

A Brief Regarding the Legality of Non-Sexual Public Female Bare-Chestedness in Maryland

Prepared by Chelsea Covington
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breastsarehealthy@gmail.com

QUESTION PRESENTED

Whether under Maryland law women may go bare-chested in public.

BRIEF ANSWER

Yes, as there exists no statutory language or case law in Maryland that criminalizes female bare-chestedness, and as Article 46 of the Maryland Constitution guarantees equality under the law regardless of sex, and as the Court of Appeals of Maryland, the state's highest court, has repeatedly upheld an absolute prohibition against gender-based discrimination, and as male bare-chestedness has been treated as legal since the 1930's, female bare-chestedness is a legal behavior.

INTRODUCTION

Until 1936, it was illegal for men to bare their nipples in public in the United States. In that year, 42 men staged a protest in Atlantic City, New Jersey to assert their right to go bare-chested and were fined \$2 each. Over the next several years, men began to fight for and eventually won the right to appear bare-chested across the country. (*Nelson, Steven, "Topless Rights Movement Sees Equality on the Horizon," U.S. News and World Report, Aug. 26, 2015.*) Now it feels perfectly normal for males to go bare-chested in public, whether jogging on city sidewalks or swimming at a public pool, and the act is associated with power, strength and

freedom. Witness the worldwide positive reaction to the bare-chested Tongan Taekwondo player, who at the Rio 2016 Olympics “shot to fame after he walked in the opening ceremony shirtless – completely smothered in baby oil. The Olympian, part-time model and homeless youth counselor, who melted hearts all over the globe, strutted back through the Maracana Stadium wearing a traditional Tongan ta’ovala – a mat wrapped around the waist – and very little else on Sunday night, much to the delight of his fans.” (“*Topless Tongan Flagbearer Steals the Show at Rio Olympics Closing Ceremony Again*,” Angle News, Aug 22, 2016.”

In 1986, a woman named Ramona Santorelli and six other women removed their shirts in protest of gender inequality under New York indecent exposure law in Rochester, New York. They were arrested and convicted at the trial court level, but in 1992, the New York Court of Appeals, the state’s high court, ruled that the women had the right to go bare-chested in public and overturned their convictions. *People v. Santorelli, Schloss et al*, 80 N.Y.2d 875, 600 N.E.2d 232, 587 N.Y.S.2d 601 (1992).

Since then, it has been legal for women to go bare-chested in the entire state of New York. Arrests of bare-chested women were still being made in New York City as recently as 2013 however, when four successive wrongful arrest suits were settled against New York City, and the New York City Police Department began a department-wide training to stop its officers from arresting women for bare-chestedness. Since arrests stopped, more and more women are appearing bare-chested in public throughout New York State.

Washington D.C., Pennsylvania, New York, Vermont, New Hampshire, Maine, Ohio, North Carolina, Washington, Idaho and Oregon, as well as parts of Florida, Texas and Colorado all allow female bare-chestedness and it is being practiced in all of these places.

The negative effects of the disparate social treatment of the male and female breast in our society contribute to feelings of body and gender shame in young girls and adult women. A recent study by University of Minnesota researchers found a strong correlation between a low body image in girls and future poor health (a correlation they did not observe in boys) and that bullying and body-shaming contributed heavily to their low body image. (Olsen, Jeremy. “*Body Image Affects Weight Gain in Teen Girls, University of Minnesota Study Finds*,” www.startribune.com, September 15, 2015.)

Entrenched negative prejudices about female breasts also discourage breast feeding, cement the idea that women do not get to decide when they are to be perceived as sexual or not and give rise to victim blaming, rape culture and bullying. *The United States Surgeon General’s Call to Action to Support Breastfeeding, 2011*, (<http://www.ncbi.nlm.nih.gov/books/NBK52688/>) emphasized the many health

benefits of breastfeeding but also identified a number of barriers to breastfeeding. In the section titled, “Embarrassment,” the report said:

A study that analyzed data from a national public opinion survey conducted in 2001 found that only 43 percent of U.S. adults believed that women should have the right to breastfeed in public places.⁹⁸ Restaurant and shopping center managers have reported that they would either discourage breastfeeding anywhere in their facilities or would suggest that breastfeeding mothers move to an area that was more secluded.^{73,99,100} When they have breastfed in public places, many mothers have been asked to stop breastfeeding or to leave.⁹⁹ Such situations make women feel embarrassed and fearful of being stigmatized by people around them when they breastfeed.^{68,95,101,102} Embarrassment remains a formidable barrier to breastfeeding in the United States and is closely related to disapproval of breastfeeding in public.^{76,102–104} Embarrassment about breastfeeding is not limited to public settings, however. Women may find themselves excluded from social interactions when they are breastfeeding because others are reluctant to be in the same room while they breastfeed.⁶⁵ For many women, the feeling of embarrassment restricts their activities and is cited as a reason for choosing to feed supplementary formula or to give up breastfeeding altogether.^{104,105}

In American culture, breasts have often been regarded primarily as sexual objects, while their nurturing function has been downplayed. Although focusing on the sexuality of female breasts is common in the mass media, visual images of breastfeeding are rare, and a mother may never have seen a woman breastfeeding.^{106–109} As shown in both quantitative and qualitative studies, the perception of breasts as sexual objects may lead women to feel uncomfortable about breastfeeding in public.^{68,101} As a result, women may feel the need to conceal breastfeeding, but they have difficulty finding comfortable and accessible breastfeeding facilities in public places.^{110,111}

Allowing male bare-chestedness but not female bare-chestedness makes it impossible to ever completely and effectively correct the imbalance of entrenched gender stereotypes regarding proper female behavior, the healthful use of the breast for feeding and comforting children, or the hypersexualization and fetishization of the female breast.

MARYLAND LAW

As in many other states, including Washington D.C., Pennsylvania and New York, female bare-chestedness does not qualify as “indecent exposure” according to the way that crime has been interpreted in Maryland. To prohibit females from appearing bare-chested in public while not similarly prohibiting men from doing so violates Equal Protection.

Article 46 of the Maryland Constitution reads, “Equality of rights under the law shall not be abridged or denied because of sex (*added by Chapter 366, Acts of 1972, ratified Nov. 7, 1972. Amended by Chapter 681, Acts of 1977, ratified Nov. 7, 1978.*)”

According to the *The Rights of Women: The Authoritative ACLU Guide to Women's Rights* by Lenora M. Lapidus, Emily J. Martin, and Namita Luthra, the Maryland Court of Appeals, the high court of the state, has established an “absolute prohibition” standard regarding gender discrimination, the highest possible level of judicial scrutiny. The authors write on page 10, “High courts in five states – Colorado, Maryland, Oregon, Pennsylvania, and Washington – have ruled that practically *all* gender-based classifications are prohibited because their state constitutions impose an absolute standard that eliminates gender as a factor in determining legal rights.” By way of comparison, the authors elaborate on this absolute prohibition standard by writing that Pennsylvania’s Supreme Court, in *Henderson*, 327 A.2d at 62, wrote of its equal protection clause (which is similar to Maryland’s), “The gender of citizens... is no longer a permissible factor in the determination of their legal rights and responsibilities.”

Pennsylvania allows females to go bare-chested in public and females around the state are doing so.

Maryland § 11-107, Indecent exposure, reads simply, "A person convicted of indecent exposure is guilty of a misdemeanor and is subject to imprisonment not exceeding 3 years or a fine not exceeding \$1,000 or both."

According to *Wisneski v. State of Maryland, Court of Appeals of Maryland, No. 76, Sept. term, 2006*, the Maryland legislature reset indecent exposure to English common law in 1977 and reaffirmed this through recodification in 2002. The court examined Maryland’s legislative history regarding its indecent exposure law and wrote,

In 1967, the statute was expanded to read “wilfully act in a disorderly manner by . . . indecently exposing his or her person on or about any public place . . .” 1967 Md. Laws, Chap. 520, codified

a t Md. Code (1957, 1967 Repl. Vol.), Art. 27, § 122. The statutory offense was repealed, however, in 1977 and replaced with Section 335A of Article 27, which provided the following sentencing provisions for the offense of indecent exposure: Every person convicted of the common-law crime of indecent exposure is guilty of a misdemeanor and shall be punished by imprisonment for not more than three years or a fine of not more than \$1,000, or both. 1977 Md. Laws, Chap. 384. Section 335A was recodified in 2002 without substantive changes as Section 11-107 of the Criminal Law Article, and now provides: A person convicted of indecent exposure is guilty of a misdemeanor and is subject to imprisonment not exceeding 3 years or a fine not exceeding \$1,000 or both. 2002 Md. Laws, Chap. 26. We recognized in *Harris v. State*, 306 Md. 344, 509 A.2d 120 (1996), that a common law offense is revitalized with the repeal of the statutory offense and cited with approval *Neal*, 45 Md. App. at 551, 413 A.2d at 1387-88, in which the Court of Special Appeals determined that common law offense of indecent exposure was resurrected in 1977 when the statutory offense was repealed.

There exists no Maryland case law regarding non-sexual female bare-chestedness, but the District of Columbia, which interprets Maryland common law, did make a landmark ruling in *Duvallon v. District of Columbia*, 515 A.2d 724 (1986). In this case a female was arrested and charged with indecent exposure for protesting bare-chested in public in Washington D.C. The D.C. court ruled that English common law clearly and repeatedly held the crime of indecent exposure to include only the exposure of the genitalia, in particular, male genitalia.

English common law cases compel the conclusion that indecent exposure was limited to the exposure of genitals. These cases repeatedly state that the defendant exposed her or his "private parts" or "person." See, e.g., *Reg. v. Webb*, 3 Cox C.C. 183 (1848) (indictment states that Webb did "indecently and wilfully expose and exhibit his private parts, naked and uncovered, in the presence of Mary Ann . . ."); *Reg. v. Thallman*, 9 Cox C.C. 388 (1863) (indictment charges that Thallman did "indecently expose his person and private parts *727 naked"); see also 4 W. BLACKSTONE, COMMENTARIES *169 ("persons wilfully, openly, lewdly, and obscenely exposing their persons in any street or public highway, or in the view thereof, or in any place of public resort with intent to insult any female" were rogues and vagabonds) (quoted in *Dill v. State*, supra, 24 Md.App. at 698, 332 A.2d 690, 693 n. 2).

Significantly, the word "person" has been held to be a euphemism for the penis. See *Evans v. Ewels*, [1954] 2 All E.R. 22.[7] In *Evans*, the Queens Bench division was faced with the question of whether or not *Evans*' exposure of his lower abdomen near his genitals constituted indecent exposure under section four of the Vagrancy Act of 1824. The Vagrancy Act prohibits a man from "wilfully, openly, lewdly and obscenely exposing his person . . . with intent to insult any female." Any man guilty of this crime "shall be deemed a rogue and a vagabond." The court found that the exhibition of the lower abdomen was not indecent exposure.

It seems to me that at any rate today, and indeed by 1824, the word "person" in connection with sexual matters had acquired a meaning of its own, a meaning which made it a synonym for penis.

Evans v. Ewells, supra, 2 All E.R. at 24.[8] The *Evans* holding has considerable support in English caselaw.[9] In *Reg. v. Wood*, 14 Cox C.C. 46 (1877), *Wood* was convicted of raping *Emelia Wild*. *Wild* testified "how *Wood* had come into the house, had committed this assault upon her by insertion of his person. . . ." (Emphasis added). In *Reg. v. Orchard and Thurtle*, 3 Cox C.C. 248, 251 (1853), the court held that in a public urinal, "[e]very man must expose his person who goes there for a proper purpose." (Emphasis added). In *Reg. v. Wellard*, 15 Cox C.C. 559 (1884), *Wellard* took seven or eight girls down to a marsh and "exposed his person. . . ." (Emphasis added). When some local boys came upon this *728 scene, "[the] boys saw nothing improper, as the prisoner had turned round on their approach, and was lying on his stomach." *Id.* at 560. It can easily be inferred from this factual statement that *Wellard* exposed his penis to the young girls. See also *Reg. v. Thallman*, supra, 9 Cox C.C. at 389 ("*He was almost entirely naked, and exposed his person.*") (emphasis added); *Reg. v. Eliot*, 169 Eng.Rep. 1322 (1861) (defendants fornicated in public and "unlawfully, wickedly and scandalously did expose. . . the bodies and persons of them") (emphasis added); *Reg. v. Reed*, 12 Cox C.C. 1, 2 (1871) (defendants unlawfully and indecently exposed "their bodies and persons naked and uncovered" in front of ladies) (emphasis added).

American common law cases are in accord with those of England. In *State v. Moore*, 194 Or. 232, 238, 241 P.2d 455, 459 (1952), in discussing the term "private parts" as applied to a female, the court said: "It is hornbook law that whenever the term `privates

or private parts' are used as descriptive of a part of the human body, they refer to the genital organs." In *Jones v. State*, 7 N.C.App. 166, 171 S.E.2d 468 (1970), the court held that private parts means genitals, those portions of the human anatomy used in the reproductive process. Accord *State v. Crenshaw*, 61 Hawaii 68, 69, 597 P.2d 13, 14 (1979); *Martin v. State*, 534 P.2d 685 (Okla.Crim.App. 1975); *State v. Dennison*, 72 Wash. 2d 842, 435 P.2d 526 (1967); *Pendell v. State*, 158 Tex.Crim. 119, 253 S.W.2d 426 (1952).

In 2008, the Court of Appeals of Maryland, in ***STATE of Maryland v. Michael Raheem DURAN***, No. 73, Sept. Term, 2008, confirmed that English common law only includes the exposure of genitalia in its definition of indecent exposure. It also emphasized that indecent exposure does not imply a sexual element, as established in common law and upheld through numerous decisions throughout the United States. The court explained that according to the English common law the term indecency meant at the time an affront to morality and religion, and did not mean that an act was inherently sexual.

Whether, then, indecent exposure, by its nature contains a sexual component is the issue. In this regard, we already have had occasion to address the origins of the crime of indecent exposure as well as analyze its elements in *Wisneski v. State*, 398 Md. 578, 589, 921 A.2d 273, 279 (2007), wherein we noted that the misdemeanor offense of indecent exposure was “originally derived from English common law when our Declaration of Rights was adopted on November 3, 1776.” In *Wisneski*, while addressing whether indecent exposure had to occur in a public place, we clarified that “[t]he authorities . . . are in substantial accord that at the common law indecent exposure was the wilful and intentional exposure of the private parts of one's body in a public place in the presence of an assembly,” so that “its main elements were the wilful exposure, the public place in which it was performed, and the presence of persons who saw it.” *Id.* at 591, 921 A.2d at 280-81 (emphasis in original) (internal quotes omitted). We concluded that “the offense of indecent exposure necessitating open and notorious lewdness, was an offense against morality.” *Id.* at 591, 921 A.2d at 280.

It is the word “lewdness” that the State seizes upon to support the notion that indecent exposure is sexual in nature. In doing so, however, the State fails to realize that at common law in England before 1776 “lewdness” was defined as either “frequenting houses

of ill fame” or “some grossly scandalous and public indecency.” William Blackstone, 4 Commentaries on the Laws of England 65 (1st ed. 1769). As a result, the crime of indecent exposure is not in and of itself sexual in nature, because the lewdness element incorporates conduct that is not sexual, in addition to that which may be sexual.

Our conclusion is bolstered by English common law prior to 1776, which demonstrates that the crime of indecent exposure incorporates conduct that is non-sexual in nature. In the first documented indecent exposure case in England, Sir Charles Sydlyes Case, 83 *Eng. Rep.* 1146, 1146-47 (1663), the defendant was fined, jailed for a week and sentenced to one year of good behavior “for shewing himself naked in a balkony, and throwing down bottles (pist in) vi & armis among the people in Convent Garden, contra pacem, and to the scandal of the Government.” If appearing naked in a public place and tossing a bottle of urine could constitute indecent exposure, then, the crime is not by its nature sexual.

Other of our sister courts interpreting English common law also have determined that non-sexual conduct may constitute indecent exposure. In *Van Houten v. State*, 46 *N.J.L.* 16, 16-17 (1884), for example, the New Jersey Supreme Court affirmed a conviction for indecent exposure when a defendant “exposed himself so that he could be seen from the windows of two dwelling-houses that were then inhabited” and located within a few feet of the place of the occurrence, while urinating outside. See also *Davenport v. United States*, 56 *A.2d* 851, 852 (D.C.1948) (concluding that “[a]n indecent exposure in a public place likely to be observed by others is a criminal offense regardless of the purpose with which it is made,” when a defendant exposed himself while urinating in public in violation of Section 3.25(a) of the National Capital Parks Regulations, which, much like the common law offense in Maryland, defined indecent exposure as “[o]bscene or indecent exposure by any male or female of his or her person . wherefrom the same may be seen”); *State v. Fly*, 348 *N.C.* 556, 501 *S.E.2d* 656, 657-59 (1998) (holding that a man who “was bent over at the waist, with his short pants pulled down to his ankles” thus “moon[ing]” a female witness was guilty of the statutory crime of indecent exposure, which had four elements: “(1) the willful exposure, (2) of private parts of one's person, (3) in a public place, (4) in the presence of one or more persons of the

opposite sex,” because “the jury could reasonably find from the evidence that defendant had exposed private parts, either his anus, his genitals, or both”).

Of course, statutes criminalizing indecent exposure may include a sexual element. See, e.g., *State v. Isaac*, 756 N.W.2d 817, 819, 821 (Iowa, 2008) (finding insufficient evidence supporting conviction under an Iowa statute that lists as an element of indecent exposure that “[t]he person does so to arouse or satisfy the sexual desires of either party”). In the present case, however, neither this Court's interpretation of the common law indecent exposure nor any statute requires a sexual component.

In considering the exact issue under review in the present case, the *Supreme Court of Hawaii*, in *State v. Chun*, 102 Hawai'i 383, 76 P.3d 935, 942 (2003), concluded that indecent exposure “does not constitute an offense that entails ‘criminal sexual conduct’ and, consequently, that a person convicted of indecent exposure is not a ‘sex offender,’” that must register as such. See also *State v. Goins*, 151 Wash.2d 728, 92 P.3d 181, 185 (2004) (concluding that “because the legislature did not classify second degree assault with the intent to commit indecent liberties as a sex offense, the legislature did not see fit to require every person convicted of that general crime to register as a sex offender upon release”) (emphasis in original).

As a result, we conclude that indecent exposure is not a crime that by its nature is a sexual offense. Duran, who was convicted of the crime, is not required to register as a “offender” under Section 11-701(d)(7).

The court in *Duran* asserts that common law indecent exposure is a crime against morality and religion, not a sexual crime. One of the arguments sometimes used to justify banning female bare-chestedness is that female breasts are inherently sexual and incite sexual feelings in the men that are not excited when females observe male chests. Hair, eyes and mouths can incite sexual feelings in people as well, but these are allowed to be shown in public. Also, male breasts have been visible in public for 80 years and in that time the site has normalized to the point where it does not carry the sexual excitation it would if it were still taboo. Also, by that logic, homosexual males could be sexually excited by the sight of male bare-chestedness, and because of those sexually excited males, other males should be banned from going bare-chested. Further, according to *Robert Wildman et al.*, “*Note on Males' and Females' Preferences For Opposite-Sex Body Parts, Bust Sizes, and Bust-Revealing Clothing*,” 38 *PSYCHOL REP.* 485-86 (1976) researchers have also

found that the chest is the male body part most sexually stimulating to women. Yet male bare-chestedness is permitted.

All major Maryland case law regarding Maryland §11-107 involves charges against males for exposing their penises or anuses. Upon information and belief there are no Maryland cases in which a female or male has been charged or tried for merely going bare-chested. *Messina (1957)*, *Wisneski (2006)*, *McNealy (2007)* and *Genies (2009)* all have lengthy discussions about aspects of common law as it applies to things like the definition of "public," but none of them address female breasts as being different than male breasts. In fact, all of the cases cited in these four cases deal with men exposing their penises, or testicles, which is in accordance with the English euphemistic language in the indecent exposure language of the 1700's, wherein the exposure of a "member" or "person" means penis.

LOCAL ORDINANCES IN MARYLAND

Regarding local ordinances, first, no local ordinance may violate the state or federal constitution. The Maryland Constitution's equal protection clause, Article 46, clearly guarantees gender equality, as does the Maryland Court of Appeals' absolute prohibition standard. With that said, upon information and belief, the only local ordinance in Maryland that specifically bans bare-chestedness exists in Easton and forbids bare-chestedness in all genders and only in specific parts of the town. Some counties and cities have ordinances which ban men from performing commerce with exposed genitals or anus, and females from performing commerce with exposed genitals, anus or breasts (sometimes without delineating between cleavage, nipples, areolas, etc. meaning any woman showing cleavage in the workplace would be in violation), which are anti-strip club ordinances. Worcester County's strip club ordinance is *PH1-109(a){2}Adult Entertainment or Material*. Though these ordinances clearly violate the Maryland Constitution's equal protection clause, my focus is on non-commercial bare-chestedness, as would happen if one were sunbathing, walking or swimming. These ordinances do not address non-commercial bare-chestedness.

GUIDANCE FROM OTHER STATES

In 1986, *Duvallon* clearly established a female's right to go bare-chested in public in **Washington D.C.** by establishing that English common law only considered the exposure of genitalia to be indecent. Females are indeed going bare-chested in public in D.C. and Metro Police Chief Lanier confirmed its legality through department-wide training in 2015, which she then extended to the associated campus, park and transit police departments in the District.

Section 28 of **Pennsylvania's** state constitution, titled, "*Prohibition against denial or abridgement of equality of rights because of sex,*" reads, "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." In *Henderson*, 327 A.2d at 62, Pennsylvania's high court wrote of its equal protection clause (which is similar to Maryland's), "The gender of citizens... is no longer a permissible factor in the determination of their legal rights and responsibilities."

In 2015, Philadelphia Police Lieutenant Edward Egenlauf, Research and Planning Unit, confirmed the legality of female bare-chestedness by writing, "It is not illegal for a female to go topless in Philadelphia. The nipples do not need to be covered." (*E-mail of Nov. 27, 2015, on file with the author of this brief.*)

In 2016, the Pittsburgh Bureau of Police legal department also confirmed this understanding by stating, "CONCLUSION, there is no City or State law which expressly prohibits or even addresses the act of appearing bare-breasted in public. Based on upon [sic] the information provided to the Law Department, the City does not appear to have any legal grounds under the City Code or Title 18 (i.e. the Commonwealth's Crimes Code) to cite or arrest women for being bare-chested without any additional sexual or criminal behavior associated therewith. The City is preempted from regulating criminal conduct on its own so we only have state law with which to work." (*E-mail forwarded from Officer Kenneth Stewing, PBP Zone 6, of March 22, 2016. , on file with the author of this brief.*) The Pittsburgh Bureau of Police also made a city-wide training as to the legality of female bare-chestedness throughout its own department as well as other campus and park police departments within Pittsburgh in 2016.

In **New York**, *The People v. Santorelli and Schloss*, 80 N.Y.2d 875, 600 N.E.2d 232, 587 N.Y.S.2d 601 (1992) found that females may go bare-chested in public. In that landmark ruling, Judge Titone wrote in concurrence that female breasts are not to be treated differently just because an entrenched cultural bias might hold them to be sexual or offensive when in fact there exists no inherent reason to consider them so.

Although protecting public sensibilities is a generally legitimate goal for legislation (see, e.g., *People v Hollman*, supra), it is a tenuous basis for justifying a legislative classification that is based on gender, race or any other grouping that is associated with a history of social prejudice (see, *Mississippi Univ. for Women v Hogan*, [458 US 718](#), 725 ["[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions"]). Indeed, the concept of "public sensibility" itself, when used in these contexts, may be nothing more than a reflection of commonly-held preconceptions and

biases. One 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. Thus, where "public sensibilities" constitute the justification for a gender-based classification, the fundamental question is whether the particular "sensitivity" to be protected is, in fact, a reflection of archaic prejudice or a manifestation of a legitimate government objective (cf., *People v Whidden*, [51 NY2d 457](#), 461).

Viewed against these principles, the gender-based provisions of Penal Law § 245.01 cannot, on this record, withstand scrutiny. Defendants contend that apart from entrenched cultural expectations, there is really no objective reason why the exposure of female breasts should be considered any more offensive than the exposure of the male counterparts. They offered proof that, from an anatomical standpoint, the female breast is no more or less a sexual organ than is the male equivalent (see, e.g., J McCrary, *Human Sexuality* [1973] 141). They further contend that to the extent that many in our society may regard the uncovered female breast with a prurient interest that is not similarly aroused by the male equivalent (but see Kinsey, *Sexual Behavior in the Human Female* [1953] 586-587; Kinsey, *Sexual Behavior in Human Male* [1948] 575; Wildman, *Note on Males' and Females' Preference for Opposite-Sex Body Parts*, 38 *Psychological Reports* 485-486), that perception cannot serve as a justification for differential treatment because it is itself a suspect cultural artifact rooted in centuries of prejudice and bias toward women. Indeed, there are many societies in other parts of the world -- and even many locales within the United States -- where the exposure of female breasts on beaches and in other recreational area is commonplace and is generally regarded as unremarkable.^{[in 3](#)} It is notable that, other jurisdictions have taken the position that breasts are not "private parts" and that breast exposure is not indecent behavior (*State v Parenteau*, Ohio Misc 2d 10, 11, citing *State v Jones*, 7 NC App 165; *State v Moore*, 241 P2d 455; *State v Crenshaw*, 61 Haw 68; see also *Duvallon v State*, 404 So 2d 196), and twenty-two states specifically confine their statutory public exposure prohibitions to uncovered genitalia.^{[in 4](#)}

The People in this case have not refuted this evidence or attempted to show the existence of evidence of their own to indicate that the non-lewd exposure of the female breast is in any

way harmful to the public's health or well being. Nor have they offered any explanation as to why, the fundamental goal that Penal Law § 245.01 was enacted to advance -- avoiding offense to citizens who use public beaches and parks -- cannot be equally well served by other alternatives (see, *Wengler v Druggists Mut. Ins. Co.*, [446 US 142](#), 151-152; *Orr v Orr*, [440 US 268](#), 281-283).

In summary, the People have offered nothing to 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. 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 (see, *Kirchberg v Feenstra*, [450 US 455](#), 461). Accordingly, the gender-based classification established by Penal Law § 245.01 violates appellants' equal protection rights and, for that reason, I concur in the majority's result and vote to reverse the order below.

Females have been appearing bare-chested around New York State since 1992. New York City, after settling four separate wrongful arrest suits of between \$9,000 and \$77,000, in 2013 trained all of its police officers to stop arresting bare-chested women. The National Park Service also trained its New York-based law enforcement officers and visiting public to this reality in a document titled, "*Fire Island National Seashore Talking Points*," which concludes, "State of New York law has established that women may be topless in public... women may be topless at the Seashore and be in compliance with the law."

In 2016, District Court Judge James Carroll of **Laconia, New Hampshire** acquitted two women who had been cited for going bare-chested in nearby Gilford, New Hampshire, ruling that New Hampshire law does not criminalize female bare-chestedness. (*Dan Seufert, "Judge Dismisses Charge Against One of Several Women Arrested For Going Topless on Gilford Beach", New Hampshire Union Leader, February 2, 2016.*) Also in 2016, two separate bills proposed in the New Hampshire Senate and House that would have made female bare-chestedness illegal were defeated unanimously in committee. (www.gencourt.state.nh.us, *HB 1525, SB 347.*) Women are currently going bare-chested in New Hampshire.

In July 2016, a group of women went bare-chested in **Helena, Montana** and the Helena Police issued a statement that read, "After speaking with the City Attorney's Office, officers will not be responding to complaints about the women being topless. The protesters are expressing their 1st Amendment Rights and (are) not violating any laws." (*Dehaven, James, "Topless Picnic in Helena Looks to Normalize the Human Body", The Missoulian, July 8, 2016.*)

In 1995, five women in **Columbus, Ohio** were arrested for going bare-chested in public and later released because Ohio law does not consider the breast to be a “private part.” In 1998, three of those women sued for false arrest and won \$5,000 each. Columbus, Ohio police have been trained to the fact that female bare-chestedness is legal. (*Alice Cervantes, “To Some, Going Topless is a Matter of Pride,” Columbus Dispatch, June 26, 2005.*)

In 1998, voters in **Newport, Maine** overwhelming voted to continue to allow female bare-chestedness after a citizen complained about a woman mowing her lawn while bare-chested. Maine law allows female bare-chestedness. (*Associated Press, “Maine Ok’s Topless Mowing,” Nov. 4, 1998.*)

Also in 1998, in **Moscow, Idaho**, several college women were arrested for going bare-chested. They were simply walking down a street on a hot day in the company of five bare-chested males. The women were arrested, the males were not. The charges against the women were dismissed because no law criminalized their behavior. The Moscow City Council then voted down a proposed ordinance that would have made female bare-chestedness illegal. (*Associated Press, “Four Topless Women Busted in Idaho,” Dec. 20, 1998.*)

Asheville, North Carolina has seen five annual gender equality “rallies” involving bare-chested women between 2011-2015, which is openly allowed because “state law allows toplessness.” (**Fox 8 News, www.fox8.com, August 23, 2015.**) Raleigh, North Carolina has also hosted such rallies, without women being arrested. Women also go bare-chested along the Atlantic beaches of North Carolina’s outer banks and South Nags Head.

Even in **Virginia**, where state laws allow female bare-chestedness but some local ordinances do not, a federal judge wrote in a 1991 opinion (*928. F. 2d 112 – United States v. M. Biocic*) in which a woman was convicted of indecent exposure for walking down a national seashore bare-chested, in violation of an Accomack County ordinance,

An increasingly large number of persons comprising the body politic does not agree with the definition of indecency. While I have substantial doubts as to how long the almost-everyone-feels-that-way attitude will prevail, bearing in mind how rapidly the country passed through the era in the 1890s when men first began to swim bare breasted or the demise of the necessity for women to wear stockings and shoes while swimming, I acknowledge that, as of the moment, the predominant belief as to what constitutes propriety and indecency relied on by the majority still endures. A dissent, therefore, would not be appropriate...

Nonetheless, I write to express my belief that commonsense, relied on so heavily to excuse the lack of plain meaning of language, is exactly what has been missing in the prosecution of Biocic. It seems to me questionable in the extreme to rely on a popular interpretation to construe the words of a regulation to convict when no human beings, other than an entirely willing companion and a federal Fish and Wildlife Service officer, were present and Biocic was offered no opportunity to replace her top...

Furthermore, the majority's decision can hardly be read to hold that all actions resulting in "nudity" are illegal. Some would raise more difficult problems of "vagueness"; others would not result in a holding of criminality. Though logic has impelled the prosecution to insist that the law admits of no exceptions, it is literally beyond comprehension to conceive that a mother of a two-year old infant, even on a heavily populated beach would be hauled into federal court for changing a diaper in response to a call of nature. The same thing I daresay would be true in the case of a three-year old openly relieving himself or herself, or a four-year old cavorting stark naked at the water's edge. And what of a woman wearing a one-piece bathing suit who lowers her suit to remove an offending piece of slime from her stomach area? Or a man who, upon viewing no one in the vicinity, finds the lure of the water undeniable, and begins to change into bathing trunks? In its zeal, the prosecution, with a straight face, classifies such hypothetical occurrences as crimes. Criminal "indecent," the language involved, involves concepts of offensiveness and public outrage at the behavior. Only those aspects of public nudity prohibited by the statute which are also "indecent" or "offensive" can be made illegal by the federal regulation. I submit that the above examples could not so be found...

Yet, constrained by precedent, I am compelled to concur. The time may well soon come, as it has already with the French and others, when the perceived public sense of outrage will wane. Biocic's action will then be classified as non-criminal, not because it was a bold blow for "liberty," but because it was too trifling--perhaps even childish--a matter for a community to spend time and energy addressing.

...That public morals are not static in this realm, and that artistic depictions of the female breast have indeed long been accepted, cannot be gainsaid. But for our limited purpose--which is only to inquire whether intentional exposure of the full female breast in

public places at the whim of the actor is at this time constitutionally protected against any governmental restrictions-
-the two points are beside the point...

Biocic has not pursued her First Amendment argument, apparently accepting the district court judge's finding that her conduct was "utterly lacking in any speech element." Had she raised a more valid First Amendment claim based on expression, I note that a conviction for indecency which was not obscene would fail because "expression which is indecent but not obscene is protected by the First Amendment." *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989).

Many other states have laws that limit indecent exposure to genitals and/or anus only. Major cities in **Texas, Colorado, Florida, Oregon** and **Washington** are all among the locales where no state or local ordinances exist to criminalize female bare-chestedness, and where females are doing so. Miami Beach, Florida for example is well-known for allowing female bare-chestedness, as are other local Dade County beaches. Austin, Texas, Portland, Oregon, Boulder, Colorado and Seattle, Washington have seen females going bare-chested in public parks and streets with more and more regularity. With the exception of one town, **Vermont** allows full non-sexual nudity in public, which of course means female bare-chestedness is legal, and it is practiced there as well.

THE MARYLAND COMMISSIONERS MANUAL

Some Maryland police officers use the **Maryland Commissioners Manual** to guide them in writing charges after an arrest. This manual is not law. It is suggested language created by a non-elected, non-legislative body (the district court commissioners), many of whom are not even lawyers. It is only periodically updated, some sections are *never* updated, and there exists no means for a citizen to request a review of the language in this document, according to Executive Commissioner Timothy Haven in personal correspondence with me.

I have asked Maryland prosecutors and police about the Commissioners Manual and they tell me it often contains errors or outdated language and that they use it only for guidance. In this case, the Maryland Commissioners Manual erroneously claims that the English common law definition of indecent exposure is "genitals, buttocks and breasts."

In personal correspondence (e-mail of date March 29, 2015, on file with the author of *this brief*) rejecting a request to review the Commissioners Manual language in light of *Duvallon* and *Maryland v. McNealy*, Haven writes:

This issue does not involve the charging language, but involves the explanatory note attached which is what is used to define "indecent exposure." That note derives from the Judiciary's interpretation of Common Law. Fundamental changes to that interpretation comes from new legislation or significant case law from the Maryland Court of Appeals or the U.S. Supreme Court, not by administrative function. Furthermore, whether a charge is constitutional or not is a determination to be made by those same Courts, and therefore far beyond any administrative authority to determine. I appreciate your concern and the information provided, but for the reasons I stated there no changes will be effected. However, if new legislation or new case law involving this case come forward, we will certainly make adjustments to the explanatory note as necessary.

Mr. Haven ignores the fact that the judiciary has already ruled, in *Duvallon*, that English common law only considers the genitalia to be included in the definition of indecent exposure and that the Maryland Legislature has twice, in 1977 and 2002, declined to amend this definition. Mr. Haven's stance creates the untenable situation in which a woman has to be arrested and fight her cause all the way to the Maryland Court of Appeals or the U.S. Supreme Court to prove that what is not written in law does not exist.

Even assuming *arguendo* that the Commissioners Manual's language is valid, it is important to note that it reads only, "breasts," notably leaving the term gender-neutral.

Merriam-Webster Dictionary defines breasts as, "Either of the pair of mammary glands extending from the front of the chest in pubescent and adult human females and some other mammals: *also*: either of the analogous but rudimentary organs of the male chest especially when enlarged." Men can lactate and have breast cancer. Breast does not mean female breast.

Further evidence that the Commissioners Manual is not an accurate reflection of Maryland § 11-107 is the mention of buttocks in the Manual's definition of indecent exposure. In 2006 Montgomery County Appellate Court Judge Debelius found Raymond McNealy not guilty of indecent exposure for "mooning" someone (unreported case, see media coverage, *Ernesto Londoño, "Mooning Deemed 'Disgusting,' but No Crime in Md."*, *Washington Post*, January 4, 2006). Judge Debelius stated in his opinion that because the anus was not exposed, the mere

exposure of buttocks was not legally indecent. The judge then cited “women in thongs in Ocean City” as proof that the exposure of buttocks was legal. Note the judge’s use of the analogous female body part to prove the right of a male to make the same act. So by appellate case law the exposure of buttocks is legal in Maryland, but this language is not reflected in the Maryland Commissioners Manual definition of indecent exposure as Mr. Haven says it should be. And police are clearly not relying on the Commissioners Manual to cite people for buttocks exposure or men for going bare-chested, only to selectively target bare-chested females.

Mr. Haven’s declination to reconsider the Commissioners Manual language is creating an environment in which Maryland police officers and agencies relying on this inaccurate guidance will inevitably be sued for wrongly arresting a bare-chested woman, as so many other jurisdictions have been.

DISORDERLY CONDUCT, OPEN LEWDNESS

Anticipating the argument that a police officer may still charge a bare-chested woman with the catch-all charges of **disorderly conduct, public indecency or open lewdness**, merely being a female is neither disorderly, indecent nor lewd, any more than being a male is. Since police do not consider mere bare-chestedness disorderly, indecent or lewd in a male, it cannot be considered so in a female. Disorderly conduct traditionally consists of such actions as using vulgar and obscene language, vagrancy, loitering, playing loud music or creating excessive noise, or purposefully causing a crowd to gather in a public place in such a way that it impedes traffic or creates a security hazard. Bare-chested sunbathing or walking through a park involves none of those things.

Nor is it a valid argument that female bare-chestedness is lewd because it is unusual in our society, or because it draws attention from or upsets people who are not accustomed to seeing bare-chested females, or because a person (or 10 or 20) calls 911 to report a bare-chested female. Twenty people reporting a legal act does not make it illegal. Unusualness is not a valid reason to arrest someone. Mixed race couples were unusual and criminal at one time in our history as well.

GENDER and AGE

Regarding gender, age and policing, creating different standards for the same crime based on gender will require police officers to determine in the field what gender a person is. The use of a person’s apparent gender is invalid, since assigning

gender to a person by appearance alone relies on entrenched cultural prejudices about how men and women should look, dress and behave. Gendering a person through physical examination, on the other hand, requires invasive techniques and the ability to determine biologically, medically and psychologically what gender a person is, skills police officers do not possess. The current awareness campaigns over transgenderism and intersex people across the country have underscored the difficulty in drawing a meaningful line between males and females. If female bare-chestedness were made illegal, would transgendered women, who have “female looking breasts” but male genitalia be allowed to go bare-chested as occurred in Delaware in 2010 (*Associated Press article, “Transgender Men [sic] Go Topless at Delaware Beach – And Police Can’t Do A Thing.” June 3, 2010.*) Will women with mastectomies be allowed to go bare-chested, since they have no nipples or breast tissue? Which set of rules would intersex people, who are born with chromosomal and physical attributes of males and females, have to abide by? At what age does a girl suddenly become criminally responsible for going bare-chested? Would a breast-feeding mother be allowed to simply sit bare-chested if she has a child nursing on one of her breasts? What happens if the baby stops feeding and the mother continues to sit bare-chested? How much time does she have to cover herself? **Maryland § 20-801 – Breast-feeding of children** reads, “(a) In general – A mother may breast-feed her child in any public or private location in which the mother and child are authorized to be. (b) Restriction of right prohibited – A person may not restrict or limit the right of a mother to breast-feed her child.”

Recent research by University of California Irvine developmental psychologists Ashley Thomas and Barbara Sarnecka and philosopher Kyle Stanford found a correlation between people’s moral judgments about a thing and the risk they perceive to exist in that thing. The more a person felt an act was morally wrong, the more danger they perceived to exist as a result of that act, even when data clearly showed that danger did not actually exist. The researchers also identified the presence of gender, race and class bias resulting from this phenomena. They also commented on bias in law enforcement. Stanford wrote,

When people think they are judging danger to a child, much of what they are actually doing is imposing a moral judgment on the child’s parents. The relevant “danger” should be legally defined in terms of actual, immediate, demonstrable risk, rather than left up to the unexamined intuitions of bystanders, social workers, police officers and other individuals who may think something must be dangerous when it is actually quite safe. For example, eight times more children are killed in parking lots than in parked cars. But when a parent with a child in tow runs into a grocery store for a few minutes, he or she has to choose between allowing the child to wait in the car, which is safer but might get her arrested or jailed and/or her child taken away – and the more

dangerous option of bringing the child with her because this is socially approved. (Lombrozo, Tania, “*Why Do We Judge Parents for Putting Kids at Perceived – But Unreal – Risk?*” National Public Radio, August 22, 2016.)

According to this principle if a person felt a woman was morally obligated to be modest, or to present herself only in certain socially acceptable attire, or that a woman should be held morally responsible for “provoking” a rape if she acts or dresses “inappropriately”, or that it is morally wrong for a woman to seek equal treatment under that law, or to own her body and decide when it is sexual and when it is not sexual -- all ideas directly challenged by the act of going bare-chested -- then those observers will erroneously perceive risk to be associated with bare-chestedness even when it does not actually exist.

CONCLUSION

The Maryland Constitution and Court of Appeals of Maryland protect gender equality with the highest possible scrutiny, namely an absolute prohibition against gender bias. Maryland § 11-107 Indecent Exposure does not define which body parts are illegal to expose, nor does it indicate that genders should be treated differently, meaning that in Maryland indecent exposure is determined by English common law. *Duvallon* clearly establishes that English common law defines indecent exposure as genital exposure only. Many other states including our neighbors in Washington D.C., Pennsylvania, North Carolina, and New York allow females to appear bare-chested in public. Drawing a meaningful gender line between male and female regarding breast tissue is difficult if not impossible, and attempting to enforce such a law will result in illegal arrests and harassment charges against police, as well as cement the societal stigma of being born into a female body.

Absent any legal language or precedent defining the female breast as indecent, and with the strong guarantees of gender equality that exist in Maryland, it is inappropriate for police to enforce societal prejudices about what is "proper" attire or behavior for females when they do not enforce the same standard for males. Law enforcement enforces law, not social norm. We are allowed the freedoms in the United States and Maryland to challenge those norms through our expression and speech.

In conclusion, female bare-chestedness is legal in Maryland.