

SUNBATHER GIVES CITY THE SHIRT OFF HER BACK
TO TEST NUDITY BAN IN PARKS

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In the summertime, a significant number of sun enthusiasts may want to "get naked", in whole or part, on public lands. While this desire may present an opportunity for a lucrative concession in the sale of sunblock and suntan lotions, it may also run afoul of a wide spectrum of laws and regulations banning various forms of public nudity. This particular issue was addressed in the May 1990 law column entitled "Does the Constitution Protect Nude Bathing at a Public Beach?" wherein a federal court found that the First Amendment did not accord constitutional protection to sunbathing in the nude (*Williams v. Kleppe*, 539 F.2d 803 (1976)). A similar constitutional challenge was described in a case report contained in Volume I, number 1 of *Legal Issues in Recreation Administration (LIRA)*. The case synopsis for this particular LIRA report entitled "Runner Challenges Municipal Ordinance Ban on Shirtless Jogging" (*DeWeese v. Town of Palm Beach*) was as follows:

Plaintiff challenged defendant's town ordinance which prohibited jogging without a shirt or top on town streets. In this instance, the federal court found that the challenged ordinance was rationally related to the general public welfare and, therefore, valid. Further, the court found that the first amendment protected speech, not dress. Any liberty interest in dress was, therefore, subject to legitimate governmental proscriptions. In addition, the court found that plaintiff's desire to engage in a pleasurable activity, shirtless running, was neither pure speech nor symbolic speech meriting constitutional protection. The court also found a rational basis for the exempt classifications within the challenged ordinance, i.e., beach and under 14 years of age. Therefore, the court concluded that the ordinance did not deprive plaintiff of equal protection of the law and was not unconstitutionally vague. As a result, the federal district court concluded that the challenged ordinance was a valid exercise of the defendant town's police power and entered judgment for the defendant town.

While addressing constitutional challenges similar to those examined in *Williams* and *DeWeese*, the *Turner* opinion presented herein is interesting because it also considered defendant's allegation that the park ordinance at issue created "an unconstitutional gender-based classification." Specifically, the ordinance at issue in *Turner* proscribed the intentional exposure of the "female breast below the top of the areola, with less than a fully opaque covering in or upon any park or parkway." (Emphasis added.) As a result, the defendant in this case argued that the ordinance denied women equal protection under the law because females, but not males, could be arrested under the ordinance for going topless in city parks.

LIRA is a quarterly publication of the George Mason University Center for Recreation Resources Policy. LIRA is co-sponsored by the National Recreation and Park Association. Each edition of LIRA provides a series of case reports on a specific law-related topic in recreation and park administration, such as the constitutional issues analyzed in the *Turner* decision described below. The first edition of LIRA addressed First Amendment Rights in Public Parks. Other editions of LIRA have presented case reports on Mandatory Dedication for Public Parks and Federal Recreation Liability.

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Chest Fever

In the case of *State v. Turner*, 382 N.W.2d 254 (Minn.App. 1986), defendant Lee Ann Turner was arrested on September 8, 1983, "for sunbathing topless in a city park [Wirth Lake in Minneapolis] in violation of Minneapolis Park Board ordinance PB2-21 (1982)" which required that "suitable attire be worn in Minneapolis parks and on its parkways." Prior to her arrest in this case, Turner "had been arrested on different occasions for violating other similar ordinances." Turner challenged two of these prior arrests and had "succeeded in overturning those ordinances on constitutional grounds, once in Minneapolis." In preparing this case for trial, Turner and the State both agreed that "the governmental objectives of PB2-21 are to control public nudity and protect societal norms." The city park ordinance at issue, PB2-21, provided as follows:

Proper Attire Required. No person ten (10) years of age or older shall intentionally expose his or her own genitals, pubic area, buttocks or female breast below the top of the areola, with less than a fully opaque covering in or upon any park or parkway, as defined in PB1-1. This provision does not apply to theatrical, musical, or other artistic performances upon any park or parkway where no alcoholic beverages are sold.

After hearing the case, the trial judge found Turner guilty and sentenced her. Turner appealed.

On appeal, Turner argued that PB2-21, the city ordinance forbidding topless sunbathing, was an unconstitutional infringement on her right to free expression under the first amendment. Further, Turner contended that the ordinance was unconstitutionally overbroad and denied her equal protection under the federal and state constitutions. The first issue to be addressed by the appeals court was, therefore whether PB2-21 imposed "an unconstitutional restraint on Turner's freedom of expression."

Pursuant to the applicable rules of statutory construction, the appeals court acknowledged that "this ordinance is presumed constitutional." Further, the court found that Turner had failed to rebut this presumption.

Turner cites no authority for her claim that partial nudity, when not in connection with an artistic performance or expression, is protected by the first amendment. Nor does she disclose any states recognizing a constitutional right to sunbathe nude. Conduct or expression, in general, is not afforded unlimited constitutional protection. Not all conduct is, in itself, first amendment expression. Protection depends on the presence of a "communicative element." Nudity with lewd, indecent intent is not constitutionally protected.

In addition, the appeals court noted that the Minnesota Supreme Court had held that "nudity is not protected expression, but conduct, which the city has a substantial interest in regulating via its police power." As a result, the appeals court concluded that "Turner's nudity does not rise to the level of constitutionally protected expression."

The city's interest in regulation must be balanced against Turner's right to free expression. The park board enacted PB2-21 to further what the park board perceived to be a legitimate governmental interest, protecting societal norms. The ordinance was carefully drawn to exclude nudity in artistic expression, thereby avoiding regulation of protected expression.

While admitting that "her conduct contained all the essential elements of the act proscribed by the ordinance," Turner maintained that she was "immune from prosecution because her conduct was for the purpose of communicating political beliefs." The appeals court rejected Turner's contention based upon the following principles enunciated by the United States Supreme Court.

When "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

Government may regulate conduct if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The assertion that all speech and all acts of "symbolic speech" come within the first amendment's barrier to prosecution is legally unsupportable. State and federal civil and criminal law regulating and penalizing such acts as libel, slander, inciting to riot, disorderly conduct, or public nuisance have been consistently upheld where the underlying law was carefully drawn to both limit the undesired specific conduct pursuant to a proper governmental objective and protect the public's general right to free expression.

Consequently, the appeals court held that "PB2-21 does not unconstitutionally infringe on Turner's right to free speech granted by the United States or Minnesota constitutions."

Turner may not knowingly violate a criminal law and escape criminal sanctions for the violation merely because she characterizes her action as "political free speech." Turner has available legal means to protest.

Turner, both before and after this appeal, is entitled to write or speak out for change. Turner can communicate with Congress, the state legislature, or the Minneapolis Park Board and advocate repeal or modification of any law or ordinance. However, while this ordinance is on the books, its violation cannot be negated by a claim that violating a law to protest it clothes the violator with constitutional immunity.

The appeals court then addressed Turner's contention that PB2-21 was unconstitutionally overbroad because "it prohibits all nudity, not just nudity with lewd, indecent intent." As defined by the appeals court "an ordinance is overbroad if it is so drawn as to sweep within its ambit protected speech or expression." Applying this definition to the facts of the case, the appeals court rejected Turner's claim that "PB2-21 is overbroad both on its face and as applied to her."

We note at the outset that this is incorrect. PB2-21 specifically allows nudity in artistic performances. Nudity in artistic expression is protected by the first and fourteenth amendments....

PB2-21 specifically states what parts of the body must be covered, the kind of covering necessary, and the age group affected. It does not purport to regulate speech. It contains an exception for nudity in artistic performance.

Courts have consistently held that non-artistic nudity, such as nude sunbathing, is not, in itself, first amendment expression. For nudity to be protected by the constitution, it must come within the narrow confines of legitimate artistic expression or performance. PB2-21 is so drawn. There is no requirement that nudity in contexts other than artistic expression must be accompanied by lewd, indecent interest for nudity to be regulated by the government.

As a result, the appeals court held that "PB2-21 does not overbroadly regulate areas of constitutionally protected conduct." Further the appeals court held that "Turner's topless sunbathing is not protected symbolic speech and we hold that PB2-21 is not overbroad in its application to her."

Finally, the appeals court addressed Turner's contention that PB2-21 violated the equal protection clauses of the United States and Minnesota constitutions because "the ordinance creates an unconstitutional gender-based classification." As noted by the appeals court, "gender-based classifications must serve important governmental objectives and must be substantially related to achievement of those objectives" to withstand constitutional challenge. Turner argued that there was "no difference between the male breast and the female breast" which would warrant a gender-based classification making women more susceptible to arrest than men under the ordinance.

Citing precedent case law from the United States Supreme Court, the appeals court concurred with the opinion of the trial court that "PB2-21 advances a legitimate governmental interest in the preservation of public decency and order."

The female breasts, unlike male breasts, constitute an erogenous zone and are commonly associated with sexual arousal. Common knowledge tells us that there is a real difference between the sexes with respect to breasts, which is reasonably related to the preservation of public decorum and morals...

There being such a difference between the breasts of males and females (however undiscernible to the naked eye of some), and that difference having a reasonable relationship to the legitimate legislative purpose which it serves, the ordinance does not deny equality of rights or impose unequal responsibilities on women. Protection of society's norms is a legitimate legislative goal. The slight difference in clothing requirements imposed on the two sexes is necessary if the legislative purpose is to be served.

[T]he Minneapolis Park Board may not make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class. But because the Equal

Protection Clause does not demand that a statute necessarily apply equally to all persons or require things which are different in fact to be treated in law as though they were the same, the Supreme Court has consistently upheld statutes where the gender classification is not invidious [i.e., based on animosity], but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.

In certain narrow circumstances, a gender classification based on clear differences between the sexes is not invidious, and a legislative classification realistically based upon those differences is not unconstitutional. When men and women are not in fact similarly situated in the area covered by the legislation in question, the Equal Protection Clause does not mean that the physiological differences between men and women must be disregarded. While those differences must never be permitted to become a pretext for invidious discrimination, no such discrimination is presented by this case. The Constitution surely does not require a State to pretend that demonstrable differences between men and women do not really exist.

Applying these principles to the facts of the case, the appeals court concluded that "PB2-21 is constitutional and does not violate the Equal Protection Clause" because "PB2-21 as drawn advances legitimate governmental objectives and is not a pretext for impermissible discrimination."

The Court finds that PB2-21 is a legislative classification based upon clear differences between the sexes. The classification is constitutional because men and women are not similarly situated in the area covered by PB2-21. PB2-21 is not a pretext for invidious discrimination. PB2-21 serves two important governmental objectives, controlling public nudity and preserving societal norms. The gender classification is substantially related to achieving those objectives.

The appeals court, therefore, affirmed "the trial court's judgment of conviction for the violation of ordinance PB2-21."