April 7, 2019

Dear readers,

It is my pleasure to present this article at the Workshop on Regulation of Family, Sex, and Gender. Thank you to Mary Anne for the invitation! We welcome all comments and critiques of this article as well as suggestions for future research. Liz and I are contemplating follow-up projects, which might include an essay further elucidating this history’s implications for contemporary debates, a short piece on state action claims in feminist public accommodations litigation, and/or a piece on challenges to “private” clubs.

Sincerely,

Elizabeth Sepper* & Deborah Dinner**

SEX IN PUBLIC

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 sexual minorities 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, like Rotary and Jaycees, and were excluded altogether from many professional bodies, like 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. At the time “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 space. 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.

** Associate Professor of Law, Emory University School of Law. We are grateful to David Cohen, Deborah Widiss, Fred Smith, Robert Schapiro, Meredith Render, Maya Manian, Ron Levin, Ron Krotoszynski, Jill Hasday, Katie Eyer, Jessica Clarke, Deborah Brake, Meghan Boone, Amna Akbar, Rick Brooks, Mary Anne Case, and Susan Appleton for their helpful comments. Thank you to participants in law school faculty workshops at Alabama, Drexel, Temple, Rutgers-Camden, Emory, and Washington University.

INTRODUCTION

One winter’s evening in 1969, Carolyn Anderson suffered humiliation over a perfectly ordinary cocktail. Anderson planned to meet her husband at P.J. Clarks, 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. 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.” She eventually told the bartender she preferred her money to the drink and left. The treatment was not new to Anderson, but the insult stung this time, perhaps because she found the bartender “unusually threatening.” Perhaps the date made a difference: just three years earlier, advocates had founded the National Organization for Women (NOW) to pursue equal opportunity under law. Radical activists had

---

1 Letter from Carolyn M. Anderson to Faith Seidenberg, Apr. 16, 1970 (on file with Schlesinger Library, Harvard University, Faith Seidenberg Papers [hereinafter Seidenberg Papers]).

2 Id.

3 Id.
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 “educate herself regarding her rights,” and she asked Seidenberg: “What are the laws governing the serving of a lone woman at a commercial bar?”

The answer to Anderson’s question would have disappointed her: at the time, no law offered recourse against sex discrimination in public accommodations—the legal term for public-facing entities other than the workplace. State laws passed after the Civil War and Title II of the newly enacted Civil Rights Act of 1964 barred race, national origin, and religion discrimination in public accommodations, but no law included “sex.” 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.” 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 adult women. Perhaps most notably, United Airlines flew “Executive Flights” reserved for male customers.

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, led protests in the streets, litigated in courts, and advocated the passage of state laws prohibiting sex discrimination.

---

4 Id. at 2.
5 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.
6 Id. at 249-53.
7 Friendly Skies of United Hostile to Women, NOW ACTS (NOW), Fall 1968, at 3, 10 (on file with Northwestern University Library, Karen DeCrow Papers [hereinafter DeCrow Papers]).
By decade’s end, thirty-one states and many more cities barred sex discrimination in public accommodations. Today, all forty-five state public accommodations laws reach sex discrimination. While statutory language varies, a representative statute encompasses 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.” As a general principle, public accommodations laws apply to any entity that enters commerce and opens to the world at large.

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 ranging from a cocktail at a bar to a loan to buy a car. Sex integration was hoped, or feared, to transform institutions central to dominant masculinity from baseball fields to bathrooms.

The history recounted in this Article provides a new and important touchstone for pressing legal controversies. Debates continue to rage today over sex in public, from same-sex wedding cakes and the 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.

---

8 See infra notes 164–164 and accompanying text.
11 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 laws also apply to public-facing commerce of otherwise private clubs, for example, a bake sale at an otherwise exclusive private membership club.
12 The single piece of historical scholarship on point, Georgina Hickey, Barred from the Barroom: Second Wave Feminists and Public Accommodations
The centrality of public accommodations statutes to women and men’s experience of the gendered public square has been overlooked in scholarship on feminist legal advocacy, which has focused on employment discrimination, reproductive freedom, and equal protection under the Fourteenth Amendment. Moreover, formal legislative history that might explain statutory meaning typically is lacking. And the cultural memory of this sex-segregated public and its (partial) undoing has faded.

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 in the 1970s originated in older periods of anxiety over gender roles 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 law 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.


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.

129 YALE L.J. --- (forthcoming)
and sexuality. Sex segregation of public space derived from three sources: the separate spheres ideology of the mid nineteenth century that assigned women to the home and men to the market; heterosexual norms that emphasized respectable white women’s sexual vulnerability while simultaneously constructing other women as sources of sexual disorder; and defensive impulses to preserve dominant masculinity in male-only spaces from gyms to barber shops.

Over the course of the 1970s, feminist advocacy challenged these ideologies to dismantle much of the sex segregation and exclusion that characterized public accommodations—as Part II details. Just as it had for the civil rights struggle, public accommodations served as kindling for feminist mobilization. Sex discrimination in public was pervasive—structuring interaction between the sexes and shaping relations among women. Women of varying backgrounds recognized its injustice and sought equality through public accommodations laws.

While 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 crucial dimensions: challenges to the notion of a “woman’s place”—a remnant of separate spheres ideology, rejection of heterosexual dependency, and destabilization of dominant masculinity. While 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 as well as bar customs and dress codes that enforced compulsory heterosexuality, and 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 a gender-differentiated public.
The advent of laws prohibiting sex discrimination in public accommodations began to deconstruct the legal architecture of compulsory heterosexuality. As Part IV reveals, for feminist activists, equality in public accommodations meant delinking women’s identity as market actors from their sexuality and marital status. Women, they 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 what import sex integration held for masculinity. Ultimately, however, resistance from legislatures, courts, and the public blunted the meaning of sex equality in public at its most radical edges—to yield “separate but equal” in sports, restrooms and other significant spaces of socialization.15

Today, the meaning of sex in public remains hotly contested. Flashpoints for legal controversies include the ongoing regulation of cisgender women in contexts ranging from public breastfeeding16 to sex-segregated sports,17 of transgendered individuals’ use of public facilities consistent with their identities,18 and of gay and lesbian people’s

---


access to commercial goods and services. The Conclusion identifies insights from the history of sex in public accommodations law that the burgeoning scholarly literature in this field should pursue. In the absence of a history of sex in public, legal scholars and courts have drawn strained comparisons between the experiences of sexual minorities in contemporary market conditions and African-Americans in the 1960s South. 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. 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

19 See, e.g., Masterpiece Cakeshop v. Colorado Civil Rights Commission 137 S. Ct. 2290 (2017) (finding that the government had shown religious animus toward baker, but not resolving broader challenges).


22 See, e.g., Br. for Petitioners at 50–61, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 137 S. Ct. 2290 (2017) (No. 16-111) 2017 WL 3913762, at *50–61 (arguing that the existence of other bakeries renders the government interest in public accommodations law less than compelling).
monopolistic exclusion but the dignitary and material harms of less-than-full inclusion in public life.

This history provides a missing link between the African-American civil rights movement and the LGBT rights movement: the women’s liberation movement. As this history shows, at the time “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 and through the mid-1970s. 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 business meetings of male executives. Other places, both working class taverns and department store men’s grills, kept women out altogether to preserve a space for homosocial conviviality. Often, only if a male “escort” accompanied her could a woman access commerce—a room at a hotel, a coffee at a diner late at night, or a cocktail at a bar. Eating and drinking establishments throughout U.S. cities posted signs, “No Unescorted Ladies Allowed”—out of fears of prostitution and single women’s sexual immorality.

Many organizations that shaped civic life subordinated women and

---

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

24 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 (noting “hundreds of restaurants and hotels which discriminate against women” in New York City).


26 NOW New York City Goals, supra note 23.
girls. Dining, professional, and athletic clubs, though 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. Leisure activities were often separate and radically unequal. Supermarkets ran children’s contests—named, for example, “Believe in a Boy.” Boys’ scouting and sports received significantly more funding and were “vastly superior.” Athletic facilities restricted women’s admission, and where they existed, girls’ and women’s teams received worse playing times and facilities.

Financial institutions also discriminated in ways that undermined women’s economic independence. Into the 1970s, single women were held to higher standards than men when applying for credit. Lenders routinely discounted married women’s income. Credit companies subsumed women’s economic identities under those of their husbands. Banks and stores refused to issue credit to married women in their own names. Indeed, any woman who married found her credit canceled.

This Part explains the origins of sex segregation of public accommodations. As Section A shows, as women increasingly entered public places from the mid-nineteenth through the twentieth centuries, a separate spheres ideology yielded sex segregation. It treated respectable women (usually defined as white and middle-class) as vulnerable and

---

29 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])
30 Pennsylvania Girls Gain Equal Rights in Public School Sports, PENNSYLVANIA NOW (Penn. NOW, Erie, PA), Oct. 1974, at 3 (reporting on almost tenfold discrepancy between boys’ and girls’ sports) (on file with University of Pittsburgh, Jean Witter Papers [hereinafter Witter Papers]).
31 Statement of Sharyn Campbell, D.C. Comm’n on the Status of Women, before the Economic Development, Manpower, & Labor Committee of the D.C. City Council 1 (June 7, 1973) [hereinafter Campbell Statement].
34 See Campbell Statement, supra note 31, at 1 (“Single women with credit accounts have traditionally lost their credit status upon marriage, even if nothing changed but their last name.”).
in need of protection outside the domestic sphere. As Section B explains, concerns about sexual morality underscored policies in bars, restaurants, and hotels that treated unescorted women as sexual nuisances. Women’s relationship with the public frequently was constructed by reference to their attachment to a man. As Section 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 Male Public: Preserving Separate Spheres

In 1969, the Connecticut Intercollegiate Student Legislature—a mock legislature—debated amending state law to allow women to sit at bars. “Joseph Coyne of Fairfield University spoke for the majority, most of them males, in ‘Bemoaning the passing of the buffalo herds, the wide open spaces and the last great piece of Americana—the men’s bar.’” Another 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.”35 A woman student congratulated the gentlemen who “preserved their shaky masculinity.”36

This exchange highlights the first rationale for sex segregation in public spaces: that the public belongs to men, and the home to women. This “separate spheres” ideology, which accompanied the advent of industrialization in the mid-nineteenth century, rigidified what were previously more fluid boundaries between the public and private. It assigned men to the economic and political realms and women to the domestic realm.37 Middle-class, white women were assumed to be caregiving and dependent, whereas men sought competition and individualism in the world of industrial capitalism.38 Notwithstanding the fact that women’s confinement to the home was always a myth even in the nineteenth century,39 the ideal of sex-separated roles, places, and inter-

35 Male Students Win: Limit Bars to Men, HARTFORD COURANT, Mar. 9, 1969 (on file with DeCrow Papers).
36 Id.
ests lived on well into the twentieth century in places of public accommodation.

The growth of mass leisure and commerce from the late nineteenth century through the post-World War II era threatened separate spheres ideology. Though 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. 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 pool-rooms, gyms, barber shops, sports teams, lodges, and saloons. 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 most places would not permit unescorted women. By the beginning of the twentieth century, an increasingly large number of women came downtown as shoppers and began to work. Mixed-sex socializing in dance halls, cafes, and amusement parks took off in an urban culture developed around unmarried working women. As the work day radically shortened, these leisure time activities grew in importance.

Social anxieties about gender integration in public led to the creation and expansion of male-only venues. Department stores and hotels opened grills that served only men. Perhaps nowhere was the male public culture so evident as in the professional and civic organizations that barred women—from bar associations to press clubs to fraternal

41 Peiss, supra note 39, 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.”).
42 Jan Whitaker, Service and Style: How the American Department Store Fashioned the Middle Class 222 (2006) (before department stores, “toilets for women in business districts were scarce, if they existed at all” as were restaurants).
44 See Peiss, supra note 39, at 6-7 (describing how working class young men and women drove the development of heterosocial amusements at the turn of the twentieth century).
46 Whitaker, supra note 42, at 49.
organizations. As social life grew more sex-integrated, ongoing separation preserved business as a masculine sphere.

Like men-only spaces, credit practices reproduced men’s longstanding dominance of the public. Lenders, including retail stores, assumed single working women were temporarily in the workforce and thus poor credit risks. They also refused to issue credit cards and loans to married women in their own names. Such discrimination prevented married women from building independent credit history and contributed to the economic hardship of divorced women.

As the feminist movement would uncover, credit practices presumed women’s dependence and perpetuated the common law of coverture well into the 1970s (and beyond).

In contrast to men’s dominance, the creation of women-only spaces reflected perceptions of women’s vulnerability. 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. They reserved spaces for women designed “to offer protective havens in the dangerous public

---

47 CYNTHIA EPSTEIN, WOMEN IN LAW 257–61 (1981) (discussing the development of women’s bar associations due to women’s exclusion from existing organizations).

48 Campbell Statement, supra note 31, at 4 (“[W]hen 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.”).


50 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 (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).

realm.”52 The separation of restrooms during this period, for example, derived from concerns about physical weaknesses of women and modesty and sexual morality between the sexes.53 Sex segregation in public accommodations aimed to protect “good” women from a singular danger: the company of men.54 As the next Part shows, this purported fragility of women and girls co-existed with fears of their predatory sexuality.

B. “The Myth of the Evil Female”55: 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 being accosted and solicited by streetwalkers.”56 Maintaining a “better establishment” required this custom. Law, however, was “one more consideration,” Frowenfeld explained. To maintain 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.” 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.”57

A long legal tradition underpinned proprietors’ exclusion and regulation of women to avoid sexual impropriety. In the late nineteen and early twentieth century, some states enacted laws prohibiting women

53 Id. at 40–55; see also Alexander Kyle Davis, Equal but Separate? Building Gender, Sex, and Status into Public Restrooms in the United States, 1883–2015 54 (2016) (unpublished dissertation on file with authors) (suggesting that gendered patterns of commerce and sociability made businesses adopt sex segregated restrooms by custom initially).
56 Letter from Charles E. Frowenfeld, Director of Catering, Belmont Plaza to Ira Glasser, NYCLU, June 9, 1970 (on file with DeCrow Papers).
57 Id.
from drinking at or loitering in a saloon. 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. At the time, even entering a saloon, restaurant, dance hall, or amusement park could mark a woman as a prostitute and risk her reputation. From New York to Chicago to Miami, city officials, white male elites, and entrepreneurs organized urban space into realms of respectability and vice in ways that tracked racial and ethnic segregation. They constructed African-American and immigrant neighborhoods as at once sexual playgrounds for white voyeurs and sites of criminality. Police, like social reformers, viewed young women of color as inherently licentious, targeting them with false prostitution and other sex-related charges.

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. After Prohibition’s repeal in 1933, states no longer banned women from drinking establishments altogether. And by mid-century, “women of good character” could enjoy libations and meals out without “besmirch[ing] their reputations.” But, said the Supreme Court in Goesaert v. Cleary in 1949, “[t]he fact that women may now . . . indulge in vices that men have long practiced, does not

---

58 See, e.g., Madisonville v. Price, 94 S.W. 32 (Ky. 1906) (making it unlawful for any infant or female to drink in a saloon or remain therein over five minutes).
59 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”).
60 MURDOCK, supra note 40, at 63, 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).
61 JULIO CAPO JR., WELCOME TO FAIRLYAND: QUEER MIAMI BEFORE 1940, at 24-27, 46-57 (2017); CYNTHIA M. BLAIR, I’VE GOT TO MAKE MY LIVIN’ 86-94 (2010); CHERYL D. HICKS, TALK WITH YOU LIKE A WOMAN: AFRICAN AMERICAN WOMEN, JUSTICE, AND REFORM IN NEW YORK, 1890-1935, at 204-05 (2010).
62 HICKS, supra note 61 at 205, 211-13; CAPO, supra note 61, at 35-36.
63 PEISS, supra note 39, at 91; see also MURDOCK, supra note 40, at 7, 5 (by the 1920s, “growing acceptance of women’s drinking” in public “dismantled the traditional linking of masculinity with drink”).
64 CHRISTINE SIMONDO, AMERICA WALKS INTO A BAR 234 (2011) (observing that having ventured out to speakeasies, many middle- and upper-class women were reluctant to return to the past).
preclude the States from drawing a sharp line between the sexes, certainly, in such matters as the regulation of the liquor traffic.”

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. Many municipalities enacted laws during World War II, when cultural anxieties escalated regarding young women’s casual sex with servicemen—extending beyond prostitution to the phenomenon of “pickup girls”—and venereal disease. 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 1968. In many other states, no law specifically regulated women, but extensive liquor licensing regulation required licensees to avoid “disorderly” conduct at their establishments. Disorder took the form of having on their premises “prostitutes, female impersonators, or other persons of ill repute.”

Especially in places subject to licensing, women’s sexuality and dependency became closely linked in custom and law. The shift toward heterosociality at the beginning of the twentieth century, historian Kathy Peiss argues, resulted in restaurants, bars, and other amusements inviting women into the public, but then simply “reformulated women’s subordination,” requiring women to define themselves by “heterosexual and marital relationships.” Between the two world

---

66 335 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).

67 Compare Massachusetts, which prohibited particular liquor license-holders from admitting women, Laws Will Free Women’s Spirits (In Male Bars), BOST. 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. Com., Alcoholic Beverage Control Bd. v. Burke, 481 S.W.2d 52, 53–54 (Ky. 1972).


71 One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control, 235 A.2d 12, 14 (N.J. 1967).

72 PEISS, supra note 39, at 8; LEWIS ERENBERG, STEPPIN’ OUT: NEW YORK NIGHTLIFE AND THE TRANSFORMATION OF AMERICAN CULTURE, 1890–1930 136
wars, “the ‘couple on a date’ became an increasingly important cultural construct” offering a way to avoid promiscuous mixing at new places of leisure.\textsuperscript{73} 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.\textsuperscript{74}

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

C. “Man’s Last Retreat”\textsuperscript{75}: 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.”\textsuperscript{76} 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.”\textsuperscript{77} In so doing, it invoked a theme that sounded throughout the twentieth century—the loss of dominant masculinity to feminine siege.\textsuperscript{78}

\footnotesize
(1981) (noting that middle-class establishments required escorts or placed physical barriers between unacquainted men and women).
\textsuperscript{73} PEISS, supra note 39, at 105; see generally CHRISTINA SIMMONS, MAKING MARRIAGE MODERN: WOMEN’S SEXUALITY FROM THE PROGRESSIVE ERA TO WORLD WAR II (2011).

\textsuperscript{74} See, e.g., Littauer, supra note 68, at 58 (“Under intense government pressure to reduce bar-based sexual exchange, many bar owners banned ‘unescorted’ women from bars entirely.”). In the 1950s, many of the same laws that regulated women’s gender performance came to be used to suspend or revoke liquor licenses of establishments where gay people congregated. Rhonda R. Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, 50 HASTINGS L.J. 1015, 1133 (1999).

\textsuperscript{75} MURDOCK, supra note 40, at 72 (quoting contemporary news-writer describing women going to barber shops for bobs in the 1920s).


\textsuperscript{77} Jack Thomas, Play Ball, Girls Told; Men Cry Foul, BOSTON GLOBE, Apr. 7, 1974.

\textsuperscript{78} 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 12, at 396, this rhetoric pre-dates the feminist movement.
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 women’s suffrage movement, and the immigration spawned by U.S. imperial projects all threatened dominant conceptions of white masculinity and femininity.79 Everywhere men looked, it seemed, women had taken on previously “masculine” pursuits and traits from wage-earning to athletics to short hair.80 Americans generally agreed that men too had changed, replacing their “instinct of pugnacity” with an “effete” nature.81

In response, men and the places that served them self-consciously re-claimed 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.82 Barbershop signs avoided the flock of women seeking bobbed hair in the 1910s and ‘20s.83 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.84 Through homosocial spaces, men could escape the formal rules of dress and decorum that interaction with women required.85 At a time when the sexes were beginning to seem similar, smoking and cursing—masculine behaviors unseemly for women—filled men’s spaces.86

---

80 Kristi Andersen, Women and Citizenship in the 1920s, in WOMEN, POLITICS, AND CHANGE IN TWENTIETH-CENTURY AMERICA 184, 184 (Louise A. Tilly & Patricia Gurin, eds. 1990).
82 WHITAKER, supra note 60, at 136.
83 MURDOCK, supra note 40, at 72 (noting that male customers felt overwhelmed by women’s magazines).
84 Mary Ann Clawson, Nineteenth-Century Women’s Auxiliaries and Fraternal Orders, SIGNS, Autumn 1986, at 40, 42. See also Mark A. Swienicki, Consuming Brotherhood: Men’s Culture, Style and Recreation as Consumer Culture, 1880–1930, 31 J. of 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.”).
85 WHITAKER, supra note 42, 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.”).
86 See MICHAEL S. KIMMEL, HISTORY OF MEN: ESSAYS ON THE HISTORY OF AMERICAN AND BRITISH MASCUINITIES 48 (2005) (discussing men’s avoidance...
The development of modern sports and children’s activities proved an essential tool to “remasculinize” middle-class men.\textsuperscript{87} Organizations like the Boy Scouts and YMCA formed with the explicit goal of countering the “feminization” of boys.\textsuperscript{88} For “normal” men and boys, participation in sports became mandatory.\textsuperscript{89} The link between sports and masculinity only tightened over the course of the next half century. In 1971, popular adventure novelist Zane Grey could proclaim “Every boy likes baseball, and if he doesn’t he’s not a boy.”\textsuperscript{90}

The construction of sports as masculine, and therefore by definition “unfeminine,” inhibited women’s play.\textsuperscript{91} The science of sex difference emergent 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 when playing defense as grabbing was “unladylike.”\textsuperscript{92} 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.”\textsuperscript{93}

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 the Derby is “about all we boys have left to ourselves any more”; if she were to build the winning car, “100,000 or more boys would be humiliated to no end.”

And gender norms would be upended—“the only thing left for the American boy would be for him to take up a cake baking contest or embroidery competition.” 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.” 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.

***

Sex segregation still was 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 separate spheres ideology, resist the regulation of sexuality, and confront the sanctity of masculine space.

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 had codified and extended to newly freed slaves the common law duty of businesses open to the public—ranging from inns and common carriers to barbershops and theaters—to provide equal access to

---

95 Id.
96 State v. Hunter, 300 P.2d 455, 458 (Or. 1956).
97 See infra Part V.A.
But after the federal government withdrew its oversight under the Compromise of 1877, Southern states legislated Jim Crow. In the North, segregation and subordination reigned by custom in many public accommodations—even where statutes precluded it. While the 1920s saw sporadic efforts to resist racial segregation, African American activists and their allies escalated protests in Northern cities during World War II. They lobbied for, strengthened, and litigated under state laws barring race discrimination in public accommodations.

In the early 1960s, African Americans faced violence to sit-in at restaurants and department stores across the South and, at long last, won the passage of Title II of the federal Civil Rights Act. By 1968, most states barred race, national origin, and religious discrimination across the full range of public places.

State statutes prohibited exclusion, segregation, and mistreatment in the public square—in spaces as varied as restaurants, saloons, roller-skating rinks, dances, spas, banks, and theaters. Racial minorities in southern states lacking public accommodations laws had recourse

---

98 Singer, supra note 20, at 1374–75.
against only the more narrow list of public accommodations enumerated in Title II—hotels, eateries, gas stations, and places of entertainment.\footnote{42 U.S.C. §2000a(b).} Courts, however, interpreted the federal statute liberally consistent with its civil rights goal. A snack bar on the premises, for example, meant hospitals fell within the scope of federal law.\footnote{United States v. Med. Soc. of S.C., 298 F. Supp. 145, 152 (D.S.C. 1969)} Relying on Title II’s reach to “places of entertainment,” African-Americans successfully gained access to membership in clubs like the YMCA and sued for participation in youth football leagues.\footnote{E.g., Nesmith v. YMCA of Raleigh, N.C., 397 F.2d 96 (4th Cir. 1968); Smith v. YMCA of Montgomery, 316 F. Supp. 899 (N.D. Ala. 1970); United States v. Slidell Youth Football Ass’n, 387 F. Supp. 474 (E.D. La. 1974); 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).} 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, in the wake of a feminist movement reinvigorated by the black freedom struggle.\footnote{SARA MARGARET EVANS, PERSONAL POLITICS: THE ROOTS OF WOMEN’S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT 83-90, 167-86 (1979).} African-American women laid the institutional groundwork for the feminist movement. The 1963 March on Washington prompted their pioneering protest of sex subordination in public. Although black women such as Rosa Parks, Secretary of the Montgomery NAACP, and Diane Nash, the leader of the SNCC’s direct action activities, had put their lives on the line in the struggle for black freedom, A. Philip Randolph and other male organizers refused to give women leaders more than token representation.\footnote{Carol Giardina, MOW to NOW: Black Feminism Resets the Chronology of the Founding of Modern Feminism, 44 FEMINIST STUD. 736,740-48 (2018).} 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 face broader protest as part of the soon-to-come feminist public accommodation campaign. Murray wrote an open letter to Randolph arguing that discrimination because of sex like race did “violence to the human spirit.” She explained: “It is as humiliating for a woman reporter assigned to cover Mr. Ran-
dolph’s speech to be sent to the balcony as it would be for Mr. Randolph to be sent to the back of the bus.”

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

Public accommodations held a prominent place in NOW’s early agenda, on a par with employment opportunity, the Equal Rights Amendment (ERA), childcare, and women’s representation in the media, politics, and religion. Feminists highlighted the injustice of sex segregation in public places by invoking racial segregation in the trains and at the lunch counters of the South. 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.

While public accommodations activism was not a priority of the black feminist organizations that emerged in the early 1970s, African-American women played a role in NOW and women’s liberation protests. 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. Florynce Kennedy, another of NOW’s founders, understood this reality well. Before 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 the second African-American

---

110 Id. at 741-43
111 Id. at 753, 756. DOROTHY SUE COBBLE ET AL., FEMINISM UNFINISHED: A SHORT SURPRISING HISTORY OF AMERICAN WOMEN’S MOVEMENTS 72 (2014).
112 See id. at 764.
113 Call to 1968 NOW National Conference 2 (n.d.) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University, Dolores Alexander Papers [hereinafter Alexander Papers]).
woman to graduate from Columbia Law and a ground-breaking criminal and civil rights attorney. She participated in feminist public accommodations activism in the early 1970s, sometimes schooling white women in protest tactics. 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’” while 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.

Though 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. To even experience discrimination in public accommodations in the first instance, moreover, one had to have money to spend in the market. Middle-class white women’s marital status and racial privilege, as Kennedy admonished a group she was instructing in protest tactics, also protected their physical security.

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. Employed as an educational researcher, DeCrow found herself the only woman in the class when she began law school in 1969. She wrote to her mother, “The fellows in my class ... tell me I should go home and cook. It is

---

116 Achbar, supra note 115; Martin, supra note note 115.
119 See, e.g., Minutes, 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).
120 Letter from Karen DeCrow to Joseph Hawley Murphy, N.Y. Comm’r of Tax (Oct. 16, 1968) (on file with DeCrow Papers).
enough to inspire me to get all A’s and be first in the class!”

Faith Seidenberg, another NOW member and civil rights lawyer, also was a key figure. By the late 1960s, Seidenberg had worked as a public defender, safeguarded registration of black voters in the South, and filed a landmark lawsuit challenging sex-segregated job listings. 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.

In 1969 and 1970, NOW—often joined by other groups—conducted nationwide protests. 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. 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.

126 See, e.g., Memorandum from Karen DeCrow to Aileen Hernandez (Mar. 6, 1971) (on file with DeCrow Papers) (reporting 20 cities); Memorandum from Mary Jean Robson, supra note 125, at 1 (Chicago); Chusmir, supra note 24 (Miami); Handwritten Note of Karen DeCrow (noting Albuquerque, Oregon, Boston, Los Angeles, Seattle, and Minneapolis) (on file with DeCrow Papers); Memorandum from Karen DeCrow to NOW Board of Directors (Mar. 21, 1969) (on file with DeCrow Papers) (Atlanta).
127 For investigations of scouting and YMCA/YWCA, see Memorandum from Gerry O’Kane, supra note 29, at 1 (describing Des Moines NOW Chapter report); The Spokeswoman, Dec. 1, 1970, at 8 (Sacramento) (on file with Witter Papers).
By the spring of 1970, feminist activists had made significant progress. United Air Lines discontinued its men-only flight. Bars from the Yankee Doodle Tap Room in Princeton to the Squire Room of the Fairmont Hotel in San Francisco integrated. Department stores from Miami to Chicago succumbed. 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.

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.” NOW’s protests produced just such evidence.

Feminists combined protest with litigation. The most advantageous doctrinal route was unclear, and they experienced many setbacks even as they won some important victories. Following the path trod by civil rights lawyers in the 1940s and ’50s, the earliest challenges relied on state statutes codifying common law requirements of equal access to public accommodations. Ultimately, however, feminist lawyers hoped to ensure equal access across the nation under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

Litigating under the Equal Protection Clause presented two significant hurdles. First, the Civil Rights Cases had confined the reach of the Equal Protection Clause to state action. Yet most public accommodation discrimination involved customary practices of private businesses. Litigants had to show that the custom of sex classification

130 Id.
133 Memorandum from Karen DeCrow to NOW Officers, Board Members, & Chapter Conveners, re Week of Feb 9–15, 1969 2 (n.d.) (on file with DeCrow Papers).
amounted to state, not private, action. Second, at this time, the Supreme Court applied only rational basis scrutiny to sex classifications and had yet to find any sex classification unreasonable. While a handful of district courts had struck down laws as violating women’s right to equal protection, no court of appeals had done so. Indeed, “the separate treatment of women in the regulation of liquor dispensing establishments was uniformly held to be a valid classification.”

Improbably then, in 1970, NOW won the first case it filed under the Equal Protection Clause. The defendant was McSorley’s Old Ale House, a New York City institution that had never admitted women. Over its 114 years, the dark and dingy ale house had hosted a who’s who of public figures, including playwright Eugene O’Neill, poet Dylan Thomas, and city mayors. To initiate the suit, Faith Seidenberg and Karen DeCrow entered McSorley’s and experienced its most famous tradition—patrons shouting “No Women!” While they were shown the door, Seidenberg and DeCrow had gone further than McSorley’s woman owner, who had never stepped foot inside.

McSorley’s was a ground-breaking victory for the early feminist movement. Granting summary judgment to the plaintiffs, the district court found state action in the bar’s exclusion of women due to the state’s “pervasive regulation” of the sale of alcohol—despite the fact that “[t]here was no state enforcement of the refusal to serve, no use of state property, and no performance of a governmental function.” More significantly, McSorley’s held that discriminating based on sex was irrational, though the Supreme Court had yet to do so. Manifesting the “bite” that would become characteristic of the Court’s rational basis

---

136 Mink, supra note 132, at 400 n.15 (“The Court has consistently maintained that classification by sex is reasonable and within the police power of the state.”).


138 White v. Fleming, 522 F.2d 730, 730 (7th Cir. 1975) (reviewing a few cases after McSorley’s that bucked the trend).


140 Id.

141 Reunions: Ladies’ Night, NEW YORKER, Mar. 9, 2009.

142 Id.

jursiprudence, the court concluded that the policy could not be justified by the “history and tradition on its side” or the preference of male patrons for a “retreat from the watchful eye of wives or womanhood.”

McSorley’s appealed but withdrew its appeal after the New York City Council outlawed sex discrimination in public accommodations. Having hoped to go to the Supreme Court with a “decision for 50 states,” Seidenberg and DeCrow were disappointed. But the litigation did more than open the doors of this single bar. It generated considerable publicity—on CBS national news and the front page of the New York Times—catalyzing antidiscrimination legislation. Its powerful rejection of sex stereotyping was cited in important early sex discrimination cases—including Sail’er Inn v. Kirby, the first state supreme court decision striking down a sex classification on equal protection grounds, and Craig v. Boren, the first U.S. Supreme Court decision in which a majority applied intermediate scrutiny to sex discrimination.

For a few years following McSorley’s, feminists advanced constitutional claims against bars, athletics, and civic organizations under the Equal Protection Clause. They notched both wins and losses in cases alleging that sex discrimination in children’s baseball was unconstitutional state action, pointing to the use of city facilities, preferential

145 McSorley’s, 317 F. Supp. at 605.
147 Margaret Crimmins, Liberating McSorley’s, WASH. POST, Jul. 1, 1970, at B2; see also Letter from Seidenberg to Boylan, supra note 146 (expressing disappointment) (on file with Seidenberg Papers).
148 Letter from Karen DeCrow to Juliette Lipschultz (Jul. 5, 1970) (on file with Northwestern University, Juliette Lipschultz Papers [hereinafter Lipschultz Papers]).
scheduling, and the like. Confronted with discrimination by civic organizations, plaintiffs across the country mounted creative—and occasionally successful—state action arguments. In a number of these cases, courts carefully scrutinized sex classifications and uncovered gender stereotypes—anticipating the Supreme Court’s move to heightened scrutiny for sex under the Equal Protection Clause. By the mid-1970s, however, while constitutional doctrine barring sex discrimination had emerged, the Supreme Court had brought the brief period of robust state action doctrine to an end, foreclosing equal protection claims against public accommodations.

As they litigated, feminists also mobilized for federal, state, and local legislation. 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. Due to NOW’s advocacy, the Women’s Equality Act—a bill which would have amended several federal statutes to advance women’s rights including Title II—was introduced in 1970 and 1971. Nonetheless, the Act failed to progress. Once the ERA passed

---

153 See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176–77 (1972) (requiring that the state “foster or encourage racial discrimination” or be “a partner or even a joint venturer in the club’s enterprise” in order to find state action).
in 1972, the feminist movement turned its energies toward state ratification.158

City councils and state legislatures proved more responsive.159 In June 1969, Pittsburgh passed the nation’s first law against sex discrimination in public accommodations,160 thanks to an alliance of women’s groups spearheaded by Wilma Scott Heide, a nurse educator and NOW leader.161 Chicago followed later that year and New York City in 1970.162 Cities near and far enacted similar ordinances.163

State legislative change occurred swiftly. Colorado amended its public accommodation statute to reach sex discrimination in 1969.164 Iowa, New York, and New Jersey adopted similar statutes in 1970.165 Bills passed steadily in states as geographically diverse as West Virginia, Nebraska, and Utah. By the end of the 1970s—the period that is the subject of this Article, thirty-one out of thirty-nine state statutes banned sex discrimination in public accommodations.166 Title II has

---


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

161 Report from DeCrow to NOW National Conference, supra note 129, at 3.


never been 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.

III. CHALLENGING “A WOMAN’S PLACE”

Debates over sex segregation in public centered over a “woman’s place” in the market. By the late 1960s, middle-class women increasingly participated in the paid labor force and marketplace. But the separate spheres ideology that once assigned them to the home had left its imprint. Custom and law relegated women to subordinate places and roles in the market. As Part A argues, “business lunches,” men’s grills, and male-only professional organizations represented an ever-present signal women did not belong as equals in public. Middle-class and professional women connected the discrimination they faced in the labor market to that which they faced in these spaces. They began to fight for sex integration in public accommodations as part of their broader efforts toward economic equality. As Part 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, 28 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.’”\(^\text{167}\) The percentages of women doctors and attorneys stood at 7% and 3% respectively, although they would soon rise.\(^\text{168}\)

Sex-based exclusions denied middle-class women attempting to climb the career ladder access to the social networks at the center of

---

\(^{167}\) Memorandum from Karen DeCrow to Timothy Costello, Vice Chairman, Liberal Party of N.Y. State 3 (May 9, 1970) (on file with DeCrow Papers).

\(^{168}\) Id.
economic power. 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. Such exclusions “create[d] a professional handicap” because women journalists could not participate in events at which news leads were exchanged. Even where clubs voted to admit women as members, they might—as the Chicago Press Club’s 2000 female members found in 1970—not permit women access to the club at lunchtime. Because so many events were held at men’s clubs, female journalists might be preemptively removed from their coverage. At the annual awards ceremony sponsored by the National Press Club in Washington, D.C., which excluded women, 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.

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

---

169 Nickerson, supra note 27 (noting that “women ensconced in male-dominated situations” “at a decided disadvantage in comparison with their male colleagues” brought a litany of public accommodations complaints to NOW).


172 Men’s Clubs and Women Reporters, EVERYWOMAN, 1972, at sec. 6.

173 See also Rachel Scott, Gridiron Protest, OFF OUR BACKS, Feb. 27, 1970, at 1 (protesting Gridiron dinner for male journalists from which women in press and politics excluded). See supra notes 107 to 112 and accompanying text for discussion of earlier press club activism.


175 Letter from Betty Friedan to Arthur D. Dooley, Vice President, General Manager, The Plaza (Feb. 6, 1969) (on file with Alexander Papers).
on the social capital built when their male colleagues lunched together. Feminists also pushed to gain entry to men’s clubs. Finding themselves in (otherwise public) dining rooms in the men’s clubs, female legislators in several states took a table.

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, a Barbadian American Representative from Brooklyn, who served as the first black woman elected to Congress and ran for President in the 1972 election, commented on this dilemma. Speaking to the correlation between racial and class status at a National Black Feminist Organization Conference, Chisholm argued: “Black women don’t exactly see themselves as hung up in desexing all-male bars.” 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.” 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 for the importance for African-American women of winning inclusion in professional organizations, precisely because they were more likely than white women to serve as the primary wage earners.

Class shaped activists’ experiences of sex discrimination. Sometimes, feminists had become aware of the gendered patterns of exclusion only after obtaining entrée to elite culture through their education or work. 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.”

176 Public Accommodations, supra note 174.
177 See, e.g., Sit in the Back of the Tent, COURIER-J., Feb. 18, 1975, at A14 (reporting that an Indiana state representative filed a complaint with the Indiana Civil Rights Commission after being denied entrance to club lunch room); Letters from Virginia Watkins, President, NOW Twin Cities Chapter, to Minn. Reps. Linda Berglin & Janet Clark (Feb. 1, 1975) (on file with Minn. NOW Records) (commending representatives’ “breaking tradition at the St. Paul Athletic Club” despite harassment).
179 Id.
180 Giardina, supra note 108, at 748-49.
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.” 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 manifest class-appropriate respectability. Class privilege sometimes provoked disdain from activists’ 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 in New York City as “boorish” and “lower class.”

Activists often flexed their economic muscle as consumers. Roxey Bolton, president of the Miami NOW Chapter, noted that the exclusion of women from department store men’s grills was “especially insulting . . . where most of the shoppers are women.” She asked management “to consider what would happen if women boycotted the store for a day.” In similar incidents across the nation, middle-class women used their spending power as a tool to demand equality in public accommodations. 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 airlines sexualized the services of female stewardesses to market air travel. Friedan warned United’s president that “growing numbers of

---

182 We Will Not be Barred!, NOW ACTS (NOW), Winter/Spring 1969, at 7 (on file with Alexander Papers).
183 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 69, 69-100 (Peter J. Ling & Sharon Monteith, eds., 2004); see also Tanisha C. Ford, NCC Women, Denim, and the Politics of Dress, 79 J. OF SOUTHERN 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).
184 Grace Lichtenstein, Stein Song Hits a Sour Note: Coed Brawl Erupts at McSorley’s, SYRACUSE HERALD J., Aug. 11, 1970.
186 Chusmir, supra note 23.
187 Friendly Skies, supra note 7, at 5 (noting coordinated protests in Chicago and Newark). On the gendered construction of airline attendants’ work, see generally RYAN PATRICK MURPHY, DEREGULATING DESIRE: FLIGHT ATTENDANT ACTIVISM, FAMILY POLITICS, AND WORKPLACE JUSTICE (2016) (connecting flight
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.”

Activists were willing to bear additional economic costs to realize equality as consumers. 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.” 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.” Activists accepted losing this small financial advantage to gain economic equality. Legal scholar William Eskridge calls such activism “women’s politics of recognition,” “demanding the same duties as well as benefits that men had.” Across the nation, administrative agencies and, in later years, courts tended to agree that ladies’ discounts could be no more.

attendant activism to workers’ desires to provide for themselves and their kin outside of normative heterosexual families).

188 Friendly Skies, supra note 7, at 3.
189 Kerber, supra note 54, at 435-36.
190 NEWSLETTER (Greater Pitt. Area NOW Chapter, Pittsburgh, PA), June 1972, at 9 (on file with Witter Papers).
191 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 39, at 97.
193 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 $10 less annually. Press Release, MCLU, Park Board Drops Sex Discrimination (Jul. 9, 1974) (documents on file with MNCLU Records). The New York City Commission, 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 54, at 435–36. See also Bar Ladies Nights’ Illegal, Official Says, MINNEAPOLIS STAR, Dec. 9, 1972, at 5A (noting that Minneapolis Civil Rights Department ended restaurant and bar ladies’ discounts as discriminatory in response to complaints); Liberated, Women to Pay Full Price, N.Y. TIMES, Dec. 29, 1972, at 55 (to comply with Philadelphia ordinance, race-track to charge women full-price); Paper Drops Ads As Unfair to Men, HARTFORD COURANT, Oct. 2, 1974, at 2 (News Day to discontinue advertisements for ladies’ discounts).

Most courts eventually concluded, as human rights commissions had, that ladies’ discounts were discriminatory. See, e.g., Ladd v. Iowa W. Racing Ass’n,
The demise of ladies’ day illustrates the significance of administrative agencies to robust interpretations of public accommodations law. The most well-known leader of these agencies was Eleanor Holmes Norton, appointed as Chair of New York City’s Commission on Human Rights by Mayor John Lindsay in 1970. Previously a Student Non-Violent Coordinating Committee organizer fighting for African Americans’ civil rights in the South during the early 1960s, Norton was the assistant legal director for the American Civil Liberties Union before her appointment. In that position, she had fought sex discrimination, successfully litigating against Newsweek’s policy of hiring only male reporters. As Commission chair, Norton held pivotal hearings at which feminists testified about issues ranging from public accommodations to employment discrimination. \(^{194}\) Exchanges between Norton and public accommodations activists reflect a familiarity and sense of mutual purpose, suggesting Norton’s receptivity to movement claims. \(^{195}\) 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.” \(^{196}\) 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. \(^{197}\)

As feminists sought full access to commerce, business owners and some members of the public sought to barricade the doors. Resistance to sex integration of professional forums and meeting places often

---


\(^{195}\) 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 is a smoke screen to allow a public accommodation to continue its illegal discriminatory practices”).

\(^{196}\) Kerber, *supra* note 54, at 435-36.

\(^{197}\) ‘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); see, *supra* note 193.
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 “dropping into the men’s bar . . . at five in the evening” whenever he “wanted to catch somebody in publishing, advertising, public relations or related fields.”

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.”

While some argued that if women could pay they should be served, more commonly the feminist movement against public accommodation discrimination was denied the moral high ground of the sit-ins of the 1960s. “The stigma of silliness” attached instead to their public protests. “Ridiculous,” Mrs. A.S. Rugare called the picketing of men’s bars in a letter to the editor, “If women were as good spenders as men (better tippers) and otherwise offered a market for a women’s bar there would be such.” While Rugare, like feminists, saw economic power and consumer access as linked, she concluded women’s general lack of resources justified the exclusion of presumably paying women customers from public places.

B. Moving Freely within Public Space

Full and equal access to the public meant not only material equality, but also 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.”

---

199 Public Accommodations, NOW ACTS (NOW), Spring 1971, at 17 (on file with Witter Papers).
200 Hearing that Connecticut law kept women from the bar, bar customer said, “Hey, if they got money to pay, let them drink.” Carol Miller, They’d Make Public Bars Coed, NEW LONDON DAY (n.d.) (on file with DeCrow Papers).
Activists argued that sex equality in public accommodations implicated women’s citizenship. DeCrow wrote, “[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.” The language of this oft-repeated message linked equality in public accommodations to Congress’s power to enforce the Thirteenth Amendment, “abolishing all badges and incidents of slavery in the United States.”

NOW members explicitly reasoned from race in articulating the harm of sex discrimination in public accommodations. “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.’” 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. The language asserted entry into public places as a right of U.S. citizenship.

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

---

204 Report from DeCrow to NOW National Conference, supra note 123, at 3.
205 The Civil Rights Cases, 109 U.S. 3, 20 (1883); see also Jennifer Mason McAward, Defining the Badges and Incidents of Slavery, 14 U PENN. J. CONST. LAW 561, 563 (2012).
206 Hunter, supra note 9, at 1620.
207 See MAYERI, supra note 13, at 9-11 (analyzing how feminists used an analogy to race to advance antidiscrimination law).
208 Transcript of Meeting on Public Accommodations 79 (on file with Alexander Papers); see also Memo re Week of Feb. 9–15, 1969, supra note 127 (analogizing sex discrimination in public accommodations to that based on race or ethnicity).
209 NOW New York City Goals, supra note 22.
Commission told her that she had not faced race discrimination, assuming that if she were a black man, the bar might have served her.\textsuperscript{210} Then lacking jurisdiction over sex discrimination in public accommodations, the Commission denied her 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.”\textsuperscript{211} 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.\textsuperscript{212} 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.\textsuperscript{213}

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 barroom. 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 is more important.”\textsuperscript{214} 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.”\textsuperscript{215} Some men agreed that as important sites of social and economic participation, public accommodations should be open to women. At the Oak Room, several men even signed a petition, condemning women’s exclusion as

\begin{flushleft}
\textsuperscript{210} Transcript of Meeting on Public Accommodations, supra note 208, at 79.
\textsuperscript{211} Anna Mae Williams, Letter to the Editor, SYRACUSE HERALD-J. (Oct. 6, 1968) (on file with DeCrow Papers).
\textsuperscript{213} See infra text accompanying notes 325–329 (describing the story of Maria Pepe, a working-class girl from New Jersey who fought for inclusion in Little League Baseball).
\textsuperscript{215} Jack Williams, Lady Lawyer Leads Modern Crusade, Jan. 1969 (on file with Seidenberg Papers). 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 183 (quoting woman unaffiliated with feminist movement who said she came to have a drink at McSorley’s as “a matter of principle”).
\end{flushleft}

129 YALE L.J. --- (forthcoming)
“unfair, undemocratic, and un-American.”

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

The fight for equality in public accommodations implicated a broader struggle against gender roles. During the first half of the 1970s, 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.”

A fundraising letter for the Women’s Rights Project at the ACLU, written by Ruth Bader Ginsburg, exemplified this vision—it shows a little girl playing baseball and reads “She should have the right to do anything, be anyone. Her place is everywhere.”

Legislative retrenchment of some forms of public accommodations discrimination frequently aimed to safeguard space for men. Massachusetts’ passage of a public accommodations law in 1971, for example, set off considerable cultural anxiety. The Boston Globe reported that when “tippling in taverns becomes a women’s right,” it “jeopardize[s] all-male sanctuaries across the state.”

---

217 Greater Pitt. Area NOW Chapter, supra note 214, at 11.
221 Letter from Ruth Bader Ginsburg, ACLU General Counsel, to Supporters (n.d.) (on file with MNCLU Papers).
222 Laws Will Free Women’s Spirits (In Male Bars), BOST. GLOBE, July 17, 1971, at 3.
access but “why the ladies would even want to invade . . . anyway.” Analogizing to the home where the preservation of masculine “dens” and feminine “sewing rooms” maintained “domestic felicity,” the editors suggested that sex-segregated spaces were a social necessity. 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.

The legislative battle in Michigan, like Massachusetts, demonstrated concerns about maintaining separate preserves for the sexes defined by sex stereotyped interests and roles. In December 1971, the Michigan House rejected a nondiscrimination bill that, unlike earlier versions, did not include exemptions for educational, religious, and charitable institutions. Those in opposition, however, did not only cite the fraught issues of sex integration in religious institutions or in public restrooms. They also remarked on the many 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?”

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 the 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 plenty of 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

---

224 Id.
226 See Roger Lane, Sex Equality Puts House in a Quandary, DETROIT FREE PRESS, Dec. 2, 1971, 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).
227 Id. at 1.
involve not only access but also freedom in public, as Part IV demonstrates.

IV. ASSERTING FREEDOM FROM SEXUALITY AND HETERO/NORMATIVITY

As they accessed public space, feminist activists also claimed freedom within public arenas. 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 Part 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 Part B argues, feminist activists, their opponents, and legal bodies all recognized that an impulse to regulate sexuality motivated sex segregation. Public accommodations law targeted the construction of men as sexual predators and women as, alternatively, sexual threats or sexual prey. As Part 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, from bars to credit card companies, allowed women access but only via their husbands or male partners. Married women found their eligibility for goods and services derivative of their husbands’ legal and economic identities. Such discrimination was commonly understood to represent a practical extension of coverture. They demanded legal recognition as individuals without sexual attachment to a man as a physical companion or economic proxy.

Credit card companies regulated women according to their reproductive and marital status, undermining their economic autonomy and contributing to gender inequality. Companies denied credit to and charged higher rates of interest for single women. At the same time,

when issuing credit to a married couple, credit agencies often discounted the wife’s wages on the assumption that she only marginally participated in the workforce and 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. Women who married also found that companies defined their credit histories by their husbands’ records. This practice prevented women from establishing independent credit, reinforced their dependence, and impeded their ability to exit bad marriages. Whether she was single, divorced, or married, a woman’s credit was determined by a man.

In campaigning for public accommodations laws, activists often identified its most important effect to be “eliminating the inequities in the extension of credit to women by banks and retail establishments.” 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 practices, especially the refusal to permit women to open credit in their own names. 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.” Other credit practices made the need for a woman’s attachment even clearer. State commissions on the status of women investigated policies requiring that a husband co-sign for a married woman to open a credit line. Feminists argued that making access derivative of mar-

---

230 Campbell Statement, supra note 33, at 4.
231 National Organization for Women, Massachusetts Legislative Program 3 (n.d.) (on file with Schlesinger Library, Harvard University, Nancy Williamson Papers [hereinafter Williamson Papers]).
232 Letter from Teri Milton to R.M. Lawson, Manager, Houston Travel Card Center (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).
233 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.
ital status was unlawful, akin to closing store doors or refusing to provide women goods or services. 234

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 accommodation statutes against sex discrimination in credit. 235 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, while 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. 236 States often combined efforts under public accommodations laws with more specific credit discrimination legislation, banking regulations, or amendments of public accommodations to specify credit. 237

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. 238 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 firm liable for losses—a waiver not required of men. 239 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

---

234 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); Memorandum from Karen DeCrow to Central N.Y. NOW Chapter Steering Committee (Nov. 7, 1968) (both documents on file with DeCrow Papers).


237 Id. at 15–16.


239 Id. at *1.
in Florida, she suffered $87,000 in losses against which she was unprotected. The Commission easily concluded that the imposition of differing requirements for women violated the public accommodations ordinance. Some courts similarly held that credit discrimination fell within these laws’ clear terms—presenting the “refusal or withholding of certain advantages” because of sex.

Attacking credit discrimination comprehensively, however, proved a hard target for public accommodation law. The statutes clearly reached facially discriminatory policies requiring different procedures and products for men and women—for example, refusal to provide credit in a married woman’s own name or requirements of spousal consent to access financial accounts established while single. 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. Other practices—like policies against counting alimony as income—applied evenly to potential borrowers of all sexes, but affected far greater numbers of women. 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. 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.

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

---

240 Id. at *11.
243 Id. at 28.
244 See, e.g., Credit Report, supra note 32, at 17–18.
245 See Joslin, supra note 228, at 8–9 (discussing the 1974 enactment of the federal Equal Credit Opportunity Act).
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.246 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. 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.”247 Adjudicating complaints under public accommodations laws, courts precluded some such clubs from issuing membership to women only through male heads of household.248

A lawsuit brought by NOW against U.S. Power Squadrons, a boating school and organization, provides an example of the socio-legal use of coverture in leisure. Women could take courses and become certificate holders, but could not become members.249 Defending against women’s claims, Power Squadron 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. To appear more private, the Squadrons named itself a “fraternal” organization and stripped women of their certificates with a by-law smacking of coverture: only the surviving wife or daughter of a deceased member could continue to hold a certificate, and even then only until marriage (or re-marriage).250 While the New York Court of Appeals rejected Power Squadron’s maneuver, policies granting women club memberships via their attachment to men persist in some bonafide private clubs today.251


248 Warfield v. Peninsula Golf & Country Club, 10 Cal. 4th 594, 628 (1995) (involving membership dating from the 1970s that was terminated upon a woman’s divorce).


251 E.g., Jim Baumbach, Male-Only Garden City Golf Club Stands By ‘Tradition,’ NEWSDAY (June 18, 2018), https://www.newsday.com/sports/golf/male-
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.252 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.253 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 non-conformists of both sexes.254

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.255 In 1970, the owner of Danny’s Hideaway in New York explained, a woman could sit at his bar “only if I know her and she’s waiting for her husband or boyfriend”—any other woman might start talking with a man and “then they [the liquor commission] can say she’s ‘soliciting.’”256 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

254 Cohen, supra note 253, at PIV.
255 Hickey, supra note 12, at 389.
256 Earl Wilson, Barkeeps Don’t Want Lone Women, HARTFORD COURANT, May 27, 1970, at 33.
with a friend—platonic or romantic.  

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. Proprietors and some members of the public typically responded with the prominent trope of women as sexual threats. In a letter to the editor, “A Proud Taxpayer”—“calling herself one of the good women”—wrote “a pick up” was the only reason for “women wanting the right to go into a men’s sanctuary.” Requesting exemption from New York City’s public accommodation 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.” 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.” Signs carried by protestors resisted this vision of predatory sexuality: “Women who drink cocktails are not all prostitutes.” 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’ 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.” Officers of clubs justified sex-based exclusions in terms

---

257 Memorandum from DeCrow to Costello, supra note 167, 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.”).

258 Letter from “A Proud Taxpayer” to Karen DeCrow & Faith Seidenberg (June 29, 1970) (on file with DeCrow Papers); see also Nickerson, supra note 27 (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.”); Baltad, supra note 215, at B7 (noting that a woman at a bar must be “looking for something”).

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

260 Jersey Clam House to Fight Opening of Bar to Women, NEWSLETTER (Central N.J. NOW Chapter), Nov. 1971, at 13 (on file with NOW Newsletter Collection); see also Wilson, supra note 272, at 33 (recounting a number of bar owners stating resistance to admitting unescorted women).

261 A Woman (Syracuse), Letter to the Editor (on file with DeCrow Papers).

262 Vernon A. Guidry, Jr., ‘Men Only’ Grills Face Test, DETROIT FREE PRESS, Nov. 11, 1973, at 5D; see also Bill Stokes, Women Behind Bars—It’s Not So Tender, Sept. 1966, in Clippings of Wis. Comm’n on the Status of Women at 140 (arguing that women shouldn’t be allowed to tend bar because men go to bars to
that 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.”

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.”

Even as they decried some women’s sexual aggression, proponents of sex segregation also emphasized others’ alleged sexual vulnerability. Requiring sex integration would subject women in bars to the sexual interest of men and unleash male sexuality more broadly. 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.”

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.”

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.” 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 caused 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

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

263 EDITH LYNTON, BEHIND CLOSED DOORS: DISCRIMINATION BY PRIVATE CLUBS, A REPORT BASED ON NEW YORK CITY COMM’N ON HUM. RTS. HEARINGS 2 (May 1975).
264 Id. at 1.
265 Coyne, supra note 139, at 997.
266 Kerber, supra note 54, at 434–35.
267 Baltad, supra note 215, at B7.
women served at the counter after midnight."  

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. While Hotel Syracuse defended the rule as necessary to “to maintain the dignity of the room,” 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?” Using a New York innkeeper law, plaintiffs 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. 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.” His acceptance of extant sexual norms—Seidenberg said—was “in accord with public opinion.”

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. In treating women as a “potential nuisance that may lead to vice [and] immorality,” plaintiffs said,

---

268 Hickey, supra note 12, at 401.
270 An Absurd Campaign, SYRACUSE POST-DISPATCH, Nov. 8, 1968 (on file with DeCrow Papers).
272 Id. at 3.
273 DeCrow, 298 N.Y.S.2d at 862–63.
275 Gallagher v. City of Bayonne, 102 N.J. Super 77, 78 (N.J. Super. 1968). The act spoke broadly: “All persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . .” including taverns. Id. at 81.
the law was “archaic and totally unrelated to any public need or danger.”

In a decision affirmed by the Supreme Court of New Jersey, the trial court agreed. Recognizing that “a woman standing or sitting at a bar in the company of men for the purpose of being served a drink constitutes, at least in the minds of the City fathers of Bayonne, an occasion of sin,” the court found no legal necessity for the ordinance.

The McSorley’s court similarly held that women’s presence in bars did not give rise to “moral and social problems” rationally justifying their exclusion.

Courts also came to repudiate the protectionist rationales for excluding women from bars. Using rational basis scrutiny, the McSorley’s court concluded, 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.”

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, and a plurality of the Court had even indicated sex merited strict scrutiny.

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.’”

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. For women to attain equality in public, courts recognized, the

---

277 Bayonne, 102 N.J. Super. at 81. For cases striking down similar laws on equal protection grounds, see White v. Fleming, 522 F.2d 730, 737 (7th Cir. 1975); Com., Alcoholic Beverage Control Bd. v. Burke, 481 S.W.2d 52, 53–54 (Ky. 1972).
279 Id. at 606.
280 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).
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 these ideas are historically constructed and, indeed, relatively recent in human history.284 Only after what theorist Thomas Laqueur terms the “invention of sex” in the late eighteenth century—the historical processes that produced women as the physiological and psychological opposites of men—did western society come to view athletics as fraught with sexual danger.285

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.”286 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.287 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.288 “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.289 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.”290

This “undercurrent of heterosexuality”—Case argues—generally characterized mixed-sex sports into the twentieth century.291 As girls

284 Mary Anne Case, Heterosexuality as a Factor in the Long History of Women’s Sports, 80 LAW & CONTEMP. PROBS. 25 (2018) (arguing that women’s involvement in athletics depended on societies’ views of whether athletic play diminished women’s reproductive capacity and heterosexual appeal).
285 Id. at 33–35.
287 Id.
288 Id.
289 Thomas, supra note 77, at 1.
290 Deford, supra note 286.
291 Case, supra note 284, at 35.
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 non-contact sports, while denying them participation in sports that “placed [them] in physical contact with boys”\textsuperscript{292}—a category that for a time included baseball.\textsuperscript{293} Even as girls increasingly competed in school sports or in extracurricular organizations subject to public accommodation laws, disparate regulations for boys’ and girls’ teams—such as state-wide prohibitions on female athletes’ overnight travel—reinforced a perception of (hetero-) sexual risk into the 1970s.\textsuperscript{294} As in bars, sexualization of female bodies justified the regulation and exclusion of the “fairer sex.”

While feminists refused to accept that heterosexual attachment or sexuality should define women’s rights in public, they did not disclaim the importance of expressions of sexuality. Letters in opposition to feminist pickets of bars often insisted that women should embrace their sexuality, not deny it. In a letter to the editor, one opponent of sex integration of bars recommended that Karen DeCrow learn to “make a man feel like a man,” so she wouldn’t “have to pad the sidewalks.”\textsuperscript{295} In response to the letter writer’s query, DeCrow said she did indeed feel empowered in the sphere of her own sexuality, but that she should be able to “define my sphere as being President of the United States, or of a company, or governor of a state, or mayor of a city, or head of a university department . . . or just a plain old high paying job. . . .”\textsuperscript{296} Sexuality could only be truly empowering and free when it did not define women’s options.

\textsuperscript{293} Federal Court Rules Ban Legal Legal; Little League Barring of Girl Player Upheld, PITT. POST GAZETTE (on file with Witter Papers).
\textsuperscript{294} See, e.g., Bucha v. Illinois High Sch. Ass’n, 351 F. Supp. 69, 75 (N.D. Ill. 1972); NOW Statement of Complaint Against Gil Hodges Little League at 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).
\textsuperscript{295} A Woman (Syracuse), supra note 277.
\textsuperscript{296} Letter from Karen DeCrow to a Woman (Syracuse) (Nov. 8, 1968) (on file with DeCrow Papers).
C. Dress and Decorum

Throughout this period, public accommodations rigorously policed normative masculinity and femininity through dress and grooming requirements. A norm of heterosexuality required men and women to perform differentiated codes of dress and decorum. Into the 1970s, restaurants and clubs would turn away women for wearing pantsuits, that is, dressing “like a man,” or sporting mini-skirts, that is, dressing “like a prostitute.” Feminists often flouted these codes in their protests—most notably dining in at the Boston Ritz reportedly in “all manner of attire from dresses to dirty blue jeans.” Flo Kennedy, who was among them, likely sported her trademark look—long red nails, a cowboy hat, and pink sunglasses. Rigid constraints on dress and decorum also confronted men, especially in mixed-sex space. Thus, as NOW aspired to liberate women to make “a free choice of what to wear and how to look,” 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. Keeping the Chicago Press Club male, for example, allowed one of its “founding fathers” “to swear a lot”—an informality presumably not allowed to him in mixed company. Perhaps more shocking is the explanation given for United’s men-only flight in 1969: “businessmen could take off their coats, loosen their ties, remove their shoes, light up their favorite cigar or pipe – and generally make themselves at home.” The presence of women, United suggested, required men to chafe (quite literally) under restrictions on their dress.

Equality principles embodied in public accommodations laws necessarily challenged rigid sartorial norms. 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 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. Equality, he suggested,
might lead not only to informality but also to either unleashed masculinility or its repudiation.

Indeed, newly enacted statutes destabilized norms of gender presentation and dress. NOW considered legal action against, for example, the Saratoga Raceway where women in pantsuits were not welcome.\(^{304}\) In 1972, Colleen DiMicco, ordered to leave a restaurant because she attempted to order to 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.’”\(^{305}\) The local human rights commission charged sex discrimination, reasoning that men were not told what undergarments to wear.\(^{306}\) 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.\(^{307}\) That same year, a New York court held that the admission of women, but not men, with long hair constituted unlawful discrimination.\(^{308}\) In Boston, the enactment of public accommodation law yielded the sex integration of previously segregated barber shops and hair salons, which in turn meant greater flexibility in hair styles.\(^{309}\) Dress codes requiring ties or prohibiting hats on men alone fell before public accommodations law.\(^{310}\) With legal reform, what was once shocking—like women in pantsuits or men loosening their ties in front of women—quickly became normal.

***

\(^{304}\) Letter from Marjorie Karowe to Faith Seidenberg (June 9, 1971) (on file with Seidenberg Papers); Hickey, \textit{supra} note 12, at 402 (“With language, tactics, and in some cases laws built around public accommodations, feminists began questioning dress codes.”).

\(^{305}\) \textit{The Bearded Nurse and Other Tales}, \textit{Civil Liberties in New York} (NYCLU), Mar. 1973, at 8 (on file with DeCrow Papers).

\(^{306}\) \textit{Id.}

\(^{307}\) \textit{NEWSLETTER, supra} note 190, at 9.


\(^{310}\) Powell v. Reds Lounge, No. PAse77050257, 1979 WL 392536 (Ind. Civ. Rts. Comm’n Aug. 24, 1979) (holding that requiring men but not women to remove their hats was discriminatory); \textit{The Bearded Nurse, supra} note 305, at 8 (discussing complaint of man ejected from a New York town’s council meeting for refusing to remove his beret); Hales v. Ojai Valley Inn & Country Club, 140 Cal. Rptr. 555, 557-58 (Cal. Ct. App. 1977) (allowing to proceed claim that requiring ties only of men is sex discrimination); In re Cox, 3 Cal.3d 205 (Sup. Ct. 1970) (holding that shopping center may not bar “individuals who wear long hair or unconventional dress” under California’s broad-based Unruh Act).
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 dependents 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 Part 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. Part B shows that the feminist movement initially welcomed restroom integration, but eventually retreated in the face of public opposition to this application of public accommodation law and, more forcefully, the ERA. A geography of sex segregation was left in place that is assumed and defended to this day.

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 sex segregation, however, is an implicit yet often unacknowledged hierarchy in athletics. Consider a recent example. On an unseasonably warm fall day, 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.\textsuperscript{311}

The incident embodied themes familiar from the history of sex in public. It involved sex-separated spheres: men play football, women do not; men and women have separate cross-country teams. Sexual stereotypes, of women as seductresses and men as susceptible to temptation, justified segregation. The women’s cross-country team, angry but unsurprised, recognized that Rowan’s sex-segregated athletics also reflected inequalities in funding and institutional power.\textsuperscript{312} Football’s prioritization extended beyond practice locations to better locker rooms and transportation.\textsuperscript{313} As the example illustrates, women and men in athletics are separate but not yet equal.

Prior to the enactment of Title IX, which emphasizes parity over integration, feminist public accommodations activists pursued what is best described as the “transformative integration” of athletics. Transformative integration represented just one of several feminist approaches to improving access to athletic funding, facilities, and opportunities for women and girls.\textsuperscript{314} From the early 1960s, female athletic administrators argued for the desirability of sex-segregated teams, expressing a desire to maintain talent on women’s teams and preserve the distinct values of women’s sports apart from men’s sports commercialism.\textsuperscript{315} Feminists who shared these views worried that sex equality mandates under Title IX might undermine women’s sports programs and reduce meaningful opportunities for participation.\textsuperscript{316} NOW activists, however, felt differently. In 1974, NOW President Wilma Scott Heide urged members to attend sporting events for men and boys and then “liberate the public microphones and discuss the immorality and illegality of masculine rites and ‘rights.’”\textsuperscript{317}

---


\textsuperscript{312} A senior member of the team commented, “[T]he football team gets what they want.” \textit{Id.}

\textsuperscript{313} \textit{Id.}


\textsuperscript{315} DEBORAH L. BRAKE, \textit{GETTING IN THE GAME: TITLE IX AND THE WOMEN’S SPORTS REVOLUTION} 23 (2010).

\textsuperscript{316} \textit{Id.} at 20.

\textsuperscript{317} Chase Untermeyer, \textit{NOW Leader Calls for Bold Gestures to Fight Sexism}, HOUSTON CHRON., May 26, 1974 (on file with DeCrow Papers).
structed. These activists aspired not merely to gain access for exceptional girls and women, but also to use sex integration to change athletic play and competition and, consequently, to transform gender relations and ideas about sex difference.\textsuperscript{318}

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.\textsuperscript{319} Girls and their parents won girls’ admission to sex-segregated events such as the Soap Box Derby.\textsuperscript{320} Women demanded to run on tracks and play on racquetball courts with and at the same time as men.\textsuperscript{321} By the late 1970s, Title IX, public accommodations statutes, and constitutional claims sometimes overlapped—for example, with regard to state-wide interscholastic organizations. Sometimes, equal protection provided no assistance, as for example in private schools. In other contexts like recreational sports or boys’ clubs, only public accommodations law applied.

Youth sports held particular significance because of their role in gender development. While opponents argued that baseball was too competitive for girls,\textsuperscript{322} NOW leader Betty Farians, herself a talented

\textsuperscript{318} On the role that sports play in constructing sex difference, see Verbrugge, supra note 91, at 62 (arguing that athletics are “a decisive mechanism for differentiating between the sexes and inscribing ‘womanhood’”).


\textsuperscript{320} Public Accommodations, supra note 201, at 17.


\textsuperscript{322} Deford, supra note 286.
athlete, thought improving girls’ access to sports would “boost girls’ self-confidence in a world that told them not to play or think too hard.”

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.”

Though opponents claimed that feminizing boys and masculinizing girls was a reason to avoid sex integration, feminists insisted on “exactly the reverse: that role blurring is not bad, it is what we need in America.”

Activists argued that sex was not a proxy for athletic talent and that sex-based exclusions were both over- and under-inclusive. 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.”

As activists often observed, sex segregation existed in sports like 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.

They pointed to the fact that women’s teams sometimes won against men’s teams—disproving stereotypes about sex difference.

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 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.”

They questioned what
meaning any differences should hold for the organization of athletic fields as much as boardrooms.

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?” 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.

Others shared this view. Carol Forbes, a law student who sued the Soapbox Derby on behalf of her daughter, argued, “[O]f 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.”

The case of National Organization for Women, Essex County Chapter v. Little League Baseball, Inc. marked a landmark for sports and public accommodations law. In 1972, a group of twelve-year-old boys approached the coach of the Hoboken, New Jersey Little League team sponsored by the Young Democrats. 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 team. When Pepe pitched briefly, 2.25 million boys worldwide played Little League; she was the only girl. 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. NOW filed suit. While the League had previously prevailed against claims of sex discrimination in Michigan and Massachusetts, the New Jersey Division on Civil Rights determined that Minnesota ACLU allowed that some contact sports separate men and women “so long as everyone has the opportunity to engage in such sports.”

---


331 Id. at 9.

332 Deford, supra note 286.


334 Id. at 242.

335 Id.

there is “no reason why that part of Americana should be withheld from girls.”

The entry of girls into male space sparked outrage among those who sought to defend boys’ sports as an “island of privateness” and training ground for masculinity. On the pages of *Sports Illustrated*, writers bemoaned the effects of allowing “bisexual baseball.” 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. 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. Nonetheless, the New Jersey courts affirmed the order, holding that the League violated the state public accommodations law when it excluded girls.

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. Inspired by NOW’s success in baseball, advocates used public accommodations law to pursue sex integration of other childhood activities. For a moment, it looked like

---

337 Abrams, supra note 333, at 252.
338 Id. at 251–52.
339 Deford, supra note 286.
341 Thomas, supra note 77.
342 Nat’l Org. for Women v. Little League Baseball, Inc., 318 A.2d 33, 41 (N.J. Super. 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. It noted that conveyances 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 38.
343 See *‘You Really Hit That One, Man!’ Said the Little League Boy to the Little League Girl*, N.Y. TIMES, May 19, 1974.
344 Mosier, supra note 324, at 3. For successful cases, see Isbister v. Boys’ Club of Santa Cruz, Inc., 40 Cal. 3d 72, 82 (1985) (holding that Boys’ Clubs had engaged in sex discrimination under state law in excluding girls); Bilotta v. Palmer Twp. Athletic Assocs., 33 Pa. D. & C.3d 402 (Pa. 1984) (upholding claim of father denied the opportunity to coach girls’ softball league because of his sex); Mich. Dept. of Civil Rights v. Waterford Twp. Dept. of Parks & Recreation, 335
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. After 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. After Congress amended its charter, the League continued to operate the softball league—fostering ongoing sex segregation. At the local level, athletic entities also resisted the advent of sex-integrated play. When a co-ed basketball team expressed interest in play, the Syracuse City Parks and Recreation Department resorted to rigid sex differentiation as a rationale: “the men’s league is a men’s league and the women’s league is a women’s league. The eligibility for playing in the men’s league is that you must be a man.”

The enforcement of Title IX also shifted prevailing paradigms for gender equity in the direction of segregation. 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


Bradway, supra note 336, at 2. With twenty-two cases across the country pending against it, the League ultimately asked Congress to adopt Griffiths’ bill, Mosier, supra note 324, at 3, which it did in 1974, Abrams, supra note 333, at 256.

Ring, supra note 79, at 386–87. In Syracuse You Can’t Play Basketball and Be a Woman at the Same Time, NEWSLETTER (Central N.Y. NOW Chapter, Syracuse, N.Y.), Nov. 1977 (on file with DeCrow Papers).

The statutory language of Title IX does not reference athletics, speaking broadly to education. 20 U.S.C. § 1681(a) (2012) (“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.”).
a “contact sport” is at issue.349 The competitive-skills provision in particular aims to preserve all-female teams by preventing male athletes from trying out for and potentially decimating women’s teams.350 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.”351 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.352

The advent of Title IX undeniably spurred participation of girls and women in athletics and did much to dismantle a cultural binary between 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.353 Most significantly, in preserving distinct spaces for female athletics, the statute facilitated adequate resources and opportunities for female participation in sports.354 Mere formal equal treatment, by contrast, might only have permitted exceptional individual girls and women to compete on male-dominated teams. And, at its most ambitious, the parity model holds the potential to reshape athletic culture in ways that en-

349 34 C.F.R. § 106.41(b).
351 34 C.F.R. § 106.41(b).
352 Letter from Carol Lefcourt, Deputy Directory, N.Y. State Temporary Comm’n to Recodify the Family Court Act, to Robert Marks, Research Assistant, NOW LDEF (Aug. 27, 1981) (on file with Schlesinger Library, Harvard University, NOW LDEF Records) (settling sex discrimination case against baseball team in return for its giving female players equal access to playing fields).
354 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 CFR § 106.41(b). 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 353, at 124.
hance women’s interest in sports and disrupt notions of gender difference.  

The parity model’s eclipse of the earlier vision for transformative integration, however, has come with 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). 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. 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 to resources, facilities, and opportunities for play, true integration—activists believed—would require implementing rules that reflected female and male excellence. Transformative integration would hold the potential to disrupt ways in which the body and its feats function as a primary site for sex differentiation, hegemonic masculinity, and gender power inequalities.

How might we synthesize the transformative integration and parity approaches? Young girls and boys might play together until an age when sex-differentiated strength becomes more relevant. Such sex-integrated play might result in more egalitarian interaction between the sexes and more fluid gender identities. Sex-separated high school teams might exist, while exceptional female athletes might join boys’ teams. Teams could practice together, even if they did not compete.

355 See generally Brake, supra note 353.
356 Greene, supra note 350, 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).
357 Brake, supra note 353, at 93–97.
359 See, e.g., Nancy Leong, Against Women’s Sports, 95 WASH. U. L. REV. 1249, 1281 (2018) (arguing for a default of sex-integrated sports and identifying gymnastics, figure skating, wrestling, long-distance swimming, as candidates for integration); B. Glenn George, Fifty/Fifty: Ending Sex Segregation in School Sports, 63 OHIO ST. L.J. 1107, 1107-08 (2002) (proposing that all college sports covered by Title IX be half men and half women).
Locker rooms might be integrated or rotate 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.\textsuperscript{360} As public accommodations laws barred sex discrimination, an alternative appeared possible: unisex, multi-user restrooms. But the range of possibilities quickly narrowed. Separation remained and fostered many subsequent controversies over issues from pay toilets to gender non-conformists.

In 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 spheres. When they protested sex-segregated restaurants and bars, NOW members sometimes occupied the men’s room.\textsuperscript{361} 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: “they’ll want to remove the ‘Men’ and ‘Women’ designations from lavatory rooms and powder rooms, thus achieving an even ‘finer’ state of equal treatment.”\textsuperscript{362} Activists observed, “All over the world rest rooms are integrated – ‘bathrooms’, as distinguished from ‘rest rooms’ are integrated, even here.”\textsuperscript{363}

In the early 1970s, the law was unsettled as to whether sex discrim-


\textsuperscript{361} Photo (on file with NOW Newsletter Collection) (showing Sacramento NOW activists with “Liberate Men’s Rooms NOW” signs at 1972 celebration of suffrage).

\textsuperscript{362} Editorial, \textsc{Syracuse Herald-J.}, Oct. 31, 1968; see also Letter from “A Proud Taxpayer,” \textit{supra} note 258 (“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.”).

\textsuperscript{363} Some Answers to Stock Questions (n.d.) (on file with Alexander Papers).
ination law, under either the ERA or state public accommodations statutes, mandated integrated toilet facilities.\textsuperscript{364} 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 the “fear expressed that women were about to invade the men’s room.” Ironically, “in their haste to do penance for the ERA defeat,” the same legislature had passed a public accommodation law with farther reach than the ERA that was at least as likely to result in sex-integrated restrooms. Like Goodwin, other legislators recognized the precarity of the men’s room under new public accommodations laws.\textsuperscript{365} Thus approximately one-third of states explicitly qualified obligations of nondiscrimination to allow sex segregation in restrooms, locker rooms, and changing areas.\textsuperscript{366}

The exclusion of toilets from public accommodations law had the unintended consequence of authorizing blatant sex inequities. In the 1970s, pay toilets—requiring depositing coins for entry—were common in bars, restaurants, and transportation centers, and were disproportionately designated for women, while men enjoyed free facilities.\textsuperscript{367} Some rooted the differential treatment in biology: men’s “natural privacy” allowed them to use urinals, while women required stalls.\textsuperscript{368} Many women found this argument specious; they had no re-

\textsuperscript{364} 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 Maryland Attorney General advisory opinion that state ERA does not bar separate toilet facilities for men and women).

\textsuperscript{365} See Lane, supra note 226, at 1A (querying whether a public accommodation law would mean “women have a legal right to patronize men’s restrooms”).

\textsuperscript{366} See Sepper, supra note 20, at 643 (compiling statutes). D.C. and New York City Commissions similarly interpreted exemptions in their ordinances to permit discrimination only in places where people customarily undress. Kerber, supra note 54, at 436.

\textsuperscript{367} Taunya Lovell Banks, Toilets as a Feminist Issue: A True Story, 6 BERKELEY J. OF GENDER L. & JUSTICE 263, 264 (1991) (discussing prevalence and disparity of pay toilets); Davis, supra note 53, 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).

\textsuperscript{368} Letter from Mary Donlon to Thomas Cody, Executive Director, EEOC 1, 4 (n.d.) (on file with Boston NOW Records).
course, however, in states where the public accommodations law excluded restrooms. Mary Donlon’s complaint to the Massachusetts Commission Against Discrimination about the public park where she worked is exemplary. The park provided twenty-five pay restrooms and only one free restroom for women, while providing fourteen free and eleven pay restrooms to men.  

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. Excepting restrooms blessed 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. 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 Schafly made the specter of unisex bathrooms, and the danger that would supposedly lie therein, a key trope of her STOP-ERA campaign. Pro-ERA activists worried the toilet issue would threaten the amendment’s ratification. By the mid-1970s, feminists largely avoided arguing that either the ERA or state public accommodation law required integrated restrooms. For many feminists of the time period, 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

---

369 Id. at 3.
370 Letter from Glendora Putnam, Chair, Commonwealth of Massachusetts Commission Against Discrimination, to Mary Donlon (June 19, 1973) (on file with Boston NOW Records).
373 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 Constitutional Change: The Case of the De Facto ERA, 94 CAL. L. REV. 1323, 1366–1403 (2006).
states and municipalities passed laws in late 1970s and 1980s mandating separate restrooms and locker rooms in schools and public places. At the federal level, Title IX permitted separate facilities for dressing, housing, and toilets within educational institutions, provided they were equal.

The debates over restrooms in this time period carry two central lessons relevant to today’s discussions of gender identity and inclusion in public space. First, restrooms often serve as a tool against the broader equality of the subordinated group. The absence of a designated women’s room often justified discrimination in employment and public accommodations. Across the country, especially in traditionally male-dominated industries, employers cited a lack of women’s facilities to defend not hiring women. 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 more generally be treated differently from race, religion, and national origin. In athletics, lawsuits under public accommodation laws often resulted in arguments that lack of changing and bathroom facilities meant coeducational sports or women’s sports were not required. 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

---

375 Davis, supra note 53, at 63.
376 45 C.F.R. § 86.33 (“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.”).
377 Aaron Epstein, Women Paying High Price for Longevity, DETROIT 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 employer guilty of sex discrimination for barring women janitors from cleaning men’s locker room, resulting in their assignment to night shifts).
379 See, e.g., Fowlkes Fears Bathroom Confrontation, NOW NOTES (Atlanta NOW Chapter), Apr. 1972, at 3 (on file with NOW Newsletter Collection) (describing Atlanta alderman’s rejecting NOW grievance for ten-year-old girl seeking to play baseball because girls and boys might share park bathrooms).
of separate “sanctuaries” for men and women. The New York City Commission on Human Rights observed wryly that men’s clubs gave as one of their many reasons “for their staunch defense of the club as masculine preserve” “the trivial and practical” answer “we haven’t enough washrooms.” The bathroom issue, it seems, served as synecdoche for opposition to sex equality writ large.

Second, sex-seperated 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. Even where toilets were free, public spaces required to admit women typically offered them what had been men’s facilities, without considering societally inscribed gender differences in dress or caregiving for children or biological differences such as menstruation that might require individual trashcans. In the late 1980s and 1990s, a move toward “potty parity” began, and dozens of new laws came to require equitable, separate toilet facilities. These laws, however, raised the surprisingly difficult question of “exactly what is to be equalized” typical of “any regime of separate but equal.” The 1990s saw the installation of diaper changing tables and stalls accessible to people with disabilities, as well as the first family restroom. Sex-separated restrooms nonetheless continue to affirm gender hierarchy and stereotypes. Parity has fallen short. Women’s restroom

380 Out with the Ladies?, supra note 223.
381 Lynton, supra note 279, at 20; see also David Alpern, Clubs: The Ins and Outs, NEWSWEEK, Jan. 10, 1977, at 19 (noting that Washington’s Metropolitan Club said it didn’t have sufficient restrooms “as much as we love the girls”).
382 Conversely, the U.S. Coast Guard then recognized that desegregating crew member restrooms could combat sex discrimination at sea. NOW NEWSLETTER (Twin Cities NOW Chapter), Feb. 1972, at 2 (on file with NOW Newsletter Collection).
383 Davis, supra note 65, 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).
384 Mary Anne Case, Why Not Abolish Laws of Urinary Segregation?. in TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 211, 216 (Harvey Molotch & Laura Noren, 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.”).
385 Id. at 212–14.
386 Id. at 214 (questioning whether equalizing square footage, number of facilities, excreting opportunities, or waiting time should be the goal).
lines are so common as to be a given invoked in movies and books. Men’s rooms typically lack changing tables, reifying women’s primary role as caregivers. Gender-nonconformists find their use of the restroom scrutinized or denied.

What might be the consequences if instead 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” where caregivers could accompany their opposite-sex children. 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, gender-nonconforming people, and parents tending for opposite-sex children. 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.

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

390 Kogan, supra note 52, at 4.
391 Harvey Molotch, Introduction: Learning from the Loo, in TOILET, supra note 402, 1, 5; see also 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 (discussing interdisciplinary design and research team for flexible, inclusive public restrooms); Harvey Molotch, What NYU Did with the Toilet and What It Means for the World, in TOILET, supra note 402, 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”).
eyes.” Instead of privacy from the opposite sex, restrooms might have evolved to shield users from the sight, hearing, and smell of all others. Establishments might have adopted single-user facilities earlier and more commonly. Alternatively, less privacy between sexes might have demystified women to men and reduced the stigma of women’s bodily functions.

Similarly, unisex multi-user 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.” In the 1970s, public accommodations activists questioned both 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?”

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. Integrated restrooms might reduce the odds of homophobic violence (and unwanted homosexual advances). 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.

Sex integration would have had costs. Men interested in homosexual encounters would have lost a reliable, private place to meet. Homosexual retreats to restrooms admittedly would have ended. Many people

---


393 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.’”).

394 Kogan, supra note 52, at 56.

395 Id.


397 Christine Overall, Public Toilets: Sex Segregation Revisited, ETHICS & ENV’T, Oct. 2007, at 71, 82. “[S]ociety should be diminishing the acceptability of sexual assault, not just trying ineffectively to protect women and others from it.” Id.
would have experienced some discomfort at this shift. 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.” 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 like Masterpiece Cakeshop v. Colorado Civil Rights Commission and Elane Photography v. Willock—often characterize the governmental interest in eradicating discrimination as confined to market access for minorities. 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. These arguments are distinctly ahistorical even with regard to race discrimination, as they ignore that laws were adopted in states and applied to industries where racial and religious minorities had available alternatives. But the history of sex discrimination in public

398 Schoenbaum, supra note 253, 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.”).


401 309 P.3d 53 (N.M. 2013) (rejecting free speech, free exercise, and religious freedom restoration act challenges).

402 See supra note 21 and 22.

403 See Amicus Br. of Public Accommodations Law Scholars in Support of Respondents at 32, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 137 S. Ct. 2290 (2017) (No. 16-111), 2017 WL 5127312, at 32 (noting that “throughout 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).
accommodations makes particularly stark the failures of the market monopoly argument. The addition of “sex” to the laws occurred in markets with plentiful venues for dining and meeting. While feminists connected their lack of full and equal access to commerce to their diminished professional prospects, 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 to non-functioning markets and demonstrates 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 same treatment of the sexes—but also an end to the regulation of sexuality and gender performance. Through their efforts to enter public space through public accommodation law, feminists successfully challenged required attachment of women to men in heterosexual pairs and the regulation of sexuality that relied on heteronormativity. This insight has major implications for the meaning of sex discrimination under public accommodation law today. While twenty-one states explicitly list “sexual orientation” in their public accommodations statutes and eighteen specify “gender identity” and “marital status,” all forty-five public accommodations statutes ban discrimination because of “sex.”\footnote{Nat’l Conf. of State Legis., supra note 9.} In 2018, state human rights commissions in Michigan and Pennsylvania interpreted their general civil rights statutes—reaching sex discrimination in employment, housing, and public accommodations—to encompass sexual orientation and gender identity.\footnote{See Michigan Civil Rights Comm’n, Interpretive Statement 2018-1 Regarding the Meaning of “Sex,” May 21, 2018, https://www.michigan.gov/documents/mdcr/MCRC_Interpretive_Statement_on_Sex_05212018_625067_7.pdf; Penn. Hum. Rel. Comm’n, Guidance on Discrimination on the Basis of Sex Under the Pennsylvania Human Relations Act, Aug. 2, 2018, https://www.phrc.pa.gov/About-Us/Publications/Documents/General%20Publications/APPROVED%20Sex%20Discrimination%20Guidance%20PHRA.pdf.} They did so largely by relying to courts’ recent interpretations of Title VII of the Civil Rights Act for support.

As we shall develop in future work, the history of sex in public accommodations laws provides a stronger basis for interpreting these
laws to extend beyond mere formal equal treatment of cisgender males and females. Sex as freedom from sexualization has repercussions for the ongoing regulation of women’s bodies in public. Consider, for example, the question of whether existing statutes protect breastfeeding women against eviction from public accommodations where the statute does not list breastfeeding in particular. 406 This history indicates that at their origin, public accommodations laws sought to do away with the policing of women’s bodies and the sexual stereotypes it entailed. Stores and eateries that remove breastfeeding women treat women’s breasts as primarily for sex. 407 They invoke moral concerns about immodest dress and corruption of children—much like earlier views that women in mini skirts or at the bars might tempt men. Courts might debunk present stereotypes by referencing their similarity to older stereotypes now considered illegitimate. Interestingly, public accommodations typically offer breastfeeding women a choice—leave or go to the sex-segregated bathroom. These conflicts thus offer another example of the restrooms as tools of resistance to full participation in public and as normalizing sexualization of women’s bodies.

Gender identity discrimination in public accommodations serves as another example of the relevance of the history of sex in public today. In 2019, with no analysis, the Missouri Supreme Court determined that a transgender boy could proceed in his public accommodations lawsuit to access restroom and locker room facilities consistent with his gender. 408 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—which prohibits


407 For an analogous case, see Free the Nipple-Fort Collins v. City of Fort Collins, Colorado, 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”).

decisions based on assumptions that men and women act a particular way or conform to gendered dress and grooming standards. Through this history, they might understand one function of public accommodations law to be freeing public commerce and leisure from irrational moral constraints and 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.

Last, equality in public space may require, not mere access to or even freedom within, but rethinking of social institutions. On this score, the 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 alternatives lost, current advocates for sex equality might take us where feminists once aspired to go, transforming sports, creating inclusive restrooms, and re-imagining 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 these feminists of the 1970s had. Public accommodations law might again offer a powerful tool for change.

---