

WOMEN BUSTED FOR BARE BREASTS IN PUBLIC, NOT MEN

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On August 20, 2015, the New York Times published an article by James C. McKinley, Jr. entitled “Topless in Times Square: A Legal View.”

[http://www.nytimes.com/2015/08/21/nyregion/topless-in-times-square-a-legal-view.html?&hp&action=click&pgtype=Homepage&module=second-column-region&region=top-news&WT.nav=top-news&\\_r=0](http://www.nytimes.com/2015/08/21/nyregion/topless-in-times-square-a-legal-view.html?&hp&action=click&pgtype=Homepage&module=second-column-region&region=top-news&WT.nav=top-news&_r=0)

The article describes the “desnudas” (Spanish for naked): “young women [who] approach tourists in Times Square and pose for photos [then ask for a tip], wearing nothing but a thong and a feathered headdress, their bare breasts painted with patriotic colors in a thin simulation of a bikini top.”

According to the article, the appearance of these “women in body paint” had stirred up “many questions about civil rights,” including “gender equality” where women are prohibited from going topless, but not men. In so doing, the article references a “1992 Court of Appeals ruling on the state law said that women could indeed be topless in public.”

In fact, the 1992 referenced in the article, *People v. Santorelli*, 80 N.Y.2d 875; 600 N.E.2d 232; 587 N.Y.S.2d 601; 1992 N.Y. LEXIS 1609, did not hold that “women could indeed be topless in public.” On the contrary, the New York state supreme court simply held the State had failed to meet its constitutional burden of proof for discriminating against women in this particular instance. Specifically, the State had failed to demonstrate an important government interest to be achieved through the gender classification in the challenged state law.

In *Santorelli*, two women were arrested for baring their breasts in a Rochester public park. Their arrest was based on a section of the state penal code which prohibited the exposure of “private or intimate parts” of one’s body in public. For females, such private or intimate body parts included “that portion of the breast which is below the top of the areola.” The female defendants claimed this state law was “discriminatory on its face” because the statute defined “private or intimate parts of a woman’s but not a man’s body as including a specific part of the breast.”

As a general rule of statutory interpretation, the state supreme court would presume the constitutionality of a state law and “uphold its constitutionality if a rational basis can be found to do so.” However, in this particular instance, the state supreme court found the State had made no attempt whatsoever in the trial court and on appeal “to demonstrate that the statute’s discriminatory effect serves an important governmental interest or that the classification is based on a reasoned predicate.”

Moreover, the state supreme court found this particular penal statute "was aimed at discouraging 'topless' waitresses and their promoters." The court also cited precedent which had held this particular penal statute should not be applied to any noncommercial, perhaps accidental, and certainly not lewd, exposure alleged." As a result, the state supreme court held the law which supposedly provided the legal basis for the women's arrest was not applicable to the circumstances in this particular case. The state supreme court, therefore, affirmed the dismissal of this case.

## GO TOPLESS

Similarly, in the case of *Tagami v. City of Chicago*, 2015 U.S. Dist. LEXIS 90149 (E.D. Ill. 7/10/15), a federal district court found the government had failed to present any evidence that the "predominant purpose" of a challenged ordinance was to "combat the harmful secondary effects of public nudity."

On August 24, 2014, plaintiff Sonoko Tagami participated in "GoTopless Day" organized by "GoTopless," a non-profit organization that advocates for the right of women to appear bare-chested in public. GoTopless Day occurs at sites around the world and Tagami participated in the event from 2010 to 2013.

On August 24, Tagami was wearing opaque body paint and "protesting the existence of laws that prevented women from appearing bare-chested in public." A City of Chicago police officer cited Tagami with violating Municipal Code of Chicago § 8-8-080 (the "Ordinance"), which prohibits indecent exposure. The Ordinance provides as follows:

Any person who shall appear, bathe, sunbathe, walk or be in any public park, playground, beach or the waters adjacent thereto, or any school facility and the area adjacent thereto, or any municipal building and the areas adjacent thereto, or any public way within the City of Chicago in such a manner that the genitals, vulva, pubis, pubic hair, buttocks, perineum, anus, anal region, or pubic hair region of any person, or any portion of the breast at or below the upper edge of the areola thereof of any female person, is exposed to public view or is not covered by an opaque covering, shall be fined not less than \$100.00 nor more than \$500.00 for each offense. Municipal Code of Chicago § 8-8-080.

Tagami filed a federal civil rights claim, alleging the Ordinance was being applied to her "expressive activity" in violation of her constitutional rights.

As noted by the federal district court, the [First Amendment](#) not only "protects the expression of ideas through both written and spoken words," but also "symbolic speech, which is nonverbal activity sufficiently imbued with elements of communication." According to the court, conduct would constitute protected "symbolic speech" under the First Amendment when "(1) the conduct demonstrates an intent to convey a particularized message, and (2) there is a great likelihood that the message would be understood by those who viewed the conduct."

That being said, the court acknowledged that merely "being in a state of nudity is not an inherently expressive condition" protected by the First Amendment.

When analyzing the likelihood that those who view the alleged symbolic speech will understand the message, courts consider the circumstances surrounding the conduct at issue... [T]he timing of conduct, during or around issues of great public moment," may transform otherwise bizarre behavior into conduct that most citizens would understand.

Accordingly, the specific issue before the federal district court was "whether Tagami engaged in expressive conduct when she appeared in public wearing opaque body paint covering her otherwise bare chest during a GoTopless Day event." Within the context of a GoTopless event, the federal district court found Tagami had indeed sufficiently alleged that she had "engaged in expressive conduct protected by the First Amendment.

Here, Tagami alleges that she and other women around the world annually protest the legal prohibition of women appearing in public bare-chested by actually appearing bare-chested in public, though wearing opaque body paint. She alleges that participants' intent is to convey the message that women, like men, should be allowed to appear bare-chested in public and the act of appearing so protests this prohibition.

Having found the requisite degree of expressive conduct, the federal district court then considered whether the Ordinance violated Tagami's First Amendment right to freedom of expression. As noted by the court: "Public nudity laws such as the one at issue have consistently been deemed content-neutral statutes that regulate conduct and not expression." Moreover, the court acknowledged "a regulation of public nudity will be upheld" if the following criteria are met:

- (1) the regulation is within the constitutional power of the government;
- (2) the regulation furthers an important or substantial governmental interest;
- (3) the governmental interest is unrelated to the suppression of free expression; and
- (4) the restriction on alleged [First Amendment](#) freedoms is no greater than essential to further the government's interest."

Under the circumstances of this particular case, the court focused on the second criterion, i.e., "whether the Ordinance furthers an important or substantial governmental interest." As noted by the court, "[t]he Ordinance contains no statement of its justification and defendants fail to present any evidence of the City's justification for passing the Ordinance." In contrast, the court cited the text of another anti-nudity ordinance which had "identified two substantial government interests: preventing offense to those unwillingly exposed to nudity *and* promoting the public health, morals, and general welfare."

Similarly, in this particular instance, the federal district court found the City “must provide some evidentiary support for its contention that the Ordinance furthers the City's substantial interest in health and safety and in protecting unwilling audiences from exposure to nudity.” In so doing, the court would require the City to “produce some specific, tangible evidence establishing a link between the regulated activity and harmful secondary effects.” In the opinion of the federal district court, the City had failed to “put forth any evidence to show that its predominant purpose was to combat the harmful secondary effects of public nudity.”

According to the court, in determining the constitutionality of a particular anti-nudity regulation, judges have “been consistent in requiring that a regulating body produce some specific, tangible evidence establishing a link between the regulated activity and harmful secondary effects.”

Having found Tagami had sufficiently alleged a First Amendment claim, the federal district court denied the City’s motion for summary judgment to dismiss the case.

#### IMPORTANT GOVERNMENTAL INTEREST?

Unlike the State of New York in *Santorelli* and the City of Chicago in *Tagami*, in a number of other cases, governmental entities have indeed been able to demonstrate the requisite “important government interest” in prohibiting women, but not men, from going topless in public, particularly in public park and recreation areas. Moreover, as illustrated by the *Craft* and *Biocic* decisions described below, public agencies have been able to establish that the chosen gender classification was substantially related to achieving an important government interest.

In the case of *Craft v. Hodel*, 683 F. Supp. 289; 1988 U.S. Dist. LEXIS 3307 (Dist. Mass. 4//4/1988), the issue before the federal district court was “[w]hether, and if so, where, when and how the Constitution compels the government to allow nudity in public.”

The female plaintiffs in this case claimed “a National Park Service regulation prohibiting public nudity -- particularly the exposure of female breasts -- at the Cape Cod National Seashore” violated their “First Amendment right to free expression and their Fifth Amendment right to equal protection.” The regulation at issue, 36 C.F.R. 7.67(g) (1975), provided as follows:

Public nudity, including public nude bathing, by any person on Federal land or water within the boundaries of Cape Cod National Seashore is prohibited. Public nudity is a person's intentional failure to cover with a fully opaque covering that person's own genitals, pubic areas, rectal area, or female breast below a point immediately above the top of the areola when in a public place. Public place is any area of Federal land or water within the Seashore, except the enclosed portions of bathhouses,

restrooms, public showers, or other public structures designed for similar purposes or private structures permitted within the Seashore, such as trailers or tents. This regulation shall not apply to a person under 10 years of age.

As characterized by the court, plaintiffs effectively claimed the Regulation prevented them from using public nudity to express their views on a matter of political concern by exposing their breasts. Specifically, plaintiffs claimed “their shirtfree appearances on the Seashore have been designed to provide expressions of opposition to the exploitation and inequitable treatment of women in American society.”

As noted by the court, “nudity alone conveys no specific content to whatever message is communicated.” On the contrary, public nudity is “a medium by which a variety of messages may be conveyed.” Accordingly, public nudity could be “clothed with expressive qualities worthy of constitutional protection” under the First Amendment if considered “symbolic speech.” As described by the court, protected symbolic speech would require that “the actor intended to convey a particularized message” and “the likelihood was great that the message would be understood by those who viewed it.”

When public nudity constitutes protected symbolic speech because it expresses a political view understood as such by the reasonable observer, such symbolic speech would still be subject to reasonable time, place and manner restrictions whereby the government could legitimately prohibit public nudity.

In this particular instance, the federal district court found plaintiffs’ “shirtfree appearances at the Seashore constitute expressive conduct protected to some extent by the First Amendment.” Moreover, the court found the challenged regulation was “content neutral,” i.e., “not based upon either the content or subject matter of speech.” On the contrary, in the opinion of the court the challenged regulation “simply regulates the way in which protected activities may be carried on and it requires that they be carried on clothed.”

In evaluating the constitutionality of the challenged regulation, the court would apply the following test to determine the existence of valid time, place and manner restrictions. Regulation of protected speech must:

- a. be justified without reference to the content of the regulated speech;
- b. serve a significant or important governmental interest;
- c. be narrowly tailored to serve that interest; and
- d. leave open ample channels for communication of the information, the expression of which it restricts.

In this particular instance, the federal district court found “three substantial governmental interests are served by the Regulation”:

- (i) preservation of the natural Seashore environment and the promotion of

aesthetics;

- (ii) preservation of the Seashore as a beach available for the enjoyment of all persons; i.e. prevention of the preemptive effect nude bathing would have on the majority's use of the public beach; and
- (iii) protection of the public from the offensiveness of public nudity.

The National Park Service had contended "nudity on the Seashore is disturbing to other users, such as families, and causes them to avoid the beach." The federal district court agreed, finding public nudity could reasonably be considered "offensive conduct" within the context of the maintaining the attractiveness of the Seashore of all users. As a result, the court found "the government has a substantial interest in shielding the population" from "an influx of nude bathers/demonstrators, and their following of voyeurs."

### EQUAL PROTECTION

In their complaint, plaintiffs also alleged the Regulation violated "the equal protection component of the Fifth Amendment" because it permitted "males to walk and play and swim 'shirtfree' upon the Seashore whereas it denies women the same 'rights'." The federal district court agreed that the Regulation distinguished "between males and females and accords a 'freedom' to males that it denies to females." Accordingly, to withstand a constitutional challenge under the Equal Protection Clause, the federal district court acknowledged that "the gender classification recognized in the Regulation must [1] serve important governmental objectives and [2] must be substantially related to achievement of those objectives."

Plaintiffs claimed "the disparate treatment accorded male and female chests under the Regulation does not further an important or legitimate governmental objective." On the contrary, plaintiffs argued the Regulation "reflects archaic and stereotypic notions," perpetuating "cultural stereotypes equating the female breast and women with sexual fantasies, irrespective of the wishes of women to treat their bodies with the same freedom available to men."

In the opinion of the federal district court, the legislative objective of the Regulation was legitimate and "not based on stereotyped notions." Specifically, the court found the intent of the Regulation was "to protect the public from invasions of its sensibilities, and merely reflects current community standards as to what constitutes nudity." According to the court, the Regulation simply recognized "a physical difference between the sexes which has implications for the moral and aesthetic sensitivities of a substantial majority of the country."

As cited by the federal district court, the Equal Protection Clause "does not require things which are different in fact to be treated in law as though they were the same," including the natural "distinction between that portion of a woman's body and that of a man's torso."

The Equal Protection Clause does not mean that the physiological differences between men and women must be disregarded. Those differences must never be permitted to become a pretext for invidious discrimination. However, the Constitution surely does not require a State to pretend that demonstrable differences between men and women do not really exist...

Unlike the situation with respect to men, nudity in the case of women is commonly understood to include the uncovering of the breasts. Consequently, in proscribing nudity on the part of women it was necessary to include express reference to that area of the body.

As a result, the federal district court found the gender classification in the challenged Regulation was reasonably based on the distinct differences between male and female chests and had "a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike." Moreover, the court found the Regulation's gender based distinction was "substantially related to the achievement of the government's important governmental objective of protecting the public from invasions of its sensibilities."

In so doing, however, the federal district court in this 1988 opinion acknowledged that "nudity is a social concept, a changing social perception" which has become more liberal over time. (One need only look to what was considered acceptable bathing attire at public beaches for both men and women in the nineteenth and early twentieth century, versus the present day.) That being said, as determined by this federal district court in 1988, and arguably through the present in most public recreation areas, "community standards have determined that women's breasts are an intimate part of the human body, and that their exposure constitutes nudity." On the other hand, the court noted legislative bodies enacting public nudity laws have generally recognized that "public exposure of men's breasts may be unpalatable to some, [but] society has decided such exposure is not so offensive as to require prohibition."

As a result, the federal district court granted summary judgment to the government, effectively dismissing plaintiffs' First Amendment and equal protection claims.

## EROGENOUS ZONES

Similarly, in the case of *United States v. Biocic*, 928 F.2d 112; 1991 U.S. App. LEXIS 4015 (4<sup>th</sup> Cir. 3/13/1991), plaintiff claimed her conviction under a public nudity regulation which prohibited the public exposure of female breasts, but not male breasts, had denied her equal protection of the law.

On a summer day in June of 1989, Ms. Biocic, an adult female, was walking on the beach on the Chincoteague National Wildlife Refuge in Accomack County, Virginia, with a male companion. "To get some extra sun," as she put it, she removed the top of her two-piece bathing suit, fully exposing her breasts. She was observed in this state of partial

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nudity by an officer of the federal Fish and Wildlife Service who issued her a summons charging a violation of 50 C.F.R. § 27.83, which provides that any act of indecency or disorderly conduct as defined by State or local laws is prohibited on any national wildlife refuge.

Reiterating the reasoning described above in *Craft*, the federal appeals court in *Biocic* similarly found the gender classification in the challenged public nudity regulation was “substantially related to an important governmental interest” which did not deny females equal protection of the law.

The important government interest is the widely recognized one of protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens' anatomies that traditionally in this society have been regarded as erogenous zones. These still include (whether justifiably or not in the eyes of all) the female, but not the male, breast.

SEE ALSO:

“Does the Constitution Protect Nude Bathing at a Public Beach ?”

James C. Kozlowski *Parks & Recreation* . May 1990. Vol. 25, Iss . 5; p. 16  
<http://cehdclass.gmu.edu/jkozlows/lawarts/05MAY90.pdf>

Sunbather Gives City the Shirt off Her Back to Test Nudity Ban in Parks

James C. Kozlowski *Parks & Recreation* . Jul 1991. Vol. 26, Iss . 7; p. 24  
<http://cehdclass.gmu.edu/jkozlows/lawarts/07JUL91.pdf>

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