8-27-2015

Top-free Rights for Women: A Showdown in Manhattan

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Verdict
AUGUST 27, 2015 | JOANNA L. GROSSMAN

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A battle over whether topless women with body paint who call themselves "desnudas" can solicit tips in Times Square—and whether they might be soliciting them too aggressively—might raise real legal questions; it certainly raises political hackles. In a weak moment, Mayor DiBlasio even threatened to rip up the pedestrian plaza where they have stationed themselves rather than allow them to continue appearing.

But while the controversy over the rights of the desnudas goes on, a separate, but related, protest has surfaced. This one raises no complicated legal question about whether soliciting tips (but not otherwise charging) transforms a non-commercial activity into a commercial one, nor whether the topless women might be engaged in an artistic performance protected by freedom of expression. It is just a few dozen women marching with signs, but without shirts, to support the right of women to bare their breasts in public—a right clearly recognized under New York law. Yet this gathering also drew surprised onlookers (many with video cameras), rampant discussion on social media, and a long article in the *New York Times*. This reaction is the product not only of a strong social norm that women's breasts should be covered in public, but also of a widespread misperception about the state of the law.

Public Nudity Laws and the Female Breast

There are many misconceptions about the exposure of female breasts in public. People tend to think the laws are more restrictive than they really are. To take one example, breastfeeding women are routinely ordered to leave public and private locations despite express statutory protection for their conduct (see examples and analysis **here (https://verdict.justia.com/2012/03/20/the-controversy-over-public-breastfeeding)**). And the New York City police recently had to be educated about the laws of their own jurisdiction because they kept arresting the same woman for conduct that is *not* against the law: wandering topless around the streets of New York City.

So what is the law of female toplessness in the United States?

Laws regulating public nudity focus primarily on mandating the concealment of genitalia from public. But even that universal animating principle does not produce uniform laws across different jurisdictions. The Model Penal Code criminalizes only exposure of genitals, as do many state laws. Other states refer vaguely to "private parts," or some other equally ambiguous designation. But not all indecent exposure laws include blanket prohibitions; some only prohibit nudity accompanied by "lewdness"—behavior designed to create, or the product of, sexual arousal.

In California, for example, simple nudity is not a crime. The exposure of "private parts" is criminal only if it's willful and lewd. And, according to the California Supreme Court, a lewd act is one in which the individual "not only meant to expose himself, but intended by his conduct to direct public attention to his genitals for purposes of sexual arousal, gratification, or affront." In that case, ***In re Smith* (http://law.justia.com/cases/california/cal3d/7/362.html)** , the court reversed the indecent exposure conviction of a man who took off his clothes at a rarely used beach and fell asleep. His "mere nudity," though it displayed the full monty, was not a crime. (In San Francisco, nudists are now required to place a towel down before sitting on park benches or city buses. The origins of the relatively new ordinance are discussed **here (https://verdict.justia.com/2011/10/04/towels-under-tailbones)** .)

What about the female breast? The laws that criminalize the exposure only of "genitalia" are generally interpreted to allow exposure of the female breast. Some indecent exposure laws specify that the female breast does not fall within the prohibition. Laws with vaguer designations and no specific language about the breast have been interpreted in different ways. At least some have ruled that a prohibition on the exposure of "private parts" does not include exposure of the female breast.

If one were to generalize about this patchwork of laws, one might say that female

toplessness in public, in general, is not a crime in most states. But there is a fairly strong social taboo against it. Bare breasts tend to be associated with two activities: breastfeeding and adult entertainment. Fights over toplessness at strip clubs and the like tend to be about zoning—where those businesses can be located—rather than about the toplessness per se. Toplessness in that setting is unlikely to run afoul of even a broad indecent exposure law because those laws tend to be restricted to public places and places where other people are present and likely to be offended. Those that frequent strip clubs are not likely to fall in that latter group.

Public breastfeeding has had a controversy all its own—one that has led, over the last decade or so, to the enactment of specific laws to protect breastfeeding women from being charged with indecent exposure when they breastfeed in a public place or in a place, such as a store or an airplane, that is generally open to the public. (This controversy and some recent developments are discussed **here (https://verdict.justia.com/2012/03/20/the-controversy-over-public-breastfeeding)** .)

Whether they have the right or not, most American women do not appear top-free in public, even at most beaches. This may be in part due to a misperception that such conduct is criminal, but the more likely explanation is the prevailing social norm. One byproduct of the current controversy in Times Square is a movement to get various social media sites to lift restrictions on images of female breasts. (I have it on good authority that #freethenipple is trending on Twitter at the moment.)

Top-Free Rights for Women in New York: *People v. Santorelli*

Outside of the breastfeeding context, there has been relatively little litigation about women's right to expose their breasts in public. But, in New York, a very deliberate and public protest brought the issue to a head in the 1980s. Four women who were part of the "Topfree Seven"—the label was chosen deliberately to avoid association with the toplessness of strip clubs—bared their breasts at a public park in Rochester. They did so to test a newly amended public indecency law.

Under a prior version of the indecent exposure law, a New York court held, in ***People v. Gilbert (https://scholar.google.com/scholar_case?q=People+v.+Gilbert&hl=en&as_sdt=4.33&case=9966542732363673486&scilh=0)*** (1972), that a woman sunbathing nude at a public beach was not guilty of indecent exposure, even though the law expressly prohibited exposure of the female breast. The statute also required "lewdness," and the court felt the sunbather did not fit that description. After the *Gilbert* decision, the New York legislature changed the law to make it stricter—it prohibited all nudity, including female breasts "below the areola", whether lewd or not.

The Topfree Seven had staged similar protests in the past, once a year, and, while they were always arrested, the charges were always dropped. But in 1986, the protest led to arrests, and the arrests led to conviction for indecent exposure. The women appealed on constitutional grounds, arguing that the indecency law, which expressly banned public exposure of all private parts, including the female breast "below the areola," discriminated against women. Men, after all, are free to bare their chests virtually everywhere, save for restaurants and stores with a "no shoes, no shirt, no service" policy.

The challenge reached the state's highest court, the New York Court of Appeals, which issued a strangely reasoned opinion, ***People v. Santorelli (https://scholar.google.com/scholar_case?case=7027949864924075479)***. Although the statute had been amended to eliminate the requirement of lewdness, and contained no other predicates or carve-outs, the court held that the blanket prohibition on the exposure of the female breast was "aimed at discouraging 'topless' waitresses and their promoters" and, therefore, only applied in situations when breast exposure was either commercial or lewd. With this holding, the court did not need to reach the women's core claim—that the law discriminated on the basis of sex. But that argument still had its day.

A concurring judge in *Santorelli* wrote separately, arguing that the majority's conclusion was based on faulty reasoning. He thought, quite plausibly, that the judges were misreading a clear statute. The text revealed no limitation to bare breasts that were part of a business (e.g., a strip club) or were displayed lewdly. In reading the statute more narrowly, the majority had, in the eyes of the concurring judge, indulged in "artful means of avoiding a confrontation with an important constitutional problem." He thought the better approach was to give the statute its due—all public exposure of female breasts was criminally indecent—but invalidate it on constitutional grounds. In other words, the Rochester women should have been found guilty of indecent exposure, but the convictions should have been thrown out because the statute violated their equal protection rights under both the New York and federal constitutions.

Under standard equal protection analysis, a statute that differentiates on the basis of gender must survive heightened judicial scrutiny. The government must demonstrate an important governmental interest and a substantial relationship between the means and the end. In this case, the state did not have a good enough reason to single out women and force them to wear shirts. Rather, the concurring judge wrote, the statute "betray[ed] an underlying legislative assumption that the sight of a female's uncovered breast in a public place is offensive to the average person in a way that the sight of a male's uncovered breast is not." But "protecting public sensibilities" was not enough, in his opinion, to outweigh the harm to women of differential treatment. In prohibiting the exposure of genitalia, the statute treated men and women the same. But the judge relied

on evidence from the Kinsey report and other human sexuality sources to conclude that the "female breast is no more or less a sexual organ than is the male equivalent." The judge thought that the differential treatment of male chests and female breasts was not based on a real biological difference, but on the societal meaning attached to the female breast. And the very fact the female breast might arouse men more than the converse is, in his view, "itself a suspect cultural artifact rooted in centuries of prejudice and bias toward women." The state could thus not justify a "law that discriminates against women by prohibiting them from removing their tops and exposing their bare chests in public as men are routinely permitted to do."

Conclusion

Santorelli stands for the proposition that non-commercial exposure of women's breasts in public does not violate New York's indecent exposure law. The concurring judge's view that any contrary reading would constitute unconstitutional discrimination has no legal force, however persuasive it might be. But both opinions produce the same result: the topless women currently protesting in Manhattan are well within their rights. So perhaps the question should be about the social taboo—why do we treat women's, but not men's, breasts as sexual objects that must be concealed in public?

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