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## The Law of Organized Nudism

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# THE LAW OF ORGANIZED NUDISM

HENRY M. SCHMERER\*

*And though you seek in garments the freedom of privacy you may  
find in them a harness and a chain.*

*And when the unclean shall be no more,  
What were modesty but a fetter and a fouling of the mind?  
And forget not that the earth delights to feel your bare feet  
And the winds long to play with your hair.*

—*The Prophet* BY KAHILIL GIBRAN

I. INTRODUCTION .....	596
II. THE TABOO OF NUDISM .....	598
III. INDECENT EXPOSURE .....	600
IV. NUDIST PUBLICATIONS .....	604
V. NUDIST CAMPS .....	608
A. <i>Michigan</i> .....	608
B. <i>New York</i> .....	610
C. <i>Texas</i> .....	612
D. <i>Other Jurisdictions</i> .....	613
VI. CONCLUSION .....	617

## I. INTRODUCTION

Organized nudism is based on the belief that people should dispense with the wearing of clothing except when necessary to protect the body from the elements of nature.<sup>1</sup> There are several thousand nudists in the United States. They belong to two national organizations, operate 109 local clubs and publish five national magazines.<sup>2</sup> Nudists represent all walks of life, political views and religions.<sup>3</sup> While most of the law govern-

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1. Some other definitions of "nudism" are:

Nudism appears to be a sincere if misguided theory that clothing, when climate does not require it, is deleterious to mental health by promoting an attitude of shame with regard to natural attributes and functions of the body. MODEL PENAL CODE § 207.10, comment at 34 (Tent. Draft No. 6, 1957).

Nudism, *n.* the cult or practice of living in a nude state. WEBSTER, NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1672 (2d ed. 1951).

[Nudism is a] socialized form of exhibitionism, i.e., one which lacks the erotic appeal among those who join in the practice. MUELLER, LEGAL REGULATION OF SEXUAL CONDUCT 59 (1961).

Also consider this statement which appeared in Note, 69 U.S.L. REV. 346 (1935): ANYONE who, in a secluded spot, far from the world's confusion, strife and gabble, on a day fair, mild and calm, has basked, unclad, in the sunshine for a half hour, looking up straight into the depths of the blue sky above, will feel that there is something real in "nudism."

2. HUNTINGTON, DEFENSE OF NUDISM 228-34 (1958). One of the national organizations, the American Sunbathing Association, received reorganization help from a New Jersey court by being in receivership during the process. DONALD JOHNSON, THE NUDISTS 173-80 (1959).

3. HUNTINGTON, DEFENSE OF NUDISM 228 (1958). For some of the diverse groups that oppose nudists, see Comment, 41 J. CRIM. L. & C. 57 (1950).

ing organized nudism centers around the crime of indecent exposure, nudism presents some interesting problems in tort law as well as constitutional law, corporate law and family law.

Contrary to popular belief, nudists do *not* attend nudist camps for sexual reasons. Nor do nudists consider themselves immodest people.<sup>4</sup> They "believe in the essential wholesomeness of the human body, and all its functions."<sup>5</sup> Scientific tests indicate that sexual responses are affected by the situation in which the stimulus is given.<sup>6</sup> Men do not show any external signs of sexual response on even their first visit to a nudist camp.<sup>7</sup> Sexually provocative clothing and alcoholic beverages are prohibited in nudist camps.<sup>8</sup> Individuals attend nudist camps for varying reasons, including health, physical fitness, relaxation, and communion with nature.<sup>9</sup> In Europe, the emphasis is on gymnastics and bodily exercise.<sup>10</sup>

Nudist camps locate in secluded places with dense growth, fences, and locked gates to keep out the public. Nearly all nudist camps have swimming pools and a few large ones have their own airfields. Volleyball is the favorite sport of nudists because it is an active sport which a large number of people can play at the same time and a playing field is easily created.<sup>11</sup> The nudist camp is a family center,<sup>12</sup> although some camps admit single persons on a limited basis. Nudists claim that nudism reduces the tensions that lead to divorce and juvenile delinquency.<sup>13</sup> As to the latter, they say that none of the more than nineteen thousand children who have spent a measurable amount of time in a nudist camp in the past twenty-nine years had been arrested as a juvenile delinquent.<sup>14</sup>

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4. [N]akedness in itself has nothing to do with modesty or immodesty; it is the conditions under which the nakedness occurs which determines whether or not modesty will be roused. If none of the factors of modesty are violated, if no embarrassing self-attention is excited, if there is a consciousness of perfect propriety alike in the subject and in the spectator, nakedness is entirely compatible with the most scrupulous modesty. A. Duval, a pupil of Ingress, tells that a female model was once quietly posing, completely nude, at the Ecole des Beaux Arts. Suddenly she screamed and ran to cover herself with her garments. She had seen a workman on the roof gazing inquisitively at her through a skylight. 1 H. ELLIS, *PSYCHOLOGY OF SEX* 75 (3d ed. rev. 1910).

5. HUNTINGTON, *DEFENSE OF NUDISM* 228 (1958).

6. See Cairns, Paul & Wishner, *Sex Censorship*, 46 MINN. L. REV. 1009, 1026-27, 1032 (1962).

7. H. C. Warren, *Social Nudism and the Body Taboo*, 40 PSYCHOLOGICAL REV. 160 (1933).

8. Literature obtained from the American Sunbathing Association, Inc., P. O. Box 38, Mays Landing, New Jersey. See generally HUNTINGTON, *DEFENSE OF NUDISM* (1958); DONALD JOHNSON, *THE NUDISTS* (1959); WEBB, *EDEN REGAINED* (1957).

9. See note 8 *supra*.

10. See PARMELEE, *NUDISM IN MODERN LIFE* (rev. ed. 1931).

11. See note 8 *supra*.

12. See Seal, *Family-Group Identification with the Nudist Movement of Oregon and Northern California* (lmt. private ed. of thesis on file at the Library of Congress 1960).

13. HUNTINGTON, *DEFENSE OF NUDISM* 143-52 (1958).

14. DONALD JOHNSON, *THE NUDISTS* 85 (1959).

In light of this last point, it would be alarming if parents were prosecuted for contributing to the delinquency of a minor<sup>15</sup> or for permitting a ward to be indecently exposed<sup>16</sup> because their children attended a nudist camp.

This paper will discuss the law applicable to organized nudism. It does not encompass situations when scanty clothing<sup>17</sup> or transparent clothing is worn,<sup>18</sup> where the "illusion of nudeness" is given,<sup>19</sup> or where exhibitionism becomes a sexual perversion. Exhibitionism is the medical term for the conduct of a person who exhibits his sexual organs to others.<sup>20</sup> But it is not considered a perversion when practiced by nudists.<sup>21</sup>

Unto the pure all things are pure: but unto them that are defiled and unbelieving there is nothing pure; even their mind and conscience is defiled.<sup>22</sup>

## II. THE TABOO OF NUDISM<sup>23</sup>

Probably the only thing more embarrassing than being naked among a number of clothed people is to be clothed among a number of naked people.<sup>24</sup> The naked body has been a taboo in the Judaeo-Christian world since Adam and Eve discovered their nakedness in the Garden of Eden.<sup>25</sup> English-speaking people are the most completely clothed

15. Comment, 41 J. CRIM. L. & C. 57, 60 (1950).

16. *Britain v. State*, 22 Tenn. 149 (1842) (slave).

17. For a discussion of bathing attire, see WEBB, *EDEN REGAINED* 26-28 (1957).

18. For a situation where a woman sued a bathing suit manufacturer because her suit became transparent when she came out of the water, see GREEN, MALONE, PEDRICK & RAHL, *CASES ON TORTS* 508 (1957).

19. A city ordinance was upheld which prohibited female night club strippers from appearing nude or giving the "illusion of nudeness." *Adams Newark Theatre Co. v. City of Newark*, 22 N.J. 472, 126 A.2d 340 (1956).

20. KARPMAN, *THE SEXUAL OFFENDER AND HIS OFFENSES* 16 (1957). The definition is sometimes limited to the exposing of the male sex organ. See RICKLES, *EXHIBITIONISM* 1 (1950). See generally RICKLES, *EXHIBITIONISM* (1950).

21. KARPMAN, *op. cit. supra* note 20, at 170; KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 365 (1953); RICKLES, *EXHIBITIONISM* 46 (1950); WILLIAMS, *THE PSYCHOLOGY OF NUDISM* 98 (1941).

22. *Titus* 1:15. For an excellent refutation of this point, see *United States v. Harmon*, 45 Fed. 414, 423 (D. Kan. 1891), *aff'd and rev'd as to sentence*, 50 Fed. 921 (C.C.D. Kan. 1892), *resentenced*, 68 Fed. 472 (D. Kan. 1895).

23. A taboo is an activity strongly disapproved as conflicting with settled beliefs. This should be contrasted with mores, which are customs which have the force of law. See WEBSTER, *NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE* 1594, 2564 (2d ed. 1951). As applied to nudism, see generally the footnotes in *Parmelee v. United States*, 72 App. D.C. 203, 113 F.2d 729 (D.C. Cir. 1940); SHAW, *THE BODY TABOO* (1937).

24. See WEBB, *EDEN REGAINED* 22 (1957).

25. And they were both naked, the man and his wife, and were not ashamed. . . . And she took of the fruit thereof, and did eat, and gave also unto her husband with her; and he did eat. And the eyes of them both were opened, and they knew they were naked; and they sewed fig leaves together, and made themselves aprons. . . . And the Lord God called unto Adam, and said unto him, Where art thou? And he said, I heard Thy voice in the garden, and I was afraid, because I was naked; and I hid myself. And He said, who told thee that thou wast naked? Hast thou

people in the world,<sup>26</sup> with the taboo emphasizing the sexual organs. The taboo today primarily takes the form of an *intersex* taboo, prohibiting exposure between persons of the opposite sex.<sup>27</sup> Some cultures emphasize a *complete* taboo, prohibiting exposure to oneself, or an *objective* taboo, prohibiting exposure to anyone else, including the same sex, or a *familial* taboo, prohibiting exposure to other members of the family.<sup>28</sup>

This taboo is not universal. In modern Japan communal baths for both sexes are popular, and the athletes of ancient Greece performed naked.<sup>29</sup> The taboo exists as long as any part of the body is covered, not for protection but for concealment. This distinguishes organized nudism from the near-nudism of athletics and the pseudo-nudism of the stage.<sup>30</sup> The taboo is beginning to decline. It was not too long ago that it was thought indecent for a male physician to attend a woman during childbirth.<sup>31</sup> Younger people are more likely to do activities in the nude than their elders did.<sup>32</sup>

There is another aspect to the taboo—no one should look at another person's nakedness. The "Peeping Tom" or voyeur<sup>33</sup> is not only punished by the law,<sup>34</sup> but he could be subject to the tort action of invasion of privacy.<sup>35</sup> While this action overlaps the concept that "Every man's house is his castle,"<sup>36</sup> the right of privacy is said to exist in its simplest form in protection against the unauthorized observance of another person's nakedness.<sup>37</sup> Recovery has been permitted where a woman's

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eaten of the tree, whereof I commanded thee that thou shouldest not eat? *Genesis* 2:25-3:11.

26. KINSEY, POMEROY & MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 365 (1949). See generally 1 H. ELLIS, *PSYCHOLOGY OF SEX* 1-84 (3d ed. rev. 1910).

27. Warren, *supra* note 7, at 162. It is considered acceptable today for members of the same sex to perform activities together nude at the local YMCA. See KINSEY, *op. cit. supra* note 26, at 366-67.

28. Warren, *supra* note 7, at 162.

29. See *Parmelee v. United States*, 72 App. D.C. 203, 206 n.16, 113 F.2d 729, 732 n.16 (D.C. Cir. 1940); KINSEY, *op. cit. supra* note 26, at 365; Warren, *supra* note 7, at 160. The word "gymnasium" is derived from the Greek meaning "to exercise naked." WEBSTER, *NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE* 1118 (2d ed. 1951).

30. Warren, *supra* note 7, at 162.

31. Comment, 33 MICH. L. REV. 936, 942 n.28 (1935).

32. KINSEY, *op. cit. supra* note 26, at 366-67, 372.

33. "Voyeurism is a pathological indulgence in looking at some form of nudity as a source of gratification in place of the normal sex act." KARPMAN, *THE SEXUAL OFFENDER AND HIS OFFENSES* 17 (1957).

34. MUELLER, *LEGAL REGULATION OF SEXUAL CONDUCT* 57-58, 127-32 (1961).

35. 1 HARPER & JAMES, *TORTS* § 9.5 (1956); *accord*, *Pritchett v. Board of Comm'rs*, 42 Ind. App. 3, 85 N.E. 32 (1908); *State v. Perry*, 224 Minn. 346, 28 N.W.2d 851 (1947) (dictum); *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952) (dictum); *Moore v. New York Elevated R.R.*, 130 N.Y. 523, 29 N.E. 997 (1892); FLEMING, *TORTS* 566 (2d ed. 1961); Winfield, *Privacy*, 47 L.Q. REV. 23, 24 (1931).

36. See Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

Every man's house is called his castle. Why? Because it is surrounded by a moat, or defended by a wall? No. It may be a straw-built hut; the wind may whistle around it, the rain may enter it, but the king cannot. *People v. Marxhausen*, 204 Mich. 559, 565, 171 N.W. 557, 558 (1919) (quoting William Pitt Chatham).

37. SELERMYER, *INVASION OF PRIVACY* 24 (1959).

nude picture was published;<sup>38</sup> a movie of a caesarean operation was distributed;<sup>39</sup> an X-ray of a woman's pelvic region was published;<sup>40</sup> and, when a man was introduced as a doctor's assistant, thereby observing childbirth.<sup>41</sup> Dean Prosser questions whether a woman sunbathing nude in her backyard would have an action for invasion of privacy when the neighbors spied upon her,<sup>42</sup> probably because she would be an "attractive nuisance."

The taboo enters the mainstream of the law under the guise of indecent exposure.

### III. INDECENT EXPOSURE

Indecent exposure is the legal term for exhibitionism.<sup>43</sup> It was a misdemeanor at common law in England. The crime consisted of the intentional exposure of the private parts or nakedness of a person, in a public place. It was necessary that more than one person observed the act or could have observed the act had they looked.<sup>44</sup> The first reported case was decided by the King's Bench in 1660.<sup>45</sup> The defendant appeared nude on a balcony in Covent Garden in front of a crowd "to the grand scandal of Christianity." The case also established that the King's Bench was the *custos morum* (guardian of the morals) of all the king's subjects.

The English courts took a liberal attitude in two cases involving men bathing nude at once-secluded spots.<sup>46</sup> While the men were convicted for indecent exposure, suspended sentences were given. There was language in the cases to the effect that nudism was permissible in secluded areas. In 1864, the High Court of Scotland in *M'Kenzie v. Whyte*<sup>47</sup> reversed the conviction of nude bathers since it was not shown that anyone was annoyed by their nudity. The High Court recognized the English cases as also being the law of Scotland, "but in every case criminal exposure of the person must have some reference both to the impropriety

38. *Myers v. U.S. Camera Publishing Corp.*, 9 Misc. 2d 765, 167 N.Y.S.2d 771 (N.Y. City Ct. 1957).

39. *Feeney v. Young*, 191 App. Div. 501, 181 N.Y. Supp. 481 (1920).

40. *Banks v. King Features Syndicate*, 30 F. Supp. 352 (S.D.N.Y. 1939).

41. *De May v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881).

42. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 422 (1960).

43. KARPMAN, *THE SEXUAL OFFENDER AND HIS OFFENSES* 16 (1957).

44. Wilson, *Public Indecency*, 11 CRIM. L. MAG. & REP. 461, 462 (1889). It is thought in England that a woman cannot commit the crime of indecent exposure. 73 SOL. J. 505 (1929). This is not true in the United States. See *State v. Hazle*, 20 Ark. 156 (1859); *Ex parte Hutchings*, 2 Cal. Unrep. 822, 16 Pac. 234 (Sup. Ct. 1887); *Commonwealth v. Hamilton*, 237 Ky. 682, 36 S.W.2d 342 (1931); *Commonwealth v. Kinniard*, 18 Ky. L. Rep. 647, 37 S.W. 840 (Ct. App. 1896); *People v. Vickers*, 259 App. Div. 841, 19 N.Y.S.2d 165 (1940); *People ex rel. Lee v. Bixby*, 67 Barb. 221 (N.Y. Sup. Ct. 1875).

45. *LeRoy v. Sidley*, 1 Sid. 168, 82 Eng. Rep. 1036 (K.B. 1660).

46. *Rex v. Crunden*, 2 Camp. 89, 170 Eng. Rep. 1091 (K.B. 1809); *Regina v. Reed*, 12 Cox Crim. Cas. 1 (Home Cir. 1871).

47. 4 Irv. 570 (Scot. High Ct. 1864). See Wilson, *Public Indecency*, 11 CRIM. L. MAG. & REP. 461, 463-64 (1889); GLOAG & HENDERSON, *INTRODUCTION TO THE LAW OF SCOTLAND* 670 (5th ed. 1952).

of the act and to its effect on the mind of the person to whom the exposure is made."<sup>48</sup> Organized nudism was probably not a crime at common law in England.

In the United States,<sup>49</sup> the prevailing view is that specific intent is not necessary; a general intent evidenced by the openness of the act is sufficient.<sup>50</sup> Also, "public place" has been expanded to cover any place where there is a congregation of people.<sup>51</sup> Kentucky,<sup>52</sup> New York<sup>53</sup> and the District of Columbia<sup>54</sup> are notable exceptions to these prevailing American views.

While there have been slightly more than one hundred indecent exposure cases reported in the United States, a sizeable number of them intentionally<sup>55</sup> omit the facts of the case. In those cases where enough facts are given, it is obvious that indecent exposure has become a catch-

48. *M'Kenzie v. Whyte*, 4 Irv. 570, 573 (Scot. High Ct. 1864). The court rejected the contention that an offense had been committed against private persons or against public morals.

But is a person lawfully bathing, and undressing with a view to lawful bathing, indecently exposing his person in a criminal sense, because he may be within some short distance of an inhabited house, if such exposure is not done with any indecent purpose, or any resulting offence to decency? I should hesitate to lay down, as a general rule, that a man cannot bathe in his own river or in the sea, because there may be one dwelling-house not far off, whether a castle or a cottage, or because I may possibly be seen by one man or one woman. It is not said that these youths were there in pursuance of any unlawful purpose. *Id.* at 574.

49. See generally Annot., 93 A.L.R. 996 (1934); Wilson, *Public Indecency*, 11 CRIM. L. MAG. & REP. 461 (1889); 1 WOOD, NUISANCES §§ 57-63 (3d ed. 1893). Animals have also been the subject of indecent exhibitions. See *Redd v. State*, 7 Ga. App. 575, 67 S.E. 709 (1910) (bull and cow permitted to copulate in public); *Nolin v. Mayor*, 12 Tenn. 134 (1833) (exhibition of a stud horse).

50. *E.g.*, *Davenport v. United States*, 56 A.2d 851 (D.C. Munic. Ct. App. 1948); *Messina v. State*, 212 Md. 602, 130 A.2d 578 (1957). A city ordinance against indecent exposure without the intent element has been upheld as part of the city's police powers. *City of Grand Rapids v. Bateman*, 93 Mich. 135, 53 N.W. 6 (1892).

51. *E.g.*, *Lorimer v. State*, 76 Ind. 495 (1881); *State v. Goldstein*, 72 N.J.L. 336, 62 Atl. 1006 (Sup. Ct. 1906), *aff'd*, 74 N.J.L. 598, 65 Atl. 1119 (Ct. Err. & App. 1907); *Moffit v. State*, 43 Tex. 346 (1875).

52. *Case v. Commonwealth*, 313 Ky. 374, 231 S.W.2d 86 (1950); *Commonwealth v. Hamilton*, 237 Ky. 682, 365 S.W.2d 342 (1931); *Commonwealth v. Hardin*, 2 Ky. L. Rep. 59 (Ct. App. 1880); *accord*, *Commonwealth v. Kinniard*, 18 Ky. L. Rep. 647, 37 S.W. 840 (Ct. App. 1896). Nudism is expressly covered by statute. Ky. REV. STAT. ch. 232 (1962).

53. *People v. Reilly*, 282 App. Div. 884, 124 N.Y.S.2d 746 (1953); *People v. Dohen*, 280 App. Div. 956, 116 N.Y.S.2d 351 (1952); *Miller v. People*, 5 Barb. 203 (N.Y. Sup. Ct. 1849). *But see* *People ex rel. Lee v. Bixby*, 67 Barb. 221 (N.Y. Sup. Ct. 1875). Nudism is expressly covered by statute. N.Y. PENAL CODE § 1140-b. It is considered that the *Miller* case defines public place more narrowly than the English rule. Wilson, *Public Indecency*, 11 CRIM. L. MAG. & REP. 461, 467 (1889).

54. *Selph v. District of Columbia*, 188 A.2d 344 (D.C. Ct. App. 1963); *Hearn v. District of Columbia*, 178 A.2d 434 (D.C. Munic. Ct. App. 1962).

55. The evidence contained in the record is so disgusting, filthy, indecent, and pornographic that we decline to set it forth in this opinion. Suffice it to say that it showed that the acts of the accused and the female named in the indictment were so utterly obscene, lecherous, and degrading as to constitute them a disgrace to the human race. *Strong v. State*, 11 S.E.2d 238, 239 (Ga. App. 1940); *accord*, *People v. Carey*, 217 Mich. 601, 187 N.W. 261 (1922).

all crime for prosecuting not only exhibitionists<sup>56</sup> and nudists,<sup>57</sup> but also acts of fornication,<sup>58</sup> adultery,<sup>59</sup> homosexuality,<sup>60</sup> intent to commit rape,<sup>61</sup> rape,<sup>62</sup> masturbation,<sup>63</sup> prostitution,<sup>64</sup> miscegenation,<sup>65</sup> impairing the morals of a child<sup>66</sup> and soliciting others to expose themselves.<sup>67</sup>

The courts have made exceptions to indecent exposure in situations of necessity<sup>68</sup> or accidental exposure.<sup>69</sup> But, because of the moral and religious significance attached to indecent exposure,<sup>70</sup> the courts are in conflict as to negation of the crime when there was consent by the person who saw the exposure,<sup>71</sup> when the prosecuting witness sought to withdraw the complaint,<sup>72</sup> and when no one was actually offended by the exposure.<sup>73</sup> In dicta, courts have said that a person could be convicted without *anyone* having seen the act; the defendant's confession corroborated by the circumstances would be sufficient.<sup>74</sup> The courts have not yet

56. *E.g.*, *People v. Kratz*, 230 Mich. 334, 203 N.W. 114 (1925); *Dubois v. State*, 164 Tex. Crim. 557, 301 S.W.2d 97 (1957), *cert. denied*, 356 U.S. 921 (1958).

57. *People v. Burke*, 243 App. Div. 83, 276 N.Y. Supp. 402 (1934), *aff'd*, 267 N.Y. 571, 196 N.E. 585 (1935); *People v. Hildabridle*, 353 Mich. 562, 92 N.W.2d 6 (1958); *People v. Ring*, 267 Mich. 657, 255 N.W. 373 (1934); *Campbell v. State*, 169 Tex. Crim. 515, 338 S.W.2d 255, *cert. denied*, 364 U.S. 927 (1960).

58. *Williams v. State*, 64 Ind. 553, 31 Am. Rep. 135 (1878); *Commonwealth v. Catlin*, 1 Mass. 8 (1804).

59. *Wainscott v. State*, 89 Ind. App. 452, 166 N.E. 666 (1929).

60. *Commonwealth v. Cummings*, 273 Mass. 229, 173 N.E. 506 (1930).

61. *Gabbard v. State*, 225 Ark. 775, 285 S.W.2d 515 (1956).

62. *People v. Case*, 16 App. Div. 2d 635, 227 N.Y.S.2d 213 (1962).

63. *Sparks v. State*, 94 Ga. App. 882, 96 S.E.2d 517 (1957); *Marshall v. State*, 316 P.2d 222 (Okla. Crim. Ct. App. 1957); *Placker v. State*, 171 Tex. Crim. 406, 350 S.W.2d 546 (1961).

64. *People ex rel. Lee v. Bixby*, 67 Barb. 221 (N.Y. Sup. Ct. 1875).

65. *Rachel v. State*, 71 Okla. Crim. 33, 107 P.2d 813 (1940).

66. *State v. Hintenberger*, 41 N.J. Super. 597, 125 A.2d 735 (1956); *Miller v. State*, 156 Tex. Crim. 389, 243 S.W.2d 175 (1951).

67. *Ex parte Hutchings*, 2 Cal. Unrep. 822, 16 Pac. 234 (Sup. Ct. 1887); *Martin v. State*, 38 Ga. App. 392, 144 S.E. 36 (1928).

68. *Hines v. Commonwealth*, 308 Ky. 859, 215 S.W.2d 1014 (1948); *Stark v. State*, 81 Miss. 399, 33 So. 175 (1903) (dictum); *Davidson v. State*, 20 Okla. Crim. 368, 209 Pac. 779 (1922).

69. *State v. Perry*, 224 Minn. 346, 28 N.W.2d 851 (1947); *People ex rel. Campbell v. Board of Police Comm'rs*, 13 App. Div. 69, 43 N.Y. Supp. 118, *appeal dismissed*, 153 N.Y. 657, 47 N.E. 1110 (1897); *McKinley v. State*, 33 Okla. Crim. 434, 244 Pac. 208 (1926).

70. See *Ardery v. State*, 56 Ind. 328 (1877); 4 BLACKSTONE, COMMENTARIES 64. It has been said that an indecent exposure is "malum in se." *Truett v. State*, 3 Ala. App. 114, 57 So. 512 (1912).

71. *Commonwealth v. Hardin*, 2 Ky. L. Rep. 59 (Ct. App. 1880) (not a crime); *State v. Martin*, 125 Iowa 715, 101 N.W. 637 (1904) (is a crime).

72. See *People v. Ulman*, 258 App. Div. 262, 16 N.Y.S.2d 222 (1939), where the conviction was reversed and the information dismissed in a three to two decision.

73. See *People v. Belmonte*, 26 P.R.R. 706 (1918); *State v. Juneau*, 88 Wis. 180, 59 N.W. 580 (1894).

74. *State v. Hazle*, 20 Ark. 156 (1859); *State v. Bauguess*, 106 Iowa 107, 76 N.W. 508 (1898). Compare *Van Houten v. State*, 46 N.J.L. 16, 50 Am. Rep. 397 (Sup. Ct. 1884), with *State v. Buffano*, 5 N.J. Super. 255, 68 A.2d 765 (1949). See also *Grisham v. State*, 10 Tenn. 588 (1831).



recognized that the exhibitionist needs medical treatment rather than punishment, even when the exhibitionist recognizes his sickness.<sup>75</sup>

A person may also be prosecuted for the "offense of maintaining a common nuisance consisting of indecent exposure of the person."<sup>76</sup> An injunction will also lie.<sup>77</sup> Individual recovery in tort actions will be permissible where the plaintiff can show unique injury.<sup>78</sup> For instance, a woman could probably recover if she showed that she was "disturbed, vexed, humiliated, and . . . suffered a violation of her individual dignity by the conduct of the defendant."<sup>79</sup> An injunction and damages were awarded a plaintiff who lived next door to a house of ill-fame because the plaintiff was "annoyed and seriously disturbed" by the noise and indecent exposures made at the windows.<sup>80</sup> A woman who was confronted by indecent exposures by several men while waiting for a train in the defendant railroad's waiting room was unable to recover since she could not show that the defendant was aware or had reason to believe that the events would happen.<sup>81</sup> It has also been advanced that it is an invasion of privacy to be forced to witness an indecent exposure:

A woman may resent as much a man making an indecent exposure in her presence as to discover that she is observed while getting ready for bed.<sup>82</sup>

Almost all states and many municipalities<sup>83</sup> have laws prohibiting indecent exposure. Many of these statutes fall under the titles of lewdness, lascivious acts, obscenity, or indecencies. Many states have a combination of these statutes.<sup>84</sup> The statutory crimes are broader than common-law indecent exposure since they also cover other sex crimes.<sup>85</sup> But when the prosecution is for indecent exposure there appears to be no practical difference between the statutory and the common-law offense, regardless of how a particular state statute is phrased. The common-law

75. *Rice v. State*, 368 P.2d 507 (Okla. Crim. App. 1962) (twelve-year sentence); *Ryall v. State*, 204 Tenn. 422, 321 S.W.2d 809 (1958) (two-year sentence). *But see* *State v. Chase*, 50 Del. 383, 386 n.2, 131 A.2d 178, 179 n.2 (1957) (indictment quashed on procedural ground).

76. *Nichols v. Commonwealth*, 312 Ky. 171, 226 S.W.2d 796 (1950); *accord*, *Truett v. State*, 3 Ala. App. 114, 57 So. 512 (1912); *Commonwealth v. Spratt*, 14 Phila. 365 (Ct. Quarter Sess. Pa. 1880); PROSSER, TORTS §§ 70-71 (2d ed. 1955).

77. *See Weis v. Superior Court*, 30 Cal. App. 730, 159 Pac. 464 (1916).

78. *See* PROSSER, TORTS § 71 (2d ed. 1955).

79. *State v. Trenary*, 79 Ariz. 351, 290 P.2d 250 (1955) (criminal prosecution).

80. *Crawford v. Tyrrell*, 128 N.Y. 341, 28 N.E. 514 (1891).

81. *Batton v. South & N. Ala. R.R.*, 77 Ala. 591, 54 Am. Rep. 80 (1884).

82. 1 HARPER & JAMES, TORTS § 9.6, at 681 (1956).

83. For problems that arise when both the state and a municipality have similar laws but different penalties, *see* *Browning v. City of Tampa*, 101 So.2d 365 (Fla. 1958).

84. *See* MUELLER, LEGAL REGULATION OF SEXUAL CONDUCT 56-59 (1961). For a table of state statutes, *see id.* at 133-38.

85. *See* *Commonwealth v. Wardell*, 128 Mass. 52, 35 Am. Rep. 357 (1880); *State v. Lizotte*, 101 N.H. 494, 148 A.2d 91 (1959).

crime and the statute may be used interchangeably.<sup>86</sup> In a state where the prosecutor has several types of laws at his disposal, a conviction under one type of law precludes a conviction under any other law.<sup>87</sup> However, a conviction for indecent exposure under a municipal ordinance does not preclude a conviction under a state statute.<sup>88</sup>

A crime has *not* been committed when a person is nude in his home and happens to be seen by a passerby.<sup>88a</sup> *Hearn v. District of Columbia*,<sup>88b</sup> decided in 1962, is an extended decision on that point and should become the precedent case for that proposition.<sup>88c</sup>

The Model Penal Code has taken a relatively progressive view:

*Indecent Exposure.* A person commits a misdemeanor if for the purpose of arousing or gratifying sexual desire of himself or any person other than his spouse, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm.<sup>89</sup>

*Lewdness.* A person commits a petty misdemeanor if he does any lewd act which he knows is likely to be observed by others who would be affronted or alarmed.<sup>90</sup>

The authors of the Code explicitly intended to exempt "cult nudism" from either section by requiring an "awareness of likelihood of affronting observers."<sup>91</sup>

"Obscenity," a term that has been used to describe indecent exposure, is usually reserved for printed material.<sup>92</sup>

#### IV. NUDIST PUBLICATIONS

While there have been many cases in various parts of the country which consider whether publications and movies distributed by nudists

86. *State v. Bauguess*, 106 Iowa 107, 76 N.W. 508 (1898); *Messina v. State*, 212 Md. 602, 130 A.2d 578 (1957); *State v. Rose*, 32 Mo. 560 (1862).

87. *Faulkner v. State*, 146 Fla. 769, 1 So.2d 857 (1941).

88. *State v. End*, 232 Minn. 266, 45 N.W.2d 378 (1950).

88a. *Selph v. District of Columbia*, 188 A.2d 344 (D.C. Ct. App. 1963); *Hearn v. District of Columbia*, 178 A.2d 434 (D.C. Munic. Ct. App. 1962); *Case v. Commonwealth*, 313 Ky. 374, 231 S.W.2d 86 (1950); *State v. Perry*, 224 Minn. 346, 28 N.W.2d 851 (1947); *McKinley v. State*, 33 Okla. Crim. 434, 244 Pac. 208 (1926); cf. *State ex rel. Sparling v. Bronson*, 83 Ohio App. 108, 82 N.E.2d 780 (1947). See also *Davison v. State*, 281 P.2d 196 (Okla. Crim. 1955) (concurring opinion). For unreported cases in this area, see DONALD JOHNSON, *THE NUDISTS* 92-117 (1959).

88b. 178 A.2d 434 (D.C. Munic. Ct. App. 1962).

88c. The *Hearn* case has already been followed in *Selph v. District of Columbia*, 188 A.2d 344 (D.C. Ct. App. 1963).

89. MODEL PENAL CODE § 213.5 (Proposed Official Draft 1962).

90. *Id.* § 251.1.

91. MODEL PENAL CODE §§ 213.4, 215.1, comment (Tent. Draft No. 13, 1961).

92. The American Digest System of Key Numbers mixes together under the topic heading "obscenity," indecent exposure, obscene publications and exhibitions, profane language, and other public indecencies.

are obscene, several decisions by the New York and Federal courts are significant since they have laid the groundwork for upholding the practice of organized nudism. Studies on sexual responses to observing nude pictures show that the effect on the viewer is slight.<sup>93</sup>

As early as 1884, the New York Court of Appeals, although upholding the conviction of a seller of photographs of nude female paintings which were on exhibit in the Salon in Paris, said in dictum:

It is evident that mere nudity in painting and sculpture is not obscenity. Some of the great works in painting and sculpture, as all know, represent nude human forms. It is a false delicacy and mere prudency which would condemn and banish from sight all such objects as obscene, simply on account of their nudity.<sup>94</sup>

In 1940, in *Parmalee v. United States*,<sup>95</sup> the District of Columbia Court of Appeals broadened this concept by saying:

It cannot be assumed that nudity is obscene per se and under all circumstances.<sup>96</sup>

The *Parmalee* case reversed the Customs Department's ban on the importation of the book *Nudism in Modern Life* by Maurice Parmalee. The Government conceded that there was nothing obscene in the text nor in nineteen of the twenty-three photographs in the book. The four "objectionable" pictures contained full front views of male and female nudes together at a nudist camp. The pictures were in black and white and unretouched. They were  $2\frac{1}{2} \times 3\frac{1}{4}$  inches in size with the human figures being  $1\frac{1}{2}$  inches in height. The majority opinion by Judge Miller is a well-documented treatise on the point that a book about the advantages of nudism is a contribution to the study of sociology. The banning of the book was compared to discouraging the study of medicine during the Dark Ages.<sup>97</sup> The court quoted from Havelock Ellis, a noted psychologist:

Nakedness is always chaster in its effects than partial clothing . . . . [N]othing is so chaste as nudity . . . . [T]he greatest provocations of lust are from our apparel.<sup>98</sup>

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93. Males respond slightly more than females. KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 652 (1953); Cairns, Paul & Wishner, *Sex Censorship*, 46 MINN. L. REV. 1009, 1020 (1962). See generally Cairns, Paul & Wishner, *Sex Censorship*, 46 MINN. L. REV. 1009 (1962).

94. *People v. Muller*, 96 N.Y. 408, 411, 48 Am. Rep. 635, 637 (1884).

95. 72 App. D.C. 203, 113 F.2d 729 (D.C. Cir. 1940).

96. *Id.* at 206, 113 F.2d at 732.

97. A dog (in 1500) was the usual object to be dissected before the class. As the dissection progressed, the professor would read what Galen [131-201 A.D.] said on the subject. Sometimes Professor Sylvius would find something in the course of dissection of the dog which did not agree with Galen. If so, he gave his class to understand the dog was wrong. *Id.* at 208 n.20, 113 F.2d at 734 n.20.

98. *Id.* at 206 n.15, 113 F.2d 732 n.15.

Judge Miller also pointed out that the *Encyclopedia Britannica* contained front views of nude males and females in contact; the pictures being larger than those in Parmalee's book and emphasizing sexual subjects as distinguished from Parmalee's book.<sup>99</sup>

In 1954, the Post Office Department was enjoined by a district court from prohibiting the mailing of coasters which depicted Marilyn Monroe in the nude. The court stated:

Modern authorities, including the Federal Courts, clearly establish the principle that nudity in itself is not obscene.<sup>100</sup>

However, in 1955, the District Court for the District of Columbia refused to enjoin the Post Office Department from prohibiting the mailing of the illustrated nudist magazine *Sunshine and Health*.<sup>101</sup> While the court recognized that "nudity is not obscene, per se,"<sup>102</sup> it said that nudes become obscene when the pubic areas of males or females are clearly visible. The court then proceeded to a picture-by-picture analysis, declaring which pictures were obscene and "grotesque."<sup>103</sup> The court then tried to establish guidelines for the future by stating that pictures of the pubic areas of children would depend on their age, analogizing presumptions of the development of a child's pubic area to common-law criminal presumptions of a child's guilt. Also, a picture's obscenity was to be determined by the view and shading, and the distance the person was from the camera. The Court of Appeals upheld this decision,<sup>104</sup> but the Supreme Court reversed in a per curiam decision,<sup>105</sup> citing the precedent case on obscenity, *Roth v. United States*.<sup>106</sup> In a later suit, *Sun-*

99. *Id.* at 208, 208 n.19, 113 F.2d at 734, 734 n.19.

100. *Le Baron v. Olesen*, 125 F. Supp. 53 (S.D. Cal. 1954).

101. *Sunshine Book Co. v. Summerfield*, 128 F. Supp. 564 (D.D.C. 1955), *aff'd*, 101 App. D.C. 538, 249 F.2d 114 (D.C. Cir. 1957), *rev'd per curiam*, 355 U.S. 372 (1958). In an earlier case involving the same magazine the court enjoined the postmaster from refusing to deliver future and as yet unpublished issues of the magazine on the basis that former issues were allegedly obscene. *Summerfield v. Sunshine Book Co.*, 95 App. D.C. 169, 221 F.2d 42 (D.C. Cir. 1954), *cert. denied*, 349 U.S. 921 (1955).

102. *Sunshine Book Co. v. Summerfield*, 128 F. Supp. 564, 569 (D.D.C. 1955).

103. On page 29 there is a most unusual picture. Here are two women who appear to be in their late twenties or early thirties. The woman to the left appears to be approximately 5 foot 7. She must weigh in the neighborhood of 250 pounds. She is exceedingly obese.

I assume the illustration, not retouched by the photographer, is to represent the normal, natural person and reveals her as she was in fact when the picture was taken. This picture was taken within approximately 12 feet of the camera. First of all, so far as the demonstration of nudism goes, the picture shows a very clear sunburned "V" at her neck—V-shaped sunburn—whereas the rest of her skin is white as the snow on which she stands. The Court might gather she is a new member or a non-conformist. She has large, elephantine breasts that hang from her shoulder to her waist. They are exceedingly large. The thighs are very obese. She is standing in snow, wearing galoshes. But the part which is offensive, obscene, filthy and indecent is the pubic area shown. *Id.* at 571-72.

104. *Sunshine Book Co. v. Summerfield*, 101 App. D.C. 358, 249 F.2d 114 (D.C. Cir. 1957).

105. *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958).

106. The *Roth* case established the right of government to punish any dissemination of

*shine and Health* received second class postal rates privileges.<sup>107</sup> The Model Penal Code has also adopted the view that a nudist magazine is not obscene "merely because it promotes the idea and pictures happily unclad people."<sup>108</sup>

On the authority of the *Roth* case, the Supreme Court also reversed the Customs Department's ban on the importation of illustrated nudist books and magazines,<sup>109</sup> even though the lower court was of the opinion that the material emphasized pictures of "shapely, well-developed young women appearing in the nude, mostly in front exposures," as opposed to pictures of "mixed groups of all ages which ordinarily would be found in a nudist park."<sup>110</sup> However, the lower court did repeat the now often-cited statement: "Nudity is not per se obscene."<sup>111</sup>

In 1957, the New York Court of Appeals, in *In the Matter of Excelsior Pictures Corp. v. Regents of the Univ.*,<sup>112</sup> held in an extended opinion by Judge Desmond that the state could not prohibit the commercial showing of the movie *The Garden of Eden*, which depicted life in a Florida nudist camp. While Judge Desmond recognized that he was "not called upon to pass judgment on nudism or nudists," he pointed out:

Nudity in itself and without lewdness or dirtiness is not obscenity in law or in common sense.<sup>113</sup>

The dissenting opinion contended: "Aside from the question of degree, the resulting harm is the same whether the exhibition is in person or portrayed."<sup>114</sup> This view emphasizes that the taboo against nudity, which underlies prosecutions of nudists, is the same whether it be the actual practice of nudism or its portrayal through pictures. One wonders who the dissenting judges are protecting: Is it the audience, which is watching the movie, or is it the nudists in the movie?

In two recent cases, the courts of the District of Columbia reversed

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obscene matter which comes within the test: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Roth v. United States*, 354 U.S. 476, 489 (1957).

107. *Sunshine Publishing Co. v. Summerfield*, 184 F. Supp. 767 (D.D.C. 1960). Over 25,000 publications have second-class postal rates including *Esquire*, *Playboy*, *Gent*, *Rogue*, *Dude*, *Whisper*, *Confidential*, *Top Secret*, and *Hush-Hush*. *Id.* at 772 n.7.

108. MODEL PENAL CODE § 207.10, comment at 35 (Tent. Draft No. 6, 1957).

109. *Mounce v. United States*, 355 U.S. 180, *vacating per curiam* 247 F.2d 148 (9th Cir. 1957), *affirming per curiam sub nom.* *United States v. 4200 Copies of Int'l Journal*, 134 F. Supp. 490 (E.D. Wash. 1955).

110. *United States v. 4200 Copies Int'l Journal*, 134 F. Supp. 490, 494 (E.D. Wash. 1955).

111. *Id.* at 493.

112. 3 N.Y.2d 237, 144 N.E.2d 31 (1957).

113. *Id.* at 242, 144 N.E.2d at 34.

114. *Id.* at 257, 144 N.E.2d at 44.

convictions for indecent exposure on the basis that "nudity is not per se obscene."<sup>115</sup>

## V. NUDIST CAMPS

### A. Michigan

Organized nudism was introduced to the United States in 1929 from Germany.<sup>116</sup> Within two years police raids against nudist groups had begun,<sup>117</sup> and in 1934, the Michigan Supreme Court had the distinction of deciding the first case on organized nudism,<sup>118</sup> *People v. Ring*.<sup>119</sup>

The defendants in the *Ring* case were convicted of indecent exposure for being nude at a private nudist camp in the presence of married couples with their children and single men. The camp was visible from a bluff on adjacent property which was used by hunters and fishermen. The police raided the camp without a search warrant and claimed that they saw the nudists "cavorting around." A unanimous court held that constitutionally protected search and seizure does not extend to open lands and answered the following question in the affirmative:

Is one who, on his own property, privately goes without clothing, in the presence of persons whose sense of decency, propriety and morality is not offended, guilty of [making an open or indecent or obscene exposure of his person]?<sup>120</sup>

The court explained that:

Instinctive modesty, human decency, and natural self-respect require that the private parts of persons be customarily kept covered in the presence of others.<sup>121</sup>

The court based its authority on a 1925 Michigan case which upheld the conviction of an elderly man who exposed himself to two girls, ages ten and twelve, on their way to school.<sup>122</sup>

In 1958, without any substantive change in the statutory law of Michigan, the supreme court, in *People v. Hildabridle*,<sup>123</sup> reversed the convictions of nudists in a fact situation almost identical to the *Ring* case. The nudist camp in *Hildabridle* had operated for fourteen years without complaint. The camp strictly enforced its ban on alcoholic

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115. *Selph v. District of Columbia*, 188 A.2d 344 (D.C. Ct. App. 1963); *Hearn v. District of Columbia*, 178 A.2d 434 (D.C. Munic. Ct. App. 1962).

116. Brief for the American Sunbathing Association as Amicus Curiae, p. 13, *People v. Hildabridle*, 353 Mich. 562, 92 N.W.2d 6 (1958).

117. DONALD JOHNSON, *THE NUDISTS* 92 (1959).

118. Annot., 93 A.L.R. 996, 1001 (1934).

119. 267 Mich. 657, 255 N.W. 373 (1934).

120. *Id.* at 662, 255 N.W. at 374.

121. *Id.* at 662, 255 N.W. at 375.

122. *People v. Kratz*, 230 Mich. 334, 203 N.W. 114 (1925).

123. 353 Mich. 562, 92 N.W.2d 6 (1958).

beverages and on occasion had called the state police to enforce it. The camp could not be seen from any point off the property. In fact, it was so well-secluded that it was impossible for the raiding officers to gather evidence except by entering the property under the subterfuge of serving arrest warrants.

Justice Voelker (author of *Anatomy of a Murder*) wrote a very literary<sup>124</sup> majority opinion on behalf of three of the seven participating justices. A fourth justice concurred only in the majority opinion relative to the search and seizure issue. With respect to the search and seizure issue, Justice Voelker called the police "peeping Toms" and distinguished the *Ring* case on the basis that in *Ring* an open field was involved but here it was the "courtyard" of a defendant's home.

The portion of Justice Voelker's opinion dealing with organized nudism was prefaced with the remarks:

Lest I henceforth be heralded as the patron saint of nudism (which I probably will be anyway), I hasten to preface what follows by stating that I am not a disciple of the cult of nudism. Its presumed enchantments totally elude me.<sup>125</sup>

Justice Voelker then proceeded to elaborate on many of the views that nudists have always claimed:

Guilt or innocence of indecent exposure is not a matter of measuring the amount of human flesh exposed; one does not caliper the revealed epidermis and certify guilt as increasing by the square inch; the indecency of an exposure is always a matter of intent to be gathered from all of the circumstances. The plain fact is that often the less the exposure the more plainly indecent it becomes, *by that very circumstance alone*; the plain fact is that usually there is involved an aggressive and unmistakably erotic attempt to focus the attention of others solely on the sexual organs of the exposer, and, as any weary patrolman knows (if some judges may have forgotten), most usually on a certain engorged portion of the male anatomy. To link these

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124. If eccentricity were a crime then all of us were felons. *Id.* at 579, 92 N.W.2d at 13.

[If nudity in itself is indecency,] the curators of our art galleries and museums would have to turn to the cultivation of fig leaves . . . . *Id.* at 581, 92 N.W.2d at 14.

In a world locked in a death struggle between the David of democracy and the Goliath of giant totalitarianism, it serves David illy for the court of last resort . . . to put its stamp of approval on such a dubious departure from our traditional procedures and historic safeguards against invasion of our individual rights . . . . *Id.* at 592-93, 92 N.W.2d at 19.

125. *Id.* at 578, 92 N.W.2d at 13. In addition, Justice Voelker concluded his opinion: "Our reversal of these convictions is no more an indorsement by us of nudism than our occasional necessary reversal of a murder conviction constitutes a judicial indorsement of murder." *Id.* at 593, 92 N.W.2d at 20.

poor defendants, however deluded, with such gross and panting immorality is a kind of back-handed indecency in itself.<sup>126</sup>

Justice Voelker refuted the state's argument that the children who were at the camp must be protected, by saying that it was "monstrous" to think that parents were exposing their children to indecencies. If this were true, then the state should be censured for not taking more drastic action. Furthermore, anthropologists and sociologists reject the idea that children who see nakedness are given evil and erotic tendencies.<sup>127</sup>

The *Ring* case must be overruled as a "murky" opinion. It is "hereby nominated for oblivion."<sup>128</sup> "[I am not] prepared to burn down the house of constitutional safeguards in order to roast a few nudists."<sup>129</sup>

The three dissenters in a relatively short opinion emphasized that nudism is not protected by the freedom to assemble any more than obscenity is protected by free speech.

### B. *New York*

Seven months after the nudists lost their appeal in Michigan in 1934, the New York Appellate Division reached the opposite result in a weaker fact situation.<sup>130</sup> In *People v. Burke*,<sup>131</sup> a nudist group leased a gymnasium and swimming pool in the basement of a building in downtown New York City. In celebration of "Nudism Forward Month," the public was invited to attend for a day upon paying an admission of one dollar. It was impossible to observe the activities from outside the building. Two detectives paid the admission price and, after observing men and women engaged in sports and swimming together nude, arrested them.

In a very short opinion, the majority of the court reversed the conviction on the basis that there was no indecent exposure and suggested that the next legislature pass a law to stop the practice.

Justice Merrell wrote a long dissent, discussing the "fall of Adam" and the immateriality of the nudists' motives, and saying that the activities were indecent because of the "effect it would have on a by-

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126. *Id.* at 592, 92 N.W.2d at 19.

127. *Id.* at 581-82, 591-92, 92 N.W.2d at 14, 19.

128. *Id.* at 587, 92 N.W.2d at 17. "When student editors [Comment, 33 MICH. L. REV. 936 (1935)] start sniping at our decisions with such deadly accuracy, perhaps the time has come for all of us to take a second look at the *Ring* case." *Ibid.*

129. *Id.* at 575, 92 N.W.2d at 11. "The busiest snoopers and moral vigilantes among us are doubtless convinced of 3 things: of their own unfaltering rectitude; that what they do is always for our own best good; and that any among us who dare question the legality of their activities are soaked in sin." *Id.* at 593, 92 N.W.2d at 20.

130. Usually nudist activities take place in the open air and sunshine. But in the *Burke* case it took place in a basement gymnasium. The *Burke* situation has been referred to as "cellar nudism." Note, 69 U.S.L. Rev. 346 (1935).

131. 243 App. Div. 83, 276 N.Y. Supp. 402 (1934), *aff'd without opinion*, 267 N.Y. 571, 196 N.E. 585 (1935).



stander, whom the indecency statutes of our state are designed to protect . . . ."<sup>132</sup> However, Justice Merrell did not explain how a bystander was injured, since the only persons who could see the nudists were those persons present in the gymnasium who chose to be there. Justice Merrell concluded:

It cannot be doubted that the parading of persons, male and female, naked, in public places, would raise thoughts of lasciviousness and lust in many who observed such practices. I do not think this country has yet reached the stage when such practices should be permitted.<sup>133</sup>

The state legislature agreed with Justice Merrell and the suggestion of the majority. Before the New York Court of Appeals affirmed the decision without opinion, two judges dissenting,<sup>134</sup> the legislature adopted the following statute:

A person who in any place wilfully exposes his private parts in the presence of two or more persons of the opposite sex whose private parts are similarly exposed . . . is guilty of a misdemeanor.<sup>135</sup>

Critics of this law point to the following situations: if one man was naked in the presence of ten naked women, only the man would have committed a crime; the nudists in the *Burke* case could still perform their activities if every half hour a different sex put on scanty underwear;<sup>136</sup> and, a crime would be committed if a woman gave birth to twin boys.<sup>137</sup> But even the critics conceded that a "statute such as New York's adequately and unquestionably prohibits nudism."<sup>138</sup>

There have been no prosecutions under the New York statute. However, in 1957, one of the reasons given by the state censorship board for denying a license to the movie *Garden of Eden* was that the showing of a movie depicting organized nudism was prohibited by that statute. In *In the Matter of Excelsior Pictures v. Regents of the Univ.*,<sup>139</sup> Judge Desmond in reversing the censorship board used the opportunity to "interpret" the statute.

Judge Desmond said the statute should be narrowly and strictly construed since it created a crime unknown to the common law. The assumption that the legislature made criminal "any practice of nudism,

132. *Id.* at 92, 276 N.Y. Supp. at 411.

133. *Id.* at 92, 276 N.Y. Supp. at 412.

134. *People v. Burke*, 267 N.Y. 571, 196 N.E. 585 (1935).

135. N.Y. PEN. LAW § 1140-b.

136. See Note, 69 U.S.L. REV. 346, 350 (1935).

137. Comment, 41 J. CRIM. L. & C. 57, 60 n.33 (1950).

138. *Id.* at 61.

139. 3 N.Y.2d 237, 144 N.E.2d 31 (1957).

even in secluded private grounds and by family groups" was false.<sup>140</sup> While Judge Desmond recognized that the contemporary press had referred to the legislation as the "anti-nudism bill," he pointed out that Governor Lehman wrote in his memorandum approving the bill that it was directed against "the professional exploitation of nudism for profit."<sup>141</sup> Thus, the majority view in the *Excelsior* case was that the statute was limited to the facts of the *Burke* case.

The three dissenting judges were furious:

The history of this legislation makes it crystal clear that the exhibition of male and female nudes totally exposed to each other offends the community sense of decency.<sup>142</sup>

The exhibition of "Garden of Eden" would be a "professional exploitation of nudism for profit" and a "widespread use of exhibitionism for financial gain" . . . .<sup>143</sup>

### C. Texas

The fourth and latest case to decide if nudism and indecent exposure were synonymous was *Campbell v. State*,<sup>144</sup> decided in 1960 by the Texas Court of Criminal Appeals. The defendant was convicted under the following statute:

If any person shall make, publish or print any indecent and obscene print, picture or written composition manifestly designed to corrupt the morals of youth, or shall designedly make any obscene and indecent exhibition of his own or the person of another in public, he shall be fined not exceeding one hundred dollars.<sup>145</sup>

It should be noted that the statute was coupled with a prohibition against obscene pictures and was similar to common-law indecent exposure except there was no minimum-number-of-observers requirement.

The defendant operated a nudist camp on a wooded tract of land he owned several miles from the nearest city. Fifty-four families belonged to the camp, paying an annual fee of forty-two dollars a year. Police officers observed ten or fifteen nude men, women and children at the nudist camp for two or three hours from a point off the defendant's property. There appeared to be no one else who saw or complained of the nudist camp. The police were aware of the camp because the defendant had told the local sheriff about it. In a short opinion the court affirmed the conviction, saying:

We do not construe the statute as authorizing anyone to invite

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140. *Id.* at 224, 144 N.E.2d at 35.

141. *Ibid.*

142. *Id.* at 249-50, 144 N.E.2d at 39.

143. *Id.* at 251, 144 N.E.2d at 40.

144. 169 Tex. Crim. 515, 338 S.W.2d 255, *cert. denied*, 364 U.S. 927 (1960), *rehearing denied*, 365 U.S. 825 (1961).

145. TEX. PEN. CODE ANN. art. 526 (1952).

a number of people to his home and then exhibit himself to them in the nude with impunity. It is the persons who can and do see the exhibition rather than the place where the exhibition is made which controls under the statute. These people were not members of his family and were therefore members of "the public." To hold otherwise would sanction any violation of the law so long as those who participated were members of a club to which they paid a fee to join."<sup>146</sup>

The *Campbell* decision made no reference to prior cases on nudism. The only cases cited were two nineteenth century Texas cases. One case discussed the meaning of a "public" place without giving any facts.<sup>147</sup> The other case gave a definition of indecent exposure to distinguish that act from the act of putting indecent marks upon the clothes worn by another person.<sup>148</sup> *Campbell* was the first case in which review was sought in the United States Supreme Court, but certiorari was denied.<sup>149</sup>

The *Campbell* case is diametrically opposed to *People v. Burke*<sup>150</sup> and *People v. Hildabridle*.<sup>151</sup> In *Campbell*, the court frowned upon admission being paid on a yearly basis. In *Burke*, the court was not disturbed by the payment of one dollar for the day. In *Campbell*, it was immaterial that the nudist camp was defendant's home. In *Hildabridle*, a nudist camp was held to be as much a "castle" as one's home, with all the incidents of privacy attaching. It should be noted that the New York and Michigan statutes considered in those cases can be considered more applicable to nudism since they were not diluted with other crimes within the same code sections and they were not limited by the words "in public."<sup>152</sup> Of course, the *Campbell* case is similar in philosophy to *People v. Ring*.<sup>153</sup> The only factual distinction that could be made to reconcile the results of the four cases is that in *Ring* and *Campbell*, which held *against* the nudists, the nudist activities *could be seen* from vantage points off the nudists' property; while in *Burke* and *Hildabridle*, which held *for* the nudists, the nudist activities could *not* be seen without entering the nudists' property. Thus, the rule is evolved: What the non-nudist cannot see cannot disturb him.

#### D. Other Jurisdictions

Several states have passed laws to prohibit or regulate organized nudism. Where there have been cases interpreting these laws, they have involved fact situations other than the practice of nudism.

146. *Campbell v. State*, 169 Tex. Crim. 515, 517, 338 S.W.2d 255, 257 (1960).

147. *Moffit v. State*, 43 Tex. 346 (1875).

148. *Tucker v. State*, 28 Tex. App. 541, 13 S.W. 1004 (1890).

149. *Campbell v. State*, 364 U.S. 927 (1960), *rehearing denied*, 365 U.S. 825 (1961).

150. 243 App. Div. 83, 276 N.Y. Supp. 402 (1934), *aff'd without opinion*, 267 N.Y. 571, 196 N.E. 585 (1935).

151. 353 Mich. 562, 92 N.W.2d 6 (1958).

152. MICH. COMP. LAWS § 750.335a (Supp. 1956); N.Y. PEN. LAW § 1140.

153. 267 Mich. 657, 255 N.W. 373 (1934).

Ohio has a code section entitled "Nudism prohibited." But the language within the section does not mention the word nudism:

Whoever being eighteen years of age or over, willfully exposes his or her private parts in the presence of two or more persons of the opposite sex . . . shall be fined not more than two hundred dollars or imprisoned not more than six months, or both.<sup>154</sup>

The statute provides exceptions for medical purposes and family members.

On the basis of that statute, the Ohio Supreme Court in *State ex rel. Church v. Brown*,<sup>155</sup> refused to issue a mandamus to require the Secretary of State to incorporate the National Nudist Council as a nonprofit corporation. The Council's articles of incorporation listed as its purposes the promotion of nudism, the education of the public about the subject, and the establishment of private facilities where nudism could be practiced. The court justified the denial of incorporation on the basis that at least part of the activities the Council planned were prohibited by statute. By adopting the general hornbook rule regarding corporations whose purpose was to violate the law,<sup>156</sup> the court was able to avoid going to the merits of the statute. The United States Supreme Court dismissed the appeal for want of a substantial federal question<sup>157</sup> even though the Council alleged violations of the religion, speech, press, and assembly freedoms in the state court.

The Ohio Court of Appeals in *State v. Rothschild*<sup>158</sup> held that the nudism statute was not applicable to a conviction for exhibiting the nudist movie *Garden of Eden* as teaching or advocating the violation of a criminal law. The court pointed out that the movie did not advocate violating the law, although it did imply that the law should be repealed. The latter purpose could not be a reason for conviction: "Legal and social progress are dependent upon our freedom to consider whether an existing law is wise or desirable."<sup>159</sup>

The Ohio nudism statute also has been used to prosecute a situation that normally is classified as indecent exposure.<sup>160</sup> However, a conviction under the statute is not a misdemeanor involving moral turpitude.<sup>161</sup>

Florida and California have become havens for nudist camps because

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154. OHIO REV. CODE ANN. § 2905.31 (Baldwin 1958).

155. 165 Ohio St. 31, 133 N.E.2d 333, *appeal dismissed*, 352 U.S. 884 (1956).

156. See Survey, 26 U. CINC. L. REV. 360-61 (1957).

157. *State ex rel. Church v. Brown*, 352 U.S. 884 (1956).

158. 109 Ohio App. 101, 163 N.E.2d 907, *reversing* 78 Ohio L. Abs. 293, 149 N.E.2d 57 (C.P. 1958).

159. *Id.* at 104, 163 N.E.2d at 910.

160. See *State ex rel. Sparling v. Bronson*, 83 Ohio App. 108, 82 N.E.2d 780 (1947).

161. *State v. Deer*, 70 Ohio L. Abs. 515, 129 N.E.2d 667 (C.P. 1955) (dictum).

of their warm, sunny climates and favorable laws. Florida's indecent exposure statute exempts from its operation a naked person "in any place provided or set apart for that purpose."<sup>162</sup> The Florida Supreme Court has twice prevented the legislature from prohibiting and regulating nudist camps in specific counties on the grounds that the Florida Constitution prohibits "local" laws. The legislature tried to avoid the constitutional provision by making the statutes applicable to all counties that fit the population figures stated in the act. But the court could not see how the legislature's concern for the morals of the people regarding nudist camps could change when a county's population increased or decreased a few thousand people.<sup>163</sup> In one of the acts, there was a section that made the prohibition of nudist camps applicable to the entire state, but this was also held unconstitutional since the general provision was not reflected in the title of the act.<sup>164</sup>

California's indecent exposure statute is only applicable to private places "where there are present other persons to be offended or annoyed thereby . . . ."<sup>165</sup> Only one case concerning a nudist camp has appeared in California.<sup>166</sup> The owner of neighboring property sued a nudist camp for overburdening the nudist camp's easement to use a road across the plaintiff's property. The plaintiff's contention was that the easement was originally granted when the defendant used his land exclusively as a farm and home; now as many as five hundred cars a week used the road. The case was decided for the plaintiff, as if nudism was not involved, except for one sentence: "The easement for access to a tranquil home and farm was converted into a turbulent route to reach a hilarious nudist colony."<sup>167</sup>

Kentucky regulates "nudist societies" to a degree that their establishment in that state is not likely.<sup>168</sup> A nudist is defined as:

any person who displays any part of his private person naked before persons of the opposite sex, not his husband or wife, at their solicitation or with their consent, for religious or health purposes.<sup>169</sup>

An annual tax of one thousand dollars must be paid to own or operate a nudist society.<sup>170</sup> A "wall twenty feet in height, made of brick, stone

162. FLA. STAT. § 800.03 (1961).

163. State *ex rel.* Cotterill v. Bessenger, 133 So.2d 409 (Fla. 1961) (counties having a population of 36,700 to 38,000); *Ex parte* Porter, 141 Fla. 711, 193 So. 750 (1940) (counties having a population of 155,000 to 165,000).

164. *Ex parte* Porter, 141 Fla. 711, 193 So. 750 (1940).

165. CAL. PEN. CODE § 314.

166. Bartholomew v. Staheli, 86 Cal. App. 2d 844, 195 P.2d 824 (1948).

167. *Id.* at 850, 195 P.2d at 828.

168. See KY. REV. STAT. ch. 232 (1962); Funk, *Some of the Problems Confronting the Attorney General*, 12 KY. S.B.J. 136, 140 (1948).

169. KY. REV. STAT. § 232.010 (1962).

170. KY. REV. STAT. § 232.020 (1962). Any violation of the nudism statute carries a minimum fine of one thousand dollars. KY. REV. STAT. § 232.990 (1962).

or cement" must surround the premises.<sup>171</sup> The attorney-general shall inspect the premises whenever he may deem it necessary.<sup>172</sup> And the names and addresses of all persons who enter the society must be kept open for inspection.<sup>173</sup> The last requirement goes against the nudists' policy of not disclosing names of members and introducing people by first names only in order to avoid public harassment of a known nudist.<sup>174</sup>

Arkansas passed a series of emergency laws in 1957, making it a crime not only to practice nudism, but also to "advocate, demonstrate or promote nudism."<sup>175</sup> The latter part of the prohibition might be violative of the speech and press freedoms, especially in light of the language found in the Ohio case of *State v. Rothschild*.<sup>176</sup> Nudism is defined as:

the act or acts of a person or persons congregating or gathering with his, her, or their private parts exposed in the presence of one or more persons of the opposite sex as a form of social practice.<sup>177</sup>

Excepted from the definition is medical treatment and "when the persons are married legally one to another." The legislature also made nudist camps a public nuisance and provided for their abatement.<sup>178</sup>

North Carolina's indecent exposure statute applies to:

Any person who in any place willfully exposes his person, or private parts thereof, in the presence of one or more persons of the opposite sex whose person, or the private parts thereof, are similarly exposed . . . .<sup>179</sup>

This statute is worded so narrowly that it could be interpreted not only against nudists, but also against a husband and wife disrobing before each other.<sup>180</sup> North Carolina did not make indecent exposure in a *public* place a statutory crime until 1941, after the type of exposure quoted hereabove had been part of the code.<sup>181</sup>

Georgia makes indecent bathing on Sunday a misdemeanor if done "in view of a road or passway leading to or from a house of religious worship . . . ." <sup>182</sup>

171. KY. REV. STAT. § 232.030 (1962).

172. KY. REV. STAT. § 232.040 (1962).

173. KY. REV. STAT. § 232.050 (1962).

174. See N.Y. Daily News, Aug. 11, 1959, special feature page, col. 2. The government discharged a postman after his nude picture appeared in a national nudist magazine. Miami Herald, Oct. 29, 1960, p. 1B, col. 1.

175. ARK. STAT. ANN. §§ 41-2709-12 (Supp. 1961). See also ARK. STAT. ANN. § 34-101 (1962).

176. 109 Ohio App. 101, 163 N.E.2d 907 (1958). See text at note 159 *supra*.

177. ARK. STAT. ANN. § 41-2709 (Supp. 1961).

178. ARK. STAT. ANN. § 34-101 (1962).

179. N.C. GEN. STAT. § 14-190 (1953).

180. See 19 N.C.L. REV. 479 (1941).

181. N.C. GEN. STAT. § 14-190, editor's note (1953).

182. GA. CODE ANN. § 26-6910 (1953).

Nudist camps are also controlled through local zoning and licensing regulations.<sup>183</sup> In addition, a property owner in the neighborhood of a nudist camp could possibly enjoin or recover damages from the nudist camp as a private nuisance. Mental depression from knowing that a nudist camp is present could prevent the full use and enjoyment of a person's property even though there may be no actual depreciation of the property.<sup>184</sup> Analogies could be drawn from cases where actions for private nuisance have been maintained against funeral homes, embalming establishments and cemeteries.<sup>185</sup> If the neighbor can view the activities of the nudist camp from his property he may be in a better position to recover. Relief has been granted where families continually saw the sex activities of animals<sup>186</sup> and a tomb<sup>187</sup> on adjacent property. It would not be material that the plaintiff's sense of decency was different from the rest of the community.<sup>188</sup>

## VI. CONCLUSION

A legal conclusion is simple; some jurisdictions permit the practice of organized nudism and others do not. The more difficult conclusion is the moral judgment of whether the law should prohibit nudism. The language used by the courts that have considered the problem indicates the issue to be whether the taboo of nudism is to be sanctioned by the law.

Justice Voelker summarized the arguments for permitting nudism in *People v. Hildabridge*.<sup>189</sup> Likewise, Justice Merrell, dissenting in *People v. Burke*,<sup>190</sup> covered all the negative arguments. The result of Judge Desmond's decision in *In the Matter of Excelsior Pictures v. Regents of the Univ.*,<sup>191</sup> was that New York's statute to prohibit organized nudism may not have accomplished its goal. Yet, *State ex rel. Church v. Brown*<sup>192</sup> seems to indicate that the Ohio legislature accomplished its goal. It is also clear that the courts treat the indecent exposure cases and the nudist publication cases in the same context, citing them interchange-

183. Interviews With Attorneys Representing Nudist Camps in Miami, Florida, March & April, 1963.

184. See HARPER, TORTS § 186 (1933).

185. E.g., *Jones v. Trawick*, 75 So.2d 785 (Fla. 1955); *Beisel v. Crosby*, 104 Neb. 643, 178 N.W. 272 (1920). *Contra*, *Dean v. Powell Undertaking Co.*, 55 Cal. App. 545, 203 Pac. 1015 (1921).

186. *Hayden v. Tucker*, 37 Md. 214 (1866); *Farrell v. Cook*, 16 Neb. 483, 20 N.W. 720 (1884).

187. *Barnes v. Hathorn*, 54 Me. 124 (1866). The majority and minority opinions in this case are excellent statements on recovery for mental suffering from private nuisances.

188. *Jones v. Trawick*, 75 So.2d 785 (Fla. 1954). *Compare* *Cleveland v. Citizens Gas Light Co.*, 20 N.J. Eq. 201, 205-06 (1869), *with* *Westcott v. Middleton*, 43 N.J. Eq. 478, 486, 11 Atl. 490, 494 (1887).

189. 353 Mich. 562, 92 N.W.2d 6 (1958).

190. 243 App. Div. 83, 276 N.Y. Supp. 402 (1934).

191. 3 N.Y.2d 237, 144 N.E.2d 31 (1957).

192. 165 Ohio St. 31, 133 N.E.2d 333, *appeal dismissed*, 352 U.S. 884 (1956).

ably. One conclusion is obvious—it is not the nudists or an occasional sightseer that the law is seeking to protect, but society as an abstract entity. It should be noted that in none of the cases involving organized nudism was there a prosecuting witness. If there has been no victim, who is to be avenged or to call for justice?<sup>193</sup>

As Justice Voelker emphasizes, one does not have to be a nudist or even believe in nudism to see that the nudist is a persecuted member of our society. Justice Voelker calls *that* an “indecentcy.” The states that prohibit nudism are possibly in conflict with the first amendment freedoms, especially if the United States Supreme Court adopts the view that:

The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others.<sup>194</sup>

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193. See HART, LAW, LIBERTY & MORALITY 83 (1963). It should be noted that this criticism is also applicable to sexual offenses where all participants have consented to the act.

194. *Id.* at 4 (quoting John Stuart Mill). See generally HART, LAW, LIBERTY & MORALITY (1963).

The law, we teach our students in law school, is a jealous mistress. Occasionally, as in the case of nudism, it is a rather meddlesome mistress. MUELLER, LEGAL REGULATION OF SEXUAL CONDUCT 59 (1961).