

---

---

# “GIRLS GET IN FREE”: A LEGAL ANALYSIS OF THE GENDER-BASED DOOR ENTRY POLICIES

MARK ALLAN HERZBERG

## I. INTRODUCTION: PRELUDE: PRESCOTT, ARIZONA

The peaceful mining town of Prescott, Arizona, was burgeoning in 1906.<sup>1</sup> Lucrative capital investments in livestock operations afforded a comfortable lifestyle for many families. While the women of the town were at home for an early bedtime, the men-only saloons along “Whiskey Row” were lit up with raucous gambling and drinking. However, for one night each year, the men only ritual change for “Open House” night as the saloons opened their doors to women chaperoned by their husbands. Thus ladies night was born.

The phrase “Ladies Night” was certainly popularized by a song by the same name, which in 1976 climbed to the number eight spot on the Billboard Top 100.<sup>2</sup> Though early forms of ladies’ night simply meant welcoming women into men-only establishments, the concept I would eventually become associated with Thursday nights out, where bars would let women in without any cover charge as a promotional tool to attract customers on slow business nights.<sup>3</sup> Ladies’ night has expanded beyond free cover on Thursday nights at the local bar to include discounts at car washes,<sup>4</sup> professional basketball games,<sup>5</sup> and even supper clubs.<sup>6</sup>

Recent times have not been accepting of businesses using ladies’ night promotions or gender-based discounts. The topic is heavily debated in a

---

<sup>1</sup> Catherine Bozarth & Virgie Robins, *A Teacher of 1906*, in *Echoes of the Past: Tales of Old Yavapai* 32, 32–41 (2d ed. 1955).

<sup>2</sup> Kool and the Gang, *Ladies’ Night* (DeLite Records 1979) (Girls, y’all got one. A night that’s special everywhere. From New York to Hollywood, It’s ladies night and girl the feelings good.). Maury Dean, *Rock ‘N’ Roll Gold Rush: A Singles Un-Cyclopedia* 287 (2003).

<sup>3</sup> *See id.* (referring to the concept of Ladies Night as “a standard Thursday night promotion”).

<sup>4</sup> *Koire v. Metro Car Wash*, 707 P.2d 195 (Cal. 1985).

<sup>5</sup> *MacLean v. First Northwest Indus. of Am. Inc.*, 635 P.2d 683 (Wash. 1981).

<sup>6</sup> *Angelucci v. Century Supper Club*, 158 P.3d 718 (Cal. 2007).

small number of cases known as “Ladies’ Night Law.”<sup>7</sup> Some states have approved the promotions, finding them a harmless business practice that does not constitute discrimination under state public accommodation statutes.<sup>8</sup> In a number of states, however, legislative attempts to prohibit ladies’ night promotions have survived judicial review.<sup>9</sup>

The debate is particularly heated in Nevada. Las Vegas, Nevada’s largest city<sup>10</sup> has grown rapidly in the past three decades to become the second most visited vacation destination in the United States.<sup>11</sup> Many casinos and nightclubs base their marketing strategies on the stereotype that “[w]omen are eye candy, men are wallets.”<sup>12</sup> Thus, ladies’ night is a key marketing strategy for Las Vegas casinos and nightclubs, which profit by reinforcing stereotypes of the societal roles of men and women.<sup>13</sup> It is such a critical promotional tool among the Las Vegas nightclub industry that many clubs offer a special “ladies’ entry” VIP tickets that include a steep entry discount and allow females to skip the door line.<sup>14</sup>

The issue became hotly debated in 2008 when Todd Phillips, an attorney, moved to Las Vegas and was shocked to learn that health clubs charged men a \$10 membership fee but allowed women to enroll for free.<sup>15</sup> He filed a complaint with the Nevada Equal Rights Commission and argued that gender-based pricing is just as unacceptable as race-based pricing, and, furthermore, that gender-based pricing stands to make women vic-

---

<sup>7</sup> See Lynn Harris, *Las Vegas Gym Case Tests “Ladies Night Law.”* Salon.com, Dec. 12, 2007, [http://www.salon.com/mwt/broadsheet/2007/12/12/ladies\\_night\\_law](http://www.salon.com/mwt/broadsheet/2007/12/12/ladies_night_law) (discussing the controversy surrounding gender-based entrance fees).

<sup>8</sup> See generally *MacLean*, 635 P.2d at 687 (noting how the court saw “no reason for judicial intervention in ticket-pricing policies which ... encourage attendance.”).

<sup>9</sup> Liz Benston, *Letting Women in Free Might Cross Legal Line*, Las Vegas Sun, Sept. 29, 2008, at 8 [hereinafter Benston, *Legal Lines*].

<sup>10</sup> The US50, <http://www.theus50.com/nevada/cities.php> (last visited March 21, 2010).

<sup>11</sup> Tourism-Review.com, *Top 10 Tourists Sites in the USA*, <http://www.tourism-review.com/article/1324-top-10-tourist-sites-in-the-usa> (last visited March 21, 2010).

<sup>12</sup> See Benston, *Legal Lines*, *supra* note 9, at *id.* (explaining that casinos and nightclubs use this marketing strategy because “[W]omen draw men, who pay big bucks to enter these clubs and buy drinks for women.”).

<sup>13</sup> See *id.*

<sup>14</sup> See Viator, *Ladies Only Single Entry VIP Nightclub Card*, <http://www.viator.com/tours/Las-Vegas/Ladies-Only-Single-Entry-VIP-Nightclub-Card/d684-3962SGLFEM> (“The Ladies Only Single Entry VIP Las Vegas Nightclub Card is a pre-paid VIP Admission Card - Good for one single VIP entry to one participating Vegas nightclub. Purchase your Ladies Only Single Entry VIP Las Vegas Nightclub Card and simply head to the VIP door for priority entrance. Spend your precious vacation time in Las Vegas partying, not waiting in lines!”) (last visited March 21, 2010).

<sup>15</sup> See Benston, *Legal Lines*, *supra* note 9; Lisa Benston, *Ruling on Gyms to Have Big Effect on Nightclubs, Too*, Las Vegas Sun, Nov. 10, 2008, at 3 [hereinafter Benston, *Ruling*].

tims by its encouragement of predatory behavior.<sup>16</sup> In November 2008, the commission ruled in favor of Mr. Phillips in a decision expected to have long-term ramifications on the Las Vegas nightclub industry.<sup>17</sup>

Much of the debate over “Ladies’ Night Law” centers on the issue of whether it is acceptable to price discriminate against males for offering essentially the same service. The Fourteenth Amendment’s Equal Protection Clause provides in part that “no State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>18</sup> However, the Fourteenth Amendment’s Equal Protection Clause typically does not regulate the behavior of private actors.<sup>19</sup> In response, states have enacted civil rights legislation, known as public accommodation statutes, which regulate the actions of private businesses. For example, California’s public accommodation statute, the Unruh Act, specifically applies to “all business establishments of any kind whatsoever,” and states that “all persons . . . are free and equal . . . no matter what their sex.”<sup>20</sup> Similar civil rights statutes—in many cases with nearly identical wording—have been adopted by many states.<sup>21</sup> However, courts in various jurisdictions have differed in their application of these statutes to ladies’ night cases.

This Note supports the proposition that ladies’ night promotions should not be permitted as a matter of public policy, and furthermore, that an interpretation of public accommodation statutes that provides an exception for ladies’ nights promotions should be found unconstitutional under the Fourteenth Amendment’s Equal Protection Clause.

## II. GENDER EQUALITY, THE FOURTEENTH AMENDMENT, AND THE SUPREME COURT

Though Plato fostered the belief that if “we are to use the women for the same thing as men, then we must teach them the same things,” traditional American society did not initially agree with him.<sup>22</sup> Historically, women in the United States have held a second-class position relative to

---

<sup>16</sup> See Benston, *Legal Lines*, *supra* note 9.

<sup>17</sup> See Benston, *Ruling*, *supra* note 23.

<sup>18</sup> U.S. Const. amend. XIV, § 1.

<sup>19</sup> See *Civil Rights Cases*, 109 U.S. 3, 11 (1883) (finding that the Fourteenth Amendment is limited to state action and does not authorize Congress the ability to outlaw discrimination by private parties or organizations).

<sup>20</sup> CAL. CIV. CODE § 51(b) (2010).

<sup>21</sup> See, e.g., UTAH CODE ANN. § 13-7-3 (1953) (stating that “All persons . . . are free and equal and are entitled to full and equal accommodations . . . in all business establishments . . . .”); 775 Ill. Comp. Stat. Ann. 5/1-102 (LexisNexis 2010) (declaring Illinois’ unlawful discrimination policy).

<sup>22</sup> Plato, *Great Dialogues of Plato* 249 (W.H.D. Rouse trans., Signet Classic 1999).

men, with the prevailing view being that women's only proper role was as wives and mothers.<sup>23</sup> Even as post-Civil War American society began to slowly recognize the equality of minority groups such as immigrants and African Americans, women's equality was slow to materialize, especially in education. French philosopher Alex de Tocqueville once noted during his travels in America that he was "struck by the continued inequality of men and women despite democracy's equalizing effect in other spheres."<sup>24</sup> It would still be another sixty years after Tocqueville's observations before women finally gained the right to vote in 1920.<sup>25</sup> Even after the success of the women's suffrage movement, the prevailing view during the twentieth century among state and federal governments remained that women could be deprived of opportunities available to men so long as "any 'basis in reason' existed to do so."<sup>26</sup>

Then came the women's liberation movement. The movement for women's legal and social equality started to gain momentum in the 1960s following a string of successful racial discrimination cases.<sup>27</sup> The movement had two goals: it aimed to erase cultural vestiges based on female stereotypes and eliminate barriers that prevented women from assuming an equal role in society. As a result, many of these cases centered largely on issues of education, as women's limited access to educational opportunities prevented women from competing equally with men.<sup>28</sup> Many women's liberation activists actively sought to create "a social climate that accommodated female education."<sup>29</sup> Other activists attacked laws and regulations that were based on traditional stereotypes of roles of men and women, with the aim to combat notions of female inferiority.<sup>30</sup>

The Supreme Court paved the way for prohibiting gender discrimination under the Equal Protection clause in 1971 with its pioneering holding in *Reed v. Reed*.<sup>31</sup> The case involved a divorced couple whose son had re-

---

<sup>23</sup> See Educ. Law at 10.10(2)(a) (2008) (discussing the traditional view of women's education in the United States).

<sup>24</sup> *Id.* at 10.10(2)(c).

<sup>25</sup> Grolier, *Women's Suffrage* Scholastic.com, <http://teacher.scholastic.com/activities/suffrage> (search "Grolier Women's Suffrage; then click on link bearing same name) (last visited March 21, 2010).

<sup>26</sup> Available Means: An Anthology of Women's Rhetoric(s) 473 (Joy Ritchie & Kate Ronald eds., 2001).

<sup>27</sup> See Educ. Law at §10.10(2)(c).

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*

<sup>30</sup> See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>31</sup> *Id.*

cently passed away.<sup>32</sup> Both parents, Cecil Reed and Sally Reed, sought to become the administrator of their son's estate.<sup>33</sup> The relevant state statute stated that, all things being equal, "males must be preferred to females" in determining which party becomes the administrator.<sup>34</sup> The probate court in Idaho adhered to the statute and did not consider factors such as the capabilities of the individual parties relative to each other. Instead, it simply awarded the administrator role to the husband.<sup>35</sup> In defending its choice, the probate court suggested that the statute's selection of males over females served an efficiency purpose by eliminating the need to hold a hearing as to the relative merits of two parties.<sup>36</sup> Sally Reed appealed the decision, and the Supreme Court granted certiorari.<sup>37</sup>

In a major victory for the women's liberation movement, the Supreme Court reversed in favor of Sally Reed.<sup>38</sup> The Court held that to give mandatory preference to one sex over the other for the purpose of efficiency is exactly the kind of arbitrary discrimination that the Equal Protection Clause is designed to protect against.<sup>39</sup> The Court notably defined the classifications as based on "gender," and therefore decided not that women were being unfairly discriminated against, but rather that gender was used arbitrarily in a state law.<sup>40</sup> Many women's liberation activists had hoped that sex-based classifications would come to be recognized as a suspect class like race or immigration status.<sup>41</sup> Suspect classification status lessens the plaintiffs' burden of proof in cases involving sex-based classifications and requires those who utilize a sex-based classification to prove that creating the sex distinction promotes a compelling governmental interest.<sup>42</sup> The Court in *Reed*, however, used the rational basis test for its standard in reviewing the gender-based classification.<sup>43</sup> This less burdensome standard protects gender classifications only when the discriminatory means employed lack a

---

<sup>32</sup> *Id.* at 71–72.

<sup>33</sup> *Id.* at 72.

<sup>34</sup> *Id.* at 73.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* 76.

<sup>37</sup> *Id.* at 74.

<sup>38</sup> *Id.* at 76–77.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 76–77 ("To give a mandatory preference to *members of either sex* over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated *solely on the basis of sex.*") (emphasis added).

<sup>41</sup> *See id.* at 10.10(2)(c).

<sup>42</sup> *See id.*

<sup>43</sup> *See Reed*, 404 U.S. at 76.

substantial relationship to achieving the government's objectives.<sup>44</sup> In other words, under a rational basis standard of review, gender classifications will be upheld as constitutional so long as gender has any rational relationship to the goal being achieved, which is why *Reed* was not the huge victory many activists wanted.

Not every major Supreme Court case which has dealt with gender equality and the Fourteenth Amendment has been based on discrimination against females. For instance, in *Mississippi University of Women v. Hogan*, the Supreme Court examined gender discrimination against men under the Fourteenth Amendment's Equal Protection Clause.<sup>45</sup> The *Hogan* decision considered the admission policy of the Mississippi University for Women (MUW), which was the only single-sex university in the state.<sup>46</sup> Joe Hogan, already a registered nurse, applied to the MUW's nursing school's baccalaureate program in 1979 to further his career opportunities.<sup>47</sup> He was denied admission<sup>48</sup> despite the fact that he was well qualified for the school.<sup>49</sup> University officials told him that he was denied "solely because of his sex" and that he could audit the courses he wanted to take, but would be unable to enroll in them.<sup>50</sup> Hogan proceeded to file suit against MUW claiming that the single-sex admissions policy of MUW violated the Equal Protection Clause of the Fourteenth Amendment.<sup>51</sup>

The district court was not sympathetic toward Hogan's cause and denied relief.<sup>52</sup> It held that maintaining MUW as a single-sex institution bore a rational relationship to the goal of "providing the greatest practical range of educational opportunities for its female student population."<sup>53</sup> It did not believe the classification to be arbitrary, since single-sex education affords students "unique benefits."<sup>54</sup> The Fifth Circuit reversed, holding that the district court improperly applied the "rational relationship" test to the policy.<sup>55</sup> The Court of Appeals held that the district court should have required a heavier burden, under which the state had to show that the gender-based

---

<sup>44</sup> Educ. Law at 10.10(2)(c).

<sup>45</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

<sup>46</sup> *Id.* at 720 n.1

<sup>47</sup> *Id.* at 720-721

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* 721.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

classification furthered a legitimate government purpose, and found that the state had not met this burden.<sup>56</sup>

On appeal to the Supreme Court affirmed the appellate holding. The Court agreed with the Court of Appeals that the standard that the district court had used did not provide a heavy enough burden.<sup>57</sup> Rather, the court held that the party seeking to uphold a classification based on gender must demonstrate an “exceedingly persuasive justification.”<sup>58</sup> To meet this goal, the state needed to show that the gender classification met an “important governmental objective” and that the classification was “substantially related to the achievement of those objectives.”<sup>59</sup> The court further reiterated that classifications based on gender, generally, are suspect, and the fact that the policy discriminated against men rather than women did not exempt it from a more rigorous analysis.<sup>60</sup> The majority concluded that the admissions policy reinforced gender stereotypes in the nursing world.<sup>61</sup> The majority held that, because the state was unable to satisfy the higher burden, the gender-based admissions policy of MUW violated the Equal Protection Clause.<sup>62</sup>

Four justices dissented from the majority opinion. In the first dissent, Justice Blackmun reasoned that, because other Mississippi universities offered nursing baccalaureate programs to males, MUW *should* be allowed to continue its women-only admission policy.<sup>63</sup> In Justice Powell’s dissent, he criticized the majority for placing an unjustified burden on too narrow of a class.<sup>64</sup> He asserted that single-sex education offered many advantages, and applying a heightened standard of review frustrates the purpose of the Equal Protection Clause.<sup>65</sup> Justice Burger generally concurred with Justice

---

<sup>56</sup> *Id.* at 721–22 (“[T]he proper test is whether the State has carried the heavier burden of showing that the gender-based classification is substantially related to an important governmental objective. Recognizing that the State has a significant interest in providing educational opportunities for all its citizens, the court then found that the State had failed to show that providing a unique educational opportunity for females, but not for males, bears a substantial relationship to that interest.”) (citations omitted).

<sup>57</sup> *Hogan*, 458 U.S. at 723–24.

<sup>58</sup> *Id.* at 724.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 723.

<sup>61</sup> *Id.* at 729–30.

<sup>62</sup> *Id.* at 733.

<sup>63</sup> *Id.* at 733–35 (J. Blackmun, dissenting).

<sup>64</sup> *Id.* at 735–36 (arguing that the majority applied “[A] heightened equal protection standard, developed in cases of genuine sexual stereotyping, to a narrowly utilized state classification . . .”) (J. Powell, dissenting).

*Id.* at 738 (“The arguable benefits of single-sex colleges also continue to be recognized by students of higher education. The Carnegie Commission on Higher Education has reported that it ‘favor[s] the continuation of colleges for women. They provide an element of diversity . . . and [an envi-

Powell's dissent, and added that, because the Court relied so heavily on the notion of stereotyping women in the nursing profession, the holding of this case should be limited to professional nursing schools.<sup>66</sup> Even though the majority in *Hogan* further approved of the use of a higher burden of proof for gender discrimination and made clear that gender discrimination applied to both sexes, the vocal dissents left uncertain the future ramifications of the majority's decision.

Another major Supreme Court case analyzing gender equality under the Equal Protection Clause was *United States v. Virginia* ("VMI").<sup>67</sup> VMI involved the Virginia Military Institute, the last public university in Virginia with a single-sex admissions policy.<sup>68</sup> VMI was a prestigious military academy, but the school remained closed to female students despite the fact that many females had inquired about admission.<sup>69</sup> In 1990, a female seeking admission to VMI challenged the admissions policy.<sup>70</sup>

The district court agreed that "some women would want to attend the school if they had the opportunity,"<sup>71</sup> and conceded that some women were perfectly capable of enrolling and completing all the activities of the academy that were required of the male students.<sup>72</sup> Further, it noted that having female students could enhance the training program, because actual combat forces are comprised of both sexes.<sup>73</sup> Nonetheless, the district court did not believe that such considerations take priority over VMI's justifications for having a male-only admittance policy.<sup>74</sup> The district court believed that VMI's goal of single-gender education, whether male-only or female-only, was an important governmental objective,<sup>75</sup> and concluded that VMI's sin-

---

ronment in which women] generally. . . speak up more in their classes, . . . hold more positions of leadership on campus, . . . and . . . have more role models and mentors among women teachers and administrators." (J. Powell, dissenting).

<sup>66</sup> *Id.* at 733 ("I agree generally with Justice Powell's dissenting opinion. I write separately, however, to emphasize that the Court's holding today is limited to the context of a professional nursing school. Since the Court's opinion relies heavily on its finding that women have traditionally dominated the nursing profession, it suggests that a State might well be justified in maintaining, for example, the option of an all-women's business school or liberal arts program.") (J. Burger, dissenting) (citations omitted).

<sup>67</sup> *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>68</sup> *Id.* at 520.

<sup>69</sup> *Id.* ("In the two years preceding the [VMI] lawsuit, . . . VMI had received inquiries from 347 women, but had responded to none of them.")

<sup>70</sup> *Id.* at 523

<sup>71</sup> *Id.* (citing *United States v. Virginia*, 766 F. Supp. 1407, 1414 (W.D. Va. 1991)).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 523-24.

<sup>75</sup> *Id.* at 524.

gle-gender admittance policy was a rational, indeed the only, means of achieving such a goal.<sup>76</sup>

The Fourth Circuit Court of Appeals vacated the district court's decision and the Supreme Court denied certiorari in 1993, which left the State of Virginia hoping to reach a compromise. The state proposed a program parallel to VMI to be called the Virginia Women's Institute for Leadership (VWIL).<sup>77</sup> The Fourth Circuit found VWIL to be an acceptable program to accomplish the objective of maintaining single-sex programs and found it to satisfy the Constitution's requirement of equal protection.<sup>78</sup> Despite some differences in the curriculums of the two schools, such as VWIL's lack of uniforms and military format of education,<sup>79</sup> the Fourth Circuit reasoned that legal principles would not require VWIL to exactly mirror VMI<sup>80</sup>; instead, the two schools accomplished essentially the same end goals, even if the means of accomplishing these goals differed.<sup>81</sup>

The Supreme Court reversed the Fourth Circuit's decision in 1996, and found that VWIL was not an acceptable alternative.<sup>82</sup> VWIL was to be hosted at another college, Mary Baldwin College, which had an average SAT score 100 points lower than the average at VMI<sup>83</sup> and lacked many of the campus amenities that VMI featured.<sup>84</sup> Furthermore, instructors at Mary Baldwin received lower salaries<sup>85</sup> and held fewer PhDs than instructors at VMI;<sup>86</sup> and the choice of curriculum and majors were significantly smaller, lacking, for example, courses in engineering and advanced math.<sup>87</sup> Perhaps most significantly, VWIL lacked VMI's strong alumni network and endowment, two distinct and unique advantages to being a VMI gradu-

---

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 526.

<sup>78</sup> *Id.* at 527-28.

<sup>79</sup> *See id.* at 527.

<sup>80</sup> *See id.* at 528 ("But the 'controlling legal principles,' the District Court decided, 'do not require the Commonwealth to provide a mirror image VMI for women.'").

<sup>81</sup> *See id.* ("The court anticipated that the two schools would 'achieve substantially similar outcomes.' It concluded: 'If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination.'") (citations omitted).

<sup>82</sup> *Id.* at 519 ("Virginia's public institutions of higher learning include an incomparable military college, Virginia Military Institute (VMI). The United States maintains that the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords. We agree.").

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 552.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 551.

<sup>87</sup> *Id.* at 552.

ate.<sup>88</sup> In sum, the Supreme Court believed that because VWIL graduates would not have access to these opportunities, VWIL did not offer a “comparable single-gender women’s institution.”<sup>89</sup> Thus, VMI’s long-standing male-only admission policy was struck down as unconstitutional.

Today, the standard of review in gender discrimination cases that facially discriminate on the basis of gender is intermediate scrutiny, which is the standard the Court applied in VMI.<sup>90</sup> The intermediate scrutiny standard requires (1) that a gender-based classification serves “important governmental objectives” that do not rely on “overbroad generalizations” about males and females; (2) that the objectives are genuine, and “describe actual state purposes, not rationalizations for actions in fact differently grounded;” and 3) that the discriminatory means employed have a substantial relationship to achieving such objectives.<sup>91</sup>

The Fourteenth Amendment’s Equal Protection Clause does not directly apply to the line of “Ladies’ Night” cases that follow because, as stated earlier, the Fourteenth Amendment is limited only to state action, and therefore cannot be applied to actions of a privately-owned business.<sup>92</sup> However, state-enacted public accommodations statutes *are* state action. Therefore, if a public accommodation statute is facially discriminatory or discriminates on the basis of gender, the statute itself might be in violation of the Fourteenth Amendment’s Equal Protection Clause. The question then turns on whether a public accommodation statute permits and sanctions ladies’ night promotions, and if so, whether the statutes pass constitutional muster under an intermediate scrutiny standard of review.

### III. LADIES’ NIGHT LAW CASES

#### A. ANTI-LADIES NIGHT

##### 1. California I

The *sine qua non* of anti-ladies’ night cases, *Koire v. Metro Car Wash*, involved two gender-based price promotions.<sup>93</sup> In *Koire*, the plaintiff visited several car washes in Orange County, California, that happened to be having “Ladies’ Day” promotions.<sup>94</sup> He approached these car washes and

---

<sup>88</sup> *Id.* at 552–53.

<sup>89</sup> *Id.*

<sup>90</sup> *Virginia*, 518 U.S. at 531–34.

<sup>91</sup> *Id.*

<sup>92</sup> See *Civil Rights Cases*, 109 U.S. 3 at 3 (1883).

<sup>93</sup> *Koire v. Metro Car Wash*, 707 P.2d. 195 (Cal. 1985).

<sup>94</sup> *Id.* at 195.

asked for the same discount that was available to females, but was continually refused.<sup>95</sup> In addition, plaintiff was refused free admission to a nightclub, Jezebel's, which offered free admission to females, but had a \$2 cover charge for males.<sup>96</sup> The plaintiff filed suit against the car washes and Jezebel's, claiming that the sex-based discounts violated the Unruh Civil Rights Act.<sup>97</sup> The trial court ruled against the plaintiff, who appealed all the way to the Supreme Court of California.<sup>98</sup>

The defendants in *Koire* argued that gender-based pricing was acceptable under the Unruh Act for four reasons. First, defendants argued that under the Unruh Act, only *total exclusion* of a member from a protected class was prohibited.<sup>99</sup> Therefore, defendants claimed, discrimination in the form of gender-based admission prices and services was acceptable because no protected class was being excluded from the business.<sup>100</sup> The court dismissed this argument and held that the Unruh Act's scope was not limited to exclusionary practices;<sup>101</sup> rather than being concerned only with citizen's access to business establishments, the Unruh Act regulated all aspects of the business.<sup>102</sup> The court clarified that the Unruh Act's broad reach encompassed all instances where "unequal treatment is the result of a business practice."<sup>103</sup> Such gender-based pricing, while not exclusionary, was still within the Unruh Act's scope.<sup>104</sup>

Defendants next argued that the Unruh Act prohibits only discrimination that is *arbitrary*.<sup>105</sup> They contended that gender-based pricing was not an arbitrary case of discrimination, and therefore "[e]ll within recognized exceptions to the Act."<sup>106</sup> The court agreed that non-arbitrary discrimination could be an acceptable practice,<sup>107</sup> noting as an example that excluding children from bars and adult bookstores is an acceptable form of non-

---

<sup>95</sup> *Id.* at 196.

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

<sup>97</sup> *Id.* The Unruh Act prohibits discrimination in places of public accommodation. Cal.Civ.Code § 51(b) (2010).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 196 ("Defendants argue that the Unruh Act prohibits only the *exclusion* of a member of a protected class from a business establishment.") (emphasis in original).

<sup>100</sup> *Id.* at 197.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* ("The Act's proscription is broad enough to include within its scope discrimination in the form of sex-based price discounts.")

<sup>105</sup> *Id.* at 197.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 198.

arbitrary discrimination.<sup>108</sup> However, such discrimination is permissible because it is based on compelling social interests.<sup>109</sup> Defendants claimed that their promotions, by encouraging women to attend, promote interaction between the sexes, which should be a “socially desirable goal” of the state.<sup>110</sup> However, to be non-arbitrary, discrimination must be compelling enough in promoting social policy to warrant an exception, which the court did not find in this instance.<sup>111</sup>

Next, defendants argued that there was no violation of the Unruh Act because there was no *per se* injury to the plaintiff.<sup>112</sup> The court explained that arbitrary sex discrimination under the Unruh Act is a *per se* injury, and further that there *is* injury in the case of gender-based pricing.<sup>113</sup> The male plaintiff paid more than females for a car wash and for admittance to a bar, and the price difference was sufficient to qualify as an injury.<sup>114</sup> In addition, the plaintiff suffered mental injury because the pricing “made him feel that he was being treated unfairly.”<sup>115</sup> Perhaps most important to the court’s decision was its finding that gender-based pricing “may be generally detrimental to both men and women, because it reinforces harmful stereotypes”<sup>116</sup>—if the legal system were to continue to permit such differentiated treatment between sexes, then the legal system would harm the chances of achieving true equality between men and women.<sup>117</sup> As the

---

<sup>108</sup> *See id.*

<sup>109</sup> *See id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 200. (“The need to promote the ‘social policy’ asserted by Jezebel’s is not sufficiently compelling to warrant an exception to the Unruh Act’s prohibition on sex discrimination by business establishments.”).

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

<sup>113</sup> *Id.* (“[B]y passing the Unruh Act, the Legislature established that arbitrary ex discrimination by businesses is *per se* injurious.”).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* *See also id.* n.15 (“I can recall that, because I thought that that was so unbelievable that I can recall that like it was yesterday—like it was today. That is how unbelievable that was to me. Letting minors in the club and then just letting the girls in free, that is unbelievable. A Celebration there. The guy was all happy. Come on down. We’re letting in these people 18 to 21. You know, all the girls from 18 to 21 get in free. It just smoked me.”).

<sup>116</sup> *Id.* at 201.

<sup>117</sup> *See id.* (“When the law ‘emphasizes irrelevant differences between men and women[,] [it] cannot help influencing the content and the tone of the social, as well as the legal, relations between the sexes. . . . As long as organized legal systems, at once the most respected and most feared of social institutions, continue to differentiate sharply, in treatment or in words, between men and women on the basis of irrelevant and artificially created distinctions, the likelihood of men and women coming to regard one another primarily as fellow human beings and only secondarily as representatives of another sex will continue to be remote. When men and women are prevented from recognizing one another’s essential humanity by sexual prejudices, nourished by legal as well as social institutions, society as a

court pointed out, “class-based generalization[s]” based on stereotypes are exactly the type of differential treatment that the Unruh Act was designed to prohibit.<sup>118</sup>

Finally, defendants claimed that prohibiting sex-based discounts would bring an end to all kinds of promotional discounts.<sup>119</sup> The court disagreed with this prediction, pointing out that promotional discounts were still acceptable so long as they were applicable to all persons, regardless of sex, race, or other class generalizations.<sup>120</sup> Distinguishing between gender-based and age-based discounts, the court found that there may be public policy considerations in favor of discounts for children and senior citizens that do not apply to gender distinctions.<sup>121</sup> Most importantly, the court dismissed claims that this practice is acceptable because it is “of minimal importance” and “essentially harmless.”<sup>122</sup> The Court refused to determine the legality of discounts based on subjective judgments about which gender-based distinctions were acceptable and which were harmful.<sup>123</sup> Instead, the court held that all gender-based pricing was discriminatory and violated the Unruh Act.<sup>124</sup>

## 2. California II

When Chippendale’s held a ladies’ night, the purpose was not to attract men and women; rather, the purpose was to keep men out.<sup>125</sup> After the local Los Angeles Department of Alcoholic Beverage Control (ABC) received two complaints from male patrons who had been denied admissions to the club on certain nights, ABC’s board held an administrative hearing to investigate the matter.<sup>126</sup> Chippendale’s had denied entry to males until all exotic male dance shows were performed, after which male customers were allowed to enter and “avail [themselves] of an opportunity to mingle with the female customers.”<sup>127</sup> The club owners believed that not allowing men during the performances was important to keeping the “vibrant and alive”

---

whole remains less than it could otherwise become.”) (quoting Leo Kanowitz, *Women and the Law: The Unfinished Revolution* 4 (1969)).

<sup>118</sup> *Id.* at 201–02.

<sup>119</sup> *Id.* at 197.

<sup>120</sup> *Id.* at 202.

<sup>121</sup> *Id.* at 203.

<sup>122</sup> *Id.* at 204.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 204.

<sup>125</sup> *Easebe Enters. v. Alcoholic Beverage Control Appeals Bd.*, 190 Cal. Rptr. 678, 679 (Ct. App. 1983).

<sup>126</sup> *Id.* at 679–80.

<sup>127</sup> *Id.*

interaction between the male performers and female audience and that the lack of male guests allowed for “women to engage in ‘all of that screaming and jumping up and down.’”<sup>128</sup> These reasons did not prevent the board from finding the club violated the Unruh Act’s prohibitions against discrimination based on gender.<sup>129</sup>

On appeal, the California Court of Appeals affirmed the ABC board’s decision.<sup>130</sup> The court held that no rationale could justify denying men admission, and that Chippendale’s had per se violated the law in doing so.<sup>131</sup> In its argument justifying their prohibition of male customers during performances, Chippendale’s said that to do otherwise would make the performances commercially unviable.<sup>132</sup> The court, however, stated that the economic self-interest of a private business does not constitute a justification to discriminate in violation of public policy.<sup>133</sup> The court went on to note that certain situations exist in which gender-based discrimination may result in societal benefits.<sup>134</sup> However, such benefits have generally been reserved to certain governmental processes, and the court refused to extend any type of benefits analysis to a private business practicing discrimination.<sup>135</sup>

### 3. Florida

In the city of Clearwater, Florida, Lawrence Liebling applied to become a member of the “Pink Ladies Club” at Studebaker’s Dance Club, but was refused.<sup>136</sup> The promotional club offered female patrons discounted prices on drinks.<sup>137</sup> Mr. Liebling filed a claim with the Clearwater Community Relations Board (CCRB) about this practice, which found that Studebaker’s had violated the city’s anti-discrimination code,<sup>138</sup> the pertinent part of which stated that “[i]t shall be unlawful discriminatory practice for any . . . place of public accommodation . . . because of the . . . sex . . . of

<sup>128</sup> *Id.* at 679-80.

<sup>129</sup> *Id.* at 680.

<sup>130</sup> *Id.* at 682.

<sup>131</sup> *Id.* at 681-82.

<sup>132</sup> *Id.* at 681.

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

<sup>134</sup> *Id.* at 682.

<sup>135</sup> *Id.* at n.7 The court cited instances in which disparate treatment based on sex has withstood challenges, including cases involving the punishment for statutory rape, mandatory discharge requirements for female naval officers, and a tax exemption for widows but not widowers.

<sup>136</sup> *City of Clearwater v. Studebaker’s Dance Club*, 516 So. 2d 1106, 1107 (Fla. Dist. Ct. App. 1987).

<sup>137</sup> *Id.* at 1107-08.

<sup>138</sup> *Id.* at 1107.

any person . . . deny to such person any of the . . . advantages . . . that are afforded to other customers."<sup>139</sup> Studebaker's appealed the CCRB's ruling to the circuit court.<sup>140</sup> The circuit court reversed and found in favor of Studebaker, holding that the promotion was not designed to deny males any advantages, but rather to "increase the enjoyment of the males by enticing the attendance of more females for males to socialize with."<sup>141</sup> Liebling and the City of Clearwater appealed the circuit court ruling to the district court of appeal.<sup>142</sup>

In a decision that was overwhelmingly in favor of Liebling and Clearwater, the appellate court quashed the circuit court's ruling<sup>143</sup> and rejected defendant-appellees' arguments that the price discrimination was de minimis and benefited men more than it hurt them.<sup>144</sup> The court found that such price discrimination was a clear and unambiguous violation of the city code.<sup>145</sup>

#### 4. Pennsylvania

As part of the Flintlock Inn's "Go-Go Girls Nights," female patrons were exempt from the \$1 cover charge that was charged to males.<sup>146</sup> Upon discovering that the Flintlock Inn had done this on at least two occasions, the Pennsylvania Liquor Control Board cited Flintlock with a ten-day license suspension.<sup>147</sup> The board claimed the inn violated sex discrimination statutes that prohibited a bar from discriminating on the basis of sex.<sup>148</sup> The inn appealed the suspension, and the trial court held in favor of the inn, saying that the discrimination was "de minimis and committed without intent to violate."<sup>149</sup> In other words, the court held that the discrimination was trivial, and that the board should worry about more important things.<sup>150</sup>

---

<sup>139</sup> *Id.* at 1108.

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

<sup>141</sup> *Studebaker's Dance Club*, 516 So. 2d at 1108.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 1109.

<sup>144</sup> *Id.* at 1108–09 ("Although the circuit court found that such discrimination was 'innocuous' and actually designed to ultimately benefit males, such considerations are irrelevant to the determination of whether the ordinance was violated.>").

<sup>145</sup> *Id.* at 1108.

<sup>146</sup> *Commonwealth v. Dorbinoff*, 471 A.2d 941, 942 (Pa. Commw. Ct. 1984).

<sup>147</sup> *Id.* at 942–943.

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

<sup>149</sup> *Id.* at 943.

<sup>150</sup> *See id.* ("The trial court vacated the suspension on the grounds that the charged actions were de minimis and committed without intent to violate. The trial court's opinion characterized the nature of some of the charges as 'nit-picking,' quoted a previous opinion criticizing the board for failure to take

On appeal, the Pennsylvania Commonwealth Court reversed the trial court's ruling and reinstated the board's decision, refusing to read into the board's statutes any form of exception for "trivial" discrimination.<sup>151</sup> The Commonwealth Court also held that the trial court's view was too subjective and went beyond the clear wording of the statute.<sup>152</sup> The court found that when a place exempts admission charges "solely upon a difference in gender, having no legitimate relevance in the circumstances," a per se violation is found.<sup>153</sup>

## 5. Iowa

Every Wednesday was "Ladies Day" during the summer of 1987 at Bluffs Run Greyhound Park racetrack in Council Bluffs, Iowa.<sup>154</sup> Not only were female patrons treated to free admission, they were also given discounts on concession items and souvenirs.<sup>155</sup> Charles Ladd attempted to use the same discounts that women received, but was refused.<sup>156</sup> He filed a complaint against Bluffs Run with the Iowa Civil Rights Commission and alleged a violation of the Iowa Civil Rights Act, which prohibited a business from refusing any advantage to a customer based on sex.<sup>157</sup> The civil rights commission granted Ladd permission to bring the matter to district court, which granted Bluff Run's motion to dismiss.<sup>158</sup>

On appeal, the Iowa Supreme Court favored Ladd, holding that Bluff Run's gender-based promotion was in violation of state discrimination statutes.<sup>159</sup> It found that giving women free admission and discounts "discriminated against men in the furnishing . . . of facilities and services."<sup>160</sup> And, with the courts in California, Pennsylvania, and Florida, the Iowa Supreme did not consider it possible to draw a "meaningful line" for de mi-

---

enforcement action against more substantial offenses, and then concluded that the board's charges, against the 'trivial' activities in this case, are 'a little like stomping on a mouse in the kitchen when there's a tiger at the door.'").

<sup>151</sup> *Id.* ("A court cannot reverse Liquor Code charges by declaring the violations to be de minimis.").

<sup>152</sup> *Id.* at 943 ("However justified the trial court's criticism might be as a matter of a concerned personal view, the legislature nevertheless has mandated that certain minor matters, as well as major breaches of law, be treated as statutory violations.").

<sup>153</sup> *Id.*

<sup>154</sup> Ladd v. Iowa West Racing Ass'n, 438 N.W.2d 600, 601 (Iowa 1989).

<sup>155</sup> *Id.*

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

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 602.

<sup>160</sup> *Id.*

nimis exceptions to prohibited discrimination.<sup>161</sup> Instead, the court held that discrimination on the basis of an enumerated classification is a per se violation of that statute.<sup>162</sup>

#### Maryland

When Mr. Richard Peppin took a female companion to the Woodside Delicatessen in Montgomery County Maryland, he was perplexed when he received the bill to find that his date had received a fifty-percent discount on her meal, while he did not.<sup>163</sup> When Mr. Peppin inquired for the reason, he was told that on Thursdays the half-off discount was given only to female patrons.<sup>164</sup> Mr. Peppin complained to the local human relations commission, which informed the deli that its practice of a weekly ladies' night was against city ordinances and needed to end.<sup>165</sup> The deli's owner complied with the request and replaced the weekly ladies' night with a weekly "Skirt and Gown Night," in which any customer coming in a skirt or gown received the discount, regardless of gender.<sup>166</sup> Although the promotion was initially popular with men, in part due to media frenzy, it eventually died down to the point where no men were taking advantage of it.<sup>167</sup> Nonetheless, at a hearing the local commission found that "Skirt and Gown Night" was still in violation of city ordinance because it was a "discriminatory subterfuge" that functioned as a ladies' night in disguise,<sup>168</sup> and the trial court found in favor of Mr. Peppin on appeal.

The Court of Special Appeals of Maryland upheld the lower court's decisions in favor of Mr. Peppin.<sup>169</sup> It believed that, in forcing men to wear a skirt to receive a discount, the promotion imposed an inconvenient and unreasonable burden upon them.<sup>170</sup> The court did not find it to be a "gender neutral" promotion, but rather it acted simply as an extension of ladies night and served the same function.<sup>171</sup> The fact that men—if they took unreasonably burdensome steps—could benefit of the promotion did not hide its true intent.<sup>172</sup> The court held the practice unlawful, reasoning that local

---

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Peppin v. Woodside Delicatessen, 506 A.2d 263, 264 (Md. Ct. Spec. App. 1986).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 264.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 264–65

<sup>169</sup> *Id.* at 267–68.

<sup>170</sup> *Id.* at 266.

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

<sup>172</sup> *Id.*

ordinances prohibiting gender discrimination were “unambiguous,” and that cases concerning such discrimination should be decided using an “absolute standard,” rather than a balancing test that might weigh the interest of the affected male customers against those of the deli.<sup>173</sup>

## B. PRO-LADIES’ NIGHT CASES

### 1. Washington

When Bruce MacLean and his wife attended a Seattle SuperSonics professional basketball game, he attempted to purchase two tickets at the discounted ladies’-night rate, one for his wife and one for himself, but was denied.<sup>174</sup> He purchased a full price ticket, and subsequently filed a complaint claiming that the Seattle SuperSonics’ ladies’ night promotion violated state statutes and the Equal Rights Amendment.<sup>175</sup> The trial court disagreed with MacLean’s contention, and found that the price discrimination was not within the scope of the statute.<sup>176</sup> On appeal, the case was brought to the Washington Supreme Court.<sup>177</sup>

In a decision that has been criticized by other courts for relying on stereotypes,<sup>178</sup> the Washington Supreme Court ruled against MacLean.<sup>179</sup> The court held that MacLean was unable to demonstrate discrimination against men as a class and that there could not be “perceived in this scheme. . . intent to discriminate against men.”<sup>180</sup> The court emphasized that it was men that benefitted from this type of discounted pricing, since men paying for women save money on buying tickets for women they may decide to bring with them.<sup>181</sup> Unlike courts that struck down ladies’ night promotions, the Washington Supreme Court held that intent is a particularly relevant factor

---

<sup>173</sup> *Id.* at 266–67.

<sup>174</sup> *MacLean v. First Northwest Indus. of Am.*, 635 P.2d 683, 684. (Wash. 1981).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *See Koire*, 707 P.2d at 201–02 (“With all due respect, the Washington Supreme Court also succumbed to sexual stereotyping in upholding the Seattle SuperSonics’ ‘Ladies’ Night.’ The court found that the discount was reasonable because, inter alia, ‘women do not manifest the same interest in basketball that men do.’ This sort of class-based generalization as a justification for differential treatment is precisely the type of practice prohibited by the Unruh Act. ‘[The] Unruh Civil Rights Act prohibits all forms of stereotypical discrimination.’ These sex-based discounts impermissibly perpetuate sexual stereotypes.”) (citations omitted).

<sup>179</sup> *MacLean*, 635 P.2d. at 684.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 685. (“One of the obvious purposes of the discount is to make family attendance cheaper, and that end was achieved here. Thus, not harmed by the price reduction, the respondent enjoyed one of the benefits it was designed to confer.”).

to consider.<sup>182</sup> Because the promotion did not "cause the respondent to feel unwelcomed, unaccepted, undesired or unsolicited," there was no injury.<sup>183</sup> Supporting the economic motives behind such promotions, the Court said that if ladies' nights presented a serious issue to the public, the marketplace should dictate when such promotions will be abandoned.<sup>184</sup> The court saw no need to intervene in ticket-pricing policies designed to generate more revenue.<sup>185</sup> The court also refused to consider the argument that ladies' night stereotyped women.<sup>186</sup>

Dissenting from the majority opinion, Justice Utter vehemently opposed any exceptions to Washington's public accommodations statute.<sup>187</sup> Justice Utter refuted the argument that an actual injury is required for a violation of the statute, noting that "sexual discrimination harms the state generally."<sup>188</sup> Another dissenting judge believed that whether such discrimination should be permitted must not rely on a cash nexus, and that the Equal Rights Amendments were not designed to revolve solely around situations where economic injury had occurred.<sup>189</sup>

## 2. Illinois

The Dock Club in Springfield, Illinois, hosted a ladies' night promotion in which females were able to purchase alcohol at reduced prices.<sup>190</sup> Upon hearing of the promotion, the Illinois Liquor Control Commission

---

<sup>182</sup> *Id.* at 686. ("It is true that, as the respondent points out, the use of the word 'includes' indicates that the term 'full enjoyment' may include forms of discrimination which do not cause a person to feel unwelcome. Still, the statute read as a whole contemplates that forbidden discrimination be damaging in its effect, and as we have shown, there was no damage.").

<sup>183</sup> *Id.* at 686.

<sup>184</sup> *Id.* at 687 ("According to the affidavit of the vice-president, a sizable majority of fans have indicated their approval of promotional programs such as "ladies' night". Perhaps the time will soon arrive when most will shun them. When that occurs, we would expect that the demands of the marketplace will dictate that the programs be abandoned.").

<sup>185</sup> *Id.* ("In the absence of some showing that the prices charged were unreasonable or forbidden by statute, we perceive no reason for judicial intervention in ticket-pricing policies which are designed not to exclude anyone but to encourage attendance. It is not denied that the pricing policies at the Sonics games have furthered that purpose. Nor is there the slightest evidence offered that the respondent's disgruntlement is shared by any sizable number of fans. What evidence there is in the record shows the contrary.").

<sup>186</sup> *Id.* at 686-87 ("The actual incentive for this lawsuit appears to be objection on the part of the respondent's attorney that promotional devices such as 'ladies' night' tend to stereotype women. Whatever merit there may be in that objection, it is not at issue here and involves no injustice to the male plaintiff in this action.").

<sup>187</sup> *Id.* at 688 ("[T]he Laws against discrimination, bar gender-based price differentials regardless of the harm suffered.").

<sup>188</sup> *Id.* at 690.

<sup>189</sup> *Id.* at 691.

<sup>190</sup> *Dock Club, Inc. v. Ill. Liquor Control Comm'n*, 428 N.E.2d 735, 736 (Ill. App. Ct. 1981).

charged the Dock Club with a violation of the local Dramshop Act, which prohibited a business from denying “any person the full and equal enjoyment of . . . advantages . . . of any premises in which alcoholic liquors are authorized to be sold.”<sup>191</sup> The Dock Club filed suit in order to receive a declaratory judgment that its ladies’ night promotions were an acceptable practice.<sup>192</sup> The circuit court reversed the administrative order, and the Illinois Liquor Control Commission appealed the decision.<sup>193</sup>

The Appellate Court of Illinois found nothing wrong with the Dock Club’s ladies night promotions. The court hinged its decision on whether the differences in prices affected a customer’s “equal enjoyment” of the bar.<sup>194</sup> The court did not believe a customer’s enjoyment was affected by such promotions.<sup>195</sup> The court distinguished between a discount promotion and what would essentially amount to gauging,<sup>196</sup> and because males were being charged the normal prices, they were not being discouraged from enjoying the businesses.<sup>197</sup> The court took no issue with purpose of the promotion, which was simply to encourage female attendance, and upheld the Dock Club’s promotion.<sup>198</sup>

### 3. Michigan

The Dearborn Indoor Racquet Club in Wayne County, Michigan, charged \$85 for male membership, but charged female members only \$65.<sup>199</sup> Paul Tucich filed a complaint against the club, alleging that the policy violated Michigan public accommodations statutes.<sup>200</sup> The relevant statute made it illegal for “any person . . . [to] withhold from or deny to any person” the advantages of public accommodation based on sex, race, or other classifications.<sup>201</sup> The trial court dismissed the case in favor of the Dearborn club, and Mr. Tucich appealed to the Court of Appeals of Michigan.<sup>202</sup>

---

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 736.

<sup>194</sup> *Id.* at 738 (“The crucial question is whether the price differential denies persons, not able to obtain the lower price, the ‘equal enjoyment’ of the facilities.”).

<sup>195</sup> *Dock Club*, 428 N.E.2d at 738.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Tucich v. Dearborn Indoor Racquet Club*, 309 N.W.2d 615, 617 (Mich. App. 1981).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 619, quoting MCL 750.147

<sup>202</sup> *Id.* at 617.

The Court of Appeals upheld the Dearborn club’s motion to dismiss.<sup>203</sup> It noted that the price difference at issue did not rise to the level of making an individual feel unwelcomed or undesired.<sup>204</sup> In its argument, the club noted that the difference in membership fees acted as a marketing device, luring women to visit the club during daylight hours when they were not otherwise at work.<sup>205</sup> Perhaps more importantly, the club further justified the different pricing strategies for women on the grounds that providing separate facilities for each gender required different maintenance costs.<sup>206</sup> The trial court—and the appellate court, too—agreed with this argument.<sup>207</sup> Furthermore, the trial court held that, because the aim of the club was not to discriminate, even indirectly, against men, sanctions against the clubs were not justified.<sup>208</sup>

#### IV. “LADIES’ NIGHTS” PROMOTIONS SHOULD NOT BE ALLOWED AS A MATTER OF PUBLIC POLICY

##### A. CIVIL RIGHTS STATUTES ARE CLEAR AND PRECISE IN THEIR WORDING PROHIBITING ALL FORMS OF DISCRIMINATION BASED ON GENDER

Ladies’ nights should not be allowed because they are prohibited by the wording of civil rights statutes. Civil rights statutes enacted in various states, such as California’s Unruh Act, are straightforward and unambiguous in their wording. In *Metro Car Wash*, the court made it clear that the Unruh Act should be read in an unambiguous manner.<sup>209</sup> Gender discrimination is a delicate issue, and public policy should dictate that in interpreting public accommodation or anti-discrimination statutes, courts should err on the side of caution by using a bright line interpretation that prohibits all forms of gender discrimination.<sup>210</sup>

Gender is a “quasi-suspect” classification. Very few classifications have been able to garner a heightened standard of review by the Supreme Court. Gender, which is reviewed under intermediate scrutiny, is among

---

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 620 (“There being no evidence that plaintiff was not welcome, not desired or not solicited or that the club facilities were denied or withheld, we conclude that summary judgment was properly entered . . .”).

<sup>205</sup> *Id.* at 617.

<sup>206</sup> *Id.* at 617–18.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Koire*, 707 P.2d at 196–97.

<sup>210</sup> As argued in *Koire*. See *id.* at 204.

those classifications.<sup>211</sup> That fact alone should make it obvious how important prohibiting *any* gender discrimination is in shaping public policy.

Further, public accommodation statutes are unambiguous in their wording. Most public accommodation statutes in general leave little up to the imagination and interpretation of the courts. They make clear that no business should discriminate on the basis of sex in providing a service to the public. Among the wording of most statutes is that the “advantages” of a business cannot be denied on the basis of sex. There is little room to argue that discounted prices are not part of an “advantage” afforded to customers. Allowing a more liberal interpretation of statutes that were designed to be unambiguous has the potential of opening up the court system to a large amount of frivolous litigation.

#### B. THERE SHOULD BE NO DE MINIMIS EXCEPTION FOR LADIES’ NIGHT PROMOTIONS

A de minimis defense to gender discrimination should not be a justification for any type of gender discrimination under civil rights statutes. In 2004, David Gillespie filed a complaint with the New Jersey Division on Civil Rights after being denied free admission to a nightclub on a Ladies’ Night.<sup>212</sup> A civil rights committee hearing the case held in favor of Mr. Gillespie on the grounds that he was discriminated against in violation of his civil rights.<sup>213</sup> Its finding was based on the fact that the pertinent civil rights legislation left no room for a de minimis defense, but if such a defense were allowed, it would have been applicable in the case.<sup>214</sup> Subsequently, the New Jersey legislature soon amended this legislation to permit a de minimis defense.<sup>215</sup>

In her article, “*Is Ladies’ Night Really Sex Discrimination?*,” Jessica Rank calls for a de minimis exception for gender-based marketing promotions such as ladies’ night.<sup>216</sup> Rank argues that men are the primary beneficiaries from such promotions, and that cases of ladies’ night discrimination are nothing more than a burden on the court system.<sup>217</sup> This argument oversimplifies the issue. First, Rank believes that a de minimis exception for ladies’ night promotions would be warranted because “the motive be-

---

<sup>211</sup> United States v. Virginia, 518 U.S. 515, 531–534 (1996).

<sup>212</sup> See *id.* at 223.

<sup>213</sup> See *id.*

<sup>214</sup> See *id.* at 224.

<sup>215</sup> See *id.*

<sup>216</sup> *Id.* at 228.

<sup>217</sup> *Id.* at 247.

hind them is simply not what state legislatures intended to prevent by enacting such laws."<sup>218</sup> Such a statement is oblivious to the wide-reaching scope of public accommodation statutes. When such statutes are created, it is nearly impossible to determine every kind of potential violation that can occur under them. Just because a law might not *intend* to reach a certain type of practice does not mean that when the law does reach that practice then it is necessarily an exception to the law. Indeed, the wide-reaching language of laws such as the Unruh Act is purposefully broad, intended to apply to and protect against many forms of discrimination. Thus, a straightforward reading of the Unruh Act it includes and prohibits ladies' night promotions.

Rank is correct in her statement that a de minimis exception to ladies' night cases would serve the efficiency purpose of limiting the number of "frivolous" cases.<sup>219</sup> However, this same purpose would be served by explicitly excluding a de minimis exception; that is, by making ladies' night per se injurious, the practice would become less popular, leaving fewer opportunities for "frivolous" cases. Instead of being inefficient, the straightforward application of the law allowing no de minimis defenses would serve its own efficiency purpose in preventing a club from defending itself against a challenge to its ladies' night promotion.

In addition, even if Rank's argument is true, efficiency in the court system, in itself, is not a sufficient reason to permit a de minimis exception for ladies' nights promotions. In *Reed*, the Supreme Court held that the objective of reducing the workload of courts does not excuse an Equal Protection violation.<sup>220</sup> Thus, gender discrimination, in the guise of ladies' nights, should not be excused merely because it is convenient or expedient for the court system to do so.

C. LADIES' NIGHT PROMOTIONS PROMOTE GENDER STEREOTYPES OF BOTH MALES AND FEMALES.

Romantic lady, single baby  
Mmm . . . sophisticated mama  
Come on you disco lady yeah  
It's ladies night and girl  
Stay with me tonight, mama, yeah.<sup>221</sup>

<sup>218</sup> *Id.* at 242.

<sup>219</sup> *See id.* at 244.

<sup>220</sup> *Reed v. Reed*, 404 U.S. 71, 76 (1971).

<sup>221</sup> *Kool and the Gang*, *supra* note 2.

Ladies' night promotions have the unfortunate effect of perpetuating gender stereotypes, which those who seek gender equality should want to avoid. In particular, ladies' nights support the simple stereotype that "men spend money, and women follow." Furthermore, it promotes the stereotypes of predator-like behavior in men who venture to nightclubs and bars on ladies' night, looking for that "single baby" to stay with them that night. The promotion of such stereotypes based on outdated societal norms is certainly not an appropriate objective for any public policy. Indeed, courts have recognized that in order to progress as a society, it is necessary to recognize that once-acceptable gender-based promotions no longer serve a desirable social purpose, and instead hinder social progress. This recognition is why several courts have held that such promotions are against public policy.<sup>222</sup> Ladies' night promotions foster such stereotypes, which one could imagine is antithetical to the struggle for gender equality.<sup>223</sup>

For instance, in *Hogan*, stereotyping played a major role in finding the Mississippi University of Women's admission policy unconstitutional.<sup>224</sup> The admissions policy of allowing only women into a nursing school perpetuated the stereotype that only women should be nurses.<sup>225</sup> The Supreme Court found no legitimate objective justified the university's gender-based admissions policy, partially because that policy perpetuated gender stereotypes.<sup>226</sup> Similarly, there is no legitimate objective to be found in allowing nightclubs and other businesses to continue to foster preconceived roles for men and women at nightclubs and other businesses.

The holding of the *Seattle SuperSonics* case—that ladies' night promotions are an acceptable form of discrimination—is an excellent demonstration of exactly how ladies' night promotions foster gender stereotypes. In the decision, one argument was that men benefit from the discounted ticket prices because they are the ones that are paying for women's tickets.<sup>227</sup> Such a broad generalization supports the notion that men are the

---

<sup>222</sup> See *Abosh v. New York Yankees, Inc.* (1972) No. CPS-25284, Appeal No. 1194, reprinted in Babcock et al., *Sex Discrimination and the Law* 1069, 1070 (in striking down Ladies' Day promotions at New York Yankees baseball games, the court concluded that "the stereotyped characterizations of a woman's role in society that prevailed at the inception of 'Ladies' Day' in 1876" are outdated "in a modern technological society where women and men are to be on equal footing as a matter of public policy.").

<sup>223</sup> Indeed, as previously noted, a primary goal of the women's liberation movement was to erase cultural vestiges based on female stereotypes and to eliminate barriers that have prevented women from playing an equal role to men in society. Ladies' night promotions do nothing to further this goal.

<sup>224</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729–30 (1982).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *MacLean v. First Northwest Indus. of Am. Inc.*, 635 P.2d 683, 685 (Wash. 1981)

ones paying the bills, presumably because they are the income earners. It also supports the outdated notion that males are the only ones that should be paying for things on dates with females. Furthermore, it perpetuates the stereotype that females would not want to attend a sporting event without a male taking them. Finally, men who attend sporting events without a date or with other male friends clearly are not benefitting from the promotion, yet likely represent a sizeable proportion of the spectators.<sup>228</sup>

Another case that approved of the use of gender-based promotions was the *Tuchich* decision in Michigan.<sup>229</sup> In that case, the defendants attempted to justify their gender-based promotions by expressly relying on stereotypes.<sup>230</sup> Defendants argued that their promotion attempted to entice women to use the club during daylight hours, presumably because women were at home with nothing else to do at that time.<sup>231</sup> Such gender-based pricing promotes the stereotype of a female's primary role as being a housewife. And it is possible that in fostering the stereotype that "women don't work," such practices discourage women from finding a job by making them feel as if that is society's predetermined role for them.

Most importantly, ladies' night promotions hinge on two undesirable social stereotypes relating to the role of females in American society.<sup>232</sup> First, ladies' night promotions perpetuate the notion that women should not pay for their own drinks, or, worse, that women are not otherwise capable of paying for a night out on the town. Secondly, ladies' nights implicitly endorse the stereotype of women occupying a second-class role relative to men, by using discounts to lure women into situations where they will often find themselves surrounded by men looking for sexual conquests. Neither of these stereotypes should be promoted by any sort of business, but ladies' night promotions at nightclubs and other entertainment venues may perpetuate those two images of a female's role in society. Ladies' night promo-

---

<sup>228</sup> According to figures provided in *MacLean*, men represented 65% of the spectators at Sonics home games. *See id.* at 684.

<sup>229</sup> *See Tuchich v. Dearborn Indoor Racquet Club*, 309 N.W.2d 615, 617 (Mich. App. 1981).

<sup>230</sup> *See id.*

<sup>231</sup> *See id.* at 617.

<sup>232</sup> It is true that the stereotypes mentioned in this paragraph relate almost exclusively to gender-based promotion discounts involving nightclubs, bars and other entertainment venues that sell alcohol, and that the stereotypes do not necessarily apply to car washes, basketball games and other situations. However, little purpose is served by attempting to weed out certain types of gender-based pricing as acceptable, and others as unacceptable. The wide ranging negative ramifications of the negative stereotypes promulgated by traditional ladies' night events should satisfy a disfavoring view towards all kinds of gender-based promotions, each of which in its own may promulgate stereotypes based on males and females, albeit those respective stereotypes may not be considered to be as harmful.

tions are sending the message to women that they are being objectified, used to lure men into clubs and bars.

Furthermore, ladies' nights promote just the opposite for men: they support the stereotype that men are the "money makers" and have a higher disposable income, and can therefore afford to pay a higher price than women. And, it can also depict men as sleazy and predatory. When a man says "I'm going to the bar tonight, its ladies' night," it is likely to conjure up an image of a man in search of a sexual conquest, rather than that of a man just going to a bar. There is little social value in the promotion of the "roles" that men and women are each supposed to play at nightclubs and bars.

What about generally accepted societal principles between men and women? If general rules of etiquette are to be followed, men are supposed to wait until all women exit the elevator, give up their seat for women on a subway car, and open doors for women when entering a room or building. And even with the significant women's liberation movement of the mid-twentieth century that promoted the goal of equality, these types of "unequal" actions remain generally practiced etiquette in America. So, do ladies' nights fall within this generally accepted sphere of social etiquette that is still practiced in American culture?

The answer is no, it does not. There is a significant difference between a man waiting for all women to exit an elevator and a man paying a higher admission price at a nightclub. In the former, the man *chooses* to practice generally accepted rules of etiquette. Indeed, he is not forced to wait for women to exit the elevator, and many men in today's society probably do not. If a man believes that such gestures, for whatever reason, are inappropriate or archaic, he is freely allowed to not exercise them. In the case of a ladies' night promotion, there is no choice to be exercised. A man who wants to visit a specific venue is *forced* into paying the higher price, regardless of his views on social etiquette.

#### D. ECONOMIC RATIONALES CANNOT OVERRIDE PUBLIC POLICY

There is no doubt that businesses benefit from ladies' night promotions. A ladies' night promotion serves the function of attracting customers of both genders. For example, in the case of sporting events—which typically attract male spectators—women might be more inclined to go to an event at a discounted price. The economic motives of businesses that offer ladies' night promotions, however, should not override the strong public policy reasons for not allowing this form of gender discrimination.

Ladies' night promotions often end up, as a whole, benefitting the *participating* public. Participating businesses benefit by gaining more customers, both male and female, especially on otherwise slow weeknights. Participating men, especially those seeking women, benefit because such promotions help to attract a large amount of females who might not otherwise have gone out that night. Participating females benefit through discounted or free cover charges or drinks.

However, does an economic benefit for a small number of participants make it an acceptable practice considering its negative societal effect of reinforcing stereotypes? The economic gains to companies and private individuals who participate in ladies' night promotions do not offset the public harm to social progress caused by ladies' night promotions. If a club that attracted primarily low-income Latino customers attempted to attract higher-income white customers by hosting a "Whites Night" with discounts for white customers, would that be acceptable? Of course not, and neither should the similar motives that underlie gender-based pricing. Although race is a more overt suspect classification, gender nonetheless remains a quasi-suspect classification as well, and in public accommodation statutes, both are protected from the same types of discrimination by the same exact wording. Discriminatory practices by a private business for its individual gain should never be a legitimate reason for overriding public policy.<sup>233</sup>

#### E. WOULD "GENTLEMEN'S NIGHT" BE OKAY?

Imagine a promotion for a local soccer club meant to attract men to the stadium. Bluntly called "Gentlemen's Night," the promotion would offer men a steep discount on ticket prices, a "VIP" will call window to purchase those tickets, and free food at the concessions when they enter. Surely, when the recipient of the promotion is reversed to being a man, the promotion appears to be significantly more outlandish.

What truly is the difference between a gender-based promotion offering discounts to men and one offering discounts to women? The simple answer is that there should be no difference. However, the reality is that stereotypes held by many people lead them to have a less accepting attitude towards a "Gentlemen's Night" promotion than they would towards a ladies' night promotion. Considering this difference, one of the strongest arguments for why ladies' night promotions are unacceptable is illuminated

---

<sup>233</sup> See *Easebe Enters. v. Alcoholic Beverage Control Appeals Board*, 190 Cal. Rptr. 678, 681 (Ct. App. 1983).

by examining why a ladies' night is acceptable and a so-called gentlemen's night is not.

If one questions prohibitions on ladies' night promotions because the resulting harm is trivial and essentially non-injurious, then one should consider what the comparable impact would be of a gentlemen's night promotion. A ladies' night promotion propagates the same type of harmful gender stereotypes that a hypothetical gentlemen's night promotion would. It sends out the message that women are not welcome at sporting events, that women do not drink beer or enjoy hot dogs, and that sports are a "guys only" activity. Furthermore, it helps to reinforce the stereotype that all males love sports and beer, and possibly implies the anticipated debauchery that comes from combining both sexes in one event (especially when the beer is free). There is a natural bias in the media to ignore situations of male gender discrimination,<sup>234</sup> but perhaps looking at gender-based promotions from both sides can give a more balanced perspective, and can illuminate the possibilities of a slippery slope that is risked when our society sanctions gender-based promotions.

#### V. STATUTES PERMITTING LADIES' NIGHT PROMOTIONS VIOLATE THE EQUAL PROTECTION CLAUSE

When Public Accommodations laws, such as the California's Unruh Act, are interpreted as permitting gender-based pricing promotions like ladies' night, either through interpretation or a de minimis exception, such interpretations of public accommodation statutes are in violation of the Fourteenth Amendment's Equal Protection Clause. This is because those statutes should not pass constitutional muster under the intermediate scrutiny standard that is applied in gender-based discrimination cases.

The Constitution prohibits state governments from denying people equal protection of the law through the Fourteenth Amendment. While the Equal Protection Clause might appear to bar the government from engaging in *any* type of discriminatory conduct, that is not the case. Every law inherently classifies by imposing burdens and conferring benefits on a selective basis (i.e. a child labor law benefits children). What *is* prohibited, however, is engaging in arbitrary or invidious discrimination which cannot be justified on the basis of any legitimate governmental objective. In this particular analysis, we deal with statutes that are being construed to potentially allow gender-based pricing promotions.

---

<sup>234</sup> See, e.g., Noel Sheppard, *If a Male Student Sues for Gender Discrimination, Will the Media Report It?*, News Busters, Jan. 27, 2006, <http://newsbusters.org/node/3779>.

Given the long history of gender discrimination in this country, courts are justifiably suspicious of laws that make distinctions based on gender. Nonetheless, given the physical differences between men and women, the government also realizes that in certain situations a gender classification is somewhat more likely to be legitimate than other classifications, like race.<sup>235</sup> As such, gender classifications are considered quasi-suspect, and for such discrimination to be found acceptable, they are measured under intermediate scrutiny, and the government has the burden of showing "exceedingly persuasive justification."<sup>236</sup> While gender classifications at issue are typically those classifying females, gender classifications that might benefit women at the expense of men are just as quasi-suspect.<sup>237</sup>

Assume a situation in which a state court interprets a public accommodations statute to include an exception for ladies' night promotions, a facially gender-based classification. Would such an interpretation of a public accommodation statute pass constitutional muster under the requisite intermediate scrutiny standard? A defendant attempting to justify such a reading of a state statute must assert that it serves an "important" government purpose. A court would then need to make a conclusion as to how "important" such a classification really is. In the case of gender classification, the classification must serve important governmental objectives and must be substantially related to those objectives.<sup>238</sup>

Already under an intermediate scrutiny analysis, defending a ladies' night exception in public accommodation statutes appears to hit a brick wall. What possible important governmental purpose could be imagined to support the constitutionality of such an exception? Maybe the government could argue that it encourages social interaction between two sexes<sup>239</sup> or that it encourages women to leave the house.<sup>240</sup> Neither argument holds much chance of being considered an "important" state purpose, but both nonetheless seem like they *might* be rational reasons for hosting a ladies' night. Indeed, these two state purposes would likely pass constitutional

---

<sup>235</sup> See, e.g., *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (upholding statutory rape law that penalizes men but not women); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding the constitutionality of the Military Selective Service Act (MSSA), which required men, but not women, to register for the draft).

<sup>236</sup> *Miss. Univ. for Women*, 458 U.S. 718, 724 (1982).

<sup>237</sup> See *Orr v. Orr*, 440 U.S. 268, 282–83 (1979).

<sup>238</sup> See *Craig v. Boren*, 429 U.S. 190, 197–98 (1976).

<sup>239</sup> This was a point argued in *Koire*. See *Koire v. Metro Car Wash*, 707 P.2d 195, 198 (Cal. 1985).

<sup>240</sup> Remember that at the turn of the century, many bars were pretty much reserved for men, and women rarely would go out and socialize at late night entertainment venues. See *Bozarth*, *supra* note 1, at 32.

---

---

muster under a rational basis test review, as used in *Reed*. However, such rational basis test reviews are no longer the standard of review now in gender-based classifications.

Perhaps the strongest argument that a defender of ladies' night promotions could make is that ladies' night promotions, in giving discounts to female patrons, are justified because females earn less money in comparison to men, with the average female earning roughly three-fourths the salary of the average male.<sup>241</sup> This fact likely leaves many females with less disposable income to enjoy leisure activities, such as going out for a drink. Therefore, the government could argue that ladies' night promotions serve the purpose of helping to compensate for the difference in income earning between men and women. While it is still up for debate whether or not a court might find such an argument to be a legitimate state purpose, we will assume that a court would for purposes of this analysis. This is likely the best argument that would allow an intermediate scrutiny analysis to move forward in the court.

Following a legitimate assertion of a state interest, the government would need to show that the discrimination inherent in a ladies' night was necessary in order to achieve these goals. In other words, if a non-discriminating or less discriminating method of achieving the same goal is available, then the facially discriminatory gender classification is likely not valid. Is there a less discriminatory means of achieving the desired goal? Perhaps not. The classification, even if it is supported by data, is still overbroad. It is based on a sweeping generalization that *all* men earn more than *all* women. All women, even those that are high earners and have plenty of disposable income to spend on leisure activities, benefit from the price discount. And, on the other end, all men, even those who are low earners and do not have disposable income to spend on leisure activities, miss out. The legitimate government interest to "compensate for the reduced earning power of women" should not be permitted to pass under intermediate scrutiny.

The problem is not gender, but rather earning power itself. While facts support that most men earn more than most women, such is not an *inherent* difference. If the government wants to compensate for reduced earning power, it should not itself discriminate based on generalizations between the sexes. It should rather attempt to address the problem of accounting for reduced earning power *regardless* of gender. How the government could go

---

<sup>241</sup> Institute for Women's Policy Research, *The Gender Wage Gap: 2009*, <http://www.iwpr.org/pdf/C350.pdf>.

about doing so is beyond the scope of this note. What should be clear, however, is that even if compensating for the difference in female earning power is a legitimate purpose, it serves an overbroad class and should not allow the government to permit ladies' night promotions. If the government wishes to compensate for reduced earning power, it should do so among all people with reduced earning power, not just one gender in which not every individual member of the group has a low earning power.

## VII. CONCLUSION

Ladies' Night promotions should not be considered a constitutional form of gender discrimination. Indeed, no form of gender discrimination – just as no form of discrimination against any suspect class – should be considered acceptable. Ladies' night promotions, like all gender-based classifications, reinforce and perpetuate stereotypes, often the most negative ones. While this note largely argues against permitting a specific form of gender discrimination – ladies' night promotions at places of public accommodation – the argument made here should not be limited to these narrow cases. Ladies' Nights Law is a good case in point, a backdrop against which to illustrate the social policy and constitutional issues that gender-based classifications of any kind create. Promotions based on archaic stereotypes do nothing but hinder the progress our society makes while striving for gender equality.