

**IS LADIES' NIGHT REALLY SEX DISCRIMINATION?:  
PUBLIC ACCOMMODATION LAWS, DE MINIMIS  
EXCEPTIONS, AND STIGMATIC INJURY**

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*De minimis non curat lex*: the law does not concern itself with trifles.<sup>1</sup>

On June 17, 1998, David Gillespie sought free admission into the Coastline Restaurant (“Coastline”) in Cherry Hill, New Jersey.<sup>2</sup> It was “Ladies’ Night” at Coastline, and the bar offered free admission and reduced prices to women, while men were charged a five-dollar cover charge and regular prices for drinks.<sup>3</sup> Mr. Gillespie requested to be charged the discounted price, but because he was not a woman, his request was accordingly denied.<sup>4</sup> He paid the five-dollar cover charge and entered the bar.<sup>5</sup> Five days later, Mr. Gillespie filed a complaint with the New Jersey Division on Civil Rights, alleging that Coastline had engaged in impermissible reverse discrimination in violation of his rights under the New Jersey Law Against Discrimination (“LAD”), a public accommodations statute.<sup>6</sup>

In June 2004, the Division on Civil Rights agreed with Mr. Gillespie. Although finding that the “minimal differences between the men’s charge . . . and the women’s [charge] . . . do not constitute the kind of ‘personal hardships’ or ‘menaces [to] the institutions and foundation of a free democratic State’ to which the Legislature intended the LAD to apply,” the Administrative Law Judge (“ALJ”)

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<sup>1</sup> BLACK’S LAW DICTIONARY 464 (8th ed. 2004).

<sup>2</sup> Gillespie v. J.C.B.C. Inc., No. CRT 2579-03, 2004 WL 1476932, at \*1 (N.J. Admin. June 10, 2004).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*; N.J. STAT. ANN. §§ 10:5-1 to -49 (West 2005).

nevertheless held that the discounts violated the LAD because the LAD did not provide for a de minimis defense to discrimination.<sup>7</sup>

The decision by the Division on Civil Rights sparked controversy and a national,<sup>8</sup> as well as international,<sup>9</sup> media backlash to the proposition that ladies' night is discriminatory towards men. The Governor of New Jersey called the decision "bureaucratic nonsense,"<sup>10</sup> and he advised the State Attorney General that the civil rights division had better things to do than consider an anti-ladies' night claim.<sup>11</sup>

Subsequently, the New Jersey Legislature drafted a bill, currently pending in the State Senate, to amend the LAD to include a de minimis defense.<sup>12</sup> The bill states that "[n]otwithstanding the provisions of the 'Law Against Discrimination,' . . . to the contrary, the holder of a plenary retail consumption license . . . may charge de minimis differential pricing for alcoholic beverages and offer other special discounts to patrons based on sex, provided that such pricing is for economic reasons only."<sup>13</sup>

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<sup>7</sup> Gillespie, 2004 WL 1476932, at \*7 (quoting N.J. STAT. ANN. § 10:5-3 (West 2005)).

<sup>8</sup> E.g., Steve Chapman, Editorial, *Ladies' nights and the "cancer of discrimination,"* BALT. SUN, June 8, 2004, at 13A [hereinafter "Chapman, Editorial"] ("American history holds numerous examples of discrimination that are thoroughly malignant. This is not one of them . . . . There are no victims [here]."); DeWayne Wickham, "Ladies Night" Ban in NJ Sends the Wrong Message, USA TODAY, June 8, 2004, at 21A (arguing that public accommodation laws were enacted in response to mean-spirited, racist practices that stand in sharp contrast to ladies' night); Jeffrey Page, *Glasses of Scorn Raised to Ladies Night Killjoy*, RECORD (NJ), June 9, 2004, at L1 (arguing that ladies' night has a legitimate, nondiscriminatory economic motive). "When there's [lively] social interaction . . . patrons have a habit of returning even when it's not ladies night." *Id.*

<sup>9</sup> E.g., David Osborne, *Pandora in America*, INDEPENDENT (UK), June 14, 2004, at 12; Elizabeth Hodgson, *New Jersey Puts the Fizz Back Into Ladies Night*, NATIONAL POST (Canada), June 19, 2004, at A15.

<sup>10</sup> Charisse Jones, *Many Scoff at N.J. Ruling Over "Ladies Nights,"* USA TODAY, June 4, 2004, at 3A.

<sup>11</sup> Andrea Cecil, *College Park Café Could Become First Place in Md. to Offer "Skirt Night,"* DAILY RECORD (Baltimore), June 4, 2004.

<sup>12</sup> A. 3005, 211th Leg. (N.J. 2004).

<sup>13</sup> *Id.* (June 14, 2004 reprint showing changes made by Assembly Judiciary Committee), available at [http://www.njleg.state.nj.us/2004/Bills/A3500/3005\\_R1.htm](http://www.njleg.state.nj.us/2004/Bills/A3500/3005_R1.htm). The amendments made by the Assembly Judiciary Committee changed the term "different prices" to "de minimis differential pricing," removed age as an exception to the differential pricing exceptions proposed by the bill, and added the last clause of the bill, stating that the pricing must be "for economic reasons only." *Id.* The Senate Judiciary Committee submitted a statement to clarify that age was removed from the bill because age, unlike sex, is not a prohibited category in the public accommodations statute, and thus the reference to age was "superfluous." A. 3005, 211th Leg. (N.J. 2004) (November 8, 2004 statement issued by the Senate

The statement of legislative purpose, which accompanied the bill, explained the intent behind the bill:

This bill would allow bars and restaurants to offer free admission and discounted drink prices to female patrons on so-called “ladies nights.” Specifically, the bill authorizes holders of a plenary retail consumption license to charge different prices for alcoholic beverages and offer other special discounts to patrons based on gender . . . .

The Director of the Division on Civil Rights recently held that a restaurant offering gender-based priced differentials was in violation of the State Law Against Discrimination (LAD). The purpose of this bill is to clarify that such price differentials do not constitute discrimination under the LAD.

In the highly competitive bar and restaurant business, establishments which sponsor theme nights, such as “Ladies Night” or “Mens Night,” clearly have a legitimate commercial goal of increasing patronage. Such *de minimis* price differentials should not be construed as gender . . . discrimination.<sup>14</sup>

Gender-based pricing has been a source of debate in our country,<sup>15</sup> and the issue is complicated further by the lack of a national standard to address gender discrimination claims. The United States did not include sex as a protected class in Title II of the Civil Rights Act of 1964,<sup>16</sup> which is the federal public accommodations law.<sup>17</sup> In addition, allegations of gender-based pricing often arise from the actions of private businesses, and as such are not subject to the “state action” doctrine under the Fourteenth Amendment.<sup>18</sup> Gender discrimination in places of public accommodation is, therefore, largely an issue left to the states. In this

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Judiciary Committee), available at [http://www.njleg.state.nj.us/2004/Bills/A3500/3005\\_S2.pdf](http://www.njleg.state.nj.us/2004/Bills/A3500/3005_S2.pdf); N.J. STAT. ANN. § 10:5-12 (West 2005).

<sup>14</sup> A. 3005, 211th Leg. (N.J. 2004) (June 10, 2004 introduction of bill in Assembly), available at [http://www.njleg.state.nj.us/2004/Bills/A3500/3005\\_I1.htm](http://www.njleg.state.nj.us/2004/Bills/A3500/3005_I1.htm).

<sup>15</sup> See, e.g., *Civil Rights — Gender Discrimination — California Prohibits Gender-Based Pricing — Cal. Civ. Code. S 51.6 (West Supp. 1996)*, 109 HARV. L. REV. 1839, 1839 (1996) (“Differential pricing of services is one of America’s last remaining vestiges of formal gender-based discrimination.”); Joyce L. McClements & Cheryl J. Thomas, *Public Accommodations Statutes: Is Ladies’ Night Out?*, 37 MERCER L. REV. 1605, 1618 (1986); Heidi C. Paulson, *Ladies’ Night Discounts: Should We Bar Them or Promote Them?*, 32 B.C. L. REV. 487, 528 (1991) (arguing that ladies’ night promotions encourage paternalistic attitudes toward women and encourage stereotypes of both men and women).

<sup>16</sup> 42 U.S.C. § 2000a (2000).

<sup>17</sup> *Id.*

<sup>18</sup> See, e.g., *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179 (1972) (holding that the granting of a liquor license to a private club is not sufficient state action to implicate the Fourteenth Amendment).

absence of a national standard, many states have enacted “public accommodations statutes” to ensure free and equal access to accommodations.<sup>19</sup> Cases related to sex-based price differentials are generally brought under such statutes.<sup>20</sup> Public accommodation statutes vary from state to state in terms of breadth of coverage and the degree to which courts will enforce their requirements.<sup>21</sup>

The issue of gender-based pricing has generated a split of opinion among the courts in how to interpret their respective public accommodations statutes.<sup>22</sup> California,<sup>23</sup> Florida,<sup>24</sup> Pennsylvania,<sup>25</sup> Iowa,<sup>26</sup> and Maryland<sup>27</sup> have taken an all-or-nothing approach to interpreting their respective anti-discrimination laws. These states do not analyze price discrimination in terms of degree, but instead have held that any gender-based price discrimination, regardless of severity or motivation, is illegal.<sup>28</sup> In contrast, Illinois,<sup>29</sup> Washington,<sup>30</sup> and

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<sup>19</sup> See Marissa L. Goodman, *Note: A Scout is Morally Straight, Brave, Clean, Trustworthy . . . and Heterosexual? Gays in the Boy Scouts of America*, 27 HOFSTRA L. REV. 825, 829 (1999) (“Over the years, state public accommodation laws, rather than federal public accommodation laws, have been the more effective tool in combating discrimination.”).

<sup>20</sup> See *infra* notes 39–108 and accompanying text.

<sup>21</sup> Goodman, *supra* note 19, at 830 (“The breadth of state public accommodation laws varies depending upon legislative definitions and judicial interpretations of what constitutes a public accommodation.”).

<sup>22</sup> See *infra* notes 39–47 and accompanying text.

<sup>23</sup> *Koire v. Metro Car Wash*, 707 P.2d 195, 204 (Cal. 1985) (barring a promotional car wash discount to women under California’s Unruh Act).

<sup>24</sup> *City of Clearwater v. Studebaker’s Dance Club*, 516 So.2d 1106, 1109 (Fla. App. 1987) (holding that club policy of allowing women into “Pink Ladies’ Club” at a bar, which was a special membership that included discounted drink prices, was in violation of local anti-discrimination ordinances).

<sup>25</sup> *Pa. Liquor Control Bd. v. Dobrinoff*, 471 A.2d 941, 943 (Pa. Commw. Ct. 1984) (holding that the practice of admitting women into “go-go bar” for free while charging men one dollar was in violation of the Human Relations Act).

<sup>26</sup> *Ladd v. Iowa W. Racing Ass’n*, 438 N.W.2d 600, 602 (Iowa 1989) (holding that because the Iowa Civil Rights Act did not provide de minimis defense based on legitimate purpose, the practice of admitting women into a racetrack at a reduced admission price violated the Act).

<sup>27</sup> *Peppin v. Woodside Delicatessen*, 506 A.2d 263, 267 (Md. Ct. Spec. App. 1986) (affirming panel decision that “Skirt and Gown Night” discount violated the Human Relations Act because it was “discriminatory subterfuge” and merely an extension of ladies’ night).

<sup>28</sup> See *infra* notes 48–80 and accompanying text.

<sup>29</sup> *The Dock Club, Inc. v. Illinois Liquor Control Comm’n.*, 428 N.E.2d 735, 738 (Ill. App. Ct. 1981) (holding that the Illinois Dramshop Act’s anti-discrimination provision barred only conduct that prohibited patronage, and thus discounts to women did not violate the Act because discounts were intended to encourage female patronage, rather than discourage male patronage).

Michigan<sup>31</sup> have engaged in a balancing of the alleged discrimination with the motivations behind it and the likely effects. These states have found no actionable discrimination where the price-based discount was not accompanied by an improper motive to prohibit patronage by one sex or the other.<sup>32</sup>

New Jersey's recent ruling is the first of its kind in any state for a number of years. While the legal analysis comports with other states that have strictly construed public accommodations laws, the ensuing public backlash about a potential ban on ladies' nights suggests that such strict construction may be misplaced.<sup>33</sup> Allowing a de minimis exception to public accommodations statutes would serve an important efficiency purpose.<sup>34</sup> The effort by the New Jersey Legislature in creating a de minimis exception demonstrates a willingness to allow for small exceptions to sexual discrimination laws in order to focus time and resources on remedying the more serious harms caused by sexual discrimination.

This Comment proposes that sex-based differential pricing in the context of ladies' night discounts should not be considered actionable sex discrimination under state public accommodations laws. Part I of this Comment examines case law and legislation dealing with gender discrimination and further examines the treatment given to sex-based differential pricing in a number of states that have dealt with the issue.<sup>35</sup> Part II provides a general overview of de minimis exceptions in other contexts.<sup>36</sup> Part III discusses the

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<sup>30</sup> *MacLean v. First Northwest Indus. of Am.*, 635 P.2d 683, 686 (Wash. 1981) (holding that a ladies' night promotion sponsored by a professional basketball team was not violative of Washington's LAD because complainant was not damaged, the discount had the legitimate purpose of increasing overall patronage, and such discounts were not the evils intended to be remedied by the statute).

<sup>31</sup> *Tucich v. Dearborn Indoor Racquet Club*, 309 N.W.2d 615, 619 (Mich. Ct. App. 1981) (holding that a lower membership fee charged to women was not violative of public accommodations statute because use of facilities was not being withheld from men); *Magid v. Oak Park Raquet Club Ass'n*, 269 N.W.2d 661, 663 (Mich. Ct. App. 1978) (same).

<sup>32</sup> See *infra* notes 81–108 and accompanying text.

<sup>33</sup> See *supra* notes 8–11 and accompanying text.

<sup>34</sup> Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 203 (1992) ("The law . . . should not concern itself with all possible violations of moral rights, but should instead select for prohibition those broad types of discrimination that are most likely to be immoral, intrinsically or extrinsically, that are either likely to violate victims' rights or to cause a great amount of social harm . . . and that are least costly to detect and establish in court.").

<sup>35</sup> See *infra* notes 39–108 and accompanying text.

<sup>36</sup> See *infra* notes 109–75 and accompanying text.

concept of stigmatic injury and compares gender-based differential pricing with a total exclusion from a public accommodation, arguing that price differentials based on legitimate economic motives are not the “cancer of discrimination” sought to be remedied by public accommodations laws.<sup>37</sup> Finally, Part IV concludes that nominal price differentials are, in fact, *de minimis* and should not constitute actionable gender discrimination.<sup>38</sup>

#### I. CASE LAW/LEGISLATION CONCERNING SEX-BASED PRICING

The issue of sex discrimination in places of public accommodation is one that has been left to the states. The federal public accommodations law, Title II of the Civil Rights Act of 1964, bans discrimination solely on the grounds of race, color, religion and national origin.<sup>39</sup> The Equal Protection Clause of the Fourteenth Amendment, though invoked often in recent years to grant “intermediate scrutiny” to sex-based classifications,<sup>40</sup> suffers a similar fate, since it too requires state action.<sup>41</sup> An individual state, however, can reach both public and private behavior through legislation enacted under its “police power.”<sup>42</sup> As a result, many states have enacted public accommodations statutes, which prohibit discrimination on the basis of sex in public accommodations.<sup>43</sup> Interpretation of these statutes has varied among the states, and has resulted in a split of opinion specifically on the issue of sex-based differential pricing.<sup>44</sup> Courts that have held gender-based differential pricing to violate public accommodations laws have almost universally recognized that no actual harm was caused to the plaintiff; despite this recognition, those courts have strictly construed the statutes to prohibit any type of discrimination, regardless of severity.<sup>45</sup> In comparison, courts that have held that differential pricing did not violate public accommodations statutes have engaged in a balancing

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<sup>37</sup> See *infra* notes 176–213 and accompanying text.

<sup>38</sup> See *infra* Part IV.

<sup>39</sup> 42 U.S.C. § 2000a (2000); Chai R. Feldblum et al., *Legal Challenges to All-Female Organizations*, 21 HARV. C.R.-C.L. L. REV. 171, 182–83 (1986).

<sup>40</sup> See *United States v. Virginia*, 518 U.S. 515, 555 (1996) (holding that a state must show exceedingly persuasive justification to exclude women from admission at state-funded military academy).

<sup>41</sup> See *id.* at 532.

<sup>42</sup> See U.S. CONST. amend. X.

<sup>43</sup> E.g., N.J. STAT. ANN. §§ 10:5-1 to -49 (West 2005).

<sup>44</sup> See *infra* notes 48–80 and accompanying text.

<sup>45</sup> See *infra* notes 48–80 and accompanying text.

of the alleged harm with the rights protected by the statute.<sup>46</sup> These courts have been more willing to acknowledge that economic motives can be a legitimate reason for differential pricing and can be utterly devoid of any invidious, discriminatory purpose.<sup>47</sup>

A. *States Prohibiting Gender-Based Differential Pricing*

1. California

In the 1985 case of *Koire v. Metro Car Wash*,<sup>48</sup> the California Supreme Court held that the Unruh Civil Rights Act (“Unruh Act”),<sup>49</sup> California’s public accommodation statute, prohibited a number of car washes and one bar from offering promotional discounts to women without offering similar discounts to men.<sup>50</sup> The Unruh Act states that “[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”<sup>51</sup> The court held that the Unruh Act did not apply solely to the exclusion of persons, but also to unequal treatment that is the result of a business practice.<sup>52</sup> In support of this statement, the court referenced a number of extreme cases of racially-motivated, verbally and physically abusive behavior towards patrons, including one instance where a black woman seated at a soda fountain was slapped and had a hot cup of coffee thrown at her by white employees.<sup>53</sup>

Continuing, the court stated that it would only recognize an exception to the Unruh Act when public policy strongly favors such treatment.<sup>54</sup> The court rejected the defendant bar owner’s argument that encouraging men and women to socialize was a sufficiently important social policy to warrant an exception to the Unruh Act.<sup>55</sup> In contrast to the bar owner’s argument, the court stated that strong public policy supported eradication of sex discrimination in any form.<sup>56</sup> The court also rejected the defendant’s argument that the

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<sup>46</sup> See *infra* notes 48–80 and accompanying text.

<sup>47</sup> See *infra* notes 81–108 and accompanying text.

<sup>48</sup> 707 P.2d 195, 203–04 (1985).

<sup>49</sup> Unruh Civil Rights Act, CAL. CIV. CODE ANN. § 51 (West Supp. 2004).

<sup>50</sup> *Koire*, 707 P.2d at 203–04.

<sup>51</sup> CAL. CIV. CODE ANN. § 51.

<sup>52</sup> *Koire*, 707 P.2d at 197.

<sup>53</sup> *Id.* (citing *Hutson v. The Owl Drug Co.*, 249 P. 524, 524 (Cal. Ct. App. 1926)).

<sup>54</sup> *Id.* at 198.

<sup>55</sup> *Id.* at 199–200.

<sup>56</sup> *Id.* at 202.

plaintiff was not injured in any way, and stated that the Unruh Act provides that any “arbitrary sex discrimination by businesses is *per se* injurious.”<sup>57</sup>

## 2. Pennsylvania

In *Pennsylvania Liquor Control Board v. Dobrinoff*,<sup>58</sup> a bar was charged with a violation of the Pennsylvania Human Relations Act<sup>59</sup> for exempting female patrons from the one-dollar cover charge on a night when “go-go girls” were dancing at the bar.<sup>60</sup> While the court acknowledged that the price difference was temporary, and that it “may well have been intended for purposes other than a desire to oppress male customers,”<sup>61</sup> the court nonetheless held that when a place of public accommodation has “based the collection or exemption of an admission charge solely upon a difference in gender, having no legitimate relevance to the circumstances, then, as a matter of law, there is a violation of the Human Relations Act’s prohibition against discrimination on the basis of sex.”<sup>62</sup>

## 3. Iowa

Iowa has also adopted a strict interpretation of its public accommodations statute. In *Ladd v. Iowa West Racing Ass’n*,<sup>63</sup> the Supreme Court of Iowa found that a “Ladies Day” promotion at a racetrack, where women were given free admission and discounted prices on concessions, discriminated against men in the furnishing of facilities and services in violation of Iowa’s Civil Rights Act.<sup>64</sup> While the court suggested that the discrimination caused no real harm, the court noted that the statute did not provide a means for distinguishing between promotional schemes that are accidentally discriminatory and those that are purposely engaging in prohibited

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<sup>57</sup> *Id.* at 200. While California’s stance in 1985 was to broadly construe the Unruh Act, some suggest that the application of the Act has been narrowed in subsequent years. See Alison Rothi, Note and Comment, *Changing Ideas About Changing Diapers*, 25 WHITTIER L. REV. 927, 956 (2004) (stating that social policy concerns have been considered less frequently by the current California Supreme Court in deciding cases under the Unruh Act, resulting in a narrow interpretation of the Act).

<sup>58</sup> 471 A.2d 941 (1984).

<sup>59</sup> 43 PA. CONS. STAT. ANN. § 955(i)(1) (West 1982) (current version at 43 PA. CONS. STAT. ANN. § 955 (West 2005)).

<sup>60</sup> *Pa. Liquor Control Bd.*, 471 A.2d at 942.

<sup>61</sup> *Id.* at 943.

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

<sup>63</sup> 438 N.W.2d 600 (Iowa 1989).

<sup>64</sup> *Id.* at 602.

discrimination.<sup>65</sup> The court therefore adhered to an interpretation of the statute that did not require discriminatory intent, but mere evidence of discrimination, and found that the promotion was invalid under the statute.<sup>66</sup>

#### 4. Maryland

In *Peppin v. Woodside Delicatessen*,<sup>67</sup> the Court of Special Appeals of Maryland considered an interesting scenario related to ladies' night discounts. The owner of the Woodside Delicatessen had long been holding ladies' nights, but after a customer filed a complaint claiming that the promotion violated a county ordinance, the owner changed the promotion to "Skirt and Gown Night."<sup>68</sup> The promotion entitled any patron who wore either a skirt or gown on Thursday nights to receive a fifty-percent discount on the price of his or her meal.<sup>69</sup> An administrative panel considered the complaint and found that the promotion violated the ordinance because it was a "discriminatory subterfuge, merely an extension of Ladies' Night."<sup>70</sup> The panel found that while some men had worn skirts and gowns to take advantage of the promotion, the majority of those arriving in skirts and gowns were female.<sup>71</sup> The panel further found that the practice would place an undue burden on men by requiring them to obtain a skirt or gown, items not found in the typical male wardrobe, in order to obtain the discount.<sup>72</sup> While the court seemed to question the gravity of the burden placed on men in this case, it nonetheless upheld the ruling of the panel, finding that the promotion violated the ordinance in question because it made a distinction on the basis of sex.<sup>73</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> 506 A.2d 263 (Md. Ct. Spec. App. 1986).

<sup>68</sup> *Id.* at 264.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 264–65.

<sup>71</sup> *Id.* at 266.

<sup>72</sup> *Id.* at 265–66. On appeal, the county court reversed the panel's decision, but it was ultimately overturned by the Court of Special Appeals, which held that the county court impermissibly substituted its judgment for that of the administrative panel. *Id.*

<sup>73</sup> *Peppin*, 506 A.2d at 267 (1986).

## 5. Florida

In *City of Clearwater v. Studebaker's Dance Club*,<sup>74</sup> a Florida District Court of Appeals found that a promotional membership, called the "Pink Ladies Club," offering discounted drink prices to women, violated the City of Clearwater's anti-discrimination ordinances.<sup>75</sup> Lawrence Liebling, a patron of Studebaker's Dance Club, filed a complaint with the Clearwater Community Relations Board ("CCRB") when his application for membership in the Pink Ladies' Club was denied because he was a man.<sup>76</sup> The CCRB found that the club had violated Section 99.11 of the City of Clearwater's Code, which stated that "it shall be an unlawful discriminatory practice for any . . . place of public accommodation . . . because of the . . . sex . . . of any person directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, that are afforded to other customers . . . ."<sup>77</sup> An intermediate ruling overturned the decision of the CCRB, finding that such discrimination was "innocuous."<sup>78</sup> The ruling of the CCRB was ultimately reinstated by the Court of Appeals, however, which held that the previous court's opinion that the discrimination was innocuous was not a proper ground for decision.<sup>79</sup> The Florida District Court of Appeals did not undertake a consideration of the gravity, or lack thereof, of the discrimination.<sup>80</sup>

### B. Gender-Based Differential Pricing Permitted

#### 1. Michigan

Two Michigan cases, *Magid v. Oak Park Racquet Club Associates, Ltd.*<sup>81</sup> and *Tucich v. Dearborn Indoor Racquet Club*,<sup>82</sup> found that a reduced-price membership for women at a health club did not violate the Michigan public accommodations statute.<sup>83</sup> In *Magid*, the Court of Appeals of Michigan determined that the Michigan public

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<sup>74</sup> 516 So.2d 1106 (Fla. Dist. Ct. App. 1987).

<sup>75</sup> *Id.* at 1108-09.

<sup>76</sup> 516 So.2d at 1107.

<sup>77</sup> *Id.* at 1107-08 (citing CLEARWATER CODE OF ORDINANCES § 99.11 (1980) (repealed 1999)).

<sup>78</sup> *City of Clearwater*, 516 So.2d at 1009.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> 269 N.W.2d 661 (Mich. Ct. App. 1978).

<sup>82</sup> 309 N.W.2d 615 (Mich. Ct. App. 1981).

<sup>83</sup> *Magid*, 269 N.W.2d at 663; *Tucich*, 309 N.W.2d at 618-19.

accommodations statute provided a civil cause of action only in instances of a “refusal or denial of accommodations.”<sup>84</sup> The court held that because defendants had alleged only a price difference, and not a refusal or denial of accommodations, they failed to state a cause of action and were not entitled to redress under the public accommodations statute.<sup>85</sup>

In *Tucich*, the court also found that there had been no denial of accommodations.<sup>86</sup> The court analyzed the club’s advertising materials and found nothing in the materials that stated or implied a denial of services to men by the facility.<sup>87</sup> Rather, the court found that the price differential was designed to encourage membership and make the club’s facilities more available to both sexes.<sup>88</sup> The court noted that one of the motivations of the club was to encourage women who did not work during the day to become members in order to increase use of the club during daytime hours.<sup>89</sup>

## 2. Washington

In *MacLean v. First Northwest Industries of America, Inc.*,<sup>90</sup> the Supreme Court of Washington held that a basketball team’s ladies’ night price-ticketing practices did not constitute prohibited sex discrimination.<sup>91</sup> The plaintiff attended a Seattle Sonics basketball game on a night when women were admitted for one-half the ticket price.<sup>92</sup> The plaintiff, who purchased tickets for himself and his wife as well as for another couple, requested to be charged half-price for all tickets, but was refused.<sup>93</sup> He subsequently brought an action under the state LAD,<sup>94</sup> alleging that the price difference discriminated against him on the basis of sex.<sup>95</sup> Based on the stadium’s evidence that women generally constituted thirty-five percent of attendance and the stadium wanted to increase overall attendance, the court found that the stadium’s motive was a

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<sup>84</sup> *Magid*, 269 N.W.2d at 663.

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

<sup>86</sup> *Tucich*, 309 N.W.2d at 618–19.

<sup>87</sup> *Id.* at 619.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 617.

<sup>90</sup> 635 P.2d 683 (Wash. 1981).

<sup>91</sup> *Id.* at 688.

<sup>92</sup> *Id.* at 684.

<sup>93</sup> *Id.*

<sup>94</sup> WASH. REV. CODE. ANN. § 49.60.030 (West 2002).

<sup>95</sup> *MacLean*, 635 P.2d at 684.

legitimate economic motive, rather than one based on a desire to discriminate against men.<sup>96</sup>

Further, the court held that the LAD did not recognize the plaintiff's claim because he was not denied access nor made to feel unwelcome.<sup>97</sup> The court did not agree with the plaintiff's analogy to a 1921 case in which an African-American man had been denied access to his seat in a theater, since in that case, the man was clearly denied access and made to feel unwelcome.<sup>98</sup> Finally, the court noted that because the plaintiff was unable to show that this alleged discrimination had harmed him in any way, he failed to state a valid cause of action under the LAD.<sup>99</sup>

### 3. Illinois

In *The Dock Club, Inc. v. Illinois Liquor Control Commission*,<sup>100</sup> an Illinois appellate court distinguished the price differential and motivations behind ladies' night from prohibited forms of discrimination.<sup>101</sup> The plaintiff brought the claim under the Illinois Dramshop Act, which served in this instance as a public accommodations statute in providing that "no licensee . . . shall deny . . . any person the full and equal enjoyment of the accommodations, advantages, facilities and privileges of any premises in which alcoholic liquors are authorized to be sold."<sup>102</sup> The court said that the crucial question is whether "the price differential denies persons, not able to obtain the lower price, the equal enjoyment of the facilities."<sup>103</sup> The court held that the patrons would only be denied equal enjoyment if the bar's policy intended to, or had the effect of, discouraging men from patronizing the establishment.<sup>104</sup> The court stated, however, that the price men were charged was the regular established price for drinks and was not intended to discourage their patronage.<sup>105</sup> The price that women were charged was reduced to a nominal sum for the purpose of encouraging their patronage.<sup>106</sup> The court suggested

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<sup>96</sup> *Id.* at 648-85.

<sup>97</sup> *Id.* at 685-86.

<sup>98</sup> *Id.* at 686 (citing *Anderson v. Pantages Theatre Co.*, 194 P. 813 (1921)).

<sup>99</sup> *Id.*

<sup>100</sup> 428 N.E.2d 735 (Ill. App. 1981).

<sup>101</sup> *Id.* at 738.

<sup>102</sup> ILL. REV. STAT. ch. 43, par. 133 (1979) (current version at 235 ILL. COMP. STAT. ANN. § 5/6-17 (West 1993)).

<sup>103</sup> *The Dock Club, Inc.*, 428 N.E.2d at 738 (internal quotations omitted).

<sup>104</sup> *Id.*

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

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

that to hold the statute to prohibit a promotional discount such as ladies' night would bar promotional discounts to any group, which the court noted was a common practice by businesses to increase patronage.<sup>107</sup> Further, the court stated that the lack of litigation over the offering of prices to different groups indicated that "no evil sought to be remedied occurred here."<sup>108</sup>

## II. DE MINIMIS EXCEPTIONS IN OTHER CONTEXTS

De minimis is defined as "of the least"<sup>109</sup> or "trifling; minimal" and a fact or thing that is "so insignificant that a court may overlook it in deciding an issue or case."<sup>110</sup>

The concept of a de minimis exception to a law is not a novel one; in fact, de minimis exceptions have been formally and informally recognized in a number of other contexts.<sup>111</sup> Though varied, these contexts contain a general theme that the law will not recognize insignificant injuries, regardless of whether the literal interpretation of the law would suggest that there has been an actual violation. Gender-based price discrimination, particularly in the context of ladies' nights, should be subject to a de minimis exception.

### A. *De Minimis Criminal Infractions*

The Model Penal Code includes a de minimis exception to its provisions.<sup>112</sup> Section 2.12, titled "De Minimis Infractions," provides that:

The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:

- 1) was within a customary license or tolerance, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or
  - 2) *did not actually cause or threaten the harm or evil sought to be prevented* by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction;
- or

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

<sup>108</sup> *Id.*

<sup>109</sup> BLACK'S LAW DICTIONARY 464 (8th ed. 2004).

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

<sup>111</sup> *See infra* notes 112–74 and accompanying text.

<sup>112</sup> MODEL PENAL CODE, § 2.12 (1962).

3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.

The Court shall not dismiss a prosecution under Subsection (3) of this Section without filing a written statement of its reasons.<sup>113</sup>

The legislative history behind Section 2.12 suggests that its purpose is to prevent “absurd applications”<sup>114</sup> of the criminal law and to codify the existing discretionary authority of prosecutors and grand juries to choose whether or not to prosecute a criminal case.<sup>115</sup>

Five jurisdictions, including New Jersey, have adopted Section 2.12.<sup>116</sup> In adopting Section 2.12, New Jersey made only one substantive modification, changing the words “shall dismiss” to “may dismiss.”<sup>117</sup> Dismissal of de minimis infractions is therefore permissive, rather than mandatory, in New Jersey. Nonetheless, the de minimis statute has been invoked on a number of occasions.<sup>118</sup>

In *State v. Zarrilli*, a 20-year-old college student was charged with underage consumption of alcoholic beverages on licensed premises for consuming one sip of beer at a church fair.<sup>119</sup> Another patron at the fair was the Director of the New Jersey Division of Alcoholic Beverage Control.<sup>120</sup> The Director witnessed the defendant, William Zarrilli, taking a sip of beer from a cup purchased by a friend.<sup>121</sup> Subsequently, the Director signed a municipal court complaint

<sup>113</sup> *Id.* (emphasis added).

<sup>114</sup> Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the “De Minimis” Defense*, 1997 BYU L. REV. 51, 52 (1997) (citing DISCUSSION OF THE MODEL PENAL CODE, 39 A.L.I. Proc. 61, 105–08, 226–27 (1962)).

<sup>115</sup> Pomorski, *supra* note 114, at 52.

<sup>116</sup> The five jurisdictions include four states and the territory of Guam. HAW. REV. STAT. § 702-236 (1993); ME. REV. STAT. ANN. tit. 17-A, § 12 (1983); N.J. STAT. ANN. § 2C:2-11 (West 1995); 18 PA. CONS. STAT. ANN. § 312 (West 1998); GUAM CODE ANN. tit. 9, § 7.67 (Westlaw through P.L. 28-037 (2005)).

<sup>117</sup> N.J. STAT. ANN. § 2C:2-11 (West 1995). The New Jersey statute also removes the requirement under subsection (3) of the Model Penal Code that the court must file a written statement of its reasons for finding that the charge would be contrary to legislative intent. *Id.* It also adds a requirement that the prosecutor be given notice and an opportunity to be heard, and a right to appeal. *Id.* In addition, New Jersey vests the authority of dismissing the case in the “assignment judge,” rather than the “Court.” *Id.*; MODEL PENAL CODE, § 2.12 (1962).

<sup>118</sup> *See, e.g.*, *State v. Bazin*, 912 F. Supp. 106, 115 (D.N.J. 1995); *State v. Zarrilli*, 523 A.2d 284, 289 (N.J. Super. Ct. Law Div. 1987); *State v. Nevens*, 485 A.2d 345, 348 (N.J. Super. Ct. Law Div. 1984); *State v. Smith*, 480 A.2d 236, 241 (N.J. Super. Ct. Law Div. 1984).

<sup>119</sup> *Zarrilli*, 523 A.2d at 285.

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

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

charging Zarrilli with the offense.<sup>122</sup> The Superior Court of New Jersey stated that the correct test in applying the de minimis statute is to determine the risk of harm to society caused by a defendant's conduct.<sup>123</sup> Applying the facts, the court found that the "harm to society caused or threatened by [the defendant's] conduct was so minimal as not to warrant the condemnation of a conviction."<sup>124</sup> The complaint was dismissed on the grounds that it was de minimis.<sup>125</sup>

In *State v. Bazin*,<sup>126</sup> the New Jersey District Court dismissed a charge of harassment under the de minimis statute.<sup>127</sup> In a criminal action brought by a private citizen,<sup>128</sup> the citizen charged United States Postal Service inspector Michael Bazin with harassment.<sup>129</sup> Bazin had been in the process of investigating a theft of \$70,000 in cash from the Trenton Post Office that occurred in May 1995, and sought to conduct polygraph tests on workers who had been present on the day of the theft.<sup>130</sup> One worker, Edgar Paulus, arrived for his polygraph test with his union representative, Evette Utley-Williams.<sup>131</sup> Upon Williams' advice, Paulus refused to take the test, and a 30-minute argument with the defendant followed.<sup>132</sup> When Paulus and Williams rose to leave, the defendant stated in a sarcastic manner, "I want to thank you for all of your cooperation in this investigation. Just remember, what goes around, comes around."<sup>133</sup> Williams asked Bazin if the statement was a threat and Bazin responded by slamming his office door, hitting Williams.<sup>134</sup> Williams then asked Bazin, "So, you are going to be violent, too?" and Bazin responded, "I would if I could."<sup>135</sup> The court found that, though Bazin's statements were not

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

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

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

<sup>125</sup> *Zarilli*, 523 A.2d at 289.

<sup>126</sup> 912 F. Supp. 106 (D.N.J. 1995).

<sup>127</sup> *Id.* at 114.

<sup>128</sup> The United States Attorney's Office, the Hamilton Township Prosecutor, the Mercer County Prosecutor, and the New Jersey Attorney General's office all refused to prosecute the case. *Id.* at 109. Complainant retained the firm of Stark & Stark to prosecute the action on behalf of the State of New Jersey. *Id.*

<sup>129</sup> Bazin was also charged with simple assault, but that charge did not factor into the court's discussion of the de minimis statute. *Id.*

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

<sup>131</sup> *Bazin*, 912 F. Supp. at 109.

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

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

<sup>134</sup> *Id.* Williams brought assault charges, alleging that the slamming of the door was meant to cause her physical harm. *Id.* at 109. The de minimis exclusion in this case concerns only the harassment charges. *Id.* at 115.

<sup>135</sup> *Id.* at 109.

professional or pleasant, they did not rise to the level of harassment.<sup>136</sup> In fact, the court noted, his statement that he would use violence “if he could” demonstrated that he did not intend to violate the law.<sup>137</sup> The court granted the defendant’s motion to dismiss the harassment charge on de minimis grounds.<sup>138</sup>

*B. De Minimis Copyright Infringement*

Copyright law also includes a de minimis standard, applied in the area of “music sampling.”<sup>139</sup> Music sampling is the practice of using previous sound recordings to create new music,<sup>140</sup> and it is particularly common in the rap and hip-hop genres.<sup>141</sup> The issue that arises with music sampling is the question of how much of an existing song can be used before the sampling has infringed on the existing copyright. Generally, if a plaintiff has a copyright in a work, such as a song, any expression substantially similar to that work constitutes an infringement.<sup>142</sup> If the use of the copyrighted work is de minimis, however, or so trivial “as to fall below the qualitative threshold of substantial similarity,”<sup>143</sup> the use is not actionable.<sup>144</sup> In determining whether the use meets the qualitative threshold of substantial similarity, courts will look to whether the portion appropriated was “much of what is pleasing to the ears of lay listeners, or the heart of the work.”<sup>145</sup>

*C. De Minimis Exception for Overtime Salary Owed to Employee*

A de minimis rule is also recognized in the context of overtime salary.<sup>146</sup> Under the Fair Labor Standards Act,<sup>147</sup> employers are

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<sup>136</sup> *Id.* at 114.

<sup>137</sup> *Bazin*, 912 F.Supp. at 114.

<sup>138</sup> *Id.* at 115.

<sup>139</sup> David S. Blessing, Note, *Who Speaks Latin Anymore?: Translating De Minimis Use for Application to Music Copyright Infringement and Sampling*, 45 WM. & MARY L. REV. 2399, 2409–10 (2004); Josh Norek, “You Can’t Sing Without the Bling”: *The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA ENT. L. REV. 83, 87 (2004).

<sup>140</sup> Blessing, *supra* note 139, at 2403.

<sup>141</sup> Norek, *supra* note 139, at 86–87 (discussing the development of music sampling in rap and hip-hop music).

<sup>142</sup> Blessing, *supra* note 139, at 2407.

<sup>143</sup> *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998) (citing *Ringgold v. Black Entm’t Television*, 126 F.3d 70, 74 (2d Cir. 1997)).

<sup>144</sup> Norek, *supra* note 139, at 87.

<sup>145</sup> *Id.* at 88 (citing *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946)).

<sup>146</sup> Amanda M. Riley, *The De Minimis Rule: Trifles of Time*, 45 ORANGE COUNTY LAW. 18, 18 (Nov. 2003).

required to pay overtime salary to employees who work beyond a forty-hour work week.<sup>148</sup> When the extra time is a matter of a few minutes, however, courts have held that such time is de minimis and need not be recorded.<sup>149</sup> The United States Court of Appeals for the Ninth Circuit, in *Lindow v. United States*,<sup>150</sup> established a balancing test to determine whether compensable time is de minimis.<sup>151</sup> In that case, employees had spent an average of seven to eight minutes reading a log book and exchanging information with each other regarding what had occurred on previous shifts, though their employer had not required them to do so and the discussions did not occur at regular times or intervals.<sup>152</sup> The court considered “(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work.”<sup>153</sup> While taking into account the effect of denying an employee his pay, the test also considers the difficulties of recording small amounts of time.<sup>154</sup> On the other hand, those difficulties are considered less important when the employee has worked for a longer period of time beyond his scheduled work hours, or when he has consistently worked a small amount of time beyond his scheduled hours. Under the facts of *Lindow*, the Ninth Circuit held that the amounts of overtime were too insignificant when compared with the administrative burden of recording short periods of time.<sup>155</sup>

#### D. De Minimis Environmental Law Violations

A de minimis standard has also been established by Congress under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).<sup>156</sup> Congress enacted CERCLA in 1980 to

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<sup>147</sup> 29 U.S.C. § 201, *et. seq.* (2000).

<sup>148</sup> 29 U.S.C. § 207(a)(1) (2000).

<sup>149</sup> *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946) (“When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded.”); *see, e.g., Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984).

<sup>150</sup> 738 F.2d 1057.

<sup>151</sup> *Id.* at 1063.

<sup>152</sup> *Id.* at 1060.

<sup>153</sup> *Id.* at 1063.

<sup>154</sup> *Id.*

<sup>155</sup> *Lindow*, 738 F.2d at 1063.

<sup>156</sup> 42 U.S.C. § 9622(g)(1) (2000); *see Monica Shah Desai, Disposing of United States v. CDMG Realty Co.: The Case Against the Application of CERCLA Liability for De Minimis Disturbances of Pre-Existing Contamination*, 6 N.Y.U. ENVTL. L. J. 200, 203–11 (1997).

clean up leaking, inactive, or abandoned hazardous waste sites.<sup>157</sup> The theory behind CERCLA is restitution: those responsible for causing the release of hazardous substances should pay the costs of cleanup.<sup>158</sup> CERCLA imposes, in general, strict liability on those responsible for the release of hazardous substances.<sup>159</sup>

Congress has, however, acknowledged that defendants who have contributed a de minimis amount of contamination should be treated differently than other CERCLA defendants.<sup>160</sup> For purposes of settlement, defendants who have caused de minimis amounts of contamination and who agree to settle with the government are protected from certain claims.<sup>161</sup> The purpose behind this provision is to provide an opportunity for de minimis contaminators to settle their claims instead of engaging in protracted legal proceedings; evidence showed that in many cases, such defendants were subject to higher legal fees and other transactional fees than their ultimate liability for cleanup at a given site.<sup>162</sup> The definition of de minimis under CERCLA is not a fixed number; instead, a determination of whether contamination is de minimis rests on a comparison with the total amount of hazardous materials in the site.<sup>163</sup>

#### *E. De Minimis Employment Discrimination*

The concept of de minimis discrimination has been recognized in the employment discrimination context for decades.<sup>164</sup> Sex-based

<sup>157</sup> 42 U.S.C. §§ 9601–9675, as reauthorized and substantially amended by the Superfund Amendments and Reauthorization Act of 1986 (“SARA”), Pub. L. No. 99-499, 100 Stat. 1613 (1986); John C. Cruden, *CERCLA Overview*, SH093 ALI-ABA 555, 561 (2003). CERCLA was enacted in response to severe environmental and health problems at abandoned toxic waste sites such as Love Canal in New York and Times Beach in Missouri. *Id.*

<sup>158</sup> Cruden, *supra* note 157, at 562.

<sup>159</sup> Desai, *supra* note 156, at 203.

<sup>160</sup> 42 U.S.C. § 9622(g)(1) (2000); Desai, *supra* note 156, at 208–09.

<sup>161</sup> Desai, *supra* note 156, at 208–09.

<sup>162</sup> *Id.* at 210–11.

<sup>163</sup> *Id.* at 209–11;

[T]he President shall as promptly as possible reach a final settlement with a potentially responsible party . . . if such settlement involves only a minor portion of the response costs at the facility concerned . . . [and] (A) both of the following are minimal *in comparison to other hazardous substances at the facility*: (i) The amount of hazardous substances contributed by that party to the facility. (ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.

42 U.S.C. § 9622(g)(1) (2000) (emphasis added).

<sup>164</sup> Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L. J. 1121, 1122 (1998).

differences in workplace dress and grooming codes are accepted as permissible forms of discrimination.<sup>165</sup> Generally, courts have upheld dress and grooming codes that differentiate between male and female employees.<sup>166</sup> An employer's policy is likely to be upheld when its rationale is nondiscriminatory and supported by facts.<sup>167</sup> Examples include employer's public image, safety concerns, enhancing employee morale and productivity, and conforming to generally accepted community standards of dress and appearance.<sup>168</sup>

Some scholars note a movement to broaden the scope of de minimis exceptions in the context of employment discrimination claims.<sup>169</sup> In light of an increasing volume of cases in the courts, some of which are perceived as "frivolous," there is a trend to limit discrimination claims to those that have the most merit, and where an employee has truly suffered harm.<sup>170</sup> Many circuit courts have begun to require that, for a claim of discrimination to be actionable under Title VII of the Civil Rights Act of 1964,<sup>171</sup> the plaintiff demonstrate a materially adverse action or effect, in addition to demonstrating the existence of discrimination itself.<sup>172</sup> Thus, an employee must show that he or she suffered a tangible effect, usually economic, in his or her employment as a result of the discrimination. Essentially, the employee must have been fired or otherwise have lost wages, through a demotion or other action.<sup>173</sup> While the details of this developing doctrine are complicated<sup>174</sup> and thus beyond the scope of this Comment, the trend suggests that courts are willing to

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<sup>165</sup> White, *supra* note 164, at 1122, n.1 (noting that employers are permitted to establish different dress and grooming standards without violating Title VII).

<sup>166</sup> Marc Koonin, *Avoiding Claims of Discrimination Based on Personal Appearance, Grooming, and Hygiene Standards*, 15 LAB. LAW. 19, 23 (1999); *see, e.g.*, Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975).

<sup>167</sup> Koonin, *supra* note 166, at 21.

<sup>168</sup> *Id.* at 21–23.

<sup>169</sup> White, *supra* note 164, at 1124–25.

<sup>170</sup> *Id.* at 1124 (stating that "courts are understandably reluctant to permit disgruntled employees to make a case out of every workplace situation arguably motivated by a worker's race, sex, or complaints of discrimination").

<sup>171</sup> 42 U.S.C. § 2000e (2000). The Act prohibits employment discrimination based on race, color, religion, sex, and national origin. *Id.*

<sup>172</sup> White, *supra* note 164, at 1124.

<sup>173</sup> *See, e.g.*, Lederberger v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997) (noting that a "purely lateral transfer" where the employee is not demoted in substance or in form, does not constitute a materially adverse employment action).

<sup>174</sup> White, *supra* note 164, at 1126 (noting that there is a "real and growing disarray concerning which improperly motivated employment decisions are legally actionable . . . [as well as] confusion over whether material adversity is a statutory requirement or is only a necessary element for a prima facie case of disparate treatment").

consider claims of discrimination only when plaintiffs can demonstrate that they were tangibly and materially harmed by the discrimination.<sup>175</sup>

*F. Summary*

As the above examples demonstrate, de minimis exceptions are recognized in a number of contexts. Despite the varied subject matter, the common theme running through these exceptions is that an act will be considered de minimis when it fails to cause the harm sought to be prevented by a particular law. As has been recognized most recently in the employment discrimination context, limiting recovery to when a person is tangibly harmed by the discrimination serves an important efficiency purpose by limiting the number of frivolous claims. Public accommodation laws, which were enacted to curtail overt, hostile acts of discrimination, should not apply to gender-based differential pricing when such pricing is the result of legitimate, good-faith economic motives. A de minimis exception is warranted in the context of ladies' nights, because while they do violate the literal interpretation of many public accommodation statutes, the motive behind them is simply not what state legislatures intended to prevent by enacting such laws.

### III. STIGMATIC HARM AND GENDER-BASED DIFFERENTIAL PRICING

The injury asserted by plaintiffs such as David Gillespie is essentially one of stigma. Assuming that the nominal difference between the price a man would pay to attend a ladies' night and the price a woman would pay is, in fact, a de minimis injury, the remaining claim is that the male plaintiffs are stigmatized on the basis of their gender. This Part discusses whether a plaintiff may successfully argue that he suffered a stigmatic injury as a result of being denied a gender-based price discount, concluding that stigmatic injury is not a viable claim.

Generally, male plaintiffs challenging ladies' night argue that by charging men more, an establishment is expressing that men are less welcome, and is thus discriminating against men in the furnishing of a public accommodation by treating men as second-class citizens.<sup>176</sup>

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<sup>175</sup> *Id.* at 1124, 1126.

<sup>176</sup> See Mark M. Hager, *Essay: Sex in the Original Position: A Restatement of Liberal Feminism*, 14 WIS. WOMEN'S L.J. 181, 213 (1999) (stating that ladies' night is "innocuous fun" that could only be compared to real discrimination by "wooden analogy").

This argument, however, is fundamentally flawed.<sup>177</sup> There is no parallel comparison between an event such as ladies' night, where reduced prices for women are used as an incentive to increase female patronage as well as overall patronage, and one where a group is expressly excluded.<sup>178</sup> Ladies' night, since it does not discourage men from attending, is nearly the opposite of what a "whites' night" or "blacks' night" would mean.<sup>179</sup> Rather, ladies' night is based on the harmless observation that women are less likely to frequent bars than men. Relying on basic economic notions of supply and demand,<sup>180</sup> bar and restaurant owners resort to discounts in order to increase their overall number of customers.

A. *Stigmatic Harm*

Stigmatic harm occurs when a given act or policy stigmatizes a person or group by sending a message that a difference renders that person or group inferior.<sup>181</sup>

It "implies more than merely being referred to by a racial epithet or even the denial of a particular opportunity . . . . It involves becoming a disfavored or dishonored individual in the eyes of society, a kind of social outcast whose stigmatized attribute stands as a barrier to full acceptance into the wider community."<sup>182</sup>

Stigma has most frequently been recognized and developed by the Supreme Court's Fourteenth Amendment Equal Protection jurisprudence. While the issue of stigmatic injury under public accommodation statutes does not involve constitutional questions, the concept serves as an analogy to explain why gender-based differential pricing does not cause stigmatic harm.

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<sup>177</sup> *Id.* ("Ladies' night disparages neither males nor females except under the most contrived interpretation . . . . [S]ome men and women like going where it is easy to meet.").

<sup>178</sup> *Cf.* *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984) (holding that total exclusion of women from membership of organization violated public accommodation statute and was not protected by constitutional right of expressive association); see Chapman, *Editorial*, *supra* note 8, at 13A (arguing that ladies' night is not the result of a "deep-seated hostility toward men, perpetuating centuries of oppression," but instead exists because women are "generally less attracted to the bar scene").

<sup>179</sup> Hager, *supra* note 176, at 182.

<sup>180</sup> Joyce Howard Price, *'Ladies Night' Ruled Discriminatory: Bar Owners Contend Men Benefit Most From Incentives to Women*, WASH. TIMES (D.C.), June 3, 2004, at A12.

<sup>181</sup> R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 803 (2004).

<sup>182</sup> *Id.* at 809.

The seminal Supreme Court case addressing stigmatic harm is *Brown v. Board of Education*.<sup>183</sup> In that case, the Court held that racially segregated schools violated the Equal Protection Clause because a separate education was inherently unequal.<sup>184</sup> In reaching its conclusion, the Court relied on social science research discussing the effect of segregation on black children.<sup>185</sup> The Court found that the effect was severe, stating that “to separate [the children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>186</sup> The exclusion of black children from the schools caused grave harm by stigmatizing the children as less worthy.

In order to violate the Equal Protection Clause, a government action must not merely run the risk of causing someone to feel stigmatized, but it also must have a discriminatory motive or intent behind it.<sup>187</sup> Stigma also appears to presume that the person or group claiming stigmatization is actually part of a historically disfavored group.<sup>188</sup> It is here that the male plaintiffs’ claims fail. First, there is no evil intent or discriminatory motive behind gender-based discounts such as ladies’ night. In fact, quite the opposite is true.<sup>189</sup> Second, no case has identified plausible grounds as to how, and in what way, such plaintiffs were stigmatized. Rather, some courts have recognized that no harm occurred as a result of the discount, but nonetheless were bound by strict statutory wording.<sup>190</sup>

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<sup>183</sup> 347 U.S. 483 (1954).

<sup>184</sup> *Id.* at 495.

<sup>185</sup> *Id.* at 494 & n.11.

<sup>186</sup> *Id.* at 494.

<sup>187</sup> Lenhardt, *supra* note 181, at 875 (citing *Shaw v. Reno*, 509 U.S. 630, 643 (1993)). *Shaw v. Reno* described stigma as a result of an intentional race-based classification. *Id.*

<sup>188</sup> Lenhardt, *supra* note 181, at 850. The author compared hypothetical situations in which a student is accused of only being admitted to Harvard because she was black, as opposed to because she was white, or a legacy, or was from a certain geographical region of the country. *Id.* He concluded that the accusation regarding race carries the greatest impact because there is a presumption of black inferiority in our society, whereas there is no such presumption regarding the other categories. *Id.*

<sup>189</sup> Hager, *supra* note 176, at 214 (stating that many men and women enjoy going out where it is easy to meet, and arguing that ladies’ night disparages men under only the most contrived interpretation).

<sup>190</sup> See *supra* notes 7, 48–80, and accompanying text for a discussion of various courts’ failure to find any true harm caused to male plaintiffs by ladies’ night discounts.

B. *Gender-Based Differential Pricing Is Not Stigmatizing*

In *Koire v. Metro Car Wash*,<sup>191</sup> the California Supreme Court stated that gender-based price discrimination is “*per se* injurious.”<sup>192</sup> The problem, however, is that such pricing is not at all similar to other forms of discrimination, making the blanket claim of injury difficult to sustain. When comparing ladies’ night to an instance of total exclusion from a public accommodation, the need for a *de minimis* exception becomes clear; sex-based price discounts simply pale in comparison to overt, hostile acts of discrimination.<sup>193</sup>

In *Gillespie*,<sup>194</sup> the ALJ found a violation of the LAD because the bar discriminated against a person in the “furnishing of” a public accommodation.<sup>195</sup> In support of this proposition, it cited two New Jersey cases: *Turner v. Wong*<sup>196</sup> and *Franek v. Tomahawk Lake Resort*.<sup>197</sup> These cases, however, are not parallel to the ladies’ night cases because they involved outright denials of service and overt acts that caused the plaintiffs to feel unwelcome, whereas the events in *Gillespie* did not involve conduct intended to make any person or group feel unwelcome.

In *Franek*, an eighty-three-year-old, wheelchair-bound woman was using the defendant’s recreational facility.<sup>198</sup> The woman’s daughter spoke with the facility’s operator in order to request access to a separate entrance, and the operator stated that he did not “want those kind [sic] of people here.”<sup>199</sup> While the disabled woman did not hear the initial conversation, she later learned of the details.<sup>200</sup> Feeling unwelcome and unhappy to be at the facility, she and her daughter left earlier than they had intended.<sup>201</sup> She never returned to the facility and died before her case went to trial.<sup>202</sup> The Superior

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<sup>191</sup> 707 P.2d 195 (1985).

<sup>192</sup> *Id.* at 200.

<sup>193</sup> McClements & Thomas, *supra* note 15, at 1618 (“The importance of a male not being able to buy a drink, attend a basketball game, or get his car washed for the same price as a female pales in comparison to someone not being able to obtain housing or employment because of his race or sex.”).

<sup>194</sup> *Gillespie v. J.C.B.C. Inc.*, No. CRT 2579-03, 2004 WL 1476932 at \*8 (N.J. Admin. June 10, 2004).

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

<sup>196</sup> 832 A.2d 340 (N.J. Super. Ct. App. Div. 2003).

<sup>197</sup> 754 A.2d 1237 (N.J. Super. Ct. App. Div. 2000).

<sup>198</sup> *Id.* at 1239.

<sup>199</sup> *Id.* at 1240.

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

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

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

Court of New Jersey, Appellate Division, held that the statements made by the operator violated the LAD.<sup>203</sup> The court stated that

it is unquestionably a violation of the LAD for the owner or operator of a public accommodation to tell a person, either directly or indirectly, that his or her patronage is not welcome because of a trait or condition which the LAD protects from discriminatory action, even though use of the facility on the particular occasion is not denied.<sup>204</sup>

The court reversed the trial court's grant of summary judgment in favor of the defendant.<sup>205</sup>

In *Turner*, Delois Turner purchased a donut and a cup of coffee from Nancy Wong's store.<sup>206</sup> When Turner complained that the donut was stale and requested a new one, Wong allegedly called Turner a "black nigger from Philadelphia."<sup>207</sup> Wong repeated the phrase three or four times in front of the other customers, who were all white, and then continued, yelling, "You black niggers come in here, give me a hard time. White people don't give me a hard time. White people nice people."<sup>208</sup> When Turner asked where she could find a phone, Wong told plaintiff to get out of her store.<sup>209</sup> The Superior Court of New Jersey, Appellate Division, found that the statements made by Wong were intended to force Turner to leave the store and to make her feel unwelcome to return.<sup>210</sup> Relying on *Franek*, the court stated that the protections of the LAD are not limited merely to where there is an outright denial of the use of a facility or the services thereof, but also to situations in which a customer is discouraged from using a public accommodation because of his or her protected status under the LAD.<sup>211</sup> Further, the court stated that the "focal issue" in such cases is whether the defendant acted with an "actual or apparent design to discourage present or future use of the public accommodation by plaintiff on account of [his or] her protected status."<sup>212</sup> As in *Franek*, the court reversed the trial court's grant of summary judgment in favor of the defendant,

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<sup>203</sup> *Franek*, 754 A.2d at 1243.

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

<sup>205</sup> *Id.* at 1243-44.

<sup>206</sup> *Turner*, 832 A.2d at 345-46.

<sup>207</sup> *Id.* at 346.

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

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 355.

<sup>211</sup> *Id.*

<sup>212</sup> *Turner*, 832 A.2d at 356.

and remanded for a factual determination of what Wong had actually said.<sup>213</sup>

When *Turner* and *Franek* are compared to *Gillespie*, a striking difference is clear. The plaintiffs in *Turner* and *Franek* were made to feel as if, based on their protected status, their present and future use of a public accommodation was unwelcome. David Gillespie, however, was not discouraged from patronizing Coastline. Because gender-based pricing is not based on an animus toward one gender or the other, it is not stigmatizing. It is not the type of harm that state legislatures intended to remedy through the enactment of public accommodations laws.

#### IV. CONCLUSION

Gender-based differential pricing, particularly in the context of ladies' night discounts, is de minimis and should not be considered violative of public accommodation laws. The effort by the New Jersey legislature to amend the LAD to recognize a de minimis exception correctly recognizes that not all instances of discrimination should form the basis for a legal challenge. The de minimis price differences involved in gender-based discounts are similar to other areas where de minimis exceptions have been recognized and embraced. Most importantly, a de minimis exception would serve an important efficiency purpose by reserving the statutory cause of action under the LAD to those cases where actual discrimination has occurred. Male plaintiffs such as David Gillespie have suffered no tangible injury and have been wrongfully afforded a statutory cause of action where there should be none. Public accommodation laws, which were enacted to remedy instances of overt, hostile discrimination against racial groups, should not be invoked in this manner.

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<sup>213</sup> *Id.*