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The Legal Aspects of Nudism

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THE LEGAL ASPECTS OF NUDISM

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Organized nudism is today struggling to regain its prewar stature.[1] Opposition to it is as assiduously forming, nudism having been condemned by everyone from the Pope to the Blind Citizens of San Diego.[2] This opposition points to existing laws as prohibiting nudist colonies, if they will only be enforced. The purpose here is to examine these existing laws to ascertain how they affect nudism. There is no attempt to decide the weighty arguments made by the proponents and opponents as to the virtues of nudism, the discussion here being limited solely to existing law.[3] The typical nudist organization is a private club maintaining a camp far off the highway to which only members are admitted, and which is enclosed with a high fence and shrubbery to keep the public out and to hide the members from view. Can the law reach this?

The first question which must be faced is whether there are any constitutional restrictions against prohibition of nudism. Constitutional clauses that the nudists often rely on are those guaranteeing religous freedom in both the federal and state constitutions[4] and the right to "pursuit of happiness" in many state constitutions.[5] These guarantees are balanced against the ubiquitous "police powers" of the states.[6] Since the courts recognize that law reflects the ethics of the community, generally, a legislature will not be prevented from curbing activities it deems harmful to the morals of a community, so long as the prohibition is reasonably related to the basis for its decision.[7] Therefore, the legislatures could find that nudism leads to immorality, however erroneous nudists feel this fact finding may be.

The problem then arises of the applicability of criminal law to nudism. While at common law lewd or obscene acts were prohibited,[8] these acts involved a lustful or lacivious intent.[9] The aesthetic bareness of the nudists hardly falls within this rule since their purpose is to de-emphasize sexual desires, and so the requisite intent

1. Before the war there were about 400 camps, and 300,000 nudists. POPULAR SCIENCE, Feb., 1938, p. 70.
2. AM. MERC., June, 1936, p. 161.
3. Proponents of nudism claim that aside from benefits obtained from exposure to the sun, its effect is to bring health and greater morality by releasing sexual inhibitions rather than repressing them. They strive to keep the pseudo-nudist, whose thinking has not progressed to an aesthetic plane, out of their camps. A. P. DEVRIES, NUDE CULTURE (1947); C. E. WILLIAMS, PSYCHOLOGY OF NUDISM (1941). Opponents reply that these arguments are mere rationalizations, and that many of the people in the nudist colonies are suffering from sexual neuroses such as exhibitionism and scopophilia. L. S. LONDON and F. S. CAPRIO, SEXUAL DEVIATIONS, 611 (1950).
4. U. S. CONST. AMEND. I; MASS. CONST. ART. III and AMEND. XI; ILL. CONST. ART. II, §3; PENN. CONST. ART. I, §3.
5. ILL. CONST. ART. II, §1 for example.
6. Davis v. Beason, 133 U.S. 333 (1890); Florida v. Woodruff, 153 Fla. 84, 13 So. 2d 704 (1943).
7. Cantwell v. Conn., 310 U.S. 296 (1939); Pierce v. U. S., 314 U.S. 306 (1941).
8. 2 WHARTON, CRIMINAL LAW §1751 (12th ed. 1932).
9. State v. Rose, 147 La. 243, 84 So. 643 (1920); State v. Gardner, 174 Iowa 748, 156 N.W. 747 (1916).

is absent. But the common law extended its prohibition to indecent actions.[10] This broad term "indecent" has been held to include what is offensive to common propriety.[11] Therefore, exposing one's private parts in a public place[12] or in a place where it was offensive to those who saw it[13] came to be recognized as a public nuisance, irrespective of the intent of the culprit. So at common law there were two crimes: that of lewdness required a certain intent, and that of indecency required the act to be done in a "public place." A private club has been held not to be a "public place,"[14] although under various statutes the term has been greatly expanded.[15] Therefore, so long as the nude inhabitants of the camp are not visible from the outside so as to offend anyone, and had proper motives, no crimes are committed.

It appears then that if nudist camps are to be closed, authority will have to be found in the statutory changes of the common law. The state laws prohibiting indecent exposures fall into three general classifications: they prohibit exposures which are either (1) lewd or (2) indecent, or else they prohibit (3) any exposures.

Statutes prohibiting lewdness vary in the narrowness of their phrasing. Some statutes require the exposure to be made in a public place (or where it will be offensive) and also to be done with lewd intent.[16] This intent requirement, as at common law, makes it impossible to prosecute nudists,[17] since they purport not to be acting in a lewd frame of mind. Another type of statute condemns lewd conduct in any place where people are present.[18] The New York court in *People v. Burke*[19] held that a nudist group which rented a gymnasium and allowed anyone willing to pay the one dollar admission price to take part in callisthenics and swimming conducted in the nude did not violate such a statute if the intent of the nudists was not vicious but clean, and the exposure was not for lust. There was a vigorous dissent to this opinion, to the effect that there should be no requirement of lewdness where the act is done in a public place, since lewd thoughts might develop in members of the public seeing the act. The dissent indicates that since anyone could

10. 2 WHARTON, CRIMINAL LAW §1751 (12th ed. 1932); 1 BISHOP, CRIMINAL LAW §1130 (9th ed. 1923); CLARK AND MARSHALL, CRIMES §471 (4th ed. 1940).

11. State v. Pape, 90 Conn. 98, 96 Atl. 313 (1916); Darnell v. State, 72 TEX. CR. R. 271, 161 S.W. 971 (1913).

12. Such as a highway, State v. Walter, 16 Del. 444, 43 Atl. 253 (1895); on an omnibus, Reg. v. Holmes, 6 Cox, C.C. 216, 175 Eng. Rep. 589 (1853), or in a public urinal, Reg. v. Harris, L.R. 1 C.C. (Eng.) 282 (1871).

13. On the roof of a house, Reg. v. Thalman, 9 Cox C.C. 388, 169 Eng. Rep. 1416 (1863); bathing near a footpath, Reg. v. Reed, 12 Cox, C.C. (Eng.) 1 (1871); or through a window, State v. Goldstein, 75 N.J.L. 336, 62 Atl. 1006 (1906). Two other interesting but extreme cases are Rex v. Black, 21 N.S.W. St. Rep. (Australia) 748 (1921) where a man exposed himself to his wife and children in his private home not visible from the outside and was held guilty of indecent exposure, and Rex v. Gallard, W. Kelynze 162, 25 Eng. Rep. 547 (1733) where a woman naked to the waist had paraded on the common and was found not guilty of indecent exposure because men were stripped to the waist at whipping posts.

14. Grant v. State, 33 Tex. Cr. R. 527, 27 S.W. 127 (1894).

15. Under gaming statutes, for example, Ferrell v. City of Opelika, 144 Ala. 135, 39 So. 249 (1905); State v. Fritz, 133 N.C. 725, 45 S.E. 957 (1903).

16. CAL. PENAL CODE §311 (1) (1949); IDAHO CODE §18-4101 (1948); MINN. STAT. §617.23 (1945); MISS. CODE §2290 (1942); MONT. REV. CODE §94-3603 (1947); N. D. REV. CODE §12-2110 (1943); OKLA. STAT. tit. 21, §1021 (1941); ORE. COMP. LAWS §23-923 (1940); S. D. CODE §13.1722 (1939).

17. See People v. Wepplo, 78 Cal. App. 2d 959, 178 P. 2d 853 (1947); *In re* Dampier, 46 Idaho 195, 267 Pac. 452 (1928).

18. IOWA CODE §725.1 (1946); N. Y. PENAL LAW §1140 (1949); S. C. CODE §1442 (1942); UTAH CODE §103-37-1 (1943). These statutes do not say the people present have to be offended.

19. 243 App. Div. 83, 276 N. Y. Supp. 402 (1934); Aff'd. 267 N.Y. 571, 196 N.E. 585 (1935).

enter the gymnasium it was public. Presumably there would have been no objection, if the nudist organization had admitted only its members. Although the New York legislature enacted an amendment aimed directly at nudism,[20] the case is important today because several states have statutes identical with the one upon which this case turned.[21] Thus, statutes which strike at "lewd" conduct are difficult to apply against nudists because they require a certain type of motive to be present in the mind of the defendant.[22]

A second class of exposure statute is that containing no requirement that the incident be lewd, but prohibiting "indecent" or "notoriously indecent" acts or exposures. Whether an act of exposure will be considered indecent depends upon whether the place and circumstances under which it is done are such that modesty or common propriety will be offended.[23] Some states have expressly limited the places where the exposure will be considered indecent to a public type of place,[24] thus excluding the private nudist camp of our example. Other statutes[25] which do not define "indecent" will be interpreted according to the common law with a similar exclusion of private camps.[26] The New York court in the previously discussed *Burke* case also had to consider nudist activities under a "notoriously indecent" statute[27] and found they did not outrage public decency. However, a Michigan case, *People v. Ring*,[28] in interpreting a similar statute held that inmates of a nudist camp were guilty of both "open" and "indecent" exposure, without qualification, and that it made no difference that the exposure was not offensive to similarly exposed members of the camp. This decision differs from the common law point of view, for the common law looked to see whether there would be a possibility of injury to the morals of those who might be in a position to witness the exposure.[29] The New York court followed this idea by deciding that the morals of those present were not hurt, but the Michigan court considered whether in its own mind this exposure would have been immoral regardless of how the people present actually felt. The judges in the Michigan court would have been offended themselves, so they held that the policy of the state was offended. Inasmuch

20. N. Y. PENAL LAW §1140 (b) (1944).

21. See note 18, *supra*.

22. *Cf.* McKinley v. State, 33 Okla. Cr. 434, 244 Pac. 208 (1926), where the court said, "Lewdly imports lascivious intent . . . proof of exposure contrary to established standards of propriety does not support conviction."

23. See note 11, *supra*. In the case of children, they may not have to be offended since they are of such tender years for the act to be considered indecent. State v. Juneau, 88 Wis. 180, 59 N.W. 580 (1894); State v. Millard, 18 Vt. 574 (1846).

24. Public Places: LA. CR. CODE §740-106 (1) (1943); N. M. STAT. §41-3420 (1941); TEXAS PENAL CODE, ART. 474 (1936); WIS. STAT. §351.33 (1947); see note 18, *supra*. Places where people will be offended: IND. STAT. §10-2801 (1933); WYO. STAT. §9-512 (1945); see note 16, *supra*. Dwelling house or public places: FLA. STAT. §800.03 (1941); N. H. REV. LAWS c. 440, §6.

West Virginia requires the act to be in the presence of a constable. W. V. CODE §6289 (1943). Presumably a constable could enter the nudist camp of our example under this statute, and hold the inhabitants guilty. While it has been assumed that an officer entering a nudist camp does not need a warrant, there is at present a case pending before the Supreme Court on this question, Church v. Michigan, SUP. CT. No. 499, 18 U. S. L. WEEK 3201 (filed Dec. 24, 1949).

25. MASS. LAWS c. 272, §53 (Supp. 1949); ME. STAT. c. 121, §7 (1944); NEV. COMP. LAWS §10142 (1929); WASH. REV. STAT. §2458 (1933).

26. Com. v. Broadland, 315 Mass. 20, 51 N.E. 2d 961 (1943); Com. v. Cummings, 273 Mass. 229, 173 N.E. 506 (1930).

27. N. Y. PENAL CODE §43 (1944). Other states rely on this type of statute alone to guard against indecent exposure. COL. STAT. c. 48, §215 (1935); MICH. STAT. §28.567 (1935); MO. REV. STAT. §4653 (1939); ILL. STAT. c. 38, §159 (1949); N. J. STAT. §2:140-1 (1937); PENN. STAT. tit. 18, §4519 (1945).

28. 267 Mich. 657, 255 N.W. 373 (1934).

29. See note 10, *supra*.

as the nudist camp in the Michigan case was visible from adjoining ground, and since passing hunters had actually seen the nudists "cavorting around" (though there was no evidence they were offended by it), the nudists could have been easily held under the statute or at common law. But the court, disregarding place and circumstances, seems to hold that as a matter of law nudism is bad in Michigan.[30] This indicates that the type of statute considered here is capable of being interpreted to mean more than a reading of its language in the light of common law experience would suggest.

The third type of exposure statute resulted from the *Burke* case. A few of the states opposed to organized nudism reconsidered the adequacy of their laws, and concluded they had best reinforce them with statutes aimed specifically at nudism.[31] These statutes make it a crime for a person ". . . to expose his private parts in the presence of two or more persons of the opposite sex whose private parts are similarly exposed. . ."[32] These new anti-nudism laws leave little to conjecture and give notice as to what is forbidden in comprehensible language. They supplement rather than supplant the old statutes curbing lewd or indecent conduct. Thus, it is difficult to see how they can avoid being construed to strike at the nudists in any camp, no matter how hidden it may be or how restricted its membership.[33]

Apart from these statutes aimed at exposure, any nudist who brings his children to a nudist camp is susceptible to a criminal charge for contributing to the delinquency of a minor. Statutes on this crime are generally worded to prohibit "causing, encouraging, or contributing to the delinquency of a child."[34] For guilt the prosecution need only prove that nudism tended, however slightly, to cause immorality by the child.[35] This would present to every court an issue in the simplest terms of the arguments for and against nudism, thus forcing the courts to make a policy determination upon nudism. Here again we would have the split in viewpoints shown in the *Ring* and *Burke* cases. It is well to note, however, that these statutes have not been freely applied.[36]

Apart from actions against the nudists themselves, their camps are open to attack. While nudist colonies are not public nuisances because of their privacy and lack of statutes declaring them to be such,[37] it is possible that individuals

30. Whether an act is indecent is a question of fact for the jury. Com. v. Friede, 271 Mass. 318, 171 N.E. 472 (1930). People v. Kratz, 230 Mich. 334, 203 N.W. 114 (1925). The court went far beyond the factors considered by the jury.

31. N. Y. PENAL CODE §1140 (b) (1944); N. C. GEN. STAT. §14-190 (1943); OHIO GEN. CODE §13032-1 (Supp. 1949). Al Smith and the Legion of Decency lobbied for the New York law.

32. ". . . or who aids or abets any such act, or who procures another so to expose his private parts or who as owner, manager, lessee, director, promoter or agent, hires, leases or permits the land, building or premises over which he has control, to be used for any such purposes, is guilty of a misdemeanor. N. Y. PENAL CODE §1140 (b) (1944).

33. *Note,* 33 MICH. L. R. 936 (1935), spoke of an implied repeal of the earlier indecency statute, which has not resulted. *Note,* 69 U. S. L. R. 346 (1935), pointed out: (1) no crime would be committed by one person exposing himself in the presence of but one member of the opposite sex similarly exposed; (2) one person exposing himself in the presence of twenty persons of the opposite sex would be guilty, while the twenty would not be; and (3) the different sexes might alternate in being unclothed, and not be guilty. A criticism on the same level as these was made during the hearing on the bill, that the statute would make it illegal in New York to give birth to twin boys. NATION, Feb. 20, 1935, p. 210.

34. MASS. LAWS c. 119, §63 (1942); N. Y. CONS. LAW tit. 39, §494 (1944); PENN. STAT. tit. 11 §262 (1939).

35. H. H. LOU, JUVENILE COURTS IN THE UNITED STATES pp. 56, 57 (1927).

36. According to a survey of judges reported in a note appearing in 4 INTRA. L. R. 230 (1949).

37. PROSSER, TORTS §72 (1941); CLARK AND MARSHALL, CRIMES §448 (4th ed. 1940). Statutes aimed at disorderly houses do not seem to apply to nudist camps. Compare: PENN.