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Dirty Dancing

By: Jim Astrachan

The town of Marshall is a quiet hamlet of 1,000 citizens, nestled in the mountains of western North Carolina. It has a lovely Community Center where the town folks gather on Friday nights and dance to local bands, and a Board of Aldermen-appointed committee to coordinate events at the Community Center, with authority to allow and prohibit activities. At the Center, Citizens of Marshall can't drink, dance barefooted or bare-chested, can't sit on the rails, and can't leave cases or instruments on the dance floor.

Rebecca Willis was a Friday night regular at the Community Center, and her dance style came to the attention of the Committee, the United States District Court and the Court of Appeals. Ms. Willis was, for lack of a better description, a provocative dancer. She and her partner would gyrate, hunch up on the floor simulating unmentionable acts. She wore a very short skirt and sometimes would bend over while dancing and expose her underwear and "privates."

Half the dancing community was concerned, and the other half was appreciative. But the concerned half complained to the Committee whose emissary asked Ms. Willis to "curtail the provocativeness of [her] dance." According to the Committee, who maintained a log of such things, Ms. Willis danced even more provocatively. She objected to the Committee's characterization of her gyrations, calling her style merely exuberant and flamboyant. "A woman," she contended, "who always wears underwear and pantyhose would not expose her privates."

When Willis was banished from the Community Center she offered an apology and to dress more appropriately, but her conciliatory efforts were to no avail and she remained banished. Marshall's a small place, and there's not much opportunity for self expression outside the Center, so she hired a lawyer and sued the town asserting that the Committee's permanent banishment of her from the Center violated her substantive

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due process rights, and her First Amendment rights of free expression, of association and to receive information.

A district court denied Ms. Willis' request for a preliminary injunction. The town moved for summary judgment on Willis' constitutional claims and provided batches of anti-Willis affidavits, and although she properly requested discovery, needed to defeat the town's motion for summary judgment, the court granted the town's motion. Willis appealed.

To win her case against the prudent town she needed to prove that she was deprived of a right secured by the Constitution or laws of the United States and that the deprivation was committed under color of state law.

First Amendment.

The threshold question is always whether any protected First Amendment right is involved. If not, the inquiry ends. The First Amendment protects expressive conduct as well as speech, and the Court recognized that dancing can be protected expressive conduct, whether it be ballet, flamenco or striptease, if it is performed for the benefit of an audience. This is because, short of obscenity, the Constitution protects live entertainment.

Although Willis attracted an audience with her gyrations she was merely a recreational dancer and her conduct, though mildly expressive, was not sufficient to engage the First Amendment. Nor did Willis have any First Amendment association rights. The Supreme Court has ruled that dance hall patrons "are not engaged in the sort of intimate human relationships" that give rise to protected associated rights such as the right to associate for companionship or to engage in protected activities. Perhaps the Justices haven't seen Willis dance.

The Court recognized that because music could be a protected expression, "there is a First Amendment issue lurking in the background of this case." But it held that a prohibition of lewd, recreational dancing is really no different than the prohibition of boozing or smoking or requiring dancers to wear shoes and shirts, and is permissible.

Willis also claimed that her First Amendment rights were violated because the ban prevented her from listening to the music played at the Center. The Court recognized that the "right to hear and the right to speak are flip sides of the same coin" and that even if the speech issue is more entertainment than information the rule is the same. Still, the Court held, a right to *hear* music was not sufficient to allow the Court to scrutinize the town's lewd dancing policy because, the Court held, First Amendment scrutiny would follow only if the town's ban on Willis' dancing affects a protected *expressive* activity; listening is not the same as speaking.

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Equal Protection.

Willis also asserted that by singling her out the Committee used its power to regulate dancing arbitrarily; it did not ban her partner; it did not ban others. The Supreme Court has held:

> "The purpose of the equal protection clause…is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination…."

Willis' allegations of arbitrary singling out should have been sufficient to support her claim, but the district court granted summary judgment in favor of the Town without any evidence in the record to show that no other person was complained of. Because discovery should have been permitted to allow Willis to learn if there had been other complaints that were not acted on by the Committee, the court vacated the district court's grant of summary judgment and remanded.

Due Process.

The Supreme Court has held that the right to travel interstate is constitutionally protected, and although it has not yet considered *intra*state travel, there is some support for Willis' claim that the town's prohibition denied her intrastate travel rights. But the court held that there was no reason to decide whether Willis' right to interstate travel or a right to access the Center are fundamental, protected rights.

Unfortunately, there is no video for scholars to view to study Ms. Willis' provocative dance steps. But I think she is missing an opportunity to make some real money as a dancer, shed her recreational label and obtain protected status as a professional.

James B. Astrachan is the author of The Law of Advertising, published by Matthew Bender-Lexis/Nexis.

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