles/the-great-harvard-peein-of-1973> [<https://perma.cc/9ETT-LB55>].

353. ERA opponents racialized these dangers, conjuring fears that black men would attack white women in sex-integrated restrooms. DONALD G. MATHEWS & JANE SHERRON DE HART, *SEX, GENDER, AND THE POLITICS OF ERA: A STATE AND THE NATION* 165, 174 (1990).

threaten the amendment's ratification.³⁵⁴ By the mid-1970s, feminists largely avoided arguing that either the ERA or state public accommodations law required integrated restrooms.³⁵⁵ For many feminists at the time, sex-integrated restrooms – even if desirable – were not essential. The legal background had also shifted. Fearing that sex equality would “obliterate, as far as possible, the distinction between the sexes,” many states and municipalities passed laws in the late 1970s and 1980s mandating separate restrooms and locker rooms in schools and public places.³⁵⁶ At the federal level, Title IX permitted separate facilities for dressing, housing, and toilets within educational institutions, provided they were equal.³⁵⁷

The debates over restrooms in this period carry two central lessons for today's discussions of gender identity and public space. First, restrooms often serve as a means of resisting the broader equality of the subordinated group. The absence of a designated women's room often justified discrimination in employment and public accommodations. Especially in traditionally male-dominated industries, employers cited a lack of women's facilities to defend their refusal to hire women.³⁵⁸ When the Minneapolis City Council voted to add sex to its public accommodations law, the sole no vote pointed to restrooms and rooming houses to “aver[] that sex discrimination differs from racial discrimination” and should be treated differently from race, religion, and national origin.³⁵⁹ Lawsuits under public accommodations laws often resulted in arguments that lack of changing

354. On the narrowing of feminist claims about the ERA's scope in response to opposition, see generally Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and the Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1366-1403 (2006).

355. *Some Facts and Social Implications of the ERA*, NOW NOTES (Atlanta NOW Chapter), Jan. 1974, at 2 (on file with NOW Newsletter Collection).

356. Davis, *supra* note 47, at 68 (quoting Charles Dudley Warner, “Equality,” ATLANTIC MONTHLY, Jan. 1880, at 29).

357. 45 C.F.R. § 86.33 (2018) (“A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.”).

358. Aaron Epstein, *Women Paying High Price for Longevity*, DET. FREE PRESS, Oct. 28, 1977, at 1C (noting that the Los Angeles Department of Water and Power reserved jobs for men located in areas “where they said they only had a men's room”); *Reserve Loses in Sex Bias Case*, MINNEAPOLIS TRIB., Apr. 12, 1975, at 10A (reporting Minnesota Department of Human Rights conciliation after company refused to hire women because its plant had no women's restroom); see also *Men's Room Invaded*, L.A. TIMES, Nov. 23, 1979 (reporting that the Maine Human Rights Commission found an employer guilty of sex discrimination for barring women janitors from cleaning a men's locker room, resulting in their assignment to night shifts).

359. TWIN CITIES NOW NEWSL. (Twin Cities NOW, Minn.) Mar. 1972 (on file with Minn. Dep't of Hum. Rts. Records).

and bathroom facilities meant coeducational sports or women's sports were not required.³⁶⁰ Likewise, when the *Boston Globe* objected to state legislation that would integrate all-male taverns, it cited both the cost of remodeling restrooms and the importance of separate "sanctuaries" for men and women.³⁶¹ The bathroom issue, it seems, served as synecdoche for opposition to sex equality writ large.³⁶²

Second, sex-separated restrooms can inscribe gender hierarchy in ways both foreign and familiar – which legislatures have addressed in fits and starts. The mid-1970s saw a successful campaign to end the pay toilets that broad cross-sections of women found objectionable.³⁶³ Even where toilets were free, public spaces required to admit women typically offered them what had been men's facilities, without considering societally proscribed gender differences in dress or caregiving for children or biological differences such as menstruation that might require individual trashcans.³⁶⁴ In the late 1980s and 1990s, a move toward "potty parity" began, and dozens of new laws came to require equitable, separate toilet facilities.³⁶⁵ These laws, however, raised the surprisingly difficult question of "exactly what is to be equalized," typical of "any regime of separate but equal."³⁶⁶ The 1990s saw the installation of diaper changing tables and stalls accessible to people with disabilities, as well as the first family restroom.³⁶⁷

Sex-separated restrooms nonetheless continue to affirm gender hierarchy and stereotypes. Parity has fallen short. Women's restroom lines are so common

360. See, e.g., *Fowlkes Fears Bathroom Confrontation*, NOW NOTES (Atlanta NOW Chapter), Apr. 1972, at 3 (on file with NOW Newsletter Collection) (describing an Atlanta alderman's rejecting a NOW grievance for a ten-year-old girl seeking to play baseball because girls and boys might share park bathrooms).

361. *Out with the Ladies?*, *supra* note 202.

362. Conversely, the U.S. Coast Guard then recognized that desegregating crew member restrooms could combat sex discrimination at sea. NOW NEWSL. (Twin Cities NOW Chapter), Feb. 1972, at 2 (on file with NOW Newsletter Collection).

363. Davis, *supra* note 47, at 63 (noting that the feminist movement and college-student-led Committee to End Pay Toilets in America persuaded local and state lawmakers nationwide to ban the ten-cent charge).

364. Mary Anne Case, *Why Not Abolish Laws of Urinary Segregation?*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING* 211, 216 (Harvey Molotch & Laura Norén eds., 2010) [hereinafter *TOILET*] ("[T]he typical pattern when sex distinctions are abolished is that women are offered what had previously been available to men.").

365. *Id.* at 212-14.

366. *Id.* at 214 (questioning whether equalizing square footage, number of facilities, excreting opportunities, or waiting time should be the goal).

367. Davis, *supra* note 47, at 158 (discussing the 1991 debut of the first-ever family restroom).

as to be a given invoked in movies and books. Men’s rooms typically lack changing tables, reifying women’s primary role as caregivers.³⁶⁸ Gender-nonconforming people find their use of the restroom scrutinized or denied.³⁶⁹

What might have happened if public accommodations laws had integrated restrooms in the early 1970s? Most obviously, women and men would wait (or not) in lines together. Diaper-changing stations would be equally available to mothers and fathers. All restrooms would be “family restrooms,” allowing caregivers to accompany their opposite-sex charges. Perhaps counterintuitively, the straightforward application of formal sex equality principles to restrooms might have had transformative potential. As legal scholar Terry Kogan has argued, unisex restrooms would mitigate the real-life hardships of disabled adults who need assistance from an opposite-sex partner, intersex children, and gender-nonconforming people.³⁷⁰ Whereas sex segregation has made it more difficult to include other identities within public space, sex integration invites us to imagine “what precisely it might mean to provide equality” in facilities that “include individuals who are different in essential ways” — across all sorts of dimensions.³⁷¹

Integrated restrooms might have come at a cost to privacy and safety, as skeptics of unisex restrooms say today. On the other hand, the alternative world of unisex restrooms might have delivered more privacy and more safety. Currently, “privacy is pretense” in public restroom stalls that have flimsy walls and large gaps and at urinals “that line men up with their penises exposed and nothing to do with their eyes.”³⁷² Instead of privacy from the opposite sex, restrooms

368. See Steven J. Shafer, *Dude, Where’s My Changing Table: The Fight to Fathers’ Rights in the Restroom*, 22 CARDOZO J.L. & GENDER 617, 622 (2016) (discussing the absence of changing tables).

369. See Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People’s Lives*, 19 J. PUB. MGMT. & SOC. POL’Y 65, 71-77 (2013) (reporting survey results showing gender-nonconforming people frequently suffer negative experiences in restrooms).

370. See Kogan, *supra* note 47, at 4-5.

371. Harvey Molotch, *Introduction: Learning from the Loo*, in TOILET, *supra* note 364, at 1, 5; see also Harvey Molotch, *What NYU Did with the Toilet and What It Means for the World*, in TOILET, *supra* note 364, at 255, 265-67 (sketching an inclusive, public restroom that would allow people to “sort themselves by the equipment they need rather than what they putatively are”); Ian Spula, *An Unexpected Ally of Gender-Neutral Restrooms: Building Codes*, ARCHITECT MAG. (Sept. 30, 2017), https://www.architectmagazine.com/practice/an-unexpected-ally-in-gender-neutral-restrooms-building-codes_o [<https://perma.cc/D84K-EMEM>] (discussing an interdisciplinary design and research team for flexible, inclusive public restrooms).

372. ROSE GEORGE, THE BIG NECESSITY: THE UNMENTIONABLE WORLD OF HUMAN WASTE AND WHY IT MATTERS 130 (2008); see also Amy Kapczynski, Note, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1284-85 (2003) (discussing the treatment of women’s bodies as more private than men’s due to conventions of female modesty).

might have evolved to shield users from the sight, hearing, and smell of all others. Establishments might have adopted more single-user facilities earlier. Alternatively, less privacy between sexes might have demystified women to men and reduced the stigma of women's bodily functions.³⁷³

Similarly, unisex multiuser facilities might have improved safety. From their origins, sex-separated restrooms labeled women as "inherently vulnerable and in need of protection when in public" and men as "inherently predatory."³⁷⁴ In the 1970s, public accommodations activists questioned these stereotypes and argued that the reconfiguration of integrated spaces would yield safety more effectively than sex segregation. They often dismissed the notion that bathrooms presented peculiar risks: "Ask the man who brings up the question if he would bother a woman in a restroom and if he wouldn't, what makes him think others would?"³⁷⁵ Ironically, recent empirical studies show that men, more than women, link public toilets to sexual violence, fearing receiving or being perceived as giving a sexual gaze.³⁷⁶ Integrated restrooms might reduce the odds of homophobic violence. Likewise, where all people use the same restroom, more people would be present, and would-be assailants could no longer expect to find only potential "victims" in the restroom.³⁷⁷

To be sure, sex integration would have entailed costs. Men interested in homosexual encounters would have lost a reliable, private place to meet.³⁷⁸ Homosocial retreats to restrooms admittedly would have ended. Many people would

373. Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 164 (2017) ("[M]en and women are not merely segregated to protect them from seeing each other's genitals. They are sex segregated to keep men and women protected from even hearing each other's 'organic processes.'" (quoting Peter C. Baldwin, *Public Privacy: Restrooms in American Cities, 1869-1932*, 48 J. SOC. HIST. 264, 267 (2014))).

374. Kogan, *supra* note 47, at 56.

375. Some Answers to Stock Questions, *supra* note 342.

376. See generally Sarah E.H. Moore & Simon Breeze, *Spaces of Male Fear: The Sexual Politics of Being Watched*, 52 BRIT. J. CRIMINOLOGY 1172 (2012) (studying perceptions of restrooms).

377. Christine Overall, *Public Toilets: Sex Segregation Revisited*, 12 ETHICS & ENV'T 71, 82 (2007) ("When members of each sex are demystified and no longer separated as if they were different species, it might be more difficult for would-be assailants to consider women to be merely prey.").

378. See, e.g., CHAUNCEY, *supra* note 66 at 198 (describing "constant sexual activity" between men in New York City's public restrooms). See generally LAUD HUMPHREYS, *TEAROOM TRADE: A STUDY OF HOMOSEXUAL ENCOUNTERS IN PUBLIC PLACES* (1970) (performing an ethnographic study of anonymous male homosexual sexual encounters in public toilets).

have experienced some discomfort at this shift.³⁷⁹ In 1977, sociologist Erving Goffman argued that sex segregation in restrooms, gyms, and pools set a “with-then-apart rhythm” for public life “as if equality and sameness were a masquerade that was to be periodically dropped . . . in the name of the respect owed females, or of the ‘natural’ need of men to be by themselves.”³⁸⁰ Having helped create this rhythm, the law might have served—and might still serve—to set a different beat.

CONCLUSION

The history of sex in public illuminates legal and political debates over gender, sexuality, and public accommodations today. As the feminist campaign for public accommodations law makes evident, equality in public means not only material interest but also full citizenship in social and civic institutions. Current free speech and free exercise challenges to public accommodations law—in cases such as *Masterpiece Cakeshop v. Colorado Civil Rights Commission*³⁸¹ and *Elane Photography v. Willock*³⁸²—often characterize the governmental interest in eradicating discrimination as confined to market access for minorities.³⁸³ On this account, public accommodations laws fail to advance a compelling interest whenever a competitive market provides available alternatives and thus must cede to interests in free speech and religious exercise.³⁸⁴ These arguments are distinctly ahistorical even with regard to race discrimination, ignoring that states adopted laws even when racial and religious minorities had available alternatives in covered industries.³⁸⁵ But the history of sex discrimination in public accommodations renders particularly stark the failures of the market-monopoly argument. The addition of “sex” to the laws occurred in markets with plentiful venues for

379. Schoenbaum, *supra* note 237, at 250–51 (“[W]e should question how much of this comfort derives from the path dependence of preferences. We may feel more comfortable with sex-segregated intimate spaces simply because that is what we have always known.”).

380. Erving Goffman, *The Arrangement Between the Sexes*, 4 THEORY & SOC’Y 301, 316 (1977).

381. 138 S. Ct. 1719 (2018) (involving enforcement of public accommodations law against a bakeshop).

382. 309 P.3d 53 (N.M. 2013) (involving enforcement of public accommodations law against a photography company).

383. *Masterpiece Cakeshop*, 138 S. Ct. at 1727–29; *Elane Photography*, 309 P.3d at 64, 78–79.

384. See *supra* text accompanying notes 23–24.

385. See Brief of Amici Curiae Public Accommodation Law Scholars in Support of Respondents at 32, *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16–111), 2017 WL 5127312, at *32 (noting that “[t]hroughout the twentieth century, disfavored minorities typically had access to a market niche, while being denied full and equal enjoyment of the entire market,” and providing examples).

dining and meeting. Feminists did connect their lack of full and equal access to commerce to their diminished professional prospects. But economic gain was not the only, or even predominant, reason for sex equality. Instead, laws prohibiting sex discrimination in public accommodations represented a state effort to remedy the second-class status and indignity of less-than-full inclusion in public life. While this account does not resolve the constitutional questions raised by the conflict between public accommodations equality and the First Amendment, it debunks the notion that public accommodations laws respond primarily to nonfunctioning markets and demonstrates the interests at stake beyond economic costs.

This history also establishes that during the period when “sex” was added to public accommodations statutes, advocates, legislators, and courts understood sex equality to entail not only the same treatment of the sexes but also an end to the regulation of sexuality and gender performance. Through their efforts to enter and freely enjoy public space through public accommodations law, feminists successfully challenged heteronormative sexual norms, in arenas ranging from bars to credit lending. This insight has major implications for the meaning of sex discrimination under public accommodations law today. Regardless of which approach a court takes to statutory interpretation, it is clear that the often-articulated view – that sex-discrimination laws say nothing, and were intended to say nothing, about the regulation of sexuality and gender performance – is simply not true.³⁸⁶ In the case of public accommodations laws, such applications were among the core areas of contestation. In the early to mid-1970s – the time when the majority of states passed public accommodations statutes – actors on all sides understood these laws to reach sexual regulation and gender performance. Such history is thus relevant to understanding both the scope of the language of the law (i.e., the meaning of the text), as well as what it was that the relevant legislatures intended (i.e., the statutory purpose).

As we shall develop in future work, the history of sex in public accommodations laws provides a stronger basis for interpreting public accommodations law in ways that protect the rights of both cisgender women and LGBTQ people. Sex as freedom from sexualization has repercussions for the ongoing regulation of women’s bodies in public. Consider, for example, whether existing statutes protect breastfeeding women against eviction from public accommodations

386. See Katie R. Eyer, *Understanding the Role of Textualism and Originalism in the LGBT Title VII Cases*, ACS BLOGS: EXPERT F. (Apr. 26, 2019), <https://www.acslaw.org/expertforum/understanding-the-role-of-textualism-and-originalism-in-the-lgbt-title-vii-cases> [https://perma.cc/VJ55-QG5J] (discussing textualist and originalist interpretative approaches to sex-discrimination statutes).

where the statute does not list breastfeeding in particular.³⁸⁷ At their origin, public accommodations laws sought to do away with the policing of women's bodies and the sexual stereotypes that that entailed. Stores and eateries that remove breastfeeding women contravene this statutory purpose by treating women's breasts as primarily for sex.³⁸⁸ Discriminating businesses invoke moral concerns about immodest dress and the corruption of children – much like earlier views that women in miniskirts or at bars might tempt men. Courts might debunk present stereotypes by referencing their similarity to older stereotypes now considered illegitimate. Interestingly, businesses typically offer breastfeeding women a choice: leave or go to the sex-segregated bathroom. These conflicts thus offer another example of the ways in which restrooms are used to resist women's full participation in public and to sexualize women's bodies.

Gender-identity discrimination in public accommodations serves as another example of this history's contemporary relevance. In 2019, with no analysis, the Missouri Supreme Court determined that a transgender boy could proceed in his public accommodations lawsuit to gain access to restroom and locker room facilities consistent with his gender.³⁸⁹ The history related here gives future courts a richer body of material from which to reason. They might draw on it as support for a stereotyping theory of gender identity discrimination, prohibiting decisions based on assumptions that men and women act a particular way or conform to gendered dress and grooming standards.³⁹⁰ Through this history, they might understand one function of public accommodations law to be freeing pub-

387. Compare *Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 434-39 (6th Cir. 2004) (citing *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145-46 (1976)) (arguing that the comparator for breastfeeding women is nonbreastfeeding men and women and concluding therefore that no sex discrimination occurred under Ohio law), with *Currier v. Nat'l Bd. of Med. Exam'rs*, 965 N.E.2d 829, 844 (Mass. 2012) (“[T]he protections of the [Massachusetts] public accommodation statute extend to lactating mothers because we find lactation to be a sex-linked distinction or classification.”). See generally Meghan Boone, *Lactation Law*, 106 CALIF. L. REV. 1827 (2018) (discussing limitations of existing lactation laws and arguing that they reinforce traditional notions of gender and motherhood).

388. For an analogous case, see *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 803 (10th Cir. 2019) (striking down a city ordinance prohibiting the baring of women's nipples under the Equal Protection Clause as reflecting “the sex-object stereotype” that “serves the function of keeping women in their place” (quoting psychologist's testimony at trial)).

389. *R.M.A. ex rel. Appleberry v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420 (Mo. 2019) (en banc) (vacating the judgment below, which granted a motion to dismiss).

390. See, e.g., Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L.J. 997, 1057-58 (2012) (discussing the application of stereotyping theory); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (arguing that gender norms underlie sexual orientation discrimination).

lic commerce and leisure from moral constraints; they might also connect current litigation for transgender people's restroom access to the long history of restrooms as a site of resistance to sex equality.

In addition, the history of sex in public could provide a basis for interpreting existing statutes to reach sexual-orientation discrimination. While twenty-one states explicitly list "sexual orientation" in their public accommodations statutes and eighteen specify "gender identity" and "marital status," all forty-five state public accommodations statutes ban discrimination because of "sex."³⁹¹ In 2018, state human-rights commissions in Michigan and Pennsylvania interpreted their general civil rights statutes—prohibiting sex discrimination in employment, housing, and public accommodations—to encompass sexual orientation and gender identity.³⁹² They did so largely by relying on courts' recent interpretations of Title VII of the Civil Rights Act for support. If the Supreme Court rules, however, that "sex" under Title VII does not include sexual-orientation discrimination, those interpretations could be jeopardized.³⁹³ Our Article provides a historical grounding for interpreting public accommodations statutes, on their own terms, to reach sexual orientation. Not only feminist activists, but also their opponents, administrative agencies, and courts understood public accommodations statutes in the early to mid-1970s to upend both the state and customary practices that imposed compulsory heterosexuality on men and women. They understood that sex equality meant freedom from the required attachment of women to men in heterosexual pairs, from sexual stereotypes related to perceived sexual vulnerability and risk, and from gendered norms of dress and decorum.

Last, equality in public space may require not mere access to or even freedom within social institutions, but their fundamental rethinking. On this score, the

391. NAT'L CONF. ST. LEGISLATURES, *supra* note 11.

392. See *Interpretive Statement 2018-1 Regarding the Meaning of "Sex" in the Elliot-Larsen Civil Rights Act (Act 453 of 1976)*, MICH. CIV. RTS. COMM'N (May 21, 2018), https://www.michigan.gov/documents/mdcr/MCRC_Interpretive_Statement_on_Sex_05212018_625067_7.pdf [<https://perma.cc/49WW-ER4K>]; *Guidance on Discrimination on the Basis of Sex Under the Pennsylvania Human Relations Act*, PA. HUM. REL. COMM'N (Aug. 2, 2018), <https://www.phrc.pa.gov/About-Us/Publications/Documents/General%20Publications/APPROVED%20Sex%20Discrimination%20Guidance%20PHRA.pdf> [<https://perma.cc/34LF-AG9S>].

393. *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019) (granting a petition for writ of certiorari on the question of "[w]hether Title VII prohibits discrimination against transgender people based on (1) their status as transgender (2) sex stereotyping"); *Altitude Exp., Inc. v. Zarda*, 139 S. Ct. 1599 (2019) (granting a petition for writ of certiorari to determine whether "because of . . . sex" under Title VII encompasses discrimination based on sexual orientation).

feminist movement's legacy is mixed. Feminist activism sought to integrate institutions long defined by hegemonic masculinity, heteronormativity, and single-sex sociality. It hoped not just to enter men's spaces or to be granted separate but equal places, but to transform the public. Looking to these lost alternatives, current advocates for sex equality might take us where feminists once aspired to go, transforming sports, creating inclusive restrooms, and reimagining places that sex segregation has prevented us from seeing. Campaigns against public discrimination – whether rooted in gender, sexuality, race, or disability – might benefit from the vision of the feminists of the 1970s. Public accommodations law might again offer a powerful tool for change.