

A GUY WALKS INTO A BAR: GENDER DISCRIMINATORY PRICING AND ADMISSION POLICIES IN LAS VEGAS ESTABLISHMENTS

*Shana S. Brouwers**

I. INTRODUCTION

In a city whose advertising slogan winks and purrs to potential tourists worldwide that “What Happens Here Stays Here,”¹ it comes as no surprise that many visitors arrive in Las Vegas expecting to indulge their forbidden desires. For a large number of these visitors, the self-gratification includes attending one or more of the famed Las Vegas Strip’s plethora of high-end nightclubs, where the alcohol flows freely at upward of ten dollars per drink,² the lights are low enough to make every face a study in seduction, and the music pulses so loudly that conversation can exist only via the body language spoken on the crowded dance floor. Visitors might also decide to display or ogle vast amounts of flesh at one of the increasingly popular poolside “day clubs”—where the desert’s scorching daytime temperatures encourage patrons to order one chilled fruity drink after another—or a “European pool,” where already-skimpy bikini tops are optional and, frankly, discouraged.³ Whatever the choice, the observant visitor is likely to notice two things: (1) sex (or the illusion thereof) sells, and (2) many “hot spots” presume that men will buy access for a higher price. Specifically, many establishments charge men higher prices than they charge women to gain entry and to imbibe.

* Juris Doctor Candidate 2011, William S. Boyd School of Law, University of Nevada, Las Vegas.

¹ The Las Vegas Convention and Visitors Authority (LVCVA) debuted this slogan in 2003, and recently resurrected it when attempts to market Las Vegas as a blue-collar, discount destination proved fruitless even in the currently depressed economy. Tamara Audi, *Vegas Tries Luck with Old Slogan*, WALL ST. J., May 13, 2009, at B5, available at <http://online.wsj.com/article/SB124217791927013441.html>.

² *Las Vegas Nighclub and Bar Prices, Drink Specials, and Table Service Costs*, JACK COLTON LAS VEGAS ENTERTAINMENT GUIDES, http://jackcolton.com/las_vegas_drink_prices.htm (last visited Oct. 14, 2010) (noting that drink prices range between \$7.00 and \$18.00 in Las Vegas nightclubs).

³ For example, billboards advertising Bare Pool Lounge at the Mirage depict a topless woman with her hair covering her breasts under the tagline, “Lose the tan line.” Similarly, TAO Beach at the Venetian is advertised with a picture of a topless woman from behind. TAO NIGHTCLUB, ASIAN BISTRO & TAO BEACH AT THE VENETIAN LAS VEGAS, <http://www.taolasvegas.com/> (last visited Oct. 14, 2010).

This note examines and challenges sex-based pricing and admissions policies in Las Vegas businesses, particularly in the entertainment industry.⁴ Such policies reinforce negative gender stereotypes—namely, the commoditization and submission of women, and the animalism and dominance of men. Such policies also violate equal protection principles. The note proceeds in seven short sections. Because it is impossible to grasp fully the stereotyping and discrimination inherent in sex-based pricing without understanding the context of Las Vegas’ entertainment and tourism industry, Section II describes briefly the fictional experiences of an average young, male tourist.⁵ Section III assesses the negative stereotyping inherent in sex-based pricing and admission policies. Section IV examines civil rights measures more liberal states in the Ninth Circuit have taken—and which are noticeably absent in Nevada—to combat gender discrimination against patrons by businesses. Section V explores the evolution of equal protection in Nevada, including the Nevada Equal Rights Commission’s brief and controversial flirtation with taking a stand against gender-discriminatory pricing at one Nevada business. Section VI attempts to reconcile this blatant discrimination and disregard for equal protection rights with the state’s interests in light of Nevada’s unique economy. Finally, Section VII concludes briefly and suggests avenues for future scholarship. Information regarding each establishment’s policies comes either from its relevant promotional website, or from employee interviews.

II. WHAT HAPPENS HERE . . .

“He that loveth pleasure shall be a poor man.”

—Proverbs 21:17⁶

Sexual innuendos and imagery bombard the traveler almost from the moment he and his friends decide to take a guys-only vacation to Las Vegas. To plan his itinerary, he heads to his computer and accesses the Las Vegas official tourism website, whose scrolling banner displays four separate photos of bikini-clad women along with the phrase, “There’s always an excuse to be in Vegas . . . Find yours now.”⁷ Intrigued, he clicks on a few more links and finds that this same website, which the Las Vegas Convention and Visitors Authority⁸ (LVCVA) operates, also boasts an interactive feature that promises to give him a secret, sexier identity (e.g., Lance, the Double Agent from Amsterdam) to use during his stay, complete with a fake history, fashion tips, printable fake

⁴ However, the adult entertainment venue by no means has a monopoly on such pricing schemes; in fact, my favorite sushi restaurant also advertises a “Ladies’ Night” from which I have—perhaps hypocritically—benefitted.

⁵ The fictional account here is based on an amalgamation of potential real-life experiences, as told to me by several male friends.

⁶ *Proverbs* 21:17.

⁷ Las Vegas Convention & Visitors Auth., OFFICIAL LAS VEGAS TOURISM WEBSITE, <http://www.visitlasvegas.com/vegas/index.jsp> (last visited Sept. 27, 2009).

⁸ The LVCVA is a “quasi-governmental agency. It was established by a state law, is funded by a county room tax, and is governed by an autonomous Board of Directors.” Las Vegas Convention & Visitors Auth., *About the LVCVA: Mission & Purpose*, LVCVA.COM, <http://www.lvcva.com/about/mission-purpose.jsp> (last visited Oct. 14, 2010).

business card, “1-800” number, and fake company website to back up his story.⁹ Armed with such essentials, he plans the trip for the following weekend.

He and his friends arrive in Las Vegas on a sweltering Friday morning. During the taxi ride to their hotel, they pass numerous billboards advertising the many dining, drinking, and dancing opportunities the city offers. The billboards depict stunning women with high hemlines, low tops, full-lipped pouts, and heavy-lidded gazes. One announces that its venue hosts a weekly Ladies’ Night at which female patrons enjoy half-priced drinks after 8:00 p.m.¹⁰ The traveler makes a mental note of the establishment’s location.

At the hotel and eager to shake off the harrowing past week at work, the men drop off their bags in their suite and head straight to the hotel’s upscale European-style pool. A doorman wearing mirrored sunglasses and a discreet headset separates a bevy of busty beauties from some less genetically gifted women and brings them to the front of the line,¹¹ where he checks their ID cards and takes from each a crisp twenty dollar bill to cover the cost of admission.¹² When the men get to the front of the line with their twenties in hand, the doorman informs them that male guests must pay fifty dollars for the privilege of being in the presence of so much bare flesh.¹³ The men look wistfully at the party of women who entered before them and dig in their bathing suit pockets to find another thirty dollars each. Once inside, they position themselves near the women’s rented pavilion, a spacious private lounge area furnished with a flat-screen television and a vast bed.¹⁴

Later that night, the men leave for another casino to catch a Cirque du Soleil show. When the performance is finished, they stop at the themed “ultra-lounge” next door. They watch another group of women, wearing little more than the sunbathers wore that morning, simply smile and breeze by the burly doorman, who gazes at them with an appraising eye. The men learn they must pay thirty dollars each, and grumble good-naturedly when informed they could have saved ten dollars by coming on a weeknight.¹⁵ They joke with one another about recouping their costs at the craps tables later, and saunter inside to survey the crowd.

⁹ Las Vegas Convention & Visitors Auth., *Be Anyone in Las Vegas*, OFFICIAL LAS VEGAS TOURISM WEBSITE, <http://www.visitlasvegas.com/vegas/features/be-anyone/> (last visited Sept. 27, 2009).

¹⁰ *Las Vegas Events*, BLUE MARTINI: THE PREMIERE MARTINI LOUNGE, <http://www.bluemartinilounge.com/eventsvegas.html> (last visited Oct. 14, 2010).

¹¹ Though this Note focuses on the visible discrimination of sex-based pricing, less quantifiable but undeniably operative, is the practice of granting especially beautiful women even more expedited admission.

¹² Telephone Interview with Wendy Divas, PBX (Telecommunications) Supervisor, Mandalay Bay Info. Line (Sept. 27, 2009).

¹³ *Id.*

¹⁴ *Moorea Pavilion*, MANDALAY BAY, <http://www.mandalaybay.com/thingstodo/pavilion.aspx> (last visited Oct. 14, 2010).

¹⁵ Telephone Interview with Stacey Kaptain, Receptionist, The Light Group (Sept. 27, 2009).

III. GENDER STEREOTYPING

“*Woman was the second mistake of God.*”

—Friedrich Nietzsche, *The Antichrist*¹⁶

The above scenarios beg the question: Exactly who does sex-based pricing hurt? It might seem these policies ensure everyone goes home happy. Women receive generous discounts without any effort on their part, encouraging them to attend venues offering such discounts in droves. Likewise, men are attracted to the venues by the promise of vast numbers of beautiful girls.¹⁷ Finally, the venues enjoy revenue from increased numbers of both sexes, and the state taxes the venues based on their profits. Nonetheless, the answer to the above question is: Everyone is hurt by sex-based pricing.¹⁸

Admittedly, the vast majority of Las Vegas’ population and tourists seem content with the status quo of sex-based pricing,¹⁹ although, they might be unaware they are playing into a mass marketing scheme based on sexualized stereotypes of each gender. Both men and women seem to tacitly encourage, or at least consent to, the discrimination by readily participating in “ladies’ night” promotions—women by showing up in the venues with waived entrance fees and accepting free or discounted drinks, and men by paying door fees and purchasing higher-priced drinks. In fact, Lee Rowland, of the American Civil Liberties Union of Nevada (ACLU of Nevada), notes that the organization simply does not receive complaints about sex-based pricing in Nevada.²⁰ The absence of complaints suggests that people of both sexes accept such policies as the norm or even enjoy them.

One possibility for such apparent acceptance might lie in the demographics of Las Vegas’ visitors. The LVCVA reports that only 8 percent of visitors to Las Vegas in 2008 were under the age of twenty-one,²¹ meaning that a staggering 92 percent of the year’s 36,351,469 visitors²² were of club-going age. By way of contrast, in 2006, the Nevada State Demographer’s

¹⁶ F.W. NIETZSCHE, *THE ANTICHRIST* 138 (H.L. Mencken ed., Alfred A. Knopf 1920) (1895).

¹⁷ Eric D. Hone & Franchesca Van Buren, *Is the Death Knell Ringing for Ladies’ Nights?*, *NEV. LAW.*, Mar. 2009, at 10; Liz Benston, *Letting Women in Free Might Cross Legal Line: Lawyer Targets Discrimination, Sets Sights on Casino Nightclubs*, *LAS VEGAS SUN*, Sept. 29, 2008, at 8.

¹⁸ Although this Note focuses primarily on men and women, arguably the other two entities are susceptible to harm, too. For example, venues might suffer if they rely too heavily on such price schemes for revenue in the face of growing opposition and potential legislative reform. Nevada (or Las Vegas), already widely criticized for its reputation for sexism in the entertainment gaming industry, could be further vilified as sex-based pricing receives more media attention.

¹⁹ However, see *infra* Part V for a discussion of a man’s recent challenge of sex-based enrollment prices at the Las Vegas Athletic Club.

²⁰ Telephone Interview with Lee Rowland, Attorney and Northern Coordinator, American Civil Liberties Union of Nevada (Oct. 15, 2009) [hereinafter Rowland Interview].

²¹ Las Vegas Convention & Visitors Auth., *Vegas FAQs*, LVCVA.COM, <http://www.lvcva.com/getfile/106/2009%20Vegas%20FAQs.pdf> [hereinafter *Vegas FAQs*] (last updated Mar. 2010).

²² *Id.*

Office projected that less than 35 percent of Clark County's 2008 population would be of common club-going age.²³ If a large number of club-goers are tourists, a proposition the numbers appear to support, it is possible that tourists may not notice or care about the discrimination because of their limited exposure to it, typically only 3.6 nights.²⁴ Moreover, a glance around any club dance floor shows that patrons typically range in age from their early twenties to their late thirties, which is an age group generally not considered particularly litigious.²⁵ This could provide another theory for why more adult entertainment venue patrons do not contest ladies' night policies. Regardless of why people deem using women as "bait" to draw men into a venue more or less socially palatable, it is nonetheless morally unconscionable. Merely because society widely tolerates discrimination does not mean that it is acceptable or that it does not harm individuals indirectly.

A. *Everybody is a Victim*

Sex-based pricing relies on a stereotype-driven dichotomy between men and women. It perpetuates the idea that the sexes are entirely separate, even to the point of being mutually exclusive or contradictory. Professor Elizabeth Emens suggests the idea that sex (in both the physiological and coital senses) is understandable only by contrast to the opposite (usually meaning male versus female) is so pervasive in our culture that it essentially goes unnoticed and uncontested.²⁶ In fact, as compared to classifications based on other criteria, such as race or disability, "The only relation of difference that is validated is gender, and then only when a male and a female are involved."²⁷ In other words, society seems willing to accept treating the sexes not simply as different versions of the same species, but as diametrically opposed entities.

However, such separation along the lines of physical sex often implies one sex—usually the female—is inferior to the other. Thus, sex-based pricing reinforces certain negative stereotypes about both women and men. As Mary Becker points out, "[The] desire for subordination, rather than aversion, may be a greater part of discrimination against women [Sexist men] desire contact [with women] in certain subordinating forms, such as having women as secretaries and dependent wives."²⁸ This observation might indicate that not only do gender distinctions generally portray women as inferior to men, but they also tend to survive on the notion that men are chauvinists. Although such an idea does not mean all club-going men are sexist or that all club-going women

²³ JEFF HARDCASTLE, AGE SEX RACE AND HISPANIC ORIGIN ESTIMATES FROM 2000 TO 2005 AND PROJECTIONS FROM 2006 TO 2026 FOR NEVADA AND ITS COUNTIES (2006), available at http://www.nsbdc.org/what/data_statistics/demographer/pubs/docs/2006_ASRHO_Summary.pdf (calculating data for projected 2008 numbers of Clark County residents between the ages of 20-39).

²⁴ *Las Vegas FAQs*, *supra* note 21.

²⁵ BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 188 fig.5.2 (1977).

²⁶ Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1331 (2009).

²⁷ ALAN SINFIELD, ON SEXUALITY AND POWER 14 (2004).

²⁸ Mary E. Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO. L.J. 1659, 1668 (1991).

are inferior, it does suggest that those who design sex-based pricing policies might be relying on said stereotypes as part of their business acumen.

The multitude of advertisements for adult entertainment venues²⁹ lends support to this hypothesis: such venues' advertisements, billboards, and websites often portray men, but women significantly outnumber the men. And although undoubtedly fit and good-looking, the men are far closer to society's notion of "average" and more thoroughly clothed than the ads' physically enhanced "bombshell" women. The message might well imply that at these hot spots, the sky is the limit and relatively normal-looking men can obtain improbably beautiful women. It also suggests women need to look and dress like lingerie models in order to even gain admittance.

B. Male Stereotypes

Although less obvious than stereotypes associated with women, disparate price schemes impose archaic and negative stereotypes on men, as well. Specifically, the price schemes impliedly emphasize outdated notions of male financial dominance and the overly simplified animalistic nature of men.³⁰ From the male perspective, one can view disparate price schemes as dependent on at least one of two assumptions: (1) men have a greater *ability* to pay entrance surcharges or higher drink prices than women, or (2) men have a greater *willingness* to pay these charges than women. Male-female income disparity is a well-known and widely discussed phenomenon in our society.³¹ However, the former assumption seems the less likely of the two potential motivations because billboards and websites touting these venues almost never mention the higher prices men are required to pay,³² which would undoubtedly be a failing advertising strategy.³³

The more plausible reason that these clubs and day pools are able to get away with disparate pricing is the notion that men are more willing to buy proximity to sex than women. For example, a man or a group of men are more likely³⁴ than a woman or group of women to buy "bottle service," a common practice in upscale bars whereby the patron purchases a bottle of wildly over-

²⁹ The term "adult entertainment venue," as used throughout this article, refers collectively to nightclubs, poolside day clubs, European pools, and any other such venue that seeks primarily to attract adults to dine, drink, dance, or otherwise engage in discretionary spending and consumption.

³⁰ See Steve Friess, *A Las Vegas Gym Faces a 'Ladies' Night' Bias Case*, N.Y. TIMES, Dec. 12, 2007, at A27, available at <http://www.nytimes.com/2007/12/12/us/12ladies.html> [hereinafter Friess, *Las Vegas Gym*] (quoting Professor John F. Banzhaf III's anecdotal relation of his female students' opposition to Ladies' Nights).

³¹ Catherine Rampell, *Women Earn Less Than Men, Especially at the Top*, N.Y. TIMES ECONOMIC BLOG (Nov. 16, 2009, 5:25 PM), <http://economix.blogs.nytimes.com/2009/11/16/the-gender-pay-gap-persists-especially-for-the-rich/>.

³² Except by implication in statements such as "Ladies' Night" or "Ladies drink free."

³³ See, e.g., *Nightclubs in Las Vegas*, LAS VEGAS LOGUE, <http://www.lasvegaslogue.com/nightclubs> (last visited Oct. 14, 2010) (giving general prices of ten nightclubs without reference to sex-specific pricing).

³⁴ Telephone Interview with Anonymous Nightclub VIP Host (September 27, 2010). Also, many of my male friends have shared their own experiences, lamenting that nightclubs frequently keep large groups of men waiting at the door for long periods of time unless they buy bottle service (and often, slip the bouncer something for his "trouble.").

priced hard alcohol³⁵ in exchange for the privilege of being seated in a club's "VIP" section. To male buyers, bottle service often comes along with the promise, expressed or implied, that it will attract female admirers.³⁶ This practice assumes that men have a brutish, carnal appetite they are both willing and eager to pay generously to appease. This is an oversimplified and unattractive depiction of men's characters and mental capacities. However, because men so readily participate, this seems to be a self-perpetuating stereotype. As long as these venues continue to tell men what they are coming to see or take home, men seem likely to buy into it in both figuratively and literally. The cycle validates the clubs' actions and justifies continuing the policy.

C. Female Stereotypes

Conversely, if sex-based pricing relies upon men's willingness to pay for proximity to the opposite sex, it logically must also presume women are less willing to pay for such proximity. In fact, some nightclub operators validate sex-based pricing as simply "offer[ing] male customers the mix they seek."³⁷ The implication is that women might not patronize the establishments without an additional incentive, which could thereby reduce female patronage to the point where men will cease attending the venues due to a lack of interest in its occupants. It also suppresses the concept of legitimate female sexuality by presuming that if men desire sex, women do not, or at least not enough to pay full price for access to a roomful of potential partners.

In this way, sex-based pricing forces two conflicting roles on women: that of the innocent virgin, and that of the lustful whore.³⁸ Venues presume women to be sexually disinterested, but then encourage them to act lasciviously once inside the venue.³⁹ It certainly seems as though men pay premium prices in order to gain access to the women an adult entertainment venue attracts with its low prices for female patrons, while venues simultaneously encourage women to imbibe heavily and dance provocatively for men's entertainment. Forcing women to fit each of these roles denies women the ability to express their sexuality in a way that is healthy and equal to men. There is no middle ground—no acknowledgment of legitimate sexual desires women might have—which ultimately paints female sexuality as an aberrance or anomaly compared with equivalent male desires. Thus, women are essentially de-sexualized and their images as fully functional human beings severely limited, to the extent they exist as mere pawns to attract male business.

³⁵ One company specializing in organizing bottle service and VIP packages estimates bottle service at a Strip nightclub to cost between \$350-\$475 per bottle, usually with a 2 bottle minimum. *Las Vegas Nightlife: VIP Bottle Service*, LAVISHVEGAS.COM, http://www.lavishvegas.com/bottle_service.htm (last visited Oct. 14, 2010). Considering that most available alcohols are grocery-store brands costing roughly \$30 for a 750 mL bottle, the markup itself is almost as shocking as the fact that people are willing to pay it.

³⁶ *See id.*

³⁷ Friess, *Las Vegas Gym*, *supra* note 30 (quoting MGM Mirage spokesman Alan Feldman).

³⁸ *See infra* text accompanying notes 49-50 for another example of the industry's fascination with this dichotomy.

³⁹ *See infra* text accompanying notes 46-48 for further discussion.

The most obvious of the sex stereotypes sex-based pricing reinforces are the commoditization and subservience of women as male-oriented sexual objects. As one scholar notes, “[Las Vegas] is not a town rife with sex, but it is a city that systemically uses women’s bodies to sell *everything other than sex*.”⁴⁰ The venues even use architecture to attract male business by frequently incorporating sweeping, soft lines reminiscent of the “sexy curves” of the body in their architectural designs.⁴¹ Some may consider it flattering or even empowering that businesses assume the female form has such strong influence over decisions such as where and on what to spend one’s money. However, the names of some of these establishments belie this idea in that they are harshly evocative of decadent living and the concept of women as commodities, for example: XS,⁴² Tryst,⁴³ Bare,⁴⁴ and Cathouse.⁴⁵ Instead of empowering women, these tactics use the ideas of sex and loose women as lures—mere tools to encourage people to attend the venues and spend as though they are dripping with money. In turn, venues employ sex-based pricing to lure women into establishments in order to use their physically present bodies as pawns to influence and exacerbate men’s spending decisions.

There are other indicia of female subordination aside from the outward appearance of an adult entertainment venue. In fact, the practices in which the clubs engage or promote are perhaps even more evocative of female subservience than the pricing structures alone. For example, many nightclubs have patron-accessible “stripper poles”⁴⁶ or platforms where female revelers can give fellow partygoers a better view of their gyrating bodies.⁴⁷ Some venues have monitors near their front entrances that show real time video of women on

⁴⁰ Kathryn Hausbeck, *Who Puts the “Sin” in “Sin City” Stories?: Girls of Grit and Glitter in the City of Women*, in *THE GRIT BENEATH THE GLITTER: TALES FROM THE REAL LAS VEGAS* 335, 345 (Hal K. Rothman & Mike Davis eds., 2002).

⁴¹ XS, ENCORE LAS VEGAS, <http://www.encorelasvegas.com/index.cfm#/nightlife/xs> (last visited Oct. 14, 2010).

⁴² XS THE NIGHTCLUB AT ENCORE, <http://xslasvegas.com/flash2/#/home/> (last visited Oct. 14, 2010). The name is a phonetic spelling of “excess,” implying extravagance or overindulgence, as evidenced by the fact that the bar offers a \$10,000 cocktail. XS, *supra* note 41.

⁴³ TRYST THE NIGHTCLUB AT WYNN, <http://trystlasvegas.com/flash/> (last visited Oct. 14, 2010). “Tryst” is defined as “an agreement (as between lovers) to meet.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1345 (11th ed. 2003).

⁴⁴ BARE POOL LOUNGE, <http://www.barepool.com/> (last visited Oct. 14, 2010). Aside from the name’s obvious reference to nudity, the “B” in the “Bare” logo is represented by two shapely curves that bring to mind female breasts or buttocks. *Id.*

⁴⁵ CATHOUSE, <http://www.cathouselv.com> (last visited Oct. 14, 2010). My personal “favorite” in terms of thinly-veiled female objectification, “cathouse” is defined as a slang term for a “bordello,” or whore house. DICTIONARY, *supra* note 43, at 196. Perhaps unsurprisingly, it is also one of the establishments that have patron-accessible stripper poles and stages.

⁴⁶ See, e.g., Jay David Murphy, *Stripper-pole Ban Coming Soon to Las Vegas Nightclubs*, DIGITAL JOURNAL (Sept. 8, 2009), <http://www.digitaljournal.com/article/278914> (noting that patron-accessible stripper poles are being scrutinized heavily for their capacity to encourage patrons to engage in exceedingly “naughty” behavior).

⁴⁷ For example, one company specializing in organizing Las Vegas VIP services (especially for men) promises that Jet Nightclub at the Mirage has “more stripper poles than most strip clubs” and boasts that it is “a prime place to ‘hook up in Vegas.’” *Las Vegas Nightclubs*, BACHELOR VEGAS, <http://www.bachelorvegas.com/nightclubs.html> (last visited Oct. 14, 2010).

the dance floor inside,⁴⁸ essentially using these women as free advertising to passersby. Some clubs even offer dress-up promotions in which women who dress in a certain type of clothing gain some perk at the club. For example, one popular nightclub's website depicts a shapely young woman clad in only a black bra and a slit-to-the-waist plaid skirt to advertise its weekly free champagne giveaway to all women dressed in "schoolgirl outfits."⁴⁹ This is an ensemble that simultaneously infantilizes and sexualizes women—a disturbing dichotomy that has been exploited heavily in popular culture.⁵⁰ Arguably, the women who participate in such promotions tacitly agree to a sort of deal with the clubs—free advertising to men in exchange for free drinks or admission for women. This deal is tantamount to buying a woman's nature as a human—by turning her into a fantasy-derived toy—for the mere price of a couple glasses of cheap champagne.

The pervasive images of female subordination and sexualization manifested in virtually every aspect of these establishments can easily send the message that women are only valuable proportionate to their looks or ease of virtue. That implication is not only harmful to the women who participate in the stereotype, but also to the self-images of thousands of young males and females. Young men and women who might see the images on television or billboards would seem more likely to engage in this seemingly endless cycle of stereotype reinforcement and the negative effects thereof, such as body dysmorphic disorder and sexual aggression.⁵¹

Sex-based pricing and admissions policies therefore hurt both women and men by holding them to demeaning, outdated stereotypes based on archaic notions of sexuality and traditional gender roles. However, although most courts have been swift to strike down other practices that reflect such sweeping and archaic notions of gender roles,⁵² these practices are ubiquitous and, unfortunately, likely to remain so in Las Vegas nightclubs.⁵³

⁴⁸ For example, Jet at the Mirage. *Id.* Also, the author has personally observed such video screens at Cathouse at the Luxor.

⁴⁹ See Friess, *Las Vegas Gym*, *supra* note 30, at A27 (noting that the Hard Rock Hotel's Body English nightclub held a weekly event where "ladies dressed in schoolgirl outfits drink free Champagne all night."). Body English is now closed and its website shut down.

⁵⁰ "Sexy" costumes modeled after Catholic schoolgirl uniforms and marketed to adults are perennial Halloween bestsellers, and women in schoolgirl outfits are a staple in the pornography industry. Just try "googling" the word "schoolgirl" in an attempt to find academic articles.

⁵¹ See, e.g., Susan Villani, *Impact of Media on Children and Adolescents: A 10-Year Review of the Research*, 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 392, 394-95 (2001).

⁵² For discussion, see *infra* Section IV.

⁵³ For discussion, see *infra* Section V.

IV. EQUAL PROTECTION – A BRIEF REFRESHER AND
OTHER NINTH CIRCUIT APPROACHES

“[T]he only stable state is one in which all men are equal before the law.”
—Aristotle⁵⁴

A. *National Precedent*

Before delving into the issue of equal protection for the sexes in Nevada, it is useful to review and discuss the applicability of equal protection principles to the adult entertainment venue industry, by comparing the ways in which other Ninth Circuit jurisdictions have approached the topic. Originally, the framers of the Fourteenth Amendment designed the text to ensure equal rights to newly freed African American slaves.⁵⁵ However, one of the most crucial phrases of the amendment, in terms of the litigation that has sprung from it, is the Equal Protection Clause, which asserts that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”⁵⁶ The Supreme Court has interpreted this clause to protect not only African Americans, but other groups, such as minorities,⁵⁷ homosexuals,⁵⁸ and women.⁵⁹ In evaluating equal protection challenges, courts grant intermediate scrutiny review to classifications based on sex,⁶⁰ a degree of judicial review that falls between the highly skeptical strict scrutiny afforded to racial classifications⁶¹ and the relatively deferential rational basis scrutiny in cases in which the challenged classification is not suspect.⁶²

The Civil Rights Act of 1964 (CRA) provides another means of protection against discrimination based on arbitrary classifications of people.⁶³ Specifically, Title II of the CRA prohibits discrimination in places of public accommodation⁶⁴ if those places “affect commerce”⁶⁵ or are supported by state

⁵⁴ JAMES L. CHRISTIAN, *PHILOSOPHY: AN INTRODUCTION TO THE ART OF WONDERING* 349 (10th ed. 2009).

⁵⁵ Section 1 of the Fourteenth Amendment, making “[a]ll persons born or naturalized in the United States” U.S. citizens, overruled the portion of the *Dred Scott* decision that held that African Americans could not be citizens under the federal Constitution. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, § 1.

⁵⁶ U.S. CONST. amend. XIV, § 1.

⁵⁷ *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (invalidating a San Francisco ordinance that prohibited laundry businesses in wooden buildings from operating without a discretionary permit from the Board of Supervisors because the ordinance, though facially neutral, was administered prejudicially against Chinese Americans).

⁵⁸ *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 635-36 (1996) (striking an amendment to Colorado’s constitution that declared unconstitutional any laws attempting to ban discrimination against homosexual persons).

⁵⁹ This list is, of course, non-exhaustive.

⁶⁰ *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

⁶¹ *See, e.g.*, *Yick Wo*, 118 U.S. at 374.

⁶² *See, e.g.*, *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487-88 (1955).

⁶³ *See* 42 U.S.C. § 2000a(a) (2006) (defining the scope of the CRA).

⁶⁴ *Id.*

action.⁶⁶ Detractors might argue that the definition of *places of public accommodation* does not specifically mention European pools and nightclubs, and that these venues do not “affect commerce,” but these are relatively weak arguments. The venues might fit under the “place of . . . entertainment”⁶⁷ language and might be “physically located within the premises of any establishment otherwise covered . . . and . . . hold[ing] itself out as serving patrons of [any] such covered establishment”⁶⁸ because they are commonly located in hotels, which the statute clearly covers.⁶⁹

Another intensely litigated section of the CRA is Title VII, which prohibits discrimination in employment based on arbitrary classes, including sex.⁷⁰ In one Title VII case, the Supreme Court stressed that “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire* spectrum of disparate treatment of men and women resulting from sex stereotypes.”⁷¹ Taken together, Title II and Title VII indicate both Congress’ and the Court’s dedication to achieving gender equality in society.

Historically, most gender-discrimination cases have concerned classifications that harm women in one of two ways: either directly by denying women certain rights available to men,⁷² or indirectly by using classifications based on “archaic and overbroad” generalizations or stereotypes regarding the role or capabilities of women.⁷³ As Section III above demonstrated, sex-based pricing indirectly reinforces archaic and overbroad generalizations about *both* sexes, making it theoretically a prime candidate for judicial invalidation. However, stereotype reinforcement and discriminatory classifications alone are not sufficient to strike a discriminatory practice in a place of public accommodation; there must also be “state action” that endorses the discriminatory conduct in which the privately owned establishment engages.⁷⁴ Mere state *involvement*, such as issuing a liquor license to a place of public accommodation, does not constitute “state action.”⁷⁵ The “state action” must either “foster or encourage” the discriminatory practice to invoke the Fourteenth Amendment’s Equal Pro-

⁶⁵ *Id.* § 2000a(b).

⁶⁶ *Id.*

⁶⁷ *Id.* § 2000a(b)(3).

⁶⁸ *Id.* § 2000a(b)(4).

⁶⁹ *Id.* § 2000a(b)(1).

⁷⁰ *Id.* § 2000e-2(a). *But see id.* § 2000e-2(e)(1) (permitting sex-based employment decisions if gender is a “bona fide occupational qualification” of the relevant job).

⁷¹ *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

⁷² *See, e.g., United States v. Virginia*, 518 U.S. 515, 558 (1996) (denying women enrollment at the Virginia Military Institute declared unconstitutional).

⁷³ *See, e.g., Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975) (citing *Frontiero v. Richardson*, 411 U.S. 677, 689 n.23 (1973) in support of its decision to overturn 42 U.S.C. § 402(g)’s archaic and overbroad generalizations about women inherent in assuming “that male workers’ earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families’ support” for purposes of entitling widowed mothers, but not widowed fathers, to Social Security benefits based upon the earnings of the deceased spouse).

⁷⁴ *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

⁷⁵ *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972).

tection Clause.⁷⁶ This caveat in the “state action” doctrine could disqualify nightclubs and other similar venues from equal protection scrutiny absent some other source of legal authority.

B. Ninth Circuit States’ Approaches

In order to protect the rights of its citizenry more clearly and fully, many states have enacted their own civil rights statutes that include sex as a protected class.⁷⁷ In fact, every state in the Ninth Circuit, as well as Guam, has enacted some version of such a statute—except Nevada.⁷⁸ Many of these jurisdictions even have statutes that prohibit businesses from advertising in ways that indicate or imply that the business might discriminate based on sex.⁷⁹ The states’ equal protection statutes protecting sex as a class have different language granting diverse degrees of compulsory obeisance and leading to diverse interpretations in each jurisdiction.⁸⁰ Regardless of these distinctions, each offers superior protection against sex classifications compared with what exists in Nevada.

1. California

In the Ninth Circuit, the most stringent of these statutes is California’s Unruh Civil Rights Act (Unruh Act), which guarantees that all persons, regardless of sex, are “free and equal” and entitled to “full and equal accommodations” in “all business establishments of every kind whatsoever.”⁸¹ California’s Court of Appeals has interpreted this statute to mean that a challenged business’ policy or action qualifies as “unreasonable, arbitrary, or invidious gender discrimination” whenever it “‘emphasizes irrelevant differences between men and women’ or perpetuates any irrational stereotypes.”⁸² The Ninth Circuit Court of Appeals read the Unruh Act to expressly prohibit discrimination in the form of pricing differentials.⁸³ California’s Gender Tax Repeal Act of 1995 (Gender Tax Repeal Act) adds yet another layer of protection, stating, “No business establishment of any kind whatsoever may discriminate, with respect to the price charged for services of similar or like kind,

⁷⁶ *Id.* at 176-77.

⁷⁷ Hone & Van Buren, *supra* note 17, at 11-12. Although the Hone & Van Buren article and the one it cites speak to such states’ enactments across the U.S., this Note focuses on states in the 9th Circuit, which includes Nevada. Moreover, though the statutes discussed also include other protected classifications such as race, religion, or disability, I will discuss only their sex-based components as they relate to the subject of this Note.

⁷⁸ See *infra* notes 81-85, 98-106 and accompanying text. But see *infra* notes 107-115 and accompanying text (discussing Washington’s statute).

⁷⁹ See, e.g., ALASKA STAT. ANN. § 18.80.230(a)(2) (West 2007); IDAHO CODE ANN. § 67-5909 (West 2006); MONT. CODE ANN. § 49-2-304(1)(b) (2009); OR. REV. STAT. ANN. § 659A.409 (WEST 2003).

⁸⁰ See sources cited *supra* note 79.

⁸¹ CAL. CIV. CODE § 51(b) (West 2007). The statute also protects against discrimination on the basis of “race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation.” *Id.*

⁸² Cohn v. Corinthian Colls., Inc., 86 Cal. Rptr. 3d 401, 405 (Cal. Ct. App. 2008) (quoting Koire v. Metro Car Wash, 707 P.2d 195 (Cal. 1985)).

⁸³ Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000).

against a person because of the person's gender."⁸⁴ Even more expansively, for the purposes of both statutes, sex includes gender identity, appearance, and behavior, even if society does not stereotypically assign such appearance or behavior to the person's physical makeup.⁸⁵

A brief case study of a successful challenge to gender discriminatory pricing policies under the Unruh Act is instructive in decoding the statute's language and demonstrating the critical eye with which California views sex-based pricing. In *Koire v. Metro Car Wash*, several car-washing businesses denied the male plaintiff's request for gender-based discounts when he visited on "Ladies' Day."⁸⁶ A local nightclub, Jezebel's,⁸⁷ also refused his request for the free entry advertised for "girls,"⁸⁸ instead requiring him to pay two dollars for admittance.⁸⁹ The plaintiff challenged each of these policies under the Unruh Act.⁹⁰ The businesses argued that the Unruh Act did not prohibit their policies because, under their theory, the Unruh Act proscribed only the *exclusion* of persons, and even then only if the exclusion was *arbitrary*.⁹¹ They also maintained that their policies caused the plaintiff no injury and that a ruling against their policies would cripple businesses by effectively putting a stop to all promotional discounts.⁹²

California's Supreme Court rejected each of these arguments in turn. First, the Court held that the Unruh Act prohibited not only discriminatory exclusion from places and services, but also expressly prohibited unequal treatment of patrons once the establishment admitted them.⁹³ Second, the Court emphasized that although there are certain limited instances where discrimination is reasonable, the business' argument that the policies promoted "substantial business and social purposes" did not make the policies reasonable; business policies that spring from a "motive of rational self-interest"—that is, profitability—cannot justify discrimination.⁹⁴ Third, the Court held that the Unruh Act's passage made discrimination on the basis of sex *per se* injurious, noting the Act allowed a minimum of \$250 in damages per violation regardless of whether the plaintiff actually suffered damage.⁹⁵ Lastly, the Court dismissed outright the claim that precluding the businesses from employing the sex-based price promotion would halt all promotional discounts, pointing out that the businesses could employ any number of permissible discounts that

⁸⁴ CIV. § 51.6(b).

⁸⁵ GOV'T § 12926(p); PENAL § 422.56(c).

⁸⁶ *Koire v. Metro Car Wash*, 707 P.2d 195, 195 (Cal. 1985).

⁸⁷ Though not addressed in the opinion, "jezebel" is also a slang term for "an impudent, shameless, or morally unrestrained woman." DICTIONARY, *supra* note 43, at 672.

⁸⁸ *Koire*, 707 P.2d at 196.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 196-97.

⁹³ *Id.* at 197.

⁹⁴ *Id.* at 198-200.

⁹⁵ *Id.* at 200.

applied equally to all customers.⁹⁶ Absent a compelling social policy to uphold them, the car washes' and nightclub's policies violated the Unruh Act.⁹⁷

2. *Similar Statutes*

Other states in the Ninth Circuit have enacted statutory language comparably strong to the language in California's Unruh Act and Gender Tax Repeal Act. For example, Hawaii's relatively concise public accommodations statute prohibits "[u]nfair discriminatory practices that deny . . . full and equal enjoyment of [public accommodations] on the basis of . . . sex" in places of public accommodations,⁹⁸ a category in which establishments holding Class-5 liquor licenses are squarely placed.⁹⁹ Idaho's statute also avers that it is a "*prohibited* act to discriminate . . . on a basis of . . . sex" which includes denying "an individual the full and equal enjoyment of . . . a place of public accommodation."¹⁰⁰ Similarly, Arizona's statute asserts that "[d]iscrimination in places of public accommodation against any person because of . . . sex . . . shall be deemed *unlawful*."¹⁰¹ Other jurisdictions in the Ninth Circuit whose statutes employ the express adjective "unlawful" include Alaska,¹⁰² Montana,¹⁰³ Oregon,¹⁰⁴ and Guam.¹⁰⁵ Moreover, Guam's statute, like California's Gender Tax Repeal Act, specifically makes it unlawful to charge different prices for the same goods and services on the basis of sex.¹⁰⁶

3. *Washington*

Washington presents an interesting example because, like Nevada, its statutory protection against discrimination in places of public accommodation must be read together with its statement of public policy regarding discrimination in places of public accommodations.¹⁰⁷ Washington's statement of public policy does not use direct language such as "unlawful," "illegal," or "prohibited." Instead, Washington's statement merely declares that the right to be free from discrimination in places of public accommodation is a "civil right."¹⁰⁸

A 1981 case shows that the Washington Supreme Court's ability to enforce that version¹⁰⁹ of Washington's declaration of civil rights statute was as weak as the statute's language implies. That year, in *MacLean v. First Northwest Industries of America, Inc.*, the Court held a Ladies' Night discount for Sunday-night Seattle SuperSonics NBA basketball games did not violate the

⁹⁶ *Id.* at 202.

⁹⁷ *Id.* at 204.

⁹⁸ HAW. REV. STAT. ANN. § 489-3 (West 2008).

⁹⁹ Haw. Att'y Gen. Op. No. 91-01 (1991).

¹⁰⁰ IDAHO CODE ANN. § 67-5909 (West 2006) (emphasis added).

¹⁰¹ ARIZ. REV. STAT. ANN. § 41-1442 (2010) (emphasis added).

¹⁰² ALASKA STAT. ANN. § 18.80.230(a)(1) (West 2007).

¹⁰³ MONT. CODE ANN. § 49-2-304(1) (2009).

¹⁰⁴ OR. REV. STAT. ANN. § 659A.006(1) (West Supp. 2010).

¹⁰⁵ 5 GUAM CODE ANN. § 32201(a) (2009).

¹⁰⁶ *Id.* § 32201(c)(18).

¹⁰⁷ WASH. REV. CODE ANN. § 49.60.030(1)(b) (West 2008).

¹⁰⁸ *Id.*

¹⁰⁹ An amendment to the public accommodations statute in 1985 added "sex" as a protected class where it was absent before. *Id.* § 49.60.215.

state law against discrimination.¹¹⁰ However, the Court noted that it denied relief to the male plaintiff based only on the fact that the state operated under a community property scheme that indirectly made him a beneficiary of the sex-based price reduction when he purchased his wife's ticket.¹¹¹ Even more distressing, the Court gave credence to an overbroad stereotype when it accepted the assertion by the vice president of the SuperSonics' ownership organization that the sex-based discounts were valid because they were part of a larger attendance-boosting initiative derived in part from the notion that "women do not manifest the same interest in basketball that men do."¹¹² Perhaps unsurprisingly, California's Supreme Court in *Koire* disagreed vehemently with Washington's interpretation of its statute and the Court's reliance on such sweeping generalities on the basis of sex.¹¹³

Arguably, the weak language of Washington's civil rights declaration achieved greater effective force by a later amendment to its public accommodation statute, which asserts it is "unfair" to require "any person to pay a larger sum than the uniform rates charged other persons."¹¹⁴ It is noteworthy that the statute specifically cites price differentials as unfair, especially because many other states' statutes lack such specificity regarding what constitutes an unfair or prohibited act. However, at the time of *MacLean*, the public accommodations statute did not include sex as a protected class,¹¹⁵ and it is possible, even probable, the *MacLean* court would have reached a different conclusion if the statute explicitly protected sex as a class. To date, though, this theory remains untested because no cases have yet interpreted the public accommodations statute with regard to the protection of sex as a class since Washington amended it to add sex as a specifically protected class.

V. (UN)EQUAL PROTECTION: NEVADA'S APPROACH

"Nevada's one of the most conservative states in the Union, but you can do what you want in Vegas and nobody judges you."

—Drew Carey¹¹⁶

In contrast to most jurisdictions in the Ninth Circuit, Nevada does not have an affirmative law that protects persons from discrimination based on sex or gender. Like Washington, Nevada does have a declaration stating it is Nevada's public policy to protect against sex discrimination.¹¹⁷ However, unlike Washington's statutes, Nevada's statutes contain no further language that specifies what kinds of acts constitute discrimination in violation of the

¹¹⁰ *MacLean v. First Nw. Indus. of Am., Inc.*, 635 P.2d 683, 686 (Wash. 1981).

¹¹¹ *Id.* at 685.

¹¹² *Id.* at 684.

¹¹³ *Koire v. Metro Car Wash*, 707 P.2d 195, 201 (Cal. 1985).

¹¹⁴ WASH. REV. CODE ANN. § 49.60.215. The statute's Historical and Statutory Notes indicate that the Washington Legislature amended the statute in 1985 to include "sex" as a protected class, though the language on price differentials existed prior to that time.

¹¹⁵ *Id.* *MacLean* was decided four years previously, in 1981.

¹¹⁶ Nick Gillespie & Steve Kurtz, *Stand-up Guy*, REASON, Nov. 1997, at 32, 35, available at <http://reason.com/archives/1997/11/01/stand-up-guy/2>.

¹¹⁷ NEV. REV. STAT. § 233.010(2) (2009).

state's policy.¹¹⁸ In fact, Nevada's affirmative "equal enjoyment" statute contains a glaring omission—the protection of sex as a class.¹¹⁹ This omission makes it allowable for adult entertainment venues to continue charging men more than women for admission and drinks in the face of strong evidence of the practice's inequality.

The statutes' language and omissions, however, do not mean Nevada has completely ignored the invidious nature of classifications based on gender. In November 2008,¹²⁰ the Nevada Equal Rights Commission (NERC) found that the Las Vegas Athletic Club's (LVAC) periodic enrollment promotions, during which women could enroll as members of the gym for free while men had to pay \$10, violated Nevada's public policy by discriminating against men.¹²¹ Despite criticism, even from some of its strongest allies,¹²² NERC entertained the sex discrimination claims even though the relevant statutes did not list sex as one of the bases upon which an individual may file a complaint, and sex was not protected under Nevada's public accommodations statute.¹²³ At the time, Nevada's public policy declaration purported to protect the interests of persons regardless of "race, religious creed, color, age, sex, disability, national origin or ancestry."¹²⁴ The separate public accommodations statute protected against discrimination based upon "race, color, religion, national origin or disability."¹²⁵ A third statute permitted persons who believed a public accommodation discriminated against them based upon "race, color, religion, national origin or disability" to file complaints with NERC.¹²⁶ Because of the statutory language, however, NERC could not hold that LVAC's policy violated state law.

However, the complaints that sparked the NERC hearing compel the question of whether the LVAC's policy really does discriminate *solely* against men. In other words, how different is this scenario from the sex-based pricing policies in adult entertainment venues? The lighting might be brighter in an athletic club than a nightclub, and athletic club members clearly patronize the

¹¹⁸ Not including *id.* § 651.075, which protects the right of the disabled to enter a place of public accommodation with a service animal.

¹¹⁹ *Id.* § 651.070.

¹²⁰ Press Release, Nev. Equal Rights Comm'n, Public Hearing to Be Held in Male Discrimination Case (Nov. 5, 2008), <http://nvdetr.org/PDFS/HearingNoticeNov08.pdf>.

¹²¹ *Phillips v. Las Vegas Athletic Club*, Charge No. 0828-07-0563L (Nev. Dep't of Emp't, Training and Rehab. Aug. 11, 2008) (determination), available at <http://media.lasvegasweekly.com/pdfs/2008/08/PhillipsvLVAC.pdf>; Liz Benston, *Ruling on Gyms to Have Big Effect on Nightclubs, Too*, LAS VEGAS SUN, Nov. 10, 2008, at 3, available at <http://www.lasvegassun.com/news/2008/nov/10/ruling-gyms-have-big-effect-nightclubs-too/>. Mr. Phillips also claimed that the women-only gym area discriminated against men, but NERC did not uphold these charges. Hone & Van Buren, *supra* note 17, at 15 n.1.

¹²² One of the most notable critics was the ACLU of Nevada, usually one of NERC's allies. Steve Friess, *Weirdest Grudge Match Ever: ACLU v. NERC*, LAS VEGAS WKLY. (Aug. 12, 2008), <http://www.lasvegasweekly.com/news/2008/aug/12/weirdest-grudge-match-ever-aclu-v-nerc/> [hereinafter Friess, *Weirdest Grudge*].

¹²³ This action sparked some criticism that NERC acted outside of its authority. Rowland Interview, *supra* note 20; Friess, *Weirdest Grudge*, *supra* note 122.

¹²⁴ NEV. REV. STAT. § 233.010(2) (2007).

¹²⁵ *Id.* § 651.070.

¹²⁶ *Id.* § 651.110.

establishment for the purpose of exercising as opposed to engaging with potential paramours, but consider what a typical woman's workout attire might look like and the visible effect of vigorous movement on the female anatomy. Is it not at least possible that the true motive for LVAC's policy was similar in nature to those of the adult entertainment establishments?

Regardless, NERC did not consider these arguments in its determination that LVAC's policies violated Nevada's public policy. NERC's decision garnered much media interest and speculation about the case's potential ramifications for the nightclub and casino industries,¹²⁷ especially after the complainant, an attorney, promised the issue would soon play out in Nevada's court system and would involve the Nevada Resort Association.¹²⁸

Although the courts have yet to determine the issue of sex-based pricing, another development in the realm of equal protection in Nevada has occurred by way of new protection afforded to sexual orientation. An amendment to the public accommodations statute,¹²⁹ proposed as Senate Bill (SB) 207, was approved on May 22, 2009,¹³⁰ and adds sexual orientation as a protected class.¹³¹ The new public accommodations statute ensures that "[a]ll persons are entitled to the full and equal enjoyment of . . . any place of public accommodation, without discrimination or segregation on the ground of race, color, religion, national origin, disability or sexual orientation."¹³² Nightclubs and day pools certainly qualify as places of public accommodation under Nevada law, which are defined as: "Any restaurant, bar, cafeteria, lunchroom, lunch counter, soda fountain, casino or any other facility where food or spirituous or malt liquors are sold."¹³³ Therefore, any amendment to Nevada Revised Statute (NRS) § 651.070, which addresses equal enjoyment in places of public

¹²⁷ For some examples of the media's attention and speculation, see Stuart Goldman, *Commission Rules Against Las Vegas Athletic Club*, CLUB INDUSTRY.COM (Nov. 14, 2008), <http://clubindustry.com/forprofits/las-vegas-discrimination-commission-1108/>; Stuart Goldman, *Commission Rules Against Las Vegas Athletic Club*, CLUB INDUSTRY.COM (Dec. 1, 2008), http://clubindustry.com/forprofits/commission_rules_against_las_vegas_athletic_clubs_1208/ [hereinafter Goldman, Dec. 1 Post]; Steve Friess, *Lower Rates for Women Are Ruled Unfair*, N.Y. TIMES, Aug. 13, 2008, at A17, available at <http://www.nytimes.com/2008/08/13/us/13nevada.html>; Melissa Duran, *Man Wins Sexual Discrimination Claim Against Club*, 8NEWSNOW.COM (Aug. 14, 2008), <http://www.8newsnow.com/Global/story.asp?S=8837378>; Benjamin Spillman, *No Special Deals for Women, Commission Says*, LAS VEGAS REV. J., Dec. 2, 2008, at 1D; Friess, *Weirdest Grudge*, *supra* note 122.

¹²⁸ Goldman, Dec. 1 Post, *supra* note 127.

¹²⁹ S.B. 207, 2009 Leg., 75th Sess. (Nev. 2009).

¹³⁰ S.B. 207 Bill History, NEV. LEG., <http://www.leg.state.nv.us/75th2009/reports/history.cfm?ID=591> (last visited Oct. 14, 2010).

¹³¹ Notably, the ACLU endorsed this amendment even though it did not include sex as a protected class, despite the ACLU's fight for sex equality in the LVAC matter. Letter from Gary Peck, Exec. Dir., ACLU of Nev., to Maggie Carlton, Chairwoman; Michael Schneider, Vice Chairman; and Members of the Senate Commerce and Labor Committee (Mar. 27, 2009), <http://www.aclunv.org/files/SB%20207%20ACLU%20Testimony.pdf>. The ACLU actually endorsed even more inclusive language, "Gender Identity or Expression," in order to encompass more of the LGBT community, but at least adding "sexual orientation" to the accommodations statute was considered an important step. *Id.*

¹³² NEV. REV. STAT. § 651.070 (2009).

¹³³ *Id.* § 651.050(2)(b).

accommodations, would necessarily implicate the adult entertainment venues discussed herein.

It is ultimately for this reason proponents of SB 207 did not attempt to add sex as a protected class simultaneously with sexual orientation,¹³⁴ even though the sex issue arguably could not be more timely. Anecdotal evidence from representatives of the casino and nightclub industries indicated to reformers that the Nevada Resort Association and other industry lobbyists would take a hard line against any amendment attempting to add sex as a protected class because such an amendment would halt the lucrative practice of Ladies' Nights, thus making any other additions also "dead in the water."¹³⁵ Therefore, dropping the issue of sex from the proposed amendment in favor of pushing for the addition of sexual orientation was essentially an attempt to save one issue (at least temporarily) by killing the other.¹³⁶ Because complaints of sexual orientation discrimination are far more prevalent than complaints of gender discrimination,¹³⁷ and therefore arguably more pressing, the decision is not a hard one to understand. Nevada law still fails to protect against gender discrimination in places of public accommodation.

VI. SEX(Y) TRAFFICKING—A SUFFICIENTLY IMPORTANT STATE INTEREST?

"Nevada continues to show economic stability with its desirable business climate and booming tourism sector."

—Former Nevada Governor Kenny Guinn¹³⁸

The issue of sex-based pricing as it stands in Nevada—tactically swept under the rug by the legislature, but probably imminent¹³⁹ in the court system—begs the question of how this issue should or will be resolved in the future. Despite hotel-casino lobbyists' opposition to such an approach, the swiftest and most efficient way to protect the sexes against the demeaning stereotypes propagated by sex-based pricing is for the legislature to enact another amendment to Nevada's public policy statute to add sex as a protected class.

Although an unpopular addition, reformers could take steps to increase support for such an amendment similar to how support is often achieved for sexual orientation equality measures—through education of the public. For example, when interest groups in California sought to pass Proposition 8, which made gay marriage illegal by defining marriage as only between a man and a woman,¹⁴⁰ many celebrities and ordinary citizens united against the law's passage via the "No H8" campaign.¹⁴¹ This campaign failed with regard to

¹³⁴ Rowland Interview, *supra* note 20.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ News Release, State of Nev. Dep't of Taxation, Taxation Revenue Statistics – June 2005 (July 30, 2005), http://gov.state.nv.us/PR_Archive/pr/2005/2005-08-30TAXJune2005.htm.

¹³⁹ The courts may be addressing this issue if plaintiff and attorney Michael Phillips, the complainant in the LVAC matter, makes good on his promise or threat to bring sex-based pricing cases to court following NERC's interpretation of Nevada's public policy statement.

¹⁴⁰ CAL. CONST. art.1, § 7.5.

¹⁴¹ NOH8 CAMPAIGN, <http://www.noh8campaign.com> (last visited Oct. 14, 2010).

Proposition 8, which passed in November 2008,¹⁴² but the fight for marriage equality continues in full force in California¹⁴³ and across the nation. Similarly, reformers in Nevada could educate the public about the harms of discriminating against persons because of sex—including the related issue of gender identity—in order to gain popular support for an amendment barring such discriminatory practices. Such public education and outreach is critical in influencing the minds of voters nationwide. It is possible, though unlikely, that when faced with overwhelming popular support, lobbyists would back down from their opposition to such an amendment and even embrace it in the interests of maintaining a positive public image of inclusivity and liberality. In the alternative, spurred by popular backing, the citizenry itself could attempt to guarantee equal protection of the sexes by putting the question to a vote as an upcoming ballot initiative.¹⁴⁴

However, because of the hotel-casino lobbyists' weighty, and likely unrelenting, opposition to such an amendment,¹⁴⁵ the courthouse is a more likely venue for change. Any challenge to sex-based discrimination should come under the Fourteenth Amendment's equal protection clause,¹⁴⁶ in addition to other potentially relevant grounds. The issue of sex-based pricing policies in Nevada's nightclubs and day pools is novel before the courts, making the outcome difficult to predict. The questions will be whether the nightclubs' policies qualify as state action and, if they do, whether there is a sufficient state interest to support them. It is well established that the mere issuance of a liquor license does not constitute state action,¹⁴⁷ but the court might question whether Nevada presents a special case of state action because of its unique economy and reliance upon the gaming industry.

The wording and construction of Nevada's laws demonstrate that gaming has greater importance than equal treatment. For example, Nevada's statutes governing the gaming industry are far lengthier and more developed than the state's public accommodations statutes.¹⁴⁸ Although Nevada does have a public policy opposing discrimination against persons,¹⁴⁹ the state also has a public policy declaration regarding the gaming industry. In contrast to the dry language of NRS § 233.101(2), which merely states that protection of certain classes (exclusive of sex) is "hereby declared to be the public policy of the State of Nevada,"¹⁵⁰ the language in NRS § 463.0129(1)(a) is more colorful and

¹⁴² CAL. CONST. art.1, § 7.5.

¹⁴³ On August 4, 2010, a California District Court ruled the amendment unconstitutional. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). Amendment proponents filed an appeal, and on August 16, 2010, the Ninth Circuit granted appellants' motion for a stay of the District Court's order pending appeal. *Perry v. Schwarzenegger*, No. 10-16696, 2010 WL 3212786, at *1 (9th Cir. 2010). It is anticipated that the case will be appealed all the way up to the United States Supreme Court.

¹⁴⁴ See ROSS MILLER, STATE OF NEVADA INITIATIVE & REFERENDUM GUIDE 1 (2010), available at <http://nvsos.gov/Modules/ShowDocument.aspx?documentid=1357>.

¹⁴⁵ See *supra* Section V.

¹⁴⁶ U.S. CONST. amend. XIV, § 1.

¹⁴⁷ *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972).

¹⁴⁸ Compare NEV. REV. STAT. Ch. 463 (2009) (Licensing and Control of Gaming), with *id.* Ch. 651 (Public Accommodations).

¹⁴⁹ *Id.* § 233.010(2).

¹⁵⁰ *Id.*

descriptive in emphasizing that the gaming industry “is vitally important to the economy of the State and the general welfare of the inhabitants.”¹⁵¹

This statement arguably has more effective force than the anti-discrimination policy in at least three ways. First, the gaming policy declaration carries more interpretive weight in that it appears in the same chapter as the gaming regulation statutes it modifies; the anti-discrimination policy appears discretely four chapters before the public accommodations statute. Second, the gaming policy declaration’s language is far more forceful than either the anti-discrimination statute or the public accommodations statute, declaring gaming is “vitally important”; there is no such qualitative assertion regarding equal treatment in places of public accommodation.¹⁵² Third, from a practical-state-interest standpoint, the gaming industry has a far greater positive financial effect on Nevada’s annual revenues than the state’s reputation for equal protection could ever hope to have. Therefore, court rulings favorable to the gaming industry are much more desirable and necessary than rulings that strive for equal protection among men and women. The last argument gains credence not only from evidence of Nevada’s gaming-related and tourism-related revenues,¹⁵³ but also indirectly because Nevada has no state income tax due to the extreme tax revenues the gaming and tourism industries generate.¹⁵⁴

The emphasis and reliance upon gaming and tourism revenue could, in a court’s reasoning, simultaneously condemn and rescue the practice of sex-based pricing policies in the adult entertainment venue industry. The former could occur because, rather than the state simply issuing liquor licenses to each establishment, a court might find the state “acted” by condoning the policies. In support of this, a court could point to the fact that Nevada’s State Gaming Control Board (the Board) also exerts authority over the venues via the Nevada Gaming Commission (the Commission), which the Board appoints to enforce its licensing decisions.¹⁵⁵ NRS § 463.165(1) requires any individual or business that permits certain gaming activities on its premises to obtain a license from the Board, and the Board may require the licensure of any individual or entity that it deems to have influence over a licensee’s gaming operations,¹⁵⁶ including a number of adult entertainment venues. The Board and Commission can essentially act as moral police to preserve the “legitimacy and reputation of the gaming industry”¹⁵⁷ under NRS § 463.311(1)(d).¹⁵⁸

¹⁵¹ *Id.* § 463.0129(1)(a).

¹⁵² *Compare id.* § 463.0129(1)(a), with *id.* § 233.010(2), and *id.* § 651.070.

¹⁵³ For example, in 2009, Clark County’s gaming revenue was \$8,833,902,000. LAS VEGAS CONVENTION & VISITORS AUTH., 2009 LAS VEGAS YEAR-TO-DATE EXECUTIVE SUMMARY (2009), <http://www.lvcva.com/getfile/479/ES-YTD2009.pdf>. By the end of May 2010, Clark County’s gaming revenue had already reached \$3,776,291,000. LAS VEGAS CONVENTION & VISITORS AUTH., 2010 LAS VEGAS YEAR-TO-DATE EXECUTIVE SUMMARY (2010), <http://www.lvcva.com/getfile/624/ES-YTD2010.pdf>.

¹⁵⁴ NEV. CONST. art. 10, § 1, cl. 9.

¹⁵⁵ STATE GAMING CONTROL BD. & NEV. GAMING COMM’N, GAMING REGULATION IN NEVADA: AN UPDATE 4-5 (2006), available at http://gaming.nv.gov/documents/pdf/gaming_regulation_nevada.pdf.

¹⁵⁶ NEV. REV. STAT. § 463.165(1).

¹⁵⁷ Liz Benston, *Is the Party Over?*, LAS VEGAS SUN, July 29, 2009, at 2, available at <http://www.lasvegassun.com/news/2009/jul/29/party-over-privel/>.

As licensees under the state's gaming regulations, venues must follow guidelines regarding the operation of their businesses, or face the Board's consequences,¹⁵⁹ which can include revocation of the establishment's operating license.¹⁶⁰ In the summer of 2009, the Board shut down Planet Hollywood Casino's Privé Nightclub,¹⁶¹ one of the Strip's popular nightspots at the time. The decision to close the club's doors came after an investigation uncovered evidence of management admittedly serving alcohol to underage females and allowing "rampant drug use, prostitution and the dumping of intoxicated customers outside the club"¹⁶² in violation of a multitude of laws.¹⁶³ The Board and Commission essentially cracked down on Privé for what amounts to unseemly and illegal behavior,¹⁶⁴ which indicates that they are active participants in regulating and controlling what is or is not acceptable in Nevada hotspots for the sake of Nevada's gaming industry and reputation. When applied to sex-based pricing policies, the ability of the Board and Commission to exercise authority like it did in the Privé case might be enough for courts to deem the State to have "acted," as the Equal Protection Clause requires, by failing to challenge such policies under the state's public policy declaration¹⁶⁵ or the Commission's broad authority to preserve the good reputation of Vegas' gambling industry.¹⁶⁶

Many nightclubs and day pools, although usually privately owned and operated, are located within or on the premises of casinos. Therefore, it is necessary for any person who wishes to attend such a venue to walk through the casino, necessarily passing the thousands of slot machines and table games sprinkled liberally across the casino's floor. The bright, flashing lights and whirring, clanging, beeping noises of the slot machines can no doubt distract even the most determined of partygoers, and, presumably, at least some visitors give in to the temptation to place a bet or two.¹⁶⁷ In 2009, \$5.6 billion of Clark

¹⁵⁸ The Commission may take action against a licensee to protect "the public peace, health, safety, morals, good order or general welfare." NEV. REV. STAT. § 463.311(1)(d).

¹⁵⁹ See *id.* § 463.310.

¹⁶⁰ *Id.* § 463.310(4)(a).

¹⁶¹ Benston, *supra* note 157, at 1.

¹⁶² *Id.* at 2.

¹⁶³ After the Privé scandal and also facing potential sanction by the Gaming Board, the Rio Casino preemptively closed its Sapphire pool, where Sapphire Gentlemen's Club exotic dancers sunbathed topless to attract male patrons, after Las Vegas Metro police uncovered fourteen counts of prostitution and nine drug offenses there. Sun Staff, *Metro: Prostitution, Drug Activity Found at Topless Rio Pool*, LAS VEGAS SUN (July 29, 2009), <http://www.lasvegassun.com/news/2009/jul/29/metro-prostitution-activity-found-topless-rio-pool/>.

¹⁶⁴ Note also that the Board and Commission have considered banning patron-accessible stripper poles, too, based upon the fact that the poles ostensibly encourage patrons to act excessively "naughty." Murphy, *supra* note 46.

¹⁶⁵ NEV. REV. STAT. § 463.0129.

¹⁶⁶ *Id.* § 463.311(1)(d).

¹⁶⁷ This same line of thinking is also behind the trend of the last few years of bringing Broadway shows to Vegas stages with reduced running times, usually around 90 minutes; less time in the theater means more time on the casino floor before and after. Sherry Amatenstein, *Broadway Musicals Get High-Profile Slot in Las Vegas*, NY DAILY NEWS (June 14, 2008), available at http://www.nydailynews.com/travel/2008/06/15/2008-06-15_broadway_musicals_get_highprofile_slot_i.html.

County's \$8.8 billion in gaming revenue came from the Las Vegas Strip,¹⁶⁸ which indicates the transit time from a casino garage or a hotel room to the doors of a nightclub might well be sufficient for the club to significantly impact gaming revenues, thus justifying the Commission's authority over the entertainment venues. Of course, venues such as nightclubs, bars, and adult pool parties also attract tourists who do not necessarily gamble, but do contribute to the State's tax revenue.

However, despite the battle of the sexes that rages daily—or perhaps more accurately, nightly—in Las Vegas, nightclubs and the like might also serve “an important government objective” that will spare them from being banned. Indeed, some of the same indicators that the state-action requirement has been fulfilled might also lead to sex-based pricing schemes passing the intermediate-scrutiny test given to gender classifications, on the ground that they are “substantially related” to serving “important governmental objectives.”¹⁶⁹ The decision by proponents of SB 207 to forego attempting to add sex in favor of adding sexual orientation is perhaps, albeit indirectly, the best indicator that sex discrimination in places of public accommodation might be here to stay. That decision reflects the importance of maintaining Nevada's reputation as the primary location for recreation and gambling in the country. As attorney Greg Kamer notes,

With the continued creation of regional gaming locations, riverboat gambling, Indian gaming, and the formation of new international gaming ventures, competition among gaming establishments is fiercer than ever. There is constant pressure to find that certain niche, image, or theme that will set a gaming establishment apart from the others. Take a close look around Las Vegas, for example, and count the number of new risqué nightclubs, tantalizing themed bars, and topless showgirl productions, all just a short distance from the casino floor.¹⁷⁰

Although Kamer's article focuses on the use of sexualized employee dress codes—especially scanty uniforms for female employees—to attract patrons to the various casinos, the parallel to attracting primarily male patrons by ensuring the presence of beautiful female patrons is not difficult to draw. Inter-casino competition for the highest visitor volume likely fuels attendance numbers at all casinos, thus increasing revenue across the board for the casinos themselves, and therefore for the State.

Similarly, Nevada's ability to attract tourists from out of state despite the national economic downturn is therefore all the more crucial. The extra revenue possibly excuses marketing gimmicks such as sex-based pricing if they influence visitors' decisions to come to the state and contribute to casino revenues. Taxable casino revenue is more important to Nevada's economic wellbeing than ever before. The Bureau of Economic Analysis found that Nevada was one out of only ten states in the entire nation whose gross domestic product

¹⁶⁸ *Vegas FAQs*, *supra* note 21.

¹⁶⁹ *Craig v. Boren*, 429 U.S. 190, 197 (1976).

¹⁷⁰ Gregory J. Kamer & Edwin A. Keller Jr., *Give Me \$5 Chips, a Jack and Coke—Hold the Cleavage: A Look at Employee Appearance Issues in the Gaming Industry*, 7 *GAMING L. REV.* 335, 335 (2003).

dropped by 0.6 percent or more in 2008 versus 2007,¹⁷¹ due in large part to the swift decline of Nevada's housing market.¹⁷² Therefore, the potential for lost revenues if adult entertainment establishments' sex-based pricing policies are curbed might be fearsome enough for a court to deem the policies meet the compelling state interest of maintaining tax revenue.

VII. CONCLUSION

Sex-based pricing and admissions policies in nightclubs, European day pools, and other adult entertainment venues inflict harm on women and men alike by imposing and maintaining negative sexual and gender role stereotypes on each sex. Laws and practices that promote such archaic and overbroad generalizations about men and women are just the kind of actions ripe for invalidation by the courts under the Fourteenth Amendment's Equal Protection Clause. Statutes have expressly invalidated sex-based discrimination in places of public accommodation in every one of the Ninth Circuit's member states and Guam, except for Nevada. Additionally, though perhaps other jurisdictions do not ordinarily deem them "state actors," adult entertainment establishments could be properly considered state actors for equal protection purposes in Nevada because of their extreme regulation by the state's Gaming Commission. Therefore, it seems possible that a court would find that sex-based pricing in such establishments discriminates unconstitutionally on the basis of sex.

Of course, the inquiry of whether such discrimination is unconstitutional does not end there, but must go further by determining whether the discrimination serves an important government interest. In this respect, because gaming regulation and licensing laws deem such establishments to significantly affect gaming profitability, and because Nevada relies more heavily now than ever upon the cash-cow gaming industry, courts will probably find that the ability of sex-based pricing policies to attract patrons to the casinos serves the compelling government interest of maintaining the state's economy. Thus, sex-based pricing policies, without or even in spite of any potential action against them in the legislature, are likely to survive an equal protection challenge in the courts and remain a part of Nevada's culture and allure indefinitely. If the public ever wishes to achieve sex equality on this issue in the face of such extreme gaming-industry opposition, a public education campaign might be necessary to spark the indignation and passion requisite for such a relatively revolutionary amendment to pass.

¹⁷¹ News Release, Bureau of Econ. Analysis, Economic Slowdown Widespread Among States in 2008, at tbl.2 (June 2, 2009), http://www.bea.gov/newsreleases/regional/gdp_state/2009/pdf/gsp0609.pdf.

¹⁷² *Id.*