STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK, DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,

Plaintiff/Respondent,

vs.

STONECALF WARRIORWOMAN,

Defendant/Appellant.

Case No. **CR 2007 6006**

MEMORANDUM DECISION AND ORDER ON APPEAL

I. INTRODUCTION AND BACKGROUND.

According to the stipulated facts, on February 10, 2007, North Idaho College (NIC), learned that defendant Stonecalf Warriorwoman (Warriorwoman) was planning on attending a concert at NIC, on February 27, 2007, for the purpose of making a political statement. NIC learned of this through a posting placed on the internet by Warriorwoman. Tr. p. 2, Ll. 16-25; p. 2, Ll. 8-11. NIC also received a telephone call from Warriorwoman saying she was going to be at the Raining Jane concert that night, and she was going to bring a "Tomahawk with a 30-million-year-old part to it, that she planned to dance and would be wearing too tight of clothing, and she wanted a black student and a yellow student to dance with her." Tr. p. 5, Ll. 1-8. The stated reason was "She was holding the four corners of the earth to save the evil American." *Id.,* Ll. 24-25. Warriorwoman did show up at NIC on the evening of February 27, 2007, with a backpack and was told by a security

officer for NIC that she was "being trespassed" and needed to leave. Tr. p. 6, Ll. 13 p. 7, L. 15. Idaho Code § 18-7008(8) lists the following as one of several ways one can commit the crime of trespass:

> Every person, except under landlord-tenant relationship, who, being first notified in writing, or verbally by the owner or authorized agent of the owner of real property, to immediately depart from the same and who refuses to so depart, or who, without permission or invitation, returns and enters said property within a year, after being so notified;

On March 20, 2007, Warriorwoman returned to the NIC campus and attended the Popcorn Forum. NIC security called Coeur d'Alene Police, and Warriorwoman was arrested and incarcerated on the trespassing charge.

Warriorwoman was cited on March 21, 2007, for the misdemeanor crime of Trespassing, a violation of Idaho Code § 18-8008. Warriorwoman, through counsel Brad Chapman of the Kootenai County Public Defender's Office, filed a Motion to Dismiss on July 7, 2008, and filed a brief in support of that motion. On December 31, 2007, the State filed Plaintiff's Response Brief to Defendant's Motion to Dismiss. The Motion to Dismiss was not noticed up for argument by counsel for Warriorwoman, and on November 26, 2007, the Court (Magistrate Judge Barry Watson) filed a notice for hearing, setting oral argument on Warriorwoman's Motion to Dismiss for January 2, 2008. Oral argument was held on January 2, 2008, and at the conclusion of that argument, Judge Watson set forth at length the reasons for his denying the Motion to Dismiss. Tr. p. 19, L. 4 – p. 27, L. 23. An Order Denying Defendant's Motion to Dismiss was filed January 22, 2008.

Following Judge Watson's ruling on her Motion to Dismiss, Warriorwoman pled guilty to Trespassing pursuant to *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), with the agreement that Warriorwoman "retains the right to appeal this Court's decision on her Motion to Dismiss, and should she prevail on appeal she retains the right to

withdraw her plea." Order, p. 1. Warriorwoman was sentenced to 10 days in jail with credit for days previously served, costs were waived, no fine was imposed and no probation was imposed. *Id.* Tr. p. 4, Ll. 12-14. Thus, other than the misdemeanor conviction, any punishment for this crime has already been served by Warriorwoman.

Notice of Appeal was filed by Warriorwoman's counsel, Brad Chapman, on January 31, 2008, where he simply stating the issue on appeal: "Did the trial court err by denying the Defendant's Motion to Dismiss." The appeal was assigned to the undersigned District Court Judge. On March 7, 2008, Warriorwoman, purporting to act *pro se,* filed a "Public Records Request Form" in which she requested reassignment to a different judge on appeal because, "Lynn Nelson informed me yesterday in the Public Defenders office that Brad Chapman stepped down from appearing before Judge Mitchell and my appeal case was reassigned to Sean Walsch [sic] because: 'Judge Mitchell does not like Brad and Brad will no longer appear before him because Judge Mitchell NEVER rules favorably in the cases he brings before him." (emphasis in original). On March 11, 2008, this Court responded that the request was not a motion and that since Warriorwoman was at the time represented by counsel, a copy of Warriorwoman's filing and this Court's response was sent to Sean Walsh, Warriorwoman and counsel for the State.

On May 9, 2008, Warriorwoman filed her brief, written by Sean Walsh of the Kootenai County Public Defender's office. On June 6, 2008, the State filed its brief. No reply brief was filed by Warriorwoman.

On August 3, 2008, Warriorwoman, again purporting to act *pro se,* filed a pleading captioned "Termination of Counsel" in which she claims she notified Sean Walsh by fax on July 30, 2008, that he was fired, that she was told by Lynn Nelson, Chief Deputy Public Defender that her "preferred" public defender Brad Chapmen was reassigned but that

Chapman "refused to appear before Judge John Mitchell, as Judge Mitchell always rules against Brad Chapman", and Warriorwoman notified the Court that she would be appearing *pro se* for oral argument on the appeal scheduled for August 14, 2008.

No motion to disqualify the undersigned has ever been filed. Also, Warriorwoman's "Termination of Counsel" is of no effect. While Warriorwoman certainly has the right to refuse the assistance of appointed counsel and conduct her own defense (*State v. Browning,* 121 Idaho 239, 244, 824 P.2d 170, 175 (Ct.App. 1992)), she has not done so in this case. The Court may appoint substitute counsel (*Id.*), or the Kootenai County Public Defender, John Adams may make a reassignment of counsel, but it is not Warriorwoman's determination to pick and choose her attorney. "An indigent's right to court appointed counsel includes the right to effective assistance of counsel, but it does not necessarily include the right to counsel of one's own choosing." *Id.* Whether John Adams reassigned Warriorwoman's case from Sean Walsh to Brad Chapman is of no import, as nothing in the record indicates that Warriorwoman is not satisfied with Mr. Chapman, and nothing in the record indicates that Warriorwoman is conducting her own defense on this appeal.

On August 12, 2008, Warriorwoman, through her counsel Brad Chapman, and the State, filed a stipulation that this matter be submitted without oral argument and upon the briefing. On August 14, 2008, Brad Chapman filed a Notice of Attorney Assignment Change on behalf of his client, Warriorwoman, notifying the Court and opposing counsel that Brad Chapman was Warriorwoman's attorney.

This appeal is now at issue.

II. ANALYSIS.

Although the Notice of Appeal filed on January 31, 2008, simply states the issue on appeal to be: "Did the trial court err by denying the Defendant's Motion to Dismiss",

Warriorwoman's Brief of Appellant claims the four reasons Judge Watson erred was: 1) the arrest for trespass was a violation of Warriorwoman's First Amendment Right to free speech; 2) the trespass statute is void for vagueness; 3) the trespass statute as applied to Warriorwoman is overbroad, and 4) the statute is a violation of the 14th Amendment Due Process Clause as applied to Warriorwoman. These issues will be taken up in the order presented by Warriorwoman.

A. Violation of Warriorwoman's First Amendment Right of Free Speech.

Warriorwoman correctly notes "If a statute as applied to a particular defendant infringes upon his or her freedom of speech protected by the First Amendment, the defendant's conviction must be reversed without any showing that such infringement was 'substantial'". *State v. Poe,* 139 Idaho 885, 893, 88 P.3d 704, 712 (2004). Appellant's Brief, p. 2. The State agrees with that standard. Respondent's Brief, p. 1. This Court agrees with the State's analysis that Warriorwoman was arrested not for exercising her right to free speech but for her conduct in trespassing, for two reasons. First, Warriorwoman was "trespassed" from NIC when Warriorwoman received an order of trespass from a security officer of NIC on February 27, 2007. No violation of law occurred on that day by Warriorwoman. The violation occurred on March 20, 2007, when Warriorwoman was arrested for coming back onto the NIC campus. Warriorwoman was not arrested for exercising her right to free speech. Warriorwoman was arrested for violation of the earlier order. Second, Warriorwoman was trespassed on February 27, 2007, again, not for her speech, but because of her conduct. For obvious reasons, Warriorwoman's February 27, 2007, phone call to NIC, that she was going to attend the concert that night, that she was going to bring a tomahawk with a 30-million-year-old part to it, that she planned to dance, and she would be wearing too tight of clothing and wanted a

black student and a yellow student to dance with her, and then her showing up that night, raised obvious safety concerns. You simply do not threaten to bring a tomahawk to a concert, then show up at the concert, and later claim your free speech rights were violated. It is conduct, not speech that is involved. The government can regulate the non-speech conduct. *United States v. O'Brien,* 391 U.S. 367, 376, 88 S.Ct. 1673, 1678 (1968). "Not all conduct claimed to have communicative purpose is protected as speech by the First Amendment." *State v. Korsen,* 138 Idaho 706, 715, 69 P. 3d 126, 135 (2003), citing Cox v. Louisiana, 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471, 484 (1965).

Warriorwoman also cites *City of Eugene v. Lincoln,* 183 Or.App. 36, 50 P.3d 1253 (Or.App. 2002), wherein the Oregon Court of Appeals held Oregon's trespass statute was unconstitutionally applied. Warriorwoman's argument is that neither NIC nor the police had any information that the tomahawk was to be used for "anything other than a symbolic object or historical artifact". Appellant's Brief, p. 4. This argument would be much more persuasive had Warriorwoman actually made such a statement regarding symbolism or historical significance to NIC. But those are not the facts. The facts are Warriorwoman called NIC, said she was going to be at the Raining Jane concert that night, and she was going to bring a "Tomahawk with a 30-million-year-old part to it, that she planned to dance and would be wearing too tight of clothing, and she wanted a black student and a yellow student to dance with her", and her stated reason was "She was holding the four corners of the earth to save the evil American", and she did show up with a backpack. A security officer for NIC informed her that she was "being trespassed" and needed to leave. This is conduct of Warriorwoman, not her speech. This is conduct, upon which if action is not taken by NIC, has all the earmarks of something very bad occurring. *Lincoln* is not on point factually (Chelsea Lincoln neither threatened nor brandished a weapon such as a

tomahawk) or from a legal standpoint (the Oregon statute used completely different language than I.C. § 18-2008(8)). As correctly pointed out by the State in the present case, the sole concern in Lincoln was the spoken words of defendant Chelsea Lincoln and other demonstrators, not their conduct. Respondent's Brief, p. 4.

B. Idaho's Trespass Statute is not Void for Vagueness.

This issue has already been discussed by the Idaho Supreme Court in *State v. Korsen,* 138 Idaho 706, 711-12, 69 P. 3d 126, 131-32 (2003):

> The void-for-vagueness doctrine is premised upon the due process clause of the Fourteenth Amendment to the U.S. Constitution. This doctrine requires that a statute defining criminal conduct be worded with sufficient clarity and definiteness that ordinary people can understand what conduct is prohibited and that the statute be worded in a manner that does not allow arbitrary and discriminatory enforcement. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Furthermore, as a matter of due process, no one may be required at the peril of loss of liberty to speculate as to the meaning of penal statutes. *United States v. Smith,* 795 F.2d 841, 847 n. 4 (9th Cir.1986), *citing Lanzetta v. New Jersey,* 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888, 890 (1939), *Smith v. United States, cert. denied,* 481 U.S. 1032, 107 S.Ct. 1964, 95 L.Ed.2d 535 (1987). This Court has held that due process requires that all "be informed as to what the State commands or forbids" and that "men of common intelligence" not be forced to guess at the meaning of the criminal law. *State v. Cobb,* 132 Idaho 195, 969 P.2d 244 (1998), *citing Smith v. Goguen,* 415 U.S. 566, 574, 94 S.Ct. 1242, 1248, 39 L.Ed.2d 605, 612 (1974). A statute may be void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes, *Schwartzmiller v. Gardner,* 752 F.2d 1341, 1345 (9th Cir.1984), or if it fails to establish minimal guidelines to govern law enforcement or others who must enforce the statute. *Kolender v. Lawson,* 461 U.S. 352, 357-58, 103 S.Ct. 1855, 1858-59, 75 L.Ed.2d 903, 908-09 (1983); *State v. Larsen,* 135 Idaho 754, 756, 24 P.3d 702, 704 (2001).
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> A statute may be challenged as unconstitutionally vague on its face or as applied to a defendant's conduct. For a "facial vagueness" challenge to be successful, "the complainant must demonstrate that the law is impermissibly vague in all of its applications." *Hoffman Estates,* 455 U.S. at 497, 102 S.Ct. at 1193, 71 L.Ed.2d at 371. In other words, the challenger must show that the enactment is invalid *in toto.* To succeed on

an “as applied” vagueness challenge, a complainant must show that the statute, as applied to the defendant's conduct, failed to provide fair notice that the defendant's conduct was proscribed or failed to provide sufficient guidelines such that the police had unbridled discretion in determining whether to arrest him. A “facial vagueness” analysis is mutually exclusive from an “as applied” analysis. *See Schwartzmiller, supra* at 1346.

Neither the magistrate nor the district court examined the constitutionality of I.C. § 18-7008(8) as it applied to Korsen's specific conduct in this case. Nor did they examine the statute *in toto.* Rather, they applied a hybridized form of the facial test, which ordinarily is used to determine if a statute is void in all its applications, by considering the statute only in its application to public property. By finding the statute vague, not as applied to Korsen's conduct, but as to all applications on public property alone, the magistrate and the district court used an improper standard for determining whether the statute was facially vague. It was improper to conclude that the statute is invalid on its face as applied to public property, because the standard to sustain a facial challenge requires that a statute be held impermissibly vague in *all of its applications. See Hoffman Estates,* 455 U.S. at 497, 102 S.Ct. at 1193, 71 L.Ed.2d at 370. Furthermore, because the magistrate failed to examine the individual conduct of Korsen, consideration of the “as applied” standard with respect to only public property was in error.

Under our standard of independent review, this Court will consider the constitutional challenges raised in this case. As previously stated, in a facial challenge to a legislative enactment, “the challenger must establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697, 707 (1987). *See also Hoffman Estates, supra,* 455 U.S. at 498, 102 S.Ct. at 1193, 71 L.Ed.2d at 371; *State v. Newman,* 108 Idaho 5, 12, 696 P.2d 856, 863 (1985), *citing Steffel v. Thompson,* 415 U.S. 452, 474, 94 S.Ct. 1209, 1223, 39 L.Ed.2d 505, 523 (1974). Clearly, Idaho's trespass statute can be constitutionally applied. As succinctly stated by this Court in *State v. Missamore,* 119 Idaho 27, 803 P.2d 528 (1990): “All that is required for an I.C. § 18-7008(8) violation is that the defendant refuse to leave property that belongs to another after being so requested by the owner or authorized agent.” *Id.* at 32, 803 P.2d at 533. In *Missamore,* the defendant was convicted of trespass based on evidence that she was on the private property of Mr. and Mrs. Schmidt; that they asked her repeatedly to leave the property; and that she refused. *Id.* Because the Court has applied the statute to specific conduct, it is not so vague as to specify “no standard of conduct at all” in any application. *See Schwartzmiller, supra* at 1348.

When Korsen indicated that he would not leave the department offices, even after the request of the regional director in the presence of a police officer, Korsen was subject to a charge under the statute. **There is no ambiguity in the language of the statute, whose terms are to be given their commonly understood, everyday meanings. *Ada County Assessor v. Roman Catholic Diocese,* 123 Idaho 425, 849 P.2d 98**

> **(1993). Nor has the statute been given a limiting judicial construction toward avoiding a possible infirmity for vagueness. *See State v. Cobb,* 132 Idaho 195, 969 P.2d 244 (1998), *citing State v. Richards,* 127 Idaho 31, 896 P.2d 357 (Ct.App.1995). The statute makes no distinction between private and public property. Furthermore, the statute informs the public of the prohibited conduct, that is, remaining willfully on property belonging to another after having been asked to leave. Therefore, the statute gives fair notice of the conduct that is made criminal by the statute. Similarly, the core of circumstances to which the trespassing provision unquestionably applies is the willful refusal to leave the premises after having been asked to do so by one in authority.** The statute does not allow for unbridled discretion in police enforcement. Indeed, the police have no discretion when enforcing the statute on any type of property; any person who refuses to leave after receiving a warning is subject to arrest. See, e.g. *Daniel v. City of Tampa, Florida,* 38 F.3d 546, 551 (11th Cir.1994).
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> Therefore, neither the magistrate's nor the district court's conclusion that the statute is void for vagueness can stand. *We hold that I.C. § 18-7008(8) is not unconstitutional under the void-for-vagueness doctrine.*

(bold and italics at end of quoted portion added). (footnotes omitted). The italicized portion answers Warriorwoman's argument that I.C. § 1807008(8) is unconstitutionally vague.

In spite of the clear mandate of *Korsen,* Warriorwoman argues the Idaho Supreme Court in *Korsen* did not undertake an "as applied" vagueness analysis. This Court disagrees. The portion quoted in bold shows the Idaho Supreme Court analyzed the first prong of an "as applied analysis", that being whether the statute provides fair notice that the defendant's conduct was prohibited. Using the Idaho Supreme Court's language: "…the statue informs the public of the prohibited conduct, that is, remaining willfully on property belonging to another after having been asked to leave." Immediately following the bold portion above, the Idaho Supreme Court then went on to analyze the second prong of the "as applied" analysis, which is whether the statute has insufficient guidelines for the police such that they have unbridled discretion in determining whether to arrest. The Idaho Supreme Court held I.C. § 18-7008(8) "…does not allow for unbridled discretion in police

enforcement" because "the police have no discretion when enforcing the statue on any type of property; any person who refuses to leave after receiving a warning is subject to arrest."

Warriorwoman's argument that Idaho's trespass statute is void for vagueness as applied to her is seriously misplaced. Her claims and interpretation of *Korsen* are simply unfounded and unsupportable.

C. Idaho's Trespass Statute is not Overbroad as Applied to Warriorwoman.

Whether Idaho Code § 18-7008(8) is "overbroad" has also been answered by the Idaho Supreme Court in *State v. Korsen:*

> The State also challenges the district court's ruling that I.C. § 18-7008(8) is overbroad as applied to public property as an alternative basis chosen by the district court to uphold the magistrate's dismissal of the trespass charge against Korsen. The State argues that, as with the vagueness analysis, the district court improperly used a hybrid test intertwining the "facial" analysis and the "as applied" analysis in reviewing the constitutional scope of I.C. § 18-7008(8).
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> The statutory crime with which Korsen was charged consists of a refusal to leave real property after being notified to depart by the owner or authorized agent of the owner. Korsen argues that the district court correctly interpreted the statute as seeking to curb constitutionally protected speech, specifically his right to petition the government for redress of grievances (regarding his child support obligations), as provided by the express language of the First Amendment. He asserts that I.C. § 18-7008(8) sweeps too broadly and includes otherwise lawful activities and speech traditionally accorded protection in public places.
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> The question of whether a statute regulates constitutionally protected conduct should begin the court's analysis of an overbreadth challenge. *See State v. Bitt,* 118 Idaho 584, 589, 798 P.2d 43, 48 (1990). If the answer to this first step is in the affirmative, then the next step asks whether the statute precludes a significant amount of the constitutionally protected conduct. *See id.*
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> The overbreadth doctrine is aimed at statutes which, though designed to prohibit legitimately regulated conduct, include within their prohibitions constitutionally protected freedoms. *State v. Leferink,* 133 Idaho 780, 785, 992 P.2d 775, 780 (1999), *citing State v. Richards,* 127 Idaho 31, 896 P.2d 357 (Ct.App.1995). When a statute may deter protected speech only to some unknown extent, we cannot justify invalidating the statute and thereby prohibit the government from regulating conduct within its power to proscribe. *Broadrick v. Oklahoma,* 413 U.S. 601, 615, 93 S.Ct. 2908, 2917, 37 L.Ed.2d 830, 841 (1973).

"If the overbreadth is 'substantial,' the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation." *State v. Leferink supra, citing Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 503-04, 105 S.Ct. 2794, 2801-02, 86 L.Ed.2d 394, 405-06 (1985). Overbreadth, however, is not substantial if, "despite some possibly impermissible application, the 'remainder of the statute ... covers a whole range of easily identifiable and constitutionally proscribable ... conduct....' " *State v. Leferink, supra.*

The United States Supreme Court has recognized that the overbreadth doctrine should be applied sparingly. In *Broadrick v. Oklahoma, supra,* the Court said:

> [F]acial overbreadth adjudication is an exception to our traditional rules of practice and ... its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct-even if expressive-falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.

Id. at 615, 93 S.Ct. at 2917, 37 L.Ed.2d at 842.

A statute that is found to be overbroad may not be enforced at all, even against speech or conduct that could constitutionally be prohibited by a more narrowly drawn statute. *Id.* at 613, 93 S.Ct. at 2916, 37 L.Ed.2d at 840. However, a statute will not be invalidated for overbreadth merely because it is possible to imagine some unconstitutional applications. *Members of City Council v. Taxpayers of Vincent,* 466 U.S. 789, 800, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772, 783 (1984). Rather, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court ..." *Id.* at 801-02, 104 S.Ct. at 2126, 80 L.Ed.2d at 784. Therefore, the Supreme Court has developed a requirement that the overbreadth must be "substantial" before the statute will be held unconstitutional on its face. *Id.* Only if the statute "intrude[s] upon a substantial amount of constitutionally protected conduct" may it be struck down for overbreadth. *State v. Newman,* 108 Idaho at 11, 696 P.2d at 862 (*citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362, 368 (1982)).

As with its vagueness analysis, the district court did not find I.C. § 18-7008(8) unconstitutional under a strictly "as applied" analysis, which requires an examination of the statute as it applied to Korsen's particular conduct in this case. The court did not find that Korsen's speech was wrongfully suppressed, that he was a victim of discrimination because of his viewpoints, or that he otherwise suffered a violation of a freedom protected by the First Amendment. Nor did the court use a purely facial overbreadth test, examining the statute *in toto.* Instead, the court applied a hybrid analysis, applying the analysis for facial overbreadth (determining

whether the statute is unconstitutional in a substantial portion of the cases to which it applies) but only in its application to public, not private, property. The district court failed to determine, under the correct facial analysis, whether the statute, which makes no distinction between public and private property, is unconstitutional in a substantial portion of public *and private* property cases.

The district court ruled that I.C. § 18-7008(8) is unconstitutionally overbroad as it applies to all public property, regardless of the conduct or speech in which a particular defendant is engaging on that property. By finding the statute overbroad, not as applied to Korsen's conduct, but as to all applications on public property, the district court erroneously combined the facial and "as applied" standards of overbreadth. As with vagueness claims, these standards cannot be combined. To find that a statute is facially overbroad, and therefore unenforceable as to everyone, and not just the defendant, requires a determination that it is invalid *in toto* and therefore incapable of any valid application. *Newman,* 108 Idaho at 11 n. 7, 696 P.2d at 862. When a criminal statute contains a general prohibition that makes no distinction among different applications of the prohibition, a court cannot conclude that a statute is facially overbroad only in one particular application, but not overbroad in another. *See Schwartzmiller,* 752 F.2d at 1346.

By not choosing either the facial or the "as applied" analysis, but instead improperly combining them both to reach its conclusion that I.C. § 18-7008(8) is overbroad, the district court erred as a matter of law. Having reached that conclusion, this Court will determine the issue *de novo.*

In *Broadrick,* the Supreme Court observed that where *conduct* is involved, the overbreadth of a statute must be both real and substantial when judged in relation to its legitimate sweep, and whatever problems exist should be cured in a particular case by case analysis of the fact situation to which the statute's sanctions, assuredly, may not be applied. 413 U.S. at 614-15, 93 S.Ct. at 2917-18, 37 L.Ed.2d at 841-42. Idaho's trespass statute is not aimed at regulating speech or communication in any form. Contrary to the district court's ruling, in light of the statute's plainly legitimate sweep in regulating conduct, it is not so substantially overbroad that any overbreadth that may exist cannot be cured on a case-by-case basis. *Id.* at 615-16, 93 S.Ct. at 2917-18, 37 L.Ed.2d at 841-42.

As an example of the statute's reaching constitutionally protected speech, the district court pointed out the situation of people entering the Capitol to meet with legislators, asserting that, because the threat of prosecution under the trespass statute "potentially chills such clearly protected activity, the Court finds that the statute is unconstitutional in a substantial portion of the cases to which it applies." This conclusion, however, illustrates the district court's erroneous application of the facial overbreadth doctrine. A statute will not be invalidated for overbreadth merely because it is possible to come up with a hypothetical situation in which the statute is unconstitutional as applied. *Taxpayers for Vincent,* 466 U.S. at 800, 104 S.Ct. at 2126, 80 L.Ed.2d at 783. Rather, "there must be a realistic danger that the statute itself will significantly compromise

> recognized First Amendment protections of parties not before the Court...." *Id.,* at 801-02, 104 S.Ct. at 2126, 80 L.Ed.2d at 784.
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> Not addressed by the district court is the statute's application, without constitutional implications, to private property or to cases involving purely conduct and not speech. Physical presence in a public building dedicated to public uses other than that of a public thoroughfare, even presence for the purpose of communicating ideas, is not "pure speech." Not all conduct claimed to have communicative purpose is protected as speech by the First Amendment. *See Cox v. Louisiana,* 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471, 484 (1965). The statute is also capable of constitutional application to government-owned nonpublic forums, such as government office buildings or portions of college campuses that, unlike traditional public forums such as a public street, public park or sidewalk, or the steps of the state Capitol building, are not open to the public for expressive activities. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45-46, 103 S.Ct. 948, 954-956, 74 L.Ed.2d 794, 804-805 (1983); *Bader v. State,* 15 S.W.3d 599, 604-05 (Tex.App.2000). The facts in Korsen's case do not provide a situation where the exercise of free speech was impinged. Rather, Korsen showed up at the Health and Welfare office to conduct legitimate business, *i.e.,* to discuss his child support obligation with the agency charged with overseeing collection of child support. When it appeared that his desire to obtain modification of the obligation could not be obtained at that office but, as he was informed, was a matter that properly should be addressed to the court where the obligation was established, the purpose of his visit to the Health and Welfare office came to an end.
>
> Assuming that a criminal trespass prosecution is filed pursuant to I.C. § 18-7008(8) against a person on public property who is exercising his or her free speech rights, the statute could be attacked as applied to that constitutionally-protected conduct. This does not render the statute substantially overbroad. A reasonable reading of I.C. § 18-7008(8) shows that the statute does not reach a substantial amount of constitutionally protected conduct. The district court therefore committed reversible error in determining that the statutory language is overbroad.

138 Idaho 706, 713-16, 69 P.3d 126, 133-36. (footnotes omitted). In spite of *Korsen* clearly answering Warriorwoman's overbreadth argument against her, she argues:

> In this case, Appellant was charged with trespass on March 20, 2007 after returning to NIC following her removal on February 27, 2007. During these times Appellant's freedom of speech and assembly were curbed to the greatest possible extent. On whim and speculation of what Appellant may say or do, she was removed from NIC despite lawfully attending NIC functions that were open to the public.

Appellant's Brief, p. 11. It is only the February 27, 2007, date which is of concern in

determining overbreadth. As pointed out by the State, the reason Warriorwoman came to NIC on March 20, 2007, is completely irrelevant. By being at NIC on March 20, 2007, Warriorwoman violated the February 27, 2007, trespass order issued by coming onto the campus within a year of February 27, 2007. Her claim that she was present on March 20, 2007, for the Popcorn Forum, an event open to the public is true, **but not as to Warriorwoman.** Since the Popcorn Forum was held on the NIC campus, and since Warriorwoman already had the prohibition to be on the NIC campus as a result of the February 27, 2007, trespass order, Warriorwoman had no right to be there on March 20, 2007, not at the Popcorn Forum, and not at any other location on the NIC campus. Warriorwoman had no right to be there for any event or for any reason for one year following February 27, 2007.

D. Idaho's Trespass Statute Does Not Violate Due Process as Applied.

Warriorwoman makes a fairly elaborate and convoluted argument that since NIC is a college and under the State of Idaho Board of Education, and since the Board of Education has adopted the Idaho Administrative Procedures Act *"in establishing administrative rules and hearing procedures",* Warriorwoman was entitled to all the notice procedures under IDAPA. Appellant's Brief, pp. 12-16. The italicized portion is from Warriorwoman's brief. That italicized portion answers Warriorwoman's due process argument…against Warriorwoman. This trespass action is simply not an administrative action or a hearing. As pointed out by the State, *Mead v. Arnell,* 117 Idaho 660, 666, 791 P.2d 410, 415 (1990), the fact that rules are passed by the Board of Education does not elevate those regulations to the status of a statute. The legislature has spoken as to what constitutes a trespass, and it is codified in I.C. § 18-7008(8). Warriorwoman's due process rights, as a result of violating that statute (per her plea of guilty), are through the judicial system, not through

IDAPA.

III. CONCLUSION AND ORDER.

IT IS HERBY ORDERED THAT for the reasons set forth above, the decision of the Honorable Barry Watson is AFFIRMED in all aspects. Warriorwoman's plea of guilty is valid, and her conviction stands. While no further action is anticipated, this matter is remanded to the Honorable Barry Watson for any further proceedings.

DATED this 26th day of August, 2008.

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of August, 2008 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – J. Bradford Chapman
Prosecuting Attorney – Anna Eckart

Honorable Barry Watson

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy