

Nudity and California Law

California Penal Code Sec. 314. "Every person who willfully *and lewdly*, either:

1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or,

2. Procures, counsels, or assists any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, *such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts,*

is guilty of a misdemeanor."

California Jury Instructions -- Criminal. CALJIC 16.220 -- Indecent exposure. "In order to prove this crime, each of the following elements must be proved:

[1] A person intentionally exposed [his] [her] [person] [private parts] [in a public place] [, or] [in any place where there were present other persons to be offended or annoyed]; AND

[2] That person did so with the specific intent to direct public attention to [his] [her] *genitals* for the purpose of [his] [her] *own sexual arousal or gratification*, or that of another, or of *sexually insulting or offending* others."

On [2], public attention to the anus, anal area, buttocks, pubic hair or a women's breast(s) are not to be considered in proving this crime.

People v. Dallas W. (2000) 85 Cal. App. 4th 937, 938. "The juvenile court found this was 'a mooning case,' and that Dallas had '*exposed his buttocks ... with the intent to annoy and affront people.*' The court specifically found that Dallas *did not act with 'sexual intent in the sense that he intended to arouse himself or a third person by his act.* I think he did it strictly to annoy and to affront people.' The petition was nevertheless sustained, and Dallas was made a ward of the court. He appeals. *Because the court found Dallas acted without any sexual intent, we reverse* [his indecent exposure conviction]."

People v. Massicot (2002) 97 Cal. App. 4th 920. The court in this case reversed Massicot's "indecent exposure" conviction under California Penal Code 314 PC because the defendant, who pulled up his robe and exposed his women's flesh-colored lace underpants and lace bra, did not display his naked genitals. The court ruled that regardless of how much of Massicot's body the victim saw, since it wasn't completely nude, Massicot neither exposed his person, nor his genitalia. Even though the flesh-colored, lace underwear revealed a "bulge" and, when Massicot turned around, his *buttocks*, neither were sufficient to satisfy California "indecent exposure" law.

Robins v. Los Angeles County (1967) 248 Cal. App. 2d 1, 10. "Thus, we are constrained to the view that the *display of the bare female bosom*, whether defined as 'entertainment' or not, does not violate state [indecent exposure] law, is not regulated by the state, and does not constitute criminal sexual activity in the area definitively preempted by the state. (In re Lane, supra, 58 Cal. 2d 99, 22 Cal. Rptr. 857, 372 P.2d 897.)"

In re Smith (1972) 7 Cal. 3d 362, 366. "Accordingly, a conviction of that offense [that is, Penal Code 314 PC 'indecent exposure'] requires proof beyond a reasonable doubt that the actor not only meant to expose himself, but intended by his conduct to *direct public attention to his genitals for purposes of sexual arousal, gratification, or affront.* [FN4] FN4. Wainwright v. Procutier (9th Cir. 1971) 446 F.2d 757, is in accord. There a Berkeley policeman on evening patrol observed the defendant urinate against the wall of an abandoned service station. When questioned, the defendant explained he had recently undergone surgery making it necessary for him to urinate frequently. No other persons were present but the defendant's own companions. The federal appellate court rejected the People's contention that the officer had probable cause to arrest the defendant for indecent exposure under [California Penal Code] section 314, subdivision 1. Emphasizing *the sexual connotations of the requirement that the act be performed 'lewdly,' the court held the statute inapplicable* as a matter of law to the defendant's conduct."

Additional regulations.

Title 36 Code of Federal Regulations (CFR) : Parks, Forests, and Public Property. Parts 2.34(2) and 1002.34(2): "A person commits disorderly conduct when, with intent to cause public alarm, nuisance... or knowingly or recklessly creating a risk thereof... engages in a *display or act that is obscene.*" [... the federal regulation does not specify whether nudity alone or behavior combined with nudity might be an *obscene display or act* ... — Linda Tashbook, Esq.]

San Francisco Park Code Sec. 4.01. - Disorderly Conduct: "No person shall, in any park without permission of the Recreation and Park Department: (h) Expose his or her genitals, public hair, buttocks, perineum [area between the genitals and anus], anal region or public hair region or any portion of the female breast at or below the areola thereof, except that this section shall not apply to children under the age of five years;" {The code really does say "public hair" not "pubic hair" — zaun.}

California Code of Regulations, TITLE 14. Natural Resources Division 3. Department of Parks and Recreation Chapter 1. General Sec 4322. Nudity. "No person shall appear nude while in any unit [of the California State Park system] except in authorized areas set aside for that purpose by the Department. The word nude as used herein means unclothed or in such a state of undress as to expose any part or portion of the pubic or anal region or genitalia of any person or any portion of the breast at or below the areola thereof of any female person."

State of California, Memorandum, May 31 1979
From: Department of Parks and Recreation
Subject: **Clothing Optional Beaches.** "... it shall be the policy of the Department that enforcement of nude sunbathing regulations within the State Park System shall be made only upon the complaint of a private citizen. Citations or arrests shall be made only after attempts are made to elicit voluntary compliance with the regulations. Russell W. Cahill, Director". The Cahill policy was later upheld on appeal in *People vs. Bost* (1988) but in July 2009 175 Cal. App. 4th 1244 ruled the Cahill policy was in violation of state park procedures because the policy did not seek public feedback. In Oct. 2009

the Cal. Supreme court refused to take the case on appeal so the 4th App. court ruling stands.

California Penal Code Sec. 647(a) "Lewd conduct in public. Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: (a) Who solicits anyone to engage in or who engages in *lewd* or dissolute conduct in any public place or in any place open to the public or exposed to public view."

Judicial Council Of California Criminal Jury Instruction (CALCRIM) 1161 -- Lewd conduct. "To prove that the defendant is guilty of this crime, the People must prove that:

- [1] The defendant willfully engaged in the touching of ((his/her) own/ [or] another person's) genitals, buttocks, or female breast;
 - [2] The defendant did so with the intent to sexually arouse or gratify (himself/herself) or another person, or to annoy or offend another person;
 - [3] At the time the defendant engaged in the conduct, (he/she) was in (a public place/ [or] a place open to the public [or to public view]);
 - [4] At the time the defendant engaged in the conduct, someone else who might have been offended was present;
- AND
- [5] The defendant knew or reasonably should have known that another person who might have been offended by (his/her) conduct was present."

While unrelated, situations involving public nudity may lead to other legal challenges:

Lawful Order. If a peace officer orders you to cover up, it is lawful for him/her to order you do so and you must comply. There is no law that says it is unlawful to cover your body. A *lawful order* is any order that is not in violation of the law given by any duly-appointed authority. See **SF Parks Code 4.13, Cal. Vehicle code 2800.(a)**, and to a much lesser extent **Cal. Penal Code 148 (a)(1)** (which involves physical resistance or interference).

Federal Law. There is no federal law that specifically bans nudity with a few exceptions such as at The Smithsonian. There is a rather vague federal park code regarding *obscene display* [See 36 CFR on other side] which is open to much interpretation and seems to be applied selectively and arbitrarily by park rangers to ban nudity in most areas of the Presidio but not other areas like Baker Beach where The Nudist Society lobbied to keep Baker unofficially "clothing optional." It appears that the rangers apply this code more on the degree of perceived "public alarm" than on actual nudity itself. There is no written policy that specifically relates to Baker Beach other than to day-use hours.

Concurrent Jurisdiction. Under this provision, federal park rangers, at their discretion, may enforce state and local laws or call in the local authorities to do so. It is unclear whether the Presidio rangers are banning nudity in most areas under the vague federal code or the more specific, local SF Park code.