Slide: Portland Municipal Rule

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.

Commentary: Portland's municipal rules governing indecent exposure are governed by the Portland City Code. Portland's ban was challenged but upheld by the Oregon Court of Appeals, but the court also found that nudity as a form of protest could be protected.

Slide: Comparative Municipal Rule- Ashland

ASHLAND MUNICIPAL CODE 10.44.012
It is unlawful for any person eight years of age or older to intentionally expose his or her genitalia while in an exterior public place.

Commentary: The City of Ashland has long been known for its artsy image but it also has a public nudity ban. In 2010, the Ashland City Council adopted a citywide ban on public nudity. Prior to adoption of the 2010 code, the display of genitals was already prohibited in parks and in downtown.

The 2010 decision to expand the ban arose when a woman dubbed "the naked lady" started bicycling around the city wearing only a G-string. Other incidents leading to the ban include complaints of about a retired computer programmer visiting the city who would take nude strolls near an elementary school.

City councilors reportedly had the option to limit nudity, but decided to outlaw it altogether.

Violator is guilty of a Class III violation as defined in AMC 1.08.020 (coincides with Class C Violation in ORS)

Slide: Another Comparative Municipal Rule- Happy Valley

Happy Valley Municipal Code 9.10.010
A. It is unlawful for any person to expose his or her genitals while in a public place or place visible from a public place if the exposure reasonably would be expected to alarm or annoy another person. There is a presumption that such exposure would be expected to alarm or annoy another person under the age of thirteen (13) years.

THE NAKED TRUTH

Gus J. Solomon Inns of Court Presentation

April 21, 2015

INDEX OF DOCUMENTS

- Local ordinances and state laws on public indecency
- *Portland v. Gatewood*
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B. Unlawful exposure is a violation that subjects a person to a penalty of not more than one thousand dollars ($1,000.00). A person commits a separate violation for each unlawful exposure to another person. (Ord. 399 § 1, 2010; Ord. 364 § 1, 2007)

Slide: State Criminal Provisions

Primary criminal provision is ORS § 63.465:

(1) A person commits the crime of public indecency if while in, or in view of, a public place the person performs:
(a) An act of sexual intercourse;
(b) An act of deviate sexual intercourse; or
(c) An act of exposing the genitals of the person with the intent of arousing the sexual desire of the person or another person.

(2) (a) Public indecency is a Class A misdemeanor.
(b) Notwithstanding paragraph (a) of this subsection, public indecency is a Class C felony if the person has a prior conviction for public indecency or a crime described in ORS 163.355 to 163.445 or for a crime in another jurisdiction that, if committed in this state, would constitute public indecency or a crime described in ORS 163.355 to 163.445.

Slide: Determining When a Municipal Ordinance Conflicts with State Law- The Dollarhide–Lodi–Jackson Trilogy

Commentary: The modern law on cities' powers to create and enforce a criminal ordinance that differs from statutory offenses is shaped by three decisions involving Portland ordinances.

Slide: City of Portland v. Dollarhide, 300 Or 490, 714 P2d 220 (1986)

Commentary: Dollarhide concerned a challenge to the city's minimum penalty for prostitution.

The defendant argued that state law, which set no minimum penalty, preempted the city's authority to set a minimum penalty. The city argued that there was no conflict because its minimum penalty was still less than the state's maximum penalty.

The court noted that the constitutional assumption regarding statutory preemption of local ordinances differs for criminal and civil laws. While the court will assume that the legislature did not intend civil statutes to displace local charters or ordinances unless it makes that intention apparent, the reverse is true for state criminal law. *Dollarhide*, 300 Or at 501.

The court then formulated different tests for the definitional and penalty provisions of an ordinance that is asserted to conflict with a criminal statute. As to the definitional and prohibitory provisions of an offense, the test is whether the city's criminal ordinance "prohibits an act which the statute permits, or permits an act which the statute prohibits." *Dollarhide*, 300 Or at 502.

The ordinance at issue in Dollarhide defined prostitution in terms that were nearly identical to the statutory definition, so the court did not have to explain whether a statute or ordinance "permits" something merely by not prohibiting it. As to penalty provisions, when conduct constitutes an offense under both state and local law, the city may punish it less severely than the state does, unless the legislature has expressed a contrary intent. However, a city penalty that is greater than the state-prescribed minimum or maximum penalty for the same conduct is "incompatible" with state law, and therefore invalid. *Dollarhide*, 300 at 502.

Slide: City of Portland v. Lodi, 308 Or 468, 782 P2d 415 (1989)

Commentary: Lodi concerned the substantive definition of an offense.

A city ordinance prohibited carrying any concealed knife with a blade longer than 3 ½ inches. The defendant argued that the ordinance was preempted by state law because the statutes restricting concealed knives prohibited switchblades, dirks, and daggers, but not other knives with blades longer than 3 1/2 inches.

After reviewing the legislative history, the court agreed that, by a deliberate decision not to outlaw knives other than switchblades, dirks, and daggers, the legislature had intended to "permit" such knives. Thus, the statute preempted the ordinance. Lodi, 308 Or at 475.

Slide: "But"

Lodi relied on a liberal reading of legislative intent to occupy the field. Although the legislative history was clear that the legislature intended that the state would not outlaw the type of knife in question, whether the legislature also intended to occupy the field—that is, to prevent cities from prohibiting carrying such knives as concealed weapons—was a different question that the court did not fully address.

Slide: City of Portland v. Jackson, 316 Or 143 (1993)

In Jackson, the court offered a more nuanced version of how to determine when a state law "permits" conduct that an ordinance prohibits.

The asserted conflict was between a city ordinance that defined an offense of indecent exposure without requiring a culpable mental state and a statute that defined the crime of public indecency in similar terms but also required proof of intent to arouse sexual desire of the actor or another person.

The court interpreted "subject to" in Article XI, section 2 of the Oregon Constitution, as meaning "not in conflict with," and it identified two kinds of impermissible conflict: A city may not create a safe haven for criminals by legalizing conduct that the state has outlawed, and it may not criminalize conduct that the state has chosen to permit. *Jackson*, 316 Or at 146.

The court described three ways that the legislature could "permit" conduct.

Slide: *Jackson* Cont.; When Does the Legislature Occupy the Field?

First, the legislature may expressly occupy the field on a particular subject, as it has with firearms regulation and certain alcohol-related offenses, so as to leave little or no room for cities to define additional offenses in that field. ORS 166.170, ORS 430.402.

Second, it may expressly permit certain conduct, as it has for persons possessing a concealed weapons permit. ORS 166.370(3)(d).

Third, and more generally, the legislature may manifest its intent to permit specific conduct in some other way, as the legislative history purportedly showed it intended to do with the knives that were at issue in Lodi.

Slide: *Jackson Cont.;* Caveat

The court will not, however, infer intent to "permit" conduct from legislative silence.

When a local criminal ordinance prohibits conduct, unless the legislature has permitted that same conduct, either expressly or under circumstances in which the legislative intent to permit that conduct is otherwise apparent, the ordinance is not in conflict with state criminal law and is valid under Article XI, section 2, of the Oregon Constitution. *Jackson*, 316 Or at 149.

> In *Jackson*, even though the legislative history of the public indecency statute included the statement that an accidental or negligent exposure would not violate the statute, the court found that insufficient to establish a "political decision to permit non-sexually motivated public nudity." *Jackson*, 316 Or at 154.

Slide- Permitted Nude Areas in Portland

Portland official designated "clothing optional" beaches are:

> Collins Beach on Sauvie Island; and
> Rooster Rock State Park

Collins beach is administered by the Oregon Department of Fish and Wildlife in cooperation with the Columbia County Sheriff's office.

Portland v. Gatewood

Court of Appeals of Oregon

May 6, 1985, Argued and submitted ; October 30, 1985, Filed

CA No. A34366

Reporter
76 Ore. App. 74; 708 P.2d 615; 1985 Ore. App. LEXIS 3958

CITY OF PORTLAND, Appellant, v. MARTIN L. GATEWOOD, Respondent

Subsequent History: [***1] Argued and submitted May 6, 1985; Reconsideration Denied December 20, 1985; Petition for review denied January 14, 1986Reconsideration Denied December 20, 1985. Petition for Review Denied January 14, 1986 (*300 Or 477*).

Prior History: Appeal from District Court, Multnomah County. Frank L. Bearden, Judge. DA No. 279144.

Disposition: Reversed and remanded for trial.

Counsel: Thomas H. Denney, Assistant Attorney General, Salem, argued the cause for appellant. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Garrett A. Richardson, Portland, argued the cause and filed the brief for respondent.

Judges: Gillette, Presiding Judge, and Richardson and Van Hoomissen, Judges.

Opinion by: GILLETTE

Opinion

[*76] [**616] The City of Portland appeals the dismissal of a charge of indecent exposure against defendant, arguing that the trial court erred in granting defendant's demurrer and holding the City's indecent exposure ordinance to be overbroad. We reverse and remand for trial.

Portland City Code § 14.24.060, which defendant is accused of violating, reads:

> "It is unlawful for any person to expose his or her genitalia while in a public [***2] place, or a place visible from a public place, if the place is open or available to persons of the opposite sex."

Defendant relies on *Article I, section 8, of the Oregon Constitution* and the *First* and *Fourteenth Amendments to the United States Constitution* for his claim that the Portland city ordinance is overbroad. We address defendant's state constitutional argument first. *State v. Kennedy, 295 Or 260, 666 P2d 1316 (1983)*.

Article I, section 8, of the Oregon Constitution provides:

> "No law shall be passed restraining the free expression of opinion, or restricting [**617] the right to speak, write, or print freely on any subject whatever * * *."

Defendant argues that the ordinance is overbroad in that some of the conduct it proscribes is protected speech under the section. The trial court agreed, stating:

> "Whether or not this ordinance is overbroad is the critical issue. Does this ordinance encompass permitted behavior? Unlike *ORS 163.465(c)* which outlaws exposure of genitalia 'with the intent of arousing the sexual desire of himself or another person', Portland City Code section 14.24.060 outlaws the act of exposure itself - i.e., nudity. [***3]
>
> "In *State v. Frink, 60 Or App 209 (1982)* our Court of Appeals upheld the trial court which had granted defendant's demurrer to *ORS 167.065(1)(a)* which prohibited 'furnishing obscene materials to minors.' The challenged section prohibited distributing photographs to minors which depicted nudity.
>
> "The court in *Frink at page 212* held that the 'mere depiction of nudity may not be prohibited, because it infringes on the constitutionally protected right of free expression.' [*77] This case is not out of the wilderness, but follows cases in other states and U.S. Supreme Court cases which make nudity a form of permitted free expression. There can, of course, be some restrictions, but all examples cited by *Frink* and other cases require the addition of an erotic or obscene flavor to the act of nudity which is absent in the present ordinance. There is no

> difference in exhibiting a photograph of a nude person, showing genitals, to members of the public (as in *Frink*) or exhibiting the person to members of the public as Portland City Code section 14.24.060 seeks to prohibit. Nudity, without more, is not a crime.
>
> "The demurrer is granted and the case dismissed."

[***4] The ruling was in error.

In State v. Robertson, 293 Or 402, 412, 649 P2d 569 (1982), the Oregon Supreme Court held that Article I, section 8

> "forecloses the enactment of any law written in terms directed to the substance of any 'opinion' or any 'subject' of communication, unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach."

We explained in State v. Harrington, 67 Or App 608, 680 P2d 666 (1984), that an Article I, section 8, challenge to a statute under *Robertson* essentially involves a two-step process. The first is to determine whether the Portland ordinance is "directed to the substance of any opinion or any subject of communication." As we noted in *Harrington*,

> "*Robertson* explains the constitutionally significant distinction between legislation directed against the pursuit of a forbidden effect and a provision directed against speech itself:
>
> > '[A]rticle I, section 8, prohibits lawmakers from enacting restrictions [***5] that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences. * * * [L]aws must focus on proscribing the pursuit or accomplishment of forbidden results rather than on the suppression of speech or writing either as an end in itself or as a means to some other legislative end.' 293 Or at 416-17."
>
> 67 Or App at 611.

Defendant argues that the ordinance in question here [*78] impinges on protected conduct as a form of free expression. We think, however, that it is clear from the terms of the ordinance that it is directed against an effect, in that it seeks to proscribe a specific type of conduct or act, *i.e.*, nudity, from occurring in a public place or a place visible from a public place, which [**618] would or could have the effect of being offensive to viewers of the opposite sex. The ordinance does not in any way punish speech or the use of words in the traditional sense. [1] Therefore, under our reading of *Robertson*, the ordinance as enacted does not on its face violate Article I, section 8, because it does not proscribe speech or any [***6] other communicative act *per se*. Accordingly, we do not reach the second step described in *Harrington*. [2]

[***7] Our inquiry, however, does not end there. Once a law challenged under Article I, section 8, for overbreadth has been found to be constitutional as enacted, it still must be examined to see if "it nevertheless might be applied in a manner that would violate Art I, § 8." State v. Spencer, 289 Or 225, 228, 611 P2d 1147 (1980). That is, in addition to its permissible proscriptions, does the ordinance reach otherwise protected behavior?

The United States Supreme Court has granted protection to expressive or symbolic conduct that qualifies as speech due to its communicative character. *See* Spence v. Washington, 418 U.S. 405, 94 S Ct 2727, 41 L Ed 2d 842 (1974) (displaying of United States flag with peace symbol attached to it); Tinker v. Des Moines School Dist., 393 U.S. 503, 89 S Ct 733, 21 L Ed 2d 731 (1969) (wearing of black armbands by [*79] students to protest Vietnam war); Brown

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[1] It is on this point that we believe the trial court's reliance on State v. Frink, 60 Or App 209, 653 P2d 553 (1982), was misplaced when it ruled that "[n]udity, without more, is not a crime." In *Frink*, we held that the "mere depiction of nudity may not be prohibited" in our examination of the state obscenity statute. ORS 167.065(1)(a). Although the statute forbade "furnishing obscene materials to minors," we found the statute unconstitutionally overbroad, because "obscene materials" was not defined anywhere in the statute, and we therefore determined that the legislation impermissibly proscribed the furnishing of "*all* materials to minors depicting nudity, regardless of the context in which the nudity is presented." State v. Frink, *supra*, 60 Or App at 212. (Emphasis in original.)

[2] If legislation is found to be in violation of Article I, section 8, on its face, the second step in *Harrington* is to determine whether the legislative prohibition is within some historical exception to that constitutional provision. Although we do not reach that analytical step in this case, we do not mean to imply that the *Robertson* methodology would be unavailable in a challenge to similar legislation under different facts and circumstances.

v. Louisiana, 383 U.S. 131, 86 S Ct 719, 15 L Ed 2d 637 (1966) (sit-in by Black students to protest segregation). We recognize that the prohibited conduct at issue here, *i.e.*, appearing nude or exposing one's genitals in public, can constitute symbolic conduct and be a form of [***8] expression protected under Article I, section 8. Several examples will suffice to demonstrate the communicative aspect of such behavior: Lady Godiva's ride through Coventry to protest taxes; nude theatrical performances in outdoor arenas; or disrobing in public to protest the exploitation of females. *See State v. Nelson, 178 NW2d 434 (Iowa 1970), cert den 401 U.S. 923 (1971)*. The ordinance may therefore be said to extend its prohibition into constitutionally protected areas.

However, even if legislation is susceptible to attack for such an alleged weakness, it may be saved by a narrowing construction to bring the proscription of the ordinance within constitutionally permissible limits. *State v. Robertson, supra, 293 Or 411-13*. In fact, it is our duty to impose such a construction if it can be done without straining the boundaries of what the Portland city council sought to accomplish or what the ordinance itself conveys to a reader. *State v. Robertson, supra, 293 Or at 411*.

The authority of a city to enact reasonable legislation to regulate conduct which is thought to be detrimental to the public's health, safety, or morals is indisputable. *See City of Astoria [***9] v. Nothwang, 221 Or 452, 351 P2d 688 (1960)*; *Morris v. City of Salem, 179 Or 666, 174 P2d 192 (1946)*; *but see LaGrande/Astoria v. PER,, 281 Or 137, 576 P2d 1204, rev allowed 284 Or 173, 586 P2d 765 (1978)*; *City of Portland v. Dollarhide, 71 Or App 289, 692 P2d 162 (1984)* (Joseph, C.J., specially concurring), *rev den 298 Or 704 [**619] (1985)*. On that basis, bans on nudity *per se* have been upheld in other jurisdictions, usually in the context of constitutional challenges to ordinances or statutes dealing with public nudity, nude sunbathing or indecent exposure. *See Eckl v. Davis, 51 Cal App 3d 831, 124 Cal Rptr 685 (1975)*; *Moffet v. State, 340 So 2d 1155 (Fla 1976)*; *State v. Miller*, 54 Hawaii 1, 501 P2d 363 (1972); *State v. Nelson, 178 NW2d 434 (1970), cert denied 401 U.S. 923 (1971)*. *But see People v. Hardy, 77 Misc 2d 1092, 357 NYS2d 970 (1974)* ("nudity in itself is not prohibited and [*80] lewdness cannot be presumed from the mere fact of nudity"). [3] In relation to legislation regulating objectionable conduct, the Oregon Supreme Court has said:

> "The city's legislative judgment in the matter should be upheld unless [***10] the statute unreasonably impinges upon those elements of communication which may be incidental to the regulated conduct." *City of Portland v. Derrington, 253 Or 289, 293, 451 P2d 111, cert denied 396 U.S. 901 (1969)*.

We have similarly stated:

> "Conduct is not brought within [the] protections [of Article I, section 8] merely because it reflects particular attitudes. One may express his personality by walking the streets naked, but we may assume a municipal proscription of that act would not violate Art I, § 8." *Brookes v. Tri-Met, 18 Or App 614, 625, 526 P2d 590 (1974)*.

[***11] It is therefore entirely reasonable to assume that the Portland City Council enacted the ordinance as a measure to protect the public from the possible disruptive effects and other negative results that public nudity could create. The attempt to prevent public nudity because it may unreasonably interfere with and impose on the public's health, safety and welfare is, accordingly, within the city council's legislative authority if it does not violate the constitutional prohibitions of Article I, section 8, and restrict speech.

Defendant argues, however, that the ordinance cannot be narrowed, because it does cover instances of constitutionally protected expression, as already noted. At the outset it can be said that most of the examples defendant cites in his brief do not merit consideration, because they simply do not fall within the intended proscription of the statute as discussed

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[3] The dissent in *People v. Hardy, supra*, issued a warning regarding the effect of the ruling by the majority.

> "Thus, the 'streakers' of today may be the complacent unadorned 'strollers' of tomorrow, for whom our schools, streets, beaches, parks, and other public facilities, become a stage for display of their form of exhibitionism at the expense of others who are compelled to be a captive audience. Uninhibited by law and unconcerned for the rights of others, these individuals are allowed to foist upon society their peculiar idiosyncrasies and standards of indecency despite the fact that infringement of the rights of others by offensive conduct is not protected by the constitutional guarantee of freedom of expression." 77 Misc 2d at 1093.

above. The Supreme Court has said that there is a [*81] presumption that legislators intend to except from an ordinance's proscription "all actions the prohibition of which would be absurd." *City of Portland v. Goodwin*, 187 Or 409, 418, 210 P2d 577 (1949). [4] [**620] Furthermore, the Supreme [***12] Court stated in *Robertson* that it was the legislature's responsibility

> "to narrow and clarify the coverage of a statute so as to eliminate most apparent applications to free speech or writing, leaving only marginal and unforeseeable instances of unconstitutional applications to judicial exclusion." *293 Or at 437*.

That has recently been clarified by the court to mean

> "that a statute which reaches constitutionally protected behavior only rarely when compared with legitimate applications of the law need not succumb to an overbreadth attack. Such a statute may be interpreted as impliedly excluding the protected activity from coverage." *State v. Garcias, 296 Or 688, 699 n 10, 679 P2d 1354 (1984)*.

[***13] It is our duty to interpret a constitutionally challenged statute in a manner such that, if at all possible, its validity can be upheld. *State v. Jackson, 224 Or 337, 356 P2d 495 (1960)*; *City of Portland v. White*, 9 Or App 239, 241, 495 P2d 778 (1972). We accomplish that result by holding that the ordinance is intended to reach only non-protected public nudity and is to be interpreted and enforced accordingly. So narrowed, the ordinance does "eliminate most apparent applications to free speech or writing, leaving only marginal and unforeseeable instances of unconstitutional applications [*82] to judicial exclusion." *State v. Robertson, supra, 293 Or at 437*. [5]

[***14] We read the challenged ordinance as focusing on the goal of regulating conduct which the city council has determined to be injurious to health, safety and morals, *i.e.*, the prohibition of public nudity or indecent exposure not intended as a protected symbolic or communicative act. The ordinance is not unconstitutionally overbroad under *Article I, section 8, of the Oregon Constitution*, [6] and it was error for the trial court to sustain defendant's demurrer on that basis. [7]

[***15] Reversed and remanded for trial.

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[4] Similarly, defendant's argument that the ordinance would prohibit nudity in theatrical performances was properly rejected by the trial court, relying on *State v. Brooks*, 275 Or 171, 550 P2d 440 (1976). In *Brooks*, it was held that presentations "performed before an audience" could be differentiated from conduct or an act occurring in places where an unwilling public may be subjected to "unwanted or shocking displays." 275 Or at 176-78. It is the latter kind of nudity which the ordinance seeks to prevent.

Neither is the absence in the ordinance of a culpable mental state fatal to the ordinance, as defendant contends. The complaint in this case alleged that defendant "did unlawfully, knowingly and recklessly expose his genitalia * * *." This is sufficient under our holding in *City of Portland v. Chicharro*, 53 Or App 483, 488, 632 P2d 489 (1981) (applying state statute, ORS 161.115(2)).

Finally, despite defendant's assertions, *City of Portland v. Tuttle*, 295 Or 524, 668 P2d 1197 (1983), does not impose a blanket prohibition against applying interpretations of state statutory provisions to municipal ordinances. The "grave concerns" expressed by the Supreme Court against such an application stemmed from the peculiarities of the ordinance and statute involved in that case only. 295 Or at 530 n 7.

[5] The distinction between the present case and *State v. House*, 66 Or App 953, 676 P2d 892, *modified* 68 Or App 360, 681 P2d 173, *aff'd on other grounds* 299 Or 78, 698 P2d 951 (1984), on which defendant relies, lies in the fact that, as we construed it, the statute under consideration in *House* directly and primarily burdened speech. No limiting construction was possible. Here, by contrast, the burden on communication is ancillary to the statute's otherwise legitimate purpose. A limiting construction is permissible. *State v. Robertson, supra.*

[6] Because Article I, section 8, is more protective of an individual's rights than the First Amendment in these circumstances, there is no need to discuss defendant's federal constitutional claims separately.

[7] Our disposition of this case is pretrial. The question of whether nudity in a particular case is a symbolic or communicative act is a question of fact. We express no opinion, at this stage of the case, as to what kind of evidence at trial would serve to raise the issue or how a jury should be instructed on the question.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

STATE OF OREGON, Plaintiff, vs. JOHN E. BRENNAN, Defendant.	No. 120444581 TRIAL MEMORANDUM Trial date: 18 July, 2012

> "What a huge debt this nation owes to its 'troublemakers.' From Thomas Paine to Martin Luther King, Jr., they have forced us to focus on problems we would prefer to downplay or ignore. Yet it is often only with hindsight that we can distinguish those troublemakers who brought us to our senses from those who were simply . . . troublemakers. Prudence, and respect for the constitutional rights to free speech and free association, therefore dictate that the legal system cut all non-violent protesters a fair amount of slack."

Hon. Jed S. Rakoff, in *Garcia v. Bloomberg*, 2012 WL 2045756 (S.D.N.Y. June 7, 2012)

A. THE ORDINANCE – PCO §14A.040.030

Defendant was arrested and charged with a violation of PCO §14A.040.030, which reads:

> "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."

The simplest and most direct analysis is that required by the court of appeals decision in *City of Portland v. Gatewood*, 76 Or App 74, 708 P2d 615 (1985), *rev denied*, 300 Or 477 (1986). The court considered the ordinance[1] and concluded

> "*the ordinance is intended to reach only non-protected public nudity* and is to be

[1] Formerly numbered PCO §14.24.060 but textually identical to the current PCO §14A.040.030.

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interpreted and enforced accordingly.

* * *

> "We read the challenged ordinance as focusing on the goal of regulating conduct which the city council has determined to be injurious to health, safety and morals, *i.e*., the prohibition of public nudity or indecent exposure *not intended as a protected symbolic or communicative act*."

Id., at 81-2 (footnote omitted; emphases added). That interpretation of the ordinance is dispostive. *See*, *e.g*., *Kambury ex rel. Kambury v. DaimlerChrysler Corp*., 173 Or. App. 372, 378 n.5 (2001) *rev'd and remanded sub nom. Kambury v. DaimlerChrysler Corp*., 334 Or 367 (2002) ("Obviously, our decision . . . is controlling precedent for the. . .state trial courts[.]").

> "Of course, even if the Supreme court's decision . . .were both an innovation in Oregon law and completely indefensible analytically, we would be bound to follow it . . .*because the decision is a binding precedent of a superior court*. *Jensen v. Osburn*, 74 Or App 7, [9-10], 701 P2d 790 (1985)."

State v. Westlund, 75 Or. App. 43, 49, n 5, 705 P.2d 208 (1985) (emphasis added), *aff'd in part and rev'd in part on other grounds* 302 Or. 225, 729 P.2d 541 (1986); *State v. Murray*, 343 Or. 48, 55, 162 P.3d 255 (2007).

The same conclusion may be reached by several other routes. Its is axiomatic that, in applying a legislated law to a set of facts, *viz*., in interpreting such law, the court must give effect to the intent of the legislature, considering the text in context, legislative history if offered and, if necessary, other aids to construction. *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 610-12, 859 P.2d 1143 (1993); ORS 174.020; *State v. Gaines*, 346 Or. 160, 171-3, 206 P.3d 1042 (2009). Context, at the first level of analysis, includes case law interpreting those statutes. *Gaston v. Parsons*, 318 Or. 247, 252, 864 P.2d 1319 (1994). *See State v. Sullens*, 314 Or 436, 443, 839 P2d 708 (1992); *State v. Cloutier*, 351 Or. 68, 100, 261 P.3d 1234 (2011). At this contextual level, statutory interpretation particularly implicates the rule of *stare decisis*.

> "The doctrine of *stare decisis*, weighty in any context, is especially so in matters of statutory construction. For in such cases Congress may cure any error made by the courts. Until it does, the bar and the public are justified in expecting the

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> courts, except in the most egregious cases, neither to depart from previous interpretations of statutes, nor to give them a grudging application."

State v. Clevenger, 297 Or at 244, quoting *Cottrell v. C.I.R.*, 628 F2d 1127, 1131 (8th Cir 1980).[2] Again, the court in *Gatewood* has provided the only appellate interpretation of the ordinance, holding that its prohibition was limited to public nudity or indecent exposure *not intended as a protected symbolic or communicative act*. Thus the textual/contextual analysis of PCO §14A.040.030 confirms that the defendant's conduct, which was undisputably "intended as a protected symbolic or communicative act," is beyond the ambit of the ordinance.

Similarly, the *Gatewood* reading of the ordinance has, as a matter of law, become part of the text of the ordinance itself. "'When this court interprets a statute, that interpretation becomes a part of the statute as if written into it at the time of its enactment.' *Walther v. SAIF*, 312 Or 147, 149, 817 P2d 292 (1991)." *State v. Sullens*, 314 Or at 443. In so holding, the Court in *Walther* was quoting the decision in *State v. Clevenger*, 297 Or at 244, which, in turn, relied on the holding in *State of Oregon v. Elliott*, 204 Or 460, 465, 277 P2d 754, *cert den* 349 U.S. 929, 75 S Ct 772, 99 L Ed 1260 (1955) ("When we [interpreted a statute in a prior case] such holding became a part of the statute as if written into it at the time of its enactment."). At the time of the *Elliott* decision, there was no Court of Appeals. Since, as discussed above, the basis of that principle is found in the doctrine of *stare decisis*, it would seem that it would apply, at least at the trial court level, to an interpretation by the court of appeals as well as one by the Supreme Court.[3]

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[2]It should be noted that the ordinance was renumbered long after the decision in *Gatewood*. If the city council had found any error in the court's interpretation of the ordinance, it certainly could have corrected it. The language or the ordinance remained – and remains – the same. *See*, *e.g.*, *Murray*, 343 Or. at 55.

[3] It is true that the Supreme Court has recently retreated from the "strict application" of the prior interpretation rule in *Farmers Ins Co v. Mowry*, 350 Or. 686, 695-97, 261 P.3d 1 (2011), 695-97. That case was decided, however, in the context of the *stare decisis* effect of a prior Supreme Court decision upon that same Court's decision in a subsequent case. There does not appear to be any retreat signaled from the prior interpretation rule as it applies to trial court decisionmaking in light of prior appellate decisions.

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Applying the rule, since the court in *Gatewood* explicitly held that "the ordinance is intended to reach only non-protected public nudity," and that "appearing nude or exposing one's genitals in public, can constitute symbolic conduct and be a form of expression protected under Article I, section 8," (76 Or App at 79), the ordinance must now be read – at least approximately – as follows:

> "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, *so long as the exposure is not intended as a protected symbolic or communicative act*."

The undisputed evidence in this case will be that defendant's act of disrobing in protest of overly-intrusive TSA policies was in fact "intended as a protected symbolic or communicative act." As interpreted by the court in *Gatewood*, the ordinance must be read to exclude exposure that is intended as a protected symbolic or communicative. It is the state's burden to prove beyond a reasonable doubt that the exposure is not intended as a protected symbolic or communicative act.[4]

B. OVERBREADTH

Government has only a limited power and authority to constrain the rights of its citizens. Indeed, the entire premise of the constitutional forms of government lies in the limitation of the power of the government to impose such restrictions.

"It is axiomatic from our organic concept of constitutional government that every

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[4] Consideration of how the court in *Gatewood* reached its conclusion, and the further implications of that analysis, is unnecessary for the present purpose but is central to the considerations of the overbreadth of the ordinance as applied, discussed *post*. Since this basis for defendant's inevitable Motion for Judgment of Acquittal is subconstitutional – and, if granted, dispositive – the court may not need to reach the constitutional questions that are implicated. *State v. Barrett*, 350 Or. 390, 397-8, 255 P.3d 472 (2011); *State v. Phillips*, 235 Or App 646, 651 (2010).

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> person"s liberty is complete except as the people have granted to themselves collectively (*i.e.*, to the government) the power to restrict individual liberty. The idea is as fundamental as the Social Contract and it is embodied in the Fourteenth Amendment to the United States Constitution which forbids states to 'deprive any person . . . of liberty. . . without due process of law'."

State v. Newton, 291 Or 788, 805, 636 P2d 393 (1981). The court went on to quote with approval, at page 806, from the dissent of Harlan, J., in *Poe v. Ullman*, 367 US 497, 543, 81 SCt 1752, 6 LEd2d 989 (1961):

> " . . . this 'liberty' is not a series of isolated points . . . it is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgement must, that certain interest require particularly careful scrutiny of the state needs asserted to justify their abridgment. . ."

See also, Griswold v. Connecticut, 381 US 479, 85 SCt 1678, 14 LEd2d 510 (1965); *Roe v. Wade*, 410 US 113, 153, 93 SCt 705, 35 LEd2d 147 (1973), both cited with approval in *Newton*, at 806, note 10. Criminal laws, of course, must be scrutinized with particular care. *City of Houston v. Hill*, 482 US 451, 107 SCt 2502, 96 LEd2d 398 (1987); *Winters v. New York*, 333 US 507, 515, 68 SCt 665, 92 LEd2d 84 (1948). The criterion against which such laws are scrutinized are precisely those constitutional protections that circumscribe the limits of the permissible exercise of government power.

Government enactments may run afoul of constitutional mandates either as they are written or as they are applied, and the courts have, over the years, developed a jurisprudence for addressing those questions. *See State v. Robertson*, 293 Or 402, 407-8, 649 P.2d 569 (1982). Since the facial validity of the ordinance, as interpreted, was upheld by the court in *Gatewood*, *supra*, defendant does not assert a facial challenge to the ordinance under the Oregon Constitution but, as applied to the allegations herein, the ordinance is overbroad.

2. Oregon Constitution

Article I, §8 of the Oregon Constitution states:

> No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever, but every person shall be responsible for the abuse of this right.

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Particularly in the context of free expression, government enactments which improperly impinge on activities protected by those constitutional guarantees are said to be overbroad. Under the Oregon Constitution, the Supreme Court held in *State v. Illig-Renn*, 341 Or 228, 236-7, 142 P3d 62 (2006):

> "only statutes that by their terms proscribe the exercise of the constitutionally protected rights of assembly or expression are susceptible to a facial overbreadth challenge under Article I, sections 8 and 26. Of course, the state may apply statutes that do *not* expressly or obviously refer to assembly or expression in a way that restricts the rights guaranteed by sections 8 and 26 in some circumstances, but challengers must attack those applications of the statutes, and not the statutes themselves."

The Court elaborated on the methodology:

> "In *State v. Robertson* * * * this court established a framework for evaluating whether a law violates Article I, section 8. First, the court recognized a distinction between laws that focus on the *content* of speech or writing and laws that focus on the pursuit or accomplishment of *forbidden results*. This court reasoned that a law of the former type, a law 'written in terms directed to the substance of any "opinion" or any "subject" of communication, 'violates Article I, section 8' [unless the statute falls within an historical exception].
>
> "* * * *
>
> "Laws of the latter type, which focus on forbidden results, can be divided further into two categories. The first category focuses on forbidden effects, but expressly prohibits expression used to achieve those effects. * * * Such laws are analyzed for overbreadth:
>
> > "'When the proscribed means include speech or writing, however, even a law written to focus on a forbidden effect * * * must be scrutinized to determine whether it appears to reach privileged communication or whether it can be interpreted to avoid such 'overbreadth.' *Ibid*.
>
> "The second kind of law also focuses on forbidden effects, but without referring to expression at all. Of that category, this court wrote:
>
> > "'If [a] statute [is] directed only against causing the forbidden effects, a person accused of causing such effects by language or gestures would be left to assert * * * that the statute could not be constitutionally be applied to his particular words or other expression, not that it was drawn and enacted contrary to Article I, section 8.'"

State v. Plowman, 314 Or. 157, 163-4, 838 P.2d 558 (1992), *cert den*, 508 U.S. 974, 113 S. Ct.

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2967, 125 L. Ed. 2d 666 (1993), *quoted at* 341 Or. at 234-5; *see also Outdoor Media Dimensions v. Dept. of Transportation*, 340 Or. 275, 300-01, 132 P.3d 5 (2006).

Put another way, Article I §8 protects against two distinct infringements. First, it protects against the "enactment" of laws that violate free expression. Armstrong, "Free Speech Fundamentalism: Justice Linde's Lasting Legacy," 70 Or L Rev 855 (1991). Second, the Section protects against the "enforcement" of laws that violate free expression. *Id*. It is upon the latter protection that the defendant focuses the argument.

Two questions must be addressed. First, the nature of defendant's conduct must be assessed to determine whether or not the conduct is indeed protected under the Oregon constitution. The second question is whether or not the government enactment impermissibly encroaches on that protected activity.

It is expected that the evidence to be adduced at trial will be largely undisputed: defendant's actions were directed towards peacefully, if dramatically, protesting the overly intrusive and oft-times Draconian policies of the Transportation Security Administration (TSA) in searching airline passengers in a a manner that is supposed to give at least the appearance of doing something useful to prevent airborne terrorism, even though no one really believes it. His act of protest involved taking off all of his clothing to facilitate their search. In the present case the conduct prohibited by the ordinance and Mr. Brennan's expressive conduct are interwoven into a single piece, recognizing the currency of

> "a [once-] popular maxim, 'the medium is the message.' The expresser's medium can affect the persuasiveness of his message, the duration of its influence, and the size and type of audience which it reaches. . . .The various school boards which restricted the media employed by Wilson here, and by Keefe, Parducci, and Sterzing in the cases cited, suppressed expression which the First Amendment protects."

Wilson v. Chancellor, 418 F. Supp. 1358, 1363-4 (DCt Or, 1976)

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"The medium is the message"[5] is more than merely a formerly-faddish, largely misunderstood catch-phrase of the '60's. Rather, it describes a relationship in which information is seen to be inextricably intertwined with its context, such that the form of a medium embeds itself in the message, with the message embedded in the emdium, creating a symbiotic relationship by which the medium influences how the message is perceived and, in a very real sense, what the message means. The behavior addressed by the ordinance is inseparable and indistinguishable from the expression of opinion it manifests.

The Supreme Court considered the scope of the protections of Article I, section 8, as it relates to nudity, in two cases decided on the same day, namely *State v. Ciancanelli*, 339 Or. 282, 121 P.3d 613 (2005), and *City of Nyssa v. Dufloth/Smith*, 339 Or. 330, 121 P.3d 639 (2005), and concluded:

> ". . .Article I, section 8, announces a broad and sweeping right of an individual to free expression. As we stated in *Ciancanelli*, the words are so sweeping, in fact, that 'it appears to us to be beyond reasonable dispute that the protection extends to the kinds of expression that a majority of citizens in many communities would dislike – profanity, blasphemy, pornography – and even to physical acts, such as nude dancing or other explicit sexual conduct, that have an expressive component.' 339 Or. at 311."

Dufloth, 339 Or at 337.

This is hardly a new or revolutionary concept. Twenty years earlier, the court in *Gatewood*, 76 Or App at 79, considered the matter with regard to public nudity, under the same ordinance at issue herein, and came to the same conclusion:

> "We recognize that the prohibited conduct at issue here, *i.e.*, appearing nude or exposing one's genitals in public, can constitute symbolic conduct and be a form of expression protected under Article I, section 8. Several examples will suffice to demonstrate the communicative aspect of such behavior: Lady Godiva's ride through Coventry to protest taxes; nude theatrical performances in outdoor arenas; or disrobing in public to protest the exploitation of females. *See State v. Nelson*, 178 NW2d 434 (Iowa 1970), *cert den* 401 U.S. 923 (1971). The ordinance may

[5] McLuhan, *Understanding Media: The Extensions of Man* (1964)

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therefore be said to extend its prohibition into constitutionally protected areas." [6]

Given that the conduct at issue in this case is expressive and protected under the Oregon constitution, the analysis is again directed by the court of appeals decision in *City of Portland v. Gatewood*, *supra,* in which the court considered this same ordinance, formerly numbered PCC §14.24.060 but otherwise identical to its present incarnation, in the context of a facial overbreadth challenge. The court was understandably concerned that the scope of the prohibition of the ordinance was broad enough that, even though it might be facially neutral, the ordinance would impermissibly prohibit expressive conduct protected under Article I, §8. *Id.* at 78-79. Thus, the ordinance would have been susceptible to an overbreadth challenge *as applied* to a particular set of facts if the ordinance "unreasonably impinges upon those elements of communication which may be incidental to the regulated conduct." *Id*., at 80, quoting *City of Portland v. Derrington*, 253 Or. 289, 293, 451 P2d 111, cert denied, 396 US 901 (1969).

The *Gatewood* court approached the question in the manner prescribed by the Supreme Court in *Robertson*:

> "It is our duty to interpret a constitutionally challenged statute in a manner such that, if at all possible, its validity can be upheld. *State v. Jackson*, 224 Or 337, 356 P2d 495 (1960); *City of Portland v. White*, 9 Or App 239, 241, 495 P2d 778 (1972). We accomplish that result by holding that *the ordinance is intended to reach only non-protected public nudity* and is to be interpreted and enforced accordingly. So narrowed, the ordinance does 'eliminate most apparent applications to free speech or writing, leaving only marginal and unforeseeable instances of unconstitutional applications to judicial exclusion.' *State v. Robertson, supra*, 293 Or at 437.
>
> "We read the challenged ordinance as focusing on the goal of regulating conduct which the city council has determined to be injurious to health, safety and morals, *i.e*., the prohibition of public nudity or indecent exposure *not intended as a protected symbolic or communicative act*."

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[6] In reaching that conclusion, the court considered other, fully clothed examples of expressive or symbolic conduct that the courts have determined to be protected expressive conduct, including *Spence v. Washington*, 418 US 405, 94 S Ct 2727, 41 L Ed 2nd 842 (1974) (displaying of United States flag with peace symbol attached to it); and *Tinker v. Des Moines School Dist.*, 393 US 503, 89 S Ct 733, 21 L Ed 2d 731 (1969) (wearing of black armbands by students to protest the Vietnam war).

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Id., at 81-2 (footnote omitted; emphases added). The court embarked on the prescribed process of crafting a narrowing construction of the ordinance precisely because the ordinance, if it were allowed to reach the protected activity, would, perforce, be overbroad as applied. *Id*.[7]

It is hard to conceptually distinguish defendant's act from those cited by the *Gatewood* court as prime examples of expressive, and, hence, protected, nudity: Lady Godiva's ride through Coventry to protest taxes or disrobing in public to protest the exploitation of females. *Id*., at 78-9. If it is found, as a factual matter, that defendant's conscientious act of removing his clothing was, indeed, an act of political protest, *viz*., a symbolic or communicative act – and it is difficult to see how that finding can be escaped[8] – then it is protected under Article I, section 8, and beyond the reach of the prohibition of the ordinance, which, if applied to these facts, would be fatally overbroad. *See also City of Portland v. Hammond*, Multnomah County Case No. 0806-47870 (Opinion of Hon. Jerome LaBarre, 11/12/08, attached hereto).

C. MJOA

Defendant's Motion for Judgment of Acquittal must be granted when, viewed in the light most favorable to the state, the evidence is insufficient to support a verdict against the defendant, and a judgment of acquittal must be entered. ORS 136.445; State v. Nix, 7 Or App 383, 386, 491 P2d 635 (1971).

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Michael E. Rose, OSB #75322
Of Attorneys for Defendant

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[7]In *State v. Rich,* 218 Or. App. 642, 650, 180 P.3d 744 (2008), the court acknowledged the continued vitality of this

> "strong prudential interest in construing statutes so as to avoid constitutional infirmity. . .As we recently noted in *State v. Rodriguez*, 217 Or. App. 24, 34, 175 P.3d 471 (2007), '[T]he avoidance canon is commonly invoked when there is even a tenable argument of unconstitutionality.'"

[8] More accurately, it is the state's burden to prove beyond a reasonable doubt that Mr. Brennan's conduct was *not* an expressive act.

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I hereby certify that I have served the foregoing MOTION TO DETERMINE TRIAL PROCEDURE: SUPPLEMENTAL MEMORANDUM, by causing a true copy thereof to be:

□ MAILED FIRST CLASS, VIA THE US POSTAL SERVICE,

✓ HAND DELIVERED

to counsel for Plaintiff as follows:

✓ OFFICE

District Attorney
600 Multnomah County Courthouse
1021 SW Fourth Avenue
Portland, Oregon 97204

□ IN OPEN COURT.

on 5 March, 2015.

CREIGHTON and ROSE, P.C.

_____

MICHAEL E. ROSE OSB #75322

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State Breastfeeding Laws

- **Forty-nine states**, the **District of Columbia** and the **Virgin Islands** have laws that specifically allow women to breastfeed in any public or private location. (Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming.)

- **Twenty-nine states**, the **District of Columbia** and the **Virgin Islands** exempt breastfeeding from public indecency laws. (Alaska, Arizona, Arkansas, Florida, Illinois, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, Wisconsin and Wyoming.)

- **Twenty-seven states**, the **District of Columbia** and **Puerto Rico** have laws related to breastfeeding in the workplace. (Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Minnesota, Mississippi, Montana, New Mexico, New York, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington and Wyoming.)

- **Seventeen states** and **Puerto Rico** exempt breastfeeding mothers from jury duty or allow jury service to be postponed. (California, Connecticut, Idaho, Illinois, Iowa, Kansas, Kentucky, Michigan, Mississippi, Missouri, Montana, Nebraska, Oklahoma, Oregon, South Dakota, Utah and Virginia.)

- **Five states** and **Puerto Rico** have implemented or encouraged the development of a breastfeeding awareness education campaign. (California, Illinois, Minnesota, Missouri and Vermont.)

- **Source: NCSL, National Conference of State Legislators**

Breastfeeding mom takes Clackamas case public

Created on Wednesday, 13 August 2014 09:32 | Written by Shasta Kearns Moore |

5 Comments

It was a 90-degree sunny Sunday evening in August, National Breastfeeding Month, and the Klein family wanted to eat.

After wandering around Clackamas Town Center Aug. 3, the Beaverton residents picked RAM Restaurant and Brewery and were seated at a table near the entrance around 7 p.m., during the height of the dinner rush.

During drinks and appetizers, Kleins' five-month-old, Isaac, started to fuss. Erin Klein unhooked her nursing top and latched him on.

Photo Credit: PHOTO BY: LACEY JACOBY - Adam Klein stands with his wife, Erin, after she breastfed their son, Isaac (6 months), in their Beaverton home. Recently, at a restaurant in Clackamas, an employee repeatedly asked Erin to cover herself while breastfeeding, which is an illegal request.

"He was hungry, too, so I was feeding him," said Erin Klein, a stay-at-home mom with a professional childcare background.

"She's not very shy," said her husband, Adam Klein, who works in information technology. "She doesn't have to be and she doesn't need to be."

After a few pleasant interactions with the waiter, a manager came over and said he had been getting several complaints and asked the mother to cover herself with a blanket.

The Kleins refused, citing a 1999 Oregon law.

The Oregon Revised Statute 109.001 states simply and in its entirety: "A woman may breast-feed her child in a public place."

The manager left, but returned a few minutes later asking Erin Klein again to cover up, citing restaurant policy.

"Any time you begin a sentence with: "That may be the law, but...," you're probably making a mistake," Erin Klein said.

Adam Klein said he began to get angry and frustrated.

"I told him: 'You've got all these 72-inch TV screens, tell the customers to look at those instead of my wife's breast, which really doesn't take up that much room," he recalled. "If you really don't like it, look away."

The Kleins left upset and submitted a complaint through RAM's website. They said a district manager called and told them apologetically that the manager should have offered them a restaurant T-shirt to cover with.

"I said: "You're totally missing the point,'" said Adam Klein.

After five months of breastfeeding in public, this was the first negative reaction the Kleins said they had ever experienced.

"I understand that Clackamas is a little more conservative, but still," Adam Klein said.

"We (adults) don't eat with blankets over our head," said Erin Klein. "Ever."

Community Relations Leader Mark Schermerhorn is a spokesperson for RAM restaurants, which has 27 restaurants across the United States, including three in Oregon.

"Daily I am sure we have dozens of breastfeeding women in our restaurants," Schermerhorn said, adding that since the restaurant company started 43 years ago, the total number of babies being breastfed while at a RAM could reach into the tens of thousands. "To my knowledge, I don't think we've ever had anything quite like this."

Schermerhorn said the family-owned restaurant prides itself on being family friendly. That day, management was caught between two opposing viewpoints from its customers, and "it kind of blew up from there, I guess."

"We were fielding more than one complaint from tables that were parents and adults who had kids in the nearby vicinity that were dining with us," Schermerhorn said. "I think all we were asking for was some discretion."

"I'm pretty good at minimizing the time that my nipple is exposed," Erin Klein said, but added that Isaac popped off and needed to relatch a few times, distracted in part by incoming customers. "It's not necessarily unreasonable for a baby to eat, take a break."

Marion Rice, executive director of the Breastfeeding Coalition of Oregon, said often in cases like this, the complaining party thinks the mother is trying to draw attention to herself, meanwhile the mother is concentrated on the needs of her infant.

"This is not about mothers. This is not about breasts. It's about babies," Rice said.

BCO often aids mothers as part of its mission to educate the public about the need for cultural acceptance of breastfeeding, universally accepted in the medical community as the healthiest option for almost all babies.

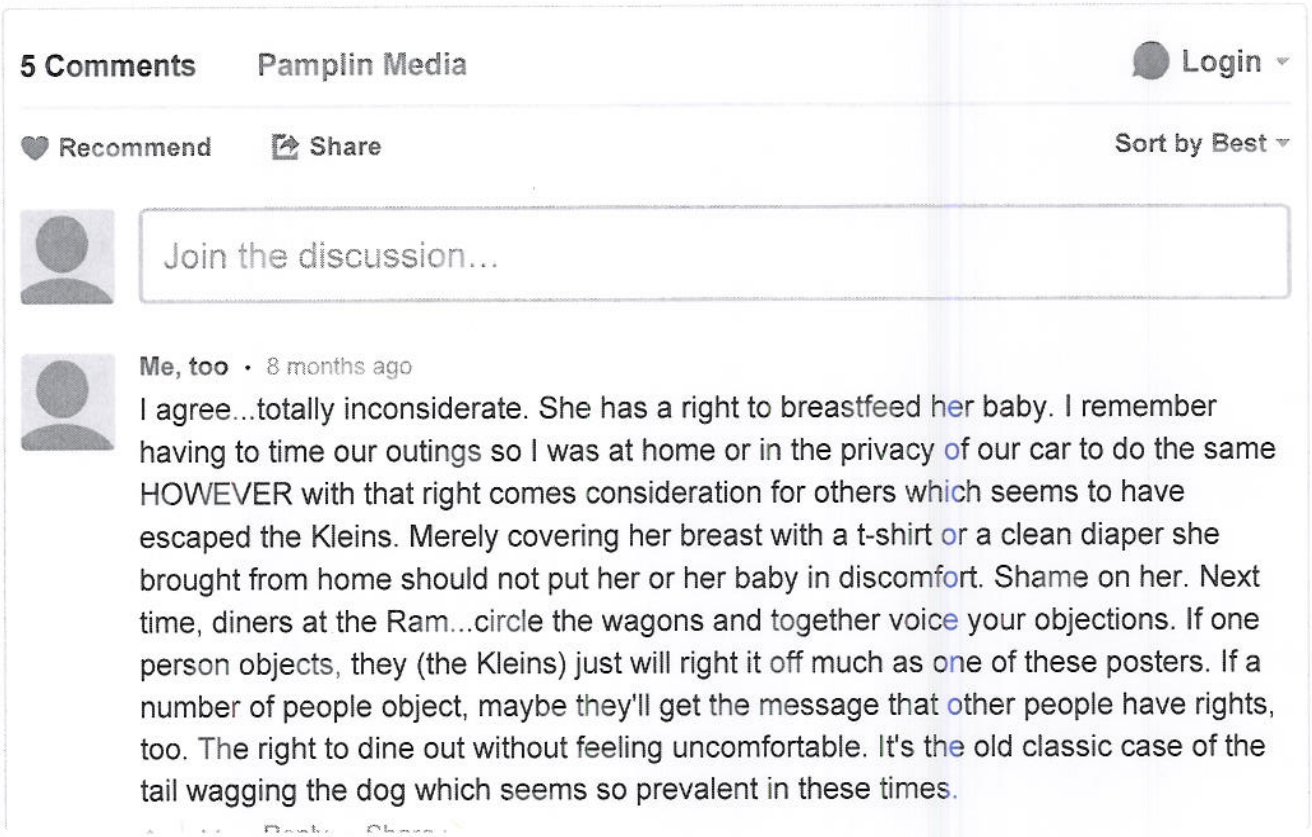
"These types of interactions with families are what perpetuate women feeling like breastfeeding is hard and that it's shameful," Rice said.

Erin Klein said she feels confident about breastfeeding in public, but worries that attitudes like those she experienced at RAM might discourage and isolate other mothers.

Adam Klein said he fully supports his wife's decision: "As much as I appreciate the female form, that's what breasts are for."

Schermerhorn, the RAM spokesperson, said the company does not have a policy about breastfeeding in its restaurant and doesn't plan to have one. He said he thinks this was a unique situation and that if management had reacted differently, the complaining parties would have been equally upset.

"We want everyone in our restaurants to have an enjoyable experience and they are entitled to that," he said.



Lactation and The Law

By Jake Marcus, J.D.

Most women who breastfeed their children will, at some time or other, find it necessary to nurse their children outside of their homes. For most women who nurse in public places, feeding their children will be no more stressful than nursing at home. Other people often do not notice when someone is breastfeeding near them, and those who do notice are generally indifferent or even supportive. All too often, however, we read stories of women who have been told to use a bathroom to nurse their children, asked to cover themselves and their child with a blanket, or told they must leave a place because they want or need to nurse.

"I have the right to breastfeed anywhere I have the right to be" has become the rallying cry of mothers who breastfeed outside their homes. But is this true? And if it is true, what can be done if someone interferes with that right while a woman is breastfeeding in a public space?

There are no laws in the US forbidding breastfeeding outside of the home, and only two states in which laws place any limitation on the way in which public breastfeeding may be done.[1] However, in the absence of a law establishing and protecting the right, a woman who breastfeeds in a public accommodation—a privately owned place open to the public, such as a restaurant or shopping mall—might lawfully be asked to leave, either by the owner or in accordance with the owner's instructions. If she refuses, she might be removed by the police or placed under arrest for trespass. Without a law to protect her, a woman breastfeeding in a public place such as a park, or state-owned properties (e.g., a courthouse), risks removal by the police and potentially (though this is rare) a charge of some form of indecent exposure. A basic maxim of American law is that a right without a remedy is no right at all.[2] In plain terms, this means that although you may have a "right" to do anything not otherwise forbidden by law, if you do not also have a legal protection against someone interfering with that right, your ability to exercise it may be limited.

What Do State Public Breastfeeding Laws Say?

State laws that protect public breastfeeding fall into three categories. Currently, the strongest state laws are those that both protect a woman's right to breastfeed anywhere she or her child have a right to be, regardless of whether the breast is showing, and that also give the woman the power to bring a legal action against anyone who interferes with her breastfeeding.[3] Other state laws establish a woman's right to breastfeed in public, but don't provide a way for her to enforce this right. The third category specifies that the act of breastfeeding is not indecent exposure (sometimes given other names, but always referring to the exposure of body parts), and prevent a woman from being charged with a sex crime for breastfeeding.

What Does "Enforcement" Mean?

In Vermont, a woman whose right to breastfeed has been violated "may file a charge of discrimination with the human rights commission … or may bring an action for injunctive relief and compensatory and punitive damages and any other appropriate relief in the superior court of the county in which the violation is alleged to have occurred."[4] She may also seek an order for the offending party to pay her attorneys' fees.[5]

This statute enabled Emily Gillette to file a complaint against Freedom Airlines and Delta Air Lines before the Vermont Human Relations Commission in 2006. Gillette, a mother from New Mexico, was removed from a Freedom Airlines flight, while it was still on the ground in Vermont, for refusing a flight attendant's demand that she cover herself while breastfeeding her child. Without the law, she might have been left only with the statement of a Delta spokesperson (Delta had an agreement with Freedom to carry its passengers) that "Delta Air Lines fully supports a mother's right to breast-feed on board our aircraft, and we were very disappointed in the decision to move Ms. Gillette from the flight."[6]

Gillette and her family were not only humiliated by an airline employee, but had to wait until the next day for a new flight. Other than a few public words, the airlines have offered her nothing, and in the absence of a court or commission ruling, there are no guarantees that a Freedom or Delta employee will not behave the same way in the future. **[UPDATE: This case settled in 2012 for an undisclosed amount, none of which was paid by Delta. Delta has had no policy changes and repeated allegations from other women of discriminatory conduct.]**

In the other states that currently have enforcement mechanisms for their public breastfeeding laws, the possible awards include an injunction—a court order that the discriminatory behavior stop immediately—or, in a few states, a fine. New Jersey law, for example, imposes possible fines "not to exceed $25.00 for the first offense following initial notification, and not to exceed $100.00 for the second offense, and not to exceed $200.00 for each offense thereafter."[7] Laws in some states also create a private right of action for someone who has suffered discrimination, which means that a woman may file a lawsuit to recover money damages.[8] The stress, embarrassment, and humiliation that a woman may suffer when she is harassed is difficult to quantify in dollars, but the fact is that in many other contexts, our state and federal courts make these determinations every day. Often, the threat of having to defend against a lawsuit will motivate the offending party to settle the case. Most state laws enforcing protections for nursing in public also include the right to recover attorneys' fees and other costs incurred in bringing a complaint or lawsuit.

What If the Public Breastfeeding Law Has No Enforcement Provision?

Most state laws protecting the right to breastfeed outside the home do not have enforcement provisions. However, this does not mean that there is nothing a nursing mother or her supporters can do. In a heart-wrenching incident last April, Jessica Swimeley was told to stop nursing her 17-month-old son, Tobin, in a common area of the Ronald McDonald House of Houston, Texas. What made this story particularly compelling was that Tobin and his family were staying in the House because Tobin was recovering from surgery to remove a brain tumor. According to his family, he was in such great post-surgical pain that breast milk was all that he could consume and nursing was his only comfort. Although the facility later denied it, Tobin's family insist that they were told by the Ronald McDonald House administration that they would be evicted from the facility if they refused to comply with what was called an "oral guideline" forbidding breastfeeding anywhere other than in the family's private room—in Tobin's case, a three-story ride on a slow elevator.

Texas state law provides that a "mother is entitled to breast-feed her baby in any location in which the mother is authorized to be."[9] Unfortunately, however, the law does not contain a penalty for violating it, or provide for a department in the state government to enforce it. But this didn't stop Swimeley's sister, Melanie Mayo-Laakso, who had pulled the Texas law up on her laptop computer to show facility staff as soon as her sister was told to stop nursing. Mayo-Laakso took her sister's story to the Internet, where her request for help from breastfeeding supporters resulted in so many phone calls and e-mails that Ronald McDonald House of Houston reported that its server crashed and required repair. After a tense few days, facility administration called a meeting with the family, at which representatives from La Leche League International were present to support Tobin's mother and aunt.

The outcome of the meeting was highly controversial. It was agreed that Swimeley (who was also nursing Tobin's twin brother) and Mayo-Laakso (who was nursing her own three-year-old daughter) could remain in the facility and could breastfeed in common areas. However, both women would be required to announce to all present in the room that they were going to breastfeed, so that anyone who did not wish to be present could leave. The mothers were also told to breastfeed "discreetly." While the definition of "discreetly" was left up to the mothers, the administration reserved the power to stop the public nursing if it received complaints about a lack of discretion on the part of the mothers. Also of note is that the permission to breastfeed applied only to Tobin's family. The Ronald McDonald House administration would not commit to a written policy concerning breastfeeding, or describe the rules that would apply to nursing families in the future.

Would this family have been forced to rally public support on its own, had Texas law contained an enforcement provision? Clearly, the answer is "no." Would the facility have been allowed to place restrictions on the way these moms breastfed, had there been a way to enforce the law? Again, probably not.

What About Indecent Exposure?

No nursing mother or supporter of breastfeeding would consider the act of breastfeeding indecent exposure.However, in the process of latching a child on to the breast or while nursing a squirming child, it is certainly possible that some or all of the mother's breast

could be revealed to an onlooker. While I could find no reported case of a mother being criminally charged with indecency for breastfeeding outside the home, the possibility exists.

In 2003, Jacqueline Mercado temporarily lost custody of her two young children after she was reported to Child Protective Services in Richardson, Texas, by an Eckerd drugstore clerk who had processed photographs taken of Mercado breastfeeding her son, then one year old. Mercado and the children's father, both natives of Peru, were arrested and charged with "sexual performance of a child," a felony for which they could have served 20 years in prison.[10] It took six months for the local district attorney to drop the charges and for the couple to regain custody of their children.

Unlike Alaska, in which a law explicitly states that breastfeeding is not "lewd conduct," "lewd touching," "immoral conduct," or "indecent conduct,"[11] most states do not protect nursing mothers from prosecution under indecency laws. Though the Mercado case was unusual, the absence of explicit legal protection made it possible.

What About Federal Law?

When Rhea Wolf was told that she needed to cover herself or go into the bathroom as she prepared to latch her daughter, Scarlett, on to her breast, she knew that her right to breastfeed was protected by Oregon law. What she didn't realize, as she refused the demand made by a receptionist in the otherwise empty waiting room of an Internal Revenue Service office in Portland, was that she was also protected by federal law, which states: "Notwithstanding any other provision of law, a woman may breastfeed her child at any location in a Federal building or on Federal property, if the woman and her child are otherwise authorized to be present at the location."[12] Unfortunately, this federal law lacks an enforcement provision.

Even though Wolf continued to breastfeed her daughter under the hostile glare of the flustered receptionist, Wolf wrote a letter to the director of the Portland IRS office reporting the fact that, in violation of Oregon law (which also has no enforcement provision), she had been told to stop. She also asked that the office adopt a clear policy, and that employees be trained in the law regarding breastfeeding. She never received a response, and plans to continue writing to higher authorities within the IRS until someone replies.[13] **[UPDATE: while Wolf never received a response from the IRS in writing, she did learn that the employee who discriminated against her was dismissed.]**

What To Do in States With No Enforcement Provision or No Breastfeeding Law

Even without an enforcement mechanism, a law clarifying the right to breastfeed should always be cited in any complaint made about harassment. Though she may never need to use them, every nursing mother should know her state's laws regarding breastfeeding. Most discrimination can be resolved by reporting it to the person in the highest position of authority where the incident has taken place. A waiter or store clerk does not have the authority to ask a mother to stop breastfeeding, regardless of the breastfeeding law. A mother should always insist on speaking to the owner of a public accommodation. In some situations, that may mean going to a board of directors of an organization. A worker does not necessarily represent the views of the owner; the person with power may support breastfeeding or simply want no trouble.

In Pennsylvania, a state with no breastfeeding law, a mother was harassed by a teacher for breastfeeding her infant while her older child attended a class in a nonprofit community center. She first attempted to settle the matter by negotiating with the teacher and the director of the community center. When that failed, she wrote them letters documenting the exchange and requesting a change in policy. When that was unsuccessful, she went to an attorney, who wrote to the board of directors of the community center, threatening to file a lawsuit for infliction of emotional distress because the teacher had yelled at the mother, embarrassing her in a group of other parents. Not wanting the expense and negative publicity of a lawsuit, the center's board of directors—which, according to its lawyer, had no objection to breastfeeding at the center—quickly settled the matter by issuing a written apology to the mother and posting a breastfeeding policy at the center that specifically stated that breastfeeding was welcome.

Sometimes, harassment of a woman for breastfeeding violates other state laws, such as those relating to the infliction of emotional distress. Recently, a mother in Alabama reported that, while she was nursing in a restaurant, a waitress placed dirty dishtowels on her baby's head.[14] Under some state laws, an unwanted touching, particularly with an object, might be considered battery or assault. In the absence of an enforcement provision for a clear state law protecting the right to breastfeed in public, a mother must decide how comfortable she is with the publicity that might follow drawing attention to discrimination. Leigh Bellini, whose harassment at a Pennsylvania shopping mall inspired a large, well-publicized nurse-in, says, "Every time someone looks my way, I think to myself ?here we go again,' especially if it is a security guard. I really hate leaving the house with the kids." But, Bellini says, she continues to speak publicly about the need for a breastfeeding law.[15] Rhea Wolf says she will continue to fight because "I don't want women to be bullied." Wolf believes that harassment "leads to women deciding not to breastfeed."[16]

The Power of Power

When Emily Gillette was forced off that Freedom Airlines flight, she didn't know she could bring a legal action against the airline under Vermont law, an option she does not have in her home state of New Mexico. She called and wrote to Delta Air Line officials about her experience but received no satisfactory response. "I felt I had no power against this very big, very powerful organization," she says. When she hired a lawyer to help her proceed under Vermont's public breastfeeding law, her position changed. She says, "I don't think anything would have happened without this law," and describes it as "a godsend" and "the only way to hold an industry accountable."[17]

Delta and Freedom recently lost their attempt to have the Gillette complaint dismissed. Despite this preliminary defeat, the airlines involved have yet to approach Gillette or her lawyer with any offer to settle the matter. Gillette's lawyer, Elizabeth Boepple, has stated that it is "evident from the Airlines' utterly superficial responses and complete lack of attention to this case that they simply do not care about what happened to Emily and her family. This is an appalling example of two corporations' callous disregard for their actions and adds to the humiliation Emily and her family experienced when they were thrown off the plane."[18] When asked what is her best hope for an outcome to the complaint, Boepple says, "First, to see these two airlines become the leaders in the industry as proponents for accommodating a woman's right to breastfeed when on their airplanes or in their airport terminal locales, through policy and training of their employees. Second, a public apology to not only Emily but all mothers who breastfeed their children. Third, a monetary settlement that makes Emily and her family whole. And finally, a punitive monetary penalty because the original act of kicking Emily and her family off the plane was so outrageous coupled with the callous disregard the airlines have shown since then."[19] Under Vermont's law, a change in policy and practice while the airlines' planes are in Vermont, and the monetary payments, are very real possibilities. The rest will depend on the laws in the other states in which the airlines land their planes.

For Gillette, the case is about more than what happened to her. She knows other women who have been discriminated against but did not take further action, and have been left with feelings of anger and guilt. "Not following through is an easy space to fall into," she says.

The Future

When Emily Gillette was forced off the plane in Vermont, more than 800 breastfeeding supporters nationwide attended nurse-ins at Delta terminals. The harassment of Leigh Bellini brought over 150 people together just a week later, and the actions by Ronald McDonald House of Houston resulted in a server-crashing flood of e-mail within days. Several state legislatures, including those of Pennsylvania and Texas, are currently considering creating or strengthening their states' breastfeeding laws.

Whether breastfeeding advocates write letters, make phone calls, call legislators, seek help from other breastfeeding supporters, hire a lawyer, contact the press, or organize a nurse-in, there may be stress and hardship, but there are also community and power, and often, much-needed change.

NOTES

1. Under Illinois law, a mother's right to breastfeed in public is protected, but "a mother considering whether to breastfeed her baby in a place of worship shall comport her behavior with the norms appropriate in that place of worship." 740 Illinois Consolidated Statutes 137 (2004). Missouri law also protects the right to breastfeed in public, but requires that it be done "with as much discretion as possible." 191 Missouri Revised Statutes 191.918 (2006).

2. See Marbury v. Madison, 5 US 137, 163 (1803): "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy . . . whenever that right is invaded."

3. A child also has a right to breastfeed, but no law in the US is currently drafted to protect the right to breastfeed in public, from the child's perspective.

4. 9 Vermont Statutes Annotated 4506 (2002).

5. Ibid.

6. Cecilia Kang, "Mothers Rally to Back Breast-feeding Rights," *The Washington Post* (22 November 2006).

7. 26 New Jersey Statutes Annotated 4B-5 (2006).

8. See, e.g., Hawaii Revised Statutes 489-22.

p. Texas Health & Safety Code 165.002 (2001).

10. Thomas Korosec, "1-Hour Arrest: When Does a Snapshot of a Mother Breast-feeding Her Child Become Kiddie Porn? Ask the Richardson Police," *Dallas Observer* (17 April 2003).

11. Alaska Statutes 29.25.080 (1998).

12. Public Law 106-058, sec. 647 (1999).

13. Personal communication (24 April 2007).

14. Nancy Glasscock, "Protest Smaller than Planned," *The Cullman [Alabama] Times* (15 March 2007).

15. Personal communication (16 April 2007).

16. See Note 14.

17. Personal communication (26 April 2007).

18. Personal communication (27 April 2007).

19. Ibid.

This article was originally published in *Mothering* magazine, July/August 2007. This article has been updated by Jake Marcus since original publication. (c) Jake Marcus. *See also* "Lactation and the Law Revisited" on this website and when in doubt go to the state page on this site.

28 Responses to "Lactation and The Law"

1. *Top 5 Tips for Working and Breastfeeding | Best for Babes* says:
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3. *Working and Pumping Series – Breastfeeding and the Law (Part 1 of 5) | Little Legal* says:
   February 6, 2012 at 2:08 pm

   […] laws in the United States including their enforcement provisions.* Upon reading her website and this excellent article in particular, I decided the best thing to do would be to scrap 95% of what I'd written and […]

4. *Mandi* says:

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McMINNVILLE, Ore. -- A group of mothers staged a "nurse-in" at Goodwill in McMinnville after an employee there sent out a negative tweet about a breastfeeding mom.

"So I totally had a lady come through my line while she was breastfeeding her baby," the tweet read, with the hashtag #SawHerNipple.

When asked why she would shame the customer on a public forum, she replied that the woman shouldn't have taken her baby shopping.

Goodwill suspended the employee afterward.

Then an employee elsewhere in the company added to the controversy by posting from the Goodwill Twitter account that "breastfeeding is a natural thing, but it should be done in a private place."

But Oregon law protects the right of nursing mothers to breastfeed in public. Goodwill has since apologized for that employee's response, saying it was unacceptable and doesn't represent the company's beliefs or policy.

"We do feel horrible that any of our shoppers are made to feel bad. It never should happen," said spokeswoman Dale Emanuel. "We hope people understand that we support them and we've never not supported them."

Signs were placed in front of the McMinnville store Friday, reading, "Goodwill respects women's right to breastfeed."

The nurse-in was held Friday afternoon, with protesters hoping the store will change its response to breastfeeding mothers in the future.

Nearly 100 moms brought their babies to the nurse-in. Goodwill provided refreshments.

"Unfortunately this society sexualizes breasts," said Jessica Gonzales, who organized the nurse-in. "If they were in a strip club uncovered or if you were in a very skimpy bikini, it wouldn't be a problem. But the fact that you're feeding your child becomes a controversy, which to me just seems silly."

The woman at the center of the controversy, mother of two Emma Ingram (*pictured below*), said she learned of the original tweet from a friend, and then found out it was about her. She said she is not mad at the employee; she still plans to shop at the store.

Ingram also said she welcomes the public discussion about the stigma associated with breastfeeding.

"Hopefully it opens up a lot of conversation within many families, why they feel certain ways about public breastfeeding and hopefully it will change people's minds about it," she told KGW. "People are trying to shame mothers. I don't feel shamed because I'm going to do what I'm going to do, no matter what everyone else thinks."

Another woman who spoke with KGW Friday said she breastfed all three of her children, but not in public places.

"I think it's a private thing," Sally Berkey said. "If you're breastfeeding in public, in a line, there's no need for that. The baby can wait five minutes until you get through your line. I very rarely see people trying to bottle feed in a line. I don't see that. They wait until they get to their car."

In a poll on debate.org, about 64 percent of respondents said breastfeeding in public is appropriate.

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