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The First Amendment and the Foxy Lady

The First Amendment and the Foxy Lady

January 8, 2019

Edward Fitzpatrick

Jared A. Goldstein, RWU School of Law associate dean for academic affairs, professor and former U.S. Department of Justice attorney:

The exotic dancing at the [Foxy Lady](#) will never be confused with the [Bolshoi Ballet](#).

Indeed, some would consider it “low value” speech and condemn it as demeaning to women, offensive and immoral. Yet, the fact that some members of society may frown on this type of expression provides no basis to suppress it.

Courts must be especially vigilant to protect exotic dancing and other types of unpopular speech precisely because they face the greatest threats of suppression. As U.S. Supreme Court Justice Oliver Wendell Holmes Jr. said in 1919: “We should be eternally vigilant against attempts to check the expression of opinions we loathe.”

That vigilance prompted the American Civil Liberties Union of Rhode Island to file a “friend of the court” brief, arguing that the City of Providence trampled on the Foxy Lady’s First Amendment rights by shutting down the Chalkstone Avenue strip club. RWU School of Law Professor Andrew Horwitz and I submitted that legal brief in our capacity as volunteer attorneys for the ACLU.

The Providence Board of Licenses shut down the club on Dec. 12 after three dancers were arrested on solicitation of prostitution charges, and the board revoked all of the club’s licenses on Dec. 18, effectively putting 225 people out of work. A few days later, the Rhode Island Department of Business Regulation allowed the Foxy Lady to reopen as a nightclub, and the Rhode Island Supreme Court has now allowed the club to reopen pending an appeal.

In our brief filed with the state Supreme Court, we argue that the revocation order by the Board of Licenses violates the First Amendment because it reflects “unbridled discretion” and arbitrary decision-making.

The Providence Home Rule Charter, which created the Board of Licenses, provides the board with authority to revoke an entertainment license based on “any reason which the board may deem to be in the public interest.”

But the First Amendment requires that any licensing system for engaging in protected speech must specify “narrow, objective and definite standards” for determining when to grant or revoke a license, as the U.S. Supreme Court ruled in the 1969 case of *Shuttlesworth v. Birmingham*.

In that case, the high court found a strikingly similar ordinance unconstitutional in Birmingham, Ala., which provided a city commission with broad discretion to grant or deny parade permits. In later cases, the Supreme Court made clear that the invalidity of licensing ordinances that provide administrative boards with “unbridled discretion” applies equally to ordinances for licensing adult entertainment.

The absence of any definite criteria for revoking the Foxy Lady's license is fatal to the revocation decision, regardless of whether the Providence board acted in good faith and regardless of whether it intended to suppress activity that enjoys First Amendment protection.

The unconstitutionally arbitrary nature of the board's decision is obvious when you look at other decisions by the board, which has routinely suspended licenses rather than revoking them following much more serious infractions. For example, the board imposed a four-day license suspension after a double stabbing inside Club Ultra, and it imposed a 12-day suspension after a bouncer at the Rock & Rye Bar started a fight with and stabbed a patron.

Yet, the board chose to impose the ultimate penalty it has available – immediate and permanent revocation – based on the Foxy Lady's first offense involving allegations of a non-violent misdemeanor.

In a submission to the court, the Board of Licenses cited a Providence ordinance that appears to require the immediate revocation of all licenses upon a finding that the use of a licensee's premises for prostitution "resulted from the gross negligence of the licensee." But that does not cure the unbridled discretion of the board and the arbitrary sanction imposed in this case.

For one thing, it's not clear the ordinance can properly be invoked to justify revocation because it was not identified in the show-cause order. As a result, the club had no notice that it would need to defend itself against a charge of "gross negligence."

In any event, that ordinance compounds the constitutional problems instead of resolving them. The Department of Business Regulation made clear that the ordinance cannot be applied to the revocation of liquor licenses because it would be inconsistent with statewide policies to revoke liquor licenses based solely on a first offense involving solicitation of prostitution. As a result, the ordinance can only be applied to the club's entertainment licenses, and the board apparently takes the position that the ordinance gives it greater power to revoke entertainment licenses than liquor licenses.

The board's position thus turns the First Amendment on its head.

The First Amendment prohibits the government from imposing more severe sanctions on licensees because they are engaged in protected speech than it would impose for identical infractions by licensees not engaged in speech. Whatever else the First Amendment means, it does not allow the government to punish the club, or punish it more harshly than other establishments, because it engages in protected speech.

That would be too much of a leap, even for the Bolshoi Ballet.