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Volume 5  
Number 2 *Symposium on Women and the Law*

pp.318-325

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*Symposium on Women and the Law*

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#### Recommended Citation

Faith A. Seidenberg, *The Federal Bar v. The Ale House Bar: Women and Public Accommodations*, 5 Val. U. L. Rev. 318 (1971).

Available at: <https://scholar.valpo.edu/vulr/vol5/iss2/4>

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## THE FEDERAL BAR v. THE ALE HOUSE BAR: WOMEN AND PUBLIC ACCOMMODATIONS

FAITH A. SEIDENBERG\*

### INTRODUCTION

On a dark wintry night in January, 1969, two women stood shivering before the double doors of an old ale house whose portals had withstood for one hundred and fifteen years the entry of female customers. The women were shivering as much from fear as from cold, but, after standing uncertainly for a few minutes, they pushed open both sets of doors and plunged in.

The effect was electrifying. Bells were rung, the all-male clientele of the bar clapped and stamped, and the waiters whooped it up. The women did not retreat, however, and the noise slowly subsided. Then came the coup de gras; the women requested service! At first, they were politely refused, then more heatedly. The customers as well as the employees became incensed, but the two invaders stood fast. Finally, a young man appeared, surveyed the situation and offered to buy the two women a drink. Much to his chagrin, however, he was thereupon grabbed roughly by several of the men and thrown unceremoniously onto the curb. The two women withdrew in his wake, upset by the treatment that he had received on their behalf. The saga might have ended there, but, instead, the women shortly thereafter filed an action in federal court. So began the battle for the soul of McSorleys' Old Ale House.

In spite of its somewhat frivolous beginning, the case itself had a very serious purpose. All over the United States women were, and still are, excluded from places of public accommodation such as restaurants, hotels, airlines and the like. This article examines the case of *Seidenberg v. McSorleys' Old Ale House, Inc.*<sup>1</sup> which culminates a series of legal actions asserting the right of women to public accommodations.

### THE CIVIL RIGHTS ACT OF 1964

Although the 1964 Civil Rights Act<sup>2</sup> forbids discrimination in employment on account of sex, it has been found not to forbid such discrimination in public accommodations. In *DeCrow v. Hotel Syracuse*

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1. 317 F. Supp. 593 (S.D.N.Y. 1970).

2. Civil Rights Act of 1964 § 201(a), 42 U.S.C. § 2000a(a) (1964), guarantees to all persons the full and equal employment of public accommodations without regard to race, color, religion or national origin.

*Corp.*,<sup>3</sup> the National Organization for Women brought suit in federal court in the Northern District of New York against the Hotel Syracuse because it served unescorted women only when they were seated at a table. Plaintiffs were told that this was to protect the male customers from female solicitation. (No mention was made, however, as to male solicitation.) The judge, in deciding against the plaintiffs held that: 1) there was no state action as they were not arrested<sup>4</sup> and 2) that although the hotel may have been discriminating, it was allowed to do so because the word "sex" did not appear in the public accommodations section of the 1964 Civil Rights Act.

The conduct of hotels and restaurants is governed by section 201(a) of said Act (42 U.S.C. § 2000(a)). The full and equal employment of public accommodations without discrimination on account of "race, color, religion, or national origin" . . . including the right to be served at a bar, has been guaranteed by Congress. No such guarantee has been made on account of *sex*. This Court should not gratuitously do what Congress has not seen fit to do. Mrs. Kennedy's complaint should be addressed to Congress.<sup>5</sup>

It should be pointed out, however, that in *Paterson Tavern & Grill v. City of Paterson*<sup>6</sup> a New Jersey court took the opposite position in interpreting its public accommodation statute:<sup>7</sup> "While the statute does not mention specifically sex, I think it is the public policy of our state that such discrimination should not be practiced."<sup>8</sup>

Having suffered defeat at the hands of the federal district court, the plaintiffs then brought a state cause of action under a New York statute which, though largely untested, seemed promising. This particular statute states:

A person who either on his own account or as agent or officer of a corporation, carries on business as innkeeper, or as common carrier of passenger, and refuses, without just cause or excuse, to receive and entertain any guest, or to receive and carry any passenger, is guilty of a misdemeanor.<sup>9</sup>

3. 288 F. Supp. 530 (N.D.N.Y. 1968).

4. See notes 16-22 *infra* and accompanying text.

5. 288 F. Supp. at 532.

6. No. 9248-68 PW (N.J. Super., Dec. 17, 1968).

7. N.J. STAT. ANN. §§ 10:1-2 to -7 (1960), as amended, N.J. STAT. ANN. §§ 10:1-3, 10:1-6 (Supp. 1970). The 1970 amendment prohibits sexual discrimination.

8. *Paterson Tavern & Grill v. City of Paterson*, No. 9248-68 PW (N.J. Super., Dec. 17, 1968).

9. N.Y. CIV. RIGHTS LAW § 40-e (Supp. 1970) (emphasis added).

Plaintiffs felt that simply the fact of being a woman did not constitute "just cause" to refuse to serve. The judge thought otherwise:

[I]t is eminently clear that on neither occasion did the defendant refuse to receive or entertain the plaintiff but simply conditioned their reception and entertainment of her by requiring that she be escorted to the bar or be seated at a table removed therefrom.<sup>10</sup>

This is in accord with an earlier case which arose in the state of Washington, *Randles v. Washington State Liquor Control Board*,<sup>11</sup> where service was refused to women unless they were seated at a table. As a result of these and similar decisions, women continued to be excluded from restaurants where they had appointments with male colleagues, barred from certain airline flights<sup>12</sup> and refused service "unless accompanied by a male." Therefore, finding protection under neither federal nor state civil rights law, a different approach had to be attempted. This attack was to be under the equal protection clause of the fourteenth amendment.

#### EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT

There are two threads that weave their way through the fabric of every public accommodations suit brought under the fourteenth amendment. One deals with state action; the other concerns the concept of classification of persons.

##### *State Action*

The first desideratum is state action. This principle was best expressed in *Shelley v. Kraemer*<sup>13</sup> which held that discrimination by private persons is not barred by the fourteenth amendment unless accompanied by state action.<sup>14</sup> This doctrine was further amplified in *Burton v. Wilmington Parking Authority*<sup>15</sup> where the plaintiff was denied service in a coffee shop solely because of his color. The Court found for the plaintiff because the coffee shop was part of the State Authority's Public Parking Garage. The Court ruled that although the state had not expressly authorized or commanded the discriminatory conduct, it had

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10. *DeCrow v. Hotel Syracuse Corp.*, 59 Misc. 2d 383, 386, 298 N.Y.S.2d 859, 862-63 (Sup. Ct. 1969).

11. 33 Wash. 2d 688, 206 P.2d 1209 (1949).

12. United Airlines had an "executive flight" which translates to mean "men only."

13. 334 U.S. 1 (1948).

14. See also *Civil Rights Cases*, 109 U.S. 3 (1883); *Williams v. Hot Shoppes, Inc.*, 293 F.2d 835 (D.C. Cir. 1961); *Powell v. Utz*, 87 F. Supp. 811 (D. Wash. 1949).

15. 365 U.S. 715 (1961).

become sufficiently involved and that its inaction was enough to establish state action.

In *Williams v. Howard Johnson's Restaurant*,<sup>16</sup> the Fourth Circuit upheld a restaurant's refusal to serve the plaintiff because of his race. The court stated that the state's licensing statute "does not authorize state officials to control the management of the business or to dictate what persons shall be served."<sup>17</sup> The involvement was not sufficient to justify a finding of state action and thus there was no violation of the fourteenth amendment.

Turning to the case at hand, *Seidenberg v. McSorleys' Old Ale House, Inc.*,<sup>18</sup> such involvement was uncovered. Plaintiffs brought an action to quell the sex discrimination evident in McSorleys' Ale House. McSorleys' moved to dismiss for failure to state a cause of action. In an initial ruling against the defendant<sup>19</sup> Judge Tenny stated:

To adhere to practices supported by ancient chivalristic concepts, when there may no longer exist a need or basis therefor, may only serve to isolate women from the realities of everyday life, and to perpetuate, as a matter of law, economic and sexual exploitation. While members of each sex may at times relish the opportunity to withdraw to the exclusive company of their own gender, if it be ultimately found that the State has become significantly involved in a policy which mandates such seclusion then considerable question is presented as to whether, for the purposes of the Fourteenth Amendment, this discrimination is founded upon a basis in reason.<sup>20</sup>

Plaintiffs then moved for judgment as, oddly enough considering the judge's decision, did the defendants. Plaintiffs argued that defendant's ale house could not discriminate because it was licensed by the state and, that, therefore, this was not a private discrimination but one backed by state action. On May 26, 1970, in a scholarly opinion, Judge Mansfield, District Judge of the Southern District of New York, granted plaintiffs' motion.<sup>21</sup> The court found state action within the licensing procedure.

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16. 268 F.2d 845 (4th Cir. 1959).

17. *Id.* at 848.

18. 317 F. Supp. 593 (S.D.N.Y. 1970).

19. *Seidenberg v. McSorleys' Old Ale House, Inc.*, 308 F. Supp. 1253 (S.D.N.Y. 1969).

20. *Id.* at 1260-61.

21. *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593 (S.D.N.Y. 1970).

[W]ithout the state license to serve beer, defendant here could never have discriminated in the sale of beer . . . . Furthermore, the state has continued annually to renew defendant's license over the years despite its open discrimination against women, without making any effort in the exercise of the broad authority granted it, to remedy the discrimination or revoke the license which defendant must have in order to practice it. These circumstances convince us that the state's participation here is significant, as distinguished from situations where the licensor-licensee relationship is not accompanied by any extensive state regulation and the licensee is not a commercial establishment or has not offered its facilities or services to the public generally.<sup>22</sup>

In a similar decision, a three-judge court in Pennsylvania held that the discriminatory admission policies of a private liquor-serving club violated the fourteenth amendment because of the extensive state regulation of those holding state licenses to serve liquor.<sup>23</sup>

We believe the decisive factor is the uniqueness and all-pervasiveness of the regulation by the Commonwealth of Pennsylvania of the dispensing of liquor under licenses granted by the state.<sup>24</sup>

### *Sex as a Classification*

The second desideratum is the validity of sex as a classification. Only arbitrary or unreasonable classifications are forbidden by the fourteenth amendment.<sup>25</sup> The answer to this query therefore depends on whether sexual discrimination as is supported by *McSorleys'* is without foundation in reason. As stated by Judge Mansfield: "[D]iscrimination based on sex will be tolerated under the Equal Protection Clause only if it bears a rational relation to a permissible purpose of the classification."<sup>26</sup> Unfortunately for the plaintiffs, the Supreme Court has consistently upheld classification on the basis of sex.<sup>27</sup> Faced with such authority, plaintiffs argued that barring women from public places which the state has licensed to sell alcoholic beverages is an unreasonable and arbitrary classification.

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22. *Id.* at 598-99.

23. *Irviss v. Scott*, 318 F. Supp. 1246 (M.D. Pa. 1970).

24. *Id.* at 1248.

25. See Eastwood, *The Double Standard of Justice: Women's Rights Under the Constitution*, 5 VAL. U.L. REV. 281 (1971).

26. 317 F. Supp. at 605.

27. *Muller v. Oregon*, 208 U.S. 412 (1908). See Eastwood, *supra* note 25.

*Eskridge v. Division of Alcoholic Beverage Control*<sup>28</sup> was an early case where a woman was refused service at a bar. A tavern owner's license was suspended for serving women at a U-shaped counter. The court found the counter was, in fact, a bar, and that the tavern owner had violated a municipal ordinance by serving alcohol to a woman seated at the bar. In its opinion, the court stated :

Ordinances which forbid the serving of liquor to women except when seated at tables do not violate any constitutional right of either the licensees or the women, and are well within the regulatory power of the State.<sup>29</sup>

The *Eskridge* decision has been largely overruled by *Gallagher v. City of Bayonne*.<sup>30</sup> In upholding the right of a woman to obtain service, the court stated that it cannot accept

as a general assumption that mere sexual difference is a viable classification under equal protection concepts . . . [W]e are dealing with the application of laws to humanity generally, and humanity quite clearly is comprised of both masculine and feminine elements. . . . The truly mature male or female . . . is composed of a wholesome synthesis of the elements of personality which perhaps we have been too prone to oversimplify and relegate to categories labeled male or female.<sup>31</sup>

There is a line of cases which considers the right of a woman to *work* in a tavern, but this goes beyond the problem of the right to be served and is of interest only tangentially. In *Goesaert v. Cleary*,<sup>32</sup> the Supreme Court upheld the constitutionality of a Michigan statute which prohibited women from working as bar maids unless they were wives or daughters of tavern owners. However, in *Wilson v. Hacker*,<sup>33</sup> a woman's right to join a union as a bartender was upheld, the court stating that

[u]nder the present New York statutes, the special penalties or procedures cannot be invoked against discrimination on the ground of sex, but it does not follow that a court may not condemn such discrimination as a violation of fundamental

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28. 30 N.J. Super. 472, 105 A.2d 6 (1954).

29. *Id.* at 476-77, 105 A.2d at 9.

30. 102 N.J. Super. 77, 245 A.2d 373 (1968), *aff'd*, 106 N.J. Super. 901, 256 A.2d 61, *aff'd*, 55 N.J. 159, 259 A.2d 912 (1969).

31. *Id.* at 82, 245 A.2d at 376.

32. 335 U.S. 464 (1968).

33. 200 Misc. 124, 101 N.Y.S.2d 461 (Sup. Ct. 1950).

principles and judge the legitimacy of union activities in the light of such principle.<sup>34</sup>

Since Judge Mansfield in *McSorleys'* treated the issue of sexual classification as discrimination without foundation in reason,<sup>35</sup> the court limited the impact of the decision. Thus, *McSorleys'* is directly applicable only to situations where women are denied the right to enter a public accommodation under sufficient control of the state. The case would, however, appear to have persuasive value in any factual situation where the state attempts to regulate the relationship between women and alcohol. Judge Mansfield found no rational basis for excluding women from *McSorleys'*;<sup>36</sup> he concluded that the exclusion violated the equal protection clause of the fourteenth amendment.

Without suggesting that chivalry is dead, we no longer hold to Shakespeare's immortal phrase "Frailty, thy name is woman." Outdated images of bars as dens of coarseness and iniquity and of women as peculiarly delicate and impressionable creatures in need of protection from the rough and tumble of unvarnished humanity will no longer justify sexual separatism. At least to this extent Woman's "emancipation" is recognized.<sup>37</sup>

#### CONCLUSION

Philosophically, the courts have changed slowly in the approximately hundred years since *Bradwell v. State*.<sup>38</sup> There, Justice Bradley, in a concurring opinion, stated his belief that

[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

The law of the Creator may have been changed by secular law, but the views of most people concerning women have not. The *New York Times*, in reporting the *McSorleys'* story, said, "There was, perhaps a trace of

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34. *Id.* at 135, 101 N.Y.S.2d at 473. See also *McCrimmon v. Daley*, 418 F.2d 366 (7th Cir. 1969).

35. 317 F. Supp. at 603.

36. *Id.* at 605-06.

37. *Id.* at 606.

38. 83 U.S. (16 Wall.) 130 (1872).

39. *Id.* at 141-42.



wistfulness in the ruling [in that] the sawdust-floored haven was just another 'public place' that must admit any customer who comes in, even a woman."<sup>40</sup>

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40. N.Y. Times, June 26, 1970, at 1, col. 7 (emphasis added).