

3-1-2020

Shared Histories: The Feminist and Gay Liberation Movements for Freedom in Public

Elizabeth Sepper

University of Texas at Austin School of Law

Deborah Dinner

Emory University School of Law

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>



Part of the [Civil Rights and Discrimination Commons](#), [Courts Commons](#), [Judges Commons](#), [Sexuality and the Law Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Elizabeth Sepper & Deborah Dinner, *Shared Histories: The Feminist and Gay Liberation Movements for Freedom in Public*, 54 U. Rich. L. Rev. 759 (2020).

Available at: <https://scholarship.richmond.edu/lawreview/vol54/iss3/5>

This Symposium Articles is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

SHARED HISTORIES: THE FEMINIST AND GAY LIBERATION MOVEMENTS FOR FREEDOM IN PUBLIC

Elizabeth Sepper *

Deborah Dinner **

INTRODUCTION

This Symposium on the fiftieth anniversary of the Stonewall Rebellion presents the opportunity to evaluate the regulation and deregulation of gender and sexuality in public space. In 1969, LGBTQ people erupted against policing, harassment, and exclusion in public spaces. While they had engaged in earlier, smaller protests and reforms, Stonewall ignited a mass gay liberation movement and sparked popular awareness of LGBTQ people's civil rights struggles. LGBTQ activists demanded their rights to express identity, associate with one another, and engage in queer behavior. That same year, the newly burgeoning feminist movement also launched protests and called for women's equality in public accommodations—the legal term of art for places open to the public.¹ These groups shared a history of regulation. Customary business practices, the discriminatory administration of liquor licensing laws, and limited protections against discrimination all denied LGBTQ people and heterosexual women alike the freedoms that heterosexual men enjoyed in public space. As they resisted this regulation, LGBTQ people and cisgender women won mutually reinforcing legal reforms.

To understand the dramatic change in social custom and law regulating gender and sexuality over the last half century requires examining the historical regulation and deregulation of cisgender

* Professor of Law, University of Texas at Austin School of Law.

** Associate Professor of Law, Emory University School of Law. Thank you to participants in the University of Richmond Law Review Symposium on the 50th Anniversary of the Stonewall Riots. We thank Athena Dufour, Chris Marple, and the staff of the *University of Richmond Law Review* for their superb organization and editing.

1. For a full exploration of feminist advocacy during the late 1960s and 1970s, see Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 *YALE L.J.* 78, 80–81 (2019).

women and of LGBTQ people together. Risa Goluboff has led the charge against siloed accounts of social movements and socio-legal change, arguing against historical narratives that treat subordinated groups as distinct and in pursuit of discrete goals.² By instead synthesizing the histories of social movements, Goluboff shows that we gain better understanding of how social and legal structures of hierarchy and oppression “worked [and] how they then fell apart.”³ Heeding this call, this Article offers a close examination of dual case studies of feminist and gay and lesbian activism, in the period from the late 1960s through the mid-1980s.

While we leave a more comprehensive account of socio-legal change to future work, this Article offers two insights into what we might learn from an integrative socio-legal history of feminist and LGBTQ public accommodations activism. The Article’s first insight is that the regulation of cisgender women and LGBTQ people stemmed from common sources of law. In the late 1960s, a system of gender and sexual regulation structured access to public accommodations. Public authorities and private businesses targeted unescorted heterosexual women, gay people, and gender nonconformists for particular scrutiny. For each of these groups, policing was justified by fears of their sexuality, perceived to threaten to the hetero-patriarchal family.

An array of public accommodations, from athletic clubs to credit institutions, presumed women’s heterosexuality and dependence on men.⁴ Women often needed to perform their heterosexual dependency to eat and drink in public. By custom, and in some states by law, women could only sit (or stand) at a bar if escorted by a man.⁵ Bar owners and legislators justified the practice by depicting unescorted women as prostitutes or seductresses and by referencing men’s alleged need for leisure spaces free of heterosexual distraction.⁶ Male-escort requirements also limited the ways in which women could associate with each other in public, preventing

2. RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S*, at 335 (2016).

3. *Id.*

4. *Id.*

5. Georgina Hickey, *Barred from the Barroom: Second Wave Feminists and Public Accommodations in U.S. Cities*, 34 *FEMINIST STUD.* 382, 382 (2008); Sepper & Dinner, *supra* note 1, at 91–93.

6. Sepper & Dinner, *supra* note 1, at 115–21.

women from grabbing a drink with other women, whether a platonic friend or romantic interest.

Similar motivations—to impose dominant gender norms and morality—underpinned widespread restrictions on LGBTQ people. Insurance companies, credit institutions, and banks perceived homosexual people as inherently risky and therefore denied them services. Anti-cross-dressing regulations in a wide array of public accommodations were designed to prevent people from straying (too far) from a binary of gendered dress. Liquor licensing authorities interpreted the mere presence of gay men in bars, as they had unescorted women, as threats to the “normal red-blooded man.”⁷ These same authorities used licensing laws to shut down gay and lesbian bars, denying these communities the refuge of separate spaces.⁸ Even when gay patrons did not engage in conduct that violated prohibitions on immoral acts, licensing authorities interpreted their association in public to “present[] . . . a definite social problem.”⁹ The arrest, and even just the outing, of perceived sexual minorities seriously undermined their employability and housing prospects.

This Article’s second insight is that feminist and LGBTQ people’s respective fights for equality in public reinforced one another. In the late 1970s, civil rights law offered no assistance to either group. Title II of the Civil Rights Act of 1964 prohibited race, national origin, and religious discrimination—but not sex discrimination—in specified categories of public accommodations.¹⁰ State laws that dated to Reconstruction barred race, color, and national origin discrimination.¹¹ Before 1969, however, no state or city law prohibited sex, sexual orientation, or gender identity discrimination in public accommodations.

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

8. William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961–1981*, 25 HOFSTRA L. REV. 817, 870–72 (1997) (describing harassment by liquor licensing agents and police in New York and San Francisco).

9. *One Eleven Wines*, 235 A.2d at 14; see Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 50 HASTINGS L.J. 1015, 1133–35, 1141 (1999) (summarizing cases involving the use of liquor licensing authorities against gay and lesbian bars).

10. 42 U.S.C. § 2000a (2012).

11. Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 238–40 (1978).

Beginning in the 1960s, the LGBTQ and feminist movements pursued court battles and legal reforms for equality and liberty in public. They ensured that liquor licensing no longer targeted cisgender women and LGBTQ people. Virtually all states came to adopt public accommodations laws prohibiting sex discrimination and twenty-four explicitly included sexual orientation as well.¹² This history shows that the feminist and gay liberation movements' public accommodations advocacy was linked rather than independent. Each movement built on each other's legal victories in ways that were cyclical and mutually reinforcing. Putting feminist and LGBTQ activism together enables us better to see how gender and sexuality were inherently intertwined.

This Article explores two case studies of public accommodations activism: New Jersey in the late 1960s and California in the mid-1980s. Part I begins just before Stonewall as an emerging doctrinal distinction between status and conduct began to ensure rights of LGBTQ people to associate in public space. In 1967, in *One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control*, the New Jersey Supreme Court held that the mere fact that gay men congregated in a bar did not establish immoral conduct in violation of a liquor licensing regime.¹³ Women's rights advocates, in turn, successfully used this gay rights precedent to challenge sex-based regulation of cisgender women in *Gallagher v. Bayonne*. Put together, these judicial decisions involving gay men and women highlight a common history of policing and surveillance of gender and sexuality in public. The decisions challenge the conventional periodization of civil rights, showing how LGBTQ liberation laid a foundation for feminist legal advances.

Part II takes us to California in the period from the mid-1970s through the 1980s, when activists began to demand not only access to public spaces but also the right to express their identities openly. Having achieved a status-conduct distinction in the courts, feminist and gay liberation movements pursued legislative reforms that would explicitly guarantee full and equal enjoyment of public accommodations. Activists successfully lobbied for the addition of "sex" to the California law barring arbitrary exclusion from public

12. *State Public Accommodation Laws*, NAT'L CONFERENCE STATE LEGISLATURES (Apr. 8, 2019), <http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx> [https://perma.cc/N67T-B3A5].

13. *One Eleven Wines*, 235 A.2d at 19.

businesses and then used the law to challenge the gender regulation of both cisgender women and LGBTQ people. To illustrate this process, we analyze the case of *Rolón v. Kulwitzky*, in which a lesbian couple who were denied a celebratory Valentine's Day dinner won rights to express their identities in public. The case offers insight into how one couple experienced subordination in public, highlights points of intersection between activism for sex equality and sexual freedom, and illustrates conservative resistance to the deregulation of gender.

These episodes—offering an entry point into the history of liquor licensing in New Jersey and public accommodations law in California—highlight that feminist and LGBTQ legal victories evolved cyclically and interdependently, rather than in a linear and isolated manner. Rights development proceeded from gay liberation to women's rights and vice versa. Struggles for sex equality and gay and lesbian liberation in public were intertwined rather than independent.

I. LIQUOR LICENSING, SEXUAL RISK, AND GENDER REGULATION: THE STORY OF *ONE ELEVEN* AND *BAYONNE*

Nearly two years before the Stonewall rebellion, the New Jersey Supreme Court's ruling in *One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control* affirmed the rights of gay men to socialize with each other in bars.¹⁴ Swiftly, *One Eleven Wines* led to a victory for women in public too. Analogizing straight women to gay men, a series of New Jersey courts struck down a law that prohibited women from standing at a bar, finding the law beyond the police power to regulate liquor, in *Gallagher v. Bayonne*.¹⁵ Issued when gay liberation was just stirring and when the feminist movement was still forming, these decisions represent early court victories for the respective movements.

From the repeal of Prohibition through the 1950s, liquor licensing had acted as a formidable system to surveil and discipline gender and sexuality in public space.¹⁶ Public authorities and private businesses policed, harassed, excluded, and marginalized unes-

14. *Id.* at 12.

15. 245 A.2d 373, 375–76 (N.J. 1968).

16. Eskridge, *supra* note 8, at 867.

corted heterosexual women, gay people, and gender nonconformists on the grounds that their sexual identities and gender performance presented moral risks.¹⁷

One Eleven Wines and *Bayonne* formed part of a nationwide trend in state courts toward skepticism of expansive police power over behavior in public accommodations. Decided at a time when the expansion of the Equal Protection doctrine and the enactment of civil rights statutes heightened attention to the injuries that morals regulation inflicted on subordinated groups, the decisions affirmed both individual liberty and group association. They manifested an emergent distinction between status and conduct that allowed cautious steps toward freedom for unescorted heterosexual women, gay people, and gender nonconformists.

A. *A Trajectory from Gay Liberation to Women's Rights in New Jersey*

With *One Eleven Wines*, New Jersey courts faced a challenge to an administrative licensing regime that restricted the formation of gay community in public. As part of a nationwide crackdown on gay bars throughout the 1950s and 1960s, New Jersey regulators had suspended the licenses of Murphy's Tavern, Val's Bar, and One Eleven Wines.¹⁸ The bars fought the suspensions, arguing that the mere congregation of homosexual people did not constitute "lewd or immoral" conduct prohibited by liquor licensing regulations.¹⁹ Their efforts drew the support of the Mattachine Society, an early gay political organization founded in 1951 to educate the public about homosexuality and to secure legal reforms.²⁰ Mattachine members, who had coordinated a 1966 "sip-in" that prodded New York City licensing authorities to allow gay men to congregate in

17. *Id.*

18. Whitney Strub & Timothy Stewart-Winter, *Remembering One Eleven Wines, a Pre-Stonewall Win Against Homophobic State Surveillance*, SLATE: OUTWARD (Nov. 30, 2017, 1:27 PM), <https://slate.com/human-interest/2017/11/remembering-one-eleven-wines-liquors-a-pre-stonewall-win-against-homophobic-state-surveillance.html> [https://perma.cc/ERN8-6K4Z].

19. *One Eleven Wines*, 235 A.2d at 15, 19.

20. JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940–1970*, at 57–58 (2d ed. 1983) (discussing the "homosexual emancipation movement" that began to take root in the 1950s).

bars and restaurants, wrote an amicus brief supporting the bars that would prove similarly influential in *One Eleven Wines*.²¹

The New Jersey litigation formed part of the periodic legal resistance by gay and lesbian bars to their policing and closure by alcohol regulators. One of these legal challenges yielded what is thought to be the nation's first successful gay rights case—*Stoumen v. Reilly*—when, in 1951, the California Supreme Court sided with the Black Cat bar against liquor regulators.²² The California Board of Equalization had revoked Black Cat's license for allegedly violating the Alcoholic Beverage Control Act, which prohibited the use of a liquor license to maintain a “disorderly house for purposes injurious to public morals.”²³ The court held that the fact that “persons of known homosexual tendencies patronized [Black Cat] and used [it] as a meeting place” was not itself evidence of illegal or immoral conduct.²⁴

Nonetheless, successful challenges to license revocation remained rare or of limited effect.²⁵ As they had since the repeal of Prohibition, courts still treated police power over liquor distribution as extraordinarily far-reaching, insulating liquor regulation from charges of unconstitutional vagueness, deprivation of due process, and rights infringement.²⁶ As precedent seemed to require, the New Jersey Appellate Division upheld the bars' license suspensions as consistent with the exercise of police power.

21. Eskridge, *supra* note 8, at 872–73 (noting influence of brief); *Photos: LGBT Advocates Honor 52nd Anniversary of Historic “Sip-In” with Trailblazer Dick Leitsch and Advocate/Influencer Adam Eli*, NYC LGBT HISTORIC SITES PROJECT (Apr. 26, 2018), <https://www.nyclgbtsites.org/2018/04/26/photos-lgbt-advocates-honor-52nd-anniversary-of-historic-sip-in-with-trailblazer-dick-leitsch-and-advocateinfluencer-adam-eli/> [https://perma.cc/8Y2H-U6UY].

22. 234 P.2d 969, 969, 971 (Cal. 1951) (addressing an appeal from the denial of a writ of mandamus to compel the California Board of Equalization to annul an order suspending its liquor license). On the description as a pioneering gay rights decision, see CRAIG A. RIMMERMAN, *FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENTS IN THE UNITED STATES* 49 (2002).

23. *Stoumen*, 234 P.2d at 970.

24. *Id.*

25. See generally Rivera, *supra* note 9, at 1132–43 (summarizing cases involving the use of liquor licensing authorities against gay and lesbian bars). Resistance was not universal. Eskridge, *supra* note 8, at 869 (discussing crackdown in Dade County that resulted in closure of Miami's gay and lesbian bars but without a single reported decision in the late 1950s and early 1960s).

26. Rivera, *supra* note 9, at 1133 (discussing theories courts used to uphold such regulation).

In *One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control*, the New Jersey Supreme Court—then emerging as a leader in progressive state constitutional doctrine—bucked prior doctrine to embrace the rights of gay patrons.²⁷ Several courts had recently restrained liquor licensing authorities, and the California Supreme Court had even recognized gays' constitutional rights to public space, but it did so in a way that prohibited them from "any public display which manifests sexual desires," from pairing off, to gender-nonconforming dress, to dancing or kissing.²⁸ Justice Jacobs writing for the New Jersey Supreme Court went much further.²⁹ While the case was nominally about commercial licensing, the court focused on the injury to gay customers and linked the case to the Warren Court's contemporaneous rights revolution.³⁰ Just as regulation of the NAACP threatened the rights of African Americans, the court reasoned, suspension of the bars' licenses violated the rights of gay citizens.³¹ Gay people had "the undoubted right to congregate in public" and to "be viewed as having the equal right to congregate within licensed establishments such as taverns, restaurants and the like."³²

The court drew a distinction between the status of homosexuality (or gender nonconformity) and the conduct of lewd behavior. The court did not treat the regulation of morality through liquor licensing as outside the bounds of judicial power, subject to minimal oversight.³³ Instead, Justice Jacobs's opinion dismantled each of the government's justifications for the regulation as lacking any

27. Leigh B. Bienen, "A Good Murder", 20 FORDHAM URB. L.J. 585, 590 (1993) ("[T]he New Jersey Supreme Court has had a history of being a leader in the development of state constitutional doctrine."); see also John B. Wefing, *The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism*, 29 RUTGERS L.J. 701, 703-04 (1998) (recounting court's significant decisions requiring more equitable school funding, striking down zoning restrictions that restricted the ability to build low and moderate income housing, and imposing strict liability for products liability).

28. *Vallerga v. Dep't Alcoholic Beverage Control*, 347 P.2d 909, 912 (Cal. 1959).

29. Eskridge, *supra* note 8, at 872-73 (calling *One Eleven Wines* "the most dramatic litigation" against licensing authorities).

30. *Id.*

31. *One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control*, 235 A.2d 12, 18 (N.J. 1967) (citing *NAACP v. Alabama*, 357 U.S. 449, 458 (1958)). The court also cited constitutional standing cases in *Griswold v. Connecticut* (physicians and women seeking contraception), *Pierce v. Society of Sisters* (private schools and parental rights), *Barrows v. Jackson* (homeowner in a private suit for violating racially restrictive covenant and racial minorities). *Id.*

32. *Id.*

33. *Id.* at 19.

“significant support.”³⁴ Homosexual identity alone would not amount to lewd or immoral conduct for licensing purposes.³⁵ Nor did gender deviance—in the form of allegedly campy behavior, high-pitched voices, and dress—suffice.³⁶ If individuals engaged in specific lewd behavior or solicitation, the government could bring those charges, but only where the same behavior of heterosexuals would also be banned.³⁷

The liberatory potential of *One Eleven Wines* extended beyond gays and lesbians. For litigants in Bayonne, New Jersey, the decision immediately offered a tool to destabilize regulation of heterosexual women. In 1967, any woman who approached a bar in Bayonne to order a drink was turned away. By city ordinance, women could not stand or sit at a bar or be served alcoholic beverages unless seated at a table.³⁸ Motivated by “some unfortunate experiences . . . in taverns and bars” involving women and enlisted navy men during World War II, the ordinance dated from 1943.³⁹ But voters had proved unwilling to let it go. Just as *One Eleven Wines* was decided, they had rejected a proposal supported by the Bayonne Tavern Owners Association to permit women at the bar—for the second time in seven years.⁴⁰

Edward P. Gallagher, who owned The Pub, and Ann Guntiorowski, a female “taxpayer of Bayonne,” sued for a declaratory judgment that the ordinance was invalid.⁴¹ They mounted two distinct arguments. First, the ordinance exceeded the city’s police powers.⁴² Second, the ordinance amounted to sex discrimination in violation of the New Jersey Constitution and civil rights act.⁴³ Eliz-

34. *Id.* at 18–19.

35. *Id.* at 18.

36. *Id.*

37. *Id.* at 19.

38. *Gallagher v. City of Bayonne*, 256 A.2d 61, 61 (N.J. Super. Ct. App. Div. 1969).

39. *Gallagher v. City of Bayonne*, 245 A.2d 373, 374 (N.J. Super. Ct. Ch. Div. 1968).

40. *No Women on Bayonne Bar Stools*, JERSEY J. (Farians Papers) Nov. 15, 1967. The taverns’ interests were primarily deregulatory, and they had resources the nascent feminist movement then lacked. Accord William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2165 (2002) (“Unlike individual gay people, the bars had resources . . .”).

41. *Bayonne*, 256 A.2d at 61. The suit was filed in March of 1966 but only reached pre-trial conference in November 1967. *Trial Stated for Women at Bar Suit*, JERSEY J. (Farians Papers) Nov. 7, 1967.

42. *Bayonne*, 256 A.2d at 61.

43. *Id.*

abeth “Betty” Farians—an early feminist activist who subsequently founded the New Jersey chapter of the National Organization for Women (“NOW”)—pointed the plaintiffs’ lawyers to the equal rights provision of the state constitution.⁴⁴ According to Farians, the plaintiffs’ lawyers found that a case had yet to be brought under the provision.⁴⁵

The plaintiffs faced an uphill battle on both claims. At the time the case was filed, “a long line of cases” supported wide-ranging exercise of the police power against liquor licensees.⁴⁶ Most damning of the plaintiffs’ claim was a 1954 New Jersey Appellate Division decision in *Eskridge v. Division of Alcoholic Beverage Control*.⁴⁷ That decision upheld a similar Camden ordinance on the rationale that as a place “normally frequented by men,” the bar area invited “commingling” in “an informal atmosphere in which all too often the usual amenities and restraints do not prevail.”⁴⁸ Women’s entry into such a space would both disrupt the socialization among men and risk immorality. *Eskridge*—the *Bayonne* plaintiffs admitted—seemed “dispositive of the issue we raise here.”⁴⁹

The sex discrimination claim also appeared to have little traction. The New Jersey Constitution and the state civil rights act did not explicitly bar sex discrimination in public accommodations. Neither the United States Supreme Court nor any state supreme court or federal court of appeals had struck down any sex classification as violating women’s rights to equal protection,⁵⁰ although

44. Memorandum from E.J. Farians to All Stout-Hearted Women and Their Friends (July 10, 1968) [hereinafter E.J. Farians Memorandum] (on file with DeCrow Papers) (“No one in the legal profession involved in the case seemed to be aware of the equal rights article in the N.J. State Constitution until it was pointed out to them by me. After checking, the plaintiff’s lawyer found that no case had been brought under this article.”). Farians convened the first NOW New Jersey chapter meeting in April 1968, noting that it was “high time” the chapter got organized given issues of “large magnitude” like the Bar Stool Case. Letter from Elizabeth Farians to Potential New Jersey NOW Members (Mar. 15, 1968) (on file with Farians Papers).

45. E.J. Farians Memorandum, *supra* note 44.

46. Brief on Behalf of Plaintiff at 4, *Bayonne*, 245 A.2d 373 (No. C-1956-65) (N.J. Super. Ct. Ch. Div. 1968) (on file with Farians Papers).

47. 105 A.2d 6, 9 (N.J. Super. Ct. App. Div. 1954) (“Ordinances which forbid the serving of liquor to women except when seated at tables do not violate any constitutional right of either the licensee or the women . . .”).

48. *Id.* at 10 (quoting *Holderness v. Orange*, *Bulletin* 257, *Item* 1).

49. Brief on Behalf of Plaintiff, *supra* note 46, at 6.

50. The Supreme Court would do so for the first time in 1971. *Reed v. Reed*, 404 U.S. 71, 76–77 (1971) (striking down the preference under Idaho law for male over female kin as estate administrators).

several district courts had done so.⁵¹ Courts still uniformly held that the differential treatment of women in establishments serving liquor posed no constitutional concern.⁵² Indeed, nineteen years earlier, the Supreme Court in *Goesaert v. Cleary* had upheld a state law prohibiting women from bartending on the basis that the Constitution did not “preclude the States from drawing a sharp line between the sexes . . . in such matters as the regulation of the liquor traffic.”⁵³

But just as the *Bayonne* case was scheduled for trial, *One Eleven Wines* caused the legal ground to shift. The plaintiffs argued that the decision stood for the “dramatic new concept” that “where the rights of citizens come into conflict with liquor control,” the government had a duty to adopt narrow regulations and “must not restrict beyond the public need.”⁵⁴ The old rule—requiring only “any semblance of relationship between the restriction and the public need”—was no longer valid.⁵⁵ *Eskridge*, which showed “little or no consideration for the rights of the individuals involved,” had to be read as overruled.⁵⁶ The new rights-protective approach should apply to court review of liquor regulation generally.

The briefing highlights a surprising trajectory, as the recognition of rights of gay men paved the way for heterosexual women. The plaintiffs’ brief read, “[T]he facts in our case are so analogous to those of *One Eleven Wines* that the word ‘woman’ could be substituted for ‘homosexual’ throughout the opinion with little or no loss of sense.”⁵⁷ The explicit analogy was striking. The parties might have distanced women from gay men to avoid the stigma of sexual immorality,⁵⁸ but they instead emphasized the fear of sexuality common to restrictions on women and gays.⁵⁹ For both groups,

51. See, e.g., *Karczewski v. Balt. & Ohio R.R. Co.*, 274 F. Supp. 169, 179 (N.D. Ill. 1967); *White v. Crook*, 251 F. Supp. 401, 408–09 (M.D. Ala. 1966) (per curiam) (respectively striking down statutes barring women from jury service and permitting only husbands to sue for loss of consortium).

52. But see *White v. Fleming*, 522 F.2d 730, 730 (7th Cir. 1975).

53. 335 U.S. 464, 466 (1948).

54. Brief on Behalf of Plaintiff, *supra* note 46, at 8, 11–12.

55. *Id.* at 12.

56. *Id.* at 6.

57. *Id.* at 12–13.

58. See *Representing the Unpopular Client*, 72 L. LIBR. J. 674, 689 (1979).

59. Brief on Behalf of Plaintiff, *supra* note 46, at 13 (providing a chart that details the similarities in the *One Eleven Wines* and *Bayonne* cases).

the plaintiffs' brief read, an absolute prohibition was overinclusive.⁶⁰ The presumption of immorality attached to each group had to give way to individualized inquiry.

Judge Robert A. Matthews agreed.⁶¹ *One Eleven Wines* had limited liquor licensing authorities to "a rule of reason instead of arbitrary fiat" and required looking to "the rights of individual patrons who desire access to licensed premises."⁶² Judge Matthews therefore focused on how the prohibition regulated women, rather than its consequences for bars.⁶³ As in *One Eleven Wines*, an amorphous need to ensure morality purported to justify the restriction. The court observed wryly that in the city's view, "the mingling of males and females at a bar is in some manner deleterious to the morals of the community."⁶⁴ Like the New Jersey Supreme Court, Judge Matthews took a skeptical view of the "supporting data" for Bayonne's ordinance.⁶⁵ He insisted that the city structure any regulation so as to "not impair the rights of women to patronize licensed premises."⁶⁶ A purported risk to morality did not justify women's total exclusion from the bar.

Matthews's decision also embraced the plaintiffs' state constitutional claims. The New Jersey Civil Rights Act protected individuals' equal enjoyment of and access to public accommodations.⁶⁷ Under the New Jersey Constitution, "No person shall be denied the enjoyment of any civil . . . right, nor be discriminated against in the exercise of any civil . . . right, . . . because of religious principles, race, color, ancestry or national origin."⁶⁸ Person, the equal rights amendment to the constitution specified, "shall be taken to include both sexes."⁶⁹ The court held that the two constitutional provisions "together with" the public accommodations statute led "to the con-

60. *Id.* at 14.

61. *Gallagher v. City of Bayonne*, 245 A.2d 373, 376 (N.J. Super. Ct. Ch. Div. 1968).

62. *Id.* at 375.

63. *Id.* at 377 (describing the ordinance as unconstitutional and violative of the civil rights act in that it "prohibits females from being served at public bars").

64. *Id.* at 375.

65. *Id.*

66. *Id.* at 376-77; *see also id.* at 376 ("[T]here has been no factual showing before me (and I am sure there cannot be) which can support the legal necessity for the ordinance . . .").

67. N.J. STAT. ANN. § 18:25-4 (West 1964); *Bayonne*, 245 A.2d at 376.

68. *Bayonne*, 245 A.2d at 376 (quoting N.J. CONST. art. I, § 5).

69. *Id.* (citing N.J. CONST. art. X, § 4).

clusion that the people and the legislature have created a clear prohibition against discrimination in this area of civil rights based on sex.”⁷⁰ Like *One Eleven Wines*, the *Bayonne* decision showcased a new awareness of the impact of morality regulation on minority groups.

Judge Matthews’s opinion drew upon a distinction between biological sex and social gender roles that feminist social scientists were then advancing.⁷¹ Matthews observed, “No doubt there are those who would seek to polarize men and women on the basis of sex differentiation alone, and to whom maleness would represent crude masculinity and femaleness fainting femininity.”⁷² He proceeded to issue “a signal for caution,” however, to those “who would look no further than genital difference as a general support for classification on the basis of sex . . . under law.”⁷³ Writing a memorandum to other feminists, Farians flagged this “lengthy polemic concerning the nature of humanity”⁷⁴ and its androgyny, whereby each person reflects characteristics that “we have been too prone to oversimplify and relegate to categories labeled male or female.”⁷⁵ In its openness to variance in gender identity, rather than tight linkage between male anatomy and masculinity, Judge Matthews’s opinion contained a foundation for future liberation.

Ultimately, however, the outcome would not rest on constitutional or civil rights grounds. Preferring to avoid arguments based on sex discrimination, the appellate court affirmed the trial court’s holding in *Bayonne* on the grounds that the city ordinance involved

70. *Id.* at 376. The judge adopted a reading of the statute and constitution that was consistent with progressive readings of civil rights protections at the time but seems foreign to lawyers fifty years later. The New Jersey Civil Rights Act does specify, as Judge Matthews wrote, that “[a]ll persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation” including taverns. *Id.* at 375 (quoting § 18:25-4 (West 1964)) (citing N.J. STAT. ANN. § 18:25-5 (West 1964)). But in a section the judge omitted, it continued “without discrimination because of race, creed, color, national origin, ancestry, or age, subject only to conditions and limitations applicable alike to all persons.” N.J. STAT. ANN. § 18:25-4 (West 1964). The constitutional provision likewise spoke in terms of denial of civil rights “because of” a list of protected traits that did not include sex. *See* N.J. CONST. art. I, § 5. If the New Jersey Constitution and civil rights act had protected against sex discrimination in public accommodations, they would have been the first in the country to do so.

71. Joanne Meyerowitz, *A History of “Gender,”* 113 AM. HIST. REV. 1346, 1353–55 (2008).

72. *Bayonne*, 245 A.2d at 376.

73. *Id.*

74. E.J. Farians Memorandum, *supra* note 44, at 1.

75. *Bayonne*, 245 A.2d at 376.

an unreasonable exercise of police power.⁷⁶ But its opinion also resonated with sex equality arguments. The rationale in *One Eleven Wines*, the appellate court reasoned, equally applied to women's treatment in taverns: "In these enlightened days of the 1960s the fact that women congregate and are served at bars cannot be said to be a threat to the health, safety and welfare of the public."⁷⁷ The Supreme Court of New Jersey unanimously affirmed.⁷⁸ Where rights were at stake, the police power had to be narrowed. No longer did mere membership in a group—gay men, heterosexual women—suffice to restrict the freedom of individuals to move and congregate in public under the liquor licensing power.

B. *The Regulation of Gender Through Liquor Licensing*

One Eleven Wines and *Bayonne* marked a significant shift. For much of the twentieth century, dominant society denied women and gay people the freedoms granted to heterosexual men in public space, particularly in places where alcohol was served.⁷⁹ Prohibition had offered a brief reprieve. Speakeasies and other establishments permitted "flouting of social convention" and "'promiscuous' and unregulated intermingling of the classes and sexes."⁸⁰ Gender nonconformists—fairies and female impersonators in the parlance of the day—enjoyed some measure of tolerance in the social life of large cities.⁸¹ Whereas previously most respectable women drank only at home if at all,⁸² and a woman alone in a drinking establishment was assumed a prostitute, during Prohibition middle- and

76. *Gallagher v. Bayonne*, 256 A.2d 61, 63 (N.J. Super. Ct. App. Div. 1969), *aff'd*, 259 A.2d 912 (N.J. 1969).

77. *Id.*

78. *Bayonne*, 259 A.2d at 912.

79. See PATRICIA A. CAIN, *RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT* 74 (2000) (noting similarities in confining cis-gender women and gay men and lesbians to the privacy of their homes for reasons of gender roles and immorality).

80. GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890–1940*, at 335 (1994).

81. JULIO CAPO, JR., *WELCOME TO FAIRYLAND: QUEER MIAMI BEFORE 1940*, at 237, 256–57 (2017) (noting the ways that LGBTQ people thrived in Miami during Prohibition and in that city even after Repeal into the 1940s); LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* 62–80 (1991) (describing exploration of bisexuality and homosexuality and cross-racial interaction during the 1920s sexual revolution in New York City); HUGH RYAN, *WHEN BROOKLYN WAS QUEER* 111 (2019) (discussing the burgeoning queer public scene in New York in the 1920s and 1930s aided by Prohibition).

82. See, e.g., *Madisonville v. Price*, 94 S.W. 32, 33 (Ky. 1906) (upholding a city ordinance

upper-class women began to drink and socialize in public establishments.⁸³

As public consternation about the erosion of sexual norms intensified, the twilight days of Prohibition saw efforts to impose gender lines. With the participation of middle- and upper-class women in nightlife, establishments came to require escorts or to place physical barriers between unacquainted men and women.⁸⁴ Restaurants, bars, and other amusements invited women in, but then, as historian Kathy Peiss argues, simply “reformulated women’s subordination,” requiring women to define themselves by “heterosexual and marital relationships.”⁸⁵ To encourage Prohibition’s repeal, a number of states began to limit the congregation of unpopular groups. For example, New York City forbade serving “a drink to a single homosexual or to allow homosexuals to gather” on the rationale that it rendered the place disorderly.⁸⁶

Repeal only intensified the policing of gender norms, as regulators sought to reestablish race, class, and gender hierarchies in public sociability.⁸⁷ Liquor licensing, historian George Chauncey argues, provided “a more pervasive and more effective regime of surveillance and control” than the ad hoc laws and customs of earlier decades.⁸⁸ Liquor licensees had to be of “good moral character” and to avoid “disorderly” conduct at their establishments⁸⁹—vague requirements that were distinctly gendered. As *One Eleven Wines* noted, many of the laws used against sexual minorities also reflected concerns about cisgender heterosexual women’s presence in public space.⁹⁰ Under liquor regulations, disorder took the form of

that made it unlawful for any infant or female to drink in a saloon or remain therein over five minutes).

83. JAN WHITAKER, *TEA AT THE BLUE LANTERN INN* 5 (2002) (showing that pre-Prohibition, a woman entering a restaurant even with an escort risked her reputation).

84. LEWIS A. ERENBURG, *STEPPIN’ OUT: NEW YORK NIGHTLIFE AND THE TRANSFORMATION OF AMERICAN CULTURE, 1890–1930*, at 134, 136–37 (1981).

85. KATHY PEISS, *CHEAP AMUSEMENTS: WORKING WOMEN AND LEISURE IN TURN-OF-THE-CENTURY NEW YORK* 8 (1986).

86. LISA KEEN & SUZANNE B. GOLDBERG, *STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL* 86 (1998).

87. See CHAUNCEY, *supra* note 80, at 334–37.

88. *Id.*

89. See William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet 1946–1961*, 24 FLA. ST. U. L. REV. 703, 762 (1997); Rivera, *supra* note 9, at 1132–33.

90. *One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control*, 235 A.2d 12, 14 (N.J. 1967) (noting that among the first rules adopted by the N.J. liquor commissioner, for example, was a ban on “prostitutes” and “female impersonators” in licensed premises).

having on their premises “prostitutes, female impersonators, or other persons of ill repute.”⁹¹

Liquor licensing redefined the bounds of social interaction. First, repeal worked to segregate gay men and lesbians from the majority of society and often each other.⁹² The presence of unaccompanied women and gay men, who were often labeled “female impersonators,” risked sexual nuisance and thus threatened the status of the license.⁹³ For gays and lesbians, it was gender performance—dress, hairstyle, and conversational interests—that indicated sexuality and had to be controlled and isolated.⁹⁴ With the exclusion of gender nonconformists from mainstream establishments, bars and clubs designated for gays and/or lesbians came into existence. Second, many places where liquor was served remained closed to women. Although by the mid-twentieth century, “women of good character” could enjoy libations and meals out without “be-smirch[ing] their reputations,”⁹⁵ only men had full access to many restaurants, clubs, and both working-class and high-end bars.⁹⁶ Those businesses that did allow women often required that they be escorted by men.⁹⁷ The post-Prohibition period further cemented the link between women’s sexuality and dependency, as women’s access to public space often was contingent on the presence of a man.

Concerns about sexuality prompted hysteria during World War II and a clampdown in the 1950s and early 1960s. The flurried mixing of young women and G.I.s and the notion of “pickups”—or sexually available single women—“captured the public imagination.”⁹⁸ As Amanda Littauer explains, wartime launched intense

91. *Id.*

92. CHAUNCEY, *supra* note 80, at 335 (“Repeal resulted in the segregation and isolation of the gay social world from the broader social life of the city . . .”).

93. See Anthony Michael Kreis, *Policing the Painted and Powdered*, 41 CARDOZO L. REV. (forthcoming 2020) (discussing origins and enforcement of these laws against groups that threatened dominant masculinity whether cisgender women working as men or “fairies”).

94. KEEN & GOLDBERG, *supra* note 86, at 86. In this earlier period, gay bars almost never challenged license revocation because it was expensive and they could expect to lose. *Id.*

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

96. Hickey, *supra* note 5, at 382–83.

97. *Id.* at 382.

98. AMANDA H. LITTAUER, *BAD GIRLS: YOUNG WOMEN, SEX, AND REBELLION BEFORE THE SIXTIES* 55–56 (2015).

scrutiny “not only of the usual ‘delinquent’ suspects—poor girls and girls of color—but also of white, middle-class girls.”⁹⁹ By the 1950s, B-girls, or women who induced male customers to buy drinks for a commission from bars, provoked particular anxiety by blurring the markers that distinguished immoral from respectable women.¹⁰⁰ Because it had become more common for working women to socialize in bars and taverns, men could assume that these conservatively dressed women were sexually available single women—and be put at risk for predation.¹⁰¹

Cities and states cracked down. Byzantine regulations set where, when, and how women could be served or stand.¹⁰² Lawmakers passed prohibitions on B-girls, and authorities revoked licenses from establishments hosting them and cracked down on places that prostitutes patronized (even if no solicitation occurred).¹⁰³ Cisgender women also faced policing by licensees that extended beyond what the law required. As the New York Alcoholic Beverage Control Commission explained in 1969, proprietors often took “certain precautions” against the sexual nuisances women presented.¹⁰⁴ They banned women entirely, posted “no unescorted women” signs, or prohibited women—accompanied or not—at the bar.¹⁰⁵ Linda Kerber explains that “the exclusion of women preserved male space and marked women who moved into it as sexually promiscuous, inviting what we would now call harassment” well into the 1960s.¹⁰⁶ Requirements of escorts instead emphasized

99. *Id.* at 20.

100. *Id.* at 52–53.

101. *Id.* at 67.

102. *See, e.g.*, *Randles v. Wash. State Liquor Control Bd.*, 206 P.2d 1209 (Wash. 1949) (discussing one such law adopted by state voters). A Kentucky statute, for example, provided that “no distilled spirits or whiskey shall be sold, given away or served to females” “except at tables where food may be served”—even though women could sit at a bar and consume other alcoholic beverages. *Ky. Alcoholic Beverage Control Bd. v. Burke*, 481 S.W.2d 52, 53 (Ky. 1972).

103. LITTAUER, *supra* note 98, at 74–80 (documenting this phenomenon in California’s liquor reform movement); Eskridge, *supra* note 8, at 871 (describing New York State Liquor Authority campaign in 1959 and 1960 to revoke the licenses of all bars “patronized by prostitutes and homosexuals”).

104. Dolores Alexander, *Her Pause for Refreshment Leads to Fight for Equality*, *NEWSDAY* (DeCrow), June 13, 1968, at 3B.

105. LITTAUER, *supra* note 98, at 58; Sepper & Dinner, *supra* note 1, at 81, 90–93.

106. Linda K. Kerber, *Writing Our Own Rare Books*, 14 *YALE J.L. & FEMINISM* 429, 434–35 (2002).

the importance of women's heterosexual attachment to men to access public spaces.¹⁰⁷

Deputized by licensing authorities to surveil morality, bars, taverns, and other drinking establishments targeted sexual minorities even more stringently than cisgender women. States and cities conducted campaigns to revoke the licenses of any and all bars patronized by gays and lesbians.¹⁰⁸ In some cities, policing was so effective as to wipe out gay bar culture.¹⁰⁹ Out of fear of being shut down by authorities, bartenders would deny drinks to patrons suspected of being gay.¹¹⁰ Others would serve them drinks but force them to sit away from other customers to prevent socializing.¹¹¹ Fearful of police raids and faced with legal uncertainty, the management of straight bars engaged in self-policing and sometimes posted signs announcing "We Do Not Serve Homosexuals."¹¹²

The regulation of women and gays through liquor licensing was in accord with an array of morals regulation that structured gender in public space. Sodomy laws criminalized sex between two men (and sometimes women) in every state but Illinois and fostered society-wide discrimination against gays and lesbians.¹¹³ As Faith Seidenberg, a feminist activist in the NOW and attorney, explained, criminal law at the beginning of the 1970s still generally "followed the principle that there are two kinds of women: 'good women' and 'bad'"—defining "bad" as "sexually free."¹¹⁴ For example, teen girls could be detained for up to four years for promiscuous behavior because girls' sexuality was considered "ungovernable and unmanageable."¹¹⁵ Vagrancy law enforcement was aimed

107. Hickey, *supra* note 5, at 395–96.

108. Eskridge, *supra* note 8, at 870–72 (describing harassment by liquor licensing agents and police in New York and San Francisco).

109. FRED FEJES, GAY RIGHTS AND MORAL PANIC: THE ORIGINS OF AMERICA'S DEBATE ON HOMOSEXUALITY 62–63 (2008) (describing shift from Miami's tolerance of gays to a repressive climate beginning in the summer of 1954 and continuing through the 1960s).

110. CHAUNCEY, *supra* note 80, at 334–36 ("[B]y threatening proprietors with the revocation of their licenses if its agents discovered that customers were violating the regulations, it forced proprietors to uphold those regulations on behalf of the state.").

111. *Id.* at 341–42.

112. Brief of Org. of Am. Historians as Amicus Curiae in Support of Petitioners at 13, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2015 U.S. S. Ct. Briefs LEXIS 867, at *25–26.

113. See generally CARLOS A. BALL, THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY 131–36 (2017) (reviewing criminalization and decriminalization of sodomy).

114. Faith A. Seidenberg, *The Myth of the "Evil" Female as Embodied in the Law*, 2 ENVTL. L. 218, 218 (1971).

115. Lacey Fosburgh, *Criminal Laws Called Discriminatory on Women*, (Farians Papers)

at groups not conforming to sexual mores or unwilling to remain in the privacy of the closet or the home.¹¹⁶ Gay men faced “vag lewd” arrests for liaising in bars and on beaches; lesbian women were charged for dressing, or looking, too masculine.¹¹⁷ Cisgender women also disproportionately were subject to vagrancy charges. Although the laws targeted prostitutes, into the 1960s even middle-class, purportedly respectable women could be arrested for simply being “unescorted . . . in public places.”¹¹⁸

One Eleven Wines and *Bayonne* form part of a then-unfolding revolution in law and society. In the late 1960s, legal doctrine was undergoing a transformation away from morals regulation and toward a status-conduct distinction—phenomena these decisions reflect. The early 1960s launched serious scholarly debate over whether criminal law had any role to play in enforcing morality where no harm occurred to others.¹¹⁹ Reformers began to push for the decriminalization of homosexuality and prostitution. Courts in some jurisdictions read legislation narrowly and revised evidentiary rules to limit the application of sodomy and prostitution laws.¹²⁰ Vagrancy laws—used to police prostitutes, unescorted women, and homosexuals—fell.¹²¹ Obscenity laws narrowed, as courts rejected governmental arguments that they were necessary to protect public morality and allowed sexual content and gay magazines to flourish.¹²² The mere invocation of an interest in morality

N.Y. TIMES, Sept. 25, 1970 (detailing lawyer Sally Gold’s testimony about New York law to this effect).

116. GOLUBOFF, *supra* note 2, at 151.

117. *Id.* at 47.

118. *Id.* at 151, 153 (quoting Brief for the N.A.A.C.P. Legal Def. and Educ. Fund, Inc. as Amicus Curiae at 46, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67)) (describing several instances).

119. See Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 158–59 (1967); see, e.g., H.L.A. HART, LAW, LIBERTY, AND MORALITY 1–5, 81–83 (1963); EDWIN M. SCHUR, CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOR AND PUBLIC POLICY 79, 114 (1965).

120. William E. Nelson, *Criminality and Sexual Morality in New York, 1920–1980*, 5 YALE J.L. & HUMAN. 265, 280–88 (1993) (documenting in New York case law, parallel trends toward decriminalization of sodomy and call-girl prostitution through narrow readings of legislation and changes in evidentiary rules by the courts).

121. See generally GOLUBOFF, *supra* note 2, at 148–50.

122. Carlos A. Ball, *Obscenity, Morality, and the First Amendment: The First LGBT Rights Cases Before the Supreme Court*, 28 COLUM. J. GENDER & L. 229, 230 (2014) (describing the first two gay rights cases before the Supreme Court in 1958 and 1962, that sided with publishers of gay magazines against charges of obscenity, “as part of the push by mid-twentieth century courts to ‘demoralize’ the law of obscenity, that is to reject, minimize, or ignore the government’s contention that obscenity laws were needed to promote and protect public morality”).

no longer sufficed in these areas. Instead, “[a] doctrinal shift requiring empirically-rooted justifications for government action would make it possible to expose judicial acceptance of particular government interests to empirical as well as normative critiques.”¹²³ The *One Eleven Wines* court conducted precisely such analysis, inquiring into and finding without foundation the government’s reasons for targeting places that gay people gathered.¹²⁴ This application of liquor-licensing laws, like vagrancy and obscenity, targeted people based on their status (being a homosexual, a prostitute, or an unescorted woman) rather than their conduct (committing sodomy, soliciting, or other crimes). As in *One Eleven Wines* and *Bayonne*, courts, scholars, and advocates turned to separating status, which would go unregulated, from conduct, which could be punished.¹²⁵

Doctrinal change occurred against a backdrop of the sexual revolution. The mainstream media showed a new openness toward sexual enjoyment in the 1950s.¹²⁶ The 1960s saw countercultural sexual nonconformity from the hippies.¹²⁷ Not only those on the margins but also middle-class heterosexual people increasingly contested the bounds of morality and gender relations.¹²⁸ Women and gay liberation movements were stirring.¹²⁹ The Stonewall Rebellion would soon promote protest, radical claims for acceptance of gay people, and the formation of new organizations modeled on the legal liberalism of civil rights.¹³⁰

One should hesitate, however, to see *One Eleven Wines*, or even *Bayonne*, as merely following societal change. The *One Eleven Wines* court chided the government for “disregard[ing] the bur-

123. Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1241 (2004).

124. *One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control*, 235 A.2d 12, 23 (N.J. 1967).

125. See, e.g., Mary Ziegler, *What Is Sexual Orientation?*, 106 KY. L.J. 61, 76–77 (2017) (discussing the ways in which the gay rights movement split conduct from status to challenge their targeting by police).

126. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 207.

127. GOLUBOFF, *supra* note 2, at 158.

128. *Id.* at 158–59.

129. *Id.* at 158–60.

130. MICHAEL BRONSKI, *A QUEER HISTORY OF THE UNITED STATES 209–12* (2011) (discussing formation of more radical and also new reformist groups after Stonewall).

geoning movement towards greater tolerance and deeper understanding” of homosexuality.¹³¹ But, though opinions would soon shift, *One Eleven Wines* was decidedly ahead of societal norms. Before the 1970s, the media uniformly portrayed gayness as sickness and criminality.¹³² As the New Jersey Supreme Court noted with sympathy, “[I]n our culture homosexuals are indeed unfortunates.”¹³³ Only in the 1970s was there a shift in public polling toward more acceptance of sexual freedom.¹³⁴ *Bayonne* might more accurately be described as following societal change. After all, by 1969, women could be found in bars in other New Jersey cities and beyond.¹³⁵ But women’s attempts to access those bars, restaurants, and clubs viewed as properly male still faced widespread resistance into the early 1970s. Indeed, the year the case was filed, city voters had determined to keep women out.

One Eleven Wines and *Bayonne* gave sexual minorities, gender nonconformists, and unescorted women greater, but still partial, rights to access and associate in public places. They protected the rights of access of heterosexual women and gay men against criminal enforcement so long as these individuals did not actually flout prohibitions on criminal or lewd behavior. But this limited protection for status left businesses free to impose rules by custom to exclude and to harass individuals because they held hands, danced together, displayed affection, or had a nonconforming gender image. For good and for ill, legal decisions in favor of gay rights led to the separation of lesbians and gays from the broader public.¹³⁶ As the expert for the plaintiffs in *One Eleven Wines* noted, “[T]he bars serve to keep homosexuals ‘in their place’—out of more public places and, to a certain extent, beyond the public view.”¹³⁷ As the next Part explains, statutes prohibiting sex and eventually sexual

131. *One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control*, 235 A.2d 12, 19 (N.J. 1967).

132. FEJES, *supra* note 109, at 19; Ball, *supra* note 122, at 291 (quoting a 1966 Time magazine article vilifying homosexuality as nothing “but a pernicious sickness”).

133. *One Eleven Wines*, 235 A.2d at 18.

134. FEJES, *supra* note 109, at 28.

135. Brief on Behalf of Plaintiff, *supra* note 46, at 13–14 (requesting that the court take judicial notice of the fact that “virtually every municipality in New Jersey . . . permit women to be served at bars”).

136. Many gay bars and clubs—including Stonewall—labeled themselves “private clubs” to protect their freedom to congregate. CAIN, *supra* note 79, at 76, 90. For an earlier history, consider that homophile groups were modeled on the Elks and Knights of Columbus (organizations that excluded women, as well as racial and religious minorities). BRONSKI, *supra* note 130, at 176.

137. *One Eleven Wines*, 235 A.2d at 16.

orientation discrimination would give activists the capacity to challenge the status-conduct distinction and achieve a more robust conception of freedom in public.

II. PUBLIC ACCOMMODATIONS LAW AND THE REINFORCING NATURE OF PROTECTIONS FOR SEX, GENDER EXPRESSION, AND SEXUAL ORIENTATION: THE STORY OF DEBORAH JOHNSON AND ZANDRA ROLÓN

On January 13, 1983, Deborah Johnson and Zandra Rolón went out to dinner to celebrate Martin Luther King Junior's birthday and their blossoming relationship.¹³⁸ In a later interview with author Eric Marcus, the two women explained that they were newly dating and serious.¹³⁹ The Thursday evening celebration would kick off their first full weekend together; Rolón picked a special spot.¹⁴⁰ A friend had told her about Papa Choux, a Los Angeles establishment known for its "Intimate Room."¹⁴¹ The two women arrived for their reservation at one of six private booths, each graced with sheer curtains.¹⁴² There was a violinist, Rolón remembered, "[a]nd the candle light . . . it was just romantic."¹⁴³

A few minutes after seating Johnson and Rolón, their waiter returned and told the women they could not dine in the booth.¹⁴⁴ Both Johnson and Rolón, though only twenty-seven years old at the time, were already veterans of the LGBTQ civil rights movement. They asked to see the manager.¹⁴⁵ He insisted that it was against the law for a same-sex couple to dine in the private booth and—as Johnson and Rolón describe it—did "the back of the bus type of thing," saying they were welcome to eat elsewhere in the restaurant but not in the booths.¹⁴⁶ Johnson and Rolón retorted, "[T]hat's bullshit."¹⁴⁷ They had in mind MLK: "[I]f there's anything that

138. *Making Gay History, The Podcast: Deborah Johnson & Zandra Rolón Amato*, MAKING GAY HISTORY (Nov. 16, 2017) [hereinafter *Making Gay History*], <https://makinggayhistory.com/podcast/deborah-johnson-zandra-rolon-amato/> [<https://perma.cc/L5BE-ZMLQ>].

139. *Id.*

140. *Id.*

141. *See id.* (quoting Steve Harvey, *Papa Choux Serves Black Crepe at 'Wake for Romance'*, L.A. TIMES, May 25, 1984).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

King had taught us, it was that we could sit anywhere in the restaurant we wanted to sit.”¹⁴⁸ After a heated argument, the women left with the names of the owner and manager they would sue.¹⁴⁹

Johnson and Rolón retained the services of famed feminist attorney, Gloria Allred.¹⁵⁰ Allred had already emerged as a high-profile, politically savvy lawyer who challenged unequal treatment of men and women in public accommodations. Through the 1980s, Allred would sue a salon that set higher prices for girls than boys for haircuts, a dry cleaner who charged women more than men for the same shirt, a restaurant that gave menus listing prices only to men, a health club that admitted only women, and stores that banned men but not women in tank tops or required men but not women to check their bags.¹⁵¹ Criticized for making “mountain[s] out of . . . molehill[s],”¹⁵² Allred understood that public accommodations were an important site for the formation of gender identity and hierarchy. She was eager to take on the norms that restricted the access of lesbian and cisgender women alike to commerce and leisure.¹⁵³ Allred filed a complaint arguing that Papa Choux had discriminated against Johnson and Rolón in violation of California’s Unruh Civil Rights Act (the “Unruh Act”) that contained a broad mandate of equal access to public accommodations, and of a city ordinance that prohibited denial of service based on sexual orientation.¹⁵⁴ The socio-legal history of the case, *Rolón v. Kulwitzky*, offers a window into the changing regulation of public accommodations in California and, specifically, the intertwined struggles for women’s equality and LGBTQ people’s freedom.¹⁵⁵

148. *Id.*

149. *Id.*

150. *See id.*

151. Robin Abcarian, *Gloria Allred Is Easy To Criticize, but Just Wait ‘til You Need Her*, L.A. TIMES (Aug. 9, 2013, 12:00 AM), <https://www.latimes.com/local/lanow/la-xpm-2013-aug-09-la-me-ln-gloria-allred-filner-abcarian-20130807-story.html> [<https://perma.cc/33TC-CFBM>].

152. *Id.*

153. *See id.* Allred remained an advocate for sex equality throughout her career. In 2004, she filed suit on behalf of same-sex couples in Los Angeles who were denied marriage licenses, arguing state statutes restricting marriage to a man and a woman violated the state constitution. Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1282–83 (2010).

154. Myrna Oliver, *Judge’s Night Out at a Posh Restaurant All Part of Job*, L.A. TIMES, June 10, 1983, at C1.

155. 200 Cal. Rptr. 217 (Cal. Ct. App. 1984).

This Part uses the story of Deborah Johnson and Zandra Rolón's activism to explore the evolution of sex equality in California's public accommodations law. Section A examines the feminist and gay rights activism that gave rise to new statutory protections. At the crest of a wave of state legislation adding "sex" to public accommodation statutes, California amended the Unruh Act in 1974 to clarify that it reached sex discrimination. Both proponents and opponents of the 1974 amendment understood that the amendment concerned not mere classification on the basis of sex but also protections for "lifestyle," including sexual orientation, marital status, and family formation. At the same time, activists in Los Angeles mobilized for specific legislation prohibiting sexual orientation discrimination. Section B analyzes interpretive debates in *Rolón* about the Unruh Act, the Los Angeles ordinance, and the jurisprudence that developed under these statutes.

This history suggests that protections for sex, gender expression, and sexual orientation were mutually reinforcing. While the 1950s and 1960s witnessed a distinction between status and conduct, the 1970s saw jurisprudence that mandated greater tolerance for dissenting gender performance. Activism yielded statutory protections for both sex and sexual orientation and, ultimately in the *Rolón* decision, recognition for associative freedom in public accommodations.

A. *Feminist and Gay Rights Mobilization for Statutory Antidiscrimination Protections*

In 1974, grassroots advocates, as well as state legislators, mobilized to amend the text of the Unruh Act by adding "sex" to its list of explicit protections. The push in California came at the height of feminist public accommodations activism nationwide. In 1969 and 1970, activists across the country had started to protest against sex discrimination in public. They held "eat-ins" targeting establishments that ranged from Pittsburgh's Stouffers to Los Angeles's Biltmore Hotel.¹⁵⁶ As they accessed public space, feminist activists "fought against the customs and laws that made women's sexual identity determinative of their access to public accommodations."¹⁵⁷ They contended that public accommodations had to treat

156. Sepper & Dinner, *supra* note 1, at 86, 101, 109 n.177.

157. *Id.* at 114.

women as individuals, instead of requiring them to gain access through attachment “to a man as a physical companion or economic proxy.”¹⁵⁸ They demanded the right to dress as they wished and made associational claims that they should not be restricted to the heterosexual pair.¹⁵⁹ They brought lawsuits affirming common law rights of access.¹⁶⁰ And they lobbied for state legislation that would extend the reach of public accommodations statutes to sex discrimination.¹⁶¹

Local and state legislatures responded swiftly.¹⁶² NOW leader Wilma Scott Heide spearheaded activism in Pittsburgh that led to the 1969 enactment of the nation’s first city ordinance prohibiting sex discrimination in public accommodations.¹⁶³ Colorado amended its public accommodations statute to reach sex discrimination the same year.¹⁶⁴ The next year, Iowa and New Jersey adopted similar statutes.¹⁶⁵ Between 1971 and 1973, nineteen additional states across the country passed laws.¹⁶⁶ By the decade’s close, thirty-one states explicitly prohibited sex discrimination in public accommodations.¹⁶⁷

Advocates in California found a relatively hospitable legal environment, as the Unruh Act already provided particularly robust protections for access to public accommodations. Enacted in 1959, the Unruh Act codified common law protections of equal access to public accommodations, clarifying that an 1897 statute applied to all businesses.¹⁶⁸ The state legislature worded the Unruh Act

158. *Id.* at 115.

159. *Id.* at 126–28.

160. *Id.* at 102, 123–24.

161. *Id.* at 81, 97, 103.

162. *Id.* at 104 nn.140–47 and accompanying text.

163. *Id.* at 104 nn.140–42 and accompanying text.

164. 1969 Colo. Sess. Laws 200.

165. 1970 Iowa Acts 83; 1970 N.J. Laws 296.

166. 1974 Cal. Stat. 2568; 1971 Conn. Pub. Acts 399; 58 Del. Laws 286 (1971); 1972 Idaho Sess. Laws 980; 1972 Kan. Sess. Laws 764; 1973 Me. Laws 635; 1971 Md. Laws 987; 1971 Mass. Acts 241; 1973 Minn. Laws 2158; 1974 Mont. Laws 696; 1971 Neb. Laws 1; 1973 N.M. Laws 533; 1971 N.Y. Laws 3107; 1973 Ohio Laws 1884; 1973 Or. Laws 1644; 1972 S.D. Sess. Laws ch. 11 § 9 46; 1973 Utah Laws 35; 1973 Wash. Sess. Laws 418; 1971 W. Va. Acts 373.

167. Sepper & Dinner, *supra* note 1, at 104.

168. Sande L. Buhai, *One Hundred Years of Equality: Saving California’s Statutory Ban on Arbitrary Discrimination by Businesses*, 36 U.S.F. L. REV. 109, 113 (2001) (noting that the enactment meant to clarify the scope of the state’s 1897 statute); *see also* Curran v. Mount Diablo Council of the Boy Scouts, 952 P.2d 218 (Cal. 1998) (defining “business establishment[]” under the Act); *In re Cox*, 474 P.2d 992, 999 (Cal. 1970) (concluding that “a business generally open to the public may not arbitrarily exclude a would-be customer from its premises”).

broadly: “All citizens within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”¹⁶⁹ The Unruh Act was unique among modern state civil rights statutes because it broadly prohibited arbitrary exclusion or marginalization, even as it barred discrimination based on specific traits. Individuals did not need to prove their exclusion was because of a protected trait to make a claim; arbitrary discrimination was unlawful no matter its basis. At the same time, the Unruh Act made clear that certain traits—race, color, etc.—were per se arbitrary and unlawful grounds for differential treatment.

By the mid-1970s, the rise of sex equality as a social value and legal ideal had shed new light on both the Unruh Act’s existing meaning and the limitations in its enforcement. Proponents of legislation to add “sex” to the Unruh Act referenced California’s passage of the Fair Employment Practices Act in 1970 and its ratification of an Equal Rights Amendment to the state constitution in 1972.¹⁷⁰ If sex was once considered a reasonable ground for discrimination and thus lawful under the Unruh Act, changing socio-legal norms made clear that it was no longer. From this new vantage, activists drew attention to the rampant sex discrimination, particularly in housing, which was occurring in violation of the Unruh Act. Landlords routinely turned away single women, female roommates (some of whom might have been lesbian couples), and widows and divorced women with children. This forced women to pay premiums for substandard housing.¹⁷¹ Landlords also some-

169. 1959 Cal. Stat. 4424.

170. INDUS. RELATIONS BD., ENROLLED B. REP. FAR S.B. 1380, S. Reg. Sess. 1973-74-A-117 (Cal. 1974) (on file with Cal. State Archives).

171. *Hearing on S.B. 1380 Before the Assemb. Jud. Comm.*, S. Reg. Sess. 1973-74 (Cal. 1974) (on file with Cal. State Archives) (statement of Maxine Brown, Chair of Task Force on Hous. for Cal. NOW) (“I cannot emphasize strongly enough the harm, the shock, the sense of helplessness these people experience when this occurs to them.”); Letter from Brown W. Newcomb, Sonja A. Soehnel, Peter Reid, Bruce N. Berwald, attorneys, Legal Aid Soc’y of San Mateo Cty., to Assemb. Charles Warren (April 9, 1974) (on file with Cal. State Archives) (discussing housing premium paid by women); Letter from Robert Ralph, Chairperson, Advisory Council Convention Comm., Women Lawyers’ Ass’n of L.A., to Maxine Brown (Jan. 17, 1974) (on file with Cal. State Archives); Letter from Mary Anne Roelke, Housing Coordinator, San Fernando Valley Fair Hous. Council, to Maxine Brown (Nov. 21, 1973) (on file with Cal. State Archives) (describing complaints from clientele about sex dis-

times refused to rent to unmarried men seeking housing together.¹⁷² Victims, moreover, had trouble finding lawyers both because of the lack of a statutory provision for attorneys' fees and because of some lawyers' skepticism that sex discrimination was truly unlawful.¹⁷³ Advocates including NOW, the Women's Lawyer's Association of Los Angeles, the California Commission on the Status of Women, the American Civil Liberties Union, the California Rural Legal Association, and numerous fair housing organizations turned to the legislature.¹⁷⁴

The amendment's sponsors argued that the addition of "sex" would clarify to businesses, attorneys, and the courts that sex discrimination fell within the Unruh Act's existing prohibition on arbitrary discrimination in public accommodations.¹⁷⁵ Legislators referred in particular to the California Supreme Court's decision in *In re Cox*, which challenged the arrest of Theodore William Cox pursuant to a trespass ordinance that criminalized remaining upon a business premises after being asked to leave.¹⁷⁶ Cox had refused to leave the Northgate Shopping Center and instead sat on a mall bench talking with his friend, whose appearance suggested he was a hippie.¹⁷⁷ The question was whether the ejection of Cox and his friend was reasonable under the Unruh Act.¹⁷⁸ In ruling for Cox, the California Supreme Court held that the enumeration of specific classes was merely illustrative and not a limitation on the scope of the Unruh Act's coverage.¹⁷⁹ Citing this holding, legislators argued that the addition of "sex" would not bring new forms

crimination in housing); Letter from Dolly Sacks, Coordinator, Stanford Mid-Peninsula Urban Coal., to Maxine Brown (July 24, 1973) (on file with Cal. State Archives) (describing rampant sex discrimination in housing); Letter from Dan Williams, President, Midpeninsula Citizens for Fair Housing, to Assemb. Charles Warren (Mar. 14, 1974) (on file with Cal. State Archives) (discussing the same housing premium paid by women).

172. Memorandum from Maxine Brown to the S. Judiciary Comm. (Jan. 22, 1974) (on file with Cal. State Archives) (describing sex discrimination against men as well as women, including an Episcopal priest who wanted to rent along with his brother) (on file with Cal. State Archives).

173. See Letter from Women Lawyers' Ass'n of Los Angeles to Maxine Brown (containing Res. No. 5-3) (on file with Cal. State Archives).

174. Letter from Sen. Nicholas C. Petris to Governor Ronald Reagan (Sept. 11, 1974) (on file with Cal. State Archives).

175. Memorandum from George H. Murphy, Legis. Counsel of Cal., to Sen. Nicholas C. Petris (Aug. 17, 1973) [hereinafter Aug. 1973 Memorandum from Murphy] (on file with Cal. State Archives); Buhai, *supra* note 168, at 114.

176. 474 P.2d 992, 993–95 (Cal. 1970).

177. See *id.* at 994.

178. *Id.* at 993.

179. *Id.* at 999.

of discrimination within the Unruh Act's coverage but rather ensure sex discrimination was understood to be arbitrary.¹⁸⁰

The prominent place of *In re Cox* in the legislative history of the 1974 amendment is significant because of its capacious interpretation of equality in public. Previous cases such as *Stoumen*, *One Eleven Wines*, and *Bayonne* had separated status from conduct to recognize a right to access the public. Individuals still could face ejection for their conduct, if not their group status. Reflecting the 1960s social activism demanding tolerance and respect for social difference,¹⁸¹ *In re Cox* affirmed a far more expansive right to inclusion in public accommodations. Recognizing that the shopping mall performed “a significant public function” in its provision of “food, clothing and other commodities,”¹⁸² *In re Cox* validated the individual's right to inclusion notwithstanding one's dissenting image, expression, and behavior: “The shopping center may no more exclude individuals who wear long hair or unconventional dress, [than those] who are black, . . . members of the John Birch Society, or . . . belong to the American Civil Liberties Union”¹⁸³ The court affirmed individuals' rights to express difference in public—that is, to engage in conduct that reflected their personal identity and commitments. The California legislature's reliance on the decision set the stage for an interpretation of “sex” that extended far beyond formal classification of males and females.

Both sides of the legislative debate—proponents and opponents—interpreted the 1974 bill to reach associational rights and gender performance. The California Real Estate Association (“CREA”) conceded the validity of legislation barring formal classification on the basis of sex—for example, renting to single men but not to single women. But CREA distinguished between “sex” and what it called “life style[sic].”¹⁸⁴ It sponsored an amendment to the

180. Memorandum from George H. Murphy, Legis. Counsel of Cal., to Sen. Nicholas C. Petris (July 13, 1973) [hereinafter July 1973 Memorandum from Murphy] (on file with Cal. State Archives); Aug. 1973 Memorandum from Murphy, *supra* note 175; Press Release, Antidiscrimination Bill Approved (on file with Cal. State Archives).

181. On the relationship between demands for individual freedom and gay rights activism in the sixties, see GOLUBOFF, *supra* note 2; Katherine Turk, “*Our Militancy Is Our Openness*”: Gay Employment Rights Activism in California and the Question of Sexual Orientation in Sex Equality Law, 31 LAW & HIST. REV. 423, 429–30 (2013) (arguing that gay activists fought for both nondiscrimination and “the right to be openly gay at work”).

182. *In re Cox*, 474 P.2d at 1001.

183. *Id.*

184. Letter from Dugald Gillies, Vice President of Governmental Relations, CREA, to

bill that created exceptions for single-sex housing and for housing within inadequate single-sex bathroom facilities as well as “[s]election for multiple occupancy of a unit of housing on the basis of a blood or marital relationship between the prospective occupants, or lack of such relationship”¹⁸⁵ CREA intended this last exemption to prevent interpretation of “sex” under the Unruh Act to reach protections for homosexuality. CREA contrasted individual rights recognized in *Stoumen* “to access . . . restaurants and bars so long as [gay men] are not in violation of the law by their conduct” and those of gay men to cohabit together, which in itself would “creat[e] strong implications” of illegality.¹⁸⁶ State legislative counsel determined that blanket exceptions were unnecessary and misguided,¹⁸⁷ reasoning that the factual context should determine whether single-sex housing or discrimination based on marital status or blood relationship were justified.¹⁸⁸ In rejecting a statutory design that distinguished between sex on the one hand and marital status or gender conformity on the other, the legislature affirmed a broader conception of the Act’s protections.

As the debates about sex and the Unruh Act unfolded, gay rights activists in Los Angeles pressed the city to prohibit sexual orientation discrimination explicitly. Despite *Stoumen*, *One Eleven Wines*, *In re Cox*, and similar cases, structures of discrimination nationwide had eroded only slowly and in piecemeal fashion for LGBTQ people. Gays continued to experience violence and police intrusion in bars and other public spaces for decades, albeit in a less sustained fashion than during the 1950s and 1960s. The persistence of anti-sodomy laws in many jurisdictions meant that socialization in public did not promise full freedom to pursue intimate relationships in private.¹⁸⁹ In many places, state courts proved reluctant to

Roger T. Mason, President, Mason and Associates Realtors (Aug. 1, 1973) [hereinafter Letter from Gillies] (on file with Cal. State Archives).

185. Amendments to S. BILL NO. 1380, *as amended in Senate* June 6, 1973 (on file with Cal. State Archives).

186. Letter from Gillies, *supra* note 184.

187. Memorandum from George H. Murphy, Legis. Counsel of Cal., to Sen. Nicholas C. Petris (Nov. 26, 1973) (on file with Cal. State Archives).

188. Letter from Robert H. Frank to Maxine Brown (Dec. 13, 1973) (on file with Cal. State Archives); *see also* July 1973 Memorandum from Murphy, *supra* note 180; Letter from Sen. Nicholas C. Petris to Dugald Gillies, Cal. Real Estate Assoc. (Jan. 9, 1974) (on file with Cal. State Archives) (“I do not intend to carry a bill which has the effect of *weakening* the people’s protection against arbitrary discrimination.”).

189. *See KEEN & GOLDBERG, supra* note 86, at 94.

restrain states' exercise of liquor licensing power in ways that discriminated against LGBTQ people.¹⁹⁰ Just as feminist activists in California argued for the necessity of explicit textual protections for sex within the Unruh Act, so too did gay rights activists argue that existing public accommodations laws—even those state statutes that referenced “sex” explicitly—were not enough.

Agitation for gay rights in public accommodations began as early as 1967 amidst grassroots resistance against police harassment.¹⁹¹ Gay rights activism did not always align with feminist activism and, at times, came into conflict with it. While 1970s feminist activism sought to dismantle sex segregation,¹⁹² gay rights proponents often fought to preserve their own public spaces—the gay and lesbian bars and community groups where identity was formed.

In practice, women's integration collided with realms of gay male freedom. Even during the decades of rampant liquor enforcement, many night clubs and high-class bars, in particular those in grand hotels, were left alone and developed reputations for encounters between respectable gay men.¹⁹³ In 1969, when one hotel bar justified its refusal to serve unescorted women at the bar as motivated by “the desire to protect [its] bar patrons from being accosted and solicited by streetwalkers[,]”¹⁹⁴ Ira Glasser of the New York Civil Liberties Union replied, “Your worry about losing your liquor

190. For example, the same year as *One Eleven Wines*, a Florida court came to the opposite conclusion in ways that again link the regulation of heterosexual women and gay people. Miami prohibited liquor licensees from knowingly employing or selling alcohol to a homosexual person or allowing two or more to congregate in the place of business. *Inman v. City of Miami*, 197 So. 2d 50 (Fla. Dist. Ct. App. 1967). Richard Inman challenged the ordinance as denying him the right to “visit and enjoy by himself or with his friends who are similarly situated the public places of amusement.” *Id.* at 51. Here, Inman's case was controlled by *City of Miami v. Kayfetz*, a 1957 decision of the Supreme Court of Florida upholding as a reasonable exercise of police power Miami's “B girl” ordinance, which prohibited female bar employees from mingling or fraternizing with customers and all women from frequenting or loitering in any tavern, cabaret or nightclub to solicit drinks. 92 So. 2d 798 (Fla. 1957). Sex and sexual orientation classifications had a direct relationship.

191. Ziegler, *supra* note 125, at 94–95.

192. Smaller groups of cultural feminists in the mid-1970s would seek to carve out all-women cafés, restaurants, and community centers, but the dominant trend in the first half of the decade was to demand full sex integration of the public sphere. For an argument about the importance of spatial analysis to the history of feminism and the significance of separatism, see ANNE ENKE, FINDING THE MOVEMENT: SEXUALITY, CONTESTED SPACE, AND FEMINIST ACTIVISM 5–7, 10–11 (2007).

193. CHAUNCEY, *supra* note 80, at 349–50.

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

license is legitimate. But . . . you do not appear concerned that a single gentleman might proposition a lady or, for that matter, another gentleman”¹⁹⁵—referring obliquely to the cruising known to take place in hotel bars.¹⁹⁶ Feminist protests in 1969 and the early 1970s targeted many of these places—including the Biltmore Hotel in Los Angeles, the Monteleone’s Carousel bar in New Orleans, and the Oak Room at the Plaza in New York City.¹⁹⁷ While bars and taverns remained male preserves into the 1970s,¹⁹⁸ the move to make drinking establishments more friendly to women further isolated gay men and women. Singles bars, for example, took off with an emphasis on pairing single men with single women and a presumption of heterosexuality.¹⁹⁹

While gay rights groups began to mobilize for antidiscrimination legislation in the late 1960s,²⁰⁰ it was not until the mid-1970s that local ordinances modeled on federal civil rights legislation proliferated.²⁰¹ Liberal university towns and large cities were the first movers.²⁰² The District of Columbia adopted a bill in 1973 that prohibited sexual orientation discrimination.²⁰³ Minneapolis enacted a law in 1974 with “so little news coverage that it was a kind of victory without a battle.”²⁰⁴ The quiet nature of the passage was not unusual. Advocates often added these bases of discrimination during then-ongoing efforts by cities to revise and modernize their codes.²⁰⁵ Sometimes, however, protections for gay people responded to horrific acts of anti-gay violence.²⁰⁶ While some jurisdictions used the language of “sexual orientation,” others used “sexual pref-

195. Letter from Ira Glasser, N.Y. Civil Liberties Union, to Charles E. Frowenfeld, Director of Catering, Belmont Plaza (June 30, 1970) (on file with DeCrow Papers).

196. *Id.*

197. CHRISTINE SISMONDO, AMERICA WALKS INTO A BAR 259 (2011).

198. LITTAUER, *supra* note 98, at 79 (noting that into 1970s bars remained male preserves).

199. SISMONDO, *supra* note 197, at 269–70.

200. DAVID CARTER, STONEWALL: THE RIOT THAT SPARKED THE GAY REVOLUTION 244–49 (2d ed. 2010); FEJES, *supra* note 109, at 53–54.

201. BRONSKI, *supra* note 130, at 219.

202. *Id.*

203. Eskridge, *supra* note 8, at 926–27.

204. DICK HEWETSON, HISTORY OF THE GAY MOVEMENT IN MINNESOTA AND THE ROLE OF THE MINNESOTA CIVIL LIBERTIES UNION 76 (Dr. Matthew Stark et al. eds., 2013).

205. FEJES, *supra* note 109, at 54.

206. The Tucson City Council in Arizona, for example, passed a comprehensive antidiscrimination ordinance following four teenagers’ murder of a gay man outside a bar. FEJES, *supra* note 109, at 56.

erence,” a term lesbian activists advanced as a way to reject medical models and further dignify gay relationships.²⁰⁷ By 1977, thirty-nine cities had some kind of legislation prohibiting discrimination against gay people.²⁰⁸ Although activists attempted to secure state legislation,²⁰⁹ only in 1982 would the first state pass such protections, with the second to follow in 1989.²¹⁰

This brief period in the 1970s of including gays and lesbians within local antidiscrimination legislation reflected an emergent distinction between civil rights and substantive morality. When New York City considered amending its ordinance, *The New York Times* cast the issue as one of civil rights, not the moral rightness or wrongness of gay lifestyles.²¹¹ This distinction grew increasingly influential. In 1974, the conservative commentator William Safire argued that “normal” people should work to preserve heterosexuality by “counter[ing] [gays] new proselytization with some mission work of our own”²¹² Safire nonetheless advocated extending antidiscrimination laws to gays and lesbians: “when we fail to give them the protection of the law, then it is the law that is queer.”²¹³ Opponents of these measures instead argued that antidiscrimination protections were intimately linked to immorality and “deviant sexuality,” granting “public license to uninhibited manifestations of sexual preference or sexual relationships.”²¹⁴ With the rise of the Religious Right and Anita Bryant’s campaign against a Miami-Dade County sexual orientation antidiscrimination ordinance, progress toward gay rights measures stalled and in some places was reversed.²¹⁵ By the 1980s, conservatives proved

207. Ziegler, *supra* note 125, at 97.

208. PA. NOW TIMES (May–June 1977), available in JEAN WITTER PAPERS (University of Pittsburgh Archives and Special Collections, Box 6, Folder 26).

209. HEWETSON, *supra* note 204, at 76–77 (discussing advocacy for and failure of gay rights bills in Minnesota); *Gay Rights Bills Before the Massachusetts Legislature: 1974*, available in RECORDS BOS. NOW (Harvard University Library, Folder 490) (describing Massachusetts law prohibiting discrimination based on sexual preference in employment, labor unions, insurance, marketing, housing, leasing of commercial space, and credit).

210. See Act of Nov. 15, 1989, ch. 516, 1989 Mass. Acts 796; Act of Mar. 12, 1982, ch. 112, 1981 Wis. Sess. Laws 901.

211. Editorial, *Matter of Civil Rights*, N.Y. TIMES, April 19, 1974, at 36, available in RECORDS BOS. NOW (Harvard University Library, Folder 490).

212. William Safire, *Gays Gaining More Rights*, BOS. HERALD AM., Apr. 18, 1974, available in RECORDS BOS. NOW (Harvard University Library, Folder 490).

213. *Id.*

214. Ziegler, *supra* note 125, at 96.

215. See generally FEJES, *supra* note 109, at 85–212 (recounting the history of Anita Bryant and Religious Right leaders’ campaign against gay rights measures).

effective at convincing the public that LGBT people were demanding “special rights,” rather than rights available to all.²¹⁶

National trends toward morals deregulation, civil rights consciousness, and religion-based opposition manifested in the debate over the Los Angeles ordinance. In 1979, advocates for this ordinance, modeled on laws in Berkeley and San Francisco, argued that state and federal restraints on “arbitrary discrimination” were “inadequate to meet the particular problems of discrimination based on sex and sexual orientation.”²¹⁷ The ordinance defined “sexual orientation” to reach gender performance and association: “[S]exual orientation’ shall mean an individual having or manifesting an emotional or physical attachment to another consenting adult person or persons, or having or manifesting a preference for such attachment, or having or projecting a self-image not associated with one’s biological maleness or one’s biological femaleness.”²¹⁸ Prohibiting discrimination in public accommodations, employment, housing, real estate, and credit transactions, the ordinance passed the City Council by a vote of thirteen to two over the objections of those who decried it as an immoral assault on Judeo-Christian values.²¹⁹

By the decade’s close, both feminist and LGBTQ activists had made headway toward equality in public. Jurisprudence had evolved from the status-conduct distinction in *Stoumen*, to the affirmation of individual rights to gender nonconformity in *In re Cox*. Activists had realized the inclusion of explicit textual protections for “sex” in the Unruh Act, and the legislative history suggested the Act protected not only women’s equal rights to enjoy public accommodations but also rights related to gender expression, marital status, family formation, and association (including with gays and lesbians). In addition, city ordinances, as in Los Angeles, provided specific protections for sexual orientation. Activists and legislators alike intended the Unruh Act’s broad right to access public accom-

216. KEEN & GOLDBERG, *supra* note 86, at 133–41; *see also* RIMMERMAN, *supra* note 22, at 127 (“By the early 1980s, [Richard] Viguerie had articulated the ‘special rights’ argument that the Christian Right would embrace to fight efforts to overturn bans on policies that discriminated against [gays] . . .”) (citation omitted).

217. Sid Bernstein, *City Gay Rights Measure Wins Tentative Approval*, L.A. TIMES, May 24, 1979, at A3.

218. L.A., CAL., MUN. CODE ch. IV, art. 12, § 49.71.4 (1979).

219. Erwin Baker, *Council OKs Gay Rights Ordinance*, L.A. TIMES, May 30, 1979, at A1.

modations, its textual protections for sex, and the Los Angeles ordinance's ban on sexual orientation discrimination to be mutually reinforcing.

B. *Litigation to Realize LGBT People's Freedom of Expression in Public*

When Johnson and Rolón filed suit against Papa Choux in 1983, they invoked the Unruh Act, as amended in 1974, and the Los Angeles ordinance to seek recognition and inclusion for their full selves in public. Both women understood their gender, sexual, and racial identities as well as their romantic relationship in intersectional ways. Johnson grew up in Los Angeles in an “upper-middle-class bourgeois black household—a very well-rooted, extremely well-connected family.”²²⁰ She came out in the mid-1970s in her early twenties and had started a social club for 600 lesbian women, where she ultimately met Rolón.²²¹ Rolón was raised among a large extended Mexican-American family in Brownsville, Texas.²²² She had heard stories about her grandfather's experiences of racial segregation, and related the incident at Papa Choux to her family history.²²³ Johnson and Rolón both connected the sex-based discrimination they faced at Papa Choux to the racial discrimination they encountered within the LGBTQ community.²²⁴ They had each “come to the gay and lesbian community naively, expecting it to be more sensitive,” but they had encountered significant racism including, for example, at a famous gay club, Studio One, that admitted people of color only a single night of the week—the night that some customers referred to as “plantation night.”²²⁵ When Johnson and Rolón challenged Papa Choux, they did not analogize to race, but instead asserted rights to full expression as individuals and as a couple in public.²²⁶

220. *Making Gay History*, *supra* note 138.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* Popular nightclub Studio One used various forms of harassment, such as asking for multiple IDs, to exclude people of color most nights of the week and then used advertisement of a DJ or music to signal the night that they were welcome.

225. *Id.*

226. Press Release, Gloria Allred, Announcing Lawsuit Against Papa Choux Restaurant (June 9, 1983) [hereinafter Allred Press Release], <https://makinggayhistory.com/podcast/deborah-johnson-zandra-rolon-amato/> [https://perma.cc/L5BE-ZMLQ].

In translating Johnson and Rolón's grievance into a legal claim, Gloria Allred had at her disposal a slew of recent cases under the Unruh Act that affirmed associative freedom in public accommodations. In the 1970s and 1980s, California courts held unlawful businesses' exclusion of individuals based on the simple excuse of "I don't like you" or "I don't like your kind."²²⁷ For example, in *Hubert v. Williams* involving a landlord's eviction of a quadriplegic tenant and his lesbian home attendant,²²⁸ the Appellate Department of the Superior Court of California for the County of Los Angeles confronted the question of whether the Unruh Act's protections extended to "homosexuals as tenants in rental housing" and to the individuals associated with them.²²⁹ In analyzing this issue, the court drew upon a Supreme Court of California decision of the same year, *Marina Point, Ltd. v. Wolfson*, which determined a landlord's policy of excluding families with minor children was unlawful.²³⁰ *Wolfson* concluded that the Unruh Act did not permit the exclusion of a class of persons from a business enterprise just because members of the class were more likely than the general population to engage in misconduct.²³¹ The *Hubert* court further interpreted *Wolfson's* citation to *In re Cox*, which in turn cited to *Stoumen*, "as clearly indicating homosexuals, as a class, are protected from arbitrary discrimination."²³² In cases concerning gay men, hippies, families with children, lesbians, and disabled persons,²³³ California courts interrogated public accommodations' reasons for excluding individuals on the basis of identity alone. *Hubert* in particular went beyond the status-conduct distinction and even tolerance for dissenting gender performance to affirm the rights of

227. Buhai, *supra* note 168, at 109 (internal quotation marks omitted); *see, e.g., In re Cox*, 474 P.2d 992, 993, 999 (Cal. 1970) (holding a business may not arbitrarily exclude customers from its premises under the Unruh Act).

228. 184 Cal. Rptr. 161, 162 (Cal. App. Dep't Super. Ct. 1982).

229. *Id.* at 162, 164.

230. *Id.* at 162 (citing *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115, 124 (Cal. 1982)).

231. *Wolfson*, 640 P.2d at 125–26.

232. *Hubert*, 184 Cal. Rptr. at 162–63, 163 n.1.

233. *O'Connor v. Vill. Green Owners Ass'n*, 662 P.2d 427, 428–29, 431 (Cal. 1983) (age); *Long v. Valentino*, 265 Cal. Rptr. 96, 97–99, 101–02 (Cal. Ct. App. 1989) (occupation as police officer), *reh'g denied*, No. G006130, 1990 Cal. App. LEXIS 202, at *4 (Cal. Ct. App. Jan. 19, 1990), *cert. denied*, 498 U.S. 855 (1990); *Winchell v. English*, 133 Cal. Rptr. 20, 20–22 (Cal. Ct. App. 1976) (association with African Americans); *see* Opinion No. SO 75-6, 58 Ops. Cal. Att'y Gen. 608, 613 (1975) (marital status); Opinion No. SO 75-72, 59 Ops. Cal. Att'y Gen. 70, 71 (1976) (student status); Opinion No. SO 75-81, 59 Ops. Cal. Att'y Gen. 223, 224–25 (1976) (welfare recipient status); *see also* Buhai, *supra* note 168, at 114–15, 115 nn.45–50 (listing cases).

individuals to be free from discrimination based on whom they associated with in public.²³⁴

Deborah Johnson and Zandra Rolón's lawsuit drew on this jurisprudence to insist that Papa Choux violated the law when it denied them service in the Intimate Room. Allred's press release emphasized "bias by businesses against homosexuals."²³⁵ Yet it also made arguments grounded in associational rights and nondiscrimination on the basis of gender: "[W]e believe that every person has the right to associate with the person of their choice, and that it is wrong and illegal to deny them the right to service in certain sections of restaurants for solely arbitrary reasons, such as sex, sex preference or race."²³⁶ The ban on "two people of the same sex" sitting together violated the Unruh Act for the same reason that a ban on two African Americans or Catholics eating together would.²³⁷ Rather than cleanly separate sex and gender, the legal framing of the couple's lawsuit spoke to the blurry boundaries between these categories. It relied on the Unruh Act's protection against arbitrary exclusion as well as its prohibitions on discrimination based on the particular traits of sex and sexual orientation.²³⁸ Johnson and Rolón's claim—that a romantic association between women constituted an arbitrary basis for exclusion—evinced shifting social mores.

From the start, management fought with "boxing gloves" to preserve Papa Choux's Intimate Room as a space for heterosexual romance.²³⁹ In June 1983, following the initiation of the lawsuit, Walter Kulwitzky (Managing Director) and Seymour Jacoby (Owner) took out a newspaper advertisement expressing their opposition to serving same-sex couples in the private dining area: "[T]his charade . . . would certainly make a mockery of true romantic dining."²⁴⁰ Kulwitzky and Jacoby's resistance exemplified a common social objection to gay and lesbian rights—that tolerance for homosexual attraction threatened the vitality of heterosexuality.

Their attorney, Arnold Barry Gold, endeavored to reframe the Unruh Act's protections as confined to particular classes. He argued that the Act protected against discrimination on the basis of

234. *Hubert*, 184 Cal. Rptr. at 162–64, 163 n.1.

235. Allred Press Release, *supra* note 226.

236. *Id.*

237. *Id.*

238. *Rolón v. Kulwitzky*, 200 Cal. Rptr. 217, 217–18 (Cal. Ct. App. 1984).

239. *Making Gay History*, *supra* note 138.

240. *Id.*

sex, not sexual orientation, and that Papa Choux's policy was not sex discriminatory because it excluded male as well as female couples.²⁴¹ Further, the restaurant's policy was a "reasonable regulation" of public (homosexual) behavior that is unacceptable to society."²⁴² Although California had legalized consensual sex between adults in 1975, the defendant's arguments initially won out. The trial judge, Judge Bruce R. Geernaert, visited Papa Choux's Intimate Room to investigate its purpose and the degree to which a gay couple would be secluded from sight by others.²⁴³ Geernaert commented at trial, "The courts really can't be too far out ahead of what society accepts as acceptable conduct when we are dealing with one's right to conduct a business and try to be successful at it."²⁴⁴ He therefore agreed with the defendants that the Unruh Act's protections extended only to the enumerated trait of "sex," not sexual orientation.²⁴⁵ Both Gold and the trial judge used the 1974 amendment in a conservative manner, cabining the Act's reach to enumerated classes. Ironically, the court simultaneously evaded the Los Angeles ordinance's mandate to extend antidiscrimination protections to gay and lesbian people, holding that it was preempted by state law.²⁴⁶

In March 1984, the Court of Appeals reversed.²⁴⁷ Another provision of the California Code provided that actions pursuant to the Unruh Act did not preclude other "independent" available remedies.²⁴⁸ While it did not revisit the lower court's decision on the Unruh Act, the Court of Appeals held that the Los Angeles ordinance explicitly barring sexual orientation discrimination gave Johnson and Rolón an alternative remedy.²⁴⁹ The court rejected the defendant's arguments that its exclusionary policy was meant to prevent

241. James W. Meeker et al., *State Law and Local Ordinances in California Barring Discrimination on the Basis of Sexual Orientation*, 10 U. DAYTON L. REV. 745, 753 (1985); Oliver, *supra* note 154, at C1.

242. Oliver, *supra* note 154, at C1.

243. *Id.* (describing the judge's visit).

244. *See* Meeker et al., *supra* note 241, at 753 (internal quotation marks omitted).

245. Rolón v. Kulwitzky, 200 Cal. Rptr. 217, 218 (Cal. Ct. App. 1984); *see also* Meeker et al., *supra* note 241, at 753 ("[S]exual preference is not in the statute and is not inferentially in the statute.") (citing the Record in the case).

246. *See* Meeker et al., *supra* note 241, at 753.

247. Rolón, 200 Cal. Rptr. at 217, 219.

248. *Id.* at 218 (quoting CAL. CIV. CODE § 52(e)).

249. L.A., CAL., MUN. CODE ch. IV, art. 12, § 49.71.4 (1979); Rolón, 200 Cal. Rptr. at 218 (prohibiting discrimination on the basis of sexual orientation in public accommodations as well as employment, housing and real estate transactions, city facilities and services, and educational institutions). Advocates for the Los Angeles ordinance, modeled on ordinances

sexual acts between gay and lesbian couples, observing that despite its name the Intimate Room allowed for little intimacy.²⁵⁰ After the California Supreme Court subsequently denied the defendants' motion for rehearing, Papa Choux closed its Intimate Room rather than open to same-sex couples.²⁵¹ The restaurant held "A Wake for Romance," complete with a funeral wreath and flowers, a eulogy by an undertaker, and free drinks for attendees.²⁵²

CONCLUSION

Over the course of three decades, movements for gay and women's liberation asserted rights to inclusion in the market. They insisted that any exclusion be based on specific acts of wrongdoing rather than identity alone. In so doing, they set in motion a shifting target for what the courts and society considered "rational" exclusion from the public. The status-conduct distinction realized in the 1950s and 1960s, in landmark decisions including *Stoumen*, *One Eleven Wines*, and *Bayonne*, offered some measure of enjoyment of and equality in public space, but did not suffice to guarantee freedom of expression and of association. In the 1970s, plaintiffs such as Theodore Cox demanded access to public spaces notwithstanding gender nonconformity. Feminist and LGBTQ activists worked for antidiscrimination laws to eradicate customs of gender and sexuality policing then-widespread in the market. Advocates and opponents of 1970s reforms prohibiting "sex" and "sexual orientation" discrimination understood those statutes to reach not only formal classification but also association, marital status, and family formation. As the 1980s began, plaintiffs such as Deborah Johnson and Zandra Rolón used protections for "sex" and "sexual orientation" interchangeably to assert rights to associate as same-sex couples in public.

passed in Berkeley and San Francisco, had argued that state and federal restraints on "arbitrary discrimination" were "inadequate to meet the particular problems of discrimination based on sex and sexual orientation." Bernstein, *supra* note 217, at A3. The ordinance passed the City Council by a vote of thirteen to two over the objections of opponents who decried it as an immoral assault on Judeo-Christian values. Baker, *supra* note 219, at A1.

250. *Rolón*, 200 Cal. Rptr. at 219. The court observed that the Intimate Room was still open for observation and that the restaurant's policy also excluded straight couples with children from that space; clearly the exclusions were meant to do more than prevent acts of sexual intimacy. *Id.*

251. Meeker, *supra* note 241, at 754; Harvey, *supra* note 141.

252. Harvey, *supra* note 141.

The stories of *One Eleven Wines*, *Bayonne*, and *Rolón* illustrate that the regulation and deregulation of cisgender women and LGBTQ people must be told as one history. These episodes—offering an entry point into the history of liquor licensing in New Jersey and public accommodations law in California—highlight that feminist and LGBTQ legal victories evolved cyclically and interdependently, rather than in a linear and isolated manner. Law and custom regulating sexual respectability and gender roles constrained the freedom of straight women, gay men and lesbians, and all people whose attire bent, or crossed, conventional gender performance. Conversely, the struggles of cisgender women and of gay and lesbian people for full inclusion reinforced one another. Public accommodations lawsuits alleging sex discrimination succeeded in ending gendered norms in some places, potentially opening space for queer people. Women suspected of prostitution, gay men, hippies, single women out on the town, lesbian couples enjoying romantic dinners, even parents with children in adult-only spaces—used the precedents each other set to win freedom in public.