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CRIMINAL LAW AND PROCEDURE - INDECENT EXPOSURE - NUDISM

CRIMINAL LAW AND PROCEDURE — INDECENT EXPOSURE — NUDISM — The two recent cases of *People v. Ring* [1] and *People v. Burke* [2] have raised the interesting question of the legal position in this country of the practice of organized nudism.[3] Inasmuch as the decisions are difficult to reconcile, the result is somewhat disconcerting.

In the case of *People v. Ring*, the facts as recited by the court showed that the defendant's nudist camp was situated in a more or less secluded location in the country, surrounded by a second growth of scrub oak in a clearing of about three acres. It lay about a mile and a half from the highway, and was reached by a road claimed by the proprietor to be private. Peace officers having viewed the camp from adjoining ground, entered, found unclad men, women, and children harmlessly cavorting about, and arrested the defendant proprietor.

On appeal, the counsel for the defendant submitted the clear question: "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 violation of the statute [4] prohibiting open or indecent exposure? The court, in affirming the conviction, replied:

"The answer, in the light of the facts presented in the record, is, 'Yes.' It is clearly shown that the appellant designedly made an

[1] 267 Mich. 657, 255 N. W. 373, 93 A. L. R. 993 (1934).

[2] (Sup. Ct. 1934) 276 N. Y. S. 402 (1934). Since the writing of this comment, this case has been appealed and affirmed by the New York Court of Appeals (see N. Y. Times, May 1, 1935, p. 6), Chief Justice Crane and Justice Hubbs dissenting.

[3] In talking of "organized nudism" it is perhaps well to understand the significance of the terms. One must be careful to distinguish the nudist, who sincerely believes that society and the race will be bettered by destroying the body-taboo and minimizing sex, from any and all persons who advocate the practice to satisfy errotic or immoral desires. Too often the public's mind has been confused by a failure to realize that a distinction between the two exists. This failure is perhaps partly due to the inability of those who theorize on morals to separate indecency from nudity or immorality from exposure. That there is no natural correlation between the two is the belief of the true "nudists," and there is abundant evidence to support their belief. See in general, PARMELEE, THE NEW GYMNOSOPHY (1927); MERRILL, AMONG THE NUDISTS (1931), and NUDISM COMES TO AMERICA (1932); and see the interesting article by Warren, "Social Nudism and The Body Taboo," 40 PSYCHOLOGICAL REV. 160 (1933).

[4] "Any man or woman, not being married to each other, who shall lewdly and lasciviously associate and cohabit together, and any man or woman, married or unmarried, who shall be guilty of open and gross lewdness and lascivious behavior, or who shall designedly make any open or indecent or obscene exposure of his or her person, or of the person of another, shall be guilty of a misdemeanor. . . ." Mich. Comp. Laws (Mason's 1933 Supp.), sec. 17115-335.

open exposure of his person and that of others in a manner that is offensive to the people of the state of Michigan." [5]

This decision might be unquestioned had the facts presented in the record been fully set forth in the opinion. The court, however, omitted to list those factors which would go far to justify the conviction; and in basing the decision on the few facts stated, coupled with the presence of sweeping dicta, in effect, it is to be feared, determined that organized nudism, regardless of time, or place, or circumstances is illegal in the State of Michigan.

By judicial pronouncement, indecent exposure is the exhibition of such parts of the person as modesty or a sense of self-respect requires usually to be kept covered.[6] Both at common law and under the statutes prohibiting indecency, it is believed that the sole purpose is to protect public morals by preventing acts which shock the sense of decency of the community, or which tend to lower the moral standards.[7] A close analysis of the cases on the question of indecent exposure indicates that underlying every decision, whether at common law or under the statutes, the conviction of the accused is based on the presence of one of two factors: either (1) the defendant's conduct was lewd and obscene and made with an impure motive,[8] or (2) the conduct was such as, although innocent of purpose, was intentionally done and either offensive to those who saw it,[9] or was or could be visible to the public

[5] 267 Mich. 657 at 662, 255 N. W. 373 at 374-375.

[6] 1 BISHOP, CRIMINAL LAW AND PROCEDURE, 9th ed., sec. 1125 (1923); State v. Bauguess, 106 Iowa 107, 76 N. W. 508 (1898); People v. Kratz, 230 Mich. 334, 203 N. W. 114 (1925).

[7] Redd v. State, 7 Ga. App. 575, 67 S. E. 709 (1910); Commonwealth v. Wardell, 128 Mass. 52, 35 Am. Rep. 357 (1880); State v. Roper, 18 N. C. 213 (1835); Rex v. Crunden, 2 Camp. 89, 170 Eng. Rep. 1091 (1809). Whether the acts have such a tendency, it is believed, is a question of fact for the jury. The statutes prohibiting indecent exposure seldom attempt to define what constitutes the act, but the courts have consistently upheld this vague legislation, declaring that "the common sense of the community, as well as the sense of decency, propriety and morality, which most people entertain, is sufficient to apply the statute to each particular case, and point out what particular conduct is rendered criminal by it." People v. Kratz, 230 Mich. 334 at 336, 203 N. W. 114 (1925), quoting State v. Millard, 18 Vt. 575, 46 Am. Dec. 170 (1846). Thus, it would seem that the law must define indecent exposure as an exposure contrary to the common sense of the community, and the sense of decency, propriety and morality which most people entertain, and leave it to the jury to determine, in each case, whether the acts complained of were of that nature. And this, indeed, was practically as the trial court charged in the Ring case.

[8] Commonwealth v. Wardell, 128 Mass. 52, 35 Am. Rep. 357 (1880); State v. Millard, 18 Vt. 575, 46 Am. Dec. 170 (1846); People v. Kratz, 230 Mich. 334, 203 N. W. 114 (1925); State v. Walter, 2 Marv. (16 Del.) 444, 43 Atl. 253 (1895); People ex rel. Lee v. Bixby, 67 Barb. (N. Y. Sup. Ct.) 221 (1875); State v. Roper, 18 N. C. 213 (1835); Queen v. Wellard, 14 Q. B. D. 63 (1884); and see 93 A. L. R. 993 at 996 (1934), and 12 B. R. C. 725 (1925) for collection of cases.

[9] Rex v. Black, 21 N. S. W. St. Rep. 748 (1921); Van Houten v. State, 46 N. J. L. 16, 50 Am. Rep. 397 (1884).

and was of such a nature as offended the community sense of decency.[10]

While upon the record and the evidence in the *Ring* case, the finding of the guilt of the defendant may not be sustained on the first ground, it may well be on the second; for the testimony at the trial showed clearly not only that the camp was easily accessible to onlookers,[11] but that it was already beginning to attract people, who came searching only to satisfy their own desires and to find what might be seen. Such facts go far to show that the camp was visible to the public and was in such a position as may reasonably be conceded would offend the sense of decency of the community.

It is true that the Michigan court did qualify its affirmative reply to the question submitted by adding the phrase, "in the light of the facts presented in the record." [12] From this might be gathered the hope that a future court will re-examine those facts, not as stated in the opinion of the court, but as presented in the original record, and confine the dicta of the case to the facts, as the supreme court has purported to do. One cannot read the decision, however, without feeling that the judges have gone beyond the facts of the patricular case and laid down a very broad rule of law. Especially is this feeling raised by the concluding paragraph of the opinion, where the court has quoted from an earlier case, not precisely in point since it involved a factual situation entirely remote from the case then being considered: [13] "Instinctive modesty, human decency and natural self-respect require that the private parts of persons [14] be customarily covered in the presence of others." [15]

[10] Rex v. Crunden, 2 Camp. 89, 170 Eng. Rep. 1091 (1809); Reg. v. Thallman, Le. & Ca. 327, 169 Eng. Rep. 1416 (1863); Truett v. State, 3 Ala. App. 114, 57 So. 512 (1912); Martin v. State, 38 Ga. App. 392, 144 S. E. 36 (1928); State v. Martin, 125 Iowa 715, 101 N. W. 637 (1904).

[11] The road, claimed by the defendant to be private, was, in fact, an easement road, used by hunters and fishermen for over twenty years. Practically from that road the camp could be seen. Several fishermen fishing in the vicinity had testified as to seeing the nudists. There was nothing, therefore, to prevent any curious or degraded person from freely satisfying his individual curiosity.

[12] 267 Mich. 657 at 662, 255 N. W. 373 at 374.

[13] People v. Kratz, 230 Mich. 334, 203 N. W. 114 (1925). Here the defendant exposed his privates on the street to three young girls and beckoned or attempted to get them to come into the woods with him. The exposure was clearly offensive.

[14] That this statement is not only questionable law but doubtful psychology is the conclusion of Warren, "Social Nudism and the Body Taboo," 40 PSYCHOLOGICAL REV. 160 (1933). After a week of observation while in a nudist camp, he wrote (at p. 181): "Two conclusions of considerable psychological importance were satisfactorily established: (1) Since the traditional body-taboo can be readily, almost immediately broken without detrimental results, it is not a fundamental human trait. (2) Social nudity is not in itself indecent; only a widespread and persistent social convention has made it so."

[15] Moreover, the earlier Michigan case was using the statement only to define the

This quotation strongly imports that any practice of nudism would be illegal in Michigan, that the indecent quality of the act does not depend on where or when or to whom the exposure is made, and that the only requisite to convict a man of indecency would be the fact that the private parts of his person were not customarily kept covered in the presence of others. Such a sweeping holding, it is submitted, is open to serious question.[16]

The supreme court decision might be justified on the basis of the statute under which the conviction was attained.[17] This, however, may be questioned on the ground that the statute is broad, first, in punishing not only "indecent" exposure but "open" [18] exposure as well; and second, in not qualifying the provisions so as to make them applicable only where the act is done in a public place, or where the people who see the exposure are offended thereby.[19] Read literally, it is hardly conceivable that any act of exposure would escape the application of

statutory phrase, "open and indecent exposure." Thus, the court said, "The well-settled and generally known significance of the phrase 'indecent and obscene exposure of the person' is the exhibition of those private parts of the person which instinctive modesty, human decency or natural self-respect requires shall be customarily kept covered in the presence of others." People v. Kratz, 230 Mich. 334 at 337, 203 N. W. 114 at 115 (1925). This, it is submitted, has an entirely different meaning from that conveyed by the words selected by the court in the Ring case.

[16] Compare the cases cited in notes 8, 9, and 10, supra; and see Commonwealth v. Hamilton, 237 Ky. 682, 36 S. W. (2d) 342 (1931), and Lockart v. State, 116 Ga. 557, 42 S. E. 787 (1902).

[17] Supra, note 4.

[18] The words "open" and "indecent," it should be noted, are in the disjunctive. An earlier Michigan statute, on the contrary, had the words placed in the conjunctive. (Mich. Comp. Laws, 1929, sec. 15467). As an original question it may be argued that the disjunctive form is more broad in scope than the conjunctive. Whether there would be any practical difference would have to depend on the attitude of the court when interpreting the provision. The court in the Ring case escaped interpretation by holding the exposure to be both open and indecent.

[19] A number of statutes make some such qualification. The California Code (Cal. Penal Code, Deering 1931, sec. 311) punishes, for example, "Every person who willfully and lewdly, either:

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

"2. *Procures, counsels, or assists any person so to expose himself* or to take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, such as is offensive to decency, or is adopted to excite to vicious or lewd thoughts or acts. . . ." *Cf.* also: Ariz. Rev. Code (1928), sec. 4662; Fla. Comp. Gen. Laws (1927), sec. 7588; Idaho Code Ann. (1932), sec. 17-2101; Ind. Stat. Ann. (1933), sec. 10-2801; Okla. Stat. (1931), sec. 2388; Mont. Rev. Code (Choate 1921), sec. 11136; N. D. Comp. Laws Ann. (1913), sec. 9635; S. D. Comp. Laws (1929), sec. 3884; Utah Rev. Stat. Ann. (1933), sec. 103-37-1.

the provision;[20] and it is believed that eventually the statute will have to be modified by the legislature or scaled down by the court.

The court in the instant case, however, did not deem it necessary to interpret the provision, for it found that the conduct was of such a nature as offended the common sense of decency, and declared, "It is clearly shown that the appellant designedly made an open exposure of his person and that of others in a manner that is offensive to the people of Michigan. Such exposure is both open and indecent." [21]

One cannot help but question how the court arrived at the conclusion that the defendant's conduct was clearly shown to be offensive to the people of Michigan. It may be conceded that the jury below, with the evidence before it and under proper instructions, decided that the acts complained of were contrary to the community sense of decency; but the opinion of the court appears to lean but lightly on the jury's verdict, omits the consideration of points which, it is believed, bore weight with the jury, and tends toward holding that as a matter of law the acts of the defendant were offensive to the people of Michigan. This, however, is hardly in line with the holdings in other cases, cited by the court, that what is indecent and offensive is a question of fact for the jury.[22]

If it might be assumed that the case was confined to its facts, the conclusion by the court might be accepted without more. Remove, however, the two factors heretofore mentioned, which, apparently, the supreme court deemed unessential to the decision, and in the light of the dicta, the holding approaches a highly doubtful ground, and a stand which conflicts clearly with the New York decision in *People v. Burke.*

In this latter case the facts showed that the defendants, leaders of a nudist organization, rented a gymnasium and conducted exercises in which people of both sexes, entirely unclad, took part. The admission price was one dollar, but there do not appear to have been any other limitations imposed upon participation. Police officers, gaining admis-

[20] The trial court in the Ring case charged: "When I speak about open, open exposure of his person as used in this law, means that it was made to all persons who were there in vision, and by that is not meant that it was or must be on public ground or in a public place, in the sense of it being open public property. It may be on private property, but it must have been openly and publicly with relation to the people that were there at the time." *Cf.* People v. Kratz, 230 Mich. 334, 203 N. W. 114 (1925), and State v. Juneau, 88 Wis. 180, 59 N. W. 580, 24 L. R. A. 857, 43 Am. St. Rep. 877 (1894), for similar definitions of the word "open." The statute and the charge would clearly make any athlete in a swimming tank guilty of the misdemeanor of "open" exposure though only his team-mates were present.

[21] 267 Mich. 657 at 662, 255 N. W. 373 at 374-375.

[22] Commonwealth v. Friede, 271 Mass. 318, 171 N. E. 472, 69 A. L. R. 640 (1930); and *cf.* the cases cited in note 6, supra.

sion, viewed the exercises and thereafter arrested the proprietors. On appeal from conviction, the court held, Justice Morrell dissenting, that such conduct did not constitute lewdly exposing one's person or openly outraging public decency under the New York statutes.[23]

It is difficult if not impossible to draw any valid distinction between the facts stated in the one case and the facts set forth in the other. Nor can the statutes have had any bearing on the decisions. While different in language, the difference had no effect on the result. By inference, the New York court has held that "instinctive modesty, human decency, and natural self respect" do not require the private parts of persons customarily to be kept covered in the presence of others; and even more clearly the inference from the Michigan decision is that had the Michigan court been given the facts of the *Burke* case, it must have found the defendants guilty.

Until further decisions shed more light on the subject, about all that can be concluded is that, (1) as a matter of law the practice of nudism is probably illegal in Michigan, while it is legal in New York; and (2) in Michigan the test of what is offensive to the people's sense of decency is measured by the "subjective" standard of whether persons would be shocked or would feel that morals were being corrupted by the knowledge that somewhere in the state other people were harmlessly going without clothing, while in New York the test is an "objective" one of whether the exposure is at such a time or place or under such circumstances as to shock or injure the morals of those who would ordinarily observe the exposure.

It is to be hoped that the future will bring a limitation upon the pronouncement so broadly and freely laid down in *People v. Ring*. The Michigan court is seemingly without precedent in holding that an indecent exposure occurs and the community sense of decency is offended regardless of the accompanying circumstances.[24] All cases have tacitly implied that what makes the act offensive is the relationship which it bears to the public in general or to the people there present, and some cases have expressly pointed this out.[25] If it is felt that now

[23] The sections of the Penal law relied on were: "A person who wilfully and lewdly exposes his person, or the private parts thereof, in any public place, or in any place where others are present, or procures another so to expose himself, is guilty of a misdemeanor" (sec. 1140); and sec. 43, providing that a person who "wilfully and wrongfully commits any act which . . . openly outrages public decency, for which no other punishment is expressly prescribed . . . is guilty of a misdemeanor." 5 N. Y. Ann. Consol. Laws, Penal Law (1917).

[24] This statement is based, of course, on the import of the broad dictum of the court.

[25] *Cf.* cases cited in notes 8, 9, 10, and 16, supra.

is the time to change the law, it is submitted that this is a matter for the legislature, not for the courts.[26]

The only contention that might be made to bear weight against allowing the practice of nudism to grow is that this would tend to corrupt public morals, because of the fact that the standards of the nudists, supposedly lowered by the constant exposure of one person to another, would have a detrimental effect on society as a whole through the more or less gradual seepage of these morals throughout the country. It is believed, however, that that theory is purely the result of prejudicial rationalization, and entirely without foundation.[27] Were the hypothesis correct, the conclusion might follow, but instead of speculating as to probabilities the critic might well investigate for proof. The testimony and evidence on the subject, rapidly becoming cumulative, points in but one direction, that the hypothesis is wrong.

It may be conceded that the law, as a guardian of the morals of society, must protect a standard which the community has established; but at the same time it should be remembered that concepts of what is decent or indecent are not constant.[28] Granting that the majority of people prefer, either for æsthetic or moral reasons, neither to be seen nor to see others unclad, this logically should lead only to a law which would prohibit the obtrusion of nakedness on the public, not to a law which would prohibit entirely a development which is becoming more and more widespread.

J. B. B.

[26] It is interesting to note that following the decision in the case of People v. Burke, a bill, sponsored by Al Smith and the Legion of Decency, was introduced in the New York legislature to outlaw the practice of nudism. It failed of passage, but, queerly enough, it could be so interpreted as to give more instead of less protection to one indicted for indecent exposure, for it provided punishment only where the observers are similarly exposed: "A person who in any place wilfully exposes his person, or the private parts thereof, in the presence of two or more persons of the opposite sex whose persons or private parts thereof are similarly exposed, or who aids and abets any such act, or who procures another so to expose his person . . . or who as owner, manager, lessee, director, promoter, or agent, or in any other capacity, hires, leases, or permits the land, building or premises of which he is the owner, lessee or tenant, or over which he has control to be used for any such purposes, is guilty of a misdemeanor." See 25 TIME MAGAZINE 40 (January 14, 1935). Of course, the court might hold that this provision applied only to the practice of nudism and was not meant to replace the other statutes on the question of indecency; but it nevertheless is open to some doubt.

[27] See PARMELEE, THE NEW GYMNOSOPHY (1927); Warren, "Social Nudism and the Body Taboo," 40 PSYCHOLOGICAL REV. 160 (1933); ROYER, LET'S GO NAKED (1932); NEWCOMB, STORY OF NUDISM (1934).

[28] Consider, for example, that it was at one time thought to be indecent for a woman in childbirth to be attended by a male physician.