# WOMEN'S BODY IMAGE AND THE LAW

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> Resistance can take the form of momentous acts of organized, planned, and disciplined protests, or it may consist of small, everyday actions of seeming insignificance that can nevertheless validate the actor's sense of dignity and worth—such as refusing on the basis of inferiority to give up a seat on a bus or covering one's self in shame.[1]

## INTRODUCTION

On June 21, 1986, nine women exposed their breasts in a secluded area of a public park in Rochester, New York.[2] The women appeared topless to express publicly their outrage against New York Penal Law section 245.01, which imposes criminal sanctions on women, but not men, who expose their bare chests in public.[3] Seven of the women were arrested and charged with violating section 245.01.[4] The ensuing litigation spanned six years and culminated in a decision by the Court of Appeals of the State of New York, the state's highest court.[5]

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1. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 396.

2. People v. Craft, 509 N.Y.S.2d 1005, 1007 (Rochester City Ct. 1986), *rev'd*, 564 N.Y.S.2d 695 (Monroe County Ct. 1991), *rev'd sub nom.* People v. Santorelli, 600 N.E.2d 232 (N.Y. 1992).

3. *Id.* Under New York law,

> [a] person is guilty of exposure if he appears in a public place in such a manner that the private or intimate parts of his body are unclothed or exposed. For purposes of this section, the private parts or intimate parts of a female person shall include that portion of the breast which is below the top of the areola. This section shall not apply to the breastfeeding of infants or to any person entertaining or performing in a play, exhibition, show or entertainment.
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> Exposure of a person is a violation.
>
> Nothing in this section shall prevent the adoption by a city, town or village of a local law prohibiting exposure of a person as herein defined in a public place, at any time, whether or not such person is entertaining or performing in a play, exhibition, show or entertainment.

N.Y. PENAL LAW § 245.01 (McKinney 1989).

4. *Craft*, 509 N.Y.S.2d at 1007.

5. People v. Santorelli, 600 N.E.2d 232 (N.Y. 1992).

The women complained that the statute violated equal protection principles because it treated men and women differently for no legitimate reason.[6] The court reversed the women's convictions but *not* on equal protection grounds. Instead, the court decided that the law prohibiting public exposure of the female breast was not meant to apply to this type of non-lewd behavior. Nonetheless, the court upheld the statute.[7]

Although this case garnered a great deal of publicity and media attention,[8] it failed (not surprisingly) to stimulate a massive revolution in topless sunbathing by women on the beaches or in the parks of New York.[9] The significance of the decision rests more in its symbolic power and the legal analyses employed. This case is illustrative of the larger phenomenon of the law's impact on women's images of their own bodies. Just as the law can influence people's behavior, it can influence how people feel about themselves.

Women have a powerful psychological need to pursue and preserve their beauty and to enhance their attractiveness.[10] One noted psychologist has written that "[o]ur body image is at the very core of our identity."[11] Women have been shown to be more sensitive and to attach more significance to body image than men.[12] Not only do different cultures and races have unique and specific ideas about what it means to be "attractive,"[13] but these

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6. It is well established that any law that discriminates between men and women violates the Equal Protection Clause of the Fourteenth Amendment unless the government can demonstrate that the gender-based classification is substantially related to achieving an important government interest. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Craig v. Boren, 429 U.S. 190, 197 (1976).

7. *Santorelli*, 600 N.E.2d at 233–34.

8. For some examples, see Michelle Slatalla, *Tops Drop, Gripes Grow*, NEWSDAY, July 23, 1992, at 4; Gary Spencer, *Law Permits Bathing By Topless Women: Judges Point to Noncommercial Conduct*, N.Y. L.J., July 8, 1992, at 1; Michael Winerip, *On Sunday: Blazing Trails, Toplessly but Timidly*, N.Y. TIMES, Aug. 2, 1992, at A37. For a sampling of editorials written about the case, see Alan M. Dershowitz, *Cover Up!*, NEWSDAY, July 29, 1992, at 38; Carlin Meyer, *Women's Breasts: So What?*, N.Y. TIMES, July 29, 1992, at A21; Ellen Willis, *Erroneous Zones*, NEWSDAY, July 29, 1992, at 38.

9. Winerip, *supra* note 8, at A37.

10. Adrian Furnham et al., *Sex Differences in the Preferences for Specific Female Body Shapes*, 22 SEX ROLES 743, 744 (1990).

11. Judith Rodin, *Body Mania*, 25 PSYCHOL. TODAY, Jan.-Feb. 1992, at 56, 60 (1992).

12. *Id.* This differential is reflected in the fact that 90% of all anorexics are women. *See* ROBERTA P. SEID, NEVER TOO THIN: WHY WOMEN ARE AT WAR WITH THEIR BODIES 26 (1989).

13. Furnham et al., *supra* note 10, at 744.

at all times.[20] The very sight of the bare breast is a crime, regardless of the woman's intent.[21] Exposure statutes are only one example of the law's negative impact on women's body image. This Note explores the broader relevance of *People v. Santorelli* by discussing other legal decisions that have been harmful to women's body image.

This statutory double standard embodies the inequality between men and women in society. Men are free to expose their chests in virtually any surroundings they choose with no consideration of the impact on possible viewers. New York Penal Law section 245.01, however, is written solely to take into account potential viewers.[22] The focus is on the male response to viewing topless women; there is no focus on the female actor herself.

This inverted structure of point of view[23] helps to maintain men's objectification of women. Male power is perpetuated by regarding women as objects that men act on and react to rather than as actors themselves.[24] When women are regarded as objects, a great deal of importance rests on their appearances because their entire worth is derived from the reaction they can induce from men.[25] In order to maintain the patriarchal system, men must determine when and where this arousal is allowed to take place. In this way, 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. For example, the statute contains an exemption for topless entertainment, for which the audience is overwhelmingly male.[26] In

20. That is, they are to be covered unless, as even the New York law makes clear, it is for the purpose of entertaining (implicitly) men. *See* N.Y. PENAL LAW § 245.01 (McKinney 1989).

21. Unless the woman's behavior falls under a specific exception, the exposure of her breasts violates the New York law. The statute contains no *mens rea* requirement. *See id.*

22. It is not inevitable that public exposure statutes that are intended to "protect" the public be constructed solely from the vantage point of potential viewers. For examples of exposure statutes that impose intent requirements that shift the focus back to the actor, see discussion *infra* Section II(A).

23. For a discussion of the issues involving the point of view in this case, see *infra* Section II(C).

24. Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83, 90–91 (1980).

25. Mary Whisner, Note, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L.J. 73, 77 (1982).

26. N.Y. PENAL LAW § 245.01 (McKinney 1989).

adopting the statutory standard, no consideration was given to contexts in which women might enjoy going topless for their own reasons, regardless of any effect on male viewers. Nor was any consideration given to the fact that women might not be bothered by the sight of other women's breasts. As this Note suggests, women have actually been harmed by their isolation from other women's bodies and by their lack of autonomy with regard to their own bodies.[27]

Freeing women, as the Court of Appeals' decision does to a certain extent, to control their own bodies and to not be ashamed of them goes a long way toward creating a legal system that fosters positive notions of women's body image and promotes equality in society. Although the practical outcome of *People v. Santorelli* (creating exemptions from the statute for non-lewd topless activities, such as sunbathing)[28] was warranted, the court did not go far enough in its analysis and reasoning. It should have struck down New York Penal Law section 245.01 as a violation of equal protection. There is no plausible justification for this legal double standard.

Although the New York statute is blatantly discriminatory, the methodology and analysis that should be used to achieve equality are far from obvious. On the one hand, there is overwhelming evidence that female and male breasts are more the same than different.[29] This similarity seems to mandate their equal treatment. On the other hand, to argue that women are the same as men seems to deny fundamental and obvious anatomical, biological, and developmental differences between men and women. This theoretical sameness/difference debate has not been effective in grappling with attempts to promote equality. In sameness/difference analysis, men are the standard, leaving women always to be both "the same and different: the same in their humanity, different in their anatomy."[30] Under sameness theory, women can get equal treatment only to the extent that they are the same as men. Not only does this present the problem of using a male norm as the standard,[31]

27. *See* discussion *infra* subsection III(A)(4).

28. 600 N.E.2d 232, 233-34 (N.Y. 1992).

29. *See infra* Section I(D).

30. DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 82 (1989).

31. *See* Martha Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 39, 61 (1987).

but it leaves unaddressed, and therefore irreparable, all the various situations in which women are different from men. Instead of stressing sameness as the standard, an emphasis on "equal dignity" is conceptually more appropriate.[32] Difference theory also has its problems. Proponents of difference theory advocate special treatment, which often serves only to reinforce stereotypical notions about women.[33]

This Note suggests that topless sunbathing is a good context for a reconciliatory position. No one is claiming that women's breasts are *identical* to men's—clearly, they are not. Likewise, there is no request for any *special* treatment. Women are only seeking the option to do what men are already free to do.[34] In this context, although difference exists, it should not matter.[35] This Note advocates a move toward a more context-specific analysis of difference that does not reinforce stereotypes.[36]

Part I begins with a discussion of the legal background relating to *People v. Santorelli.* The legislative history of section 245.01 illustrates that the current law is a relatively new construction and was not adopted without criticism. This Part details the multiple litigation and court opinions that women who have exposed their breasts have generated. A critical analysis of the Court of Appeals decision is also offered. This Part suggests that it is clear from the statutory history of section 245.01 that the court misread the statute in an effort to evade the more challenging equality issues and proposes the equal protection analysis the court should have pursued. In order to demonstrate how extreme the New York law is, Part II presents a jurisdictional comparison of exposure statutes and cases. Part III explores the broader societal importance of

32. Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 308.

33. *Id.* at 310.

34. This argument is central to the sameness/difference debate: Does an argument that women are only seeking the same rights as men help or harm women with more significant and pronounced differences? For discussions of pregnancy (arguably the most pronounced difference between men and women), see Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984–1985).

35. RHODE, *supra* note 30, at 312–13 ("The difference dilemma cannot be resolved; it can only be recast. The critical issue should not be difference, but the difference difference makes.").

36. *Id.* at 3–4 (requiring legal analysis to be contextual because "sex-based classifications often reinforce sex-based stereotypes").

*People v. Santorelli* by analyzing the effects of requiring women to cover their breasts in public on cosmetic surgery, breast-feeding, and women's self-esteem. This Part also discusses other legal contexts in which the law has had a negative impact on women's body image. The Note concludes that the law could have a positive impact on women's body image by allowing choice and advocating tolerance rather than by reinforcing monolithic and unobtainable beauty norms.

## I. LEGAL BACKGROUND

### A. *Statutory History of New York Penal Law Section 245.01*

Anti-exposure statutes have a long history in the penal law of New York. New York adopted an "[e]xposure of person" law in 1881.[37] In 1935, the state legislature added a statute prohibiting nudity and nudist colonies.[38]

These early statutes made no explicit gender differentiation and had an intent requirement: that exposure be committed "wilfully and lewdly."[39] Although it is not explicit in the statutory history, at some point in time, allegedly in 1936, men fought for and won the right to go shirtless in public.[40]

The Revised Penal Law of 1965 recodified these earlier statutes into section 245.00—"public lewdness"[41]—which retained an intent requirement and also made no gender distinction. The major change occurred in 1967 with the enactment of section 245.01, which was added specifically to cover "exposure of a female."[42]

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37. The 1881 law stated, "A person who willfully and lewdly exposes his person, or the private parts thereof, in any public place, or in any place where others are present, or procures another so as to expose himself, is guilty of a misdemeanor." N.Y. PENAL CODE § 316, 1881 N.Y. Laws 913.

38. 1935 N.Y. Laws 1663.

39. *See* N.Y. PENAL CODE § 316.

40. Brief of Defendant-Appellant at 32, People v. Santorelli, 600 N.E.2d 232 (N.Y. 1992) (No. 115); *Sonya Live* (CNN television broadcast, July 23, 1992), *available in* LEXIS, Nexis Library, CNN file (comments of Betsy Gotbaum, New York City Parks Commissioner, and Mary Lou Schloss, Defendant-Appellant).

41. The statute stated, "A person is guilty of public lewdness when, in a public place, he intentionally exposes the private or intimate parts of his body in a lewd manner or commits any other lewd act. Public lewdness is a class B misdemeanor." N.Y. REV. PENAL CODE § 245.00 (McKinney 1965).

42. The 1967 law specified that

> [a] female is guilty of exposure when, in a public place she appears clothed or costumed in such a manner that the portion of her breast below the top of the aureola [sic] is not covered with a fully opaque covering. This subdivision shall

The New York legislature amended section 245.01 in 1970, to correct the spelling of the term "areola" and to add a clause allowing local municipalities to enact even stricter prohibitions against female breast exposure.[43] It is clear from the legislative history that the "exposure of a female" statute was targeted specifically "at discouraging 'topless' waitresses and their promoters."[44] No inquiry into the woman's purpose or intent is necessary; mere exposure is sufficient to constitute a violation.

Prominent state officials voiced serious objections to the enactment of section 245.01 in 1967. For example, the Chairman of the Committee on Criminal Courts, Law and Procedures of the Association of the Bar of the City of New York, Richard A. Green, wrote to the governor's counsel:

> We note that the bill, while apparently a response to the introduction of "topless" waitresses in a cabaret in New York City, affects the much wider area of public attitudes toward female exposure, which are currently undergoing rapid and sometimes bewildering changes. Some varieties of the "bikini" bathing suit, which appear to have received acceptance, if not admiration, on our public beaches over the last few years, reveal portions of the breast *below* the top of the areola (although concealing the areola itself) and would be prohibited by the proposed statute.
>
> It is our view that the state's penal laws should not so broadly and precisely attempt to dictate or stifle changes in public taste as to female attire and exposure. We believe that Section 245.00 [the Public Lewdness statute] is sufficient to deal with the kind of exposure which community attitudes consider clearly to be condemned, i.e., intentional exposure in a public place of the private or intimate parts of the body *in a lewd manner.* We

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not apply to any female entertaining or performing in a play, exhibition, show or entertainment.

Exposure of a female is a violation.

1967 N.Y. Laws 1074, *amended by* 1970 N.Y. Laws 100, *repealed by* 1983 N.Y. Laws 1574.

43. The new clause stated that

> [n]othing in this section shall prevent the adoption by a city, town or village of a local law prohibiting the exposure of a female substantially as herein defined in a public place, at any time, whether or not such female is entertaining or performing in a play, exhibition, show or entertainment.

1970 N.Y. Laws 100-01, *repealed by* 1983 N.Y. Laws 1574.

44. N.Y. PENAL LAW § 245.01 practice commentary (McKinney Supp. 1993) (citation omitted).

> believe that the underlined phrase is necessary in order to allow for changing public tastes.[45]

Lawrence T. Kurlander, Commissioner of Criminal Justice Services, wrote: "I have reservations about making mere nudity criminal and I am concerned that such a general prohibition makes behavior criminal that should not be."[46] As these statements demonstrate, contemporary commentators recognized that the statute's omission of an intent requirement had troubling implications.

In approving the 1983 revision of the law, which is the current form of the statute, Governor Mario Cuomo wrote that this provision would protect parents and children who use public beaches and parks from the "discomfort caused by unwelcome public nudity."[47] This statement indicates that the legislature intended the revised section 245.01 not to apply only to commercially motivated activity, as the majority in *People v. Santorelli* contends,[48] but specifically to prohibit topless sunbathing. Although there is no lewdness requirement, the majority reads one into the statute. In fact, the lewdness requirement is specifically covered in a separate public lewdness statute—section 245.00.[49] As the concurrence in *Santorelli* recognizes, the majority's reading of section 245.01 to incorporate a lewdness or intentional annoyance requirement is a questionable interpretation because such a requirement is not mentioned in the legislative history and would render section 245.00 redundant.[50]

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45. Brief for Defendant-Appellant at 23, People v. Santorelli, 600 N.E.2d 232 (N.Y. 1992) (No. 115) (citation omitted).

46. *Id.* at 24.

47. Message of the Governor, June 2, 1983, N.Y. LAWS, ch. 216, at 2756 (McKinney 1983).

48. *Santorelli*, 600 N.E.2d at 233.

49. The public lewdness statute states that

> [a] person is guilty of public lewdness when he intentionally exposes the private or intimate parts of his body in a lewd manner or commits any other lewd act (a) in a public place, or (b) in private premises under circumstances in which he may readily be observed from either a public place or from other private premises, and with intent that he be so observed.
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> Public lewdness is a class B misdemeanor.

N.Y. Penal Law § 245.00 (McKinney 1989).

50. *Santorelli*, 600 N.E.2d at 235 (Titone, J., concurring).

B. People v. Santorelli: *Procedural History*

Six months after the women's arrest for exposing their breasts in violation of section 245.01, their case appeared before City Court Judge Herman J. Walz in Rochester, New York. Although the judge dismissed the charges, the decision was hardly the victory that the women were seeking.

Throughout the litigation, the women claimed that the law violated their equal protection rights. They argued that because the statute created a gender-based classification (whereby men can go topless but women cannot), equal protection analysis applied[51] and that the State had the burden of showing that the gender-based classification was substantially related to the achievement of an important government objective.[52] The only objective the State could argue in this case was the protection of public sensibilities.[53]

Judge Walz decided that there was no equal protection violation, that the government objective was legitimate and that the discriminatory means employed were appropriate to achieve this objective.[54]

> Today, community standards, as perceived by the Legislature, regard the female breast as an intimate part of the human body. Therefore, the state may legitimately enforce this standard by requiring that the female breast not be exposed in public places.
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> . . . .
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> Here, the statute's objective is to protect the public from invasions of its sensibilities, and merely reflects current community standards as to what constitutes nudity. The objective itself is not based on stereotyped notions, therefore it is not illegitimate.
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> . . . .
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> . . . [C]ommunity standards do not deem the exposure of males' breasts offensive, therefore the state does not have an interest in preventing exposure of the males' breasts. A gender-neutral statute which either required both men and women to cover their breasts or eliminated the requirement for both sexes

51. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Craig v. Boren, 429 U.S. 190, 197 (1976); Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

52. *See Craig*, 429 U.S. at 197.

53. People v. Craft, 509 N.Y.S.2d 1005, 1009–10 (Rochester City Ct. 1986), *rev'd*, 564 N.Y.S.2d 695 (Monroe County Ct. 1991), *rev'd sub nom.* People v. Santorelli, 600 N.E.2d 232 (N.Y. 1992).

54. *Id.*

> would not best serve the government's interest in preventing exposure of the female breasts.[55]

The court's denial of the equal protection claims reinforced stereotypical thinking, although the court purported not to be influenced by stereotypes. By relying on the highly questionable goal of protecting public sensibilities as a basis for the discrimination,[56] the court adopted the view that society needs protection from an exposed female breast.

Judge Walz concluded, however, that section 245.01 was unconstitutional as applied to the women because their First Amendment right to protest the law outweighed the government's interest in prohibiting exposure. Because the women issued press releases, held organizational meetings, carried signs, and wore T-shirts with a specific slogan, the judge held that their conduct was "overwhelmingly imbued with communicative elements."[57]

By deciding the case on First Amendment grounds, the court frustrated the women's objective. First Amendment analysis limits protection to formalized protests and grants no protection to women who wish to engage in topless activity for their own enjoyment. None of the federal courts that have addressed the constitutionality of local ordinances banning nude sunbathing have been willing to hold that nude sunbathing is an expression that the First Amendment protects.[58] Similarly, the U.S. Supreme Court has held that nude dancing is not protected by the First Amendment.[59] Second, the women involved in these topless activities were trying to show that their bodies were natural. They wanted to be seen for who they were as individuals and not as walking

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55. *Id.*

56. For a discussion of the issue of public sensibilities and stereotypical thinking, see discussion *infra* Section I(D).

57. *Craft*, 509 N.Y.S.2d at 1013. The T-shirts had "a top-free Statue of Liberty, and the slogan 'Equal rights now—shirtless equality 1986.'" *Id.*

58. *See, e.g.*, South Fla. Free Beaches, Inc. v. City of Miami, 548 F. Supp. 53 (S.D. Fla. 1982), *aff'd*, 734 F.2d 608 (11th Cir. 1984); Chapin v. Town of Southampton, 457 F. Supp. 1170 (E.D.N.Y. 1978); Williams v. Hathaway, 400 F. Supp. 122 (D. Mass. 1975), *aff'd sub nom.* Williams v. Kleppe, 539 F.2d 803 (1st Cir. 1976). *See generally* Richard B. Kellam & Teri Scott Lovelace, *To Bare or Not to Bare: The Constitutionality of Local Ordinances Banning Nude Sunbathing*, 20 U. RICH. L. REV. 589, 627–28 (1986) (analyzing the social nudism movement's arguments for overturning nudity bans).

59. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2457 (1991) (holding that an Indiana public indecency statute requiring dancers at adult entertainment establishments to wear panties and G-strings did not violate the First Amendment).

breasts.[60] Women should not be given the freedom to use their bodies only when their purpose is communicative in nature. First Amendment analysis in this context only reinforces stereotypes: the women did not want their bodies to make any special type of statement, but the court was only willing to grant them freedom when they became a *cause celebre*.

The State appealed the decision to the Monroe County Court.[61] Judge John J. Connell did not re-examine the trial court's holding with regard to the equal protection claim. However, he reversed the trial court on the First Amendment grounds and remanded the case for further proceedings.[62] The county court held that the state regulations were appropriate time, place, and manner restrictions.[63] Because the women had other ways of expressing their opposition to the discriminatory statute, they did not have to resort to going topless in violation of the statute in order to protest it.

On June 24, 1989, while still engaged in this litigation, two of the appellants, Mary Lou Schloss and Ramona Santorelli, participated in another topless demonstration during a picnic at Durand-Eastman Beach in Rochester, New York. On a hot day, about twenty-five to thirty women removed their shirts and swam, sunbathed, and played volleyball. Sometime thereafter, the police arrived and ordered the women to cover their breasts. The women refused and were arrested, again charged with violating New York Penal Law section 245.01.[64] No one had complained to the police; thus it appears that no members of the public were offended.

Judge John Manning Regan of the Rochester City Court convicted the women for this, their second, violation of New York

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60. Catharine MacKinnon writes,

> We have had something to fight and therefore something to gain here, and that is a different relation to our bodies than women are allowed to have in this society. We have had to gain a relation to our bodies *as if they are our own* . . . . It is our bodies as acting rather than as acted upon. It is our bodies as being and presence, our bodies that *we* do things with, that we in fact are and identify with as ourselves, rather than our bodies as things to be looked at . . . .

CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 121 (1987).

61. People v. Craft, 564 N.Y.S.2d 695, 696 (Monroe County Ct. 1991), *rev'd sub nom.* People v. Santorelli, 600 N.E.2d 232 (N.Y. 1992).

62. *Id.* at 697–98.

63. *Id.* at 698.

64. People v. David, 549 N.Y.S.2d 564, 564–65 (Rochester City Ct. 1989), *rev'd*, 585 N.Y.S.2d 149 (Monroe County Ct. 1991).

Penal Law section 245.01. In upholding the constitutionality of the statute, Judge Regan quoted extensively from the Book of Genesis:

> Nudity and morality are inextricably interwoven in the Judeo-Christian ethic. The first book of the Bible—GENESIS—uses nudity, and man's consciousness of it, to illustrate how mankind acquired the knowledge of good and evil.
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> > "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.
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> > 9. The Lord God then called to the man and asked him 'Where are you?'
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> > 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 have forbidden you to eat!"
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> Nudity, accordingly, in the Judeo-Christian ethic, is a catalyst for shame, and for immoral behavior. It triggers a compelling and immediate choice between good and evil for anyone who possesses the knowledge of good and evil.[65]

Leaving aside the constitutional infirmity of allowing a judge's decision to rest on his reading of the Bible,[66] Judge Regan's fundamentalist conclusions are not necessarily the only ones the text compels. Adam and Eve only came to the realization that something was wrong with being nude *after* they ate from the forbidden tree, *after* they had sinned and destroyed their pristine innocence. The text could just as validly convey the message that nudity is

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65. *Id.* at 567 (quoting *Genesis* 3:6–11).

66. Although this reference appears to raise Establishment Clause problems, judicial reliance on and quotation from the Bible seems to be fairly common. J. Michael Medina, *The Bible Annotated: Use of the Bible in Reported American Decisions*, 12 N. ILL. U. L. REV. 187, 187 (1991).

the natural and original state. The ideal, represented by Adam and Eve before their downfall, depicts nudity as acceptable and virtually unnoticed—the norm rather than the exception.[67]

The women appealed the conviction to the Monroe County Court. Although Judge Connell had upheld the statute in the first case,[68] Judge Patricia D. Marks, in ruling on the appeal from the second convictions, held section 245.01 to be unconstitutional. She concluded that

> [m]ale and female breasts are physiologically similar except for lactation capability. Therefore, it is apparent that the [New York] Law with the gender based classification does not serve the legitimate governmental interest better than would a gender neutral law.
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> The Court therefore concludes that the statute's gender classification violates the equal protection clauses of the [United States] and [New York State] Constitutions.[69]

Accordingly, Judge Marks dismissed the women's second convictions on equal protection grounds.[70]

### C. People v. Santorelli: *Majority Opinion*

The women's first conviction eventually reached the New York Court of Appeals.[71] In a memorandum decision, the court dismissed the convictions by interpreting the statute to apply only to lewd activity, not to topless sunbathing, although the legislative history of the statute indicates otherwise.[72] Relying on the maxim that a statute should enjoy a "presumption of constitutionality," the majority did not address the women's equal protection argument.[73] Thus, the opinion is disingenuous; the court's legal analysis evades clearly implicated gender issues.

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67. For feminist analyses of biblical texts, see CAROL L. MEYERS, DISCOVERING EVE: ANCIENT ISRAELITE WOMEN IN CONTEXT (1988); PHYLIS TRIBLE, TEXTS OF TERROR: LITERARY-FEMINIST READINGS OF BIBLICAL NARRATIVES (1984).

68. People v. Craft, 564 N.Y.S.2d 695 (Monroe County Ct. 1991), *rev'd sub nom.* People v. Santorelli, 600 N.E.2d 232 (N.Y. 1992).

69. People v. David, 585 N.Y.S.2d 149, 151 (Monroe County Ct. 1991) (footnotes omitted).

70. *Id.* at 152.

71. People v. Santorelli, 600 N.E.2d 232 (N.Y. 1992).

72. *See supra* Section I(A).

73. *Santorelli*, 600 N.E.2d at 233.

In failing to "challenge patterns of thought,"[74] the majority of the court fell victim to "judicial passivity." Instead of confronting the concededly difficult issues of equality and social norms, the court rested its decision on a fabrication of statutory construction. The court did not, as Martha Minow suggests they should have, "consider the human consequences of their decisions."[75] The judges could have relied on their own personal experiences to appreciate fully the recognition these appellants were seeking. A male judge may take for granted his unfettered right to toss off his shirt whenever and for whatever reason he likes—because he's hot, wants to swim, or wants to show off the benefits of his exercise regimen. By being confronted with his own experience and made consciously aware of the choices he is able to make, a male judge could become more accepting of a particular female litigant's needs and experiences. A male judge who is able to make that leap is better able to see exactly how unequal the position of men and women is and the double standard that this statute implements.[76]

### D. *Recognizing the Gender Issue*

As the *Santorelli* concurrence correctly acknowledges, this case demands the equal protection analysis that the majority ignored.[77] New York Penal Law section 245.01 requires women, but not men, to cover their breasts in public. The law treats men and women differently.

Discrimination between men and women violates the Equal Protection Clause unless the government's classification is "substantially related to the achievement of [an important government] objective[]."[78] Because gender classifications are "inherently sus-

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74. Minow, *supra* note 31, at 86.

75. *Id.* at 89.

76. Robin West has suggested that judges need to "look past our differences and understand the suffering of others by reference to our shared human aspirations, fears, pains, and pleasures. The ability to look past difference to the humanity that we share is necessary to any sensibly evolving notion of constitutional entitlement . . . ." Robin L. West, *Taking Preferences Seriously*, 64 TUL. L. REV. 659, 703 (1990).

77. *Santorelli*, 600 N.E.2d at 234 (Titone, J., concurring).

78. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); *see also* Craig v. Boren, 429 U.S. 190, 197 (1976); Caban v. Mohammed, 441 U.S. 380, 388 (1972); People v. Liberta, 485 N.Y.S.2d 207, 216-218 (1984), *cert. denied*, 471 U.S. 1020 (1985).

pect,"[79] the government has the burden of establishing a substantial relationship between a statute that discriminates on the basis of gender and a legitimate government objective.[80] In essence, the State must demonstrate that a gender-based statute achieves the legitimate goal better than a gender-neutral statute could.[81]

In *Santorelli*, the prosecutors did not even bother to articulate an objective for using a gender distinction in section 245.01.[82] Nonetheless, it is clear from legislative history that "the governmental objective . . . is to protect the sensibilities of those who wish to use the public beaches and parks."[83] The State, however, offered no evidence to show that a woman's chest causes greater public harm than a man's does. This assumption—that women's breasts are offensive in a way that men's breasts are not—underlies the statute. Undoubtedly, it reflects a traditional view of the female body, but assumptions and stereotypes are not enough to justify discrimination:

> Although protecting public sensibilities is a generally legitimate goal for legislation, it is a tenuous basis for justifying a legislative classification that is based on gender, race or any other grouping that is associated with a history of social prejudice. Indeed, the concept of "public sensibility" itself, when used in these contexts, may be nothing more than a reflection of commonly held preconceptions and biases. One of the most important purposes to be served by the Equal Protection Clause is to ensure that "public sensibilities" grounded in prejudice and unexamined stereotypes do not become enshrined as part of the official policy of government. Thus, where "public sensibilities" constitute the justification for a gender-based classification, the fundamental question is whether the particular "sensibility" to be protected is, in fact, a reflection of archaic prejudice or a manifestation of a legitimate government objective.[84]

The role of public sensibilities as a basis for discriminatory legislation and practices has been delegitimized in other contexts. For

79. Frontiero v. Richardson, 411 U.S. 677, 682 (1973).

80. *Craig*, 429 U.S. at 197.

81. Wengler v. Druggists Mut. Ins., 446 U.S. 142, 151–52 (1980); Orr v. Orr, 440 U.S. 268, 281–83 (1979).

82. People v. Santorelli, 600 N.E.2d 232, 236 (N.Y. 1992) (Titone, J., concurring).

83. *Id.*

84. *Id.* (citations omitted).

example, in *Palmore v. Sidoti*,[85] the U.S. Supreme Court held on equal protection grounds that offense to public sensibilities and potential societal stigmatization were not sufficient to terminate a mother's custody rights merely because she was romantically involved with a man of a different race.[86] However, the notion persists that society must be protected from the evils women and female sexuality pose. Characteristics that are more gender-neutral and more universally regarded as offensive, such as body odor, are neither statutorily regulated nor criminalized based on the mere effect the characteristic might have on potential viewers (or smellers).

Other than societal presuppositions, there is no inherent reason why exposure of the female breast is any more offensive than exposure of the male breast. Other Western societies do not share this assumption; in fact, topless sunbathing is common in Europe.[87] A clash of cultural views on the nudity issue is currently being played out in Germany. Most former East Germans were brought up with nude beaches; whole families sunbathed naked on the beach. Since German reunification, complete nudity has not been as accepted because many West Germans oppose it. Yet, even the relatively "prudish" West Germans do not object to toplessness; their only concern is exposure of genitals in public.[88] Canada is in the midst of ongoing bare-breast protests, and Canada's Supreme Court may soon hear an argument for chest equality under the Canadian Charter of Rights and Freedoms.[89]

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85. 466 U.S. 429 (1984).

86. *Id.* Chief Justice Burger wrote:

> There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.
>
> The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

*Id.* at 433 (footnote omitted).

87. Emily Campbell, *Obscenity, Music and the First Amendment: Was the Crew 2 Lively?*, 15 NOVA L. REV. 159, 199 n.209 (1991).

88. Kara Swisher, *Eastern Nudes vs. Western Prudes: Unified Germany Divided Over Birthday Suits at the Beach*, WASH. POST, Sept. 5, 1992, at D1 (suggesting that a serious consequence of unity and the new taboo surrounding nude sunbathing has been an increase in pornography in eastern Germany).

89. Anna-Liza Kozma, *Her Say: Breast Emancipation May Be a Setback*, CHI. TRI-

Anatomically, men's and women's breasts are fairly similar, which suggests that the law should treat the two similarly. Dr. Jack Morin has concluded that "[p]hysiologically, men's and women's breasts have the same erotic potential, with virtually identical anatomy, except that women's breasts are obviously more developed. Similarities include a rich supply of nerve endings, especially within the nipple and surrounding areola. In addition, the nipples in both sexes have erectile capacity."[90]

One underlying argument for distinguishing between male and female breasts is that they are sexually stimulating to differing degrees. It seems obvious, and it has been borne out in research, that men find women's breasts sexually stimulating.[91] Therefore, the argument goes, women's breasts should not be exposed in public. A basic problem with this argument is that researchers have also found that the chest is the male body part most sexually stimulating to women.[92] Carrying the argument to its logical conclusion, men's chests should not be exposed because they stimulate women. Neither physiological distinctions nor the visual stimuli of female breasts support a rationale for gender-specific exposure statutes. Because men and women are similarly situated in this regard, a gender-neutral statute, if any, is appropriate.

## II. A JURISDICTIONAL COMPARISON

### A. *Statutory Treatment of Exposure*

The fact that forty-eight other states have not criminalized the mere exposure of a woman's breasts severely weakens the asserted rationale for gender classification in New York Penal Law section 245.01: that the public must be protected from the great evil that the exposed female breast poses.[93] New York and Indiana are the only two states that have laws prohibiting the mere exposure of women's breasts.[94]

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BUNE, Sept. 20, 1992, at 13.

90. Jack Morin, *Male Breast: Overlooked Erogenous Zone*, 20 MEDICAL ASPECTS OF HUMAN SEXUALITY 85, 128 (1986).

91. Women's breasts are sexually stimulating to (heterosexual) men, at least in part because they are publicly inaccessible; society further eroticizes the female breast by tagging it shameful to expose. *See* WOLF, *supra* note 15, at 152.

92. Robert Wildman et al., *Note on Males' and Females' Preferences For Opposite-Sex Body Parts, Bust Sizes, and Bust-Revealing Clothing*, 38 PSYCHOL. REP. 485–86 (1976).

93. *See* discussion *supra* Section I(D).

94. *See* IND. CODE ANN. § 35-45-4-1 (Burns 1985); N.Y. PENAL LAW § 245.01

The overwhelming majority of states restrict penalties for public exposure to "lewd"[95] acts or to exposure of the genitalia.[96] Approximately twenty states specifically restrict their public exposure laws to genitalia.[97] Of these, only New Mexico prohibits mere exposure of the genitalia without lewd intent.[98] Other state statutes require the actor to have been reckless, to have had the intent of causing affront or alarm, or to have had the purpose of arousing or gratifying sexual desire.[99]

There is additional evidence that exposure statutes generally are not concerned with the female breast. Wisconsin's statute, which formerly prohibited exposure of the "sex organ," now uses the more precise terms "genitals" and "pubic area."[100] West Virginia restricts liability to exposure of the "sex organs" or "anus,"[101] and the Tennessee statute penalizes only exposure of the "genitals" or "buttocks."[102] Even statutes that use the more ambiguous "private parts" or "sex organs" language prohibit only acts done with some intent to create offense or alarm.[103] Something more than mere exposure is required to criminalize the action.

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(McKinney 1989).

95. "Lewd" is defined as "1. inclined to, characterized by, or inciting to lust or lechery; lascivious. 2. obscene or indecent . . . . 3. a. low, ignorant, or vulgar. b. base, vile, or wicked . . . . c. bad, worthless, or poor." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1106 (2d ed. 1987).

96. "Genitalia" is defined as "the organs of reproduction." *Id.* at 797.

97. ALASKA STAT. § 11.41.460 (1989); COLO. REV. STAT. § 18-7-302 (1986); IDAHO CODE § 18-4105 (1987); IOWA CODE § 709.9 (1979); KY. REV. STAT. ANN. § 510.150 (Baldwin 1984); ME. REV. STAT. ANN. tit. 17-A § 854 (West 1983 & 1992 Supp.); MO. ANN. STAT. § 566.130 (Vernon 1979); MONT. CODE ANN. § 45-5-504 (1989); NEB. REV. STAT. § 28.806 (1989); N.H. REV. STAT. ANN. § 645:1 (1986); N.M. STAT. ANN. § 30-9-14 (Michie 1984); N.D. CENT. CODE § 12.1-20-12.1 (1985) (includes anus); OR. REV. STAT. § 163.465 (1990); R.I. GEN. LAWS § 11-45-1 (1981 & 1992 Supp.); S.D. CODIFIED LAWS ANN. § 22-24-1 (1988 & 1993 Supp.); TENN. CODE ANN. § 39-13-511 (1991) (includes buttocks); TEX. PENAL CODE ANN. § 21.08 (West 1989) (includes anus); UTAH CODE ANN. § 76-9-702 (1990); WIS. STAT. § 944.20 (1982 & 1992 Supp.).

98. N.M. STAT ANN. § 30-9-14 (Michie 1984).

99. *See, e.g.*, KY. REV. STAT. ANN. § 510.150(1) ("A person is guilty of indecent exposure when he intentionally exposes his genitals under circumstances in which he knows or should know his conduct is likely to cause affront or alarm.").

100. WIS. STAT. § 944.20.

101. W. VA. CODE § 61-8-9 (1992).

102. TENN. CODE ANN. § 39-13-511.

103. *See, e.g.*, ALA. CODE § 13A-12-130 (1982) (requiring knowledge that the lewd act "is likely to be observed by others who would be affronted or alarmed").

Other than Indiana and New York,[104] only a few states specifically prohibit women from exposing their breasts. These prohibitions, however, are generally coupled with a requirement that the actor intend to arouse sexual desire[105] or know that the conduct will cause alarm.[106]

### B. *Judicial Interpretations and Applications of Exposure Laws*

The statutory isolation of New York and Indiana is heightened by a number of state court decisions that have explicitly held that a breast is not a "private part" and that breast exposure is not lewd in and of itself.[107] Such judicial interpretations arise mainly in states whose exposure statutes use ambiguous terminology. For example, California and North Carolina prohibit the public exposure of "private parts."[108] In *State v. Jones*,[109] the North Carolina Court of Appeals interpreted "private parts" as "generally acceptable legal parlance in referring to male or female genitalia."[110] Hence, the court held that female breasts are not private parts and that the statute did not prohibit breast exposure.[111] An Ohio court, relying on *Jones*, also concluded that a breast is not a "private part."[112] Similarly, a California court held that its state's applicable penal section does not encompass breast exposure.[113] Florida's equally imprecise statutory term, "sexual organs,"[114] has also been interpreted to exclude breasts, unless they are exposed in a lewd or lascivious manner.[115]

In *State v. Crenshaw*,[116] the Supreme Court of Hawaii held that wearing only bikini bottoms while sunbathing on a public beach did not constitute a lewd act within the meaning of the

104. *See* IND. CODE ANN. § 35-45-4-1 (Burns 1985) (prohibiting mere exposure of a woman's breast); N.Y. PENAL LAW § 245.01 (McKinney 1989) (same).
105. WYO. STAT. § 6-4-201 (1988).
106. DEL. CODE ANN. tit. 11, § 764 (1992 Supp.).
107. *See, e.g.*, State v. Crenshaw, 597 P.2d 13, 14 (Haw. 1979); State v. Jones, 171 S.E.2d 468 (N.C. Ct. App. 1970).
108. CAL. PENAL CODE § 314 (West 1988); N.C. GEN. STAT. § 14-190.9 (1986).
109. 171 S.E.2d 468 (N.C. Ct. App. 1970).
110. *Id.* at 469.
111. *Id.* at 470.
112. State v. Parenteau, 564 N.E.2d 505, 506 (Ohio Mun. Ct. 1990).
113. Robbins v. County of Los Angeles, 56 Cal. Rptr. 853, 859-60 (Cal. Ct. App. 1967).
114. FLA. STAT. ANN. § 800.03 (West 1992).
115. Duvallon v. State, 404 So. 2d 196, 197 (Fla. Dist. Ct. App. 1981).
116. 597 P.2d 13 (Haw. 1979).

Hawaii statute.[117] The court reasoned that because female breasts are not genitalia, exposure of the breast is not a "lewd act."[118] In *State v. Bull*,[119] a case decided the same day as *Crenshaw*, the court upheld the convictions of *completely nude* male and female sunbathers but reversed the convictions of two defendants who were body surfing and swimming in the nude because there was not enough evidence that these defendants were likely to expose their genitalia to public view.[120] Taken together, *Crenshaw* and *Bull* make it clear that the Hawaii Supreme Court did not dispense with the state's exposure laws but distinguished between private parts and breasts. In essence, the court defined nudity so as to exclude breasts.

Even in circumstances not related to public exposure, courts have held that breasts are not private parts. The Supreme Court of Oregon held that a defendant charged with contributing to the delinquency of a child for fondling and manipulating the victim's private parts could not be convicted solely on evidence that he played with her breasts because the term "private parts" refers to genital organs and not breasts.[121] A Canadian court reached a similar conclusion in 1984, finding a man not guilty of sexual assault for fondling a woman's breast because, according to Webster's Dictionary, breasts are not "primary sexual characteristics."[122] The unfortunate outcome of these cases could easily be rectified by changing statutes to specifically cover nonconsensual fondling of the breasts (or any other body part for that matter) of either *women or men.* This change requires only that legislatures be more precise in their use of terminology and avoid vague language such as "private parts" and "sex organs."

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117. *Id.* at 14. The Hawaii statute states that, "A person commits the offense of open lewdness if in a public place he does any lewd act which is likely to be observed by others who would be affronted or alarmed." HAW. REV. STAT. § 712-1217(1) (1988).

118. *Crenshaw*, 597 P.2d at 14.

119. 597 P.2d 10 (Haw. 1979).

120. *Id.* at 13.

121. State v. Moore, 241 P.2d 455, 459 (Or. 1952).

122. *See* Kozma, *supra* note 89, at 13.

### C. *A Precursor to* People v. Santorelli *and the Problem of Point of View*

Although only two states force women to conceal their breasts in public, many municipalities have passed local ordinances to the same effect. Faced with facts similar to *People v. Santorelli*, the Supreme Court of Washington, in *City of Seattle v. Buchanan*,[123] upheld a Seattle city ordinance prohibiting women from publicly exposing their breasts.[124] In *Buchanan*, five women were arrested at the Seattle Arboretum for swimming, sunbathing, and playing frisbee with their breasts exposed.[125] They were fined $100 each for violating the ordinance.[126] The women appealed.

Experts testified at trial that there is no significant difference between male and female breasts.[127] The court, however, chose not to believe the medical and scientific evidence and instead relied on lay newspaper articles.[128] It concluded that female

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123. 584 P.2d 918 (Wash. 1978).

124. *Id.* at 930. The ordinance in question prohibited "lewd conduct:"

> (1) As used in this section a 'lewd act' is:
>
> (a) an exposure of one's genitals or female breasts;
>
> (b) the touching, caressing or fondling of the genitals or female breasts; or
>
> (c) sexual intercourse as defined in Section 12A.04.140(1)(c); or
>
> (d) masturbation; or
>
> (e) urination or defecation in a place other than a washroom or toilet room.
>
> (2) A person is guilty of lewd conduct if he intentionally performs any lewd act in a public place or at a place and under circumstances where such act could be observed by any member of the public.
>
> (a) 'Public place' has the meaning defined in section 12A.12.020(1)(a).
>
> (3) The owner, manager or operator of premises open to the public wherein alcoholic beverages are sold, served or consumed is guilty of permitting lewd conduct if he intentionally permits or causes any lewd act on said premises.
>
> (4) This section shall not be applied to artistic or dramatic performances in a theatre or a museum.

*Id.* at 920 n.3 (quoting Seattle, Wash., ordinance 102843, § 12A.12.150).

125. *Id.* at 919.

126. *Id.*

127. The court noted the testimony of one expert who stated

> that there is no difference in the composition of the flesh of male and female breasts; that the breasts do not form a primary sex characteristic but a secondary one, and that the degree of development of the breasts does not determine sex . . . . [S]ome men have breasts as large as those of some small-breasted women.

*Id.* at 919 (footnote omitted).

128. As evidence of the overwhelming danger of exposed female breasts, the court used the following two excerpts from the *Seattle-Post Intelligencer*:

> The Big eyeballing attraction during the hydro races—which even diverted some attention from the Blue Angels—was a dinghy carrying four topless

breasts, but *not* male breasts, "constitute an errogenous [sic] zone."[129]

The court's focus was exclusively on the male point of view—the reaction of male observers to female breasts. The differentiation between male and female breasts was not based on physiology but on external reactions. Indeed, the only substantial distinction the court found between male and female breasts was *male* sexual arousal at women's breasts. "[T]he preservation of public decency and order"[130] is achieved by limiting women's freedom because exposure by women presumably inspires uncontrollable urges in males. This framework of protecting women from men shifts the burden of responsibility from men to women; because women provoke uncontrollable urges in males, society excuses male behavior and blames the victim for whatever happens.[131] Yet "[m]en are not 'wild animals' and women are not their 'tamers.' "[132] In many ways, the excitement for men in viewing women bare-breasted is rooted in the prohibition against public exposure. This element of the forbidden merely perpetuates the intense male reaction female exposure allegedly inspires.[133]

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girls—propelled mostly, it seemed, by the hot breath of male onlookers.

. . . .

An Atlanta, Ga., ordinance requires shops to draw their blinds when the cloth[e]s on female window dummies are being changed. Understand it was passed as a result of a few traffic accidents.

*Id.* at 920 n.4 (quoting Emmett Watson, SEATTLE POST INTELLIGENCER, Aug. 9, 1977, § B, at 1 and SEATTLE POST INTELLIGENCER, Aug. 10, 1977, § B, at 5).

129. *Id.* at 920. *But see* Morin, *supra* note 90.

130. *Buchanan*, 584 P.2d at 922.

131. *See* Joan H. Aiken, *Differentiating Sex From* Sex*: The Male Irresistible Impulse*, 12 N.Y.U. REV. L. & SOC. CHANGE 357, 380 (1983) (noting that to sanction the concept that men have uncontrollable urges implies that violence against women is inevitable) (citation omitted).

Women have to walk a fine line between being too pretty—jurors might think she invited the rape or sexual harassment—and being not pretty enough—jurors would think, "Who'd rape her?" Carol Sanger, *The Reasonable Woman and the Ordinary Man*, 65 S. CAL. L. REV. 1411, 1413 (1992). Women's body image cannot help but be negatively affected when a jury acquits a defendant accused of rape because "we felt she [the woman] asked for it for the way she was dressed, . . . with that skirt, you could see everything she had. She was advertising for sex." *Jury: Woman in Rape Case 'Asked for It,'* CHI. TRIBUNE, Oct. 6, 1989, at 11; *see* Peter M. Hazelton, Note, *Rape Shield Laws: Limits on Zealous Advocacy*, 19 AM. J. CRIM. L. 35, 35 (1991). Given such reactions, women are made to feel self-conscious about everything they wear.

132. Aiken, *supra* note 131, at 381.

133. *See* Whisner, *supra* note 25, at 117.

As Mary Whisner has explained, women are missing from the *Buchanan* court's analysis.[134] The court paid no attention to the women's mind-set, motives, or intentions. The women's desire to and enjoyment of going topless was not even considered; their interest was considered only as it related to male viewers. Moreover, what the court considered to be sexually arousing was viewed only from the (heterosexual) male point of view. Either the court was under the mistaken impression that women are not aroused by male chests,[135] or it desired, consciously or subconsciously, to reinforce stereotypes of women as passive sexual beings who even when "aroused . . . would not react so as to disturb the public order."[136]

Whisner is also critical of the court's definition of "lewd."[137] The majority used a dictionary definition of lewd—"suggestive of or tending to moral looseness: inciting to sensual desire or imagination"[138]—that defined the term solely from the viewer's perspective. Because (heterosexual) male viewers could be aroused by the sight of female breasts, *women are guilty*. As Justice Utter acknowledged in his dissent, these women will have a criminal record, although they had no "intent to excite a sexual response in the beholder."[139]

The *Santorelli* court does not adopt this paternalistic way of thinking completely. By allowing women in New York to sunbathe topless, the court empowers women at least to some degree. Of course, this is not a perfect world. The *Santorelli* appellants know that women who go topless may encounter some disagreeable reactions. Topless sunbathing is probably not something most women want to do because undoubtedly some people will stare, leer, or make unpleasant comments. Yet adult women who choose to take off their tops in public must be willing to take responsibility for their actions and accept some of the unpleasantries that may result. Women are not asking to be protected; they simply want to be able to choose how to enjoy themselves and to reclaim control of their bodies.

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134. *Id.* at 113.
135. *See* Wildman et al., *supra* note 92, at 485.
136. Whisner, *supra* note 25, at 113.
137. *Id.* at 113–14.
138. City of Seattle v. Buchanan, 584 P.2d 918, 929 (Wash. 1978).
139. *Id.* at 931 (Utter, J., dissenting).

## III. THE BROADER RELEVANCE OF *PEOPLE V. SANTORELLI*

### A. *Practical Implications of the Mandatory Covering of Women's Breasts*

Women have suffered physically and psychologically as a result of the negative messages they receive about their bodies. These consequences also affect women's relationships with men, other women, and their children. Any real and complete independence and equality that women achieve must be accompanied by autonomy over their own bodies.

1. *Unnecessary Cosmetic Surgery.* Women have been driven to self-destructive surgical procedures because they are not encouraged and do not learn to be proud and accepting of who they are as women.[140] Women's pervasive dissatisfaction with their bodies has culminated in massive numbers of women seeking breast reductions or implants.[141] A total of two million American women, or 150,000 a year, have received breast implants;[142] more than eighty percent of these women had the surgery for purely cosmetic reasons.[143] Not surprisingly, the implant industry has grown into a $500 million-a-year business.[144] Some women have this surgery for themselves; others receive breast implants as gifts from husbands or boyfriends who even pick out the breast size they want.[145]

Cosmetic surgery, like any form of surgery, involves risks. This type of breast surgery leads to a hardening of the scar tissue around the implants, which makes breast cancer harder to detect and can cause a lack of sensation in and hardening of the breast. Some implants tend to leak or rupture and require periodic replacement.[146] Silicone breast implants also can cause other prob-

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140. *See infra* subsection III(A)(4) (discussing how women could benefit from more communal female nude experiences).

141. Men are far less likely to have invasive procedures and more likely to change their appearances through exercise and weight regimens. According to the American Society of Plastic and Reconstructive Surgeons, fewer than 200 men had pectoral implants in 1990. Elisabeth Rosenthal, *Her Image of His Ideal, in a Faulty Mirror*, N.Y. TIMES, July 22, 1992, at C12.

142. Laura Shapiro et al., *What Is It with Women and Breasts?*, NEWSWEEK, Jan. 20, 1992, at 57.

143. *Id.*

144. Barbara Ehrenreich, *Stamping out a Dread Scourge*, TIME, Feb. 17, 1992, at 88.

145. Shapiro et al., *supra* note 142, at 57.

146. Philip J. Hilts, *Vigilance Is Called Essential for Women with Implants*, N.Y.

lems: chest pain; arthritis-like diseases that cause pain and swelling of the joints; scleroderma, a skin disease that leads to toughness, redness, or swelling of the extremities; autoimmune disorders; swelling of the lymph nodes and nodes under the arm; and stiffness in the chest, shoulder, and upper arm.[147]

In January 1992, the Food and Drug Administration imposed a moratorium on gel implants that effectively amounted to a ban on their use. Until new safety studies are performed, the implants will be immediately available only to women who are enrolled in clinical trials or who meet an "urgent need" exception. This exception is primarily for cancer patients who have had mastectomies and allows these women to receive silicone-gel implants without being enrolled in a long-term clinical trial.[148]

Several thousand lawsuits have been filed by women claiming they have been harmed by silicone breast implants. About 400 federal cases have been joined together, and a decision on whether a class action should go forward is pending.[149]

2. *Breast-Feeding.* Requiring women to cover their breasts in public also has discouraged women from breast-feeding.[150] This concern is the reason one of the *Santorelli* appellants, Mary Lou Schloss, gave for her involvement in the topless demonstration. She had been active in childbirth education and "felt that helping to remove a law that puts any kind of restrictions on breast exposure would help women feel more comfortable with the idea of breast-feeding in our society."[151] The exposure of women's breasts has become so taboo in this culture that women do not feel comfortable using them for the very reason they are different from men's—lactation.[152]

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TIMES, Jan. 8, 1992, at A16.

147. Felicity Barringer, *First Steps Taken in Revived Use of Breast Implants*, N.Y. TIMES, May 3, 1992, at A34; Hilts, *supra* note 146, at A16.

148. Barringer, *supra* note 147, at A34.

149. Philip J. Hilts, *Decision Time Near for Implant Suits*, N.Y. TIMES, Sept. 2, 1992, at C12.

150. Brief of Defendant-Appellant at 27, People v. Santorelli, 600 N.E.2d 232 (N.Y. 1992) (No. 115) (referencing testimony of psychologist Dr. Rita Freedman).

151. *Id.* at 6 (quoting trial transcript in the Rochester City Court).

> Our society is far more at home with the idea of sexy breasts than functional ones. Even a woman who is comfortable with the mechanics of nursing may feel ill at ease in public—subject to stares or pointedly averted eyes, and knowing that she make[s] many people around them uncomfortable.

Lisa deMauro, *Beating the Bottle*, N.Y. TIMES, Sept. 21, 1991, at A21.

152. A related problem, recounted by Dr. Freedman, is that women tend to avoid

Breast-feeding is a vivid example of the inequities in the power structure. A male norm focuses the difference as resting with women. Because men cannot breast-feed, it is not accepted as a form of appropriate public behavior. Christine Littleton describes the following scenario:

> Consider the woman who recently lunched in the restaurant of the Beverly Rodeo Hotel. When she began breastfeeding her infant the manager asked her to leave the dining room. What routes are open to her? Imagine the following dialogue:
> Woman: Equality!
> Restaurant: Yes, let's have equality. We don't allow men to bare their breasts in the dining room, so we can't let you do it either. (Assumption of symmetry.)
> Woman: Wait a minute. There's a difference between those two situations.
> Restaurant: Yes, there's a difference. Women's breasts are far more disruptive than men's breasts. Keep yours covered. (Location of difference in the woman.)
> Woman: No, I have different needs and this social institution should take account of them.
> Restaurant: Fine, go over there behind the screen. You can rejoin the others when you're finished. ("Accommodation" of difference leaves institution itself as rejecting the woman.)[153]

Men are not made to feel different because they do *not* breast-feed; women, however, *are* made to feel different and uncomfortable because they *do* breast-feed.

Breast-feeding serves a vital purpose. The connection between mother and infant is critical; male observers are irrelevant to the process. By viewing the situation from the male perspective, soci-

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breast examinations because of their specific discomfort with that part of their bodies. Brief for Defendant-Appellant at 27 n.14, People v. Santorelli, 600 N.E.2d 232 (N.Y. 1992) (No. 115) (referencing testimony of psychologist Dr. Rita Freedman). Breast cancer is a serious and growing concern for American women. According to the American Cancer Society, 1 in 9 women will be diagnosed with breast cancer each year, a dramatic increase from the 1 in 20 women who got the disease in 1940. Jeanne Kassler, *Weighing Lumpectomies vs. Mastectomies*, N.Y. TIMES, July 21, 1991, at 12LI8. Each year alone, breast cancer will strike 150,000 women and claim 45,000 lives. Jane E. Brody, *Personal Health*, N.Y. TIMES, Aug. 2, 1990, at B5; Marian Burros, *Eating Well*, N.Y. TIMES, Feb. 12, 1992, at C4. Breast examination is critical for early detection; the cure rate for women whose cancer has not spread is virtually 100%. Brody, *supra*; Elisabeth Rosenthal, *Screening the Tests That Detect Cancer*, N.Y. TIMES, Apr. 28, 1991, § 6, at 9.

153. Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1310–11 (1987) (footnote omitted).

ety continually places breast-feeding mothers in uncomfortable situations and perpetually reminds them of their "otherness."[154] This discomfort can be severe enough to deter women from making the choice to breast-feed although breast-feeding is generally considered to be preferable to other methods of feeding an infant.[155]

3. *Good Girls/Bad Girls.* The New York law at issue in *Santorelli* also reinforces a damaging double standard *between* women. It exempts women who appear topless for the entertainment of others.[156] However, women who want to go topless for their own enjoyment are not allowed to take off their shirts. Maintaining this inequality reinforces a dual image of women: "good girls" vs. "bad girls;" "Madonnas" vs. "whores."[157]

Both of these images serve to oppress women. "Good girls" are denied freedom in areas related to sexuality, whereas the law legitimizes the exploitation of "bad girls."[158] Frances Olsen has explained this double standard for women's sexuality:

> First, nonmarital sex, or sexual activity separated from emotional commitment, is considered desirable for men but devaluing for women. The second aspect is a corollary of the first: some women have to be "immoral" in order to serve as sexual partners for males outside of marriage. Thus, women are categorized as moral or immoral, good girls or bad girls, virgins or whores, wife material or playmate material.[159]

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154. Because a patriarchal society uses the male as the standard, women are made to feel like outcasts because they do something—breast-feed—that men do not do. Men, in contrast, are not made to feel inferior because of their inability to breast-feed. *Cf. id.* at 1311 & n.171 (drawing a parallel between the significance women place on breast-feeding and the significance observant Jews place on kosher food, in that the ubiquity of non-kosher foods in American cuisine sends a similar signal of "otherness").

155. According to the U.S. Surgeon General and the American Academy of Pediatrics, breast milk is the best form of nutrition for babies. Breast milk has all the essential nutrients, and its content varies to meet the baby's changing nutritional needs. It is the only mechanism for passing on immunity after birth, and it is far less likely than formula to cause allergic reactions or constipation. deMauro, *supra* note 151, at A21.

In part because of the health benefits associated with breast-feeding, Florida recently enacted the first state statute guaranteeing women the right to breast-feed in public. *See* Larry Rohter, *Florida Approves Measure on Right to Breast-Feed in Public*, N.Y. TIMES, March 4, 1993, at A18.

156. N.Y. PENAL LAW § 245.01 (McKinney 1989).

157. *See* Willis, *supra* note 8, at 38.

158. Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 110 n.24 (1989).

159. Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L.

"Good girls" need to be protected and cannot make decisions for themselves. Exemptions are made to allow "bad girls" to service male needs, but women are inhibited from acting in their own self-interest. Collapsing this dualism is an important step in gaining respect for individual women's choices.

4. *Psychological Isolation of Women and the Benefits of Women Encountering Others Nude.* In the United States, women rarely see other women naked.[160] Such exposure only occurs with any regularity in the movies, and actresses rarely embody the average female form.[161] Women have, in effect, been kept ignorant about the realities of their own bodies.

Because men are able to see what shapes and sizes other men come in, they are better able to understand that their own body shapes are just one of many acceptable variations. Women, however, have no similar "locker room experience." The only other naked female forms they are allowed to see are cover girls and Barbie dolls. This isolation has been very effective in conditioning women to believe that the cover girl is the only acceptable body image for women.[162] Women have willingly lined up at plastic surgeons' offices because they have been conditioned to believe that breasts only come in one acceptable form;[163] if their breasts do not fit this model, something is wrong with the way they, as women, appear. Women are kept from realizing that "breasts come in as many shapes and variations as there are women."[164] Professor Carlin Meyer acknowledges that until she was twenty-one years old, she did not realize that her breasts were nothing to be ashamed of because they did not look like Barbie's. She came to this realization only after joining a group of bare-chested swimmers, among whom she was able to see and appreciate the variety of the female form. She maintains that

> if a few real . . . bosoms are bared, more young women and men will notice that breasts are not as toy manufacturers, filmmakers,

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REV. 387, 402 n.70 (1984).

160. WOLF, *supra* note 15, at 136.

161. Men also only see "perfect" women as they are portrayed by the media and thus may make their wives or girlfriends feel inferior.

162. Shapiro et al., *supra* note 142, at 57.

163. *See supra* subsection III(A)(1).

164. WOLF, *supra* note 15, at 247.

> pornographers and novelists portray them. Maybe girls would be less ashamed of them and wouldn't feel the need to wear "falsies" or to ask physicians to enlarge them with injurious synthetics.[165]

Although suggesting a re-thinking of female communal nudity sounds radical, many women have described in revelatory terms what such group experiences have meant for them. Deirdre English describes such an experience:

> It was a hot summer day in Pennsylvania, and during a break in the weekend-long conference we gathered at an outdoor swimming pool. There were no men around, so we all stripped and swam naked—dozens of women, most of them perfect strangers. I had never really been struck before by how *different* women's bodies are from how they're "supposed to be," and how [a] woman's body is unique. The effect was incredibly beautiful.[166]

It is important for women to learn to love their bodies. Such affinity will lead to more autonomy and strength for women, as well as to a lessening of male control over them.[167] A more positive approach to female nudity would help combat the problems women have with body image.[168]

### B. *Other Legal Contexts That Have Had an Impact on Women's Body Image*

Public exposure laws are only one example of the law's significant effect on the way women think and feel about their bodies. Their enforcement is a poignant example of how the law is used to subordinate women and a dramatic illustration of the different positions men and women occupy in our society. Yet topless sunbathing is not an isolated instance in which the law has a negative influence on women's body image.

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165. Meyer, *supra* note 8, at A21.

166. Deirdre English, *The Politics of Porn: Can Feminists Walk The Line?*, MOTHER JONES, April 1980, at 20, 50.

167. ROSEMARIE TONG, WOMEN, SEX, AND THE LAW 32 (1984).

168. Women with eating disorders such as anorexia and bulimia could be helped by viewing other *real* women. Indeed, if women, from an early age, saw other women's bodies, these disorders might even be prevented. *See* WOLF, *supra* note 15, at 280.

1. *Television Anchorwomen.* The case of *Craft v. Metromedia, Inc.*[169] illustrates the impact that employment discrimination law can have on women's body image. Christine Craft alleged that her treatment while employed as a co-anchor of the nightly news in Kansas City and her subsequent demotion constituted sex discrimination.[170] She contended that appearance standards imposed on her were much more stringent than those imposed on male anchors.[171] She was subjected to extensive makeup counseling and a "clothing calendar" to ensure that she did not wear the same outfit more often than once every three weeks.[172] Eventually, she was reassigned from the co-anchor position to general reporting duties because Metromedia allegedly considered her "too old, too unattractive, and not deferential enough to men."[173] At trial, a jury found that Craft had been a victim of sex discrimination and rendered a verdict in her favor.[174] The trial court, however, set aside the jury's verdict.[175] The U.S. Court of Appeals for the Eighth Circuit agreed with the district court that Craft had not been subject to sex discrimination, in essence ruling that she could be fired from her job because she was not sufficiently attractive.[176]

A case such as *Craft*, involving a high-profile plaintiff, sends a strong message to women. It is no wonder that a large part of women's self-worth revolves around their appearance: their careers could be at stake. In addition to concerns about job performance, women bear the additional burden of being beautiful. Not only must women expend time and energy maintaining these appearance standards, but the law allows employers to treat any lack of beauty as the woman's fault, for which she can lose her job. It is her fault if she is brunette in a blonde world, or if she wrinkles in

169. 572 F. Supp. 868 (W.D. Mo. 1983), *aff'd in part and rev'd in part*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986).

170. *Id.* at 876.

171. *Craft*, 766 F.2d at 1210.

172. *Id.* at 1209, 1214.

173. *Craft*, 572 F. Supp. at 878.

174. *Id.* at 870.

175. *Id.* at 877–79.

176. *Craft*, 766 F.2d at 1215–17. For analysis of the Title VII issues involved in *Craft*, see Patti Buchman, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance*, 85 COLUM. L. REV. 190 (1985); Leslie S. Gielow, Note, *Sex Discrimination in Newscasting*, 84 MICH. L. REV. 443 (1985).

a world that does not allow aging.[177] What a powerful force the law would be if, instead, it did not condone such thinking but allowed individuals to come in all shapes, sizes, and colors, to grow old gracefully and honorably, and to perform their jobs professionally whatever their appearance.

2. *Flight Attendant Weight and Makeup Policies.* Airlines have a history of employing young, attractive women as marketing ploys to attract male passengers.[178] Litigation battles continue over airline maximum weight limits that are often set at levels that only serve to perpetuate stereotypical notions of female attractiveness and often pose dangerous health risks. Unnecessarily low or stringent weight restrictions serve no legitimate safety purpose. Instead, because there are no allowances for weight gain with age, these restrictions allow the airlines to terminate older flight attendants and to maintain a demoralizing control over their workforce.[179]

In several early cases, courts upheld airline weight restrictions,[180] but in 1982, the U.S. Court of Appeals for the Ninth Circuit held that Continental Airline's weight maximums violated Title VII.[181] In 1987, Pan American settled a class action suit in

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177. Ellen Goodman writes:

> In the past decade, we have charted the middle-aging of female models and role models. Women who are fortysomething are being allowed out in public, although they almost always wear a label that reads: "still." Still attractive at 40. Still youthful at 46.
>
> But . . . women are only being given an extension on aging . . . . The culture is telling women they can be younger longer. It is not welcoming old women.

Ellen Goodman, *The Aging Battle*, BOSTON GLOBE, Nov. 19, 1992, at 21.

178. Pamela Whitesides, *Flight Attendant Weight Policies: A Title VII Wrong Without a Remedy*, 64 S. CAL. L. REV. 175, 175 (1990). Southwest Airlines, for example, required its flight attendants to promote its "sexy image and fulfill its public promise to take passengers skyward with 'love.' " Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 293 (N.D. Tex. 1981).

179. Whitesides, *supra* note 178, at 177.

180. *See, e.g., In re* National Airlines, Inc., 434 F. Supp. 269 (S.D. Fla. 1977) (holding that weight maximums do not violate Title VII because they apply equally to men and women); Jarrell v. Eastern Air Lines, Inc., 430 F. Supp. 884 (E.D. Va. 1977) (same), *aff'd*, 577 F.2d 869 (4th Cir. 1978); Cox v. Delta Air Lines, 14 Empl. Prac. Dec. (CCH) ¶ 7600 (S.D. Fla. 1976) (upholding weight restrictions as acceptable grooming standards), *aff'd mem.*, 553 F.2d 99 (5th Cir. 1977).

181. Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982) (en banc), *cert. dismissed*, 460 U.S. 1074 (1983).

part by agreeing to a more liberal weight chart, allowing for three additional pounds at ages 35, 45, and 55, successively.[182]

Airlines have begun changing their policies even before being hauled into court. Teresa Fischette, a ticket agent at Logan International Airport in Boston, was fired by Continental when she refused to wear makeup. She had never worn makeup and did not think that cosmetics had anything to do with her job. A rule requiring all female groundworkers to wear makeup was part of the airline's code on personal appearance.[183] Fischette's termination set off protests against Continental, including one at company offices in which picketers chanted, "Better service, lower fares, it doesn't matter what you wear."[184] After the negative publicity, Continental offered to reinstate Fischette, including providing her with back pay, and changed the customer-service appearance standards to "guidelines" instead of "rules."[185]

The law should applaud and reinforce this trend away from rigid weight restrictions and cosmetic requirements. When employment depends on appearance, a woman's preoccupation with her body is intensified. The phenomenon of women who endure severe diets and develop eating disorders is one consequence of the fact that their jobs may depend on their weight. The law should encourage employers and customers to acknowledge talent and good service, not just good looks. Instead of perpetuating stereotypical myths that flight attendants are sexy bombshells looking for wealthy male passengers to marry, the public should be encouraged to recognize them as professionals performing a very difficult job. The law can facilitate the breakdown of arcane notions by proscribing policies that foster stereotypes and are in no way related to job performance.

3. *Hairstyles.* The choice of a hairstyle is an important way of expressing one's self and is closely tied to an individual's body image.[186] The courts have been active in proscribing how both women and men may wear their hair in employment and school settings.[187] A stinging example of the courts' insensitivity to this

182. Whitesides, *supra* note 178, at 215.
183. *Airline Retracts Rule Requiring Makeup Use*, N.Y. TIMES, May 16, 1991, at A19.
184. *About-Face*, AVIATION WK. & SPACE TECH., May 20, 1991, at 19.
185. *Id.*
186. *See* Caldwell, *supra* note 1, at 383.
187. Courts have generally ruled against male employees with long hair. *See, e.g.*,

issue is *Rogers v. American Airlines, Inc.*[188] The plaintiff, Renee Rogers, a black woman, argued that American Airlines discriminated against her as a black woman by categorically forbidding her to wear a braided hairstyle.[189] The court treated her race and sex claims independently and would not acknowledge that the policy could be discriminatory without affecting all women or all blacks, although it discriminated against black women.[190]

The court further demeaned Rogers's claim by asserting that she only began braiding her hair after it was popularized by Bo Derek in the movie "10."[191] In reality, black actress Cicely Tyson had introduced braids into popular American culture a decade earlier.[192] Moreover, the wearing of braids by black women is not new; braids have been worn for centuries around the world.[193] The choice to wear their hair in braids is an important political and cultural statement for black women. It is a "survival mechanism" for black culture and a way to fight "western standards of physical beauty."[194] By denying women like Rogers the freedom to wear their hair as they wish, the court not only

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Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1092 (5th Cir. 1975) (en banc) (holding that employer's haircut requirement was not sex discrimination given the prevailing views in the community toward men with long hair); Dodge v. Giant Food, Inc., 488 F.2d 1333, 1336 (D.C. Cir. 1973) (holding that hair-length regulations are "logically indistinguishable" from "the requirement that men and women use separate toilet facilities or that men not wear dresses"); Fagan v. National Cash Register Co., 481 F.2d 1115, 1124 n.21 (D.C. Cir. 1973) (Douglas, J., concurring and dissenting) (noting that some employers would see " 'non-conventional' hair growth [as] a very real personal threat to those who support the *status quo*") (quoting Ham v. South Carolina, 409 U.S. 524 (1973)).

In the school context, the reasons administrators and courts supply for regulations are equally stereotypical. *See* Bishop v. Colaw, 450 F.2d 1069, 1076 (8th Cir. 1971) (noting principal's explanation that boys with long hair are more "rowdy" and that allowing males to grow long hair would lead to "confusion over appropriate dressing room and restroom facilities"); Copeland v. Hawkins, 352 F. Supp. 1022, 1024 (E.D. Ill. 1973) (noting principal's testimony that requiring boys to have short hair is important because otherwise "it might be difficult to tell boys from girls" and, because boys participate in athletics, short hair is beneficial because it will dry faster after they shower). The courts in these cases, however, did not find the regulations to be justified.

188. 527 F. Supp. 229 (S.D.N.Y. 1981).

189. *Id.* at 231.

190. *Id.* at 231–32. For discussions of compound discrimination, see Madeline Morris, *Stereotypic Alchemy: Transformative Stereotypes and Antidiscrimination Law*, 7 YALE L. & POL'Y REV. 251 (1989); Elaine W. Shoben, *Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination*, 55 N.Y.U. L. REV. 793 (1980).

191. *Rogers*, 527 F. Supp. at 232.

192. Caldwell, *supra* note 1, at 379.

193. *Id.*

194. *Id.* at 383.

denied their cultural affiliations but also minimized their chances of having a positive body image.

It is especially difficult for black women to meet the white Barbie doll standard, which does not incorporate black physical characteristics and does not acknowledge black physical characteristics as beautiful. The need to change one's appearance in an effort to gain legitimacy causes tremendous psychological harm.[195] A black person "should not have to look more white in order to keep [her] job."[196]

## IV. CONCLUSION

Although at first glance, topless sunbathing may seem like an insignificant issue, it is symbolic of the power inequities that persist in American society. Women's bodies will never look like men's bodies, but this difference must not be used to foster stereotypical notions about women or to inhibit women's choices. Increasing numbers of women will not accept a law, defined solely by the male point of view, that tells them that their desires do not matter and that their bodies must be hidden in shame. Instead of reinforcing unattainable beauty norms, the law can play a significant role in helping women overcome the discomfort and guilt they feel about their bodies by allowing for alternatives and personal choices in areas that have an impact on appearance and body image. Only when the law acknowledges that all the sizes, shapes, and colors that women come in are acceptable and valuable can women begin to overcome their status as outsiders.

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195. *Id.* Even some black dolls have been considered to resemble nothing more than "white dolls with dark paint." Carolyn Battista, *Teaching Children to Celebrate Diversity*, N.Y. TIMES, July 28, 1991, at 12CN3.

196. WOLF, *supra* note 15, at 55.