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Freedom at Home Revisited: The New Mexico Equal Rights Amendment after New Mexico Right to Choose/Naral v. Johnson

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FREEDOM AT HOME REVISITED: THE NEW MEXICO EQUAL RIGHTS AMENDMENT AFTER *NEW MEXICO RIGHT TO CHOOSE/NARAL V. JOHNSON*

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INTRODUCTION

In 1996, when state constitutional issues were of seemingly greater scholarly interest, I wrote a law review article about the use of the New Mexico Constitution in challenging an abortion funding regulation.[1] I have been asked to revisit that article and to update what has taken place in the area of state constitutional law, particularly with regard to women's rights. This article addresses the broad question of the extent to which the Equal Rights Amendment has been asserted to provide explicit protection against sex discrimination under the New Mexico Constitution.

During the two decades prior to my first article, the U.S. Supreme Court had repeatedly held that under federal law a state may fund childbirth related expenses without funding medically necessary abortions.[2] The same Court had decided that the Hyde Amendment's federal ban on Medicaid-funded abortion was constitutional.[3] Inherent in these holdings was the determination that subsistence payments did not restrict the exercise of any constitutionally protected fundamental rights. Consequently, litigants started turning to their state constitutions in the hopes that their state courts would diverge from federal precedent to find a greater degree of privacy and equality protection than under the U.S. Constitution. Not unexpectedly, the results were mixed and the analyses varied.[4]

New Mexico was among the states that responded to the challenge, and on April 21, 1995, a team of lawyers filed suit against the Department of Health and Human Services (HSD) seeking to enjoin a proposed regulation that would limit financial assistance for abortions to indigent women.[5] The district court, in *New*

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* Linda M. Vanzi is currently a judge on the New Mexico Court of Appeals. She would like to thank Maureen A. Sanders and Jennifer Gardner for their invaluable suggestions and insights on several prior drafts.

1. Linda M. Vanzi, *Freedom at Home: State Constitutions and Medicaid Funding for Abortions*, 26 N.M. L. REV. 433 (1996).

2. *See* Beal v. Doe, 432 U.S. 438, 445–46 (1977); Maher v. Roe, 432 U.S. 464, 469–80 (1977); Poelker v. Doe, 432 U.S. 519, 521 (1977).

3. *See* Harris v. McRae, 448 U.S. 297, 317 (1980).

4. *Compare* Doe v. Dep't of Soc. Servs., 487 N.W.2d 166 (Mich. 1992), *and* Fischer v. Dep't of Pub. Welfare, 502 A.2d 114 (Pa. 1985) (both upholding limitations on abortion funding under the equal protection clauses of their state constitutions), *with* Comm. to Defend Repro. Rights v. Myers, 625 P.2d 779 (Cal. 1981), Doe v. Maher, 515 A.2d 134 (Conn. Super. Ct. 1986), Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387 (Mass. 1981), Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982), N.M. Right to Choose/NARAL v. Danfelser, No. SF 95-867(C) (N.M. Dist. Ct. July 3, 1995), Planned Parenthood Ass'n v. Dep't of Human Res., 663 P.2d 1247 (Or. Ct. App. 1983), *aff'd en banc on statutory grounds*, 687 P.2d 785 (Or. 1984), *and* Women's Health Ctr. Of W. Va., Inc. v. Panepinto, 446 S.E.2d 658 (W. Va. 1993) (all striking down statutes restricting abortion funding relying upon both state constitutional provisions with federal analogs and other provisions such as state Equal Rights Amendments which had no federal counterpart). For other cases showing mixed results and varied analyses see Vanzi, *supra* note 1, at 441 & nn.62–65, 442 n.67 (discussing Women of Minn. v. Steffen, No. MC 93-3995 (Minn. Dist. Ct. June 16, 1994); Doe v. Celani, No. S81-84CnC (Vt. Super. Ct. May 26, 1986); Roe v. Harris, No. 96977 (Idaho Dist. Ct. Feb. 1, 1994); Doe v. Wright, No.91-CH-1958 (Ill. Cir. Ct. Dec. 2, 1994), *leave to file late appeal denied*, No. 78512 (Ill. Feb. 28, 1995); Doe v. Masten Childers, No. 94CI02183 (Ky. Cir. Ct. Aug. 7, 1995)).

5. Pregnancy Termination Procedures, New Mexico Human Services Department, II N.M. Reg., p. 684 (4/29/95, codified at 8.325.7 NMAC, as amended through 11/1/03). The regulation mirrored the limitations

Mexico Right to Choose/NARAL v. Danfelser, agreed with the plaintiffs' arguments that the proposed regulation violated the state constitutional guarantees of due process, inherent rights, equal protection, and equal rights.[6] Six days later, the court ordered a permanent injunction prohibiting the implementation of the proposed regulation.[7] My article was written after the district court ruling but the case continued to wind its way through the appeals process for three more years. On the day before Thanksgiving in 1998, the New Mexico Supreme Court issued its opinion affirming the district court.[8]

It has been twelve years since Justice Minzner authored the groundbreaking decision in *New Mexico Right to Choose/NARAL v. Johnson (NARAL)*.[9] The court's ruling, which utilized the New Mexico Equal Rights Amendment (ERA) as the basis for its decision, was noteworthy because it unequivocally transported New Mexico's constitutional equality jurisprudence into a new dimension. This article analyzes the supreme court's decision and then addresses the effectiveness of the ERA in other discrimination claims where men and women are similarly situated. Specifically, this article looks at the application of the substantive analysis in the only case to use the New Mexico ERA since the *NARAL* decision.

I. A SUBSTANTIVE APPROACH TO REPRODUCTIVE AUTONOMY—THE NEW MEXICO SUPREME COURT'S OPINION IN *NEW MEXICO RIGHT TO CHOOSE/NARAL V. JOHNSON*

On appeal in the New Mexico Supreme Court, the *NARAL* plaintiffs raised all of the same constitutional arguments that they had argued in the district court below.[10] They particularly relied on the fact that our courts have long held that the state constitution is not limited by the U.S. Constitution and that the state constitution often provides its citizens broader protections than its federal counterpart.[11] However, most of the cases finding these more expansive rights under the New Mexico Constitution had dealt primarily with the First and Fourth Amendments.[12] In *NARAL*, I think that the lawyers believed the New Mexico Supreme Court would broaden those protections yet again, and that the court would engage in

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under the Federal Medical program and prohibited the use of state funds to pay for abortions for Medicaid-eligible women except when necessary to save the life of the mother, to end an ectopic pregnancy, or when the pregnancy resulted from rape or incest. *See id.*

6. *See* N.M. Right to Choose/NARAL v. Danfelser, No. SF 95-867(C) (N.M. Dist. Ct. July 3, 1995).
7. *Id.*
8. N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-005, 975 P.2d 841 (filed 1998).
9. *Id.*
10. *See id.* ¶ 8, 975 P.2d at 846.
11. *See id.* ¶ 25, 975 P.2d at 850. For cases discussing how the New Mexico Constitution often provides its citizens broader protections than its federal counterpart, see *State v. Gutierrez*, 116 N.M. 431, 435–36, 863 P.2d 1052, 1056–57 (1993) (noting that New Mexico courts "independently analyze the New Mexico constitutional proscription against unreasonable searches and seizures"); *Blea v. City of Espanola*, 117 N.M. 217, 221, 870 P.2d 755, 759 (Ct. App. 1994) (recognizing that the state supreme court has "continued its expansion of rights in favor of the citizen"); *City of Farmington v. Fawcett*, 114 N.M. 537, 544–45, 843 P.2d 839, 846–47 (Ct. App. 1992) ("[F]ederal decisions do not control the nature and scope of the rights guaranteed by the New Mexico Constitution.").
12. *See, e.g.*, State v. Attaway, 117 N.M. 141, 147–51, 870 P.2d 103, 109–13 (1994); State v. Gutierrez, 116 N.M. 431, 435–36, 863 P.2d 1052, 1056–57 (1993); State v. Cordova, 109 N.M. 211, 212 n.1, 784 P.2d 30, 31 n.1 (1989).

either a substantive analysis under the state constitution's due process clause,[13] or in an equal protection analysis under its inherent rights clause.[14] That did not prove to be the case.

Instead of using the formal equality analysis of federal precedent, the supreme court turned to the unique and independent language of the New Mexico ERA[15] to expand the scope of protection against sex inequality.[16] The court made clear that the state ERA provides more comprehensive protection against sex discrimination and that distinctions based on pregnancy, although a physical characteristic unique to women, must be subject to strict scrutiny review where they operate to disadvantage women.[17] Thus, "'[t]he question at hand is whether government has the power to turn th[e] capacity [to bear children], limited as it is to one gender, into a source of social disadvantage.'"[18] Further elaborating upon a substantive equality approach to gender discrimination, the court concluded that HSD's regulation was part of a long history in which "women's biology and ability to bear children have been used as a basis for discrimination against them,"[19] and that the law discriminated against women by singling them out for distinctly different treatment than men with reference to medically necessary medical services.[20]

The most interesting part of Justice Minzner's opinion was her examination of the text of the ERA as well as its history and meaning from territorial times to the present.[21] The court noted that the New Mexico ERA was passed in 1973 "by an overwhelming margin"[22] and represented "the culmination of a series of state con-

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13. The New Mexico due process clause provides: "No person shall be deprived of life or property without due process of law. . . ." N.M. CONST. art. II, § 18.

14. Article II, section 4 states: "All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness." N.M. CONST. art. II, § 4. The plaintiffs had argued that "a woman's right to reproductive choice is among the inherent rights guaranteed by Article II, Section 4 of the New Mexico Constitution, and that the [regulation] unlawfully infringes upon this right because it favors childbirth over abortion." *NARAL*, 1999-NMSC-005, ¶ 3, 975 P.2d at 844.

15. New Mexico's ERA provides: "Equality of rights under law shall not be denied on account of the sex of any person." N.M. CONST. art. II, § 18.

16. *NARAL*, 1999-NMSC-005, ¶¶ 30, 36, 975 P.2d at 851–52, 853.

17. *Id.* ¶¶ 34–43, 975 P.2d at 853–55. The "strict scrutiny" standard used by the New Mexico Supreme Court is in contrast to the U.S. Supreme Court's ruling that sex discrimination claims would be reviewed under an "intermediate scrutiny" standard. The "intermediate scrutiny" standard only requires proof that classifications based on sex "serve important governmental objectives" and those objectives must be substantially advanced by the use of the sex-based classification. Craig v. Boren, 429 U.S. 190, 197 (1976).

18. *NARAL*, 1999-NMSC-005, ¶ 40, 975 P.2d at 854 (quoting Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 33 (1992)). The New Mexico Supreme Court rejected outright the U.S. Supreme Court's reasoning in *Geduldig v. Aiello*, 417 U.S. 484 (1974), *superseded by statute*, Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076, *as recognized in Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669 (1983), emphasizing that "it would be error to conclude that men and women are not similarly situated with respect to a classification simply because the classifying trait is a physical characteristic unique to one sex." *NARAL*, 1999-NMSC-005, ¶¶ 38–39, 975 P.2d at 854.

19. *NARAL*, 1999-NMSC-005, ¶ 41, 975 P.2d at 854 (quoting Doe v. Maher, 515 A.2d 134, 139 (Conn. Super. Ct. 1986)).

20. *Id.* ¶¶ 46–47, 975 P.2d at 856 ("[T]here is no comparable restriction on medically necessary services relating to physical characteristics or conditions that are unique to men. Indeed, we can find no provision . . . that disfavors any comparable, medically necessary procedure unique to the male anatomy. . . . Thus, [the regulation] undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women.").

21. *Id.* ¶¶ 27–37, 975 P.2d at 850–53.

22. *Id.* ¶ 29, 975 P.2d at 851.

stitutional amendments that reflect an evolving concept of gender equality in this State."[23] Justice Minzner's historical narrative took readers on a journey from pre-statehood debates about a woman's right to vote and to hold public office, to her right to practice law in the Territory.[24] It traced the path from women being considered "incapable mentally of exercising judgment and discretion" and of restrictive community property laws, to the removal of "gender-based restrictions on veterans' property tax exemptions" and "changes to the definition of criminal sexual offenses."[25]

The inevitable conclusion reached by the court was that the ERA was added to New Mexico's constitution with the specific intention of providing broader protection against sex discrimination than that afforded under the U.S. Constitution.[26] The federal courts had long relied upon a formal equality paradigm which applied a less rigorous standard in sex discrimination cases, thus limiting the scope of protection afforded to women.[27] The New Mexico Supreme Court concluded, however, that "the federal equal-protection analysis [was] inapposite with respect to [the] claim of gender discrimination."[28] Having disposed of federal precedent, the court went on to scrutinize the funding restriction from a substantive equality perspective that focused on the multiple ways in which the regulation contributed to women's subordination.[29]

The *NARAL* case illustrated the New Mexico ERA's potential for enhancing protection against sex discrimination beyond the formal equality limits of Federal Equal Protection Clause analysis. It appears, however, that like other states with similar provisions, the promise that the ERA held in advancing sex equality for women has had little application in sex equality jurisprudence in New Mexico since 1998.

II. THE FAILURE TO UTILIZE THE FULL SCOPE OF PROTECTIONS AFFORDED BY THE ERA

Since the 1970s, when most of them were adopted, state ERAs have been used in a variety of factual contexts to challenge laws and policies that discriminate against women. Courts across the country have decided cases under their ERAs dealing with reproductive autonomy,[30] unwed parents,[31] disparate impact,[32] and

23. *Id.* ¶ 31, 975 P.2d at 852.

24. *Id.* ¶ 32, 975 P.2d at 852.

25. *Id.* ¶¶ 32–35, 975 P.2d at 852–53.

26. *See id.* The Court noted that "New Mexico's Equal Rights Amendment is a specific prohibition that provides a legal remedy for the invidious consequences of the gender-based discrimination that prevailed under the common law and civil law traditions that preceded it." *Id.* ¶ 36, 975 P.2d at 853.

27. *See supra* note 17. This less rigorous standard has often resulted in unpredictable outcomes. In fact, many "courts, commentators, and even Supreme Court Justices, have criticized the intermediate standard as vague, poorly defined and malleable, providing insufficient guidance in individual cases." Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1213 (2004) (footnotes omitted).

28. *NARAL*, 1999-NMSC-005, ¶ 28, 975 P.2d at 851.

29. *Id.* ¶¶ 48–52, 975 P.2d at 856–57.

30. *See, e.g.*, Colo. Civil Rights Comm'n v. Travelers Ins. Co., 759 P.2d 1358, 1359 (Colo. 1988) (en banc) (holding that excluding the costs of normal pregnancy care from an otherwise comprehensive insurance coverage constitutes sex discrimination in violation of the Colorado ERA); Doe v. Maher, 515 A.2d 134, 162 (Conn. Super. Ct. 1986) (invalidating Connecticut's restrictions on funding medically necessary abortions on the basis of Connecticut's ERA); Allison-LeBlanc v. Dep't. of Pub. Safety & Corr., 671 So.2d 448, 452–53 (La.

even discrimination based on sexual orientation.[33] However, commentators have noted that realization of the full potential of state ERAs has been frustrated by the fact that they have not been frequently used by litigators[34] and, that the use of these state ERAs appears to be diminishing.[35]

Needless to say, there has been much debate about why state ERAs are not being used. The explanations for the lack of receptivity by litigators and courts to use state ERAs are as varied as the ERAs themselves. Some state constitutional law scholars argue that because legal education tends to focus on federal constitutional law, graduating students are less comfortable and knowledgeable in the area of state constitutional law.[36] Others argue that the passage of numerous statutes and regulations targeted at sex discrimination has provided alternative avenues for relief in most cases, and that is where litigators tend to turn.[37] Still others theorize that obstacles to adequate remedies may discourage claims under state constitutions.[38] New Mexico courts, for example, have not yet allowed private actions for damages for violations of state constitutional rights,[39] nor have they awarded attorneys' fees in the absence of a statute.[40]

Ct. App. 1995) (holding that automatic reassignment of pregnant police officer to administrative duty or leave violates Louisiana ERA).

31. *See, e.g.*, Estate of Hicks, 675 N.E.2d 89, 99 (Ill. 1996) (using the Illinois ERA to strike down a provision allowing only mothers to inherit from illegitimate children who die intestate); *In re* McLean, 725 S.W.2d 696, 698–99 (Tex. 1987) (using the Texas ERA to strike down a statute that required a father, but not a mother, to prove it was in the best interest of a child born out of wedlock that he be recognized as a parent); Guard v. Jackson, 940 P.2d 642, 645 (Wash. 1997) (relying on the state ERA to invalidate a statute that required the father, but not the mother, of an illegitimate child to have regularly contributed to the support of a minor child in order to recover for the child's wrongful death).

32. *See, e.g.*, DiFlorido v. DiFlorido, 331 A.2d 174, 179–80 (Pa. 1975) (invalidating a common law rule under the state ERA that made household goods acquired during a marriage presumptively the property of the husband).

33. Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (relying on the Hawaii ERA to hold that its prohibition on same-sex marriage established a sex-based classification). The Hawaii court used a formal equality analysis and reasoned that because Hawaii's law allowed men to marry women, but prevented women from marrying women, it denied women (and conversely men) the ability to do something that men could do thereby constraining women's (and men's) choice of marital partners because of sex. *See id.* at 64–67. The court's ruling, however, never went into effect because the Hawaii voters amended the Hawaii Constitution to allow the state legislature "the power to reserve marriage to opposite-sex couples." HAW. CONST. art. I, § 23.

34. Wharton, *supra* note 27, at 1275.

35. *Id.*

36. *Id.* at 1276 (citing Jennifer Friesen, *Adventures in Federalism: Some Observations on the Overlapping Spheres of State and Federal Constitutional Law*, 3 WIDENER J. PUB. L. 25, 31–34 (1993)).

37. *Id.* at 1275.

38. *Id.* at 1277.

39. *See, e.g.*, Bell v. Bd. of Educ., No. CIV 06-1137 JB/ACT, 2008 WL 2397670, at *6 (D.N.M. Jan. 30, 2008) (noting that a plaintiff cannot seek damages for violations of rights under the New Mexico Constitution absent an express waiver of immunity under the Tort Claims Act); Barreras v. State, 2003-NMCA-027, ¶ 24, 62 P.3d 770, 776 (same); Chavez v. City of Albuquerque, 1998-NMCA-004, ¶ 11, 952 P.2d 474, 477 (same). Although New Mexico's expansive interpretation of state constitutional rights and its finding of self-executing rights could yet result in an implied cause of action for damages, to date, the New Mexico ERA has been used primarily to obtain injunctive relief, rather than as a basis for recovering damages. *See, e.g.*, N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-005, ¶ 60, 975 P.2d 841, 859 (filed 1998). For additional discussion concerning damages actions for violations of state constitutional rights, see Allison Crist, *Civil Rights—No Private Attorney General Exception to the American Rule in New Mexico:* New Mexico Right to Choose/National Abortion Rights Action League v. Johnson, 31 N.M. L. REV. 585 (2001); Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269 (1985); Paul R. Owen, *Reticent Revolution: Prospects for Damage Suits Under the New Mexico Bill of Rights*, 25 N.M. L. REV. 173 (1995).

40. The experience of the *NARAL* plaintiffs illustrates this particular difficulty. After their victory in obtaining abortion funding for poor women under the New Mexico ERA, the state supreme court denied

Whatever the reason, like the lawyers in the rest of the country, in the past decade lawyers have brought few claims under the New Mexico ERA. In the aftermath of the supreme court's *NARAL* opinion, and its unequivocal expansion of constitutional protection against sex discrimination, one would hope that lawyers would have been greatly encouraged to challenge laws and policies that support or promote gender oppression and heterosexisim in New Mexico. That has not been the case and instead, consideration of the ERA has been limited to a single appellate decision.

III. FEMALE TOPLESSNESS AND THE ERA—*CITY OF ALBUQUERQUE V. SACHS*

In 2004, the New Mexico Court of Appeals held that a city ordinance prohibiting only women from showing their breasts in a public place without an opaque covering of the entire nipple does not violate the ERA of the New Mexico Constitution.[41] The facts in the case were simple. Renee Sachs owned and operated a tattoo and body modification store in Albuquerque.[42] She published a gender neutral advertisement offering customers a free nipple piercing as long as they agreed to have the piercing done in the front window of the business, which was visible from the sidewalk.[43] Not unexpectedly, people agreed to the free procedure. The second customer, a female, sat in the front window with her breasts exposed while she had her nipples pierced.[44] Several people, including a police officer who had just arrived, watched from the sidewalk.[45]

Sachs was convicted of violating Section 11-8-3(B) of an Albuquerque city ordinance.[46] The district court denied Sachs' motion to dismiss on the basis—among other things—that the ordinance is unconstitutional under the ERA because it prohibits only the showing of the female breast and not the male breast.[47] The court of appeals, after a fairly lengthy—but rather tautological—discussion about the "physiological and sexual distinctions" between male and female breasts, concluded that the classification in the ordinance is based on a unique characteristic, and that the differences in physical characteristics made by the ordinance do not

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plaintiffs their attorneys' fees and joined a majority of states in refusing to adopt a "private attorney general" exception that would allow fees in the absence of a statute when litigation protects important societal interests. N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-028, ¶¶ 26–28, 34, 986 P.2d 450, 458, 460.

41. City of Albuquerque v. Sachs, 2004-NMCA-065, ¶ 1, 92 P.3d 24, 25.

42. *Id.* ¶ 2, 92 P.3d at 26.

43. *Id.*

44. *Id.* The first customer was a male who, while he may have been a curiosity, did not attract the attention of the police. *See id.*

45. *See id.*

46. *Id.* ¶ 4, 92 P.3d at 26.

> Section 11-8-3 of the City Ordinance at issue states in pertinent part:
>
> (A) No person shall knowingly or intentionally, in a public place . . . appear in a state of nudity;
>
> (B) No person who owns or operates a public place shall knowingly or intentionally permit or allow another person to violate the provisions of this article in that public place.

Id. ¶ 3, 92 P.3d at 26.

The ordinance defined "nudity" as: "The showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of a part of the nipple. . . ." *Id.*

47. *Id.* ¶ 5, 92 P.3d at 26.

operate to the disadvantage of women.[48] Thus, according to the New Mexico Court of Appeals, the ordinance does not treat men and women differently in violation of the ERA.[49]

In finding that the compulsory covering of the female breast does not constitute discrimination for purposes of the ERA, the court first reasoned that the ordinance's prohibition on public nudity properly distinguished between males and females on the basis of "unique physical characteristics attributable to each."[50] It then noted that there must be proof that the classification works to the disadvantage of the person thus classified in order to establish a violation of the ERA.[51] Had Renee Sachs asserted a disadvantage, the state would then have had the burden to show that there was a compelling interest behind the law in question and that such interest was accomplished by the least restrictive means.[52] On appeal, Sachs did not challenge the district court's conclusion that the ordinance did not present a disadvantage to women.[53] As a result, the appeals court did not engage in a strict scrutiny analysis under the New Mexico ERA as required by *NARAL*. Instead, the court examined the common law roots of nudity as well as the treatment of similar laws in other jurisdictions.[54] For example, it turned to *City of Seattle v. Buchanan*, in which the Supreme Court of Washington upheld a Seattle ordinance banning public exposure of female breasts as "lewd conduct."[55] The Washington court held that its ERA does not prohibit sex-based classifications that are based on actual physical differences between the sexes and bear a reasonable relationship to a legitimate legislative purpose.[56] The *Buchanan* court further stated that "the obvious purpose of the ordinance [is] to protect the public morals and its concern for the privacy of intimate functions" and concluded that it was reasonably related to that purpose.[57]

In reaching its decision, the New Mexico Court of Appeals in *Sachs* appears to have missed the central point established by the supreme court in *NARAL*. The court did not utilize a substantive approach requiring that it look first to whether the law discriminates against one sex solely on the basis of gender.[58] Instead, it

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48. *Id.* ¶ 15, 92 P.3d at 28–29.

49. *Id.* ¶ 16, 92 P.3d at 29.

50. *Id.* ¶ 13, 92 P.3d at 27.

51. *Id.*

52. *Id.* Interestingly, several of the cases cited in *Sachs* involved women's right to dance topless as a means of employment. *See id.* ¶ 15, 92 P.3d at 28. It is also noteworthy that the court of appeals did not examine critically the fact that its ruling would allow men to benefit from the advertisement (i.e., they could get free piercings) while women would be denied the same opportunity.

53. *Id.* ¶ 11, 92 P.3d at 27.

54. *See id.* ¶¶ 13–15, 92 P.3d at 27–29.

55. City of Seattle v. Buchanan, 584 P.2d 918, 920 (Wash. 1978) (en banc); *see also* MJR's Fare of Dallas, Inc. v. City of Dallas, 792 S.W.2d 569, 575 (Tex. App. 1990) (resorting to the unique "physical characteristics" exception to prove that female breasts are different).

56. *Buchanan*, 584 P.2d at 921. The Washington court relied on the City's undisputed testimony that physiological and sexual distinctions exist between male and female breasts; that such differences are external and internal; and that the female, but not male, breast is a mammary gland. *See id.* at 919–20.

57. *Id.* at 920.

58. *Sachs*, 2004-NMCA-065, ¶¶ 9–16, 92 P.3d at 26–29. Interestingly, although these courts essentially claim that the difference is purely biological, only two courts have actually heard evidence on the physical characteristics of men and women's breasts. *See Buchanan*, 584 P.2d at 921; *MJR's Fare of Dallas, Inc.*, 792 S.W.2d at 575; *see also* Messina v. State, 904 S.W.2d 178, 183 (Tex. App. 1995) (taking judicial notice of the sexual nature of women's breasts).

resorted to the physical characteristics exception.[59] The court's analysis thus reduced the matter to a simple determination that female breasts are in fact different than male breasts, and used a biological difference to justify a social stereotype. Notwithstanding documentary evidence that there is no inherent, significant difference between men's and women's breasts, it appears that the court was primarily concerned not with whether there is a difference but rather with societal norms.

Like most other state courts, the New Mexico Court of Appeals attempted to paint the sexual nature of men's and women's breasts as a real difference between men and women.[60] As one commentator has noted, however, the conclusion that the breast is an erogenous zone and that decency dictates coverage is too simplistic.[61] Even if we agree that symbolically only the female breast is sexualized and that the male breast is not, an honest substantive equality analysis under the New Mexico ERA should require us to ask *who* is doing the sexualizing. The question then becomes: Can substantive equality account for gender differences without making the male sex its normative role? Under *NARAL*, I think it has to.

The principle that the New Mexico ERA should not be used to enforce negative social stereotypes was clearly pronounced in *NARAL*.[62] It would ignore all the teachings of that case to merely rely on the decisions of courts from other jurisdictions to decide whether the city ordinance—in light of the history of discrimination against women in New Mexico—can withstand strict scrutiny. Even assuming that the relevant question was limited to a focus on unique characteristics, given the New Mexico ERA's interest in ridding society of gender stereotypes, the appeals court perhaps should have explained why this governmental interest had to give way to society's stereotypes.

CONCLUSION

For years various provisions of the New Mexico Constitution have been used to assess the validity of our statutes and ordinances. However, it is hard to believe that in the past decade, the only application of the ERA has been with regard to the right of a tattoo parlor along Albuquerque's Route 66 to challenge an ordinance prohibiting it from piercing a woman's nipples in its front window. On one hand, given the history of women's oppression—as chronicled in *NARAL*—one must wonder whether this was the sort of perceived bias against women that the rich protection for equality rights embedded in the New Mexico ERA was meant to remedy. On the other hand, one could argue that the enforcement of societal

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Moreover, some of that evidence shows that the physical difference between men and women is questionable at best. For example, the expert in *Buchanan* testified that "there is no difference in the composition of the flesh of male and female breasts; that the breasts do not form a primary sex characteristic but a secondary one, and that the degree of development of the breasts does not determine sex." *Buchanan*, 584 P.2d at 919.

59. *Buchanan*, 584 P.2d at 919.

60. One could argue that these "sexual differences" between male and female breasts, cited in *Buchanan* and relied upon by *Sachs*, produces a distinctly male heterosexual point of view which ultimately forms the basis of disadvantage to women.

61. 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, 285 (2005) (noting that the conclusion "arises from a limited perspective, that of heterosexual men at a distinct point in time, and yet it claims to identify a real, ancient difference").

62. *See* N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-005, ¶ 36, 975 P.2d 841, 853 (filed 1998).

norms, at least where it prejudices a particular group, is one of the very things against which the ERA is meant to protect.

NARAL, and its unequivocal expansion of constitutional protection against sex discrimination, leaves no doubt that our ERA is an important legal tool in advancing women's equality. On the surface, however, it appears that the use of the ERA is underutilized by New Mexico litigators who seek to remedy gender-motivated discrimination. *NARAL* honored the distinctive language and history of our ERA and we must as well. To realize the full potential of the New Mexico ERA in our constitutional culture, we must continue to challenge laws and policies that perpetuate gender oppression and heterosexisim by fully utilizing this important constitutional amendment.