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A Proposed Analysis for Gender-based Practices and State Public Accommodations Laws

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A PROPOSED ANALYSIS FOR GENDER-BASED PRACTICES AND STATE PUBLIC ACCOMMODATIONS LAWS

Bars, restaurants, and other establishments frequented by the public often extend preferential treatment to members of one sex in order to attract a larger or more select clientele. Women, for example, may be excluded from admission[1] or required to have a male escort;[2] men may also be excluded[3] or required to pay a greater admission fee than women.[4] This differential treatment is both inequitable and reinforces sexual stereotypes[5] humiliating to many individuals.[6]

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1. *See, e.g.*, Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593 (S.D.N.Y. 1970) (public bar prohibiting admission of females). *See generally* Seidenberg, *The Federal Bar v. The Ale House Bar: Women and Public Accommodations*, 5 VAL. U.L. REV. 318 (1971) (discussing exclusionary practices).

2. *See, e.g.*, De Crow v. Hotel Syracuse Corp., 288 F. Supp. 530 (N.D.N.Y. 1968) (refusal to serve unescorted woman not prohibited by federal law); De Crow v. Hotel Syracuse Corp., 59 Misc. 2d 383, 298 N.Y.S.2d 259 (1969) (refusal to serve unescorted woman not prohibited by state law).

3. *See, e.g.*, Romano v. Bohemia Health Operating, Inc., No. P-S-50528-77 (N.Y. Div. Human Rts. Apr. 14, 1980) ("women only" health spa).

4. *See* McDaniel v. Cory, 631 P.2d 82 (Alaska 1981) (differential prices on the basis of race and sex); Tucich v. Dearborn Indoor Racquet Club, 107 Mich. App. 398, 309 N.W.2d 615 (1981) (differential membership charge for men and women); Abosh v. New York Yankees, Inc., No. CPS-25284-71 (N.Y. Human Rts. App. Bd. July 19, 1972) (reduced admission prices for women at Yankee baseball games); MacLean v. First Northwest Indus. of Am., Inc., 96 Wash. 2d 338, 635 P.2d 683 (1981) (reduced admission prices for women at Seattle Supersonics basketball games).

5. *See, e.g.*, Seidenberg v. McSorleys' Old Ale House, Inc., 308 F. Supp. 1253, 1260 (S.D.N.Y. 1969) ("To adhere to practices supported by ancient chivalristic concepts, when there may no longer exist a need or basis therefor, may only serve to isolate women from the realities of everyday life, and to perpetuate, as a matter of law, economic and sexual exploitation."); B. BABCOCK, A. FREEDMAN, E. NORTON & L. ROSS, SEX DISCRIMINATION 1037 (1975) ("Exclusion and segregation are variously defended as necessary to discourage prostitution, to protect women themselves, or, just as often, to protect the all-male atmosphere."). *See generally* Freeman, *The Legal Basis of the Sexual Caste System*, 5 VAL. U.L. REV. 203 (1971) (depicting our system as one of "institutionalized inequality"); Harzenski & Weckesser, *The Case for Strictly Scrutinizing Gender-Based Separate But Equal Classification Schemes*, 52 TEMP. L.Q. 439, 472-478 (1979) (separate but equal classification schemes may perpetuate outdated and improper stereotypes about men and women); Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach To The Topics*, 24 U.C.L.A. L. REV. 581 (1977) (socially created sexual distinctions are often cited to justify sexual differentiation).

6. *See, e.g.*, Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago, 604 F.2d 1028 (7th Cir. 1979) (holding the demeaning nature of a particular wardrobe to be unequally burdensome and illegal under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (1976 & Supp. IV 1980)); Interview, *Blow Whistle on NBA Champs' Ladies' Nights*, 65 A.B.A. J. 1619 (1979) (alleging that ladies' nights derive partly from a view of women as sex objects); *Transcript of Hearings on Exemptions to Sex Discrimination in the Public Accommodations*

Effective relief from such gender-preferential practices has not come from either the federal Constitution[7] or federal legislation.[8] Some states have attempted to compensate for this deficiency by implementing public accommodations statutes.[9] These statutes typically guarantee both sexes the right of "full and equal enjoyment" of all the "advantages, facilities and privileges" of a "place of public accommodation."[10] The precise

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Law, New York City Comm'n. on Human Rights 200-01 (Jan. 14, 1971), *reprinted in* B. BABCOCK, A. FREEDMAN, E. NORTON & L. ROSS, *supra* note 5, at 1069 (testimony that ladies' nights at ball parks perpetuate an image of women as "unatheletic, improvident, . . . and silly"); Harkins, *Sex and the City Council*, N. Y. MAG., April 27, 1970, at 10-11 (reciting some instances of discrimination in public accommodations and the patrons' reaction to them). *Cf.* H.R. REP. NO. 914, 88th Cong., 1st Sess., *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2355 (preventing humiliation is one purpose behind the prohibition of racial discrimination in public accommodations under § 2000a of the Civil Rights Act of 1964); Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago, 604 F.2d 1028 (7th Cir. 1979) (holding that the demeaning nature of a particular wardrobe is unequally burdensome on women and thus illegal under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (1976 & Supp. IV 1980)).

7. Whether the fourteenth amendment has any role to play in the resolution of this issue is currently uncertain. Actions brought pursuant to the fourteenth amendment require a showing of "state action." *See, e.g.*, United States v. Cruikshank, 92 U.S. 542, 545 (1875) ("The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property without due process of law; but this adds nothing to the rights of one citizen against another."). While this requirement was met in two cases involving preferential treatment for men, see Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593 (S.D.N.Y. 1970) (granting of liquor license to all-male bar held to constitute state action); Johnson v. Heinemann Candy Co., Inc., 402 F. Supp. 714 (E.D. Wis. 1975) (agreement between owner of restaurant with only limited seating for women, and city attorney and police department for enforcement of preferential policy, held sufficient governmental involvement to constitute state action), recent Supreme Court decisions indicate reluctance to find state action in private discrimination. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (granting liquor license to private club is not sufficient state action).

Moreover, where the practice is not explicitly gender-preferential, a showing of disparate impact may not suffice because the fourteenth amendment requires proof of a "specific discriminatory intent." *See, e.g.*, Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) (adverse effects of gender-neutral practice must reflect invidious intent to violate the fourteenth amendment); Washington v. Davis, 426 U.S. 229 (1975) (disparate impact on blacks of a local government's employment test does not deny equal protection).

8. Title II of the Civil Rights Act of 1964 does not prohibit sex discrimination in public accommodations. *See* 42 U.S.C. § 2000a (1976) ("All persons shall be entitled to the full and equal enjoyment . . . of any place of public accommodation . . . without discrimination or segregation on the ground of race, creed, color, religion, or national origin."); De Crow v. Hotel Syracuse Corp., 288 F. Supp. 530 (N.D.N.Y. 1968) (holding Title II inapplicable to a case involving sex discrimination).

9. In contrast to the fourteenth amendment, these public accommodation laws usually require neither state action nor invidious intent. A showing of state action is unnecessary because the state may control this aspect of its citizens' behavior through its police power. *See, e.g.*, Bonfield, *State Civil Rights Statutes: Some Proposals*, 49 IOWA L. REV. 1067, 1086-95 (1964). Moreover, depending upon the precise wording of the statutes, proof of a specific discriminatory intent may not be necessary to establish a violation of a state's antidiscrimination laws. *See infra* notes 31-39 & 66-67 and accompanying text.

10. Defining places of public accommodation is beyond the scope of this Note. *See generally* Avins, *What Is A Place of "Public" Accommodation?*, 52 MARQ. L. REV. 1 (1968) (discussing federal law); Note, *Public Accommodations Laws And The Private Club*, 54 GEO. L.J. 915 (1966) (discussing federal and state laws).

scope of such legislation, however, remains unclear. State courts have advocated widely differing tests, none of which adequately address the problems presented by gender-preferential practices.

This Note argues that the proper test of gender-preferential practices in public accommodations proceeds from the principle of "equal treatment:" separate standards are tolerable only where reasonable and applied evenhandedly. Part I sets out a typical public accommodations statute and criticizes the principle tests used to evaluate this type of legislation. Part II applies traditional methods of statutory construction which trigger an equal treatment analysis. Extrapolating from this analysis, Part III advocates a two-part test for examining gender-based practices in public accommodations.

I. CURRENT APPROACHES TO ANALYZING GENDER-BASED PRACTICES IN PUBLIC ACCOMMODATIONS

Gender-based practices distinguish individuals by gender, establishing different standards for men and for women.[11] "Ladies' nights,"[12] "men only" bars,[13] separate accommodations,[14] "women only" health spas,[15] and numerous other practices[16] exemplify overt gender-based distinctions often made in public accommodations. In addition, "sex-plus" practices,[17] such as hair and dress codes, further reflect gender-based distinctions by regulating on the basis of some "neutral" characteristic.[18]

Such gender-based practices have prompted much state legislation. At least thirty-four jurisdictions have enacted human rights laws pro-

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11. In other words, these practices employ sex as a classifying device. *See* Harzenski & Weckesser, *supra* note 5, at 440 n.2.

12. In this Note the term "ladies' nights" refers to the practice of allowing women to pay reduced prices either for admission or for the goods and services of a place of public accommodation. For cases testing these practices, see *supra* note 4.

13. *See generally* Seidenberg, *supra* note 1.

14. The term "separate accommodations" means gender-segregation, a practice commonly employed with respect to rest rooms, hospital rooms, and prison facilities.

15. *See* Romano v. Bohemia Health Operating, Inc., No. P-S-50528-77 (N.Y. Div. Human Rts. April 14, 1980).

16. In addition to such easily categorized practices, a number of less prominent policies have been adjudicated. *See, e.g.*, Boesen v. Macy's N. Y., Inc., No. P-S-50528-77 N.Y. Div. Human Rts. June 24, 1980) (different alteration fees for similar men's and women's clothing). *Cf. Women Hemmed In By Alteration Fees*, 68 A.B.A.J. 669 (alteration fees); N.Y. Times, Jan. 25, 1982, at A17, col. 1 (Chatham, Massachusetts all-male town band).

17. *Cf.* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1970) (employer's refusal to hire women with pre-school age children constitutes a sex-based distinction for purposes of Title VII). *See generally* Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 S. CAL. L. REV. 965, 989-90 (1973).

18. Sex-plus practices focus not upon an immutable characteristic but upon a characteristic shared by both sexes. In doing so, however, these practices establish different standards for men and women on the basis of that characteristic.

hibiting sex discrimination in public accommodations.[19] A typical public accommodations statute[20] provides:

> (1) The right to be free from discrimination because of race, creed, color, national origin, *sex*, or the presence of any sensory, mental, or physical handicap is recognized as and declared to be a civil right. This right shall include, but not be limited to:
>
> (a) . . .
>
> (b) The right to the full enjoyment of any of the *accommodations, advantages, facilities*, or *privileges* of any place of public resort, accommodation, assemblage, or amusement.[21]

The proper scope of this type of statute, however, is unsettled. Judicial analysis has been widely divergent, irreconcilable, and generally misguided.

Public accommodations statutes generally have been interpreted in one of three widely divergent ways. Some courts seemingly apply a "gender-blind"[22] test, rejecting any gender-based distinctions in public accommodations.[23] Other courts look to the motive behind a gender-preferential practice and suggest that an absence of invidious discriminatory intent may excuse an otherwise illegal distinction.[24] Still others

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19. *See* ALASKA STAT. § 18.80.230 (1981); CAL. CIV. CODE § 51 (Deering Supp. 1982); COLO. REV. STAT. § 24-34-601 (Supp. 1981); CONN. GEN. STAT. ANN. § 46a-64 (West Supp. 1982); DEL. CODE ANN. tit. 6, § 4504 (1975); D.C. CODE ANN. § 1-2519 (1981); IDAHO CODE § 67-5909 (Supp. 1982); ILL. ANN. STAT. ch. 68, § 5-101 (Smith-Hurd Supp. 1982-1983); IND. CODE ANN. § 22-9-1-2 (West 1981); IOWA CODE ANN. § 601A.7 (West 1975); KAN. STAT. ANN. § 44-1009 (1981); KY. REV. STAT. § 344.145 (1977); ME. REV. STAT. ANN. tit. 5, § 4592 (1979); MD. ANN. CODE art. 49B, § 5 (Supp. 1982); MASS. ANN. LAWS ch. 272, § 98 (Michie/Law. Coop. 1980); MICH. STAT. ANN. § 28.343 (Callaghan 1981); MINN. STAT. ANN. § 363.03 (West Supp. 1982); MO. ANN. STAT. § 314.010 (Vernon Supp. 1982); MONT. CODE ANN. § 49-2-304 (1981); NEB. REV. STAT. § 20.132 (1977); N.H. REV. STAT. ANN. § 354-A:8 (Supp. 1981); N.J. STAT. ANN. § 10:5-4 (1976); N.M. STAT. ANN. § 28-1-7 (1978); N.Y. EXEC. LAW § 296 (McKinney 1982); N.D. CENT. CODE § 12.1-14-04 (1976); OHIO REV. CODE ANN. § 4112.02 (Page Supp. 1981); OR. REV. STAT. § 30.670 (1981); PA. STAT. ANN. tit. 43, § 955 (Purdon Supp. 1965-1981); S.D. CODIFIED LAWS ANN. § 20-13-23 (1979); TENN. CODE ANN. § 4-21-111 (Supp. 1982); UTAH CODE ANN. § 13-7-3 (Supp. 1981); WASH. REV. CODE ANN. § 49.60.030 (Supp. 1982); W. VA. CODE § 5-11-9 (1979); WIS. STAT. ANN. § 942.04 (West Supp. 1982).

20. The statutes vary slightly from state to state, especially in the remedies provided. Because some statutes provide for criminal as well as civil penalties, invidious intent may be a necessary element of those cases in which criminal penalties are sought. *See, e.g.*, CONN. GEN. STAT. ANN. § 469-64(c) (West Supp. 1982). The precise language framing the right may differ, as may the particular accommodations covered. Nevertheless, the substantive provisions of these statutes, are in most cases sufficiently similar that the statutes should be interpreted identically. For an overview of these statutes see Note, *Survey of Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215 (1978).

21. WASH. REV. CODE ANN. § 49.60.030 (Supp. 1982) (emphasis added).

22. *Cf.* United Steelworkers of Am. v. Weber, 443 U.S. 193, 238 (1978) (Rehnquist, J., dissenting) (Title VII of the Civil Rights Act of 1964 is designed to be "color-blind.").

23. *See infra* notes 26-30 and accompanying text.

24. *See infra* notes 31-39 and accompanying text.

utilize an "encouragement discouragement" distinction, upholding practices designed merely to encourage attendance.[25] Although each of these analyses is plausible, none support the true purpose of public accommodations laws: equal treatment.

A. Sweeping Interpretations and Gender-blindness

Some court opinions imply that state antidiscrimination laws were intended to prohibit all gender-based distinctions in public accomodations. In *Braun v. Swiston*[26] a New York trial court held that excluding a long-haired male from defendant's restaurant violated the state antidiscrimination statute because defendant had no similar policy excluding long-haired females.[27] In *MacLean v. First Northwest Industries of America, Inc.*[28] the Washington State Appellate Court struck down price reductions offered only to women ("ladies' nights"), reasoning that this practice would clearly be illegal had it been offered on the basis of race.[29]

Whether or not these outcomes are correct, the courts' opinions articulate an unnecessarily broad test. Taken to its logical conclusion, this "gender-blindness" test leads to absurd, unisex requirements. Certain situations warrant separate treatment for men and women; when applied evenhandedly such separate treatment need not burden one sex

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25. *See infra* notes 40-47 and accompanying text.
26. 72 Misc. 2d 661, 340 N.Y.S.2d 468 (1972).
27. *Id.* at 662, 340 N.Y.S.2d at 469.
28. 24 Wash. App. 161, 600 P.2d 1027 (1979), *rev'd*, 96 Wash. 2d 338, 635 P.2d 683 (1981).
29. *Id.* at 171-74, 600 P.2d at 1032-34. The court noted that:

> The injustice of the case at bar would readily be recognized as impermissible if it arose in the context of race. It would be inconceivable to have a "Blacks' Night" or a "Whites' Night" or a "Filipinos' Night" at the Seattle Center Coliseum. It would be unsupportable for the City of Seattle to increase its coffers or take in any revenues on the basis of race classifications.

Id. at 171, 600 P.2d at 1032.

The court's analogy to race is nevertheless imperfect. The Supreme Court has historically treated racial discrimination and sex discrimination differently under the fourteenth amendment. As a result, gender-based discrimination triggers close scrutiny though not the "strict scrutiny" applied to racial classifications. *Compare* McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (racial distinctions must serve some "overriding statutory purpose"), *and* Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny."), *with* Craig v. Boren, 429 U.S. 190, 197 (1976) ("Classifications by gender must serve important governmental objectives and be substantially related to achievement of those objectives."), *and* Orr v. Orr, 440 U.S. 268 (1979) (application of the *Craig* test to "benign" gender-discriminatory practices).

Moreover, gender-based distinctions, unlike racial distinctions, legitimately may exist because of biological differences between males and females. *See, e.g.*, 42 U.S.C. § 2000e-2(e) (1976) (bona fide occupational qualification exception to Title VII). *Cf.* Rosther v. Goldberg, 453 U.S. 57 (1981) (upholding registration of men but not women for the draft).

more than the other.[30] Separate hospital rooms and rest rooms are two such examples. The overly broad test implicit in *Braun* and *MacLean*, therefore, does not accommodate gender-based distinctions which may be non-discriminatory and socially desirable. Existing restrictive interpretations, however, are equally unacceptable.

B. Restrictive Interpretations

In contrast to the gender-blindness approach, which does not look behind a gender-based practice, some courts focus on the "means and motivations" behind gender-based practices.

1. Invidious intent— In reversing the appellate court's decision in *MacLean*,[31] the Washington State Supreme Court noted in dictum that an absence of discriminatory intent might excuse a gender-preferential practice.[32] The court then noted that in the case of "ladies' nights," an inference of discriminatory intent could be rebutted by a showing that defendant had also maintained policies benefiting men, such as price reductions for military personnel.[33]

Proof of "invidious intent," however, has never been required under state public accommodations laws[34] or analogous federal law.[35] Such

30. *See infra* notes 70-75 and accompanying text.

31. 96 Wash. 2d 338, 635 P.2d 683 (1981).

32. *Id.* at 341, 635 P.2d at 684.

33. *Id.*

34. Other courts, including the *Braun* court and the lower court in *MacLean* have ignored the issue of defendant's intent. One court has explicitly rejected this argument in the context of discrimination on the basis of handicap. *See* Vidrich v. Vic Tanny Int'l, Inc., 102 Mich. App. 230, 301 N.W.2d 482 (1980) (exclusion of a blind patron on the basis of safety concerns and lack of discriminatory intent prohibited). *Cf.* New York Inst. of Technology v. State Div. of Human Rts., 48 A.D.2d 132, 368 N.Y.S. 2d 201, 207 (1975) (construing the employment discrimination provisions of the New York Human Rights Law to prohibit a hiring system which was not discriminatory in form or intent but had such an effect), *rev'd on other grounds*, 40 N.Y.2d 316, 386 N.Y.S.2d 685 (1976).

35. The federal counterpart to state public accommodations laws is Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1976), which bars discrimination in places of public accommodation on the basis of race, color, religion or national origin. Lack of invidious intent does not excuse discrimination otherwise barred by this statute. For instance, in Katzenbach v. Gulf State Theaters, Inc., 256 F. Supp. 549 (N.D. Miss. 1966), the defendants attempted to justify the exclusion of blacks from a movie theater by arguing that blacks were admitted in other theaters owned by the defendants, and that economic reasons alone motivated the challenged conduct. They claimed that their discriminatory actions did not manifest a discriminatory intent and therefore fell outside the statutory proscriptions. Rejecting this argument, the district court noted that Title II forbids *all* racial discrimination "regardless of the presence or absence of racial prejudice in the minds of the defendants." *Id.* at 552.

In addition, no other federal anti-discrimination legislation requires a showing of invidious discriminatory intent. Proof that an employment practice unrelated to job performance has a disparate impact on members of a protected group will support a discrimination claim under Title VII of the 1964 Act, 42 U.S.C. §§ 2000e to e-17 (1976 & Supp. IV 1980). *See generally* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Williams v. Colorado Springs, Colo. Dist.

a requirement would undermine these statutes. Moreover, endorsing "offsetting" discriminatory practices merely exacerbates an already discriminatory policy. Gender-based distinctions, even if "the product of innocent, protective, or well-intentioned motivations,"[36] may reinforce stereotypes[37] that later encourage even more serious sex discrimination.[38] Balancing — or more accurately, offsetting discriminatory practices — must therefore be rejected as incompatible with a societal goal of equal rights for all persons regardless of gender.[39]

2. Encouragement/discouragement— Some courts hold that practices which "encourage" admission of a single sex do not contravene public accommodations statutes. In *Tucich v. Dearborn Racquet Club*[40] the Michigan Court of Appeals held that the state's public accommodations law does not bar preferential admission prices for one sex. The court ruled that this practice merely encourages attendance and does not deny the non-favored class "the advantages, facilities, and privileges" of the public accommodation.[41]

#11, 641 F.2d 835, 839 (10th Cir. 1981). The courts are currently split on whether a Title VI claim requires only proof of a discriminatory impact. *See generally* Note, *Intent or Impact: Proving Discrimination Under Title VI of the Civil Rights Act of 1964*, 80 MICH. L. REV. 1095 (1982).

36. Harzenski &. Weckesser, *supra* note 5, at 468.

37. *See generally id.* at 472 (claiming that strict scrutiny should apply to gender-based separate-but-equal statutory schemes because, though discriminatory motives may be non-existent or hard to prove, history demonstrates the misuse of such classification schemes).

38. *See id.* at 472-78 (noting a continued reliance upon "habit-forming stereotypical assumptions"); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-25, at 1063-66 (noting that stereotypes "chill sex-role experimentation"). *See also* Stanton v. Stanton, 421 U.S. 7, 15 (1975) (referring to self-fulfilling nature of sterotypes); Freeman, *supra* note 5 (describing how the legal system engenders and perpetuates sex-based myths). *Cf.* Wasserstrom, *supra* note 5, at 594 (noting our "patriarchal system of power relationships").

39. Even within the parameters of its own balancing test, the Washington State Supreme Court's characterization in *MacLean* of offsetting practices is highly questionable. Men and women alike benefit from a senior citizens' night or a military members' night, whereas only women were eligible for the reduced admission price offered on "Ladies' Night."

40. 107 Mich. App. 398, 309 N.W.2d 615 (1981) (involving male plaintiff's suit against several area tennis clubs which offered preferential admission prices to women).

41. *Id.* at 405-406, 309 N.W.2d at 618. *See also* Magid v. Oak Park Racquet Club Assocs., Inc., 84 Mich. App. 522, 526-27, 269 N.W.2d 661, 662-63 (1978) (preferential membership fees for women); MacLean v. First Northwest Indus. of Am., Inc., 96 Wash. 2d 338, 344, 635 P.2d 683, 685-86 (preferential admission policies do not make a member of the non-preferred class feel "not welcome, accepted, desired, or solicited."). *But see* McDaniel v. Cory, 631 P.2d 82 (Alaska 1981) (rejecting differential pricing schemes for men and women); Abosh v. New York Yankees, Inc., No. CPS-25284-71 (N.Y. Human Rts. App. Bd., July 19, 1972) (holding that reduced admission prices for women at Yankee baseball games violated state public accommodations law); ME. REV. STAT. ANN. tit. 5 § 4592 (1979) (discrimination "against any person in the price, terms or conditions upon which access to such accommodation, advantages, facilities, and privileges may depend" is prohibited); WIS. STAT. ANN. § 942.04(1)(a) (West Supp. 1982) (violation of state law to deny or charge another a "higher price than the regular rate").

For a definitional treatment of the statutes see *infra* notes 48-50 and accompanying text. The distinction between practices that encourage and those that discourage admission is critical to the *Tucich* Court's argument because practices discouraging admission clearly violate the statute

Like the invidious intent test, however, practices encouraging the attendance of one sex may perpetuate unreasonable stereotypes.[42] For instance, when the defendant in *Tucich* argued that the differential membership fee helped persuade women to attend during the day,[43] this "justification" reflected a stereotype of women as "homemakers" who have considerable free time during the day. Furthermore, implicit in *Tucich* and similar opinions is the assumption that practices encouraging the attendance of one sex do not violate the statutory language because they benefit all patrons[44] or at least do not exclude members of the non-preferred group.[45] The validity of such an assumption is questionable. Preferential pricing policies may well impose a "surcharge"[46] on the non-favored group. This surcharge may outweigh the economic benefits potential patrons derive from the preferential practice, thereby deterring their attendance.[47] Thus, the court's argument

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by denying potential patrons all the advantages and facilities of an establishment. Such a fine distinction, however, is overly strict and unwarranted, see *infra* notes 51-65 and accompanying text, in light of the liberal construction these statutes should be given. *See, e.g.*, N.Y. EXEC. LAW § 300 (McKinney 1982); UTAH CODE ANN. § 13-7-1 (Supp. 1981); WASH. REV. CODE ANN. § 49.60.020 (Supp. 1982). Moreover, preferential admission prices can serve an exclusionary function which denies members of the non-preferred class the facilities of an accommodation. *See infra* notes 46-47 and accompanying text.

The Supreme Court has acknowledged the encouragement/discouragement distinction in some Title VII cases on the grounds that policies encouraging employment of a protected class may atone for the vestiges of past intentional discrimination hindering present opportunities to qualify for employment. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193 (1978). This logic, however, is inapposite to public accommodation cases: absent a discriminatory policy, nothing impedes the ability of one group to attend an accommodation.

42. *See supra* notes 37-38 and accompanying text.

43. 107 Mich. App. at 401, 309 N.W.2d at 617.

44. *See id.* at 405, 309 N.W.2d at 619 ("[T]he price differential is designed to encourage membership and make the club facilities more available to both sexes."); MacLean v. First Northwest Indus. of Am., Inc., 96 Wash. 2d 338, 342, 635 P.2d 683, 685 (noting that "ladies' nights" benefit the team's fans by providing additional revenues with which the best players can be bought).

45. *See supra* note 41 and accompanying text.

46. A surcharge is a price above that normally demanded for a good or service. Few charges are explicitly denoted as surcharges, and a determination of whether a fee constitutes the "normal" price or a surcharge is quite difficult, especially where different rates are charged at different times. In addition, any discriminatory price could be viewed as a surcharge relative to the lower price charged an advantaged group.

47. In some cases, this exclusion may even be intended. Although an intentionally exclusionary price would violate even the narrow *MacLean* test, it may be difficult for the courts to determine that a particular price is a surcharge, *see supra* note 46, or that it is intended to be prohibitive.

Moreover, to the extent that a preferential pricing policy leads to increased attendance by the preferred group, the policy may effectively exclude other patrons because of an accommodation's limited capacity.

Finally, these practices may also result in distributive inefficiencies. Consider a ladies' night policy making $2.00 drinks available for $1.00 to female patrons. Patron F, a female, may value drink X at $1.25 and patron M, a male, may value that same drink at $1.75. At $2, patrons F and M will be unwilling to purchase drink X while at the preferential $1 price for women patron F may be induced to buy it. If drink X is consumed by patron F who values it substantially

fails: practices encouraging the attendance of one sex do no necessarily benefit all patrons and may even exclude them.

In sum, the sweeping "gender-blindness" test and the restrictive invidious-intent and encouragement/discouragement tests fail to withstand close analysis; the former because some situations warrant differential treatment, the latter because they may foster unreasonable stereotypes or promote exclusionary practices. On a more fundamental level, however, these tests are entirely misguided: none comports fully with the legislative intent underlying state public accommodations laws.

II. DEVELOPMENT OF THE EQUAL TREATMENT PRINCIPLE

The uncertain scope of public accommodations laws can be attributed to the attempt to achieve broad goals through vague language. Crucial terms such as "full enjoyment," "advantages," or "privileges" may be undefined[48] or the statutory definitions unclear. For example, the state of Washington's anti-discrimination law defines "full enjoyment" to "include" the right to be free from acts that "directly or indirectly" cause a potential patron to feel "not welcome, accepted, desired or solicited."[49] Use of the term "includes" suggests that the statute is not exhaustive, lending itself to diverse interpretations.[50] Moreover, clarity is hardly furthered by terms as nebulous as "not welcome"; any preferential practice can make a member of the non-preferred class feel "not welcome" or unsolicited. The precise applicability of this

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less than patron M, then society does not derive its maximum utility from its available resources, in this case drink X.

48. The terms "privileges" and "advantages" are not defined in any state's statute. "Full enjoyment" is directly or indirectly defined in only some of the statutes. *See infra* note 49 and accompanying text.

49. WASH. REV. CODE ANN. § 49.60.040 (Supp. 1982). The Michigan statute, MICH. STAT. ANN. § 28-343, 344 (Callaghan 1981), indirectly defines it as a withholding, refusal, or denial of all the "advantages, facilities, and privileges" of an accommodation. *See* Tucich v. Dearborn Racquet Club, 107 Mich. App. 398, 402, 309 N.W.2d 615, 618 (1981).

50. The *MacLean* court refused to address the issue of what conduct, other than that expressly stated in the statute, the term "includes" might encompass. MacLean v. First Northwest Indus. of Am., Inc., 96 Wash. 2d 338, 344, 635 P.2d 683, 686. The dissent, in contrast, suggested that the statutory definition of full enjoyment was intended only to illustrate possible applications of the term "full enjoyment." *Id.* at 350, 635 P.2d at 689. (Utter, J., dissenting). Rather than confront this issue, the *MacLean* majority held that the plaintiff had not been "injured" for purposes of the Washington statute, a puzzling ruling that hinged on the community property laws of Washington. The court reasoned that the plaintiff benefited from "ladies' night" because of the reduction his wife received and thus sustained no injury within the meaning of the statute. This logic is apparently inapplicable in those states without community property laws though the court stated that its reasoning would apply had the plaintiff taken only a female friend. *Id.* at 685, 635 P.2d at 690. Moreover, this holding is simply not persuasive. *See id.* at 351, 635 P.2d at 690 (Utter, J., dissenting) (discrimination can be per se injurious).

statute is therefore uncertain, and must be determined through traditional interpretive techniques.

Courts confronted with an ambiguous statute must construe its terms in accordance with the legislature's intent.[51] A preferred source of legislative intent is the statute's legislative history.[52] Where this source is not conclusive — often the case with state public accommodations laws[53] — courts must turn to traditional rules of statutory construction.[54] Applied to state public accommodations legislation, these traditional rules suggest the same thing: the legislation was intended to provide "equal treatment" for both men and women.

For instance, the plain or "ordinary meaning" rule,[55] when applied to a typical antidiscrimination statute,[56] supports the equal treatment interpretation. "Advantage" is commonly defined as a "favorable position" or "benefit";[57] "privilege" is defined as "a right granted as a benefit" or an "exemption from a burden."[58] Substituting these definitions for the statutory language, the law guarantees both sexes the full enjoyment (or full and equal enjoyment) of all the benefits an accom-

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51. *See, e.g.*, United States v. Klinger, 199 F.2d 645, 648 (2d Cir. 1952) (L. Hand, J.) ("Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion."), *aff'd*, 345 U.S. 979 (1953).

52. *See, e.g.*, Lehman, *How to Interpret a Difficult Statute*, 1979 WIS. L. REV. 489, 491.

53. Legislative histories to state statutes are notoriously scarce. *See* C. NUTTING & R. DICKERSON, CASES AND MATERIALS ON LEGISLATION 560 (1978). A thorough search of the history underlying the Michigan public accommodations statute disclosed only procedural data. *See* 3 MICH. SENATE J., 2479 (1972) (P.L. 4139 and history thereof). In addition, written requests for available historical information by the author of this Note to many state Human Rights Commissions proved equally unsuccessful. With one exception, the commissions contacted responded negatively or failed to respond. Materials submitted by the District of Columbia Office of Human Rights shed no light on the proper scope of the District of Columbia statute. This correspondence is on file with the *Journal of Law Reform*.

54. *See generally*, P. MAXWELL, THE INTERPRETATION OF STATUTES 39 (P. Langham 12th ed. 1969).

55. *See, e.g.*, Nix v. Hedden, 149 U.S. 304, 306-07 (1893):

> There being no evidence that the words 'fruit' and 'vegetables' have acquired any special meaning in trade or commerce, they must receive their ordinary meaning. Of that meaning the court is bound to take judicial notice, as it does in regard to all words in our own tongue; and upon such a question dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court.

See generally E. CRAWFORD, THE CONSTRUCTION OF STATUTES § 319 (1940).

56. *See, e.g.*, WASH. REV. CODE ANN. § 49.60.030 (Supp. 1982) (set out *supra* text accompanying note 19).

57. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 30 (1971).

58. *Id.* at 1805. In Tucich v. Dearborn Racquet Club, 107 Mich. App. 398, 405, 309 N.W.2d 615, 619 (1981), the Michigan Court of Appeals ignored the issue of whether plaintiff had been denied a privilege or advantage, focusing instead on whether he had been denied the use of the "facilities." Such an oversight is indefensible. The statute provides for the full enjoyment of all the privileges and advantages of a public accommodation, not merely access to the facilities of an accommodation. Besides, the price differential may act in an exclusionary manner, effectively denying the plaintiff access to the accommodation. *See supra* notes 46-47 and accompanying text.

modation extends to its patrons. Given the ordinary meaning of their terms, public accommodations statutes prohibit any gender preferential practice resulting in greater burdens or benefits; in short, they mandate "equal treatment."

The "mischief" rule[59] further supports this interpretation. Under the "mischief rule," statutes should be interpreted in that manner most conducive to suppressing the wrong the common law failed to address. The preambles to many public accommodations statutes[60] indicate that the statutes were intended to prevent humiliation[61] and to make all the goods, services, and facilities of an accommodation equally available to men and women.[62] The statutes thus promote equal treatment rather than gender-preferences.[63]

Confronted with race preferences, courts and commentators have consistently applied the principle of equal treatment when interpreting these statutes.[64] Gender-based practices have not, however, prompted an analogous response.[65] The "invidious intent test,"[66] for example, focuses upon the defendant's discriminatory motivation, not the consequences of the preferential act. The encouragement/discouragement test similarly ignores differential effects.[67] To the extent that these restrictive tests permit courts to ignore disparate treatment, they are inconsistent with the fundamental principle of equal treatment underlying public accommodations statutes.

In contrast to these restrictive tests, the "gender-blindness" test prohibiting all gender-based distinctions[68] is overinclusive. The principle

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59. This rule apparently originated in Heydon's Case, 3 Co. Rep. 7a (1584), *cited in* P. MAXWELL, *supra* note 54, at 40-43.

60. Preambles may be used as an interpretive aid. *See generally* P. MAXWELL, *supra* note 54, at 6-9.

61. *See, e.g.*, KY. REV. STAT. § 344.020 (1977); TENN. CODE ANN. § 4-21-101 (Supp. 1982).

62. *See, e.g.*, IND. CODE ANN. § 22-9-1-2 (West 1981) ("equal access to and use of" a public accommodation). Indeed, many statutes use the term "full *and equal* enjoyment" rather than "full enjoyment." *See, e.g.*, COLO. REV. STAT. § 24-34-501 (Supp. 1981).

63. The language of several statutes specifically forbids preferential treatment. *See* WIS. STAT. ANN. § 942.04 (West Supp. 1982); S.D. CODIFIED LAWS ANN. § 20-13-23 (1979) (prohibiting unequal treatment in terms or conditions of accommodation).

64. *See, e.g.*, Smith v. Suburban Restaurants, Inc., 373 N.E.2d 215 (Mass. 1978) (places of public accommodation have an obligation to treat each member of the public equally in the absence of good cause); Anderson v. Pantages Theatre Co., 114 Wash. 24, 28, 194 P. 813 (1921) (public accommodations laws confer "upon all persons . . . the right to be admitted to the places enumerated on equal terms . . ."); Caldwell, *State Public Accommodations Laws, Fundamental Liberties and Enforcement Programs*, 40 WASH. L. REV. 841, 842 (1965) ("The legal objective of public accommodations statutes is to make equal access to and the use of places of public accommodations . . . a *public* right.").

65. *But see* MacLean v. First Northwest Indus. of Am., Inc., 24 Wash. App. 161, 600 P.2d 1027 (1979) (involving gender-preferential practice) (citing Anderson v. Pantages Theatre Co., 114 Wash. 24, 194 P. 813 (1921)), *rev'd*, 96 Wash. 2d 338, 635 P.2d 683 (1981).

66. *See supra* notes 31-39 and accompanying text.

67. *See supra* notes 39-47 and accompanying text.

68. *See supra* notes 26-30 and accompanying text.

of equal treatment implicit in public accommodations statutes prohibits only preferential practices: practices conferring greater "advantages" or "privileges" on members of one sex.[69] Not every gender-based distinction violates this standard. Separate-but-equal standards[70] originating in cultural or biological differences, if they do not perpetuate unreasonable stereotypes[71] and both males and females are held to "relatively similar standards,"[72] need not burden one sex more than the other.[73]

The California Court of Appeals recognized this principle in *Hales v. Ojai Valley Inn and Country Club*,[74] a case involving different dress requirements for men and women. The *Hales* court remanded the dispute to determine whether the particular dress code was preferential.[75] The remand order implied that a different dress requirement for males and females need not burden one sex more than the other. *Hales* thus recognizes that unisex standards need not be established to satisfy the "equal treatment" principle.

III. A PROPOSED MODEL FOR CONSTRUING PUBLIC ACCOMMODATIONS STATUTES

The key issue in assessing the legitimacy of a gender-based practice

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69. *See supra* notes 55-58 and accompanying text.

70. In Brown v. Board of Educ., 347 U.S. 483 (1954), the Supreme Court held that racially based separate-but-equal educational systems violated the equal protection clause of the fourteenth amendment. *See also* Loving v. Virginia, 388 U.S. 1 (1967) (striking down state miscegenation statute).

Separate-but-equal gender-based situations do not enjoy the same degree of constitutional protection. *See, e.g.*, Vorchheimer v. School Dist., 532 F.2d 880 (3d Cir. 1976) (maintenance of some single sex schools in a system otherwise coeducational held constitutional), *aff'd per curiam by an equally divided Court*, 430 U.S. 703 (1977). *See generally* Comment, Plessy *Revived: The Separate But Equal Doctrine and Sex-Segregated Education*, 12 HARV. C.R.-C.L. L. REV. 585 (1977).

71. *See infra* notes 80-90 and accompanying text.

72. *Cf.* Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago, 604 F.2d 1028, 1031 (7th Cir. 1979) (striking down a dress code under Title VII because women were held to a stricter standard than men).

73. *See, e.g.*, Harzenski & Weckesser, *supra* note 5, at 456 ("We admit that neither group in a separate but equal situation appears to be especially benefited or burdened; nor does either group appear to be especially disadvantaged.").

Title VII grooming cases provide an instructive analogy. *See, e.g.*, Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1092 (5th Cir. 1975) ("It does not appear that defendant fails to impose grooming standards for female employees, thus in this respect each sex is treated equally."); Fagan v. National Cash Register Co., 481 F.2d 1115, 1117 n.3 (D.C. Cir. 1973) ("[T]aking account of basic differences in male and female physiques and common differences in customary dress of male and female employees, it is not usually thought that [a dress code] is unlawful discrimination because of sex.").

74. 73 Cal. App. 3d 25, 140 Cal. Rptr. 555 (1977) (women dressed in leisure suits admitted to an accommodation while a similarly attired male was not).

75. *Id.* at 28, 140 Cal. Rptr. at 558.

is whether the separate standards burden or benefit the sexes unequally.[76] Any gender-based distinction should raise a presumption of inequality,[77] but not every such distinction violates the concept of equal treatment.[78] This Note advocates a two-part test to determine the validity of separate standards embodied in gender-based distinctions. Separate standards apply equally and should be upheld when (1) they can be justified by commonly accepted social norms and do not promote unreasonable stereotypes, and (2) they apply evenhandedly to both men and women.

A. Commonly Accepted Social Norms and Unreasonable Stereotypes

Separate gender-based standards can be equal when they are supported by "commonly accepted" cultural differences.[79] Nevertheless, the prevalence of a particular gender-based practice is not dispositive of the equal treatment issue. Even widely accepted cultural distinctions can perpetuate the burdensome, humiliating, or demeaning stereotypes[80] public accommodations statutes were designed to eliminate.[81] The "commonly accepted social norm" defense might be invoked to justify every gender-based practice,[82] protecting even invidious discrimination merely

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76. When determining whether a practice burdens or benefits the sexes unequally, the focus should always be upon the separateness of standards rather than the practice itself. A practice may incorporate standards for both sexes; these separate standards, however, may be unequal or preferential. *See, e.g., supra* note 72 and accompanying text (dress codes). *See also infra* notes 98-100 and accompanying text (discussing evenhandedness).

77. Because few gender-based practices are likely to satisfy this Note's proposed equal-treatment test, every gender-based distinction should raise a rebuttable presumption of unequal burdens. The burden would then be upon the party implementing the practice to show that the practice is nonpreferential.

78. *See supra* notes 70-75 and accompanying text.

79. *See supra* notes 70-75 and accompanying text. *Cf.* Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago, 604 F.2d 1028, 1032 (7th Cir. 1979) (as long as they can be justified in "commonly accepted social norms," separate standards of dress for men and women do not necessarily violate Title VII); Wasserstrom, *supra* note 5, at 592-94 (noting that gender-segregation is often tolerated where it is "mutually undesirable" for men and women to associate, such as in rest rooms). A determination of whether a practice is "widely accepted," however, would likely require evidence both of similar practices elsewhere and of the degree of patron approval, evidence both difficult to acquire and to evaluate.

80. Certain culturally imposed role expectations become so ingrained in a social system that members may sometimes fail to recognize the false stereotypes underlying these expectations. Consequently, a stereotyped member of society may accept mechanically this stereotype and assume the corresponding personality traits. This can result in both perpetuation of the stereotype and psychological defects in the actor. *See generally* Harzenski & Weckesser, *supra* note 5, at 472-78; Note, *"A Little Dearer than His Horse": Legal Stereotypes and the Feminine Personality*, 6 HARV. C.R.-C.L. L. REV. 260, 271-83 (1971).

81. *See supra* note 61 and accompanying text.

82. Hoyt v. Florida, 368 U.S. 57, 62 (1961), illustrates the point:

> [W]oman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless

because it is rooted in tradition. Consequently, even widely accepted gender-based practices in public accommodations should be closely scrutinized to determine whether they tend to promote unreasonable stereotypes.

The reasonableness of a particular gender-based distinction depends upon two factors. The first is the cultural foundation for the distinction. Distinctions deriving in whole or in part from a humiliating or demeaning stereotype are inherently suspect.[83] For instance, the practice of excluding unescorted women from bars has sometimes stemmed from the belief that these women may be of low moral character.[84] Some distinctions, however, serve merely to differentiate males from females without perpetuating unreasonable stereotypes. Dress codes, for example, reflect social distinctions between the sexes rather than underlying, unfounded, and humiliating stereotypes.[85]

The second element of this reasonableness test requires that the distinction serve some important social policy.[86] If a gender-based practice implicates a demeaning stereotype, courts should balance the offen-

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she herself determines that such service is consistent with her own special responsibilties. *See also* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.").

83. Some scholars argue that all gender-based distinctions, except those that are biologically necessary, are unreasonable because men would be virtually indistinguishable from women in the absence of culturally imposed differences. *See generally* Wasserstrom, *supra* note 5, at 603-15; Harzenski & Weckesser, *supra* note 5, at 473, 477; Comment, Geduldig v. Aiello: *Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441, 461 (1975). Professor Wasserstrom labels this the "assimilationist" view. Wasserstrom, *supra* note 5, at 604. Even if no legitimate non-cultural reasons justify some gender-based distinctions, however, these distinctions are not necessarily founded upon demeaning stereotypes. Some practices, like dress codes, serve merely to distinguish men from women without promoting the humiliating stereotypes that accompany practices like "men-only" bars. *But see id.* at 594 (all gender-based distinctions, including separate rest rooms, promote our oppressive "patriarchal system of power relationship").

84. *See, e.g.*, De Crow v. Hotel Syracuse Corp., 59 Misc. 2d 383, 298 N.Y.S.2d 259 (1969).

85. *See, e.g.*, M. ROACH, *The Social Symbolism of Women's Dress*, in THE FABRICS OF CULTURE 415, 416 (1979) ("Once distinctions between the dress of sexes have existed for a long time, as is true in Western society, their continuation is supported by custom even though the tasks that men and women perform may change."). *But see id.* at 416 ("[T]hrough time a complex set of meanings becomes attached to the traditional dress of each sex, and sanctions develop that discourage behavior inconsistent with meanings.").

86. A number of state public accommodations statutes contain a public policy exception. *See, e.g.*, KAN. STAT. ANN. § 44-1009 (1981); MASS. GEN. LAWS ANN. ch. 272, § 98 (Michie/Law Coop. 1980); MICH. STAT. ANN. § 28.343 (Callaghan 1981). Such a provision would likely exempt many of the practices permitted under this Note's proposed test. A statutory public policy exception is narrower, however, than a reasonableness standard. Dress codes, for example, while reasonable, would not trigger a statutory public policy exception because such codes serve no important social function. Conversely, a statutory public policy exception is broader than the proposed reasonableness test; it could be invoked to exempt establishments incapable of complying with the state antidiscrimination law. *See* Romano v. Bohemia Health Operating, Inc., N.Y. State Div. of Human Rights, April 14, 1980 ("women only" health spa with inadequate facilities to serve both sexes granted an exemption from the state law) (on file with the *Journal of Law Reform*).

siveness of this stereotype against the social policies the practice promotes, allowing only important social policies[87] to outweigh the burdensome effects of a stereotype. Notwithstanding those who feel that gender-based cultural differences are never rationally based,[88] some social policies clearly legitimize certain gender-based distinctions. Privacy interests, for example, justify separate rest rooms and hospital rooms for men and women;[89] such important interests outweigh any of the stereotypes conceivably underlying the practice.

The justification that "ladies' nights" are widely accepted and encourage attendance thus fails to support this practice under the proposed reasonableness test. The widespread acceptance of "ladies' nights" does not excuse perpetuating the demeaning stereotype of women as improvident and helpless.[90] Moreover, encouraging the attendance of only one sex serves no important social policy. Conversely, a court might well be persuaded that concerns about exposure, violence, and privacy warrant separation of the sexes in rest rooms, hospital rooms, and correctional facilities.[91]

For a limited category of practices, however, the issue of reasonableness is difficult to resolve. Although privacy interests may justify separate rest rooms and prohibit "men only bars,"[92] in other contexts the privacy justification is not clearly determinative. For example, public accommodations sometimes reserve separate time slots for male and female patrons, with some hours open to both sexes.[93] Although only minimally burdensome,[94] perhaps this separate-but-equal practice fails the reasonableness test because separation may promote the offensive prejudice that one sex is bothersome to the other. At the same time, no important social policies outweigh the potentially

87. The definition of "important" social policies is not addressed in this Note. Such a determination will depend on a multitude of factors not readily examinable in the present analysis.

88. *See supra* note 83.

89. *But see* Wasserstrom, *supra* note 5, at 594 (arguing that the purpose behind segregated rest rooms and hospital rooms is not privacy but the preservations of the mystery concerning the genitalia which maintains the "primacy of heterosexual attraction central to [the] . . . patriarchal system of power relationships we have today.").

90. *See supra* note 6.

91. *But see supra* note 89.

92. The privacy concerns of the patron of an all-male bar differ markedly from those of the hospital patient. While the hospital patient is compelled to remain in the hospital, the bar patron may seek respite in alternative settings. Moreover, worries about bodily exposure are not relevant to the bar patron's privacy concerns. Consequently, because all-male bars serve no important public policy, and may promote the demeaning stereotype of women as "homemakers" incapable of handling both themselves and their liquor in a bar, the proposed reasonableness standard is not met.

93. This practice is fairly common in establishments such as skating rinks.

94. Unlike operating an all-male bar, reserving different hours for men and women does not exclude a particular sex from attending the accommodation. But such a practice may be de facto exclusionary. If, for example, the accommodation sponsored separate hours for women during inconvenient times of the day, it would effectively deter their attendance.

offensive impressions it fosters.[95] Another setting where the reasonableness test is not clearly determinative is that of "women only" health spas. Like segregated time slots, such segregated spas may depict one sex as a nuisance to the other. On the other hand, this segregation is founded upon the same privacy reasons underlying separate rest rooms.[96] Notwithstanding this potential justification, "women only" health spas fail the second part of this Note's preferentiality test, the evenhandedness requirement.

B. Evenhandedness

A reasonable gender-based practice may nevertheless be preferential. "Evenhandedness" requires that places of public accommodation provide equal benefits to members of both sexes.[97] Even where segregation is reasonable, accommodations must furnish equivalent facilities and privileges. Thus, if a gender-based practice dictates "two entirely different standards,"[98] rather than relatively similar standards, it fails the evenhandedness requirement and violates the equal treatment principle.

In most cases, this issue of equality of standards is easily resolved. A hospital, for example, may not reserve all the best rooms for members of one sex. Similarly, assuming that the occasional segregation of customers at particular hours is not unreasonable,[99] one sex cannot be granted this privilege and the other denied it. Such unequal treatment fails the evenhandedness requirement. By the same token, establishments catering solely to members of one sex, such as "men only" bars or "women only" health spas, fail to survive scrutiny. Even if justified on privacy grounds,[100] this exclusiveness is impermissible because members of only one sex are restricted. The failure to provide similar facilities for both sexes is a breach of the accommodation's obligation of equal treatment.[101]

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95. The privacy interest secured by this practice more closely approximates that of the all-male bar than the hospital room. *See supra* note 92.

96. As used in this Note, the term "segregated spas" refers to exercise spas accommodating only one sex. Spas which accommodate both sexes yet have certain segregated facilities (e.g. saunas) may more closely resemble segregated rest rooms.

97. *See supra* notes 55-64 and accompanying text. *Cf.* Smith v. Suburban Restaurants, Inc., 373 N.E.2d 215 (Mass. 1978) (holding that a place of public accommodation is obligated to treat each member of the public equally in the absence of good cause).

98. *Cf.* Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago, 604 F.2d 1028, 1032 (7th Cir. 1979) (holding that Title VII prohibits "two entirely separate dress codes" for men and women).

99. *See supra* note 93 and accompanying text.

100. *See supra* note 92 and accompanying text.

101. A health spa established prior to the passage of a state's public accommodation statute might be exempt from the law if it were incapable of providing facilities for both men and women. *See supra* note 86. An alternative to exemption, however, is alternating days for men and women.

In certain cases, determinations of evenhandedness are not so simple. The evenhandedness of standards promulgated under practices such as dress codes, for example, depends greatly on geographic and social customs.[102] Where evenhandedness depends upon such factors, a jury is especially suited to resolve the issue.[103] Once a trial court determines that a gender-based practice is not unreasonable, the jury should then be allowed to decide whether the separate standards apply evenhandedly.

CONCLUSION

State public accommodations statutes embody a legislative goal of equal treatment for all persons. Courts interpreting these statutes have failed, however, to recognize the principle of equal treatment underlying such legislation; the result has often been either overly restrictive or overbroad application of these statutes. This Note proposes a preferentiality test for gender-based distinctions which will advance the fundamental "equal treatment" objective of public accommodations legislation without creating a gender-blind society. Application of this test will ensure equal treatment for both men and women while preserving those gender-based distinctions which are neither demeaning nor

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102. *See* Hales v. Ojai Valley Inn and Country Club, 73 Cal. App. 3d 25, 140 Cal. Rptr. 555, 558 (1979) (remanding with order that the trial court determine "arbitrariness" of dress codes on the basis of "community standards").

"Hair codes" also reflect social convention and prevailing notions of "fashion." They are sometimes used to exclude long-haired males. *See, e.g.*, Braun v. Swiston, 72 Misc. 2d 661, 340 N.Y.S.2d 468 (1972) (exclusion of long-haired males held to violate state antidiscrimination law).

Hair codes are more difficult than dress codes to analyze. A distinction between long-haired males and long-haired females can conceivably apply in an evenhanded manner because "fashion" dictates that men be held to stricter grooming requirements than women. This argument, however, overlooks the issue of whether this distinction is "reasonable." Unlike dress codes, a humiliating stereotype underlies a hair code which distinguishes long-haired males from long-haired females. Long-haired males are frequently considered rebellious or otherwise objectionable. *See, e.g.*, Ham v. South Carolina, 409 U.S. 524, 530 (1973) (Douglas, J., concurring and dissenting). Nor does the exclusion of long-haired males serve an important social policy. Although the length of an employee's hair may be regulated under Title VII on the grounds that a salaried representative is expected to present a certain image, *see, e.g.*, Fagan v. National Cash Register Co., 481 F.2d 1115, 1124-25 (D.C. Cir. 1973), no such considerations apply with respect to public accommodations statutes. Indeed, this policy may so burden the patron that it contravenes certain constitutional policies. *See, e.g.*, Richards v. Thurston, 424 F.2d 1281, 1284-86 (1st Cir. 1970).

103. Judge Pell's dissent in Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1033 (7th Cir. 1979), underscores this point. The judge disagreed with the majority as to whether men and women were subject to relatively equal standards, stating, "[i]n sum, customary attire for the men employees of Talman seems to me to confine these employees in a uniform to the same extent as the Talman dress code does for women . . . ." *Id.* at 1034.

Fashion is an area in which the jury is likely to have as much expertise as the court. Moreover, community standards will have some bearing on the question of fashions and a jury is best able to ascertain these community standards. The evenhandedness of fashion-oriented standards, therefore, is a question particularly suited for the jury.

burdensome, thereby permitting each gender to retain its distinctive character.

—Alan J. Hoff