

DATSOPOULOS, MACDONALD & LIND, P.C.
MEMORANDUM

To: Dennis Lind
From: Jason Williams
Date: 11/29/2014
Re: Whether any additional actions can be taken to modify the statute on indecent exposure

Question presented

Whether steps can be made to modify the current statute in regards to indecent exposure?

Discussion

Montana's current indecency exposure statute states:

45-5-504. Indecent exposure. (1) A person commits the offense of indecent exposure if the person knowingly or purposely exposes the person's genitals under circumstances in which the person knows the conduct is likely to cause affront or alarm in order to:

- (a) abuse, humiliate, harass, or degrade another; or
- (b) arouse or gratify the person's own sexual response or desire or the sexual response or desire of any person.

(2) (a) A person convicted of the offense of indecent exposure shall be fined an amount not to exceed \$500 or be imprisoned in the county jail for a term of not more than 6 months, or both.

(b) On a second conviction, the person shall be fined an amount not to exceed \$1,000 or be imprisoned in the county jail for a term of not more than 1 year, or both.

(c) On a third or subsequent conviction, the person shall be punished by life imprisonment or by imprisonment in a state prison for a term of not less than 5 years or more than 100 years and may be fined not more than \$10,000.

The problem with this statute during the recent Missoula bike parade was there is an intent element in the exposure beyond the mere exposing act. This coupled with the First Amendment "free speech" argument made the Missoula Attorney and the other law enforcement individuals wary about enforcing it against the bike parade.

Rewording the statute to eliminate the troublesome intent element could be beneficial. However, the free speech argument also needs to be addressed. The recent phenomenon of protesting nude raises legal questions concerning conduct as protected speech and freedom of expression.

1. Speech and the freedom of expression

The Supreme Court has recognized that not all forms of expressive conduct are protected as "speech" under the First Amendment to the U.S. Constitution. In the seminal case of United States v. O'Brien, 391 U.S. 367 (1968), the Supreme Court recognized that when "speech" and "nonspeech" elements are combined in the same course of conduct," the First Amendment may protect both the speech and nonspeech aspects. Id. at 376. Nonetheless, the Court has not recognized that the right to free speech and expression is absolute. See Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) ("It is well understood that the right of free speech is not absolute at all times and under all circumstances.") There are several recognized exceptions to the right of free speech including illegal activity, fighting words, and obscenity. Danielle Moriber, Note, A Right To Bare All? Female Public Toplessness and Dealing with the Laws that Prohibit, 8 Cardozo Pub. L. Pol'y & Ethics J. 453, 468 (2010).

The level of scrutiny a court applied to a challenged law weighs heavily on whether it will be upheld or struck down, and often accounts for discrepancies between two otherwise similar laws. City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000); citing Texas v. Johnson, 491 U.S. 397, 403 (1989). If the purpose for enacting a challenged ordinance or regulation was to suppress expression, then the court will apply the strict scrutiny test. If the purpose behind enacting the ordinance or regulation was unrelated to suppressing expression, however, then a court will apply the less exacting O'Brien test.

In order for the act of communication to obtain First Amendment protection it must be considered symbolic speech because certain acts alone are not expressive conduct. United States v. O'Brien, 391 U.S. 367, 376-77 (1968). The Court in O'Brien stated that symbolic speech cases will turn on the question of whether alternative avenues of communication exist. The Court held that if there are other satisfactory modes of communication, then the conduct at issue would not be protected as long as there is a "sufficiently important governmental interest in regulating the non-speech element." Id. at 376.

The US Supreme Court has stated "we think it clear that a government regulation is sufficiently justified 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." Barnes v. Glen Theatre, 501 U.S. 560, 567, 111 S.Ct. 2456, 2461 (1991); citing United States v. O'Brien, 391 U.S. 367, 376 – 377 (1968)

The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Ward v. Rock Against Racism, 491 U.S. 781, 791-92, 109 S.Ct. 2746, 2754 (1989); citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986). Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech." Community for Creative Non-Violence, supra, at 293; Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981); Boos v. Barry, 485 U.S. 312, 320-321 (1988) (opinion of O'Connor, J.).

Consequently, when nudity is unassociated or not sufficiently intertwined with the message being protested, the nudity will be considered conduct and thus subject to government regulation. Conversely, if the nudity is sufficiently intertwined with the message being communicated, it falls within the modest segment of messages that relate to nudity, and the act will be protected as symbolic speech.

Further, even though the First Amendment applies to the federal government, the Fourteenth Amendment prohibits state governments from depriving any citizen of their liberty without due process of law, which, through analyzing the Amendment's history, has come to protect freedom of speech. NAACP v. Alabama, 357 U.S. 449, 460 (1958).

Ultimately, a proposed statute that prohibits the nudity would have to assure that it is worded to prohibit individuals from being nude, except for cases wherein the nudity is specifically related to a message that is being communicated.

1. Sample State Statutes/Codes

-Arizona

§ 13-1402. Indecent exposure; exception; classification

A. A person commits indecent exposure if he or she exposes his or her genitals or anus or she exposes the areola or nipple of her breast or breasts and another person is present, and the defendant is reckless about whether the other person, as a reasonable person, would be offended or alarmed by the act.

B. Indecent exposure does not include an act of breast-feeding by a mother.

C. Indecent exposure to a person who is fifteen or more years of age is a class 1 misdemeanor, except that it is a class 6 felony if the defendant has two or more prior convictions for a violation of this section or has one or more prior convictions for a violation of section 13-1406. Indecent exposure to a person who is under fifteen years of age is a class 6 felony.

A.R.S. § 13-1402

-California

§ 314. Indecent exposure

Every person who willfully and lewdly, either:

1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or,
2. Procures, counsels, or assists any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts, is guilty of a misdemeanor.

Every person who violates subdivision 1 of this section after having entered, without consent, an inhabited dwelling house, or trailer coach as defined in Section 635 of the Vehicle Code, or the inhabited portion of any other building, is punishable by imprisonment in the state prison, or in the county jail not exceeding one year.

Upon the second and each subsequent conviction under subdivision 1 of this section, or upon a first conviction under subdivision 1 of this section after a previous conviction under Section 288, every person so convicted is guilty of a felony, and is punishable by imprisonment in state prison.

Cal Pen Code § 314

-Colorado

18-7-302. Indecent exposure

(1) A person commits indecent exposure:

(a) If he or she knowingly exposes his or her genitals to the view of any person under circumstances in which such conduct is likely to cause affront or alarm to the other person with the intent to arouse or to satisfy the sexual desire of any person;

(b) If he or she knowingly performs an act of masturbation in a manner which exposes the act to the view of any person under circumstances in which such conduct is likely to cause affront or alarm to the other person.

C.R.S. 18-7-302

-Minnesota

617.23 INDECENT EXPOSURE; PENALTIES

Subdivision 1. Misdemeanor. -- A person who commits any of the following acts in any public place, or in any place where others are present, is guilty of a misdemeanor:

(1) willfully and lewdly exposes the person's body, or the private parts thereof;

(2) procures another to expose private parts; or

(3) engages in any open or gross lewdness or lascivious behavior, or any public indecency other than behavior specified in this subdivision.

Subd. 2. Gross misdemeanor. -- A person who commits any of the following acts is guilty of a gross misdemeanor:

(1) the person violates subdivision 1 in the presence of a minor under the age of 16; or

(2) the person violates subdivision 1 after having been previously convicted of violating subdivision 1, sections 609.342 to 609.3451, or a statute from another state in conformity with any of those sections.

Subd. 3. Felony. -- A person is guilty of a felony and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$ 10,000, or both, if:

(1) the person violates subdivision 2, clause (1), after having been previously convicted of or adjudicated delinquent for violating subdivision 2, clause (1); section 609.3451, subdivision 1, clause (2); or a statute from another state in conformity with subdivision 2, clause (1), or section 609.3451, subdivision 1, clause (2); or

(2) the person commits a violation of subdivision 1, clause (1), in the presence of another person while intentionally confining that person or otherwise intentionally restricting that person's freedom to move.

Subd. 4. Breast-feeding. -- It is not a violation of this section for a woman to breast-feed.
Minn. Stat. § 617.23

-North Dakota

12.1-20-12.1. Indecent exposure.

1. A person, with intent to arouse, appeal to, or gratify that person's lust, passions, or sexual desires, is guilty of a class A misdemeanor if that person:

- a. Masturbates in a public place or in the presence of a minor; or
- b. Exposes one's penis, vulva, or anus in a public place or to a minor in a public or private place.

2. A person is guilty of a class C felony if the person violates subsection 1 after a previous conviction for violating subsection 1, after a previous conviction for violating section 12.1-20-12.2, or after being required to register under section 12.1-32-15.

3. A person who commits a violation of subsection 1 within fifty feet [15.24 meters] of or on the real property comprising a public or nonpublic elementary, middle, or high school is guilty of a class C felony. A person who commits a violation of subsection 2 within fifty feet [15.24 meters] of or on the real property comprising a public or nonpublic elementary, middle, or high school is guilty of a class B felony.

4. The act of a woman discreetly breastfeeding her child is not a violation of this section.

N.D. Cent. Code, § 12.1-20-12.1

-Oregon

163.467 Private indecency.

(1) A person commits the crime of private indecency if the person exposes the genitals of the person with the intent of arousing the sexual desire of the person or another person and:

- (a) The person is in a place where another person has a reasonable expectation of privacy;
- (b) The person is in view of the other person;
- (c) The exposure reasonably would be expected to alarm or annoy the other person; and
- (d) The person knows that the other person did not consent to the exposure.

(2) Private indecency is a Class A misdemeanor.

(3) Subsection (1) of this section does not apply to a person who commits the act described in subsection (1) of this section if the person cohabits with and is involved in a sexually intimate relationship with the other person.

(4) For purposes of this section, "place where another person has a reasonable expectation of privacy" includes, but is not limited to, residences, yards of residences, working areas and offices.

ORS § 163.467

-Pennsylvania

§ 3127. Indecent exposure.

(a) Offense defined. -- A person commits indecent exposure if that person exposes his or her genitals in any public place or in any place where there are present other persons under circumstances in which he or she knows or should know that this conduct is likely to offend, affront or alarm.

(b) Grading. -- If the person knows or should have known that any of the persons present are less than 16 years of age, indecent exposure under subsection (a) is a misdemeanor of the first degree. Otherwise, indecent exposure under subsection (a) is a misdemeanor of the second degree.

18 Pa.C.S. § 3127

-South Dakota

§ 22-24-1.4. Indecent exposure -- Definition -- Class 1 misdemeanor

A person commits the crime of private indecent exposure if:

(1) The person exposes the genitals of the person with the intent to arouse or gratify the sexual desire of the person or another person;

(2) The person is in a place where another person has a reasonable expectation of privacy;

(3) The person is in view of the other person;

(4) The exposure reasonably would be expected to annoy, offend, or alarm the other person; and

(5) The person knows that the other person did not consent to the exposure.

Private indecent exposure is a Class 1 misdemeanor.

This section does not apply to a person who commits the act described in this section if the person cohabits with or is involved in a sexually intimate relationship with the other person.

S.D. Codified Laws § 22-24-1.4

-Texas

§ 21.08. Indecent Exposure

(a) A person commits an offense if he exposes his anus or any part of his genitals with intent to arouse or gratify the sexual desire of any person, and he is reckless about whether another is present who will be offended or alarmed by his act.

(b) An offense under this section is a Class B misdemeanor.

Tex. Penal Code § 21.08

2. Sample City Ordinance

Several cities have their own indecent exposure ordinance.

- Portland City Ordinance:

14A.40.030 Indecent Exposure. -

It is unlawful for any person to expose his or her genitalia while in a public place or place visible from a public place, if the public place is open or available to persons of the opposite sex.

- City of McRae, Georgia Ordinance

1. Findings and Purposes:

A person commits the offense of public indecency when he or she performs any of the following acts in a place where a person should reasonably expect to be in view of the public:

1. An actual or simulated act of sexual intercourse or masturbation;
2. Exposure of the genitals;
3. A lewd appearance in a state of partial or complete nudity;
4. A lewd caress or indecent fondling of the body of another person;
5. A lewd caress or indecent fondling of the sexual organs of any person, including oneself;
6. Urination or defecation; or
7. Appears wearing pants or skirts more than three inches below the top of the hips (crest of the ilium) exposing the skin or undergarments.

2. Fines and Penalties:

A citation shall be issued to the offender and the person shall be subject to a penalty of not less than twenty-five (\$25.00) dollars on the first offense and not more than two hundred (\$200.00) dollars for each subsequent offense. In addition to the fine, the court may order such person to participate in up to forty (40) hours of court approved

community service activities. Violators shall not be subject to arrest or imprisonment for the violation of this section, however, the municipal court shall have the same authority as the superior court to enforce obedience to its orders, judgments and sentences.

3. Defenses:

It is a defense under this subchapter if it is determined, after a hearing or trial, that the person was exercising rights protected by the Federal or State Constitution. Any defense under this subsection must be asserted prior to any hearing or trial in the matter.

- Spokane City Ordinance

Section 10.06.025 Indecent Exposure

A person is guilty of indecent exposure if he intentionally makes any open and obscene exposure of his person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm.

Indecent exposure is a misdemeanor unless such person exposes himself to a person under the age of fourteen years in which case indecent exposure is a gross misdemeanor on the first offense and, if such person has previously been convicted under this subsection or of a sex offense as defined in RCW 9.94A.030, then such person is guilty of a class C felony punishable under chapter 9A.20 RCW. (RCW 9A.88.010).

- Chicago Ordinance

§ 8-8-080 Indecent exposure or dress

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.

Other cities have enacted regulations against public nudity.

- Boise

Section 6-22-01 DEFINITIONS

- a. "Nudity" means 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 any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.
- b. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquets halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

Section 6-22-02 VIOLATION

It shall be unlawful for a person to knowingly and intentionally, in a public place, appear in a state of nudity.

Section 6-22-03 EXCLUSIONS

- a. This prohibition shall not apply to any child under the age of ten (10) years of age, or any person exposing a breast in the process of breast-feeding.
- b. This prohibition shall not apply to persons engaged in dance, ballet, music or dramatic performances, or artistic displays which are of serious artistic merit and are offered on premises in which the predominant business or attraction is not the offering to customers of entertainment which is intended to provide sexual stimulation or sexual gratification. This exclusion does not apply to any activities which may take place on the following premises, as defined in Boise City Code 11-01-03.01:

Section 6-22-04 CONSTRUCTION AND SEVERABILITY

It is the intention of the City of Boise that the provisions of this ordinance be construed, enforced Boise Municipal Code and interpreted in such a manner as will cause the least possible infringement of the constitutional rights of free speech, free expression, due process, equal protection or other fundamental rights consistent with the purposes of this ordinance. Should a court of competent jurisdiction determine that any part of this ordinance, or any application or enforcement of it is excessively restrictive of such rights

or liberties, then such portion of the ordinance, or specific application of the ordinance, shall be severed from the remainder, which shall continue in full force and effect.

Section 6-22-05 PENALTY

Violation of the provisions of this section is a misdemeanor punishable by a fine of up to three hundred (300) dollars and/or six (6) months in jail, or both.

3. Sample proposed legislation

Indecent exposure; exception, penalty.

(1) A person commits indecent exposure if:

(a) he or she exposes his or her genitals, pubic hair, anus or she exposes the areola or nipple of her breast or breasts with anything less than a fully opaque covering;
or

(b) he or she exposes any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, anus region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.

(c) while in a public place or visible from a public place without taking reasonable precautions to prevent exposure; and

(d) he or she disregards whether other individuals, as a reasonable person, would be offended or alarmed by the act.

(2) Indecent exposure does not include an act of breast-feeding by a mother.

(3) A person convicted of the offense of indecent exposure shall be fined

(a) an amount not to exceed \$500 or be imprisoned in the county jail for a term of not more than 6 months, or both.

(b) On a second conviction, the person shall be fined an amount not to exceed \$1,000 or be imprisoned in the county jail for a term of not more than 1 year, or both.

(c) On a third or subsequent conviction, the person shall be punished by imprisonment in a state prison for a term of not more than 5 years and may be fined not more than \$2,000.

Conclusion

Montana's indecency exposure statute could be improved if it removed the intent element, but at the same time remain neutral in its application against speech. This approach could also be done at the municipality level, although Missoula's current council member makeup would make it difficult to achieve any headway.