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# Female Toplessness: Gender Equality's Next Frontier

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## INTRODUCTION

If a man is hot on a summer's day in Los Angeles<sup>1</sup> or Newport Beach,<sup>2</sup> California, he could simply take his shirt off to help him cool down. When he does this, no one would even bat an eyelash. On that same day, on that same street, a woman would be guilty of a misdemeanor, fined and possibly jailed, for doing the exact same thing. Laws discriminating on the basis of a woman's anatomy bear no relationship to a woman's capabilities or role in society; they merely subjugate her to a second-class citizenship solely because of the way society sexualizes her body.

In order to defend prohibitions on general, public female toplessness, proponents equate it to nude or topless dancing and import the same justifications to ban it.<sup>3</sup> For example, the Newport Beach City Council declared that the intent of its public nudity ordinance is "to eliminate . . . the secondary effects associated with the presentation of nudity in adult-oriented establishments."<sup>4</sup> This false equivalence codifies the fetishization of a woman's body into law and leads to an absurd result. This reasoning rests on the faulty premise that the two acts are essentially interchangeable and share the same purpose. It follows that any time a woman is topless in public she is doing it solely to attract attention and making her body a constant spectacle for the public's enjoyment and sexual pleasure. This reasoning neglects the multitude of benign reasons why a woman would want to be topless in public, such as to cool off, to avoid tan lines, or to feel free from the encumbrances of straps and bands.

Female topless prohibitions are the embodiment of gender discrimination. It is one of the remaining laws that blatantly treat men and women differently on the basis of how society views their bodies and the biological differences between the sexes. Paternalistic notions that a woman needs the laws to protect her from a man's gaze and his uncontrollable desire to touch her if he sees her bare chest undermine the struggle for gender equality. It is a modern example that a woman's body is deemed lesser than a man's. The justifications for these laws are faulty and based on flawed logic that can be traced from the Women's Suffrage movement in England and America in the late nineteenth and early twentieth centuries to the 2016 election. This Note will show that there is no important governmental objective that justifies making it a crime for a woman to be topless in public, just as there was no important objective that justifies prohibiting women from voting, becoming a lawyer, attending a prestigious military academy, or fighting in the military.

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1. L.A., CAL., CODE OF ORDINANCES § 17.04.480 (1971).

2. NEWPORT BEACH, CAL., MUN. CODE § 10.54.010–030 (1975).

3. See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 283–84 (2000) (upholding a Pennsylvania public nudity ordinance); *Barnes v. Glen Theatre Inc.*, 501 U.S. 560 (1991) (holding that an Indiana public indecency law that required nude dancers to wear pasties and a G-string did not violate the First Amendment).

4. NEWPORT BEACH, CAL., MUN. CODE § 10.54.010–030 (1975).

In Part I, this Note examines the Constitutional implications of female toplessness laws. More specifically, it demonstrates how female toplessness laws ought to fail under an Equal Protection framework and illustrates why the First Amendment has been incorrectly applied to general toplessness. In Part II, this Note will argue that many of the justifications proponents set forth, based on protecting morality, public order, and ending sexual violence against women, are irrelevant to the issue of topless female sunbathing, and provide no valid justifications for these laws. Further, in Part III, this Note will analyze other arguments in favor of lifting these bans, including the negative effects these laws have on men and women. Finally, in Part IV, the Note will conclude with illustrations of some ways society has already demonstrated a willingness to liberalize these laws and its perceptions of women's bodies.

#### I. FEMALE TOPLESSNESS AND THE CONSTITUTIONAL UNDERPINNING

The foundation of gender equality is to ensure that men and women enjoy the same rights and opportunities across all sectors of society. It means that rights, responsibilities, and opportunities will not depend on whether a person is born male or female.<sup>5</sup> Banning a woman from being topless limits her rights, not just based on her gender, but also based on how society views her gender. In order for women to achieve total equality in America, society must view all gendered bodies on equal footing. Men and women are already not allowed to show their genitalia,<sup>6</sup> but only women are not allowed to be topless in public.

##### *A. Equal Protection Doctrine*

Sex is an immutable characteristic determined by accident of birth. As such, the Supreme Court has held that any law that is based on a discriminatory classification, must “at least ... serve[] important governmental objectives and [] the discriminatory means employed [must be] substantially related to the achievement of those objectives.”<sup>7</sup> Female toplessness laws are a modern-day example of intentional discrimination by the government based on traditional (sexist) notions of women in society. However, the Supreme Court has consistently ruled that traditional notions of sex cannot be used to justify a discriminatory law.<sup>8</sup> The imposition of special disabilities upon the members of a particular sex “because of their sex would seem to violate ‘the basic concept of our system that legal burdens

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5. *Gender Mainstreaming*, EUR. INST. FOR GENDER EQUALITY, <http://eige.europa.eu/gender-mainstreaming/concepts-and-definitions> [https://perma.cc/FJB2-MGKV] (last visited June 3, 2018).

6. *See* L.A., CAL., CODE OF ORDINANCES § 17.04.480 (1971); NEWPORT BEACH, CAL., MUN. CODE § 10.54.010–030 (1975).

7. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)) (internal quotation marks omitted).

8. *See, e.g., Reed v. Reed*, 404 U.S. 71 (1971) (invalidating a law based on the traditional view that men were more qualified to administer estates than women). The Supreme Court in *Reed* and its progeny slowly chipped away at the belief that men are more capable than women.

should bear some relationship to individual responsibility.”<sup>9</sup> Therefore, they must be deemed unconstitutional under the Fourteenth Amendment. Sadly, this has not been the case. Courts too often find governmental reliance on incorrect descriptions and false analogies—that women’s bodies are sexual and comparable to one’s genitalia.<sup>10</sup>

Female toplessness laws are an unjustifiable burden on women and bear no justification in sound legal or societal principles. The common justifications for these laws are based on antiquated Victorian and Judeo-Christian values that have no place in our modern society.<sup>11</sup> These laws are rationalized “by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”<sup>12</sup> These laws find their origin in an era when women were legal second-class citizens, whose “paramount destiny and mission . . . [were] to fulfill the noble and benign offices of wife and mother”<sup>13</sup> and whose value was dictated on whether they were chaste and modest. Women could not vote;<sup>14</sup> women could not be heirs;<sup>15</sup> women could not hold public office<sup>16</sup> or be on juries;<sup>17</sup> women could not bring lawsuits in their own names.<sup>18</sup> Married women were not even able to serve as legal guardians of their own children<sup>19</sup> and many were obligated to relinquish control of

9. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)).

10. See discussion *infra* Section II.C.

11. Sara Sheridan, *Toplessnes - The One Victorian Taboo That Won't Go Away*, BBC NEWS ONLINE, Nov. 15, 2014, <http://www.bbc.com/news/magazine-30052071> [<https://perma.cc/FT2D-LFVW>].

12. *Frontiero*, 411 U.S. at 684.

13. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring).

14. See U.S. CONST. amend. XIX; *Suffrage Wins in Senate; Now Goes to States*, N.Y. TIMES, June 5, 1919; see also Susan B. Anthony, *On Women’s Right to Vote (1873)* (transcript available at DIGITAL HIST., [http://www.digitalhistory.uh.edu/disp\\_textbook.cfm?smtid=3&psid=3604](http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtid=3&psid=3604) [<https://perma.cc/BE5E-52US>] (last visited June 3, 2018)).

15. See *Reed v. Reed*, 404 U.S. 71 (1971) (overturning Idaho code that stated that “[o]f several persons claiming equally entitled . . . to administer [the estate of one who dies intestate], males must be preferred to females . . .”); cf. Thomas Edgar, *The Law’s Resolutions of Women’s Rights; Or, the Law’s Provision for Women*, in NORTON ANTHOLOGY OF ENGLISH LITERATURE: EARLY SEVENTEENTH CENTURY TOPICS 26, 30 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES (1765)) (noting that, uncommonly, “[s]ome seventeenth-century men did . . . respect[] their [wives’] claims to inherited estates”).

16. In 1949, Margaret Chase Smith became the first woman elected to the U.S. Senate without previously being appointed to the office or filling a vacancy by the death of her husband. See *Smith, Margaret Chase*, HIST., ARTS, & ARCHIVES: U.S. HOUSE REPRESENTATIVES, <http://history.house.gov/People/Detail/21866> [<https://perma.cc/MM2X-CKA9>] (last visited June 3, 2018).

17. See *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (prohibiting states from systematically excluding women from jury service).

18. Edgar, *supra* note 15.

19. Harvard Bus. Sch., *Women and the Law*, WOMEN, ENTERPRISE & SOC’Y, [http://www.library.hbs.edu/hc/wes/collections/women\\_law/](http://www.library.hbs.edu/hc/wes/collections/women_law/) [<https://perma.cc/EQ3P-TBPP>] (last visited June 3, 2018).

their property and earnings to their husbands.<sup>20</sup> It is no surprise, then, that women could not be topless in public.<sup>21</sup>

### 1. *The Evolution of the Doctrine*

The Supreme Court's recognition of gender as a suspect classification arose out of the women's movement of the 1960s. By questioning the social and legal understandings of the gendered divide, the women's movement of the 1960s gave rise to many of the key protections women enjoy today. It is with this backdrop that Congress enacted key legislation prohibiting sex discrimination<sup>22</sup> and the Senate passed the Equal Rights Amendment (the "ERA") on March 22, 1972.<sup>23</sup> Further, a unanimous Supreme Court held that statutory classifications on the basis of gender are "subject to scrutiny under the *Equal Protection Clause*" of the Fourteenth Amendment,<sup>24</sup> reversing nearly a century's old practice of refusing to extend the protections of the Fourteenth Amendment to women.<sup>25</sup>

Between 1971 and 1976, the Supreme Court fundamentally altered its treatment of gender discrimination. Starting with *Reed v. Reed* and *Frontiero v. Richardson* in 1971 and 1973, respectively, and ending with *Craig v. Boren* in 1976, the Court laid the foundation for the gender discrimination jurisprudence that it still relies on today. Prior to these cases, the Court had consistently relied on social and biological differences between men and women to justify discriminatory treatment under the law.<sup>26</sup> In *Reed v. Reed*, a husband and wife conflicted over who could be the administrator of the estate of their deceased son.<sup>27</sup> At the time, Idaho Probate Code specified that "males must be preferred to females" in appointed

20. Mary Beth Norton, "Either Married Or to Bee Married": *Women's Legal Equality in Early America*, in *INEQUALITY IN EARLY AMERICA* 29, 34 (Carla Gardina Pestana & Sharon V. Salinger eds., 1999); see also Edgar, *supra* note 15.

21. For much of American history, women were subject to social ridicule for wearing trousers. See Nora Caplan-Bricker, *Women Who Wear Pants: Still Somehow Controversial*, SLATE (Feb. 16, 2016, 2:27 PM), [http://www.slate.com/articles/double\\_x/doublex/2016/02/women\\_wearing\\_pants\\_are\\_still\\_controversial.html](http://www.slate.com/articles/double_x/doublex/2016/02/women_wearing_pants_are_still_controversial.html) [<https://perma.cc/RE5V-QCJF>].

22. Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255–57 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17); see also Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 335, 373–74 (codified as amended at 20 U.S.C. §§ 1681–1688); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 13, 86 Stat. 816, 903 (codified as amended at 33 U.S.C. §§ 1251–1376); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (codified as amended in scattered sections of 42 U.S.C. §§ 2000e to 2000e-17); State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, § 122, 86 Stat. 919, 932; Nurses Training Act of 1971, Pub. L. No. 92-158, § 11, 85 Stat. 465, 479–80; Comprehensive Health Manpower Training Act of 1971, Pub. L. No. 92-157, § 110, 85 Stat. 431, 461.

23. Eileen Shanahan, *Equal Rights Amendment Is Approved by Congress*, N.Y. TIMES, Mar. 23, 1972, at A1.

24. *Reed v. Reed*, 404 U.S. 71, 75 (1971).

25. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 138–39 (1873) (declining to extend to women the right to obtain a license to practice law under the Fourteenth Amendment).

26. See, e.g., *id.* at 141 (Bradley, J., concurring) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.")

27. *Reed*, 404 U.S. at 71–72.

administrators of estates.<sup>28</sup> In striking down the law, Chief Justice Burger applied the test for non-gender-based Equal Protection challenges: “A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’”<sup>29</sup> The Court declared the statute’s preference “arbitrary” and a distinction that could not “stand in the face of the Fourteenth Amendment’s command that no State deny the equal protection of the laws to any person within its jurisdiction.”<sup>30</sup>

The Court expanded its protections in *Frontiero* where eight Justices held that classifications based on gender are inherently invidious and are unconstitutional.<sup>31</sup> The Court struck down a law that required female military personnel to prove dependency on their husbands in order to receive benefits; the law assumed dependency of wives for male military personnel.<sup>32</sup> The law, it found, was based on the “long and unfortunate history of sex discrimination . . . [that] in practical effect, put women, not on a pedestal, but in a cage.”<sup>33</sup> However, the Court could not agree on the level of judicial scrutiny that this classification warranted. The plurality, penned by Justice Brennan, held that such classification was “inherently suspect,” on par with race and national origin, and subject to “strict judicial scrutiny.”<sup>34</sup> The concurrence, by Justice Powell, disagreed saying it is “unnecessary . . . to characterize sex as a suspect class”<sup>35</sup> and instead, found solace in *Reed* and the ERA.<sup>36</sup>

The Court settled on a level of scrutiny three years later in *Craig v. Boren*.<sup>37</sup> Unfortunately, Justice Brennan writing this time for the majority had forsaken the

28. *Id.* at 73.

29. *Id.* at 76 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

30. *Id.* at 74.

31. *Frontiero v. Richardson*, 411 U.S. 677, 686–87, 690 (1973) (Brennan, J.) (plurality opinion) (“As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.”); *id.* at 691 (Stewart, J., concurring); *id.* at 691–92 (Powell, J., concurring).

32. *Id.* at 678–79.

33. *Id.* at 684.

34. *Id.* at 688 (Brennan, J.) (plurality opinion) (“With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid.”).

35. *Id.* at 691 (Powell, J., concurring).

36. *Id.* at 692 (noting that the ERA is a compelling reason to defer invoking strict scrutiny because “. . . if adopted [it] will resolve the substance of this precise question.” He continued that “this reaching out to pre-empt by judicial action a major political decision [ratifying the ERA] which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.”). While at the time this opinion was published in May of 1973, thirty states had already ratified the ERA, ultimately it fell just three states shy of the requisite three-fourths. See Roberta W. Francis, *Ratification: State Ratification of the ERA*, THE EQUAL RIGHTS AMENDMENT: UNFINISHED BUSINESS FOR THE CONSTITUTION, <http://www.equalrightsamendment.org/ratification.htm> [https://perma.cc/7HDP-DHRK] (last visited June 3, 2018).

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

standard of “strict judicial scrutiny”<sup>38</sup> from *Frontiero* in favor of an “elevated or ‘intermediate’ level scrutiny.”<sup>39</sup> In *Craig*, the Court struck down an Oklahoma statute that prohibited certain types of beer to be sold to men under the age of twenty-one and women under the age of eighteen.<sup>40</sup> The Court articulated the following test, based on *Reed* and its progeny: “To withstand constitutional challenge [under the Equal Protection Clause of the Fourteenth Amendment] classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”<sup>41</sup> Applying this test, the Court held that the law “invidiously discriminate[d] against males 18–20 years of age” and that the State failed to show that “sex represent[ed] a legitimate, accurate proxy for the regulation of drinking and driving.”<sup>42</sup>

## 2. The Doctrine Today

The modern Equal Protection doctrine’s intermediate scrutiny standard has been clarified in two recent cases: *Mississippi University for Women v. Hogan*<sup>43</sup> and *United States v. Virginia*.<sup>44</sup> Although recent decisions have not truly honored this new standard,<sup>45</sup> it is important to consider as this still remains good law.<sup>46</sup>

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38. *Frontiero*, 411 U.S. at 688.

39. *Craig*, 429 U.S. at 218 (Rehnquist, J., dissenting) (describing the majority’s test); *id.* at 210, n.\* (Powell, J., concurring) (articulating that the test will be viewed as a “middle-tier” because it is more demanding than rational basis, and less demanding than strict scrutiny).

40. *Id.* at 191–92.

41. *Id.* at 197–99 (Brennan, J.); *see also id.* at 210 n.\* (Powell, J., concurring).

42. *Id.* at 204.

43. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 718 (1982).

44. *United States v. Virginia*, 518 U.S. 515, 515 (1996).

45. *See Virginia Milstead, Forbidding Female Toplessness: Why “Real Difference” Jurisprudence Lacks “Support” and What Can Be Done About it*, 36 U. TOL. L. REV. 273, 314–18 (2005) (arguing that the *Virginia* standard has largely been ignored); *see also Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting) (“The illegitimacy of using ‘made up tests’ to ‘displace longstanding national traditions as the primary determinant of what the Constitution means’ has long been apparent.”) (quoting *Virginia*, 518 U.S. at 570 (Scalia, J., dissenting)). *Compare* *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53, 70 (2001) (applying *Virginia* in name only, while effectively applying the traditional version of intermediate scrutiny), *with id.* at 88–89 (O’Connor, J., dissenting) (arguing that the INS has not shown an exceedingly persuasive justification for the sex-based classification because the court did not adequately consider the effectiveness of a gender-neutral law).

46. Many federal courts of appeals, including the Ninth Circuit Court of Appeals, continue to apply *Virginia*’s heightened scrutiny test for sex-discrimination. *See, e.g., Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017); *Morales-Santana v. Lynch*, 804 F.3d 520, 528–30 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016), *and aff’d in part, rev’d in part and remanded sub nom; Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep’t of Transp.*, 713 F.3d 1187, 1195 (9th Cir. 2013); *Cmty. for Equity v. Mich. High Sch. Ath. Ass’n*, 459 F.3d 676, 693–95 (6th Cir. 2006); *Hibbs v. Dep’t of Human Res.*, 273 F.3d 844, 854 (9th Cir. 2001); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 712–15 (9th Cir. 1997). In the Ninth Circuit, only *Associated Gen. Contractors of Am.* has applied the “exceedingly persuasive justification” analysis at the court of appeals level; however, many Ninth Circuit district courts have. *See, e.g., Sassman v. Brown*, 99 F. Supp. 3d 1223, 1234 (E.D. Cal. 2015), *appeal dismissed* (Mar. 14, 2016), *modified on reconsideration*, No. 214CV01679MCEKJN, 2015 WL 8780632 (E.D. Cal. Dec. 15, 2015); *Latta v. Otter*, 19 F. Supp. 3d 1054, 1073 (D. Idaho 2014).



In *Mississippi University for Women*, the Court stated that:

Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or “protect” members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.<sup>47</sup>

The Court used this test to strike down the Mississippi University for Women’s single-sex admissions policy.<sup>48</sup> As a result of their discriminatory admissions policy, the university would not admit a male nursing student applicant who was otherwise qualified, solely because he was male.<sup>49</sup>

The pivotal case of the modern era regarding gender equality is *Virginia*.<sup>50</sup> In this 1996 decision, the Court with a seven-to-one opinion heightened the standard for gender discrimination to “skeptical scrutiny” when it found Virginia Military Institute’s exclusively male admissions policy unconstitutional under the Fourteenth Amendment.<sup>51</sup> By requiring that the government show an “exceedingly persuasive justification,” the court imposed a stricter standard than intermediate scrutiny. The Court declared: “State actors controlling the gates of opportunity ... may not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females.’”<sup>52</sup>

Under the new “skeptical scrutiny”<sup>53</sup> standard, the party seeking to defend a classification must show “at least that the [challenged] classification serves

47. *Miss. Univ. for Women*, 458 U.S. at 724–25 (citing *Frontiero v. Richardson*, 411 U.S. 677, 684–85 (1973)).

48. *Id.* at 731:

Thus, considering both the asserted interest and the relationship between the interest and the methods used by the State, we conclude that the State has fallen far short of establishing the “exceedingly persuasive justification” needed to sustain the gender-based classification. Accordingly, we hold that MUW’s policy of denying males the right to enroll for credit in its School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment.

49. *Id.* at 720–21.

50. *Virginia*, 518 U.S. 515.

51. *Id.* at 534:

Measuring the record in this case against the review standard just described, we conclude that Virginia has shown no “exceedingly persuasive justification” for excluding all women from the citizen-soldier training afforded by VMI. We therefore affirm the Fourth Circuit’s initial judgment, which held that Virginia had violated the Fourteenth Amendment’s Equal Protection Clause.

52. *Id.* at 541 (quoting *Miss. Univ. for Women*, 458 U.S. at 725).

53. *Id.* at 531:

We note, once again, the core instruction of this Court’s pathmarking decisions in *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994), and *Mississippi Univ. for Women*, 458 U.S. at 724 (internal quotation marks omitted): Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.

‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’<sup>54</sup> The Court declared that, in order for an objective to be sufficient, “[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>55</sup> Many courts continue to follow these criteria in order to determine whether an interest can justify the sex discrimination.<sup>56</sup>

### B. First Amendment

“Being ‘in a state of nudity’ is not an inherently expressive condition.”<sup>57</sup> Under the Court’s declaration it would follow that the First Amendment is generally inapplicable in instances of toplessness for toplessness’ sake because general toplessness is not expressive conduct, but it would protect topless protesting which is expressive. And yet, that is not the case in the majority of decisions.<sup>58</sup> Perhaps

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Today’s skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history.

*Id.*

54. *Id.* at 533 (quoting *Miss. Univ. for Women*, 458 U.S. at 724 (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980))).

55. *Id.* (“The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”) (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648 (1975); *Califano v. Goldfarb*, 430 U.S. 199, 223–24 (1977) (Stevens, J., concurring in the judgment)).

56. *Associated Gen. Contrs. of Am. v. Cal. Dept. of Transp.*, 713 F.3d 1187, 1195 (9th Cir. 2013); *Cmtys. for Equity v. Mich. High Sch. Ath. Ass’n*, 459 F.3d 676, 695 (6th Cir. 2006); *Morales-Santana v. Lynch*, 804 F.3d 521, 528–30 (2d Cir. 2006); *Hibbs v. Dep’t of Human Res.*, 273 F.3d 844, 854 (9th Cir. 2001); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 712–16 (9th Cir. 1997); *Sassman v. Brown*, 99 F. Supp. 3d 1223 (E.D. Cal. 2015); *Latta v. Otter*, 19 F. Supp. 3d 1054 (D. Idaho, 2014).

57. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000) (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991) (plurality opinion); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981)).

58. *See Craft v. Hodel*, 683 F. Supp. 289, 291 (D. Mass. 1988) (rejecting the argument “that [the plaintiffs’] message of protest against exploitation is conveyed particularly by their nudity” and finding that “this is only a matter of perspective” because “public nudity does not convey any specific message, at most it is a medium by which a variety of messages may be conveyed”); *Free the Nipple—Fort Collins v. City of Fort Collins*, 216 F. Supp. 3d 1258 (D. Colo. 2016) (granting City of Fort Collins’ motion to dismiss in part with regards to plaintiffs’ First Amendment claim but otherwise denying it); *Free the Nipple—Fort Collins v. City of Fort Collins*, 237 F. Supp. 3d 1126 (D. Colo. 2017) (granting preliminary injunction on Equal Protection Claim). *But see* *People v. Craft*, 509 N.Y.S.2d 1005, 1007, 1012 (N.Y. City Ct. 1986) (finding that a New York public exposure penal statute was not unconstitutional as applied to a group of women who went topless in a New York park to protest the state’s public exposure law), *rev’d* 564 N.Y.S.2d 695 (1991); *People v. Craft*, 564 N.Y.S.2d 695 (1991), *rev’d sub nom.* *People v. Santorelli*, 600 N.E.2d 232 (N.Y. 1992). The court also justified the discriminatory treatment under the Equal Protection Clause:

The State of course may treat males and females differently and not violate the Equal Protection Clauses of the United States and New York State Constitutions provided the unequal treatment is substantially related to the achievement of an important governmental concern. (*Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982)). This court finds that the State’s objective in the passage of this statute is to protect the public from invasions of its sensibilities and that it currently reflects community standards as to what constitutes

because the same rules prohibit both forms of toplessness, both are prohibited. It is also because courts fail to view a woman's breasts as anything but a sexual object that it must protect society against. Even when the conduct is expressive, courts have used this reasoning to uphold female toplessness prohibitions like in the nude and topless dancing context<sup>59</sup> and also when it is not expressive (or when they deem it non-expressive), like topless protesting. As a result, it is necessary to analyze the ways the First Amendment has affected female toplessness.<sup>60</sup> While there are some courts that have protected female toplessness through the First Amendment, more often than not, general toplessness gets lumped into the same category as nude dancing and thus deemed "obscene,"<sup>61</sup> or found not to be expressive and thus not protected.

### 1. Expressive Conduct

The right to free speech is one of the fundamental tenets of our modern society.<sup>62</sup> The First Amendment states: "Congress shall make no law ... abridging the freedom of speech, or of the press ... ."<sup>63</sup> It prohibits the government from restricting expression, but it is not limitless prohibition. The Supreme Court's First Amendment jurisprudence establishes that there are permissible restrictions on speech. The First Amendment also protects speech when it is not on oratory or on a page.

In *United States v. O'Brien*, the Supreme Court recognized that communicative conduct is not immune from government regulation.<sup>64</sup> David Paul O'Brien burned his Selective Services registration certificate in protest of the Vietnam War in violation of federal law.<sup>65</sup> As a result, he was indicted, convicted, and sentenced.<sup>66</sup> O'Brien brought suit arguing that his conviction and the federal law violated the

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nudity. As such, the prohibition under the statute as it applies to women is substantially related to the achievement of an important governmental interest or concern.

*Craft*, 564 N.Y.S.2d at 697.

However, it is important to note that this case was decided before *Virginia*, thus it is possible that the court may have ruled the other way as a result of the stricter standard. See Reena Glazer, Note, *Women's Body Image and the Law*, 43 DUKE L.J. 113, 122–30 (1993).

59. By this, I mean nude dancing, where toplessness is also prohibited. See *Barnes*, 501 U.S. at 565 (holding that an Indiana public indecency law that required nude dancers to wear pasties and a G-string did not violate the First Amendment); *California v. LaRue*, 409 U.S. 109 (1972) (upholding a California Department of Alcoholic Beverage Control regulation prohibiting nude dancing in places in establishments licensed to sell alcohol as valid under the First Amendment).

60. See also Brenna Helppie-Schmieder, Note, *The Constitution and Societal Norms: A Modern Case for Female Breast Equality*, 5 DEPAUL J. WOMEN, GENDER & L. 1, 14–17 (2015); Danielle Moriber, Note, *A Right to Bare All? Female Public Toplessness and Dealing with the Laws that Prohibit*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 453, 469 (2009).

61. See discussion *infra* Part I.B.2.

62. See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1237–38 (5th ed. 2017).

63. U.S. CONST. amend. I.

64. *United States v. O'Brien*, 391 U.S. 367 (1968).

65. *Id.* at 369. It was unlawful to knowingly destroy one's Selective Service registration card under 50 U.S.C. § 462(b) (current version at 50 U.S.C. § 3811(b) (2015)). See *O'Brien*, 391 U.S. at 370.

66. *O'Brien*, 391 U.S. at 369.

First Amendment. The Court did not agree,<sup>67</sup> laying out the following test for symbolic conduct:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>68</sup>

The Court found that the government's prohibition was "an appropriately narrow means of protecting"<sup>69</sup> its interest in maintaining a smooth functioning draft system. It further justified O'Brien's conviction "because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest."<sup>70</sup>

The Supreme Court applied *O'Brien* to nude dancing vis-à-vis its communication of "an erotic message."<sup>71</sup> In *Barnes v. Glen Theatre Inc.*, the Court noted that because nude dancing "is expressive conduct within the outer perimeters of the First Amendment,"<sup>72</sup> it is afforded some protections under the First Amendment, but that some types of nude dancing may be regulated and are not protected.<sup>73</sup> Applying the four-part *O'Brien* test, the Court upheld an Indiana statute that proscribed all instances of public nudity. The Court found that the law furthers a substantial interest in "protecting societal order and morality."<sup>74</sup> The Court went further to note that since public nudity is the evil the State seeks to prevent, the fact that the law may have implications on expression is only incidental and not a cause to strike it down.<sup>75</sup>

The blanket prohibitions in these ordinances fail the "greater than is essential"<sup>76</sup> test in *O'Brien*. Under this test, the ordinances are inherently overbroad because they impose restrictions that are greater than is essential to further a substantial government interest such as protecting children. The blanket prohibitions neglect the fact that there are valid circumstances where it should be

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67. *Id.* at 386.

68. *Id.* at 377. *See also* CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1119 (5th ed. 2015) (noting that the standard is very similar to the intermediate scrutiny standard); Moriber, *supra* note 60, at 475.

69. *O'Brien*, 391 U.S. at 382.

70. *Id.*

71. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 560 (1991).

72. *Id.* at 566.

73. *Id.* at 565–66.

74. *Id.* at 568–69 (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973) ("[T]his Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.'" (emphasis omitted) and *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) ("The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.")).

75. *Id.* at 570.

76. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

acceptable for an adult female to determine that it will not be offensive for her to be topless. Yet, these ordinances impose a blanket prohibition on public toplessness altogether. Furthermore, these ordinances forget to consider alternative, less restrictive, means to further its interests, such as to prohibit the time or place a woman can be topless, like a children's playground.

## 2. *Nude Dancing, Sexual Speech, and Obscenity*

Just as the First Amendment does not protect all instances of nude dancing,<sup>77</sup> it does not protect obscenity.<sup>78</sup> However, it may protect depictions of sex as the court has noted how “sex and obscenity are not synonymous.”<sup>79</sup> “Obscene material is material which deals with sex in a manner appealing to prurient interest[.]” it is not simply the portrayal of sex.<sup>80</sup> The difference between sex and obscenity is laid out by the following test:

- (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>81</sup>

The Court's treatment of nude dancing, sex, and obscenity are best evinced in three cases: *Roth v. United States*, *Paris Adult Theatre v. Slaton*, and *Erie v. Pap's A.M.*<sup>82</sup> In *Roth*, the Court acknowledged that a legislature could legitimately act to protect “the social interest in order and morality.”<sup>83</sup> The Court furthered this reasoning in *Paris Adult Theatre* to recognize that states have a legitimate interest in regulating the commerce of obscene material in places of public accommodations.<sup>84</sup>

77. Compare *California v. LaRue*, 409 U.S. 109, 118–19 (1972) (holding that the California Department of Alcoholic Beverage Control could regulate nude dancing in places that sell liquor), and *Barnes*, 501 U.S. at 560 (holding that the State government may ban nude dancing entirely), with *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981) (finding a municipal ordinance that prohibited all live entertainment in a commercial area was unconstitutionally overbroad).

78. *Roth v. United States*, 354 U.S. 476, 484–85 (1957) (“[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . We hold that obscenity is not within the area of constitutionally protected speech or press.”); see also *Miller v. California*, 413 U.S. 15, 36–37 (1973) (reaffirming that obscene material is not protected by the First Amendment and remanding to determine whether mass mailings depicting sexually explicit material are obscene and not protected by the First Amendment); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (holding that states have the power to make laws prohibiting obscenity; upholding a Georgia obscenity law that prohibits the showing of pornographic films).

79. *Roth*, 354 U.S. at 487.

80. *Id.*

81. *Miller*, 413 U.S. at 24 (citations omitted).

82. See *Roth*, 354 U.S. 476; *Paris Adult Theatre I*, 413 U.S. 49; *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

83. *Roth*, 354 U.S. at 485 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

84. *Paris Adult Theatre I*, 413 U.S. at 69.

However, the Court limited a state's power to censor "obscene" material to "depiction[s] and description[s] of specifically defined sexual conduct . . ." <sup>85</sup> In *Paris Adult Theatre*, the Court stated that: "The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the States' 'right . . . to maintain a decent society.'" <sup>86</sup> Finally, in *Erie*, the Court upheld an ordinance passed by the city of Erie, Pennsylvania requiring live dancers to wear at least "pasties" and a "G-string." <sup>87</sup> The city adopted the ordinance "for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects." <sup>88</sup> A plurality found that the ordinance was justified to combat nude dancing's "secondary effects." The court found that nude dancing is expressive conduct that is subject to the First Amendment but that being "in a state of nudity" is not an inherently expressive condition. <sup>89</sup>

The Supreme Court has made it clear that nudity alone is not enough to make speech unprotected. <sup>90</sup> Unfortunately, lower courts have not followed this reasoning.

## II. BREAKING [DOWN] THE OPPOSITION

In *Virginia*, the Court recognized that while diversity in education may be a noble justification, it is not a sufficient justification for the sex-based discrimination

85. *Id.*

86. *Id.* (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)).

87. *Pap's A.M.*, 529 U.S. at 291, 296 (2000) (upholding a Pennsylvania public nudity ordinance):

We conclude that the [City's] asserted interest in combatting the negative secondary effects associated with adult entertainment establishments . . . is unrelated to the suppression of the erotic message conveyed by nude dancing.

. . . The asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important.

*Id.* at 296.

88. *Id.* at 290 (citing *Pap's A.M. v. City of Erie*, 553 Pa. 348, 359 (1998), *rev'd*, 529 U.S. 277 (2000)).

89. *Id.* at 289.

90. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 207, 213 (1975) (declaring unconstitutional an ordinance that prohibits the exhibition of any motion picture "in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown if such motion picture . . . is visible from any public street or public place."):

[A]ll nudity cannot be deemed obscene, even as to minors. Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable . . . .

*Id.* at 213 (citation omitted). *See also* *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981) ("[N]ude dancing is not without its First Amendment protections from official regulations.").

in Virginia's Military School.<sup>91</sup> Similarly, while ending sexual violence and promoting public morality may be valid justifications to prohibit nude dancing, they are not substantially related to the prohibition on topless sunbathing. Unlike nude dancing, which is done for the express purpose of a performance and in many instances to sexually gratify an audience, the act of being topless or topless sunbathing has no relation to an intended audience.

The arguments in favor discussed below are based on the most commonly-cited reasons to ban female toplessness, based on the cases that have upheld female topless prohibitions, including nude dancing prohibitions, as well as in the text of some of the ordinances.<sup>92</sup> The main justifications for female toplessness include the need to preserve public order and morality, to combat sexual violence, and that women's breasts are different than men's.

Last, critics and advocates of female toplessness have largely focused on the women who are affected by these laws. However, these laws also harm men. Since many of the Court's principal gender discrimination decisions involve suits brought by men,<sup>93</sup> this Part will also explore some of the arguments men can raise in order to challenge these laws. These laws perpetuate a negative stereotype of men: that they become vulgar, thuggish, sadistic monsters at the sight of a woman's flesh. The underlying rationale behind the justification of combatting sexual violence is precisely if men were able to control themselves, then women would not need to cover up.<sup>94</sup>

91. *United States v. Virginia*, 518 U.S. 515, 534 n.80 (1996).

92. *See, e.g.*, NEWPORT BEACH, CAL., MUN. CODE § 10.54.010–030 (1975).

93. *See, e.g.*, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 718 (1982) (brought by a male nursing applicant); *Craig v. Boren*, 429 U.S. 190, 190 (1976) (brought on behalf of men eighteen to twenty years old); *Frontiero v. Richardson*, 411 U.S. 677, 677 (1973) (brought on behalf of women in the military on the basis of discriminatory treatment against husband-dependents).

94. Similar arguments have been made across cultures. Ironically, in places where the veil is mandatory, sexual harassment seems to be more prevalent. *See* Tehran Bureau Chief, *How the Hijab Has Made Sexual Harassment Worse in Iran*, GUARDIAN, Sept. 15, 2015, <https://www.theguardian.com/world/iran-blog/2015/sep/15/iran-hijab-backfired-sexual-harassment> [<https://perma.cc/U48A-PXLG>] (describing how women in Iran faced increased unwanted sexual attention, more akin to “hunting” after the Hijab):

What is peculiar about Iran, as opposed to other nations in the region, is that it does not have a long tradition of requiring women to cover up. In fact, up until 1979 Iranian women looked no different than any woman in Europe or America, they could wear mini jupes and short dresses, and anecdotally, sexual harassment was not as prevalent as it is today. Fast forward thirty years, a generation of men and more have become trained to think of women as sexual objects and have lost all sense of self-control. Even, the sight of a woman's ankle, will excite men beyond belief.

*Id.* In a post about a brother recounting how his sister's full hijab invited unwanted sexual attention, Josh Shahryar recounts:

The men who passed us on sidewalks would say demeaning things—things sexual in nature that I was too young to understand. My mom and dad wanted me to walk her to school because if I wasn't with her, who knew what these men would do? I grew up hearing stories about women being groped, punched, even abducted—all while wearing hijabs. The perpetrators were from all ethnic groups and were both Pakistanis and, like us, refugees.

### A. False Morality

Despite the differences between nude dancing and female toplessness, the government equates the two and posits the same justifications for its prohibitions. One argument is to protect public order and morality and to combat sexual violence. To date, the Supreme Court has not yet addressed whether it is permissible to prohibit toplessness alone (meaning, when it is not in conjunction with dancing) on the basis of morality. However, many appellate courts and some state courts have. For instance, the Fourth Circuit Court of Appeals states that:

The important government interest is the widely recognized one of protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous zones. These still include (whether justifiably or not in the eyes of all) the female, but not the male, breast.<sup>95</sup>

More recently, an Indiana state court in *C.T. v. Indiana* applied reasoning from the Supreme Court's First Amendment ruling in *Paris Adult Theater*<sup>96</sup> and the Fourth Circuit's *United States v. Biocic* to uphold a public nudity statute against an Equal Protection challenge.<sup>97</sup> The *C.T.* court reasoned that in the absence of authority stating that legislatures can no longer act to preserve order and morality, protecting moral sensibilities is still an important justification.<sup>98</sup> However, the court neglected to consider the Supreme Court's recent rulings which have questioned reliance on morality to justify a discriminatory law.<sup>99</sup>

In *Barnes*, the Court acknowledged that Indiana's public indecency statute<sup>100</sup> "reflect[s] moral disapproval of people appearing in the nude among strangers in

Josh Shahryar, *The Myth of How the Hijab Protects Women Against Sexual Assault*, WOMEN'S MEDIA CENTER (Sept. 6, 2012), <http://www.womenundersiegeproject.org/blog/entry/the-myth-of-how-the-hijab-protects-women-against-sexual-assault> [https://perma.cc/65AP-GJHA].

95. *United States v. Biocic*, 928 F.2d 112, 115–16 (4th Cir. 1999).

96. See discussion *supra* Part I.B.

97. *C.T. v. Indiana*, 939 N.E.2d 626, 630 (Ind. Ct. App. 2010).

98. *Id.* at 629.

99. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

100. The Indiana Statute that was discussed in *Barnes*, section 35-45-4-1 of the 1988 Indiana Code, provides in pertinent part:

Public indecency; Indecent exposure

(a) A person who knowingly or intentionally, in a public place:

- (1) engages in sexual intercourse;
  - (2) engages in deviate sexual conduct;
  - (3) appears in a state of nudity; or
  - (4) fondles the genitals of himself or another person;
- commits public indecency, a Class A misdemeanor.

(b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

IND. CODE. ANN. § 35-45-4-1 (LexisNexis 1988); see also Aaron Brogdon, *Improper Application of First-Amendment Scrutiny to Conduct-Based Public Nudity Laws*, *Eric v. Pap's A.M. Perpetuates the Conclusion Created by Barnes v. Glen Theatre, Inc.*, 17 BYU J. PUB. L. 89 n.2 (2002).



public places.”<sup>101</sup> In justifying this conclusion, the Court relied on *Bowers v. Hardwick*, a case where the Court upheld a Georgia statute that criminalized sodomy.<sup>102</sup> Continued reliance on *Bowers*, permitting morality as a legitimate government interest, is unfounded; this reasoning was explicitly overruled by *Lawrence v. Texas* in 2003.<sup>103</sup>

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. “Our obligation is to define the liberty of all, not to mandate our own moral code.”<sup>104</sup>

Just as the long history of homophobia masked as morality, this nation has applied that same reasoning to its sexist treatment of women’s bodies through its laws. *Lawrence* explicitly questioned the use of one’s morality to justify a discriminatory law, yet those in favor of female toplessness bans, such as the Fourth Circuit and the Indiana court in *C.T.*, rely on such arguments to ban female toplessness.<sup>105</sup> The morality, viewed in light of the Court’s previous decisions, is not an “exceedingly persuasive justification” for this blatant form of gender discrimination.

As *Lawrence* noted, the reliance on morality is deeply connected to religion, and specifically Judeo-Christian ideologies.<sup>106</sup> The explicit use of such ideologies is evidenced in a 1980s toplessness case from New York state court, *People v. David*.<sup>107</sup> While the case has since been invalidated because a subsequent state court case found toplessness laws unconstitutional,<sup>108</sup> the reasoning that the *David* court applied has been followed in subsequent cases, such as *C.T.* In *People v. David*, Judge Regan cited a passage from the *Book of Genesis* where Adam and Eve both realize that they were naked and cover themselves up with fig leaves. He believes the use of nudity and man’s consciousness of it illustrate man’s knowledge of good and evil and that one’s sense of embarrassment from one’s nudity is because nudity is evil

101. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 568 (1991).

102. *Bowers v. Hardwick*, 478 U.S. 186, 186 (1986).

103. *Lawrence*, 539 U.S. at 558.

104. *Id.* at 571 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

105. *C.T. v. Indiana*, 939 N.E.2d 626, 630 (Ind. Ct. App. 2010).

106. *Lawrence*, 539 U.S. at 572.

107. *People v. David*, 549 N.Y.S.2d 564, 567 (1989), *overruled on appeal by* 585 N.Y.S.2d 149 (1991) (overruled on equal protection grounds).

108. *People v. Santorelli*, 80 N.Y.2d 875, 883 (1992) (finding New York’s public exposure law unconstitutional under the Equal Protection Clauses of the federal and state constitutions).

and immoral.<sup>109</sup> He argues that, “Judeo-Christian morality bans on public nudity” are desirable to “reduce the incidence of public misbehavior”<sup>110</sup> because, in the Judeo-Christian ethic which, according to him, that the United States as a society espouses, nudity is a catalyst for shame and immoral behavior and triggers a choice between good and evil.

The use of morality and the Judeo-Christian ethic is illogical not only under its own reasoning<sup>111</sup> but more importantly as a foundation for a legal judgment. Judge Regan assumes that Eve’s breasts were part of the immorality of nudity and that she was ashamed to have them exposed,<sup>112</sup> but even the most iconic depictions of Adam and Eve throughout history show them with fig leaves covering only their genitalia, not their chests.<sup>113</sup> These celebrated images span centuries and civilizations and hang in museums around the world. Many are proudly displayed at some of the

109. Glazer, *supra* note 58, at 125; *David*, 549 N.Y.S.2d at 567 (using the following passage from Book of Genesis to justify a ruling against several women who were arrested for violating, now repealed, New York Penal Law § 245.01):

So she took some of its fruit and ate it; and she also gave some to her husband, who was with her, and he ate it.

7. Then the eyes of both of them were opened, and they realized that they were naked, so they sewed fig leaves together and made loin cloths for themselves.

8. When they heard the sound of the Lord God moving about in the garden at the breezy time of the day, the man and his wife hid themselves from the Lord God among the trees of the garden.

9. The Lord God then called to the man and asked him “Where are you?”

10. He answered; I heard you in the garden but I was afraid, because I was naked, so I hid myself.

11. Then the Lord God asked: “Who told you that you were naked?” You have eaten then from the tree (of the knowledge of good and evil) of which I had forbidden you to eat! (Genesis 3:6-11.)

*Id.*

110. *David*, 549 N.Y.S.2d at 567.

111. Undergoing the same literal close read of the passage from the Book of Genesis that the *David* court did, it does not follow that nudity in and of itself is evil or immoral, nor does it follow that female toplessness “is a catalyst for immoral behavior.” Prior to eating from the Tree of Knowledge, Adam and Eve knew right from wrong, good from bad. They were naked before they ate the forbidden fruit and did not care. Prior to them eating the fruit, there was nothing immoral about their nudity. The “immoral behavior” occurred when Adam and Eve disobeyed instructions and ate the forbidden fruit, which they did while they were naked. Moreover, nowhere is shame linked to such immoral behavior. Following the logic of Genesis and considering it as truth, it does not follow that God would consider the nudity immoral. God intentionally left them naked in the garden in the first place. The shame and embarrassment that Adam and Eve felt does not mean that their nudity is “evil.” These are natural emotions that most people would feel if they suddenly realized they were completely naked in public. Despite Judge Regan’s assumptions to the contrary, The Book of Genesis cannot definitively support the notion that God considers a woman’s bare chest immoral.

112. *David*, 549 N.Y.S.2d at 567–68.

113. Even the most iconic ancient depictions of Adam and Eve from various regions show Eve topless. See *Adam and Eve* in Abreha and Atsbeha Church, Ethiopia (circa 210 ACE); Mosaic in Monreale Cathedral, Sicily, Italy (twelfth to thirteenth century); Ja’far al-Sādiq, *Falnameh (Book of Omens)*, watercolor and gold on paper, Iran (Safavid Dynasty, 16th century); Albrecht Dürer, *Adam and Eve*, engraving, Germany (1504) and *Adam and Eve*, oil on panel, Germany (1507); Raphael, *Adam and Eve* fresco from *Stanza della Segnatura*, Vatican (1509-1511); Lucas Cranach the Elder, *Adam and Eve in Paradise (The Fall)*, oil on beech wood, Germany (1526); and Titian, *The Fall of Man*, oil on canvas, Italy (1550).

world's holiest sites. It is unlikely that anyone would even consider these images immoral because they depict Eve's bare chest. In fact, even the Fourth Circuit Court of Appeals agreed with the notion that "the female breast has from time immemorial been the subject of high artistic expression in great, publicly displayed sculpture and painting."<sup>114</sup> Even some laws, like the Los Angeles ordinance that inspired this Note, have exceptions for depictions of toplessness for artistic purposes in certain public spaces.<sup>115</sup> Thus, if a woman brought a painting of a topless Aphrodite, Venus, or Eve to the beach, she may not violate the law, but if she herself was topless, she would violate it. Some may argue that allowing female topless sunbathing would cause issues for parents who wish to instill the values of modesty in their children who would equate the exposure of topless sunbathers to subjecting their child to pornography. This is at best a secondary argument against public toplessness, and one that has not been tested by the courts. Although parents have the right to control the upbringing, and to some extent education, of their children,<sup>116</sup> this right is not absolute and should not be a sufficient justification for an infringement on a woman's rights. Furthermore, such claims negate the potential important lessons that public toplessness could teach children. For example, the very valuable lessons of how to feel comfortable in one's skin and to normalize the human body in its various forms.

*B. Degrading, Demeaning, and Humiliating Reliance on Combating Sexual Violence*

Another argument that proponents rely on is that topless prohibitions are necessary to prevent sexual violence. This argument too is invalid because it relies on an "overbroad generalization" about men and women and may be more of an ad hoc justification for the ban of this form of toplessness. Like the morality argument, this explanation is the same one that the court acknowledged in its nude dancing cases. In *LaRue*, the Court upheld the California Department of Alcoholic Beverage Control regulation prohibiting nude dancing in establishments licensed to sell alcohol as valid under the First Amendment.<sup>117</sup> The regulation promulgated by the Department only prohibited the "displaying of the pubic hair, anus, vulva, and genitals"<sup>118</sup> and did not prohibit the displaying of the breast. The Court took note of the Department's "numerous incidents of legitimate concern," which included incidents where:

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114. *United States v. Biocic*, 928 F.2d 112, 116 n.4 (4th Cir. 1999) (agreeing with this point but noting that it was irrelevant to the issue of whether intentional exposure of the full female breast in public places at the whim of the actor is constitutionally protected).

115. L.A., CAL., CODE OF ORDINANCES § 17.04.480(C.) (1975).

116. The Supreme Court repeatedly recognizes parents' right to control the upbringing of their children. *See Troxel v. Granville*, 530 U.S. 57 (2000); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925). However, such a right is not absolute. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (upholding a child labor statute which prohibited a young child from soliciting for the Jehovah's Witnesses at her parent's direction and stating that "the family itself is not beyond regulation in the public interest").

117. *California v. LaRue*, 409 U.S. 109, 109 (1972).

118. *Id.* at 111–12.

Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the vagina of a female entertainer, or on the bar in order that she might pick it up herself . . . .

Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises.<sup>119</sup>

In his dissent, Justice Marshall questioned the veracity of the interest in preventing “sex crimes, drug abuse, prostitution, and a wide variety of other evils.”<sup>120</sup> He noted how they are the “same interests that have been asserted time and again before [the] Court as justification for laws banning frank discussion of sex and that we have consistently rejected.”<sup>121</sup> Additionally, he questioned “the empirical link between sex-related entertainment and the criminal activity popularly associated” which had “never been proven and, indeed, has now been largely discredited.”<sup>122</sup>

Nearly all of the incidents that the California Department cited involved exposure of the vagina, and not the breast.<sup>123</sup> In fact, the Department, noting these incidents, felt that it was unnecessary to extend the ban to topless dancing.<sup>124</sup> Thus, banning innocent, benign, non-sexual toplessness for those same reasons cited above is disingenuous. If topless dancing’s “erotic message”<sup>125</sup> was not of concern for California in *LaRue* despite those incidents of sexual violence, it is disingenuous to use those same incidents to ban benign, innocent, non-sexual toplessness, such as sunbathing, swimming, or cooling off.

The argument that banning toplessness is necessary to combat sexual violence sends a degrading message to both men and women and is not an exceedingly persuasive justification to condone this prohibition. Just as the Defense of Marriage Act and state prohibitions of sodomy and same-sex marriage demeaned, degraded, and humiliated our fellow human beings who are homosexual,<sup>126</sup> prohibitions of female toplessness demean women and degrade men. These laws humiliate men and women. They strip every person of his or her humanity. These laws tell women that their bodies are obscene, while at the same time telling men that they are unable to trust their ability to control themselves around persons of the opposite sex.

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119. *Id.*

120. *Id.* at 131 (Marshall, J., dissenting).

121. *Id.* (citing REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 27 (1970) and Robert B. Cairns, James C.N. Paul & Julius Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009 (1962)).

122. *Id.*

123. *Id.* at 111.

124. *Id.* at 112.

125. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 560 (1991).

126. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013); *see also Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

These laws further the practice of putting the majority of the burden on women to avoid getting sexually harassed and raped,<sup>127</sup> rather than encouraging men to take an active role<sup>128</sup> and teaching men not to harass and assault women.<sup>129</sup> By forcing a woman not to go topless in public, in fear that it would invite unwanted attention, the law is tacitly condoning the bad behavior.

*C. A Breast is a Breast: All Breasts are Erogenous*

Some state courts have concluded that the Equal Protection Clause does not prohibit female toplessness laws, reasoning that female breasts are sufficiently different than male breasts, as only the former constitute an erogenous zone, and that society understands female breasts to be an element of nudity or one's private areas, but not male breasts.<sup>130</sup> This is not an important governmental interest in and of itself, but it is an argument that has been consistently used to justify this discrimination.

While "nature, not the legislative body, created the distinction between that portion of a woman's body and that of a man's torso,"<sup>131</sup> the legislature and courts

127. Julie Beck, *The Different Stakes of Male and Female Birth Control*, ATLANTIC, Nov. 1, 2016, <http://www.theatlantic.com/health/archive/2016/11/the-different-stakes-of-male-and-female-birth-control/506120/> [<https://perma.cc/B7W2-5QWL>] (discussing how women have to bear the burdens of birth control as opposed to men, especially in light of the discontinuation of the trial of male birth control); Tara Culp-Ressler, *All of the Things Women Are Supposed to Do to Prevent Rape*, THINKPROGRESS (June 10, 2014, 7:50 PM), <https://thinkprogress.org/all-of-the-things-women-are-supposed-to-do-to-prevent-rape-b9365bf520c1#.wx8hvp1sn> [<https://perma.cc/QZ7T-S7XS>] (a compilation of some of the many sexist and burdensome measures women are expected to take to prevent getting raped); Sexual Harassment Policy Office, *What You Can Do to Stop Sexual Harassment*, STAN. U., <https://harass.stanford.edu/take-action/what-you-can-do-stop-sexual-harassment> [<https://perma.cc/Z3EV-NUHB>] (last visited June 3, 2018) (guide for students on how to stop sexual harassment).

128. *The Pledge*, IT'S ON US CAMPAIGN, <https://shop.itsonus.org/pages/about-us> [<https://perma.cc/V54E-8NAP>] (last visited June 3, 2018) ("I pledge [t]o RECOGNIZE that non-consensual sex is sexual assault[.] [t]o IDENTIFY situations in which sexual assault may occur[.] [t]o INTERVENE in situations where consent has not or cannot be given[.] [and] [t]o CREATE an environment in which sexual assault is unacceptable and survivors are supported."); see also Barack Obama, *Glamour Exclusive: President Barack Obama Says, "This Is What a Feminist Looks Like,"* GLAMOUR MAG., Aug. 4, 2016, <http://www.glamour.com/story/glamour-exclusive-president-barack-obama-says-this-is-what-a-feminist-looks-like> [<https://perma.cc/PU72-RELJ>] ("It is absolutely men's responsibility to fight sexism too. And as spouses and partners and boyfriends, we need to work hard and be deliberate about creating truly equal relationships.").

129. Zerlina Maxwell, *Stop Telling Women How to Not Get Raped*, EBONY, Jan. 14, 2012, <http://www.ebony.com/news-views/stop-telling-women-how-to-not-get-raped> [<https://perma.cc/Q6B9-JFNA>] ("Holding women and girls accountable for preventing sexual assault hasn't worked and so long as men commit the majority of rapes, men need to be at the heart of our tactics for preventing them. Let's stop teaching 'how to avoid being a victim' and instead, attack the culture that creates predators in the first place."); see also Larry Harris Jr., *Do Not Rape and Teach Your Sons Not to Rape*, HUFFINGTON POST, Aug. 8, 2016, [http://www.huffingtonpost.com/larry-harris-jr/do-not-rape-and-teach-you\\_b\\_11342100.html](http://www.huffingtonpost.com/larry-harris-jr/do-not-rape-and-teach-you_b_11342100.html) [<https://perma.cc/2BPY-5SCD>].

130. See generally Kimberly J. Winbush, Annotation, *Regulation of Exposure of Female, But Not Male, Breasts*, 67 A.L.R.5th 431 (1999).

131. *Eckl v. Davis*, 51 Cal. App. 3d 831, 848 (1975) (upholding a Los Angeles County public nudity ordinance against an Equal Protection challenge on the grounds that the classification was

perpetuated it. The distinction is only in the function of the breast: a woman's breasts are made to nourish her young children, whereas a man's ordinarily are not. However, even this may not be the case anymore, as recent studies show that men may be able to breastfeed if exposed to enough estrogen.<sup>132</sup> Finally, while most laws that prohibit female toplessness provide exceptions for breastfeeding,<sup>133</sup> the law does not address why exposure of the breast to breastfeed is acceptable, where exposure for exposure's sake is not. Both scenarios involve a woman being topless in public—a mother breastfeeding in public for convenience or necessity, or a woman choosing to go topless to sunbathe or cool off (just like a man could). Even if there is no purpose or necessity for removing one's shirt, the law clearly denies a woman this right but grants it to a man without question.

Recently, a district court in Colorado agreed with this assertion and granted a preliminary injunction of the City of Fort Collins's toplessness ordinance in part because it found the City's argument regarding the inherent physical differences between male and female breasts unconvincing. The court reasoned that "while inherent physical differences can in some circumstances be a permissible basis for differential treatment by the government, . . . that is not the difference between the sexes on which [the City's ordinance] is based."<sup>134</sup> The court noted that based on the record, the ordinance was based on the generalized notion that, regardless of a woman's intent, the exposure of her breasts in public (or even in her private home if viewable by the public) is necessarily a sexualized act.

While one may hope that the most recent *Free the Nipple* case may be an indication of how courts may rule in the future, unfortunately, that case is not the norm. Courts in California, Indiana, New York, and Washington have blatantly ignored science and common logic in favor of society's unfounded sexist notions.<sup>135</sup> For example, in a 1978 Washington case,<sup>136</sup> the court disregarded physician testimony (regarding how the breasts have the same composition and are not primarily sexual organs, and that the development of the breast is not dictated by

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reasonable only because "nudity . . . of women is commonly understood to include the uncovering of the breasts."). Fortunately, *Eckl* is no longer good law because it applied faulty reasoning and a standard of review that gave the benefit of the doubt to the government, a standard that gave the government the upper hand and was struck down by the California Supreme Court in *Morris v. Mun. Court*, 652 P.2d 51 (Cal. 1982).

132. Jared Diamond, *Father's Milk*, DISCOVER, Feb. 1, 1995, <http://discovermagazine.com/1995/feb/fathersmilk468> [<https://perma.cc/76LP-7978>]; see also Nikhil Swaminthan, *Strange but True: Males Can Lactate*, SCI. AM., Sept. 6, 2007, <https://www.scientificamerican.com/article/strange-but-true-males-can-lactate/> [<https://perma.cc/8UUR-FGU3>].

133. CAL. CIV. CODE § 43.3 (West 2018) ("Notwithstanding any other provision of law, a mother may breastfeed her child in any location, public or private, except the private home or residence of another, where the mother and the child are otherwise authorized to be present.").

134. *Free the Nipple—Fort Collins v. City of Fort Collins*, 237 F. Supp. 3d 1126, 1132 (D. Colo. 2017) (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

135. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991); *People v. David*, 549 N.Y.S.2d 564 (1989); *City of Seattle v. Buchanan*, 584 P.2d 918 (1978) (en banc).

136. *Buchanan*, 584 P.2d 918 (en banc).

gender)<sup>137</sup> and instead agreed with the city council's finding that female but not male breasts constitute an erogenous zone and are associated with sexual arousal.<sup>138</sup> The court also ruled that the council had a legitimate goal of encouraging the privacy of those body parts used for procreative and reproductive functions.<sup>139</sup>

The problem with courts' conclusions like the one above, that women's breasts can be targeted because they are sexual or erogenous,<sup>140</sup> is that they assume that men's breasts cannot be erogenous. However, this is false. Scientists and even some courts have acknowledged that the male chest is part of his erogenous zones.<sup>141</sup> Further, many individuals believe that a man's chest is his most arousing feature.<sup>142</sup> However, the courts that have addressed female toplessness have simply concluded that there is a difference between a male and female breast, without acknowledging this or any other point.

Justifications for the distinction that a woman's breasts are erogenous and a man's are not also neglect physiology, which finds few differences between the male and female breast.<sup>143</sup> As depicted below, the female breast is made up of fat, nipple, glands, or alveoli, and a network of ducts through which milk can pass from the

137. *Id.* at 919–20.

The doctor was not asked and did not say whether there is any difference in function between the male and female breasts, and we see that the appellants agree that there is such a difference. They give it no weight, however, evidently because, as they view the legislative intent, function is not an element which the legislative body had in mind when it forbade the public exposure of female breasts.

We are unable to agree that the legislative body could only have been interested in the size or shape of female breasts when it included them among the parts of the human body which should not be exposed in public.

*Id.* at 920.

138. *Id.* at 920.

139. *Id.* (“When the legislative intent is viewed in light of the obvious purpose of the ordinance—to protect the public morals and its concern for the privacy of intimate functions—common knowledge tells us, as it undoubtedly told the trial judge, that there is a real difference between the sexes with respect to breasts, which is reasonably related to the preservation of public decorum and morals.”).

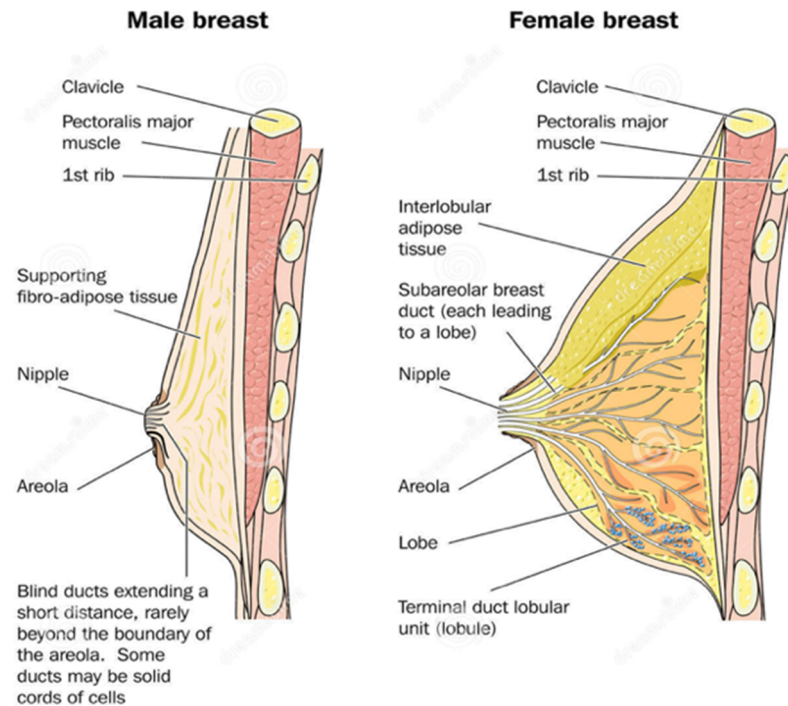
140. *United States v. Biocic*, 928 F.2d 112, 115–16 (4th Cir. 1999) (“The important government interest is the widely recognized one of protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens’ anatomies that traditionally in this society have been regarded as erogenous zones. These still include (whether justifiably or not in the eyes of all) the female, but not the male, breast.”) (citations omitted); *Craft v. Hodel*, 683 F. Supp. 289, 300 (D. Mass. 1988) (upholding NPS regulation barring female toplessness and public nudity on the grounds that there are “physical difference between the sexes which has implications for the moral and aesthetic sensitivities of a substantial majority of the country.”); *State v. Vogt*, 775 A.2d 551, 558 (N.J. Super. Ct. App. Div. 2001) (“... [It is] not just the size of the breast exposed that is at the heart of the male-female distinction. Indeed, while one could infer from the photographs admitted at trial some men are more full breasted than some women, it is the public sensitivity in the case of women which is at stake.”). *See generally* Winbush, *supra* note 130, at 453–57.

141. Glazer, *supra* note 58, at 128.

142. *Id.*

143. Roy Levin & Cindy Meston, *Nipple/Breast Stimulation and Sexual Arousal in Young Men and Women*, 3 J. SEXUAL MED. 450 (2006).

glands to the nipples. The glands produce the milk and the ducts transport it.<sup>144</sup> Men's breasts are also made up of fat, nipple, and ducts.



**Figure 1 Male and Female breast compared**

The only anatomical difference is that a woman's breast has "lobes" which contains the mammary glands and ducts. Since men actually have the biological scaffold to breastfeed, and just have to be exposed to the right hormonal cocktail of progesterone, estrogen, oxytocin, and prolactin,<sup>145</sup> this is not a true distinction. Thus, differences between a man and a woman's breast are mainly aesthetic and socially imposed, which cannot be enough to justify a discriminatory law.

### III. STIGMATIZATION OF WOMEN'S BODIES

The stigma that women experience as a result of their breasts is uniquely female. From the moment their bodies begin to develop, a woman's body is sexualized in a way that a man's is not. However, the justifications for this are

144. *Male and Female Breast*, DREAMSTIME.COM, <http://thumbs.dreamstime.com/z/male-female-breast-anatomy-12436234.jpg> [<https://perma.cc/SF9S-UMEV>] (last visited June 3, 2018).

145. Thomas H. Kunz & David J. Hosken, *Male Lactation: Why, Why Not, and Is It Care?*, 24 *TRENDS IN ECOLOGY & EVOLUTION* 80 (2009). Additionally, breastfeeding males are not uncommon in the animal world; male fruit bats actually breastfeed their newborns. Charles M. Francis et al., *Lactation in Male Fruit Bats*, 367 *NATURE* 691 (1994).



entirely unfounded. As discussed above, men's and women's breasts can both experience pleasure, they are made up of the same anatomical structures, and in some cases, men's breasts can be larger than women's breasts;<sup>146</sup> yet only a woman is punished for the way society views her breasts. Even where public breastfeeding is legal, women are still stigmatized and harassed for feeding their children.<sup>147</sup> Topless prohibitions are only one example of the many ways that the law punishes a woman for being a woman. However, it is one of the only areas where the law explicitly treats a woman differently than a man. In other areas of law, a woman is able to enjoy the same rights as her male counterparts, except when it comes to what a woman can do with her body.

The government may posit that these laws are not a serious deprivation because women can show cleavage and wear bikini tops, just as the Court did in *Barnes*.<sup>148</sup> However, this trivializes the whole struggle. Women are not able to be topless in public because the government deems their breasts obscene and overtly sexual. Every day a woman has to cover her breasts is another day when her body is deemed lesser than a man's. Her body is deemed sexual and a man's is not. However, these are all based on heterosexual male-dominated views and do not reflect all of society.

Courts have often relied on traditional societal views to consistently shut women out. They used this reasoning to deny Myra Bradwell admission to the Illinois Bar,<sup>149</sup> and to forbid women from becoming bartenders<sup>150</sup> and from working the same hours<sup>151</sup> and for the same wages<sup>152</sup> as men. These rulings may have worked 100 years ago, but they cannot persist today. Traditional societal views frustrate modern civil rights, including interracial marriage, desegregation of schools, and same-sex marriage. These views have very little connection to science and modern society. This is the next frontier in the Women's Movement. Just as

146. Gynecomastia is a condition where the breast tissue of boys and men swell and becomes tender. Studies show that about 70% of all boys develop pubertal gynecomastia and up to two-thirds of all adult men might have palpable breast tissue on examination. Harmeet S. Narula & Harold E. Carlson, *Gynecomastia—Pathophysiology, Diagnosis and Treatment*, 10 NATURE REVIEWS ENDOCRINOLOGY 684, 684, 688 (2014).

147. Terri Peters, *See How Strangers Awesomely Defend Mom Bullied for Breastfeeding at Target*, TODAY, June 16, 2016, <http://www.today.com/parents/see-how-strangers-awesomely-defended-mom-bullied-breastfeeding-target-t98776> [<https://web.archive.org/web/20160617133421/https://www.today.com/parents/see-how-strangers-awesomely-defended-mom-bullied-breastfeeding-target-t98776>] (a video of a woman being verbally assaulted by a man for breastfeeding her four-week old daughter in a Connecticut Target. Before the video started, the man apparently told the woman: "Can't you do that somewhere else? . . . That's fucking disgusting. . . . You are nasty . . . you are fucking disgusting . . . you are fucking disgusting . . . you are fucking disgusting . . . you whore").

148. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 587 (1991) (Souter, J., concurring) ("Pasties and a G-string moderate the expression to some degree, to be sure, but only to a degree. Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message.").

149. *Bradwell v. Illinois*, 83 U.S. 130, 130 (1873).

150. *Goesaert v. Cleary*, 335 U.S. 464, 464 (1948).

151. *Muller v. Oregon*, 208 U.S. 412 (1908).

152. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overturning *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), and declaring the federal minimum wage legislation for women was an unconstitutional infringement of liberty of contract).

the Women's Movement of the 1960s and 1970s exposed the discrimination and harassment women faced in the workforce, it is time to expose the discrimination and harassment imposed on women's bodies by our laws. Women are making gains in all aspects of life: they dominate universities and post-graduate programs; they are in board rooms and court rooms; they can be Supreme Court justices and even Presidential nominees, and one day soon, Presidents. Yet, despite all of these gains, a woman's body is still legally and socially treated as a sexual object, subservient to a man's.

Additionally, these laws can have other ramifications such as criminal or professional punishments. A woman who chose to sunbathe topless in a jurisdiction with a prohibition may have a criminal record for doing something that would be perfectly legal as a man. In most cases the woman would get a misdemeanor and be jailed or fined, making women criminals for doing something that a man can do legally.

Women can find the sight of man's chest erotic and some men can also get aroused from breast and nipple stimulation.<sup>153</sup> However, men do not experience the same treatment as women with regards to their chest. As Reena Glazer eloquently notes:

The (heterosexual) male myth of a woman's breast has been codified into law. Because women are the sexual objects and property of men, it follows that what might arouse men can only be displayed when men want to be aroused . . . . No consideration [is] given to contexts in which women might enjoy going topless for their own reasons, regardless of any effect on male viewers. Nor [is] any consideration given to the fact that women might not be bothered by the sight of other women's breasts.<sup>154</sup>

Unfortunately, this "myth" has also sexualized women at the first signs of development. At a young age, girls are taught to self-objectify; by middle school, many are already confronted with the reality that they are sexual objects.<sup>155</sup> The reality that girls and women face is not rooted in anything but social views of what is sexually appealing.<sup>156</sup> Because this perspective gives no consideration for other benign uses of being topless, many can never divorce the sight of a topless woman from something of sexual pleasure. It is no wonder why many laws are justified on the basis of offending other people. For instance, in many cases, these laws were designed to protect non-consenting viewers. The ordinance in Newport Beach for example was passed for this exact purpose,<sup>157</sup> to expressly codify the view that a

153. Levin & Meston, *supra* note 143.

154. Glazer, *supra* note 58, at 116–17.

155. Marinda Valenti, *What Do Dress Codes Say About Girls' Bodies*, MS. MAG. BLOG (May 24, 2013), <http://msmagazine.com/blog/2013/05/24/what-do-dress-codes-say-about-girls-bodies/> [<https://perma.cc/2DV5-8Q3D>].

156. *Id.*; see also Milstead, *supra* note 45, at 282 ("Our court is not authorized, however, to take judicial notice of the concept that the breasts of female topless dancers, unlike their male counterparts, are commonly associated with sexual arousal. Such a viewpoint might be subject to reasonable dispute, depending on the sex and sexual orientation of the viewer." (citing *Williams v. City of Fort Worth*, 782 S.W.2d 290, 297 (Tex. Ct. App. 1989))).

157. NEWPORT BEACH, CAL., MUN. CODE ch. 10.54 (1996) (The City Council finds that it is both in the public interest and necessary to protect and promote the public health, safety and welfare

woman's breasts are offensive and obscene sends a message to women that their bodies are obscene.

#### IV. FEMALE TOPLESSNESS CAN GAIN SOCIAL ACCEPTANCE

There are many instances throughout the civil rights and women's movements where the status quo needed to change in order for society to progress, and this is one of them. Until 1967, the status quo in many parts of the country was that interracial marriage was forbidden.<sup>158</sup> The Supreme Court declared that ban unconstitutional, and today, no one would consider such a marriage anything but a joyous union between two individuals who love each other.<sup>159</sup> Until 1975, it was common for states to exclude women from jury service,<sup>160</sup> and yet today, men and women throughout the country all get to share the pleasure of being called for (and trying to avoid) jury duty. Until 1984, it was common for many law firms to discriminate on the basis of sex in promoting lawyers to the partnership;<sup>161</sup> such a thing could never overtly happen today. Until 1996, many women were unable to attend the same military universities as men,<sup>162</sup> and now women make up at about 20 percent of the graduating classes of the nation's most prestigious military universities.<sup>163</sup> More recently, until late 2015, women were not able to hold the same combat positions as men,<sup>164</sup> but now they are. The de-stigmatization of women's

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and that said parks, playgrounds and beaches *be utilized* and enjoyed by as many persons as possible; that *maximum utilization and enjoyment* of said parks, playgrounds and beaches *can only be obtained through imposition of regulations regarding* activities thereon; the periods of some persons utilizing said parks, playgrounds and beaches by appearing thereon without clothing and with the private parts of their bodies exposed, *unreasonably interferes* with the rights of all persons to use and enjoy said parks, playgrounds and beaches by causing many persons to leave and others not to use said parks, playgrounds and beaches; . . . that the presence of persons who are unclothed and exposed to public view in or on public rights-of-way, parks, playgrounds and beaches, or on any private property open to public view from public parks, playgrounds, beaches or other public ways *tends to discourage the use and enjoyment* of said public parks, playgrounds, beaches and public ways of the City, and creates a nuisance and *is offensive* to members of the public who wish to use and enjoy said public parks, playgrounds, beaches and places and who are *unwillingly exposed to such conduct* (emphasis added); *see also* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 560 (1991).

158. Loving v. Virginia, 388 U.S. 1 (1967).

159. *Id.*

160. Taylor v. Louisiana, 419 U.S. 522, 522 (1975).

161. Hishon v. King & Spaulding, 467 U.S. 69 (1984).

162. United States v. Virginia, 518 U.S. 515, 515 (1996).

163. The 2015 graduating class of the Naval Academy had 204 female students out of 1070 students, and the 2016 graduating class of the Air Force Academy had 182 female students out of 812 students. *Class of 2015 Statistics*, U.S. NAVAL ACADEMY (May 22 2015 8:19 AM), <https://www.usna.edu/NewsCenter/2015/05/class-of-2015-statistics.php> [<https://perma.cc/X5MJ-YWEH>]; U.S. Air Force Acad. Pub. Affairs, *Academy Releases Class of '16 Stats*, U.S. AIR FORCE ACAD. (June 1, 2016), <http://www.usafa.af.mil/News/Article-Display/Article/788557/academy-releases-class-of-16-stats/> [<https://perma.cc/37LT-4BCP>]. Unfortunately, VMI still has quite a way to go; in 2015, VMI had 183 female students, out of a student body of 1717. *Common Data Set: Fall 2016*, VA. MIL. INST., [http://www.vmi.edu/media/content-assets/documents/assessment/CDS\\_2016-2017.pdf](http://www.vmi.edu/media/content-assets/documents/assessment/CDS_2016-2017.pdf) [<https://perma.cc/7YG8-KDM5>] (last visited June 3, 2018).

164. Dep't of Def., *Secretary of Defense Ash Carter Opens All Jobs to Women - 12/3/2015*, YOUTUBE (Dec. 3, 2015), [https://www.youtube.com/watch?v=8d3cI\\_Kcgwk](https://www.youtube.com/watch?v=8d3cI_Kcgwk); *see also* Bill Chappell, *Pentagon Says Women Can Now Serve in Front-Line Ground Combat Positions*, NPR, Dec. 3, 2015, <http://www.npr.org/sections/thetwo-way/2015/12/03/458319524/pentagon-will-allow-women-in->

bodies vis-à-vis female toplessness is the next frontier. If the military, which is generally slow to react to social changes,<sup>165</sup> is finally able to acknowledge that a woman is equal to a man in combat and education, and possibly the draft,<sup>166</sup> the rest of society needs to catch up.

#### A. *Pushing the Limits*

Societal pressures on women to look a certain way are nearly universal.<sup>167</sup> This pressure is applied through laws and social norms. Society also imposes cruel and harsh punishments on a woman who does not fit this model—if she shows too much skin, she is “asking for it,” or is called awful names. Society has expected women to be chaste and modest. However, throughout history there are instances where women tried to break this mold simply by changing what they wore when they went to the beach or out in the town. For example, in 1907, Annette Kellerman, an Australian swimmer, was arrested for wearing a fitted, sleeveless bathing suit in Boston.<sup>168</sup> A famous image by the National Photo Company shows a Washington D.C. swimsuit policeman measuring the distance between women’s knees and bathing suits in 1922, when at that time the rule was that suits could not be over six inches above the knee.<sup>169</sup> Today, women can wear anything they want at the beach, except a monokini.<sup>170</sup>

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frontline-ground-combat-positions [https://web.archive.org/web/20180417180804/https://www.npr.org/sections/thetwo-way/2015/12/03/458319524/pentagon-will-allow-women-in-frontline-ground-combat-positions].

165. For example, the military only recently repealed Don’t Ask Don’t Tell. DON’T ASK DON’T TELL REPEAL ACT OF 2010, 111 Pub. L. 321, 124 Stat. 3515 (Enacted Dec. 22, 2010); *see also* CLIFFORD L. STANLEY, MEMORANDUM RE: REPEAL OF “DON’T ASK, DON’T TELL,” (2011), [http://archive.defense.gov/home/features/2010/0610\\_dadt/USD-PR-DADT\\_Repeal\\_Day\\_Memo\\_20Sep.pdf](http://archive.defense.gov/home/features/2010/0610_dadt/USD-PR-DADT_Repeal_Day_Memo_20Sep.pdf) [https://perma.cc/DK98-T8JV]; Elisabeth Bumiller, *Obama Ends ‘Don’t Ask, Don’t Tell’ Policy*, N.Y. TIMES, July 22, 2011, <http://www.nytimes.com/2011/07/23/us/23military.html> [https://web.archive.org/web/20180510083232/https://www.nytimes.com/2011/07/23/us/23military.html].

166. As this Note was written, President Obama announced that he would be willing to open the draft to women. *See* Josh Lederman, *Obama Administration Supports Requiring Women to Register for Military Draft*, ASSOCIATED PRESS, Dec. 1, 2016, <http://www.pbs.org/newshour/rundown/white-house-announces-support-women-military-draft/> [https://perma.cc/PBL2-BNBW].

167. Across the globe, there are accounts of widespread pressure to look good. *See* PARDIS MAHDAVI, *PASSIONATE UPRISINGS: IRAN’S SEXUAL REVOLUTION* 31, 134 (2009); ANGELA B. MCCracken, *THE BEAUTY TRADE: YOUTH, GENDER, AND FASHION GLOBALIZATION* (2014); Susanne Helfert & Petra Warschburger, *The Face of Appearance-Related Social Pressure: Gender, Age and Body Mass Variations in Peer and Parental Pressure During Adolescence*, CHILD & ADOLESCENT PSYCHIATRY & MENTAL HEALTH, May 2013.

168. It was seen as acceptable in Australia, but prohibited in the United States. *See* Kristin Toussaint, *This Woman’s One-Piece Bathing Suit Got Her Arrested in 1907*, BOSTON.COM, July 2, 2015, <https://www.boston.com/news/history/2015/07/02/this-womans-one-piece-bathing-suit-got-her-arrested-in-1907> [https://web.archive.org/web/20171115095006/https://www.boston.com/news/history/2015/07/02/this-womans-one-piece-bathing-suit-got-her-arrested-in-1907].

169. *Swimsuit Police Check the Length of Swimmers’ Ensembles in Amazing Re-colored 1922 Photo*, THE HUFFINGTON POST, Aug. 6, 2013, [http://www.huffingtonpost.com/2013/08/06/swimsuit-police\\_n\\_3713153.html](http://www.huffingtonpost.com/2013/08/06/swimsuit-police_n_3713153.html) [https://perma.cc/SA5X-X364].

170. A monokini is a swimsuit which consists of only a close fitting bottom. It was first created in 1964 by Rudi Genreich, and the initial versions consisted of a brief that went from the upper thigh to the midriff and had two thin straps that tied around the neck. Modern ones are much simpler, and



If female toplessness was as legal in this country as male toplessness is, it would eventually gain social acceptance just as male toplessness did eighty years ago. Today, men are free to expose their chests in public with “no consideration of the impact on possible views.”<sup>171</sup> However, until the 1930s, male toplessness was banned in most parts of the country for the same reasons women’s toplessness is today. In 1936, Westchester, New York became one of the first cities to permit male toplessness at the beach.<sup>172</sup> Only two years before, eight men were fined \$1 for being topless at Coney Island beach. In condoning the men, the presiding magistrate, exhibiting a similar objectifying tone when discussing the men’s body, said: “All of you fellows may be Adonises but there are many people who object to seeing so much of the human body exposed.” In 1935, forty-two men were arrested for being topless in Atlantic City and were fined \$84. The city fathers referred to the men as “gorillas.” Now, no one refers to a topless man as an animal; no one refers to a topless man as anything besides someone dressed appropriately for the beach. It did not take long for male toplessness to gain social acceptance and popularity. Three years after the Atlantic City incident, *Life Magazine* published images of various male topless beachgoers of various ages and donning different styles of “the topless suit.”<sup>173</sup> Rather than calling the men “gorillas,” the article changed its tone and simply provides the caption below.

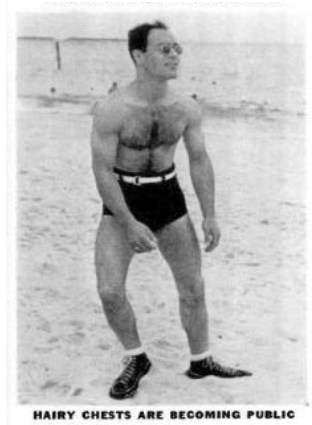
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resemble a bikini bottom. See Eleanor Nanble, *Topless Swimsuit Causes Commotion*, CHI. TRIB., June 10, 1964.

171. Glazer, *supra* note 58, at 116.

172. Irving Wallace et al., *Men Arrested for Topless Bathing*, READING EAGLE PARADE, Oct. 3, 1982, at 19.

173. *Men Now Bathe Topless on Many Public Beaches*, LIFE MAG., July 18, 1938.



Society has proven willing to grow and adapt with the times as it did with male toplessness. Society will change and progress as it has done in many other areas.<sup>174</sup> It just needs to be given the opportunity to do so.

#### *B. Using Media to Normalize Breasts*

Covered or not, breasts make a woman an instant target for unwanted attention. Part of the reason for this is that, through depictions of women's bodies in media, people have grown accustomed to associating a woman's breasts with something overtly sexual and objectified. It is no wonder why society expects men to act like barbarians at the sight of a breast, because society has essentially trained men to associate the sight of a woman's breast as something purely sexual.<sup>175</sup>

The best way to stop propagating this conditioning of men is by normalizing female toplessness in reality. The significance of the growing depictions of women's bodies and breasts in television and film is twofold. On the one hand, as mentioned above, the depictions have likely increased men's view of women as either sexual objects, reproductive, or maternal figures; but on the other, society is also growing more used to seeing women's breasts. No one could forget what happened to Janet Jackson during the 2004 Superbowl Halftime Show and how CBS was not only fined, but Jackson herself was the subject of Congressional hearings and had her reputation tarnished.<sup>176</sup> But over ten years later, the Halftime show incident has largely become a thing of the past. Today, toplessness is not as taboo as it once was. Even the popular television show *Modern Family* poked fun at America's prudishness in an episode where the family goes on a vacation to

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174. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Loving v. Virginia*, 388 U.S. 1, 1 (1967); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2584 (2015).

175. L. Monique Ward, Ann Merriwether & Allison Caruthers, *Breasts Are for Men: Media, Masculinity Ideologies, and Men's Beliefs About Women's Bodies*, 9 *SEX ROLES* 55 (2006).

176. See Milstead, *supra* note 45, at 273.

Australia and the two teenage boy characters are searching for topless sunbathers. According to the episode's synopsis on ABC, while on their Australian vacation Luke and Manny, the two teenaged boys in the series, want to see "boobs at topless Bondi Beach."<sup>177</sup> When the boys finally do see a topless sunbather, Luke is so spooked that he loses his swimming trunks in the ocean, and a topless swimmer helps him find them. The joke of the episode was that the boys were "searching" for topless sunbathers, only to be spooked once they finally saw one. Surprisingly, many of the reviews of the episode barely even mentioned that scene. This is one of the most popular shows on television; if it can normalize toplessness in other countries without any significant backlash, then perhaps through similar depictions, the American people will grow more accustomed to it.

#### CONCLUSION

For decades, women have tried to address this issue through the political process and have not been successful. While some state courts were strong allies for this movement in the 1980s and 1990s, there were also many who further damaged the movement. In the 1980s and 1990s there have been a few successful state court decisions in New York and California regarding topless dancing. Since 2014, there have been numerous protests regarding female toplessness but legal efforts have largely halted since the early 1990s, with the exception of the most recent failed attempt of Sonoko Tagami in Illinois<sup>178</sup> and the successful Equal Protection challenge by Free the Nipple.<sup>179</sup> The most recent district court decision is promising; however, there is a long way to go.

The fact that a woman cannot go topless in public in most states and cities in this country is indicative of a larger problem with the treatment of women in our society, which affects all women, regardless of age, race, or sexual identity, and whether they would choose to go topless. Repealing these laws is about ensuring that a woman can stand on equal footing under the law to a man. It is about ensuring that if a woman is required to give up a part of her freedom, that it is justified and based on sound logic, and not the remnants of antiquated social norms. The Equal Protection Clause ensures that inherent differences do not allow for discriminatory treatment under the law. The issues that female toplessness raises are indicative of the greater problem of the way the law treats women. In order to get true equality under the law for women, the law needs to view a woman and her body as equal to

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177. Modern Family, Australia, Season 5 Episode 20 (Apr. 23, 2014).

178. Sonoko Tagami v. City of Chicago, No. 14 cv 9074 (E.D. Ill. 2015). For a discussion about some of the recent social movements behind female toplessness, see Take Two, *Should it Be Legal for Women to Go Topless in Public? (Poll)*, 89.3KPCC, Sept. 26, 2013, <http://www.scp.org/programs/take-two/2013/09/26/33923/should-it-be-legal-for-women-to-go-topless-in-publ/> [<https://perma.cc/N2R5-JT5U>], and Jessica Blankenship, *The Social and Legal Arguments for Allowing Women to Go Topless in Public*, ATLANTIC, Sept. 18, 2013, <http://www.theatlantic.com/national/archive/2013/09/the-social-and-legal-arguments-for-allowing-women-to-go-topless-in-public/279755/> [<https://perma.cc/7BLU-D3EC>].

179. Free the Nipple—Fort Collins v. City of Fort Collins, 237 F. Supp. 3d 1126, 1126, 1130–33 (D. Colo. 2017) (holding that the factors for a preliminary injunction weigh heavily in plaintiff's favor because the City's justifications for the ban, namely, preserving morality, maintaining public order, and protecting children, and the differences between the male and female breast are not sufficient to justify the City's gender-based discrimination).

a man's. A woman's body is her vessel, just like a man's is his. If the law cannot treat this fundamental part of her as equal to her male counterparts, she will not be able to expect the law to treat her equally in other ways. This is the first step in the long fight for true equity.