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Power, Autonomy, and the Role of Law: Nudity and the Public-Private Distinction

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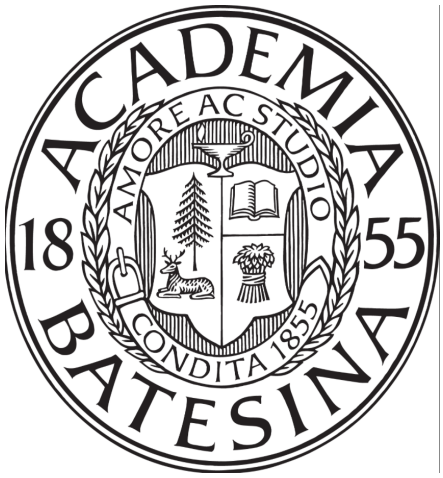

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Nudity and the Public-Private Distinction

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This thesis is dedicated to my mentors, Bill Corlett and Nina Hagel, who have helped me structure my thoughts and whose passion for theory has inspired this thesis.

And to my family, both in the U.S and abroad, who have encouraged me to construct and pursue my own path.

Finally, to the unruly lads of the Bates Rugby Football Club, who have given me a community within and from which to express my individuality.

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Abstract

I ask how the public-private distinction impacts legality, particularly with respect to the "public sphere"; I use "public nudity" as a vehicle through which to understand the larger legal implications of the public-private distinction. Given that public nudity is only offensive (and subsequently illegal) because of how the body is constructed, opinions on when and whether it can be prohibited reveal the various liberal positions on the limits of the public sphere. To show how the *naked* body is constructed as *nude* (a social stigma associated with being unclothed,) I adopt a Foucauldian account of modern power, which clashes with liberal theorists' focus on "power as law" (what Foucault calls a "juridico-discursive" theory of power.) I temporarily set aside this tension, re-adopting a juridico-discursive theory of power in order to explore the relationship between law, the public sphere, and liberal theory. Given these findings, I formulate a tentative conclusion, which relies on liberal assumptions about power as law. I subsequently deconstruct these assumptions, undermining the foundation for liberals' presumed public-private divide altogether. I conclude by questioning how to reconceive the public-private distinction given liberal theory's unfounded assumptions about power, autonomy, and the role of law.

Introduction

My first reflective naked experience occurred during a trip to Japan the summer before my first year of college. “Bathhouses,” which were really a series of mineral water pools, are a common place of leisure in Japanese culture, and my family and I wanted to experience one. When we arrived, we were informed that there were two separate bathing areas: one for men and one for women; when we went to the locker room, my father and I found that no one wore bathing shorts to the pool. The idea that being unclothed in front of others was acceptable seemed foreign to me: my entire life, I had been taught that one’s body was private and that one should cover up in front of others at all times, to the point of going out of one’s way to do so. While the initial feeling of being unclothed in front of others (and seeing others unclothed) was a bit uncomfortable, I quickly came to realize that being free of clothes was, in some sense, liberating; in a place where others were similarly unclothed, and being unclothed did not carry any connotations, exposing myself came to feel natural and comfortable.

A number of years later, I had the opportunity to attend an unclothed party, this time, with both men and women. I found the social dynamics to be identical to those at a normal party, perhaps even more sexually tame—the fact that everyone was unclothed did not make the party explicitly vulgar or sexual. Nonetheless, when explaining the situation to some friends (who did not attend), they seemed puzzled by my experience. They immediately wondered how such a situation could be un-sexual. My claim that being unclothed and seeing others similarly situated was not necessarily sexual or vulgar sounded foreign to them.

Both experiences led me to question how society constructs the unclothed body. If people are born without clothing, how is it that the body becomes taboo and ideas of “modesty” or

"body privacy" develop as unquestionable concrete social codes. Moreover, why is it that societies that seemingly hold freedom of action and expression among their highest values, often use coercive legal force to ensure that members hide their bare self? I wondered how such coercive force, which restricts freedom for the alleged greater good of society, is justified within the legal context of individual rights. What is it about being unclothed that is provocative enough to warrant using legal force to restrain it?

I initially wanted to focus my thesis on why the unclothed body is circumscribed in public. When I began to do research, however, I gradually realized that my query forms part of a larger question about the limits of legal autonomy/agency in the public sphere. I began to research the Constitutional history of legal autonomy, both in public and private. The second half of the twentieth century saw a massive transformation in private individual rights; the constitutional "right to privacy" ensured individuals almost complete autonomy/agency in the private sphere. But given that actions can be restricted to protect public sensibilities (for instance, since public nudity can be proscribed,) this legal freedom to do as one wishes does not entirely carry into the public sphere. There is a difference, at the level of law, between the public and private spheres in terms of which actions governments can restrict.

This thesis gets at the heart of the public-private divide, using public nudity as a case study. Governments justify public nudity restrictions on the grounds that such laws protect public sensibilities—a theory which rests on the assumption that protecting the public from offense justifies restricting others' ability to act as they wish. Consequently, examining whether liberal theorists, who by definition believe in the right to privacy, agree with public nudity restrictions provides a window into the larger debate over the limits of the public sphere. Throughout this thesis, I examine public nudity in the larger context of public autonomy, using this case to

generalize about larger questions regarding law and the public sphere. Looking at whether public nudity can be restricted is a vehicle by which to examine my overall question in this thesis: *How should the public-private distinction, particularly with respect to the "public sphere," impact which actions can be proscribed?*

The first chapter examines the historical development of the right to privacy along with the intra-liberal debate over the limits of the public sphere. In order to understand public nudity laws, it is crucial to understand *wh*y individuals are offended by the unclothed body. Chapter Two uses sociological literature on the body to show the constructed difference between *nakedness*, one's intrinsic state of undress, and *nudity*, a state of indecency associated with the "body taboo." I further explain, using a Foucauldian "analytics of power," *how* the body is constructed as nude and how, consequently, laws outlawing public nudity stem from and reinforce the body taboo. Foucault's account of power differs from that of liberal theorists described in the first chapter. While liberal theorists presume an autonomous subject regulated through prohibitive laws (what Foucault calls a "juridico-discursive" theory of power,) Foucault's modern power (or bio-power) operates below the law, constructing the individual and their perception of the world. These two accounts of power are seemingly at odds, a tension which I address in Chapter Five.

Chapters Three and Four employ a liberal account of power (juridico-discursive) in order to explore the limits of individual autonomy in the public sphere, both at a theoretical and legal level. Since liberals are split as to the limits of the public sphere, Chapter Three seeks to find which of the three liberal positions most closely accords with the tenets of liberal doctrine. Given the answer to this question, Chapter Four explores four Supreme Court cases dealing with public nudity, asking whether the U.S Constitution's approach to the public sphere is in line with liberal

doctrine (as determined in the previous chapter.) These two chapters provide the bulk of my evidence, analyzing the relationship between liberal theory and U.S law.

In Chapter Five, I use the findings from the third and fourth chapters to formulate a "liberal conclusion" (how liberal theorists, given their understanding of power, would conclude) to my question; I go on to assess this conclusion using the Foucauldian analytics of power applied to the body in Chapter Two. Liberal theorists presume an intrinsic public-private distinction: there is a real difference between how individuals ought to act in public vs. in private. Moreover, liberal theorists assume that liberating an individual from unnecessarily constraining laws is sufficient to ensure their autonomy. But according to a Foucault, the individual is constructed below the level of law; that is, eliminating unnecessarily constraining laws does not liberate the individual from the power which constructs them. I address this tension, assessing the liberal public-private distinction from a Foucauldian perspective. I conclude by asking how we might structure laws in order to maximize agency within the field of power relations that regulate the individual.

1: The Legal Limits of Private and Public Autonomy

Defining the limits of individual autonomy is a central question in legal philosophy. In a broader sense, the issue of autonomy speaks to the relationship between the individual and society. What is the proper balance between individual rights, which society cannot intrude on, and duties, which compel an individual to act in a certain way?

Although the United States Constitution is supposedly rooted in inalienable rights, the dominant interpretation of these rights has evolved over the years. For instance, until 1962, all states in the U.S had laws prohibiting same-sex sex; these laws rested on the assumption that "sodomy" was a "crime against nature" and could be prohibited accordingly[1]; individuals' right to autonomy was trumped by a duty to obey certain social norms. Nonetheless, these laws were gradually repealed over the course of the 20th Century, and were ultimately interpreted as violations of the Fourteenth Amendment, marking a shift in the relationship between law and social norms.[2]

What about acting in the presence of others? When one is in the public sphere, is an individual's right to autonomy, if there is such thing, compromised? For instance, should LGBT groups be allowed to have a pride parade in Jerusalem even if it offends religious leaders?[3] Should an interracial couple in the antebellum South have had the right to stroll hand-in-hand

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[1] Janet E Halley, "Reasoning about Sodomy: Act and Identity in and after Bowers v. Hardwick." *Virginia Law Review*, vol. 79, no. 7, 1993, p. 1721., doi:10.2307/1073385; Geoffrey Stone, "Strange Freaks of Nature." In *Sex and the Constitution: Sex, Religion, and the Law from Americas Origins to the Twenty-First Century*, (Liverlight Publishing 2017) 212-22.

[2] Lawrence v. Texas, 539 U.S. 558 (2003.) I return to the issue of sodomy laws later in this chapter; for now, I merely use their evolution as an example of how understandings of rights can change over time.

[3] Pinto, Meital. "What Are Offences to Feelings Really About? A New Regulative Principle for the Multicultural Era." *Oxford Journal of Legal Studies* 30, no. 4 (2010): 695-723.

down the street, likely offending the majority of the public?[4] These questions may require governments to adjudicate between autonomy and others' desire not to be offended.

Such queries speak to the relationship between society and the individual. And the nature of this association has been constantly re-negotiated throughout American history. In order to better comprehend this relationship, it is first necessary to understand the evolution of legal autonomy. To this end, the first section of this chapter focuses on the scope of state police power in the 19th century United States, charting the dominance of legal moralism—the belief that law could and should enforce a certain morality; I also briefly discuss its critics at the time. Having described a context in which all immoral actions, both in private and public, fell under the scope of state police power, the second section explores the expansion of private autonomy in the second half of the twentieth century; this expansion was part of a move toward a "liberal conception of law," which holds that governments cannot prohibit private harmless actions on their immorality alone. Having investigated the limits of private sovereignty, I go on to examine the limits of individual autonomy in public; the third section explores how legal autonomy in public has expanded since the 1960's, and charts the intra-liberal debate on public autonomy. What was, in the private sphere, a two-sided dispute between legal moralists and liberals becomes quadripartite, given that the liberal position fractures into three separate camps. These debates lead me to my research question, which concerns the limits of individual autonomy in the public sphere.[5]

I. The Age of Public Morals: Limited Public and Private Autonomy

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[4] Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (New York: Oxford University Press, 1987,) 25.

[5] I use the terms "public individual autonomy," "individual autonomy in public" and "public autonomy" interchangeably. Both refer to an individual's ability to act freely in the public sphere.

In order to understand the development of private and public autonomy, it is crucial to comprehend the backdrop against which they emerged. William Novak's book *The People's Welfare* details the nature of law in the 19th Century United States, which prioritized the community's welfare over individual rights through an expansive notion of state police power.[6] Novak explains how individual sovereignty, both in public and private, was believed to be subservient to society's interests.

By the early 19th Century, American society, influenced by the Second Great Awakening, increasingly adopted a protectionist attitude toward law. Rebelling against the enlightenment emphasis on individual freedom, a number of early 19th Century thinkers like Lewis Hockeimer, James Williams, and Nathaniel Chipman rejected what they saw as the "selfish" philosophies of Hobbes and Locke. These writers viewed "society, government, association, and ultimately law [as] not only…necessary but natural, keenly suited to human appetites."[7] Unlike the enlightenment's humanist focus, this legal philosophy emphasized the importance of society in realizing man's ambitions. After all, it was reasoned, "man was a fundamentally social or relational being; man's natural state was not to be found outside of community or in isolation from others but *in society*."[8] Not surprisingly, this school of thought emphasized man's duties to society rather than the individual rights that he retained by living in it. Novak identifies four key features of this new philosophy:

> (1) a focus on man as a social being in society; (2) a relative and relational theory of individual rights; (3) a pragmatic, historical methodology enshrined in a dynamic, pre-Enlightenment conception of the rule of common law; and (4) an overall concern with the people's welfare obtainable within a well-regulated society.[9]

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[6] William J Novak, *The Peoples Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996.)
[7] Ibid, 32.
[8] Ibid, 29.
[9] Ibid, 26.

Law's function evolved to reflect this conception of man; within local communities, law's role was increasingly seen not solely as a means by which to mediate private disputes and protect property, but rather as a means to ensure the good of the collective, and through it, individual happiness. In this age, the police came to play a major role in society, their job being to ensure "…the loftiest ambitions and powers of government—the general pursuit of public good and people's happiness."[10] Although the U.S Constitution entrenched a profoundly individualistic notion of law, it was understood that an older pre-Enlightenment moral code of common law still held sway. Common law was responsible for creating the archetype of a proper society, which was secured through the policing of public morals in local communities. Only through a well-functioning, morally upright society could the individual, a social being, realize their maximum potential.

As previously touched on, public morals increasingly fell within the scope of law; once again, since the community's welfare superseded private interests, it was believed that society had every right to punish individuals whose actions proved a public nuisance or in other ways betrayed society's values. Accordingly, sodomy, vagrancy, prostitution, and adultery were aggressively prosecuted by local communities. It is worth noting, however, that that these "public morals" actively entrenched a *particular* interpretation of "social good," which suppressed the interests of those who thought and acted differently.

Public spaces, similar to private ones, were fervently policed under the veil of "public nuisance," since (it was believed that) protecting the community from nuisance superseded individual autonomy. "Public nuisances consisted of…troublesome behavior or uses of property,

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[10] Ibid, 52.

but so as to injure the whole community…Livery stables, slaughterhouses, disorderly inns, bawdy houses, and malarial ponds were all considered public nuisances at common law."[11] Judges upheld these definitions as well, often ruling on the axiom that "like peace, order, and safety, morality belonged to that group of public concerns that defined the essence of nineteenth-century government obligation."[12] The more public the behavior, the more likely it was to be regulated; but society reserved the right to regulate any actions which it found immoral. For instance, public indecency was more likely to be policed than nudity in one's own home; and given that public nudity hinged on participation in public, it was prosecuted most aggressively.[13] To the average nineteenth century American, and certainly to the courts, the idea that the state had no right to dictate whether a person was clothed in public would have been all but inconceivable.[14]

In sum, nineteenth century legal philosophy, rooted in common law traditions, blurred the lines between public and private, and between "individual rights" and "the public good." Individual rights were clearly subservient to entrenched public interest, and regulating private behavior was seen as a natural function of the state. In short, all aspects of life fell under the power of the state, whose job it was to secure a moral community in order to promote the people's welfare.

It was in this age that John Stewart Mill wrote *On Liberty*.[15] Writing in 1859, Mill believed that in "developed societies," the greatest threat to freedom was not the threat of

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[11] Ibid, 61; also see State v. Buckley, 5 Del. 508 (1854,) 508
[12] Ibid, 156.
[13] Ibid, 158; State v. Rose 32 mo 560 (1862); State v. Roper, Miller v. People 5 barb 203 (NY., 1849.)
[14] Ibid 156.
[15] John Stuart Mill, *On Liberty*, (Andrews UK, 2011.) ProQuest Ebook Central, https://ebookcentral.proquest.com/lib/bates/detail.action?docID=770561.

coercive action by a sovereign. Rather, as European countries moved toward democracy, "there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them."[16] To this end, Mill famously articulated his harm principle, the idea that among adults in "civilized" societies, "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[17]

Mill approached this argument from a utilitarian point of view: if "the worth of a state is the worth of the individuals composing it," a state will be stronger if its individuals are happier; this will only occur if its citizens are allowed to pursue life as they see fit.[18] Moreover, diversity of opinion works to society's benefit, since it promotes "mental expansion" and may suggest new, more suitable, ways of living. To be clear, Mill's harm principle did not use the language of individual rights championed by many of his twentieth century contemporaries;[19] Mill claimed that individuals should be sovereign over their own actions because autonomy benefitted society as a whole.

So what is the balance between the individual and society? Mill contended that individuals have a right to warn others that their conduct is dangerous but have no right to tell them that "he shall not do with his life for his own benefit what he chooses to do with it."[20] Moreover, he held that "there are many acts which, being directly injurious only to the agents

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[16] Ibid, 21.
[17] Ibid, 26.
[18] Ibid, 138-139
[19] "It is proper to state that I forego any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility." Ibid, 27
[20] Ibid, 95.

themselves, ought not to be legally interdicted", but which, "if done publicly, are a violation of good manners and, coming thus within the category of offences against others, may rightly be prohibited."[21] But which public acts does Mill refer to? Future liberal scholars, notably Joel Feinberg, would attempt to define the limits of individual freedom, balancing it against society's demands. I discuss Feinberg and public autonomy in greater detail later in this chapter; for now, it is important to note that Mill's philosophy leaves open the question of what the limits of public autonomy are.

Although Mill's philosophy, which Novak contends characterized much legal doctrine in the 19th Century United States, aimed to promote the common good, the two philosophies sharply differed in their approach to law. The latter philosophy was shared by Mill's rival, James Fitzjames Stephen, who argued that morality was a necessary component of law if society was to achieve liberty; for Stephen, allowing unlimited individual freedom would inevitably lead to tyranny.[22] Stephen's ideas mark the traditional understanding of law in Mill's age; it was Mill, not Stephen, who, in the United States, would have been considered reactionary. While *On Liberty* was well-received in its time and continues to be a classic liberal text, but it was not until the middle of the twentieth century that Mill's ideas would begin to be adopted in American law.

II. Toward Private Autonomy

Nineteenth and early twentieth century law was largely characterized by legal moralism. But in the middle of the twentieth century, the U.S government's hold on the private sphere was challenged and all but supplanted with the right to privacy. This section describes the development of this right both in American law and legal theory. Sub-Section A describes how

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[21] Ibid, 94.
[22] James Fitzjames Stephen, and Stuart D. Warner. *Liberty, Equality, Fraternity* (Liberty Fund, Incorporated, 2014.)

the limits of private autonomy were debated in the Hart-Devlin debates, while Sub-Section B discusses the development of the right to privacy (which dealt a blow to legal moralism's understanding of the private sphere); Sub-Section C charts how the right to privacy was applied to eliminate prohibitions on obscenity and (private consumption of) pornography, while Sub-Section D charts contemporary legal perspectives on private autonomy. Throughout this section, it is important to keep in mind that the debates concerning sodomy and pornography's legality reflected the clash between two competing ideologies: legal moralism and liberalism; while the former held that governments could regulate private behaviors which society disapproved of, the latter philosophy championed a "right to privacy," which prevented the government from regulating whom individuals had sex with or whether they viewed images of it. While it is widely acknowledged that liberals largely won, debates between moralists and liberals continue to take place today. [23]

A. Hart-Devlin Debates and the Right to Privacy

The early clashes between legal moralism (and first half of the twentieth) and liberalism were famously exhibited by the Hart-Devlin debates. The debates began when the Wolfenden Committee was chartered by the British Parliament to determine whether sodomy (same-sex sex) should be decriminalized, ultimately holding that it should and recommending "individual freedom of actions in matters of private morality"[24]; Parliament's decision to investigate whether to erase prohibitions on sodomy was not an attempt to survey public opinion (which most likely would have been morally opposed to same-sex sex)—it was rooted in the fundamental question

[23] Ronald Dworkin "Lord Devlin and the Enforcement of Morals." *Faculty Scholarship Series*, Paper 3611, 1 (Jan. 1966.)
[24] "Wolfenden Report." The British Library, www.bl.uk.learning/timeline/item107413.html.

of whether the public's conception of morality should affect which actions are allowed.[25] H.L.A Hart, a legal scholar, and Patrick Devlin, a judge, debated the committee's findings.

Devlin, adopting an idealist concept of law, argued that societies, although they should be hesitant to regulate private behavior, had a right to do so.

> There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government... the suppression of vice is as much the law's business as the suppression of subversive activities.[26]

Devlin was a proponent of legal moralism in an increasingly liberal age, holding that the law had a right to regulate actions which "rational men" considered harmful to society; if certain behavioral norms were not enforced, the bonds that held society together would weaken.

In contrast, H.L.A Hart, argued for a liberal concept of individual rights, contending that "law as it is and law as it ought to be" (our existing rules and an ideal moral concept of society) are separate.[27] Largely basing his argument on Mill's harm principle, he claimed that laws do not need to reflect an established morality. This belief flows from his conception of the nature of law. Hart was a champion of Legal Positivism, a philosophy which viewed law as a socially constructed code designed to promote the functioning of society.[28] In The *Concept of Law*, Hart rejected the legal philosophy known as "Natural Law" which dictates that laws stem from moral principles. Although laws often conform with society's virtues, "it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality."[29] Hart believed that laws, at

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[25] Ronald M. Dworkin, "Lord Devlin and the Enforcement of Morals" *Faculty Scholarship Series*. Paper 3611 (1966.)
[26] Patrick Devlin, "The Enforcement of Morals." Lecture, Maccabean Lecture in Jurisprudence, March 18, 1959.
[27] H. L. A Hart, "Positivism and the Separation of Law and Morals." *Essays in Jurisprudence and Philosophy*, 1983, 49-87.
[28] H.L.A Hart, *The Concept of Law* (Oxford, Clarendon Press, 1994.)
[29] Ibid, 185-186

their core, are a union of two types of rules: "rules of the game" (primary rules) and rules on how the primary rules are made (secondary rules); the most important secondary rule is the "rule of recognition," which refers to a recognized means by which society decides what is legal. This suggests that law does not emanate from a predetermined morality; rather it is a constructed code revolving around a set means by which to adjudicate it, such as a constitution. Primary and secondary rules may stem from individuals' moral sense of what is right, but a community's moral dislike of a particular action cannot justify outlawing the act if the rule of recognition would otherwise allow it.

Refuting Devlin's aforementioned claim (that laws serve to protect society's integrity,) Hart held that countless societies have withstood changes in moral values and are consequently equipped to do so. He also questioned why the majority's morality should prevent individuals from acting as they wish. Hart's quandary with Devlin over the legality of same-sex sex marked an important turning point in American law. Hart's ideas were influential in the Model Penal Code, a code formally adopted by the American Law Institute in 1962 (and which states were encouraged to embrace) which, among other things, abolished prohibitions on sodomy; this reflected the growth and [gradual] espousal of individual autonomy, at least in the private sphere.[30] While same-sex sex was far from universally accepted, states began to move away from sodomy laws. With regards to actions done in the presence of others, however, Hart was far more willing to allow governments to exercise regulations in order to protect public sensibilities.

B. The Right to Privacy

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[30] Melinda D. Kane, "Timing Matters: Shifts in the Casual Determinants of Sodomy Law Decriminalization, 1961-1998." *Social Problems*, vol. 54, no. 2, (2007): 211—239. Also see D'Emilio, John. *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* (Chicago, University of Chicago Press, 1998.)

Defining the limits of government restriction and the bounds of the private and public spheres corresponded with this increased focus on individual rights. In *Griswold v. Connecticut* (1965,) the Supreme Court ruled that Connecticut's ban on contraception violated a constitutional right to marital privacy.[31] This right was subsequently affirmed in *Stanley vs. Georgia* (1969,) when Thurgood Marshall wrote that "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[32] Perhaps most famously, in *Roe v. Wade* (1973,) the Supreme Court declared that the right to privacy ensured a right to abortion.[33] While *Bowers v. Hardwick* (1986) was a reminder that governments could still outlaw private actions which society considered immoral,[34] the idea that the government had no right to regulate decisions between consenting adults would triumph in 2003, when *Lawrence v. Texas* extended the right to privacy established in the aforementioned cases to deem sodomy laws unconstitutional.[35] Over the second half of the twentieth century, the Court altered the reach and focus of law. While private actions could once be regulated under the umbrella of public morals, the aforementioned cases created an invisible, impenetrable line, within which governments could not interfere to promote the public good. Liberal scholars such as David Richards saw the right to privacy as the

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[31] Griswold v. Connecticut 381 U.S. 479 (1965)
[32] Stanley v. Georgia 394 U.S. at 565 (1969.)
[33] Roe v. Wade 410 U.S at 154 (1973.)
[34] "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis" Bowers v. Hardwick 478 U.S. at 196 (1986.)
[35] Lawrence v. Texas, 539 U.S. at 558 (2003.)

"principled interpretive elaboration of a longstanding constitutional skepticism about state enforcement of certain conceptions of perfectionist public morality."[36]

But the right to privacy was not without its critics; scholars such as Robert Bork believed that the Court had engaged in principled judgments when deciding which actions governments could restrict; principled judgments were, for Bork, an unconstitutional method of adjudication.[37] Writing in the 1980's, Bork, an originalist, believed that courts had a requirement to neutrally apply the Constitution; the right to privacy, established in *Griswold v. Connecticut,* was one example of such discriminatory legal application.[38] Moreover, Bork argues that privacy rights have inconsistent principles of adjudication, a fact which illustrates how contemporary interpretations of the constitution cannot be neutral.[39] It is worth quoting Bork at length here.

> …if a neutral judge must demonstrate why principle X applies to cases *A* and *B* but not to case *C* (which is, I believe, the requirement laid down by Professors Wechsler and Jaffe,) he must, by the same token, also explain why the principle is defined as *X* rather than as *X minus,* which would cover *A* but not cases *B* and *C,* or as *X plus,* which would cover all cases, ***A,*** *B* and *C.* Similarly, he must explain why *X* is a proper principle of limitation on majority power at all. Why should he not choose *non-X?* If he may not choose lawlessly between cases in applying principle X, he may certainly not choose lawlessly in defining X or in choosing X, for principles are after all only organizations of cases into groups. To choose the principle and define it is to decide the cases.
>
> It follows that the choice of "fundamental values" by the Court cannot be justified. Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights.[40]

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[36] David A. J. Richards, "Liberalism, Public Morality, and Constitutional Law: Prolegomenon to a Theory of the Constitutional Right to Privacy." *Law and Contemporary Problems*, vol. 51, no. 1, 1988, p. 123.
[37] Robert Bork, "Neutral Principles and Some First Amendment Problems." *Yale Law School Legal Scholarship Repository*, 1971. Also see Rick Kozell, "Striking the Proper Balance: Articulating the Role of Morality in the Legislative and Judicial Processes." American Criminal Law Review 47 (Fall 2010): 1,555-1,575
[38] Bork writes that the Court established that the right applies to contraception for married couples, but "is not going to throw constitutional protection around heroin use or sexual acts with a consenting minor." Ibid at 7.
[39] Ibid.
[40] Ibid at 7-8.

For Bork, the late 20th Century Court (particularly the "Warren Court")'s turn toward private individual autonomy reflected a form of non-neutral adjudication; the Constitution, which requires neutral application of the law, affords governments all but complete ability to regulate private actions. Bork's originalist philosophy, promoted by the Reagan administration, may have marked a new tactic for moralist Conservatives in combatting the Warren Court's enshrined notion of private autonomy.[41]

C. Obscenity and Pornography: Liberal Activists' Next Frontier

The the gradual abolition of sodomy laws and the legal adoption of a private sphere were part of a larger turn toward liberalism in American law;[42] this shift was also manifest in the changing legality of pornography.[43] Materials deemed obscene were previously restrictable, since the government could regulate materials which might harm public morality; pornography, erotic literature, and nude dancing establishments often qualified under these laws, and the idea that freedom of speech applied to sexually explicit content was often disregarded by the Supreme Court.[44] Louis Henkin, who contended that the constitution included a liberal right to autonomy, argued that there was no legal basis for obscenity laws.[45] Henkin contends that obscenity laws are not rooted in a drive to protect individuals from each other but rather in a religious-based drive to protect people from themselves; obscenity, in short, is not crime but sin. Laws rooted in

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[41] Stephen M. Engel, "A Polity Fully Developed for Harnessing (II.)" In *American Politicians Confront the Court*: *Opposition Politics and Changing Responses to Judicial Power*, (Cambridge: Cambridge University Press, 2011.) 337–371.doi:10.1017/CBO9780511994890.009.
[42] See Bork "Neutral Principles and Some First Amendment Problems."
[43] Geoffrey Stone, "The End of Obscenity?" Sex and the Constitution: Sex, Religion, and Law From Americas Origins to the Twenty-First Century, (Liverlight Publishing, 2017.) 296-312.
[44] Ibid, 264.
[45] "By my hypotheses, the United States would be a polity nearer the heart of Professor Hart, and of John Stuart Mill." Louis Henkin, "Morals and the Constitution: The Sin of Obscenity." *Columbia Law Review* 63.3 (1963): 391. Web.

a specific, religious-based conception of the good, Henkin argues, are at odds with the Constitution.

When Henkin wrote his article (in 1963,) the Supreme Court had already begun to define what was and was not obscene. In 1957, the Supreme Court ruled in *Roth v. US* that materials deemed "obscene" are not protected by the First Amendment. But *Roth* did not allow governments to merely choose what was obscene; the Court established a test for determining which material was obscene and subsequently restrictable.[46] By defining obscenity, *Roth* put the Court in the business of determining what qualified under this definition, a burden that would overwhelm the Court over the next three decades, as they struggled to define what was and was not appropriate.[47]

Perhaps this narrowing definition of obscenity reflected changing attitudes toward "morally offensive material"; but it also increased the Court's role in protecting individual rights. Throughout the 1960's, 70's, and 80's, liberals and libertarians sought to chart a "methodological course aimed at changing the climate of ideas to one that would be more sympathetic to the idea that judges should be more engaged in defending constitutional liberties than most conservatives at the time, fearing judicial activism, were inclined to support." [48] Legal libertarian doctrine required an activist Court, not for the purpose of securing a "well-regulated society" but in order to protect individual rights.

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[46] Roth v. United States, 354 U.S. 476 (1957,) 488-489; The five-part test in Roth required that (1) the perspective of evaluation was that of an ordinary, reasonable person, (2) community standards of acceptability were to be used to measure obscenity, (3) works whose predominant theme was questionable were the only target of obscenity law, (4) a work, in order to be evaluated for obscenity, had to be taken in its entirety, and (5) an obscene work was one that aimed to excited individuals' prurient interest.

[47] Stone, *Sex and the Constitution*, 264-312; Grazia, Edward De. "How Justice Brennan Freed Novels and Movies during the Sixties." *Cardozo Studies in Law and Literature* 8, no. 2 (1996): 259-65.

[48] Roger Pylon, "On the Origins of the Modern Libertarian Legal Movement." *Chapman Law Review* 16, no. 2 (April 13, 2013): 262.

The debate over "obscenity's" legality was largely manifest in the debate over pornography.[49] Conservative philosophers (many of whom shared Devlin's belief that society always had a right to regulate private conduct which might offend the community's morality) tended to support prohibitions on pornography.[50] In contrast, liberal legal theorists, such as Ronald Dworkin, famously defended the right to pornography, holding that prohibiting it would violate porn actors and pornographers' rights to equal liberty (by discriminating against their profession.)[51] Given that, according to Dworkin, pornography does not constitute a direct harm to any person, its prohibition is discriminatory and ungrounded.[52] Dworkin's position on pornography flows from his legal philosophy. While Dworkin, like Hart, was opposed to the idea that a community's offense at a certain behavior was sufficient to prohibit it, their legal philosophies sharply differed. As previously mentioned, Hart was a proponent of Legal Positivism, the belief that laws are rooted in normative rules which were specific to individual societies, about how to structure society, not moral ideas about the good. Dworkin was not a proponent of Natural Law (Legal Positivism's philosophical nemesis) but believed in a "third

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[49] Stone, Sex and the Constitution, 264-293.

[50] "'Empirical studies have found a significant correlation between approval of strong law enforcement procedures and disapproval of pornography'. Birkelbach & Zurcher, "Some Socio-Political Characteristics of Anti-Pornography Campaigners*, Social Symposium* 4 no. 13, 13-22 (1970); Peek & Brown, "Pornography as a Political Symbol: Attitudes Toward Commercial Nudity and Attitudes Toward Political Organizations," *Social Science Quarterly* 58, no. 4 (1978): 717-23." Hoffman, Eric. "Feminism, Pornography, and the Law." *University of Pennsylvania Law Review*, vol. 133, no. 2, (1985): 497n53.

[51] Ronald Dworkin, "Is There A Right To Pornography?" *Oxford Journal of Legal Studies* 1, no. 2 (1981): 177-212.

[52] A number of feminist activists in the 1980's and 1990's found themselves fighting to re-owtlaw pornography. Scholars such as Catharine MacKinnon, David Dyzenhaus, and Rae Langhton did not support the Conservative premise that the state had a right to impose morality; rather, they argued that pornography should be constituted as a civil rights violation insofar as it fetishizes rape and contributes to the subjugation of women overall. Many anti-pornography activists ground their justification for censoring pornography in Mill's harm principle and Dworkin's equal liberty principle, claiming that pornography constitutes a direct harm to women and consequently inhibit's women's right to equal liberty. Catharine MacKinnon, "American Booksellers Ass'n, Inc. v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984)"; David Dyzenhaus, 'John Stuart Mill and the Harm of Pornography' *Ethics* 102(3) (1992): 534-51; Rae Langhton, "Whose Right? Ronald Dworkin, Women, and Pornographers." *Philosophy and Public Affairs* 19, no. 4 (1990): 311-59; Hoffman. "Feminism, Pornography, and Law."

way," or a middle ground between the two sides. Legal Interpretivism, Dworkin's philosophy, held that the lawmaking process was grounded in morality, since judges often invoke community ethics when adjudicating the law; to Dworkin, the "rule of recognition" does not separate a community's law from the moral rules which gave rise to it. Thus, in order to protect individual autonomy, Dworkin stressed the need for iron-clad rights, on which governments cannot infringe.

In accordance with his belief that pornography prohibitions violated the rights of pornographers and pornography consumers, Dworkin claimed that "we need rights, as a distinct element in political theory, only when some decision that injures some people nevertheless finds prima facie support in the claim that it will make the community as a whole better off…"[53] Much like Mill, Dworkin shared a concern over the "tyranny of the majority," which can impose its will on those whose actions it dislikes. But unlike Mill, Dworkin held individual rights, not utility, as the ultimate justification for restraining the government's power. Fitting with the increasingly liberal interpretation of law, advocates of legal pornography won the day, with anti-pornography statutes being ruled unconstitutional on a number of occasions.[54]

D. Contemporary Private Autonomy

The dominant legal conception of private autonomy has certainly shifted since the nineteenth century.[55] Once criminalized acts such as same-sex sex, viewership of pornography, and adultery are now widely practiced. Moreover, "from the standpoint of free speech, we have

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[53] Dworkin, "Is There A Right To Pornography?" 211.
[54] Christina Spaulding, "Anti-Pornography Laws as a Claim for Equal Respect: Feminism, Liberalism, and Community." *Berkeley Journal of Gender, Law & Justice* 4, no. 1. September 2013: 128-165; Stone, *Sex and the Constitution*, 264-293.
[55] Stone, Sex and the Constitution, 342.

seen a revolution in the realm of sexual expression."[56]. In this sense, Dworkin would be content that "The widely held assumption today is typically that which Supreme Court justices Hugo Black and William Douglass explained in their dissent to *Roth v. US*: there was never a legitimate constitutional justification for treating sexual expression as less 'valuable' a right than other forms of expression."[57] The Hart-Devlin debates set the stage for a massive transformation in constitutional interpretation in the second half of the twentieth century; in short, Hart won.[58]

Joel Feinberg, a liberal scholar writing in the 1980's, admits that on the surface, the narrowing definition of obscenity may suggest that the Court has adopted the harm principle as a means to adjudicate questions regarding the private sphere.[59] But he points out that the the Court has not extended the right to privacy to "couples living in 'open adultery', or to certain self-regarding but idiosyncratic life-styles, or to the use and cultivation of marijuana even in the 'sanctity' of one's own home…"[60] Seeking to explain this partial adoption of harm, Feinberg cites Justice Berger's opinion that the Court employed the right to privacy, "'only [with respect to] personal rights that can be deemed 'fundamental' or 'implicit' in the concept of ordered liberty…' The boundary line, in short, tends to follow, however erratically, the line of those liberties which are most fecund..." The Court's limits to autonomy are narrower than Feinberg's, who would permit all non-offensive (and some offensive) and non-harmful actions.

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[56] Ibid.
[57] Ibid.
[58] "Robert George observes that '[m]any, . . . perhaps even most, think that Hart carried the day.' Robert George, *Making Men Moral* (Oxford: Clarendon Press, 1993,) 65. Jeffrie Murphy likewise recalls that '[l]ike most good liberals I sided with Hart and [John Stuart] Mill against Devlin…I believed, along with most of the people with whom I talked about legal philosophy, that legal moralism had been properly killed off, that liberalism had once again been vindicated against the forces of superstition and oppression.' Jeffrie G. Murphy, "Legal Moralism and Liberalism," *Arizona Law Review* 37 (1995): 73,74-75. Joel Feinberg reports that it is "fair to say" that Devlin's position has been 'discredited'." Harcourt, Bernard. "The Collapse of the Harm Principle." *Journal of Criminal Law and Criminology* 90, no. 1 (1999): 125n51.
[59] Joel Feinberg, "Autonomy, Sovereignty, and Privacy: Moral Ideas in the Constitution." *Notre Dame Law Review* 58 (1983): 445-92.
[60] Ibid.

Steven Gey shares this wide conception of autonomy rights. Writing in 1995, Gey criticized the (pre-*Lawrence)* Court for ruling that the Constitution allows for laws based on morality alone.[61] Gey believes the opposite and advocates for a Constitutional principle that would require every government action to have a primary amoral purpose and effect. This would ensure that "political control of purportedly immoral beliefs, expression, and behavior would be permitted only if the immorality threatens some direct and particularized harm to others."[62]

But even if the right to privacy (albeit limited) has proliferated, legal moralism is by no means extinct. Various contemporary scholars continue to tout the merits of Devlin's philosophy, holding that laws can and should be based on morals. Gerald Dworkin (not to be confused with Ronald Dworkin) agrees with Devlin that morality is and should be a deciding factor in lawmaking.[63] He specifically appeals to Devlin's argument that morality can be a deciding factor in determining law, even if in many situations a society may decide not to criminalize certain immoral actions. Moreover, he argues that liberals such as H.L.A Hart and Joel Feinberg unwittingly support this position insofar as they propose legal restrictions in situations where direct harms do not apply.[64] Dworkin concludes that while not all morally laudable actions ought to be illegal, an action's immorality is sufficient to bring it within the purview of the law.

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[61] Steven Gey. "Is Moral Relativism a Constitutional Command?" *Indiana Law Journal* 70, no. 2 (2005.) 331-404. While the "Moral Insufficiency Docrtine" articulated in *Lawrence* would come to officially challenge that belief, Gey nonetheless provides an account of anti-moralist Constitutional scholarship. Lawrence v. Texas, 539 U.S. at 558 (2003.)

[62] Ibid, 404.

[63] Gerald Dworkin, "Devlin Was Right: Law and the Enforcement of Morality." *William and Mary Law Review* 40, no. 3 (1999): 927-946.

[64] "A few of my favorite things that have been criminalized include the following: dwarf-tossing, informational blackmail (the threat to reveal true information about the sordid past of a reformed person,) the sale of one's heart (for transplantation,) and consensual slavery," Dworkin, "Devlin Was Right," 942. Also see S.D Smith, "Is the Harm Principle Illiberal?" *The American Journal of Jurisprudence* 51, no. 1 (2006): 1-42. doi:10.1093/ajj/51.1.1.

But legal moralism remains alive even after *Lawrence v. Texas* solidified the Constitutional right to privacy.[65] Rick Kozell, a conservative legal theorist, argues that moral claims lie at the heart of law: "Despite the vast differences that have existed between civilizations throughout human history, nearly all have shared one thing in common: they have all relied upon moral judgments as the foundation for their most important and most fundamental governing principles."[66] He focuses his argument on the Court's decision in *Lawrence*, which declared sodomy laws unconstitutional; specifically, he argues against the "moral insufficiency doctrine" (a principle formulated in *Lawrence*,) which dictates that morality is not a sufficient basis for criminalization.[67] Kozell believes that the moral insufficiency doctrine is an incorrect reading of *Lawrence,* partially because it did not explicitly overturn countless cases embracing the use of majoritarian morals in lawmaking. Given said precedent, morality remains a constitutionally valid reason to support a law. Kozell does not differentiate between the public and private spheres, arguing that majoritarian morals are and should be sufficient grounds for restricting autonomy (both in private and public.)

Private individual autonomy has greatly expanded since the mid-twentieth century. Public morality as a justification for regulating the private sphere, has largely been supplanted by the right to privacy; legal moralism saw its greatest blow in the "moral insufficiency doctrine" established in *Lawrence*. While the Court's position may be closer to liberalism than to legal moralism, it has not completely adopted a harm-based conception of law, and moralists continue to contend that laws ought to be grounded in morality. Liberalism is winning the debate

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[65] Rick Kozell, "Striking the Proper Balance: Articulating the Role of Morality in the Legislative and Judicial Processes." *American Criminal Law Review* 47 (Fall 2010): 1,555-1,575; Lawrence v. Texas, 539 U.S. at 558 (2003.)
[66] Kozell, "Striking the Proper Balance," 1,555.
[67] Ibid.

regarding private autonomy, its main attack against moralists centering around the idea that non-harmful actions cannot be restricted. But when those acts leave the private sphere, potentially affecting others' interests, the liberal position is not as cohesive.

III. Individual Autonomy in Public

In the late twentieth century, the Supreme Court adopted a constitutional right to privacy and gradually expanded it to cover more private actions; this established limits to state regulation of private actions. But what about those actions which are not private? Liberal theorists presume an inherent distinction between the public and private spheres. While in private, the individual has all but complete autonomy (they act as an individual,) the individual in public must act as a "citizen"; that is, the individual, upon entering the public sphere, is subject to certain constraints in order to ensure the good of society.[68] For certain public actions, governments often employ what has been called "mandatory privacy" regulations, a legal requirement that individuals keep certain actions in the private sphere (those actions are prohibited in the public sphere); mandatory privacy regulations are often employed with regards to actions that others find offensive or unappeasing.[69] Scholarly positions on the limits of public autonomy are far more complex than in private: the main debate is not merely between legal moralists and liberals but also within the latter, with liberal opinions ranging on a spectrum from most to least restrictive. This section proceeds accordingly: I first explore how the Supreme Court has expanded the public sphere through two landmark court cases, ruling that a community's desire to regulate

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[68] See Seyla Benhabib "Models of Public Space: Hannah Arendt, the Liberal Tradition and Jürgen Habermas." *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (Cambridge, UK: Polity Press, 1992): pp. 89–114. Also see Ruth Gavison "Feminism and the Public/Private Distinction." *Stanford Law Review*, vol. 45, no. 1 (1992.)

[69] Lawrence M Friedman and Jenna Grossman. "A Private Underworld: The Naked Body in Law and Society." *Buffalo Law Review*, vol. 61, (2013): 169-214.

potentially-offensive messages is not a sufficient justification for proscribing certain actions. This expanded public sphere leaves open the question of *when* and *which* public actions can be restricted. In order to explore this issue in greater depth, I review the liberal literature on when the state is entitled to enforce mandatory privacy restrictions.

A. The Supreme Court and Public Offense

First Amendment scholar Geoffrey Stone marks two Supreme Court cases that redefined the limits of public autonomy: *Cohen v. California* (1971) and *Erzodnik v. Jacksonville* (1975.)[70] In *Cohen,* the Court ruled that offensive language, insofar as it was not directed at anyone and was a means to assert a political message, could not be banned in public.[71] When Paul Cohen entered a Los Angeles Courthouse wearing a jacket displaying the words "Fuck the Draft," he was subsequently arrested for "disturbing the peace." Justice John Marshall Harlan boiled down the issue to one of morality, not of harm, when he claimed that the real issue being examined was

> whether California can excise, as 'offensive conduct', one particular scurrilous epithet from the public discourse, either upon the theory...that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.

The Court ruled that Cohen had a right to wear his jacket in public, since protecting the public from offense did not outweigh Cohen's right to free expression; if individuals were offended by the display of the word "Fuck," it was their responsibility to look away. The burden of protecting oneself and one's children from offense shifted from the actor to the viewer, a major departure

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[70] Stone, *Sex and the Constitution*, 315-317; "Erznoznik v. City of Jacksonville 422 U.S. 205 (1975); Cohen v. California 403 U.S 15 (1971.)

[71] The case was weighed by a test laid out by U.S v. O'Brien 391 U.S. 367 (1968,) 376-377. The test established when governments could establish content-neutral restrictions.

from moralist lawmaking.[72] Essentially, *Cohen* established that an individual's right to display a political statement trumped another's right not to be offended.

The Court further extended *Cohen's* principle to publically-displayed nude images in *Erzodnik v. Jacksonville* (1975.) A Jacksonville drive-in theatre was convicted of violating a local law which declared that movie theatres could not show movies containing nude images if the screen was visible from the public street. But the Supreme Court ruled that since nudity was not obscene, and since the law was not narrowly tailored to increase public safety, it discriminated against the nude image. As in *Cohen*, the court ruled that it was the passerby's responsibility to "divert his gaze" if they were morally offended by nudity. The implications of *Erzodnik* cannot be overstated: *Erzodnik* established that the perception that nudity was immoral was not sufficient to outlaw its display in public.[73] The majority's redefinition of the public sphere was vehemently opposed by the dissent. Justice White explained his frustration that this understanding of the public sphere allowed for limited protection from offense. "If this broadside is to be taken literally, the State may not forbid 'expressive' nudity on the public streets, in the public parks, or any other public place, since other persons in those places at that time have a 'limited privacy interest,' and may merely look the other way."[74] Whereas anything harmful to public sensibilities was once restrictable under the umbrella of public morals, governments increasingly needed to prove explicit harms in order to restrict public autonomy.

Stone notes that *Cohen* and *Erzodnik* "make clear that perhaps in exceptional circumstances, the government cannot constitutionally ban non-obscene sexual images or words

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[72] A number of cases would follow this logic. See Texas v. Johnson 491 U.S. 397 (1989); U.S v. Eichman 496 U.S. 310 (1990); Virginia v. Black, 538 U.S. 343 (2003); United States v. Playboy Entertainment Group, 529 U.S. 803 (1996.)
[73] While the movie theater was technically private property, its visibility from the street made it a public question.
[74] *Erzodnik*, 212.

in public in order to protect the sensibilities of either adults or children…"[75] While cases like *Erzodnik* and *Cohen* may suggest a greater legal openness to taboo language or publically displayed nude images, Stone explains how this legal tolerance has not extended to all non-obscene actions, namely public nudity (although Justice White believed that based on *Erzodnik*, public nudity could be constructed as a legal right.)[76] The Court has argued that public nudity can be outlawed because it constitutes a harm to public sensibilities.[77] One explanation is that the Court continues to be guided by moral conceptions of the good; bans on public nudity assume that people should be clothed in public, and that the blow to autonomy is less important than protecting the public from offense.[78] This apparent contradiction (which is the subject of chapter four) leaves one hungry for a legal principle that articulates when governments can restrict public actions; in order to locate such a principle, we must first examine how different theorists have outlined the limits of public autonomy.

B. Theoretical Approaches to Public Autonomy

Scholarly opinions on the legal limits of the private sphere fall into a binary: legal moralists and liberals fundamentally disagree on whether governments have a right to regulate "immoral" private actions. But with respect to the public sphere, the liberal position is split; while to moralists, an action's publicity does not alter its restrictability, the liberal position fractures into

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[75] Stone, Sex and the Constitution, 316-317.
[76] Ibid. See also n. 73.
[77] See Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) at 568; and City of Erie v. Pap's A. M., 529 U.S. 277 (2000,) at 296-298; For more on how Court ruling on privacy may unwittingly open the door toward "domesticated liberty," specifically with regard to Lawrence v. Texas, see Franke, Katherine M. "The Domesticated Liberty of Lawrence v. Texas." *Columbia Law Review* 104, no. 5 (2004): 1399. This framing in terms of harm follows Bernard Harcourt's argument. Harcourt argues that the "harm" has become so ingrained in the dominant discourse that it is effectively "collapsing under the weight of its own success"; moralists are constructing language of harm in ways that it was not originally intended to be applied. See Harcourt, " The Collapse of the Harm Principle."
[78] Anita Allen, "Disrobed: The Constitution of Modesty." *Villanova University Law Review* 51, no. 4 (2006.) Anthony Ellis, whom I later discuss, believes that prohibitions on public nudity violate liberal principles, which require the Constitution to not legislate based on social constructs.

three different camps. The binary becomes a quadripartite spectrum, ranging from legal moralists, who believe that an action's immorality is sufficient to justify restricting it, to permissive liberals, which, as the name suggests, are willing to permit all rational actions in public.

As mentioned above, legal moralists like Stephen, Devlin, Bork, Kozell, and Gerald Dworkin believe that governments can restrict all actions which the community finds immoral. [79] For moralists, the public-private distinction does not exist, given that unpopular actions can be regulated regardless of where they take place.[80] Most proponents of the harm principle would deny the tenets of legal moralism—that an action's immorality is sufficient to justify restricting it. Liberal theorists presume a public-private distinction. The private sphere, for liberals, is a space in which the individual has all but complete autonomy insofar as their actions do not hurt others. But liberal scholars are divided as to what the limits of public autonomy should be, particularly on how much offense can weigh in legal judgments. The first group of liberals, who do not hold individual rights as the ultimate justification for personal autonomy (unlike the two latter groups,) believe that as soon as an action enters the public sphere, the community's offense is sufficient to justify regulation; I refer to these scholars as "restrictive liberals," given that they easily defer to offense claims when adjudicating which actions can be restricted. The second group of liberals, whom I call "interest-balancing liberals," agree that certain actions can be restricted to protect the community from offense, but draw clear limits on which actions qualify. "Permissive liberals," largely critical of the aforementioned groups, believe that restrictive and

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[79] Stephen, *Liberty, Equality, Fraternity*; Devlin "The Enforcement of Morals.," Bork, "Neutral Principles and Some First Amendment Problems; Kozell, "Striking the Proper Balance," and Dworkin, "Devlin Was Right."
[80] Alan Freeman and Elizabeth Mensch. "The Public-Private Distinction in American Law and Life." *The Buffalo Law Review*, vol. 36, no. 237 (1987): 256.

interest-balancing liberals place too much weight on public sentiment, given that the perceived offensiveness of certain actions is often rooted in the way that said acts are constructed; they consequently believe that all actions that are not irrational or intrinsically offensive, regardless of what individuals think, ought to be permitted.

Restrictive liberals believe that as soon as an action enters the public sphere, the offense that it causes is a restrictable harm; the offense is sufficient to warrant outlawing it. As previously mentioned, John Stewart Mill, who coined the harm principle, believed that an action's immorality was not sufficient to justify its proscription. Nonetheless, Mill argued that as soon as an action enters the public sphere, it immediately becomes the concern of society. While Mill believes that private harmless actions are outside of the purview of social regulation, he draws a clear distinction between the private and public spheres: "there are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners and, coming thus within the category of offences against others, may rightly be prohibited."[81] Perhaps it the Harm Principle's utilitarian foundation, the belief that society's welfare is the ultimate justification for individual autonomy, that guides Mill's reluctance to allow offensive actions in public.

H.L.A Hart draws a similar public-private distinction to Mill. While Hart argued adamantly for the legalization of private same-sex sex on the grounds that it was harmless, he adopts a wholly different perspective toward the public sphere. For instance, Hart argues in favor of prohibitions on *public* homosexual sex. "Sexual intercourse between husband and wife is not immoral, but if it takes place in public it is an affront to public decency. Homosexual intercourse

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[81] Mill, *On Liberty*, 94.

between consenting adults in private is immoral according to conventional morality, though not an affront to public decency, though it would be both if it took place in public."[82] This belief that public sex should be outlawed to protect public sensibilities is supported by philosophers like Joel Feinberg (who I discuss later.) But what sets Hart's perspective apart from Feinberg's is that while Feinberg makes an effort to balance offences in public, Hart seems to imply that any actions that society finds offensive can *always* be banned from the public sphere. This is most evident in his belief that societies have a right to prohibit bigamous marriages on the grounds that such marriages might offend the majority of society; since marriage is a public act, a society with a deep religious commitment to monogamous marriage has a right to prohibit bigamy not because it is immoral but because it is offensive.[83] Hart declares that immorality does not justify illegality; but this conception of individual autonomy almost completely falters when the action occurs in public. In the same way as Mill's utilitarian focus undercuts his willingness to allow for individual autonomy in public, the fact that Hart's doctrine is not based on individual rights limits his willingness to allow offensive actions in public. Hart, unlike Dworkin, did not emphasize individual rights as a safeguard against government encroachment but rather believed that all actions permitted by the rule of recognition ought to be allowed. While a society cannot selectively restrict actions which the rule would otherwise allow for, the rule of recognition itself can restrict individual liberty for the sake of the public good. So while the private sphere should be free from state interference, governments can restrict public actions which the majority finds offensive.

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[82] H.L.A. Hart, *Law, Liberty and Morality*, (Stanford University Press, 1963) 43, as cited by Anthony Ellis, "Offense and the Liberal Conception of the Law." *Philosophy & Public Affairs* 13, no. 1 (1984): 3.
[83] Ibid. As cited by Burt, Robert A. "Moral Offenses and Same Sex Relations: Revisiting the Hart-Devlin Debate." *Yale Law School Legal Scholarship Repository*, (2004.)

Interest-balancing liberals, while admitting that certain actions can be restricted because the public finds them offensive, formulate principles for determining which actions qualify as "offenses." More broadly, they attempt to balance the individual right to expression with others' rights not to be offended. One of the most prominent scholars on public offense, Joel Feinberg, holds this position. Feinberg (briefly mentioned in the previous section,) a disciple of Mill, aimed to provide a legal rationale for determining which actions should be allowed in public.[84] At the core of Feinberg's legal philosophy lie two principles: the harm principle and (his addition) the "offense principle." Feinberg's offense principle holds that "It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end." [85] But Feinberg does not believe that all perceived offenses should fall within the purview of the state. He lays out a complex formula for determining what counts as an offense, which includes (among other criteria) how important the action is to the individual and its social value; in such situations, the action's offensiveness is trumped by other considerations.[86] In order to illustrate the need for his offense principle,

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[84] Feinberg, Moral Limits of the Criminal Law.
[85] Feinberg, Moral Limits of the Criminal Law, 1.
[86] "1. *Personal importance*. The more important the offending conduct is to the actor, as measured by his own preferences and the vitality of those of the actor's own interests it is meant to advance, the more reasonable that conduct is.
2. *Social value*. The greater the social utility of the kind of conduct of which the actor's is an instance, the more reasonable is the actor's conduct.
3. *Free expression* (A corollary of 1 and 2.) Expressions of opinion, especially about matters of public policy, but also about matters of empirical fact, and about historical, scientific, theological, philosophical, political, and moral questions, must be presumed to have the highest social importance in virtue of the great social utility of free expression and discussion generally, as well as the vital personal interest most people have in being able to speak their minds fearlessly. No degree of offensiveness in the expressed opinion itself is sufficient to override the case for free expression, although the offensiveness of the manner of expression, as opposed to its substance, may have sufficient weight in some contexts." Feinberg 198, 44.)
4. *Alternative opportunities*. The greater the availability of alternative times or places that would be equally satisfactory to the actor and his partners (if any) but inoffensive to others, the less reasonable is conduct done in circumstances that render it offensive to others.

Feinberg proposes a thought experiment: imagine riding on a bus where others are doing things ranging from vomit-eating to masturbation to not wearing clothing; he argues that such universally offensive acts must be illegal because they are offensive to others. But not all potentially-offensive acts should be restricted. For instance, if interracial hand-holding triggers offense, "we should be loath to permit their groundless repugnance to outweigh the innocence of the offending conduct."[87] Through his offense principle, Feinberg aims to provide a more tailored version of the harm principle as it relates to balancing individuals' interests in the public sphere.

Feinberg's stance on public nudity exemplifies his understanding of public restrictability.[88] Feinberg concedes that the unrestricted harm principle may prevent the government from proscribing public nudity on the grounds that it "does no one any harm, and the state has no right to impose standards of dress or undress on private citizens."[89] Nonetheless, according to Feinberg, that a naked body triggers almost universal embarrassment allows society to regulate it. Feinberg's offense principle goes beyond the unrestricted harm principle by allowing the state to regulate non-harmful offensive actions in public.

Donald Vandeever reviews the debate between Feinberg and Michael Bayles (whom I later discuss,) evaluating a number of criteria formulated to adjudicate which actions should be

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5. *Malice and spite*. Offensive conduct is unreasonable to the extent that its impelling motive is spiteful or malicious. Wholly spiteful conduct, done with the intention of offending and for no other reason, is wholly unreasonable. Especial care is required in the application of this standard, for spiteful motives are easily confused with conscientious ones.
6. *Nature of the locality* (A corollary of 4.) Offensive conduct performed in neighborhoods where it is common, and widely known to be common, is less unreasonable than it would be in neighborhoods where it is rare and unexpected." Feinberg, *Moral Limits of the Criminal Law,* 44.

[87] Feinberg, Moral Limits of the Criminal Law, 26.
[88] Joel Feinberg "Hard Cases for the Harm Principle." *Social Philosophy*, (Prentice-Hall, 1973.)
[89] Ibid, 44.

permitted in public.[90] After evaluating a number of principles laid out by both Feinberg and Bayles, Vandeever rejects Feinberg's "standard of universality" (a principle proposed in Feinberg's earlier works, which Feinberg later rejects) and his formulated (based on Bayles) "standard of reasonableness," where an action's restrictability is determined by the rationality of the person performing the action. He does accept a number of standards, however; these include the (self-explanatory) "standard of permissiveness toward conscientious offenders," the "standard of reasonable restraint" (whether individuals can avoid the action,) and the "standard of reasonable avoidability" (which weighs whether the action being done in public can be done elsewhere.)

Meital Pinto also contends that certain actions may be restricted if they offend others. Unlike the first group (all public offenses can be limited,) however, Pinto does not suggest that an action being offensive for a group of people is sufficient to justify restricting it.[91] Pinto, focusing on group rights, devises a criteria for when a group's offense can justify restriction; she calls this principle the "vulnerable cultural identity principle." Under this principle, which aims to "avoid the problems of legal moralism," offensive actions should be prohibited when they threaten the cultural integrity of a vulnerable group; the more vulnerable a group's culture is, the greater its claim to protection from offense. For instance, France's ban on the burka in public spaces would fail the test, because it allows a majority to sanction the culturally-significant actions of a vulnerable minority. Conversely, in "minority against majority" cases, such as the case of the 2005 Danish controversial cartoon drawing of Mohammed, "members of the minority

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[90] Donald Vandeever, "Coercive Restraint of Offensive Actions." *Philosophy and Public Affairs* 8, no. 2 (1979): 175-93.
[91] Pinto, "What Are Offences to Feelings Really About?" (see n. 3.)

possess a vulnerable cultural identity, thus their claim from integrity of cultural identity is culturally strong."[92] While Pinto, unlike Feinberg and Vandeever, focuses on offenses directed at particular groups, she nonetheless agrees that offenses, whether morally-based or not, must follow some criteria which weighs the interests of the parties involved.

Permissive liberals dissect the moral undertones that guide what is considered an "offense," contending that under liberal doctrine, offenses based on morality cannot guide which actions are restricted. Mostly critiquing Feinberg, these theorists deny that the beliefs or interests of the public are a suitable guide for determining which actions count as offensive.

Larry Alexander criticizes Feinberg's offense principle, arguing that it inevitably collapses into legal moralism.[93] Feinberg claims that offensive conduct may not be criminalized if the value of expressiveness (for the person committing the offense) is greater than the offense it causes to others. Alexander believes, however, that such value judgments presume that the majority's moral convictions supersede individual interests; by weighing interests, Feinberg accepts the illiberal premise that the majority's desires can outweigh an individual's right to self-expression. Alexander argues that

> Even if we deem all correct norms of personal behavior to be norms of correct social behavior, we have no legitimate interest in enforcing these norms against violators. On a desert island we would have many things, but we would not have the comfort of knowing that others, on their desert islands, were living according to norms and ideals we hold.[94]

Alexander criticizes Feinberg's delineation of which actions can be restricted, suggesting that liberal doctrine does not permit value-judgments or legal decisions based on private interests.

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[92] Ibid, 699.
[93] Larry Alexander, "Harm, Offense, and Morality." *Canadian Journal of Law and Jurisprudence* vol. 7, no. 2 (1994): 199-216.
[94] Ibid, 215.

Michael Bayles, who argues that only *unreasonable* public actions can be regulated, draws a narrower critique.[95] He accepts the offense principle but argues that Feinberg places too much weight on the nature of the offense caused rather than on the reasonableness of the offense in question. Specifically, he refutes Feinberg's assertion that public nudity ought to be prohibited because of the feeling of shame that it causes others; Feinberg claims that the the offense caused by "a nude person entering a public bus" may be dictated by the amount of nudists present on the bus. The issue with this is that in arguing that the beliefs of the riders dictate whether nudity is offensive, Feinberg admits that the majority's sentiment may justify restricting otherwise-reasonable actions. For Bayles, public nudity is not unreasonable for "It might help people overcome psychological neuroses about sex." [96] The interests of the majority should not dictate which offensive actions should be prohibited; outside of unreasonable actions, offense does not justify curbing autonomy.

Anthony Ellis also critiques Feinberg's understanding of which public actions can be outlawed, arguing that Feinberg allows public morality to guide regulations.[97] Discussing what qualifies as an offense, Ellis argues that "feelings, however un- pleasant, which are the expression of a moral view, cannot so count either. If they were allowed to, then, again, the Harm Condition would have no force at all; it would allow the sorts of law which it was centrally intended to exclude."[98] For Ellis, Feinberg's contention that public nudity and sex can be restricted contains ingrained normative judgments, which would proscribe certain actions merely

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[95] Joel Feinberg, and Michael Bayles. "Third Symposium." In *Issues in Law and Morality*, (Cleveland: The Press of Case Western Reserve University, 1973,) 83-140.
[96] Ibid, 118-119.
[97] Ellis, "Offense and the Liberal Conception of the Law."
[98] Ibid, 9.

because they are taboo. Ellis separates Feinberg's offenses into two categories: 1. those that are repulsive in themselves (such as vomit-eating and public defecating) and 2. Those that are repulsive because they contravene norms of accepted behavior (public sex and public nudity.) Ellis admits that the first may reasonably be prohibited under a liberal concept of law, seeing as they "are intrinsically unpleasant to observe, and that is why the standard which prohibits it has grown up"; this standard resembles Bayles' "reasonableness" standard (which he adopts from Feinberg.) In contrast, public nudity and public sex are illegal merely because of the social understanding that people ought to wear clothes and not display affection in certain places. Feinberg justifies prohibitions on public indecency on the grounds that they cause shame and embarrassment to those who observe them, even though not all such actions should be illegal. Ellis attributes this inconsistency to the cultural taboo placed on sex and the body.

> Why single out the embarrassment caused by indecency? There is no reason to think it more widespread or more intense, or easier to legislate against. In my view, the reason is that our attitude to indecency has a pronouncedly moral dimension, and that seduces us into thinking that the embarrassment it causes is of some special significance. Indeed, perhaps from some points of view it is. But from the point of view of the liberal conception of the law it cannot be. It is merely embarrassment.[99]

Ellis argues that under liberal doctrine, actions which cause offense merely because society has constructed them as such cannot be prohibited. If one accepts Ellis' criticism, perhaps Feinberg's inability or unwillingness to separate his taught cultural biases reveals an element of moralism present in his philosophy.

While the theoretical position on private autonomy placed liberals and legal moralists in direct opposition, the issue of mandatory privacy restrictions turns the binary debate into a spectrum. Restrictive liberals, who's justification for liberalism is not rooted in individual rights,

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[99] Ibid, 19.

find themselves holding a similar position to moralists: all offensive public actions can be proscribed (albeit for different reasons.) Nonetheless, the latter two groups, who use individual rights to justify liberalism, argue that at least *some* offensive actions cannot be restricted in public. Interest-balancing liberals deny that *all* public offensive actions can be restricted but nonetheless allow restrictions to be based on socially-constructed notions of offense; permissive liberals, in contrast, argue that a behavior must be intrinsically offensive or unreasonable (outside of public perception) if it is to be restricted. While scholars' justification for liberalism does not define their position on the legal limits of public autonomy, their foundation may nonetheless impact their understanding of which actions can be prohibited in public; I return to this issue in Chapter Three.

IV. Question, Case Study, and Chapter Progression

The aforementioned debate triggers questions about how publicness impacts legality. If we accept that governments can proscribe certain public actions in order to prevent offense, how do we decide *which* actions can be restricted? For example, if public nudity can be restricted because the sight of it is offensive, should interracial hand-holding in 19th Century Alabama (which would certainly have been universally offensive) also have been illegal?[100] Of course, according to Feinberg, the hand-holding should have been permitted because the expressive value outweighed the offense; but such a judgment might be shaped by the normative belief that interracial affection is more expressive than it is offensive. Weighing these various interests raises questions about where the burden of restriction should lie: when do individuals have to alter their behavior and when does the public need to be more open-minded? My question for

[100] Feinberg, Moral Limits of the Criminal Law, 25.

this thesis is as follows: *How should the public-private distinction, particularly with respect to the "public sphere," impact which actions can be proscribed?*

As Geoffrey Stone explains, the Supreme Court's interpretation of the Constitution is far more in line with the liberal harm principle (in the private sphere) than with legal moralism; Hart's philosophy has won.[101] Accordingly, I seek to explore the limits of public autonomy under liberal theory and Constitutional precedent respectively. I address this issue in two cumulative parts. The first part of the argument concerns the former and will be explored in the third chapter: I ask when offense is a valid reason for restricting autonomy in the public sphere under liberal doctrine. After answering this question, we must, in the chapter which follows, see whether U.S law (the parameters of which are delineated by the Constitution) adheres to liberal doctrine: I ask whether the current interpretation of the United States Constitution adheres to liberal doctrine (with respect to the public sphere). Answering these questions will provide a fuller picture of the relationship between liberal theory, the public sphere, and the Constitution. In my final chapter I use these answers to assess liberal theorists' assumptions about power, autonomy, and the role of law.

In order to examine such wide-sweeping questions, it is necessary to choose a case which reveals the limits of offense. Since I focus on the legality of non-harmful offensive acts, the behavior to be examined must be "offensive" solely because of others' reactions to it; the action performed must not be intrinsically offensive, and the feeling of offense that others feel must be the product of a socially-taught morality.

Feinberg's public nudity example perfectly fits the criteria.[102] Feinberg explains that

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[101] Stone, Sex and the Constitution, 342.

[102] Public nudity refers to being unclothed in public for its own sake. The purpose of this behavior is not to sexually arouse or sexually harass the public; individuals go about their normal business without covering their bodies. It also

public nudity --and by this I refer to being unclothed for its own sake (not with the intent of provoking or harassing others)-- is only harmful because of the offense it causes. If Feinberg is correct, then the question of whether public nudity can be prohibited would bring out fierce debate between the liberal theorists discussed in this chapter. Restrictive liberals might argue that it is irrelevant whether nudity is constructed, since social disapproval is sufficient to outlaw actions in the public sphere. For interest-balancing liberals, the offense that public nudity causes would have to be weighed against the individual's right to autonomy. For permissive liberals, law cannot enforce social constructs, and consequently, governments cannot outlaw public nudity. Throughout this thesis, I use the case of public nudity to lead the reader toward larger questions about individual freedom in the public sphere.

This thesis proceeds accordingly: the second chapter uses a Foucauldian account of power to explain how the body (in public) is constructed as taboo (as nude.) In exploring how nudity is constructed, I encounter an account of power which contradicts liberal theorists' focus on (negative) law. This helps contextualize the liberal account of power adopted in Chapters Three and Four, which respectively address the limits of public autonomy under liberal theory and the U.S Constitutional law (I explore this through the example of public nudity.) In the fifth chapter, I review the previous two chapters' findings, addressing the tension between liberals' assumptions about power and the Foucauldian discourse which constructs the body. Charting the positions of many critics of liberalism, I raise broader questions about the "liberal conception of law" and the public-private distinction altogether.

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excludes explicitly political states of undress such as nudity for the sake of protest, given that being undressed in such a situation is typically legally classified as a vehicle by which to convey a political message rather than a mere state of being. In the majority of states, public nudity defined as such is classified as "public indecency." See Friedman and Grossman, "A Private Underworld."

2: Constructing and Regulating the Body

The previous chapter looked at the debate over the limits of the public sphere, particularly between liberal theorists. Whereas restrictive liberals believe that actions which the majority finds offensive can always be restricted in public, interest-balancing liberals attempt to balance individual expression with public offense. For permissive liberals, the fact that the majority of society finds an action offensive is irrelevant, given that the majority's opinion should not be a factor in determining legality. We also reviewed the Supreme Court's current position with regards to liberalism and its application in the public sphere. Whereas in the private sphere, the Court offense.[1]

To restrictive liberals, who believe that an action's offensiveness is sufficient to justify regulating it in public, it may be irrelevant whether nudity is what Anthony Ellis calls "intrinsically offensive."[2] For interest-balancing liberals, the fact that nudity is not intrinsically offensive should be weighed against the public's interest and adjudicated according to a formulated principle. But if nudity is merely offensive because it "contravenes some accepted…standard of appropriate behavior," permissive liberals would argue that governments have no right to legally prohibit it.[3]

The question of whether and when public nudity can be proscribed speaks to the larger

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[1] See Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) at 568; and City of Erie v. Pap's A. M., 529 U.S. 277 (2000), at 296-298.
[2] Anthony Ellis, "Offense and the Liberal Conception of the Law." *Philosophy and Public Affairs*, vol. 13, no.1. (1984): 2-23.
[3] The Supreme Court seemingly affirmed this understanding in *Erzodnik,* when it ruled that "nude" images could no be restricted without a valid reason.

question of whether actions can be prohibited (in public) based on the offense that they cause. Consequently, public nudity is a fitting example through which to explore larger questions of the legal limits of the public sphere. To fully understand public nudity restrictions, we must examine how nudity is constructed and the relationship between this construct and the laws prohibiting it. This sets the stage for a theoretical and constitutional assessment of public nudity's proscription under liberal doctrine and, ultimately, an assessment of liberal doctrine altogether. This chapter is divided into two sections (the second of which is composed of two sub-sections): the first section breaks down the taboos surrounding exposure using sociological literature on the body. The second section looks at the body through a Foucauldian lens, examining *how* the body is constructed as *nude*; I argue that the nudity's legal circumscription to the private sphere stems from and reinforces the social discourse that constructs it as such it. The Foucauldian approach to power described in this chapter goes beyond that of liberal theorists discussed in the previous chapter; understanding the operations of Foucauldian power sheds a new light on the relationship between power, the body, and the law.

I. The Naked/Nude Body

This section explores the nature of *nudity* and the "body taboo" associated with it; I argue, as Howard Warren does, that *nudity*, as opposed to *nakedness,* is a constructed state stemming from the body taboo.[4] I use sociological literature on the body to better understand how the unclothed body is constructed in western society. By understanding the role of cultural perceptions in constructing nudity, one can better see the cultural foundations of legal place restrictions surrounding it.

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[4] Howard Warren, "Social Nudism and the Body Taboo." *Psychological Review* 40, no. 2 (1933): 160-183.

Psychologist Howard Warren discusses the "instinct to cover one's body, which exists across most cultures."[5] He understands why modern society might wear clothing as protection from the elements but questions its necessity in situations where it may be constraining (activities like sunbathing, swimming or athletics); this drive to wear clothing when not necessary stems from what he calls "the body taboo." This taboo is premised on the idea that to seeing a member of the opposite sex without clothing is necessarily sexual. He explores two fundamental questions: "1) Is the traditional taboo of the human body an inherent factor in human nature?" and "2) Is social exposure of the body indecent or obscene, as the general opinion and laws of most civilized lands insist?"[6] In visiting a nudist camp in Denmark, Warren found that "the body taboo sheds quite easily there, and that there exists a context in which the exposure of one's genitals is not lewd. Consequently, Warren concludes, "The most striking phenomenon in the life at a nudist park is that this taboo disappears almost at once, and without any detrimental effect to one's world-view or morals. One quickly realizes that the human body is not indecent."[7] Warren highlights how the body it not intrinsically indecent, it is constructed as such. Warren subsequently calls for society to abandon clothing, thus working to stripping the body of its nude construction.

Phillip Garr-Gomm differentiates *nakedness* from *nudity*. Nudity refers to being unclothed for the purpose of being watched; someone is nude if they are unclothed for a protest, a performance, or to convey an erotic message. Nakedness, in contrast, refers to being unclothed for its own sake: one is naked when in the bathroom, during intimate relations or when one is

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[5] Warren, "Social Nudism and the Body Taboo." Although Warren's article was published in 1933, his argument that the body taboo is socially constructed is relevant insofar as the body taboo continues to exist.
[6] Ibid, 167.
[7] Ibid, 180.

born; in places where it is acceptable, individuals can even be naked when sunbathing in public parks.[8] Perhaps John Berger put it best when he claimed "To be naked is to be oneself. To be nude is to be seen by others and yet not recognized for oneself. A naked body has to be seen as an object in order to become nude."[9] The naked-nude dichotomy hints at the various meanings that can be assigned to the same state of undress. In situations where one is expected to be unclothed, such as when one is showering in a locker room or having sex, one is merely naked; but the same person in the same state of undress would be *nude* if they walked into a place where being undressed is not expected. Nudity as such is a relative state, which hinges more on social perception than one's absolute state of dress.

The nude-naked distinction is a prominent theme of this chapter, and it is consequently important to explain how I use these terms throughout. I use the term *nude* insofar as their body is perceived as indecent, a state associated with the "body taboo."[10] The term "public nudity" is thus fitting, given that social taboos governing *where* and *when* individuals can be unclothed make the body nude in the public sphere. Similarly, I refer to *nudist* communities as such because, as I argue in Section Two, they continue to be subject to social regulation.[11] Understanding the naked-nude distinction throughout this chapter is crucial if one is to comprehend how the former is constructed and subsequently legally regulated.

Ruth Barcan argues that *nudity* "exists only in recognition by others,"[12] believing that "it is best defined as a psychological trait—a state of feeling exposed…"[13] In contrast, she sees nakedness as a symbol of "the raw human being, the human being outside of culture, time, and artifice."[14] Barcan takes the idea of the unclothed body beyond the traditional dichotomy of dress

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[8] Philip Carr-Gomm, *A Brief History of Nakedness* (London: Reaktion Books, 2013), 7.
[9] John Berger, *Ways of Seeing* (London: British Broadcasting Corporation, 2008). 9.
[10] Warren, "Social Nudity and the Body Taboo."
[11] While Berger and Carr-Gomm's naked-nude distinction plays a key role in this chapter, it is not universal in nudist scholarship, and a number of the writers that I quote conflate the two terms. When a writer uses both the terms *nakedness* and *nudity*, I will explain their use of the terms in a footnote.
[12] Ruth Barcan. *Nudity: A Cultural Anatomy* (Oxford: Berg Publishers, 2006), 23.
[13] Ibid.
[14] Ibid, 72.

(clothed) and undress (nude), arguing that one can be *nude* without actually being completely unclothed; nudity, for Barcan, depends more on the way that one's state of dress is constructed than on the amount of clothing worn.[15] For instance, Barcan notes how it is normal for a woman to wear a revealing bikini top at the beach or, even in public. Yet wearing a bra, even if less revealing, is seen as indecent, making a woman nude.[16] Similarly, Barcan explains how men may be unclothed in each other's presence without stigma (and vice versa), but those men become nude (their unclothed bodies would become taboo) if women are present in said changing room. The aforementioned examples portray nudity as a state primarily shaped by socially constructed notions of decency and indecency, which hinge on *where* one can be unclothed.

This idea that nudity does not refer to an intrinsically unacceptable physical state—that it exists in relation to social understandings of decency (it is socially constructed)—is also made evident by the fact that "nudity" can, in different time periods, refer to different physical states. Carr-Gomm explains how "In the Victorian age, for a woman to exhibit a naked ankle was considered immodest, while today on most beaches it is considered acceptable to sunbathe totally naked apart from the slightest bikini…"[17] In Carr-Gomm's example, the bare ankle was once considered indecent; but today, a woman wearing a bikini is merely considered naked (as opposed to nude).[18] The fact that the definition of nudity has shifted over time reveals that *nudity* is more about the way that one's state of dress is constructed by society rather than the amount of

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[15] Ruth Barcan. "The Nude-Clothing Dialectic." In *Nudity: A Cultural Anatomy* (Oxford: Berg Publishers, 2006). Also see "The Caddy." Seinfeld, Season 7, episode 12, NBC, 25 Jan. 1996.
[16] Barcan, *Nudity*, 17.
[17] Carr-Gomm, A Brief History of Nakedness, 243.
18 Carr-Gomm refers to the bare ankle as "naked" despite the fact that he discusses a context in which it is considered indecent may be confusing. This is because Carr-Gomm, despite believing in the naked-nude dichotomy, uses the terms interchangeably in order to avoid confusion, Carr-Gomm, *A Brief History of Nakedness*, 7-8.

clothing worn; just like the female breast can be sexual today, so was the ankle at one point. The fact that nudity's definition can change over time does not in itself prove that the unclothed body is intrinsically *naked*, but it does show that *nudity* depends more on how one is perceived than on one's absolute degree of exposure.

Anne Hollander also appeals to history as a means to break down the idea that nudity refers to an objective physical state. Hollander too holds that nudity is circumstantial—nudity exists in contrast to clothedness. So much so, in fact, that "At any time, the unadorned self has more kinship with its own usual dressed aspect than it has with any undressed human selves in other times and places, who have learned a different visual sense of the clothed body."[19] This statement is bold not least because it asserts that what society considers nude does not depend on the absolute amount of clothing worn. Rather, it stems from how an individual's unclothed or semi-clothed body is conceived by those around them. Perhaps what is most remarkable is the magnitude of Hollander's assertion: states of undress in different time periods have almost nothing in common, given that nudity is dependent on circumstance.

The aforementioned scholars differ both in their focus and in their understanding of nudity's relationship to the unclothed body. While some see nudity as a feeling of shame that exists irrespective of clothing itself, others focus on the dichotomy between dress (where the body taboo exists) and undress (where the body taboo fades); others cite changing understandings of nudity over time as evidence that taboos on exposure are circumstantial. Despite their differing foci, all agree that the (unclothed) body is not intrinsically sexual or indecent; nakedness is, as

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19 Anne Hollander, *Seeing Through Clothes* (Berkeley: University of California Press, 2003, Xii-xiii.) As cited by Barcan, *Nudity*, 84.

Carr-Gomm puts it, "the raw," but nudity stems from social taboos.[20] Understanding that the body (unlike its cousin: the nude body) is, at core, naked is crucial if we are to comprehend how it is constructed, as well as the relationship between such a construct and public nudity statutes. The next section focuses on the discursive relationship between nudity and the laws which prohibit it in certain spaces.

II. Foucauldian Regulation: Constructing the Body

If we accept Barcan's and Warren's argument that the unclothed body is not intrinsically taboo, why is it that the body is constructed as nude? This section uses a Foucauldian account of modern power to show how the *naked* body is constructed as such. Foucault not only explains the larger system of regulation through which *nudity* develops, his understanding of power helps explain how discourse regulating the body shapes and is reinforced by laws prohibiting it.

This section is broken up into two sub-sections, which guide the reader through Foucault's understanding of regulation, law, and resistance, particularly with respect to the body. Sub-Section A charts Foucault's analytics of modern power, explaining how discourse constructs the body; I also explain the relationship between modern power and law. Sub-Section B provides a history of nudist groups and movements, raising larger questions the possibility of resistance to discursive norms. The Foucauldian analytics of body regulation developed in this section clashes with the focus of liberal theorists discussed in the previous chapter. Nonetheless, Foucault's account of how the body is constructed is relevant to the intra-liberal public autonomy debate, which revolves around whether actions constructed as offensive can be outlawed on such a basis.

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[20] Barcan, "Nudity," 23; Carr-Gomm, *A Brief History of Nakedness,* 7.

The two contrasting accounts of power do, however, raise larger questions about power, autonomy, and the role of law, which I explore later in this thesis.

A. Foucault: Regulation, the Body, and Law

Foucault's understanding of power speaks to the larger system of body regulation which creates *nudity*. Foucault argues that power regulates actions through a constructed knowledge.[21] Modern power, which he also refers to as "bio-power" (power over life,) is not top-down but horizontal, and is based primarily on the internalization of discipline rather than adherence to law.[22] Foucault writes that "Power is not something that is acquired, seized, or shared, something that one holds on to or allows to slip away; power is exercised from innumerable points, in the inter-play of nonegalitarian and mobile relations."[23] Modern power is not an external entity that permits or represses; rather, is the fabric of society itself and structures the individuals and their conception of the world.

Power does not operate exclusively through explicit prohibition but rather through "discourse," which forms knowledge and truth. Chris Weedon writes that "discourses, in Foucault's work, are ways of constituting knowledge, together with social practices, forms of subjectivity and power relations which inhere such knowledges and the relations between them."[24] Foucault writes that "There can be no possible exercise of power without a certain economy of discourses of truth which operate through and on the basis of this association. We

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[21] Alan Hunt. "Foucault's Expulsion of Law: Toward a Retrieval." *Law & Social Inquiry* 17, no. 1 (1992): 1-38. Also See Gerard Turkel, "Michel Foucault: Law, Power, and Knowledge." *Journal of Law and Society* 17, no. 2. 1990: 170-93; Isaak Dore, "Foucault on Power (Comments)." *UMKC Law Review*, 78, no. 3: (2010, 737-748.
[22] By contemporary power, Foucault refers to the 19th century onwards. For Foucault on the history of power, see Michel Foucault, *The History of Sexuality: the Will to Knowledge*: vol. 1 (Camberwell, Vic: Penguin, 2008) 87.
[23] Foucault, *History of Sexuality*, 94. For more on the term "bio-power," see Mark Blasius, *Gay and Lesbian Politics: Sexuality and the Emergence of a New Ethic*. (Philadelphia, PA: Temple University Press, 1994): 58-65.
[24] Chris Weedon, Feminist Practice and Poststructuralist Theory. (Blackwell Pub., 2008) 108.

are subjected to the production of truth through power and we cannot exercise power except through the production of truth."[25] Foucault's understanding of truth encapsulates his account of how power operates: power does not either permit or deny; it does not work by externally suppressing desire. Rather, it constructs those desires, the individual, and their knowledge of the world.

Unlike ancient power, which was essentially negative (Foucault uses the metaphor of "power of the king" over life and death,) power regulates life itself.[26] And bio-power is not primarily exercised through legal prohibitions. Foucault emphasizes the need to distance ourselves from a "juridico-discursive" theory of power, which assumes power is wielded by a sovereign or a legal system.

> The aim of the inquiries that will follow is to move less toward a "theory" of power than toward an "analytics" of power… However, it seems to me that this analytics can be constituted only if it frees itself completely from a certain representation of power that I would term-it will be seen later why- "juridico-discursive." It is this conception that governs both the thematics of repression and the theory of the law as constitutive of desire.[27]

The juridico-discursive model sees power's effects as binary: it either prohibits or restricts. This account of law is "…centered on nothing more than the statement of the law and the operation of taboos. All the modes of domination, submission, and subjugation are ultimately reduced to an effect of obedience."[28] For Foucault, however, the juridico-discursive account of law mischaracterizes how power operates. Seeing power as a "theory" enforces the juridico-

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[25] Michel Foucault, "Two Lectures" *Power / Knowledge: Selected Interviews and Other Writings, 1972-1977*. Ed. Colin Gordon. (Brighton: Harvester, 1980): 93.
[26] Foucault writes that "In any case, in its modern form-relative and limited-as in its ancient and absolute form, the right of life and death is a dissymmetrical one. The sovereign exercised his right of life only by exercising his right to kill, or by refraining from killing; he evidenced his power over life only through the death he was capable of requiring. The right which was fornlulated as the "power of life and death" was in reality the right to toke life or let live." Foucault, *History of Sexuality*, 135.
[27] Ibid, 83.
[28] Ibid, 85.

discursive notion that power is tangible—that it *operates on* the individual. But power is positive; it constructs the individual themselves. In this sense, there is no identifiable entity which is "power" but rather a *field of power relations*, which work in conjunction with law to shape desire and lack thereof. Liberal theorists, by portraying law as the main vehicle of regulation, adopt the "juridico-discursive" theory of power that Foucault argues against. This seeming tension between two accounts of power raises questions about the liberal understanding of the public sphere, which I address in later chapters.

How the body is constructed is central to Foucault's analysis. Foucault explains that power constructs how individuals make sense of their bodies, particularly with regard to sex and sexuality. Weedon explains that "[For Foucault,] sex does not exist outside of its realization in discourses of sexuality"; sex has no intrinsic meaning. In *History of Sexuality vol. 1*, Foucault argues that sexuality, that is how one understands sexual attraction and orientation, are wrapped up in a discourse that regulates sex. But it is not that sexuality gives meaning to a real sexual desire, sex itself is constructed. Foucault concludes that only bodies and pleasures exist outside of the realm of power; when one strips sex and sexuality of their construction, one finds only the physical body and the feeling of sexual pleasure.[29] Foucault's belief in a core, unconstructed body is one of the building blocks for his analytics of sexual regulation. The body, at core, is

[29] Foucault writes that "…we must not refer a history of sexuality to the agency of sex; but rather show how "sex" is historically subordinate to sexuality. We must not place sex on the side of reality, and sexuality on that of confused ideas and illusions; sexuality is a very real historical formation; it is what gave rise to the notion of sex, as a speculative element necessary to its operation. We must not think that by saying yes to sex, one says no to power; on the contrary, one tracks along the course laid out by the general deployment of sexuality. It is the agency of sex that we must break away from, if we aim – through a tactical reversal of the various mechanisms of sexuality – to counter the grips of power with the claims of bodies, pleasures, and knowledges, in their multiplicity and their possibility of resistance. The rallying point for the counterattack against the deployment of sexuality ought not to be sex-desire, but bodies and pleasures" Ibid, 157.

absent of significance. But while the body exists outside of discourses of sex and sexuality, its meaning, in modern society, is ascribed by power.[30]

And this account of sex and sexuality explains how the naked body is constructed as nude: as sexual and indecent. Foucault alludes that nudity is a product of power in the introduction to *History of Sexuality*, where he describes the more relaxed regulation of sex and the body prior to the 18th century.

> At the beginning of the seventeenth century, a certain frankness was still common, it would seem. Sexual practices had little need of secrecy; words were said without undue reticence, and things were done without too much concealment; one had a tolerant familiarity with the elicit… *it was a period where bodies made a display of themselves*.[31]

Foucault contrasts this with the increased regulation of sex and the body in modern times. By grouping body regulations along with regulations of sex and sexuality, Foucault asserts that the way in which individuals make sense of their unclothed bodies is a social construct; discourse constructs the body as *nude*.[32] For Foucault, the body is not inherently sexual. Rather, it is tied up in discourses of bodily regulation (associated with sex and sexuality) and constructed as such.

By grouping the open display of the body with the more permissive understanding of sex in pre-modern times, Foucault explains that discourse regulates how we see and use our bodies, whether sexually or with respect to dress. Just like sex is codified, so too is the display of sexual organs themselves. The idea that individuals wish to be unclothed for the sake of comfort is

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[30] Ibid, 147.
[31] Foucault, The History of Sexuality, 3.
[32] In this context, Foucault discusses the repressive hypothesis' account of the history of sexuality, which he finds incomplete. Nonetheless he disagrees not with the fact that the 18th century saw a change in attitude toward sexuality, but with the nature of that power. Consequently, this analysis of pre-18th century society, and what it tells us about the body, is still relevant.

overruled by the widespread belief that being unclothed in front of others is *necessarily* sexual. The fact that taboos on the unclothed body have come to regulate more than just sexuality is also argued by Brett Lunceford, who explains that "taboos on nakedness do more than reign in sexuality; controls on nakedness function as controls on the body itself—how one can appropriately use one's own body."[33] Foucault's understanding of sex and sexuality speaks to how the body is constructed in modern society. How we understand the use of the body sexually parallels how we comprehend the display of our bodies; power constructs how we understand our bodies and the act of sex itself. While the unclothed body is, at core, naked, it is constructed as nude; a discourse of sex and sexuality erects a set of norms around when it is acceptable to be unclothed. What falls on the acceptable side of the line, we term *naked*; what is unacceptable, and often conceived of as "sexual and indecent," we call *nude.* To reiterate, the body taboo is not intrinsic to the publically displayed body, the body is ascribed such an association.

If nudity is constructed, what is the relationship between this body discourse and law? While Foucault repudiates liberal theorists' *exclusive* emphasis on juridico-discursive power, that is, power that operates primarily through negative law, he does not deny that law can play a positive regulatory role. Additionally, the unclothed body's construction as nude forms the basis for mandatory privacy restrictions on "public nudity," which is highly relevant to the intra-liberal public autonomy debate charted in Chapter One. On one hand, laws proscribing the unclothed body emulate from how nudity is constructed. Simultaneously, such laws reinforce how the body is constructed.

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[33] Brett Lunceford, Naked Politics: Nudity, Political Action, and the Rhetoric of the Body (Lanham, MD: Lexington Books, 2012), 14.

Laws that circumscribe the the unclothed body stem from its construction as nude. Given how the body is constructed, individuals are made to feel offended if others are unclothed in the wrong place. This social construction is subsequently enforced at the level of law in the same way as taboos against homosexuality influenced laws prohibiting same-sex sex; the body is forced to be kept private. Despite not necessarily agreeing that power flows exclusively from law, Foucault's account of body construction reveals how the public sphere becomes a place where the unclothed body is considered indecent; it is a place where the body is *nude* as opposed to *naked*. This construct guides individuals' understanding of which actions ought to be allowed in public, leading public nudity to be outlawed. This position is similar to Anthony Ellis, a permissive liberal who argues that public nudity and public sex are only illegal by virtue of the fact that they are culturally unacceptable.[34]

But laws circumscribing the body also create and reinforce the very idea of "public nudity." Foucault argues against the focus on negative law held by liberal theorists. But he clarifies that law is not irrelevant to regulating behavior, he merely argues that it plays an alternate role.

> I do not mean to say that the law fades into the background or that the institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and that the judicial institution is increasingly incorporated into a continuum of apparatuses …whose functions are for the most part regulatory.[35]

Foucault claims that law's new function, to regulate, enforces norms at the social level. Isaak Dore explains that (for Foucault,) law "is not always negative but can be productive" in instituting norms of behavior." With regard to the body, laws regulating where one can be

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[34] See Ellis, "Offense and the Liberal Conception of the Law."
[35] Foucault, History of Sexuality, 144.

unclothed officially classify "being unclothed in public" into "public nudity," officiating and consequently legitimizing the body's social classification. To be clear, it is not that the body is regulated *through* being illegal; rather, law entrenches normative constructions of the body and where/how it can manifest itself. Consequently, not only does the fear of legal reprisal prevent individuals from going about unclothed in public, potentially working to de-stigmatize the body, but the very idea that individuals cannot legally be unclothed in public works to construct such actions as taboo. Law's relationship to the unclothed body is thus cyclical: law not only reflects the way that the body is constructed, it simultaneously reinforces the construct altogether.

To be concise, Foucault claims that the juridico-discursive understanding of law fails to capture the entirety of regulation. As a result, he might dispute liberals such as Ellis' focus on undoing regulation at the level of law. This seeming tension raises questions over whether Foucault's account of law, which explains how nudity is constructed, can be compatible with liberal theorists' focus on public nudity's legal proscription as the primary method of body regulation. I return to this question later in this thesis, attempting to understand whether these two conflicting accounts of law can coexist and how we can understand law and the body in light of this clash.

B. Rebelling Against the Body Taboo

The compilation of social norms through which power operates construct and reinforce the naked body as nude. But a number of groups have attempted to rebel against such the body taboo (placed on nudity); in order to fully comprehend the reach of power, it is necessary to briefly explore the history of nudist movements, with a particular focus on how their attempts to undermine the body taboo may simultaneously reinforce the systems of power that regulate

them.[36] Simultaneously, however, it is important to keep in mind the potential starting points for "reverse discourse" that these groups, by raising the issue of the body taboo, may have opened up.

Unlike the juridico-discursive conception of power, which holds that power can be resisted through rebellion and defiance, Foucault claims that power is similarly embedded in resistance. Foucault explains that "there is a plurality of resistances, each of them a special case: resistances that are possible, necessary, improbable; others that are spontaneous, savage, solitary, concerted, rampant, or violent; still others that are quick to compromise, interested, or sacrificial; by definition, they can only exist in the strategic field of power relations."[37] Even if individuals attempt to rebel against the system of regulation, power is nonetheless present in the way that those individuals make sense of that resistance. Despite believing that they have cast off power's hold, individuals are subject to it in new ways.

Various individuals have attempted to dismantle the body taboo in American society.[38] Carr-Gomm discusses the beginning of the American nudist movement in the late 1800's. He discusses how poets Henry David Thoreau and Walt Whitman saw the value in nakedness, the latter living "the simple life" on a country estate free of clothing. These writers' work inspired a string of utopian communities in New England, many of which experimented with nudity. These groups are believed to be the first nudist communities in the U.S, one of their principles being

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[36] Even though such groups attempted to undo the body taboo, I continue to refer to them as "nudist" sinces they were still subject to Foucauldian regulation. Insofar as the body taboo was present, these people's mutual undress was still a state of nudity.
[37] Foucault, History of Sexuality, 96.
[38] For a legal and historical perspective on 19th century regulations in the United States, see Novak, William J. *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill, University of North Carolina Press, 1996).

that persons should have the option of whether to clothe their own bodies. Henry David Thoreau best sums up his ideas on nudity in *Journals*, when he writes "What a singular fact for an angel visitant to this earth to carry back in his notebook, that men were forbidden to expose their bodies under the severest penalties!"[39] These late 1800's writers may not have succeeded in securing body freedom as a right, but they did demonstrate that living without clothing was a possibility. By going about unclothed, individuals such as Whitman sought to unravel the body taboo.

It was not until the 1930's, however, that "nudism" became a movement. The nudist movement emerged in the midst of economic depression and anxiety about the dominant social structure; nudism was part of a larger countercultural call for humans to return to their roots and build a better society. In this sense, nakedness was a way to "live the simple life." The movement started in Germany, when Richard Ungewitter published *Nakedness* in 1905.[40] In the book, Ungewitter "extolled the health benefits of nudism and proposed a vision of an ideal society in which men and women could enjoy each other's company in the nude, while gymnasia trained their children in physical and moral development similarly free of clothing."[41] Ungewitter's book became a bestseller and, for it, he is often considered the "father of nudism."[42]

The nudist movement's popularity in Germany set the stage for its spread to the United States by German immigrants in the early 1930's; much like their predecessors in the late 1800's,

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[39] Carr-Gomm, Brief History of Nakedness, 148.
[40] Richard Ungewitter, Nakedness: in a Historical, Hygienic, Moral and Artistic Light (Ultraviolet Press, 2005.)
[41] Carr-Gomm, Brief History of Nakedness, 156.
[42] Ibid. The movement that Ungewitter spawned provided the context for Warren's study and ultimate renouncement of the body taboo as a universal and fixed concept.

nudist communities in the 1930's represented radical a drive to create a better society. Carr-Gomm describes how

> these groups were also breeding-grounds of progressive thinking that attracted socialists, liberals, pacifists, Marxists and many Jews. The ideas of the reform movements that were based on a 'return to nature' and on natural health methods were carried to the United States, particularly California, by some of the thousands of German immigrants, many of whom were Jewish, who arrived in America before the Second World War. They promoted vegetarianism, raw food diets and nudism, and became prototypal hippies – a term first used in the 1930s."[43]

Nudist movements were tied to a larger drive to redefine the norms by which Americans lived.[44] These movements echoed Thoreau and Whitman's ideas of "returning to nature" in the midst of a rapidly urbanizing and industrial society.[45] The movement, which emphasized the health and hygienic benefits of exposing the body, inspired many "health enthusiasts, sex reformers, and immigrants to organize and join nudist groups across the United States."[46] These nudists, importantly, "sought to redefine the naked body as healthy and rejected the notion of the body as a source of shame."[47]

But nudist communities occupied a status on the periphery of society, and were often the targets of police raids.[48] Amidst fears of these raids, and bad publicity in general, a number of nudist clubs made a concerted effort to distance themselves from the sexual stigma associated

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[43] Ibid, 157.
[44] H.W Smith, "Does Shedding One's Clothes Imply Shedding One's Culture? A Crosscultural Test of Nudism Claims." *International Journals*, (July 1980), 255–258. See also Fred Ilfeld and Roger Lauer, *Social Nudism in America*, (College and University Press, 1964); William E Hartman et al., *Nudist Society: An Authoritative, Complete Study of Nudism in America* (Crown Publishing, 1970).
[45] Brian S. Hoffman, *Naked: A Cultural History of American Nudism* (New York: New York University Press, 2015), 2.
[46] Ibid, 2.
[47] Ibid, 3.
[48] J.B.B, "Criminal Law and Procedure: Indecent Exposure: Nudism." *Michigan Law Review* 33.6 (1935): 936; "267 Mich. 657 at 662, 255 N. W. 373," J.B B., "Criminal Law and Procedure," 936.

with nudity. Sociologist Martin Weinberg explains how early nudist camps constructed a set of moral rules and social norms surrounding the unclothed body, the most important of which was the understanding that nudity and sex were unrelated. To secure that individuals were committed to these rules, many of them excluded single males, "prohibited drinking alcoholic beverages, discouraged unnecessary body contact, nude dancing, deliberate staring, and sexual jokes."[49] This restrictive atmosphere was a way for nudist communities to distance themselves from their sexual reputation and ensure that new members remained committed to the movement's principles.[50]

The aforementioned communities may have attempted to cast off the body taboo—to merely be *naked*. And while one might argue that they succeeded in calling attention to nudity as a construct, these communities reinforced nudity's status as a peripheral private activity. In the same way as (according to Foucault,) homosexual liberation movements entrench the identity categories that marginalize those individuals, nudist communities perpetuated the idea that recreational nudity was something practiced by a specific group of people outside the mainstream;[51] this also enforced the idea that the proper place to be unclothed, if one was a *nudist*, was in private. Likewise, establishing overly prudish codes of conduct may have been necessary in order to protect the movement from associations with sex, but in doing this, nudists

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[49] Brian S. Hoffman, *Naked*, 213.
[50] Martin Weinberg and Earl Rubington. "The Nudist Management of Respectability." *Deviance: The Interactionist Perspective,* 10th ed. (Routledge, 1968.)
[51] Foucault explains how "the nineteenth-century homosexual became a personage, a past, a case history, and a childhood…nothing that went into his total composition was unaffected by his sexuality. It was everywhere present in him: at the root of all his actions because it was their…active principle." (Foucault, 2008, 43) While "sodomy" had once been a "temporary aberration," a mere crime, it now became an identity; one did not *engage in sodomy* but was rather a *sodomite*. By creating alternative sexual identities, discourse reinforced monogamous heterosexuality as the normal, natural, and authentic form of sex. Consequently, Foucault explains, homosexual "coming out" movements, believing that they undermine the ubiquity of heterosexuality, perpetuate the idea that homosexuality is an *identity,* thus reinforcing hegemonic heterosexuality.

treated nude recreation as something precarious, which required social norms to be set up to protect those who wanted to be nude. Such regulations prevented nude individuals from acting as they regularly would, which prevented *nudity* from becoming *nakedness*.

The nudist movement took a turn in the 1960's, as numerous countercultural movements began to take force. Much like their predecessors, these movements sought a radical transformation in the social structure; an increased emphasis on individual freedom and a disdain for conforming to traditional values set the stage for attempts to undermine the body taboo and promoting greater cultural openness toward sex and the body. Perhaps John Lennon best captured the movement's attitude toward the body when he declared that

> The main hang-up in the world today is hypocrisy and insecurity. If people can't face up to the fact of other people being naked, or whatever they want to do, then we're never going to get anywhere. People have got to become aware that it's none of their business and that being nude is not obscene. Being ourselves is what's important. If everyone practised being themselves instead of pretending to be what they aren't, there would be peace.[52]

But unlike previous nudist movements, which distanced themselves from sex, many of the young men and women of the counterculture movement felt alienated by the "secrecy, shame, and voluntary seclusion that defined organized nudism in the United States."[53] Instead, they saw removing taboos on the unclothed body as part of a single effort to remove cultural stigmas on sex and sexuality, fostering a more open community. It seems that nudist movements are often part of a radical counter-cultural effort to change society. In this sense, defying the body taboo might be seen as a rebellion against discourse itself, including the idea that society should tell an

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[52] Lennon uses nakedness and nudity interchangeably. This is perhaps because of the conflation of the two in everyday discourse. Hoffman, *Naked,* 211.
[53] Ibid.

individual how to live their life or whether to dress. But as we have and will continue to see, power itself limits people's ability to defy its hold.

The 1960's also saw the beginning of the "free beach movement," which called for parts of public land to be zoned off for nude sunbathing. Jefferson Poland, a San Francisco activist, founded an organization known as the League for Sexual Freedom, which protested the limits of sexual expression in the United States and defended "marginal sexualities."[54] Pollard believed that allowing nudity on public beaches was a way to de-stigmatize the body and promote sexual freedom; he sent letters to a number of nudist organizations calling for a nude "wade in" protest at Aquatic Park beach in San Francisco.[55] But while some nudist communities were receptive to Poland's idea, more conservative ones feared that "public demonstrations would undermine the respectable character of the movement."[56] The wade-in, and the larger movement it inspired, was influential in initiating the move toward calls for increased spaces for public nudity. A number of nudists and California beachgoers began going to secluded beach areas (in California) in order to socialize in the nude; unlike nudist communities, nude beaches lacked both the tight sexual regulations and the pressure to take off one's clothes. Poland wrote that nude beach patrons disliked "the social cliques, racial barriers, and emotional blocks often found in nudist parks" and saw "free beaches" as an alternative.[57] These spaces also became a place for gays and lesbians to socialize in the nude outside of urban bathhouses.[58]

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[54] The League for Sexual Freedom's board included notable counter-culture figures like Allen Ginsburg and Peter Orlovsky.
[55] Jefferson Poland and Sam Sloan. "Picketing for Sex." *Sex Marchers*, (Ishi Press International, 2006); Hoffman, *Naked*, 217-219.
[56] Poland and Sloan, ibid.
[57] Poland, "Committee for Free Beaches," 84-85. As cited by Hoffman, *Naked,* ibid.
[58] Hoffman, *Naked*, 217-219.

Even though this movement was more open to nudity in public, it still reinforced the idea that the body was indecent, and belonged outside the cultural mainstream. First of all, activists such as Poland advocated for designated sectioned-off areas for nude recreation; even if these areas were on public land, the fact that they pushed for designated special areas for nudity entrenched the idea that the open display of the body belongs only belongs in specific spaces. Moreover, the fact that these groups associated nudity with sex further reinforced the myth that the unclothed body is intrinsically sexual—a conflation that underlies its cultural and legal proscription. While 1960's sexual freedom activists were right that the body was not indecent, the fact that they saw nude recreation as part of a larger move toward eliminating sexual taboos reveals the embeddedness of power in language: they continued to see nudity and sex as intertwined. Activists like Poland reinforced nudity's association with sex in an effort to break down taboos that marginalized both behaviors.

Charles Taylor charts Foucault's belief that 1960's countercultural groups failed to "liberate the body.". Despite the supposed "revolt of the sexual body" from "repressive" sexual morals, the body continues to be subject to regulation through other points of power, namely capitalism and images of the ideal body.[59]

> 'The revolt of the sexual body is the reverse effect of this encroachment. What is the response on the side of power? An economic (and perhaps also ideological) exploitation of eroticisation, from sun-tan products to pornographic films. Responding precisely to the revolt of the body, we find a new mode of investment which presents itself no longer in the form of control by repression but that of control by stimulation. 'Get undressed- but be slim, good-looking, tanned!' For each move by one adversary, there is an answering one by the other.'[60]

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[59] Charles Taylor. "Foucault on Freedom and Truth." *Philosophy and the Human Sciences* (May 1984): 152-184.
[60] "Michel Foucault, *Power/Knowledge* (New York: Pantheon, 1980), 57fn15." As cited by Charles Taylor, "Foucault on Freedom and Truth." *Political Theory* 12, no. 2 (1984): 152-83.

Taylor explains how "we may think we are gaining some freedom when we throw off sexual prohibitions, but in fact we continue to be dominated by certain images of what it is to be a full, healthy, fulfilled being."[61] While individuals believe that they are freeing the body from tight sexual "repression," they become subject to power's horizontal system of regulation; "we live under a power of the new kind, and this we are not escaping."[62] This ability to create a sense of false liberation further illustrates Foucault's regulative understanding of power and its application to the body; despite attempting to liberate the unclothed body from the sexual norms which render it taboo, individuals continue to be subject to regulation. This understanding of resistance explains nudist groups' inability to shoulder off the body taboo. The body taboo is embedded in discourse, which shapes how rebelling groups structure their resistance. And the various nudist movements discussed in this section have similarly found themselves enveloped by further regulation following their attempts at "liberation." The sexual revolution sought to liberate the body from prudish restrictions, but in the process individuals found themselves bound by the social expectations placed on appearance.[63] In attempting to "liberate the body" from perceived "restrictions," not only did counterculture activists reinforce the notion that sex is taboo, they unwittingly allowed power to commoditize this "liberation"; by commercializing sex and the body, power subjects individuals to *different* body regulations: instead of being pressured to de-sexualize and conceal their bodies, individuals are pressed to adopt a certain aesthetic.

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[61] Taylor, "Foucault on Freedom and Truth," 161.
[62] Ibid, 162.
[63] Foucault et al. *Power/Knowledge*, 57; Taylor, "Foucault on Freedom and Truth," 1984.

The most recent evolution of the nudist movement may avoid some of the aforementioned movements' errors. Carr-Gomm describes recent "body freedom" movements, which seek to liberate the body from legal restrictions.[64]

> Body freedom activists on the west coast of the United States have…managed to craft numerous pithy slogans to convey their message: 'Why hide your appearance?' 'Question Shame.' 'The human body: legalize it!' 'Don't arrest me – I was born this way!' 'Body shame is not a family value!' 'Government has no business setting dress codes – period.'[65]

Stuart Ward also adopts this argument in *Strange Days Indeed: Memories of the Old World*. Ward's novel, which takes place in a utopian future where vegetarianism and nakedness are the norm, ridicules the body taboo.[66] By portraying nudism as part of a utopian vision, Ward invokes the notion that the body taboo, particularly its enforcement via law, is an impediment to the flourishing of an ideal society. Essential to these activists' claims is the notion that legal restrictions on the natural body violate individual freedom; not only do they deny that the bare body is indecent, they also reject the idea that the government has a right to force individuals to cover their natural bodies. Unlike previous movements that portrayed nudism as a private matter, the movement for body freedom is *not* focused on becoming more in touch with nature or on the health benefits that nudity brings. Rather, said movement directly calls for a lifting of legal restrictions on public nudity. Like their nudist predecessors, these activists reject the body taboo; but body freedom activists take this idea further: they argue that since the body taboo is arbitrary, society has no right to legally impose it. This movement may avoid playing into certain aspects of body discourse. By advocating for "the right to choose" whether to wear clothing in public

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[64] These movements began in the late 1990's and early 2000's, Carr-Gomm, *A Brief History of Nakedness,* 169.
[65] Ibid.
[66] Stuart Ward, Strange Days Indeed: Memories of the Old World (Desert Sage Book, 2007).

(portraying clothing as a matter of personal choice), body freedom activists might avoid both reinforcing the idea that nudity belongs in private and associating nudity with sex—both of which must be avoided if individuals wish to properly break down the body taboo. By eliminating legal restrictions on where an individual can be unclothed while avoiding the notion that nudity is sexual, deviant, or characteristic of a particular group, these activists hope to loosen power's hold on the body. But the body freedom movement might still fall victim to Foucauldian power insofar as taboos on the body remain in place. The fact that even the most permissive of nudist groups are unable to completely dismantle power's hold speaks to the depth with which systems of control are entrenched in dominant discourse.

This realization, however, raises more questions than it answers.

Foucault argues that resistance is itself a product of discourse but that it can simultaneously open up new spaces within which to contest the dominant order; in this case, the body taboo. While power is present in all relationships and shapes interactions, there are certain moments where power is exposed—these moments serve as the potential starting point for "reverse discourse."[67] Foucault says that

> We must make allowance for the complex and unstable process whereby discourse can be both an instrument and an effect of power, but also a hindrance, a stumbling-block, a point of resistance and a starting point for an opposing strategy. Discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it.[68]

While it is true that resistance is itself shaped by power, such discourse can lay the foundations for a challenge to that power. Resistant discourses, while constructed by power, open up spaces

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[67] See Weedon, *Feminist Practice*, 109-110.
[68] Foucault, History of Sexuality, 101.

which can serve as "a starting point for an opposing strategy." "Subjugated knowledges" are brought into circulation, opening up new discursive spaces from which they might ultimately inspire small-scale resistance to hegemonic norms.[69]

While nudist movements may entrench certain regulatory understandings of the body itself, they can also highlight that body regulation exists and raise the possibility that displaying one's body is not necessarily taboo; such movements showed that it is possible for individuals to be unclothed in each other's presence, potentially opening up a space for a discussion of the body taboo itself. For instance, early nudist groups were able to make the idea of recreational nudity more known. Prior to the late 1800's, the idea of choosing to be unclothed was simply unheard of. Nudist groups, while certainly outside of the mainstream, nonetheless created "nudism," a lifestyle with health and comfort-related benefits. While it is true that these groups continued to be regulated by discourses which construct and regulate the body, they might also have snubbed the idea that individuals ought to always be clothed in each other's presence. But this merely leads to another question: does this new discursive space lay the groundwork for future nudist movements, such as the body freedom movement for example, to refine their resistance in a way that avoids entrenching the body taboo? Or is the individual constructed to the point where no reverse discourse can free the body from its construction? And if we accept the latter, that the individual is confined by a set of power relations which construct them (the individual lacks autonomy,) are the individual's actions within that field still relevant? For instance, with regards to the body freedom movement, should we still strive to change laws regulating the unclothed body even if changing if said law does not increase autonomy? Can

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[69] See Brent L. Pickett, "Foucault and the Politics of Resistance," *Polity* vol. 28 no. 4 (Summer 1996): 445-466.

eliminating mandatory privacy restrictions on the body allow for greater agency even if we accept the interpretation that the subject is constrained within a set of power relations? Questions about the relationship between power, law, and the subject become increasingly relevant as we move through this thesis, exploring the legal limits of constructed offense.

III. Conclusion

To better understand laws proscribing public nudity, it is crucial to understand nudity itself. To one who has grown up with the body taboo, the idea that individuals should be able to choose whether to wear clothing in public may sound foreign or even comical. Nonetheless, when one realizes that nudity is socially constructed, the idea that wearing clothing is essential to decency (and thus warrants legal regulation) may become less absolute. As I have previously mentioned, unclothed individuals are, in themselves, *naked*, but become *nude* when they are unclothed in an "improper" place.[70] This not only shows that nudity is a constructed state, it also reveals the role of publicness in constructing that nudity.

Having established that nudity is constructed, I then employed a Foucauldian analytics of power to explain the development of the body taboo. Foucault's analytics of power has helped clarify how *nakedness* becomes *nudity*; it helps explain *why* many people assume that in certain spaces, individuals ought to be clothed. While nakedness in private or in a changing room is perfectly legal, the same state of dress in public is illegal; in this sense, it is nudity, not nakedness, that is legally restricted. And public nudity restrictions reinforce this construction. Moreover, since power constructs truth, individuals seeking to contest dominant norms subconsciously uphold the system of regulation. While various nudist groups may have

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[70] Berger, Ways of Seeing, 9

"rebelled" against the body taboo, these groups unwittingly reinforced the dominant assumption that nudity is inherently sexual and/or indecent. The fact that these groups were unable to cast off the body taboo (and that they even reinforced it) shows how power is infused in discourse; it is embedded in resistance. Nonetheless, these groups may simultaneously have succeeded in opening up new discursive spaces for contesting the body taboo.

With respect to the intra-liberal public autonomy debate, even permissive liberals believe that society reserves the right to prohibit intrinsically offensive acts; acts such as public defecation and vomit-eating are offensive in themselves and society is justified in keeping these actions out of the public sphere. But the fact that nudity is *not* taboo in itself, but rather taboo because of the Foucauldian system of regulation that frames it as such, raises questions over whether the offense it causes can be a valid reason to restrict it in the public sphere.

The Foucauldian account of power employed in this chapter presents an alternative approach to power. While the liberal theorists discussed in Chapter One see law as the main vehicle of regulation, Foucault holds that individuals are subject to regulatory discourse below the level of law. But while these two definitions of power differ in their focus, they can nonetheless temporarily coexist. In this chapter, I use Foucault's notion of power to understand how the naked body is made nude, and the subsequent basis for laws circumscribing the nakedness to the private sphere. While Foucault would disagree with liberals' focus on the "cutting the head off of the king," his account of regulation nonetheless helps explain the discursive basis (and the normative social effects) of the legal regulations that liberals discuss, particularly with respect to the body. So far, I have employed Foucault's notion of regulation to do just that: to understand the discourse regulating the body and how that discourse is subsequently reflected in law. While there is a looming tension between Foucuault and liberals'

understanding of the nature of power, they are not necessarily incompatible; Foucault does not deny that legal restrictions are a form of power (albeit a surface-level manifestation of it); he does claim, however, that power goes far beneath law. Given that I seek to explore the status of legal prohibitions on nudity, we must thus temporarily lay aside the sub-legal implications of power, and focus on law itself (whether we see it as regulative or or restrictive,) which is often based on discursive construction.

The alternative account of power presented in this chapter has implications that liberal theorists must ultimately contend with. It raises questions about the relevance of the juridico-discursive account of power that they employ as well as about the relevance of the intra-liberal public autonomy debate altogether. The next two chapters (respectively) explore the liberal position with regard to public autonomy and whether the U.S Constitution accords with that position. For the sake of understanding the liberal position on public autonomy, these chapters adopt a juridico-discursive focus on law as negative. In the fifth chapter, however, I reassess these chapters' findings (using public nudity) in light of the Foucauldian analytics of modern power discussed in this chapter.

3: Liberal Doctrine and Public Autonomy

This thesis, so far, has two areas of clash. In order to conceptualize this chapter, it is crucial to review what we have covered thus far. The first of these debates is within liberal theory itself. Liberal theorists share a commitment to individual autonomy in the private sphere. But in the public sphere, liberal theorists disagree on the limits of individual autonomy. The intra-liberal debate on the limits of the public sphere is tripartite, and ranges from most to least willing to restrict "offensive" actions. It is crucial to review the three groups in order to contextualize this chapter. John Stewart Mill and H.L.A Hart, whom I term "restrictive liberals," wrote against the dominant legal philosophy in their age: legal moralism. They specifically refute legal moralists' conception of the relationship between law and the private sphere, believing that only actions which are harmful to others can be restricted. Nonetheless, both Mill and Hart, who do not hold individual rights as the foundation for (their conception of) liberalism, would agree that "there are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly in violation of good manners and, coming thus within the category of offences against others, may rightly be prohibited."[1] The second group, interest-balancing liberals, deny that offense *necessarily* justifies restricting actions in public, but hold that in certain situations, individual autonomy ought to be restricted in order to protect the community from offense; typically basing their conception of law on individual rights, these scholars attempt to balance persons' right to autonomy with others' right not to be

[1] John Stuart Mill, *On Liberty*, (Andrews UK, 2011). ProQuest Ebook Central, https://ebookcentral.proquest.com/lib/bates/detail.action?docID=770561, 94.

offended.[2] The most tolerant group of scholars I call permissive liberals. These writers believe that under what Anthony Ellis calls a "liberal conception of law," offense is not a sufficient reason to restrict autonomy, given that offense often reflects subjective social codes.[3] If those "offensive" actions are "intrinsically unpleasant to observe," or "unreasonable" society might rightly prohibit them; but if those offensive actions "simply contravene some accepted non-moral standard of appropriate behavior," the law has no right to prohibit them on such grounds. Essentially, permissive liberals tease out the cultural basis of "offense," holding that actions that are offensive merely because they contravene cultural norms are not restrictable.

We also see a clash between two competing accounts of power. Liberal theorists see law as the main vehicle through which power is exercised, adopting what Michel Foucault calls a "juridico-discursive" notion of power. In contrast, under Foucault's "modern power," or "bio-power," power transcends law. Power is not a permissive or repressive apparatus that acts on autonomous subjects; rather, power constructs the individual and their knowledge of the world. The question of public nudity brings together these two competing accounts of power, simultaneously exposing the tensions between them. On one hand, Foucault's analytics of power relations explains how the body is constructed and the source of laws which regulate it (this is highly relevant to the intra-liberal public autonomy debate, given that liberals differ in their willingness to prohibit actions based on the offense they cause.) On the other hand, accepting Foucault's notion of regulation might make the intra-liberal public autonomy debate less

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[2] See Donald Vandeever, "Coercive Restraint of Offensive Actions." *Philosophy and Public Affairs* 8, no. 2 (1979); Meital Pinto, "What Are Offences to Feelings Really About? A New Regulative Principle for the Multicultural Era." *Oxford Journal of Legal Studies* 30, no. 4 (2010): 695-723; Joel Feinberg, *The Moral Limits of the Criminal Law Volume 2: Offense to Others* (New York: Oxford University Press, 1987), 25.

[3] Anthony Ellis, "Offense and the Liberal Conception of the Law." *Philosophy & Public Affairs* 13, no. 1 (1984): 3. Also see Larry Alexander, "Harm, Offense, and Morality." *Canadian Journal of Law and Jurisprudence* 7, no. 2 (1994): 199-216, and Joel Feinberg and Michael Bayles. "Third Symposium." In *Issues in Law and Morality*, (Cleveland: The Press of Case Western Reserve University, 1973), 83-140.

relevant, given that power primarily operates below the law. We must, however, put aside this tension for the time being (I return to it in Chapter Five.) Given that our overarching project explores the legal limits of public autonomy, we must temporarily "put on our juridico-discursive hats," accepting Foucualt's account of how the body is constructed but focusing on when governments can enact mandatory privacy restrictions. Consequently, the next two chapters focus on the relationship between law and public autonomy, both within liberal theory and in American law.

The three-sided debate over the limits of public autonomy (Restrictive Liberalism, Interest-Balancing Liberalism, and Permissive Liberalism) leaves the reader wondering which public actions governments can restrict under a "liberal conception of law"; this query forms the basis for what I explore in this chapter: when offense is a valid reason for restricting autonomy in the public sphere under liberal doctrine. Public nudity, a frequently cited case within the intra-liberal public autonomy debate, brings out fierce debate with regards to which actions can be proscribed in public.[4] Given that the unclothed body's construction as *nude* is the source of and is reinforced by laws proscribing where one can be unclothed, such laws qualify under Ellis' latter category; public nudity is only offensive because "it…contravene(s) some accepted non-moral standard of appropriate behavior." Consequently, the debate over public nudity's legality reveals a more specific query within liberalism: *under liberal doctrine, can an action's constructed offensiveness be a sufficient reason to restrict it?* Basing my conception of liberalism on the lowest common denominator of various liberal positions, I explore whether liberal doctrine, as

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[4] See Ellis, "Offense and the Liberal Conception of the Law"; Feinberg, *The Moral Limits of the Criminal Law Vol. 2*; Joel Feinberg and Michael Bayles. "Third Symposium" In *Issues in Law and Morality*, (Cleveland: The Press of Case Western Reserve University, 1973), 83-140. Also see David A. Conway, "Law, Liberty and Indecencv," *Philosophy* 49 (1974): 143 and Martha C Nussbaum, *Hiding from Humanity Disgust, Shame, and the Law* (Princeton University Press, 2009)

laid out by theorists like Mill, Hart, Feinberg, and Ellis, allows governments to restrict public nudity. Answering this specific question allows us to generalize about the legal limits of the public sphere under liberal doctrine.

My chapter breaks down into four sections, each of which help further narrow down the definition of "liberalism," ultimately using the narrowed definition to understand public nudity's restrictability. I begin by reviewing a number of prominent theorists who have shaped liberal doctrine, seeking to find the "lowest common denominator" of their positions; this will help me establish a baseline definition of liberal doctrine. I further narrow the definition of liberalism by eliminating those definitions which do not address the issues faced by late-twentieth century liberal activists and jurists. In the third section, I examine liberal doctrine in the late twentieth century through Joel Feinberg's work, ultimately criticizing what I find to be a rather illiberal understanding of the public spheres limits. After proving that Permissive Liberalism and Interest-Balancing Liberalism are not true manifestations of liberalism in the public sphere, I explain how permissive liberals are the only group whose ideas hold true to liberal doctrine in Section Four.

I. Defining Liberalism

If we are to understand whether public nudity can be restricted under a liberal conception of law, it is crucial to define what exactly that legal philosophy entails. In Chapter One, we reviewed a number of liberal scholars, exploring their justification for liberalism and their conception of the limits of individual autonomy in the public sphere. In this section, I review the aforementioned theorists in greater depth, searching for liberalism's "lowest common denominator." Finding this basis will allow me to examine the various liberal positions on public autonomy.

John Stewart Mill, often considered the father of liberalism, formulated his famous Harm Principle, the idea that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." But unlike later thinkers who championed individual rights, Mill regarded "utility as the ultimate appeal on all ethical questions."[5] For Mill, individuals ought to be left to their own faculties in order to promote individual happiness, and consequently, the community's welfare. And given that utility is the ultimate justification for individual autonomy, society has the right to restrict actions that affect others: "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion."[6] Mill's utilitarian justification for individual rights guides his willingness to restrict offensive actions in the public sphere.

H.L.A Hart, another restrictive liberal, similarly denies individual rights as a justification for liberalism. Hart believes that laws derive from "secondary rules," most importantly, the "rule of recognition," which is a document or principle that dictates which laws can and cannot be passed; consequently, society cannot outlaw actions which would otherwise be permitted by the rule of recognition merely because individuals find them immoral.[7] The belief that law derives from secondary rules, rather than collective morality, differentiates Hart's legal positivism from natural law. While the "rule of recognition" might itself be guided by certain norms, it is this principle, not society's morality, that guides whether an action can be restricted.

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[5] Mill, *On Liberty*, 27.
[6] Mill, *On Liberty*, 93.
[7] H.L.A Hart, *The Concept of Law* (Oxford, Clarendon Press, 1994).

Ronald Dworkin, who does not write on *public* autonomy, also holds that an action's immorality is not sufficient to justify its proscription. But unlike Hart's legal positivism, Dworkin's philosophy (legal interpretivism) holds that even Hart's secondary rules are reflective of a particular morality; securing individual autonomy requires iron-clad individual rights, upon which governments cannot infringe, in order to protect individual autonomy.[8] While Hart and Dworkin have different understandings of the nature of law and hold separate justifications for individual autonomy, they nonetheless base their arguments on Mill's harm principle: actions can only be restricted in order to prevent harm to others.

In order to ward off critics who argue that the principle is illiberal, Joel Feinberg attempts to refine the harm principle and apply harm-based arguments to the public sphere. One of these critics is S.D Smith, who writes that the Ham principle "actually works to obfuscate the deeper issues, to conceal real injuries, and to marginalize some conceptions of the good life."[9] To Smith, Mill's Harm Principle "is not inherently liberal, and indeed…may well be illiberal in its intrinsic tendencies."[10] By formulating a rights-based harm principle and clarifying which actions can be restricted, Feinberg attempts to circumvent these illiberal implications.[11] In addition, Feinberg supplements the harm principle with the "offense principle," which deals with non-harmful offensive behaviors in the public sphere.[12] His concept of the relationship between law and individual autonomy is shaped by both the harm principle and his offense principle, which states

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[8] Ronald Dworkin, "Is There a Right to Pornography?" *Oxford Journal of Legal Studies* 1, no. 2 (1981): 177-212.
[9] Steven D. Smith, "Is the Harm Principle Illiberal," *American Journal of Jurisprudence* 51 (2006): 4.
[10] Ibid, 3.
[11] While Smith believes that Feinberg's refined of the harm principle "forfeits the virtues that made it rhetorically attractive in the first place," I hold that Feinberg's refined harm principle and its supplementation with the offense principle are nonetheless useful in avoiding its illiberal implications. Also see Joel Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others (New York: Oxford University Press, 1984).
[12] Joel Feinberg, *The Moral Limits of the Criminal Law Volume 2: Offense to Others* (New York: Oxford University Press, 1984).

that regulating offense is squarely the state's business. Despite individual autonomy rights not always trumping the desire to not be offended, Feinberg holds that an action's immorality does not necessarily allow it to be restricted; autonomy rights must be weighed against offense.

Anthony Ellis critiques Feinberg's conception of liberalism, arguing that it lends too much support to culturally-learned social norms, which is incompatible with a "liberal conception of law"; Ellis provides two possible definitions of liberalism, both of which hold that liberal principles derive from the harm principle (even if it needs to be supplemented.)[13] Ellis does not deny that it is necessary to weigh interests in deciding which actions ought to be legal in public; but he contends that Feinberg allows subjective conceptions of offense to guide which actions can be restricted. To Ellis, a liberal conception of law requires society to allow all actions which are not "intrinsically offensive."

The aforementioned liberals are just a few of many liberal scholars, but have nonetheless been prominent in shaping contemporary liberalism. While Feinberg, Dworkin, and Ellis hold individual rights as the ultimate justification for autonomy, Mill and Hart hold alternate justifications. Given this clash, we can only define liberal doctrine according to the lowest common denominator of the various scholars' positions: those principles which all liberals *must* hold if they are to qualify under such an umbrella.

So what do all of these liberal positions have in common? All liberals agree (in some capacity) with Mill's harm principle: the idea that insofar as an action does not affect others, governments have no right to restrict it. Moreover, all liberals share an opposition to legal moralism, the belief that society can outlaw actions on their immorality alone. Although many, such as Hart, believe that normative moral judgements of the can underlie the way that laws are

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[13] Ellis, "Offense and the Liberal Conception of the Law."

framed, the fact that an action is immoral is not *sufficient* for governments to restrict it. More specifically, Anthony Ellis explains that liberals have a shared opposition to certain types of laws:

1. Strong paternalistic laws
2. Laws prohibiting an activity simply on the ground that it contravenes some moral or religious code
3. Laws prohibiting an activity simply because the majority wish it to be prohibited
4. Laws requiring an activity simply because it is customary14

Given that they oppose such laws and agree with the harm principle (although it may be interpreted differently,) liberal ideology can be defined as *the belief that laws restricting autonomy must be based on personal injury alone; society's disdain for an action is not sufficient to restrict it*. This definition of liberalism puts the question of public nudity in perspective; and it raises the question of whether laws prohibiting public nudity are meant to prevent harm to others, or whether they merely reflect the preferences of the majority.

II. Modifying the Harm Principle

We have established that agreeing with the harm principle is central to liberalism. But the harm principle, taken literally, may be deeply at odds with the agenda of twentieth century liberalism. This has to do with the fact that the Mill does not define what counts as harm and that the principle does not apply in the public sphere; I will address both of these issues in turn.

S.D Smith discusses the former issue, arguing that "harm" can be interpreted to allow almost anything to be regulated. Specifically, the harm principle can and has been taken to include harms done to the public or unpleasant mental states.[15] And "if psychic and communal harms are allowed to count, then the harm principle would support government's coercive

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[14] Ellis, "Offense and the Liberal Conception of Law," 6.
[15] See Bernard Harcourt, "The Collapse of the Harm Principle, " *Journal of Criminal Law and Criminology* 90 (1999): 109-194.

jurisdiction over virtually any conduct that anyone might be inclined to regulate."[16] Bernard Harcourt, who blames the harm principle for a number of restrictions on public and private autonomy, would likely agree with this point. Harcourt argues that the principle has become so ingrained in American politics that it "is effectively collapsing under the weight of its own success."[17] He cites bath-houses closings under the guise of "preventing the spread of HIV," along with the proliferation of the feminist anti-pornography movement (which argued that pornography should be banned because of the harms that it does to women) as evidence that what was originally a liberal principle, has been co-opted by non-liberals. While Smith does not agree with Harcourt's assessment of the harm principle, calling it "premature," both theorists nonetheless agree that given its potential implications, the unrefined harm principle is not necessarily the best way to secure a liberal legal framework.

Moreover, the harm principle, taken on its face, is ambiguous about the limits of the public sphere. Mill himself argued that "as soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it."[18] While Mill seems to imply that all actions which affect others' interests *can* be restricted, he is simultaneously skeptical about society legally imposing a particular moral code through autonomy restrictions. Similarly, Mill's goes on to argue that many, *but not all*, offensive public actions ought to be restricted. "There are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners and, coming thus within the category of offences against others, may rightly be prohibited." Given his use of the word "many," it is clear that Mill does not believe that all actions *should* be regulated in the

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[16] Smith, Is the Harm Principle Illiberal?" 21.
[17] Harcourt, "The Collapse of the Harm Principle"
[18] Mill, *On Liberty*, 27

public sphere, even if he believes that they *can* be. But Mill is vague about how to determine which actions these are. Consequently, if the harm principle is a formula for deciding whether certain actions are permitted, it is insufficient to resolve whether acts that are perceived to be offensive, such as public nudity, can be prohibited under liberal doctrine. We consequently need some refined version of the principle that deals with the complex implications of the public sphere if we are to decide whether public nudity can be restricted.

It is especially important to examine the changing liberal debate in order to tease out what qualifies as harm (in the public sphere.) Given that liberals are jointly opposed to "laws prohibiting an activity simply on the ground that it contravenes some moral or religious code," and "laws prohibiting an activity simply because the majority wish it to be prohibited," restrictive liberals' belief that all public offensive acts can be restricted (even if some should not) might be considered dated and/or illiberal.[19] Mill wrote *On Liberty* in 1859, in response to the "tyranny of the majority" that he observed.[20] Similarly, Hart, writing in the 1950's and 1960's, wrote in reaction to the consensus of legal moralism. Given that Hart and Mill, the two main restrictive liberals, write against legal moralism, their failure to take public autonomy seriously may speak to how they structured their argument; since their opponents did not believe in autonomy at all, Hart and Mill conceded the public sphere in an effort to conquer the private.

But as we established in Chapter One, liberals have defeated moralists, particularly in light of the development of a right to privacy: the U.S Supreme Court has established that in private, individuals have a right to do as they wish insofar as their actions do not affect others;[21]

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[19] Ellis, "Offense and the Liberal Conception of Law," 6; Smith, "Is the Harm Principle Illiberal?"
[20] Mill, *On Liberty*, 17-31.
[21] See Griswold v. Connecticut 381 U.S. 479 (1965), Stanley v. Georgia 394 U.S. at 565 (1969), Roe v. Wade 410 U.S at 154 (1973), and Lawrence v. Texas, 539 U.S. at 558 (2003).

it has also established that laws cannot be based on morality alone.[22] Moreover, the Supreme Court's narrowing definition of obscenity in the later twentieth century greatly expanded which forms of speech are covered by the First Amendment. This has changed the context in which liberals argue for autonomy. While liberals once fought for private autonomy against the consensus that immoral actions can be restricted, private autonomy is now a given in constitutional law and (usually) legal theory; moreover, while Mill and Hart did not base their definition of liberalism on individual rights, the idea of a *right* to privacy suggests that the current working definition of liberalism uses rights as its justification for individual autonomy.

In the wake of victory, liberals find themselves faced with another question: *whether and when an action's offensiveness allows it to be restricted in public*. Restrictive liberals write prior to a consensus over whether an action's perceived-immorality was sufficient to justify it; their position on public autonomy is not specifically tailored to this intra-liberal public autonomy debate. Consequently, their theory of public autonomy can be excluded from our definition of liberalism in the public sphere. The new narrower debate accepts the premise that there are at least *some* actions which ought to be allowed in spite of the fact that they are offensive. And given Constitutional precedent, which upholds a rights-based notion of liberalism, we accept that individuals have a *right* to autonomy in public, even though we might say that such a right can be restricted if it clashes with others' right not to be offended. Our definition of liberalism in the public sphere can be narrowed to a debate (between interest-balancing liberals and permissive liberals) over *which* actions can be prohibited.

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[22] Rick Kozell, "Striking the Proper Balance: Articulating the Role of Morality in the Legislative and Judicial Processes." *American Criminal Law Review* 47 (Fall 2010): 1,555-1,575; Lawrence v. Texas, 539 U.S. at 558 (2003).

Now that we have narrowed our understanding of liberal theory in the public sphere to one that accepts that *some* offensive actions cannot be restricted, we are left to adjudicate between those which can and cannot be restricted. Again, given that the harm principle is ambiguous about what constitutes harm, and since Mill does not legitimately consider the issue of public autonomy, we must modify or supplement the principle in order to define the liberal limits of public autonomy. Our new principle(s) must not only be rights-based, it (they) must provide a means for adjudicating *which* actions can be restricted. Modifying the harm principle is essential to deciphering when liberal governments can enact mandatory privacy restrictions.

III. Feinberg's Illiberal Offense Principle: A Case Against Interest-Balancing Liberalism

Thus far, we have narrowed our conception of liberalism to one that opposes legal moralism, and the more general claim that actions cannot be restricted merely because the majority finds them immoral. Moreover, we have seen how certain traditions of liberalism, particularly Permissive Liberalism, do not fit the current intra-liberal debate. Given that (in light of the right to privacy and the expansion of public autonomy) liberalism is the dominant ideology in American law, we have resolved the debate over whether individuals should be free in private and over whether there should be *some* public autonomy; the contemporary debate deals with what the limits of public autonomy should be. One answer to this question is that an individual's right to autonomy should be balanced against the offense suffered by the public: this is the position of interest-balancing liberals. In this section, I evaluate this position by looking at Joel Feinberg's position toward public nudity and the public sphere more generally.

In *The Moral Limits of the Criminal Law: Offense to Others,* Joel Feinberg aims to clarify when and which actions can be restricted in public. In order to help the reader understand how

non-harmful behaviors can nonetheless be offensive, Feinberg contrives a thought experiment: imagine you ride on a bus where individuals are doing distasteful things such as vomit-eating, public masturbation, and flag-burning (just to name a few.) Feinberg formulates 31 stories, classified into six different categories in order to help the reader visualize the unpleasant behaviors that they would witness. Feinberg uses these stories to show how actions which are not directly harmful can nonetheless be injurious; many of these actions, he claims, can rightfully be regulated as offenses.

Feinberg consequently points out an issue with the harm principle: it does not allow for restrictions on offensive actions.[23] He claims that

> Passing annoyance, disappointment, disgust, embarrassment, and various other disliked conditions such as fear, anxiety, and minor ("harmless") aches and pains, are not in themselves necessarily harmful. Consequently, no matter how the harm principle is mediated, it will not certify as legitimate those interferences with the liberty of some citizens that are made for the sole purpose of preventing such unpleasant states in others.[24]

For Feinberg, the harm principle does not allow governments to restrict certain actions which may be deeply offensive to some. But a number of these actions, although not qualifying under the harm principle, are nonetheless deeply offensive to the public. Feinberg seeks to resolve this dilemma of restrictability; his central question in this volume is whether "there are any human experiences that are harmless in themselves yet so unpleasant that we can rightly demand legal protection from them even at the cost of other persons' liberties?"

Feinberg answers in the affirmative, but simultaneously aims to differentiate his theory from legal moralism, under which any action deemed offensive can be restricted. Feinberg

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[23] This issue is similar to one of the two issues laid out in the previous section: that the harm principle is unclear about what constitutes harm.
[24] Feinberg, *The Moral Limits of the Criminal Law Vol. 2*, 1.

supplements the harm principle, which he calls the *Offense Principle*. Feinberg begins by establishing that "the prevention of offensive conduct is properly the state's business."[25] Feinberg does not argue that all actions which individuals may find offensive can or ought to be banned; but by starting from the axiom that certain actions can be restricted based on the offense caused, he establishes offense as a form of wrong.[26]

Similarly, Feinberg clarifies that his definition of offense cannot be construed to include restrictions on private freedom (he uses the example of sodomy) on the grounds that the action is offensive to members of society or to its moral fabric. Feinberg dismisses such "offenses," claiming that

> No one in his right mind could claim that lewd indecencies or even privately performed sexual deviations that are shocking merely to think about are some sort of menace to individual or collective interests, a threat from which we all urgently need protection at any cost to the offenders. Offensive behavior as such is no kind of menace, but at its worst only severely irritating nuisance.[27]

In order to be considered an "offense," the action in question must be a nuisance and be directly offensive to the individual; an action being offensive "to society" is not sufficient to justify its proscription. Through this, Feinberg caveats out those constructions of harm and offense which have been used by non-liberals to justify restricting autonomy.[28]

So which "affronts to sensibilities" can be restricted? Feinberg certainly does not adopt the restrictive liberal position that *all* public actions fall within the purview of the law.[29] He finds

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[25] Feinberg, *The Moral Limits of the Criminal Law Volume 2*.
[26] This axiom is shared by permissive liberals; even Ellis clarifies that "it should not be thought, of course, that the liberal approach has no place for the weighing of interest." But the major difference between Feinberg's position and the permissive liberal one lies in Feinberg's willingness to restrict "reasonable" actions solely based on the offense that they cause.
[27] Feinberg, *The Moral Limits of the Criminal Law Vol. 2*, 5.
[28] Harcourt, "The Collapse of the Harm Principle."
[29] Even though I dismiss Restrictive Liberalism, believing that it is inadequate to deal with the the public sphere, it is nonetheless useful as a contrast to Feinberg's stance on restrictability.

this position problematic, claiming that even though offenses are properly the state's business, "there are abundant reasons…for being extremely cautious in applying the offense principle." Given that people's sense of offense can be guided by prejudice, "the offense principle must be formulated in a very precise way, and supplemented by appropriate standards or mediating maxims, so as not to open the door to wholesale and intuitively unwarranted legal interference."[30]

Feinberg uses a scale analogy, where the reasonableness of the conduct in question is weighed against the seriousness of the offense caused by that action, in order to determine what counts as reasonable behavior.

> 1. *Personal importance*. The more important the offending conduct is to the actor, as measured by his own preferences and the vitality of those of the actor's own interests it is meant to advance, the more reasonable that conduct is.
> 2. *Social value*. The greater the social utility of the kind of conduct of which the actor's is an instance, the more reasonable is the actor's conduct.
> 3. *Free expression*. (A corollary of 1 and 2.) Expressions of opinion, especially about matters of public policy, but also about matters of empirical fact, and about historical, scientific, theological, philosophical, political, and moral questions, must be presumed to have the highest social importance in virtue of the great social utility of free expression and discussion generally, as well as the vital personal interest most people have in being able to speak their minds fearlessly. No degree of offensiveness in the expressed opinion itself is sufficient to override the case for free expression, although the offensiveness of the manner of expression, as opposed to its substance, may have sufficient weight in some contexts.
> 4. *Alternative opportunities*. The greater the availability of alternative times or places that would be equally satisfactory to the actor and his partners (if any) but inoffensive to others, the less reasonable is conduct done in circumstances that render it offensive to others.
> 5. *Malice and spite*. Offensive conduct is unreasonable to the extent that its impelling motive is spiteful or malicious. Wholly spiteful conduct, done with the intention of offending and for no other reason, is wholly unreasonable. Especial care is required in the application of this standard, for spiteful motives are easily confused with conscientious ones.

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[30] Feinberg, *The Moral Limits of the Criminal Law Vol. 2*, 26.

> 6. *Nature of the locality*. (A corollary of 4.) Offensive conduct performed in neighborhoods where it is common, and widely known to be common, is less unreasonable than it would be in neighborhoods where it is rare and unexpected.[31]

Feinberg attempts to diagnose the reasonableness of the conduct in question. Understanding whether an action is reasonable, for Feinberg, is instrumental toward adjudicating whether it can be restricted. If the action is done merely in order to offend, if said conduct could easily take place elsewhere, or if the action has limited value to society (it is exclusively offensive,) the conduct has a low level of "reasonableness." In contrast, if the public sphere is the only place in which said individual can express themselves and if their conduct is done with the intent to send a message, then said conduct might have a high level of reasonableness. But even if an action qualifies as reasonable, it must be weighed against the degree of offense which it causes.[32] This "weighing" mechanism encapsulates Feinberg's understanding of which actions can be restricted in public and of when the offense principle can be applied. In future chapters, Feinberg applies the offense principle to obscenity and pornography, ultimately arguing against most prohibitions on the two insofar as direct harms cannot be demonstrated. The following chapters, although certainly interesting for considering the interest-balancing liberal position on obscenity and pornography, are roughly irrelevant to understanding the more general limits of public autonomy under liberal doctrine.

Despite arguing that the offense principle should be cautiously applied (in order to avoid restricting offenses based on prejudice or restricting free expression,) Feinberg embraces that offenses can be contextual: "the offense principle…is dependent on cultural standards that vary greatly from place to place, and within our own nation 'constantly and rapidly change.'"[33] On its

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[31] Feinberg, *The Moral Limits of the Criminal Law Vol. 2*, 44.
[32] See Feinberg, *The Moral Limits of the Criminal Law Vol. 2*, 35 for how this is adjudicated.
[33] Feinberg, *The Moral Limits of the Criminal Law Vol. 2*, 47.

face, this argument may not seem problematic, given that even permissive liberals believe in restricting "unreasonable" behaviors[34]; "vomit-eating" is a good example. But there are a number of culturally unacceptable actions which individuals may wish to engage in because it brings them joy, because it contributes to the public good, or because they fit with how they see the world. Nonetheless, insofar as Feinberg believes that reasonable actions can be restricted on their offense alone, he supports the principle that individual freedom must, at least sometimes, bow to cultural norms. For example, the line between restricting public nudity and restricting interracial hand-holding (which he sees as an implication that the offense principle must be guarded against) is more fine than Feinberg would like to admit. When one examines Feinberg's argument for restricting public nudity, it is evident that his willingness to restrict it speaks to a larger illiberal willingness to restrict actions solely on the grounds that they contravene an accepted social code.

Feinberg is clear that public nudity is only offensive because of how it is constructed. Referring back to his bus scenario, he explains that one of the most contentious of the stories is "story 13: The passenger who takes the seat directly across from you is entirely naked."[35] Feinberg explains that said passenger's state of undress "never did any person any harm" and can be avoided by diverting one's gaze, but would nonetheless make individuals "vaguely ill at ease." Here, Feinberg establishes public nudity as a minor affront to public sensibilities, which is nonetheless discomforting. He goes on to examine the offense suffered by public nudity and public sex, the "disquietude" of which he categorizes as "a complicated psychological

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[34] Joel Feinberg and Michael Bayles. "Third Symposium." In *Issues in Law and Morality*, (Cleveland: The Press of Case Western Reserve University, 1973): 83–140.
[35] Feinberg, *The Moral Limits of the Criminal Law Vol. 2,* 14; Feinberg, *The Moral Limits of the Criminal Law Vol. 2*, 12.

phenomenon." He explains that our disdain for seeing the unclothed body is tangential to our reluctance to see sex in public. Both sights cause what he calls "shame," and emulate from the fact that they remind us of the same taboo subject: sex. "Our culture," Feinberg explains, "is far more uptight about sexual pleasures than about 'harmless' pleasures of any other kind, which is easy enough to understand given the danger in, and harmful consequences of, sexual behavior in the past." Feinberg' understanding of public nudity laws parallels the argument I advance in Chapter Two: society's disdain for public nudity stems from how the body is constructed. This is not to say that public nudity and public sex can necessarily be restricted; recall his claim that "affronts to public sensibilities" are only "*relevant* to the permissibility of the conduct in question," not that they necessarily justify restricting it.

We must, however, exclude individuals who are unclothed with the *intent* to provoke others' sensibilities from the argument; such an action would clearly be unreasonable, given that it violates tenet five of the reasonableness criteria. Feinberg claims that "if the whole point of nudity is to offend others, if one goes bare in the supermarket not despite but because of the known tendency of nudity to offend, then the legislature must, at the very least, discount the reasonableness of the offending conduct."[36] For example, if a man walked around in a trench-coat, opening it periodically to expose himself, one can hardly argue that said conduct is "reasonable," and a legislature has the right to prohibit it accordingly. Conversely, in Feinberg's example of a "nude housewife in the supermarket," the woman is merely unclothed for its own sake.[37] Feinberg explains that "if the point of being nude is to facilitate one's movements, get a

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[36] Feinberg, *The Moral Limits of the Criminal Law Vol. 2*, 40.
[37] The housewife, by going about unclothed in the supermarket, attempts to be naked. But insofar as her conduct stands out, she is nude; this use of the naked-nude distinction is consistent with that used in Chapter Two. Consequently, I will refer to the housewife as *nude*, although her behavior is not meant to provoke public sensibilities.

suntan, keep cool, or 'feel free in the supermarket,' then the conduct has a certain amount of reasonableness, *despite* its tendency to offend (shock, embarrass, inconvenience) others."[38]

If actions are to be restricted (for Feinberg), they must be less reasonable than the offense that they cause. As previously mentioned, Feinberg formulates six standards by which the reasonableness of an offense is determined: 1. Personal importance, 2. Social value, 3. Free expression, 4. Alternative opportunities, 5. Malice and spite, and 6. Nature of the locality. I will demonstrate that nudity qualifies under a number of these standards, arguing that the benefits of nudism laid out by various nudist groups in Chapter Two make public nudity perfectly reasonable.

Let us suppose that the nude housewife disdained clothing. Suppose that she, like Jefferson Poland, Henry David Thoreau, and Stuart Ward, believed that not wearing clothes (insofar as the weather permits it) is healthy. Suppose that she also sees the nude body as "natural" and consequently believes that individuals should not need to cover their bodies with constraining clothing; by going about nude in public, she seeks to normalize the unclothed body, asserting that there are people who believe that individuals should not hide their bodies. Feinberg embraces this idea, raising the possibility that individuals may wish to go nude in order "to habituate the public to the sight of nude bodies so that what she takes to be the unreasonable susceptibility to offense at the sight of nudity may diminish and eventually disappear along with various unwholesome attitudes towards sex to which it may be connected."[39] One might call the the nude housewife's motivations *political*. To this woman, who's perspective on the unclothed

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[38] Feinberg, The Moral Limits of the Criminal Law Vol. 2, 40.
[39] Feinberg, *The Moral Limits of the Criminal Law Vol. 2*, 41. Feinberg's argument here shares some similarities to Foucault's description of resistance, where he argues that resistance can open up new discursive spaces. See Chapter Two, Section 2D.

body is shared by Jefferson Poland and body freedom activists, not wearing clothing on the public bus is certainly helps assert her political point of view; her conduct is clearly reasonable under the first standard.[40]

The nude housewife's conduct can also be justified under the second standard: social value. Beyond the intrinsic value in the woman expressing her political opinions, one might argue that the woman being allowed to go about unclothed creates a social environment that fosters discussion around the health benefits of being unclothed, or about the body in general. This might prompt more open conversations about taboo subjects such as sex, bodily functions, and body image. As Michael Bayles argues in his critique of Feinberg's balancing claims, public nudity "…might help people overcome psychological neuroses about sex. There might even be other benefits." Consequently, Bayles argues, Feinberg's focus on the offense brought by public nudity should not and cannot justify proscribing it, given that it is not unreasonable.[41] Moreover, "legalizing the unclothed body," as body freedom activists call it, might foster a less restrictive atmosphere and allow individuals to feel free not only to dress as they see fit but also to have the option of not doing so.[42] Given the potential increases in freedom that the nude housewife's behavior might bring, her conduct is reasonable. While for Bayles, this alone is sufficient to justify its legality, Feinberg insists on weighing it against the nature of the offense caused.

The third standard of reasonableness, free expression, might also be applied to the naked woman's conduct. Feinberg argues that "no amount of offensiveness in an expressed opinion

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[40] See Philip Carr-Gomm, *A Brief History of Nakedness* (London: Reaktion Books, 2013): 169; Jefferson Poland and Sam Sloan. "Picketing for Sex." *Sex Marchers*, (Ishi Press International, 2006); Brian S. Hoffman, *Naked: A Cultural History of American Nudism* (New York: New York University Press, 2015), 217-219.
[41] Feinberg and Bayles. "Third Symposium," 118-119.
[42] "What a singular fact for an angel visitant to this earth to carry back in his note-book, that men were forbidden to expose their bodies under the severest penalties!" Henry David Thoreau, *Journals*. As cited by Carr-Gomm, *Brief History of Nakedness,* 148

can counterbalance the vital social value of allowing unfettered personal expression."[43] Perhaps for this reason nude protests are explicitly covered by the first amendment, despite public nudity not being so.[44] But we might also understand the housewife's actions as explicitly expressive insofar as she attempts to undermine the hegemony of the body taboo; she may be making a political statement by directly defying social norms. This is certainly the opinion of body freedom activists and Jefferson Poland, who advocate(d) "nude-in's." in order to protest restrictions on the unclothed body.[45] And Feinberg himself believes that "no degree of offensiveness in the expressed opinion itself is sufficient to override the case for free expression," even if the time, place, and manner of the speech can be.[46]

But the time, place, and manner of speech can only be restricted if there are alternative opportunities for individuals to express their message. Feinberg, citing David Conway, agrees that "in many cases it is highly inconvenient or virtually impossible to perform the same action in private, and more importantly, in other cases, the very point or rationale of the action disappears if one is restricted to privacy."[47] Feinberg agrees with Conway's application of this principle to nudity:

> Not only is there inconvenience involved in such cases, but presumably the very point of having long hair or a beard is to "go about looking that way." The same is true of a woman wearing a mini-skirt, or a very brief bikini, or only the bottom half of the bikini, or no bikini at all. One can be nude in private, but again, the point of so doing (a feeling of freedom in the supermarket, or whatever) may be lost, just as it is if it is demanded that one wear a beard-cover in public.[48]

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[43] Feinberg, *The Moral Limits of the Criminal Law Vol. 2*, 39.
[44] Brett, Lunceford, *Naked Politics: Nudity, Political Action, and the Rhetoric of the Body* (Lanham, MD: Lexington, 2012): 77.
[45] Hoffman, *Naked*, 217-219; Carr-Gomm, *Brief History of Nakedness*, 169
[46] Feinberg, *The Moral Limits of the Criminal Law Vol. 2*, 44.
[47] David A. Conway, "Law, Liberty and Indecencv," *Philosophy* 49 (1974): 139-140, as cited by Feinberg, *The Moral Limits of the Criminal Law Vol. 2*, 40.
[48] Ibid, 140.

There are few opportunities for the woman in the supermarket to convey the same message. While he may choose to be unclothed in private, his behavior would certainly not carry the same significance or have the same impact as if he were to do it in public; public nudity, in terms of the message expressed, is wholly different than being naked in one's own house.[49] If one accepts that the nude housewife's behavior is expressive and Feinberg and Conway's argument that there are few alternative opportunities to express the message, the action is clearly reasonable and cannot be outlawed no matter the offense it causes.

I have already discussed the fifth standard (malice and spite,) caveating out nudity in order in order to others' sensibilities. In this situation, we have narrowed the argument to one that supposes that the nude housewife does not aim to offend anyone; we assume that she considers it comfortable to be nude, she wants to make a political statement about the body, or she wants to normalize the unclothed body. Although Feinberg holds that the nude housewife's conduct is reasonable, he nonetheless believes that her behavior can be proscribed, hoping that she will "be treated fairly" by Courts; but the fact that her behavior can be made illegal in the first place reveals that to Feinberg, the offense wrought by public nudity outweighs its reasonableness.[50] I have demonstrated that public nudity, insofar as it is not meant to provoke, is perfectly reasonable behavior—even more reasonable than Feinberg believes it to be.[51] This, combined with Feinberg's contention that the offense brought by public nudity only makes one

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[49] The Supreme Court would hold the opposite argument in Barnes v. Glen Theatre Inc. 501 U.S. 560. 1991, which I will discuss in more detail in the following chapter.

[50] Feinberg does not hold that the housewife's behavior is reasonable under the third standard: free expression. Were he to admit this, no amount of offense could justify restricting public nudity.

[51] Feinberg believes that the nude housewife's behavior qualifies under the fourth and fifth standards; I have proven that it can be justified under the first five standards of reasonableness, the third of which, according to Feinberg, supersedes all offense wrought by it.

"vaguely ill at ease" leads one to believe that his balancing mechanism would prevent public nudity from being restricted (as long as it is not deliberately done with the intent to offend.)

The fact that Feinberg considers public nudity a restrictable offense may thus be due to his prudential attitude that individuals ought to be clothed in public. While admitting that the case of public nudity is a difficult one, Feinberg nonetheless supports prohibiting nudity on the grounds that "the sight of nude bodies in public places is for almost everyone acutely embarrassing."[52] But perhaps one could make a similar argument about an act that Feinberg is adamant *not* to restrict: interracial hand-holding. It can similarly be argued that for persons in the antebellum south, the sight of interracial affection was acutely offensive; so much so that the offense outweighed the reasonableness of those people's expression. The belief that the two races should be kept separate was so ingrained that seeing a couple that actively defied this might have been as unacceptable as "public nudity," and certainly as much of an affront to decency. Moreover, to individuals raised with the belief that racial integration was unnatural, and to those who believed that interracial couples should, at most, solely be allowed to be affectionate in private, that sight would have been incredibly offensive; likewise, to individuals raised with the belief that individuals ought not be unclothed in each other's presence, the sight of a bare body in public is strange and offensive. So why can interracial hand-holding not be restricted while nudity can? Of course, Feinberg argues that inter-racial hand-holding is reasonable and that, more generally, "the balancing tests on the whole would still tell against prohibitions of such natural and spontaneous practices as gestures of affection even among 'deviant groups.'"[53] But could the idea that interracial couples (and homosexual couples) have a right to public affection

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[52] Joel Feinberg, "Hard Cases for the Harm Principle." *Social Philosophy* (Prentice-Hall, 1973) 44.
[53] Feinberg, *The Moral Limits of the Criminal Law Vol. 2*, 43.

while nudists do not reveal Feinberg's normative contention (shaped by contemporary notions of decency) that interracial hand-holding is acceptable while not wearing clothing is not? The facts seem to point to the affirmative, given that, as I have demonstrated, nudity, just like interracial hand-holding is reasonable under five of Feinberg's six criteria. Feinberg seems to prudentially exclude interracial hand-holding because he is hesitant to endorse a principle which allows such an act to be restricted. But if one accepts Feinberg's interest-balancing position and his claim that, in the case of public nudity, the offense caused outweighs the reasonableness, I see no reason to believe that interracial hand-holding cannot be restricted. And if we can take Feinberg's argument justify restrictions on interracial hand-holding, Feinberg restricts the very action that his offense principle was meant to protect.

The larger issue with this is not that Feinberg has balanced offenses incorrectly, it is Feinberg's weighing mechanism altogether, particularly his willingness to use public reaction as a reason to restrict certain actions. Larry Alexander presents this critique, arguing that Feinberg lends too much weight to cultural norms.

> Even if we deem all correct norms of personal behavior to be norms of correct social behavior, we have no legitimate interest in enforcing those norms against violators. On a desert island we would have many things, but we would not have the comfort of knowing that others, on their desert islands, were living according to norms and ideals that we hold.[54]

Feinberg's willingness to weigh the perceived offense of certain actions is, as Alexander later explains, incompatible with liberalism. Given that he defers to cultural norms of behavior, Feinberg allows laws to be based on culturally-specific notions of decency; this seems oddly similar to legal moralism, which holds that actions can be restricted based on the beliefs of the

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[54] Larry Alexander, "Harm, Offense, and Morality, " *Canadian Journal of Law and Jurisprudence* 7, no. 2 (1994): 215.

majority. One can make a case for restricting interracial hand holding precisely because Feinberg gives weight to perceived offense, even if that offense stems from cultural norms.

This is not to say that, under liberal doctrine, all actions must be allowed regardless of the offense that they cause; surely there are "universally revolting sights, sounds, and smells" that are universally offensive and the offense suffered from them can weigh in deciding what can be restricted; many of these actions would be reasonable under Feinberg's standard. But if we accept that the lowest common denominator of liberal theory, liberal doctrine prohibits "1. Strong paternalistic laws, 2. Laws prohibiting an activity simply on the ground that it contravenes some moral or religious code, 3. Laws prohibiting an activity simply because the majority wish it to be prohibited," and "4. Laws requiring an activity simply because it is customary." Consequently, we should not allow the offense suffered by members of the community to weigh in our adjudication of what can be restricted.[55] With regards to behaviors which contravene a cultural code, offense is not a legitimate reason to restrict autonomy. More generally, Interest-Balancing Liberalism violates the central tenets of liberalism, since it allows the four off-limit types of laws that we have laid out. Our working definition of liberalism must therefore be more permissive than Interest-Balancing Liberalism; offense cannot outweigh individual autonomy if the action qualifies as reasonable.

IV. Permissive Liberalism: Liberalism in the Public Sphere

At the beginning of the previous section, I had narrowed the liberal debate down to a dispute over *which* behaviors can be restricted in the public sphere: a debate between Interest-Balancing Liberalism and Permissive Liberalism. Throughout that section, however, I critiqued the interest balancing position, showing that it does not hold true to liberal doctrine (as defined in

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[55] Ellis, "Offense and the Liberal Conception of Law," 6.

Section One). Given that Interest-Balancing Liberalism is illiberal, only Permissive Liberalism remains a potential manifestation of liberalism in the public sphere. In this section, I argue that Permissive Liberalism avoids the illiberal pitfalls that plague the other two traditions; to this end, I will review the positions of a couple of permissive liberals, proving that their conception of public restrictability is consistent with liberal doctrine.

Michael Bayles criticizes Feinberg's "scales analogy," where actions' reasonableness are weighed against the offense that they cause.[56] Bayles does not argue that Feinberg's reasonableness standard is illiberal; quite the contrary, he accepts it as a valuable way of differentiating actions done in order to deliberately offend from those which exercise a point of view. The reasonableness standard is a valuable way of distinguishing, for example, individuals being nude in public for its own sake from nudity done in order to offend. In this respect, Feinberg admits that the "nude housewife's" behavior is reasonable. But Bayles opposes Feinberg's willingness to balance said reasonableness against the amount of offense caused; given that the offense suffered by the community reflects individuals' personal and cultural beliefs; to allow offense to outweigh reasonableness is to allow moral codes to guide restrictability —a mode of adjudication that, I also argue, is illiberal. Insofar as an action qualifies as reasonable, no amount of offense is sufficient to restrict it. Permissive liberalism, by not lending weight to public sentiment, avoids the illiberal trap of legally promoting certain social traditions over others.

Anthony Ellis, who has been frequently mentioned thus far, critiques Feinberg's offense principle altogether; Ellis separates offenses into two categories: those which are "intrinsically

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[56] Joel Feinberg and Michael Bayles. "Third Symposium." In *Issues in Law and Morality*, (Cleveland: The Press of Case Western Reserve University, 1973): 83–140.

unpleasant to observe," and those which "simply contravene some accepted…standard of appropriate behavior"; liberal doctrine allows the first sort, but not the second, to be restricted.[57] Ellis criticizes Feinberg's offense principle for allowing restrictions on behaviors which fall under both the first and second categories; specifically, the fact that Feinberg supports restrictions on public nudity and public sex reveals a willingness to base restrictions on specific "standard[s] of appropriate behavior." In response to Feinberg's claim that public nudity is embarrassing, Ellis explains that

> There is no reason to think it more widespread or more intense, or easier to legislate against. In my view, the reason is that our attitude to indecency has a pronouncedly moral dimension, and that seduces us into thinking that the embarrassment it causes is of some special significance. Indeed, perhaps from some points of view it is. But from the point of view of the liberal conception of the law it cannot be. It is merely embarrassment.[58]

Ellis' understanding of which actions can be restricted is more permissive than Feinberg's: Ellis claims that since a liberal conception of law forbids governments from legislating based on certain moral codes, laws that enforce social codes are illiberal. Ellis' definition of liberalism is roughly in line with its lowest common denominator, which guides his permissive approach to the public sphere.[59] Perhaps some may raise the following concern: is not Ellis' understanding of behaviors which are "intrinsically unpleasant to observe" not also culturally specific? My response would be that even if this is true, there is still a difference between actions such as public vomit-eating and public nudity. The main difference is that the former is not expressive, is universally offensive, and is likely done solely with the intent to offend; outlawing such an action would not preference a certain cultural belief. However, I must concede, that if it can be proven that vomit-eating, for some individuals, expresses a point of view, or that the belief that it

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[57] Ellis, "Offense and the Liberal Conception of Law," 16.
[58] Ellis, "Offense and the Liberal Conception of Law," 19.
[59] Ellis, "Offense and the Liberal Conception of Law," 6.

is offensive is culturally-specific, then perhaps one would have to re-evaluate its classification. Nonetheless, there is a line which governments cannot cross when deciding which actions to restrict. And under Permissive Liberalism, the line stays true to the lowest common denominator of liberal doctrine.

Bayles and Ellis are just a few of the scholars who support the permissive liberal conception of the public sphere.[60] Nonetheless, reviewing their standards for what should be allowed has helped us better conceptualize the permissive liberal position altogether. Permissive liberals do not deny that there are certain behaviors which ought not to be allowed; and permissive liberals differ on what the criteria of differentiation ought to be. But they deny that such criteria should reflect those actions which society disapproves of. In this sense, while permissive liberals differ on which standards ought to guide restrictability, they are united in a shared disapproval of Interest-Balancing (and Restrictive) Liberalism. Most importantly, given that Permissive Liberalism avoids the illiberal pitfalls that plague the other schools, we can consequently conclude that it is the only truly liberal tradition among the three groups.

V. Conclusion

In this chapter I have attempted to find which actions can be prohibited under liberal doctrine. Since liberal scholars are divided as to how liberalism is formulated, I have located liberalism's lowest common denominator, which is that an action being immoral is not sufficient to restrict it. Similarly, all liberals agree with the harm principle (although many modify it), the idea that harm to others is the only reason for which societies may restrict individual autonomy. More specifically, I accept that liberals are opposed to

1. Strong paternalistic laws

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[60] Also see Larry Alexander, "Harm, Offense, and Morality, " *Canadian Journal of Law and Jurisprudence* 7, no. 2 (1994): 215 and David A. Conway, "Law, Liberty and Indecency," *Philosophy* 49 (1974.)

2. Laws prohibiting an activity simply on the ground that it contravenes some moral or religious code
3. Laws prohibiting an activity simply because the majority wish it to be prohibited
4. Laws requiring an activity simply because it is customary.[61]

But following the establishment of the right to privacy, the narrowing of obscenity, and the constitutional expansion of the public sphere, the debate over liberalism changed from one over whether the harm principle should be applied to how it should be applied, specifically in the public sphere. Given that restrictive liberals wrote in the context of the liberalism v. moralism debate, their position does not properly fit the intra-liberal public autonomy debate. In the contemporary debate over public autonomy, we take as an axiom the idea that there are at least *some* offensive actions which must be allowed in the public sphere.

Feinberg's offense principle aims to balance individuals' right to autonomy with others' right not to be offended. His "scales analogy," where he weighs an action's reasonableness with the amount of offense it causes, is meant to prevent offense while excluding prejudice-based restrictions. But when one more closely examines Feinberg's weighing standard, it is clear that public nudity, which is only offensive because of cultural body standards and is perfectly reasonable, can only be prohibited under a philosophy that would allow us to restrict interracial hand-holding: the illiberal premise that laws should defer to the majority's interests. If we accept a "liberal conception of law," actions which are "reasonable" under Feinberg's standard cannot be restricted merely because they contravene accepted moral codes.

Given that Interest-Balancing Liberalism lends weight to (socially-constructed) offense at the expense of individual autonomy, we are left with the only remaining school of public liberalism: Permissive Liberalism. Permissive Liberalism, which does not lend any weight to the public's preferences (unless the action is universally or intrinsically offensive,) is the only theory

[61] Ellis, "Offense and the Liberal Conception of Law," 6.

of public space which stays true to liberal doctrine. Interest-Balancing Liberalism does not allow all offensive actions to be restricted, but it does let society preference certain cultural moralities when adjudicating restrictability; this is evident when one considers the case of public nudity. Permissive liberal theorists go further: they argue, as I do, that a liberal conception of the law cannot favor one culturally-learned conception of decency over another. Consequently, we can only restrict offensive actions using a standard which does not lend weight to the public's culturally-learned morality. And with regard to public nudity, permissive liberals hold that there is no basis, without making moralist claims, to outlaw it.

Given that liberal theorists adopt a juridico-discursive account of law, the question of whether liberal doctrine has been legally enforced is highly relevant. To this end, we must examine how the Supreme Court, which (as established in Chapter One) supposedly follows liberal principles, has dealt with the issue of public autonomy. Exploring the legal limits of public autonomy in the United States is key to understanding whether liberal theory has succeeded in enforcing its account of freedom. Essentially, if we take law as the main vehicle of regulation and see liberal doctrine as guaranteeing individual autonomy, are we already free?

4: Liberal Doctrine and the U.S Constitution

This chapter, like the last, adopts a juridico-discursive notion of power in order to better understand liberal's account of the relationship between individual "autonomy," publicity, and the law. In the previous chapter, we found that Permissive Liberalism is the only theory of the public sphere which accords with liberal doctrine, which, at minimum, holds that actions cannot be restricted solely because they contravene a certain morality.[1] The limits of public autonomy (given liberal doctrine,) I concluded in my third chapter, cannot be formulated using principles which lend weight to culturally-based offense. Specifically, with regard to public nudity, liberalism requires us to permit individuals to be unclothed. But is this theory reflected in American Constitutional law? As discussed in the first chapter, nineteenth and early twentieth century American law's approach to individual autonomy was largely characterized by legal moralism, which held that protecting "public morals" was a valid function of state police power; the standing interpretation of the Constitution was that state and local governments could police actions which the community found immoral.[2] In the second half of the twentieth century, however, such police power was gradually rolled back. Specifically, the Supreme Court established a right to privacy and narrowed the definition of what counted as "obscene." While actions that threatened society's moral fabric could once be prohibited, the Supreme Court

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[1] Anthony Ellis more specifically explains that liberal doctrine, at core, is opposed to
1. Strong paternalistic laws 2. Laws prohibiting an activity simply on the ground that it contravenes some moral or religious code 3. Laws prohibiting an activity simply because the majority wish it to be prohibited 4. Laws requiring an activity simply because it is customary. Anthony Ellis, "Offense and the Liberal Conception of the Law." Philosophy & Public Affairs 13, no. 1 (1984): 6.

[2] See Roger Pylon "On the Origins of the Modern Libertarian Legal Movement." *Chapman Law Review*, vol. 16, no. 2 (April 2013): 255–268.

limited when and which actions governments could restrict because they were "obscene"[3]; essentially, the Supreme Court increasingly rejected legal moralism. But the fact that the U.S Constitution secures a right to privacy, and that it respects *some* level of autonomy in public, does not necessarily mean that it is truly a liberal government.[4] This chapter examines the second part of the liberal public autonomy question; I ask: does American law hold true to permissive liberal doctrine? Finding whether Constitutional precedent is in line with liberal doctrine is crucial to liberal theorists, given their belief that power is primarily manifest through (negative) law. In order for individuals to be free, liberal theorists would argue, they must be free from unnecessarily constraining laws. If the U.S Constitution (as interpreted by the Supreme Court) does not adhere to (permissive) liberal principles, then it is not in line with liberal theory; to liberal theorists, that may suggest that individuals are not autonomous before the law.

I plan to explore this question, as I have throughout this thesis, through the example of public nudity. As discussed in Chapter Two, nakedness refers to the unconstructed, undressed body. Nudity, by contrast, is associated with the body taboo; individuals' state of undress is constructed as sexual, shameful, and/or lewd in public. The public's feeling of offense at an individual's state of undress hinges on their body's construction as *nude*. And public nudity proscriptions designed to protect "public sensibilities" operate on this assumption. Consequently, examining how the Supreme Court has ruled on public nudity is crucial to understanding the relationship between social constructs, public autonomy, and the Constitution.[5] In Chapter One,

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[3] See Geoffrey Stone, "The End of Obscenity?" Sex and the Constitution: Sex, Religion, and Law from America's Origins to the Twenty-First Century, (Liverlight Publishing, 2017). 296-312.
[4] For more on the development of the right to privacy see Chapter One, Section 2B.
[5] Public nudity here, as I explained in the first chapter, refers to being unclothed for its own sake. I exclude public nudity done in protest, given that said nudity is explicitly done in order to advance a separate political message; such nudity is more a means of political protest than a manifestation of individual autonomy. See Brett Lunceford, *Naked Politics: Nudity, Political Action, and the Rhetoric of the Body* (Lanham, MD: Lexington, 2012) 77.

Section III, I charted the limits of public autonomy, explaining the seemingly inconsistent rationale by the Court in public autonomy. In this chapter, I want to explore that contradiction in greater depth. To this end, I analyze four Supreme-Court cases dealing with the public sphere, three of which deal with nudity in public (the other regards the limits of public autonomy more generally and provides relevant precedent for the other cases.)[6] Throughout this chapter, I seek to understand how the Supreme Court has ruled on public nudity, which provides a window into its position toward public autonomy more generally. In the previous section, I found that Permissive Liberalism is the only theory of the public sphere which accords with liberal principles. If the Supreme Court has adhered to permissive liberal principles, we might conclude that American law follows liberal doctrine, both in public and private. But if the Constitutional "right to privacy" is not mirrored by a "right to public autonomy," then perhaps American law does not adhere to liberal principles. For liberal theorists, whether an individual is free all but completely hinges on whether they are free from unnecessarily constraining laws; finding whether the Constitution is in line with liberal principles is thus pivotal.

Four specific cases help us diagnose when governments are Constitutionally justified in restricting public autonomy. These cases all deal with when governments can restrict individuals' freedom to act in the public sphere. While the first deals with the question of public autonomy and the first amendment more generally, the other three look at the question through the lens of public nudity. These cases, which concern either the First or Fourteenth Amendment, are a window into how the legal limits of the public sphere compare to those laid out by liberal doctrine. While the cases concern disparate Constitutional questions, they provide a window into

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[6] In the third and fourth cases, the Court held that "public nudity" included nudity in a private business establishment. For the sake of considering their approach to the public sphere on their own terms, I accept the Court's public-private distinction and plan to Constitutionally evaluate public nudity accordingly.

the more general limits of the public sphere when taken as a whole. The first case, (*Cohen v. California,*) while not explicitly dealing with public nudity, was a landmark Supreme Court case which determined whether offense always justified restricting autonomy in the public sphere.[7] The precedent established in *Cohen* was also instrumental in the Court's future rulings on publically displayed nude images, specifically in *Erzodnik v. Jacksonville*.[8] *Erzodnik*, along with the two remaining cases, deal with whether governments can restrict public nudity; this provides a window into more general questions of public autonomy. Liberal doctrine, as argued in the previous chapter, does not permit restrictions on public nudity in order to shelter the public from offense. So seeing how the Court has ruled on public nudity is pivotal to understanding the Constitution's overall approach to the public sphere.

With regard to the Constitution, cases regarding public autonomy might trigger questions about the first amendment, particularly its free speech guarantee. Moreover, if a government discriminates against a specific action, while allowing others of similar social impact, cases dealing with public autonomy might also concern the fourteenth amendment, specifically the clause which guarantees equal protection under the law.[9] While the Court evaluated the cases in the context of these specific Constitutional amendments, I take the rulings as a whole as a window into larger questions about the relationship between standing Constitutional interpretation and liberal doctrine.

I take my cases from a section in Geoffrey Stone's *Sex and the Constitution,* in which Stone charts the Court's increased permissiveness in the second half of the twentieth century.[10]

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[7] Cohen v. California 403 U.S 15 (1971).
[8] Erznodnik v. City of Jacksonville 422 U.S. 205 (1975)
[9] The clause claims that "no state shall deny to any person within its jurisdiction 'the equal protection of the laws'."
[10] Stone, Sex and the Constitution, 315-320.

Stone uses *Erzodnik* and *Cohen* as evidence that the Court became increasingly permissive with respect to the nude body and the public sphere (in the 1960's and 1970's,) while explaining that such increased autonomy was (later) offset by *Erie v. Pap's A.M* and *Barnes v. Glen Theatre Inc*.; in the latter cases, the Court was highly deferential to local and state governments with regard to public nudity.[11] Stone's section is useful insofar as it provides a brief historical overview of the expanding public sphere in the late twentieth century. But Stone does not focus on the question of public autonomy, using the aforementioned cases as part of a larger story about the gradually liberalizing Supreme Court. Given that Stone asks a different question, he reviews a wider amount of cases than I do; for my purposes, I take those cases which are most relevant to public nudity. Focusing on the Constitutional limits of public autonomy, I analyze a few of his cases in greater depth within the context of the intra-liberal public autonomy debate and liberal doctrine more generally.

I. *Cohen* and *Erzodnik*: Expanding Public Autonomy

Stone cites two cases which marked a liberal turn toward autonomy in the public sphere: *Cohen v. California* and *Erzodnik v. Jacksonville*.[12] In this section, I explain and analyze the decisions in the two cases, asking whether the restrictability framework laid out in these cases accords with Permissive Liberalism (as I established in the previous chapter, Permissive Liberalism is the sole liberal theory which accords with the lowest common denominator of liberal doctrine.)

In 1968, Paul Robert Cohen, a 19-year-old college student, entered a Los Angeles courthouse to testify on behalf of an acquaintance. But Cohen never made it into the courtroom

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[11] Barnes v. Glen Theatre Inc. 501 U.S. 560 (1991) and Erie v. Pap's A.M 529 U.S. 277 (2000.)
[12] Stone, *Sex and the Constitution,* 315-317; Erznoznik v. City of Jacksonville 422 U.S. 205 (1975); Cohen v. California 403 U.S 15 (1971).

itself; he was arrested in the corridor for wearing a jacket displaying the words “Fuck the Draft.” Cohen later recounted in an interview that a woman whom he had met the night before stenciled the phrase on his jacket, an event which he did not remember when getting dressed that morning.[13] Nonetheless, Cohen was arrested in violation of section 415 of the California Penal Code, which prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person [by] offensive conduct," and sentenced to 30 days in jail.[14]

Cohen appealed the case to the Court of Appeals and ultimately to the Supreme Court, “testifying that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft."[15] Given that he did not intend to offend, Cohen argued, his act was a valid form of personal expression and the state of California had no right to prohibit it. The question before the Supreme Court, consequently, was whether the state of California could prohibit individuals from displaying potentially-offensive words in public. Justice Harlan delivered the opinion of the court. Harlan began by citing the Appeals Court’s account of the events “‘The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct that in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest.’" So given that Cohen was not deliberately attempting to harm or offend anyone, could his conduct be restricted on the basis that some found it offensive?

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[13] “Paul Robert Cohen and ‘his’ Famous Free-Speech Case.” Newseum Institute, www.newseuminstitute.org/2016/05/04/paul-robert-cohen-and-his-famous-free-speech-case/.
[14] Cohen v. California 403 U.S 15 (1971).
[15] Cohen v. California 403 U.S 16 (1971).

The Court answered in the negative, holding that "absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display of this single four-letter expletive a criminal offense."[16] Given that Cohen's conduct was done in order to exercise his opinions on the draft (or so he claimed,) it qualified as an exercise of speech. While the "fighting words doctrine" articulated in *Chaplinsky v. New Hampshire* held that foul language directed at someone was not protected by the First Amendment, the word "fuck," in this case, was not directed at a particular person.[17] Consequently, Harlan argued, the "Appellant's conviction…rests squarely upon his exercise of the "freedom of speech" protected from arbitrary governmental interference by the Constitution, and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys."[18] Harlan here claimed that while the state of California could not restrict Cohen's anti-draft message, it could regulate the time place and manner in which it could be displayed. Anticipating this argument, the State of California also formulated a second argument: the law was not a restriction on speech but on *where* it was expressed; specifically, the state had an interest in protecting the sensibilities of "sensitive citizens" (such as women and children) in the Courthouse. But the Court rejected that the California statute was a valid place restriction, arguing that unlike residents confronted by "raucous emissions of sound trucks blaring outside their residences," the persons in the Courthouse, if they found the word "fuck" to be offensive, could merely "avert their eyes." Despite the potential offense felt by persons in the courtroom, Cohen's right to display his message how, where, and when he wanted to could not be restricted.

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[16] Cohen v. California 403 U.S 22-26 (1971.)
[17] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942.)
[18] Ibid, at 19.

In a dissenting opinion, Justice Harry Blackmun (joined by Justices Burger and Black) argued that Cohen's conduct was an "immature antic" and consequently qualified as mere "conduct" rather than "speech." Moreover, the dissenters refuted the majority's contention that the case did not qualify under the "fighting words doctrine" established in *Chaplinsky v. New Hampshire,* arguing that "this Court's agonizing over First Amendment values seems misplaced and unnecessary."[19] Given that, according to the dissent, the word "fuck" qualified as a "fighting word," Cohen's display of it was not a form of speech protected under the First Amendment. The State of California had the right to restrict the word "fuck" to protect public sensibilities.

While Cohen later recounted that wearing the jacket was accidental and symptomatic of his having a "Ph.D in partying in those days," his jacket spawned a landmark free speech decision. The enormity of the Court's verdict cannot be overstated: insofar as Cohen's behavior was not done with the intent to harm or offend, it was unconstitutional for the state of California to suppress his autonomy, even if others found it offensive. Moreover, the Court ruled that while governments can regulate the time, place, and manner of certain offensive actions (a premise in line with Permissive Liberalism,[20]) the mere offense suffered by the sight of a foul word was not sufficient to justify restricting Cohen's autonomy; it was not on Cohen to change his behavior but rather on the viewer, if they found Cohen's message disturbing, to look away. This case redefined when governments could restrict offensive behavior in public. Cohen established that the offense suffered by a certain action, and a desire to protect community sensibilities, was not sufficient to curb autonomy.

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[19] *Cohen* at 27.

[20] Michael Bayles, who accepts Feinberg's "reasonableness" standard. Criteria three of evaluating reasonableness states that the greater the alternative opportunities for individuals to engage in the same behavior, the less reasonable. Feinberg, Joel, and Michael Bayles. "Third Symposium." In *Issues in Law and Morality*, (Cleveland: The Press of Case Western Reserve University, 1973), 83-140

But does the principle established in *Cohen*, that governments cannot always restrict actions on the basis of their offense alone, have limits? *Cohen*, after all, concerned an individual expressing a political message; does such a right also apply to potentially-offensive sights that are not politically-motivated? Moreover, does the same principle also apply to the display of offensive images? Stone raises this very question; "suppose above the words 'fuck the draft' on his jacket, Cohen had drawn an image of a naked man with an erect penis 'fucking' the director of the local draft board? Suppose he placed that image on a billboard."[21] The Court considered a similar issue in *Erzodnik v. Jacksonville.*[22] The issue came to a head when a drive-in movie theater in Jacksonville, Florida was convicted of violating a local law making it a public nuisance (a punishable offense) for a drive-in movie theater to showcase films containing nudity if the screen was visible from the public street. The City of Jacksonville justified the law on the grounds that it prevented the sensibilities of un-consenting adults and minors. Richard Erzodnik, the manager of the University Drive-in Theater, was fined for showing a movie displaying female breasts and buttocks.

The question before the Court was whether the Jacksonville law banning the display of nude images was constitutional under the Fourteenth Amendment. Could the City of Jacksonville selectively ban the display of nude images on screens seen from the street? The constitutional stance at the time was that materials deemed obscene could be selectively restricted under state police power.[23] And three years prior to *Erzodnik*, the Court had redefined the definition of obscenity. In order for something to be obscene, the Court had to determine three things:

> 1. whether the average person, applying contemporary "community standards", would find that the work, taken as a whole, appeals to the prurient interest;

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[21] Stone, Sex and the Constitution, 316.
[22] Erznodnik v. City of Jacksonville 422 U.S. 205 (1975)
[23] Stone, Sex and the Constitution, 254

> 2. whether the work depicts or describes, in an offensive way, sexual conduct or excretory functions, as specifically defined by applicable state law (the syllabus of the case mentions only sexual conduct, but excretory functions are explicitly mentioned on page 25 of the majority opinion); and
> 3. whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[24]

Mere nudity, the Court held, did not qualify. While the respondents for the City of Jacksonville acknowledged such a fact, they nonetheless claimed that "any movie containing nudity which is visible from a public place may be suppressed as a *nuisance*."[25] Specifically, the City of Jacksonville attempted to justify the ordinance on the grounds that it protected the public from the offense felt by the sight of sexual organs. Second, they argued that the law protected minors on the street from the sight of sexual organs.[26] Finally, they argued that the regulation can be justified as a traffic regulation, since nude images may distract passing motorists. So even if nudity was not obscene, could the City of Jacksonville restrict the nude images on these grounds?

The Court ruled in the negative to all three questions. With respect to the first argument, "that the nude image could be suppressed in order to protect the public from offense, the Court ruled that since nudity was not obscene, the City of Jacksonville discriminated against the nude image merely because it considered it more offensive than other images. Justice Powell, speaking for the Court, explained that a number of freedom of speech cases, including *Cohen*, had dealt with the issue of when and where governments can restrict speech. As a principle, cities have a right to exercise time, place, and manner restrictions on particular acts. "But when the government, acting as censor, undertakes selectively to shield the public from some kinds of

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[24] Miller v. California, 413 U.S. at 24-25.
[25] *Erzodnik* at 208.
[26] *Erzodnik* at 213.

speech on the ground that they are more offensive than others, the First Amendment strictly limits its power."[27] Essentially, the City of Jacksonville applied an inconsistent rationale with respect to offense, selectively regulating certain offensive displays based on a prudential judgment. Since nudity itself was not obscene, it could not be prohibited, even to protect the public (including minors) from offense, merely on the grounds that it may offend some viewers. Moreover, even if it could, the City of Jacksonville did nothing to restrict other images which might be offensive to viewers. The law singled out nudity which, since it was not obscene, could not be restricted in order to protect public sensibilities. Basing their ruling on the precedent established in *Cohen*, the Court held that individuals had a limited right to be protected from offensive images in public; and just like in *Cohen*, the Court ruled that if an individual felt offended by the nude image, it was their responsibility to "readily avert [their] eyes."[28]

The Court next addressed whether the regulation could nonetheless be upheld to protect minors from crude sights. The City of Jacksonville argued that "even though it cannot prohibit the display of films containing nudity to adults, the present ordinance is a reasonable means of protecting minors from this type of visual influence." But the Court rejected this argument. While the majority conceded that "states and municipalities may adopt more stringent controls on communicative materials available to youths than on those available to adults," there are only specific circumstances under which governments can bar the public display of protected materials to them.[29] In this case, the Court ruled, the restriction is broader than necessary; the ordinance did not prohibit sexually explicit nudity but rather all nudity regardless of purpose. Since mere nudity was not obscene, it could not be restricted merely because the government

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[27] *Erzodnik* at 209.
[28] *Erzodnik* at 208-212.
[29] See Interstate Circuit, Inc. v. City of Dallas, 390 U. S. 676 (1968) and Rabeck v. New York, 391 U. S. 462 (1968).

thought it best that children not see it. With respect to the third argument, that the restriction was justified as a traffic regulation, the majority argued that nothing in the text of the law indicated that it was designed as such. And even if it was, the ordinance is still unjustified insofar as it singles out nudity; many other sights displayed on a screen could be just as distracting to a passing motorist. The Court's rejection of all three rationales reveals the majority's argument that nudity could not be legally singled out.

Erzodnik established that absent a more compelling reason, states could not regulate where nudity is displayed merely because individuals found it offensive. While the Court accepted that displays of obscenity were not protected under the First Amendment and could be restricted under state police power, nudity itself was not obscene. Consequently, there was no reason to treat nudity as any less valuable than other content (which individuals might find offensive) displayed on a screen. Just like in *Cohen*, actions done in public, insofar as they are not directed at anyone, cannot be restricted in order to protect persons who might incidentally be offended by them.

Two separate dissenting opinions were filed. The first, written by Justices Burger and Rehnquist, argued that the restrictions were a valid function of state police power. Explicitly refuting the majority's claim that passerby's could merely "divert their gaze," Burger wrote that "the screen of a drive-in movie theater is a unique type of eye-catching display that can be highly intrusive and distracting."[30] Given that nude images have a unique effect on the viewer and are difficult to ignore, governments have a legitimate interest in proscribing their display. Justice White, in his dissent, argued if the Court is willing to prohibit the display of nude images on said

[30] *Cohen* at 222.

grounds, then the Court must be prepared to allow public nudity, a step he was not prepared to take.

The ruling as a whole leaves open the question of whether public nudity is similarly protected under such a ruling. Perhaps one could such an argument: given that the sight of the body is not obscene, Feinberg's housewife in the supermarket's right to go unclothed cannot be restricted merely to protect the interests of those who might incidentally be offended.[31] The housewife's nudity is not aimed to offend anyone and consequently the state may not prohibit the sight of her body, which is not obscene, merely on the grounds that some might be offended by it. While one could make such a case, the Court has never applied *Erzodnik* to public nudity outright, and restricting public nudity remains a valid function of state police power (as we shall soon see.) Nonetheless, Justice White, in his dissent, raised the possibility that the precedent established in *Erzodnik*, might be interpreted in such a way; frustrated with the majority's outline of the public sphere, Justice White protested that "If this broadside is to be taken literally, the State may not forbid 'expressive' nudity on the public streets, in the public parks, or any other public place, since other persons in those places at that time have a 'limited privacy interest,' and may merely look the other way." Justice White's comment speak to the potential implications of the Court's rulings in the two aforementioned cases.

Public nudity aside, both *Cohen* and *Erzodnik* were massive transformations in the limits of state police power. While governments could once enact mandatory privacy restrictions in order to protect the sensibilities of individuals in public, the two cases rolled back the understanding that individuals always had a right to be protected from sights which they found

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[31] Joel Feinberg, *The Moral Limits of the Criminal Law Volume 2: Offense to Others* (New York: Oxford University Press, 1987), 40.

offensive. The burden of preventing offense to the public was no longer on the actor but on the viewer, who had the responsibility of "averting their eyes." This definition of the public sphere's limits would qualify under Permissive Liberalism, given that it does not allow actions to be restricted merely because they cause offense. The Court's use of "obscenity" as a hard backstop for what can be restricted might be compared to Ellis' "intrinsic offensiveness" standard or Bayles' "reasonableness" standard. And like permissive liberals, the standard that the Court laid forth in *Cohen* in *Erzodnik* held that preventing offense did not necessarily justify curbing individual autonomy.

II. *Glen Theatre* and *Erie*: Tightening the Loosened Reins

While *Cohen* and *Erzodnik* stood for the principle that state police power in the public sphere was not unlimited, the Court seemingly reaffirmed that power twenty years later. In *Barnes v. Glen Theatre* and *Erie v. Pap's A.M*, the Court ruled that laws prohibiting public nudity did not violate the first amendment;[32] the Court also ruled that such laws could be applied to restrict nude dancing in private business establishments like the Kitty Kat Lounge and Kandyland, which, according to the Court, were "essentially places of public accommodation."[33] In both cases, the Supreme Court attempted to justify the proscriptions using liberal language, and accepted that there were certain situations in which public expression outweighed offense and warranted Constitutional protection. Nonetheless, their rulings that public nudity (both in itself and in the form of nude dancing) could be restricted without violating the First or Fourteenth Amendment suggests a departure from the more permissive interpretation of the Constitution laid out in *Cohen* and *Erdodnik*.

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[32] Barnes v. Glen Theatre Inc. 501 U.S. 560 (1991) and Erie v. Pap's A.M 529 U.S. 277 (2000.)
[33] Glen Theatre at 566.

In *Barnes v. Glen Theatre*, the Supreme Court ruled on which actions governments could prohibit without infringing on free speech. In the case, a statewide Indiana law banning public nudity was applied to restrict nude dancing in the Kitty Kat Lounge, a club that featured full nude striptease. The state claimed that the Kitty Kat Lounge qualified as a public place and was therefore subject to the law; striptease was not prohibited, but dancers would be required to wear, at least, pasties and G-strings. The primary question before the Court was whether forcing dancers to wear pasties and G-strings violated the dancers' First Amendment right to free speech.

The owners of the Kitty Kat Lounge challenged the law, claiming that such a ban violated the dancers' First Amendment rights. First, they argued that nude dancing was expressive speech protected by the First Amendment, as had been established in a number of previous Supreme Court Cases;[34] consequently, the plaintiffs argued, the State of Indiana could not restrict it. The Court rejected this argument, however, claiming that since the statute was designed to restrict public nudity (as opposed to nude dancing,) the law was justified. The plaintiff's claim that the restrictions violated their right to free expression was dismissed; "This governmental interest is unrelated to the suppression of free expression, since public nudity is the evil the State seeks to prevent."[35] Ruling on public nudity for the first time, the plurality swiftly declared that since it was not a form of speech, individuals' ability to be unclothed could be restricted in order to protect the public from offense.

With regard to the nude dancing at the Kitty Kat Lounge (considered a form of public nudity,) the Court, while accepting that the act of "erotic dancing" was expressive, argued that the nude aspect of that dancing was not. They consequently employed the "O'Brien Test," which

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[34] See Doran v. Salem Inn, Inc., 422 U. S. 922, 932 (1975); California v. LaRue, 409 U. S. 109, 118 (1972); Schad v. Mount Ephraim, 452 U. S. 61, 66 (1981.)
[35] Glen Theatre at 501.

adjudicated when governments could restrict speech. According to O'Brien, regulations on speech in public are subject to the following considerations: "The regulation must 1) be within the constitutional power of the government to enact, 2) further an important or substantial government interest, 3) that interest must be unrelated to the suppression of speech (or "content neutral", as later cases have phrased it), and 4) prohibit no more speech than is essential to further that interest."[36] The Court also used the precedent of *Renton v. Playtime Theatres*, which established that nude dancing establishments could be subject to time place and manner restrictions in accordance with O'Brien. First, the restriction was within the government's constitutional power, since it prohibited public nudity, not nude dancing. Second, the restriction was unrelated to suppressing the message conveyed by erotic dancing, since the restriction served a valid state interest in eliminating the secondary effects associated with such dancing, such as "prostitution, sexual assaults, and other criminal activity."[37] Third, that interest was unrelated to the suppression of free speech, since nudity played no expressive role in the dancing; to them, the message was "erotic dancing," and restricting the nude aspect of it did not change the message expressed. Wearing pasties and G-strings, for the Court, "does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic."[38] Finally, the law did not prohibit more speech than necessary, given that it still permitted erotic dancing despite the dancers' clothing restrictions. Taken together, the State of Indiana's public nudity ban, according to the Court, passed the O'Brien test.

Justice White, joined by Justices Marshall, Blackmun and Stevens, dissented. Specifically, White argued that the law did not pass part three of the O'Brien test. For White,

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[36] United States v. O'Brien, 391 U.S. 367 (1968.)
[37] Glen Theatre at 561.
[38] Glen Theatre at 571.

nudity is an integral aspect of the message expressed in "erotic dancing." Forcing dancers to wear pasties and G-strings wholly changes the message and takes away one of its key expressive aspects. precisely because of nudity's expressiveness that the state chooses to forbid public nudity, because the state desires to control the negative secondary effects such as prostitution and degradation of women. The state's interest in forcing dancers to wear pasties and G-strings is clearly related to the suppression of free speech and thus unconstitutional.

Throughout the case, one can see the Court's illiberal appeals to public morality, specifically when explaining why public nudity was a valid proscription under the law:

> 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, 333 U.S. 507, 515 (1948). Public nudity was considered an act malum en se. Le Roy v. Sidley, 1 Sid. 168, 82 Eng. Rep. 1036 (K.B. 1664). Public indecency statutes such as the one before us reflect moral disapproval of people appearing in the nude among strangers in public places.[39]

The Court here explained that state police power allows governments to restrict actions because the public disapproves of them. Referring to common law, the Court argued that public nudity could be made illegal not because of the real harm that it inflicted on others but rather because there has been a longstanding tradition of prohibiting it. The claim that common law considered public nudity an "act malum en se" (wrong in itself) reveals that for the Court, proscribing public nudity did not require there to be a proven tangible harm; rather, public nudity's tradition as an immoral, illegal act was sufficient to uphold current laws proscribing it. The Court argued that it was not unconstitutional for laws to be based on morality, or for them to be designed to protect the public from offense. With respect to the relationship between law and morality, the Court cited a precedent established in a case concerning sodomy, in which the Court held that

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[39] Glen Theatre, at 568.

> 'The law…is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.' Thus, the public indecency statute furthers a substantial government interest in protecting order and morality.[40]

The Court here justified restrictions on public nudity by claiming that laws which enforced morality are not necessarily unconstitutional. This is a marked departure from the Court's claim, in *Erzodnik*, that moral offense derived from the sight of the body is not sufficient not justify restricting non-obscene messages.[41]

Furthermore, the Court established that the law can restrict when and where individuals can be nude. Such time, place, and manner restrictions are not necessarily illiberal; Bayles (a permissive liberal,) by ascribing to Feinberg's "reasonableness" standard, accepts that actions can be restricted if there are alternative opportunities for expressing the same message. But what is illiberal is the Court's interpretation of the facts in *Glen Theatre* in a way that fit the criteria of restrictability set forth in *Renton*. That the Court could restrict the *nudity* in *nude dancing* (considered a form of speech) without infringing on the dancers' right to free speech relies on the claim that being unclothed is itself not a form of speech.

In this respect, the Court appeared to draw the line between what can and cannot be circumscribed to the private sphere along what qualifies as speech; this raises a question about how "speech" is defined. It might be argued that being unclothed is expressive, and consequently that forcing the dancers to wear pasties and G-strings restricts the message expressed by the

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[40] Glen Theatre at 570.

[41] *Bowers v. Hardwick* 478 U.S. 186, 196 (1986) was ultimately overturned by *Lawrence v. Texas* 539 U.S. 558, which established an iron-clad right to privacy. Nonetheless, the *Glen Theatre* Court's ruling has not been overruled by *Lawrence* insofar as private businesses can still be considered public spaces; public spaces, in turn, are not covered by the right to privacy solidified in *Lawrence*.

dancers. [42] But the plurality drew a line between "expressive" actions and "speech." While nudity was expressive, it did not qualify as speech.

> Some may view restricting nudity on moral grounds as necessarily related to expression. We disagree. It can be argued, of course, that almost limitless types of conduct - including appearing in the nude in public - are "expressive," and in one sense of the word this is true. People who go about in the nude in public may be expressing something about themselves by so doing. But…'We cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.[43]

The plurality here drew a narrow definition of speech. Speech, which cannot be restricted, does not include all expressive actions; rather, only certain expressive actions are afforded the status of "speech." But how is "speech" determined? Why was the message on Cohen's jacket considered "speech" while Feinberg's "nude housewife in the supermarket's" state of being would not be? The Court's statement here is a slippery slope. The Court apparently made the argument that "expression warrants complete protection except when it doesn't." Since the public would be so greatly offended by public nudity, the court reasoned, nudity cannot be granted the status of "speech," which would afford it all-but-complete protection. But if actions' perception guides whether they can be protected, the logic behind free speech protections is completely undercut. Unlike permissive liberals, who argue that the law cannot discriminate between forms of expressive behavior, the Court's standing definition of what counts as "speech" in *Glen Theatre* drew parameters within which free expression could exist.

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[42] This argument is similar to that made by the dissent, who argued that the message expressed by nude dancing is different when the dancers wore clothing; G-strings and pasties did not moderate the message, they did away with it outright. Given this, they argued that "simple references to the State's general interest in promoting societal order and morality are not sufficient justification for a statute which concededly reaches a significant amount of protected expressive activity." Nonetheless, while the court properly recognized that nudity was an expressive component of the erotic dancing, and that preserving morals are not a sufficient justification for restricting speech, they failed to extend this protection to nudity in general; the dissenting Justices expressed the same point as the majority: that nudity can be prohibited in order to protect others from offense.

[43] Glen Theatre at 570.

While in *Cohen* and *Erzodnik*, the Court expanded autonomy in public, in *Glen Theatre* the Court clarified that such autonomy has limits. The Court passively addressed Justice White's claim that under the decision in *Erzodnik*, one might similarly argue that public nudity could not be prohibited; the majority clarified that states could prohibit public nudity not only to protect community sensibilities but also because it is "wrong in itself." Moreover, the Court ruled that nudity itself, although expressive, was not a form of "speech" and could consequently be restricted in order to moderate the message expressed (*speech*, as established in *Cohen*, cannot be restricted). This distinction between *expression* and *speech* seemingly affirmed (in the wake of *Cohen*) that only when expressing *certain* messages are individuals afforded complete autonomy. The Court's position on public restrictability, which affords some forms of expression more legitimacy than others, is certainly narrower than Permissive Liberalism, which holds that society cannot make value-judgments with regards to which actions can be restricted.

The Court's conception of the public sphere was affirmed nearly a decade later *in Erie v. Pap's A.M.*[44] The case concerned whether Kandyland, a nude dancing establishment in Erie, PA could be banned from exhibiting totally nude dancing under a local law banning public nudity. In a case almost identical to *Glen Theatre*, the Court upheld the ordinance as a valid exercise of local police power; neither the statute, nor its application, violated the dancers' right to speech. Like in *Glen Theatr*e, the Court evaluated the law under the O'Brien test.[45] And like in *Glen Theatre*, it found that the law met all four standards for speech restrictions. While the ordinance was applied to prohibit nude dancing, considered a form of speech, the fact that the law was designed to suppress public nudity, not nude dancing, showed that the city's purpose was not to

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[44] Erie v. Pap's A. M., 529 U.S. 277 (2000.)
[45] United States v. O'Brien, 391 U.S. 367 (1968.)

restrict speech itself. Rather, the ordinance was designed to combat "crime and other negative secondary effects caused by the presence of adult entertainment establishments like Kandyland"; restrictions deemed constitutional nearly twenty years prior.[46]

Like in *Glen Theatre*, the Court ruled that "speech" could rarely be restricted. But since nudity itself was not a form of speech, the restriction on nude dancing was not content-based (designed to suppress a certain content) but rather content-neutral (designed to suppress the means by which a message is expressed.) But the argument advanced in *City of Erie* was slightly more overt in *Glen Theatre*. Recall that in *Glen Theatre*, the Court ruled that pasties and G-strings did not change the message expressed but rather moderated it; given that nudity itself was not a form of speech, restricting the nude aspect of the dance did not regulate speech. The ruling in City of Erie went further: like in Glen Theatre, the majority claimed that nude dancing fell on the "outer ambit of the First Amendment's protection." But while the *Glen Theater* court took this at face value, the *City of Erie* court took this to mean that the restriction only warranted low-level review.[47] Thus, the City of Erie's desire to regulate the secondary effects associated with nude dancing, despite the limited proof that such restrictions were tailored to remedy the issue, justified the regulation (even if it had an incidental effect on speech.)

> Even if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings. Any effect on the overall expression[48] is therefore de minimis.[49]

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[46] Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981.)
[47] Stone, Geoffrey R. "Content-Neutral Restrictions." *The University of Chicago Law Review*, vol. 54, no. 1, (1987): 46. The tiers of review were established in U.S v. Carolene Products Company 304 U.S. 144 (1938,) specifically in footnote four.
[48] Although the Court used the word "expressive," in the context of the expression/speech distinction established in *Glen Theatre*, the court likely meant that any effect on speech was de minimis.
[49] City of Erie, at 279.

While in *Glen Theatre*, the Court claimed that that forcing dancers to wear pasties and G-strings did not have any effect on speech, the majority in *City of Erie* added that *even if* the restriction affected speech, the suppression was minimal, given that nude dancing is only marginally a form of speech.

The dissenting justices (Stevens and Ginsberg) contended that the City of Erie's regulation was explicit censorship of nudity in a private establishment. They specifically refuted the majority's argument that the statute was content-neutral. "Although nude dancing might be described as one protected "means" of conveying an erotic message, it does not follow that a protected message has not been totally banned simply because there are other, similar ways to convey erotic messages."[50] As a result, the restriction failed part three of the O'Brien test. The justices referred to Glen Theatre, claiming that "The Court's commendable attempt to replace the fractured decision in *Barnes v. Glen Theatre, Inc*., 501 U. S. 560 (1991), with a single coherent rationale is strikingly unsuccessful; it is supported neither by precedent nor by persuasive reasoning."[51] The dissent's refutation of the majority's decision serves as a foundation for my critique of the majority further on.

In *City of Erie*, the Court was even more deferent to community norms in determining what could be restricted. While the Court in *Glen Theatre* articulated a distinction between speech and expression, with only the latter warranting protection, the Court in *City of Erie* held outright that not even all speech warrants legal protection. Given that nude dancing was not entitled to the same amount of protection as, say, the message on Cohen's jacket, the Court was highly deferential to the City of Erie when considering whether compelling dancers to wear

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[50] City of Erie at 319.
[51] City of Erie at 318.

pasties and G-strings helped combat the secondary effects associated with nude dancing establishments. Unlike in *Erzodnik*, where the Court ruled that nudity, since it was not obscene, could not be restricted without a valid state interest, the Court in *City of Erie* held that since nude dancing was only a marginal form of speech, it could be restricted without the slightest evidence that the restrictions helped combat crime.

More generally, the Court took for granted that laws regulating public nudity were justified in order to prevent crime. There is little evidence, or common sense, behind the idea that making dancers wear pasties and G-strings prevents the secondary effects associated with nude dancing. The secondary effects associated with nude dancing establishments clearly have to do with the establishment itself, not with how much skin the dancers expose. The fact that the Court was willing to consider nudity a low-level form of speech and consequently be highly deferential to the City of Erie (again, because the case only fell under low-level scrutiny) reveals the Court's deference to community norms in adjudicating which actions are allowed in public. The Court, by considering nude dancing to be only "marginally covered by the First Amendment," asserted that the dancers' right to free expression in the public sphere (insofar as the court considered Kandyland to be public) was trumped by the community's desire to not have offensive behavior in their area. This standard is even more deferential than that of Feinberg, who argues that the offendee must be directly affected by the conduct in question in order for the action to qualify as a restrictable offense. The Court's standard cannot be easily classified as legal moralist, restrictive liberal, or interest-balancing liberal. What is clear, however, is that in *City of Erie*, and *Glen Theatre*, the Court did not adhere to (permissive) liberal doctrine.

Anita Allen argues that the aforementioned cases reveal the Court's legal moralist attitude toward sex.[52] Allen begins by laying out three ways in which society compels sexual modesty: prohibiting public nudity, enforcing "modest" standards of dress, and circumscribing sexually explicit plays to certain places. Allen focuses on the third category, particularly nude dancing. Allen breaks down the decisions in *Glen Theatre* and *City of Erie*, revealing that the Court litigated in a way that enforced the social norms of body modesty, particularly with respect to women; this, according to Allen, is a form of moralist decision-making. I do not aim to evaluate Allen's accusation; I chart her critique as a means of raising questions about the Court's rationale in the aforementioned cases. Recall that my purpose in this chapter is not to classify the Court's public restrictability standard in the context of the four sides of our debate. Rather, I only have to evaluate whether their standard adhered to permissive liberal doctrine, the manifestation of liberalism in the public sphere.

Allen explains that in *Glen Theatre*, the Supreme Court employed the precedent set forth in *Renton v. Playtime Theatres*, which established when governments could enact restrictions on nude dancing. To Allen, "Renton represents the low standard of proof to which the Supreme Court holds government when it comes to establishing that nudity is harmful. modesty is of a piece with vice and crime, or how sexual immodesty is otherwise harmful to society."[53] Essentially, given that nudity is considered "low-level speech," it can be restricted without the government having to demonstrate how the regulation is designed to stop crime. But to Allen, nudity is treated as less than speech due to socially-constructed notions of modesty. Likewise, Allen criticizes the rulings in *Glen Theatre* and *City of Erie*, in which the Court held that having

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[52] Anita Allen, "Disrobed: The Constitution of Modesty." *Villanova University Law Review*, vol. 51, no. 4, 2006
[53] Ibid, 851-852.

dancers wear pasties was a valid fix for the secondary effects caused by nude dancing without limiting (or having a minimal impact on) the dancers' right to free expression (recall that nude dancing is technically considered expressive.) She explains that "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?" Given what Allen believes to be an inconsistent argument laid out by the Court coupled with the low level of speech afforded to nudity, she concludes that the Court used legal moralist principles in the aforementioned cases.

Allen further explains that despite the Court's claim that the restrictions in *Glen Theatre* and *City of Erie* were ruled "content-neutral," that is, they regulated the means by which the message was expressed (rather than the message itself,) the opposite is true. The laws' justification as "content-neutral" is merely a guise for paternalism. Allen cites Justice White's dissent in *Glen Theatre*, in which he argues that restrictions on nude dancing are meant to "protect the viewers from what the State believes is the harmful message that nude dancing communicates."[54] Agreeing with White's dissent, Allen adds that "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."[55] Allen criticizes the Court's decisions in the aforementioned cases, arguing that their belief that individuals ought to be clothed and their convictions about female decency guided their willingness to defer to state and local police power in regulating it; more generally, such beliefs

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[54] *Glen Theatre* at 590-591.
[55] Allen, "Disrobed," 854

led them to rule that nudity is not itself expressive and consequently that it only qualifies under low-level review.

Regardless of whether one believes that the Court in *City of Erie* and *Glen Theatre* was legal moralist, it is clear that in the two aforementioned cases, the Court did not adhere to permissive liberal doctrine. The Court ruled that nudity is not a form of speech, which makes it restrictable in nude dancing establishments without any effect on speech; not only that, the majority's justified public nudity restrictions on the grounds that they protect community sensibilities and uphold social decency, which reflects the principle that actions can be restricted based on the offense that they cause. Regardless of whether one characterizes such a belief as legal moralist, restrictive liberal, or interest-balancing liberal, it is clear that the precedent set by the Court is more deferential to governments than Permissive Liberalism.

III. Conclusion

After having laid out which actions liberal doctrine allows societies to restrict in the public sphere, I sought to analyze whether U.S law, the parameters of which are framed by the Constitution, holds true to such an ideology. As discussed in Chapter Two, the body is inherently naked but is made nude by a discourse which regulates the body. The publically displayed body is seen as sexual and consequently lewd, which makes people feel offended by the publically displayed body. And given that laws governing public nudity stem from how the body is constructed (as nude,) exploring the Constitutional status of public nudity provides a window into whether the Constitution, as it currently stands, embraces liberal ideology with respect to the public sphere.

Cohen, and *Erzodnik* suggested that the Court was beginning to embrace Permissive Liberalism. Both cases established that an action being offensive was not sufficient to restrict it;

the language used in *Erzodnik* also left open the possibility that public nudity, insofar as it was not done in order to offend, could not be prohibited. In order to restrict actions, they had to be "obscene," a firm backstop like Ellis' "intrinsic offensiveness" standard or Bayles' "irrationality" standard. Although such principles were not explicitly overturned in *Glen Theatre* and *City of Erie*, the latter cases clarified the limits of public autonomy under the Constitution. Specifically, *City of Erie* and *Glen Theatre* stood for the fact that public nudity could be restricted merely because the public found it offensive. Free speech protections did not apply to public nudity, since, according to the Court, only certain expressive actions qualify as speech (and even among those which do, some warrant greater protection than others); since nudity did not qualify, it can easily be restricted if the government presents a remotely reasonable rationale. Moreover, nude dancing can be restricted (under public nudity statutes) if the government presents a roughly rational reason. The first set of cases, particularly *Erzodnik*, established that absent a compelling reason to restrict a particular action, it had to be permitted; the second set of cases, in contrast, suggested that absent evidence that an action qualified as "speech," governments reserved the right to restrict it.

Given that current Constitutional precedent allows actions to be restricted (in public) based on how they are perceived by the public, the U.S Constitution's approach to the public is not in line with liberal doctrine. Understanding this disconnect sets the stage for a normative assessment of the limits of the public sphere, and the public-private distinction, in the following chapter.

5. Liberating the Public? Power/Knowledge and the Public-Private Distinction

Liberal theory has been considered a driving force in expanding individual liberty throughout the second half of the twentieth century. Its successful legal conquest of the private sphere has seemingly been key in protecting the private autonomy of marginalized individuals such as women and same-sex couples.[1] With respect to the private sphere, American law has been roughly consistent with liberal doctrine: the Court has ruled that actions cannot be regulated on the grounds that they contravene social morals; actions deemed harmless cannot be restricted in the private sphere.

Our topic of investigation throughout this thesis has been the other side of this question: whether actions can be restricted in public based on their perceived immorality. The first chapter led us to our question, sub-questions, and case study; so let us recap what we have covered since then. In the second chapter, I explained how laws regulating the unclothed body stem from how said body is constructed; the body is inherently naked but is turned nude by a system of power which regulates the body. Given that *nudity* is socially-constructed, mandatory privacy restrictions on "public nudity" enforce and create such a construct. Given that liberalism's lowest common denominator prevents us from passing paternalistic laws, laws which enforce customs, and laws which restrict an action merely because it contravenes a socially-accepted code, liberals cannot support mandatory privacy restrictions on the (public) *nude* body (Chapter Three.) Consequently, only Permissive Liberalism's conception of the public sphere holds true to liberal

[1] See Roe v.Wade, 410 U.S. 113 (1973,) Griswold v. Connecticut, 381 U.S. 479 (1965,) and Lawrence v. Texas, 539 U.S. 558 (2003).

principles. Having defined the parameters of liberal doctrine in the public sphere, we examined whether U.S Constitutional law, which holds true to liberal principles in private, has stayed true to these tenets in the public sphere (Chapter Four.) While *Cohen v. California* and *Erzodnik v. Jacksonville* established that offense was not a sufficient reason to restrict individual autonomy in public, that autonomy was undercut over two decades later in *City of Erie v. Pap's A.M* and *Barnes v. Glen Theatre Inc.*, where the Court ruled that state police power allowed governments to constitutionally restrict public nudity and nude dancing. The latter two cases rejected Permissive Liberalism and easily deferred to state and local governments, often willfully overlooking their moralist intentions. We can see, thus, that the Constitutional understanding of the public sphere does not adhere to liberal principles.

Liberal theorists see the private as a space where the individual should be left to their own volitions. When the individual is in private, no degree of offense (felt by the community) can warrant government interference; securing private autonomy is crucial to ensuring individual freedom. This narrative, however, changes with respect to the public sphere. But all liberal theorists agree that the public sphere is fundamentally different than the private; while private autonomy is fundamental to freedom, the public sphere is where people act as "citizens," as members of a collective. There is an intrinsic difference between the public individual and the private individual. In order to preserve people's right not to be offended, a society cannot allow limitless conduct in the public sphere. If this were the case, then liberalism would collapse under the force of its own weight; liberal theory would be so permissive that there would be no "right

not to be offended"; this certainly runs counter to the harm principle, which declares that actions can be restricted if they cause harm to others.[2]

To avoid this issue, liberal theorists, no matter how permissive, advocate a backstop against public freedom. For instance, Anthony Ellis (a permissive liberal) argues that actions that are "inherently unpleasant to observe" can be restricted.[3] Similarly, Michael Bayles (another permissive liberal) contends that actions which *do not* qualify as "reasonable" (by Joel Feinberg's standard) can be prohibited.[4] Permissive Liberalism, as established in Chapter Three, is the true manifestation of liberal doctrine in the public sphere. Permissive Liberalism avoids lending weight to culturally-learned offense, which violates liberal principles. Simultaneously, its backstop prevents liberal theory from collapsing under its own weight. Liberal theory aims to secure individual autonomy both in public and private. Through this, liberal theorists argue, we can secure the maximum amount of personal freedom.

Permissive Liberalism is the theory which best secures individual freedom while preserving the right not to be offended. Nonetheless, our current legal system is not in line with such principles. While the U.S Constitution adequately protects private autonomy, it severely falters with respect to securing public freedom. Finding that the Constitution's approach to the public sphere differs from liberal doctrine is not necessarily surprising. After all, theorists often see issues in abstract, not needing to deal with the practical consequences of their opinions. The Court, on the other hand, operates in the real world, their rulings having tangible effects; what's

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[2] John Stuart Mill, On Liberty, (Andrews UK, 2011.) ProQuest Ebook Central, https://ebookcentral.proquest.com/lib/bates/detail.action?docID=770561.
[3] Anthony Ellis "Offense and the Liberal Conception of the Law." *Philosophy and Public Affairs*, vol. 13, no. 1, (1984.)
[4] Joel Feinberg, and Michael Bayles. "Third Symposium" In *Issues in Law and Morality*, (Cleveland: The Press of Case Western Reserve University, 1973) 83-140.

more, the Court often has to deal with the issue of public backlash.[5] Nonetheless, just like Louis Henkin criticized the Court in the 1960's, arguing that it should adhere to liberal doctrine in the private sphere[6], so too liberal theorists (like Anita Allen) might critique the Supreme Court for not adhering to liberal doctrine in the public sphere.[7] If we accept liberal theory's assumptions about power and freedom, we might conclude thus: the Supreme Court must adhere to permissive liberal principles in order to secure individual freedom (in the public sphere); the Court cannot appeal to the community's perception of a certain action as a justification for mandatory privacy restrictions. To this end, the constitutional "right to privacy" must be supplemented with a "right to public autonomy," which guarantees individuals public freedom in line with permissive liberal principles. This constitutional principle will ensure that one's right to autonomy does not dissipate when they exit their homes. We have already liberated the private sphere from government interference, now it is time to free the public.

Under a right to public autonomy, public nudity laws would be illegitimate. The unclothed body is inherently *naked*; it is constructed as *nude*. Laws which circumscribe public nudity stem from such a construction. The "right to public autonomy" would prevent governments from restricting public nudity. Individuals are born unclothed; nakedness is our natural state. Just like the body freedom activists (described in Chapter Two Section 2D) argue, the government has no right to tell individuals to cover their natural bodies; lifting mandatory privacy restrictions on public nudity will lead to greater freedom. Individuals are currently

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[5] Joseph Ura "Backlash and Legitimation: Macro Political Responses to Supreme Court Decisions." *American Journal of Political Science* vol. 58, no. 1 (2014): 110-26; For an assessment of Constitutional modalities of evidence, see Colin Stargher, "Constitutional Law and Rhetoric." *Journal of Constitutional Law*, vol. 18, no. 5, May 2016, pp. 1348–1379.

[6] Louis Henkin, "Morals and the Constitution: The Sin of Obscenity." *Columbia Law Review*, vol. 63, no. 3, (1963): 391-414

[7] Anita Allen "Disrobed: The Constitution of Modesty." *Villanova University Law Review*, vol. 51, no. 4, (2006)

oppressed by laws which force them to either hide their bodies or face legal sanction. These laws further reinforce the body taboo and prevent the body from becoming naked. The freedom to reveal one's natural body would allow individuals to snub the social expectation that clothing be worn in front of others. This rebellion, might ultimately lead to us not seeing the body as something to be ashamed of; allowing "body freedom" might work to normalize the body. More importantly, however, we will be free from laws which force us to adopt a certain dress code. We would be outraged if governments set laws banning certain styles of dress or certain colors of clothing. But why is it any less oppressive for the government to obligate us to wear clothing in the first place? Individual autonomy means that we have the right to showcase our bodies as we wish. The fact that certain states of (un)dress are socially unacceptable is not a sufficient reason to outlaw them.

Such is what I call the "liberal conclusion": the Constitution should secure a right to public autonomy (in line with permissive liberal principles) in addition to the right to privacy. This conclusion might suitably answer our question if we accept liberal assumptions about the subject and the public-private distinction. But applying our analysis of the body (in Chapter Two) to the liberal conclusion reveals irreconcilable differences between the two accounts of power. Looking at public nudity helps take the question of public autonomy beyond these liberal assumptions, using Foucault and other postmodern liberal-critics to push us toward a more profound understanding of autonomy, the subject, and the public sphere.

I. The Liberal Conclusion: Two Problems

The liberal conclusion, that the Supreme Court must adhere to permissive liberal principles, may suffice if we accept the liberal assumption of an autonomous subject and their belief that power is manifest through law, which either permits or suppresses (what Foucault

calls a "juridico-discursive account of power.) Throughout this thesis, we have accepted certain liberal premises with respect to individual autonomy and the public-private distinction. Given that mandatory privacy restrictions on the unclothed body (as well as on other socially-constructed offenses) are unjustified under Permissive Liberalism, we might say that Permissive Liberalism will pave the way for greater freedom. But when we look at the unclothed body, a number of issues with liberalism's account of the subject become evident. In this section, I present two separate but related issues that come with this supposed "liberation of the body."

A. Problem One: The Liberal Subject

The first problem with the liberal account of the public sphere is that it presumes that the subject is autonomous and that law is the primary mechanism of regulation. Thus, if mandatory privacy restrictions on the unclothed body are limited, individuals will have greater autonomy. But when one cross-applies Foucault's analytics of power to the unclothed body (as we did in Chapter Two,) it is evident that liberals mischaracterize how power operates, placing too much emphasis on negative law and autonomy.

Michel Foucault claims that modern power is primarily positive. Unlike liberals' negative account of power, which he terms "juridico-discursive," Foucault's "bio-power" is primarily positive and regulates individuals by constructing knowledge. Foucault explains the difference between ancient power and modern bio-power. "Power would no longer be dealing simply with legal subjects over whom the ultimate dominion was death, but with living beings, and the mastery it would be able to exercise over them would have to be applied at the level of life itself; it was the taking charge of life, more than the threat of death, that gave power its access even to

the body."[8] Modern power (bio-power) does not regulate through the "threat of death" but rather holds control over "life itself"; that is, it does not allow or deny but rather controls. As a result, greater freedom of action under the law does not liberate individuals from power; people continue to be regulated below the level of law.

Foucault explains that "we are subjected to the production of truth through power and we cannot exercise power except through the production of truth."[9] Since power constructs truth, the individual is not autonomous in the way that liberal theorists presume. Liberal theorists assume that the individual is able to exercise their will freely insofar as they are not constrained by law. But Foucault argues that even in areas where the law permits certain actions, individuals continue to be regulated by power. Bio-power, or power over the subject, goes beyond negative law.

Foucault's critique of juridico-discursive power becomes apparent when one considers public nudity. Even if we embrace Permissive Liberalism as a guide for determining which actions can be circumscribed to the private sphere, we continue to be subject to the body taboo; that is, erasing mandatory privacy restrictions on the body will not make unclothed individuals *naked.* Insofar as the body is stigmatized (it is *nude* rather than *naked,*) individuals continue to be subject to the body taboo. In Section D of Chapter Two, I explained how various groups which attempted to rebel against the body taboo reinforced it; for instance, they entrenched the idea that nudists were inherently different from the norm or portrayed that nudism is only to be done in private. These groups' experiences reveal how the body's construction as *nude*, that which

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[8] Michel Foucault. *The History of Sexuality: The Will to Knowledge: vol. 1*. (Camberwell, Vic.: Penguin, 2008): 142-143.
[9] Michel Foucault, "Two Lectures" *Power / Knowledge: Selected Interviews and Other Writings, 1972-1977*. Ed. Colin Gordon. (Brighton: Harvester, 1980): 93.

regulates it, is eternally present even when individuals may think otherwise. Changing the laws surrounding public nudity (although potentially allowing for greater agency) will not free the subject from the power that regulates their state of undress.

That the public body would still be *nude* despite being legal reveals Foucault's hostility to the idea of the autonomous subject who is primarily controlled by prohibitive law. Central to the juridico-discursive account of law is the notion that there exists an autonomous subject free from external factors which shape him; the individual is completely in control of themselves and their actions. But the example of *nudity*-- that is, that it exists despite a lack of laws proscribing it -- reveals that power continues to control the subject beneath the level of law. In this sense, there is no autonomous subject; rather, the subject is constantly subject to the discourse which shapes them. Embracing Permissive Liberalism may free the subject from legal proscription, but it leaves them victim to the stigma of *nudity*.

Foucault rejects the idea of an *autonomous* subject. But that is not to say that the subject lacks *agency*. Below the level of law, Foucault is open to the idea that the subject has choice. In "Foucault and Critique: Deploying Agency Against Autonomy," Mark Bevir articulates a difference between *autonomy* and *agency*.[10] Bevir explains that "a hostility to the subject runs throughout Foucault's oeuvre."[11] Detailing how the subject is constructed by power, Bevir claims that "If we take Foucault's hostility to the subject to be a critique of autonomy, it seems to me to be reasonable."[12] But, unlike certain scholars, who understand the Foucauldian subject as

[10] Mark Bevir "Foucault and Critique: Deploying Agency Against Autonomy." *Political Theory*, vol. 27, no. 1 (1999): 65–84.
[11] Ibid 65.
[12] Ibid 67.

passive, Bevir argues that rejecting autonomy does not necessarily entail a rejection of agency.[13] Under Foucault's analytics of power, it is wholly possible for the subject to have choice despite those choices existing within a field of power relations. "Different people adopt different beliefs and perform different actions against the background of the same social structure, so there must be at least an undecided space in front of these structures where individuals decide what beliefs to hold and what actions to perform."[14] Bevir's interpretation of Foucault, which is open to the subject as agent, is quite fitting. After all, insofar as there is disagreement among members of society, individuals must have some ability to choose one idea over another. To say that the subject's actions exist within a limited context is not to say that the they have no ability to act within that context, and that there cannot be real disagreement among constituted subjects. Bevir's definition of autonomy as "freedom from relations of power" follows liberals' emphasis on the autonomous subject outside of the scope of law.[15] Unlike James Wong, who interprets autonomy as "self-rule" rather than "self-formation," Bevir's interpretation of Foucault holds that the French philosopher adopted liberal theorists' definition of autonomy, a concept which he rejected. Bevir and Wong's positions are not wholly different; their main point of contention is not over whether Foucault believes that the subject can act freely within the power relations which constitute them (they both believe that they can) but rather whether this ability to act constitutes "autonomy." But embracing Wong's definition of autonomy as "self-rule" would require rejecting the liberal conception of autonomy, or at the very least, differentiating it from

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[13] For proponents of the former view, see Charles Taylor, "Foucault on Freedom and Truth," in *Couzens Hoy*, Foucault, A Critical Reader, 69-102; Edward Said, "Foucault and the Imagination of Power," in *Couzens Hoy, ed. Foucault, A Critical Reader*: 149-156; Nancy Fraser, "Foucault on Modem Power: Empirical Insights and Normative Confusion," *Praxis International* (1981): 272- 87; and Harold Weiss "The Genealogy of Justice and the Justice of Genealogy: Chomsky and Said vs. Foucault and Bove," *Philosophy Today*, (Spring 1989): 73-94.
[14] Bevir "Foucault and Critique: Deploying Agency Against Autonomy," 68.
[15] James Wong "Foucault and Autonomy." *Archives for Philosophy of Law and Social Philosophy*, vol. 96, no. 3, (2010): 277

Wong's conception of autonomy (as self-rule.) If we are to do this, however, then we find ourselves with an imprecise definition of autonomy insofar we have to distinguish between autonomy as "self-rule" and autonomy as "freedom from relations of power." Bevir's autonomy-agency distinction allows us to better understand the difference between two different definitions of freedom and, more generally, two separate conceptions of power. And Bevir's agency-autonomy distinction clarifies that despite the liberal mischaracterization of the subject (according to Foucault,) they are not completely without the ability to act.

Neve Gordon has a similar understanding of the Foucauldian subject.[16] Gordon, like most Foucauldian theorists, agrees that "power makes human beings into objects by giving them identities to which a set of categories are attached…The categories or attributes are concatenated to the subject and are conceived of as natural, normal and/or essential."[17] But Foucault's later work, Gordon argues, is more open to the idea of the subject as an agent, which can freely act within the boundaries of power. Gordon uses Heidegger and Sartre's ontological accounts of freedom to make the case that such a freedom can have a place within the web of constraints imposed by power.[18] In this sense, while power defines the parameters within which individuals can act, they can be radically free within such a web of constraints. Gordon's embrace of the autonomy-agency distinction reveals that the subject is not completely tied within power.

Contemporary Foucauldian thinkers, such as Judith Butler, have also embraced the autonomy-agency distinction. In response to the argument that Foucault's account of power leaves no room for action, Butler claims that "To perform this kind of Foucauldian critique of the

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[16] Gordon, Neve. "Foucault's Subject: An Ontological Reading." *Polity*, vol. 31, no. 3, 1999, pp. 395–414.
[17] Ibid 400.
[18] See Michel Foucault "The Ethics of the Care of the Self as a Practice of Freedom." *The Final Foucault*, edited by James Bernauer and David Rasmussen, (MIT Press, 2011): 11; Michel Foucault *History of Sexuality. Vol. 2: The Use of Pleasure* (London: Penguin Books Ltd., 1992)

subject is not to do away with the subject or pronounce its death, but merely to claim that certain visions of the subject are politically insidious."[19] While Butler holds that the idea of a liberal autonomous subject is "politically insidious," she does not embrace the view that the subject is "dead"; "to claim that the subject is constituted is not to claim that it is determined; on the contrary, the constituted subject is the very precondition of its agency."[20] While Butler agrees that the subject retains agency despite being determined, she makes clear that agency cannot exist a priori: agency requires that we presume the subject is constituted by power. Nonetheless, Butler's account of the subject as a possible agent reveals that contemporary Foucauldian thinkers have adopted the agency-autonomy distinction.

Foucault's account of the subject reveals a flaw in the liberal account of power. While liberal theorists presume that the subject is autonomous--and consequently emphasize law as the primary (mostly negative) mechanism of social control-- the subject is controlled by discourse beneath the level of law; such positive power shapes the subject and their knowledge. In this sense, embracing Permissive Liberalism fails to completely liberate the unclothed body insofar as the body continues to be subject to social systems of control--the naked body is still perceived as nude. But the fact that the subject is not autonomous does not mean that they lack choice. Power lays out the parameters within which individuals can act, but within those parameters the individual is a free agent. And given that the subject can act as an agent, lifting laws proscribing the unclothed body might have real effects on expanding agency. In Chapter Two, I mentioned that laws control the unclothed body in two ways: 1. they construct the body as taboo, and 2. they prevent individuals seeking to normalize the unclothed body from legally being able to do

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[19] Judith Butler "Contingent Foundations: Feminism and the Question of 'Postmodernism'" *Feminist Contentions: A Philosophical Exchange*, edited by Linda Nicholson (New York: Routledge, 1993): 46
[20] Ibid 47.

so (I discuss the first sense in the next sub-section.) With respect to the second point, lifting laws proscribing the unclothed body may allow individuals to go about unclothed and potentially work to normalize the body; such might be the sort of small scale resistance that Foucault envisaged.[21] To be fair, these individuals will lack autonomy insofar as their bodies are still *nude*. But within the scope of power, legalizing the body would allow more individuals to actively defy the body taboo, even if their actions are still perceived as indecent by most of society. Lifting mandatory privacy restrictions does not *liberate the body,* but it can have tangible effects on individuals' ability to express their view within power and perhaps even be a starting point for resistance against the body taboo. Permissive Liberalism, which seeks to "free the public sphere" and in the process legalize public nudity, does the right thing for the wrong reasons.

B. Problem Two: Permissive Liberalism and the Public-Private Distinction

The previous sub-section criticized liberal theorists' presumption of an autonomous subject. Even if laws proscribing the unclothed body are lifted, the body's construction as *nude* will remain, even if such a legal change might allow for greater agency. Permissive Liberalism, given the boundaries that it lays out, is also faced with another problem. By rejecting the other two traditions, Permissive Liberalism aims to allow for greater autonomy in the public sphere. But Permissive Liberalism does not allow for limitless conduct in public. Recall that various permissive liberals formulate their own standards for which actions can be proscribed in public. For instance, Anthony Ellis holds that liberalism allows governments to restrict actions which are "intrinsically offensive," and claims that "It should not be thought, of course, that the liberal approach has no place for the weighing of interests. Any sensible approach must have a place for

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[21] Brent L. Pickett, "Foucault and the Politics of Resistance," *Polity* vol. 28 no. 4 (Summer 1996): 445-466

that."[22] Similarly, Michael Bayles, in adopting Feinberg's "reasonableness standard," accepts that actions which are unreasonable can justly be proscribed.[23] The permissive liberal position carries a hard backstop; while offense is not a sufficient reason to restrict actions, governments can restrict actions based on other criteria (such actions might include public vomit-eating or public defecation.)

But insofar as there is a distinction between what is allowed in the public sphere and what is allowed in private, certain actions will continue to be constructed in line with society's understandings of what belongs in public and private. Recall that in Chapter Two, I used a Foucauldian analytics of power to argue that mandatory privacy restrictions on the unclothed body reinforce its construction as taboo. I particularly relied on a passage in *History of Sexuality, vol. 1*, in which Foucault explains how law, in contemporary society, "…operates more and more as a norm, and…the judicial institution is increasingly incorporated into a continuum of apparatuses…whose functions are for the most part regulatory."[24] Foucault argues that law plays a normalizing role and works to construct and reinforce a certain knowledge. In this case, the public-private distinction itself normalizes certain actions as acceptable while shunning others. If we accept the Foucauldian claim that the subject and knowledge are constructed, then we might similarly argue that circumscribing certain actions (such as vomit-eating, and public defecation) to the private sphere reinforces their construction as taboo and consequently private.

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[22] Anthony Ellis "Offense and the Liberal Conception of the Law." *Philosophy and Public Affairs*, vol. 13, no. 1, (1984): 23.
[23] Joel Feinberg and Michael Bayles. "Third Symposium." In *Issues in Law and Morality*, (Cleveland: The Press of Case Western Reserve University, 1973): 83–140.
[24] Foucault, *History of Sexuality*, 144; For more on Foucault and law's normalizing role see Ewald, Francois. "Norms, Discipline, and the Law" *Representations*, no. 30, Special Issue: Law and the Order of Culture (1990): 131–169.

Foucault is not the only critic of liberal doctrine to make this argument. Alan Freeman and Elizabeth Mensch analyze the liberal public-private distinction:

> We consistently take for granted that there is both a public realm and a private realm. In the private realm we assume that we operate within a protected sphere of autonomy, free to make self-willed individual choices and to feel secure against the encroachment of others… In contrast, the public realm is a world of government institutions, obliged to serve the public interest rather than private aims.[25]

This liberal public-private distinction presumes a difference between those actions which ought to be allowed in public and those which should be permitted in private. Freeman and Mensch further argue that the understanding that actions can be classified into two separate realms shapes how we perceive those actions themselves.

> It is part of our lived reality to know that the public realm is different from the private, that they both exist, but are separate from each other, with different things happening in each one. That knowledge, in turn, molds our relationships even to our closest friends.[26]

Freeman and Mensch argue that law plays a normative role in shaping how actions are constructed. We might perceive actions differently depending on whether we understand them to belong in the public or private realm. But actions are not inherently "public" or "private." Rather, the idea of separate public and private spheres, according to Freeman and Mensch, is a "product of cultural contingency, not objective reality," which is created and perpetuated by the legal distinctions that enforce it.[27] And such a worldview may have dangerous consequences. For instance, abused women might find that the state fails to punish their abusers since such an action occurred in the private sphere. While the liberal response to these harmful implications is to "move the line," arguing, for example, that one's body is a private sphere which others cannot

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[25] Alan Freeman and Elizabeth Mensch "The Public-Private Distinction in American Law and Life" *The Buffalo Law Review*, vol. 36, no. 237 (1987): 237.
[26] Ibid, 238
[27] Ibid.

intrude on, this is problematic insofar as liberals fail to see that the distinction is itself arbitrary. It is not that Freeman and Mensch believe that we cannot use the public-private distinction in law, but they do highlight the importance of understanding that such a distinction is a construct and stems largely from the laws enforcing it; this understanding might allow for a "strategic" use of the public-private distinction, viewing it as an adaptable legal distinction rather than an intrinsic difference.

If in modern power, law (and the public-private distinction more specifically) plays a normative role in constructing knowledge, we can hardly say that accepting permissive liberal doctrine frees us from the hold of power in public. Although embracing Permissive Liberalism may allow for greater agency, the public-private distinction continues to marginalize those actions which it does not protect. Insofar as we presume a public-private distinction at all, we continue to uphold the idea that individual freedom ought to be limited in certain places. What's more, we reinforce the taboos surrounding actions which are labeled as "private," by enforcing the idea that those actions not protected by Permissive Liberalism are not of public concern. This is problematic because, according to Foucault, the significance of an action is assigned by power. If power constructs discourse, protecting certain actions (public nudity, public sex) while not covering others (public defecation, public vomit eating) plays into the normative system of power which marginalizes certain actions in the first place.[28] What we can see, thus, is that Permissive Liberalism, by assuming a juridico-discursive notion of power, neglects the regulatory tendencies infused in its liberatory discourse.

Examining the two problems associated with Permissive Liberalism reveals the extent to which the individual is constructed by power. While Foucault criticizes the liberal emphasis on

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[28] See Foucault, "Two Lectures."

"law as prohibitive," he does not completely shun the idea that law plays an active role in shaping the subject and their knowledge. Foucault sees law in modern society as another manifestation of bio-power, a positive power which regulates. And given that law has a normative effect, changing laws might impact on the (constructed) individual's ability to act. While it is important to note that embracing Permissive Liberalism will not, in itself, make the body naked, it is possible that legalizing the unclothed body might eliminate one element in constructing and perpetuating the body taboo. Moreover, legalizing the body might allow for greater agency insofar as individuals can be nude without fear of legal reprisal; while their state of undress would still be taboo, they will be free from the constraining influence of law. We can conclude this section, thus, by saying that while eliminating mandatory privacy restrictions on the unclothed body might pave the way for greater agency, legalizing the body as part of a permissive liberal opposition to certain regulations perpetuates the idea of a real public-private distinction, which, as Grossman and Herschel argue, has a regulatory effect on the subject; as previously mentioned, Permissive Liberalism does the right thing for the wrong reasons.

II. Autonomy, Agency, and the Public-Private Distinction

While the two problems associated with embracing Permissive Liberalism appear separate, they are in fact two sides of the same coin. The first problem, that liberal theory presumes an autonomous subject, shows that many of liberalism's assumptions about law being essentially negative and the ultimate source of regulation might be ill-founded; if the subject is not autonomous, we cannot assume that law is the primary mechanism of domination over them. The other problem is that in embracing Permissive Liberalism, we presume a real public-private distinction. And insofar as law serves a normalizing function in society and power produces knowledge, we conceive of actions in line with the laws surrounding them. For instance, if an

action is legally restricted to the private sphere, we see it as something personal. These two issues, as I mentioned, are in fact part of the same critique of liberal doctrine. In this section, I explain the joint critique: that the public-private distinction itself depends on the presumption of an autonomous subject; it requires that an assumed split between a private sphere free from power and a public sphere where the subject acts as a public citizen (free from their privately-held beliefs.) I go on to situate this critique within a wider analysis of the public-private distinction. Understanding the futility of this split will ultimately lead us to re-evaluate how we have framed our research question and our assumptions throughout this thesis.

The liberal juridico-discursive account of power presumes a clear distinction between the public and private subject. To illustrate, this entire thesis has revolved around the distinct question of *public* autonomy, (having resolved the question of whether there should be private autonomy in the affirmative.) For instance, the very idea of a "right to privacy," established by the Supreme Court and advocated for (albeit not using the language of rights) by H.L.A Hart in his debate with Patrick Devlin, presumes that the private sphere is fundamentally *different* than the public sphere. This distinction takes as its starting point, as Freeman and Mensch explain, that while the private sphere is a space for individuals to act as they wish, the public sphere is where an individual acts as a citizen, a member of a community.[29] The idea that the public sphere is subject to different regulations, in which societies have to balance the right not to be offended with the right to autonomy, relies on this idea of a two-sided individual. But this concept of the subject only holds insofar as one presumes that power operates exclusively through law; that is, it is only if we presume that law (in its prohibitive form) is the primary means of power (there is an autonomous subject) that we can see the private sphere as a space outside of it. But if we

[29] Freeman and Mensch, "The Public-Private Distinction in American Life."

reject the juridico-discursive account of power, this distinction appears arbitrary. If the subject is constructed and lacks autonomy in the first place, then we can hardly say that being free from (prohibitive) legal imposition makes the subject "free." The individual, constituted by power, remains subject to its hold in both the public and private spheres. While we can say, perhaps, that one has greater *agency* in the private sphere (insofar as they are not subject to laws that prohibit certain types of conduct,) the subject similarly lacks autonomy in the public and private spheres. The fundamental assumptions behind the liberal public-private distinction are undercut once we move past the juridico-discursive account of law.

The Foucauldian critique of the public-private distinction is situated within a theoretical camp which criticizes the liberal public-private distinction. Larry Alexander, a permissive liberal, explains that this camp formulates "conceptual attacks associated with postmodern thought."[30] The postmodern attack criticizes the fundamental assumptions underlying the liberal public sphere. Alexander describes the postmodern critique as two-sided: one which he calls "perspectivalism" and the other which he describes as "the postmodernist claim that the private subject is a social construction." "The first attack asserts the conceptual primacy of the private sphere, while the second asserts the conceptual primacy of the public sphere."[31] The Foucauldian critique is situated, most likely, within the latter "attack"; but in order to contextualize the Foucauldian critique, it is important to review the postmodern perspective altogether.

Alexander cites Pierre Schlag as one proponent of the first attack, which again, Alexander describes as "the postmodernist claim that the private subject is a social construction." I will refer to this perspective as the "social-construction perspective." Schlag explains that

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[30] Larry Alexander. "The Public/Private Distinction and Constitutional Limits on Private Power." *Constitutional Commentary*, vol. 10, no. 2, (1993): 361–378.
[31] Ibid, 370.

"contemporary legal thought establish, depend upon and eclipse a quintessentially liberal individual subject"[32] But such an assumption is problematic when "each school recognizes that its own intellectual architecture, its own normative ambitions rest upon the presupposition of a subject—a subject whose epistemic, ontological, and normative status is now very much in question."[33] Liberal theory, once one acknowledges the "problem of the subject," reveals itself as confined to a realm of power; that is, it cannot make independent normative judgments about power because such critiques also exist within the scope of power. This larger critique of liberal theory can be cross-applied to the public-private distinction. The liberal subject, in the private sphere, is not outside of power. The public-private distinction, once we acknowledge that the subject is not autonomous, reveals itself as arbitrary; operating on its basis will, as Schlag (and Freeman and Mensch) argues, reproduce "a false aesthetic of social life." Insofar as liberalism presumes an autonomous subject, all normative legal claims that operate on the basis of such an assumption fail to carry normative weight. With respect to the private sphere, liberal doctrine assumes that the private subject can be free from power. Given that this assumption rests on a juridico-discursive notion of power, the assumption that the private sphere is inherently different from the public for this reason lacks foundation. The "social-construction" perspective, thus, undermines the liberal view that the private sphere is outside of power.

The other side of the postmodern liberal critique is what Alexander calls "perspectivalism." This view holds not that the public sphere is not a place where individuals act as "citizens" but rather a place where individuals manifest their "private" identities constructed by a regime of power/knowledge; in this sense, the public individual does not operate as a citizen

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[32] Pierre Schlag "The Problem of the Subject." *Texas Law Review*, vol. 69 (1991): 1630.
[33] Ibid.

but as a subject. Once one acknowledges that so-called private identities carry into the public sphere, the logic behind the separation of the two spheres becomes arbitrary. Martha Minow is a notable proponent of this view.[34] Minow explains the "dilemma of difference": the problem associated with how we understand difference itself. Minow claims that "legal treatment of difference…tends to treat as unproblematic the point of view from which difference is seen, assigned, or ignored, rather than acknowledging that the problem of difference can be described and understood from multiple points of view."[35] By presuming difference rather than examining how "power influences knowledge," legal theory presents alternate perspectives as "different" rather than understanding the social factors which positioned that perspective outside of the norm; moreover, such a treatment of difference neglects the experiences of individuals who may not fit within recognized categories of difference. Minow explains, however that "once we see that any point of view, including one's own, is a point of view, we will realize that every difference we see is seen in relation to something already assumed as the starting point."[36] Justice, then, is not the rights afforded to pre-determined special groups but rather "the quality of human engagement with multiple perspectives framed by, but not limited to, the relationships of power in which they are formed."[37] For the perspectivalist, the public sphere is a construct; it reflects a particular perspective. There is no such thing as a neutral "public sphere," where only certain actions belong. Rather, there can only be, for instance, a "male public sphere" or an

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[34] Martha Minow "The Supreme Court, 1986 Term--Foreward" *Harvard Law Review,* vol. 101, no. 1, (Nov. 1987): 10–95.
[35] Ibid, 14.
[36] Ibid, 15.
[37] Ibid, 16.

"able-bodied public sphere." Once one acknowledges that there is no such thing as an objective, neutral public sphere, one undercuts the entire logic behind keeping the two realms separate.

Alexander denounces both sides of the postmodern critique, writing that

> Both of these conceptual attacks on the public/private distinction, carried to the extreme, completely collapse the public and private spheres into one another…Both the relativism of perspectivalism and the determinism of postmodernism [the social construction perspective] are skeptical claims that, like all strong forms of skepticism, are ultimately self-undermining and normatively impotent. Relativism and social construction leave everything unchanged. There is a public/private distinction. We perceive matters as appropriately assigned to one or the other of these domains in part because we are socially constructed to do so.[38]

Alexander argues that the postmodern critiques of the public-private distinction end in extreme relativism and collapse the public-private distinction into each other. But, Alexander argues, the public-private distinction is real insofar as we see things as public or private, even if that is a result of how we are conditioned.[39] Consequently, the differences between public and private continue to be legally relevant. But Alexander misses the point of the postmodernist critiques. It is not that realizing that the public-private distinction is arbitrary necessarily requires us to abolish it; none of the theorists we have covered advocate such a solution. Rather, what the postmodern critiques teach us is that it is necessary to first *acknowledge* that the public/private distinction is constructed (much like we might acknowledge that power regulates us beyond law), even if, for our purposes, it is necessary to employ it.[40] Once we acknowledge this, we can discuss the legal implications.

III. The Wider Debate

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[38] Larry Alexander "The Public/Private Distinction and Constitutional Limits on Private Power," 371.
[39] This might be compared to the idea of "agency" whereby we accept that autonomy is a myth but hold that we can still be free within the realm of power.
[40] Freeman and Mensch, "The Public-Private Distinction in American Life," 256.

The liberal conclusion, that the Supreme Court should adopt permissive liberal principles, encounters two related problems: liberal theory mistakenly presumes an autonomous subject, and the public-private distinction itself limits freedom insofar as it constructs and codifies certain actions as "public," meaning for the collective good, or "private," meaning personal. Those constructs reveal themselves as arbitrary once we acknowledge how power operates. Both critiques come together in the two-sided "postmodern" critique of the liberal public-private distinction. The postmodern critique holds that since the subject is not autonomous--that is, power constructs the individual and their knowledge of the world—the designation of actions as "public" or "private" is ill-founded. But the postmodern critique is situated within a wider web of criticism of the liberal public-private distinction. In this section, I contextualize the postmodern critique by reviewing Marxist and Feminist attacks on the public-private split.

A number of second-wave feminists took issue with the liberal public-private distinction, particularly its conception of the household as a space free from government intrusion. Moreover, liberal theory often presumes that its subjects are "heads of households," neglecting the interests of "dependents," such as women and children. One such critic is Catharine MacKinnon. MacKinnon, a radical feminist, argues that presuming a public-private distinction is instrumental for the liberal state in enforcing male supremacy.[41] In particular, the liberal notion of an impenetrable private sphere constructs marital rape and abuse as "private matters." MacKinnon writes that "private means consent can be presumed unless disproven. To contain a systematic inequality contradicts the notion itself."[42] Liberalism sees privacy from a male point of view; the very notion of a "private sphere" presumes that there is a level beneath which

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[41] Catharine A. MacKinnon "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence." *Signs: Journal of Women in Culture and Society*, vol. 8, no. 4, (1983): 635–658.
[42] Ibid, 656.

inequalities do not exist. Consequently, the very notion of a public-private split promotes systemic gender inequality. MacKinnon's slogan: "the personal is political," claims that such inequalities are not outside of the political realm (public sphere); they are part of it. And addressing such inequalities, MacKinnon believes, requires dissolving the public-private divide altogether.

Liberal feminists also criticize the liberal public-private distinction. But unlike radical feminists, liberal feminists do not necessarily support doing away with the public-private distinction altogether. Rather, many believe that doing justice to women requires that liberal theorists acknowledge gendered hierarchies when deciding where the public-private line ought to be. Susan Moller Okin, for example, criticizes liberal theorist John Rawls, who in *Justice as Fairness*, presents a theory of justice in which individuals choose social principles under a "veil of ignorance."[43] Rawls presumes that gender is one of those categories covered by his veil (under which individuals do not know where in society they will be placed when making decisions about that society.)[44] Nonetheless, in placing the household outside of the state's control, Rawls (whom she uses to take issue with liberal theorists more generally) portrays the subjugated role of women as a natural hierarchy. That is, Rawls does not take issue with hierarchies which exist within the household. Consequently, Okin argues that it is necessary to understand intra-household gender relations as an unequal relationship which, like economic and social inequality, falls under Rawls' principles of justice; if we presume that household relationships are outside of the scope of justice, then Rawls' liberal promise of equality operates "on shaky ground."

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[43] Susan Moller Okin "Justice as Fairness: For Whom?" *Justice, Gender, and the Family* (New York: Basic Books, 1989.)
[44] John Rawls, *A Theory of Justice* (Cambridge, MA: The Belknap, 1971.)

Marxist theorists have also criticized the liberal public-private distinction for legitimizing inequality. Gerald Turkel sums up Marx's opposition to the public-private dichotomy. He divides these critiques into three parts.[45] First, Marx argued that the public-private dichotomy leads leads individuals to understand actions in terms of their legal status rather than on their effects. "Owning property, buying and selling on the market, and engaging in household consumption have their social significance established through a universalizing legal discourse rather than through the practical meaning they have for actors."[46] Consequently, an action being labeled as "private" presents it as a personal matter—something outside of the community's consideration. Marx's second critique builds upon the first: insofar as the public-private distinction leads individuals to place emphasis on actions' legality, it similarly legitimizes private property. Marx argues (according to Turkel) that the dichotomy portrays private property as a legal, and consequently moral, right. Whereas society may otherwise be able to allocate resources as it sees fit, the public-private legitimizes private ownership as a right outside of the state's consideration.[47] Marx's third critique presents a "more concrete, empirical approach to the public/private distinction."[48] This is less a critique and more of how Marx sought to use the concept to the advantage of the worker; Marx hoped that "the formation of a progressive public sphere, which led to increased private rights of workers to control their time, would generate conditions both for the enhancement of workers' private lives and, also, for their fuller enlightenment and participation in public life."[49] The third critique is less relevant for our

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[45] Gerald Turkel, "The Public/Private Distinction: Approaches to the Critique of Legal Ideology." *Law & Society Review,* vol. 22, no. 4, (1988): 801–823.
[46] Ibid, 805.
[47] Ibid, 806-807.
[48] Ibid, 807.
[49] Ibid, 809.

illustration of the public-private critiques. The first two, however, present a socio-economic critique of the public-private distinction. While Marx certainly did not write in response to 20th century liberalism, his ideas are nonetheless useful in conceptualizing how the public-private distinction impacts how individuals see the world and can consequently obstruct necessary social restructuring. More generally, understanding that scholars of other theoretical camps similarly critique the liberal public-private distinction is important in grasping the countless issues associated with such a divide. Understanding these difficulties allows us to re-evaluate our approach toward the public-private distinction altogether.

IV. Conclusion

There are two possible conclusions to this thesis. The first, which I call the "liberal conclusion," is discussed in the first section of this chapter. In Chapters Three and Four, we found that Permissive Liberalism is the only theory of the public sphere which accords with liberal doctrine, but that the U.S Constitution is not in line with this theory. Since liberal theorists see "freedom" as "freedom from unnecessarily constraining laws," a "juridico-discursive" theory of power might lead to the conclusion that the Supreme Court needs to interpret the Constitution in line with permissive liberal doctrine. Supplementing the right to privacy with what I call a "right to public autonomy" would ensure that an individual's freedom is not compromised when they enter the public sphere.

But such a conclusion only follows if we accept a juridico-discursive theory of power. Chapters Three and Four employed this understanding of power in order to better understand liberal theorists' and U.S Law's understanding of the public sphere; but liberal theorists, given their conception of power, have a flawed approach to the public-private distinction. Given their overwhelming focus on law, liberal theorists entrench certain social constructs through the laws

that they promote. Moreover, liberal theorists neglect to consider how individuals and actions are constructed by a web of power relations. This superficial understanding of power has grave implications for law. Even permissive liberals presume that there ought to be a backstop against public autonomy—they presume that the public sphere must be a space for as much "individual autonomy" as possible while preserving the public-private distinction; actions which are universally offensive, for instance, can be restricted without issue. But if society finds law to be indicative of right and wrong, then the law works to construct "universally offensive" actions as taboo. In this sense, law does not act on independent subjects; rather, law plays a role in constructing those subjects themselves.

This understanding of power raises questions about liberals' presumption of an intrinsic divide between the public and private spheres. Liberal theorists presume that the individual in private is and should be fundamentally different from the individual in public; while in private, the individual is completely autonomous, the public individual acts as a citizen, as a member of society. Consequently, restrictions on public "autonomy" are more justified than on private ones. But when one takes into account Foucault's analytics of modern power, it is clear that this "intrinsic divide" constructs how individuals see the world. This Foucauldian critique forms part of a larger "postmodern" critique of the liberal public-private distinction.[50] This general school of thought criticizes liberals' presumption that the subject is autonomous; since they are not, these scholars argue, the public-private distinction operates on a faulty assumption. Feminist and Marxist theorists have also criticized the public private distinction, arguing that it normalizes and entrenches gender and economic inequalities.

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[50] Larry Alexander "The Public/Private Distinction and Constitutional Limits on Private Power," Martha Minow "The Supreme Court, 1986 Term--Foreward" *Harvard Law Review,* vol. 101, no. 1 (Nov. 1987): 10–95, Pierre Schlag "The Problem of the Subject."

The broader debate about the liberal public-private distinction raises questions about how, if at all, we might restructure our understanding of the public sphere (if we believe there should even be one) to allow for greater "freedom." If we accept that the subject is not autonomous, but can act as an agent, how might we work to maximize that agency through a set of laws. If we deny liberals' understanding of power, believing that the subject is constructed below the level of law, and that law plays a positive role in constructing the subject, how might we factor these issues into our assessment of the public sphere? Liberals ask the right question but pursue the answer by the wrong means; the question for us is how to formulate a theory of the public sphere while avoiding liberal theorists' faulty assumptions.

Conclusion

Let me briefly review what I have covered thus far: Chapter One charted the historical development of liberal autonomy, both in the public and private spheres. Moreover, I reviewed the liberal literature on public autonomy, which breaks down into three groups: I call these groups "Restrictive Liberalism," "Interest-Balancing Liberalism," and "Permissive Liberalism." I located my case study, public nudity, as a frequently debated example within this literature. In Chapter Two, I explored how nudity is constructed using a Foucauldian analytics of power. The body's construction as nude not only explains laws proscribing public nudity, it also raises questions about the subject, power, and autonomy. Chapters Three and Four employed a liberal account of power (as opposed to the Foucauldian one discussed in Chapter Two) to explore how liberals approach the question of public autonomy. Chapter Three finds that only Permissive Liberalism accords with what I call the "lowest-common denominator" of liberal doctrine, which prohibits restrictions based on social conventions. Chapter Four finds that the U.S Constitution's approach to the public sphere, as currently interpreted by the Supreme Court, does not accord with Permissive Liberalism (and consequently does not follow liberal doctrine.) In Chapter Five, I explain how liberal theorists might conclude this thesis: in order to maximize freedom, the Supreme Court must supplement the "right to privacy" with what I call a "right to public autonomy," which follows permissive liberal principles. This right would maximize individual freedom in the public sphere. But I take this conclusion further, arguing that since liberal theorists neglect how power constructs the subject, their presumptions about the public-private distinction rest on a shaky foundation. So given this newfound understanding of the public-private distinction, what can we say about the role of law?

The bulk of this thesis has focused on analyzing the limits of the public sphere under liberal theory; the case of public nudity was intended to test whether actions which are socially constructed as offensive can be restricted. Across the spectrum, the liberal literature on public autonomy suggests that there ought to be a hard backstop against what governments must allow. Even Permissive Liberalism, the most laissez-faire of the three positions, presumes an intrinsic difference between actions which are restrictable and those which are not, even if that difference does not follow the line of "offense."

I was initially convinced by this backstop. There was no way, I figured, that *all* actions must be allowed in the public sphere; working backwards from my constructed notions of decency, I didn't want to admit that, for instance, public vomit-eating deserved the same protection as public nudity. At the same time, however, I did not want to concede that morality could in fact guide restrictability (even if I was willing to admit, as Hart argues, that the "rule of recognition" reflects a certain morality.)[1] I was thus convinced that Permissive Liberalism was a way to legalize public nudity, and other socially-constructed offenses, while avoiding backsliding into a position which forces us to allow all non-harmful actions irrespective of offense.

But as I progressed throughout the thesis, I found myself trying to understand the liberal public-private distinction in light of Foucault's conception of power. The more I understood the implications of Foucault's "bio-power," the more disenchanted I grew with Permissive Liberalism. Permissive Liberalism, like liberal doctrine in general, presumes that the subject is autonomous; it also assumes that there are real, non-constructed differences between the public and private realms. Embracing Permissive Liberalism does not change the fact that the public-

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[1] H.L.A Hart, *The Concept of Law*. (Oxford: Clarendon Press, 1994.)

private distinction constructs the difference which it presumes.[2] Similarly, there is no guarantee that changing the legal limits of the public sphere brings greater autonomy. Understanding that the autonomous subject is a liberal myth led me to push beyond Permissive Liberalism; people, knowledge, and institutions exist within and are constructed by discursive norms.

Liberal theorists, notably Larry Alexander, might reject this critique, presuming such a distinction is necessary in order to represent the way that individuals see the world.[3] But this view neglects to consider that individuals are not constructed equally; it takes, as Minow argues, a certain point of view for granted.[4] To accept that people see actions in terms of public or private is to neglect that the public-private distinction legislates and constructs social relations in a way that benefit certain individuals.[5] On the other hand, seeing the public-private distinction as a construct does not require us to collapse the legal divide altogether. If we operated on the premise that social constructs cannot influence law, we would be unable to have any laws at all. Rather, we must factor our understanding of power/knowledge into our lawmaking in a way that allows individuals maximum agency within the bounds of power/knowedge. We must stop presuming that agency must be restricted in the service of securing a concrete notion of decency—one that assumes, for instance, that there is an intrinsic difference between public nudity and vomit eating—rather, we must acknowledge the role of power in shaping that distinction.

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[2] See Alan Freeman and Elizabeth Mensch "The Public-Private Distinction in American Law and Life" *The Buffalo Law Review*, vol. 36, no. 237 (1987): 237, and Gerald Turkel, "The Public/Private Distinction: Approaches to the Critique of Legal Ideology." *Law & Society Review,* vol. 22, no. 4, (1988): 801–823.
[3] Larry Alexander. "The Public/Private Distinction and Constitutional Limits on Private Power." *Constitutional Commentary*, vol. 10, no. 2, (1993): 361–378.
[4] Martha Minow "The Supreme Court, 1986 Term--Foreward" *Harvard Law Review,* vol. 101, no. 1, (Nov. 1987): 15.
[5] For instance, feminist critics of the public-private distinction argue that the public-private distinction legislates from a male perspective and entrenches male superiority. See MacKinnon "Feminism, Marxism, Method, and the State."

Formulating a normative legal theory is not my goal in this thesis, although there are certain considerations that such a theory must take into account. It is crucial that we allow individuals maximum agency in the public sphere. With respect to public nudity, people ought to be able to go about unclothed in public regardless of whether it effects autonomy. In this purely legal sense, I agree with the liberal conclusion. But my normative inclinations go deeper than liberal theory. I reject the liberal premise that the public and private spheres should be subject to different regulations *because they are fundamentally different*. Such a distinction might be necessary, but only if justified for alternate reasons. While the law ought to allow for maximum agency, legislators must take into account that law universalizes the perspective of a particular group; the law takes a certain perspective for granted and normalizes that perspective as a cultural norm. This thesis, by neglecting how the subject's positioning (due to race, culture, age, class etc.) shapes how their bodies are constructed, has passively illustrated this universalization; I, like liberal theorists, have been blind to how the subject's construction shapes their experience. While I explore how the body is constructed in Chapter Two, briefly touching on the impact of gender, I subconsciously neglect how individuals' disparate positions impact the construction and social perception of their bodies. My failure to acknowledge how my experience (as a Caucasian, cisgender, college-educated, wealthy male—a person with a dominant social position) is specific to my social position may have led me to universalize the norms surrounding my body. My subconscious error highlights the importance of acknowledging the disparate ways in which subjects are constructed, specifically when making legal decisions. This is not to say that we must reject liberals' normative theories altogether; but we must reject the assumptions about power, law, and the subject that got them to those conclusions.

Rethinking the public private distinction requires us to legislate in light of the considerations laid out in this chapter. While those considerations are crucial, it is for future theorists to decide how to apply them. My aim in this thesis is to take us thus far; it is to point toward a new way of thinking about our question. Liberal theorists presume that there is an autonomous subject and a concrete knowledge; given this, they argue, we must find a way to preserve society's structure while allowing that individual maximum autonomy; they conclude that a moral dislike of a certain action is not sufficient to shape the laws surrounding it. But what happens when such an assumption is undercut? What happens when we realize that everything is constructed and that, as a result, law always takes a certain point of view for granted? How should we understand the role of law then? What ought to be its limits? More specifically, how might we reconceive the public-private distinction in a way that allows subjugated knowledges to come to fruition and allows individuals greater agency?[6] Asking such questions is the first step toward working toward a more accurate and just theory of power, agency, and the role of law.

[6] Michel Foucault, "Two Lectures" *Power / Knowledge: Selected Interviews and Other Writings, 1972-1977*. Ed. Colin Gordon. (Brighton: Harvester, 1980): 82.

Bibliography

Alexander, Larry. "The Public/Private Distinction and Constitutional Limits on Private Power." *Constitutional Commentary* 10, no. 2 (Summer 1993): 361-78.

Allen, Anita. "Disrobed: The Constitution of Modesty." *Villanova University Law Review* 51, no. 4 (2006).

Ambacher, Mary C. "Bare-Naked Ladies (and Gentlemen): Analyzing Protection of Nude Protesting under the First Amendment and State Constitutions." *Suffolk University Law Review* 47 (2014): 331-52.

Archard, David. "Disgust, Offensiveness, and the Law." *Journal of Applied Philosophy* 25, no. 4 (2008): 314-21.

B., J. B. "Criminal Law and Procedure: Indecent Exposure: Nudism." *Michigan Law Review* 33, no. 6 (1935): 936.

Baker, Dennis J. "Constitutionalizing the harm principle." *Criminal Justice Ethics* 27, no. 2 (2008): 3-28. doi:10.1080/0731129x.2008.9992238.

Barcan, Ruth. *Nudity: a cultural anatomy*. Oxford: Berg, 2006.

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

Baxandall, Lee. *World guide to nude beaches and recreation*. N Editions, 1991.

Beggan, James K., and Scott T. Allison. "VivaViva? Women's Meanings Associated with Male Nudity in a 1970s “For Women” Magazine." *Journal of Sex Research* 46, no. 5 (2009): 446-59.

Benhabib, Seyla. "Models of Public Space: Hannah Arendt, the Liberal Tradition and Jürgen Habermas." In *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics*, 89-114. Polity Press, 1992.

Berger, John. *Ways of seeing*. London: British Broadcasting Corporation, 2008.

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Bernstein, Mary. *Sexual orientation policy, protest and the state*. 1997.

Bevir, Mark. "Foucault and Critique: Deploying Agency Against Autonomy." *Political Theory* 27, no. 1 (1999): 65-84. doi:10.1177/0090591799027001004.

Blasius, Mark. *Gay and Lesbian Politics Sexuality and the Emergence of a New Ethic*. Temple University Press, 1994.

Bork, Robert. "Neutral Principles and Some First Amendment Problems." *Yale Law School Legal Scholarship Repository*, 1971.

"Bowers v. Hardwick 478 U.S. 186 (1986)." Justia Law. Accessed August 04, 2017. https://supreme.justia.com/cases/federal/us/478/186/case.html.

Burt, Robert A. "Moral Offenses and Same Sex Relations: Revisiting the Hart-Devlin Debate." *Yale Law School Legal Scholarship Repository*, 2004.

Butler, Judith. "Imitation and Gender Insubordination." In *The Lesbian and Gay Studies Reader*, edited by H. Abelove. Routledge, 1993.

Butler, Judith. "Contingent Foundations: Feminism and the Question of "Postmodernism"." In *Feminist Contentions: A Philosophical Exchange*, edited by Linda Nicholson. Routledge, 1993.

Carr-Gomm, Philip. *A brief history of nakedness*. London: Reaktion Books, 2013.

CITY OF ALBUQUERQUE v. SACHS 23,632 (Court of Appeals of New Mexico March 23, 2004).

Cohen v. California 403 U.S 15 (1971).

Connell, Kathleen, and Paul Gabriel. "The Power of Broken Hearts The Origin and Evolution of the Folsom Street Fair." Folsom Street Events | Leather events for good causes. May 24, 2017. Accessed August 07, 2017. https://www.folsomstreetevents.org/heritage/.

David, Larry, writer. "The Caddy." In *Seinfeld*. NBC. January 25, 1996.

Deacon, Roger. "Strategies of Governance: Michel Foucault on Power." *Theoria* 45, no. 92 (1998). doi:10.3167/004058198782485966.

DEmilio, John. *Sexual politics, sexual communities: the making of a homosexual minority in the United States, 1940-1970*. University of Chicago Press, 1998.

Devlin, Patrick. "The Enforcement of Morals." Lecture, Maccabean Lecture in Jurisprudence, March 18, 1959.

Dore, Isaak. "Foucault on Power (comments)." *UMKC Law Review* 78, no. 3 (Spring 2010): 737-48.

Dworkin, Gerald. "Devlin Was Right: Law and the Enforcement of Morality." *William and Mary Law Review* 40, no. 3 (1999).

Dworkin, Ronald. "Lord Devlin and the Enforcement of Morals." *Faculty Scholarship Series* Paper 3611 (January 1, 1966).

Dworkin, Ronald. "Is There A Right To Pornography?†." *Oxford Journal of Legal Studies* 1, no. 2 (1981): 177-212.

Dworkin, Ronald. *Law's Empire*. Cambridge, MA: Belknap Press, 1986.

Ellis, Anthony. "Offense and the Liberal Conception of the Law." *Philosophy and Public Affairs* 13, no. 1 (Winter 1984): 3-23.

"Erie v. Pap's A. M. 529 U.S. 277 (2000)." Justia Law. Accessed May 30, 2017. https://supreme.justia.com/cases/federal/us/529/277/case.html.

"Erznoznik v. City of Jacksonville 422 U.S. 205 (1975)." Justia Law. Accessed June 06, 2017. https://supreme.justia.com/cases/federal/us/422/205/case.html.

Eskridge, William N., Jr. "From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct." *Yale Law School Legal Scholarship Repository*, 1994.

Ewald, Francois. "Norms, Discipline, and the Law." *Representations*, no. 30, Special Issue: Law and the Order of Culture (Spring 1990): 131-69.

Feinberg, Joel. "Hard Cases for the Harm Principle." In *Social Philosophy*. Prentice-Hall, 1973.

Feinberg, Joel, and Michael Bayles. "Third Symposium." In *Issues in Law and Morality*, 83-140. The Press of Case Western Reserve University, 1973.

Feinberg, Joel. "Autonomy, Sovereignty, and Privacy: Moral Ideas in the Constitution." *Notre Dame Law Review* 58 (1983): 445-92.

Feinberg, Joel. *The Moral Limits of the Criminal Law Volume 1: Harm to Others*. New York: Oxford University Press, 1987.

Feinberg, Joel. *The Moral Limits of the Criminal Law: Volume 2: Offense to Others*. New York: Oxford University Press, 1988.

Foucault, Michel, Colin Tr. Gordon, and Colin Gordon. *Power / knowledge*. Harvester Wheatsheaf, 1980.

Undefined, Undefined Undefined. "Body/Power." In *Power / knowledge*, by Michel Foucault, Colin Tr. Gordon, and Colin Gordon. Harvester Wheatsheaf, 1980.

Foucault, Michel, and Graham Burchell. *The Foucault effect: studies in governmentality*.

Harvester Wheatsheaf, 1991.

Foucault, Michel. *The History of Sexuality. Vol. 2: The Use of Pleasure*. Penguin Books, 1992.

Foucault, Michel. *Discipline and punish: the birth of the prison*. Vintage Books, 1995.

Foucault, Michel. *The history of sexuality: the will to knowledge: vol. 1*. Camberwell, Vic.: Penguin, 2008.

Foucault, Michel. "The Ethics of the Care of the Self as a Practice of Freedom." In *The Final Foucault*, edited by James Bernauer and David Rasmussen, 11. MIT Press, 2011.

Foucualt, Michell. "Governmentality." Lecture, 1978-1979.

Franke, Katherine M. "The Domesticated Liberty of Lawrence v. Texas." *Columbia Law Review* 104, no. 5 (2004): 1399. doi:10.2307/4099390.

Freeman, Alan, and Elizabeth Mensch. "The Public-Private Distinction in American Law and Life." *The Buffalo Law Review* 36, no. 237 (1987): 237-57.

Undefined, Undefined Undefined. *Civilization and Its Discontents*. By Sigmund Freud, Todd Dufresne, and Gregory C. Richter. Broadview Press, 2016.

Friedman, Lawrence M., and Jenna Grossman. "A Private Underworld: The Naked Body in Law and Society." *Buffalo Law Review* 61 (2013): 169-214.

"FW/PBS v. City of Dallas 493 U.S. 215 (1990)." Justia Law. Accessed June 07, 2017. https://supreme.justia.com/cases/federal/us/493/215/case.html.

Gavison, Ruth. "Feminism and the Public/Private Distinction." *Stanford Law Review* 45, no. 1 (1992): 1. doi:10.2307/1228984.

"Getting Rid of Sodomy Laws: History and Strategy that Led to the Lawrence Decision." American Civil Liberties Union. Accessed July 11, 2017. https://www.aclu.org/other/getting-rid-sodomy-laws-history-and-strategy-led-lawrence-decision.

Gey, Steven. "Is Moral Relativism a Constitutional Command?" *Indiana Law Journal* 70, no. 2 (2005).

Gordon, Neve. "Foucault's Subject: An Ontological Reading." *Polity* 31, no. 3 (Spring 1999): 395-414.

Grazia, Edward De. "How Justice Brennan Freed Novels and Movies during the Sixties." *Cardozo Studies in Law and Literature* 8, no. 2 (1996): 259-65. doi:10.1525/lal.1996.8.2.02a00040.

Green, Leslie. "Legal Positivism." Stanford Encyclopedia of Philosophy. January 03, 2003. Accessed July 10, 2017. https://plato.stanford.edu/entries/legal-positivism/.

"Griswold v. Connecticut 381 U.S. 479 (1965)." Justia Law. Accessed June 20, 2017. https://supreme.justia.com/cases/federal/us/381/479/case.html.

"Hague v. Committee for Industrial Organization 307 U.S. 496 (1939)." Justia Law. Accessed June 03, 2017. https://supreme.justia.com/cases/federal/us/307/496/case.html.

Halley, Janet E. "Reasoning about Sodomy: Act and Identity in and after Bowers v. Hardwick." *Virginia Law Review* 79, no. 7 (1993): 1721. doi:10.2307/1073385.

Harcourt, Bernard. " The Collapse of the Harm Principle." *Journal of Criminal Law and Criminology* 90, no. 1 (1999).

Hart, H. L. A. "Positivism and the Separation of Law and Morals." *Essays in Jurisprudence and Philosophy*, 1983, 49-87. doi:10.1093/acprof:oso/9780198253884.003.0003.

HART, H.L.A. *The concept of law*. Clarendon Press, 1994.

HART, H.L.A. *The concept of law*. Oxford: Clarendon Press, 1994.

Hart, Herbert L. A. *Law, Liberty and Morality*. Stanford Univ. Press, 1963.

Hartman, William E., Marilyn Fithian, and Donald Johnson. *Nudist society: an authoritative, complete study of nudism in America*. Crown Publ., 1970.

Helppie-Schmeider, Brenna. " e Constitution and Societal Norms: A Modern Case For Female Breast Equality." *DePaul Journal of Women, Gender and the Law* 5, no. 1 (December 17, 2015).

Henkin, Louis. "Morals and the Constitution: The Sin of Obscenity." *Columbia Law Review* 63, no. 3 (1963): 391.

Hoffman, Brian S. *Naked: a cultural history of American nudism*. New York University Press, 2015.

Hoffman, Eric. "Feminism, Pornography, and Law." *University of Pennsylvania Law Review* 133, no. 2 (1985): 497. doi:10.2307/3312061.

Hollander, Anne. *Seeing through clothes*. Berkeley: Univ. of California Press, 2009.

Hudson, David L., Jr. "Paul Robert Cohen and His Famous Free Speech Case." Newseum Institute. May 4, 2016. Accessed June 07, 2017. http://www.newseuminstitute.org/2016/05/04/paul-robert-cohen-and-his-famous-free-

speech-case/.

Ilfeld, Fred, and Roger Lauer. *Social nudism in america: fred ilfeld, jr., and roger lauer*. College and University Press., 1964.

"Jenkins v. Georgia (1974), 73 US 557." FindLaw. http://caselaw.findlaw.com/us-supreme-court/418/153.html.

Kane, Melinda D. "Timing Matters: Shifts in the Causal Determinants of Sodomy Law Decriminalization, 1961–1998." *Social Problems* 54, no. 2 (2007): 211-39. doi:10.1525/sp.2007.54.2.211.

Kelly, Jon. "Who, What, Why: Is public nudity a form of free speech?" BBC News. November 22, 2012. Accessed June 05, 2017. http://www.bbc.com/news/magazine-20404710.

Kozell, Rick. "STRIKING THE PROPER BALANCE: ARTICULATING THE ROLE OF MORALITY IN THE LEGISLATIVE AND JUDICIAL PROCESSES." *American Criminal Law Review* 47 (Fall 2010).

Lauritsen, New York Gay Activists Alliance, John. "Repeal the New York Consensual Sodomy Statute!" Repeal the New York Consensual Sodomy Statute! Accessed August 04, 2017. http://paganpressbooks.com/jpl/REPEAL.HTM.

"Lawrence v. Texas 539 U.S. 558 (2003)." Justia Law. Accessed August 04, 2017. https://supreme.justia.com/cases/federal/us/539/558/.

Leahy, Christopher Thomas. "The First Amendment Gone Awry: City of Erie V. Paps A.M., Ailing Analytical Structures, and the Suppression of Protected Expression." *University of Pennsylvania Law Review* 150, no. 3 (2002): 1021. doi:10.2307/3312926.

Leahy, Christopher Thomas. "The First Amendment Gone Awry: City of Erie V. Paps A.M., Ailing Analytical Structures, and the Suppression of Protected Expression." *University of Pennsylvania Law Review* 150, no. 3 (2002): 1021. doi:10.2307/3312926.

Lemke-Santangelo, Gretchen. *Daughters of Aquarius women of the sixties counterculture*. University Press of Kansas, 2009.

Lunceford, Brett. *Naked politics: nudity, political action, and the rhetoric of the body*. Lanham, MD: Lexington Books, 2012.

Mackinnon, Catharine A. "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence." *Signs: Journal of Women in Culture and Society* 8, no. 4 (1983): 635-58. doi:10.1086/494000.

Marcuse, Herbert. *One-dimensional Man: Studies in the Ideology of Advanced Industrial Society*. Routledge, 2002.

Martin, Richard. "The Deceit of Dress: Utopian Visions and the Arguments against Clothing." *Utopian Studies* 4 (1991): 79-84.

"McGowan v. Maryland 366 U.S. 420 (1961)." Justia Law. Accessed June 05, 2017. https://supreme.justia.com/cases/federal/us/366/420/case.html.

Mill, John Stuart. *On liberty*. Edited by Elizabeth Rapaport. Indianapoli: Hackett, 1982.

Mill, John Stuart. *On liberty*. London: Penguin, 2010.

Milstead, Virginia F. "Forbidding Female Toplessness: Why Real Difference Jurisprudence Lacks Support and What Can be Done About It." *University of Toledo Law Review* 36, no. 2 (2005).

Minow, Martha. "The Supreme Court, 1986 Term." *Harvard Law Review* 101, no. 1 (November 1987): 10-95.

Moriber, Danielle. "Right To Bare All? Female Public Toplessness and Dealing With the Laws that Prohibit ." *Cardozo Public Law, Policy, and Ethics Journal* 8, no. 453 (2010).

Nevitt, Peter K. "The Legal Aspects of Nudism." *Journal of Criminal Law and Criminology (1931-1951)* 41, no. 1 (1950): 57.

Novak, William J. *The peoples welfare: law and regulation in nineteenth-century America*. Chapel Hill: University of North Carolina Press, 1996.

Novak, William J. *The peoples welfare: law and regulation in nineteenth-century America*. Chapel Hill: University of North Carolina Press, 1996.

Nussbaum, Martha C. *Hiding from Humanity Disgust, Shame, and the Law*. Princeton University Press, 2009.

Nussbaum, Martha. "A Right to Marry." *California Law Review*, 1st ser., 98, no. 3 (2010).

Okin, Susan Moller. "Justice as Fairness: For Whom?" In *Justice, Gender, and the Family*. Basic Books, 1989.

Orren, Karen, and Stephen Skowronek. *The search for American political development*. New York: Cambridge University Press, 2007.

OXANE TAUB, "Gypsy"; GEORGE DAVIS v. CITY AND COUNTY OF SAN FRANCISCO; SAN FRANCISCO POLICE DEPARTMENT 15-16415 (United States Court of Appeals for the Ninth Circuit May 18, 2017).

Pascoe, Peggy. *What comes naturally: miscegenation law and the making of race in America*.

Oxford: Oxford Univ. Press, 2011.

Pascoe, Peggy. *What comes naturally: miscegenation law and the making of race in America*. Oxford: Oxford Univ. Press, 2011.

Pascoe, Peggy. *What comes naturally: miscegenation law and the making of race in America*. Oxford: Oxford Univ. Press, 2011.

"Paul Robert Cohen and "his" Famous Free-Speech Case." Newseum Institute. http://www.newseuminstitute.org/2016/05/04/paul-robert-cohen-and-his-famous-free-speech-case/.

Pinto, Meital. "What Are Offences to Feelings Really About? A New Regulative Principle for the Multicultural Era." *Oxford Journal of Legal Studies* 30, no. 4 (2010): 695-723. doi:10.1093/ojls/gqq029.

"Poe v. Ullman 367 U.S. 497 (1961)." Justia Law. Accessed June 05, 2017. https://supreme.justia.com/cases/federal/us/367/497/case.html.

Poland, Jefferson, and Sam Sloan. "Picketing for Sex." In *Sex marchers*. Ishi Press International, 2006.

Pollis, Carol A. "The Apparatus of Sexuality: Reflections on Foucaults Contributions to the Study of Sex in History." *Journal of Sex Research* 23, no. 3 (1987): 401-08. doi:10.1080/00224498709551379.

Pylon, Roger. "On the Origins of the Modern Libertarian Legal Movement." *Chapman Law Review* 16, no. 2 (April 13, 2013): 255-68.

"Rabe v. Washington 70 U.S 247 (1972) ." Findlaw. Accessed June 07, 2017. http://caselaw.findlaw.com/us-supreme-court/405/313.html.

Rawls, John. *A theory of justice*. *Rawls*. Cambridge: The Belknap, 1971.

Rawls, John. *A Theory of Justice*. Belknap, 1971.

Richards, David A. J. "Liberalism, Public Morality, and Constitutional Law: Prolegomenon to a Theory of the Constitutional Right to Privacy." *Law and Contemporary Problems* 51, no. 1 (1988): 123. doi:10.2307/1191717.

Ristroph, Alice. "Third WAve Legal Moralism." *Arizona State Law Journal* 42 (2010).

Robinson, Paul H. "Deviations from Empirical Desert." *Intuitions of Justice and the Utility of Desert*, 2013, 189-207. doi:10.1093/acprof:oso/9780199917723.003.0010.

Roe v. Wade 410 U.S 113 (1973).

Salant, Jonathan D. "FCC to Investigate Jackson's Display at Super Bowl ." Washington Post. February 2, 2004. http://www.washingtonpost.com/wp-dyn/articles/A5734-2004Feb2.html.

Satran, Joe. "Here's Where You Can Drink In Public In America (INFOGRAPHIC)." The Huffington Post. December 16, 2013. Accessed October 17, 2017. https://www.huffingtonpost.com/2013/12/16/where-you-can-drink-in-public_n_4453212.html.

"Schad v. Borough of Mount Ephraim 452 U.S. 61 (1981)." Justia Law. Accessed June 06, 2017. https://supreme.justia.com/cases/federal/us/452/61/case.html.

Schlag, Pierre. "The Problem of the Subject." *Texas Law Review* 69 (1991).

Shapiro, Ian. *Democratic justice*. New Haven: Yale University Press, 2001.

Smith, H.W. "DOES SHEDDING ONE'S CLOTHES IMPLY SHEDDING ONE'S CULTURE? A CROSSCULTURAL TEST OF NUDISM CLAIMS." *International Journals*, July 1980, 255-58.

Smith, S. D. "Is the Harm Principle Illiberal?" *The American Journal of Jurisprudence* 51, no. 1 (2006): 1-42. doi:10.1093/ajj/51.1.1.

"Southeastern Promotions, Ltd. v. Conrad 420 U.S. 546 (1975)." Justia Law. Accessed June 06, 2017. https://supreme.justia.com/cases/federal/us/420/546/.

Spaulding, Christina. "Anti-Pornography Laws as a Claim for Equal Respect: Feminism, Liberalism, and Community." *Berkeley Journal of Gender, Law & Justice* 4, no. 1 (September 2013).

"Stanley v. Georgia 394 U.S. 557 (1969)." Justia Law. Accessed June 20, 2017. https://supreme.justia.com/cases/federal/us/394/557/case.html.

Stargher, Colin. "Constitutional Law and Rhetoric." *Journal of Constitutional Law* 18, no. 5 (May 2016): 1348-379.

Stephen, James Fitzjames., and Stuart D. Warner. *Liberty, Equality, Fraternity*. Liberty Fund, Incorporated, 2014.

Stone, Geoffrey R. "Content-Neutral Restrictions." *The University of Chicago Law Review* 54, no. 1 (1987): 46.

Stone, Geoffrey R. *Sex and the constitution: sex, religion, and the law from americas origins to the twenty-first ... century*. Place of publication not identified: Liveright Publishing Corp, 2017.

Stone, Geoffrey. ""Strange Freaks of Nature"." In *Sex and the constitution: sex, religion, and the law from americas origins to the twenty-first ... century*, 212-22. Liverlight Publishing, 2017.

Stone, Geoffrey. "The End of Obscenity?" In *Sex and the Constitution: sex, religion, and law from americas origins to the twenty-first century*. Liverlight Publishing, 2017.

Strong, S.I. "Justice Scalia as a Modern Lord Devlin: Animus and Civil Burdens in Romer v. Evans." *Southern California Law Review* 71, no. 1 (1997).

Taylor, Charles. "Foucault on Freedom and Truth." *Philosophy and the Human Sciences*, May 1, 1984, 152-84. doi:10.1017/cbo9781139173490.007.

Turkel, Gerald. "The Public/Private Distinction: Approaches to the Critique of Legal Ideology." *Law & Society Review* 22, no. 4 (1988): 801-23. doi:10.2307/3053710.

U.S v. Playboy Entertainment Inc. 529 U.S. 803 (2000).

Ungewitter, Richard. *Nakedness: in an historical, hygienic, moral and artistic light*. Ultraviolet Press, 2005.

Vandeever, Donald. "Coercive Restraint of Offensive Actions." *Philosophy and Public Affairs* 8, no. 2 (1979): 175-93.

Ward, Stuart. *Strange days indeed: memories of the old world*. Desert Sage Book, 2007.

Warren, H. C. "Social nudism and the body taboo." *Psychological Review* 40, no. 2 (1933): 160-83.

Weedon, Chris. *Feminist Practice and Poststructuralist Theory*. Blackwell Pub., 2008.

Weinberg, Martin. "The Nudist Management of Respectability." In *Deviance: The Interactionist Perspective*, by Earl Rubington. 10th ed. Routledge, 1968.

"Wolfenden Report." The British Library - The British Library. https://www.bl.uk/learning/timeline/item107413.html.

Wong, James. "Foucault and Autonomy." *Archives for Philosophy of Law and Social Philosophy* 96, no. 3 (2010): 277-90.