

A Private Underworld: The Naked Body in Law and Society

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INTRODUCTION

Like millions of United States travelers, John Brennan was fed up with the indignity and hassle of airport security screening procedures. After being patted down, the security officer referred him for further screening; the officer detected nitrates on Brennan's clothes. Something inside Brennan snapped; and he stripped off every stitch of clothing, to prove he was harboring no explosives. As he stood naked in the Portland airport, police arrived and hauled him off in handcuffs. Brennan, a veteran of an annual naked bike ride, insisted he had done nothing wrong. Nudity was an act of protest, he claimed, protected by the First Amendment. After a brief trial in July 2012, a judge agreed with Brennan and dismissed the charge of public indecency.¹ There was precedent for his argument about nudity as a form of protest; and, in any event, the local law on public indecency only prohibited the exposure of genitalia if done "with the intent of arousing the sexual desire of the person or another person."² Arousing

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1. Aimee Green, *Northeast Portland Man Who Stripped Naked at Airport is Acquitted of Indecent Exposure Charge*, OREGONIAN (July 18, 2012, 6:42 PM), http://www.oregonlive.com/portland/index.ssf/2012/07/northeast_portland_man_who_str.html; Kate Mather, *Naked Man Arrested at Portland International Airport After Disrobing at Security Checkpoint*, OREGONIAN (Apr. 18, 2012, 3:13 PM), http://www.oregonlive.com/portland/index.ssf/2012/04/naked_man_arrested_at_portland.html.

2. OR. REV. STAT. § 163.465(1)(c) (2012).

Transportation Security Administration agents was surely far from Brennan's mind. "Sir Godiva," as one of his friends called him, walked out of court (fully dressed) a free man.³

Probably Brennan's naked body surprised the other people in the security line; at most they expected to see bare feet and perhaps a wisp of underwear poking out of trousers without belts. Most people assume that public nudity is illegal. Even police might confuse social norms about nudity with the law. The New York City Police Department just agreed to pay \$15,000 to settle a wrongful arrest suit by a woman they had arrested for public nudity.⁴ She was completely naked in public, top to bottom, but she was demonstrating the art of body painting, and state law exempts nudity undertaken in the course of a performance, play, or exhibition. So she had done nothing to deserve being dragged away in handcuffs, nor left naked and ogled in the police station for fifteen minutes before being allowed to dress.⁵

In fact, the law of public nudity is more nuanced and generally less strict than people expect. Nor do most people—and indeed most lawyers—think nudity has anything to do with the important issue they call privacy. But it most certainly does. What parts of themselves, their minds, and most definitely their bodies people can and cannot reveal is an important aspect of the law of privacy. The literature on privacy is enormous: what it is, how we can protect it, what it means in today's world. There is endless discussion about the definition of privacy: what the word means and doesn't mean. No wonder. The word is used in a great many senses. It is so hard to put all these senses together that some scholars simply throw up their hands and dismiss the whole question as hopeless.

3. Green, *supra* note 1.

4. Bruce Golding, *Naked Gal Gets Deal on a Suit: 15G for Times Sq. Bust*, N.Y. POST (Sept. 4, 2012, 7:44 AM), http://www.nypost.com/p/news/local/manhattan/naked_gal_gets_deal_on_suit_rzU3DNFTdMhSYMMe1bAMVO.

5. *Id.*

We have no intention of adding our two cents to this literature. We suspect that the doubters are basically right: it's not really possible—or worthwhile—to try to frame some definition that would include a woman's right to an abortion, the right to pull down your shades at night, the right to keep your health problems to yourself, or to keep the FBI from reading through your mail. From 1965 on, the United States Supreme Court has decided that there is a constitutional right of privacy, which includes the right to make certain fundamental personal decisions: to have children or not, to have sex or not, and with whom.⁶ This is a very important line of cases, and oceans of ink have been spilled about it. We exercise our fundamental right to leave these issues for other people. Instead, we want to talk about a mundane and common sense notion of privacy: the right to be left alone, the right to keep some things secret, the right to retreat into a private world.

This is in itself a very big topic. We live in a world of surveillance cameras and Google Earth. It is a world where, every time we buy a can of peas at the supermarket or a detective novel on Amazon, this act gets recorded somewhere to be used later for advertisement and for who knows what. It is a world in which government has the *technical* power to eavesdrop on our conversations, tap our phones, and, for all we know, peek inside peoples' bedrooms.

In general, the literature on privacy stresses, quite naturally, our right to keep things private, or to make our own decisions. The individual, the citizen, is the center of gravity. There is a great deal of material on the limits of privacy, on threats to privacy, and the like. In this Article, we want to discuss what one might call *mandatory* privacy: those aspects of life that we are required to keep secret, hidden, or private. The things that we *must* keep private, whether we want to or not. This is a subject that has been

6. The leading case was *Griswold v. Connecticut*, 381 U.S. 479 (1965). The line of cases includes of course the famous abortion case, *Roe v. Wade*, 410 U.S. 113 (1973).

mostly, though not entirely, ignored in the privacy literature.⁷

One of the most obvious examples of mandatory privacy involves the naked human body. The taboo against exposing the naked body has a long history in Western societies.⁸ This is a taboo which many ancient societies shared, along with some (not all) preliterate societies. The taboo did not apply to the ancient Greeks, however, as anybody who has looked at Greek sculpture knows. Whenever a (male) Greek statue seems to have lost its penis, the reason is not prudery, but rather the ravages of time. Nude bathing may be a modern thing in St. Tropez; but apparently not in Japan.

The taboo against nudity is, in modern times, a taboo against exposing sex organs, at least in the Western countries. Or, to be more exact, the sex organs of grown-up men and women, and of boys and girls once past a certain age. Nobody seems to object to nudity in little tiny babies (although distributing pictures of naked children is most definitely a crime). In some traditional societies, the taboo goes much further than in Western societies. In conservative Muslim countries, in addition to the usual strictures (which apply to men and women alike), there are special and very stringent rules for and about women.⁹ It is considered indecent or immodest for women to show their hair, legs, or even faces (in some countries), outside of the home.¹⁰

In Western society, the taboo went much further in the past than it does today. Photographs of people at bathing beaches in the nineteenth century, for example, make this point clear. Much more of the body was covered up. Today it is certainly not a crime or an offense to wear sexy clothes,

7. A leading exception is the recent book by ANITA L. ALLEN, *UNPOPULAR PRIVACY: WHAT MUST WE HIDE?* 9-11 (2011).

8. See LAWRENCE M. FRIEDMAN, *GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY* 165-71 (2007).

9. See generally LEILA AHMED, *A QUIET REVOLUTION: THE VEIL'S RESURGENCE, FROM THE MIDDLE EAST TO AMERICA* (2011).

10. *Id.*

skimpy bathing suits, and the like; though people would definitely raise their eyebrows if you sauntered into a grocery store or an insurance office wearing nothing but a bikini or short shorts. In general, sexy clothing has definitely emerged from the closet. The most popular issue of *Sports Illustrated* is the swimwear issue. It probably attracts thousands of men who have little or no interest in swimming, diving, or perhaps, for that matter, any sport that takes place outside of the bedroom. Millions of men smack their lips over “pin-ups” and “cheesecake,” pictures of women in skimpy and sexy clothing, or nothing at all; “beefcake” is the male equivalent, for women and gay men to wallow in. Still, respectable journals and magazines recognize an invisible line; and they are careful not to cross it. *The Sun*, an English tabloid, specializes in the breasts of nubile women (always on page three). It featured, on the front page, under the headline “Heir It Is,” a picture of Prince Harry, fully exposed with only his hands to cover his genitals.¹¹ It also published a defensive explanation, noting that it made the decision to publish the racy photos, despite palace pressure to withhold them, only after they were widely available on Internet sites.¹² But full frontal nudity, even in such a publication and with such a celebrity, is out.

The rules of the game are complicated, but it is fair to say that, in our times, the taboo against exposing the body has shriveled to the point where basically it is restricted to sex organs. The taboo against exposing a woman’s breasts, or an adult’s butt, male or female, is considerably weaker. And the taboo in general seems to be losing steam. What is left of it, and why, and why and how it has changed, is a subject we will briefly deal with.

In our society, in general, we can see two quite distinct trends. The more general taboo, against what one might call simple nudity, is showing signs of decay. Society has become

11. See *Heir It Is! Pics of Naked Harry You’ve Already Seen on the Internet*, SUN, Aug. 24, 2012, at 1.

12. *Id.*; Anthony Castellano, *Nude Photos of Prince Harry Surface Online*, ABC NEWS (Aug. 22, 2012), <http://abcnews.go.com/Entertainment/nude-photos-prince-harry-surface-online/story?id=17055379>.

more permissive. In many places in the Western world, public nudity may not be illegal at all. But there is quite a sharp distinction between *lewd* nudity and just plain nudity. If anything, the distinction is sharper than ever.

I. THE TIGER'S CAGE

We might begin with a few very basic questions: Why are there taboos against nudity at all? What is wrong with nudity? Is there something shameful about the human body?

The taboos, pretty obviously, are all about sex; and sex taboos, rules about sex, strictures about sex, and the like, are probably present in every society. In some countries, rules about nudity, particularly rules about female "modesty," seem to rest on beliefs or assumptions about the overheated sexual drives of men. It is as if just seeing a woman's hair or legs (in some countries), or her naked body, in other countries, would drive men to wild, impulsive, and dangerous acts. The naked *male* body poses a different sort of danger: it suggests a man who has, in fact, been driven wild and is apt to act like a tiger on the loose; this man is a threat to all the women in his path. Of course, we are happy to provide the tiger with a mate, to keep him company in the cage. Otherwise, tigers would die out altogether. But only a mate; nothing more, thank you.

Norms about bodily privacy seem to assume that society, the family structure, and just about everything depend on keeping the tiger in its cage. The (male) sex drive is both extremely powerful; and extremely addictive.¹³ It has to be controlled. The taboos about nudity are part, then, of a large and complex structure of laws and customs that deal with sexual behavior and misbehavior. Feminists will be quick to point out that men make up the rules about sex; and that men make them up, on the whole, for their own benefit. There is certainly a lot of truth to that. But the rules, insofar as they are enforced, are also meant to restrict

13. There are also, to be sure, beliefs about the wild, uncontrolled sex drives of certain evil and seductive women; but these, we think, play less of a role in most societies.

the behavior of men—if not for the benefit of women, then at least for the benefit of society in general.

The Western Christian tradition is, on the whole, pretty suspicious about sex in general. Celibacy was considered a worthy ideal. Holy people, monks, nuns, priests, were celibate. The Shakers, an American sect, believed in celibacy.¹⁴ Celibate monks can also be found in Eastern religions—Buddhism, very notably. But of course, celibacy is obviously not something everybody is likely to choose, and a good thing too, since survival of the species depends on sex. Sex, however, must be controlled. And rigid enforcement of sexual privacy is part of the system of control.

In short, throughout most of our history, and the history of most societies, a powerful social norm dictates that sexual behavior not only may be, but must be, kept private. Taboos against nudity go along with this. The Old Testament tells us that Noah had three sons.¹⁵ The old man drank wine, became drunk, and lay naked inside his tent.¹⁶ Ham, one of his sons, saw him naked.¹⁷ The other sons walked in and covered their father's body, turning their faces so that they would not see him naked.¹⁸ When Noah awoke, he pronounced a curse on Ham.¹⁹ The norms about bodily privacy are by no means obsolete. But their contours change from time to time and place to place.

We have drawn a distinction between what we called simple nudity and sexually threatening nudity. The two extremes are fairly easy to see; but there is a more puzzling middle ground.

14. See Lyn Riddle, *Shaker Village Buoyed by New Blood*, N.Y. TIMES, Aug. 28, 1988, at 43, on the last community of celibate Shakers.

15. *Genesis* 9:10 (King James).

16. *Id.* at 9:21.

17. *Id.* at 9:22.

18. *Id.* at 9:23.

19. *Id.* at 9:24-26; see also *Leviticus* 18:5-30 (King James), which lists a whole series of sexual taboos against “uncovering” the “nakedness” of relatives. But this seems to be euphemistic; what is meant is not to have sexual intercourse with these relatives by blood or marriage, rather than not to expose their bodies.

II. SIMPLE NUDITY

Probably even in the high and palmy days of Victorian prudery, there was no absolute bar against displaying the naked human body. Museums contained classical statues that were naked; models posed naked for artists, and boys swam naked in the rivers and waterholes. "Art" has always been something of an excuse for the naked body. Of course, there is always the question: what makes something "art," as opposed to, well, pornography. In 1936, the Vice Chairman of the Richmond Academy of Arts, in Richmond, Virginia, was arrested on a warrant sworn out by one F. M. Terrell, who took offense at certain murals with "nude and semi-nude figures."²⁰ John Ashcroft, Attorney General under George W. Bush, refused to be photographed in front of two partially nude statues standing in the Great Hall of the Department of Justice.²¹ Drapes, costing \$8000, were ordered to block the statues—a female, representing the "Spirit of Justice," with one breast exposed, and a male representing the "Majesty of Law" with just a cloth over his pelvis. Apparently photographing Ashcroft, a notorious prude, in front of the statues had "been something of a sport for photographers."²² Edwin Meese, the Attorney General under President Ronald Reagan, had been similarly manipulated; photographers "dived to the floor" to get an ironic photograph of him raising a report on pornography "in the air, with the partially nude female statue behind him."²³

Nudity reached beyond art, however. From the late nineteenth century on, there was in fact a nudist movement.²⁴ This was particularly strong in Germany.²⁵ To

20. *Art Leader Jailed as Virginians Battle over Murals and Morals*, ATLANTA CONST., Feb. 29, 1936, at 17.

21. See Joe Marquette, *Drapes Removed from Justice Department Statue*, USA TODAY (June 24, 2005, 7:10 PM), http://usatoday30.usatoday.com/news/washington/2005-06-24-doj-statue_x.htm.

22. *Justice Department Covers Partially Nude Statues*, USA TODAY (Jan. 29, 2002, 9:54 AM), <http://usatoday30.usatoday.com/news/nation/2002/01/29/statues.htm>.

23. *Id.*

24. See PHILIP CARR-GOMM, *A BRIEF HISTORY OF NAKEDNESS* 152-59 (2011).

be nude was to be free, natural, close to nature, and healthy.²⁶ Sensuality had no role to play in this matter. The movement is by no means dead. It seems to appeal to quite a number of people. The American Association for Nude Recreations claims to have more than 260 affiliates—“family nudist” resorts—in North America.²⁷ Nude beaches are certainly not evenly spread across the country. Alaska has none, perhaps because public nudity is illegal as a matter of state law,²⁸ or perhaps because the weather makes nudism unappealing. California, on the other hand, is littered with nude and clothing-optional beaches, hot springs, and resorts.

Clearly, the nudist movement tries, very earnestly, to divorce nudity from sex; to make it as benign as possible. The movement insists that there is nothing lewd or obscene about walking around naked, playing volleyball, chatting, and doing normal life activities, without any clothes on.²⁹ Their literature shows whole families, children and all, taking part in the wholesome activities of the nudist colony, without embarrassment and (more importantly) without sexual overtones.³⁰

The rest of us probably find this a bit unrealistic; or somewhat eccentric and cult-like. Indeed, nudists themselves realize that there is a problem. A study of nudist colonies, published in 1965, documented how careful the camps are to maintain an air of “modesty.”³¹ The ideology of

25. See MAREN MÖHRING, *MARMORLEIBER: KOERPERBILDUNG IN DER DEUTSCHEN NACKTKULTUR (1890–1930)* (2004); CHAD ROSS, *NAKED GERMANY: HEALTH, RACE, AND THE NATION 1* (2005).

26. ROSS, *supra* note 25, at 1.

27. See *About the American Association for Nude Recreation*, AM. ASS'N FOR NUDE RECREATION (2012), <http://www.aanr.com/about-aanr>.

28. See *id.*, listing clubs by region; see also ALASKA STAT. ANN. § 11.41.460 (West 2012).

29. Gary L. Mussell, *A Brief History of Nudism and the Naturalist Movement in America*, S. CAL. NATURIST ASS'N 4, 6 (2010), <http://www.socalnaturist.org/forum/historyofUSnudism.pdf>.

30. See *id.*

31. Martin S. Weinberg, *Sexual Modesty and the Nudist Camp*, 12 SOC. PROBLEMS 311, 312 (1965).

the camps was that “nudism and sexuality are unrelated.”³² Some camps either did not allow single men to join, or restricted their numbers, or charged them higher rates for membership.³³ Staring is frowned on.³⁴ As one observer put it, “[t]hey all look up to the heavens and never look below.”³⁵ Members avoid telling “dirty” jokes.³⁶ “Body contact is taboo”; and nude dancing is forbidden.³⁷ In a way, of course, all of this merely reinforces the notion, which most people have, that nudism and sexuality *are* related.

At all points, moreover, moralists opposed nudism and the nudist movement. Germany was in a way the mother church of the nudist movement; but when the Nazis came to power, in 1933, they tried to stamp the practice out. Goering declared nudism a “cultural aberration.”³⁸ “In women, it deadens the sense of shame and in men it destroys respect for womanhood.”³⁹ “Organized nudism” was imported into the United States in the 1920s. One of the early nudist camps was Fraternity Elysia; and one of its early members was none other than Charles Richter, who devised the famous Richter scale for earthquakes. Richter joined Elysia with his wife.⁴⁰ Nudist colonies faced legal troubles in the United States as well as in Germany. In 1936, one Stephen P. Holish made films at a nudist camp near Roselawn, Indiana. The Eastman Kodak Company refused to develop them. Holish went to court.⁴¹ Holish’s attorney argued that

32. *Id.* at 314.

33. *Id.*

34. *Id.* at 315.

35. *Id.*

36. *Id.*

37. *Id.* at 316.

38. *Germany Suppresses Nudist Movement as Menace to Morality*, CHI. DAILY TRIB., Mar. 8, 1933, at 7.

39. *Id.*

40. SUSAN ELIZABETH HOUGH, RICHTER’S SCALE: MEASURE OF AN EARTHQUAKE; MEASURE OF A MAN 163 (2007). Visitors to Elysia had to sign a “registration form acknowledging acceptance of nudism as a wellspring or fountainhead of moral and health benefits.” *Id.* at 165.

41. *Judge Glimpses Nudist Movies; Says: Indecent*, CHI. DAILY TRIB., Sept. 18, 1936, at 3.

the pictures were “as good and clean as movies of any Sunday school picnic.”⁴² They lacked the “leer of the sensual.”⁴³ But Judge Samuel H. Trude, after watching the films, decided they were “indecent,” and gave Eastman power to destroy them.⁴⁴

This kind of legal action is much less likely to happen today, unless the photos show naked children, and suspicions about child pornography come into play.⁴⁵ Sedate, organized nudism hardly leads to any sense of outrage. The movement even boasts an American Nudist Research Library, founded in 1979.⁴⁶ According to the library’s website, it is on the grounds of Cypress Cove Nudist Resort, in Kissimmee, Florida, “next to the tropically landscaped pool area.” This romantic setting “provides the visitor a vivid memory of our identity with sunlight, fresh air, relaxation and a oneness with nature.” The library itself is a “clothing optional facility.” Donations to the library are “tax-deductible.”

At any event, cozy and bourgeois nudist camps clearly stand at one end of a continuum. A bit further down (or up) the scale, are nude beaches. They are common today around the world. There are three in Lithuania,⁴⁷ for example; and many more are in such countries as Spain and France.⁴⁸

42. *Id.*

43. *Id.*

44. *Id.*

45. See, e.g., Sarah Netter, *Family Pics May Lead to Deportation*, ABC NEWS (Mar. 30, 2010), <http://abcnews.go.com/us/family-pictures-flagged-walgreens-deportation/story?id=10241066>, which describes how a young Utah couple suffered the wrath of child protective services and immigration officials after a Walgreen’s technician called the police over some naked photos.

46. AMERICAN NUDIST RESEARCH LIBRARY, <http://www.anrl.org/> (last visited Oct. 17, 2012).

47. Cori Anderson, *Naked Women Sunbathe on Beach*, BALTIC TIMES (July 3, 2008), <http://www.baltictimes.com/news/articles/20768/>; *Europe Nude Beaches Swingers*, SWINGER TRAVEL, http://www.swingertravel.org/nude_beaches/nude_beaches_swingers.php?mod=europe_nude_beach (last visited Dec. 7, 2012).

48. Press Release, Bare Beaches, *Nude Beach Opinion Poll* (June 27, 2008), <http://www.barebeaches.com/pdf/survey.pdf>.

There are none, of course, in Saudi Arabia. It would not be quite honest to say that these nude beaches, like the “family nudist” resorts, sharply separate sensuality from nudity. Indeed, they carry with them at least a mild tang of sexual liberation. There is certainly a good deal of ogling and gawking, which would be definitely frowned on in the most rigorous and ideological of the nudist colonies. There are also all sorts of nude spas and resorts, which lack the prudish air of the classic colonies, proud of their family atmosphere, and with scads of children. One, for example, a “premier . . . spa hotel,” is for adults only; its website uses the words “luxurious” and “romantic” to describe its facilities; it labels itself a “sensual boutique hotel, a private nude resort paradise, a safe environment,” with “less stress, less clothes.”⁴⁹ The founders of the German nudist movement would surely disapprove.

If the question is whether or not simple nudity is illegal today, the answer depends on when and where. Clearly not in one’s own home. Taking a shower is not a crime. Nudity is also probably not illegal in discreet nudist colonies, carefully fenced in from prying eyes. Nudity is not illegal, either, in carefully marked nudist beaches. But in other more-or-less public places? Sometimes there is formal law on the subject; more often, it is the living law of prosecutors and the police which matters. The short answer is, nudity is illegal, when it amounts to something called “indecent exposure.”

III. INDECENT EXPOSURE

“Indecent exposure” or something equivalent is quite generally against the law in the American states. The language varies from place to place.⁵⁰ “Indecent exposure” is a starkly different type of nudity from simple nudity. It is overtly sexual, and is thought of as perverse, or threatening,

49. SEA MOUNTAIN RESORT, <http://www.seamountaininn.com/> (last visited Dec. 7, 2012).

50. For a state-by-state rundown, see RICHARD A. POSNER & KATHARINE B. SILBAUGH, *A GUIDE TO AMERICA’S SEX LAWS* 83-97 (1996).

or pathological. The crime is committed almost exclusively by men.⁵¹

The key term in these statutes is “indecent” (sometimes the word used is “lewd”). Exposure, in most states, is not a crime unless it is “indecent.” Indecency comes not only from what is exposed, but where, when, and with what purpose. What parts must people keep hidden? Obviously not bare feet, even dirty feet. The statutes are about exposing “private parts” (the very term is significant). Some state statutes use the phrase “private parts,” without any further elaboration, or simply forbid the “indecent exposure of his or her person.”⁵² The California Penal Code makes it a crime for a person to expose his or her “private parts . . . in any public place, or in any place where there are present other persons to be offended or annoyed,” if this is done “willfully and lewdly.”⁵³ It is particularly bad to do this “after having entered, without consent, an inhabited dwelling house, or trailer coach . . . or the inhabited portion of any . . . building.”⁵⁴ The Indiana statute goes further than most; it includes in the definition of indecent exposure “covered male genitals” at least when “in a discernibly turgid state.”⁵⁵

The texts vary from state to state, but the message is essentially the same everywhere. In Alabama, the crime of “public lewdness” is committed when a person “exposes his anus or genitals in a public place and is reckless about whether another may be present who will be offended or

51. Sheldon Travin et al., *Female Sex Offenders: Severe Victims and Victimizers*, 35 J. FORENSIC SCI. 140, 140-41 (1990).

52. CAL. PENAL CODE § 314 (West 2012) (“private parts”); MICH. COMP. LAWS ANN. § 750.335a (West 2004) (“person”).

53. CAL. PENAL CODE § 314(1) (West 2012).

54. *Id.* § 314. It is also a crime to help or advise anybody to commit the crime, or to “take part in any model artist exhibition, or to make any other exhibition of himself to public view,” if this is “offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts.” The California code also specifically allows counties and cities to have ordinances that regulate the “exposure of the genitals or buttocks . . . or the breasts” of waiters and waitresses. *Id.* at § 318.5.

55. IND. CODE § 35-45-4-1 (2008).

alarmed by his act.”⁵⁶ The definition of “lewdness” in Utah is fairly elaborate. A number of acts are lewd if they are done “in a public place,” or “under circumstances which the person should know will likely cause affront or alarm,” or if the act is done “in the presence of another who is 14 years of age or older.”⁵⁷ The “lewd” acts include “sexual intercourse or sodomy,” masturbation, or exposure of “the female breast below the top of the areola, the buttocks, the anus, or the pubic area,” as well as exposure of genitalia.⁵⁸ In Connecticut, a person is guilty of “public indecency” if he performs certain acts in a “public place”: sexual intercourse, or a “lewd exposure of the body with intent to arouse or to satisfy the sexual desire of the person”; or “a lewd fondling or caress of the body of another person.”⁵⁹

These statutes—at least nowadays—do not seem to make what we have called simple nudity a crime. At least not obviously. In California, for example, exposing “private parts” is a crime only if there are people around who might be “offended or annoyed”; and the act was done “lewdly.”⁶⁰ Many statutes are particularly fussy about exposing children to the sight of these “private parts”; this is true in Pennsylvania, for example.⁶¹ Going to a nudist colony would not be a crime under this statute; or taking a sunbath at a nude beach; or acting in one of the plays these days that call

56. ALA. CODE § 13A-12-130 (2012). This code section also has a more general provision, against any “lewd act in a public place,” which is likely to be “observed by others who would be affronted or alarmed.” *Id.*

57. UTAH CODE ANN. § 76-9-702 (2012). Here too there is a general clause: “any other act of lewdness.” *Id.*

58. *Id.*

59. CONN. GEN. STAT. ANN. § 53a-186 (West 2012). “Public place” is defined as “any place where the conduct may reasonably be expected to be viewed by others.” *Id.*

60. CAL. PENAL CODE § 314(1) (West 2012).

61. In Pennsylvania indecent exposure is bumped up to a more serious misdemeanor if it is committed in the presence of a person who is under 16. 18 PA. CONS. STAT. ANN. § 3127 (2012); *see also* Gabbard v. State, 285 S.W.2d 515 (Ark. 1956). This arose under a statute that made it a crime to “knowingly and intentionally expose . . . private parts” to anyone under the age sixteen, if done “with lascivious intent.” The defendant exposed himself to a little girl and tried to have sex with her.

for actors to be naked on the stage. The same is true under the statutes of many other states.

In a California case from 1972, *In re Smith*, the defendant took off his clothes at a beach, which was public, but fairly sparsely used.⁶² He was lying on his back on a towel; and he fell asleep.⁶³ The police came and arrested him; at that time, there were some other people at the beach.⁶⁴ Defendant was completely naked; but at no time did he have an erection, and he did not engage “in any activity directing attention to his genitals.”⁶⁵

Smith was convicted of indecent exposure, and had to pay a fine (\$100); he was also given a three-year suspended sentence.⁶⁶ This was not particularly severe; and he might have swallowed it. But he learned that he would also have to register as a sex offender;⁶⁷ and that would be no small matter. So he appealed, arguing that his nudity was not “lewd.”⁶⁸ The California appeals court agreed. Mere nudity was not a violation of the statute.⁶⁹ Sleeping naked on the beach, without sexual overtones, was not “lewd.”⁷⁰ The conviction was reversed.

Public nudity, then, may not be “indecent exposure,” at least in some states. “Simple nudity” is obviously not a crime per se. As we said, nobody would claim that taking a shower is a crime, or getting totally undressed in your own bedroom, on a very hot day. Even outside the home, as we have seen, attitudes have relaxed greatly. An unfortunate man in New Jersey, in the 1880s, urinated in the yard of his house, and was apparently seen by people who lived in the

62. 497 P.2d 807, 808 (Cal. 1972).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 808-09.

69. *Id.* at 810-11.

70. *Id.* at 811.

house.⁷¹ He was convicted of “indecent exposure.”⁷² We doubt very much that he could be convicted today, in most states anyway.

There is no question that true “indecent exposure” is or can be a social problem or at any rate a psychiatric problem. The cases that uphold convictions involve overt sexual acts. According to a study published in the 1970s, one-third of all sex offenses reported to the police were the acts of men who committed the crime of indecent exposure.⁷³ Ten percent of the sex offenders in the New Jersey State Prison in 1950 were exhibitionists.⁷⁴ Attitudes toward sex may have changed; but “indecent exposure” is still very much a crime. The courts have struggled, to be sure, with problems of definition and boundaries. The exposure has to be “public”;⁷⁵ but exactly what does this mean? Not necessarily outdoors, for one thing. Some courts have allowed convictions even when the exposure took place in a private home. In a 2007 case in Maryland, Gerald Wisneski, a “guest” in the home of Bridgette Penfield, exposed himself to another guest, and the guest’s fifteen-year-old sister.⁷⁶ Wisneski asked her if she was “on her period,” took out his penis and testicles, and started shaking them.⁷⁷ Wisneski was convicted of indecent exposure (and other offenses).⁷⁸ Wisneski appealed; his argument, essentially, was that there could be no such thing

71. *Van Houten v. State*, 46 N.J.L. 16 (1884).

72. *Id.* at 17.

73. JOHN M. MACDONALD, *INDECENT EXPOSURE* 3, 10 (1973).

74. *Id.*

75. In some statutes, at least in the past, “public” exposure was not necessary, if the victim was a child. The Arkansas statute read: “It shall be unlawful for any person with lascivious intent to knowingly and intentionally expose his or her private parts or genital organs to any other person, male or female, under the age of sixteen years.” *See, e.g.*, *Gabbard v. State*, 285 S.W.2d 515, 515 (1956), construing the Arkansas statute that criminalized lewd exposure of sex organs before a minor under age sixteen.

76. *Wisneski v. State*, 921 A.2d. 273, 275 (Md. 2007). Whether a place is “public” can be a difficult issue in the various decisions. There have been cases involving dentists’ offices, laundromats, and the like.

77. *Id.* at 275, 289.

78. *Id.* at 278.

as indecent exposure inside a private home; the exposure had to be “public.”⁷⁹ The court, however, affirmed his conviction because Wisneski deliberately exposed himself to “actual observation by two . . . people”; Wisneski had in fact “publicly” exposed himself.⁸⁰ There are a number of fairly similar cases; they do not all agree. Much hinges on how the particular court interprets the word “public.” But in all of the reported cases, what the defendant did was fairly shocking; and the victims were usually young children, which explains perhaps why the defendant was prosecuted in the first place.

In contemporary society, a prosecution for indecent exposure, generally speaking, has to be something more than simple nudity: something more than just displaying the body. There has to be something overtly sexual: an erection, masturbation, sexual intercourse, or the like. Yet there are many people, and many jurisdictions, that still find public nudity offensive even without these features, and are willing to punish offenders. Even in California, the penal code gives localities the right to pass ordinances that regulate the “exposure of the genitals or buttocks of any person, or the breasts of any female person, who acts as a waiter, waitress, or entertainer.”⁸¹ Another section gives local governments power to regulate “live acts, demonstrations, or exhibitions occurring within adult or sexually oriented business [that] involve the exposure of the genitals or buttocks of any participant or the breasts of any female participant.”⁸²

These provisions were put in the code in 1969 to allow cities and towns to regulate nudity in restaurants and “adult” establishments.⁸³ The California Supreme Court had

79. *Id.* at 278-79.

80. *Id.* at 289.

81. CAL. PENAL CODE § 318.5(a) (West 2012).

82. *Id.* at § 318.6.

83. *Live Nude Entertainment at Sexually Oriented BUSINESSES Local Ordinances: Hearing Before the S. Comm. on the Judiciary* (Ca. 1996) (statement of Assembly Member Baugh), available at ftp://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_2551-2600/ab_2579_cfa_960701_170559_sen_comm.html.

held, in an earlier case, that the state had “pre-empted” the whole field of control of sexual activity in public places; the provisions were meant to give back cities and towns the authority to regulate live performances and such things as topless waitresses.⁸⁴ These ordinances and statutes thus have very different aims from the aims of rules against indecent exposure. They are tools in a battle against sex clubs and strip joints. Clearly, the people who flock to “adult” establishments are hardly victims, are definitely not small children, and are paying good money precisely because they want to see as much “indecent exposure” as possible.

Nonetheless, the notoriously liberal city of Berkeley enacted an ordinance banning all public nudity in 1993.⁸⁵ Under this ordinance, it is a misdemeanor for “any person to appear nude in any place open to the public or any place visible from a place open to the public.”⁸⁶ In the background was the case of a certain Andrew Martinez, nicknamed the “Naked Guy,” a student at the University of California.⁸⁷ Martinez stood up for what he considered his right to go everywhere naked—including classes, where he appeared dressed (if that is the word) in sandals and a backpack.⁸⁸ The university adopted a no-nudity policy for public areas of campus.⁸⁹ Martinez was expelled after showing up naked at his disciplinary hearing.⁹⁰ He was arrested in the city, but won his case on the grounds that it was not illegal to walk

84. *Abbott v. City of Los Angeles*, 53 Cal. 2d 674, 685 (1960) (en banc).

85. BERKELEY, CAL., MUN. CODE § 13.32.010 (1993), available at <http://codepublishing.com/ca/berkeley/html/Berkeley13/Berkeley1332/Berkeley1332010.html#13.32.010>.

86. *Id.* “Nude” was defined to include male and female genitalia, and female breasts “below the areola.”

87. Jason Zengerle, *The Naked Guy*, N.Y. TIMES MAG. (Dec. 31, 2006), available at http://www.nytimes.com/2006/12/31/magazine/31naked.t.html?_r=0.

88. *Id.*

89. *Id.*

90. *Id.*

around naked in Berkeley. That prompted the city to adopt its no-nudity ordinance.⁹¹

Another famously liberal city, San Francisco, has its own ordinance on public nudity.⁹² It applies to waiters, waitresses, and entertainers. People in those jobs must keep their genitals, buttocks, and (female) breasts concealed. The original ordinance, however, allowed the customers to be naked while dining. And any person could lawfully be nude out in the open, as long as the nudity was not “lewd”—interpreted in the *Smith* case to mean intending “to direct public attention to his genitals for purposes of sexual arousal, gratification, or affront.”⁹³ In 2011, a city supervisor, Scott Wiener, proposed controls over public nudity.⁹⁴ He noticed an uptick in the number of public nudists in “the Castro,” the city’s gay district.⁹⁵ The aptly named “Wiener’s Law,” proposed that naked people could no longer enter restaurants.⁹⁶ And while naked people could continue to visit parks and beaches, and to ride city buses, they would be required to place a towel or other barrier under their genitals or buttocks when sitting “on any public bench, public steps, or other public seating area.”⁹⁷

The good citizens of the Castro did not take kindly to Wiener’s Law.⁹⁸ In response, they organized a public “Nude-in” to add to the Folsom Street Festival (an enormous gathering of fetish paraphernalia and leather).⁹⁹ The Nude-in was not a representation of classical nudism, of the

91. *Id.* Martinez was arrested under the ordinance, pleaded guilty, and was put on probation. In the following years, he showed more and more signs of mental illness. In 2006, he was arrested after a fight in a halfway house. He committed suicide in his cell.

92. S.F., CAL., POLICE CODE art. 15.3, § 1071.1 (2011).

93. *In re Smith*, 497 P.2d 807, 810 (Cal. 1972).

94. Malia Wollan, *Protesters Bare All Over a Proposed San Francisco Law*, N.Y. TIMES, Sept. 26, 2011, at A16.

95. *Id.*

96. S.F., Cal., Ordinance 110967 (Sept. 6, 2011).

97. Wollan, *supra* note 94.

98. *Id.*

99. *Id.*

nudist colony type, which is discreet, likes privacy, and insists on conventional morality. The Nude-in, rather, is a form of rebellion. It is an expression of contempt for bourgeois morality, a finger stuck in the eye of respectability. Why the organizers were so exercised by Wiener's Law is unclear. Apparently, putting a towel under the tailbone is also standard nudist etiquette.

If Wiener thought his ordinance would have some tendency to curb nudism in San Francisco, he was badly mistaken. According to one prominent local nudist (a man of sixty five), nudity is one of San Francisco's tourist attractions, along with cable cars and the Golden Gate Bridge.¹⁰⁰ Tourists, he said, love to have their picture taken with naked people; the only objections [come] from "religious nutcases."¹⁰¹ The San Francisco nudists seem to be mostly men; and men who are frankly, as one account put it, hardly "supermodel types."¹⁰² Why is it, one woman asked a *New York Times* reporter, that "it's always the people who should not be naked who get naked."¹⁰³ Another said that the participants looked as if they had been "put through the wrong cycle in the wash-and-dry machine and then not ironed properly"; and that they have "pathetic, ugly unkempt bodies."¹⁰⁴ They would not do, in short, as poster people for the American Association for Nude Recreations. It is certainly true, alas, that most people look a lot better with their clothes on. In any event, the Nude-in came and went. The Supervisors, undeterred, enacted the Wiener

100. *Nudity Ban in Restaurants Passes Board of Supervisors*, HUFFINGTON POST (Oct. 23, 2011, 4:54 PM), http://www.huffingtonpost.com/2011/10/21/photos-san-francisco-restaurant-nudity-ban_n_1024533.html.

101. *Id.*

102. Wollan, *supra* note 94.

103. *Id.*

104. Joanna L. Grossman & Lawrence M. Friedman, *Towels Under Tailbones?: Naked San Franciscans Protect Proposed Restrictions on Public Nudity*, JUSTIA'S VERDICT (Oct. 4, 2011), verdict.justia.com/2011/10/04/towels-under-tailbones.

ordinance into law.¹⁰⁵ Buoyed by his victory, Wiener then moved to ban all public nudity in San Francisco.¹⁰⁶

San Francisco is, in many ways, an outlier. Most states and cities have a lower level of tolerance for public nudity, even simple nudity. Naked people may wander about the Castro district; but it is hard to imagine such people in downtown Wichita or even downtown Philadelphia. Any such behavior would lead to an immediate arrest—on whatever charge seemed handy.

In short, both socially and legally, there are problems with what we might call the middling sort of nudity—nudity which neither takes place in, say, a fenced-in colony, on the one hand, or which is plainly offensive and sexually threatening, on the other. People who roam the streets naked, in most places, would strike observers as, well, somewhat strange, and their mental condition would be suspect. Quite something else is what one might call recreational public nudity: nudity done to have fun, by shocking or amusing onlookers or bystanders, usually done by young people and in groups. This was probably one of the motives of many of the men in the Nude-in. No doubt this is what motivates streakers. More on this later.

The difficult and ambiguous case would be someone like fifty-four-year-old Dean Meginniss, who went fishing in Medical Lake, Washington, in August 2011, without benefit of clothing.¹⁰⁷ One wonders what he had in mind. The Spokane County authorities, after complaints about the “eyeball-scarring” view of Meginniss, arrested him and charged him with indecent exposure.¹⁰⁸ In fact, Meginniss had a criminal record: a prior charge of indecent exposure

105. Noemy Mena, *Supervisor Wiener's Nudity Ban Would Strip San Francisco's Culture*, GOLDEN GATE XPRESS (Oct. 19, 2012), <http://www.goldengateexpress.org/2012/10/19/nudity-ban-opinion/>.

106. *Id.*

107. Cynthia Hsu, *Naked Fisherman Arrested in Wash. 'Wasn't a Pretty Sight'*, FINDLAW.COM (Aug. 18, 2011, 8:44 AM), http://blogs.findlaw.com/legally_weird/2011/08/naked-fisherman-arrested-wasnt-a-pretty-sight-witness-said.html.

108. *Id.*

and a warrant for stalking.¹⁰⁹ These facts no doubt influenced the police to do something more than tell him kindly to put his clothes back on.

Apparently, most people, even police, are not sure what the law actually allows and what it prohibits. The so-called Topless Woman of Union Square saunters around New York City baring her breasts. Moira Johnston does this to “raise awareness that it’s legal for [a] woman to be topless anywhere a guy can be without a shirt.”¹¹⁰ When asked to define her personal style, she described it as “kind of artsy” with “roots in social activism.”¹¹¹ She gets “mixed reactions” from onlookers, to be sure, who are not used to seeing topless, professionally dressed women walking the streets.¹¹² But the police are surprised as well and have arrested her repeatedly, only to learn later that she has broken no law.¹¹³ (“Shirt-free” rights for women in New York are discussed below).

IV. NUDITY IS FUN

The United States is, perhaps, rather puritanical—if that’s the word—compared to many other Western countries. Or perhaps we should say: *parts* of the United States are puritanical; other parts certainly are not. And certain classes and groups of people are puritanical, while other segments seem to have embraced modern permissiveness with enormous gusto.

In many countries, there are periodic outbursts of nakedness, either to make a political point, or simply to

109. *Id.*

110. *A Brief Conversation with a Topless New Yorker About Her Outfit*, RACKED.COM (May 18, 2012), http://ny.racked.com/archives/2012/05/18/a_brief_conversation_with_a_topless_new_yorker_about_her_outfit.php.

111. *Id.*

112. *Id.*

113. *See id.*; *see also* Lizzie Crocker, *Maria Johnston Goes Topless in N.Y.C. to Raise Awareness of the Right to Bare a Chest*, DAILY BEAST (July 29, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/07/29/moira-johnston-goes-topless-in-nyc-to-raise-awareness-of-the-right-to-a-bare-chest.html>.

poke the eye of the bourgeoisie. Usually, some people are shocked; other people (the majority?) are amused or titillated. People take off their clothes to ride bicycles, to indulge in “performance art,” or simply to show that one can do (and should?) do all sorts of “normal” things without the benefit of clothing.¹¹⁴ An English television channel tried out a nude television show, *Naked Jungle*, in 2000; it “featured nude contestants pitting themselves against an assault course”; the presenter was also naked. It did not last very long, even though it had two million viewers and very high ratings. It was denounced in the House of Commons, but the public was, in general, “amused rather than outraged.”¹¹⁵ The commercial possibilities of nudity have not escaped the greedy eye of business. A clothing store in Lisbon, in 2003, offered “two free items of clothing to anyone who shopped in the nude”; they had plenty of “eager customers” who wanted to take them up on the offer. A record store in Melbourne, Australia, used to hold “annual nude shopping days”; while a department store in Vienna, in 2000, offered a voucher for 5000 Austrian schillings to “the first people to enter the store naked.”¹¹⁶

In 2012, the Museum of Contemporary Art Australia, in Sydney, began offering nude art tours, where the patrons, not the images, were in the buff.¹¹⁷ Attendees were led on a tour of a show by an artist, Stuart Ringholt, also naked, who explained that “[w]e are sexualized with our clothes on – with them off, we are not.”¹¹⁸ Tour participants were “divided” as to whether viewing the art while naked enhanced the experience.¹¹⁹

For a while, too, there was a positive epidemic of “streaking,” that is, running naked (usually quite quickly)

114. For a rich documentation of all of this, see CARR-GOMM, *supra* note 24.

115. *Id.* at 144-45.

116. *Id.* at 233-34.

117. Mark Whittaker, *New Tour at Museum Reveals All*, N.Y. TIMES, May 2, 2012, at C1.

118. *Id.*

119. *Id.*

in a public place.¹²⁰ This was particularly popular on college campuses. There was a mass streaking event at the University of Maryland in 1973.¹²¹ A celebrated incident took place during the broadcast of the Academy Awards in 1974 (it may have been something less than spontaneous).¹²² Robert Opel ran naked across the stage before a television audience of seventy-six million.¹²³ And there have been sporadic incidents ever since, particularly at sports events. We think it is fair to say that here too, people are generally speaking amused, rather than shocked. And the streakers—this is part of the rules of the game—run by so quickly that nobody has much of a chance to dwell on their nakedness.

V. THE FEMALE BREAST

Public nudity law focuses primarily on the necessity of concealing genitalia from public view. What about the female breast? It occupies a complicated place in America's sexual and social conscience, as well as in its laws. For the most part, indecent exposure laws do not include the female breast in the definition of indecency. The Model Penal Code, for example, mentions only exposure of genitals.¹²⁴ Many state laws, as we saw, follow the same approach. Some

120. On streaking incidents, see *Streaking at Princeton Celebrates a Snowfall*, N.Y. TIMES, Feb. 1, 1987, at 45, noting the "annual appearance" of sixty student-streakers at Princeton to mark the first snowfall in a "romp" called the "nude olympics." In 1974, Tass, the Soviet press agency, told its readers about streaking, no doubt a sign of the "rebelliousness of young people in crisis-plagued capitalist societies." See *Soviet Informs Public of Streaking in West*, N.Y. TIMES, Mar. 31, 1974, at 9.

121. See *Streaking Through Sports History: The Most Wins in a Row*, BLEACHER REPORT (Jan. 11, 2011), <http://bleacherreport.com/articles/569845-streaking-through-sports-history-the-most-wins-in-a-row>; see also *Streaking: A Timeline*, THE WEEK (Oct. 15, 2010), available at <http://theweek.com/article/index/208103/streaking-a-timeline>.

122. See Jon Nordheimer, *Oscars for 'Sting,' Lemmon, Miss Jackson*, N.Y. TIMES, Apr. 3, 1974, at 36.

123. *Id.*

124. See MODEL PENAL CODE § 213.5 (1980). "A person commits a misdemeanor if, for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm." *Id.*

statutes refer to “private parts” or some other vague category, without specifying whether breasts are included. In at least some of those states, courts have ruled that the female breast does not fall within the prohibition on indecent exposure.¹²⁵

A handful of states clearly and intentionally define “private part” to include the female breast “below the areola.” But even those, in most cases, require “lewdness” in addition to simple exposure. In a 1972 New York case, *People v. Gilbert*, the court held that a woman sunbathing nude at a public beach was not guilty of indecent exposure, even though the law expressly applied to the female breast; she was not behaving “lewdly,” which was also required under the statute.¹²⁶

Female toplessness is not part of American culture, at least outside adult entertainment venues. But restrictions on bare breasts do get challenged from time to time. Sometimes feminists protest over the unequal treatment of the female versus the male breast; sometimes by the occasional nude sunbather; but more often as part of a controversy over public breastfeeding.

In the 1980s, four women went bare-chested in a public park in Rochester, New York to protest the state’s ban on toplessness for women (but not men).¹²⁷ After the *Gilbert* decision, in favor of the nude sunbather, the legislature had amended its indecency law to prohibit all nudity, lewd or not.¹²⁸ The women, part of a group known as the “Topfree Seven”—they deliberately avoided “topless” in favor of “topfree” to avoid association with strip clubs—apparently did this every year, and got arrested every year, but the district attorney always dismissed the charges.¹²⁹ But not

125. See, e.g., *State v. Crenshaw*, 597 P.2d 13, 14 (Haw. 1979); *State v. Jones*, 171 S.E.2d 468, 470 (N.C. Ct. App. 1970); *State v. Parenteau*, 64 N.E.2d 505 (Hamilton Cnty. Mun. Ct. 1990); *State v. Moore*, 241 P.2d 455, 459 (Or. 1952).

126. 338 N.Y.S.2d 457, 459-61 (Crim. Ct. 1972).

127. Libby S. Adler, *A Short Essay on the Baring of Breasts*, 23 HARV. WOMEN’S L.J. 219, 220-21 & n.12 (2000).

128. N.Y. PENAL LAW § 245.01 (McKinney 2012).

129. Adler, *supra* note 127, at 220-21 & n.12.

this time. The women were prosecuted for indecent exposure, and convicted.¹³⁰ They appealed on constitutional grounds.¹³¹ The state's highest court, in *People v. Santorelli*, reversed the convictions.¹³² The court did not reach the constitutional issue.¹³³ It held, instead, that the statute, despite its blanket prohibition of the exposure of the female breast, was "aimed at discouraging 'topless' waitresses and their promoters" and thus should not be applied to bare breasts in situations that were neither commercial nor lewd.¹³⁴

A concurring judge in *Santorelli* wrote separately to argue that the judges were misreading the statute.¹³⁵ It was not limited, he thought, to bare breasts that were either part of a business model, or were just plain lewd.¹³⁶ The majority, he felt, had merely indulged in "artful means of avoiding a confrontation with an important constitutional problem."¹³⁷ In his view, the statute did apply to the Rochester women, but was invalid because it violated the equal protection guarantee of both the New York and federal constitutions.¹³⁸ The state did not, in his opinion, have a good enough reason for singling out women and making them wear shirts.¹³⁹ The statute "betray[ed] an underlying legislative assumption that the sight of a female's uncovered breast in a public place is offensive to the average person in a way that the sight of a male's uncovered breast is not."¹⁴⁰ But "protecting public sensibilities" is not enough to outweigh the harm to women

130. *People v. Santorelli*, 600 N.E.2d 232, 233 (N.Y. 1992).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 233-34 (quoting *People v. Price*, 33 N.Y.2d 831, 832 (1973)).

135. *Id.* at 234-35 (Tintone, J., concurring).

136. *Id.* at 235.

137. *Id.*

138. *Id.* at 236.

139. *Id.*

140. *Id.*

of differential treatment. The judge relied on evidence from the Kinsey Report¹⁴¹ and other human sexuality sources to say that the “female breast is no more or less a sexual organ than is the male equivalent.”¹⁴² Indeed, the very fact that the female breast might arouse men more than the converse is “itself a suspect cultural artifact rooted in centuries of prejudice and bias toward women.”¹⁴³ The state thus could not justify a “law that discriminates against women by prohibiting them from removing their tops and exposing their bare chests in public as men are routinely permitted to do.”¹⁴⁴

Thus, Moira Johnston was right when she insisted she had the right to go topless on the streets of New York City. What if she revealed her breasts not to send a message about shirt-free rights for women, but to feed an infant? The New York statute expressly carves out an exception for breastfeeding; women are exempt from any criminal prosecution for any exposure of the breast that may result from breastfeeding.¹⁴⁵

Many other states have similar breastfeeding exceptions to their indecent exposure laws. Washington State, for example, provides that neither breastfeeding nor expressing breast milk constitutes “indecent exposure.”¹⁴⁶ Illinois law states that breastfeeding an infant “is not an act of public indecency.”¹⁴⁷ Louisiana makes clear that breastfeeding is not “obscene.”¹⁴⁸ Montana adds that breastfeeding is neither “sexual conduct,” “indecent

141. *Id.* at 237.

142. *Id.* at 236.

143. *Id.* at 237.

144. *Id.*

145. N.Y. PENAL LAW §§ 245.01, 245.02 (McKinney 2012).

146. WASH. REV. CODE ANN. § 9A. 88.010 (West 2012).

147. 720 ILL. COMP. STAT. ANN. 5/11-30(2) (Supp. 2012).

148. LA. REV. STAT. ANN. § 51:2271.1E (2003 & Supp. 2012).

exposure,” obscene, nor a “nuisance.”¹⁴⁹ Rhode Island says it is neither “indecent exposure” nor “disorderly conduct.”¹⁵⁰

Clearly, under these statutes, a woman can breastfeed outdoors, in parks, on beaches, and the like. On the other hand, nursing moms want to be able to breastfeed wherever they otherwise happen to be—Wal-Mart, a doctor’s office, or on a crowded airplane. Many of the most recent incidents involve women who were thrown out of private establishments, or asked to cover up. What rights, if any, do women have to breastfeed in these places?

As a general matter, proprietors of private businesses have the right to set their own rules for customer behavior, as well as the right to exclude customers for noncompliance. The primary limit on this right comes from public accommodations laws, which prevent businesses from using the right to control or exclude patrons in a discriminatory way. The federal public accommodations law addresses only race discrimination and prevents restaurants, for example, from maintaining a “whites only” policy or from segregating customers by race.¹⁵¹ Many states, however, have enacted their own public accommodations laws that are broader; they ban other forms of discrimination, too, such as sex discrimination.¹⁵²

After a decade of activism by women’s groups, most states now also have a provision in their public accommodations law or elsewhere that explicitly allows women to breastfeed in public or private places.¹⁵³ The vast majority of these provisions were adopted in the last ten to

149. MONT. CODE ANN. § 50-19-501 (2011).

150. R.I. GEN. LAWS § 11-45-2(e) (2002).

151. 42 U.S.C. § 2000a (2006).

152. For a state-by-state rundown, see Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1478-95 (1996).

153. See KAREN M. KEDROWSKI & MICHAEL E. LIPSCOMB, BREASTFEEDING RIGHTS IN THE UNITED STATES 91-95 (Judith Baer ed. 2008); see also *Breastfeeding Laws*, NAT’L CONFERENCE OF ST. LEGISLATURES (May 24, 2011), <http://www.ncsl.org/issues-research/health/breastfeeding-state-laws.aspx> (fifty-state survey of applicable laws).

fifteen years.¹⁵⁴ The public breastfeeding laws have minor variations. Some are tied explicitly to the public accommodations law, and thus may vary in scope, depending on the definition of a “public accommodation.” Others are stand-alone provisions that apply only to breastfeeding. California’s law, for example, protects a woman’s right to breastfeed in any location other than someone else’s house.¹⁵⁵ Illinois provides an unfettered right to breastfeed in public unless the mother is in a “place of worship,” where she is expected to “follow the appropriate norms within that place of worship.”¹⁵⁶ Virginia, in contrast, only protects breastfeeding on property owned or leased by the state.¹⁵⁷

Most breastfeeding statutes, however, simply grant a mother the right to breastfeed in any location in which she is otherwise authorized to be. A few states allow breastfeeding anywhere, but require that it be done discreetly, which seems to mean that a woman should use something to cover the baby and the breast. Mothers in Missouri must exercise “as much discretion as possible,” when nursing in public or private locations.¹⁵⁸ The Minnesota provision, in contrast, states that a mother may breastfeed in a place of public accommodation “irrespective of whether the nipple of the mother’s breast is uncovered during or incidental to breastfeeding.”¹⁵⁹

Although the federal civil rights law does not cover sex discrimination in public accommodations (probably nobody thought it was necessary), Congress later addressed the issue of public breastfeeding. A 1999 amendment to a postal appropriations bill provided that “a woman may breastfeed her child at any location in a Federal building or on Federal property, if the woman and her child are otherwise

154. See KEDROWSKI & LIPSCOMB, *supra* note 153, at 91-95.

155. CAL. CIV. CODE § 43.3 (West 2007).

156. 740 ILL. COMP. STAT. ANN. 137/10 (West 2010).

157. VA. CODE ANN. §2.2-1147.1 (2002).

158. MO. ANN. STAT. § 191.918 (West 2012).

159. MINN. STAT. ANN. § 145.905 (West 2012).

authorized to be present at the location.”¹⁶⁰ This makes courthouses, government buildings, and national parks and forests all safe places for public breastfeeding.

In states without broad protection for breastfeeding, nursing mothers may be subject to the whims of private business owners. In a 2004 case, *DeRungs v. Wal-Mart Stores, Inc.*, a federal appellate court ruled that Ohio’s public accommodations law does not prohibit pregnancy discrimination, and that breastfeeding discrimination is not a form of unlawful sex discrimination—leaving the plaintiff with no legal recourse.¹⁶¹ The woman, who was shopping at Wal-Mart, attempted to nurse her son while sitting on a bench outside a dressing room.¹⁶² An employee told her to feed him inside the bathroom, or leave the store.¹⁶³ Other plaintiffs in the case described similar experiences at Wal-Mart stores.¹⁶⁴ But Wal-Mart won the right to exclude—at least temporarily. The Ohio legislature amended its code the following year to provide that “a mother is entitled to breast-feed her baby in any location of a place of public accommodation wherein the mother is otherwise permitted.”¹⁶⁵

As we saw, the police sometimes arrest topless women, simply because they do not understand that the women are not breaking the law. Similarly, breastfeeding mothers are routinely thrown out of public and private places even when the law clearly protects them. Emily Gillette was forced off a Delta Airlines plane (still at the gate, fortunately) in 2006 for refusing to cover her baby’s head with a blanket while she was breastfeeding.¹⁶⁶ She and her husband and

160. Treasury and General Government Appropriations Act, Pub. L. No. 106-58, § 647, 113 Stat. 478 (1999).

161. 374 F.3d 428, 437 (6th Cir. 2003).

162. *Id.* at 430.

163. *Id.*

164. *Id.* at 431.

165. OHIO REV. CODE ANN. § 3781.55 (West 2006).

166. Gillette v. Delta Airlines, Vt. Human Rights Comm’n, Investigative Report PA07-0007, at 4-5 (Mar. 27, 2008), http://hrc.vermont.gov/sites/hrc/files/pdfs/rg%20cases/Gillette_v_Delta_Airlines__Freedom_Airlines.pdf.

daughter occupied an entire row, near the rear of the plane.¹⁶⁷ The nursing infant's head was facing the aisle, leaving little or none of the mother's breast exposed to passers-by.¹⁶⁸ But a flight attendant who claimed to be offended gave Gillette a blanket and insisted that she use it to cover the baby's head.¹⁶⁹ Gillette pleaded for the pilot to intervene, but he claimed that the flight attendant was in control of the cabin.¹⁷⁰ Gillette and her family were escorted off the plane and told to take some other (any other) flight from Burlington, Vermont to their final destination.¹⁷¹

One surprising part of this incident is that Vermont very clearly protects a woman's right to breastfeed in public. Vermont's public accommodations law provides: "Notwithstanding any other provision of law, a mother may breastfeed her child in any place of public accommodation in which the mother and child would otherwise have a legal right to be."¹⁷² The legislature added this provision in 2001, based on its finding that "breastfeeding a child is an important, basic and natural act of nurture that should be encouraged in the interest of enhancing maternal, child and family health."¹⁷³ Another case before the Vermont Human Rights Commission made clear that this provision does not require that breastfeeding mothers cover themselves or their babies when nursing in a place of public accommodation.¹⁷⁴ Yet Gillette—like the naked protester at Portland airport security—had no way to insist on her rights at that moment.

After the incident, Gillette filed a complaint with the Vermont Human Rights Commission, the state agency

167. *Id.* at 4.

168. *Id.*

169. *Id.* at 4-5.

170. *Id.* at 7.

171. *Id.* at 5-9.

172. VT. STAT. ANN. tit. 9 § 4502j (2006 & Supp. 2011).

173. *Id.*

174. See *Leonard v. Friendly's Restaurant*, Vt. Human Rights Comm'n, Investigative Report PA11-0001, at 7, n.3 (Feb. 2, 2011), available at http://hrc.vermont.gov/sites/hrc/files/pdfs/Misty_Leonard_Inv_Report.pdf.

charged with implementing the state's civil rights laws.¹⁷⁵ She went on to file a lawsuit against two smaller carriers who handled that particular flight for Delta. Each claim was settled for \$20,000.¹⁷⁶ But the confrontations over public breastfeeding continue. In 2012, a Michigan mother was loudly chided for discreetly nursing her five-month-old baby in the back of a courtroom; she was waiting to appear in court regarding a ticket.¹⁷⁷ The baby was sick, and after all the time spent waiting in courtroom, quite hungry. The baby had not escaped the watchful eye of the bailiff, who slipped the judge a note saying that "there is a woman breastfeeding in court."¹⁷⁸ The judge then called the mother up to the front of the courtroom and asked her if she thought it was "appropriate" to breastfeed in court.¹⁷⁹ Her response, according to her blog post about the incident, was that "[c]onsidering the fact that my son is hungry, and he's sick, and the fact that it's not illegal, I don't find it inappropriate."¹⁸⁰ The judge, however, was of a different mind. The mother recalls that he said "something to the effect of 'It's my court, it's my decision, and I do find it

175. See Compl. and Demand for Jury Trial, *Gillette v. Freedom Airlines, Inc.*, No. 765-10-09 (Vt. Super. Ct. Nov. 24, 2009); *Gillette v. Delta Airlines*, Vt. Human Rights Comm'n, Investigative Report PA07-0007 (Mar. 27, 2008), available [at http://hrc.vermont.gov/sites/hrc/files/pdfs/rg%20cases/Gillette_v_Delta_Airlines__Freedom_Airlines.pdf](http://hrc.vermont.gov/sites/hrc/files/pdfs/rg%20cases/Gillette_v_Delta_Airlines__Freedom_Airlines.pdf).

176. Liz Szabo, *Airline Settlement Fuels the National Breast-feeding Fight*, USA TODAY (Mar. 14, 2012, 6:55 PM), <http://usatoday30.usatoday.com/news/health/story/health/story/2012-03-14/Airline-settlement-fuels-the-national-breast-feeding-fight/53536674/1>.

177. Martha Neil, *Public Breastfeeding May be Legal in Mich., But It's Not OK in My Court, Judge Told Mom*, ABA J. (Nov. 11, 2011, 10:01 AM), http://www.abajournal.com/mobile/article/mom_sues_says_deputy_broke_law_oking_public_breastfeeding_by_sending_her_to/. She had allegedly operated a boat without taking a water safety course.

178. *Id.*

179. *Id.*

180. Emma Gray, *Natalie Hegedus, Mom, Kicked Out of Courtroom for Breastfeeding*, HUFFINGTON POST (Nov. 14, 2011, 2:52 PM), www.huffingtonpost.com/2011/11/14/natalie-hegedus-courtroom-breastfeeding-n_1089271.html.

inappropriate.”¹⁸¹ Michigan exempts public breastfeeding from the criminal law on public nudity; but it is one of the few states that does not protect breastfeeding in any other way.¹⁸²

This courtroom exchange became a national news story. So did stories about women who were asked, in stores and government offices, to do their breastfeeding in restrooms, rather than in more comfortable and sanitary places where, however, other customers or patrons could see them.¹⁸³ These incidents provoke shock and outrage. In recent decades, breastfeeding has become more popular; it is considered both healthier and more natural.¹⁸⁴ A kind of grassroots movement has grown up to protect and encourage the right to breastfeed. The La Leche League International is devoted to the promotion of breastfeeding.¹⁸⁵ According to its website, in 1950 or so, only about one mother out of five breastfed. Then the movement really got going. There are branches in dozens of countries, and one

181. *Id.*

182. MICH. COMP. LAWS § 41.181 (West 2006).

183. *See, e.g.,* Juhie Bhatia, *Moms Fight to Breastfeed in Public*, WE NEWS (Nov. 22, 2004), <http://www.womensenews.org/story/health/041122/moms-fight-breastfeed-public>, breastfeeding controversy at Starbucks; Ryan Jaslow, *Breastfeeding Moms Stage “Nurse-in” Protests at Target Stores*, CBS NEWS (Dec. 29, 2011, 1:51 PM), http://cbsnews.com/8301-504763_162-57349806-10391704/breastfeeding-moms-stage-nurse-in-protests-at-target-stores; Martha Neil, *Mom Sues, Says Deputy Broke the Law OKing Public Breast-Feeding by Sending her to Courthouse Bathroom*, ABA J. (May 31, 2012, 11:01 AM), http://www.abajournal.com/news/article/mom_sues_says_deputy_broke_law_oking_public_breastfeeding_by_sending_her_to/; Amy Strand, *Mom, Told She Couldn’t Carry Breast Pump on Plane*, HUFFINGTON POST (Mar. 2, 2012, 3:02 PM), http://www.huffingtonpost.com/2012/03/02/amy-strand-breast-milk_n_1317058.html, on woman told by TSA agents she could only pump milk in the bathroom; *Pastor Calls Breastfeeding Mom a Stripper*, SFGATE (Oct. 18, 2012, 6:50 AM), <http://blog.sfgate.com/sfmoms/2012/02/28/pastor-calls-breastfeeding-mom-a-stripper/>, on a pastor’s ordering a woman who was breastfeeding during a service to move to the bathroom (and to not come back to the church again).

184. *See, e.g.,* Am. C. Obstetricians & Gynecologists, Exec. Board Statement on Breastfeeding (Sept. 1994); Am. Acad. of Pediatrics, Work Group on Breastfeeding, *Breastfeeding and the Use of Human Milk*, 100 J. AM. ACAD. PEDIATRICS 1035, 1035-36 (Dec. 1997).

185. The official website of La Leche League International is www.laleche.org.

can read promotional literature in all major languages, not to mention Icelandic and Basque.

The breastfeeding movement has had enormous success; it has convinced more and more mothers to breastfeed, and it has also been a factor in the adoption of some forty or more public breastfeeding laws in just over a decade. Still, many people seem to be unaware of the law; and some institutions routinely violate it. Incidents like the Delta Airlines dispute presumably raise awareness of the law and help change attitudes about public breast feeding.

Emily Gillette's incident with Delta Airlines, for example, provoked not only litigation in federal court, but also, and perhaps more powerfully, a national "nurse-in"—a form of protest that is now a common response by lactation activists when women are ejected from public places for breastfeeding. In a "nurse-in," breastfeeding mothers converge en masse at a particular business or location to protest the lack of support for public breastfeeding. Social media, such as Facebook, Twitter, and the rest, act (as usual) as tools of this small revolution. They can turn an incident into a national scandal in minutes. The nurse-in that followed Gillette's exclusion was staged at Delta ticket counters at thirty airports across the country.¹⁸⁶ Similar nurse-ins have been staged at Starbucks (the site of more than one breastfeeding incident),¹⁸⁷ at Facebook headquarters (after the company was accused of removing photos that showed breastfeeding),¹⁸⁸ and at Whole Foods.¹⁸⁹ A 2011 nurse-in was held at more than 100 Target stores to protest an incident in which a woman who was nursing her

186. See Cecilia Kang, *Mothers Rally to Back Breast-Feeding Rights*, WASH. POST, Nov. 22, 2006, at D1.

187. Rosalind S. Helderman, *Md. Moms Say No to Coverup at Starbucks*, WASH. POST, Aug. 9, 2004, at B3.

188. Benny Evangelista & Vivian Ho, *Breastfeeding Moms Hold Facebook Nurse-In Protest*, SFGATE (Feb. 7, 2012, 4:00 AM), <http://www.sfgate.com/business/article/Breastfeeding-moms-hold-Facebook-nurse-in-protest-3087893.php#ixzz2CjN544wA>.

189. Nick Valencia, *'Nurse-In' Supports Public Breastfeeding*, CNN (Dec. 28, 2011, 10:28 PM), <http://www.cnn.com/2011/12/28/us/breastfeeding-protest/index.html>.

baby while sitting on the floor of the women's clothing department was asked repeatedly to move to a fitting room.¹⁹⁰ Target issued a statement that female guests are welcome to "breastfeed in public areas," as well as to breastfeed in a fitting room "even if others are waiting to use the fitting rooms."¹⁹¹ So-called "lactation activists" also stage marches and meetings to raise awareness about public breastfeeding rights. One planned for August 2012 on the National Mall in Washington, D.C., was alternately referred to as the "Great Nurse-In" or the "Million Boob March."¹⁹² These can be seen as consciousness-raising events. After all, laws are already in place to protect the right to breastfeed in public. The issue is how to make these laws respected and enforced.

Controversies about exposed breasts arise in other contexts, too. Janet Jackson's "wardrobe malfunction" while singing during the half-time show at the Super Bowl before a television audience of millions and millions, a fleeting exposure of a breast, created a storm of controversy.¹⁹³ The fact is, that in American culture, the female breast has

190. Michael Winter, *Mothers Stage 'Nurse-in' Protest at Target Stores*, USA TODAY (Dec. 28, 2011, 8:04 PM), <http://content.usatoday.com/communities/ondeadline/post/2011/12/mothers-staging-nurse-in-protest-at-target-stores/1#.UN2086woqFQ>.

191. *Id.*

192. Janice D'Arcy, *"The Great Nurse-In" to Take Place at the National Mall This Summer*, WASH. POST (Jan. 11, 2012, 7:00 AM), http://www.washingtonpost.com/blogs/on-parenting/post/the-great-nurse-in-to-take-place-at-the-national-mall-this-summer/2012/01/05/gIQA4bLLfP_blog.html; Martha Neil, *Moms Plan Nurse-In on National Mall in Washington, D.C.*, ABA J. (Jan. 11, 2012, 5:23 PM), http://www.abajournal.com/news/article/moms_plan_national_mall/.

193. The Federal Communications Commission fined CBS \$550,000 for violating the policy against nudity and expletives during prime time (when children are likely to be watching). *See F.C.C. v. CBS Corp.*, 663 F.3d 122, 125, 128 (3d Cir. 2011). The Third Circuit vacated the fine, however, on grounds that it was an arbitrary departure from the agency's longstanding policy of ignoring "fleeting" indecency. *Id.* The Supreme Court declined to review the appellate ruling, but Justice Roberts wrote separately to question whether the "fleeting" exception had ever been applied to images, rather than expletives. *FCC v. CBS Corp.*, ___ U.S. ___, 132 S. Ct. 2677, 2677-78 (2012) (Roberts, J., concurring in the denial of certiorari).

sexual meaning.¹⁹⁴ The comparison with the male breast is therefore misleading. To be sure, “shirtless” pictures of handsome men have some erotic resonance, but nothing like the erotic meaning of a woman’s breasts.

Public breastfeeding (like the nudist movement) insists on removing this erotic meaning. Or, more accurately, compartmentalizing it. After all, even people in nudist colonies have sexual intercourse, though never on the volleyball court or in the dining hall; and nudist couples certainly find the naked body erotic; they have not, after all, taken a vow of celibacy. Their message seems to be: yes, the naked body can be erotic, but only under certain conditions. But many conservative and traditional people still find breastfeeding offensive.

They also find nudity offensive, of course. They have trouble separating the erotic from the nonerotic in this and other contexts. One should recall that pregnant women, in some social circles, rarely showed themselves in public. A pregnant woman—an obviously pregnant woman—was one who in a sense was wearing a large bodily sign that said: look, I’ve had sexual intercourse, and this is the result. It was not that there was anything *shameful* about pregnancy (just as there is nothing shameful about sex between married couples); but it was shameful to talk about it, or show it, or the like. Sex was supposed to be a purely private affair.

VI. EROTIC NUDITY

The female breast—and more—pops up in another context. In between simple and playful nudity, on the one hand, and indecent exposure on the other, is a shadowy domain we might call erotic nudity. Here the nudity is frankly and openly sexual. But it is not by any means forced on innocent victims. To the contrary: people pay good money

194. In cultures where toplessness is common, or the norm—some tribal societies—presumably the meaning would be different. See generally FLORENCE WILLIAMS, *BREASTS: A NATURAL AND UNNATURAL HISTORY* (2012), for a fascinating account of breasts from scientific, anthropologic and sociological perspectives.

for the privilege of seeing (mostly) women in the nude. Or, as in the classic burlesque show, almost nude (the so-called "strip tease"). Or, as in certain "adult" establishment, more than nude: women gyrating and dancing, or going even further. (In this age of creeping gender equality, women sometimes also go to see male strippers in action).

Can the state regulate the goings on in such bawdy shows? The question reached the august halls of the United States Supreme Court in *Barnes v. Glen Theatre, Inc.*¹⁹⁵ Two clubs in South Bend, Indiana, were the subject of this case—the Kitty Kat Lounge and Glen Theatre.¹⁹⁶ In both of these establishments, customers could watch women who were "exotic dancers," completely nude.¹⁹⁷ Indiana had a law that outlawed nudity; the women were supposed to wear pasties and G-strings.¹⁹⁸ The Supreme Court upheld the statute.¹⁹⁹ It promoted order, morality, and decency.²⁰⁰ Four justices dissented.²⁰¹ The Court reversed the judgment of the Seventh Circuit.²⁰² In the Seventh Circuit, Judge Richard Posner had written an opinion that struck down the statute, and poked fun at it.²⁰³ Posner called censorship of erotica "ridiculous"; and he wondered what kind of people would make a career of "checking to see whether the covering of a woman's nipples is fully opaque?"²⁰⁴ But the Supreme Court was not amused.

The general issue came back to haunt the Supreme Court nine years later, in *City of Erie v. Pap's A.M.*, in

195. 501 U. S. 560, 562-63 (1991). On this and the following case, and the case-law in Canada as well, see ALLEN, *supra* note 7, at 78-91.

196. *Barnes*, 501 U.S. at 563-64.

197. *Id.* at 563.

198. *Id.* at 563-64, 566.

199. *Id.* at 572.

200. *Id.* at 568.

201. *Id.* at 587.

202. *Id.* at 572.

203. *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1100 (7th Cir. 1990) (Posner, J., concurring), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

204. *Id.*

2000.²⁰⁵ Here the city had an ordinance that made it illegal to appear in public in a “state of nudity.”²⁰⁶ The defendant ran a club called Kandyland, where customers could see completely nude “exotic” dancing.²⁰⁷ Like Indiana, Pennsylvania wanted the women to wear pasties and G-strings.²⁰⁸ The highest court of Pennsylvania thought the ordinance was unconstitutional.²⁰⁹ The Supreme Court disagreed. The lawyers for the clubs had invoked the noble ideals of freedom of speech and expression.²¹⁰ But the Supreme Court refused to take the bait. The Court quoted the preamble to the ordinance: “[N]ude live entertainment” has a deleterious impact on “public health, safety and welfare”; it creates “an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, [and] the spread of sexually transmitted diseases.”²¹¹

In a way, these cases remind us of the old story about King Canute trying to command the waves. In the early twenty-first century, the United States—and other western countries—are flooded with pornography: hard-core movies, videos, magazines, books, and pictures. That a place like Kandyland could even *claim* the protection of the Constitution would have shocked and horrified people in the nineteenth century (and much of the twentieth century as well). That the Supreme Court *almost* declared regulation of “exotic dancing” out of bounds would have been equally shocking. That the Court would plainly allow women to swivel and gyrate (and worse) in front of men, with nothing on but tiny things on their nipples, and a G-string, would have, been perhaps, the most shocking thing of all. Judges (mostly elderly men, who tend to be “snooty” about popular culture, in Posner’s opinion) are still fumbling and mumbling over the issue; but sex sells, and millions seem

205. See 529 U.S. 277, 282-83 (2000).

206. *Id.* at 277.

207. *Id.*

208. *Id.* at 279.

209. *Id.* at 277.

210. *Id.* at 277, 292.

211. *Id.* at 277, 290.

willing to buy; and the result, in a permissive and prurient era, are powerful forces that more and more are getting their way.

VI. THE MEANING OF IT ALL

Throughout all the ups and downs of the law—and the ups and downs of the norms—a few things remain constant. To some extent, every society has insisted that some kinds of sexual activity *must* be kept private. And that means rules about exposure of parts of the body. What parts of the body must be concealed, and how, is itself socially determined. Of course, cultural and historical variation is enormous. We live in an age of extraordinary permissiveness. It is an age of “triple x” movies, sex clubs, even live sex shows. But there are limits. Sexual intercourse in the public square would get a couple arrested, probably everywhere.

Why must sex—and sex organs—stay private, hidden, masked and disguised? It will not do to simply say, religious reasons; or reasons of morality. Our hypothetical couple, making out in the public square, could not defend their actions by pointing out that they were duly and truly married. Married or not, privacy would be an absolute requirement. The real reason may lie in part in an idea, common to so many societies, that sex is a vital but somehow dangerous activity; it is mighty and disruptive, and it must be carefully limited and controlled. If unchecked, it could destroy what people considered civilization. Moreover, sex is both infectious and addictive. Addictive, yet, unlike alcohol or heroin, people cannot give it up completely; that would be the end of the human race (and, moreover, too much to ask of people). Infectious seems more like it. Infection can be cabined and quarantined. The same may be true of sex.

This notion was widely accepted, at least implicitly, in the nineteenth century. Sex between married people was

okay (in limited amounts). Anything else was forbidden.²¹² It was a period of enormous prudery. On the surface, at least. There was a vigorous Victorian underground, a massive world of hidden sexuality.²¹³ But public life, public literature, and public discussion were riddled with taboos. Much of this outburst of Victorian prudery was justified in religious terms. But the Victorian attitude toward sex clearly went beyond religion. It was grounded on a theory of society, on what society needed, what society must have, to keep on an even keel.

This theory of society led to a rigorous insistence on bodily privacy. The naked truth of the body had to be kept private, out of view. Nudity was bad. Indeed, many married people took off as little of their clothing as possible when indulging in sexual intercourse. In the famous Kinsey Report on the sexual behavior of women, a third of the women born before 1900 said they were generally "clothed" during the sex act.²¹⁴ Krafft-Ebing thought only "savage races" had sex in the open, like animals.²¹⁵ Dr. Frank Lydston, who wrote books about sex hygiene in the early twentieth century, called for a "less intimate association of husband and wife."²¹⁶ He made this recommendation for the sake of "health and morals."²¹⁷ The less man and wife knew about each other's bodies, the better: privacy was "an individual right, in or out of matrimony."²¹⁸ The couple should not, he thought, sleep in the same bed. Sharing a bed

212. See JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 78-79, 109-20 (2011), which traces the origin and decline of the restriction of legitimate sex to marriage.

213. See FRIEDMAN, *supra* note 8, at 165-66; see generally RONALD PEARSALL, *THE WORM IN THE BUD: THE WORLD OF VICTORIAN SEXUALITY* (1969).

214. ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953); RICHARD VON KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS* 2 (1894).

215. KRAFFT-EBING, *supra* note 214, at 2 (1894). Obviously, animals have sex without benefit of clothing. Krafft-Ebing saw nudity in sex as primitive, animalistic. Kinsey saw the matter quite differently: for him, nudity in sex was more natural than unnatural; the human being, after all, was an animal.

216. G. FRANK LYDSTON, *SEX HYGIENE FOR THE MALE* 133 (1912)

217. *Id.*

218. *Id.*

made “personal privacy” impossible, and could lead to sexual “excess.”²¹⁹

Taboos against sex and the body justified a heavy dose of censorship. The nineteenth century took for granted that governments had the right, indeed the duty, to crack down on obscenity and pornography. There was, of course, a vigorous and lively market in dirty books and pictures; but it was strictly speaking an underground trade.²²⁰ Prudery in the Victorian age went even further: it extended to language as well. The taboo against “four letter words” was so pronounced that the great Oxford English Dictionary could not bring itself to include two of them, simple and common words, that no doubt every male above a certain age knew perfectly well, and probably most women. All this was part of the grand plan to keep anything having even a remote connection with sex utterly private. And all of it based on the implicit theory that letting the beast out of its cage could wreak havoc with the social structure.

Censorship, prudery, and the whole Victorian package lasted well into the twentieth century. When the movies became popular, in the early years of the twentieth century, they were the target of censorship as well.²²¹ Censorship of movies seemed especially necessary because the masses loved the movies and flocked to see them. Children too were avid consumers of movies. Hence the movies were quite dangerous. Some cities and states set up censorship boards.²²² The courts—including the Supreme Court—had no problem upholding these statutes and the censorship boards.²²³ There was a kind of elite consensus: the public must be protected from offensive movies. “Undraped

219. *Id.*

220. There is of course a large literature on the subject. See, for example, DONNA DENNIS, *LICENTIOUS GOTHAM: EROTIC PUBLISHING AND ITS PROSECUTION IN NINETEENTH-CENTURY NEW YORK* (2009).

221. See LEE GRIEVESON, *POLICING CINEMA: MOVIES AND CENSORSHIP IN EARLY TWENTIETH-CENTURY AMERICA* 23 (2004); RICHARD S. RANDALL, *CENSORSHIP OF THE MOVIES: THE SOCIAL AND POLITICAL CONTROL OF A MASS MEDIUM* 77-78 (1968).

222. See GRIEVESON, *supra* note 221, at 23; RANDALL, *supra* note 221, at 77-78.

223. *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 243 (1915).

figures” had to be kept out of the movies.²²⁴ Movies should not pander to “lasciviousness and passion”; they should not “deliberately or even unintentionally cater to sensuality.”²²⁵

Of course, not every city or state gave in to the urge to censor. Still, the industry felt the heat. Under relentless pressure from the Catholic Church and from moralists, the movies adopted a strict code of self-regulation.²²⁶ Movies had to conform to this code. No nudity, of course. Sex could at most be hinted at. Adultery was out of the question. Even married people had to sleep in twin beds. No criminal could get away with his crime. No religion was to be insulted.

Even a pregnant married woman had to be kept hidden from the public.²²⁷ A pregnant woman, after all, advertised with her very body the fact that she had been sexually active, as we pointed out.²²⁸ If she was a nice married woman, of course, she had a perfect right to be pregnant. Married people were certainly supposed to have sex; but not to advertise that fact. In the well-known Supreme Court

224. *Nude Figures Barred from Movie Screen*, N.Y. TIMES, Jan. 22, 1917, at 9.

225. This came from the National Board of Review, which acted together with the National Association of the Motion Picture Industry, in an early attempt at self-regulation. *Id.*

226. See GRIEVESON, *supra* note 221, at 205-06; RANDALL, *supra* note 221, at 186. The current rating system is administered by the Classifications and Rating Administration. Information about the rating is available at their website, www.filmratings.com.

227. See Elizabeth Duncan Koontz, *Childbirth and Childrearing Leave: Job-Related Benefits*, 17 N.Y.L.F. 480, 481 (1971), discussing the days “when pregnant women were forced to remain at home—when pregnancy was viewed as ‘obscene.’”

228. Pregnant women were also pressured to conceal their condition for aesthetic reasons. The pregnant belly was considered a monstrosity. In *EEOC v. Fin. Assurances, Inc.*, for example, a secretary successfully sued for pregnancy discrimination after her boss told her, among other things, that “we can’t have you running around the office with your belly sticking out to here.” 624 F. Supp. 686, 691 (W.D. Mo. 1985); see also *EEOC v. W&O, Inc.*, 213 F.3d 600, 608 (11th Cir. 2000), where a pregnant waitress was told she was too big and fat to be seen in public; she won her case. In *Leach v. State Bd. of Rev.*, a waitress, laid off because the manager thought “her appearance was unseemly,” was entitled to unemployment compensation. 184 N.E. 704, 705 (Ohio Ct. C.P. 1962); see Koontz, *supra* note 227, at 481.

case of *Cleveland v. La Fleur* (1974),²²⁹ a married and pregnant teacher protested a school board rule that pregnant teachers had to step down relatively early in their pregnancy. This was supposedly for health reasons; but the real reason was the taboo against looking pregnant in public.²³⁰ Children were not supposed to see, before their very eyes, clear evidence that a teacher (married or not) had been having sex, so that they could giggle about it, make jokes about swallowing a watermelon, and so on.²³¹

Similarly, many school districts had restrictive rules for married high school students.²³² After all, it is perfectly legal for a seventeen-year-old to get married, provided the parents say yes. And a married student had the right to go to school and graduate high school. But many school districts were quite hostile to married students. They told these students they were forbidden to take part in any extracurricular activities. They were not allowed to go to the prom. They were ostracized, in a way: kept away as much as possible from the other students. It seems ironic that a school district would discriminate against *married* students. Marriage is supposed to be a good thing. No doubt plenty of unmarried students were sexually active. But this was on the sly; or privately. The trouble was, the wedding ring of married students, like the belly of a pregnant woman, announced to the world: look at me; I am a person who has regular access to sex. And this kind of open recognition was not to be tolerated—at least not in the context of high school.

229. 414 U.S. 632, 632 (1974). The Supreme Court invalidated the school board rule on grounds of due process. Public employers, after that case, could no longer presume all pregnant women incapable of work after a certain point in pregnancy.

230. See LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 306-07 (2002).

231. See *id.*; see also FRIEDMAN, *supra* note 8, at 171-74.

232. See FRIEDMAN, *supra* note 8, at 172-73. On the policies and case law related to married high school students, see J.A.F., Note, *Constitutional Law—Married High School Students—Participation in Extracurricular Activities*, 40 TENN. L. REV. 268 (1973).

Cleveland lost the *La Fleur* case, and the rules about married students in high school have long since been consigned to the ashcan of history. Today, pregnant women teach; and after they give birth, they can breastfeed in public, if they so desire. Censorship is also for the most part ancient history. The Supreme Court, in 1965, struck down the Maryland statute on movie censorship.²³³ The new edition of the great Oxford Dictionary includes the banned four-letter words, in their proper alphabetical place. There are still rules about pornography, but in many cities they are feebly enforced—if they are enforced at all. This is the way we live now—in the United States, at least, and in most developed countries. No surprise, then, that rules and norms about social nudity are in a state of decay.

CONCLUSION

In short, there is no longer an ironclad rule that the body, or at least the “private parts,” have to remain that way: private. It has become a matter of choice. Or context. You can, in short, choose to join a nudist colony; or visit a nude beach. But only if you want to. Similarly, you can go to San Francisco and join a “nude-in”; or go with the flow of naked bike-riders. *Forced* bodily privacy has declined; now it is much more a matter for each person to decide. In *Lake v. Wal-Mart Stores*, a Minnesota case from 1998,²³⁴ Elli Lake and Melissa Weber—nineteen and twenty years old, respectively—went on vacation in Mexico, in 1995, along with Weber’s sister. The sister photographed Lake and Weber, naked in the shower together.²³⁵ After their Mexican adventure, Lake and Weber gave five rolls of film to Wal-Mart in Dilworth, Minnesota; but Wal-Mart refused to print the offending pictures “because of their nature.”²³⁶

233. *Freedman v. Maryland*, 380 U.S. 51, 57 (1965). The Court made a feeble attempt to distinguish the *Mutual* case; but it was clear from this decision that no state or city censorship board could survive a challenge in court. *See id.* at 58-60.

234. 582 N.W.2d 231, 232 (Minn. 1998).

235. *Id.*

236. *Id.* at 233.

Apparently, though, one employee did in fact print the photograph, and copies “were circulating in the community.”²³⁷ The two brought an action against Wal-Mart for invasion of privacy.²³⁸ The Minnesota court was sympathetic: “One’s naked body is a very private part of one’s person and generally known to others only by choice.”²³⁹

But it would be wrong to think that old taboos are completely dead. There are parts of the country (and the world) that are much less tolerant than, say, San Francisco. When, in August, 2012, it was revealed that a congressman from Kansas had gone skinny-dipping in the Sea of Galilee, during a political junket to Israel—he was in the water for all of ten seconds—it made headlines, and resulted in a harsh scolding by the House majority leader.²⁴⁰

In a way, the *Wal-Mart* case sums up the modern law, at least on the issue of choice and compulsion with regard to bodily privacy. There are still strong rules about behavior that seems threatening or abusive or pathological. But otherwise, stripping is largely (though not entirely) a matter of free choice. The camera was present at the birth of the right of privacy—the famous article by Warren and Brandeis, published in 1890, owed a good deal to the invention of the candid camera.²⁴¹ Earlier cameras could not capture motion. A person was required to *pose*. Now, for the first time, the camera could record your image, without your permission, even without your knowledge. In 1998, when the *Wal-Mart* case was decided, film still had to be developed. This put Lake and Weber at the mercy of Wal-

237. *Id.*

238. *Id.*

239. Neil M. Richards, *The Limits of Tort Privacy*, 9 J. TELECOMM. & HIGH TECH. L. 357, 364-65 (2011). Apparently, this was the first case to recognize the tort of invasion of privacy in Minnesota. *See id.*

240. Jennifer Steinhauer, *House Member is Rebuked After Nude Swim in Israel*, N.Y. TIMES, Aug. 21, 2012, at A12.

241. The article, of course, is Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). On the role of the camera, see Robert E. Mensel, “Kodakers Lying in Wait”: *Amateur Photography and the Right of Privacy in New York, 1885–1915*, 43 AM. Q. 24, 27-29 (1991).

Mart. Lake and Weber chose nudity; chose to record it; they were “public” in the sense that Weber’s sister took the photographs; and perhaps they wanted to share these beautiful moments with other people. Technology undid the boundaries they wanted to set, boundaries on what would be revealed, and how, and to whom. But they lost control. The candid camera has been superseded by a whole host of surveillance devices, a whole armory of ways to invade people’s privacy, without their permission and without their knowledge. This is the form that the problem of bodily privacy now takes.