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A SHORT ESSAY ON THE BARING OF BREASTS

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The uproar that followed last summer's victory by the U.S. team in the Women's World Cup Soccer Final shed new light on a legal controversy from my hometown. After making the penalty kick that won the game, defender Brandi Chastain "ripp[ed] off her white jersey, thr[ew] it into the air,"[1] and "slid[ ] on her knees . . . celebrating victory with a full-throated roar."[2] What followed from the 90,000-plus fans in the stands[3]—not to mention from my own living room—was an eardrum-shattering clamor of elation, conveying an amalgam of emotions that defied articulate expression. The next day, Chastain appeared on the Sunday morning news programs with Hillary Rodham Clinton and Madeleine Albright,[4] evidencing her prompt induction into the Great Hall of Female Role Models.

But critics labeled Chastain's celebration an "unladylike display,"[5] designed to sell sports bras[6] or lure the male audience into sustaining a women's soccer league.[7] One faux feminist confided that he was personally pained by the celebration: "What hurts here is just when it looks like Sports Illustrated finally will put a woman . . . on its cover for reasons other than a string bikini, along comes Brandi Chastain with the perfect cover shot for them."[8] Viewed from this perspective, Chastain hurt us all—but this perspective is not our only option.

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[1] Bill Plaschke, *U.S. Team Gave Shirt Off Its Back*, LAS VEGAS REV.-J., July 11, 1999, at C1.

[2] Jim Litke, *Not Your Mother's Role Models*, AP ONLINE, July 12, 1999, *in* 1999 WL 17823342.

[3] *See* Plaschke, *supra* note 1.

[4] *See* Litke, *supra* note 2.

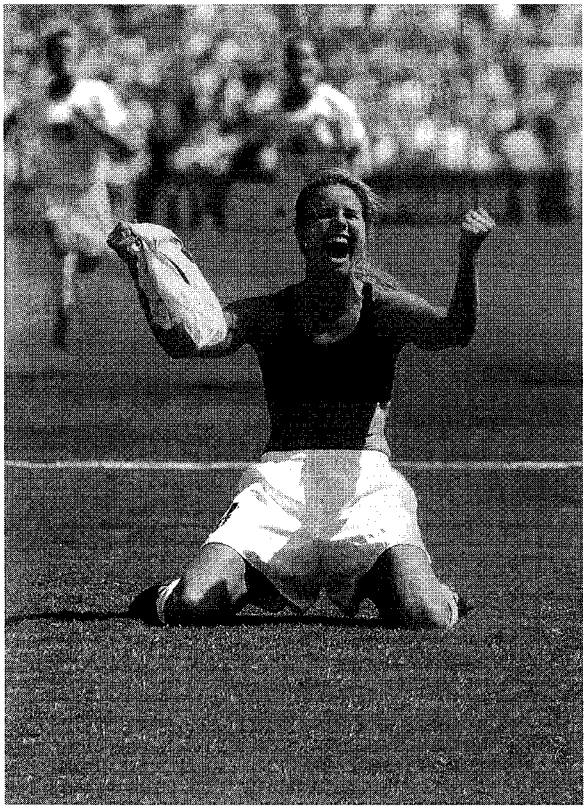
[5] *What They're Saying*, AUGUSTA CHRON., July 12, 1999, at B5.

[6] *See, e.g.*, Jim Donaldson, *U.S. Women Booters Don't Lack for Exposure*, PROVIDENCE J.-BULL., July 13, 1999, at D2.

[7] *See, e.g.*, *What They're Saying*, *supra* note 5.

Also in the news, members of the Ohio State University women's rugby team recently posed for a team photo, *sans* jersey *or* sports bra, in front of the Lincoln Memorial because they "wanted to do something crazy." Nancy Trejos, *Topless Rugby Players Face Penalty*, WASH. POST, Nov. 3, 1999, at B1. Participating players have been suspended from games and practice pending an investigation into the incident because "[a]s representatives of Ohio State University, [the players' behavior] was inappropriate." *Id.*

[8] Peter Kerasotis, *Chastain Ruins Great Moment*, FLA. TODAY, July 13, 1999, at C1. By "faux," I mean that while the author purports to advance the cause of women's freedom, he has curtailed it. *See infra* notes 33–37 and accompanying text.



Robert Beck / *Sports Illustrated*

I grew up in Rochester, New York, where every year a radical feminist named Ramona Santorelli and a small band of like-minded women marched bare-breasted through a public park called Cobbs Hill.[9] Their procession was "an effort to dramatize their opposition"[10] to a law that effectively permitted men to appear in public bare-chested, but forbade women to do the same.[11] Year after year, Santorelli and the six other "Topfree Seven,"[12] as they came to be known, were arrested for violating a statute prohibiting public lewdness, but released before being criminally prosecuted—until 1986.[13]

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[9] *See, e.g.*, Jonathan D. Epstein, *Senator Seeks Cover-Up Law*, GANNET NEWS SERVICE, July 16, 1992, *in* 1992 WL 9384068; *Charges Dismissed for 2 Women Who Bared Breasts in Rochester*, BUFFALO NEWS, July 8, 1992, at A8.

[10] People v. Santorelli, 600 N.E.2d 232, 234 (N.Y. 1992) (Titone, J., concurring).

[11] *Id. See also* N.Y. PENAL LAW § 245.01 (McKinney 2000).

[12] The women preferred the term "topfree" to "topless" because the latter "connotes the exploitive pornography business." Louise Continelli, *Campaigning for the Natural Look: Mary Lou Schloss Strives for Equality,* BUFF. NEWS, July 31, 1992, at C11.

[13] *Cf.* Epstein, *supra* note 9 (regarding state senator's hope for more effective enforce-

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That year, the District Attorney decided that he could not abide the indecency. When the trial court dismissed the charges against the Topfree Seven, the District Attorney appealed and the statute's applicability and constitutionality were ultimately considered by the state's highest court.[14] Santorelli and her cohorts argued that the statute is "discriminatory on its face since it defines 'private or intimate parts' of a woman's but not a man's body as including a specific part of the breast."[15] The court set forth as its task "constru[ing the] statute, which enjoys a presumption of constitutionality, [so as] to uphold its constitutionality if a rational basis can be found to do so."[16] In a near-heroic act of avoidance, the court decided in only four short paragraphs that the statute, which "was aimed at . . . 'topless' waitress[ing]," was inapplicable to the facts because the context in which they arose was "noncommercial."[17]

While concurring in the outcome—dismissal of the charges—Justice Titone blasted the majority for employing "artful means of avoiding a confrontation with an important constitutional problem."[18] Devoting expanded attention to the legislative history, Justice Titone demonstrated that the statute had been revised with an eye toward "protecting public sensibilities."[19] This objective, he asserted,

> 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 . . . . 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.[20]

Furthermore, Justice Titone agreed with Santorelli and her co-defendants 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 . . . . [T]o 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 . . . that perception . . . is itself a

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ment against annual topless picnic).

[14] *See Santorelli*, 600 N.E.2d 232.

[15] *Id.* at 233; *see also* N.Y. PENAL LAW § 245.01 (McKinney 2000).

[16] *Santorelli*, 600 N.E.2d at 233.

[17] *Id.* at 233–34.

[18] *Id.* at 235 (Titone, J., concurring).

[19] *Id.* at 236.

[20] *Id.*

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> suspect cultural artifact rooted in centuries of prejudice and bias toward women.[21]

Justice Titone not only would have dismissed the charges, therefore, but also would have declared the statute unconstitutional as a violation of the defendants' right to equal protection of the laws.[22]

Shortly after the decision issued, Alan Dershowitz appeared in print to condemn the decision as violative of the rights of "those who do not want to see the breasts of strange women."[23] Assuring his readers that he is "no prude,"[24] Dershowitz criticized the New York court for its use of the term "the male equivalent," arguing that this term "begs the question: Is the male chest the 'equivalent' of the female breast? Culturally, it is not . . . ."[25]

Then, as if to eliminate any doubt that he is freedom-loving, Dershowitz concluded that

> [w]e endanger freedom and equality when we trivialize it. The Supreme Court of the United States trivialized freedom last year when it upheld an Indiana statute that required topless dancers to wear 'pasties' over their nipples when they danced in front of people *who wanted to see them nude* . . . . I will continue to defend the rights of any woman or man who wants to expose any part of his or her anatomy to any other willing adults.[26]

What Dershowitz neglects to discuss is that a willing (or perhaps more accurately, an *eager*) audience is not all that distinguishes the topless dancers from the Topfree Seven. Santorelli and the rest of the Topfree Seven bared their breasts in a spirit of protest—not sexual availability.

Nike, which has indicated that it "might tap Chastain for promotional appearances or advertising for its high-end [sports] bra,"[27] understands that the act of disrobing can convey a meaning other than the one perceived by the champion defender's critics.[28] When Chastain "fell to her

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[21] *Id.* at 236–37.

[22] *Id.* at 237.

[23] Alan Dershowitz, *N.Y. Nudity Rule Goes Too Far*, BOSTON HERALD, July 27, 1992, at 21.

[24] *Id.*

[25] *Id.*

[26] *Id.* (emphasis added to highlight Dershowitz's focus on the rights of the viewer, as opposed to the rights of the person whose breasts are subject to being viewed). Interestingly, Dershowitz takes a different position on hate speech and sexual harassment. *See, e.g.*, Clarence Page, *Racist is Punished for His Candid Bigotry*, DES MOINES REG., Feb. 19, 1999, at 11. (Dershowitz comes to the aid of a racist, offering a free speech defense.).

[27] Melanie Wells & Ann Oldenburg, *Sports Bra's Flash Could Cash In*, USA TODAY, July 13, 1999, at A1.

[28] To be fair, Chastain did not bare her breasts after winning the World Cup—only her bra. Chastain's critics, however, did not see this distinction as critical: "[T]he issue here

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knees like Bjorn Borg after winning Wimbledon and ripped off her jersey, waving it above her head to the thundering crowd,"[29] one Nike marketer indicated that Chastain's act "fits right in with Nike's marketing strategy .... What Chastain did said, 'I am woman; hear me roar,' and that's the image Nike wants its athletes to have."[30]

In her allegorical tale of a war between the sexes, *Les Guérillères*, French feminist Monique Wittig describes a battle scene in which women bare their breasts and roar:

> Then the women, at a signal, uttering a terrible cry, suddenly rip off the upper part of their garments, uncovering their naked gleaming breasts. The men, the enemy, begin to discuss what they unanimously regard as a gesture of submission. They send ambassadors to treat for the gates to be opened. Three of their number fall struck down by stones as soon as they are within range .... A great tumult arises. The besiegers utter cries of rage .... Some [of the women] laugh out loud and manifest their aggressiveness by thrusting their bare breasts forward brutally.[31]

The men in Wittig's tale felt betrayed by the unanticipated offensive. How were they to rely on an enemy's battle signs when the enemy changed the meaning of those signs without warning? When the men thought that the women's gesture was one of submission, they were receptive and prepared; but when the same act signaled aggression, the men objected, feeling duped. The male warriors could proceed more confidently if the uncovering of breasts sent a consistent message of surrender.

Perhaps Dershowitz likewise would proceed more confidently in his defense of "the rights of any woman or man to expose any part of his or her anatomy"[32] if the meaning of that exposure were confined to the one conveyed by topless dancers. Indeed, one of Chastain's critics observed that "[w]ith such names as Brandi ..., Tiffany ... and Tisha, the roster [of the U.S. team] sounds more like a lineup of exotic dancers than athletes,"[33] and suggested that Hooters sponsor a women's professional soc-

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isn't whether or not Brandi Chastain in her sports bra is risqué stuff. It's that you'd like to think women can be recognized for something truly outstanding and not feel compelled to take off their clothes." Kerasotis, *supra* note 8. I agree that how much skin is revealed is beside the point—it is the act of disrobing that interests me. For those who would differ, Chastain has something for them, too: she received similar criticisms for her appearance in *Gear* magazine wearing nothing but "cleats and a strategically placed soccer ball." Wells, *supra* note 27.

[29] Grant Wahl, *Out of This World with the Cup on the Line*, SPORTS ILLUSTRATED, July 19, 1999, at 38.

[30] Wells, *supra* note 27.

[31] MONIQUE WITTIG, LES GUÉRILLÈRES 99–100 (David Le Vay trans., Beacon Press 1985) (1969).

[32] *See supra* note 26 and accompanying text.

[33] Donaldson, *supra* note 6.

"I take it we got the account."

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cer league.[34] The apparent meanings of these acts (and names), however, are not intrinsic; they are imposed by the limited perspectives of the commentators.

The sports promoters are not so limited in their thinking. "One World Cup ad feature[d] a pair of shapely legs with the caption, 'She's got legs: she knows how to use them,'" from the not-so-feminist ZZ Top lyric.[35] The promoter who came up with this ad is not trading merely on the sex appeal of women's legs. He or she predicted that readers would get a thrill from the collision of meanings embodied in the image and lyrics—from witnessing the rebellious appropriation of an image of the female body. This is not to say that the image is no longer sexy, but rather that "sexy" is redefined in the ad—and that the kick is in the act of redefinition.[36]

Brandi Chastain, the Topfree Seven, and Wittig's women soldiers unleash their breasts rather than unveil them. In so doing, they convey not

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[34] *Id.*

[35] Sarah Layden, *There's Beauty in Sports: U.S. Players Prove Women Can Be Feminine, Athletic*, HERALD AM., July 11, 1999, at C2. *See also* ZZ TOP, *Legs*, *on* ELIMINATOR (WEA/Warner Bros. 1983).

[36] *Cf.* Layden, *supra* note 35 ("Imagine: a strong, competitive, aggressive woman with (gasp!) muscles could actually be . . . alluring?").

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submission, passive sexual availability, or obsessive concern for the viewer, but victory, protest, and aggression, respectively.[37] Like the sense of betrayal that the men in Wittig's battle scene felt after learning that they had committed the fatal error of misinterpretation, it is the content of the baring that really upsets those who have criticized Chastain and the Topfree Seven. Under the ruse of indignant concern for women's liberation or freedom and equality, these critics effectively propose to hide the full range of meaning that the baring of breasts can convey. But the critics are too late—we have already seen it all.

[37] For another example of women disrobing in protest, see A HERO FOR DAISY (50 EGGS, Inc. 1999), a documentary film about the 1976 Yale women's crew, which "storm[ed] the Yale athletic director's office . . . to protest the lack of locker room facilities for the women. In front of a reporter from the New York Times, the women stripped, exposing the phrase 'Title IX' which was written in blue marker" on their chests and backs." *A Hero For Daisy* (visited Jan. 14, 2000) <http://www.aherofordaisy.com/daisy.html?305,23>.

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