

Friday, November 9, 2007

If women are barred from baring their breasts, why are men permitted to bare theirs?

Bill of Rights. (From the public domain.) Despite all the inroads made over the last few decades for gender equality, I have yet to find a court opinion barring lawmakers from banning women from baring their breasts in public. Consequently, when defending against prosecutions involving women baring their breasts (whether on the beach, at a bar, in one's home when the window is open, or anywhere else), my argument focus includes: focusing on any equal protection provisions of the applicable state or federal constitutions and statutes; arguments of vagueness and overbreadth in the applicable statute or regulation (e.g., Maryland state law (aside from laws governing adult cabarets) does not say bared breasts are forbidden in public, but only talks of indecent exposure (and breasts -- which, for instance, sustain life through providing mother's milk -- certainly are not indecent); arguments that statutes permitting public breastfeeding confirm that the baring of breasts is not indecent; and arguments about vagueness in the law about how much of a breast is permitted to be exposed (e.g., whether an anti-nudity statute, read to its illogical conclusion, would prohibit the baring of even a half-inch of breast cleavage, which clearly would violate due process rights, equal protection rights, and free expression rights (in that revealing cleavage is a form of expression through fashion, at the very least; imagine, for instance, if women were prohibited from baring cleavage even at the beach)). It is bad enough that men freely are permitted to bare their breasts but women are not. It is even worse, and grossly bizarre at the very least, that in Ohio recently, barebreasted women were arrested for disorderly conduct, and an appellate court affirmed the convictions. Baring breasts certainly is not a disorderly act, particularly in this instance where the purpose of the breast baring was for a "Solidarity Potluck" in a public park, "to raise awareness of sexism and double standards. Fliers announcing the event had been distributed on the campus of Bowling Green State University." The case is *City of Bowling Green v. Lorien D. Bourne* (Ohio Sixth Appellate Dist., Oct. 26, 2007). Quoting from its opinion in *State v. Poirier*, the Ohio Sixth Appellate District in *City of Bowling Green* proclaimed: "We further note that the reason the female breast was explicitly enumerated as an 'erogenous zone' is the fact that female breasts are anatomically distinct and our society has viewed the public display of female breasts far more differently than male breasts. The female breast has traditionally been viewed as an erogenous zone. Because of the anatomical and societal differences, the government has an interest in preservation of the public decorum, decency and morals. See *Buzzetti v. New York* (C.A.2 1998), 140 F.3d 134; *Hang On, Inc. v. Arlington* (C.A.5 1995), 65 F.3d 1248; *United States v. Biocic* (C.A.4 1991), 928 F.2d 112." Id., ¶ 28." If we follow this foregoing court-quoted language to its illogical conclusion, we are back to the question of whether legislatures may even ban the baring of breast cleavage, even if it is at the beach. Moreover, even though clothed people can elicit a sexually excited response from others, that does not permit legislators to mandate the wearing of potato sacks. For the same reason, it is unconstitutional to bar the baring of breasts; now, I just need to convince judges of that. This preoccupation with barring bared breasts seems to be an unfortunate remnant of America's Puritan past. Such European Mediterranean nations as France and Italy are not burdened by Puritan pasts, and are places where women are free to bare their breasts on the beach just as much as men are permitted to do so. I have spent many total days at the beaches in France and Italy, starting at the age of fifteen, and witnessed no commotion caused by such bared breasts on the beach, where women freely make their own choice whether or not to bare their breasts. Jon Katz. ADDENDUM I - Thanks to the First Amendment Profs blog for bringing *City of Bowling Green* to my attention. ADDENDUM II - Thanks to Pete Guither from Drug War Rant, for commenting: "You're familiar with the New York Court of Appeals decision? <http://www.contra.org/lifestyles/naturist/topfree7.html>." I replied "Thanks, Pete, particularly seeing that I thought I had heard about the Santorelli case you list, but apparently used the wrong Lexis search phrases, which left me empty-handed. The citation for the Santorelli case you list is *People v. Santorelli*, 80 N.Y.2d 875, 600 N.E.2d 232 (1992). A Shepard's analysis of the case indicates that no courts outside New York have decided to follow Santorelli." ADDENDUM III - Thanks to Scott Greenfield for commenting as follows: "That was when the New York Court of Appeals, with then Chief Judge Sol Wachtler, was at the height of its independence. Unfortunately, the potential of Santorelli has never been met in New York, much to Herald Price Fahringer's dismay." Particularly since I'm not New York-barred, Scott's perspective on this matter is particularly beneficial for me.

Posted by Jon Katz in Criminal Defense at 00:00

You're familiar with the New York Court of Appeals decision?

<http://www.contra.org/lifestyles/naturist/topfree7.html>
Anonymous on Nov 9 2007, 02:29

Thanks, Pete, particularly seeing that I thought I had heard about the Santorelli case you list, but apparently used the wrong Lexis search phrases, which left me empty-handed.

The citation for the Santorelli case you list is *People v. Santorelli*, 80 N.Y.2d 875, 600 N.E.2d 232 (1992).

A Shepard's analysis of the case indicates that no courts outside New York have decided to follow Santorelli. Here are the results of my Shepard's search:

CITING DECISIONS (9 citing decisions)

NEW YORK SUPREME COURT APP. DIV.

3. Cited in Dissenting Opinion at:

Hernandez v. Robles, 26 A.D.3d 98, 805 N.Y.S.2d 354, 2005 N.Y. App. Div. LEXIS 13892, 2005 NY Slip Op 9436 (N.Y. App. Div. 1st Dep't 2005)

26 A.D.3d 98 p.145
805 N.Y.S.2d 354 p.390
2005 NY Slip Op 9436

OTHER NEW YORK DECISIONS

4. Cited by:

Seymour v. Holcomb, 7 Misc. 3d 530, 790 N.Y.S.2d 858, 2005 N.Y. Misc. LEXIS 313, 2005 NY Slip Op 25070 (2005) LexisNexis Headnotes HN1

7 Misc. 3d 530 p.534
790 N.Y.S.2d 858 p.863
2005 NY Slip Op 25070

2ND CIRCUIT - COURT OF APPEALS

5. Distinguished by:

Tunick v. Safir, 209 F.3d 67, 2000 U.S. App. LEXIS 5048 (2d Cir. N.Y. 2000) LexisNexis Headnotes HN2

209 F.3d 67 p.71

2ND CIRCUIT - U.S. DISTRICT COURTS

6. Cited by:

Galonsky v. Williams, 1997 U.S. Dist. LEXIS 19570 (S.D.N.Y. Dec. 9, 1997)

10TH CIRCUIT - U.S. DISTRICT COURTS

7. Cited by:

Moore v. Coffeyville, 1993 U.S. Dist. LEXIS 9705 (D. Kan. June 16, 1993)

ARIZONA COURT OF APPEALS

8. Cited by:

City of Tucson v. Wolfe, 185 Ariz. 563, 917 P.2d 706, 1995 Ariz. App. LEXIS 163, 195 Ariz. Adv. Rep. 54, 115 No. 33 Ariz. Bus. Gaz. 25 (Ariz. Ct. App. 1995)

185 Ariz. 563 p.566
917 P.2d 706 p.709

MASSACHUSETTS SUPREME JUDICIAL COURT

9. Cited in Dissenting Opinion at:

Cote-Whitacre v. Dep't of Pub. Health, 446 Mass. 350, 844 N.E.2d 623, 2006 Mass. LEXIS 110 (2006)

446 Mass. 350 p.411
844 N.E.2d 623 p.671

10. Cited by:

Commonwealth v. Arthur, 420 Mass. 535, 650 N.E.2d 787, 1995 Mass. LEXIS 281 (1995)

420 Mass. 535 p.540
650 N.E.2d 787 p.790

NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION

11. Distinguished by:

State v. Vogt, 341 N.J. Super. 407, 775 A.2d 551, 2001 N.J. Super. LEXIS 262 (App.Div. 2001)

341 N.J. Super. 407 p.419
775 A.2d 551 p.558

ANNOTATED STATUTES (6 Citing Statutes)

12. NY CLS Const Art I, @ 8

13. NY CLS Const Art I, @ 11

14. NY CLS CPL @ 470.35

15. NY CLS PRHPL @ 27.01

16. NY CLS PRHPL @ 27.03

17. NY CLS Penal @ 245.01

LAW REVIEWS AND PERIODICALS (14 Citing References)

18. STATE CONSTITUTIONAL COMMENTARY: HIGH COURT STUDY: NEW YORK'S COURT OF APPEALS: VITO J. TITONE: STALWART OR CURMUDGEON?, 59 Alb. L. Rev. 1803 (1996)

59 Alb. L. Rev. 1803 p.1803

19. Article: Introduction: Professionalism in the Balance?, 49 Ark. L. Rev. 671 (1997)

20. NOTE/COMMENT: NAKED BEFORE THE LAW: REALITY PORN AND THE CAPACITY TO CONTRACT, 11 Cardozo Women's L.J. 353 (2005)

21. ARTICLE: The Bona Fide Body: Title VII's Last Bastion of Intentional Sex Discrimination +, 12 Colum. J. Gender & L. 77 (2003)

22. WOMEN'S BODY IMAGE AND THE LAW, 43 Duke L.J. 113 (1993)

23. ARTICLE: MORAL NUISANCES, 50 Emory L.J. 265 (2001)

50 Emory L.J. 265 p.265

24. ESSAY: A Short Essay on the Baring of Breasts, 23 Harv. Women's L.J. 219 (2000)

25. ARTICLE: THE CASE FOR LEGAL RECOGNITION OF SAME-SEX MARRIAGE, 8 J.L. & Pol'y 61 (1999)

26. ARTICLE: FREEDOM OF DRESS: STATE AND PRIVATE REGULATION OF CLOTHING, HAIRSTYLE, JEWELRY, MAKEUP, TATTOOS, AND PIERCING, 66 Md. L. Rev. 11 (2006)

66 Md. L. Rev. 11 p.11

27. ARTICLE: NEW YORK'S CHIEF JUDGE KAYE: HER SEPARATE OPINIONS BODE WELL FOR RENEWED STATE CONSTITUTIONALISM AT THE COURT OF APPEALS, 67 Temp. L. Rev. 1163 (1994)

28. ARTICLE: FORBIDDING FEMALE TOPLESSNESS: WHY "REAL DIFFERENCE" JURISPRUDENCE LACKS "SUPPORT" AND WHAT CAN BE DONE ABOUT IT, 36 U. Tol. L. Rev. 273 (2005)

36 U. Tol. L. Rev. 273 p.273

29. ARTICLE: RES IPSA LOQUITUR (HUMOR) OGLING RECENT BARE BREAST CASES: PROHIBITIONS IN SEARCH OF A RATIONALE?, 23 Westchester B. J. 65 (1996)

30. ARTICLE: NONVERBAL COMMUNICATION AND THE FREEDOM OF "SPEECH"., 1993 Wis. L. Rev. 1525 (1993)

1993 Wis. L. Rev. 1525 p.1585

31. NOTES: Stereotyping and Difference: Planned Parenthood v. Casey and the Future of Sex Discrimination Law., 104 Yale L.J. 1875 (1995)

ALR ANNOTATIONS (1 Citing Annotation)

32. Regulation of exposure of female, but not male, breasts, 67 A.L.R.5th 431, secs. 2(b), 4(a), 12(a), 12(b)

TREATISE CITATIONS (2 Citing Sources)

33. 1-2 NY CLS Desk Ed. Gilbert's Criminal Practice Annual @ 245.01

34. 7-77 New York Criminal Practice @ 77.09
Anonymous on Nov 9 2007, 05:42

That was when the New York Court of Appeals, with then Chief Judge Sol Wachtler, was at the height of its independence.

Unfortunately, the potential of Santorelli has never been met in New York, much to Herald Price Fahringer's dismay.
Anonymous on Nov 9 2007, 12:47

Thanks, Scott- What would it take for Santorelli to reach its potential short of the return of Chief Judge Wachtler? Have a great weekend. Jon
Anonymous on Nov 9 2007, 17:47

After Judge Wachtler fell from grace, the New York Court of Appeals abandoned its independent constitutional jurisprudence and fell in line with the increasingly conservative federal courts. The more expansive state constitutional protections began to simply fade away and New York gradually fell into line, as when it adopted the rule of Whren (one of the worst decisions ever).

There was a time when New York was a leader in constitutional jurisprudence, refusing to be told what its Constitution means. Alas, those days are nothing but a fond memory.
Anonymous on Nov 10 2007, 05:47

Lorien has appealed to the Ohio Supreme Court. The docket, complete with the briefs that have been filed, is at <http://tinyurl.com/27kh2t> .

Of course, the odds are pretty small that they will take the case.
Anonymous on Dec 13 2007, 17:26

Thanks, Maxtlatl, for your excellent update. Jon
Anonymous on Dec 13 2007, 18:08