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DISROBED: THE CONSTITUTION OF MODESTY

ANITA L. ALLEN

I. INTRODUCTION

THE First Amendment of the United States Constitution protects freedom of speech and expression.¹ The Fourteenth Amendment protects liberty of action.² Still, state and local laws compel sexual modesty. Of course, law cannot make anyone truly modest. The sanctions the law threatens, however, can impel even the least modest men and women to behave in public as if they were paragons of that saintly virtue.

American laws compel sexually modest behavior: first, by restricting nudity on the streets, on beaches and in places of public accommodation; second, by prohibiting modes of public undress that could be characterized as obscene, lewd or indecent; and third, by restricting the time, place and manner of sexually-oriented public theatrical performances, dancing and touching.³ Laws have demanded that women cover up their breasts.⁴ By contrast to Western Europe, topless sunbathing is rarely permitted in the United States. Even infant breast-feeding in public was once treated as an indecency offense.⁵ Female genital and nipple cover-up is a command

1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

2. The Fourteenth Amendment reads in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

3. Cf. Carol A. Crocca, Annotation, *Validity of Ordinances Restricting Location of "Adult Entertainment" or Sex-Oriented Businesses*, 10 A.L.R.5TH 538, 553-55 (1993).

4. See generally Reena N. Glazer, *Women's Body Image and the Law*, 43 DUKE L.J. 113 *passim* (1993) (discussing Indiana and New York laws that prohibit women from exposing their breasts in public).

5. See Dora A. Corby, *A Mother's Right to Breast-Feed Her Child in Public—A New Personal Right in California*, 29 MCGEORGE L. REV. 447, 447 (1998); Durmeris Cruver-Smith, *Protecting Public Breast-Feeding in Theory but Not in Practice*, 19 WOMEN'S RTS. L. REP. 167, 168-70 (1998); Lara M. Gardner, *A Step Toward True Equality in the Workplace: Requiring Employer Accommodation for Breastfeeding Women*, 17 WIS. WOMEN'S L.J. 259, 264-66 (2002); Danielle M. Shelton, *When Private Goes Public: Legal Protection for Women Who Breastfeed in Public and at Work*, 14 LAW AND INEQ. 179, 181-86 (1995); Corey Silberstein Shdaimah, *Why Breastfeeding is (Also) a Legal Issue*, 10 HASTINGS WOMEN'S L.J. 409, 411-13 (1999); Emily Suski, *In One Place, but Not Another: When the Law Encourages Breastfeeding in Public While Simultaneously Discouraging It at Work*, 12 UCLA WOMEN'S L.J. 109, 111-12 (2001); Gordon G. Waggett & Rega Richardson Waggett, *Breast Is Best: Legislation Supporting Breast-Feeding Is an Absolute Bare Necessity*, 6 MD. J. CONTEMP. LEGAL ISSUES 71, 81-84 (1995).

of sexual modesty laws upheld by the United States Supreme Court in the two noteworthy non-obscene nude-dancing cases discussed in this essay: *City of Erie v. Pap's A.M.*⁶ and *Barnes v. Glen Theatre, Inc.*⁷

Just why are mandatory sexual modesty laws deemed constitutional in a modern liberal democracy? Shouldn't people have a right to express themselves and make personal choices concerning their own bodies? Not everyone prefers bodily privacy.⁸ Some people feel no need to cover up or to conduct intimacies behind closed doors. Some people like to feel "natural." Some people like being "sexy," even in public. Exhibitionists discern advantages to granting observational access to their bodies. The well-paid nude pole-dancing job may beat secretarial work. In short, not everyone is (or can afford to be) modest.

Yet, according to traditional moralities, everyone is *supposed to be* modest, especially about matters relating to sexuality. That ultimately explains the persistence of mandatory modesty laws.⁹ Modesty is an ethical virtue, worthy of legal protection.¹⁰ To quote former Chief Justice Earl Warren, "[i]n civilized life, law floats in a sea of ethics."¹¹

This Essay examines sexual modesty as a principal ethical value underlying nude-dancing restrictions. Cities and towns apparently want to rid themselves of totally nude dancing because their lawmakers and residents believe nude dancing is inherently immoral. Lawmakers and ordinary citizens also believe that nude dancing furthers crime and disease. It is a danger, a blight, a nuisance, a moral vice.

In just, free societies, persons are owed strong, consistent rationales for their laws, including relatively minor laws. Has the public gotten a good set of reasons for widespread modesty laws restricting totally nude dancing? Striking polarities of jurisprudential thought surround the issue of nude dancing in public, suggesting grounds for doubt.

According to perspectives at one end of the spectrum, including Justice Antonin Scalia's,¹² it is constitutionally permissible to prohibit totally

6. 529 U.S. 277 (2000) (upholding constitutionality of city ordinance prohibiting public nudity).

7. 501 U.S. 560 (1991) (upholding constitutionality of state statute prohibiting public nudity).

8. See, e.g., Bare Buns Family Nudist Club (2003), <http://www.takeoffwithus.com/decentexposure.html> (describing Bare Buns Family Nudist Club, gathering place for individuals and families who enjoy wholesome, social, non-sexualized nudity).

9. See generally Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108 (2005) (providing psychoanalytic account of Supreme Court's nude dancing cases).

10. See Aaron Ben-Ze'ev, *The Virtue of Modesty*, 30 AM. PHIL. Q. 235 *passim* (1993). "Modesty is generally considered to be an important virtue." See *id.* at 235; G. F. Schueler, *Why Modesty Is a Virtue*, 107 ETHICS 467 *passim* (1997); see also Michael Ridge, *Modesty as a Virtue*, 37 AM. PHIL. Q. 269 *passim* (2000); G. F. Schueler, *Why Is Modesty a Virtue?* 109 ETHICS 835 *passim* (1999).

11. Quotation of the Day, N.Y. TIMES, Nov. 12, 1962, at 31.

12. See *Barnes*, 501 U.S. at 572-81 (Scalia, J., concurring).

nude dancing to protect the moral traditions of society, quite apart from vital concerns about public health and crime control. According to perspectives at the other end of the spectrum, including Judge Richard Posner's,¹³ it is constitutionally impermissible and ridiculous to prohibit totally nude dancing.

I will explore these polarities of thought about nude dancing—construed as a form of sexually immodest conduct—but first I must clarify my subject matter. Sexual modesty is one of two distinguishable senses of modesty currently recognized as a moral or ethical virtue.¹⁴ The other is what I will call general modesty. Although my focus here is sexual modesty, in an effort to avoid conceptual confusion, I will begin with a characterization of general modesty.

II. MODESTY AS MORAL OR ETHICAL VIRTUE

A. *General Modesty*

General modesty consists of the tendency to avoid exaggerating or calling attention to one's virtues and accomplishments.¹⁵ The modest mil-

13. See *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1089-1104 (7th Cir. 1990) (Posner, J., concurring), *rev'd sub nom.* *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

14. See Schueler, *Why Modesty Is a Virtue*, *supra* note 10, at 467 n.1 (distinguishing sexual modesty from general modesty using different terminology); cf. ROGER SCRUTON, *SEXUAL DESIRE* 140-48 (1986) (distinguishing social modesty/shame—what I term general modesty—from sexual modesty/shame—what I term sexual modesty).

15. For a thorough definitional account of modesty, see Ridge, *supra* note 10, at 281 (noting dispositions that define modesty). Ridge states:

In sum, then, on my account a person is modest just in case:

- (a) She is disposed to de-emphasize her accomplishments and traits that are taken to entitle her to benefits.
- (b) She is so disposed at least partially in virtue of not caring too much about whether she is esteemed and partially in virtue of not caring too much about whether she gets everything to which she is entitled.
- (c) She is so disposed at least partially in virtue of caring enough that people not overestimate her accomplishments and characteristics or her responsibility for them.

Id.; see also Owen Flanagan, *Virtue and Ignorance*, 87 J. PHIL. 420, 424 (1990) (“[T]he modest person may well have a perfectly accurate sense of her accomplishments and worth but he does not overestimate them.”). I think it is important to emphasize, in addition, that the modest person does not unduly publicize her appropriately estimated accomplishments and worth. I am thus in agreement with Schueler that a modest person “cares . . . about what is valuable, genuinely valuable, not about getting credit for what she has done.” Schueler, *Why Modesty Is a Virtue*, *supra* note 10, at 485. I am also in accord with a major strand in Daniel Statman's account of modesty: “[Modesty] is a disposition to avoid arrogance and boastfulness in spite of one's (justified) high self-assessment, and to be careful not to interpret one's (true) superiority as granting one extra, more permissive moral rights.” Daniel Statman, *Modesty, Pride and Realistic Self-Assessment*, 42 PHIL. Q. 420, 434 (1992). Statman argues that many contemporary accounts of expressive modesty and humility make sense only if we assume the premise of the Judeo-Christian tradition that human kind is in fact lowly and unworthy of God's magnanimity. See

itary commander will not brag about his victories; the modest Nobel prize-winning author, about her literary prowess.¹⁶ A modest monk will be quiet, not ostentatious, in his prayer. A modest judge will be humble in the face of the sovereign law and his or her own authority. A hundred years ago, modest, well-mannered ladies and domestic servants kept their intelligent opinions and strong passions to themselves, as expected.

Notwithstanding its detractors,¹⁷ general modesty is often defended as a positive character trait by secular philosophers, ancient and contemporary alike.¹⁸ General modesty is a Christian virtue that is shared by other major religious traditions, including Judaism.¹⁹

General modesty may have inherent value, but it has practical value, too, because it can be socially advantageous to avoid provoking "an envy response in others."²⁰ Modesty is so important to social harmony that men and women who are not modest are expected by the rules of eti-

id. at 430 ("[T]he endorsement of humility is connected with the 'pessimistic' view of human nature which is to be found in religious thought."); *cf.* A.T. Nuyen, *Just Modesty*, 35 AM. PHIL. Q. 101, 102 (1998).

16. General modesty is akin to, but not identical to humility. *See* Statman, *supra* note 15, at 420 ("Though the title of my paper speaks of modesty, my argument applies to the virtue of humility too."); *see also* Nancy E. Snow, *Humility*, 29 J. VALUE INQUIRY 203, 211-15 (1995) (arguing that humility is important because it helps foster compassion, it checks boastfulness, vanity, conceit and other vices and because we should value self-knowledge apart from its effects); *cf.* Sebastian Carlson, *The Virtue of Humility*, 7 THE THOMIST 135, 136 (1944) (discussing humility as Christian virtue, "humility, by which every man, considering the depth of his nothingness and sin, and God's excellence as his Creator and Redeemer, is restrained from attempting anything beyond the measure of his nature and of the grace given him, yet at the same time from acting beneath that measure"); Schueler, *Why Modesty Is a Virtue*, *supra* note 10, at 468 (discussing relationship between humility and modesty); Anthony Skillen, *Can a Good Man Know Himself?*, 18 PHIL. INVESTIGATIONS 151, 151-55 (1995) (discussing possibility of humility and accurate self-assessment).

17. A few philosophers have questioned whether it makes sense to view modesty, construed as humbling oneself or not recognizing the truth about one's value, as a virtue. *Cf.* Statman, *supra* note 15, at 420-38 (assessing whether modesty ought to be considered virtue).

18. *See* 2 ARISTOTLE, *Magna Moralia*, in THE COMPLETE WORKS OF ARISTOTLE bk. I 1887 (Jonathan Barnes ed., 1984) (defining modesty as "a mean between shamelessness and bashfulness" and as pertaining to "deeds and words"). Aristotle seemed to think that false modesty was preferable to boastfulness, but truthfulness is best of all. *See* 2 ARISTOTLE, *Nicomachean Ethics*, in THE COMPLETE WORKS OF ARISTOTLE bk. IV 1779-80; 2 ARISTOTLE, *Magna Moralia*, in THE COMPLETE WORKS OF ARISTOTLE, *supra*, at bk. I 1875; *see also* Ridge, *supra* note 10, at 277 (discussing modern approach influenced by Aristotle).

19. *Cf.* Daniel H. Frank, *Humility as a Virtue: A Maimonidean Critique of Aristotle's Ethics*, in MOSES MAIMONIDES AND HIS TIME 89, 89-99 (Eric L. Ormsby ed., 1989) ("The right way . . . is not to be merely humble . . . but to be humble-minded . . . and lowly of spirit to the utmost.").

20. *See* Julia Driver, *Modesty and Ignorance*, 109 ETHICS 827, 828 (1999).

quette to convincingly feign modesty. Pretending to be modest is of little practical value, though, when pretense fails to veil frank conceit.²¹

B. *Sexual Modesty*

Enforcing general modesty has been left to etiquette, morality and religion. Sexual modesty, by contrast, is aggressively enforced through coercive laws. As a personal trait, sexual modesty is the tendency to conceal the genitalia, breasts or other parts of the body that have sexual connotations. Sexual modesty norms may require persons within a society to conceal their hair, eyes, face, legs, breasts or buttocks, no less than the genitalia.²² Further, sexual modesty norms may demand restraint from even speaking of matters related to sexual attraction or sex acts. Speaking of sex is sometimes seduction, and seduction is one step removed from sex.

It happens that in many societies the requirements of sexual modesty differ for men and women. Acts that would be immodest for women are often not immodest for men.²³ A recent example from U.S. popular culture proves the point. It was considered indecent by many Americans for pop star Justin Timberlake to rip performer Janet Jackson's shirt, exposing one of her breasts to millions of Super Bowl football fans.²⁴ But it would have been no big deal had Janet ripped Justin's shirt to reveal his chest, even if he had had a flabby set of male breasts rather than a trim, youthful physique.²⁵ What was an indecent and immodest exposure of Janet would have been no worse than tasteless in the case of Justin.

21. Schueler points out a paradox about modesty through a quip he attributes to Alan Bennett: "All modesty is false modesty, otherwise it wouldn't be modesty." Schueler, *Why Modesty Is a Virtue*, *supra* note 10, at 467.

22. Cf. Shana M. Christrup, *Breastfeeding in the American Workplace*, 9 AM. U. J. GENDER SOC. POL'Y & L. 471, 472 (2001) ("Although it is strange, current American social norms dictate that women breastfeed their infants in bathrooms because it is deemed 'inappropriate' for them to breastfeed in public where the breast might accidentally be exposed.").

23. Double standards pervade western societies. See Keith Thomas, *The Double Standard*, 20 J. HIST. IDEAS 195 *passim* (1959) (detailing double standards of chastity and fidelity); Marina Warner, *The Slipped Chiton*, in FEMINISM AND THE BODY 265 *passim* (Londa Schiebinger ed., 2000) (noting significance of women's bare breasts in art and in life). Warner states:

The female breast, which we so quickly and reductively think of as only sexual, is as much the seat of honesty, of courage and feeling, as is the male. For both sexes it is the place of the heart, held to be the fountain-head of sincere emotion in both classical culture and our own

Id. at 273.

24. See Kalefa Sanneh, *Pop Review: During Halftime Show, a Display Tailored for Video Review*, N.Y. TIMES, Feb. 2, 2004, at D4, available at <http://query.nytimes.com/gst/fullpage.html?res=9500E2DE173BF931A35751C0A9629C8B63>.

25. *But see* Glazer, *supra* note 4, at 116-17 (arguing no inherent reason why exposure to female breast is any more offensive than exposure to male breast).

On a related note, the Commonwealth of Virginia's House of Delegates approved a law introduced by Del. Algie T. Howell Jr. (D-Norfolk) that imposed a fifty dollar fine on anyone who "intentionally wears and [publicly] displays his

Sexual modesty is a special, obligatory virtue for women. Hyperbolic classic philosophical accounts of female modesty explain and justify it by reference to the demands of civilized order and the perpetuation of the species.²⁶ There is a close, reciprocal connection between chastity and sexual modesty. Failures of sexual modesty are a threat to premarital and marital chastity.²⁷ Correlatively, to violate norms of chastity by engaging in unchaste sex acts is to violate expectations of modesty. Tocqueville speculated that nineteenth century American women were more chaste than their European counterparts because they were trained, realistically, to see the advantages of chastity, and because they tended to seclude themselves inside their homes after marriage.²⁸

There is also a close connection between shame and modesty. Shame is the emotion that purportedly ought to follow lapses of modesty and other virtues.²⁹ Indeed, the sex organs are inherent organs of shame in some belief systems.³⁰ They are instruments of shameful, if delightful, past-times.³¹

below-waist undergarments, intended to cover a person's intimate parts, in a lewd or indecent manner.'" News Release, American Civil Liberties Union of Virginia, *Legislation Dictating Clothing Style Goes Too Far* (Feb. 8, 2005), <http://www.acluva.org/newsreleases2005/Feb8.html> (discussing proposed Virginia bill). The measure was defeated in the state senate and did not become law. This law was aimed primarily at young men. The ACLU took a stand against the proposed law: "In a free society, there are simply some things too personal for government to regulate," said ACLU of Virginia executive director Kent Willis, "and one of them is the style of our clothing." *Id.*

26. See, e.g., JOEL SCHWARTZ, *THE SEXUAL POLITICS OF JEAN-JACQUES ROUSSEAU* 33-40 (1984) (assessing Rousseau's view that instilled female modesty restrains females' purported natural promiscuity and heightens males' purported physiologically restricted sexual desire).

27. See MICHAEL NOVAK, *A TIME TO BUILD* 373-81 (1967) (arguing premarital intercourse is morally wrong because it fails "to fulfill the conditions of permanence implied in the symbol of intercourse"); see also David Carr, *Chastity and Adultery*, 23 AM. PHIL. Q. 363, 363-70 (1986) (arguing chastity is virtue of self control and attachment); cf. Anna Stubblefield, *Contraceptive Risk-Taking and Norms of Chastity*, 27 J. SOC. PHIL. 81 *passim* (1996). Stubblefield states:

Norms of chastity in American society have traditionally dictated that a "good girl" preserves her virginity until she is married and that the woman who fails to do so is thereby tarnished. These norms have been problematic for women insofar as they have been part of a sexual "double standard" for men and women.

Id. at 81.

28. See Sanford Kessler, *Tocqueville on Sexual Morality*, 16 INTERPRETATION 465 *passim* (1989).

29. See Carl D. Schneider, "The Reddened Cheek"—*Nietzsche on Shame*, 21 PHIL. TODAY 21, 23 (1977) ("If the sense of shame protects the vulnerability of things of value to violation, it also easily serves as a cloak to hide fearful inhibitions."). See generally GABRIELLE TAYLOR, *PRIDE, SHAME AND GUILT: EMOTIONS OF SELF-ASSESSMENT* (1985).

30. Cf. Nathan Rotenstreich, *On Shame*, 19 REV. OF METAPHYSICS 55, 63 (1965).

31. See generally Thomas W. Laquer, "Amor Veneris, vel Dulcendo Appetetur", in *FEMINISM AND THE BODY* (Londa Schiebinger ed., 1989).

Sex and the body are supposed to be private. This is the lesson Adam and Eve taught the American courts. Schooled in the Bible, one nineteenth century judge adjudicating an indecency case wrote:

The enquiry, therefore, arises for this court to answer, is the exposure, in a public place, to divers persons there assembled, by a person, of his or her private parts, a public indecency? *Prima facie*, we think, it is, if there is in the world any such thing as public indecency.

Immediately after the fall of Adam, there seems to have sprung up in his mind an idea that there was such a thing as decency and such a thing as indecency; that there was a distinction between them; and, since that time, the ideas of decency and indecency have been instinctive in, and, indeed, parts of, humanity. And it historically appears that the first most palpable piece of indecency in a human being was the public exposure of his or her, as now commonly called, privates; and the first exercise of mechanical ingenuity was in the manufacture of fig-leaf aprons by Adam and Eve, by which to conceal from the public gaze of each other their, now, but not then, called, privates. This example of covering their privates has been imitated by all mankind since that time, except, perhaps, by some of the lowest grades of savages. Modesty has ever existed as one of the most estimable and admirable of human virtues.³²

The history of the matter is surely more complicated than this quaint passage suggests. Yet longstanding ethical and religious notions do seem to explain why contemporary law so aggressively regulates nudity.

As noted, modesty enforcement laws have faced major constitutional challenges.³³ Why have fig leaf challenges failed? Ironically, the Constitution Americans value so much for its protection of wanted privacy, they also value for its protection of unwanted privacy—mandatory sexual modesty.

Mandatory sexual modesty laws enjoy popular support. Many Americans believe core moral decency standards should be enforced—public nudity and public sex are inherently wrong and should be banned. In defending a proposed Erie, Pennsylvania law designed to prohibit nude dancing,³⁴ one self-revealing lawmaker clearly identified what was on his

32. *Ardery v. State*, 56 Ind. 328, 329-30 (1877).

33. See generally *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

34. In relevant part, Ordinance 75-1994, codified as Article 711 of the Codified Ordinances of the City of Erie, provides that:

1. A person who knowingly or intentionally, in a public place:
 - a. engages in sexual intercourse
 - b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code
 - c. appears in a state of nudity, or

mind: "We're talking about what is indecent and immoral."³⁵ Many prefer to live in a society in which they are not offended by others' nudity or sex acts, even in the context of art or entertainment. For them, a regime of mandated sexual modesty does the trick. Finally, some people associate immodesty with what the courts call harmful "secondary effects," like prostitution, sexually transmitted diseases, the obscenity trade, illegal drugs and violence. Their reasoning is simple: Enforce modesty, contain crime and vice.

III. MODESTY AND LEGAL MORALISM

A. City of Erie v. Pap's A.M.

The town of Erie, Pennsylvania successfully enacted an ordinance banning totally nude dancing.³⁶ Although lawmakers debating the measure identified morality as a core purpose of the ordinance, the official preamble to the ordinance stated that its enactment was:

[F]or the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.³⁷

d. fondles the genitals of himself, herself or another person commits Public Indecency, a Summary Offense.

2. "Nudity" means the showing of the human male or female genital [sic], pubic hair or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.

3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

4. The prohibition set forth in subsection 1(c) shall not apply to:

a. Any child under ten (10) years of age; or

b. Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age.

See City of Erie, 529 U.S. at 283 n.*.

35. *Id.* at 329 (Stevens, J., dissenting).

36. *See supra* note 34 (providing ordinance).

37. *Pap's A.M. v. City of Erie*, 719 A.2d 273, 279 (Pa. 1998), *rev'd*, 529 U.S. 277 (2000).

The corporate owner of Kandyland, a club featuring totally nude erotic female dancers, sought declaratory and injunctive relief against the enforcement of the nudity ban. The Court of Common Pleas struck down the ordinance, but the Commonwealth Court reversed. The Pennsylvania Supreme Court reversed on the grounds that the ordinance violated the First and Fourteenth Amendments. Nude dancing, the court reasoned, is expressive conduct meriting protection.

Victory for the corporate owner of Kandyland was short-lived. In 2000, in *City of Erie*, the U.S. Supreme Court reversed the Pennsylvania Supreme Court. Justice O'Connor, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, made four substantive findings, pursuant to a test laid down in *United States v. O'Brien*³⁸ for content-neutral restrictions on symbolic speech. She found that the statute was within the city's police powers; furthered an important government interest in combating the harmful secondary effects of crime and vice posed by public nudity; was not government suppression of free speech; and did not restrict conduct more than necessary.³⁹

Dissenting Justices raised questions: Doesn't the Constitution require more than speculation about secondary effects? What empirical evidence did Erie rely on to conclude that nude dancing breeds crime and vice in its midst? City authorities were content to have partially nude dancing continue, so long as dancers were clad in at least "pasties" covering the nipples of their breasts and "G-strings" covering their genitals; but how is wearing itsy bitsy pasties and G-strings supposed to alter the alleged tendency of sexually-oriented dancing to attract crime and vice?

These sensible questions go to the core of why the Court's decision cannot be taken at face value as upholding a state interest in public health and safety. *City of Erie* is not John Stuart Mill's harm principle at work; it is instead legal moralism at work. The Court's symbolic (and awkward) nod at the harm principle is barely concealed moralism, a replay of *Barnes*, an earlier decision by the Court to permit a nude dancing ban.

B. *Barnes v. Glen Theatre, Inc.*

An Indiana statute defined "public indecency" and "indecent exposure" to include appearing "in a state of nudity."⁴⁰ Two South Bend estab-

38. 391 U.S. 367 (1968).

39. See *City of Erie*, 529 U.S. at 296-98.

40. The Indiana Code at issue in *Barnes* provides:

Public indecency; indecent exposure

Sec. 1. (a) A person who knowingly or intentionally, in a public place:

(1) engages in sexual intercourse;

(2) engages in deviate sexual conduct;

(3) appears in a state of nudity; or

(4) fondles the genitals of himself or another person; commits public indecency, a Class A misdemeanor.

(b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the show-

ishments (the Kitty Kat Lounge and the Glen Theatre), along with individual dancers who wished to offer totally nude entertainment, sued, lost and appealed a lower court ruling upholding the statute. Dancer Darlene Miller speculated that she would make more money dancing totally nude than partly covered. She wanted the opportunity to test her theory, but did not get it.

She almost did. The Seventh Circuit Court of Appeals held that the statute was unconstitutional under the First Amendment because it infringed the appellants' right to engage in non-obscene expressive activity with a message of eroticism and sexuality.⁴¹ In *Barnes*, however, the Supreme Court ruled on appeal that state and local authorities in Indiana may require clothing, notwithstanding the admitted First Amendment interest of dancers in free expression.⁴²

A plurality opinion by Justice Rehnquist defended the Indiana law as justified legal moralism. According to Rehnquist, the Indiana law's heritage and purpose were clear—"protecting societal order and morality":

Public indecency statutes of this sort are of ancient origin and presently exist in at least 47 States. Public indecency, including nudity, was a criminal offense at common law, and this Court recognized the common-law roots of the offense of "gross and open indecency" in *Winters v. New York*.⁴³

Justice Scalia wrote a concurrence expressly attacking the dissenting views that offense and harm, but not morality, were constitutionally sound bases for limiting a First Amendment freedom. Justice Scalia took on the dissenting Justices' seeming assumption that the statute could not stand if its only purpose were to avoid the offense of public nudity (because the nudity in question took place behind closed doors) or to enforce morality (because morality was not a matter for public regulation):

The dissent confidently asserts . . . that the purpose of restricting nudity in public places in general is to protect nonconsenting parties from offense; and argues that since only consenting, admission-paying patrons see respondents dance, that purpose cannot apply and the only remaining purpose must relate to the communicative elements of the performance. Perhaps the dissenters believe that "offense to others" *ought* to be the only reason for restricting nudity in public places generally, but there is

ing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 n.2 (1991) (citing IND. CODE § 35-45-4-1 (1988)).

41. See *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1087-89 (7th Cir. 1990), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

42. See *Barnes*, 501 U.S. at 571.

43. *Id.* at 568 (citation omitted).

no basis for thinking that our society has ever shared that Thoreauvian “you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else” beau ideal—much less for thinking that it was written into the Constitution. The purpose of Indiana’s nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd. Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, “*contra bonos mores*,” *i.e.*, immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy.⁴⁴

(This opinion was written long before *Lawrence v. Texas*⁴⁵ took sodomy between consenting adults off the acts *contra bonos mores* list.)

The harm principle is at the core of Justice Souter’s concurrence.⁴⁶ Nudity has externalities, “secondary effects,” he argued. It attracts vice, he presumed. Note the speculative evidence:

The type of entertainment respondents seek to provide is plainly of the same character as that at issue in [other cases]. It therefore is no leap to say that live nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects as the adult films displaying “specified anatomical areas” at issue in *Renton v. Playtime Theatres, Inc.*⁴⁷

*Renton*⁴⁸ represents the low standard of proof to which the Supreme Court holds government when it comes to establishing that nudity is harmful.⁴⁹ States, towns and cities need not spell out exactly how sexual im-

44. *Id.* at 574-75 (Scalia, J., concurring).

45. 539 U.S. 558 (2003).

46. *See Barnes*, 501 U.S. at 584 (Souter, J., concurring).

47. *Id.* at 584.

48. 475 U.S. 41 (1986).

49. In *Renton*, the Court held that:

The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

Id. at 51-52; *accord City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002). There, the Court opined:

In *Renton*, we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is “reasonably believed to be relevant” for demonstrating a connection between speech and a substantial, independent government interest.

Id. (quoting *Renton*, 475 U.S. at 51-52) (emphasis added).

modesty is of a piece with vice and crime,⁵⁰ or how sexual immodesty is otherwise harmful to society.⁵¹ They may rely on studies by other jurisdictions, or no studies at all.

50. See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 678-79 (1986) (holding school may constitutionally suspend student who delivered speech before classmates and faculty containing extended sexual metaphor “indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly”).

51. The Supreme Court permits zoning regulations that restrict the location of adult entertainment establishments. See *Alameda Books*, 535 U.S. at 425; *Renton*, 475 U.S. at 54. The Court also upheld laws requiring exotic dancers to wear pasties and G-strings. See *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000); *Barnes*, 501 U.S. at 572. Licensing schemes that operate as prior restraints on free speech, however, have been struck down. See *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990).

Judge Posner of the Seventh Circuit is skeptical. See *Miller v. Civil City of South 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). Posner opined:

Thirty years ago a striptease that ended in complete nudity would have been thought obscene. No more. It is worth pausing a moment to ask why. Nudity as titillation or outrage is relative rather than absolute. In a society in which women customarily go about in public bare-breasted, there is no shock value in a bare breast, while in Victorian England, where decent women were expected to wear dresses that reached from the top of the neck to the floor—where even the legs of furniture were sometimes clad for the sake of decency—a bare ankle was a sensation. Since then female dress has become progressively less modest, and today many decent women appear in public in states of undress (mini-skirts, hot pants, slit skirts, body stockings, see-through blouses, décolletage becoming outright topless evening wear) that would have been considered nakedness, or the garb of prostitutes, thirty years ago. A striptease that ended in a degree of nudity no longer suggestive of preparations for sex—a striptease that left the stripper garbed as she might be for an expedition to the supermarket—might lack erotic punch today.

In any event there is no contention that the stripteases of the “Kitty Kat” dancers are obscene. It would be difficult to make such a contention with a straight face at a time when a career respectable in the eyes of many people can be founded on posing in the nude for men’s magazines. *Id.* at 1091. Posner further stated:

The true reason I think for wanting to exclude striptease dancing from the protection of the First Amendment is not any of the lawyers’ classification games that I have been discussing, such as expression versus non-expression, ideas versus emotions, art versus entertainment, or speech versus conduct. It is a feeling that the proposition, “the First Amendment forbids the State of Indiana to require striptease dancers to cover their nipples,” is ridiculous. It strikes judges as ridiculous in part because most of us are either middle-aged or elderly men, in part because we tend to be snooty about popular culture, in part because as public officials we have a natural tendency to think political expression more important than artistic expression, in part because we are Americans—which means that we have been raised in a culture in which puritanism, philistinism, and promiscuity are complexly and often incongruously interwoven—and in part because like all lawyers we are formalists who believe deep down that the words in statutes and the Constitutions mean what they say, and a striptease is not a speech. But the element of the ridiculous is not all on one side. Censorship of erotica is pretty ridiculous too. What kind of people make a career of checking to see whether the covering of a

Guns, prostitution, alcohol and drugs plague too many communities. It is widely believed that adult entertainment establishments, including adult theaters and clubs or peep shows featuring erotic dancers, attract crime and vice. The Supreme Court has concluded that this belief is reasonable.⁵² Requiring sexually modest behavior counteracts the tendency of nudity to breed dangerous geographic communities of crime and vice.

A second related "reasonable" belief is that what would-be nice neighborhoods are brought down by nude entertainment and lifestyle establishments. Property values plummet. Through its zoning laws a city can avoid the bad neighborhood and bad neighbor problem.⁵³ The nudists and nude entertainers can be disaggregated and isolated. Then where would be the harm?

Public nudity also raises public health concerns.⁵⁴ Uncovered bodies are more vulnerable to infectious agents in the environment. The transmission of diseases like HIV/AIDS and hepatitis through exposure to others' body fluids is a serious risk. To avoid the public health problem, persons practicing nudity would have to be educated about precautions and motivated or compelled to practice them. Persons viewing nude dancers would have to refrain from touching them or masturbating. If sexual contact between dancers and patrons is more likely in the case of totally nude dancing, then this collateral activity, rather than the dancing itself, could be prohibited and prohibitions enforced.⁵⁵ To the extent that alcohol and illegal drug use are seen as public health problems, there is no special or unique association between nudity and substance abuse or

woman's nipples is fully opaque, as the statute requires? (These statutes are full of absurd locutions, such as: "Wholly or substantially exposed to public view," as it pertains to breasts, shall mean" Most of us do not admire the Islamic clergy for their meticulous insistency on modesty in female dress. Many of us do not admire busybodies who want to bring the force of law down on the heads of adults whose harmless private pleasures the busybodies find revolting. The history of censorship is a history of folly and cruelty.

Id. at 1099-1100 (internal citation omitted).

52. See *Renton*, 475 U.S. at 51-54.

53. See *Alameda Books*, 535 U.S. at 429-30 (upholding zoning ordinance prohibiting two adult entertainment businesses to operate within 1000 feet of one another or in same building). The Court further concluded that based on a 1977 report it is:

[R]easonable[] for Los Angeles to suppose that a concentration of adult establishments is correlated with high crime rates because a concentration of operations in one locale draws, for example, a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity.

Id. at 436.

54. See *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 829 n.9 (4th Cir. 1979) (finding unhealthy, unsanitary conditions in adult entertainment establishment warrant state regulations restricting their location).

55. Public health laws have been used in New York City to address the collateral effects and activities of nude dancing. See David Rohde, *Public Health Is Invoked to Shut Strip Bar*, N.Y. TIMES, Aug. 7, 1998, at B3.

addictions. (Although one can imagine substance abuse as a way to numb reluctant dancers' emotions and lower their bashful customers' inhibitions.)

Dissenting Justices White, Marshall, Blackmun and Stevens rejected the Indiana law on the ground that non-obscene public nude dancing is a form of constitutionally protected free expression without distinct and discernable harm. Justice White, writing for the dissenters, asserted that a legitimate purpose for laws prohibiting public nudity would be the avoidance of offense. Justice White concluded that an application of the offense principle would not justify upholding the Indiana law as applied in this case: The "offensive" conduct takes place behind closed doors in a location no person liable to offense need ever enter. Justice White continued:

The purpose of forbidding people to appear nude in parks, beaches, hot dog stands, and like public places is to protect others from offense. But that could not possibly be the purpose of preventing nude dancing in theaters and barrooms since the viewers are exclusively consenting adults who pay money to see these dances. The purpose of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates.⁵⁶

The purposes of prohibiting totally nude dancing are paternalistic and content non-neutral, in White's view—"to protect the viewers from what the State believes is the harmful message that nude dancing communicates."⁵⁷ It is not just that the state thinks nudity is immoral; the state is also trying to protect its citizens from an immoral message they voluntarily seek out to their own detriment. The state treats adults like children. Justice White pointed out that the state's concerns about the secondary effects of nude dancing could be addressed effectively by means less restrictive than a ban on totally nude dancing. If the concern were prostitution, the state could more vigorously enforce prostitution prohibitions and require that dancers and patrons keep a distance (e.g., no lap dancing).⁵⁸

IV. IN DEFENSE OF MODESTY

A. *Valuing Sexual Modesty*

For practical reasons of law enforcement, Judge Posner may be correct that it is ridiculous to attempt censorship of sexually immodest conduct, especially when one has none of the empirical data of harm Justice

56. *Barnes*, 501 U.S. at 590-91 (White, J., dissenting).

57. *Id.* at 591.

58. *See id.* at 594.

Souter would like municipalities to gather.⁵⁹ Or when we get brilliant legal minds involved in the unsavory formalistic business of determining whether a woman's nipple is fully covered by a fully opaque covering.

But there is nothing ridiculous about valuing sexual modesty. Islam and other world religions value sexual modesty. U.S. localities regulate nudity on the grounds that it is a public or private nuisance,⁶⁰ harmful and indecent or immoral.⁶¹ The regulation of nudity reveals U.S. lawmakers' discomfort with nudity.

Some of that discomfort is a function of fear and distrust. Ours is in many ways an emotionally immature society that needs a sexual morality that includes sexual modesty. One doubts that fellow citizens have sufficient self-control to handle a regime of permissible nudity. We are not certain we can trust our fellows not to engage in sexually assaultive and harassing behaviors. We fear others will turn what is supposed to be non-obscene and natural into something obscene and perverse. We fear shame, objectification and victimization.

Another source of discomfort is aesthetic. We are not used to looking at a broad range of naked bodies. Many people do not like the look of old, out-of-shape or misshapen bodies. As they would admire the flawless bodies of the young or fit, they would despise the old or unfit. Anti-nudity laws that compel modest dress spare people the need to be exposed to distasteful sights. But this, too, is a kind of cultural immaturity. In many parts of the world people are accepting of naked bodies of all shapes and sizes. They don't need sexual modesty laws like ours.

A third consideration is that sexual modesty is related to general modesty in our society. If a woman is young with a beautiful fit body, it seems immodest to flaunt it. Going nude in public is a way to show off; it is over-publicizing one's sex appeal. The Kitty Kat Lounge is a place to work if you want to show off your assets and have others admire you for them. It is generally immodest to be sexually immodest, and yet why shouldn't an attractive woman be able to profit from her assets? No one forces charity or humility. Why force modesty?

B. *The New Immodesty*

Society must be open to the possibility that mandatory modesty is old think, immodesty (or lack of modesty), new think. When you consider all of the voluntary female full-nudity on the internet (thanks to private web-

59. See *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 451 (2002) (Kennedy, J., concurring) (stating that "[Supreme Court has] consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required.").

60. Cf. Rachel Piven-Kehrle, Annotation, *Nudity as Constituting Nuisance*, 92 A.L.R.5TH 593 (2001).

61. See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-97 (2000) (opining that nude dancing is harmful and indecent).

cams), concerns about the dangers of nudity do seem out-of-date. Moreover, some immodesty is socially useful.

Sometimes, immodesty really amounts to educational or artistic self-exposure. For educational purposes, in 1999, a woman named Patti permitted the Health Network, an affiliate of the FOX Entertainment Group, to broadcast live her double mastectomy over the World Wide Web. Elizabeth, a middle-aged married mother of three, gave birth on the Network. The artist Matuschka's historic photographic self-portrait appeared on the cover of the *New York Times Magazine*.⁶² Matuschka bared her chest to the camera to artistically display the scar of a mastectomy.

The Discovery Health Channel on cable television in the United States gives people with a variety of interesting health issues an audience. Men and women from all walks of life have shown a willingness to take off their clothing in front of the television camera for the sake of entertaining medical science public education. Surgical or emergency room patients bare their bodies. How is modesty preserved? It isn't really. The convention is to blur patients' genitals and, if female, nipples, but all else is shown as is. The G-string-and-pasties principle has made its way to television.

C. Degradation?

There is useful immodesty, but in some contexts sexual immodesty is degrading and degrades. Whatever else they do and accomplish, women's lives as nude dancers easily devolve, in my view, into compartments of degradation:

The live entertainment at the "bookstore" consists of nude and seminude performances and showings of the female body through glass panels. Customers sit in a booth and insert coins into a timing mechanism that permits them to observe the live nude and seminude dancers for a period of time.⁶³

This describes, not the nude dancing of the Broadway shows *Equus*, *Hair* or *Oh! Calcutta!*, but the Kitty Kat Lounge. It seems wrong to encourage others, especially strangers, to view you solely as a means of fleeting erotic pleasure and for you to respond on demand to coins dropped in a box by men intent on voyeurism or masturbation. Persons should not treat one another like "means of self-satisfaction."⁶⁴ This is a Kantian intuition.

The Aristotelian intuition is that nude dancing in public is extreme behavior—not the mean between two extremes—but the extreme itself,

62. See Susan Ferraro, *The Anguished Politics of Breast Cancer*, N.Y. TIMES, Aug. 15, 1993, at 25.

63. *Barnes*, 501 U.S. at 563.

64. See John MacMurray, *The Virtue of Chastity*, in *THE CASE AGAINST PORNOGRAPHY* 78 (David Holbook ed., 1973).

the opposite of prudishness. In the words of the philosopher, "praise is extended to the modest man."⁶⁵ Or woman.

Sexual modesty is a moral virtue. It is not a virtue that always requires old-fashioned chastity or head-covering scarves. Modesty is a value feminists have properly urged societies to question. Historically, it has been of a piece with repressive traditions of female privacy that feminists have disavowed. The modest woman lives in the private sphere of home and family life, perhaps subordinated and economically dependent, even today. And even today, the failure to be modest can be (mis) understood as an invitation to seduction.

I believe that today we can embrace mandatory modesty laws in liberal democratic regimes so long as they do not contribute to female under-participation in politics, violence against women or forced religious conservatism. That said, there is a lot more to say on another occasion.

65. 2 ARISTOTLE, *Nicomachean Ethics*, in THE COMPLETE WORKS OF ARISTOTLE, *supra* note 18, at bk. II 1750.

