'Or' = 'And'

BY STEPHEN A. SAVICKAS

An Introduction to the First Amendment

Conceived in the War for Independence

During the American Revolution, the person feared by the crowned heads of Europe as "the most dangerous man in America" was the colonial printer and journalist, Dr. Benjamin Franklin.[1] Dr. Franklin published 126 controversial newspaper articles between 1765 and 1775. Through articles entitled "On the Propriety of Taxing America" and "Rules by Which a Great Empire May be Reduced to a Small One," among others, he struck His Royal Majesty's nerves; unleashed the righteous might of captive voices; and laid the groundwork for free speech in the United States. Engraved on Houdon's 1778 bust of Franklin is the epigram, attributed to Turgot: "Eripuit coelo fulmen mox aceptra tyrannis" (He snatched the lightning from the skies, then the scepter from tyrants).

Official Birthday

September 25, 1789: In the wake of three and a half months of proposals and a week of debate behind closed doors, Congress passed the Bill of Rights—the First Ten Amendments to the Constitution of the United States (including the First Amendment, originally "Article Third")—ratified by the states in 1791. Forty-four years later, the first U.S. Supreme Court decision on free expression was issued in 1835.

21st Century Status

The First Amendment right to freedom of speech is guaranteed to citizens of the states by the Fourteenth Amendment.[2] While "speech" is often misinterpreted to mean only spoken or printed words, expressive conduct that is not obscene is also a form of speech equally protected from the "speech police" by the First Amendment,[3] because gestures can be the "equivalent" of words.[4]

In the landmark decision *Miller v California,*[5] Chief Justice Burger set forth the framework for regulating expression: "State statutes designed to regulate obscen(ity)...must be carefully limited...the *conduct* must be specifically defined by the applicable state law, as written or authoritatively construed (by the state Supreme Court)."[6]

Case Study in Free Expression

Since the Michigan Supreme Court's 1984 decision in *Re: Certified Question,* close scrutiny of case law reveals convictions (under the "indecent exposure" statute) have been upheld on appeal by Michigan's highest court—*only if* the exposure is both "open" *and* "obscene."

Five years ago in Grand Rapids, pursuant to an unprecedented search warrant,[7] city police officers raided the home of Tim Huffman, an amateur cable TV show producer. As evidence of alleged "indecent exposure," police seized a videotape of a non-obscene program titled "The Dick Smart Show," cablecast on public access channel 25 (GRTV) at about 11:00 p.m. on Friday, April 7, 2000.

Serial motions to dismiss the case, to quash the search warrant,[8] and to suppress the videotape were repeatedly denied at the district and circuit court levels. Ironically, Huffman—a descendant of the nation's native inhabitants (American Indians)—is the first American citizen ever convicted of "indecent exposure" on the basis of the content of a non-obscene late night TV show.

The U.S. Supreme Court ruled long ago that indecent broadcasting "confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment right of (the) intruder."[9] Huffman contends that his criminal prosecution contravenes the "least restrictive means" test imposed on the state by the High

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

Court. In May, the Michigan Court of Appeals denied a bid by the ACLU to vacate Huffman's conviction. Further appeals are expected. The ACLU maintains that the indecent exposure statute does not apply to the mass medium of cable TV programmings; or, if it does, it violates the First Amendment's protection of non-obscene expression.

Statutory Construction v The First Amendment

Currently, the pertinent part of Michigan's indecent exposure statute is phrased in the disjunctive: "Any person who shall knowingly make any open *or* indecent exposure." A conviction carries potential punishment of up to life imprisonment.[10]

In contrast, the original statute of 1846 is stated in the conjunctive: "[I]f any man or woman . . . shall designedly make any open *and* indecent or obscene exposure."[11] The legislative intent of the statute was to codify the common law offense of indecent exposure, dating to 1663.[12]

"Open and *indecent*" exposure has been judicially repealed. Instead, "open and *obscene*" exposure is now proscribed. More than two decades ago, a federal district court judge assigned to a nude-dancing case[13] submitted to the Michigan Supreme Court a certified question asking how the words "'open' and 'indecent exposure'" should be defined.[14] Justice Ryan, writing for the majority in *Re: Certified Question,* deferred to federal Supremacy on the issue, reasoning that the constitutionality of Michigan's indecent exposure statute "is not about Michigan Law at all, but about the constitutionality of the Michigan statute under the First Amendment to the United States Constitution, *a question of federal constitutional law.*"[15]

Chief Justice G. Mennen Williams joined in a concurring opinion by Justice Boyle, clarifying that the statute shall henceforth solely ban open and obscene (as distinguished from indecent) exposure: "The spirit and purpose of the indecent exposure statute, is to proscribe the *unrestricted display of obscene conduct:*"[16]

> *Therefore, we announce today, that prospectively from the date of this opinion, MCL 750.343a; MSA 28.575(1), shall be construed in conformity with the minimum standards set forth in* Miller v California, *supra, and the term "indecent exposure," shall incorporate the* Miller *definitions to proscribe the following types of conduct only:*
>
> *patently offensive exhibition of ultimate sex acts, normal or perverted, actual or simulated;*
>
> *or, patently offensive exhibitions of masturbation or excretory functions, and lewd exhibition of the genitals.*

From a practical vantage point, the concurring part of J. Boyle's minority opinion, in conjunction with the holding of J. Ryan's majority opinion, is an "authoritative construction"—consonant with earlier reasoning of a majority opinion by the Michigan Supreme Court—taking precedence over the strict letter of the statute:

> *The popular use of (the disjunctive) "or" and (the conjunctive) "and" is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context.*[17]

Regarding the "open" element of the indecent exposure statute, the majority of the Michigan Supreme Court has never strayed too far afield from the following jury instruction (upheld in 1925):

> *The term "openly" as used in this information and in the law under which the prosecution is had, means public in the sense that it was not concealed, that it was not private, that it was made in such a place and such a manner as to be a public exposure, but that it was made publicly to the people who were there in view, and by that, gentlemen, is not meant necessarily that it was a public ground or in a public place in the sense of its being upon public property. It may have been upon private property but it must have been openly and publicly with relation to people that were there situate.*[18]

An evaluation of whether the setting of an obscene exposure is "open" is "suggested as a less misleading way of (differentiating from) what is meant by 'in private.'"[19]

Problems with ambiguous statutory language—sloppy legislating—are not new. In 1857, the state legislature passed an act to "reprint without alteration" the Michigan Statutes of 1846, reformatted into a two-volume set. In the preface, the compiler (legal scholar Thomas McIntyre Cooley) recognized that portions of the law are obviously constitutionally infirm—"leaving the question of its repeal to the Judiciary, where it properly belongs:"

> *However plain it might seem, in any case, that a Statute, or part thereof, (i)s void, for want of compliance with the Constitutional requirements, or which seemed opposed to Constitutional provisions, . . . Many an Enactment of doubtful validity (has been) retained . . . Many crude things will be found in this Compilation, and many incongruities have been brought together, which will be more apparent in their present form than when distributed through thirty volumes. Careless phraseology and faults in grammar are not infrequent—the latter in many cases will strike the reader as clerical or typographical errors, when, in fact, they are exact reprints of Laws carelessly and hastily prepared and passed.*

Conclusion

Over the course of the past century and a half, the enforceability of Michigan's so-called "indecent exposure" statute has waned (as written), as it has been transmogrified judicially into an "obscene exposure" statute.[20] Now, in order to pass constitutional muster under the mantle of First Amendment protection, a prosecutor has the burden of proving the exposure was "open *and* obscene"—in keeping with the parameters for obscenity set forth in the *Miller* doctrine. ◆

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Footnotes

1. Brown, C. D., *The Most Dangerous Man in America,* 1974, p ix. Source: 1990 research paper titled *Dr. Benjamin Franklin and The Free Press Frontier,* by Grand Rapids Attorney Steve Savickas.
2. *Book Tower Garage v Local No 415 Intn'l Union, United Automobile Workers of America,* 295 Mich 580, 586, 295 NW 320 (1940).
3. *Smith v Goquen,* 415 US 566; 94 S Ct 1242; 39 L Ed 2d 605 (1974) and *People v Maria Wilson,* 95 Mich App 440, 445 (1980), lv app den 409 Mich 925 (1980).
4. *Oak Park v Smith* (on rem), 79 Mich App 757, 761 (1977). As subsummated in an unpublished opinion by 17th Circuit Court Judge Dennis Kolenda in *People v Sleeman,* case no. 03-02588-AR.
5. *Miller v California,* 413 US 15, 93 S Ct 2607, 37 L Ed 2d 419 (1973).
6. *Miller,* supra, 413 US 15, 23–24, 93 S Ct 2607, 2614–2615, 37 L Ed 2d 419, 430 (1973) (emphasis added).
7. At trial, the "channel surfing" complainant identified in the police affidavit in support of the search warrant is found to be a friend of an assistant prosecuting attorney who initiated the investigation. (At the time, the complainant was also a co-worker of the same assistant prosecutor's wife, who became a probation officer for the 61st District Court in Grand Rapids.)
8. The 7th Circuit recently decided a defendant is entitled to separate and distinct substantive and procedural rights under the Fourth Amendment. The "exclusionary rule is not specifically designed to protect the innocent, but is a tool for deterring violations of Constitutional protections." *Owens v United States,* 7th Cir #03-1507, 10/19/04, 76 CrL 72m 11/3/04, /cl/031507.pdf.
9. *Denver Area Educational Telecommunications v FCC,* 518 US 727, 116 S Ct 2374 (1996), citing *FCC v Pacifica Foundation,* 438 US 726, 98 S Ct 3026 (1978).
10. 750.335a MSA 28.575(1). 'Twas a typographical error in a 1931 bill introduced by state Senator Claude Stevens that transformed the operative phrase from "open and indecent" to "open or indecent." Subsequent legislation compounded the error by replicating it. The typo remains intact in the "current" statute as amended in 2002.
11. Chapter 158, Revised Statutes of 1846, Chapter CLXXXV, Offences Against Chastity, Morality and Decency, Section 5861, subsection 6, Lewd and Lascivious cohabitation, etc., p 1541.
12. *LeRov v Sidley,* 1 sid 168, 82 English Reprint, 1036.
13. *Jewell Theatre Corp v L. Brooks Patterson,* Memo. Opin. in case No. 81-74069 (ED Mich, 10/21/85).
14. *Re: Certified Question,* 420 Mich 51; 359 NW2d 513, 516 (1984).
15. After the Michigan Supreme Court agreed it was a question of federal law, the federal judge answered the question, ruling that Michigan's indecent exposure statute is unconstitutional under the void for vagueness and overbreadth doctrines. The ruling does not conflict with other federal decisions.
16. In *Re: Certified Question,* supra, 518.
17. *Aikens v Department of Conservation,* 387 Mich 495, 498; 198 NW2d 304 (1972) (parenthetical phrases added).
18. *People v Kratz,* 230 Mich 334, 339; 203 NW 114 (1925) In the modern context, the pronoun "it" now refers to obscene exposure, eyewitnessed or not. See *People v Vronko,* 228 Mich App 649, 579 NW2d 138 (1998).
19. *Re: Certified Question,* supra, 518.
20. Caveat: Beware, the state can always opt to prosecute public nudity via "disorderly" or the "disturbing the peace" genre—petty, yet criminal misdemeanors.