NLGLA MICHAEL GREENBERG WRITING COMPETITION

A (Trans)Gender-Inclusive Equal Protection Analysis of Public Female Toplessness

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> Appellants and the five other women who were arrested with them were prosecuted for doing something that would have been permissible, or at least not punishable under the penal laws, if they had been men—they removed their tops in a public park, exposing their breasts in a manner that all agree was neither lewd nor intended to annoy or harass.[1]

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1. People v. Santorelli, 600 N.E.2d 232, 234 (N.Y. 1992) (noting the underlying factual scenario leading to the prosecution of several females under a New York law prohibiting the exposure of "that portion of the [female] breast which is below the top of the areola" (citing N.Y. PENAL LAW § 245.01)).

I. INTRODUCTION

Federal, state, and municipal laws have long regulated, and often blanketly prohibited, the exposure of female breasts in public venues for a variety of purported reasons.[2] These regulations are often included under laws which prohibit nudity in places of public accommodation, govern modes of undress that are considered obscene, lewd, or indecent, and restrict the time, place, and manner of sexually oriented performances.[3] Generally worded to prohibit the exhibition of the "female breast with less than a fully opaque covering or any portion thereof below the top of the nipple,"[4] nudity regulating laws lack a similar provision for male breasts, and, in fact, exclude the male torso from coverage entirely.[5]

Pursuant to the Supreme Court's sex-based discrimination jurisprudence, advocates for topfree equality have repeatedly challenged nudity regulating laws in court, arguing that they violate U.S. and state constitutions' equal protection provisions.[6] To successfully defend a charge that legislation discriminates on the basis of sex, the government has the burden of showing that it has an important interest, and that the regulation in question substantially furthers that interest.[7] In applying this equal protection analysis to female-only toplessness, courts have almost universally accepted the proposition that these laws serve the legitimate and important governmental interests of protecting public sensibilities,[8] or, alternatively, of preventing undesirable secondary effects associated with nudity.[9] Further, courts have also accepted, with

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2. *See* Kimberly J. Winbush, Annotation, *Regulation of Exposure of Female, But Not Male, Breasts*, 67 A.L.R. 5TH 431 (1999).

3. Anita L. Allen, *Disrobed: The Constitution of Modesty*, 51 VILL. L. REV. 841, 841 (2006) (arguing that these laws serve to "compel sexually modest behavior").

4. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3501 (2007); DEL. CODE ANN. tit. 11, § 1365 (2007); FLA. STAT. ANN. § 847.00 (West 2007); GA. CODE ANN. § 16-12-102 (West 2007).

5. *See generally* Winbush, *supra* note 2 (providing an extensive list of both federal and state court cases that have examined laws regulating female, but not male, toplessness).

6. *Id.* §§ 3[a]-4[b].

7. Craig v. Boren, 429 U.S. 190, 197 (1976).

8. *See, e.g.*, United States v. Biocic, 928 F.2d 112, 115-16 (4th Cir. 1991) ("The important government interest is the widely recognized one of protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous zones."); Craft v. Hodel, 683 F. Supp. 289, 299 (D. Mass. 1988) (citing People v. Craft, 509 N.Y.S.2d 1005, 1010 (N.Y. City Ct. 1986)) ("Here, the statute's objective is to protect the public from invasions of its sensibilities, and merely reflects the current community standards as to what constitutes nudity" (internal quotations omitted)).

9. *See* City of Eerie v. Pap's A.M., 529 U.S. 277, 296 (2000) ("The asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important").

little to no real analysis, that the sex-based classification is substantially related to the government's interests because "there can be no doubt" that female, and not male, breasts are erogenous zones associated with sexual arousal.[10] Equal protection challenges have, thus, been largely unsuccessful.[11]

Accepting, arguendo, that courts have accurately identified governments' important interests,[12] what happens to the "real differences" justification for the sex differential when our common understanding of sex no longer applies?[13] Implicit in the courts' decisions regarding female toplessness is the fact that judges have routinely assumed that the term "female" has plain meaning.[14] But is sex merely a binary, natural phenomenon? Or is it a convenient classification that society has developed to perpetuate norms for decency, morality, and roles? The answer, it seems, will depend on the agenda being pursued.

The concept of sex and what it means to be "female" is never questioned when society seeks to objectify and sexualize a part of a woman's body, inhibiting her choice to go topless. But, for example, when traditional marriage as between a man and woman is perceived as threatened because of a transgendered or transsexual person's desire to legalize the union with his or her partner, only then will society—and

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10. Dydyn v. Dep't of Liquor Control, 531 A.2d 170, 175 (Conn. App. Ct. 1987). This is commonly known as the "real difference" doctrine. *See generally* Virginia F. Milstead, *Forbidding Female Toplessness: Why "Real Difference" Jurisprudence Lacks "Support" and What Can Be Done About It*, 36 U. TOL. L. REV. 273 (2005). For other instances in which courts have found that "real differences" between women's and men's breasts render a sex-based toplessness statute substantially related to the government's legitimate interests, see, for example, *Hodel*, 683 F. Supp. at 300 (finding that the sex-based classification was substantially related to the government's interests because "[c]ommunity standards do not deem the exposure of males' breasts offensive, therefore, the state does not have an interest in preventing exposure of the males' breasts" (citing *Craft*, 509 N.Y.S.2d at 1010)) and *City of Seattle v. Buchanan*, 584 P.2d 918, 922 (Wash. 1978) ("[S]exual differences (the sexual arousal commonly associated with the female but not the male breasts) bears a direct relationship to the legislative purpose of the preservation of public decency and order.").

11. Winbush, *supra* note 2, § 2[a].

12. In determining what constitutes public sensibilities or undesirable secondary effects, courts have been over-zealous in invoking "community standards" without attempting to determine whether the community standards are valid or are based on stereotypical and archaic notions of men's and women's roles; relying on these inaccurate generalizations is forbidden under *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982). Indeed, public sensibilities may never be an important government interest when a legislative classification is based on sex, gender, race, sexual orientation, or any other marginalized group. *See* Reena N. Glazer, *Women's Body Image and the Law*, 43 DUKE L.J. 113, 128 (1993) ("[T]he concept of 'public sensibilities' itself, when used in these contexts, may be nothing more than a reflection of commonly held preconceptions and biases.").

13. *See* Milstead, *supra* note 10.

14. *In re* Gardiner, 42 P.3d 120, 135 (Kan. 2002).

more specifically, the courts—deem it necessary to meticulously scrutinize what it means to be "male" or "female." Accordingly, when determining the legal validity of a marriage between a postoperative transsexual and a "biological" male or female, almost every court has come to the same conclusion:[15] "the common meaning of male and female, as those terms are used statutorily, . . . refer to immutable traits determined at birth."[16]

The courts' sex jurisprudence, thus, exists as follows: (1) sex is to be rigidly construed as a biological predetermination, and (2) "real differences" between males and females justify the prohibition of female toplessness to protect sensibilities to mitigate harm to society. But dual application of these premises leads to an absurd result: laws regulating female toplessness are inapplicable to postoperative male to female transsexuals (MTFs). A transsexual male who, through surgery and hormone treatment, has the outward physical appearance of a woman is free to expose her breasts just as a biological male.

This Article addresses the novel issue of whether the courts' jurisprudence concerning transgender marriage requires a second look at equal protection challenges to laws regulating female, but not male, toplessness. Part II begins by giving a brief overview of the topfree equality movement, outlining the arguments for topfreedom and identifying the arguments against it. Part III will summarize the courts' current jurisprudence concerning equal protection challenges to regulations of female-only toplessness. It will discuss the applicable standard of review, and give examples of cases in which courts have found these laws to be both valid and invalid. In Part IV, the Article will then switch its concentration to court cases that have addressed how sex-specific laws apply to transgendered and transsexual persons, focusing predominately on marriage. The Article will emphasize the courts' reliance on the common understanding of "male" and "female" to mean biological sex as the determining factor in statutory construction. It will then merge the cases discussed, and will argue that, read together, they warrant a finding that laws regulating female toplessness do not further important governmental interests. Finally, the Article will close with a plea to the courts to rethink their sex jurisprudence altogether.

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15. *But cf.* M.T. v. J.T., 355 A.2d 204, 209 (N.J. Super. Ct. App. Div. 1976) (examining a similar English case, Corbett v. Corbett (otherwise Ashley), [1970] 2 All E.R. 33 (Probate, Divorce & Admiralty Div.), and stating that it disagreed that sex is "irrevocably cast at . . . birth").

16. Kantaras v. Kantaras, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004).

II. TOPFREE EQUALITY

Triggered, in part, by seven topless women (the "Topfree Seven") who were arrested and prosecuted during a June 21, 1986 demonstration in New York City,[17] advocates for topfree equality have led a constitutional assault on laws which regulate and punish only female toplessness. At the core of the movement lies the belief that "breasts are not objects; they are part of subjects, women, who should be allowed to control when they are seen, why they are seen, how they are seen, and by whom."[18] Traditionally, society has presumed that women who expose their breasts in public do so to "flaunt[]," or to be sexually provocative.[19] A woman who, of her own volition, exposes these "private" body parts is therefore considered shameful or immoral. This presumption, topfree advocates argue, is largely due to America's emotional immaturity—an immaturity that compels sexual modesty.[20] This pervasive immaturity leads one to "doubt[] that fellow citizens have sufficient self-control to handle a regime of permissible nudity."[21]

A competing interest, however, is the sexual appetite of heterosexual men. Women are often free to expose their breasts at times and in places in which men desire it: at topless bars and clubs, in pornography, and in the bedroom.[22] Society, therefore, has carved out an exception to the general nonacceptance of female breast exposure: exposure to entertain or sexually arouse males. The act of regulating the female breast apart from (and sometimes including) these exceptions[23]

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17. *See* Helen Pundurs, *Public Exposure of the Female Breast: Obscene and Immoral or Free and Equal?*, 14 IN PUB. INTEREST 1, 1-2 (1994-95).

18. *Id.* at 21.

19. *See* Barbara Arneil, *The Politics of the Breast*, 12 CANADIAN J. WOMEN & L. 345, 348 (2000).

20. Allen, *supra* note 3, at 855.

21. *Id.* ("We are not certain we can trust our fellows not to engage in sexually assaultive and harassing behaviors. We fear others will turn what is supposed to be non-obscene and natural into something obscene and perverse. We fear shame, objectification and victimization.").

22. Arneil, *supra* note 19, at 359 ("North American patriarchal culture 'tends not to think of a woman's breasts as hers. Woman is a natural territory; her breasts belong to others—her husband, her lover, her baby. Its [sic] hard to imagine a woman's breasts as her own, from her own point of view, to imagine their *value* apart from measurement and exchange.'" (quoting Iris Marion Young, *Breasted Experience*, *in* THE POLITICS OF WOMEN'S BODIES: SEXUALITY, APPEARANCE, AND BEHAVIOR 134 (Rose Weitz ed., 1998))); *see also* Glazer, *supra* note 12, at 116 ("[The] (heterosexual) male myth of a woman's breast has been codified into law [and, consequently] . . . [b]ecause women are the sexual objects and property of men, it follows that what might arouse men can only be displayed when men want to be aroused.").

23. *See generally*, *e.g.*, City of Eerie v. Pap's A.M., 529 U.S. 277 (2000); Barnes v. Glenn Theater, Inc., 501 U.S. 560 (1991). These cases represent two of the Supreme Court's most recent decisions concerning the regulation of nudity in the context of live dancing and its First Amendment implications. Notably, the Court found that a requirement that the dancers wear

has, in itself, perpetuated the heterosexual male fantasy of the female breast as a purely sexual object.[24] Topfree advocates seek to desexualize the female breast, and to allow women to determine for themselves when and why to expose.[25] Put simply, women's breasts are multi-purpose and should be treated as such. They are for sexual stimulation, for feeding a child, for sexual provocation, and, most often, simply just another part of women's bodies.[26] More importantly, they are her own.

Apart from the "real differences" doctrine, which this Article will discuss more thoroughly in Parts III and IV, there are two additional arguments that opponents of female toplessness frequently employ: (1) the need to protect the "innocent child," and (2) the need to protect women from physical and sexual assault.[27] These two arguments, however, are disingenuous. First, the "innocent child" argument fails to consider an important aspect of the perceived problem; there are currently no laws that prohibit the "explicitly sexualized presence of [covered] large, even surgically altered, female breasts (as appear in so many media images) . . . , whereas a non-sexualized [exposed] female breast, in all its varied sizes and shapes"[28] is considered threatening and worthy of regulation. Second, regarding the protection from violence argument, this too fails to consider relevant facts: for example, there are no laws that prohibit domestically abused women from returning to their abusive partners;[29] there are no laws that prohibit a woman from walking through a dangerous area alone where sexual violence is known to occur;[30] and there is no evidence, other than general presumptions and

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"pasties" (a device covering the nipple) furthered the government's legitimate interest in reducing the harmful secondary effects associated with nude dancing establishments. *Eerie*, 529 U.S. at 280; *Barnes*, 501 U.S. at 572. Does this lead to the conclusion that it is not the erotic dancing that is so sexually arousing or obscene that it leads to harmful secondary effects, but, instead, the female nipple?

24. *See* Pundurs, *supra* note 17, at 26 ("[T]he concealment of women's breasts creates an obsessive fascination with them.").

25. *Id.* at 36 ("Topfree equality is more than women being able to do what men do; it is about women being able to do what they want, when they want to. It is about women reclaiming their own bodies and redefining them as something other than sexual objects existing solely for the sexual arousal and gratification of males and the marketing of consumer goods.").

26. Arneil, *supra* note 19, at 370.

27. During a period in which topfree advocates were appealing to the California legislature to legalize topless sunbathing, Randy Thomasson, president of the Campaign for Children and Families, made the following statement: "We already have too many sexual assaults in society. This will fuel that fire, and if the women don't understand, that's because they don't think like a man." Robert Salladay, *Woman Promotes the Right To Go Topless*, L.A. TIMES, Jan. 22, 2005, at B12.

28. Arneil, *supra* note 19, at 358.

29. Pundurs, *supra* note 17, at 22-23.

30. *Id.* at 23.

stereotypes, that men are so incapable of controlling themselves that they will succumb to an impulse to sexually harass or assault a topless woman.[31] And to the extent that society is concerned about heterosexual males' harmful response to female toplessness, shifting the burden to women to prevent male behavior is a biased and inequitable solution.[32]

Thus, the movement for topfree equality seeks not only to reclaim the female breast from society's imposed designations, but to expose the fallacies in those assumptions that serve to impede women's topfreedom.

III. TRADITIONAL EQUAL PROTECTION ANALYSIS OF LAWS REGULATING FEMALE TOPLESSNESS

In *Craig v. Boren*,[33] the Supreme Court, for the first time, articulated and applied a heightened standard of review to a state statute premised on a sex-based classification. Now known as intermediate scrutiny,[34] this standard of review involves a two-step analysis requiring the government to prove that (1) the sex-based classification serves an important governmental objective, and (2) the sex-based classification is substantially related to achieving that objective.[35] Several years later, in *Mississippi University for Women v. Hogan*,[36] the Court, in dicta, expanded the inquiry by stating that, "[a]lthough the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions."[37]

But although the statutes involved make a clear distinction between males and females,[38] many courts have seemingly glossed over the Supreme Court's sex-based equal protection framework, or have found the framework inapplicable by simply invoking the "real differences"

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31. *Id.*

32. Milstead, *supra* note 10, at 297-98.

33. 429 U.S. 190 (1976). At issue was whether an Oklahoma statute which "prohibits the sale of 'nonintoxicating' 3.2% beer" to males under twenty-one and to females under eighteen violated the Equal Protection Clause of the United States Constitution. *Id.* at 191-92.

34. Ann K. Wooster, Annotation, *Equal Protection and Due Process Clause Challenges Based on Sex Discrimination—Supreme Court Cases*, 178 A.L.R. FED. 25 § 3 (2002).

35. *Craig*, 429 U.S. at 197.

36. 458 U.S. 718 (1982). Before the Court was the question of whether a state statute that prohibited a male from attending a state-sponsored nursing school passed constitutional muster under the Equal Protection Clause. *Id.* at 719.

37. *Id.* at 724-25.

38. *See* Pundurs, *supra* note 17, at 30 (noting that, under the New York penal law applicable in *People v. Santorelli*, 600 N.E.2d 232 (N.Y. 1992), men were permitted to go topless in public regardless of whether their breasts were larger than the average woman's; in contrast, women were forced to cover up even if flat-chested).

doctrine.[39] The vast majority of courts have failed to correctly apply intermediate scrutiny and, subsequently, have found the regulations valid.[40] A small minority of courts, however, has accurately applied intermediate scrutiny to laws regulating female-only exposure, analyzing the issue as one of a clear sex-based discrimination.[41] These courts have found the regulations invalid because they did not substantially relate to an important governmental interest.[42] The following is a general overview of the courts' typical analyses in opinions finding exposure regulations to be both valid and invalid.

A. Regulations of Female Toplessness Held Valid

In *United States v. Biocic*, the United States Court of Appeals for the Fourth Circuit examined a federal regulation that prohibited persons from being "partially nude" in a national wildlife refuge.[43] In defining the phrase "state of nudity," the statute specifically included "the showing of the female breast with less than a fully opaque covering on any portion thereof below the top of the nipple."[44] The appellant, who had been convicted by a magistrate judge after she removed the top of her bathing suit in a Virginia wildlife refuge, raised a number of constitutional challenges to the regulation, including a claim that it violated the Equal Protection Clause of the United States Constitution.[45]

The court recites the language traditionally used in intermediate scrutiny review, but without actually deciding whether the prohibition on public exposure of the female—but not male—breasts constitutes a "gender-based" distinction; instead, the court simply states that it "assume[s], without deciding" that a distinction exists.[46] Determining that the government has in fact identified an important interest, the court, in almost dismissive language, declares:

> The important government interest is the widely recognized one of protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various

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39. *See* Milstead, *supra* note 10, at 291-95 (critiquing and criticizing courts' application of the intermediate scrutiny test as applied to female-only toplessness laws).

40. *See* Winbush, *supra* note 2, §§ 3[a], 4[a].

41. *Id.* (quoting § 58.2 of the Accomack County Code).

42. *Id.*

43. 928 F.2d 112, 113 (4th Cir. 1991).

44. *Id.* (quoting 50 C.F.R. § 9.3 (1976)).

45. *Id.* at 113-15.

46. *Id.* at 115. The court declined to explicitly rule on whether "anatomical differences between male and female make the two incapable of 'equal' treatment." *Id.*

> portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous zones.[47]

The court goes on to acknowledge that not everyone agrees on what constitutes an erogenous zone.[48] Thus, although the court tacitly admits that there is substantial room for disagreement, it neglects to "ascertain[] whether the statutory objective itself reflects archaic and stereotypic notions" as required by the Supreme Court under *Mississippi University for Women*.[49] It merely injects its own conceptions of sensibilities, largely influenced by a world dominated by heterosexual men, without asking the fundamental question of whether "the particular 'sensibility' to be protected is, in fact, a reflection of archaic prejudice."[50]

Next, rather than analyzing whether the government had satisfied the second criterion under intermediate scrutiny, the court holds, without discussion, that "the distinction here is one that is substantially related" to furthering the important interest.[51] But the court fails entirely to consider factors that may also offend public sensibilities. For instance, why is it only the traditionally erogenous female breast that we must prevent the "willy-nilly" exposure of, whereas the male chest—which research has proven to be the "body part most sexually stimulating to women"[52]—may be freely exposed without any threat to sensibilities? Why does the exposure of exceedingly large or unsightly male breasts never offend sensibilities per se?[53]

Ultimately, it is unclear, despite the language used, whether the court actually applied intermediate scrutiny. The court concluded its equal protection analysis with contradicting language, indicating that because men and women are not similarly situated, there is no constitutional infirmity to a regulation hinged on "clear differences between the sexes."[54] This reasoning is often indicative of a court that has

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47. *Id.* at 115-16.

48. *Id.* at 116 (stating that "whether justifiably or not in the eyes of all," erogenous zones still include female, but not male, breasts).

49. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724-25 (1982).

50. *See* Glazer, *supra* note 12 and accompanying text.

51. *Biocic*, 928 F.2d at 115.

52. Milstead, *supra* note 10, at 282 ("Courts that conclude women's breasts are sexual in nature while men's are not invoke a distinctly male—in fact, distinctly heterosexual male—point of view." (quoting Glazer, *supra* note 12, at 130)). She further contends that any conclusion which finds female, but not male, breasts erotic overlooks and dismisses what women (and gay males) find erotic. *Id.* at 282-83.

53. *See* Pundurs, *supra* note 17, at 30; note 38 and accompanying text.

54. *Biocic*, 928 F.2d at 116.

abstained from applying any level of scrutiny at all to laws based on "difference."[55]

While *Biocic* serves as an illustrative example of the analysis courts have repeatedly engaged in when reviewing laws regulating women[56] and female sexuality, it by no means stands alone in its validation of laws that differentiate between the male and female breast. For instance, in *Craft v. Hodel*, a Massachusetts district court examined a federal regulation prohibiting nudity in the Cape Cod National Seashore—"nudity" defined to include female breasts—under the Equal Protection Clause.[57] The court held that the government had an important governmental interest in protecting the public "from invasions of its sensibilities," and explicitly rejected the plaintiffs' argument that the government's objective was to "perpetuate the view that the female breast is a sex object."[58] The court, without identifying where they came from or assessing their validity, relied on "community standards" to identify the sensibilities that required protection.[59] In concluding that the regulation substantially related to achieving the government's objective, the court again relied on "community standards" and stressed that those standards did not deem male breasts offensive and, therefore, the state had no interest in preventing their exposure: "[n]ature, not the legislative body, created the distinction between that portion of a woman's body and that of a man's torso."[60]

This "real difference" analysis and language, however, is not limited to domestic cases. In *R. v. Jacob*,[61] pursuant to the *Canadian Criminal*

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55. Milstead, *supra* note 10, at 291; *see also* Hang On, Inc. v. City of Arlington, 65 F.3d 1248, 1256 (5th Cir. 1995). There, the Fifth Circuit Court of Appeals analyzed an ordinance that excluded male breasts from the definition of "nudity" under the Texas Constitution's Equal Rights Amendment, and flatly concluded that the ordinance did not discriminate on the basis of "gender" because of the real differences between the sexes. *Hang On, Inc.*, 65 F.3d at 2156. The court declared that it did not need evidence "to prove self-evident truths about the human condition—such as water is wet," and expressed indignation that it was forced to "tarry long with such foolishness and, in the process, trivialize constitutional values intrinsic to our society." *Id.* at 1256-57.

56. *See, e.g.*, Milstead, *supra* note 10, at 292 (noting that, in the past, courts often relied on society's stereotypes in safeguarding "sensibilities," alluding to cases in which women sought to practice law and to bartend).

57. 683 F. Supp. 289, 290, 299-300 (D. Mass. 1988).

58. *Id.* at 299. The court acknowledged the Supreme Court's command in *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982), and attempted to determine whether the regulation was based on archaic perceptions of women. *Id.* Nonetheless, the court was confident that the regulation was not "based on stereotyped notions" because of the real "physical difference[s] between the sexes." *Id.* at 300.

59. *Id.* at 299.

60. *Id.* at 300.

61. [1996] 112 C.C.C. (3d) 1, 15 (Can.).

Code regulating indecency, a Canadian trial judge convicted a woman who was sitting topless on a porch at a friend's house.[62] Under the guise of invoking "community standards [of tolerance],"[63] the trial judge stated:

> It is clear to me, therefore, that the female breast constitutes a very personal and responsive part of the female anatomy and is a part of the female body that is sexually stimulating to men, both by sight and touch, and is not, therefore, a part of the body that ought to be flagrantly exposed to public view.[64]

Thus, "construction of the breast is defined by the impact on the outside observer."[65] This language, while more blunt than that often found in American precedent, showcases the major flaw currently present in regulation-of-the-female-breast equal protection analysis: defining "community standards" is either the exclusive province of straight males, or it is based on the straight male experience. An unrepresentative view of community standards renders both "important governmental interests" and the "substantial relation" of sex-based laws dubious at best.

B. Regulations of Female Toplessness Held Invalid

In stark contrast to the overwhelming majority of decisions that have held female toplessness regulations valid, one could count the number of decisions finding such laws invalid on a single hand. Although generally finding an important governmental interest at stake, these courts have gone beyond the lip-service generally paid to "the substantial relation" prong by challenging the driving forces behind the asserted "community standards" and "sensibilities."

Applying intermediate scrutiny under both state and federal equal protection clauses, *People v. Santorelli*[66] is the seminal case invalidating a law which differentially regulated female, as opposed to male, breast exposure. There, the New York Court of Appeals addressed a provision in the penal code prohibiting the exposure of "private or intimate parts," including the portion of the female breast "which is below the top of the areola."[67] The court began its equal protection analysis by citing *Craig v. Boren*, and noting, with tongue in cheek, that "[t]he equal protection analysis . . . is certainly not a complex or difficult one. When a statute explicitly establishes a classification based on gender, *as Penal Law*

62. *Id.* at 16-17.
63. *Id.* at 15.
64. *Id.*
65. Arneil, *supra* note 19, at 348.
66. 600 N.E.2d 232 (N.Y. 1992).
67. *Id.* at 234 (citing N.Y. PENAL LAW § 245.01).

§ 245.01 unquestionably does, the State has the burden of showing that the classification is substantially related to the achievement of an important governmental objective."[68]

Rather summarily, the court first acknowledged that "protecting public sensibilities is a generally legitimate goal for legislation."[69] Implicit in the remaining analysis, however, is the conclusion that the statute's invalidity rests on the government's inability to show that the sex-based classification is substantially related to its interest.[70] The court, quoting *Mississippi University for Women*, stated that "*justifying*" a statute aimed at protecting sensibilities "on gender, race, or any other grouping that is associated with a history of social prejudice" is "tenuous."[71] The court embraced evidence showing that male and female breasts, from an anatomical standpoint, do not vary in their sexual capacities.[72] It also found highly relevant evidence showing that, in many countries and cultures, female breast exposure is commonplace.[73] The government, thus, failed to meet its burden of proving that its prohibition of female toplessness was substantially related to protecting sensibilities because the perception that only female breasts arouse prurient interests is a "suspect cultural artifact rooted in centuries of prejudice and bias toward women."[74]

Two other cases that invalidated sex-based toplessness laws under equal protection analyses are *Williams v. City of Fort Worth*[75] and *People*

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68. *Id.* at 236 (emphasis added).

69. *Id.* Although the court reviewed the code provision under intermediate scrutiny, its language is somewhat ambiguous. Rather than an "important" government objective, as required by *Craig v. Boren*, 429 U.S. 190 (1976), the court uses the language "legitimate goal for legislation." Because the court had previously outlined the framework for analysis under a traditional intermediate scrutiny review, there is no reason to suspect that this ambiguous language indicates a derivation. *Id.*

70. The opinion is not neatly broken up into an analysis of each of the two prongs. The court's ultimate conclusion, however, dictates a reading that it is the second prong—the substantial relation—which the Government fails to meet. *Id.* at 237. "The mere fact that the statute's aim is the protection of 'public sensibilities' *is not sufficient to satisfy the State's burden of showing an 'exceedingly persuasive justification'* for a classification that expressly discriminates on the basis of sex." *Id.* (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981) (emphasis added)).

71. *Id.* at 236 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982) (emphasis added)). The court goes on to state that "[o]ne of the most important purposes to be served by the Equal Protection Clause is to ensure that 'public sensibilities' grounded in prejudice and unexamined stereotypes do not become enshrined as part of the official policy of government." *Id.*

72. *Id.*

73. *Id.* at 237.

74. *Id.*

75. 782 S.W.2d 290 (Tex. App. 1989).

v. David.[76] In both cases, the analyses paralleled that in *Santorelli*. These cases are noteworthy, however, because of the language included in dicta. In *Williams*, the Texas Court of Appeals determined that a nudity ordinance that distinguished between male and female breasts and regulated sexually oriented businesses violated the Texas Constitution's Equal Protection Clause.[77] The court found that the government had not shown how the physical difference between male and female breasts necessitated differential treatment to further its interest in combating the secondary effects of sexually oriented businesses:[78] "Our court is not authorized, however, to take judicial notice of the concept that the breasts of female topless dancers, unlike their male counterparts, are commonly associated with sexual arousal. Such a viewpoint might be subject to reasonable dispute, depending on the sex and sexual orientation of the viewer."[79]

And in *People v. David*, the New York County Court analyzed the same statute ultimately at issue in *Santorelli* and found a violation of equal protection.[80] In finding that the statute did not substantially relate to the government's interest, the court simply noted an elementary truth: "[m]ale and female breasts are physiologically similar except for lactation capability."[81]

IV. A NEW APPROACH TO EQUAL PROTECTION ANALYSIS: THE ACCIDENTAL TRANSGENDER TOPLESSNESS EXCEPTION

Rarely is the legal definition of "sex" challenged, or even considered, when making and interpreting laws. Laws are generally written to include only two sex classifications: male and female.[82] When interpreting these complementary articulations of sex, courts are unlikely to address the potential under- and over-inclusiveness of the terms. A paradigm of the courts' binary sex complacency is evident in the aforementioned opinions discussing female toplessness; there has not

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76. 585 N.Y.S.2d 149 (N.Y. Co. Ct. 1991).

77. *Williams*, 782 S.W.2d at 292, 297-298.

78. *Id.* at 296. This statement, however, should be read in the context of the Texas Constitution's Equal Protection mandate that sex-based statutes serve "compelling state interest[s]." *Id.* (citing Interest of McLean, 725 S.W.2d 696, 698 (Tex. 1987)). This is a higher burden to meet than the federal "important interest" requirement.

79. *Id.* at 297.

80. *David*, 585 N.Y.S.2d at 150-151.

81. *Id.*

82. Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Laws*, 75 DEN. U. L. REV. 1321, 1322-23 (1998) (arguing that not only are classifications defined in terms of "male" and "female," but that gender is expected to conform to sex: masculine to male and feminine to female).

been a single case in which a court has examined whether a statute's use of the phrase "female breast" was ambiguous.

Often, the law neglects to question the validity of the terms "male" and "female" until it is actually confronted with someone who does not fit neatly into either designation.[83] While most of us—thanks to the label on our birth certificate, and to our own physical observation of our genitals, secondary sex features, and reproductive capacities—embrace our classification as male or female, many members of society are not afforded the luxury of automatic sex identity,[84] or even an unambiguous biological sex.[85] There are people who are transgendered or transsexual, and experience a disconnect with, and separation from, their "biological sex";[86] there are people who have chromosomes that are atypical of a characteristically chromosomal "male" or "female"; there are people who are born with ambiguous genitalia for whom "sex" is often the product of a medical decision;[87] and there are people who have one of a variety of medical disorders that could render definitive sex determination problematic.[88] Moreover, advances in medicine and psychiatry have taught the lesson that it "is scientifically inaccurate to classify persons as fully male or female."[89] "Sex," thus, is much more than a formulaic certainty as defined by society.

When finally forced to confront the proposition that sex is not as rigid as "male" or "female," courts' responses have greatly varied. As

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83. For an early example of a court's analysis when confronted with transgenderism, see, for example, *Richards v. United States Tennis Ass'n*, 400 N.Y.S.2d 267 (N.Y. Sup. Ct. 1977) (analyzing whether an MTF was a "female" for the purposes of participating in a women's tennis tournament).

84. *See* Jennifer M. Ross-Amato, *Transgender Employees & Restroom Designation—Goins v. West Group, Inc.*, 29 WM. MITCHELL L. REV. 569, 589-90 (2002) ("Not all transgender people define themselves similarly. The transgender community includes people who understand themselves to be of the opposite sex from which their genitals would suggest and seek to become physically, socially, and legally the sex they have always been psychologically.").

85. *See* Phyllis Randolph Frye & Alyson Dodi Meiselman, *Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now*, 64 ALB. L. REV. 1031, 1053-54 (2001) (arguing that a legal test that defines chromosomes as the immutable characteristic to be used in determining a person's sex fails to take into consideration the chromosomal deviations of people who are intersexed).

86. Ross-Amato, *supra* note 84 and accompanying text.

87. *See* Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 281 (2005).

88. *E.g.*, Kallmann syndrome, Klinefelter syndrome, and Turner syndrome.

89. GEORGE W. HENRY, SEX VARIANTS: A STUDY OF HOMOSEXUAL PATTERNS 1026 (1948); *see also* Anne C. DeCleene, *The Reality of Gender Ambiguity: A Road Toward Transgender Health Care Inclusion*, 16 TUL. J.L. & SEXUALITY 123, 125-28 (2007) (providing an overview of scholars who have studied about, and argued the existence of, the fallacy of binary sex classifications).

one scholar noted, "[c]ourts often define sex by the purpose for which sex is being defined."[90] When defining sex for the purpose of extending protection mechanisms to those on the fringe of the sex binary, judges have applied a more inclusive definition.[91] But when the purpose at issue is perceived as threatening to a traditional institution—such as a transgendered or transsexual person's request to use a restroom designated for members of the "opposite sex,"[92] to receive health benefits for their families,[93] or to get married—courts have been unwilling to envision a more expansive definition and instead defer to legislatures.

Because marriage is so deeply rooted in history and tradition, any potential change to its existing contours has historically been subject to intense scrutiny. It follows, then, that one of the most thoroughly analyzed and developed areas of the law regarding the meaning of sex comes from cases in which a transgender person seeks to marry his or her partner who is of the same "biological sex." Thus, in order to better understand the courts' sex jurisprudence regarding the regulation of female toplessness, it is essential to examine several of these sex-defining transgender marriage cases in depth.

A. Transgender Marriage: Sex Is Biological

The first United States case to consider the validity of a marriage involving a transgendered party was *Anonymous v. Anonymous*,[94] decided in 1971. Unfortunately, the opinion was short, and it included very little analysis in support of the conclusion that the marriage in question was void. It did provide, however, a brief statement regarding the meaning of sex that numerous courts ultimately seized on: "mere removal of the male organs would not, in and of itself, change a person into a true female."[95] Although the court did not determine what *would*

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90. Ross-Amato, *supra* note 84, at 593.

91. *See generally*, *e.g.*, Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 75 (1998) (analyzing whether same-sex sexual harassment was harassment "because of . . . sex" as required under Title VII); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000) (analyzing whether a preoperative male to female transsexual could state a claim under the Gender Motivated Violence Act, 42 U.S.C. § 13981(c), which was originally enacted to protect women).

92. *See, e.g.*, Goins v. W. Group, Inc., 635 N.W.2d 717, 725-26 (Minn. 2001). The court considered whether an employer's denial of a preoperative transgendered person's request to use a restroom designated for members of the opposite biological sex violated the Minnesota Human Rights Act. *Id.* at 723. The court concluded that the employer did not violate the act because it requires the employee to show that "she is eligible to use the restrooms designated for her *biological* gender." *Id.* at 724 (emphasis added); *see also* Ross-Amato, *supra* note 84.

93. *See generally* DeCleene, *supra* note 89.

94. 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971).

95. *Id.* at 500.

change a person into a "true female," the implication was that biology is an essential part of the equation. But a person's biological sex is not merely a reflection of genitalia. Some of the criteria often considered when evaluating a person's biological sex are "genetics/chromosomes, gonads, internal reproductive morphology, external reproductive morphology, hormones, and phenology/secondary sex features."[96] In fact, several courts following the opinion in *Anonymous* attempted to acknowledge these competing biological factors.

In *In re Ladrach*, an Ohio court considered whether an MTF could legally marry a biological male.[97] The court, in reaching the conclusion that such a union would be illegal, extensively quoted Judge Ormond, an English judge who seventeen years earlier had written the first known opinion regarding transgendered persons' ability to marry and determined that the criteria must be biological. Judge Ormond reasoned that, when determining a person's true biological sex, "the law should adopt . . . the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage."[98] Implicitly approving this reasoning, the Ohio court determined that, because the marriage applicant had male genitalia at birth and did not have contradictory chromosomal evidence, the MTF legally remained a male.[99] The court noted that "[i]t is generally accepted that a person's sex is determined at birth by an anatomical examination . . . [and] [t]his then becomes a person's true sex."[100]

Within a five-year span surrounding the turn of the millennium, three major cases concerning transgendered persons' marriage eligibility were decided. In all three, the courts employed a new justification for their narrow construction of sex: the legislature, not the judiciary, must define the words in its laws. Rather than engaging in judicial restraint, however, the courts seem merely to be clinging to tradition. This

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96. Vade, *supra* note 87, at 280. The court argues that neither sex nor gender accurately encompass a person's identity, and both are "false distinctions." *Id.* at 279.

97. 513 N.E.2d 828, 828 (Ohio Prob. 1987).

98. *Id.* (quoting Corbett v. Corbett, [1971] P. 83, (1970) 2 W.L.R. 1306, 1324-25) ("[E]ven the most severe transsexualism in a male . . . cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage."). Judge Ormond's analysis does not take into consideration, however, that not all biological women can or will choose to "perform[] the essential role" of reproducing. By concluding that reproduction is a woman's essential marital role, he trivializes marriage, implying that it exists predominately for procreation. But most of us would likely agree that marriage is foremost about an emotional bond between partners. Thus, Judge Ormond's "essential role" basis for relying upon "biology" as the determinative factor in defining sex is unpersuasive.

99. *In re* Ladrach, 513 N.E.2d 828, 832 (Ohio Prob. 1987).

100. *Id.*

stronghold on binary sex jurisprudence comes in light of the increasingly evident reality that real change is forthcoming in the way society thinks about sex. Indeed, one court noted, "[w]e recognize that there are many fine metaphysical arguments lurking about here involving desire and being, the essence of life and the power of mind over physics. But courts are wise not to wander too far into the misty fields of sociological philosophy."[101]

In *Littleton v. Prange*, the Texas Court of Appeals considered whether a marriage between an MTF and a biological male was valid for the purpose of filing a wrongful death suit.[102] The court structured its analysis around the plain language of Texas's marriage statute (defining marriage as between a man and a woman) and concluded that the surviving transsexual spouse was legally a male, and that the marriage was void.[103] In its analysis, the court adopted several noteworthy findings of fact concerning the plain meaning of "male" and "female." It stated:

> Through surgery and hormones, a transsexual male can be made to look like a woman, including female genitalia and breasts . . . . [But] [t]he male chromosomes do not change with either hormonal treatment or sex reassignment surgery. Biologically a post-operative [sic] female transsexual is still a male . . . . Her female anatomy, however, is all man-made.[104]

The court concluded on a philosophic note, stating that "[t]here are some things we cannot will into being. They just are."[105]

The language in the subsequent two cases largely echoes that in the *Littleton* decision. For example, in *In re Estate of Gardiner*, the Kansas Supreme Court determined that the words "sex," "male," and "female" all have plain meaning and a common understanding.[106] The court concluded, rather dismissively (and without considering the potentially harmful psychological impact of its message), that the "everyday understanding" of the terms "male" and "female" does not encompass

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101. Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999).
102. *Id.* at 225, 229-30.
103. *Id.* at 231.
104. *Id.* at 230-31.
105. *Id.* at 230.
106. 42 P.3d 120, 135 (Kan. 2002). The court looked to *Webster's* and *Black's Law Dictionary*, and determined that the definitions of "male" and "female" are counterparts: "male" designates the sex that fertilizes the ovum, and "female" designates the sex that produces offspring. *Id.* While these definitions may represent the "ordinary meaning," they are, in and of themselves, the stereotypical ordinary meaning. They fail to take into consideration infertility, gay men, lesbians, transsexuals, and people who, by choice, will never procreate. According to this definition, then, these groups of people are not "male" or "female."

transsexuals or "persons who are experiencing gender dysphoria."[107] Also, in *Kantaras v. Kantaras*, the Florida District Court of Appeals held that "the common meaning of male and female, as those terms are used statutorily, . . . refer[s] to immutable traits determined at birth."[108]

To prevent a perceived assault on marriage, courts have carefully erected a blockade to protect those who, at least upon examination at birth, fall into the commonly understood biological categories of "male" and "female"—granted, of course, that a person in one category seeks only to marry a person from the other. This is a clear example, then, of courts defining sex "by the purpose for which sex is being defined."[109] But what happens when a law includes a "male" or "female" designation, and society, to preserve tradition and norms, *prefers* an expanded definition of sex? Pursuant to the afore-discussed marriage cases, it stands to reason that courts are faced with two legitimate options: (1) change their sex jurisprudence, or (2) accept the unforeseen consequences of their mandated binary sex classifications.

B. If Sex Is Biological, and Postoperative Male to Female Transsexuals May Go Topless in Public, Does Regulation of the Female Breast Still Substantially Relate to Important Interests?

In a commonly worded obscenity statute, "[s]exually explicit nudity" is, in part, defined as "the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple."[110] According to the general rule of statutory construction, courts must give unambiguous words their plain and ordinary meaning.[111] Because courts have repeatedly held that words such as "sex," "male," and "female" are commonly understood to be biological and immutable, statutes regulating female, but not male, breasts must only apply to biological females. And to determine whether a person is a biological female, an anatomical examination at birth is sufficient.[112] A postoperative MTF transsexual, therefore, is free to go topless in public; her breasts are "man-made"[113] and she is still a biological male.[114]

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107. *Id.*
108. 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004).
109. Ross-Amato, *supra* note 84, at 593.
110. GA. CODE ANN. § 16-12-102 (West 2007).
111. *See* Johnson v. United States, 529 U.S. 694 (2000); *see also* 73 AM. JUR. 2d *Statutes* § 124 (2008).
112. *In re* Ladrach, 513 N.E.2d 828, 832 (Ohio Prob. 1987).
113. Littleton v. Prange, 9 S.W.3d 223, 230-31 (Tex. App. 1999).

Physically, an MTF transsexual may appear no different than a biological female. For many MTF transsexuals, "sexual reassignment surgery involves castration, hormonal treatment, construction of functioning female genitalia, breast implants, electrolysis, and in some cases, cosmetic reconstruction to feminize facial features."[115] It may be physically impossible to discern that a person is an MTF transsexual based on sight alone. And if an MTF transsexual takes off her top on a hot summer day, or sits topless on her front porch, or swims without a top in the ocean, any bystander may notice that she has breasts which are aesthetically no different than those of a biological female. Men (and women) may gawk, parents may cover their child's eyes, and the MTF transsexual may even be subject to cat-calls or, perhaps, even more aggressive sexual harassment. Yet, under the courts' current sex jurisprudence, are public sensibilities threatened? She is, after all, biologically and unalterably a male.

Courts have regularly accepted the proposition that the government has an important interest in protecting public sensibilities.[116] But when do the "community standards" that underlie those public sensibilities come undone? When are they left exposed, revealing their true archaic, stereotypical, and objectifying nature? Perhaps it is now, at a time when the courts have created a world in which only "true" males and females exist; men may only *look* and *act like* women, and women may only *look* and *act like* men; never will the law allow one to transcend the other. But, in fact, it is the courts' own creation that may serve to demonstrate the necessity for a fluid understanding of sex and gender.

In *United States v. Biocic*, the Fourth Circuit held that a statute prohibiting female, but not male, toplessness did not violate equal protection because it was substantially related to the government's interest in "protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous zones."[117] But has society traditionally regarded only female breasts as an erogenous zone, or are all breasts that *look* female erogenous? If the latter were true, regulating female-only toplessness would not be

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114. *But see* M.T. v. J.T., 355 A.2d 204, 209 (N.J. Super. Ct. App. Div. 1976) (holding that biological sex should not always be the exclusive standard to judge whether a spouse is male or female).

115. Saru Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law*, 12 CARDOZO J. L. & GENDER 213, 217 (2005).

116. *See supra* Part III.

117. 928 F.2d 112, 115-16 (4th Cir. 1991).

substantially related to an important interest because many men's breasts *look* like women's. In fact, many male breasts are substantially larger than women's.[118] Logically, then, it is the combination of breasts that *look* female and which are located on a body that *looks* female which society considers erogenous and worthy of concealment.

Thus, under the courts' sex jurisprudence, the prohibition of female-only toplessness is not substantially related to the government's important interest because society would regard the MTF's female-looking breasts on her female-looking body as erogenous. Further, it does not follow that the prohibition could still be valid with an exception for MTFs based on their inherent inability to reproduce or lactate. The reason is self-evident: these laws make no exceptions for biological women who have had hysterectomies or who are infertile, nor do they make lactation capacity a prerequisite for mandatory top coverage. In *People v. David*, the New York County court noted that "[m]ale and female breasts are physiologically similar except for lactation capabilities."[119] Is an exception based on an inability to lactate really warranted when an MTF's breasts are not only physiologically similar to a biological woman's, but are located on a body that may be outwardly indistinguishable as female? Not if it must substantially relate to an important governmental interest.

V. CONCLUSION

To reiterate, the purpose of this Article is not to argue for the illegalization of transgender toplessness. Instead, the intent is to draw attention to the courts' heterosexist view of women's bodies, and to discredit laws regulating female breast exposure by identifying the paradox of transgender toplessness; this paradox has resulted from the courts' own rigid construction of sex as immutable and predetermined. Perhaps the analysis of whether the courts' equal protection jurisprudence could be affected by an MTF transsexual who legally chose to expose her breasts seems trivial. It should. This Article, in part, is an exercise in highlighting triviality. It seeks to magnify the courts' arbitrary and self-serving agenda in their treatment of females, female sexuality, and the understanding of sex.

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118. *See* Pundurs, *supra* note 38 and accompanying text.

119. 585 N.Y.S.2d 149, 151 (N.Y. County Ct. 1991).