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# Gendered Space Women and the Law: Goals for the 1990s

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# GENDERED SPACE\*

*Richard H. Chused\*\**

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## I. INTRODUCTION

The legal concept of discrimination, the logical repository for rules designed to provide political, economic, and cultural power to long-exploited groups, has failed its mission. Thirty-five years after *Brown v. Board of Education*,<sup>1</sup> we have returned to a regime in which spatial separation of races and genders is viewed as a natural cultural phenomenon and comparable worth studies are understood as revealing mere market preferences.

This essay's return visit to the forgotten realm of segregation begins with three pieces of text about spaces. They are taken from newspaper accounts of middle-class, conservative white women dem-

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1. 347 U.S. 483 (1954).

onstrating for temperance in the streets and bars of Hillsboro, a small town in southern Ohio, during the winter of 1873.<sup>2</sup> The texts, richly woven with gendered imagery, provide fertile ground for analyzing the ways in which temperance women used spaces to obtain power. Consider first the relationships between politics and spaces, the use of occupancy as a method of discourse about power and politics. Second, reflect on the reactions of those who watched or opposed the women who occupied, and thereby defined the meaning of, space. Finally, weigh the consequences of permitting those in power to retain their "separate" spaces. After these ruminations, it will be easier to understand the contemporary relationships among gendered spaces, the use of social science data in legal discourse, and the structure of definitions of discrimination. The saga of the temperance crusaders will remind us that gendered spaces often signal the existence of exploitative power relationships.

## II. SOME HISTORICAL TEXTS ABOUT GENDERED SPACE

The events in Hillsboro occurred during the final ground swell of public fervor accompanying the creation of the Women's Christian Temperance Union (WCTU).<sup>3</sup> The first two excerpts provide some feeling for the historical moment. They describe how women divided a street into gendered spaces:

Saturday morning a bitter cold wind made it very uncomfortable on the streets, and many doubted [the women's] ability not only to carry out the determination, but . . . to hold even a short prayer meeting. But promptly at 10 o'clock this determined army were seen coming up from the Presbyterian Church, stopping first in front of Uprig's saloon, where they held their usual prayer meeting; then after visiting the saloons of Messrs. Ward and Bales, they assembled in front of Mr. Dunn's drug store, and as the first song, with the enthusiastic chorus, "I am glad I'm in this army." rose on the air, it carried conviction to the large crowd that had gathered around that they were terribly in earnest and would endure all things until victory crowned their every effort. As prayer after prayer and song after song arose, men won-

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2. For a concise history of the Women's War on Whiskey, see Bordin, *A Baptism of Power and Liberty: The Women's Crusade of 1873-1874*, 87 OHIO HIST. 393 (1978).

3. The crusades in southern Ohio had antecedents. Women began demolishing bars and demonstrating against the liquor trade in the 1850s. See J. DANNENBAUM, *DRINK AND DISORDER: TEMPERANCE REFORM IN CINCINNATI FROM THE WASHINGTON REVIVAL TO THE WCTU 180-205* (1984).

dered at their persistent determination, for the wind blew so bitterly cold that men could scarcely keep warm but by constant exercise, yet those brave-hearted women kneeling on that freezing pavement utterly regardless of the cold, showed the invincible spirit that was within them, and with one accord for almost six hours kept up two prayer meetings, one at the front and the other at the back door, showing a tenacity of purpose that excited enthusiasm in every beholder.<sup>4</sup>

A few days later, the regular gathering of women in front of Mr. Dunn's drugstore,<sup>5</sup> a dispensary of alcohol and opiates, as well as more conventional remedies, was described as follows:

A fresh detail of women has just arrived, and after a lengthy prayer, are dealing out old "Coronation" in heart-moving tones. The townspeople go and come their accustomed ways with little notice, but it is curiously comical to notice strangers and country people. They begin to step gingerly about a square off; as they get nearer steadily soften their steps, and finally take off their hats and edge their way slowly around the open-air prayer-meeting as one would pass a funeral.<sup>6</sup>

The final text conveys some sense of the reactions of men who found their previously "separate"<sup>7</sup> space invaded by temperance women:

4. *Woman's Whiskey War*, Cincinnati Commercial, Jan. 29, 1874.

5. The term "drugstore" may seem strange in this context. But in the nineteenth century, people often used alcohol and opiates medicinally. Drugstores sometimes took on the appearance of saloons as people arrived for their daily "doses."

6. *The Hillsboro Battle*, Cincinnati Commercial, Feb. 2, 1874 [hereinafter *Hillsboro*].

7. While many might instinctively use the term "private" here, "separate" is more accurate. I do not view debates about space in the vernacular of "public" and "private." The most "private" spaces often are defined by or for important "public" purposes. This is particularly true of gendered spaces. A nice example may be found in the fanciful but telling discussion of "loopification," in Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982). Literature concerning nineteenth-century women clearly shows that the separate, home-based sphere of middle-class, married white women served quite important public purposes. See, e.g., S. LEBSOCK, *THE FREE WOMEN OF PETERSBURG: STATUS AND CULTURE IN A SOUTHERN TOWN, 1784-1860*, at 195-236 (1984); M. RYAN, *CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK 1790-1865*, at 186-229 (1981). While it is fashionable in some modern circles to conflate ideas of privacy and family, these concepts historically have served very different ends. Similarly, much history written about men made it easy to conflate "public" with "political" even though the *separate* spaces of white men permitted the "private" exercise of "public" power over others.

A young "blood" gave me, this morning, a most amusing account of the scene when the ladies entered the first saloon. He and half a dozen others, who had been out of town, and did not know what was going on, had ranged themselves in the familiar semi-circle before the bar, had their drinks ready and cigars prepared for the match, when the rustle of women's wear attracted their attention, and looking up they saw what they thought a crowd of a thousand ladies entering. One youth saw among them his mother and sister; another had two cousins in the invading host, and a still more unfortunate recognized his intended mother-in-law! Had the invisible prince of the pantomime touched them with his magic wand, converting all to statues, the tableau could not have been more impressive. For one full minute they stood as if turned to stone; then a slight motion was evident, and lager beer and brandy-smash descended slowly to the counter, while cigars dropped unlighted from nerveless fingers. Happily, at this juncture the ladies struck up —

"O, do not be discouraged.

For Jesus is your friend."

It made a diversion, and the party escaped to the street, "scared out of a year's growth."<sup>8</sup>

### III. GENDERED SPACES AND POLITICAL DISCOURSE

These texts demonstrate the obvious importance of space to economic and political discourse. The point is not that people must occupy space in order to converse; that is trivial. Rather, these texts illustrate that the nature of the space and the groups of people who habitually occupy it will influence political discourse. Alter the groups of people and the discourse changes. Restrict the ability of a homogeneous group to exert pressure on their peers in an isolated place, and their discourse changes.<sup>9</sup> The history behind these particular texts brings the point sharply into focus.<sup>10</sup>

Agitation by women<sup>11</sup> protesting alcohol consumption was a familiar phenomenon of the nineteenth century. Periodically, temperance

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8. *Hillsboro*, *supra* note 6.

9. Women hardly have monopolized the recognition of such phenomena. The sit-ins of the civil rights era as well as Ghandi's nonviolent revolution in India suggest that strong cross-cultural links exist between political power and monopolization of important economic and political spaces.

10. For general background on the temperance crusades, see R. BORDIN, *FRANCES WIL-LARD: A BIOGRAPHY* (1986); J. DANNENBAUM, *supra* note 3; Bordin, *supra* note 2.

11. Women, of course, were not the only temperance demonstrators during the nineteenth century. Many men also were involved. For example, Dioctetian Lewis, a male homeopathic physician on the Lyceum circuit, suggested during a lecture in Hillsboro that women begin demonstrations to shut down saloons. The women in his audience took the suggestion seriously.

rhetoric would rise above its normal background level to a fever pitch. The first dram shop acts in the 1850s resulted from one such spate of activity.<sup>12</sup> After a respite during the Civil War, many women again voiced their anxieties about intemperance. Part of the frustration arose because men returning from the war took over some of the organized temperance activities run by women during the hostilities.<sup>13</sup> By the early 1870s countless women believed that dram shop acts failed to discourage drinking and that state authorities refused to enforce existing restrictions on the manufacture, distribution, and sale of alcohol. Such failures led more adventurous women to argue that their entry into the political fray was a necessity.<sup>14</sup>

Finally, expectations of some middle-class and upper-class women that their men would be moral, upright fathers rose during the formative years of the Progressive era.<sup>15</sup> Such expectations collided with increased consumption of beer by young middle-class men in recently opened saloons.<sup>16</sup> Large-scale immigration also caused widespread concern among the native born about the survival of traditional American culture.<sup>17</sup> It is, therefore, not surprising that public discourse about the relationships among drinking, prostitution, and family violence

Bordin, *supra* note 2, at 394. The Women's War on Whiskey in Hillsboro was important because of the gendered political spaces it generated. Diocletian Lewis, like many other men in the temperance movement, knew that demonstrating women would send a different and perhaps more powerful message than men could deliver.

12. Maine adopted the first Act in 1851. An Act for the suppression of drinking houses and tipping shops, 1851 Me. Acts, ch. 211. Section 2 of the Act outlawed the sale of alcohol except for "medicinal and mechanical purposes and no other" by drugstores licensed by the selectmen of local towns. *Id.*

13. With a perversity not exceeded by any other historical phenomenon, wartime has been a culturally "good" time for women. With men off getting killed, spaces they typically occupied were left vacant. Women have moved into some of these spaces during every war. The war most widely discussed in this way is World War II — Rosy the Riveter and all that. A related phenomenon occurred during the Civil War when women took over some temperance organizations. See J. DANNENBAUM, *supra* note 3, at 201; Bordin, *supra* note 2, at 399.

14. See J. DANNENBAUM, *supra* note 3, at 227-29.

15. See Bordin, *supra* note 2, at 397-99.

16. While the rate of alcohol consumption per person stayed fairly constant during the nineteenth century, significant changes occurred in the types of alcohol people consumed. Hard liquor and wine sales declined while beer sales increased dramatically. See H. BLAIR, *THE TEMPERANCE MOVEMENT: OR, THE CONFLICT BETWEEN MAN AND ALCOHOL* 198 (1888); J. DANNENBAUM, *supra* note 3, at 195-96; U.S. DEP'T OF HEALTH, EDUC. & WELFARE, *ALCOHOL AND HEALTH* 15 (1971). Two characteristics of beer may have changed people's drinking habits. First, because beer was more difficult to store at home, people usually would drink it elsewhere. Unless people were wealthy enough to buy and store kegs, people had to drink beer in saloons. Second, the alcoholic content of beer is lower than other alcoholic drinks. Thus, visits to saloons required longer drinking periods to reach higher levels of intoxication. Men's long absences from their homes may have caused some women literally to drag them back.

17. See J. DANNENBAUM, *supra* note 3, at 83, 157-66.

spread. While radical women debated the wisdom of divorce reform and suffrage,<sup>18</sup> conservative women, infused with religious passion and committed to traditional family life, took to the streets in protest.

In light of the mythology created by some legal and historical writing that nineteenth century middle-class women occupied a largely separate, quiescent, domestic sphere, the movement of praying women into the streets and bars of Hillsboro may seem remarkable. For men of that time, watching them march down the street and enter saloons must have been quite an experience. Drinking places were men's territories, supposedly full of raucous behavior, the stench of cigar smoke and beer, spittoons, prostitutes, and political discourse. Society expected that self-respecting white women would not be caught dead in such places. But there they were, not as individual consumers, but as staunch defenders of the family. Their prayerful presence was enough to alter the contours of political discourse. Men no longer could assume that their drunken gatherings would go unnoticed.

Though men watching such demonstrations between 1850 and 1875 reacted in different ways, they were forced to recast their views towards women, drinking, and prayer. In the first text, the journalist reporting sympathetically on the events noted that the temperance women's occupancy of street space on a bitterly cold day evoked "wonder[ ]" at their "brave [ ] heart[s]." Indeed, they were brave to endure the cold, to speak publicly, and most importantly, to act as a group. While an unaccompanied woman entering a saloon risked censure as a prostitute,<sup>19</sup> groups of women in full Sunday regalia changed the atmosphere of the space. Those who had been watching the demonstra-

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18. See, e.g., Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth Century America* (Mar. 1988) (paper delivered at the Conference on History, Women, and Law in the United States, at John Hopkins University) (on file with the the *Florida Law Review*); Conroy, *Feminists and Divorce Reform in the Nineteenth Century* (1988) (student paper on file with the *Florida Law Review*).

19. Many settings existed in which this stereotype worked its will. Presumptions of impropriety usually associated with prostitution arose in circumstances in which women stepped outside of their traditional roles. A particularly interesting example is the image of the mid-nineteenth century New York City "factory girl," who was viewed as risqué because she mixed with men and sought amusements without parental supervision. See C. STANCELL, *CITY OF WOMEN: SEX AND CLASS IN NEW YORK, 1789-1860*, at 125-29, 171-92 (1986). This ideology still governs portions of our world. All we need remember is the gang rape of a young woman before a cheering crowd on a pool table in a New Bedford bar. After some of the men were convicted, thousands marched in protest, arguing that a flirtatious woman gets what she deserves when she is raped. For coverage of this aspect of the case, see *The Shame in New Bedford and Dallas: It's Not the Victim Who Should Be Tried for Rape*, N.Y. Times, Mar. 28, 1984, § A, at 26, col. 1; *Thousands March to Protest Bar Rape Convictions*, N.Y. Times, Mar. 24, 1984, § 1, at 7, col. 1.

tions for many days came and went "their accustomed ways with little notice." They apparently had become persuaded by, accustomed to, or contemptuous of the spatial redefinition. In contrast, those new to the scene were "curiously comical," stepping "gingerly," and doffing their hats as if "passing a funeral." The newcomers, their feelings about the women unresolved, exhibited behavior traditionally reserved for those in the presence of praying women.

These reactions were all tea and cupcakes compared to what went on inside the saloon. Here, the perhaps apocryphal mother-in-law sent her future son-in-law scurrying out the back door with his tail between his legs. Sons and cousins gave up their lager after being "turned to stone" and dropped their cigars from suddenly "nerveless fingers." These were the reactions of men both scared and surprised, bewildered and embarrassed, perhaps even humiliated and ashamed. The very strength of their reactions demonstrates the importance of the women's decision to invade the inner sanctum of the saloon.

The ironies of this scene are unsurpassed. Over the course of the eighteenth and nineteenth centuries, some spaces typically occupied by middle-class men and women became increasingly gendered. The list of traditionally gendered spaces extant before the industrial revolution — political arenas,<sup>20</sup> pulpits,<sup>21</sup> and educational institutions,<sup>22</sup> among others — grew to include homes and workplaces.<sup>23</sup> Indeed, the

20. This includes the judicial system as well.

21. Though the pulpit largely was preserved for men, women were more active churchgoers and revival participants than men during the nineteenth century. Temperance concerns may have been part of the reason. For a more detailed discussion, see A. DOUGLAS, *THE FEMINIZATION OF AMERICAN CULTURE* 17-139 (1977).

22. Before 1800 American women largely were illiterate. While most would not consider reading as spatial discourse, any activity requiring extensive learning was likely to be male space. Though women became as literate as men during the first half of the nineteenth century, many of the schools founded for their use were sexually segregated. See L. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT & IDEOLOGY IN REVOLUTIONARY AMERICA* 192-203 (1980).

23. One of the best accounts of the transition from the "corporate family" of the eighteenth century to the "republican" family of the early nineteenth century may be found in the first two chapters of Ryan's *CRADLE OF THE MIDDLE CLASS*. See M. RYAN, *supra* note 7. In the corporate family setting, economic, religious, familial, and governmental functions were closely linked. Home-based income production merged with community agreement on basic religious norms and government organization. *Id.* at 22-26. As the nineteenth century unfolded, workplaces began splitting off from homes, women became domestically isolated with their children, religious revival movements arrived from outside the household to serve female-dominated meetings, and the family became a resource upon which government relied for education of its citizens rather than a structural unit of political organization. *Id.* at 186-218.

There were also a few important instances in which spaces previously occupied almost entirely by women were invaded by men. The most notable may have been the birthing chamber where



very women waging the War on Whiskey exemplified the gendered ideology of separate spheres. They accepted their roles as mothers, caretakers, volunteer workers,<sup>24</sup> and nurturers of future citizens. Their very separation from many male spaces, primarily enforced to serve the commercial obligations of middle-class men,<sup>25</sup> gave their invasion of the saloon remarkable symbolic force. Though the women waging the War on Whiskey sought to affirm the value of traditional home life by reducing spousal abuse and forcing their men to come directly home after work, their actions actually tore at the foundations of separate sphere ideology.

The women realized the importance of their actions:

The first-hand accounts of the Crusade cannot be read without feeling the excitement experienced by these women and their growing conviction that anything was now possible. The women themselves saw the Crusade as a watershed, an experience that changed their self-conception. They articulated these feelings at Women's Christian Temperance Union [(WCTU)] conventions and whenever and wherever they gathered for the rest of their lives. . . .

The Crusade had an emotional impact upon women participants equivalent to a conversion experience. It moved them toward feminist principles, even if they did not recognize them as such.<sup>26</sup>

The clearest indication of the transforming power of the War on Whiskey was the WCTU, a temperance group organized and run by

many male doctors replaced midwives during the nineteenth and early twentieth centuries. *See* R. WERTZ & D. WERTZ, *LYING IN: A HISTORY OF CHILDBIRTH IN AMERICA* 46-47 (1977). Indeed, there is something quite remarkable about the persistence of attempts by the medical profession and the state to control reproduction despite the entrance of women into important roles in many areas of public life. *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989) (upholding state statute requiring viability testing by physicians if fetus is 20 or more weeks gestational age), is only the latest chapter in a long history of regulatory controls on reproduction. For an example, see the discussion of *Michael M. v. Sonoma County Court*, 450 U.S. 464 (1981), *infra* notes 76-99 and accompanying text.

24. The important role played by women in social service organizations in the nineteenth century re-emphasizes that historical roles undertaken by women hardly were "private." *See* Ryan, *supra* note 7, at 210-18. Dannenbaum confirmed that many of the demonstrating women had impeccable, traditional credentials. *See* J. DANNENBAUM, *supra* note 3, at 180-205.

25. Many good historical works describe the development of the home and world dichotomy in the early nineteenth century. Nancy Cott's *BONDS OF WOMANHOOD: WOMAN'S SPHERE IN NEW ENGLAND, 1780-1835*, at 63-74 (1977) has become a classic among the earlier histories. For a more recent discussion, see J. DEMOS, *PAST, PRESENT AND PERSONAL: THE FAMILY AND THE LIFE COURSE IN AMERICAN HISTORY* 50-52 (1986).

26. Bordin, *supra* note 2, at 402.

women. The organization created its own political spaces for women and developed an ideology that transformed the domestic sphere of the Hillsboro women into an overtly political weapon for temperance and suffrage.<sup>27</sup> The Union's success served as a dramatic contrast to the failure of men to accept offers of help twenty years earlier from prominent women wishing to participate actively in organizing the temperance movement.<sup>28</sup> During the late 1880s and early 1890s, the WCTU was by far the largest women's suffrage institution in the country.<sup>29</sup>

Frances Willard, the long-time head of the organization, argued that the only way for women to protect their own spaces from rapacious men was to transform the content of men's spaces by electing temperance politicians into office. She made her argument in an organization tract with the wonderfully strategic title of *The Home Protection Manual*:

Take the instinct of self-promotion (and there is none more deeply seated). What will be its action in woman when the question comes up of licensing the sale of a stimulant which nerves with dangerous strength the arm already so much stronger than her own, and which at the same time so crazes the brain God meant to guide that manly arm that it strikes down the wife a man loves and the little children for whom when sober he would die? Dependent for the support of herself and little ones and for the maintenance of her home, upon the strength which alcohol masters and the skill it renders futile, will my wife and mother cast her vote to open or to close the rumshop door over against the home.<sup>30</sup>

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27. The transformation of the WCTU into a suffrage organization was not without difficulty. Many women who strongly resisted the move argued that the political arena was out of bounds for women attempting to preserve the domestic sphere in God's name. See J. DANNENBAUM, *supra* note 3, at 227-30. The same problem appeared in the Hillsboro crusade. When taken to court by Dunn, some argued that moving the dispute into a political arena like the courts would curtail the demonstrations. See *Hillsboro*, *supra* note 6. In reality the women of the movement began pursuing overtly political directions by submitting a resolution to the Ohio Constitutional Convention seeking adoption of a prohibition measure. See *Woman's Whiskey War: Dr. Dio Lewis in Town*, Cincinnati Commercial, Feb. 10, 1874.

28. J. DANNENBAUM, *supra* note 3, at 180-204; Bordin, *supra* note 2, at 400. Many prominent women suffragists got their start in the early temperance movements. For an example, see the story of Susan B. Anthony briefly described in Bordin, *supra* note 2, at 398.

29. See E. FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES 186-89* (1975).

30. F. WILLARD, *HOME PROTECTION MANUAL: CONTAINING AN ARGUMENT FOR THE TEMPERANCE BALLOT FOR WOMEN* (1879).

The antitemperance men of Hillsboro recognized the potential power of the saloon invasion. At times men used startling public rhetoric to castigate the crusaders, denouncing them with provocative humor, charges of unchristian behavior, images of prostitution, and accusations of radicalism.<sup>31</sup> Thus, after bowing to the obvious high standing of the Hillsboro women by noting that “for intelligence and refinement, and all the female graces and Christian virtues [the Crusaders] are not excelled in this or any other State,”<sup>32</sup> Judge William H. Safford could not believe that these temperance women controlled their own political actions:

[I]n such a refined and elegant society as there is at Hillsboro, which is unsurpassed in the State, whose old settlers were persons of refinement and education, the only reason by which the late conduct of the ladies can be accounted for is that they have had bad advisors; and if any success does result from it, it will be temporary. . . .

The ladies erected the booth right in the teeth of that notice of Dunn [to halt the demonstrations], and I am not blaming them for it, but unfortunately they had raised a whirlwind and could not direct it, and I think they never

31. I do not want to leave the impression that the crusade was wholly a wonderful affair. At times, it was an irrational, coercive, mass movement. It, therefore, was not surprising that opponents of the crusade used the individual-worth rhetoric of John Stuart Mill, then in vogue in many segments of the political spectrum. For example, some, including Judge Safford, argued that the crusade was removing an individual's ability to make his or her own choice about how to live and work. See *Woman's Whiskey War: Judge Safford Interviewed*, Cincinnati Commercial, Feb. 16, 1874 [hereinafter *Judge Safford*]. My point in the text is that, in addition to the expected forms of individualistic rhetoric, the opponents also used themes that insulted and demeaned the temperance women. Crusade opponents used such rhetoric not only to debate them on the same podium, but to move the women back to their homes.

A wide variety of such imagery appears in reports of the trial of a lawsuit brought by Dunn's drugstore which sought to enjoin the women from demonstrating in front of his store and interfering with his business. For example, the movement was frequently analogized to the Paris Commune. Each day during the *Dunn* trial, women sat in the courtroom, both as defendants and observers. Their presence also was unusual for the conservative women of Hillsboro. The courthouse largely was a male preserve. The various presentations made by the lawyers for the drugstore thus had a very precise audience. For various reports of this trial, see Cincinnati Commercial, Feb. 17-21, 1874.

32. Judge Safford so remarked to a reporter for the Cincinnati Commercial in a story published on February 16, 1874. See *Judge Safford*, *supra* note 31. Safford heard and granted the original *ex parte* motion for an injunction against the demonstrators. A short time later, he resigned from the bench to represent Dunn in the litigation. Dunn eventually lost. For the final opinion, see *Injunction Case at Hillsboro*, Cincinnati Commercial, Feb. 21, 1874 [hereinafter *Injunction Case*].

intended to transgress laws, but it was brought about by meddlesome men, and for their purposes, and they prostituted the holy services of the church to the accomplishment of their purposes. There is nothing in women that is aggressive; they, more than all others, feel the effects of intemperance. . . . [L]adies, let me implore you to desist, although you look upon me as everything that is bad.<sup>33</sup>

The War on Whiskey startled Judge Safford. While the crusaders had the power to desist “voluntarily” and return to domesticity, only “meddlesome men” could have caused the gentle women of Hillsboro to “prostitute the holy services of the church” by disturbing Dunn’s drugstore. For Safford, only men could use the streets and saloons of Hillsboro for political discourse. For Safford, social expectations about place were so firm that women could not breach them. For Safford, the War on Whiskey was so counterintuitive that he could only deny its power and implore the women to go home.

In sum, temperance intrusions into the male saloons in Hillsboro had at least three important characteristics. First, they expanded the range of places where women could engage in discourse with both genders about political events. Second, these intrusions forced men to react and to pay attention to women’s concerns. Whether men’s reactions were ones of contempt, ridicule, avoidance, sympathy, or support, women could see and act upon those reactions. Finally, one small bastion of male isolation was invaded. Tippling houses generally remained male spaces once the fervor of the War on Whiskey waned, but the crusaders established their ability to alter the contours of such environments. Though a multitude of spaces remained in which groups of men could talk among themselves, women demonstrated that they could impose burdens upon customary recourse to such spots.

#### IV. GENDERED SPACES: DEFINITIONS OF DISCRIMINATION AND SOCIAL SCIENCE

##### A. *Introduction: The Temperance Story and Discrimination Theory*

Gendered spaces, such as saloons, often confirm social expectations more than legal constraints.<sup>34</sup> The temperance crusaders of southern

33. *Injunction Case*, *supra* note 32. This statement was part of Judge Safford’s closing argument in the Hillsboro injunction cases.

34. Certainly, some gendered “public” spaces were defined legally. Other than the obvious ones like legislatures and courts, one of the most interesting was public conveyances. So-called “Jane Crow” laws, later superseded by “Jim Crow” laws in the late nineteenth century, compelled the creation of first-class “ladies cars,” in which women could ride either unaccompanied or with

Ohio succeeded in altering, albeit temporarily,<sup>35</sup> the cultural nature of male territory, not the content of any discriminatory legal norm. Indeed, a number of male turfs culturally important to life in the late nineteenth and early twentieth centuries are now extinct or under challenge. What then possibly could be important for us about the temperance story? What does it tell us about present-day relationships between cultural concepts of gendered spaces and legal notions of discrimination?

Nineteenth century gendered spaces pose some intriguing challenges for modern theorists of gender and law. Both history and modern life suggest that attempts to use discrimination theory to challenge entrenched social customs often fail. This difficulty in the use of discrimination laws is related directly to generally held perceptions that intentionally created gendered spaces are significantly different from culturally created gendered spaces.<sup>36</sup> While discrimination law is built upon or is derived from the assumption that remedies should be extended only to those harmed by intentional misbehavior of identifiable parties,<sup>37</sup> much of gendered space arises out of social patterns developed over centuries of time by the actions of countless people. Even various *prima facie* discrimination theories, such as the disparate impact rules recently decimated by the Supreme Court,<sup>38</sup> are based

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their "gentlemen" and servants. *See, e.g.*, *The Sue*, 22 F. 843 (C.C.D. Md. 1885); *Gray v. Cincinnati S. R.R.*, 11 F. 683 (C.C.S.D. Ohio 1882); *Bass v. Chicago & Northwestern Ry.*, 36 Wisc. 450 (1874).

35. Though the crusade lasted for months, most reports suggest that within a couple of years, alcohol distribution and consumption returned to its precrusade levels. *See, e.g.*, Bordin, *supra* note 2, at 395-96.

36. I am not suggesting that this difference is real, but only that many, perhaps most, people believe these are different things. Kimberle Crenshaw made a related point in *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1376-81 (1988). She discussed the differences between "broad" and "narrow" concepts of race discrimination. Crenshaw argued that the narrow view, relying superficially on intent theory, refuses to acknowledge that the majority culture has the capacity to act upon its "otherness" perception of black people by describing their predicament as a cultural problem rather than a result of racism. *Id.* at 1379.

37. The United States Supreme Court's holding in *Washington v. Davis*, 426 U.S. 229 (1976), made it clear that success in equal protection challenges depended upon a showing of discriminatory intent. *Id.* at 239-41. Though statutory analysis often has been described as largely dependent upon a showing of negative effects upon members of a protected class, such effects analysis arose from efforts to ameliorate the difficulties of proving intent.

38. *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989) (establishing that *prima facie* case of disparate impact in violation of Title VII requires not merely a showing of racial imbalance in a workforce but a showing that a particular employment practice has created the disparate impact under attack).

upon two presumptions about the relationship between law and intentional behavior. The first presumption is that different treatment of men and women results from willed behavior somewhere in the bureaucracy of a defendant's business rather than from general social customs. The second presumption is that the litigation problem solved by easing a plaintiff's burden of persuasion is related to the difficulty of proving the existence of willful misbehavior, not to the propriety of judicially noticing the existence of culturally gendered spaces.<sup>39</sup> It is, therefore, not surprising that a number of recent attempts to break down spaces thought to be culturally gendered have failed.<sup>40</sup> Some comparable worth challenges, for example, do not comfortably fit the common notion in discrimination theory that protections may be extended only to those groups mistreated by the intentional misbehavior of identifiable parties in positions of authority.<sup>41</sup>

Thus, any thought of using present-day discrimination law to challenge the general exclusion of respectable women from nineteenth century saloons has an incongruous feel. Such a challenge might have noted that women were likely to be present in saloons in substantially lower numbers than were men. A woman entering a bar to drink was likely to be labeled a prostitute.<sup>42</sup> This caricature operated with enough force to preclude most women from using such facilities. Though the cultural imperatives creating this outcome were applied to women in arbitrary and coercive ways, the notion that these sorts of propositions about gendered spaces in saloons raised discrimination problems would have seemed contrived to most men and women of the time. "Respectable" women would have said, "I do not 'wish' to go to saloons to drink," rather than, "I can't go to saloons because men won't let me." The outcome would have been passed off as representative of a cultural norm, not a discriminatory practice.

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39. *Id.* at 2124-27.

40. Indeed, in some gendered settings that most readers probably considered clear cases of discrimination under some *prima facie* case theory, companies actually persuaded courts that gendered social customs trumped discrimination law. *See, e.g.,* EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 307 (7th Cir. 1988) (employer's production of evidence indicating that women were not as interested in commission sales positions as were men resulted in failure of EEOC to establish that employer discriminated against women in hiring for the sales positions). For an analysis of *Sears*, see Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 813-21 (1989).

41. It is certainly possible that challenges to some widespread employment practices may take on the appearance of cases involving intentional misbehavior. An employer may, for example, display a clear preference for paying his largely female secretarial staff less than other workers because they are women. But in many, perhaps most, comparable worth challenges, the plaintiffs cannot prove such behavior. For further discussion of this problem, see *infra* notes 109-69 and accompanying text.

42. *See* C. STANSELL, *supra* note 19, at 174-92.

The incongruity is not the result of my placing a twentieth century legal concept next to a nineteenth century fact setting. Discrimination is not a recent concept; it permeated post-Civil War rhetoric. Generally, discrimination law operated in the nineteenth century much as it does today. Before public or private activities are labeled discriminatory, some institution must determine that the setting presents distinctions worthy of concern.<sup>43</sup> Thus in the nineteenth century saloon context, men, at some level, obviously intended to exclude women from drinking places. But society so widely accepted the desirability of that exclusion that it saw nothing malicious or unlawful occurring. Today, a bar owner overtly excluding women would be acting with a gendered intention much like that of his nineteenth century predecessors, but he surely would be subject to legal constraints.<sup>44</sup> The difference lies not in the nature of the intentions supporting the gendered spaces, but in the content of cultural norms setting limits on the interactions of men and women. The War on Whiskey story, when pieced together with present-day restrictions on bar owners, emphasizes that for many people, both then and now, important legal questions dealing with critical differences in the treatment of men and women are thought of not as issues of discrimination but as clashes about socially created gendered spaces.

Indeed, at different historical moments the very notion of spatial separation has served as a foundation of both discriminatory and non-discriminatory conduct.<sup>45</sup> For a time after the decision in *Brown v. Board of Education*,<sup>46</sup> segregation by race or gender was a critical factor in proof of discrimination. But during the last quarter of the nineteenth century, placing groups of people in different locations was viewed as a means of affirming the legitimacy of gendered spaces and power relationships. Jane Crow laws, for example, required public transportation providers to maintain first-class facilities for "ladies." These rules, replaced by Jim Crow statutes after the Reconstruction,

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43. For a discussion of this sort of idea from the point of view of a "perspectivist," see Minow, *Forward: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

44. See, e.g., *Peppin v. Woodside Delicatessen*, 67 Md. App. 39, 506 A.2d 263 (Md. Ct. Spec. App. 1986). The *Peppin* court found unlawful a 50% "ladies night" discount on meals served to women. *Id.* at 41, 506 A.2d at 264. During the administrative phase of the case, the owner altered his practice to a "skirt and gown night" in which any person wearing a skirt or gown would get a price discount. *Id.* at 41-42, 506 A.2d at 264. That practice also was invalidated in *Peppin*. *Id.* at 46, 506 A.2d at 266. For a similar case, see *Seidenberg v. McSorleys' Old Ale House, Inc.*, 308 F. Supp. 1253 (S.D.N.Y. 1969) (complaint filed by women to enjoin owners of a bar from continuing practice of catering only to men).

45. *Plessey v. Ferguson*, 163 U.S. 537 (1896).

46. 347 U.S. 483 (1954).

flourished before and just after the Civil War. The Jane Crow laws were a particularly complicated example of the ways in which spaces may be defined. In the conventions of the era, creation of first-class "ladies cars" required accompanying rules permitting the presence of a lady's entourage of family members and servants, usually black women. Some transit systems also maintained second-class cars, which were set aside for nonsmokers rather than for groups defined by gender, and third class smoking cars. On those systems having only two classes, smokers, men, women, whites, and blacks would ride together.<sup>47</sup>

These structures make it quite clear that the spatial relationships between white men and women could be overridden by concerns about class and race.<sup>48</sup> But regardless of the complexities of the spatial divisions, the Jane Crow statutes demonstrate that cultural notions about gender, race, and spatial separation were related intimately to the contours of discrimination law in the post-Civil War era. One hardly could imagine a clearer example of the contradictions between the then prevailing political ideology of "rights" used by white men on the one hand and the legal definitions of discrimination on the other. Despite the rise in popularity of various strands of economic and cultural individualism during the late nineteenth century, white men routinely presumed that women and blacks were ineligible for participation in much of this ideological discourse.<sup>49</sup> A number of important Supreme Court cases of the last decade illuminate the continued vitality of these ideas.

### B. *The Supreme Court and "Intentionally" Gendered Spaces*

In the spring of 1981, the Supreme Court decided three disputes involving explicitly gendered regulations: *Kirchberg v. Feenstra*,<sup>50</sup> *Michael M. v. Sonoma County Court*,<sup>51</sup> and *Rostker v. Goldberg*.<sup>52</sup>

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47. See *supra* text accompanying note 34.

48. For analysis of the interplay between race and gender, see Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989).

49. Compare *Lochner v. New York*, 198 U.S. 45 (1908) (invalidating New York statute limiting employment hours of male workers in bakeries) with *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding Oregon statute limiting the number of work hours for women employed in laundries) and *Plessey v. Ferguson*, 163 U.S. 537 (1896) (upholding Louisiana statute requiring railroad companies to provide separate accommodations for black and white passengers).

50. 450 U.S. 455 (1981).

51. 450 U.S. 464 (1981).

52. 453 U.S. 57 (1981).



Only the last of these disputes discussed a space — military battle zones — expressly segregated by gender. The other two involved areas in which both men and women routinely appear — the home and the bedroom.<sup>53</sup> Nonetheless, the Court's illogical handling of these two integrated spaces immeasurably aids our understanding of the reasons for the Court's maintenance of gender segregation in the armed forces.

In *Kirchberg* Joan Feenstra filed a criminal complaint against her husband for molesting her daughter. Her husband, Harold, hired attorney Karl Kirchberg to defend him. To guarantee payment of Kirchberg's fee, Harold signed a promissory note for \$3,000 secured by a mortgage on the Feenstra's small house in the Irish Bayou south of New Orleans. A short time later, the dispute was settled. Joan Feenstra dropped her criminal complaint and got a divorce, and Harold Feenstra agreed to leave the jurisdiction. Because Harold had paid less than \$1,000 of his \$3,000 legal fee, Kirchberg sought to foreclose on the Irish Bayou house. Joan Feenstra, with the help of a legal services attorney, resisted the foreclosure action on the theory that the Louisiana Civil Code "head and master" provision giving husbands, but not wives, the right unilaterally to encumber community property violated the equal protection clause.<sup>54</sup>

In the Supreme Court, Justice Marshall used the test announced in prior cases holding express gender classifications unconstitutional unless they fairly and substantially related to an important governmental interest.<sup>55</sup> The Court required "the party seeking to uphold a statute that expressly discriminates on the basis of sex to advance an 'exceedingly persuasive justification' for the challenged classification."<sup>56</sup> Because Kirchberg could not do so, Joan Feenstra prevailed.<sup>57</sup>

Of the three gender cases decided by the Court in the spring of 1981, *Kirchberg* was the most straightforward. Feenstra got the votes of all the Justices, though in a short opinion two concurred in the result.<sup>58</sup> Several factors made the case easy. First, the unfortunate

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53. *Michael M.* actually involved sexual intercourse that occurred outside. *Michael M.*, 450 U.S. at 466-67. However, I use "bedroom" metaphorically here to mean any space in which men and women are intimate.

54. *Kirchberg*, 450 U.S. at 456-58.

55. *See id.* at 459 (citing *Wengler v. Druggist Mut. Ins. Co.*, 446 U.S. 142 (1980); *Craig v. Boren*, 429 U.S. 190 (1976)).

56. *Id.* at 461 (quoting *Personnel Administrator v. Feeney*, 442 U.S. 256, 273 (1979)).

57. *Id.*

58. *See id.* at 463 (Stewart, J., concurring in result) (emphasizing that holding was to apply only prospectively).

nature of Joan Feenstra's story cast her as the victim of a deviant husband and a greedy lawyer. Once the Court granted certiorari, it was unlikely that Feenstra's losing streak would be extended.<sup>59</sup> Second, Louisiana repealed the "head and master" provision of its community property system before the Supreme Court heard oral arguments in the case.<sup>60</sup> Since virtually all other states already had taken similar steps to reform their common law or community property systems,<sup>61</sup> the outcome of *Kirchberg* lacked practical significance. It was, as it were, a "freebie."<sup>62</sup>

Finally, by 1981 the legal issues in the case largely were noncontroversial. The upper-class home of the mid-eighteenth century, generally viewed as a patriarchal space, was losing its quality as a wholly male-dominated arena. Family property law had been the subject of legislative and judicial debate for over 150 years.<sup>63</sup> Along with divorce law,<sup>64</sup> alteration of various male management features of marital prop-

59. For further information on the unfortunate story of Joan Feenstra, see R. CHUSED, *CASES, MATERIALS AND PROBLEMS IN PROPERTY* 280-82 (1988).

60. *Kirchberg*, 450 U.S. at 458.

61. See Riley, *Equal Management in Louisiana — Some Flaws Still Exist*, 8 *COMMUNITY PROP. L.J.* 151, 152-53 (1981).

62. At first glance, *Lehr v. Robertson*, 463 U.S. 248 (1983), and *Parham v. Hughes*, 441 U.S. 347 (1979), appear similar to *Kirchberg*. In both cases biological fathers were denied rights associated with their children under state laws establishing "hurdles" that fathers, but not mothers, had to clear before they could be recognized as parents. See *Lehr*, 463 U.S. at 266-68; *Parham*, 441 U.S. at 356-59. Hurdle jumping for women was said to be unconstitutional in *Kirchberg*. 450 U.S. at 460-61. A provision in Louisiana's head and master statute which permitted a married woman to file a statement renouncing the male management features of the community property system did not save the scheme. See *id.* at 460 (citing LA. REV. STAT. ANN. art 2404 (West Supp. 1981)). But the apparent dissonance between *Lehr* and *Kirchberg* only emphasizes my point. *Lehr* confirmed the strong cultural links between motherhood and parenting. *Kirchberg* illustrated the demise of strong cultural links between the status of wife and the management of property. For a further discussion of the varying treatment of these two sets of cultural assumptions, see *infra* notes 66-76 and accompanying text.

63. Male management features of common law property regimes gradually disappeared beginning in the 1830s. See N. BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH CENTURY NEW YORK* (1982); M. SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* (1986); Chused, *Married Women's Property Law: 1800-1850*, 71 *GEO. L.J.* 1359 (1983). For a discussion of the reform of community property regimes, see K. LAZAROU, *CONCEALED UNDER PETTICOATS: MARRIED WOMEN'S PROPERTY AND THE LAW OF TEXAS, 1840-1913* (1986).

64. See M. BLAKE, *ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* 1-63 (1962); Censer, *Smiling Through Her Tears: Antebellum Southern Women and Divorce*, 25 *AM. J. LEG. HIST.* 24 (1981); Cott, *Divorce and the Changing Status of Women in Eighteenth Century Massachusetts*, 33 *WM. & MARY Q.* 585 (1976); Schultz, *Divorce in Early America: Origins and Patterns in Three North Central States*, 25 *SOCIO. Q.* 511 (1984).

erty law was one of the earliest objects of gender-based reform after the Revolutionary War. Alterations of women's role in the family, especially the important obligation to prepare children to take on civic responsibilities in a new republic, accompanied significant improvements in the education and literacy of women, growth in the importance of women's public service activities, and support for increased economic responsibilities in the home. Women's expanding post-Civil War roles as merchant and family consumer created additional pressure to ease wives' economic isolation. As time passed, women gradually gained a measure of control over inheritances, gifts, personal property, credit, and wages.

Though women actively supported property reforms through much of the century, many men also found the changes beneficial. The early married women's property acts, which generally exempted married women's property from attachment by creditors of their husbands, had the effect of preserving some assets from the ravages of an unpredictable, panic-beset economy. Insulating wives' property from family creditors thus increased the resources available for management by fathers and husbands. Similarly, latter acts permitting women to undertake commercial enterprises or granting women the right to sue for wages yielded more assets for men to manage. Not until *Kirchberg* did the final, overtly gendered family property law barriers to women's entry into the economy — the rules on male management of family wealth — fall.

By the time of the *Kirchberg* decision, women routinely were managing both personal and family assets. The common law notion of a patriarchal family space became ideologically barren in an era of high divorce rates, large labor force participation by women, and high family consumption expenditures by middle-class wives. By 1981 no significant segment of the culture had much interest either in reducing the ability of women to spend what money they owned or in maintaining legal vocabulary overtly granting men economic control of family spaces.<sup>65</sup> *Kirchberg* simply represented the final constitutionalization of this long historical process. Louisiana's "head and master" rule fulfilled all the now traditional indicia of an easy discrimination case. The statute facially favored men, a woman was palpably injured by an allegedly child-molesting husband and a greedy lawyer, and the legal rule under attack was out of the mainstream of cultural under-

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65. These changes do not mean that most women actually have gained economic control over family finances. Indeed for many women heading families without husbands, the controlling agent may be the state.

standings. The Court, therefore, felt free to use standard legal analysis to strike down the restriction, superficially ending centuries of legal discourse about management of the family home as space dominated by its male rather than its female occupants.<sup>66</sup>

The Court decided *Kirchberg* and *Michael M. v. Sonoma County Court*<sup>67</sup> on the same day. Michael M. was convicted of having intercourse with a woman under the age of eighteen who was not his wife.<sup>68</sup> Since California law did not forbid women from having intercourse with men under eighteen,<sup>69</sup> Michael M. challenged his conviction on equal protection grounds.<sup>70</sup> The Court's opinions reflected significant splits. Justice Rehnquist, writing for a plurality of four,<sup>71</sup> and Justice Blackmun, concurring separately,<sup>72</sup> each took the position that the statute bore a fair and substantial relationship to an important state interest and therefore passed constitutional muster.<sup>73</sup> Justice Brennan dissented with two colleagues,<sup>74</sup> and Justice Stevens dissented separately.<sup>75</sup>

Even before the various opinions were announced it was easy to predict that the case would be harder to resolve than *Kirchberg*. *Michael M.* concerned sexuality — when people get it, how they use it, and what it produces — hardly subjects handled with equanimity

66. Though the primary focus of this essay is on gender-segregated spaces, *Kirchberg* suggests that spatial analysis of integrated spaces also is quite useful. While family spaces are often, though not always, occupied by adults of both genders, the exercise of power in such space may be heavily dependent upon the purposes for which the place is created. As the discussion of *Michael M.* following this footnote will demonstrate, different kinds of spaces simultaneously occupied by men and women may produce quite different ideological reactions in the culture at large. For a discussion of shared spaces, see *infra* note 94. Indeed, such differences in the Court's reactions to *Kirchberg* and *Michael M.* provide insight into the motivations for retaining gender segregation in the armed forces in *Rostker*. See *infra* notes 99-107 and accompanying text.

67. 450 U.S. 464 (1981).

68. *Id.* at 466-67.

69. California law made sexual intercourse with a person of either gender under age 14 illegal. *Id.* at 477 (Stewart, J., concurring) (citing CAL. PENAL CODE ANN. § 288 (West Supp. 1981)). *Michael M.*, therefore, involved a dispute about the actions of persons between the ages of 14 and 17.

70. *Id.* at 473.

71. *Id.* at 466 (Rehnquist, J., plurality opinion). Justice Stewart also authored a concurring opinion. *Id.* at 476 (Stewart, J., concurring).

72. *Id.* at 481 (Blackmun, J., concurring).

73. *Id.* at 467, 470 (Rehnquist, J., plurality opinion); *id.* at 479 (Stewart, J., concurring).

74. Justice Brennan wrote for Justices White and Marshall. *Id.* at 489 (Brennan, J., dissenting).

75. *Id.* at 496 (Stevens, J., dissenting).

and poise over the years.<sup>76</sup> Sexuality and pregnancy frequently have been the subject of irrational, sometimes hysterical, state regulation and court discussion. When middle-class married women began to abort with some frequency in the 1840s, cries of fear arose over family decline and recreational sex.<sup>77</sup> Concurrently, the emerging medical "profession,"<sup>78</sup> eager to remove midwives from control of obstetrics,<sup>79</sup> viewed abortion restrictions as helpful to their professional goals, necessary for religious and moral reasons, and mandatory for protection of the family. Legislative restrictions emerged.<sup>80</sup> Loss of men in the Civil War; widespread acceptance of links between genetics and cultural success; high birth rates among poor, immigrant, and African-American families; and declining birth rates among native-born American women created great alarm in some circles over the imminent collapse of our culture. The resulting Comstock-era restrictions on the manufacture, distribution, and promotion of birth control devices, partly designed to "encourage" middle-class women to increase their reproduction rates, ironically made controlling birth rates among less-favored classes more difficult.<sup>81</sup> Recent abortion debates re-emphasize the degree to which pregnancy is viewed as an appropriate subject of state control. Little doubt exists that sexuality and pregnancy, often spoken of as the most private of human experiences, also are among the most common subjects of avid legal discourse and regulation.<sup>82</sup> Most of this discourse has been about women, not men. Despite

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76. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 195-96 (1986) (equating consensual homosexual conduct to incest); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (treating distinctions based on pregnancy as unrelated to gender). For commentary on *Michael M.*, see Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984); Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 8 WOMEN'S RTS. L. REP. 175 (1982).

77. See J. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900*, at 46-85 (1978).

78. Medicine hardly was a profession as we now know it. Many schools of thought existed on how to cure disease; education was primitive, promising results were elusive, and doctors had less than positive reputations. Nonetheless, clear signs showed that medical practitioners were beginning to stratify into various groups with some claiming professional status and expertise. See R. WERTZ & D. WERTZ, *supra* note 23.

79. Much of nineteenth century medicine involved obstetrics. Other than overseeing death, birth was the most prominent medical event of the times. See *id.*

80. See J. MOHR, *supra* note 77.

81. For a general history of the Comstock Movement, see C. DIENES, *LAW, POLITICS AND BIRTH CONTROL* (1972).

82. This is one of the major contentions in Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); see also Kennedy, *supra* note 7.

the obvious participation of both men and women in heterosexual intimacy, regulation of sexuality and pregnancy often has mirrored cultural perceptions of sexual activity as occurring in spaces dominated, though not solely occupied, by men.

*Michael M.* is a perfect example of the judicial confusion in dealing with space involving sexuality. Though the defendant was a young man, the opinions mostly were about women, and about how the state should regulate the sexuality of young women to control pregnancy and birth rates. Justice Rehnquist set the tone in his plurality opinion. After giving a not-too-polite bow to the governing equal protection standard,<sup>83</sup> he wrote,

We are satisfied not only that the prevention of illegitimate pregnancy is at least one of the "purposes" of the statute, but also that the State has a strong interest in preventing such pregnancy. . . .

We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional and psychological consequences of sexual activity. . . .

. . . .  
Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. . . . A criminal sanction imposed solely on males thus serves to roughly "equalize" the deterrents on the sexes.<sup>84</sup>

This analysis is intriguing for at least two reasons. First, Rehnquist's reconstruction of a rational basis for the California legislature's adoption of the statute missed much of the story behind the revision of statutory rape laws around the turn of this century. Second, Rehn-

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83. *Michael M.*, 450 U.S. at 469 (Rehnquist, J., plurality opinion). Justice Rehnquist, in contrast to the language in *Kirchberg* calling for an "exceedingly persuasive justification for" a gender classification, see *Kirchberg*, 450 U.S. at 461 (quoting *Personnel Administrator v. Feeney*, 442 U.S. 256, 273 (1979)), noted that the "Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M.*, 450 U.S. at 469 (Rehnquist, J., plurality opinion).

84. *Michael M.*, 450 U.S. at 470-73 (Rehnquist, J., plurality opinion).

quist's linking, by "nature," of women to the consequences of intercourse betrayed an array of fundamental biases that made his definition of "discrimination" wholly contingent on his own set of cultural values.

Justice Brennan's dissent<sup>85</sup> contained a slightly better explanation of the origins of California's statutory rape statute. California, like most states, raised the age of consent for young women, but not men, during the late nineteenth and early twentieth centuries.<sup>86</sup> Though Brennan was correct in suggesting that the Progressives of that era voiced greater concerns about the chastity of young women than they did about the chastity of young men,<sup>87</sup> their discourse was part of a multifaceted attack on prostitution and white slave traffic. That attack resulted in measures such as the Mann Act and increases in the age of consent for women.<sup>88</sup> Rehnquist's notion that adopting different ages of consent for young men and women is rationally related to a desire to prevent out-of-wedlock pregnancies and births among young women totally ignored the content of the relationship between statutory rape and prostitution regulation. Recognition of the Progressive-era "logic" supporting reduction of the age of consent for young women — that premarital intimacy by women inevitably led to prostitution — would have made it much more difficult for the Court to uphold Michael M.'s conviction. That sort of stereotyping is much less harmonious with extant cultural values than the commonly voiced desire to reduce out-of-wedlock births.

But more important for our purposes, Rehnquist's blithe acceptance of a theory using the "natural" burdens of pregnancy upon women as a basis for approving the conviction of men for statutory rape relied upon a set of remarkable assumptions. First, his analysis assumed automatic links between intercourse, pregnancy, and birth, thereby ignoring both birth control and abortion.<sup>89</sup> Second, his construction of the burdens of intercourse as "naturally" female mirrored centuries of cultural demands dictating that not only the physical, but also the

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85. *Id.* at 488 (Brennan, J., dissenting).

86. California raised the age successively to 14, 16, and 18 in 1889, 1897, and 1913. *See Michael M.*, 450 U.S. at 494 n.9 (Brennan, J., dissenting).

87. *Id.* at 494-96 (Brennan, J., dissenting).

88. *See* R. ROSEN, *THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900-1918*, at 27, 55 (1982); Myers, *Changes in the Maryland Statutory Rape Laws During the Progressive Era* (1987) (student paper on file in author's office).

89. While many teenagers may ignore these possibilities or have difficulty gaining access to family planning services, that certainly is not true for all sexually active young people. We should not base public policies on the assumption that family planning services are neither discussed nor used.

emotional and psychological, to say nothing of the financial,<sup>90</sup> consequences of both birth and childcare automatically burden women. Though the facts of *Michael M.* suggested that it concerned a man dominating the space of sexual intimacy by raping a woman,<sup>91</sup> Rehnquist could see only pictures of young single mothers in troubled domestic spheres. His confusion,<sup>92</sup> like that of innumerable jurists and legislators attempting to trudge through the power relationships of intimate spaces, was immense.

Ironically, Rehnquist's reasoning led to the affirmance of an aggressive man's criminal conviction.<sup>93</sup> But the same result could have been reached by different reasoning. If the plurality had assumed that the nonphysical burdens of pregnancy and childrearing must occur in shared space,<sup>94</sup> then California's statutory structure might well have failed constitutional scrutiny. And, as in all equal protection cases, the invalidity of a scheme simply would have moved the inquiry to the remedy stage: to a decision about abolishing the entire regulatory

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90. While the normal legal rules require fathers to support their children, many fathers fail to do so. Divorced and single women routinely bear the financial burdens of parenting. See Brinig & Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855 (1988); Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789; Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181 (1981).

91. See *infra* note 99. Fran Olsen discusses both the frequently aggressive content of sexuality for men and the potential for use of statutory rape laws to control that tendency. See Olsen, *supra* note 76, at 402-04.

92. In part, his confusion was generated by the structure of the litigation. The prosecution's failure to charge the defendant with rape, rather than statutory rape, see *Michael M.*, 450 U.S. at 500-02 (Stevens, J., dissenting), forced the Court to analyze the setting in a peculiar way. Nonetheless, the Justices displayed singularly glaring ineptitude in wading through the contradictions involved in treating a rape as consensual intercourse. The confusion in *Michael M.* is duplicated in other settings, such as the refusal of many jurisdictions to prosecute men for raping their wives. See West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990).

93. Concern over this irony in *Michael M.* is reduced significantly by strong evidence that the case actually involved a forcible rape rather than consensual intercourse. See *Michael M.*, 450 U.S. at 483 n.\* (Blackmun, J., concurring) (testimony excerpt); see also *infra* note 99.

94. Just as the *Kirchberg* decision was premised on the assumption that family economies normally operate in a shared space, the *Michael M.* Court could have assumed that childcare is "naturally" a shared enterprise. The change in purpose from economy to childrearing hardly justifies different treatment of the spaces. This reasoning relies on some of the same, and arguably erroneous, assumptions the Court made, particularly the notion that statutory rape laws are designed to prevent young people from having children. *Michael M.*, 450 U.S. at 470 (Rehnquist, J., plurality opinion). The major change in assumptions made in the text involves restructuring only the burdens of childrearing.



structure or extending its scope to all sexually active teenagers. Thus, rather than freeing Michael M., the Court could have given California the ability either to prosecute or release both genders.

Justice Rehnquist's "natural" law allocation of the burdens of pregnancy and childcare is reminiscent of earlier judicial approval of women's protective labor legislation in *Muller v. Oregon*.<sup>95</sup> The Court upheld such legislation on the theory that work spaces occupied by women, "naturally" weaker creatures than men, could be the objects of special regulatory concern.<sup>96</sup> Both *Michael M.* and *Muller* are superb examples of the Court's failure to recognize that the outcomes of their cases are heavily dependent on cultural understandings about the "natural" division of roles in spaces occupied by one or both genders.

Comparison with *Kirchberg* is instructive. While shared decision-making about the family economy now is required constitutionally, the burdens of intercourse, pregnancy, and childrearing still belong "naturally" to women. While marital property regimes calling for the equitable distribution of the capital of a marriage are now commonplace,<sup>97</sup> discussion of equalizing the psychological and economic obligations of childcare often produces agonizing debates and cries of discrimination against men. The "natural" law of a century ago — that men had the innate ability to manage money and women had the innate ability to care for children — only partially has dissipated. Though the Court has declared itself committed to removing stereotypes from its analysis of spaces and spatial roles, we should not be surprised by their utter failure to accomplish that goal.

After *Michael M.*, the result in *Rostker v. Goldberg*,<sup>98</sup> a challenge to the legitimacy of male-only draft registration, was preordained. How could a Court<sup>99</sup> that viewed all of the burdens of sexuality, preg-

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95. 208 U.S. 412 (1908).

96. *Id.* at 421-23. *Cf. Lochner v. New York*, 198 U.S. 45 (1905) (striking down state labor law as an arbitrary interference with the freedom of men to contract).

97. Though, the legal discourse in these statutes uses a concept of sharing, the reality is quite different. *See supra* note 90 and accompanying text. Much of the difference results from the still "natural" obligations of women to assume custody of the children without full financial support from their departed spouses and to work for wages significantly below their male colleagues.

98. 453 U.S. 57 (1981).

99. Though Justice Rehnquist spoke only for a four-judge plurality in *Michael M.*, Justice Blackmun's hopelessly confused concurring opinion is worse. *Michael M.*, 450 U.S. at 481 (Blackmun, J., concurring). After desperately trying to distinguish his willingness to permit California to control the sexuality of a teenager while insisting that privacy rights necessitate access to abortions, he simply declared that Michael M.'s conviction met the *Craig v. Boren* requirement of a fair and substantial relationship between a gender classification and state policy. *Id.* at 483 (Blackmun, J., concurring). He ended his short opinion with a note that

nancy, and childcare as quintessentially women's possibly overcome the equally powerful stereotype that war is a "natural" space for men? As things turned out, it could not. In his opinion for a majority of six,<sup>100</sup> Justice Rehnquist plainly articulated an unwillingness to confront basic fears about women serving on the front lines. Despite the apparent mandate of *Craig v. Boren*<sup>101</sup> to uphold overt gender classifications only when fairly and substantially related to a legitimate legislative goal,<sup>102</sup> Rehnquist devoted a large part of his opinion to the Court's "lack of competence" to review matters involving the military.<sup>103</sup> Exercising "healthy deference" to congressional judgment, he argued that Congress did not act "unthinkingly" or "reflexively" in deciding to order only men to register and that the registration scheme was, therefore, not a stereotypical "by-product of a traditional way of thinking about females."<sup>104</sup> Since Congress acted on the assumptions that registration would be used only to draft combat troops and that prior legislation forbade the use of women as combat troops, Rehnquist contended that women were situated differently from men for purposes of registration.<sup>105</sup> The Court thus deferred to the reasonable legislative decision to avoid wasting resources by asking only men to register.<sup>106</sup> Rehnquist's views were encapsulated by his statement that Congress was free to concentrate on "military need rather than 'equity'" in deciding upon the contours of a draft registration system.<sup>107</sup> Military

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basically said Sharon, the young woman in the case, deserved what she got (which from her story was a rape, *see id.* at 483-85 n.\* (Blackmun, J., concurring)), because she "led on" Michael M. *Id.* at 483-85 (Blackmun, J., concurring). In essence, Justice Blackmun argued that women are totally and justifiably within the power of male-dominated space once they participate in some sexual activity short of intercourse. This result makes Justice Rehnquist's opinion seem heroic.

100. *Rostker*, 453 U.S. at 59. Justices Brennan, White, and Marshall dissented. *Id.* at 83 (White, J., dissenting).

101. 429 U.S. 190 (1976).

102. *Id.* at 197.

103. *Rostker*, 453 U.S. at 64-72.

104. *Id.* at 72, 74 (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977)). Interestingly, Justice Rehnquist supported this point by noting that *Rostker* was easier than *Michael M.* because Congress debated the gender issue regarding armed services registration much more fully than the California legislature did at the time it increased the age of consent for young women. This point only strengthens my argument. The lengthy congressional debates demonstrated that a large majority of legislators, in quite stereotypical fashion, could not imagine women in combat roles.

105. *Id.* at 76-79.

106. *Id.* at 81.

107. *Id.* at 80. Rehnquist's use of quotation marks around "equity" emphasized his willingness to reformulate the word's meaning to accommodate the needs of the military.

need, of course, eschewed any notion of sending women to combat positions.

It is hard to take seriously the notion that *Rostker* represents a carefully thought-out rule about intentional gender discrimination. Rehnquist's presumption that the previously enacted restrictions on women serving in combat roles were constitutional hardly was commanded. Nothing in the underlying framework of discrimination law prevented either the parties or the Court from assuming that the combat restrictions were invalid. Rather, the fact that the plaintiffs in building their lawsuit, Justice Rehnquist in composing his majority opinion, and Justice Brennan in writing his dissent all assumed that the battlefield bar was valid strongly suggests that the cultural norms frowning upon women in the trenches were too powerful to ignore. There is, therefore, little to support the result save the quite obvious stereotypes that women cannot shoot guns, drive tanks, fly airplanes, push missile buttons, or die as well as men. Combat zones, like saloons in the 1870s, simply are places where women, regardless of their preferences and talents, are not to go. I am sure Justice Rehnquist would insist that Congress did not "intentionally" discriminate when it made distinctions between men and women regarding their obligations to serve in the armed forces. They simply were making "practical judgments" concerning combat readiness. Like Judge Safford's inability to understand how women could organize and operate political movements,<sup>108</sup> the *Rostker* Court was unable to avoid assumptions about the appropriate spatial roles of men and women.

### C. *Social Science, Effects Analysis, and the Supreme Court*

Much of the discrimination case law in the last two decades has involved attempts to develop methods of attacking classifications having gendered effects when explicit statements of intention to discriminate are lacking. Building on the idea that actions based upon an intention to disadvantage women were unlawful, litigators pushed courts to accept various forms of evidence as circumstantial proof of discriminatory intent and to require defendants to justify their actions if significant circumstantial evidence of intentional discrimination was submitted. Once this sort of legal structure was in place, especially in various statutory rather than constitutional settings,<sup>109</sup> social science data became a critical feature of many large cases. After courts began

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108. See *supra* text accompanying notes 98-106.

109. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (employment practice that operated to exclude blacks prohibited, notwithstanding employer's lack of discriminatory intent).

relying on such evidence, it became increasingly difficult to justify a distinction between the harm imposed upon women by practices justifying an inference of intentional misbehavior and equally pernicious harms imposed upon women by patterns of behavior extant in the culture at large. In recent years, however, the Supreme Court's unwillingness to accept widespread cultural behavior patterns as discriminatory also has led it to view virtually all social science data with skepticism, if not outright hostility. We have returned to the view that spatial gender separation reflects our culture, not discrimination.

Social scientists claim they can describe segregated spaces. Indeed, a list of the ten most racially segregated cities recently was released.<sup>110</sup> Other studies have reported that black defendants are more likely to face the death penalty when the victim is white rather than black,<sup>111</sup> that employees in jobs dominated by women earn significantly less than employees in jobs of comparable worth generally held by men,<sup>112</sup> and that employment preferences for veterans have a disastrous impact on the ability of women to find employment.<sup>113</sup> In recent years the Court has been uniformly hostile to contentions that such studies provide a basis for shaping measures to ameliorate the impact of long standing cultural patterns of spatial separation.

The judicial hostility is not based upon the ever-present debate about the truth-telling capabilities of statistical analysis.<sup>114</sup> Indeed, in

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110. See *Study Finds Segregation in Cities Worse Than Scientists Imagined*, N.Y. Times, Aug. 5, 1989, at 6, col. 5 (reporting on Massey & Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 DEMOGRAPHY 373 (1989)).

111. See *McCleskey v. Kemp*, 481 U.S. 279 (1987).

112. See, e.g., *American Nurses' Ass'n v. Illinois*, 783 F.2d 716 (7th Cir. 1986); *American Fed'n of State, County & Mun. Employees v. Washington*, 770 F.2d 1401 (9th Cir. 1985). For a similar case involving the racial employment and promotion patterns of a single private company, see *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989).

113. *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979).

114. One certainly may make a convincing argument that the social sciences, like the Supreme Court Justices, are infected with cultural bias. As noted near the end of the discussion of *Michael M.*, *supra* text accompanying notes 76-99, *Muller v. Oregon*, 208 U.S. 412 (1908), was based upon highly dubious assumptions about women's need for special protection in the workplace. The famous Brandeis brief submitted in support of the protective labor legislation attacked in *Muller* was overflowing with excerpts from "scientific" studies supporting such assumptions. See *id.* at 419 n.†. The Court's failure to take on the "neutrality" of the social science establishment dramatically simplifies my argument that discrimination law now ignores the consequences of "provably" gendered spaces. But even conceding the infectious quality of bias in the social sciences, the result is the same. First, much evidence exists that supports the historical notion that men and women frequently have occupied different spaces. Second, even if studies supporting the existence of segregated spaces are culturally influenced, the Court's selection of one set of biases supporting the maintenance of male political and economic

many cases the Court has assumed the validity of the statistical analysis establishing the existence of spaces segregated by race or gender before ignoring the data-based conclusions. The most shocking recent example of this phenomenon is *McCleskey v. Kemp*.<sup>115</sup> Justice Powell, after describing in detail the conclusions of a study demonstrating a strong correlation between the races of perpetrators and victims and the imposition of the death penalty,<sup>116</sup> wrote that the Court accepts "statistics as proof of intent to discriminate in certain limited contexts,"<sup>117</sup> such as creation of jury venires or certain Title VII cases.<sup>118</sup> However, statistical proof of discrimination in the operation of discretion-filled systems such as Georgia's criminal justice must be "exceptionally clear" before the Court would intervene.<sup>119</sup> Justice Powell got it exactly backwards, of course. He ignored the prospect that white people operating in wholly discretionary arenas are more likely to implement their authority in racial patterns than when they are constrained by tightly operating procedural or substantive limitations.

Less dramatic, but equally clear, rejections of data disclosing gendered spaces also are plentiful. *Personnel Administrator v. Feeney*<sup>120</sup> may be the most extraordinary. A Massachusetts statute required that all veterans qualifying for state civil service positions must be considered for appointment ahead of any qualifying nonveterans.<sup>121</sup> Justice Stewart, writing for the majority, openly confessed that the statute "benefit[ted] an overwhelmingly male class"<sup>122</sup> and that "the impact of the . . . law upon the public employment opportunities of

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spaces rather than another subjecting such spaces to attack leaves the basic structure of my argument intact.

115. 481 U.S. 279 (1987).

116. *Id.* at 286-89. The study, accepted as truthful for purposes of the Court's opinion, found that, ignoring the race of the defendant, the death penalty was more than four times as likely to be imposed in a case where the victim was white rather than black. When the race of the defendant was added to the matrix, the class of defendants most likely to be sentenced to die were black persons convicted of murdering white victims. This relationship was statistically significant. Prior to adjustment for nonracial factors, the death penalty was imposed in 22% of the cases involving black defendants and white victims, but in only 1% of the cases involving black defendants and black victims. *Id.* at 286-87.

117. *McCleskey*, 481 U.S. at 293.

118. However, this concession, at least in respect to Title VII cases, must be labeled dubious. See *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2121 (1989) (statistical evidence not accepted as proof of intent to discriminate).

119. *McCleskey*, 481 U.S. at 297.

120. 442 U.S. 256 (1979).

121. *Id.* at 256 (citing MASS. GEN. LAWS ANN. ch. 31, § 26 (West 1979)).

122. *Id.* at 269.

women [had] . . . been severe.”<sup>123</sup> It gave to “veterans who achieve[d] passing scores [on civil service exams] a well-nigh absolute advantage”<sup>124</sup> over women achieving higher scores.<sup>125</sup>

Nonetheless, Feeney lost. Because the statute was facially neutral, she was obligated to demonstrate that a “gender-based discriminatory purpose . . . , at least in some measure, shaped the Massachusetts veterans’ preference legislation.”<sup>126</sup> Justice Stewart then concluded that Massachusetts intended to benefit veterans, not men;<sup>127</sup> that widespread knowledge of the gendered consequences of the preference was not a sufficiently powerful level of intent to question the statute<sup>128</sup> under extant equal protection doctrine;<sup>129</sup> and that the record lacked any evidence that state officials adopted and continued the veterans’ preference with a specific desire to exclude women from the civil service.<sup>130</sup> The “Catch-22” quality of the outcome became palpable only two years later when the Court refused to curtail Congress’s overtly gendered decision to exclude women from registration for the draft.<sup>131</sup>

Comparable worth, should it ever come directly before the Court, surely will meet a similar fate. The Court simply will reject social science data, in both constitutional and statutory discrimination cases, as largely beside the point. Even the most solid, convincing statistical evidence that certain jobs virtually always are held by women and that these jobs, under any system for measuring comparability that might be used, produce lower wages than similarly important tasks virtually always filled by men, will prove to the Court only that the market operates in certain ways. It will not prove that any individuals or classes were the victims of intentionally gendered conduct.

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123. *Id.* at 271.

124. *Id.* at 264.

125. Justices Stevens and White wrote a concurring opinion in which they excused any possible invidious discrimination because the preference disadvantaged almost as many men (1,867,000) as it did women (2,954,000). *Id.* at 281 (Stevens, J., concurring). Besides the fact that the number of women was almost 60% larger than the number of men, Stevens’s and White’s argument did not explain why the existence of a large class of excluded men reduced the impact of an almost total exclusion of women from the civil service. Their opinion indicated not only that some of the Justices reject social science, but also that they do not understand it.

126. *Id.* at 276.

127. *Id.* at 277.

128. *Id.* at 279.

129. *Washington v. Davis*, 426 U.S. 229 (1976), when placed together with *Feeney*, required plaintiffs to show a purposeful intent to discriminate to meet constitutional definitions of discrimination. *See id.* at 238-42.

130. *Feeney*, 442 U.S. at 279.

131. *See Rostker*, 453 U.S. 57 (1981); *see also infra* notes 144-46 and accompanying text.

The handwriting appeared on the wall for comparable worth in *County of Washington v. Gunther*,<sup>132</sup> a case involving the payment of lower wages to female than to male jail guards. The county did a job evaluation of its civil service system. After evaluating the jail guard jobs, the study concluded that women guards should be paid ninety-five percent of the wage of male guards. Despite this recommendation, the county elected to pay women only seventy percent of the male wage.<sup>133</sup> Justice Brennan, writing for a bare majority of five, went to great lengths to declare that comparable worth was not before the Court.<sup>134</sup> The Court held only that the plaintiffs were free to argue that the county intentionally paid women less than it paid men.<sup>135</sup>

In his dissent Justice Rehnquist argued that only virtually identical jobs demanded equal pay and that the market, even if it established gendered wage differentials for comparable but not identical jobs, was a legitimate basis for determining pay levels.<sup>136</sup> Thus, if the county rejected the conclusions of its comparable worth study in favor of market level wages, knowing of its gendered consequences, it would violate neither Title VII nor the Equal Pay Act.<sup>137</sup> The opinions in *Gunther* clearly illustrated that public and private organizations may avoid comparable worth judgments by carefully justifying their wage levels by reference to market preferences rather than job descriptions. Once the possibility of overt gender-based wage determinations is removed, neither opinion in *Gunther* supports a discrimination holding.<sup>138</sup> This view almost surely commands a majority on the present Court.<sup>139</sup>

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132. 452 U.S. 161 (1981).

133. *Id.* at 180-81. The county later also closed down the women's section of the jail and fired the women. *Id.* at 164.

134. *Id.* at 166.

135. *Id.* at 180-81.

136. *Id.* at 181-88 (Rehnquist, J., dissenting).

137. *Id.* at 184-204 (Rehnquist, J., dissenting).

138. The majority did not reject explicitly comparable worth theory, but Justice Brennan wrote his majority opinion in a noticeably defensive prose. It is, therefore, hard to believe that all four Justices he convinced to join his opinion (Justices White, Marshall, Blackmun, and Stevens) would have stayed on board had he attempted to create a comparable worth remedy for the plaintiff.

139. The four dissenting justices in *Gunther* were Rehnquist, Burger, Stewart, and Powell. *Id.* at 181 (Rehnquist, J., dissenting). A majority against comparable worth theories undoubtedly would now be created by Justices Rehnquist, Scalia, Kennedy, White, and O'Connor. In fact, Justice Kennedy made his views quite clear in *American Fed'n of State, County, & Mun. Employees v. Washington*, 770 F.2d 1401 (9th Cir. 1985) (upholding state's decision to base compensation on the competitive market rather than on comparable worth theory). Justice Stevens would probably join them. Justices Brennan, Marshall, and Blackmun most likely would dissent.

The comparable worth debate is a graphic example of the contemporary importance of gendered spaces. Comparable worth studies confirm the continuing impact of long extant job segregation. Historians have demonstrated convincingly that most employed women have been relegated to certain jobs, that women's work often has occurred in places where the only men present were supervisors, that women frequently are hired as part of a strategy to reduce labor costs, and that gender-segregated job patterns facilitate the exercise of economic power over women workers.<sup>140</sup> Denying the relevance of comparable worth studies in discrimination theory dismisses the enduring relationships between gendered spaces and economic control of women's work.

#### V. SPATIAL DISCRIMINATION AND ALLOCATION OF POLITICAL POWER

Thirty-five years after the decision in *Brown v. Board of Education*,<sup>141</sup> we are left with the startling conclusion that spatial separation by race and gender has virtually no meaning in the resolution of discrimination cases. Intentional gendering of spaces by statutory mandate or bureaucratic practice now is applauded as a concession to the reality of human experience. The existence of gendered spaces, clearly described and well documented by social scientists, is justified by reference to "unintended" social preferences.

The War on Whiskey contained the seeds of a different perspective on the idea of discrimination. Recall that the invasion of male saloons by crusading women had at least three salutary results: it expanded the range of places available for discourse between the genders, it forced men to react to concerns of women, and it broke open a place usable by men to exercise or discuss the continued exercise of political and economic power.<sup>142</sup> Discrimination law routinely should produce similar results. Thus, any setting in which men occupy spaces with more political or economic power in significantly larger numbers than to women ought be subject to attack. Similarly, any setting in which long-standing cultural patterns relegate women to the occupancy of spaces with less political or economic power than those men occupy should be open for restructuring.<sup>143</sup> Finally, treating discrimination as

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140. For an excellent commentary on the history of women and work, see A. KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* (1982).

141. 347 U.S. 483 (1954).

142. See *supra* notes 18-33 and accompanying text.

143. Lawrence suggests an analogous theory for dealing with racial differences in allocation of power, though he relies more on a psychological assessment of the nature of discrimination than I do in this essay. See Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Regarding black women, readers may be



a principle for tempering the political and economic authority of dominant groups requires the protection of organizations established by the less powerful for their own political and economic benefit.

Despite the results of recent discrimination cases,<sup>144</sup> spatial separation is a critical characteristic of many arrangements in which women are deprived of political and economic power. The male-only registration for the draft, for example, clearly supports the continued existence of a tremendously powerful gendered space — the armed forces. Women are excluded, not only from getting killed on the front lines, but also from decisions about huge expenditures, extensive employment opportunities, significant benefit programs, and the formation of foreign policy at the highest levels. We all have been prevented from learning if significant changes in discourse about the exercise of military power will occur when military spaces become the joint territory of men and women.<sup>145</sup> Regardless of whether this gendered space was the result of intentional government policy or centuries of cultural understandings, little doubt exists about the concentration of male power it generates. Such a center of male authority should not be permitted to survive.<sup>146</sup>

Conversely, spaces created and used by women for their own benefit must be protected. Built into spatial discrimination theory is the notion that those excluded from important political and economic spaces should have a significant voice in changing the operation of those environments. Spaces occupied by the powerful need to be broken apart; those created by the less powerful for their own support

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tempted to simply "pile up" spatial power allocations to construct a useful discrimination principle. However, concern about racial identities among black persons may cut across gender lines, necessitating a different analysis of racially gendered spaces from what I attempt in this essay. For example, in the change from the Jane to Jim Crow laws, racism overwhelmed previously gendered spaces. For more discussion of this interplay, see Scales-Trent, *supra* note 48.

144. *E.g.*, *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989).

145. *See, e.g.*, Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron*, 12 HARV. WOMEN'S L.J. 25 (1989).

146. Since the creation of wholly volunteer armed services, the proportion of women serving the country has risen slowly. Recent data suggest that women now comprise over 10% of the military, though combat roles and serious policymaking positions are totally male domains. Sexual discrimination and harassment are pervasive. *See Open Doors Don't Yield Equality: 'Combat' Ban Symbolizes Limits to Female Advancement in Services*, Wash. Post, Sept. 24, 1989, at 1, col. 1. These facts raise intriguing questions about the military roles women will fill in future generations. For example, participation in front-line action is a traditional prerequisite for promotion to senior military positions. This practice or other practices may delay seriously the rise of women through the ranks. *See Battle Lines Are Shifting on Women in War*, N.Y. Times, Jan. 25, 1980, at 1, col. 3.

need to be nurtured.<sup>147</sup> Intentional discrimination theories have the perverse effect of legitimizing attacks on groups organized by the less powerful for their own benefit.<sup>148</sup> Thus, the Supreme Court evades the application of even the most traditional intentional discrimination theories against overtly male spaces when it finds a larger cultural imperative, but applies intentional discrimination rules rigidly when those with less economic or political authority attempt to invade spaces occupied by the powerful or to create spaces for their own use.<sup>149</sup> Affirmative action programs, an obvious remedy for reducing the impact of spaces occupied by the powerful, are viewed instead as cases about intentional discrimination.<sup>150</sup> Laws supposedly written for the benefit of groups excluded from important spaces become weapons used to maintain extant allocations of power.<sup>151</sup>

Spatial discrimination theory thus compels certain remedial choices. Rather than focusing merely on creating a path for women's entry into male spaces, remedial structures routinely should permit those confined in less-favored spaces to redefine the contours of spaces occupied by the powerful. Crafting remedies under existing discrimination theory normally involves creating some framework for ensuring that those excluded from male spaces may enter them, generally on

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147. This nurturing need not apply to traditionally lower paid women's jobs because women have not organized these tasks for their own benefit.

148. Thus, women's clubs or black clubs ought not be subject to integration orders, while men's clubs should. And if black colleges and universities, mostly established as the price for the maintenance of the *Plessey* separate but equal theory, see *Plessey v. Ferguson*, 163 U.S. 537 (1896), have taken on significant roles as organizational points for the black community, then these colleges ought not be disturbed by "discrimination" decrees.

149. The best the Court has done is to leave some authority in state and local governments to integrate private clubs. See *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984) (determining that the limits of state authority over freedom to enter an association involves an assessment of objective characteristics including size, purpose, policies, selectivity, and congeniality). But the Court has not resolved whether a state specifically can shut men's clubs while leaving women's clubs open.

150. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 730 (1989) (unless a city can identify specific factual bases necessitating remedial action, treatment of citizens on a racial basis violates the equal protection clause).

151. Thus, Justice O'Connor, discussing *Richmond*, Virginia's affirmative action contract procedures for encouraging minority businesses, wrote for the Court: "Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." *Id.* at 724. After reading the *Richmond* opinion, one of my colleagues said to me with sarcasm and disdain: "You mean I now have to prove there has been discrimination in Richmond, Virginia during the last two centuries?"

terms not significantly different from those that existed before the litigation. Consideration normally is not given to altering job descriptions, promotion standards, educational requirements, health care plan provisions, or other terms of employment unless they are part of a structure intended to benefit men. Women frequently are deprived of the opportunity to alter the shape of many of the spaces they normally occupy.

The legislative and judicial treatment of pregnancy leave policies is a complex example of the problem.<sup>152</sup> In *California Federal Savings & Loan Association v. Guerra*<sup>153</sup> a California statute required employers to grant women unpaid pregnancy leaves of up to four months for any disability "on account of pregnancy, childbirth, or related medical conditions."<sup>154</sup> The statute also required employers to reinstate employees returning from such leaves to their prior jobs unless the jobs were no longer available due to business necessity.<sup>155</sup> The bank argued that the Pregnancy Discrimination Act (PDA) provisions of Title VII preempted the statute. Because the PDA, the argument went, required employers to provide pregnancy disability benefits to women only to the same extent that they granted disability benefits to men, it preempted any state requirement insisting that women disabled by pregnancy be provided greater benefits than men.<sup>156</sup>

California's statute did not mention men. It was modeled on the traditional assumptions that women, but not men,<sup>157</sup> are unable to work for a period after the birth of a child; that women, but not men, stay home with an infant for a time while the physical impact of delivery passes; and that women, even those disabled for a time by pregnancy and birth, will find a way to take care of their new child without looking to their men for assistance. In short, the statute was a classic embodiment of the notion that childcare occurs inside spaces occupied by women<sup>158</sup> and that, as a result, only women's job security

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152. For a review of various rights based arguments about this issue, see Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984).

153. 479 U.S. 272 (1987).

154. *California Federal*, 479 U.S. at 275 n.1 (quoting CAL. GOV'T CODE § 12945(b)(2) (West 1980)).

155. *Id.* at 275.

156. *Id.* at 278.

157. I have used the woman/man dichotomy intentionally, though other parent pairs obviously exist. Indeed, many psychological parent groupings exist which are larger than doublets. But the *California Federal* statute surely was based upon a heterosexual couple model.

158. Though most now consider management of the family economy as a shared enterprise, the same may not be said of childcare. While the home frequently is used as shared space for

is placed at risk by the birth of a child. The Court did not consider the gendered spatial assumptions underlying the California statute. It merely declined the invitation to pre-empt the law, treating it as an employment regulation benefitting women in ways permitted but not required by the Pregnancy Discrimination Act amendments to Title VII.<sup>159</sup>

Recognition of the gendered spatial assumptions underlying the regulation thoroughly changes the analysis. Because the statute accepts or defines spatially gendered roles that limit employment opportunities<sup>160</sup> and requires that those roles be offered only to women, it should have been treated as discriminatory. The Court, however, did

certain portions of the day or week, traditional ideologies still construe the home as a women's place when children are present during working hours. Indeed, even when women are not home with their own children, other women likely will be doing the caretaking. For purposes of the point in the text, it is sufficient to remember that any space, such as a house, may take on different gender and spatial characteristics at different times. For a detailed analysis of the relationships between gender and family, see Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 135-54 (1989) (discussing some of the limitations of typical discrimination analysis in cases involving interplay between gender, family, and work).

159. *California Federal*, 479 U.S. at 292. A logical structure closely related to that in *California Federal* is evident in *UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989), cert. granted, 110 S. Ct. 1522 (1990). *Johnson Controls* held that a company may forbid women of childbearing age from working in high lead exposure positions. *Id.* at 901. The court found that the policy did not violate Title VII because the possibility of pregnancy and subsequent harm to a fetus was a satisfactory reason for denying women employment in such jobs. *Id.* at 890. Thus, the court made use of the stereotypical notion that fetal development is solely related to a safe space for women.

Lead poisoning of men, however, also is related to proper fetal development. See Williams, *Firing the Woman to Protect the Fetus: Reconciliation of Fetal Protection with Employment Goals Under Title VII*, 69 GEO. L.J. 641 (1981). Compare *Hayes v. Shelby Mem. Hosp.*, 726 F.2d 1543 (11th Cir. 1984) (finding hospital's firing of pregnant technician was result of facially discriminatory policy) with *Johnson Controls*, 886 F.2d 871 (discussed *supra*). For a further discussion of *Johnson Controls* in this Symposium, see Williams, *Fetal Fictions: An Exploration of Property Archetypes in Racial and Gendered Contexts*, 42 FLA. L. REV. 81, 87-89 (1990). Rather than permitting women to be fired, the court should have read Title VII to give women employees the option of compelling the layoff of men or the cleaning the job environment.

160. Family "benefits" extended only to women "serve to reinforce the notion that a woman's place is in the office only if she's taken care of her chores at home first." Spayd, *Being Too Nice to Working Mothers*, Wash. Post, Oct. 15, 1989, at H3, col. 4. The California statute certainly nurtures such stereotyping. On its face, the law provides no absolute guarantee to women that they will get their jobs back after taking birth leaves. See CAL. GOV'T CODE § 12945(b)(2) (West 1980). Even if the job return guarantee was absolute, the result I describe in the text would remain. Allocation of leaves of absence to women after birth creates substantial power misallocations. For example, the statute creates a strong economic incentive to discriminate silently against initially hiring women of childbearing age. In addition, absence from a workplace may create problems in promotion, peer acceptance, and operation of seniority rules.

not have to void the statute. The less-empowered class, the women employees, should have been given the option of either voiding the statute or requiring its application to men in the bank as well. Indeed, if society is really serious about the workplace repercussions of defining childcare zones as women's space, we would treat the emotional and physical needs of children as a special problem for all employees, a problem requiring the provision of uniform caretaker fringe benefits.<sup>161</sup> While *California Federal* might not have been the appropriate vehicle for mandating the creation of such widespread benefit programs, the Court should have modeled any remedy in the case on a structure designed to reduce the loss of workplace power women routinely confront when they have a child.<sup>162</sup>

Finally, some spaces may be shared by men and women who each exercise similar levels of economic, political, or cultural power. The generic sort of situation at issue in *Michael M.*, though not the Supreme Court's analytical techniques, might be such a case.<sup>163</sup> If relationships such as consensual intercourse, are not defined by any significantly gendered space, little is left to justify the protection of spaces established and occupied by women for their own benefit or protection. Some argue, however, that sexuality is inherently or frequently a one-sided power relationship and that law should be structured to provide women with the ability to control unwanted male aggression.<sup>164</sup> Others counter that statutory rape laws providing special

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161. This argument differs from the position of feminist writers advocating an affirmation of women's special roles as childbearers and nurturers. Cf. Fineman & Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107. Defining women's role based on spatial separations of groups also is different than defining women's role based on feminist concepts of individual connectedness to self or others. See, e.g., West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

162. This reallocation of power is not a straightforward task. Providing unpaid childcare leaves of absence on a voluntary basis, for example, probably would not result in a large proportion of men going home to be with children, at least in the short run. Income differences between men and women as well as custom will tend to keep women at home with small children. Federal support for paid leaves of absence would work better, particularly if payments made to intact couples required both partners to share in childcare as a condition of receiving the benefits.

163. But note, some argue that sexuality is inherently a male-dominated power relationship. See C. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987). As previously indicated, Justice Rehnquist's analysis in *Michael M.* certainly gives some credence to the idea that sexuality and pregnancy routinely are defined as burdensome to women, if not as bestowals of power upon men. See *supra* notes 76-84 and accompanying text.

164. See Olsen, *supra* note 76, at 407-09. Olsen argued that one way to provide young women some control over sexual intimacy would be to give them complete authority over the decision to prosecute for violation of statutory rape laws. In this Symposium issue Robin West

protection for women foster the stereotype that women are weak and in need of protection, thereby legitimating and perpetuating the very power differences protective legislation is designed to ameliorate.<sup>165</sup>

The feminist debate about the wisdom of using statutory rape laws to empower women occurs at a wholly different level than the judicial debate revealed by the opinions in *Michael M.* While the Court's dialogue ignored or misconstrued signals about the ways men and women relate to each other, academics speculate about the differences between mutually supportive and exploitative relationships.<sup>166</sup> While the Court ignored the long history of white men segregating and structuring spaces for their own benefit, academics struggle both to describe and to measure the cultural prominence of gendered spaces. While the academic debate may be unresolvable at this historical moment, at least it is occurring on the appropriate terrain.

If I am forced by the title of this Symposium to make a prediction about the fate of gender discrimination law in the 1990s, I must restrain my optimism. Enacting legislation<sup>167</sup> commanding courts, upon the petition of an appropriate member of a segregated group, to develop remedies to control politically or economically powerful space dominated by men requires restructuring the central features of innumerable important cultural and political institutions.<sup>168</sup> That level of activity may be unlikely to occur until the next wave of the Women's Movement.<sup>169</sup>

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argues a related point, contending that the failure to penalize marital rape implicates the state as a supporter of violence within relationships likely to be dominated by physically stronger men. See West, *supra* note 92, at 63-71.

165. See Williams, *supra* note 76, at 175.

166. One point in this essay is that men and women may have quite different perceptions about the same spaces, regardless of whether the spaces are shared or separate. The men in Dunn's drugstore obviously felt quite differently about their bar than did the invading host of women. Ann Scales makes a related point in her discussion in this Symposium issue of potential male and female differences towards conceptions of time. See Scales, *Feminists in the Field of Time* 42, FLA. L. REV. 95 (1990).

167. Like Robin West's essay on the marital rape exemption in this Symposium issue, see West, *supra* note 92, at 45. I agree that continued reliance on federal court discrimination litigation may be unproductive.

168. A similar problem is discussed in Williams, *supra* note 40, at 822-36.

169. Historically, a close linkage has existed between bursts of political activity by women and blacks. Perhaps the next major round of social upheaval in these communities will arrive when whites no longer comprise a majority of the school age population of the United States, an event likely to occur fairly early in the next century. Pessimists might insist that we will have to wait until the middle of the next century when whites will become a minority of our population. *Beyond the Melting Pot*, TIME, Apr. 9, 1990, at 28-30.

