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Equal Protection and the Male Gaze: An Approach to *New Hampshire v. Lilley*

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This Article uses *New Hampshire v. Lilley*, a case recently decided by the New Hampshire Supreme Court, as a starting point for an equal protection analysis of indecent exposure laws that distinguish between women and men. After discussing contemporary equal protection jurisprudence and historicizing these laws, this Article uses the film theorist Laura Mulvey's concept of the "male gaze" to demonstrate how overbroad generalizations about sex and sexuality serve as the foundation for this legal distinction. This Article concludes by emphasizing that municipalities and states may continue to enact and enforce indecent exposure laws that reflect community standards, so long as they apply equally to women and men.

I. INTRODUCTION

Lake Winnipesaukee lies in the heart of New Hampshire. As the state's largest lake, it is home to hundreds of islands and eight lakeside communities.[1] Weirs Beach, a popular tourist destination, is located in the City of Laconia on the lake's southern shore.[2] Visitors traveling along old Route 3 are greeted by a distinct sign, a curved arrow harkening beachgoers lit by 200 feet of neon

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[1] *See Bizer's List of Islands of Lake Winnipesaukee*, www.bizer.com/winislan.htm (last updated Aug. 19, 2017).

[2] *Laconia & Weirs Beach, NH*, www.weirsonline.com (last visited Apr. 27, 2019).

tubing and nearly 700 chaser lightbulbs.[3] The beach itself is sandy, broad, and adjacent to a boardwalk. Once a summer resort for Civil War veterans,[4] the area around the beach now features arcades, restaurants, a drive-in theatre, and the home port of the MS Mount Washington.[5]

It is on Weirs Beach that, on Thursday, May 28, 2016, Ginger Pierro appeared topless, performing yoga poses.[6] In a short time, several of her fellow beachgoers reported her immodesty to the police.[7] Two officers from the Laconia Police Department soon approached her to request that she cover up.[8] When she refused, she was apprehended, wrapped in a towel, and led away.[9] One spectator, Heidi Lilley, was distressed by Ms. Pierro's arrest.[10] In protest, Lilley and Kia Sinclair visited Weirs Beach a few days later on May 31, 2016, to swim and sunbathe topless.[11] Again, beachgoers called the police.[12] When officers approached Ms. Lilley and Sinclair and asked them to cover up, they too refused and were arrested while shirtless men looked on.[13]

All three women were charged under Laconia City Ordinance Chapter 180 which states, in relevant part, "it shall be unlawful for any person to knowingly or intentionally, in a public place: . . . [a]ppear in a state of nudity."[14] The ordinance defines "nudity" as "[t]he showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple."[15]At trial, the defendants submitted a motion to dismiss on the grounds that the ordinance was invalid. On November 20, 2016, Judge James M. Carroll of New Hampshire's Fourth Circuit Court (Laconia Division) denied

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[3] *Weirs Beach Sign*, WEIRS BEACH, weirsbeach.com/reasons-to-visit/atmosphere/weirs-beach-sign/ (last visited Apr. 27, 2019).

[4] BRUCE D. HEALD, NEW HAMPSHIRE IN THE CIVIL WAR 79 (2001).

[5] *Laconia & Weirs Beach, NH*, *supra* note 2.

[6] Brief for the State of New Hampshire at 3, State v. Lilley, 204 A.3d 198 (N.H. 2018) (No. 2017-0116).

[7] *Id.* at 4.

[8] *Id.* at 4–5.

[9] *Id.* at 5.

[10] *Id.*

[11] *Id.*

[12] Brief for the State of New Hampshire at 5, New Hampshire v. Lilley, 204 A.3d 198 (N.H. 2018) (No. 2017-0116).

[13] *Id.* at 5–6; Brief for the Defendant at 8–9, New Hampshire v. Lilley, 204 A.3d 198 (N.H. 2018) (No. 2017-0116).

[14] LACONIA, N.H., CODE § 180-2(A)(3) (2017).

[15] *Id.* § 180-4(A).

the defendants' motion, concluding that the ordinance "creates no violation of the Equal Protection clause as it treats all females equally."[16] The defendants were found guilty and appealed to the New Hampshire Supreme Court.

At oral argument on February 1, 2018, Associate Justice Anna Barbara Hantz Marconi inquired whether the ordinance is "oriented to a gender role or ability as opposed to a physical characteristic?"[17] This Article answers Justice Hantz Marconi's question in the affirmative. This Article begins with a discussion of equal protection jurisprudence as it relates to sex-based classifications. Next, this Article historicizes laws like Laconia City Ordinance Chapter 180, placing them in the context of public recreational bathing and bathing attire practices. Then, applying film theorist Laura Mulvey's concept of the "male gaze," this Article demonstrates how overbroad generalizations about sex and sexuality animate indecent exposure laws that distinguish between women and men. This Article concludes by emphasizing that municipalities and states may continue to enact and enforce indecent exposure laws that reflect community standards so long as they apply equally to women and men.

II. EQUAL PROTECTION

"No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[18]

Evidence suggests that the framers of the Fourteenth Amendment did not intend it to cover women.[19] Yet, as early as 1870, the noted suffragist Victoria C. Woodhull asserted that the ratification of the Fourteenth Amendment had made her a free and equal citizen of the United States.[20] It would still be over a century, however, before the U.S. Supreme Court would use the Equal Protection Clause of the Fourteenth Amendment to invalidate a law that discriminated against women.

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[16] Lilley v. New Hampshire, No. 450-2016-CR-1603, 1623, 1879 (N.H. 4th Cir. Ct Nov. 20, 2016).

[17] Oral Argument at 6:24, State v. Lilley, 204 A.3d 198 (N.H. 2019) (No. 2017-0116), livestream.com/NHJB/events/8417853/videos/183242830.

[18] U.S. CONST. amend. XIV, § 1.

[19] *See, e.g.* JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 89 (1983) ("...there emerges [from the congressional debates] some agreement that it did not cover women or children"); Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 161 (1979) ("...the framers of the [F]ourteenth [A]mendment did not contemplate sex equality."); Blanche Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U. L. REV. 723 (1935) ("If in the law and public opinion of 1865-73 race discrimination stood at the head of all discriminations as needing attention, it is certain that sex discrimination was at the end of the line.").

[20] *See* Victoria C. Woodhull, *The Memorial of Victoria C. Woodhull*, *in* 2 HISTORY OF WOMAN SUFFRAGE 443, 443–44 (photo. reprint 1969) (Elizabeth Cady Stanton et al. eds., 1881).

In *Reed v. Reed* (1971), the Supreme Court struck down an Idaho statute directing courts to prefer men to women in appointing estate administrators.[21] While purporting to apply the rational basis standard it had always used to review sex classifications, the Court characterized this state-sanctioned preference for men as "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . ."[22] Although it was clear that the Court was employing a higher standard of scrutiny, its precise nature would only be determined in later cases.[23]

Debate over the proper standard ensued in *Frontiero v. Richardson* (1973), a case in which the Court—applying the principle of equal protection to the federal government through the Due Process Clause of the Fifth Amendment—invalidated a federal law stipulating that a female member of the armed services could not claim her husband as a dependent unless he relied on her for over half of his support.[24] Under the same law, a male service member could automatically "claim his wife as a dependent."[25] Eight of the nine Justices agreed that the law was unconstitutional but disagreed on the proper standard of scrutiny.[26] A plurality of four Justices, led by Associate Justice William Brennan, asserted that sex should be treated as a suspect classification and applied strict scrutiny.[27] Three concurring Justices, led by Associate Justice Lewis Powell, maintained that sex should not be characterized as a suspect class but did not indicate the appropriate level of scrutiny.[28] Only then-Associate Justice William H. Rehnquist dissented.[29]

A compromise was finally reached in *Craig v. Boren* (1976) when a majority of Justices agreed that "classifications by gender must serve important governmental objectives and must be substantially related to [the] achievement of those objectives."[30] Using the language of earlier cases, the Court reiterated

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[21] Reed v. Reed, 404 U.S. 71, 77 (1971).

[22] *Id.* at 76.

[23] *See* Frontiero v. Richardson, 411 U.S. 677, 688 (1973); Craig v. Boren, 429 U.S. 190, 197 (1976).

[24] *See generally Frontiero*, 411 U.S. at 688–91 (plurality opinion) (holding that strict scrutiny should apply).

[25] *Id.* at 678 (internal quotations omitted).

[26] *Compare Frontiero* 411 U.S. at 688 (holding that strict scrutiny should apply), *with Frontiero*, 411 U.S. at 691–92 (1973) (Powell, J., concurring) (asserting the Court need not and should not declare sex a suspect classification in this case).

[27] *Frontiero*, 411 U.S. at 688.

[28] *Id.* at 691–92 (Powell, J., concurring).

[29] *Id.* at 691 (Rehnquist, J., dissenting).

[30] Craig v. Boren, 429 U.S. 190, 197 (1976).

that such legislation could not rest on "archaic and overbroad generalizations"[31] nor "outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas."[32] Applying this intermediate scrutiny standard, the Court struck down an Oklahoma state law prohibiting the sale of 3.2% beer to females under the age of eighteen and males under the age of twenty-one. The Court found that, while Oklahoma's stated goal of "traffic safety" was an important government interest, the statistics proffered by the state failed to show "that the gender-based distinction closely serves to achieve that objective."[33]

A few years after the Court established an intermediate scrutiny standard for sex-based classifications, however, majority opinions authored by Justice Rehnquist illustrated that, although such legislation would not always survive as it had under rational basis review prior to *Reed*, nor would it almost always fail as it might have if the Court had adopted a strict scrutiny standard. For instance, in *Michael M. v. Superior Court of Sonoma County* (1981), the Court upheld a California statutory rape law that made it a criminal act to engage in sexual intercourse with a female—but not a male—under the age of eighteen.[34] The Court declared that it would sustain "statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances,"[35] e.g., "provid[ing] for the special problems of women."[36] The Court determined that the California statute "reasonably reflects the fact that the consequences of sexual intercourse and pregnancy fall more heavily on the female than on the male."[37] Thus, a tension was embodied in federal equal protection jurisprudence dealing with sex-based classifications.[38] While a legislature could no longer distinguish between women and men on the basis of "archaic and overbroad generalizations" and "outdated misconceptions regarding the role of females in the homes,"[39] sex-based classifications that "realistically reflects the fact that the sexes are not similarly situated in certain circumstances" remained permissible.[40]

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[31] *Id.* at 198 (citing Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)) (internal quotations omitted).

[32] *Id.* at 198–99 (citing Stanton v. Stanton, 421 U.S. 7, 14–15 (1975)) (quotations omitted).

[33] *Id.* at 199–200.

[34] Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 475 (1981).

[35] *Id.* at 469 (citations omitted).

[36] *Id.* (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975)) (quotations omitted).

[37] *Id.* at 476.

[38] *Compare* Craig v. Boren, 429 U.S. 190, 198–99 (1976), *with Michael M.*, 450 U.S. at 469.

[39] *Craig*, 429 U.S. at 198–99.

[40] *Michael M.*, 450 U.S. at 469.

Later cases only served to entrench this tension. In *United States v. Virginia* (1996), the Court considered whether Virginia's operation of a men's military college, namely the Virginia Military Institute (VMI), constituted a violation of the Equal Protection Clause.[41] Associate Justice Ruth Bader Ginsburg, writing for the majority, restated the applicable standard of scrutiny this way:

> Focusing on the differential treatment for denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.[42]

Applying this standard, the Court ruled that the VMI's male-only admission policy did not further Virginia's stated objective of "diversity,"[43] nor was it necessary to preserve "the unique VMI method of character development and leadership training."[44] Furthermore, the Court found that the parallel educational opportunity that Virginia had created in response to the litigation, namely Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College, did "not cure the constitutional violation."[45]

Chief Justice Rehnquist concurred in the judgment but was concerned with the majority's apparent application of a higher standard than the one crafted by the Court in *Craig*.[46] Specifically, he took issue with majority's use of the phrase "exceedingly persuasive justification,"[47] arguing that it "is best confined, as it was first used, as an observation on the difficulty of meeting the applicable

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[41] United States v. Virginia, 518 U.S. 515, 519, 530–31 (1996).

[42] *Id.* at 532–33 (citations omitted) (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

[43] *Id. at* 534–40.

[44] *Id.* at 535, 540–46.

[45] *Id.* at 534, 546–56.

[46] *Id.* at 559 (Rehnquist, J., concurring).

[47] *Id.*

test, not as a formulation of the test itself."[48] Chief Justice Rehnquist's concerns were relieved, however, in *Nguyen v. I.N.S.*, a case in which the Court—once again applying the principle of equal protection to the federal government through the Due Process Clause of the Fifth Amendment—upheld a federal statute providing that a child born out of wedlock to an American citizen mother living abroad acquires U.S. citizenship at birth, while a child born out of wedlock to an American citizen father and a noncitizen mother living abroad only acquires U.S. citizenship if his or her father takes action before he or she turns eighteen.[49] Both the majority and the dissenting Justices defined "exceedingly persuasive justification" according to the traditional intermediate scrutiny formulation, but disagreed on whether I.N.S. had met the requisite burden.[50] The majority opinion, written by Associate Justice Anthony Kennedy, echoed but did not cite the reasoning in *Michael M.*, concluding,

> [t]he distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.[51]

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[48] *Id. See* Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979) ("[P]recedents dictate that any state law overtly or covertly designed to prefer males over females in public employment would require an *exceedingly persuasive justification* to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment." (emphasis added)).

[49] Nguyen v. I.N.S., 533 U.S. 53, 59, 71 (2001).

[50] *Id.* at 70 ("We have explained that an exceedingly persuasive justification is established by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. Section 1409 meets this standard." (citations omitted) (internal quotation marks omitted) (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982))); *Id.* at 74–75 (O'Connor, J., dissenting) ("[A] party who seeks to defend a statute that classifies individuals on the basis of sex must carry the burden of showing an exceedingly persuasive justification for the classification. The defender of the classification meets this burden only by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." (citations omitted) (internal quotation marks omitted) (quoting *Hogan*, 458 U.S. at 724)).

[51] *Id.* at 73. The dissenting justices, led by Associate Justice Sandra Day O'Connor, contended that the government's interests—assuming that they are sufficiently important and not invented post hoc—could be achieved through "sex-neutral alternatives" such as "[m]odern DNA testing." *Id.* at 79–80 (O'Connor, J., dissenting).

Thus, contemporary federal equal protection jurisprudence in the realm of sex-based class-ifications continues to rely on the often nebulous distinction between overbroad generalizations and real differences.

Some originalists, such as the late Associate Justice Antonin Scalia, have taken umbrage with the above line of cases.[52] Yet, the late Judge Robert H. Bork, the "original originalist,"[53] believed that women are protected under the Fourteenth Amendment's Equal Protection Clause for much the same reason that Woodhull did.[54] Opining, however, that the various intermediate standards articulated by the Court had made the case law in this area incoherent, Judge Bork suggested that the Court ought to adopt the standard advanced by Associate Justice John Paul Stevens in *City of Cleburne, Texas v. Cleburne Living Center.*[55]

The generality of the Fourteenth Amendment's Equal Protection Clause has created a jurisprudence that is, if not "incoherent" as Judge Bork suggested, at least somewhat volatile. Yet, Americans are not governed by the Federal Constitution alone. Half of America's state constitutions contain a provision explicitly addressing sex or gender equality and/or discrimination.[56] The oldest

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[52] *See, e.g.*, *Legally Speaking: Antonin Scalia*, CALIF. LAW. (Jan. 2011), legacy.callawyer.com/2011/01/antonin-scalia/ ("In 1868, when the 39th Congress was debating and ultimately proposing the 14th Amendment, I don't think anybody would have thought that equal protection applied to sex discrimination . . . if indeed the current society has come to different views, that's fine. You do not need the Constitution to reflect the wishes of the current society. Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws. You don't need a constitution to keep things up-to-date. All you need is a legislature and a ballot box."). *But see Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 19–20 (2011) (exchange between Sen. Dianne Feinstein, Member, S. Comm. on the Judiciary, and Hon. Antonin Scalia, Associate J., U.S. Supreme Court).

[53] *See* Mark Pulliam, *The Original Originalist*, CITY J. (Summer 2018), https://www.city-journal.org/html/robert-bork-16039.html.

[54] ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 329 (1990) ("Though the intentions of the ratifiers of the fourteenth amendment may have been narrow, the language they used is broad . . . ."). More recently, Steven G. Calabresi (a former clerk to both Judge Bork and Justice Scalia) and Julia T. Rickert have argued that an originalist interpretation of the Equal Protection Clause not only permits but requires the outcome in *United States v. Virginia*. *See* Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 9 (2011).

[55] BORK, *supra* note 54, at 330 (citing City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 451 (1985) (Stevens, J., concurring)).

[56] ALASKA CONST. art. I, § 3; ARIZ. CONST. art. II, § 36; CAL. CONST. art. I, §§ 8, 31; COLO. CONST. art. II, § 29; CONN. CONST. art I, § 20; FLA. CONST. art. I, § 2; HAW. CONST. art. I, §§ 3, 5; ILL. CONST. art. I, § 18; IOWA CONST. art. I, § 1; LA. CONST. art. I, §§ 3, 12; MD. CONST. art. XLVI; MASS. CONST. pt. 1, art. I; MONT. CONST. art. II, § 4; NEB. CONST. art. I, § 30; N.H. CONST. pt. 1,

of these are found in the state constitutions of California (1879),[57] Wyoming (1890),[58] and Utah (1896).[59] While seven such provisions are qualified in some way,[60] sixteen states have adopted an "equal rights amendment" (ERA), that is to say an unqualified provision adopted after 1970 and usually resembling the

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art. 2; N.M. CONST. art. II, § 18; OKLA. CONST. art. II, § 36A; OR. CONST. art. I, § 46; PA. CONST. art. I, § 28; R.I. CONST. art. I, § 2; TEX. CONST. art. I, § 3a; UTAH CONST. art. IV, § 1; VA. CONST. art. I, § 11; WASH. CONST. art. XXXI, § 1; WYO. CONST. art. I, §§ 2, 3; *id.* art. VI, § 1.

[57] CAL. CONST. art. I, § 8 ("A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex . . . .").

[58] WYO. CONST. art. I, § 2 ("In their inherent right to life, liberty and the pursuit of happiness all members of the human race are equal."). *Id.* art. I, § 3 ("Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of . . . sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction."). *Id.* art. VI, § 1 ("Both male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges.").

[59] UTAH CONST. art. IV, § 1 ("Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges.").

[60] *See* ARIZ. CONST. art. II, § 36 ("A. This state shall not grant preferential treatment to or discriminate against any individual or group on the basis of . . . sex . . . in the operation of public employment, public education or public contracting. B. This section does not: 1. Prohibit bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education or public contracting."); CAL. CONST. art. I, § 8 ("A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex . . . ."); *id.* art. I, § 31 ("(a) The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting . . . . (c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting."); LA. CONST. art. I, § 3 ("No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of . . . sex . . . ."); *id.* art. I, §12 ("In access to public areas, accommodations, and facilities, every person shall be free from discrimination based on race, religion, or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on . . . sex . . . ."); NEB. CONST. art. I, § 30 ("(1) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of . . . sex . . . in the operation of public employment, public education, or public contracting. . . . (3) Nothing in this section prohibits bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting."); OKLA. CONST. art. II, § 36A ("A. The state shall not grant preferential treatment to, or discriminate against, any individual or group on the basis of . . . sex . . . in the operation of public employment, public education or public contracting. . . . C. Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education or public contracting."); R.I. CONST. art. I, § 2 ("No otherwise qualified person shall, solely by reason of . . . gender . . . be subject to discrimination by the state, its agents or any person or entity doing business with the state. Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof."); VA. CONST. art. I, § 11 ¶ 1("[T]he right to be free from any governmental discrimination upon the basis of . . . sex . . . shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.").

language of the proposed federal constitutional amendment of the same name.[61] Although some state courts have adopted the federal standard of intermediate scrutiny despite the presence of an ERA in their respective state constitutions, a majority have relied on independent state grounds to impose a higher standard.[62] For instance, the New Hampshire Supreme Court has held that sex is a suspect classification warranting strict scrutiny on the basis of the equal rights amendment enshrined in part 1, article II of the New Hampshire Constitution.[63] With some understanding of the limits American constitutional law places on sex-based classifications, as well as the protections against state-sanctioned

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[61] *Compare* H.R.J. Res. 208, 92d Cong. (1st Sess. 1971), *and* S.J. Res. 8, 92d Cong. (1st Sess. 1971) ("Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.") *with* ALASKA CONST. art. I, § 3 ("No person is to be denied the enjoyment of any civil or political right because of . . . sex . . ."); COLO. CONST. art. II, § 29 ("Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex."); CONN. CONST. art I, § 20 ("No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of . . . sex . . . ."); FLA. CONST. art. I, § 2 ("All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property."); HAW. CONST. art. I, § 3 ("Equality of rights under the law shall not be denied or abridged by the State on account of sex."); ILL. CONST. art. I, § 18 ("The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts."); IOWA CONST. art. I, § 1 ("All men and women are, by nature, free and equal, and have certain inalienable rights--among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."); MD. CONST. art. XLVI ("Equality of rights under the law shall not be abridged or denied because of sex."); MASS. CONST. pt. 1, art. I ("Equality under the law shall not be denied or abridged because of sex . . . ."); MONT. CONST. art. II, § 4 ("No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of . . . sex . . . ."); N.H. CONST. pt. 1, art. II ("Equality of rights under the law shall not be denied or abridged by this state on account of . . . sex . . . ."); N.M. CONST. art. II, § 18 ("Equality of rights under law shall not be denied on account of the sex of any person."); OR. CONST. art. I, § 46 ("Equality of rights under the law shall not be denied or abridged by the State of Oregon or by any political subdivision in this state on account of sex."); PA. CONST. art. I, § 28 ("Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."); TEX. CONST. art. I, § 3a ("Equality under the law shall not be denied or abridged because of sex . . . ."); WASH. CONST. art. XXXI, § 1 ("Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.").

[62] JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW 54–56 (2008).

[63] *See* LeClair v. LeClair, 624 A.2d 1350, 1355 (N.H. 1993) ("We apply the strict scrutiny test, in which the government must show a compelling State interest in order for its actions to be valid, when the classification involves a suspect class based on race, creed, color, gender, national origin, or legitimacy. . . ." (citations omitted) (quotations omitted) (superseded by statute on other grounds); *see also* Cheshire Med. Ctr. v. Holbrook, 663 A.2d 1344, 1346–47 (N.H. 1995) ("Our constitution guarantees that equality of rights under the law shall not be denied or abridged by this state on account of sex. In order to withstand scrutiny under this provision, a common law rule that distributes benefits or burdens on the basis of gender must be necessary to serve a compelling State interest." (citations omitted) (quotations omitted)).

discrimination it affords women, we now turn to investigating the origin of laws like Laconia City Ordinance Chapter 180.

III. AN ARCHEOLOGY OF RECREATIONAL BATHING (ATTIRE)

"[A] page of history is worth a volume of logic."[64]

Any study of social regulation in the United States must begin with the English Puritans who settled along the northeastern coast of North America four centuries ago. In approaching Puritan New England, we must harbor no illusions about the status of women in that time and place. A woman living in the Massachusetts Bay Colony inhabited a patriarchal society where "[s]ubmission to God and submission to one's husband were part of the same religious duty" and "[o]bedience was not only a religious duty but a legal requirement."[65] She was, according to Puritan theology, highly susceptible to cooperation with Satan.[66] Even when women, as a collective unit, excelled in their conformity to the expectations of Puritan life, society saw this excellence as a threat to male domination of key institutions.[67]

Despite this setting, laws regulating dress were strict for women and men alike, at least as written. In 1634, the Massachusetts Bay Colony, "taking into consideration the great, superfluous and unnecessary expenses occasioned by reason of some new and immodest fashions," enacted North America's first sumptuary law.[68] This statute forbade all persons, "either man or woman," from wearing, among other items, silver and gold hatbands, girdles, and belts; cloth woven with gold thread or lace; and sleeves with more than two slashes.[69] The penalty consisted of forfeiture of the forbidden item.[70] In 1639, the General Court enacted an even stricter law banning short sleeves and the sale of lace.[71]

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[64] New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

[65] LAUREL THATCHER ULRICH, GOOD WIVES: IMAGE AND REALITY IN THE LIVES OF WOMEN IN NORTHERN NEW ENGLAND 1650–1750, at 6–7 (1982).

[66] *See generally* ELIZABETH REIS, DAMNED WOMEN: SINNERS AND WITCHES IN PURITAN NEW ENGLAND (1997) (exploring the link between women and mass delusions of satanic witchcraft in Puritan New England).

[67] For instance, the Half-Way Covenant was a remedy designed, at least in part, to address the fact that women had begun to outnumber men in the membership rolls of Puritan congregations in the latter half of the 17th century. *See* PATRICIA U. BONOMI, UNDER THE COPE OF HEAVEN: RELIGION, SOCIETY, AND POLITICS IN COLONIAL AMERICA 111 (1986).

[68] 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 126 (Nathaniel B. Shurtleff ed., Boston: William White 1853) (omitting extensive grammatical changes to the quotation for clarity).

[69] *Id.*

[70] *Id.*

[71] *Id.* at 274.

By 1651, however, an influx of wealth into the Colony forced the General Court to make a dispensation for persons with estates valued at 200 pounds or more; magistrates, public officials, and their wives and children; settled military officers and soldiers in times of service; and "any other whose education and employments have been above the ordinary degree, or whose estates [had] been considerable, though now decayed." [72] The explicit purpose of this legislation was preventing "men or women of mean condition" from wearing "the garb of gentlemen."[73] Thus the earliest laws regulating dress were "gender neutral but class specific."[74]

Like most recreational activities, swimming and public bathing at this time and for the next 200 years was neither commonplace nor respectable.[75] Indeed, it was an activity ascribed to wayward boys.[76] In the middle decades of the eighteenth century, however, elite members of New England society began to frequent mineral spas that were believed to have preventive and curative properties.[77] Patrons of these springs were both female and male but almost always wealthy.[78] Women and men utilized separate spas, and all bathers wore garments covering their entire bodies.[79]

Across the Atlantic, it was this same will to health that drove the ascendant class to the sea. Whereas the traditional rulers of English society had long escaped to provincial estates built by their ancestors, the urban elite—whose fortunes arose from financial capital—turned to the tranquility of the shore when they needed to escape the crowded and polluted cities.[80] Though their desire to "[l]ive in the sunshine, swim the sea, [and] [d]rink the wild air's salubrity"[81] no doubt arose from the aesthetic notion of oneness with nature

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[72] 4 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND pt. 1, at 60–61 (Nathaniel B. Shurtleff ed., Boston: William White 1854) (omitting extensive grammatical changes to the quotation for clarity).

[73] *Id.* at 60 (omitting extensive grammatical changes to the quotation for clarity).

[74] LINDA M. SCOTT, FRESH LIPSTICK: REDRESSING FASHION AND FEMINISM 24 (2005).

[75] BRUCE C. DANIELS, PURITANS AT PLAY: LEISURE AND RECREATION IN COLONIAL NEW ENGLAND 174 (1995).

[76] *Id.*

[77] *Id.* at 175.

[78] *Id.* at 176.

[79] *Id.*

[80] HELEN M. ROZWADOWSKI, FATHOMING THE OCEAN: THE DISCOVERY AND EXPLORATION OF THE DEEP SEA 7–9 (2005).

[81] Ralph Waldo Emerson, *Considerations by the Way*, *in* 6 THE COLLECTED WORKS OF RALPH WALDO EMERSON 129, 129 (Barbara L. Packer et al. eds., 2003).

depicted by the Romanticists in literature and art, they nonetheless imposed their bourgeois, and thus Victorian, values on these activities.[82]

Perhaps the greatest example of this can be found in the invention of the bathing machine: a device designed to ensure that men would never see women bathing.[83] A common sight on the beaches of nineteenth-century Britain, the bathing machine has come to epitomize the excesses of Victorian prudishness.[84] After stepping into a hut with wheels, the user would close the door behind her.[85] The poor lighting and stale air made the wooden box seem more like a coffin than a carriage.[86] While the cart was backed into the waves by horses, the user would change from her street clothing into her bathing gown.[87] Once parked some distance from the sand and the sight of those present on it, she would open the back door and descend a step-ladder into the cold water.[88] Although the bathing machine was popular in Great Britain, its use was far less frequent in the United States where the advent of recreational bathing came much later and sex segregation schemes were more intricate.[89]

In *Contested Water: A Social History of Swimming Pools in America*, historian Jeff Wiltse charts the evolution of the American swimming pool from the urban construction used by large numbers of working class and immigrant boys of various races and ethnicities to the private backyard oasis we know today.[90] Throughout this account of the ways racism and classism privatized an American social institution, Wiltse suggests that issues of sex and sexuality served as a catalyst for this transformation.[91] The earliest public pools in the United States appeared in the middle decades of the nineteenth century.[92] Municipalities designed these facilities for hygienic—as opposed to recreational—bathing, a necessity in an age when cramped inner-city tenements

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[82] *See* ALAIN CORBIN, THE LURE OF THE SEA: THE DISCOVERY OF THE SEASIDE IN THE WESTERN WORLD 1750–1840, at 163–83 (Jocelyn Phelps trans., 1994) (recounting how Romantic writers and artists, in "propound[ing] a coherent discourse about the sea," transformed the popular conception of the shore, their language later used in materials created by the emerging tourist industry).

[83] KATHRYN FERRY, BEACH HUTS AND BATHING MACHINES 13 (2009).

[84] *Id.* at 22.

[85] *See id.*

[86] *See* M.S.H., Letter to the Editor, *Sea-Bathing at Home and Abroad*, TIMES (London), Aug. 24, 1871, at 6.

[87] FERRY, *supra* note 83, at 16.

[88] *See id.*

[89] *Id.* at 22.

[90] *See* JEFF WILTSE, CONTESTED WATER: A SOCIAL HISTORY OF SWIMMING POOLS IN AMERICA 4 (2009).

[91] *Id.*

[92] *Id.* at 19–20.

lacked running water.[93] To prevent interaction between the sexes, "[m]ales and females either swam in separate pools or used the same pools on different days."[94]

Somewhat later in this period, the British concept of the seaside holiday arrived in the United States when elite families began summering at coastal resorts in destinations like Cape Cod.[95] As transportation improved, so too did access to the coast. For instance, America's first public beach, the Revere Beach Reservation, opened in 1895 and was largely the result of the establishment of the Boston, Revere Beach & Lynn Railroad.[96] As a 1913 article in *Municipal Journal* reveals, most of America's first public beaches were segregated according to sex in much the same way that public pools were.[97]

At the turn of the twentieth century, bathing attire "covered most of a person's body."[98] "A female swimmer [would] w[ear] stockings on her legs and a puffy skirt that extended down to her knees," a thick blouse with a high neckline and sleeves extending to her elbows, and a swimming cap.[99] A male swimmer would wear "loose-fitting trunks that extended down to the knee[s] and a loose top" typically with no sleeves and a high neckline.[100] The purpose of this early swimwear was modesty rather than movement.[101] Beginning in the 1920s, however, the social landscape of America's public bathing facilities began to change dramatically as the integration of the sexes coincided with the introduction of sleeker bathing suit styles.[102] The latter change was, at least in part, a consequence of the first, resulting in the eroticization of these spaces.[103]

Prior to 1920, authorities engaged in relatively little formal regulation of swimwear, as social pressure had a tendency to keep bathers "in line with cultural standards."[104] Soon, however, female bathers began to push the

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[93] *Id.* at 19.

[94] *Id.* at 48.

[95] *See, e.g.*, *id.* at 54 ("North End Councilman Samuel Borofsky hailed municipal pools as the poor man's alternate to Cape Cod").

[96] *See* LEAH A. SCHMIDT, REVERE BEACH 7–8, 24 (2002).

[97] A. Linn Bostwick, *Municipal Out-of-Door Baths*, 34 MUNICIPAL J. 381, 381 (1913).

[98] WILTSE, *supra* note 90, at 109.

[99] *Id.* at 109. *See also* LUCY ADLINGTON, STITCHES IN TIME 324–25 (2015).

[100] WILTSE, *supra* note 90, at 109. *See* ADLINGTON, *supra* note 99, at 324.

[101] WILTSE, *supra* note 90, at 109–10.

[102] *See id.* at 88–90.

[103] *See id.* at 89.

[104] *Id.* at 110.

boundaries of propriety, taking their inspiration from the fitted one-piece bathing suit championed by professional swimmer and film actress Annette Kellerman.[105] Although Kellerman herself had earlier been arrested for indecency while wearing her signature garment on Revere Beach,[106] the sheer popularity of this fashionable and liberating design defeated institutional resistance by the end of that decade.[107] In succeeding years, trunks replaced skirts, tops became more formfitting, and backs became open.[108] By 1940, the two-piece brassiere suit had begun to eclipse the one-piece suit altogether.[109]

Beginning in the 1930s, men pushed the boundaries further. While male trunks became shorter and tighter, the major innovation in male bathing attire was the omission of the top.[110] The transition to male shirtlessness was not a smooth one. At no other beach was this legal struggle better encapsulated than at Coney Island. At that time, the *Ordinances of the City of New York* stated: "No person shall wear . . . a bathing suit which indecently exposes or reveals any part of the wearer's anatomy, or person . . . ."[111] This vague statutory language soon led to disparate enforcement.

On February 22, 1934, Columbia Pictures released *It Happened One Night* starring Clark Gable and Claudette Colbert.[112] The film became notorious for a scene in which Clark Gable, preparing for bed, removes his shirt.[113] Consequently the summer of 1934 saw a spike in shirtless male bathers on the beaches of New York City. While the police uniformly arrested offenders at first, city magistrates, exercising their discretion, approached these cases in different ways. As Isabelle Keating, a reporter for the *Brooklyn Daily Eagle*, described it, "a bathing suit that's legal on Monday may be ruled indecent on Tuesday, if there has been a change of magistrates in the meantime; and the only way the bather can know whether his topless suit is legally correct is to learn the magistrates' idiosyncrasies beforehand."[114]

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[105] *Id.*

[106] *See* Ishbel Johns, *Boston Arrest a Mistake, Says Annette*, BOS. SUN. GLOBE, Oct. 11, 1953, at A3.

[107] WILTSE, *supra* note 90, at 110–11.

[108] *Id.* at 111.

[109] *Id.*

[110] *Id.*

[111] New York, N.Y., Code of Ordinances ch. 23, art. 21, § 288 (1934).

[112] IT HAPPENED ONE NIGHT (Columbia Pictures 1934).

[113] KIMBERLY SEALS ALLERS, THE BIG LETDOWN: HOW MEDICINE, BIG BUSINESS, AND FEMINISM UNDERMINE BREASTFEEDING 240 (2017).

[114] Isabelle Keating, *Coney's Magistrates Are Split on Question of Morals and Shirts*, BROOKLYN DAILY EAGLE, June 24, 1934, at 1.

Magistrate John D. Mason, for instance, "intended to do all in his power to rid the beaches of shirtless bathers."[115] Concluding that "the defendants' bathing suits were 'bad enough' even when the tops were worn"[116] and rebuking defendants for a lack of "respect for the women and children,"[117] he fined thirty-two men $1 each in late June 1934.[118] Yet, earlier that same month, Magistrate Thomas F. Casey had suspended the sentences of five young men who were charged with violating the same ordinance on the same beach.[119] But only a week before Magistrate Casey's ruling, Magistrate Jeanette Brill, the first woman to serve as a magistrate in Brooklyn,[120] had fined eight similar defendants $1.[121] Addressing the defendants, Magistrate Brill quipped, "[a]ll of you fellows may be Adonises . . . but there are many people who object to seeing so much of the human body exposed."[122] For his part, Magistrate William O'Dwyer "could see nothing indecent in the exposure of the upper part of the male body" and dismissed the charges against 20 offenders.[123] He warned the defendants, however, "that all magistrates did not feel as he did about the matter."[124] By the end of June 1934, Magistrate David Hirshfield had grown so tired of dismissing charges against shirtless male bathers that he publicly rebuked a Coney Island Precinct patrolman.[125] "Why bring these cases before me," he demanded, "[when] you know I will throw them out."[126]

Hearing the last of these cases, Magistrate David Malbin encouraged the young defendant before him "to bring suit for false arrest."[127] Shortly thereafter,

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[115] *More Bathers Fined; Coney Magistrate Warns He Will Be Severe on the Shirtless*, N.Y. TIMES, June 21, 1934, at 5 [hereinafter *More Bathers Fined*].

[116] *Id.*

[117] *Heat of 89.3 Here Sets Year's Mark as Summer Begins*, N.Y. TIMES, June 22, 1934, at 3.

[118] *More Bathers Fined*, *supra* note 115.

[119] *Shirtless Bathers Freed: But Owners of Uncovered Garbage Cans are Fined $2 Each*, N.Y. TIMES, June 15, 1934, at 13.

[120] Jeanette G. Brill, *Ex Magistrate*, 75, N.Y. TIMES, Mar. 31, 1964, at 35.

[121] *Coney Island 'Adonises,' Lacking Shirts, Fined $1*, N.Y. TIMES, June 5, 1934, at 7 (quoting Magistrate Jeannette Brill).

[122] *Id.*

[123] *Heat of 89.3 Here Sets Year's Mark as Summer Begins*, *supra* note 117, at 3; *see also If Boxers Bare Chests, Bathers Can*, BROOKLYN DAILY EAGLE, June 18, 1934, at 15.

[124] *Heat of 89.3 Here Sets Year's Mark as Summer Begins*, *supra* note 117, at 3.

[125] *Shirtless Bathers Freed*, N.Y. TIMES, June 28, 1934, at 10.

[126] *Id.* (quoting Magistrate David Hirshfield). *See Shirtless Bathers O. K. to Hirshfield*, BROOKLYN DAILY EAGLE, June 27, 1934, at 1.

[127] Isabelle Keating, *Police Give in to Shirtless Bathers After Court Advises Victims to Sue*, BROOKLYN DAILY EAGLE, July 3, 1934, at 1.

Magistrate Malbin sent a note to Captain Henry Bauer of the Coney Island Police Precinct advising him of the following:

> Under the recent ruling of this court and with no higher ruling from any other court, it appears that the magistrates find that the facts are insufficient to constitute a violation of Chapter 23, Section 288 of the[] Code of Ordinances of the City of New York, alleging a violation and constituting an indecency on the beach. Most of the magistrates have agreed that this is no violation of the law, and the police should cooperate with the courts. I have consistently held that there is nothing indecent about the exposure of the upper portion of a man's body, and I shall continue to do so unless I am reversed by a higher court.[128]

In early July, the head of the Brooklyn Police, Deputy Chief Inspector Edward V. Bracken, ordered his officers to halt arrests of shirtless male bathers on the grounds that "city magistrates had refused to punish men brought into court on charges of violating [the] city ordinance governing bathing attire."[129]

While the Coney Island Chamber of Commerce called on the Board of Alderman to amend the ordinance to preserve the more conservative interpretation,[130] Mayor Fiorello La Guardia maintained that defining "decency" was the prerogative of the magistrates.[131] Yet, it was not so much the prerogative of the magistrates, but a rapid change in social custom that had redefined indecency. As Oliver Pilat and Jo Ranson write in *Sodom By the Sea: An Affectionate History of Coney Island*,

> [W]hen the smoke of battle had cleared, what was immoral several months before had become sanctioned by custom. . . .
>
> Naturally the decisions of Coney Island had national effect. Sometimes lesser beaches spoke sooner, one way or the other, but when the playground of the masses, where an incredible million of men, women, and children gathered on a

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[128] *Id.* at 2.

[129] *Storm Cools City as 91° Heat Kills 3*, N.Y. TIMES, July 4, 1934, at 1, 10.

[130] *Coney Island's Chamber Opens 'Shirtless' Drive*, BROOKLYN DAILY EAGLE, July 6, 1934, at 15.

[131] *Brooklyn's Own Shirt Problem*, BROOKLYN DAILY EAGLE, June 23, 1934, at 14 ("An ordinance passed by the Board of Aldermen backing Captain Bauer's views [that shirtless swimming should be barred] was vetoed by Mayor LaGuardia on the ground that 'the question of decency is one of fact to be determined by the courts.'").

> warm Sunday, cast its moral vote, the result became official.[132]

Thus, it is custom covertly adopted into law which has, over the last eight decades, governed the ability of men to go shirtless where women cannot. We must, therefore, inquire whether this custom has any basis in real anatomical differences and, if not, what assumptions ground the persistence of this legal distinction?

IV. THE MALE GAZE

"Theorists of [poststructuralism] 'deconstruct' or take apart texts to reveal the array of assumptions underlying each statement. They point out not only the implications of what is said, but also how that which is denigrated, excluded, or otherwise marginalized is also essential to meaning and the influence of the discourse on power."[133]

Indecent exposure laws like Laconia City Ordinance Chapter 180 prohibit public exposure of the "genitals" and "buttocks," whether "male or female."[134] Therefore, the distinction between the female chest and the male chest operates from the premise that the female chest—like the other censored members of the human body—is sexual and that the male chest is asexual (or at least less sexual than the female chest). To properly determine whether the female chest has a unique sexual purpose, however, we must consult anatomy.

The nipples, being a nearly essential mammalian feature, develop in the human embryo prior to the introduction of sex-specific hormones.[135] Thus the nipples are found in the female and male anatomies alike. Furthermore, the female nipple and the male nipple share a similar number of nerves, although the density of nerves is actually higher in males because the area of the male nipple tends to be smaller.[136] If the female chest is inherently more sexual than the male chest, it cannot be the nipples which make it so.

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[132] OLIVER PILAT & JO RANSON, SODOM BY THE SEA: AN AFFECTIONATE HISTORY OF CONEY ISLAND 310–11 (1943).

[133] Jill Anne Farmer, *A Poststructuralists Analysis of the Legal Research Process*, 85 L. LIBR. J. 391, 392 (1993).

[134] LACONIA, N.H., CODE § 180-4(A) (2017).

[135] *See* Eleanor Lawrence, *Why Do Men Have Nipples?*, NATURE (Aug. 5, 1999), www.nature.com/news/1999/990805/full/news990805-1.html.

[136] *See generally* N. S. Sarhadi et al., *An Anatomical Study of the Nerve Supply of the Breast, Including the Nipple and Areola*, 49 BRIT. J. PLASTIC SURGERY 156 (1999) (comparing the nerves in the nipples of males and females).

A key difference between the female chest and the male chest does exist, however, in the relative development of the mammary glands. While the female mammary glands mature fully during puberty, allowing for lactation, the male mammary glands rarely develop fully and typically do not lactate.[137] Moreover, the female mammary glands are pronounced owing to the presence of more fatty tissue.[138] Yet, these differences are seemingly maternal rather than sexual, and our society has come to recognize that a woman's mammary glands are not inherently indecent.[139]

Perhaps, then, the female chest is not more sexual than the male chest, but merely more sexualized. If the female chest is hypersexualized, it is because it is an erotic object of the society's dominant gaze, that of the heterosexual male. This hypersexualization is likely the result of "pre-existing patterns of fascination already at work within the individual subject and the social formations that have moulded him."[140] In her 1975 essay, *Visual Pleasure and Narrative Cinema*, the feminist film theorist Laura Mulvey conceptualized the "male gaze" to explain how "the unconscious of patriarchal society has structured film form."[141] While Mulvey's male gaze has traditionally been used as an analytical tool for examining the visual arts and literature, it can also be a useful lens for understanding the basis of sex classifications used to regulate the female body.

Discussing film, Mulvey observes that, "[t]he woman displayed has functioned on two levels: as erotic object for the characters within the screen story, and as erotic object for the spectator within the auditorium, with a shifting tension between the looks on either side of the screen."[142] Law is, of course, different from film in terms of medium and purpose. Yet, parallels can be drawn in order to investigate how the male gaze animates law.[143] The laws at the heart of this Article are, admittedly, distinctly suited for such an adaption.

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[137] *See generally* Thomas H. Kunz & David J. Hosken, *Male Lactation: Why, Why not and Is It Care?*, 24 TRENDS IN ECOLOGY & EVOLUTION 80 (2009) (discussing the differences between male and female mammary glands).

[138] *See* GRAY'S ANATOMY: THE ANATOMICAL BASIS OF CLINICAL PRACTICE 946 (Susan Standring ed., 41st ed. 2016).

[139] *See* Meghan Boone, *Lactation Law*, 106 CALIF. L. REV. 1827, 1835 (2018) (recounting the rise of laws and policies accommodating nursing mothers).

[140] Laura Mulvey, *Visual Pleasure and Narrative Cinema*, 16 SCREEN, no. 3, Autumn 1975, at 6.

[141] *Id.*

[142] *Id.* at 11–12.

[143] Several legal scholars have attempted to adapt Mulvey's concept of the male gaze for use in analyzing various areas of law. *See, e.g.*, John Tehranian, *Copyright's Male Gaze: Authorship and Inequality in a Panoptic World*, 41 HARV. J.L. & GENDER 343, 343 (2018); Yxta Maya Murray, *"We Just Looked at Them As Ordinary People Like We Were:" The Legal Gaze and Women's Bodies*, 32 COLUM. J. GENDER & L. 252, 285–86 (2017); Yxta Maya Murray, *Peering*, 22 GEO. J.

As in the films that Mulvey critiques, the female form is also the sexual object in the indecent exposure laws under discussion. Yet, whereas the male gaze in film operates to display the image of the female body, these laws seek to conceal the parts of it that might arouse erotic feelings in the viewer, protecting him from distraction, temptation, and inconvenience. This viewer—presumably male and heterosexual—is the beneficiary of these laws. His view corresponds with the view of Mulvey's "characters within the screen story."[144]

What of Mulvey's "spectator within the auditorium?"[145] Surely the relationship of the law to the viewer viewing the woman as a sexual object is too attenuated for serious consideration. If, however, the phenomenon—the promulgation of the law and the resulting compliance or violation—is viewed holistically, we begin to detect the presence of another entity: the legislator. The view of the legislator corresponds with the view of Mulvey's "spectator within the auditorium" because, although he has far more power than does a member of the audience, he conceptualizes both the already-objectified woman and the viewer-beneficiary as objects. It is this legislative gaze acting on behalf of the viewer-beneficiary that must be interrogated for its underlying assumptions.

In sanctioning exposure of the male chest and prohibiting exposure of the female chest, the legislator concludes that the female chest will be problematic for the viewer-beneficiary. Exposure of the male chest, on the other hand, poses no problem. As Mulvey observes, "the male figure cannot bear the burden of sexual objectification."[146] Implicit in this assumption, however, is an archaic generalization about female sexuality, for it supposes that the female is not distracted by the exposed male chest. Presumably this is because the intensity of the erotic feelings that the male chest causes the female viewer is not sufficient to warrant restricting the freedom of the male. Such an assumption harkens back to the old stereotype that women, by their very nature, have a weaker sex drive than men. When, however, divergent cultural practices are studied comparatively, it is difficult not to conclude that—even if women and men can be said to express sexual desire differently—it is localized socialization that restrains female sexual desire in such a way that it appears less intense than male sexual desire.[147]

ON POVERTY L. & POL'Y 249, 252 (2015); Margaret M. Russell, *Race and the Dominant Gaze: Narrative of Law and Inequality in Popular Film*, 15 LEGAL STUD. F. 243, 244 (1991).

[144] Mulvey, *supra* note 140, at 11.

[145] *Id.*

[146] *Id.* at 12.

[147] *See generally* Brooke A. Scelza, *Choosy But Not Chaste: Multiple Mating in Human Females*, 22 EVOLUTIONARY ANTHROPOLOGY 259 (2013) (contrasting Western assumptions about female sexuality with the practices of, among others, the Himba (an indigenous society located in northern Namibia) and the Mosuo (an ethnic group found in China's Yunnan and Sichuan provinces)).

Yet, even if male sexual desire could be shown to be intrinsically more intense than female sexual desire, the legislator makes another, perhaps more sinister, assumption: the inexistence of the homosexual male. For most of Western history, it was commonly believed that those engaging in homosexual sexual activity were merely deviant heterosexuals.[148] Only with the writings of the German author Karl Heinrich Ulrichs (1825–1895) and the Austrian journalist Karl-Maria Kertbeny (1824–1882) did the West begin to take seriously the notion that homosexuality might be an inherent and inalterable trait.[149] The nature-nurture debate aside, today it is widely acknowledged that homosexuality is not a choice. This is not only the position of the American Psychological Association[150] but even the United State Conference of Catholic Bishops.[151] Indeed, American constitutional law now holds state-sanctioned discrimination against gays and lesbians to be impermissible on this very basis.[152]

Yet, indecent exposure laws like Laconia City Ordinance Chapter 180—while protecting the heterosexual male viewer-beneficiary against the burden of erotic feelings aroused by the bare female chest—make no consideration for the homosexual male viewer who, in the presence of the exposed male chest, experiences these feelings with the same intensity as his heterosexual

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[148] *See* MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY: THE WILL TO KNOWLEDGE 43 (Robert Hurley trans. 1978) (1976) ("As defined by ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them.").

[149] *See* ROBERT BEACHY, GAY BERLIN: BIRTHPLACE OF A MODERN IDENTITY 3–41 (2014) (examining how the respective writings of Ulrichs and Kertbeny laid the foundation for later research and activism that would serve to normalize homosexuality in the eyes of the medical community and society at large).

[150] The APA regards "homosexual behavior" as "normal aspects of human sexuality" and asserts that "most people experience little or no sense of choice about their sexual orientation." AM. PSYCHOLOGICAL ASS'N, ANSWERS TO YOUR QUESTIONS: FOR A BETTER UNDERSTANDING OF SEXUAL ORIENTATION AND HOMOSEXUALITY 2, 3 (2008), www.apa.org/topics/lgbt/orientation.pdf.

[151] The United States Conference of Catholic Bishops holds that, while "homosexual inclination is objectively disordered," "a considerable number of people who experience same-sex attraction experience it as an inclination that they did not choose." U.S. CONFERENCE OF CATHOLIC BISHOPS, MINISTRY TO PERSONS WITH A HOMOSEXUAL INCLINATION: GUIDELINES FOR PASTORAL CARE 5, 7 (2006), www.usccb.org/issues-and-action/human-life-and-dignity/homosexuality/upload/minstry-persons-homosexual-inclination-2006.pdf.

[152] *See* Lawrence v. Texas, 539 U.S. 558, 568–69 (2003) ("The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century. Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons." (citations omitted)). *See also* Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015) ("Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.").

counterpart.[153] Thus his existence is discounted entirely, or, if indeed the legislator considers the experience of the homosexual male at all, perhaps it is assumed that fear of violent reprisal at the hands of the heterosexual male tempers his erotic feelings.[154] Of course, the most troubling characteristic of laws like Laconia City Ordinance Chapter 180 is their propensity to objectify and unduly regulate the female body, restricting the freedom of women in the service of the viewer-beneficiary: the heterosexual male.

V. CONCLUSION

Should the distinction between women and men found in Laconia City Ordinance Chapter 180 survive strict scrutiny under part 1, article II of the New Hampshire Constitution?[155] New Hampshire's strict scrutiny standard requires that the government demonstrate that the legislation under review is "necessary to achieve a compelling governmental interest and narrowly tailored to meet that end."[156] Furthermore, "the government may not rely upon justifications that are hypothesized or 'invented *post hoc* in response to litigation.'"[157] Finally, "[i]f a less restrictive alternative would serve the [government's] purpose, the legislature must use that alternative."[158]

In its brief to the New Hampshire Supreme Court, the only compelling interest that the State could summon was "protecting females from non-

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[153] The inclination of the homosexual male to view the male chest erotically can be observed in the number of faceless torsos one finds on a gay dating app, as well as the number of shirtless men who feature in advertisements targeting gay male consumers.

[154] According to FBI statistics, of the 1,303 reported hate crimes based upon sexual orientation committed in 2017 (the latest year for which statistics are available), 758 targeted gay males. *Table 4: Offense Type by Bias Motivation, 2017*, FBI: UCR, https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-4.xls (last visited Apr. 27, 2019). Of these, 237 were aggravated assaults, 383 were simple assaults, and two were murders or acts of non-negligent manslaughter. *Id.* The only groups subject to more incidents of bias-motivated crime were African Americans (2,358), Jews (976), and whites (844). *Id.* The disproportionate number of hate crimes committed against gay men is unsurprising in view of the American criminal justice system's history of condoning violence against homosexual men at the hands of self-identified heterosexual men, i.e., the "gay panic defense." *See generally* Cynthia Lee, *Masculinity on Trial: Gay Panic in the Criminal Courtroom*, 42 SW. L. REV. 817 (2013) (discussing and critiquing the "gay panic defense"); Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471 (2008) (analyzing the use of the "gay panic defense" in criminal courtrooms).

[155] *See* LeClair v. LeClair, 624 A.2d 1350, 1355 (N.H. 1993). *See also* Cheshire Med. Ctr. v. Holbrook, 663 A.2d 1344, 1346–47 (N.H. 1995).

[156] Cmty. Ress. for Justice, Inc. v. City of Manchester, 917 A.2d 707, 718 (N.H. 2007) (quoting Gonya v. Comm'r, N.H. Ins. Dep't, 899 A.2d 278, 292 (2006) (Broderick, C.J., concurring specially)).

[157] *Id.* at 721 (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).

[158] State v. Zidel, 940 A.2d 255, 257 (N.H. 2003) (quoting United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813 (2000) (citation omitted)).

consensual touching of their breasts" on the basis of the fact that "female breasts generally have been regarded in society as an erogenous zone."[159] As discussed in the previous Part, shielding the viewer-beneficiary from temptation is an implicit function of these laws. Yet, even if we are to believe that this is the legislator's rationale and that this justification is not merely "hypothesized or invented *post hoc* in response to litigation,"[160] we are left with a scenario in which the freedom of the female citizen is paternalistically restricted for her own good. It is interesting that women alone are expected to bear the entire burden for their safety; rarely, if ever, have sex classifications been employed to similarly burden men.

Moreover, one wonders what other regulations could be justified on this basis. Could a municipality, for instance, institute a "female curfew," reasoning that female citizens have been disproportionally affected by a recent late-night violent crime wave? The problem with such a curfew is not necessarily the absence of a compelling government interest—"public safety" likely clearing this hurdle—but the restrictiveness of the measure, for the municipality could achieve the same objective by imposing a curfew on women and men alike.[161]

Likewise, Laconia City Ordinance Chapter 180 should ultimately fail because, even if the government's objective is a compelling one, a "less restrictive alternative would serve the [government's] purpose,"[162] namely making the restriction uniform. Indeed, the State of New Hampshire contemplates just such a change in its brief. The State writes "there is no reason why this Court cannot simply strike the word 'female' from the part of the ordinance at issue here."[163]

A more difficult question is whether an indecent exposure law like Laconia City Ordinance Chapter 180 could survive intermediate scrutiny. As previously stated, the federal standard dictates that,

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[159] Brief for the State of New Hampshire, *supra* note 6, at 20–21 (quoting People v. Carranza, No. B240799, 2013 WL 3866506, at *8 (Cal. Ct. App. July 24, 2013)).

[160] Cmty. Res. for Justice, 917 A.2d at 721 (quoting *Virginia*, 518 U.S. at 533). The legislative history of Laconia City Ordinance Chapter 180 "is virtually silent on the motivation for enacting the ordinance beyond the ordinance's conclusory 'purpose and findings' section and the fact that it was proposed by the Public Safety Subcommittee and listed in the 'Public Safety' section of City Council Meeting Minutes." Brief for the Amicus Curiae American Civil Liberties Union of New Hampshire in Support of Defendants Heidi Lilley, Kia Sinclair & Ginger Pierro at 15, State v. Lilley, 204 A.3d 198 (N.H. 2018) (No. 2017-0116).

[161] Such a curfew may, of course, be subject to other constitutional limitations.

[162] State v. Zidel, 940 A.2d at 257 (N.H. 2003) (citations omitted) (quotations omitted).

[163] Brief for the State of New Hampshire, *supra* note 6, at 23.

> the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" The justification must be genuine, not hypothetical or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.[164]

Under this formulation of intermediate scrutiny, such a law should still fail because, even assuming that the justification is substantially related to achieving an important government interest that is not hypothetical or invented post hoc, the classification is not based on real differences so much as overbroad and archaic generalizations, namely the comparative weakness of female sexual desire, the inexistence or relegation of the homosexual male, and the propriety of female sacrifice for the benefit of the heterosexual male. In fact, the Tenth Circuit Court of Appeals recently found that a similar ordinance likely fails intermediate scrutiny, concluding that "the City's professed interest in protecting children derives not from any morphological difference between men's and women's breasts but from the negative stereotypes depicting women's breasts, but not men's breasts, as sex objects."[165]

Shockingly, the New Hampshire Supreme Court declined to subject Laconia City Ordinance Chapter 180 to strict or intermediate scrutiny.[166] Although earlier precedent held that strict scrutiny is the appropriate standard for reviewing sex-based classifications under part 1, article II of the New Hampshire Constitution, the majority reasoned that laws which "impose[] requirements on both men and women, but appl[y] to women somewhat differently" do not necessarily trigger strict scrutiny.[167] Relying on custom, as well as the guidance of courts in other jurisdictions, the majority concluded that the "ordinance does not classify on the basis of gender" because it "prohibits both men and women from being nude in a public place" and "nudity in the case

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[164] United States v. Virginia, 518 U.S. 515, 533 (1996) (citations omitted) (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

[165] Free the Nipple—Fort Collins v. City of Fort Collins, 916 F.3d 792, 803 (10th Cir. 2019). *But see* Tagami v. City of Chicago, 875 F.3d 375, 380 (7th Cir. 2017), *cert denied*, 138 S. Ct. 1577 (2019) (holding that the "list of intimate body parts is longer for women than men, but that's wholly attributable to the basic physiological differences between the sexes").

[166] New Hampshire v. Lilley, 204 A.3d 198 (N.H. 2019).

[167] *Id.* at 206 (emphasis in original).

of women is commonly understood to include the uncovering of breasts."[168] Accordingly, the majority applied rational basis review and upheld the ordinance.[169]

The dissenting justices countered that the majority's decision to apply rational basis "find[s] [no] support in the plain language of the ordinance, the New Hampshire Constitution, or [New Hampshire Supreme Court] precedent."[170] Dismissing the majority's reliance on "the outcome of cases decided through [the] application of less rigorous standards,"[171] the dissent focused its attention on the presence of an ERA in the New Hampshire Constitution, writing that "[w]e . . . thwart the very protections the Equal Rights Amendment was enacted to provide, if we allow stereotypical notions about women's bodies to alter our analysis of the straightforward question of whether Laconia's ordinance classifies on the basis of gender."[172] Analyzing the ordinance under the strict scrutiny standard, the dissenting justices concluded that "Laconia's ordinance violates part I, article 2 of the New Hampshire Constitution."[173]

Ironically, the majority chastises the dissenting justices, writing that "the siren call of 'equal rights' [should not] lead us to forget our constitutional role. In the absence of a suspect classification or a fundamental right, courts will not second guess legislative bodies as to the wisdom of a specific law."[174] Yet it is the majority that goes to great lengths to contort the Court's equal protection jurisprudence to avoid subjecting Laconia City Ordinance 180 to strict scrutiny. This results-oriented approach is likely rooted in the majority's anxiety about the social implications of invalidating the ordinance. Such anxieties are, as we have seen, neither new nor uncommon.

There are individuals and communities across this country that are troubled by the potential invalidation of laws prohibiting exposure of the female chest. Many deeply and sincerely believe that the presence of bare female breasts in public spaces undermines morality. As discussed earlier, this was the very same argument invoked when men began to appear shirtless on beaches like Coney Island in the early 1930s. Yet, well it is true that the plaintiffs in *Lilley v. New*

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[168] *Id.* at 208. (quoting Eckl v. Davis, 124 Cal. Rptr. 685, 696 (Ct. App. 1975)).

[169] *Id.* at 208–09.

[170] *Id.* at 218 (Basset, J., dissenting).

[171] *Id.* at 222 (emphasis in original).

[172] New Hampshire v. Lilley, 204 A.3d at 224 (Basset, J., dissenting).

[173] *Id.* at 227.

[174] *Id.* at 210 (citing Winnisquam Reg. Sch. Dist. v. Levine, 880 A.2d 369, 371 (N.H. 2005)).

Hampshire are activists affiliated with a movement called "Free the Nipple,"[175] this does not mean that states and municipalities have no choice but to adopt their philosophy. City and state governments could, in the alternative, amend indecent exposure laws in order to make the regulation uniform. Such a change would not only achieve all the professed purposes of the current regime without violating equal protection, but would also serve to further de-eroticize public spaces. If such an outcome seems absurd, we would do well to evaluate whether it would be preferable to preserve laws that restricts the freedom of women for the benefit of heterosexual men.

[175] *Id.* at 204.