

RECREATIONAL NUDITY
AND THE
LAW

Abstracts of Cases

Compiled and Edited by Gordon Gill

Dr. Leisure, Macomb, Illinois 61455-1247

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DEDICATION

To all the distinguished attorneys and judges
who created this new body of law over the last six decades.

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The author wishes to recognize specifically two individuals on opposite sides of the continent who graciously provided moral support and encouragement during the laborious task of putting this book together: Turner Stokes, energetic nudist leader in the national capital area and a past president of the American Sunbathing Association; Cec Cinder, long time activist leader in both the California-based Beachfront U.S.A. naturist organization and the Western Sunbathing Association.

Last, but not least, the author thanks his wife Linda for understanding his need to spend countless hours researching cases in the law library and for reviewing the abstracts for readability.

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INTRODUCTION

I first ran across Gordon Gill's collection of abstracts of nude recreation case law when I was preparing information on the appropriateness of nude bathing in Hawaii in 1988. At that time public nude recreation was not as readily accepted at the beach as it is in the nineties.

Reviewing the case law, I was struck by the legal evolution of nudity within the judicial system. At first nudity in any form was viewed as deviant and a threat to public decencies. But over time that attitude (for the most part) has changed to one of acceptance. The nudity of individuals is being accepted for what it is, a fundamental right of existence and the human condition more basic than even those inalienable rights provided for in our constitution.

People learn what is correct human behavior by mimicking or following what is accepted by others at the time of their existence. In the course of human behavior's evolution, the early views of the Puritans and other groups strongly shaped the value and belief system of our great country. Most of us (myself included) have grown up in an environment where specific parts of the human body were supposed to be covered. Being the compliant child striving to fit into the culture of the society we were born into, we unquestioningly adopted the behavior so clearly expected by our predecessors and our peers.

Over time, select individuals or groups of individuals experimented with different approaches to existing value systems. In one form or another, every aspect of the human condition has been experimented with. Note the changes in beliefs and value systems that have come about in recent years regarding such things as diet, exercise, and smoking just to name a few. So too has there been a change in the acceptance of the human body.

Today "body acceptance" is the buzz word for those advocating an acceptance of the human condition as we are presented at birth by our creator. The more readily we can accept ourselves, the greater the likelihood we can accept others. This is so evident, particularly when we strip away the external trappings of culture which are intended to emphasize differences and the relative status in our societal hierarchy associated with those differences and get back to the basic individual.

Pragmatically, nudity is generally accepted to some degree in the family unit. Perhaps it follows that to the extent that nudity becomes acceptable in public, the basic family unit has expanded to be what it must be and that is the extended family unit of humankind which includes us all. When we can see other people as our brothers and sisters and as subtle variations of ourselves, then perhaps we can move toward a truly utopian society where the welfare of others rather than the control of others is our paramount concern.

In my view, the abstracts of case law presented here by Gordon Gill demonstrates and documents first hand the evolution of our contemporary culture toward the better world that we all seek. Against today's value system, some of the cases of fifty years ago seem amusing at best or even downright ludicrous. One wonders how more contemporary cases will be viewed fifty years in the future. My guess is that nudity in any context will be a non-issue of the 21st. century. In any event, the collection of abstracts presented here is both an enjoyable and educational read.

Dr. George R. Harker

AUTHOR'S PREFACE

This compendium of U.S. judicial cases, presented in abstract form, chronicles litigation involving both committed nudists and other persons independently engaged in nude recreation or similarly innocuous nude activity. In a search of the standard legal reporting systems, the writer discovered 101 such cases covering the period 1934 to the present. Handed down by various federal, state, or local courts (as identified at the beginning of each case), they include both civil and criminal proceedings. By design, cases involving other aspects of nudity--*e.g.*, incidences of inadvertent or unavoidable bareness, loathsome and despicable behavior, or commercial display unrelated to the nudist/naturist lifestyle--are omitted.

For convenience, the cases are grouped chronologically by category: [A] organized nudism on private property; [B] individual or group nudity in a public setting; and [C] books, magazines, and motion pictures constituting serious scholarship or depicting legitimate representation. Each case portrays the factual situation, the issues before the court, and the opinion rendered including concurrences and dissents, if any. In certain instances, this writer has added explanatory matter in brackets, *i.e.*, [...].

Readers are invited to share with the writer their observations on the content herein.

Gordon Gill

[A] ORGANIZED NUDISM ON PRIVATE
PROPERTY

After viewing the site from overhanging bluff... Sheriff entered... All were naked.

People v. Ring (1934)
Supreme Court of Michigan

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

FACTS--Sun Sport League Camp, an Allegan County nudist colony, consists of tents and paper or boarded buildings erected within a three-acre clearing. The entire facility is surrounded by a second growth of scrub oak. It is reached by means of a 1.5-mile private road connecting with State Highway M-89.

After viewing the site from an overhanging bluff on adjoining land, the sheriff and other officers entered and searched the colony (without a warrant therefor). In addition to the proprietor, there were present at the time his wife and two children, six other married couples, three unattached men, and two other children. Some were reclining along a creek bank, while others were engaging in such amusements as volleyball. All were naked.

The proprietor was then arrested and charged with violating a penal code section proscribing indecent exposure of one's person or the person of another. At an ensuing jury trial in the circuit court, a neighboring property owner characterized the nudist colony inhabitants' behavior as "cavorting around"; also, the sheriff testified that he thought improper conduct [without further description] had occurred on the part of a man and woman, although out of proprietor's sight. Convicted, the latter now appeals to us.

ISSUES--Was the sheriff's search unconstitutional? Does going without clothing on one's own property violate the indecent exposure statute, even when other persons present are not offended?

OPINION--Although our legal system has traditionally protected the individual in the peaceful enjoyment and occupation of the house in which he lives and the workplace in which he earns his livelihood, no right of privacy has been extended to open lands. Hence, the nudist colony property here is not immune from search.

Evidence of record clearly shows that the appellant made an open exposure of his own person and promoted the similar exposure of others. The average jury, composed of members of the community, has an instinctive realization that such behavior is offensive to the people of Michigan.

The case was fairly tried, the determination of the jury will not be disturbed, and the conviction is affirmed.

[Historical Note--See, however, *People v. Hildabridge* (*infra* at page 15) wherein the Supreme Court of Michigan, in 1958, disavowed this opinion.]

Some participants--men and women--entered the pool nude. ...arrested and charged with lewd exposure, outraging public decency, maintaining a public nuisance,

People v. Burke (1934)
New York Supreme Court, Appellate Division, First Department

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

FACTS--A director of the Olympian League (a nudist organization) arranged with the manager of a basement gymnasium in the Riverside Theatre building, 2561 Broadway, New York City, for twice-weekly use of the facilities. Announcements relative to the League's upcoming Nudism Forward Campaign were then sent to specifically addressed individuals. League members and others were encouraged therein to attend sessions at the gymnasium for a \$1 fee.

One of the announcements came into the possession of a police inspector, who dispatched two plain clothes officers--male and female--to attend the opening night events. Upon payment of the fee, the officers entered and observed ten nude men playing handball or tossing a medicine ball. Later, four women emerged nude from the dressing room and joined the men. A training instructor then led the entire group in an exercise class. Pleading bashfulness, the officers remained clothed and watched these activities from the sidelines. After twenty minutes, some participants--men and women--entered the pool nude.

At this point, the League director, gymnasium manager, and training instructor were arrested and charged with lewd exposure, outraging public decency, maintaining a public nuisance, and permitting a building to be used for such nuisance. All three were found guilty in a divided Court of Special Sessions. The director was fined \$50, with the alternative of spending ten days in prison; the others received suspended sentences. All now join in this appeal.

ISSUE--Were the defendants' various activities covered by the statutes in question?

OPINION--The conclusion reached by the dissenting Special Sessions court judge (*i.e.*, that the existing law, enacted a number of years ago, is insufficiently broad to justify these convictions) was based upon a solid foundation. Judgment reversed, information dismissed, and fine remitted.

DISSENT--The appellants' claims that their intentions were pure are of no more legal significance than those of the assassin of President Garfield who felt a patriotic mission to save a political party or of a Hindu mother who casts her babe into the Ganges to appease the gods.

Rather, the question before us is whether the public deems the type of

conduct involved here to be offensive. That humanity has historically associated exposure of the privates with indecency can be traced to the fig-leaf aprons devised by Adam and Eve. Acceding to appellants' views would lead to people parading on Fifth Avenue entirely nude. When judged on the basis of the effect of the performance at the gymnasium upon a bystander (whom the statutes are designed to protect), then certainly the exposure here was lewd. Moreover, naked persons in public places would raise thoughts of lasciviousness and lust in many who observed. I would affirm.

FURTHER PROCEEDINGS (1935)
Court of Appeals of New York

OPINION--Per Curiam. Affirmed.

DISSENT--For men and women to pay a fee to appear together naked is a violation of the law.

State antinudism act makes it unlawful for a person, firm, or corporation to operate a nudist colony...

Ex Parte Porter (1940)
Supreme Court of Florida, Division A

141 Fla. 711, 193 So. 750 (1940)

LEGISLATIVE HISTORY--A state antinudism act makes it unlawful for a person, firm, or corporation to operate a nudist colony in counties having populations between 155,000 and 165,000 as determined by the latest census.

FACTS--An individual was charged with, and incarcerated for, an offense covered by the act. [The location involved is not specified herein.] Thereupon, he sued out a writ of original habeas corpus in this court.

ISSUE--Is the antinudism act consistent with the power granted the legislature by the Florida Constitution?

OPINION--If a nexus between population size and appropriateness of nudist colonies had first been established by the legislature, this statute might qualify as one of general application throughout the state (and, hence, within the constitutional power of the legislature to enact). Since, in effect, it is being selectively applied to a local jurisdiction only, it cannot be allowed to stand. Petitioner discharged.

[EDITORIAL COMMENT--The act in question was passed in 1939 and included in the 1940 Permanent Cumulative Supplement to Compiled General Laws of Florida, under the index category of "Nudist Colonies." No such category appears in the current compilation of laws, *i.e.*, West's Florida Statutes Annotated, 1992.]

He was expelled therefrom for nonpayment of dues. . .
The seller then refused the purchaser's tender of such remainder and declined to convey a full warranty deed, stating that membership in the (nudist) association was a condition precedent therefor.

Gulvin v. Sunshine Park, Inc. (1945)
Court of Errors and Appeals of New Jersey

137 N.J.Eq. 249, 44 A.2d 75 (1945)

FACTS--A local subsidiary of the American Sun Bathers Association (a national organization formerly known as International Nudist Conference) owns a sizable tract of land near Mays Landing, Hamilton Township, Atlantic County. It has established a nudist community thereon and divided the property into lots for individual sale. Accordingly, in June 1936 the subsidiary entered into a written contract with an Illinois resident covering the sale of three such lots for the sum of \$208.50; the transaction was filed in the county clerk's office. That individual and his wife also joined the national nudist association.

In August 1936 (*i.e.*, two months after the purchaser signed the contract and joined the association), the seller adopted rules specifying that rights to full warranty deeds were contingent upon lot purchasers' maintaining association membership. The seller did not, however, notify the Illinois purchaser of such new rules and made no attempt to amend the contract with respect thereto. After an initial payment of \$5.00, the purchaser made \$8.00 monthly installments and built four cabins on his lots.

The purchaser remained a member of the national nudist association until his membership lapsed in 1941 and he was expelled therefrom for nonpayment of dues. By that time he had paid all of the contract price of the lots, save for the nominal amount of about \$20. The seller then refused the purchaser's tender of such remainder and declined to convey a full warranty deed, stating that membership in the association was a condition precedent therefor.

Next, the purchaser sued in the Court of Chancery to compel specific performance of the contract. At a hearing on the matter, the seller attempted to impugn the character and reputation of the purchaser and his wife; however, no testimony was permitted along these lines. In a final decree, the Vice Chancellor ordered the seller to execute and deliver to the purchaser a good and sufficient deed for the lots in question. Following denial of its application for rehearing, the seller now appeals to us.

ISSUES--Was the sales contract enforceable? Should the purchaser's character or reputation be accorded any weight?

OPINION--We think the learned Vice Chancellor's decree was proper and the implementing order right and just. The contract, meeting the test of mutuality (a *sine qua non* to a decree for specific performance), was subject to enforcement by both parties. Additionally, it appears that in the application for rehearing (which included for the first time a request for reformation of the contract), its newly appointed counsel was effectively seeking to retry the case, a procedure not recognized in our system of justice. Moreover, by accepting the payments, the seller waived any right to require agreement on the new rules.

In recognition that the seller predicates its unwillingness to convey the deed solely upon contractual considerations, it may not in fairness be heard to raise the matter of the purchaser's character or reputation.

Affirmed.

[EDITORIAL COMMENT--The Mays Landing, New Jersey-based national nudist organization to which the plaintiff belonged was subsequently known as the American Sunbathing Association; currently it is the American Association for Nude Recreation. Sunshine Park, the nudist community involved here, is also mentioned at page 136 *infra*.]

Observing a number of nude men, women, and children (engaged in such activities as badminton, swimming, and sunning), the officers then arrested a man and woman serving as managers and charged them with violating an ordinance proscribing operation of facilities patronized by three or more nude persons not of the same sex.

Glassey v. State (1947)
Superior Court of California (Los Angeles), Appellate Department

Unreported (Cal.App. 1947) *Cert. denied*, 332 U.S. 790, 68 S.Ct. 99, 92 L.Ed. 372 (1947) *Further action*, 334 U.S. 859, 68 S.Ct. 1528, 92 L.Ed. 1779 (1948)

FACTS--Fraternity Elysia is a nudist organization having a property at 9804 La Tuna Canyon. It is surrounded on three sides by uninhabited hills. On a day in August, police officers using false names appeared at the entrance. Upon paying the customary visitor fee and signing a registration form acknowledging acceptance of nudism as a wellspring or fountainhead of moral and health benefits, they were admitted.

Observing a number of nude men, women, and children (engaged in such activities as badminton, swimming, and sunning), the officers then arrested a man and woman serving as managers and charged them with violating an ordinance proscribing operation of facilities patronized by three or more nude persons not of the same sex. A municipal court jury found both guilty; the trial judge imposed jail sentences of 90 and 180 days, respectively.

ISSUE--Are there constitutional problems with the ordinance?

OPINION--Appellants have not demonstrated that the ordinance in question unduly restricts personal liberties. Affirmed.

PETITION FOR CERTIORARI (1947)
Supreme Court of the United States

ARGUMENT OF NUDISTS--This ordinance violates constitutional due process and wrongfully interferes with exercise of free expression. Although it is recognized that government may curtail some activities deemed intrinsically harmful to society (*e.g.*, polygamy), nudists should be granted rights similar to those now accorded Jehovah's Witnesses whose earlier convictions for declining to salute the flag have since been judicially overturned. In the absence of some clear and present danger arising from the practice of nudism, government intrusion is not warranted.

Moreover, by distinguishing between having a belief in nudist principles

(not proscribed by the ordinance for the obvious reason of potential constitutional infringement) and facilitating the practice of those same principles (which is proscribed), the State is engaging in sophistry. Its argument is as devoid of logic as would be a claim that a law prohibiting the teaching of Catholicism does not infringe upon protected religious worship because any ensuing arrests thereunder would not be for worshipping.

As understood by nudists, presentation of male and female figures in their entirety and completeness needs no apology.

RESPONSE OF STATE--Our forefathers hardly intended that the constitutional protection of free expression could be used as a shield behind which to practice mixed-sex nudism. Just as the public is protected by the destruction of rabid dogs, this ordinance protects society from the threat to public morals and decency posed by nudists.

OPINION--Per Curiam. Certiorari denied.

FURTHER PROCEEDINGS (1948)
Supreme Court of the United States

OPINION--A petition for certiorari to the Supreme Court of California relative to a refusal to grant habeas corpus (unreported) is denied.

Nudists sued for use of road.

Bartholomew v. Staheli (1948)
California Court of Appeal, Third District

195 P.2d 824 (Cal.App. 1948)

FACTS--In 1929, the state sold certain Sonoma County ranchland to its present owners. The ranch is reached by means of a 12-foot wide, meandering dirt roadway (access to which is gained by opening a padlocked gate) crossing a farm separating the ranch from a main highway. In 1943, the state--also the previous owner of the farm, which it once held incident to a home for women and later for epileptics--conveyed the farm property to a different set of owners.

In 1934, the ranch owners established a nudist colony on their land (Sun-O-Ma Club, later renamed Nature's Recreation Association), together with rental cottages, dining room, and store. Beginning in 1943, widespread distribution of circulars advertising the colony induced vastly increased travel over the dirt roadway.

In 1944, the farm owners filed suit for an injunction restraining an increased burden on the roadway easement arising from the expanded operation of the nudist colony. One of these farm owners testified that during the previous summer, he counted as many as 500 automobiles per week passing over his land. Many of them purportedly were operated at excessive rates of speed with mufflers open, raising clouds of dust which settled over his orchard and destroyed half of his fruit crop. Moreover, gates said to be left open allowed his cattle to escape.

A temporary restraining order was issued prohibiting nudist colony-related travel over the roadway. Following a trial in superior court, the judge thereof adopted findings favorable to the farm owners. The nudists now appeal to us.

ISSUES--Was the nudists' right of easement over the dirt roadway enlarged, through the doctrine of adverse possession, by reason of the major expansion in the operation of the nudist colony that occurred in 1943? Was the dirt roadway ever designated a public thoroughfare? In view of a code section specifying that the "people of this state" may not maintain a suit with respect to real property unless the defendant's right or title has accrued within the ten-year period before commencement of such suit, should this attempted injunction by the successors in title to the state fail because the nudists (the defendants here) obtained their original right of easement for access to the colony early in 1934, *i.e.*, more than ten years prior to the July 31, 1944, filing of the instant suit?

OPINION--An easement enlarging the burden upon the servient tenement by adverse possession may be realized only through open, notorious, and continual use thereof for a statutorily mandated period of five years. In recognition that the increased travel over the roadway arising from the expanded nudist colony

operation began in 1943, the nudists would not have acquired such an enlarged easement as of the time the farm owners filed this action in 1944.

The boundaries, courses, and distances of the dirt roadway were adequately designated in a surveyor's diagram introduced into the record. There is no evidence that the Board of Supervisors has ever declared this roadway public or that it has ever been so dedicated.

The code section restricting the right of the people to maintain suits contains an exception that applies when property rents have been received within the space of ten years. Here, the state as predecessor in title to the farm collected rent from 1920 (when it originally acquired the farm) until the 1943 sale to these plaintiffs; hence, the right to sue was not lost. Affirmed.

Nudist application to file as nonprofit organization rejected by state.

State *ex rel.* Church v. Brown (1956)
Supreme Court of Ohio

165 Ohio St. 31, 59 Ohio Op. 45, 133 N.E.2d 333 (1956) *Appeal dismissed*, 352 U.S. 884, 77 S.Ct. 126, 1 L.Ed.2d 82 (1956)

FACTS--The National Nudist Council, a nonprofit organization, has prepared papers of incorporation for filing with the Secretary of State. As set forth therein, the purposes of the proposed corporation are to (1) further the practice of nudism, (2) promote the nudist movement, (3) provide nudist facilities, (4) enlighten the public on benefits derived from nudism, and (5) foster public health through the teaching and practice of physical and mental hygiene.

However, the Secretary refused to accept the papers. The ground for such refusal was a determination that certain of the contemplated activities would contravene a section of the state code proscribing the willful exposure by a person eighteen years or over of his or her private parts in the presence of two or more persons of the opposite sex (except for nursing or medical care or in connection with posing for art). [This statute is also discussed in *State v. Rothschild, infra* at page 148.] Invoking original jurisdiction, relators now pray for a writ of mandamus.

ISSUES--May a corporation be formed to further activities which are, in part, prohibited by statute? Does the antinudism statute infringe upon constitutional rights, *e.g.*, peaceable assemblage with others of a like belief?

OPINION--Under the laws of this state, a corporation cannot be formed for the purpose of engaging in unlawful activities. Regardless of the beliefs held by those desiring to practice social nudism, it is clear that providing facilities where members of both sexes congregate nude would be unlawful.

Every reasonable presumption is indulged in favor of a statute's constitutionality. The code section in question here is designed to promote the public welfare and morals through an exercise of the state's police power. It has not been shown unreasonable, arbitrary, or oppressive.

Writ denied.

FURTHER PROCEEDINGS (1956)
Supreme Court of the United States

OPINION--Per Curiam. Dismissed for want of a substantial federal question.

[HISTORICAL NOTE--Edith Church (the lead relator in the case at bar) was an

associate of The Reverend IIsley Boone, one of the early pioneers of American nudism. See the note following *Sunshine Book Co. v. McCaffrey* (*infra* at page 129) for further information.]

[EDITORIAL COMMENT--The antinudism statute involved here (Ohio Revised Code Annotated, Section 2905.31, effective October 1, 1953) is reported in the 1987 Replacement Volume, Title 29 at page 83, to have been repealed.]

... a police raiding party consisting of four carloads of officers searched the premises. They encountered five nude adults--including two married couples--and five nude children. The adults were charged with indecent exposure; numerous photographs were taken of them for evidentiary purposes.

People v. Hildabridle (1958)
Supreme Court of Michigan

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

FACTS--Sunshine Gardens is a fourteen-year-old, 140-acre nudist camp in Calhoun County. One day in June, two police officers paid the proprietress a visit (ostensibly for some official business purpose). On the basis of having observed several nude persons, they then obtained arrest warrants. A few days later, a police raiding party consisting of four carloads of officers searched the premises. They encountered five nude adults--including two married couples--and five nude children. The adults were charged with indecent exposure; numerous photographs were taken of them for evidentiary purposes. All were convicted in the circuit court.

ISSUES--Did the police follow legally acceptable procedures? Was the nudists' exposure "indecent"? Should the upholding of a similar conviction in *People v. Ring* [*supra* at page 2] control the case at bar?

OPINION--Our state constitution prohibits unreasonable searches. On their initial, so-called business visit to this isolated and private property, the overzealous officers' real purpose was simply to "get the goods" on the nudists. If this clumsy and transparent maneuver were to be upheld, any deputized window-peeper--spurred by a barracks room debate into dredging up "dirt"--could climb a ladder, spy with immunity upon any married couple in the land, and justify arresting them for indecently exposing themselves to him. On the day of the raid (scheduled for the week-end to increase the likelihood that they would bag some naked nudists), the police descended upon these unsuspecting souls like storm troopers and herded them, like plucked chickens, before clicking cameras. Such action reminds us of another Michigan case wherein the court--in ruling against a similar police incursion--noted a speech before Parliament by the terse Chatham [William Pitt, Earl of Chatham, 1708-1778] who asserted that while wind and rain may enter a pauper's straw hut, the King of England must keep out. In summary, the evidence here was illegally obtained.

Except for being unclothed, the nudists resembled typical citizens enjoying a rural weekend outing. There being neither an indication of lewd intent nor a

probability of shock or outrage by any potential exposee, it must be held that the group nudity mutually and willingly engaged in here was not "indecent."

Although the *Ring* prosecution may have had some legitimacy to the extent that others could observe nakedness from a spot beyond the premises, the decision therein constitutes utterly bad law insofar as it fails to address questions of basic constitutional rights and individual liberties. Indeed, law journal editors have been roundly sniping at it with deadly accuracy for its holdings exactly opposite those of another case with substantially similar circumstances argued about the same time, viz., *People v. Burke* [*supra* at page 4]. Hence, the embarrassing *Ring* case--less a legal opinion than an exercise in moral indignation--is hereby nominated for oblivion.

While henceforth I will probably be heralded as the patron saint of nudism, the bald inescapable fact is that the prosecuting officials here badly overreached themselves. Convictions reversed and defendants discharged. All film and prints of the defendants shall be forwarded forthwith to their counsel.

CONCURRENCE--The arrest warrants were obtained by subterfuge.

DISSENT--We are not persuaded that *Ring* ought to be overruled.

. . . the sheriff and other officers stationed themselves on the perimeter of the property. For several hours, they observed 10-15 nude men, women, and children going about their activities 100 yards away. Later in the day, the sheriff returned with an arrest warrant. It named the camp operator as having violated by design an indecent exposure statute.

Campbell v. State (1960)
Court of Criminal Appeals of Texas

169 Tex.Cr.App. 515, 338 S.W.2d 255 (1960), *Cert. denied*, 364 U.S. 927, 81 S.Ct. 356, 5 L.Ed.2d 267 (1960), *Reh'g denied*, 365 U.S. 825, 81 S.Ct. 703, 5 L.Ed.2d 704 (1961)

FACTS--Fifty-two families from the Dallas-Fort Worth area are members of a nudist camp [Cedar Valley Health Resort] situated on a wooded tract in Fannin County, several miles north of Bonham. They each pay \$42 in annual dues entitling them to engage in recreation (*e.g.*, playing volleyball and pitching horseshoes) in the nude.

On a Sunday morning in spring, the sheriff and other officers stationed themselves on the perimeter of the property. For several hours, they observed 10-15 nude men, women, and children going about their activities 100 yards away. Later in the day, the sheriff returned with an arrest warrant. It named the camp operator as having violated by design an indecent exposure statute. He was subsequently tried therefor in the county court.

The trial judge's charge to the jury included an instruction that it should determine whether the nudists' exposure had occurred "in public." The latter term was then explained as referring to the presence of other people, rather than to the ownership of the place where the exposure occurred. The camp operator was convicted.

ISSUES--Did the trial judge err in charging the jury relative to the meaning of the term "in public"? Did the state prove that the camp operator designedly exhibited his person?

OPINION--The trial judge's explanation of "in public" was consistent with a prior discussion of such concept by the supreme court of this state in connection with an earlier indecent exposure case [not, however, involving nudists]. Hence, the jury charge was not improper.

That the appellant here designedly exhibited his person is obvious from his having established himself in the nudist camp business at a place where he might reasonably expect to be--and, in fact, was--seen by persons standing on

property not his own as well as by those gathered at the camp. Moreover, we do not construe the law in this state as allowing anyone to invite a number of people to his home and then expose himself to them with impunity. To the contrary, the law prohibits public exposure of those parts of the person commonly considered as private and which custom and decency require to be covered. Since the individuals paying to belong to the club are not members of appellant's family, they must be regarded as a part of the public. Accordingly, appellant may not lawfully exhibit himself to them in the nude.

In summary, we find that the evidence was sufficient to sustain the conviction and that there was no reversible error. Affirmed.

CERTIORARI DENIED (1960)
Supreme Court of the United States

REHEARING DENIED (1961)

State act regulates nudist colonies. . . purpose of act. . . to assure that the practice of nudism is confined to persons of respectability.

State *ex rel.* Cotterill v. Bessenger (1961)
Supreme Court of Florida

133 So.2d 409 (Fla. 1961)

LEGISLATIVE HISTORY--A state act regulates nudist colonies only in those counties having populations between 36,700 and 38,000. The expressed purpose of the act is to assure that--in the interest of the public good, health, morals, and welfare--the practice of nudism is confined to persons of respectability.

FACTS--An individual is being held by the Pasco County sheriff in connection with his operation of a nudist colony [not specified herein by name] in a county subject to the population criteria of the cited act. No other Florida counties presently have populations within the designated range. As relator, he now seeks his liberty in this court through a petition for original habeas corpus.

ISSUE--Was there a reasonable basis underlying the population classification embodied in the nudist colony regulatory act? (The Attorney General undertakes to distinguish the case at bar from *Ex parte Porter* [*supra* at page 6]--in which this court held that another population-related nudist colony act lacked constitutional validity--by arguing that *Porter* involved a legislative act prohibiting nudism outright, whereas this act merely restricts it.)

OPINION--The thought immediately occurs as to whether there are genuine reasons to be concerned with nudist colonies once a certain population is attained, then to consider such reasons inconsequential if--for example--the figure ever increases beyond the higher limitation, only to become concerned again if the count later slumps back within the targeted bracket. Finding no merit in the Attorney General's argument distinguishing between the legislative act involved here and the one invalidated in *Porter*, we hold that this law cannot endure either. Using narrowly constructed population classification to legislate what is, in effect, a special local act--in an attempt to avoid compliance with constitutional requirements mandating referendum elections for ratification or approval of such acts--constitutes a guise which will not be sanctioned. Prisoner discharged.

[EDITORIAL COMMENT--The nudist colony act became law in 1961. As stated in the comment following *Porter*, no such category appears in the current compilation of laws, *i.e.*, West's Florida Statutes Annotated, 1992.]

Can nudists control use of the lake?

Martinal v. Lake O' The Woods Club, Inc. (1965)
Appellate Court of Indiana, Division No. 1

140 Ind.App. 358, 208 N.E.2d 722 (1965) *Reh'g denied*, 140 Ind.App. 366, 210 N.E.2d 130 (1965) *Rev'd*, 248 Ind. 252, 225 N.E.2d 183 (1967)

FACTS--In an earlier suit tried in Starke Circuit Court, the nudist club owner of Sagers Lake and a portion of the land adjacent thereto sought an injunction preventing the owners of adjoining property from fishing and watering cattle in the lake. Holding that those owners' parents had acquired prescriptive riparian rights for such activities from the immediate grantors of the real estate, the Starke court denied the club relief.

Subsequently, the club brought a similar action in LaPorte Circuit Court. [Indiana is regarded in legal circles as having an exceptionally liberal change-of-venue tradition.] The LaPorte suit involved the same general issues in addition to a new issue, viz., that the adjoining property owners were operating--and licensing others to operate--boats and rafts. Although that court denied monetary damages for trespassing, it granted a permanent injunction. Upon denial of their motion for a new trial, the adjoining property owners now make assignment of error.

ISSUES--Is the decision of the Starke court *res judicata* as to the LaPorte proceeding? Does the practice of nudism violate public policy and, hence, "dirty the hands" of the nudist club so as to preclude its obtaining equitable relief?

OPINION--The adjoining property owners have extended their domain over the lake to such a point that they are now exercising far more rights than those recognized earlier by the Starke court. We will not enlarge the doctrine of *res judicata* to shield encroachment upon the nudist club's rights.

The existence of nudist colonies has not been proscribed in this state. Whether the practice may be offensive to some or condoned by others cannot be made a determining factor in deciding this appeal.

Affirmed.

PETITION FOR REHEARING (1965)

OPINION--Our earlier findings, conclusions, and judgment were based upon due consideration of the bare facts; the LaPorte court arrived at the naked truth. Rehearing denied.

RELATED PROCEEDINGS (1967)
Supreme Court of Indiana

FACTS--The LaPorte Circuit Court found the adjoining property owners to be in contempt for violating the order of injunction. They now appeal to us.

ISSUE--Was the injunction order too indefinite and uncertain to be effective and, thereby, lacking a basis for holding appellants in contempt?

OPINION--So that there can be no questions as to (1) what actions are being restrained, and (2) whether violations have occurred, injunction orders must be clear and certain. To the extent that pertinent language in this order reads simply "as prayed for in Paragraph One of plaintiff's complaint," it is too indefinite to be binding. The judgment of the trial court is, therefore, reversed.

Tennessee state statute prohibits nudist colonies, challenged.

Roberts v. Clement (1966)

United States District Court, Eastern Dist. Tennessee, Northern Div.

252 F.Supp. 835 (E.D.Tenn. 1966)

FACTS--Tennessee Outdoor Club, Inc. (a nudist organization) hired a manager to develop and operate a 100-acre campsite--to be known as Timberline Club--on remote and isolated property which it leased in Knox County. Shortly after the manager resigned from his previous position and relocated in the area to assume his new duties, Tennessee enacted a statute proscribing nudist colony operation and nudist practices. As a result, further development of the site was halted, and the jobs of the manager and another employee were suspended.

The club, the two employees, and the American Sunbathing Association (an umbrella group with which the club is affiliated, serving more than 15,000 of the estimated 300,000 U.S. nudists) now bring an action in this three-judge court. They seek (1) a declaration that the statute in question is unconstitutional; and (2) interlocutory and permanent injunctions restraining enforcement thereof by the governor, attorney general, and sheriff.

ISSUE--Should the statute be declared void for vagueness and indefiniteness?

OPINION--We deem the text of this statute ambiguous with respect to whether its scope extends to the nudity sometimes practiced in, *e.g.*, health clubs, YMCAs, and school gymnasiums; or even to a man and his wife taking a nude sun bath together in an area concealed from the public. Indeed, the sheriff testified that he was confused by the intent of its provisions. Hence, we find the statute unconstitutionally vague and indefinite and, therefore, void as violative of due process guarantees. As such, injunctive relief is unnecessary.

CONCURRENCE--While concurring in the result, I do not accept the finding of vagueness and indefiniteness. It should be noted that key words used in the statute (*viz.*, "colony" and "nudist") are shown in standard dictionaries as connoting a type of cult or lifestyle and, hence, different in meaning from related words (*e.g.*, "nude" and "nudity") sometimes associated with the sports activities mentioned by the majority. Moreover, that formalized nudism (whereby its adherents prefer to congregate in secluded areas far from the strictures of the general population) differs from incidental nudity associated with sports can be shown by tracing the former to the ingrained beliefs of certain pre-World War I European nudist societies.

However, nudists' rights are protected by recognized constitutional

safeguards of privacy and association. Nudism is an innocuous practice, engendering no harm or danger either to its members or to society. As such, these plaintiffs should receive the same benign treatment that is accorded other nonthreatening groups.

[EDITORIAL COMMENT--The statute in question here was enacted in 1965 and indexed under the category "Nudist Colony." No such category appears in the current compilation of laws, *i.e.*, Tennessee Code Annotated, 1991 Replacement.]

Nudist church members arrested.

Roe v. Commonwealth (1966)
Court of Appeals of Kentucky

405 S.W.2d 25 (Ky. 1966)

FACTS--The two appellants herein desire to establish a nudist church on their Greenup County farm. Accordingly, they posted a sign alerting passers-by to expect nudity and solicited people to join. On an April day designated for the initial service, appellants--together with the wife of one and their children--assembled nude at an outdoor location visible from the public road. At least four carloads of "sightseers" were parked at a point from which they could observe the nude group.

Appellants were then arrested for operating a nudist society without complying with a regulatory statute mandating that they (1) obtain a license; (2) pay an annual tax of \$1,000; (3) erect a twenty-foot wall of brick, stone, or cement around the premises; and (4) maintain a register of names and addresses of affiliated persons. Their demurrer alleging violations of religious freedom and due process and motion for directed verdict were overruled. A circuit court jury convicted both of the appellants and fined each the minimum penalty of \$1,000.

ISSUE--Does the nudist society regulatory statute represent an unconstitutional exercise of the state's police power?

OPINION--The police power is an indispensable and essential attribute of sovereignty. Courts may limit legislative acts taken pursuant to such power only when it has been exercised unreasonably, *e.g.*, when a statute fails to further a tangible and clear purpose. Recognizing that the legislature's asserted purpose for enacting the statute in question here was the regulation of nudism (*not* its outright prohibition), we believe this exercise of the police power is manifestly unreasonable because it effectively precludes the existence of nudist societies altogether. That is to say, the stringent requirement for the construction of high masonry walls goes well beyond any justifiable criteria that might have been established to achieve and maintain conditions of privacy. Moreover, the amount of the tax far exceeds the minimal requirements needed to compensate the state for costs of license issuance and regulatory supervision (the only components permitted by law to be assessed through fees imposed under the police power, as opposed to general revenue measures).

In summary, for the reasons stated above we must declare the nudist society statute--of such breadth that it could be construed as covering examination of a female patient by a male physician--unconstitutional. Under this circumstance, it is unnecessary that we address aspects of religious freedom raised at trial. Convictions reversed and fines voided.

[EDITORIAL COMMENT--Subsequent to the case at bar, Kentucky repealed some--but not all--sections of its nudist society statute. For an understanding of the current law, readers should consult Kentucky Revised Statutes Annotated, 1991 Replacement, Volume 9A, Chapter 232 at pages 597-600.]

Woman accused of exposing all to preacher.

Pendergrass v. State (1966)
Supreme Court of Mississippi

193 So.2d 126 (Miss. 1966)

FACTS--A certain 14.5-acre tract of land in George County lies adjacent to public road 307 (also known locally as Three Notch Road). It is entirely wooded, except for a small clearing accessed by a winding 400-yard private drive posted with "No Trespassing" signs. A barrier gate marked with the warning "Blow your horn to enter" crosses the drive a short distance before the clearing. The owner of the property and his wife are members of the American Sunbathing Association or ASA, an organization for practicing nudists.

One Sunday in August, a preacher stopped by to extend an invitation to attend his church (Salem Missionary Baptist Church) located on the opposite side of the public road. Based upon the preacher's subsequently filed complaint that he encountered both the wife and an unidentified man seated naked in the clearing (together with the woman's husband--who the preacher concedes was clothed at the time--and the couple's young son whose state of attire is not specified), she was indicted for violating a provision of the state code directed to persons who willfully and lewdly expose their private parts in a public place.

Evidence adduced at an ensuing trial in the circuit court is in conflict: The preacher testified that after disengaging the gate and blowing his automobile horn (which he acknowledges is not especially loud), he proceeded to the clearing, at which time the woman purportedly stood and faced him momentarily before putting on shorts. He asserts that he maintained purity of mind during the 35-45 minutes that he stayed on the property. The woman testified, however, that upon becoming aware of the approaching automobile she arose from her chair and walked behind a truck to dress, had donned a brassiere and full clothing below the waist by the time the automobile stopped at the clearing, and was also wearing a blouse when actually greeting the preacher.

Notwithstanding testimony by the husband highlighting his beliefs that sunlight and fresh air purify the body and that nude sunbathing--when practiced in accordance with ASA tenets--does not tend to excite lustful desire, the woman was convicted and fined \$50; a twenty-day sentence in the county jail was suspended.

ISSUE--Did the woman's actions conform to the essential elements required by the statute for conviction here, viz., a willful and lewd exposure of her private parts in a public place?

OPINION--Our concern is not with the therapeutic or aesthetic values espoused by nudists, but rather, with assignments of error. Contrary to wording in the

indictment suggesting that this woman exposed herself to the preacher on the public road in front of his church, their encounter occurred on private property about one-fourth mile from the road. She was, therefore, visible from neither the road nor the church. Moreover, that she began to clothe herself when the preacher neared shows that any exposure of her entire naked body was neither willful nor lewd. Conviction reversed and appellant discharged.

If nudists were farmers, would there be a problem?

Sturgis v. Margetts (1970)
Supreme Court of Wisconsin

47 Wis.2d 733, 177 N.W.2d 609 (1970)

FACTS--The owners of a certain tract of land in an agricultural zone of Walworth County filed a petition with the Board of Adjustment in which they sought a permit to operate a recreational camp on the property. Upon issuance of such a permit, they established a nudist colony known as "Running Bares Nudist Resort." It presently consists of a sizable number of residential trailer units having electrical and water connections, septic tanks, outbuildings, plantings, and fencing. Some units with expired license plates are set on blocks. Additionally, a school tax is paid on the sites. Although the board is empowered to approve land use for mobile home parks, the nudists have never applied for such authority.

The surrounding property owners filed suit in the circuit court, seeking a declaration that the nudists were exceeding their permit rights. At a trial, two local officials--who were prepared to assert in the nudists' behalf that they believe there is no zoning violation--were not permitted to testify. The circuit court awarded judgment to the plaintiffs; the nudists now appeal to us.

ISSUES--Did the circuit court correctly decide that the nudists' use of the land is not authorized by their permit? For zoning purposes, can the nudist colony--located as it is in an agricultural area--be considered a farm and, hence, not require any further permit for the present use?

OPINION--Findings of fact by a trial court should not be upset unless they are against the great weight and clear preponderance of the evidence. There is ample basis and firm underpinning in the record here to support the conclusion reached by the circuit court.

We see no analogy between a nudist facility and a dairy or crop farm. Moreover, under the zoning ordinance no more than two trailers or mobile homes may be placed on farms without special board permission. Thus, donning overalls to appear as farmers might get the nudists safely under one barbed wire fence, only to get them hung up on another.

Affirmed.

Police commissioner claims nudist can't be cop. He wouldn't be wearing his weapon.

Bruns v. Pomerleau (1970)
United States District Court, District of Maryland

319 F.Supp. 58 (D.Md. 1970)

FACTS--A member of Pine Tree Associates (a nudist club) sought a position as a patrolman with the Baltimore police. He placed first out of sixty candidates in an interview and written examination; moreover, no derogatory information surfaced in a later in-depth investigation.

However, the police commissioner--perceiving nudism as a generally unacceptable way of life--refused to accept his application in spite of his assurance that no photograph of himself would appear in nudist publications, and notwithstanding that no known incident involving nudism had previously arisen with respect to Baltimore policemen. He now files a complaint in this court against the commissioner and deputy commissioner, seeking (1) compensatory and punitive damages, and (2) an order restoring his eligibility.

ISSUES--Should Maryland's "Omnibus Act," specifying eligibility criteria for police employment, be narrowly construed so that the outcome of the written examination is declared the sole factor to be used in hiring determinations? Can the commissioner and his deputy be held personally liable? Was the refusal to accept plaintiff's application tantamount to a violation of his constitutionally protected civil rights?

OPINION--The state legislature obviously realizes that a police officer holds a position of public trust. In that respect, his conduct must be of a higher moral character than that of the ordinary citizen. Accordingly, recruitment procedures embracing scrutiny of applicants' backgrounds are not unreasonable.

The commissioner and his deputy can be held individually liable only if it is shown that they acted maliciously and wantonly outside their scope of authority. No evidence here establishes that they acted other than in an official capacity for the Police Department. Hence, the action against these officials individually will be dismissed.

However, in order to justify exclusion of the plaintiff from police employment solely because of an off-duty activity, it must be shown that it would adversely affect his morals and integrity or work efficiency. There has been no convincing indication here to demonstrate that plaintiff's nudism would be inimical to legitimate interests of the Police Department. To the contrary, nudity in art and literature is so well established that the plaintiff's unobtrusive activities cannot be deemed to transgress public sensibilities. The record does not show that the

presence of a nudist would impair working harmony with fellow officers. Plaintiff's rejection for reason that a nudist would be unable to comply with a rule requiring policemen to carry weapons while off-duty is unacceptable since it is common knowledge that many policemen participate in swimming or vigorous physical activity without weapons. There is no potential here for coercion--similar to, *e.g.*, pressure to release government secrets to unauthorized persons by homosexual public employees under threat of exposure--since it was the plaintiff *himself* who disclosed his nudist membership.

In summary, the commissioner's ruling was arbitrary and capricious. For this court to deny the plaintiff relief because of the bare allegations and hollow arguments presented by the defendants would, in effect, suppress his constitutionally protected interest in government employment and right of association. Moreover, the chilling effect upon other nudist applicants for public service positions that necessarily arises from a systematic exclusion of nudists cannot be condoned.

Eligibility ordered restored within seven days.

Are we zoning a campground, a nudist camp, or what?

Freewood Associates, Ltd. v. Davie County Zoning Board (1976)
Court of Appeals of North Carolina

28 N.C.App. 717, 222 S.E.2d 910 (1976) *Plaintiff's petition for review denied; defendant's motion to dismiss allowed*, 290 N.C. 94, 225 S.E.2d 323 (1976)

FACTS--Freewood Associates purchased 60.65 acres of woodland and unimproved farmland for the purpose of developing a recreational center in which memberships would be sold to interested parties. After six families had acquired such memberships over a four-month period, the county adopted a zoning ordinance resulting in the tract being classified as "Residential-Agricultural." Freewood's request that the Board of Adjustment grant nonconforming status as a mobile home park was denied [for reasons not specified herein]. Although a subsequent application for a single-unit mobile home was approved, a zoning officer later ordered Freewood to cease installing campground facilities.

Freewood next applied for a conditional use permit to operate a private family campground. Following acknowledgment by one of its officers at an ensuing zoning hearing that a nudist camp was planned, that application also was denied. Freewood then applied for a nonconforming use permit, claiming that the tract had served as a campground prior to adoption of the zoning ordinance. Upon denial of that permit too, both campground permit applications were reviewed in the superior court which remanded the causes for further hearings.

In the course of those hearings, a Freewood officer testified that--although local publicity was being avoided--the organization had (1) applied for membership in a national sunbathing club, (2) advertised the camp in a nudist publication, and (3) spent \$21,800 in improving the land. A witness appearing in opposition stated that "if the Lord had intended people to go nude ... Noah's son [would not have] been turned into a serpent because of looking upon his father's nude body." Finding that Freewood had neither proved prior use as a campground nor shown that a nudist camp would be compatible with orderly development, the board again declined to issue any campground permit. The latter decision was affirmed by the superior court; Freewood now petitions us for relief.

ISSUE--Was the board justified in denying the nudists a permit?

OPINION--In this state, one requisite for nonconforming use permits is that any developmental expenses be incurred in good faith. Additionally, we think it important that the use of property be stated truthfully and accurately in permit applications. Freewood's real intent of operating a nudist camp was initially concealed from the public. We see a significant difference between a family campground which the public may support and a nudist camp which it may not. Moreover, there may be a serious question that use of the property in the latter

capacity would violate a state indecent exposure statute. Affirmed.

PETITION BY PLAINTIFF FOR DISCRETIONARY REVIEW (1976)

Supreme Court of North Carolina

ORDER--Denied; defendant's motion to dismiss appeal for lack of substantial constitutional question allowed.

Who gets the kids if mom is a nudist?

Moon v. Moon (1981)
Court of Appeals of Tennessee, Middle Section

621 S.W.2d 767 (Tenn.App. 1981) *Cert. denied*, (Unreported-Tenn. 1981)

FACTS--Following the death of an infant child's father, the paternal grandparents instituted a suit in circuit court, Davidson County, to transfer custody of the child from the mother to them. The maternal grandparents then filed an intervening petition also seeking custody. Pending a full evidentiary hearing, temporary custody was granted to the paternal grandparents.

The trial judge ultimately found that the child's mother and her parents--owners of Sunburst Nudist Camp Resort--had exposed, and would likely continue to expose, the child to an assertedly detrimental nudist environment. Thus, he granted the paternal grandparents permanent custody, with the mother having visitation rights.

The paternal grandparents subsequently relocated out-of-state in connection with an employment transfer. About that time, the mother obtained physical custody of the child; both mother and child then disappeared. Appeals of the circuit court judgment filed earlier by the mother and the maternal grandparents are now before this court.

ISSUES--Did the circuit court judge abuse his discretion in denying custody to the mother or the maternal grandparents? Did he err in deciding the custody question on the basis of a presumed relevance of nudism? Should this case now be closed?

OPINION--It appears that the mother has contemptuously defied the circuit court and that the maternal grandparents may be predisposed to wrongfully assist in harboring the child. Therefore, we decline to consider their insistences.

Nevertheless, the circuit court judge was in error to base his award of permanent custody solely upon the nudist-environment question; rather, he should have considered all factors affecting the child's best interests and welfare. Accordingly, the custody judgment will be vacated.

However, this court considers it inappropriate to take any final action now because it is not believed that counsel for the various parties can adequately represent the child's interests. Thus, the cause will be remanded for further hearing--with participation of court-appointed counsel independent of partisan influence--at such time as the child may be located and brought within jurisdictional control of the circuit court. In the interim, the order of temporary custody will remain in force.

Vacated and remanded.

CERTIORARI DENIED (1981)

Supreme Court of Tennessee

Mom married a nudist. Can her daughter visit the camp?

Hadley v. Cox (1985)
District Court of Appeal of Florida, Fifth District

470 So.2d 735 (Fla. App. 1985)

FACTS--In conjunction with the dissolution of a marriage, the primary issue in a Brevard County nonjury trial involved custody of the couple's five-year-old daughter. The wife testified that she was planning to marry the manager of Cypress Cove Nudist Camp (where the couple, together with the daughter, had previously gone as a family) as soon as possible and that the daughter would be well cared for in a new home on camp grounds. No adverse testimony about such setting was presented. However, the trial court awarded custody to the husband [for reasons not specified herein], but without limitations or conditions concerning the child's prospective visits with her mother at the camp.

Subsequently, the husband petitioned to modify the decree so as to forbid visitation at Cypress Cove or any other nudist camp. The wife, by then having remarried, filed a counterpetition to modify custody and hold the husband in contempt for assertedly frustrating her efforts to visit with the child. A preliminary hearing resulted in an order limiting the wife's visitation rights to places other than nudist camps; the husband was not held in contempt.

In testimony at the final hearing on the petitions, the husband speculated that if his daughter ever tells her schoolmates of "seeing naked guys walking around ... [and] what a boy looks like when he is undressed," she may be teased. The trial court granted the husband's petition to forbid visitation at nudist camps and denied the wife's petition to modify custody. She now appeals to us.

ISSUES--Is there justification to disturb the husband's award of custody? Should the wife be denied the right to meet with her daughter on nudist camp grounds?

OPINION--It is well settled in this state that modification of custody is warranted only if (1) a substantial or material change has occurred in the condition of the parties, and (2) the best welfare of the child in question would be promoted thereby. In the case at bar, we affirm the denial in change of custody on the ground that trial courts must be accorded broad discretion in such matters.

However, we reverse the restriction on visitation rights with the mother at nudist camps because the husband's presentation was patently insufficient to carry his burden of proof. He offered no witnesses or tangible evidence that the daughter's past visits at the camp were detrimental or harmful to her. Moreover, based upon the present record, we do not think there is sufficient indication of other children's potential negative reaction to the daughter's nudist experiences to justify modifying the final decree.

In summary, the custody judgment appealed from is affirmed, but the

restriction on visitation at nudist camps is stricken.

DISSENT--One judge dissents. [No reason is given.]

Neighbors don't want a nudist resort next door!

Elysium Institute, Inc. v. County of Los Angeles (1991)
California Court of Appeal, Second District, Division 7

232 C.A.3d 408, 283 Cal.Rptr. 688 (1991) *Cert. denied*, 502 U.S. 1098, 112 S.Ct. 1180, 117 L.Ed.2d 424 (1992)

FACTS--Since 1978, Elysium Institute has operated a seven-acre, clothing-optional recreational/educational facility on North Robinson Road in rural Topanga. The property contains two former single family residences, as well as swimming pool, sauna, whirlpool, tennis courts, barn, and stable. During the summer, daily attendance can reach 325 persons, with 20-30 staying overnight.

Pursuant to a new county ordinance, nudist camps were transferred from Zone A-1 (light agriculture) to Zone A-2 (heavy agriculture); however, at that time the Planning Commission granted Elysium a legal nonconforming use status valid in A-1 for five years. Based upon adverse information from certain residents of the local community relative to a perceived excess of traffic and noise, an application for an extension was later denied by the commission and by the Board of Supervisors on appeal.

Upon challenge of these actions through a petition for writ of mandamus in the superior court, the matter was remanded to the county. After further hearings, the commission authorized Elysium to continue operation for another five years subject, however, to twenty-seven conditions. On appeal to the supervisors relative to ten of the conditions, the board noticed a *de novo* hearing and subsequently voted to deny the application. Elysium then secured another writ of mandamus requiring the supervisors to consider the results of a geological stability report previously prepared by the county engineer. After reconsidering the entire record (including the engineer's report), the supervisors again denied the application. Thereupon, Elysium filed a petition for writ of mandamus in this court.

ISSUES--Does an earlier unreported opinion involving Elysium, in which another court ruled that nudism is a constitutionally protected nonverbal expression, collaterally estop the county from asserting otherwise here? Is nudism so protected? Do the ordinance's restrictions on nudist camps--wherein the latter term is defined so as to embrace ongoing gatherings of as few as three nudists meeting inside a private home--run afoul of this state's liberal concept of privacy? Did the transfer of nudist camps to A-2 status, without a similar transfer of certain other facilities (*e.g.*, correctional institutions, convents or monasteries, and youth halls and camps), raise equal protection problems? Should the superior court have granted Elysium's motion for a new trial based upon its late offer of evidence tending to suggest that it had been singled out and discriminated against?

OPINION--The doctrine of collateral estoppel bars a reopening of questions of fact

only. Since the question we face here is one of law, the doctrine does not apply.

A number of reported cases in widely separated jurisdictions have held that nudism is not constitutionally protected. Accordingly, we find that it is subject to imposition of limitations.

The ordinance's broad definition of nudist camp unconstitutionally infringes upon the right of personal privacy. Such a right is ensured by the California constitution and strictly upheld by our state supreme court. Nevertheless, Elysium is without dispute a nudist camp and, as such, remains subject to the other provisions of the ordinance.

Given the ability of the county to regulate various kinds of establishments through its Conditional Use Permit (CUP) authority, the arbitrary distinction in the ordinance between nudist camps and other properties bears no rational relationship to a legitimate legislative purpose. Thus, we find that the ordinance unconstitutionally deprives nudists of their guarantees of equal protection. However, we note that Elysium failed to comply with CUP application requirements that it both demonstrate compatibility with the various uses permitted in Zone A-1 and bear a reasonable relation to the public welfare. Hence, we affirm the judgment.

The superior court need not have granted Elysium a new trial since it could have found that the late-tendered evidence of claimed discrimination (even if material to the issues here) showed simply that the county had been lax in enforcing the ordinance.

CONCURRENCE--One judge concurs without comment.

PARTIALCONCURRENCE/PARTIAL DISSENT--I concur with the majority insofar as it finds that the county unconstitutionally barred Elysium from Zone A-1.

However, the outstanding and unresolved issue is how Elysium's unconstitutional reclassification and banishment to Zone A-2 affects its status in A-1. It is one thing for the majority to make a finding denying Elysium the "grace" of remaining as a nonconforming use within a zone where it no longer belongs, but quite another to infer from that finding--as it does--that if Elysium had applied for a CUP to engage in a *preexisting conforming* use within that zone, the county would have denied it. Moreover, it should be noted that Elysium's legal nonconforming use derived from the zoning sections stricken here today. Since these sections are now held to be without force, it follows that Elysium never lost its prior permitted status in A-1 and, hence, it could legally continue its existence without applying for a CUP.

Elysium's excluded testimony relative to CUP requirements was hastily assembled when it became apparent that the trial court--at the conclusion of the evidence phase--was considering the unique approach of speculating that the county would have denied Elysium a CUP if the latter had applied for one. Such speculation has no place in a court decision. When judges stray from the straight and narrow path of fact, they often wander into a minefield of conjecture. Such vice acquires a constitutional dimension here because it has deprived Elysium of its right to challenge what might have been an unconstitutional decision by the county

if it had ever acted upon a CUP application. Since Elysium never applied for a CUP, it understandably saw no reason initially to submit CUP-related evidence. The trial court's rejection of the subsequent tender of such evidence and the majority's affirmance thereof place Elysium in a classic "Catch 22." If this sounds as if we have entered "never-never" land, that is because we have. In my view, we should return to the real world and reverse.

CERTIORARI DENIED (1992)
Supreme Court of the United States

[HISTORICAL NOTE -- Elysium is owned and operated by Ed Lange, long-time nudist leader and publisher.]

Are "preserve and conservation area" compatible with nude use?

Board of Supervisors v. Gaffney (1992)
Supreme Court of Virginia

244 Va. 545, 422 S.E.2d 760 (1992)

FACTS--A 200-acre property in the Criglersville area of Madison County is assigned to a "Conservation" zoning district for the purpose of protecting water, timber, and other natural resources in this vicinity adjacent to the Blue Ridge Mountains. In 1987, its owners secured from the Planning Commission a special use permit allowing for a campground and lodge. On the basis of such permit, they established a nudist club [known as Avalon] which has since grown to 170 members paying a total of \$20,000-\$25,000 in annual fees. Members and guests participate nude in such activities as volleyball, Frisbee, croquet, horseshoes, picnics, barbecues, swimming (in a cement-bottom pool), hiking, and "sing-alongs." Miscellaneous fixed facilities include a solar shower, sand box, play swings, campsites, and outhouse.

Following citizen complaints that nude persons had been spotted on the property from vantage points on adjacent land and State Highway 642, the Board of Supervisors revoked the permit in 1989. The owners deny, however, that nude persons are visible from the highway or can be seen with the unaided eye from occupied, neighboring land. In a subsequent court suit brought by the owners challenging the county's action, the trial judge ruled that the permit was invalid at the outset because the commission lacked the power to approve special uses. Although the board later vested such power in itself, the owners have sought no further permit or other zoning change.

Next, the supervisors filed a petition in the circuit court to enjoin the owners from continuing to operate the nudist club. That court denied an injunction under the theory that use of the property as a nudist club qualifies it as a "preserve and conservation area," a land use category specifically permitted by right in a Conservation district. We awarded the county an appeal.

ISSUE--Can nudist clubs acquire zoning status in this county as a use permitted by right under the general category of "preserve and conservation area"?

OPINION--The text of the county zoning ordinance makes it abundantly clear that in a zoned area only specifically enumerated land uses are permitted by right, *i.e.*, without need for a special use permit. Since nudist clubs are not named therein, we hold that the owners here have failed to prove that such use constitutes a use permitted by right. Reversed and remanded for entry of decree consistent with this opinion.

FIRST CONCURRENCE--I concur. However, the majority's having referred (in the facts) to the alleged sightings from afar of nude persons on the property suggests that such testimony is material to its opinion. This testimony was disputed by the owners who claim that such sightings would be possible only with binoculars. Well-settled legal principles require that credible trial court findings of fact in cases of conflicting testimony be made binding on appellate review. The majority's failure to acknowledge that the lower court accepted the owners' assertions underscores a weakness in its rationale.

SECOND CONCURRENCE--Although concurring in the reversal, I don't accept the majority's analysis that the land use here is a "nudist club." Rather, it is a recreational facility, which use is unaltered by the participants being unclothed.

[HISTORICALNOTE--Since this case was decided, Avalon has relocated to a 252-acre site near Paw Paw, West Virginia.]

No structures and no suits, no difference; special exception needed for such significant outdoor recreation.

New England Naturist Association, Inc. v. George (1994)
Supreme Court of Rhode Island

___ R.I. ___, 648 A.2d 370 (1994)

FACTS--In June 1993, an organization whose members enjoy sunbathing nude purchased a beachfront lot in the Town of South Kingston. On three boundary lines with abutting property, fifty-four-inch nontransparent windscreens were erected. Members are garbed while swimming; otherwise, the wearing of clothing is optional.

One month after the purchase, a local building official issued a zoning violation notice. Such notice was based upon the organization's failure to have acquired the special exception needed for uses such as significant outdoor recreation. Upon the town review board's upholding of the notice, the organization brought an appeal in the Superior Court. That court reversed, holding that the zoning ordinance was inapplicable to the naturists' use of the property because no structure had been built thereon. The town now seeks certiorari.

ISSUES--Does this property's long history as a beach render the naturists' activities a legal nonconforming use, thus overriding any need for a zoning exception? Did the Superior Court justice misuse her power of appellate review?

OPINION--Per Curiam. We conclude that the zoning provisions subjecting waterfront property to regulation are justified because of legitimate concerns for the environmental and economic impact arising from its occupancy. The net effect of plaintiff's activity has been circumvention of the ordinance. Hence, the Superior Court justice's reversal of the zoning board was in error. The naturists should proceed by seeking a special exception as provided for.

It is well established that reviewing courts should merely examine case records to determine whether competent evidence supports lower tribunals' findings. Here, the Superior Court justice wrongfully substituted her judgment for that of the zoning board.

Certiorari granted and judgment of Superior Court quashed (without prejudice to the right of petition for an exception to use the property as a members' bathing beach).

[EDITORIAL COMMENT--See another case involving this plaintiff at page 98

infra.]

[B] INDIVIDUAL OR GROUP NUDITY IN A PUBLIC
SETTING

From the waist up she wore only gloves, hat, and adhesive pasties covering both nipples.

City of Cincinnati v. Wayne (1970)
Court of Appeals of Ohio, Hamilton County

23 Ohio App.2d 91, 52 Ohio Op.2d 95, 261 N.E.2d 131 (1970)

FACTS--On an August afternoon, a woman alighted from an automobile on Sixth Street [the block is not specified] and proceeded to walk in a westerly direction. From the waist up she wore only gloves, hat, and adhesive pasties covering both nipples.

Police charged her with violating indecent exposure and indecent behavior ordinances. The municipal court (sitting without a jury) found the woman guilty of the charges, sentenced her to fifteen days in the workhouse, and imposed a fine of \$25 on each charge plus costs. She now appeals to us.

ISSUES--Are females subject to the exposure ordinance, which refers to males only? Did this woman engage in behavior legally characterizable as indecent?

OPINION--Ohio law provides that when an ordinance contains a penalty, any doubt as to its interpretation must be resolved in favor of persons against whom it is invoked. Accordingly, failure of the indecent exposure ordinance to specify that it applies to females renders the latter not amenable to prosecution thereunder. A glance at the photograph of the defendant can leave no doubt in the mind of any court that, with her expansive mammary glands, she is a female. Hence, defendant is discharged in the exposure case.

As to the indecent behavior case, we note that the word "indecent" is not defined in the ordinance. Past convictions under this ordinance have arisen out of some obscene act, *e.g.*, engaging in certain stage productions. There is no indication here suggesting that defendant made any motions or movements creating a prurient interest. Moreover, there is not a scintilla of evidence tending to show that her manner of dress was contrary to local community standards. Were it not for the requirement that evidence of such standards be introduced into trial records, judges could arbitrarily determine that, for example, miniskirts or low-cut gowns constitute indecent attire. We must hold here that defendant's act of walking normally along the street was insufficient to establish indecent behavior. Thus, she is also discharged in the behavior case.

Conviction reversed.

During a meeting of a sex education program at a Grinnell College student residence hall, ten young people (both males and females) completely disrobed.

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State v. Nelson (1970)
Supreme Court of Iowa

178 N.W.2d 434 (Iowa 1970) *Cert. denied*, 401 U.S. 923, 91 S.Ct. 864, 27 L.Ed.2d 826 (1971)

FACTS--During a meeting of a sex education program at a Grinnell College student residence hall, ten young people (both males and females) completely disrobed in the presence of about eighty others and remained unclothed for approximately ten minutes. Their asserted purpose was to protest pictures of nude females in *Playboy* magazine, a representative of which was the featured speaker. In their view, the publication is a "money changer in the temple of the body."

Following an investigation (begun independently by the state attorney general's office, not upon complaint to local authorities), charges of lewdness/indecent exposure were made against eight of the ten. At an ensuing trial in the district court, the jury--upon querying the judge relative to whether the statute in question covers nudity in the presence of doctors, nurses, artists, or sculptors--was instructed that such named circumstances, but not open meetings, constitute exceptions. Verdicts of guilty ensued; each student was fined the maximum of \$200.

ISSUES--Did the students' nudity violate the statute? Was their protest a valid exercise of free speech?

OPINION--Nonaccidental public nudity is prohibited when it occurs in a context in which firmly accepted norms of behavior require people to be clothed. Accordingly, intentional disrobing in a public meeting violates the statute; it is immaterial that the defendants perceived themselves as acting with a noble purpose.

These convictions stemmed from defendants' noncommunicative actions (*i.e.*, the public nudity), not from ideas they sought to express. When the State's interest is compelling, substantial, or sufficient (as here), minor encroachment on First Amendment rights is justified.

Affirmed.

FIRST DISSENT--We must construe criminal statutes strictly. This statute requires not merely an open exposure, but also, a lewd intent. Whether defendants harbored such an intent should be established on the basis of the likely effect of their acts upon those present. That is to say, since the meeting involved a specialized

gathering (rather than the general public), this case should not be governed by some overall notion of societal norms.

That not all segments of society are offended by nudity, per se, is suggested by evidence showing that no one at the meeting was sufficiently shocked either to complain or to leave abruptly. Properly instructed on intent, the jury might have reached a contra result. Also, the Legislature--not trial courts--should identify any blanket exceptions whereby certain categories of nudity are excluded from statutory coverage.

SECOND DISSENT--For conviction under the statute, lewd conduct must have occurred. I find it strange that a search of the majority opinion for any mention of "lewd" or "lewdness," terms appearing three times in the statute, is in vain.

CERTIORARI DENIED (1971)
Supreme Court of the United States

Pursuant to an invitation extended by one of the owners of a pond. . . an adult man went swimming in the nude.

. .

State v. Borchard (1970)
Court of Appeals of Ohio, Athens County

24 Ohio App.2d 95, 53 Ohio Op.2d 254, 264 N.E.2d 646 (1970)

FACTS--Pursuant to an invitation extended by one of the owners of a pond known as the "209 Reservoir," an adult man went swimming in the nude on an afternoon in late May. During such time, other persons--variously estimated as 20-70 in number, including adult females and children--were present, although it is not clear from the record whether they were trespassers or invitees. In response to an anonymous telephone call, deputy sheriffs traveled over private property (without having obtained any search warrant) to reach the reservoir, observed the nude man, and arrested him for willfully violating an indecent exposure statute.

Notwithstanding testimony by several women in a municipal court trial that they were not annoyed by his nude condition, a jury found him guilty. He now appeals to us.

ISSUES--Did the sheriffs' evidence constitute the fruit of an unlawful search as prohibited by the Fourth Amendment, thus making its admission into the record a violation of the "exclusionary rule"? Does the statute in question identify ascertainable standards of guilt compatible with due process guarantees and define the proscribed conduct consonant with Sixth Amendment requirements [relative to, *inter alia*, the right to be informed of the nature and cause of an accusation]? Need the man have engaged in offensive, exhibitory gestures in order to run afoul of the statute?

OPINION--The U.S. Supreme Court has held that the Fourth Amendment protects from warrantless search persons both in and away from their residences as well as their concealed papers or effects, but not open places such as the pond involved here. The defendant in the case at bar--knowingly and without objection to being seen by others--exposed his nude body in a location visible to all present. Accordingly, the sheriffs' observation of him in the nude did not arise from any search. Indeed, at no time while they were at the reservoir did these officers conduct a search. Therefore, there is no valid cause for complaint concerning the lack of a search warrant. As is often the case, this defendant is not contrite concerning his actions, but rather, merely vexed that he was arrested.

The State has laid out by affidavit the offense in terms of the governing statute. The key words "indecent exposure" are not vague and indefinite. To the contrary, they have a well-defined, well-understood, and generally accepted

meaning. By going to trial without having requested a bill of particulars, defendant effectively waived any Sixth Amendment claim in this regard.

Whether other persons may have been offended or annoyed is irrelevant to application of the statute since such elements have not been incorporated therein. All that is required for conviction is that the exposure have occurred in a place open to observation.

Affirmed.

. . . an anonymous caller notified police that nude persons were sunbathing. . . Investigating officers observed an individual on his stomach and another on his back; both were completely nude. Although this beach receives only occasional use. . .

State v. Rucker (1970)
Supreme Court of Hawaii

52 Haw. 336, 475 P.2d 684 (1970)

BACKGROUND--A section of publicly owned shoreline in Makena, District of Makawoa, County of Maui, is known as Pu'u Ola'i Beach. Isolated from the public road and adjoining beach, it is accessible by two trails (one a well-worn path, but the other seldom used).

FACTS--On a late February day, an anonymous caller notified police that nude persons were sunbathing at the location. Investigating officers observed an individual on his stomach and another on his back; both were completely nude. Although this beach receives only occasional use, several fishermen were present at the time. The sunbathers were arrested and convicted in circuit court for creating a common nuisance.

ISSUES--Did the sunbathers' conduct satisfy three essential elements needed to establish common nuisance, viz., (1) an intent to indecently expose oneself, (2) an exposure occurring in a public place, and (3) witnesses present to see the act? Did the sunbathers have a right of privacy? Should the trial court have granted their motion for acquittal on the ground that the prosecutor's evidence was insufficient to show that the beach was so public that nude sunbathing thereon would likely offend others? Did a statement by the trial judge that "this is a very close case either way ..." indicate that the State did not meet its burden of proving guilt beyond a reasonable doubt?

OPINION--Evidence of record confirms that the defendants exposed themselves in a location open to casual observers and where other persons were present at the time of arrest. We therefore hold that the State properly established all three elements of common nuisance.

The cases defendants cite in support of their privacy claim pertain to places where one can reasonably expect freedom from governmental intrusion, *i.e.*, a telephone booth and an apartment balcony. Such places are easily distinguishable from a public beach which rightfully belongs to, and is subject to use by, the general public.

The State's evidence establishing common nuisance perfected a prima facie case against the defendants. We will not disturb the trial judge's ruling that "a reasonable mind might fairly conclude guilt beyond a reasonable doubt."

That the trial judge characterized the case as "close" does not expunge the substantial evidence in support of the verdict.

Affirmed.

DISSENT--The famous observations of Mr. Justice Brandeis (relative to the comprehensive and valued right of civilized man to be let alone) and of Mr. Justice Frankfurter (that ours is an accusatorial, as opposed to an inquisitorial, system) are noted with favor.

In its effort to prove that the defendants manifested indecent intent, the State relied solely upon the police officers' testimony. One of them admitted, however, that the only persons he had ever seen at Pu'u Olai were "hippie-type" characters and fishermen. Considering the apparent absence of families and the well-known hardiness of spirit associated with fishermen, I do not see how one could conclude that the nudity engaged in here outrages the moral sense of the community. Also, there is no evidence eliminating the possibility that the defendants approached the beach via the seldom-used trail and, thus, reasonably inferred from its relatively untrodden condition that they would not likely be seen. The convictions should be reversed.

. . . two individuals went to a remote (but public) beach. One of them removed all of his clothes, lay on his back on a towel, and fell asleep nude.

In re Smith (1972)
Supreme Court of California, In Bank

7 Cal.3d 362, 102 Cal.Rptr. 335, 497 P.2d 807 (1972)

FACTS--Early on an August morning, two individuals went to a remote (but public) beach. [Its location is not specified herein.] One of them removed all of his clothes, lay on his back on a towel, and fell asleep nude. Subsequently, other people appeared in the vicinity, including a young couple, a group of juvenile boys, and three juvenile girls.

Patrolling police then arrested the nude individual for a misdemeanor violation, viz., exposing his private parts "willfully and lewdly." At an ensuing trial, a judge found him guilty, notwithstanding a stipulation that at no time did he have an erection or participate in any activity directing attention to his genitals. A suspended three-year sentence and \$100 fine were imposed; also, the state code mandated his lifelong registration as a sex offender. The superior court affirmed the conviction; the Court of Appeal [in an unreported opinion] denied his application to transfer the case for further review. He now petitions us for a writ of habeas corpus.

ISSUES--Was the exposure both "willfully" and "lewdly" accomplished, such essential elements being required for conviction?

OPINION--As used in our penal statutes, the word "willfully" suggests following through on an inclination to commit some act. There can be no doubt that a person who disrobes for the purpose of sunbathing has done so "willfully."

However, for conviction this man must also have disrobed "lewdly." The relevant dictionary meaning thereof points to a state of being sexually unchaste or to licentious, dissolute, lascivious, or salacious conduct. Counsel refer us to no case having defined the term as used in the statute in question, but in the reported decisions upholding convictions of that offense against claims of insufficient evidence, something more than mere nudity has usually been shown. Typically, these cases involved unwelcome masturbation in the presence of others. Thus, the rule clearly emerges that a person does not expose his private parts "lewdly" unless he directs public attention to his genitals for purposes of sexual arousal, gratification, or affront. The necessary proof of sexual motivation was not made in the case at bar.

Writ granted, judgment vacated, and petitioner discharged.

. . . five individuals (four male, one female) swam nude and later were discovered by rangers while eating watermelon nude on the river bank.

United States v. Hymans (1972)
United States Court of Appeals, Tenth Circuit

463 F.2d 615 (10th Cir. 1972)

LEGISLATIVE HISTORY--Congress empowers the Secretary of Agriculture to formulate regulations with respect to occupancy and use of the national forests. Accordingly, the Secretary has proscribed indecent conduct. Pursuant thereto, a sign specifically banning nudity was erected in Lincoln Gulch, on the Roaring Fork River, within White River National Forest.

FACTS--In the above setting, five individuals (four male, one female) swam nude and later were discovered by rangers while eating watermelon nude on the river bank. They were arrested for indecency, convicted by a commissioner, and fined \$50 each. Two now appeal from an affirmance [unreported] of that action by the U.S. District Court for the District of Colorado.

ISSUES--Did the Secretary's rulemaking action exceed his authority? Is the indecency regulation void for vagueness? Are the defendants subject to the regulations?

OPINION--Collectively, the regulations implement a custodial stewardship furthering the public interest. Thus, they will be allowed to stand.

The wording of the indecency regulation gives people of ordinary intelligence fair notice. It is not, therefore, vague.

While the Secretary is not outlawing "skinny-dipping" at all times and in all places, the likely presence in the posted area of others to whom it is unacceptable brings the defendants within the breadth of the regulations. The nostalgic approval of such conduct in James Whitcomb Riley's *The Old Swimming Hole* and Mark Twain's *Adventures of Huckleberry Finn* is not persuasive.

Affirmed.

. . . five vice officers dressed themselves as fishermen and proceeded to the area. Upon discovering a group of nude sunbathers, they arrested seven . . .

State v. Miller (1972)
Supreme Court of Hawaii

54 Haw. 1, 501 P.2d 363 (1972)

FACTS--A local citizen reported to police that nude persons were present on Pu'u Ola'i Beach, Maui. Thereupon, five vice officers dressed themselves as fishermen and proceeded to the area. Upon discovering a group of nude sunbathers, they arrested seven individuals for violating the common nuisance statute (which forbids, *inter alia*, indecent exposure). Following their conviction in the circuit court, one now appeals to us.

ISSUES--Is the meaning of the statute not ascertainable from a reading of the text, thereby rendering it unconstitutionally vague? Does the statute tend to suppress the exercise of protected freedoms, such that it is unconstitutionally overbroad in its reach?

OPINION--In *State v. Rucker* [*supra* at page 51], we interpreted the provisions of this statute. Our holding in that case supplies sufficient warning to a conscientious citizen that nude sunbathing in plain view of other beach users offends the community's sense of common decency, propriety, and morality. We therefore reject defendant's vagueness contention.

The challenged statutory language relates not to the communication of ideas, but rather, to conduct. The latter is traditionally accorded a lesser degree of immunity from regulation. Given the facts here, we hold that appellant's nude sunbathing constituted an unprivileged public nuisance which the laws of this state may regulate.

Affirmed.

DISSENT--The case at bar is distinguishable from *Rucker* insofar as the constitutionality of the statute was not challenged in that proceeding. I believe the statute is unconstitutionally vague since the definition of "indecent exposure" rests with the whims of a jury; its application here is also unconstitutionally overbroad since nudity was not included by the Legislature in itemized examples of common nuisance.

. . . an individual in her late twenties removed her bathing suit and . . . applied suntan lotion to . . . her breasts and down to her pubic hair. . .

People v. Gilbert (1972)
Criminal Court of the City of New York, Kings County, Part 2A2

72 Misc.2d 75, 338 N.Y.S.2d 457 (Cr.Ct. 1972) *Further opinion*, 72 Misc.2d 795, 339 N.Y.S.2d 743 (Cr.Ct. 1973)

FACTS--On an August day, an individual in her late twenties had been water-skiing at Mill Island, a Brooklyn public beach. Landing within 100 feet of a gathering of 15-20 men, women, and children, she removed her bathing suit and was totally nude. During the following one and one-half hours, she played with a ball, swam, waved at a boat, applied suntan lotion to the front of her body--including her breasts and down to her pubic hair--and sunbathed with her legs outstretched and her knees 12-18 inches apart.

While she was sunbathing, one or more persons took photographs; several covered her with a blanket which she promptly removed. Upon arrival of the harbor police, she was charged with public lewdness and is now before this court.

ISSUES--Was the woman's conduct intentional? Was it public? Were her intimate body parts exposed? Did she act in a lewd manner?

OPINION--That the People have established the first three statutory elements cannot be seriously questioned; only the fourth element causes some difficulty: If the woman had been clothed, unquestionably none of her acts would be considered unwholesome or abnormal. In recognition that (1) courts in such New York cases as *People v. Burke* [*supra* at page 4] and *Excelsior Pictures Corp. v. Regents of University* [*infra* at page 141] have found that mere nudity does not constitute lewdness, and (2) *Black's Law Dictionary* defines lewdness in terms of wanton sexual impurity, the People have failed to prove the fourth element beyond a reasonable doubt. Not guilty.

FURTHER PROCEEDINGS (1973)

PROCEDURE--At the request of counsel, legal memoranda were submitted relative to the additional crime of "exposure of a female" (*i.e.*, where a female is clothed or costumed in a public place--except when performing in a play, exhibition, show, or entertainment--such that the portion of her breast below the top of the areola is uncovered).

ISSUES--Is exposure of a female a lesser included offense within the greater offense of public lewdness? For a guilty finding, need other parts of defendant's body (*i.e.*, other than her breasts) have been literally "clothed or costumed" as worded in the statute? Does application of the statute only to females violate the Fourteenth Amendment?

OPINION--Since the lesser offense requires no element of proof not also required to establish the greater offense, I deem the former to be included within the latter.

I construe the statute such that the phrase "clothed or costumed" pertains to situations in which peekaboo apparel is worn but does not foreclose prosecution of a female with exposed breasts, irrespective of whether she is wearing anything else.

As shown by other cases wherein courts have upheld restrictive legislation involving females (*e.g.*, statutes dealing with social conditions surrounding employment), equal protection of the laws does not require identical treatment of all persons.

Defendant is found guilty; she is fined \$50 or, if in default, will serve five days.

The sixteen-year-old claimed that she observed a hole [of unspecified size] in his trunks which exposed a portion of his private parts.

Commonwealth v. Botzum (1973)
Superior Court of Pennsylvania

225 Pa.Super. 268, 302 A.2d 381 (1973)

FACTS--An individual was tried in the Court of Common Pleas, Lancaster County, under a charge of committing a lewd act of public indecency tending to debauch the people's morals. The circumstances involved a series of events on a July day in Pequea, a location on the Susquehanna River.

He had appeared fully clothed on a dock, where he spoke with a sixteen-year-old girl who was swimming with two other girls. Next, he entered adjacent woods to don swimming trunks, returned to the dock, and proceeded to swim. The sixteen-year-old claimed that she observed a hole [of unspecified size] in his trunks which exposed a portion of his private parts. However, no evidence was produced to suggest that he knew of any hole. After swimming, he returned to the woods and sat on a log. One of the other girls--a twenty-year-old--stated that although she could not distinguish body parts, the difference between the darkness of his trunks and the color of flesh signified that he was then nude. Having completed their own swim, the three girls began walking up a nearby hill. The twenty-year-old claims that, at this point, she saw him attempting to hide. The third girl did not testify.

His motion for a demurrer was denied. He was convicted and sentenced to a \$50 fine plus one year of imprisonment.

ISSUE--Had there occurred the open and notorious lewdness required by the statute in question to support a conviction?

OPINION--After a careful reading of the record, we cannot agree that there was sufficient evidence to sustain the verdict. It is hard to believe that in this day--when nudity is commonplace in theatre, movies, magazines, and some restaurants--defendant's actions constituted lewdness. Indeed, his attempt to conceal his nudeness indicates the exact opposite. What the girls saw resulted not from his overt actions, but rather, from their curiosity. The demurrer should have been granted. Defendant discharged.

DISSENT--The President Judge would affirm the conviction. [No reason is given.]

. . . holding a placard protesting air pollution. Upon taking a midday break, she handed the placard to a bystander, removed her bikini top, and walked bare-breasted across the intersection.

Baker v. State (1973)
Court of Criminal Appeals of Oklahoma

510 P.2d 1005 (Okla.Cr.App. 1973)

FACTS--On a day in July, a woman clad in a bikini stood at the corner of 5th and Cheyenne in downtown Tulsa while holding a placard protesting air pollution. Upon taking a midday break, she handed the placard to a bystander, removed her bikini top, and walked bare-breasted across the intersection. She was then arrested for outraging public decency.

At an ensuing trial in the district court, a newspaper photographer testified that (1) there was no particular disturbance, (2) men present at the scene were laughing, and (3) he personally was not outraged by the woman's toplessness. However, the state produced five witnesses who claimed they were shocked. Additionally, two witnesses claimed they heard her say during a recess in the trial that she would be willing to repeat her act. Upon her testifying, however, that she had not made such a remark, the Assistant District Attorney--in the presence of the jury--ordered that she be taken into custody on a separate perjury charge.

Her motion for a mistrial on the public decency charge (on the ground that there was a highly prejudicial courtroom atmosphere) was denied. Although the trial judge admonished the jury to disregard the accusation of perjury, the latter convicted her and assessed a \$500 fine plus nine months in jail.

ISSUE--Was the woman treated unjustly by the prosecutor's courtroom reference to perjury and her arrest therefor on the spot?

OPINION--In view of the severity of the punishment assessed by the jury, it is readily apparent that she was prejudiced. We will not reverse the judgment since there is overwhelming evidence of her guilt, but we will modify it so as to restrict the sentence to the fine portion only. Affirmed as modified.

The areola portions of both breasts were visible through its openings.

People v. Price (1973)
Court of Appeals of New York

33 N.Y.2d 831, 351 N.Y.S.2d 973, 307 N.E.2d 46 (1973)

FACTS--A woman had been walking along a New York City public street [not further identified herein] while wearing a fishnet pullover. The areola portions of both breasts were visible through its openings.

Two police officers arrested her for violating the state "exposure of a female" statute (proscribing the appearance in a public place--other than in connection with the performance of a play, exhibition, show, or entertainment--with the portion of the breast below the top of the areola uncovered). Her subsequent conviction in the criminal court was affirmed by the Appellate Term [in an unreported order].

ISSUE--Did the woman's skimpy attire run afoul of the statute?

OPINION--Criminal statutes must be carefully construed to attack the particular evil at which they are directed. The legislative history of this statute shows that it was aimed at discouraging topless waitresses. It should not be applied to the noncommercial, perhaps accidental, and certainly nonlewd exposure alleged here. Unless likely to create public disorder, manner of dress is not subject to governmental control. Order reversed and information dismissed.

Several persons were observed sunbathing nude on an Easthampton public beach. One was charged with lewdness.

People v. Hardy (1974)
New York Supreme Court, Appellate Term, Second Department

77 Misc.2d 1092, 357 N.Y.S.2d 970 (Sup.Ct. 1974)

FACTS--Several persons were observed sunbathing nude on an Easthampton public beach. One was charged with lewdness. In an ensuing trial, she was convicted and assessed a \$100 fine.

ISSUE--Did the woman's nudity, per se, constitute lewdness?

OPINION--Under the case law of this state, lewdness cannot be presumed from the mere fact of nudity; there must be a showing of lewd conduct from which an intent to act in a lewd manner can be drawn. In the absence here of any such evidence, guilt cannot be established beyond a reasonable doubt. Conviction reversed, complaint dismissed, and fine remitted.

DISSENT--In an effort to thwart idiosyncratic individuals seeking to foist standards of indecency upon society, the Legislature enacted a new statutory provision in the year following *People v. Burke* [*supra* at page 4] with the intent of outlawing public nudism. Although the precise language therein was not later carried over to the revised penal law (applicable to the case at bar), it should not be assumed that the Legislature thereby intended to lower standards of morality. To hold otherwise is to infer that it has less decency than the aborigines in their loin cloths. Not to affirm the conviction may turn public premises into stages for exhibitionism with the "streakers" of today becoming the complacent, unadorned "strollers" of tomorrow.

. . . the officials concluded that their only effective option. . . called for a Seashore-wide ban of nudity.

Williams v. Hathaway (1975)
United States District Court, District of Massachusetts

400 F.Supp. 122 (D.Mass. 1975) *Aff'd sub nom.* Williams v. Kleppe, 539 F.2d 803 (1st Cir. 1976)

LEGISLATIVE HISTORY--Nude bathing by individuals or small groups had long been an accepted tradition at numerous spots scattered along an area which, in 1959, was incorporated into the newly created Cape Cod National Seashore. Although a range of amenities (*e.g.*, lifeguards, bathhouses, waste containers, sanitary facilities, and parking spaces) was thereafter provided at six sites planned for intensive use (but as yet underutilized), the nude bathing custom continued--without interference--in remote locations within Seashore boundaries. One of these locations, Brush Hollow (on the Atlantic Ocean approximately one mile south of Ballston Beach, opposite the town of Truro), has recently been attracting sizable crowds. For example, on August 25, 1974, an estimated 1,200 persons were observed swimming or sunning themselves.

Fearing dune damage arising from the increasing activity and responding to concerns being expressed by Truro residents relative to traffic congestion and trespassing upon private property, Seashore officials set forth a number of alternative measures for alleviating these problems. Several of the alternatives would accommodate nude bathers either by earmarking one of the existing developed beaches or by providing amenities in the hitherto natural environment of Brush Hollow. Ultimately, however, the officials concluded that their only effective option at this time lay in another alternative, *viz.*, one calling for a Seashore-wide ban of nudity. Accordingly, a regulation [36 C.F.R. Ch. I, 7.67(e)] was promulgated to prohibit public exposure of genitals, pubic and rectal areas, and female breasts below the top of the areola.

FACTS--Twelve persons favoring a continuation of nude bathing have now filed a complaint in this court against the officials. They seek a declaration that--to the extent the perceived problems are susceptible of alleviation by such actions as enforcement of parking restrictions and collection of litter--the antinudity regulation is invalid. The Truro Neighborhood Association intervened in support of the officials.

ISSUE--May the plaintiffs' general constitutional rights (*e.g.*, freedom of association and exercise of personal liberty) be overridden by other factors?

OPINION--There must be a careful balancing of the complex interests of all the

parties. Although the special tradition associated with this beach entitles nude bathing to constitutional consideration, it appears that the rejected alternatives to the antinudity regulation would be ineffective solutions in dealing with legitimate environmental and traffic concerns. Thus, the regulation is deemed adequate to withstand plaintiffs' constitutional challenge. Judgment for defendants.

FURTHER PROCEEDINGS *sub nom.* Williams v. Kleppe (1976)
United States Court of Appeals, First Circuit

OPINION--The interests asserted by the appellant bathers do not fall into the narrow category of basic freedom-of-choice matters (*i.e.*, procreation, marriage, and family) which the government may not invade without prior exhaustion of less restrictive alternatives. Moreover, the barring of nude bathing bears a real and substantial relationship to environmental objectives contained in the Seashore's mandate. Affirmed.

Ordinance proscribes persons over age ten from appearing. . . without opaque covering of "the genitals, vulva, pubis, pubic symphysis, pubic hair, buttocks, natal cleft, perineum, anus, anal region, or pubic hair region of any person, or any portion of the breast at or below the upper edge of the areola thereof of any female person"

Eckl v. Davis (1975)
California Court of Appeal, Second District, Division 3

51 Cal.App.3d 831, 124 Cal.Rptr. 685 (1975)

LEGISLATIVE HISTORY--A Los Angeles ordinance was passed by the City Council on July 18, 1974, and approved by the Acting Mayor the same day, to become effective the following day. It proscribes persons over age ten from appearing in areas under the jurisdiction of the Board of Recreation and Parks without opaque covering of "the genitals, vulva, pubis, pubic symphysis, pubic hair, buttocks, natal cleft, perineum, anus, anal region, or pubic hair region of any person, or any portion of the breast at or below the upper edge of the areola thereof of any female person"

FACTS--Certain residents and taxpayers petitioned the superior court for an order declaring the antinudity ordinance unconstitutional and for an injunction restraining enforcement. Following denial of the relief sought, they now appeal to us.

ISSUES--Does the state indecent exposure statute preempt local antinudity ordinances? Does this city ordinance wrongfully abridge the expression manifested in one's personal appearance or spiritual and cultural beliefs? Are women denied equal protection of the law insofar as they may not uncover their breasts? Is there overbreadth or vagueness? Is the ten-year minimum age rational? Was the next-day notice justified?

OPINION--The Legislature's state-wide prohibition of indecent exposure applies only to *sexual* acts; it does not embrace nudity associated with *nonsexual* acts such as mere sunbathing. Hence, the city antinudity ordinance does not impermissibly preempt the state statute.

This ordinance deals not with protected speech or expression, but rather, with conduct only. In recognition that public nudity is uncommon, the ordinance simply bans conduct deemed incompatible with prevailing notions of mores as a

whole. In the absence of effective control, the prospect of encountering nude persons would preclude unfettered usage of the parks, playgrounds, and beaches by those citizens to whom such display is offensive.

Nature has created the differences in the torsos of men and women. The Legislature is merely acknowledging that with respect to the latter, nudity is commonly understood to include uncovering of the breasts.

The ordinance is clearly aimed at preventing public nudity. It does not appear probable that persons coming within its purview would fail to understand the meaning of bodily regions referenced therein.

As to ten-year-olds, since a line had to be drawn at some point, any reasonable determination would have been sufficient.

The immediacy of the action is warranted by a recent phenomenon, whereby persons are leaving the parks and beaches and walking along public streets and into businesses in a state of substantial or total nudity. Such behavior causes traffic congestion and diverts lifeguards from fulfilling their assigned duties by making them unwilling spectators.

Affirmed.

[HISTORICAL NOTE--The ordinance in question here was enacted amid controversy over nude bathing being practiced at Venice Beach. For further information, see the note following *Davis v. Gates, infra* at page 114.]

While standing ankle-deep in the Point Dume surf, an individual removed all of her clothes in the presence of others, including local sheriff's officers.

People v. Jacobs (1977)
Appellate Department, Superior Court, Los Angeles County (California)

72 Cal.App.3d Supp. 46, 140 Cal.Rptr. 141 (1977)

BACKGROUND--Some years ago, the state acquired a tract of coastal land for development as Point Dume State Beach. Under terms of a special agreement with the County of Los Angeles, the latter recently assumed operational control thereof.

FACTS--While standing ankle-deep in the Point Dume surf, an individual removed all of her clothes in the presence of others, including local sheriff's officers. She was then arrested for violating a county ordinance prohibiting nudity on public sections of Pacific Ocean shoreline or beaches. The woman was subsequently convicted in a Malibu court.

ISSUES--In view of the original deed of conveyance having specified the western extremity of the tract as the mean high-tide line (*i.e.*, a location inland from the surf), did the alleged violation occur on property under *county*--as opposed to *state*--control and, hence, give the county jurisdiction? Is the Court of Appeal's finding in *Eckl v. Davis* [*supra* at page 65]--that similar local antinudity legislation did not wrongfully preempt state regulation of sexual activity--inapposite to the case at bar because one of the county supervisors stated, before voting for the ordinance in question here, that permissiveness on the beaches leads to sexual mischief on nearby properties?

OPINION--The county's jurisdiction is not limited to real estate boundaries specified in deeds, but rather, is coextensive with that of the state. California's Constitution of 1849 makes clear that the state's western boundary extends seaward for three English nautical miles. Accordingly, the county has the power to exercise police jurisdiction over the surf area where the appellant disobeyed. Such a holding is consistent with the accepted power of the county to provide lifeguard service in its offshore waters.

Contrary to appellant's attempt to show that the intent of this county ordinance was to deal with sexual mischief (a legislative area reserved by the state for itself), the text of the resolution submitted by the measure's sponsoring supervisor suggests that it was designed to do no more than simply curtail beach nudity. Hence, we believe that the appellate rejection of the preemption challenge in *Eckl v. Davis* controls us.

Affirmed.

[HISTORICAL NOTE--Counsel for appellant herein also was the lead plaintiff in *Eckl v. Davis*.]

Two women sunbathed topless, in the presence of 50-75 other people, at North Beach in St. Lucie County.

Moffett v. State (1977)
Supreme Court of Florida

340 So.2d 1155 (Fla. 1977)

FACTS--Two women sunbathed topless, in the presence of 50-75 other people, at North Beach in St. Lucie County. In connection therewith, they were arrested for disorderly conduct.

Testimony at an ensuing trial in the county court revealed that while some witnesses claimed to have been offended by the partial nudity, others had no objection thereto; no one moved away or left the beach. Both women were found guilty and sentenced.

ISSUES--Did the women's baring of their breasts contravene the statute in question? Is that statute constitutionally valid?

OPINION--Since the beginning of civilization, as recorded in *Genesis* 3:7, public nudity has been deemed improper. Although changing social values are doubtlessly expressed in new modes of dress, we are convinced that the Legislature intended to prohibit open exposure of adult female breasts in public places--including the state's beaches--and will so construe the statute.

In view of the statute's constitutionality having been recently upheld in another case [not, however, involving recreational nudity], defendants' challenges in such regard are without merit.

Affirmed.

DISSENT--In light of current trends in modes of attire (including tight-fitting, semitransparent blouses worn without brassieres), it is not clear that a given jury can properly interpret moral standards appropriate to a beach situation. Communities should be willing to regulate standards of dress by opening portions of beaches to females who prefer to be topless. While contemporary standards still foreclose public fornication (some persons deem public kissing to be improper), we should be guided by the philosophy of Mr. Justice Holmes who remarked in an 1897 law review article that "[i]t is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV." I would hold that there was no violation here.

A certain summer resident of the town believes that nude sunbathing and swimming provide physical and spiritual benefits.

Chapin v. Town of Southampton (1978)
United States District Court, Eastern District of New York

457 F.Supp. 1170 (E.D.N.Y. 1978)

FACTS--A certain summerresident of the town believes that nude sunbathing and swimming provide physical and spiritual benefits. Pursuant to an exercise of these beliefs, he was arrested on privately owned Gibson Lane Beach for violating the town's Ordinance 1 which prohibits nude persons in "beach areas" (defined as those areas extending between the crest of the dunes and the low water mark) and "adjacent waters." Although the charges were dismissed [for reasons not specified herein], police announced an intent to continue enforcement.

This resident and the Long Island Travasuns (a group whose members have the same beliefs) now seek declaratory and injunctive relief with respect both to Ordinance 1 and to Ordinance 34, which prohibits public bathing without "suitable bathing dress."

ISSUES--Do the antinudity provisions of these ordinances violate the constitutional freedoms of (1) expression, (2) privacy, or (3) association? Is there an infringement upon private property rights insofar as the ordinances apply to the privately owned portion of the beach, *i.e.*, the portion of the dune slope lying above the high water mark? Are certain terms in either ordinance unconstitutionally vague or overbroad?

OPINION--There appear to be no personal freedom violations: (1) The various court decisions cited by the plaintiffs wherein nudity was accorded protection all involve a linking with some standard mode of expression, *e.g.*, dance and literature, not nude sunbathing or swimming which this court holds to be pure conduct. (2) In recognition that this private beach is contiguous to public beaches both east and west thereof and is situated within several hundred feet of public parking for 110 cars, a claim of privacy cannot prevail here. (3) Since the ordinances do not penalize all nudist gatherings under all circumstances and in all places, they cannot be regarded as materially infringing upon the right of free association.

The plaintiffs use Gibson Lane Beach only as members of the public and, hence, do not have standing to assert the rights of property owners. Nevertheless, the authority of the town in promoting the public welfare is beyond question.

In Ordinance 1, the term "nude" seems clear enough when applied to persons engaged in bathing and sunning while unclothed. Also, it does not appear unreasonable to construe the term "adjacent waters" as those waters in which the

nudity of a swimmer can be observed by persons standing on the public beaches; accordingly, no vagueness is discernible. Neither is there overbreadth. That is to say, since nudity is proscribed only in locations where it would significantly intrude upon others who may be offended, minimal hardship is imposed. In summary, Ordinance 1 is held constitutionally valid.

Ordinance 34, however, is more restrictive in that it prohibits public bathing without "suitable bathing dress." The latter term, which unreasonably interferes with the liberty to communicate through the wearing of expressive clothing, imposes more than a minimal burden on First Amendment rights. Therefore, this court holds Ordinance 34 to be unconstitutionally overbroad and its further enforcement is enjoined.

At an arboretum... five female students swam and sunbathed with their breasts exposed. Two... also tossed a Frisbee... .

City of Seattle v. Buchanan (1978)
Supreme Court of Washington, *En Banc*

90 Wash.2d 584, 584 P.2d 918 (1978)

FACTS--At an arboretum belonging in part to the city and in part to the University of Washington, five female students swam and sunbathed with their breasts exposed. Two of the group also tossed a Frisbee during this period.

Pursuant to citizen complaints, they were arrested for violating a lewd conduct ordinance specifically proscribing, *inter alia*, female breast exposure. All were convicted in superior court, King County.

ISSUES--Are there fundamental differences in the breasts of women and men such that the state Equal Rights Amendment confers no protection upon these appellants? Is the ordinance in question a legitimate application of legislative authority?

OPINION--The legislative body was justified in focusing upon the breasts of females, not only because of their distinctive size and shape but also, because they are known to function as an erogenous zone associated with sexual arousal. Such a link is illustrated by recent articles in the *Seattle Post-Intelligencer* noting (1) the interest evinced by local male hydro-race viewers in a dinghy carrying four topless girls, and (2) an attempt in Georgia to forestall traffic accidents through an ordinance requiring shops to draw their blinds while changing clothes on female window dummies. In summary, the ordinance does not violate the Equal Rights Amendment.

The circumstances here do not involve a constitutional exercise of free expression, but rather, simply a desire by the students to bare their breasts. While perhaps an increasingly common phenomenon, it does not require accommodation in the law.

Affirmed.

CONCURRENCE--I concur with the majority. However, I do wish to comment that the word "lewd" in the ordinance will unfortunately brand these young women with an ill-deserved stigma and bring to the minds of persons learning of the convictions visions of something far different from that which actually occurred.

FIRST DISSENT--It is established law that courts may strike down statutes and ordinances found to contain arbitrary classifications of the activities covered

therein. Insofar as the text of this lewd conduct ordinance exaggerates the severity of passive breast exposure by grouping it with aggressive acts clearly sexual in nature--viz., genital fondling, masturbation, and intercourse--it is impermissibly arbitrary. Hence, these women should not have been convicted.

SECOND DISSENT--Laws concerned with physical characteristics peculiar to one sex only (*e.g.*, wet nurse and sperm donor statutes) do not violate the state Equal Rights Amendment. Accordingly, since female breasts are found only on females, I agree with the majority that the ordinance prohibiting their exposure does not run afoul of that amendment.

It does, however, violate the federal First Amendment since its breadth goes beyond obscene display by proscribing symbolic nudity when used in advancing artistic expression (irrespective of whether criminal defendants actually manifest such an intent). This is a right having been specifically recognized by the U.S. Supreme Court in cases involving nude barroom dancing and outdoor motion picture nudity screened within view of an adjacent street.

. . . police officer observed a group of nude persons at Small Beach, Makena, on the island of Maui. ...arrested for open lewdness...

State v. Bull (1979)
Supreme Court of Hawaii

61 Haw. 62, 597 P.2d 10 (1979)

FACTS--On a June afternoon, a police officer observed a group of nude persons at Small Beach, Makena, on the island of Maui. Two (both male) were bodysurfing while three others (one male, two female) sunbathed. Following arrest for open lewdness, all were convicted in the circuit court.

ISSUE--Did the behavior here occur in a context in which others would likely see and take offense?

OPINION--We note with favor the holding in *City of Seattle v. Buchanan* [*supra* at page 72] that intentional public exposure of certain of the most intimate parts of the human body constitutes lewdness. A contrary result in *In re Smith* [*supra* at page 53] arose from the absence in California of a counterpart to the Hawaii statute involved here. Additionally, we embrace the rationale underlying the dissent in *People v. Hardy* [*supra* at page 62].

In summary, there is no difficulty in our holding that the exposure of one's genitals to public view is a lewd act. Hence, the sunbathing appellants' convictions are affirmed; the bodysurfing appellants' convictions are reversed since the body parts essential to conviction could not likely be seen.

Two women wore only bikini bottoms on Diamond Head Beach.

State v. Crenshaw (1979)
Supreme Court of Hawaii

61 Haw. 68, 597 P.2d 13 (1979)

FACTS--Two women wore only bikini bottoms on Diamond Head Beach. In the particular location, the scantiest of beach attire appears to be the norm. Both were arrested for violating the open lewdness statute; they were subsequently convicted in the circuit court.

ISSUE--Did the women's baring of their breasts constitute a lewd act within the meaning of the statute?

OPINION--As discussed in *State v. Bull* [*supra* at page 74], exposure of one's private parts constitutes an unlawful lewd act. However, such parts do not include female breasts. In this regard, we note with approval a North Carolina appellate opinion [in a nude barroom dancing case] which construes these parts as either the (1) genital, or (2) excretory organs. The dictionary definition of the first category confines the scope thereof to the reproductive system, which--in the female--consists of the vagina, uterus, uterine tubes, and ovaries; the second category is also irrelevant to female breasts. Convictions reversed.

A police officer patrolling the public beach... observed an individual emerge nude from the water and join a nude companion sitting on the beach.

State v. Luhnnow (1979)
Supreme Court of Hawaii

61 Haw. 70, 597 P.2d 15 (1979)

FACTS--A police officer patrolling the public beach at South Kohala, Island of Hawaii, observed an individual emerge nude from the water and join a nude companion sitting on the beach. Present nearby were a middle-aged couple and another man of unspecified age, all in bathing attire. Following their arrest for violating the open lewdness statute, the two nudes were convicted in the circuit court. One now appeals to us.

ISSUE--Did the conduct here fall within the provisions of the statute in question?

OPINION--Per Curiam. Affirmed on the basis of *State v. Bull* [*supra* at page 74].

Perceiving a loss of property values stemming from the nude usage, residents... filed a suit...

Sylvane v. Whelan (1981)
United States District Court, Eastern District of New York

506 F.Supp. 1355 (E.D.N.Y. 1981)

BACKGROUND--Nude sunbathers have come to frequent the so-called Bay 1 section of Riis Park, County of Queens. This park constitutes a portion of Gateway National Recreation Area, a unit of the U.S. Department of the Interior.

FACTS--Perceiving a loss of property values stemming from the nude usage, residents of adjacent and nearby communities filed a suit in this court against Interior officials in which they sought monetary damages and an order requiring promulgation of restrictive regulations. While the litigation was pending, the plaintiffs--apparently having become doubtful as to the court's power to grant such relief--withdrew both claims and now seek instead an injunction to abate what they consider a public nuisance. The defendants have moved to dismiss for lack of subject matter jurisdiction.

ISSUE--Does this court have jurisdiction over the suit?

OPINION--At the outset, we must dispose of some patently inapposite bases of jurisdiction posited by the plaintiffs: The Federal Tort Claims Act allows recovery of money damages only, affording no right to injunctive relief; the Administrative Procedure Act does not cover judicial review of agency action or inaction.

Relative to the general "federal question" statute, neither the filing of a suit against federal officials nor the occurrence of an act on federal land provides federal jurisdiction. It seems clear that whether nude bathing constitutes a nuisance is a local matter and, hence, does not warrant our either (1) applying federal common law, or (2) federalizing state law for application to a federal enclave. That is to say, it is unwise to adopt one state's common law (the procedure generally followed in deriving federal common law) which later could be used as precedent for application to widely dispersed areas around the country having diverse sets of sociological norms or mores. The federal enclave concept is inappropriate since jurisdiction pertaining to all Gateway civil litigation rests exclusively in the state courts (under a special agreement with the State of New York).

Defendant officials' motion to dismiss granted.

She was unattired except for a piece of cardboard . . . suspended in front of her body by a cord hanging from her neck. Her entire backside and the sides of her breasts were bared.

Duvallon v. State (1981)
District Court of Appeal of Florida, First District

404 So.2d 196 (Fla.App. 1981)

FACTS--Engaging in an action to protest public employee corruption, a woman picketed state government buildings in Tallahassee. She was unattired except for a piece of cardboard--twenty-eight by forty-four and one-half inches--suspended in front of her body by a cord hanging from her neck. Her entire backside and the sides of her breasts were bared. City police arrested her for violating a statute making it unlawful for one to "expose or exhibit his person in ... [a public] place or to go or be naked in such place"

At a trial in Leon County Court, it was determined that for all intents and purposes the woman had indeed been naked. Also, in accordance with a prior holding by our state Supreme Court [in an unrelated case] requiring that conviction under the statutory language quoted above be contingent upon the exposure/exhibition having met the test of another portion of the same statute--viz., that it have been "vulgar or indecent"--the trial court held that the defendant's intentional nakedness in a public place was sufficient. Following conviction, a circuit court affirmed; she now petitions us for a writ of certiorari.

ISSUE--Was the woman's partial nudity "vulgar or indecent," without which finding she could not have been properly convicted?

OPINION--While much of the language originally codified in the earliest criminal statutes has changed very little over time, evolving public attitude has necessitated a revision in its interpretation. In this connection, the state Supreme Court once noted that a great many worthy and high-minded people formerly considered the now-respectable waltz and two-step as promoting works of the devil. With respect to the matter before us here, the statutory term at issue--"vulgar or indecent"--is now construed in Florida as necessarily involving a lascivious exhibition of a person's sexual organs. Although this woman's behavior was certainly bizarre, we see no evidence of record that she exposed such organs. Certiorari granted and conviction quashed.

City officials. . . to enforce various antinudity ordinances.

South Florida Free Beaches v. City of Miami (1982)
United States District Court, Southern District of Florida

548 F.Supp. 53 (S.D.Fla. 1982) *Vac'd in part and aff'd in part*, 734 F.2d 608 (11th Cir. 1984)

FACTS--City officials recently announced their intent to enforce various antinudity ordinances. Thereupon, certain individuals and an organized group--whose members have long enjoyed nude bathing on a public section of Virginia Key in furtherance of a belief that such a lifestyle constitutes a wholesome form of expression--now bring suit in this court. They seek declaratory and injunctive relief.

ISSUE--Do the ordinances in question accord with constitutional protections?

OPINION--As noted in *Williams v. Hathaway* and *Chapin v. Town of Southampton* [*supra* at page 63 and page 70, respectively], engaging in nude bathing is not a protected act. Although the term "insufficiently clothed" in one of the ordinances is unclear in the abstract, it is not vague where--as here--total nudity is concerned. While the generalized character of a state disorderly conduct statute (simply prohibiting conduct corrupting public morals or outraging public decency) incorporated by reference into another of the ordinances renders the language unconstitutionally overbroad, a subsection specifically prohibiting "nudity" and "exposing of sexual organs" is clear enough to be severable. Thus, the ordinance can be enforced; an injunction is not appropriate in these circumstances. Order accordingly.

FURTHER PROCEEDINGS (1984)
United States Court of Appeals, Eleventh Circuit

OPINION--In the absence of either a nexus between nudity and some protected form of expression or showings of vagueness or overbreadness, the antinudity ordinances are enforceable in furtherance of legitimate governmental interests. Accordingly, the portion of the ruling of the District Court withholding an injunction is affirmed. However, in recognition that that court's disposition of the state-statute question (although favorable to plaintiffs) did not control the outcome of the proceeding, the declaration of unconstitutionality is vacated for reason that it is unnecessary.

[HISTORICALNOTE--Janet Reno (Dade County State Attorney) announced on the

record that she was disclaiming any intention to take action against these plaintiffs, albeit reserving the right to enforce existing laws. Ms. Reno was subsequently appointed U.S. Attorney General in President Clinton's administration.]

Attired only in a bikini bottom, a woman went sunbathing on a public beach...

Borough of Belmar v. Buckley (1982)
Superior Court of New Jersey, Appellate Division

187 N.J.Super. 107, 453 A.2d 910 (1982)

FACTS--Attired only in a bikini bottom, a woman went sunbathing on a public beach, using a three-sided wind screen. Upon becoming aware of an approaching police officer, she covered her chest with a straw hat. However, pursuant to the officer's complaint that she had been visible from at least one direction, she was tried in the municipal court for violating a borough ordinance proscribing public nudity, indecent or lewd dress, or unnecessary exposure of the person.

Notwithstanding testimony that the woman's manner of sunbathing was prompted by a desire to avoid unsightly skin marks and discomfort from wearing a bikini top, she was convicted.

On appeal, the Law Division did not address her claim of vagueness in the ordinance, but it reversed the judgment--without ruling on the merits--on the ground that the borough had wrongfully preempted a state indecent exposure statute. The borough now appeals to us.

ISSUES--By enacting the state statute (directed toward such sexually aggressive acts as exposure of the genitals to nonconsenting persons), did the Legislature intend to preempt municipalities from prohibiting forms of nudity not rising to the level of lewdness but, nevertheless, regarded by the community as indecent? Is the ordinance unconstitutionally vague?

OPINION--The borough ordinance did not preempt the state statute. First, that the state enactment was not intended to exclusively occupy the field is shown by legislative history specifically excluding from its scope both cult nudism and brevity of beach attire. Second, since public nudity is a matter of particular concern to the seashore resort communities, dealing with it does not inherently require a uniform, state-wide approach.

Although the ordinance was amended following institution of these proceedings so as to define nudity with more specificity (*i.e.*, it now identifies the portions of the body which cannot lawfully be exposed as the anus, genitals, pubic area, and female breasts), we are satisfied that it met constitutional muster from the outset. That is to say, it gave persons of ordinary intelligence fair notice that topless sunbathing by a female adult lying on her back is prohibited.

Reversed and remanded for a trial *de novo* on the merits.

A woman picketed the Police. . . clad only in a sign hung across the front portion of her body.

Duvallon v. Florida (1982)
United States Court of Appeals, Eleventh Circuit

691 F.2d 483 (11th Cir. 1982) *Cert. denied*, 460 U.S. 1073, 103 S.Ct. 1533, 75 L.Ed.2d 953 (1983)

FACTS--A woman picketed the Police Department in Miami [the reason therefor is not specified] while clad only in a sign hung across the front portion of her body. She was arrested for breach of the peace/disorderly conduct, convicted, and fined \$500 plus court costs; a state circuit court affirmed.

At a hearing in Dade County Court two years later to ascertain why payment had not been made, the woman testified that she had no money. That court stayed execution of the sentence in order to afford her an opportunity to make at least a partial payment, thus averting a contempt citation; after sixty days, she would be jailed if a continued refusal to pay were found willful.

She then filed a petition in U.S. District Court for federal habeas corpus relief. Upon recommendation of the magistrate, she was found [in an unreported opinion] to be not in custody (a condition precedent for prevailing in a habeas corpus action); hence, the petition was dismissed for lack of jurisdiction. The woman now appeals to us.

ISSUE--Has the habeas corpus custody requirement been met?

OPINION--Appellant's argument is as scanty as her attire at the time of arrest. Although a petitioner need not be under actual physical restraint for purposes of the habeas corpus statute (not disqualifying, *e.g.*, those who may be on probation, parole, or bail), relief thereunder is available only to those in custody. In this case, the state court judgment imposes only a fine with no provision for incarceration; hence, appellant is not in custody. If she is later incarcerated for refusal to pay the fine, that penalty would be separate from the original conviction. In such an eventuality, she could then return to the federal forum, provided state remedies have been exhausted. Affirmed.

CERTIORARI DENIED (1983)
Supreme Court of the United States

. . .observed sleeping in the nude. . .

Goodmakers v. State (1984)
District Court of Appeal of Florida, Second District

450 So.2d 888 (Fla.App. 1984)

FACTS--An individual was observed sleeping in the nude, face up, on a dock near Pelican Bay Nurseries in Collier County. Charged in an information with violating an indecent exposure statute, he entered a plea of not guilty. In a motion to dismiss, it was asserted that his sexual organs were not in a state of arousal. Upon a denial of the motion, he changed his plea to no contest. His subsequent conviction in the county court was affirmed by a circuit court; a motion for rehearing was denied. He now petitions us for a writ of certiorari.

ISSUE--Was the conviction contrary to a previous interpretation of the indecent exposure statute by the state Supreme Court [in a case unrelated, however, to recreational nudity] in which it was held that--in the absence of lewdness or lasciviousness--mere nudity is not indecent and, hence, not prosecutable under that statute?

OPINION--In our view, the Legislature intended that the form of nudity engaged in by this petitioner be made unlawful under the indecent exposure statute (in addition to the disorderly conduct statute used by the prosecution in *Moffett v. State* [*supra* at page 69]). Nevertheless, we are constrained to follow our state Supreme Court's construction of the indecent exposure statute which requires for conviction that the nudity be coupled with lewd or lascivious conduct. Since such terms are commonly restricted to situations involving lust or eagerness for sexual indulgence, petitioner's act of sleeping did not constitute a violation. Certiorari granted and conviction reversed.

. . .a female jogger wearing only a bathing suit bottom was arrested. . .

McGuire v. State (1984)
District Court of Appeal of Florida, Fourth District

466 So.2d 236 (Fla.App. 1984) *Aff'd*, 489 So.2d 729 (Fla. 1986)

FACTS--At Air Force Beach in John D. MacArthur State Park, a female jogger wearing only a bathing suit bottom was arrested on a day in May for violating a park system regulation proscribing indecent exposure of the person and requiring bathing costumes to conform to "commonly accepted standards." The area in question has long had a tradition of nude usage. Moreover, evidence introduced at the woman's subsequent trial established that the former property owner (who originally donated the site to the park system) had customarily bathed nude at the location.

The woman was convicted; a circuit court upheld that judgment. The case is now here on her petition for certiorari.

ISSUE--Is the phrase "commonly accepted standards" (as used in the regulation) sufficiently intelligible to permit its application to bare-breasted women on a beach?

OPINION--Per Curiam. Affirmed.

DISSENT--It is significant that nudity had been acceptable on this beach for many years prior to petitioner's arrest. If topless jogging here by a female is to be considered a crime, the regulation should say so in clear language. I would hold that, as presently drafted, it is unenforceable for vagueness.

CONCURRENCE--I sympathize with the dissent. However, the circuit court did not essentially depart from the requirements of the law.

FURTHER OPINION ON REHEARING--The petition for rehearing is denied upon the authority of *Moffett v. State* [*supra* at page 69, which case held that female toplessness is subject to a state disorderly conduct statute]. However, petitioner's request to certify a constitutional question to the state Supreme Court is granted.

PARTIAL CONCURRENCE/PARTIAL DISSENT--I agree with the majority in certifying the question; however, I dissent on the merits and would grant the petition for rehearing. Vagueness of the "commonly accepted standards" regulation is apparent from one park officer's having testified that a tiny seashell covering just the nipple would suffice to comply, while another officer indicated that he was unsure of compliance when telltale bathing suits divulge underlying

nipple erection or pubic hair.

Thus, linking minimally clad female bathers with indecent exposure is a subjective exercise in the mind of the beholder, with one's chances of arrest dependent upon the unbridled discretion of whichever officer happens to be on duty. It is axiomatic that a regulation should give clear and fair warning as to the conduct it is intended to prohibit.

CONCURRENCE--The phrase "commonly accepted standards" may be vague, but we do not need to reach it here because the regulation also proscribes "indecent exposure." I suggest there are very few citizens of this state who would not agree that an adult female presenting herself in public naked from the waist up is engaging in indecent exposure.

Moreover, the dissent's discourse on skimpy bathing suit tops and pubic hair is inapt. In this woman's case, we are concerned only with breast baring. Her top was neither decent nor indecent, it was nonexistent.

FURTHER PROCEEDINGS (1986)
Supreme Court of Florida

ISSUE--Is the "commonly accepted standards" regulation unconstitutionally overbroad and vague insofar as it facially applies to, *e.g.*, beachgoers wearing provocative, but otherwise acceptable, bathing attire?

OPINION--Petitioner's argument must fail because the regulation in question does not reach a substantial amount of protected conduct. We note also that a park officer had previously warned her against sunbathing topless; thus, she was on notice as to the existence and scope of the regulation. While it perhaps could have been more precisely drafted, we will not second-guess language not constitutionally infirm. The reasoning expressed by this court in *Moffett* for prohibiting adult females from exposing their breasts on public beaches applies here as well. District Court opinion approved.

FIRST DISSENT--Since the location where petitioner was arrested had undeniably become--by custom--a clothing-optional beach, both citizenry and park officers would necessarily have difficulty in determining whether female toplessness falls within the state-wide "commonly accepted standards" regulation. Also, since the prosecution in *Moffett* proceeded under a statute, the holding therein is inapplicable as precedent in the instant case, predicated as it is upon an administrative regulation. Moreover, the majority's reliance upon the officer's prior warning (based merely upon his interpretation of the regulation) blurs the focus of its inquiry and does not remove the cloud of vagueness.

Tolerance of topless female sunbathers in a few segregated areas along Florida's lengthy coastline would hardly destroy the moral fabric of society, particularly in light of the sore need to channel police resources against violent crime. Sometime in the future, people will chuckle over the majority's action.

SECOND DISSENT--In my view, the pertinent regulation is unconstitutionally vague and, hence, unenforceable.

A woman was arrested . . . while sunbathing topless. .

.

State v. Turner (1986)
Court of Appeals of Minnesota

382 N.W.2d 252 (Minn.App. 1986)

FACTS--A woman was arrested on an early September day while sunbathing topless at Wirth Park, Minneapolis. Her act purportedly violated an ordinance proscribing, *inter alia*, exposure in city parks of adult female breasts below the top of the areola (except for artistic performances at which no alcoholic beverages are sold). A nonjury trial in the municipal court, Hennepin County, resulted in conviction and imposition of a sentence.

ISSUES--Is the ordinance in question (1) excessively restrictive with respect to freedom of expression, (2) overbroad by its application to nonlewd conduct, or (3) transgressive of equal protection guarantees?

OPINION--Notwithstanding a constitutional right to public expression, advocacy of beliefs is subject to regulation when it is combined with conduct antithetical to legitimate governmental interests protecting societal norms. This is particularly so when alternative means not violative of criminal ordinances (*e.g.*, a petition to authorities for repeal of such ordinances) are available.

There is no constitutional specification that regulation of nudity is permissible only when it is accompanied by some lewd act.

Since men and women are dissimilarly situated with respect to breast function, no invidious discrimination arises from the gender-based classification in this ordinance. Hence, preservation of public decency and order may be advanced by the slight difference [*sic*] in clothing requirements imposed upon the two sexes.

Affirmed.

. . .wearing only a cardboard sign (purporting to be a form of petition) covering the front of her body. . .

Duvallon v. District of Columbia (1986)
District of Columbia Court of Appeals

515 A.2d 724 (D.C. 1986)

FACTS--A woman walked back and forth on the plaza at the U.S. Supreme Court building while wearing only a cardboard sign (purporting to be a form of petition) covering the front of her body from the neck to below the knees. Charged with indecent exposure of the person, she was convicted in the superior court.

ISSUE--Are buttocks deemed to be included in statutory references to genitalia?

OPINION--The indecent exposure statute is a codification of the common law, which--in the absence of statutorily defined elements of a crime--is controlling. The common law of this jurisdiction derives from British precedents observed in Maryland [from which the District of Columbia was formed] in 1801. Courts of that state have construed indecent exposure as the willful and intentional public display of one's private parts or person. When, for example, these terms were applied to males in a number of nineteenth century English cases, the Queen's Bench determined that they served as euphemisms for penis. American common law cases are in accordance with those of England. Hence, "person" in the statute corresponds to genitalia portions of male and female anatomy; by inference then, exposure of one's bare buttocks is not interdicted. Reversed and remanded for entry of a judgment of not guilty.

DISSENT--The majority applies too narrow an anatomical definition in evaluating appellant's behavior.

. . . discovered sunbathing nude with his wife and two small children.

People v. Hollman (1986)
Court of Appeals of New York

68 N.Y.2d 202, 507 N.Y.S.2d 977, 500 N.E.2d 297 (1986)

BACKGROUND--The beach at Riis Park, Bay 1, in Queens County has come to be known as a clothes-optional area. Over a period of years, police have received complaints of nudity thereon.

FACTS--On two occasions, a certain individual was discovered sunbathing nude with his wife and two small children. Each time, he was arrested and charged with violating a state indecent exposure statute.

At an ensuing criminal court bench trial, he moved to dismiss the charges. He professed in such motion his belief in the naturist philosophy which holds that open social nudity promotes health, permits heightened awareness of human similarity and vulnerability, and presents an alternative to the repression of puritanism and the degradation of pornography. The motion was denied and he was convicted. Failing to find any cognizable constitutional protection, the Appellate Term affirmed [in an unreported opinion].

ISSUES--Was the nudity here a form of symbolic expression protected by the First Amendment? Is the statute in question facially overbroad such that it could be applied to commonplace activities, *e.g.*, nude modeling in art class? Is there a Fourteenth Amendment right to be nude in public?

OPINION--Rather than imparting defendant's complex philosophical views, nude sunbathing may convey to others no communicative message beyond simply a desire to acquire an even tan. However, even if such nudity could be assumed to deliver an expressive message, the state may nevertheless prohibit it under its police power if a substantial governmental interest is advanced thereby. Accordingly, since beach nudity may be perceived as antithetical to the provision of family recreational facilities, it is subject to control. Defendant retains other alternatives by which he may exercise his First Amendment freedoms.

There is no overbreadth substantial enough to invalidate the statute. Potential impermissible applications represent only a tiny fraction of conduct within its reach; moreover, they may readily be severed from defendant's constitutionally proscribable acts.

No court has yet discovered Fourteenth Amendment guarantees permitting offensive conduct in public. Since displays of nudity are not essential to an ordered system of liberty, the alleged rights asserted by the defendant here

will not be recognized.
Affirmed.

. . . sexist and repressive laws permitting only males to bare their chests in public places. . .

People v. Craft (1986)
City Court of Rochester (New York)

134 Misc.2d 121, 509 N.Y.S.2d 1005 (City Ct. 1986) *Rev'd*, 149 Misc.2d 223, 564 N.Y.S.2d 695 (County Ct. 1991) *Rev'd sub nom.* People v. Santorelli, 80 N.Y.2d 875, 587 N.Y.S.2d 601, 600 N.E.2d. 232 (1992)

FACTS--In an effort to protest assertedly sexist and repressive laws permitting only males to bare their chests in public places, seven women planned to remove their shirts at Cobbs Hill Park on a day in June. Prior to the event, they issued a press release, called a meeting to discuss the issues that was attended by sixty people, and engaged in radio and television interviews.

Upon implementation of their plan, the women were charged with violating a state antinudity statute prohibiting public exposure of bare female breasts (originally titled "exposure of a female"). A trial was convened in this court; they now move for dismissal.

ISSUES--May government regulate nudity? May a criminal statute target females only? Is this statute void for vagueness? Is there a fundamental right to determine one's own physical appearance? Are there First Amendment considerations here?

OPINION--Differentiating between (1) simply the manner in which one dresses or wears his hair, and (2) conspicuous nudity, the statute in question rightfully protects the public from being accosted by women with bared breasts. While courts have held that some discreet private acts may lie beyond the reach of government, public conduct falls within the scope of regulatable activity unless a fundamental right is involved. Based upon *People v. Hollman* [*supra* at page 89], nudity is not sheltered by such a right.

This gender-based classification of breasts is grounded upon public concepts of morality, not stereotyped and archaic notions of sexual pleasure as the defendants claim. That is to say, the sight of women's breasts is deemed by the community as more offensive than that of men's (notwithstanding that exposure of the latter may also be unpalatable to some).

Although the defendants see an inherent paradox insofar as a contemporary magazine cover (on the February 10, 1986, issue of *Sports Illustrated*) depicts a woman whose swimsuit exposes most of her breast below the nipple, vis-a-vis the New York statutory requirement that the lower portion of the breast be covered (except when entertaining, performing, or breast-feeding), the statute nevertheless clearly covers their conduct. Thus, their challenge for vagueness cannot prevail.

While a baring of the breasts may promote a positive concept of a woman's body (a notion articulated at the trial by Dr. Melissa Farley, a clinical psychologist who testified in behalf of the defendants), neither the Ninth Amendment's reservation to the People of so-called penumbral rights not explicitly set forth in the Constitution nor any other provision confers a right to nudity under the aegis of controlling one's personal appearance.

However, unlike the factual situation in *Hollman* wherein that defendant's act consisted of nothing more than sunbathing, these defendants engaged in acts designed to convey a particularized message. As such, they are shielded by the First Amendment freedoms of speech, assembly, and petition for redress of grievances. In recognition that the nudity here was confined to a solitary occurrence in a limited area of the park and persons who might potentially be offended were warned in advance, imposition of criminal penalties is not warranted.

Charges dismissed.

FURTHER PROCEEDINGS (1991)
Monroe County Court

OPINION--Pursuant to appeal by the People, this court notes that while the First Amendment does, indeed, safeguard the expression of ideas, no one has a guaranteed right to select the means of communication to be used. The scope of the antinudity statute--designed to defend the public from invasions of its sensibilities--is no greater than essential to further the intended goal. Reversed and remitted.

FURTHER PROCEEDINGS *sub nom.* People v. Santorelli (1992)
Court of Appeals of New York

OPINION--In this case (in which a constitutional equal protection question was raised at the trial court level), the People have not borne the burden of proving that the antinudity statute's gender-discrimination provision serves an important governmental interest. However, the statute may nevertheless be construed in a manner by which a presumption of constitutionality is maintained. In *People v. Price* [*supra* at page 61], this court held that a woman walking on a public street with her breasts exposed through fishnet material did not transgress an earlier version of the statute (titled "exposure of a female," the declared purpose for which being elimination of topless waitresses) because her behavior was not lewd in a commercial setting. We believe the rationale underlying *Price*--not the equal protection question--should be controlling here. The order of the Monroe County Court is reversed and the informations are dismissed.

CONCURRENCE--Disposition of the case at bar on the theory that the facts here appear similar to those in *Price* (as the majority has concluded) is questionable since (1) commercial lewdness is no longer a required element for conviction, and (2) these appellants' motivation was based upon a political, rather than a fashion,

statement.

Instead, I would look to the constitutionality of the antinudity statute which proscribes bottomlessness by all persons, but exposed breasts only in the case of females. While the Legislature's implicit reason for differentiating breasts by gender was that of protecting public sensibilities, its classification of a group associated with a history of social prejudice (*i.e.*, women) is highly tenuous. That many in our society regard the uncovered female breast with a prurient interest is itself a suspect cultural artifact rooted in centuries of prejudice and bias. The equal protection clauses are intended to ensure that public sensibilities grounded in unexamined stereotypes do not become enshrined as official governmental policy. Viewed against such principle, the gender-based provision of the statute in question cannot--on this record--withstand constitutional scrutiny.

The township then enacted a local ordinance specifically outlawing public nudity.

Tri-State Metro Naturists v. Township of Lower (1987)
Superior Court of New Jersey, Law Division

219 N.J.Super. 103, 529 A.2d 1047 (1987)

LEGISLATIVE HISTORY--For almost two decades until recently, nude sunbathing transpired at Higbee Beach (located in a state-owned wildlife preserve bordering Delaware Bay along the southern tip of Cape May County) without police interference. However, during the last two or three years, Lower Township arrested persons found nude thereon for violating state obscenity laws prohibiting lewd conduct. Although convictions resulted, they were reversed on appeal on the ground that nudity alone was held not to constitute lewdness. The township then enacted a local ordinance specifically outlawing public nudity.

FACTS--Members of an unincorporated organization, created for the purpose of furthering a clothing-optional lifestyle in the New Jersey-New York-Connecticut area, have long been involved in nude bathing, lobbying, information dissemination, and furnishing of legal counsel as appropriate. Certain individuals belonging to such organization were arrested and charged with violating the township's antinudity ordinance.

Thereupon, the organization instituted this suit seeking invalidation of the ordinance. The State of New Jersey--having promulgated a wide variety of regulations covering the area, though without specifically addressing nudity--has intervened on the side of the organization on the ground that the township lacks jurisdiction.

ISSUES--Does the township ordinance infringe upon constitutional safeguards relative to (1) Freedom of expression, (2) Right to privacy, (3) Freedom of association, (4) Vagueness, (5) Nudity as a protected liberty, and (6) State preemption? Does it transgress state sovereignty?

OPINION--None of plaintiff's six enumerated claims has merit: (1) Any nonverbal expression that may be inherent in nude sunbathing is neither sufficiently distinct in itself nor combined with any form of expression to accord it protection. (2) Privacy rights do not extend from one's home to sites where they run afoul of moral views and sensibilities of others. (3) No authority has been advanced to support the notion that a gathering of nudists in public converts what is otherwise legally banned activity into protected association. (4) This court is bound by the appellate opinion in *Borough of Belmar v. Buckley* [*supra* at page 81] which held that there is nothing vague about public nudity prohibition. (5) Any fundamental right to be

left alone to engage in activities uniquely personal is incompatible with the public nature of open nude sunbathing. (6) The *Buckley* court determined that antinudity provisions in the State criminal code are directed toward matters of lewd sexual aggression, rather than beach attire which may be controlled locally.

However, while local governmental units may enact regulatory ordinances outside the scope of the state criminal code, the state can nevertheless withhold from them any powers it chooses. Accordingly, since New Jersey previously promulgated broad regulations for the area in question, principles of state sovereignty preclude the township from enforcing its local antinudity ordinance at Higbee Beach, irrespective of whether it actually conflicts with the state regulations.

The arrests previously made cannot stand and will, therefore, be dismissed; a permanent injunction will be entered against the township.

. . .women desire to enjoy beach pleasures in the nude.

Craft v. Hodel (1988)
United States District Court, District of Massachusetts

683 F.Supp. 289 (D.Mass. 1988)

FACTS--A number of women desire to enjoy beach pleasures in the nude, while others wish to expose their breasts--deemed by them as mere secondary sexual characteristics similar to male facial hair--as a means of communicating expressions of opposition to an asserted exploitation and inequitable treatment of females in American society. Accordingly, they now bring an action in this court against the Secretary of the Interior, seeking invalidation of a Cape Cod National Seashore antinudity regulation.

ISSUES--Is the holding in *Williams v. Hathaway* [*supra* at page 63], that constitutional protection does not confer an unrestricted right to bathe nude at the Seashore, controlling here? Does the antinudity regulation advance substantial governmental interests justifying time, place, or manner restrictions upon the exercise of free expression? Does the regulation violate the equal protection component of the Fifth Amendment insofar as it applies to the breasts of females only?

OPINION--The plaintiffs in the case at bar have not demonstrated that *Williams* has lost its vitality. I find it controlling law.

Plaintiffs' attempt to combine nudity with a political or ideological message must fail. While they claim that bare breasts convey a specific message of protest, in actuality their exposure presents a medium by which a variety of messages may be perceived, including the polar opposite in instances where female breasts are incorporated into obscene materials concerned with manipulation, abuse, or domination. However, even construing plaintiffs' shirtfree appearance at the Seashore as constituting expressive conduct, the contested regulation--dealing with the manner by which (not whether) viewpoints or artistic performances may be presented--satisfies all the requirements of constitutional muster, viz., it (1) favors no group over another; (2) protects against an influx of demonstrators and voyeurs; (3) avoids legitimatizing a public nuisance by keeping the entire Seashore available to all users, including those offended by beach nudity; and (4) leaves open print and broadcast media for communicating views, albeit the ensuing publicity would be less effective when made clothed rather than naked.

The different treatment accorded male and female breasts simply reflects a physical difference between the sexes, having implications for the moral and aesthetic sensibilities of many. As such, it is substantially related to achievement of the Government's interest in protecting against an invasion of those sensibilities.

Judgment for defendants.

Nude beach use affects birds!

New England Naturist Association, Inc. v. Larsen (1988)
United States District Court, District of Rhode Island

692 F.Supp. 75 (D.R.I. 1988)

BACKGROUND--Moonstone Beach, located on Block Island Sound, forms a part of Trustom Pond National Wildlife Refuge. Situated within the Town of South Kingston, it is administered by the U.S. Fish and Wildlife Service.

In recent years, the agency has become concerned that ongoing public use of the beach was adversely affecting certain bird species, viz., the Piping Plover (officially designated as endangered) and the Least Tern. To improve bird feeding opportunities, a portion of the beach was placed behind a restrictive fence. Later, it was decided to extend the restricted area along the entire beach during the April 1-August 31 nesting season. The extended fence ranges 57-83 feet above the mean high-waterline separating federal property from the state-owned intertidal zone (*i.e.*, the area between the low- and high-water lines) which the Rhode Island Constitution holds in trust for use by the people in exercising their guaranteed right of shoreline passage.

FACTS--Persons interested in pursuing nudism have long gathered at Moonstone to engage in recreational activities in the nude. A corporate association established to foster such endeavors, together with certain nudist and nonnudist individuals, now petition this court. They seek a preliminary injunction requiring dismantling of the fence.

ISSUES--Did the partition of the beach usurp state jurisdiction insofar as the fence location was erroneously derived from geodetic survey information, rather than 18.6-year Metonic cycle data as specified by statute? Is there a constitutional right to be nude in public? Was the wildlife agency's erection of the fence permissible, absent its filing with the State of Rhode Island of a Consistency Determination Certificate and the preparation for the Council on Environmental Quality of an Environmental Impact Statement?

OPINION--In spite of the federal surveyor's mistake, the fence is set back far enough from the intertidal zone to afford more than ample margin of error. Therefore, plaintiffs' claim that the service lacks dominion over the fenced-in area is without merit.

Case law has consistently rejected arguments that nude public sunbathing is constitutionally protected as a mode of expression, a form of association, or a right of privacy. These plaintiffs have not identified any such protection, historical use of the beach by nude bathers notwithstanding. No evidence suggests that the plan is aimed directly or indirectly at nudists, *i.e.*, they stand on the same footing

as clothed persons with respect to access. In the absence of any showing that the federal actions taken here were arbitrary, capricious, or an abuse of discretion, they will not be set aside.

The failure to have filed a Consistency Determination Certificate is irrelevant since no clear relationship linking the fence to the state intertidal zone is apparent. Failure to have prepared an Environmental Impact Statement is of no consequence to the outcome of this proceeding since statutory requirements to do so are triggered only by actions harming ecosystems, not tangential activities such as sunbathing.

In summary, since (1) the plaintiffs have not demonstrated a likelihood of success on the merits, and (2) the injury they could expect to suffer from the withholding of a preliminary injunction does not outweigh the environmental damage that would be inflicted if one were granted, the request therefor is denied.

[EDITORIAL COMMENT -- See another case involving this plaintiff at page 43 *supra*.]

. . . a conservation enforcement officer observed an individual completely nude on a beach at Pu'u Ola'i in Makena State Park, Maui.

State v. Rowley (1988)
Supreme Court of Hawaii

70 Haw. 135, 764 P.2d 1233 (1988)

LEGISLATIVE HISTORY--The state Administrative Procedure Act requires agencies of the state government to publish advance notice prior to adopting, amending, or repealing their rules. Such notice must clearly identify the substance of the rules under consideration, thus affording interested persons meaningful opportunities to participate in the rulemaking process. Accordingly, the Department of Land and Natural Resources placed a 1971 newspaper notice in the *Honolulu Star-Bulletin*, announcing that hearings would be held to consider proposed rules (described in general, nonspecific terms only) to govern use of parks, recreational areas, and historic sites. Following such hearings, rules were adopted to prohibit, *inter alia*, swimming, sun bathing, and walking in the nude.

To comply with subsequent legislation mandating that all state agencies recast their existing rules into a newly prescribed format, a second notice was placed in 1981. It announced forthcoming hearings to facilitate such recasting and to consider minor modifications, specifically noting, however, only a proposed repeal of obsolete rules dealing with submerged mineral exploration. At the 1981 hearings, certain persons suggested deleting the 1971 antinudity rules in view of their apparent overlapping with state statutes. Rejecting the suggestion, however, the department retained the rules but modified them by changing the words "sun bathing" to "sunbathing" and inserting language prohibiting nude outdoor showering.

FACTS--In 1987, a conservation enforcement officer observed an individual completely nude on a beach at Pu'u Ola'i in Makena State Park, Maui. Signs prohibiting nudity were posted in the area. Following arrest by police for violation of the antinudity rules, he was convicted in the circuit court.

ISSUE--Did the department adequately comply with the public notice requirements of the Administrative Procedure Act?

OPINION--The 1971 antinudity rules were invalid and unenforceable *ab initio* for lack of specificity in the notice; the 1981 rules were similarly defective. Conviction reversed.

DISSENT--Any failure of the 1971 rulemaking to have complied with the notice

requirements should not invalidate a post-1981 arrest. That is to say, upon incorporation of the 1971 rules into the state's permanent register of administrative rules, the public was thus made aware of the nudity prohibition. Indeed, such awareness was confirmed by the dialogue relative to nudity that transpired at the 1981 hearings. Since the notice published for the latter hearings indicated that they would cover all of the previously promulgated (*i.e.*, 1971) rules, inclusion therein of the antinudity rules was necessarily inferred. Consequently, I would affirm.

An organization of social nudists desires to arrange a public display of nudism on the beach at Assateague Island, Virginia.

National Capital Naturists v. Board of Supervisors (1989)
United States Court of Appeals, Fourth Circuit

878 F.2d 128 (4th Cir. 1989)

FACTS--An organization of social nudists desires to arrange a public display of nudism on the beach at Assateague Island, Virginia. Among the planned activities are airbathing, sunbathing, and the staging of an original drama especially conceived for the occasion. In an effort to counteract an Accomack County antinudity ordinance purportedly (1) violating their rights under federal and state constitutions, and (2) exceeding the county's authority granted by the commonwealth, the organization--together with certain individuals--filed a complaint in U.S. District Court, seeking declaratory and injunctive relief. However, that court stayed the proceedings and abstained from addressing federal questions until an appeal could be pursued in the state courts to obtain resolution of the state issues (both constitutional and statutory). We affirmed. 795 F.2d 82.

Accordingly, the plaintiffs brought suit in the local circuit court, seeking a state interpretation of the ordinance and alleging that the county had exceeded its legislative authority (omitting, however, discussion of their state constitutional claims). The circuit court held that (1) the meaning of the ordinance was clear, (2) it applied to plaintiffs, and (3) its restrictions were within the county's police powers. Plaintiffs' appeal of that decision to the Virginia Supreme Court was not timely perfected, the mandatory filing date being missed by twenty days. They acknowledge that there was no good cause for their lateness but simply contend that it was not intentional. Their motion for an extension of time was denied.

Next, the plaintiffs moved in the District Court to have the federal stay lifted; the motion was denied for reason that there had not been full compliance with the terms of the abstention order, *i.e.*, the state constitutional claims had not been adjudicated in the circuit court. The District Court also declined to certify the state issues to the Virginia Supreme Court (a procedure that became available during the pendency of the instant case) because to do so would render the circuit court decision a nullity. The plaintiffs now appeal the [unreported] District Court decision.

ISSUES--Is federal abstention appropriate while awaiting state interpretation of state statutes and state resolution of state constitutional questions? Should the District Court have overridden the Virginia Supreme Court's disposition of the state proceedings (*i.e.*, the latter court's refusal to accept the late appeal) by either hearing argument at the federal level or certifying the issues to that court?

OPINION--It is well established that not all forms of nudity violate state law. Thus, an authoritative interpretation of the relevant state statutes in state courts as contemplated by the abstention order (*e.g.*, does the county ordinance accord with a state statute prohibiting nudity only when associated with obscene display or exposure?) would have assisted in resolving--or at least narrowing--the federal questions. Appellants' state constitutional claims also should have been presented to the state courts since the latter have shown a willingness to invalidate provisions of state law that would, nevertheless, withstand federal scrutiny. Such state court review of state enactments promotes the avoidance of needless consideration or invalidation on federal grounds.

In view of appellants having expressly reserved their state (as well as federal) constitutional claims for adjudication in the District Court, and in recognition that under the Virginia Supreme Court's rules a motion for an extension of a filing date can be granted only when abridgment of constitutional rights is in question, the latter court should not be faulted for declining to accept the appeal. We will not encourage disrespect for the state procedure by now allowing the case to return to federal court. Also, we hold that the District Court did not abuse its discretion in declining to certify the state issues to the Virginia Supreme Court, since that procedure was not in effect at the time of its exercise of abstention. For us to do so now in behalf of a litigant who has failed to comply with the state court's time bar would frustrate cooperative judicial federalism.

Affirmed.

. . . sheriffs. . . encountered 25-30 women--all naked above the waist--on Durand-Eastman Beach.

People v. David (1989)
City Court of Rochester (New York)

146 Misc.2d 115, 549 N.Y.S.2d 564 (City Ct. 1989) *Rev'd*, 152 Misc.2d 66, 585 N.Y.S.2d 149 (County Ct. 1991)

FACTS--On a June afternoon with the temperature in the high eighties, a waterborne sheriff's deputy patrolling the Lake Ontario shoreline received a marine radio message advising that naked people had been sighted on Durand-Eastman Beach. After mooring his boat and going ashore, he encountered 25-30 women--all naked above the waist--sunbathing, playing volleyball, or picnicking. Upon his admonishing them that public exposure of female breasts is unlawful, many covered themselves. However, when the nine individuals named in this action declined to do so, the deputy authorized their arrest by arriving patrol car officers. All were fingerprinted and booked for violating a state antinudity statute specifying that private or intimate body parts (defined to include female breasts) must be clothed in public. [Three of the nine also were defendants in *People v. Craft*, *supra* at page 91.]

At an ensuing trial in this court, Dr. Rita Freedman (a specialist in developmental psychology) testified in the women's behalf that the primary physiological characteristics which distinguish the two sexes and which facilitate reproduction of the human species do not include the breasts of either sex. She stated that the female breast is a primary sexual characteristic only in a psychological sense that is cultural rather than natural in origin. The defendants maintain that puritanical laws such as the one in question here have invested female breasts with an erotic power which would quickly dissipate if they were publicly exposed.

ISSUES--Did the Legislature abuse its power in ordaining the minimum clothing requirements? Is there justification for banning the exposure of female--but not male--breasts?

OPINION--Establishing public decency is critical to the identity and self-worth of any society. This country historically accepts Judeo-Christian teachings, from which we have adopted inextricably interwoven ethics of nudity and morality. They are illustrated allegorically by the biblical stories in *Genesis* which have permeated the collective conscience of our civilization for thousands of years. Viewing nudity as a catalyst for shame and immoral behavior, our 150-year-old Legislature has simply codified standards long observed by western peoples; Governor Cuomo also approved the bill. Laws emerge at the upper levels of the graph of human

experience and reflect that which has gone before and which has already bound the community together. From this perspective, the clothing requirement provision rests upon a rational basis. Additionally, our state Court of Appeals upheld its validity in *People v. Hollman* [*supra* at page 89].

This court rejects defendants' argument that commonplace exposure of female breasts would remove their erotic characteristic. Indeed, their expert psychologist admitted that in the United States today the female breast is perceived to possess the erotic properties of a primary sex organ. Moreover, it was the proliferation of topless waitresses that led to New York's 1967 "exposure of a female" statute. Although a 1983 revision of the indecent exposure code was basically gender-neutral, it retained the discriminatory language. The Legislature has apparently decided that, for the foreseeable future at least, the public will likely continue to disapprove of female breast exposure. No constitutional deprivation arises from the statute since it is substantially related to advancing an important governmental objective.

The defendants are found guilty; they shall appear on December 13th for sentencing. [The results of that appearance are not reported.]

FURTHER PROCEEDINGS (1991)

Monroe County Court

ISSUES--Is there a constitutional equal protection problem with the antinudity statute? Can a woman's breast be characterized as a "private or intimate" body part subject to the mandatory clothing requirements of that statute?

OPINION--It is well established that a gender-based statute is constitutional only if it serves some legitimate governmental interest without arbitrary classification of people by sexual stereotype. While protecting public sensibilities qualifies as such an interest, the means by which the statute in question here seeks to serve that interest is not reasonable. That is to say, since testimony of record demonstrates that male and female breasts are physiologically similar except for lactation capability, it is apparent that this discriminatory statute does not properly serve a legitimate governmental interest. I therefore conclude that the statute's gender classification violates the equal protection clauses of both the federal and state constitutions.

Because the unconstitutionality of one part of a statute does not necessarily render it entirely void, this statute could be construed to be gender-neutral and, as such, implicitly prohibit exposure of a male's breast as well. However, a reversal of these convictions need not be grounded on the basis of an equal protection violation. Rather, testimony of defense experts Dr. Rita Freedman and Dr. George Harker relative to a change having occurred in community standards negates the once-prevailing notion that a woman's breast constitutes a "private or intimate" body part, as characterized in the statute. [Neither the City Court nor this opinion, however, identifies the particulars regarding changed standards.] Hence, the convictions are legally insufficient and against the weight of the evidence.

Reversed. Informations dismissed and records sealed.

[HISTORICALNOTE--Rita Freedman, Ph.D., one of the witnesses whose testimony was noted above as being instrumental in the reversal on appeal of the convictions of these topfree women, is a practicing clinical psychologist in Scarsdale, New York. She has written extensively on topics related to the psychology of women.

George R. Harker, Ph.D., who also testified in the women's behalf, has at various times in his professional career worked with the Cleveland (Ohio) Metropolitan Park District, the National Park Service (in Alaska), and as a professor at Western Illinois University (Macomb, Ill.). His numerous publications in the field of resource management include the 1990 definitive *Creation and Management Guide to Public Clothing Optional Beaches and Parks*, commissioned by the former American Sunbathing Association, Inc.]

. . .a federal agent patrolling the Chincoteague National Wildlife Refuge beach observed that a woman had removed her bathing suit top. . .

United States v. Biocic (1990)
United States District Court, District of Maryland

730 F.Supp. 1364 (D.Md. 1990) *Aff'd*, 928 F.2d 112 (4th Cir. 1991)

FACTS--On a day in June, a federal agent patrolling the Chincoteague National Wildlife Refuge beach observed that a woman had removed her bathing suit top. She was charged with violating a federal regulation making punishable the commission of indecent acts as defined by prevailing state or local laws. The involved law in this instance is an Accomack County, Virginia, antinudity ordinance prohibiting female breast exposure. She now appeals her conviction by a magistrate.

ISSUES--(1) Is public nudity a form of indecency? (2) Is the county ordinance in question overbroad? (3) Is it defective for failure to require proof that some observer was offended? (4) Is it preempted by a state obscene exposure statute? (5) Does its applicability to female breasts only infringe upon federal constitutional rights? (6) Is public nudity accorded protection akin to the established right of privacy?

OPINION--(1) This court agrees with the holding in *United States v. Hyman*s [*supra* at page 55] that intentional public nudity in a federal reservation can be regarded as falling within the meaning of the term "indecency." (2) Appellant's overbreadth argument must fail because the ordinance is limited to nude displays that are intentional or open to public view. (3) The ordinance is valid irrespective of whether any observer has been offended because a community may proscribe conduct it believes transgresses its sense of decency. (4) State prohibition of *obscene* exposure does not preempt local ordinances regulating *nonobscene* (but nevertheless indecent) nudity. (5) Given the historical approach to the distinction between female and male breasts, there is no abridgment of constitutional rights when an ordinance is substantially related to an important governmental interest such as that involved here. (6) Appellant's privacy argument must be rejected since the body politic has not yet recognized a right to go about in a state of partial or complete nudity. Affirmed.

FURTHER PROCEEDINGS (1991)
United States Court of Appeals, Fourth Circuit

OPINION--We agree with the magistrate's view that "common sense" compels a

conclusion that persons of ordinary intelligence reading the texts of the ordinance and regulation involved here would be sufficiently warned that full exposure of female breasts is unlawful. Also, we note that a substantial segment of society does not wish to be exposed willy-nilly to various erogenous zones--including, justifiably or not, female breasts--of their fellow citizens' anatomies. Notwithstanding appellant's attempt to equate her perceived feelings of "wholesomeness," "peace of mind from being in the natural," and "free-spiritedness" with purportedly comparable feelings judicially protected (as fundamental liberty interests under the Ninth Amendment) in other cases involving contraception and abortion, we are not prepared at this point to condone public nudity. Affirmed.

CONCURRENCE--It is discomfiting that the arresting officer skulked behind sand dunes while awaiting an opportunity to swoop down like a wolf attacking the fold. But although the time may well come (as it already has with the French and others) when public outrage over nudity will wane, I am constrained by precedent to concur.

French-cut bikinis and thongs are acceptable; G-strings, pasties, and socks covering male genitalia are not. . .

The Nativist Society, Inc., and T.A. Wyner v. Fillyaw (1990)
United States District Court, S.D. Florida, Fort Lauderdale Div.

736 F.Supp. 1103 (S.D.Fla. 1990) *Remanded*, 958 F.2d 1515 (11th Cir. 1992) *On remand*, 858 F.Supp. 1559 (S.D.Fla. 1994)

FACTS--In connection with an upcoming observance of National Nude Weekend, a Wisconsin-based social nudism organization planned a celebration at John D. MacArthur Beach State Park in Palm Beach County. It would include display of a banner measuring two by four feet, as well as distribution of literature advocating designation of the northern end of the beach for clothing-optional use.

When a Florida member of the organization notified the park manager by telephone of the impending event, the latter (1) advised her of state administrative regulations outlawing "indecent exposure" and requiring that bathing costumes conform to "commonly accepted standards"; (2) announced that, pursuant to a one-day permit, her group could distribute literature between 10:00 a.m. and 1:50 p.m. on a pedestrian path leading to the beach; and (3) suggested--to avoid a possible libel suit by the MacArthur Foundation--eschewing public mention of the original owner's reputed "skinny-dipping" on the property.

In a later clarifying letter, the manager explained that following *McGuire v. State* [*supra* at page 84], authorities specifically determined that French-cut bikinis and thongs are acceptable; G-strings, pasties, and socks covering male genitalia are not. He also wrote that an art exhibit envisioned by the group--consisting of plaster of paris human body casts patterned after sculptures in Worth Avenue shop windows--would be prohibited by regulations dealing with commercial merchandising and displays tending to obstruct free movement.

At the authorized time and place, about thirty persons--none of whom were nude--set up a card table and distributed their literature therefrom. However, believing the permit conditions to have been unjustifiably onerous and desiring to arrange a future demonstration in which the participants would wear little or nothing, the organization filed a complaint in this court against the manager, seeking damages and declaratory or injunctive relief allowing tactful literature distribution to persons on the beach.

ISSUES--Are the bathing costume regulations unacceptably vague? Are there improper speech restrictions? Did the state abuse its power in operating the beach? Did the manager's admonishment that the naturists should avoid referring to the original property owner as a nudist constitute wrongful content censorship?

OPINION--In *South Florida Free Beaches v. City of Miami* [*supra* at page 79], this

circuit explicitly upheld the prohibition of beach nudity. Although the regulations in question here are very generalized, the manager's clarifying letter removes any vagueness.

Since beachgoers may feel vulnerable while reclining in minimal attire with their paraphernalia open to view, marginal restrictions on speech in such a nonpublic forum are not unreasonable. Anyhow, the court doubts that nonnaturists would comprehend any message imparted through the wearing of *de minimis* clothing; rather, the plaintiffs might better have conveyed their views through imprinted T-shirts.

A significant part of Florida's economy is sustained by tourism. The state's interest therein, embracing the preservation of the beauty of the landscape and the provision of a unique recreational experience incorporating a sign-free natural environment, is substantial. This court finds no abuse of governmental power.

The manager's suggestion that the naturists not publicly associate Mr. MacArthur with nudity appears to be nothing more than friendly advice. No genuine content censorship can be discerned therein.

Defendant's motion for summary judgment granted; action dismissed with prejudice.

FURTHER PROCEEDINGS (1992)

United States Court of Appeals, Eleventh Circuit

FACTS--After the District Court entered its final order, Florida amended its park regulations so that permits may now be sought for signs, displays, exhibits, and petitions (but not sound amplification).

ISSUES--Is this case no longer justiciable for reason that the amending of the regulations (1) mooted the original claims, and (2) rendered the controversy not ripe for resolution because the naturists have not reconfigured their permit application in accordance with the amended regulations? Did the District Court err in denying injunctive relief? Did it err in rejecting damages?

OPINION--The amending of the regulations does not moot the original claims because the question of past damages remains outstanding. Moreover, the park manager still exercises broad discretion in the same allegedly unconstitutional fashion, thus making further controversy likely, whether or not the naturists file a new permit application.

We reject the District Court's assumption that because persons sunbathing on the beach may feel vulnerable to the expressive conduct of others, MacArthur Park in its entirety must be deemed a nonpublic forum protected by speech restrictions. Aside from its beach, this park also has parking lots, a nature center, and walkways; in all of these latter places, expressive conduct may not pose the same perils. Even with respect to the vulnerability question, we note that sunbathing is common in many city parks widely regarded as quintessential public

forums. Thus, holding as we do that MacArthur Park is a public forum, we now remand the case to the District Court for a determination of whether the regulations constitute legitimate time, place, and manner restrictions for a property in such status.

In considering the appropriateness of damages, the District Court should--on remand--give regard to the immunity from suits accorded officials acting on good faith within their discretionary authority.

PARTIAL CONCURRENCE/PARTIAL DISSENT--I concur with the majority on the justiciability issue. As to the type of forum here, in recognition that (1) there has been no tradition of First Amendment activity on Florida beaches, and (2) sunbathers should have a right of privacy in any event, the District Court was 100% correct in upholding both the regulations and the manager's implementation thereof. I believe the opinion of the trial judge should have been affirmed in all respects.

ON REMAND (1994)

United States District Court, Southern District of Florida

OPINION--Plaintiffs' motion for summary judgment is granted to the extent that (1) park management is vested with untoward discretion in the disposition of permit applications, and (2) time limits are lacking for initial handling thereof and for subsequent review by superiors.

Otherwise, the naturists have failed to persuade the court that the sign regulations are insufficiently content-neutral or that sound amplification would not unwarrantedly disrupt the area's natural tranquility. Moreover, the court denies personal damages against the defendant manager since public officials are deemed immune from suit when their actions are reasonably authorized, as here.

. . .left the hot tub, walked five or ten feet in the nude.

Miller v. Barberton Municipal Court (1991)
United States Court of Appeals, Sixth Circuit

935 F.2d 775 (6th Cir. 1991)

BACKGROUND--The Loyal Oak Swim Club in Norton, Ohio, operates an outdoor swimming pool surrounded by a chain-link fence partially covered with plastic. It has two membership categories: regular members who must leave the property by 11:00 p.m., and private members who are permitted by the owner to swim nude after such time.

FACTS--At approximately 11:30 on a summer evening, three private members--including the appellant herein--arrived at the club. Appellant wore swim trunks under his street clothes. He left the latter on a table and walked to the edge of the pool where he removed the trunks prior to entering the water. After swimming awhile, he emerged from the pool, covered himself with a towel, and moved to a nearby hot tub to join his companions. He later left the hot tub, walked five or ten feet in the nude, and obtained another towel to place around his waist. At this point, two policemen who had been summoned to the area by complaining neighbors arrested all three for reckless public indecency.

At a nonjury trial in Barberton Municipal Court, one neighbor testified that from her kitchen window 100 feet away, she could see into the pool which was lit "like a football field"; another testified that there was no plastic on the side of the pool facing her house. Upon findings of guilty, thirty-day jail sentences and \$250 fines were imposed; however, the trial court suspended the jail time and \$200 of the fines on the condition that the defendants not swim nude at Loyal Oak for two years. The state Court of Appeals affirmed appellant's conviction and the state Supreme Court denied leave for further appeal. Following denial by the U.S. District Court of a petition for writ of habeas corpus, he now appeals to us.

ISSUES--Was appellant's conduct "reckless" (a term defined by statute as heedless indifference to the consequences in disregard of a known risk where a predictable result appears likely)? Is the reasoning of the Florida appellate court in *Duvallon v. State* [*supra* at page 78]--which quashed the conviction of a partially nude defendant--suitable for application here? Did the conviction infringe upon a privacy right?

OPINION--Considering all the evidence of record, a rational trier of fact could indeed reach the conclusion adopted by the trial court, *i.e.*, that appellant's conduct was reckless.

Duvallon is inapposite because--unlike the Ohio statute in question here--Florida law specifies that public nudity may be prosecuted only when it is

coupled with lasciviousness.

There was no privacy violation since the locus, well lit and within close view of at least two homes, is not a private place.

Affirmed.

DISSENT--This case has troubled me from the start. The record shows that the appellant acted with the utmost discretion: He was not naked on the diving board, he did not use the slide, and he did not repeatedly jump in and out of the water. Further, a codefendant testified that the pool owner had assured patrons that the privacy fence had official city approval and nude swimming is acceptable. The most telling fact was that the neighbors had watched the nude defendants with binoculars. Both the original conviction and the majority's decision here are unjust.

. . . a man and a woman were arrested for violating an ordinance prohibiting nudity in public areas . . .

Davis v. Gates (1992)
United States Court of Appeals, Ninth Circuit

Unreported (9th Cir. 1992) *Cert. denied*, ___ U.S. ___, 113 S.Ct. 1846, 123 L.Ed.2d 470 (1993)

FACTS--At Venice Beach (managed and controlled by the City of Los Angeles), a man and a woman were arrested for violating an ordinance prohibiting nudity in public areas. Following prosecution, they--together with Beachfront U.S.A. and other organizations whose members endorse nude sunbathing and swimming as a source of mental, spiritual, and physical benefits--brought suit in U.S. District Court against the police chief and the city and county. The plaintiffs sought therein declaratory and injunctive civil rights relief. That court granted defendants' motions to dismiss and for summary judgment; it later denied plaintiffs' motion for reconsideration. Plaintiffs now appeal to us.

ISSUES--Should this appeal be rejected for either of two reasons advanced by defendants, viz., that the plaintiffs lack standing and that the statute of limitations has run? Did the District Court err in granting the defendants summary judgment through procedural default, rather than on the merits (that is, because plaintiffs failed to file an opposition brief to defendants' motion for such judgment)? Does the ordinance unconstitutionally infringe upon freedom of expression?

OPINION--We find that plaintiffs' allegation of specific injury, amenable to redress through a decision in their favor, establishes standing; the chilling effect of the ordinance, continuing to prohibit plaintiffs from bathing nude, overrides the statute of limitations.

It is apparent from a reading of the District Court's ruling on plaintiffs' motion for reconsideration that that court had previously examined all pleadings (as required by judicial rules dealing with unanswered motions) prior to granting the summary judgment. Hence, the ruling was properly on the merits.

The ordinance in question here is the same kind of public morals statute that was at issue in a recent case decided by the U.S. Supreme Court. In that case, the high court upheld an Indiana statute requiring female barroom dancers to wear, at a minimum, pasties and G-string. In doing so, the court noted that any suppression of protected expression was merely incidental (and, hence, permissible) to an exercise of the accepted power of government to limit behavior incompatible with order and morality. The Los Angeles ordinance targets public nudity, not whatever message these plaintiffs may be seeking to express. Accordingly, the Supreme Court's Indiana holding clearly governs this case.

Affirmed.

CERTIORARI DENIED (1993)
Supreme Court of the United States

[HISTORICALNOTE--Venice Beach, the locale where the nudity referred to in these proceedings occurred, has long been known for nude usage. For example, in reporting on Independence Day activities, the *Los Angeles Times* of July 5, 1974 (Part I, page 3), observed that "cooler weather did not deter several thousand persons from converging on nude sunbathing areas of Venice Beach" In a July 15, 1974, editorial (Part II, page 4)--dealing with a proposal in the City Council to set aside areas for nudity--the *Times* approvingly described such a legislative approach as "sensible" and mused that nakedness in public places is hardly "menacing." However, see *Eckl v. Davis, supra* at page 65.]

. . .cited by federal law enforcement officers for appearing nude in public within the bounds of Canaveral National Seashore. . .

United States v. A Naked Person (1993)
United States District Court, Middle District of Florida, Orlando Div.

841 F.Supp. 1153 (M.D.Fla. 1993)

FACTS--An individual, cited by federal law enforcement officers for appearing nude in public within the bounds of Canaveral National Seashore, was charged with violating a state statute prohibiting indecent exposure.

ISSUE--Did this individual's nudeness fall within the provisions of the state indecent exposure statute? (The Government stipulates that the conduct here cannot rightfully be characterized as lewd.)

OPINION--In construing the statute in question, the Florida Supreme Court [in an earlier case not, however, involving recreational nudity] placed an unmistakable limiting gloss on the otherwise plain words used therein. Thus, the statute is applicable only when there has been a lascivious exhibition of sexual organs occurring in conjunction with some intentionally harmful act. While doubt may be expressed as to whether such refinement of the meaning of the statute can fairly be said to flow from the words used by the legislature, it constitutes the definitive elucidation of this state law. In seeking to enforce a state criminal statute under the Assimilative Crimes Act, the federal government must take state law as it finds it. Not guilty.

[C] BOOKS, MAGAZINES, AND MOTION
PICTURES CONSTITUTING SERIOUS
SCHOLARSHIP OR DEPICTING LEGITIMATE
REPRESENTATION

. . . two retailers were charged with selling obscene, lewd, lascivious, filthy, indecent, or disgusting printed matter. . .

People v. Fellerman/People v. Koslow (1934)
New York Supreme Court, Appellate Division, First Department

243 App.Div. 64/522, 276 N.Y.S. 198/200 (1934) *Motion to dismiss denied*, 268 N.Y. 514, 198 N.E. 381 (1935) *Aff'd*, 269 N.Y. 629, 200 N.E. 30 (1936)

FACTS--*The Nudist*, a magazine offered for sale to the general public, contains pictures of persons in nudist camps and colonies, engaging in everyday activities. In connection therewith, two retailers were charged with selling obscene, lewd, lascivious, filthy, indecent, or disgusting printed matter. Both were convicted in the Court of Special Sessions, Bronx County.

On appeal to us, these retailers assert that the magazine publisher is engaged in fostering the nudist movement in a sincere, educational manner. They also note that the caption accompanying one picture asks the rhetorical question, "If simple life in the outdoors contributed to the rich development of the arts during the classical period, why not now?"

ISSUE--Is this magazine indecent in violation of the penal law?

OPINION--We are in hearty accord with the opinion in an earlier New York case [not, however, involving the nudist movement] that an art expert is not needed to determine whether a picture is indecent. Thus, we have no hesitation in saying that the provocative pictures in this mercenary magazine are calculated to appeal to the baser instincts of mankind by offending modesty and subverting morality. Affirmed.

FURTHER PROCEEDINGS (1935/1936)
Court of Appeals of New York

APPEALS AND MOTIONS--The defendants further appealed these judgments. The District Attorney moved to dismiss on the ground of failure to bring such appeals on for argument within ninety days. However, the motions were denied and the cases ordered set down for argument.

OPINION--Per Curiam. Affirmed.

DISSENTS--Three judges dissent. [No reason is given.]

[HISTORICAL NOTE--*The Nudist*, published by the old International Nudist

Conference (a forerunner of the contemporary American Association for Nude Recreation), was the first journal of its kind in the United States. In 1958, the U.S. Supreme Court implicitly held in *Sunshine Book Co. v. Summerfield* (*infra* at page 136) that pictures of nudists in the magazine *Sunshine and Health* (a new name given *The Nudist* in 1941) were not obscene, per se.]

. . . each containing a picture showing nude men and women with their private parts exposed.

Freedman v. New York Society for Suppression of Vice (1936)
New York Supreme Court, Appellate Division, First Department

248 App.Div. 517, 290 N.Y.S. 753 (1936) *Aff'd*, 274 N.Y. 559, 10 N.E.2d 550 (1937)

FACTS--In a first floor exhibit window of a bookstore at 79 Wall Street, New York City, there were displayed multiple copies of the books *Let's Go Naked* and *On Going Naked*. All were open to a different page, each containing a picture showing nude men and women with their private parts exposed.

Upon noting a group of men and boys looking in the window, a police officer (having responsibilities covering vice, indecency, and immorality) purchased one of the books and showed it to an officer of The New York Society for the Suppression of Vice. Several days later, the police officer and the Society officer visited the premises together. By this time, paper strips had been placed over all exposed private parts. Nevertheless, on the basis of the Society officer's complaint, the police officer arrested a partner in the business for unlawfully displaying indecent pictures and selling indecent books. However, he was subsequently discharged in the ensuing magistrate's court criminal proceeding [for reasons not specified herein].

Next, the partner brought a civil action in Supreme Court, New York County, against the Society and its officer for malicious prosecution and false imprisonment. He recovered judgment and the defendants now appeal to us.

ISSUE--Can the defendants reasonably assert, in justification of their involvement in the criminal proceedings, a motive of vindicating public justice?

OPINION--The facts set forth here, which the parties do not dispute, amply justified a probable cause for prosecution. Judgment reversed and complaint dismissed.

FURTHER PROCEEDINGS (1937)
Court of Appeals of New York

OPINION--Per Curiam. Affirmed.

. . .the Government filed a libel in U.S. District Court alleging that three or four full-front photographs of nude females and two such photographs of nude males and females together. . . are obscene.

Parmelee v. United States (1940)
United States Court of Appeals, District of Columbia Circuit

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

FACTS--Dr. Maurice Parmelee is a well-known writer whose various textbooks have long been used in American colleges and universities. His book *Nudism in Modern Life* is an educational treatise that deals with an unexplored area of the social sciences. It consists of written text and twenty-three illustrations. The latter are described in the preface as depicting "the beautiful and healthful methods and activities of a gymnosophic [*i.e.*, naked as used in classical Greek athleticism] society."

Upon arrival in the mail from England of six copies of this book, the Collector of Customs at Washington, D.C., seized the entire consignment. Next, the Government filed a libel in U.S. District Court alleging that three or four full-front photographs of nude females and two such photographs of nude males and females together--the human figures therein being approximately one and one-half inches in height on the printed page--are obscene.

The District Court held [in an unreported opinion] that the books fall within the condemnation of the Tariff Act and, hence, that they should be destroyed. The author now appeals to us.

ISSUE--Are there obscene photographs in this book?

OPINION--In addressing the question of obscenity posed here, we need not delve into the merits or demerits of nudism. Rather, we need only to evaluate the book in terms of the standard intended to be established by the statute. In this connection, obscenity is not a technical term of law. Nor is the word susceptible of exact definition because such intangible moral concepts as it purports to connote vary in meaning from one period to another.

Thus, the brushing up of the hair so as to uncover the ears--brought into fashion at the marriage of a former queen of England--seemed indecent to some at the time but is hardly shocking today. More recently, numerous large pictures in the 1932 edition of *Encyclopaedia Britannica* depict full-front views of nudes--including males and females in physical contact--accompanying articles on painting and sculpture. Newspapers and magazines presently feature modeled underwear advertisements. Illustrated medical treatises formerly confined to drawings made from animal studies now contain nude anatomical photographs of

the human body. The beach community has discarded elaborate bathing costumes in favor of simple halters and trunks.

In summary, the advance of civilization permits the pictures in the book here challenged to complement what appears as a whole to be an honest, sincere, and scientific study by a respected author, free of pandering or libidinous thoughts. Reversed.

DISSENT--A book is obscene when in the aggregate sense of the community the tendency of objectionable matter therein, considered with the work as a whole, is to arouse lustful thought. If a reasonable man could find this book obscene, the findings of fact should not be set aside. Although time marches on, the majority view--that only a Rip Van Winkle could find obscenity here--is unacceptable.

. . .the prosecuting attorney charged him with violating an obscenity statute in connection with specific pictures of two nude girls over the age of puberty.

Hadley v. State (1943)
Supreme Court of Arkansas

205 Ark. 1027, 172 S.W.2d 237 (1943)

FACTS--A photographer took a number of pictures of nude individuals for submission to the monthly nudist magazine *Sunshine and Health*. He was paid \$5 for each picture and, in addition, won a prize for the excellence of his work.

Upon shipment of the June 1942 issue to Clay County, where it was seen by several and may have been seen by many, the prosecuting attorney charged him with violating an obscenity statute in connection with specific pictures therein of two nude girls over the age of puberty. Sitting as a jury, the trial judge found him guilty and assessed a \$50 fine.

ISSUE--Can pictures of nude females be found obscene?

OPINION--If a trial court finding is supported by sufficient evidence, it may not be disturbed. In these pictures, one of the young women (in a sitting posture) exhibits her breasts, while the other leaves nothing for the imagination to supply. Irrespective of master works of art containing nude figures, we are unwilling to say as a matter of law that pictures of attractive nude women are not obscene. Although appellant is not the publisher of the magazine, by taking the pictures he made their publication possible. He was, therefore, *particeps criminis* and may be punished as such. Affirmed.

. . .believed to be depraving and corrupting weak minds open to immoral influences.

State v. Lerner (1948)
Court of Common Pleas of Ohio, Hamilton County

51 Ohio L.Abs. 321, 81 N.E.2d 282 (Com.Pl. 1948)

LEGISLATIVE HISTORY--This state's general obscenity statute incorporates an 1838 approach instituted in England by Lord Chief Justice Cockburn for evaluating published works then available (*e.g.*, books, pamphlets, papers, and magazines) that were believed to be depraving and corrupting weak minds open to immoral influences. Thus, the contemporary Ohio statute prohibits the sale or possession of these traditional instruments of communication if "any obscenity" is contained therein. On the other hand, instruments of communication developed in a later era (*e.g.*, advertisements, circular prints, picture photographs, and motion picture films) are prohibited in Ohio only if they are *wholly* obscene.

FACTS--The Bell Block News Shop in Cincinnati carries the nudist magazine *Sunshine and Health*, published by the American Sunbathing Association. It typically includes photographs (of men, women, and children appearing alone, in pairs, or in groups, with genitals showing) and textual matter (embracing advertising, news items, nudist camp data, editorials, and article of scientific and cultural nature).

In an indictment charging the shop owner with violating the obscenity statute, the State makes no objection to the magazine's textual passages. Rather, the sole complaint relates to the 15-18% of the contents devoted to nudist camp photographs which the State contends arouse impure sexual ideas, particularly among youth. The shop owner waived a jury trial and is now before this court.

ISSUES--Is the obscenity statute consonant with the state's police powers and freedom of the press? Are the nudist pictures obscene?

OPINION--Rather than being impartial in its application to all forms of literature, the obscenity statute treats some more harshly than others. As such, the statute (1) constitutes an unduly repressive exercise of the police powers, and (2) trespasses beyond all reason in the field reserved for the press. It would be fundamentally unsound for a modern day Ohio court to enforce standards promulgated for mid-Victorian England. Moreover, there is no evidence supporting the State's complaint that youths are in danger from nudity in literature distorting their knowledge of sex.

The statute does not define the "obscenity" that it is intended to prohibit; indeed, the word does not mean the same to all people. In the past, a number of courts applied obscenity statutes to literature by means of a "sex taboo" test. But

nature is aflame with sex: the hoot of the owl, the coo of the dove, the blossom of the flower, the spawning of the fish. Moreover, it is notable that application of Lord Cockburn-style "any obscenity" tests to most of the arts, letters, and sciences has been as much in the breach as in the observance. Accepting the State's characterization of this statute as a measure to preserve public morals, it necessarily follows that the people's moral concept of what is obscene is the only allowable test. Although there are times, places, and circumstances where nudity may be deemed inappropriate, public acceptance of great works of art representing nude human forms suggests that condemning and banishing such images would bestow a false delicacy and prudery. While photographs of nude bodies in the innocent ambience of a nudist camp may bring sex to the minds of some, there cannot be obscenity in God's own handiwork.

Not guilty.

. . .they seized the film from the projection room on the asserted ground that views of naked persons exhibiting their private parts are obscene.

Gore v. State (1949)
Court of Appeals of Georgia, Division No. 2

79 Ga.App. 696, 54 S.E.2d 669 (1949)

FACTS--The operator of the Hanger Theatre in Hapeville obtained a motion picture film entitled *The Valley of the Nude* from the customary distributor. Men, women, and children are portrayed therein playing and living in the nude.

On an afternoon when the theatre was one-half to two-thirds full, a number of police and solicitor's office personnel bought tickets and attended a screening. Afterward, they seized the film from the projection room on the asserted ground that views of naked persons exhibiting their private parts are obscene. The theatre operator was indicted by the grand jury of Fulton County for debauching the morals of the spectators in violation of the criminal code.

In the superior court, he filed both a general demurrer that the indictment set forth no facts constituting a criminal offense and special demurrers that it did not--as purportedly required to establish its validity--(1) specify the number of pictures possessed, (2) designate which private parts were visible, (3) indicate whether males and females were shown separate and apart or together, and (4) clarify that the pictures had not been exhibited to a scientific group studying human anatomy. Upon all demurrers being overruled, evidence was adduced and the jury returned a verdict of guilty; a motion for a new trial was denied. Under a \$23,500 bond, the theatre operator now petitions this court on assignment of error.

ISSUES--In view of Thomas Edison's invention of motion pictures having occurred eleven years after passage of the original criminal statutes from which the state code was derived (*i.e.*, the Acts of 1878-1879 which named every means of disseminating obscenity then known), does the prescribed penalty apply to such a communication medium? Had there been an unlawful exhibition of an obscene motion picture? Was the trial court justified in refusing the theatre operator's proffered evidence relative to the appearance of similar pictures in magazines circulating locally and the screening of an identical copy of the film at another theatre?

OPINION--That the nineteenth century statutes apply to motion pictures as we know them today is apparent from the General Assembly's having revisited the original legislation in connection with a 1935 recodification and a 1941 amendment. Thus, the present code reflects contemporary statutes.

When judged in light of present-day standards, this film--picturing nude

individuals exposing their persons to one another--is in violation of the code. The indictment amply authorized the conviction.

Based upon an unrelated case (in which the Supreme Court of this state observed that no respectable magistrate could tolerate so gross and outrageous a spectacle as, *e.g.*, the keeper of a disorderly house or the proprietor of a gaming table claiming that he could not be prosecuted because others openly indulged with impunity in the same nefarious practices), it appears that the trial court did not err in refusing defendant's evidence of other supposed violations.

Affirmed.

. . .numerous photographs of men, women, and children playing, working, and eating together nude

King v. Commonwealth (1950)
Court of Appeals of Kentucky

313 Ky. 741, 233 S.W.2d 522 (1950)

FACTS--A Newport police detective went to a city newsstand and obtained certain publications, including an issue of the nudist magazine *Sunshine and Health*. It was composed of numerous photographs of men, women, and children playing, working, and eating together nude. About the same time, the Legion of Decency (a private group engaged in investigating magazines sold in the city) obtained from the newsstand an issue of a similar nudist publication, *Modern Sun Bathing and Hygiene*.

Subsequently, the newsstand operator was charged in a single indictment--containing, however, a separate count for each magazine title--with violating an obscenity statute. He was found guilty in circuit court, Campbell County, and fined \$500.

ISSUES--Must each magazine title be covered by a separate indictment? Was there a factual question to be resolved relative to the character of the magazines?

OPINION--The indictment charges but one offense (*i.e.*, offering obscene magazines for sale) and is framed substantially in the words of the statute. It is, therefore, satisfactory.

We believe that the character of these magazines may have been a matter of sufficient doubt to justify the trial court's submission of the case to the jury.

The verdict, rendered by a fair cross section of men and women of the community in which the magazines were offered for sale, is supported by the evidence. Affirmed.

. . . arrested for displaying and selling these nudist magazines. They were charged with possession for sale or distribution of obscene, lewd, lascivious, filthy, indecent, or disgusting printed matter.

Sunshine Book Co. v. McCaffrey (1952)
New York Supreme Court, Special Term, New York County, Part III

8 Misc.2d 327, 112 N.Y.S.2d 476 (Sup.Ct. 1952) *Modified*, 4 App.Div.2d 643, 168 N.Y.S.2d 268 (1957)

FACTS--The magazines *Sunshine and Health* (the official monthly of the American Sunbathing Association) and *Solaire Universelle de Nudisme* (a bimonthly also known by the acronym *SUN*) contain articles on the theory and practice of nudism, together with pictures of nude persons. The latter consist of action shots showing nudists engaging in camp activities such as rowing, hitting volley balls, and building fires.

Without advance warning, a number of stationery store and newsstand operators in New York City were arrested for displaying and selling these nudist magazines. They were charged with possession for sale or distribution of obscene, lewd, lascivious, filthy, indecent, or disgusting printed matter. About the same time, all city newsdealers were notified by letter that the handling of these and certain other periodicals could result in suspension or revocation of their licenses. The nonprofit corporate publishers of the two magazines, together with Ilsley Boone (editorial officer of both) and a distributor servicing local newsdealers, now move to enjoin the Commissioner of Police from prosecuting pending or new criminal proceedings, and the Commissioner of Licenses from threatening the dealers.

ISSUES--Are public notions of obscenity and decency of such a shifting nature that no standard of evaluation can be identified and enforced? Was the city license notice legally acceptable?

OPINION--Although the late Judge Cardozo correctly asserted that obscenity law does not elevate public morality to the level of "saints and seers," it nevertheless rejects the sensualists and libertines. While no valid objection can be made to nudity portrayed in connection with the arts and medicine (even if it has the incidental effect of arousing sexual desire), the magazines at issue here--with typical covers dominated by large, revealing photographs of shapely and attractive young women--tend to glorify nudism and promote lust among men, women, and youths. They are, therefore, obscene and indecent. Contrary findings of the federal court in *Parmelee v. United States* [*supra* at page 121] are unsound and must be repudiated. Similarly, opinions favorable to nudity concepts as expressed by

anthropologists, sociologists, and psychologists (upon whom the plaintiffs rely) are not persuasive since they have failed to reconcile the weird and deviant customs of African natives, Australian aborigines, and desert tribes, with the precepts prevailing in this state as to what is chaste and demure.

Persons abusing the guaranty of freedom of the press by publishing obscene matter may be restrained by government when it becomes necessary to enforce primary requirements of decency. Considering these open and notorious violations of the penal law, the license notice issued here appears reasonable. This court does not deem it an unconstitutional prior restraint because by its terms it is inapplicable to publications free of obscene and indecent pictures.

Plaintiffs' motion to enjoin is denied.

FURTHER PROCEEDINGS (1957)

New York Supreme Court, Appellate Division, First Department

FACTS--Following denial of their motion to enjoin, plaintiffs moved for a jury trial on the question of whether certain issues of the nudist magazines are obscene under the penal law; the latter motion was granted and ultimately a jury found that each of four issues presented to it is obscene. Thereupon, a motion by defendants to dismiss the complaint was granted; plaintiffs now appeal to us. In view of an intervening U.S. Supreme Court opinion--in another case--sustaining generally the constitutionality of state obscenity statutes, this court is now concerned solely with plaintiffs' demands for relief against the license commissioner.

OPINION--The doctrine of immunity from prior restraint is a "foundation stone" guaranteeing speech and press freedoms. Courts must be constantly vigilant and inveigh against indirect encroachments resulting in the exercise of administrative powers tending to advance illegal censorship. It does not matter that actual suspension or revocation of licenses must follow a hearing process; the real impact of the commissioner's letter of notice would necessarily have been effective in curtailing the sale of future issues of the magazines. The plaintiffs were entitled to relief. Judgment unanimously modified.

[HISTORICALNOTE--The Reverend Ilsley Boone, identified in the facts above as a plaintiff herein, is regarded as a major figure in the American nudist movement. Oftentimes referred to by his biographers as "Uncle Danny," Boone founded an early nudist community--Sunshine Park--in Mays Landing, New Jersey. The American Sunbathing Association (predecessor of the contemporary American Association for Nude Recreation) was once based there also; it was later relocated to Kissimmee, Florida.

After prevailing on appeal in the McCaffrey case, Boone's Sunshine Book Company went on to successfully challenge two efforts by the Post Office Department to reject its magazines from the mail on the ground that they allegedly contain obscene pictures. See *Summerfield v. Sunshine Book Co.* and *Sunshine Book Co. v. Summerfield* (*infra* at page 134 and page 136, respectively), both of

which went all the way to the U.S. Supreme Court. Sunshine's able attorney, O. John Rogge, was the counsel of record in all three cases.]

Each (magazine) contains photographs of nudist men, women, and children with their private parts fully depicted.

State v. Becker (1954)
St. Louis Court of Appeals (Missouri)

268 S.W.2d 51 (Mo.App. 1954) *Aff'd*, 364 Mo. 1079, 272 S.W.2d 283 (1954)

FACTS--The defendant herein was charged with possession with intent to sell and circulate large quantities of two purportedly obscene, indecent, immoral, or scandalous magazines, to wit, 648 copies of *Solaire Universelle de Nudisme* and 195 copies of *Sunshine and Health*. Each contains photographs of nudist men, women, and children with their private parts fully depicted.

In the Court of Criminal Correction, he filed a motion to quash alleging that the statute in question violates his constitutional due process rights. Upon denial of the motion, that court--sitting without a jury--rendered a finding of guilt and assessed a \$100 fine.

ISSUE--Was the motion to quash, which referred simply to federal and state "due process clauses" without specifying their section numbers, sufficiently definitive to preserve the constitutional challenges for subsequent appellate review? (Under Missouri law, constitutional issues are transferable to the state Supreme Court for resolution.)

OPINION--Each constitution contains only one due process clause, a provision of universal recognition. Accordingly, defendant's reference to these clauses by such name was as precise as would have been citations to specific section numbers. Constitutional issues transferred to state Supreme Court.

FURTHER PROCEEDINGS (1954)
Supreme Court of Missouri, Division No. 1

ISSUES--Are the constitutional challenges substantial enough for us to take jurisdiction (the attorney general argues in a motion that they are not and, therefore, that the cause should be returned to the appeals court)? Did the trial court err in excluding proffered testimony of a college professor--holding degrees in psychology and philosophy--that he believes nudist magazines do not fall within the ambit of the obscenity statute? Is the statute vague and indefinite? Does it impair the right of free speech?

OPINION--We are unpersuaded that this court's jurisdiction is not appropriate. Hence, the attorney general's motion is overruled.

The people have determined that they will maintain a clothed society. When measured against the standard laid down by the General Assembly for the protection of all, these magazines tend to incite lascivious thoughts, arouse lustful desire, encourage breaches of the law, and promote moral decay. The learned trial court knew this far better than any lay professor. Contrary conclusions in *Parmelee v. United States* and *State v. Lerner* [*supra* at page 121 and page 124, respectively] seem confounded of confusion and artificialities. Thus, there was no error in excluding the professor's testimony.

The statute contains neither hidden meaning nor technical terms of law, but rather, employs words of common usage and understanding. Accordingly, it sets out a clear and ascertainable standard of guilt, readily comprehended; no intelligent person would be compelled to guess at its meaning and purpose.

Free speech is subject to the government's inherent police power. Accordingly, obscene publications can be forbidden.

Affirmed.

These magazines contain text explaining nudism and advocating the nudist mode of living along with photographs of nude men, women, and children.

Summerfield v. Sunshine Book Co. (1954)
United States Court of Appeals, District of Columbia Circuit

95 U.S.App.D.C. 169, 221 F.2d 42 (D.C. Cir. 1954) *Cert. denied*, 349 U.S. 921, 75 S.Ct. 661, 99 L.Ed. 1253 (1955)

FACTS--Certain publishing companies tendered copies of several magazines (viz., *Sunshine and Health*, *Solaire Universelle de Nudisme*, and *Natural Herald*) to the postal system for distribution through the mail. These magazines contain text explaining nudism and advocating the nudist mode of living along with photographs of nude men, women, and children. There are posed and unposed shots, with the subjects appearing both singly and in groups; sexual parts are shown.

In an administrative proceeding sought by the Solicitor of the Post Office Department for the purpose of determining mailability of the magazines, a departmental hearing examiner found that pictures therein are obscene (based upon his subjective judgment, rather than upon expert testimony on the subject). Adopting such finding as his own, the Postmaster General issued orders--of indefinite duration--terminating service to the companies under a statute authorizing exclusion from the mail of obscene or lewd "articles, matters, devices, things, or substances."

The companies prayed for injunctive relief in U.S. District Court. Finding that the magazines are not likely to promote lustful feelings or excite sexual passions--and, thus, are not obscene--that court [in an unreported opinion] enjoined enforcement of the orders. The Postmaster General now appeals to us.

ISSUES--Can the mailability statute be invoked with respect to pictures, and if so, was the Postmaster General's action within the scope of his authority and undertaken free of vague and nebulous administrative standards (issues raised by publishing company appellees)? Did the District Court improperly substitute its own opinion for that of the administrative determination, which the Postmaster General perceives as constituting an appropriate exercise of a statutory function supported by sufficient evidence without denial of due process (an issue raised by appellant Postmaster General)?

OPINION--Although pictures are not specifically named in the statute identifying the various kinds of obscene material prohibited from the mail, case law has extended the range of a similar companion statute (concerning mail fraud) to pictorial representation. Accordingly, we reject the publishing companies'

contention that the statute in question here cannot be applied to pictures.

However, the legislative background of this statute indicates that the Postmaster General's exclusionary power is confined to material already published, not to future items for which there is no advance knowledge of content. Indeed, the orders under review here raise grave constitutional questions involving possible wrongful prior restraint. In summary, issuance of these broad exclusionary orders exceeded the power conferred by Congress upon the Postmaster General.

Affirmed.

DISSENT--Since the administrative ruling of the Postmaster General was not palpably wrong, it should be allowed to stand.

CERTIORARI DENIED (1955)
Supreme Court of the United States

. . . although the woman's pubic area is obscured by her crossed legs, direct sunlight brightens the corona of her male companion's circumcised penis.

Sunshine Book Co. v. Summerfield (1955)
United States District Court, District of Columbia

128 F.Supp. 564 (D.D.C. 1955) *Aff'd*, 101 U.S.App.D.C. 358, 249 F.2d 114 (D.C. Cir. 1957) *Rev'd*, 355 U.S. 372, 78 S.Ct. 365, 2 L.Ed.2d 352 (1958) *Further proceedings sub nom.* Sunshine Publishing Co. v. Summerfield., 184 F.Supp. 767 (D.D.C. 1960)

FACTS--On instruction from the Postmaster General, the local postmaster at Mays Landing, New Jersey, impounded bulk shipments of two nudist magazines for the asserted reason that pictures therein portray naked men, women, and children. Following an administrative hearing before an examiner, the Postmaster General found the magazines obscene by ordinary community standards and, hence, nonmailable under the applicable statute. The publisher now seeks injunctive relief in this court.

ISSUE--Was the Postmaster General's ruling supported by the record?

OPINION--To decide this case, it is necessary that the court evaluate samples of the magazines' content. Such evaluation will be guided by the premise that certain illustrations are not pointedly objectionable: (1) children with diminutive genitalia; (2) posteriors of nudes, irrespective of age; and (3) adult female breasts, the public having become accustomed to seeing nursing mothers.

The cover of the February 1955 issue of *Sunshine and Health*, portraying a woman in her twenties whose bare bosom appears larger than normal size, is nevertheless not obscene because her genitalia are not revealed. A picture on page 7 of a very young girl on a swing is also not obscene, since her labia majora are as yet undeveloped. On the other hand, a picture on page 9 of a man water-skiing shows his genitalia and, hence, is obscene. On page 13, a picture of a couple is obscene because although the woman's pubic area is obscured by her crossed legs, direct sunlight brightens the corona of her male companion's circumcised penis. A picture on page 15 showing four middle-aged women holding hands in front of a large oak tree is obscene because of visible pubic hair. On page 16, a picture of a mixed-sex group is obscene because one of the men portrayed has exposed genitalia. A picture on page 29 of two women in their late twenties or early thirties, posing approximately twelve feet from the camera and fully revealing the pubic areas, is also obscene.

The January-February 1955 issue of *Sun Magazine* shows on page 6 a young woman standing and facing the camera from six feet away, and on pages 8 and 9 another woman in her early twenties also photographed in short range with

the pubic details clearly discernible; both are obscene. A picture on page 11 of a mother with matted pubic hair and her two teen-aged daughters with fine, soft pubic hair is also obscene. A picture on page 13 of a woman in her twenties is not obscene because the pubic area is diffused in the shadow of an inflated ball. A sketch on page 19 of two females whose pubic areas are ill-defined is not obscene; however, an adjacent photograph of two couples in the surf is obscene because the genitalia of one man are seen above the crest of an incoming wave. Pictures on page 23 of a Mexican woman whose dark complexion along with poor lighting obliterate the pubic area, and on page 29 of a distant group watching a judo exhibition, are not obscene.

Overall, there was sufficient basis in fact and in law for the Postmaster General's administrative ruling. Dismissed with prejudice.

FURTHER PROCEEDINGS (1957)

United States Court of Appeals, District of Columbia Circuit

OPINION--We are satisfied that there is no error. Affirmed.

CONCURRENCE--Indecent pictures predominate.

DISSENT--Congress has never given the Postmaster General power to censor any class of mail, sealed or unsealed.

CERTIORARI GRANTED (1958)

Supreme Court of the United States

OPINION--Per Curiam. Reversed on the basis of another high court case [not, however, involving recreational nudity] in which it was held that the portrayal of nudity, per se, is insufficient reason to deny constitutional freedom of the press.

FRTHR. PRCDNGS. *sub nom.* Snshe. Publishing Co. v. Smmrfl. (1960)

United States District Court, District of Columbia

FACTS--Three days after the 1958 Supreme Court ruling, the publisher filed applications with the Post Office for second class mail rates. Exchanges of correspondence and negotiations followed. Thirteen months later, the Post Office general counsel wrote the publisher of certain defects in the applications. Thereupon, the publisher submitted corrections. When six more weeks elapsed with no definitive response, the publisher sued the Postmaster General to secure the rates it seeks.

Five weeks after filing of the suit (but before the Postmaster General made any appearance in the case), the applications were denied on the ground that the magazines do not qualify for second class. In explanation, it was asserted that rather than disseminate educational information devoted to literature, sciences, and the arts, they improperly advertise the commercial nudist community of Sunshine

Park (two stockholders in which also hold stock in the publisher). When the publisher did not appeal during the allowed fifteen days (as required by a new rule established after the filing of the suit), the Postmaster General moved to dismiss the case on the ground that administrative remedies had not been exhausted. Upon denial of the motion, both parties now move for summary judgment; alternatively, the Postmaster General asks to have the case remanded for further review.

ISSUES--Should this court divest jurisdiction of the case? Do the magazines qualify for second class mail rates?

OPINION--The inescapable conclusion is that the Post Office handled the publisher's applications with gingerly restraint amounting to outright reluctance. When administrative procedure is inadequate, it need not be exhausted prior to invocation of judicial action.

An official Post Office document, used just recently as a standard for granting second class rates to a trailer owners' association magazine financed by the sale of advertising space to trailer manufacturers, makes clear that periodicals are not designed primarily for advertising if they address some special subject or industry and have a legitimate subscriber list. Similar authorized trade journals include *The Iron Age*, *The American Grocer*, and *The Northwestern Lumberman*. Sunshine Park has an advertisement of less than one-half page in the 32-page *Sunshine and Health*; in *Sun Magazine*, it is mentioned only in a listing of nudist clubs. Accordingly, this court is of the opinion that plaintiff's publications (one of which has 5,725 full-price subscribers as well as many newsstand purchasers) are entitled to second class rates.

Judgment for plaintiff.

. . .two nudist women--one a mother and the other a grandmother--testified in the importer's behalf that they see nothing objectionable in the publications; two nonnudist housewives testified for the Government to the contrary.

United States v. 4200 Copies (1955)
United States District Court, Eastern Dist. Washington, Northern Div.

134 F.Supp. 490 (E.D.Wash. 1955) *Aff'd sub nom.* Mounce v. United States, 247 F.2d 148 (9th Cir. 1957) *Vac'd and rem'd*, 355 U.S. 180, 78 S.Ct. 267, 2 L.Ed.2d 187 (1957)

FACTS--Alleging that certain nudist publications imported for commercial distribution are obscene by reason of photographs therein of nude men and women, the Customs Service ordered their seizure. In an ensuing libel trial in this court, two nudist women--one a mother and the other a grandmother--testified in the importer's behalf that they see nothing objectionable in the publications; two nonnudist housewives testified for the Government to the contrary.

ISSUE--Are the publications obscene and, hence, subject to a statute authorizing forfeiture, confiscation, and destruction?

OPINION--Nudity per se is not obscene; it may properly be employed in works of art and medical and scientific treatises. However, when it offends the sense of propriety, morality, and decency of average, normal, reasonable, prudent persons--typified by the nonnudist housewives--it is within the bar of the statute in question. Although nudists do not regard the full display in mixed company of nude male and female bodies as objectionable, nudism is a deviation from the norm at the present time in the United States. With the exception of certain items which the marshal failed to record on an inventory and a limited number of parodies containing mostly clothed or silhouetted figures, I find all of the seized publications obscene.

FURTHER PROCEEDINGS *sub nom.* Mounce v. United States (1957)
United States Court of Appeals, Ninth Circuit

OPINION--Per Curiam. Affirmed.

CERTIORARI GRANTED (1957)
Supreme Court of the United States

OPINION--Per Curiam. Upon confession of error by the Solicitor General, the judgment below is vacated and the case remanded to the District Court for

consideration on the basis of the same precedent by which Sunshine Book Company ultimately prevailed in its suit against the Post Office to have its publications ruled not obscene [*supra* at page 136].

[HISTORICALNOTE--Mervin Mounce, the named party ultimately prevailing in the U.S. Supreme Court, was the twelfth president of the American Sunbathing Association.]

A motion picture company had sought a license from the state Department of Education to exhibit the film *Garden of Eden*, shot in a Florida nudist colony.

Excelsior Pictures Corp. v. Regents of University (1956)
New York Supreme Court, Appellate Division, Third Department

2 App.Div.2d 941, 156 N.Y.S.2d 800 (1956) *Aff'd*, 3 N.Y.2d 237, 165 N.Y.S.2d 42, 144 N.E.2d 31 (1957) *Reargument denied*, 3 N.Y.2d 942, 167 N.Y.S.2d LXXIII, 145 N.E.2d 895 (1957)

FACTS--A motion picture company had sought a license from the state Department of Education to exhibit the film *Garden of Eden*, shot in a Florida nudist colony. Although portions of human bodies are revealed therein, there is no full exposure of any adult.

Nevertheless, believing the film to be obscene within the scope of the licensing statute, the department refused to issue a license. Such determination was upheld by the Regents of the University of the State of New York. The case is now here on review.

ISSUES--Is the film obscene? Should constitutionality of the licensing statute be ruled upon?

OPINION--The simple nudity scenes to which the department objected do not reach a level of magnitude warranting prior restraint.

It would be inappropriate for an intermediate appellate court (such as this one) to consider striking down a statute as unconstitutional.

Determination annulled and matter remitted.

CONCURRENCE--Based upon numerous opinions of the U.S. Supreme Court, the censorship provisions of the licensing statute have already been effectively voided.

FURTHER PROCEEDINGS (1957)
Court of Appeals of New York

OPINION--Formore than a century, this state's courts have held that body exposure is not criminal if there be no lewd intent. Underlying the Regents' action is a New York penal statute--inspired by the controversy in *People v. Burke* [*supra* at page 4]--proscribing exposure of private parts in the presence of two or more similarly exposed persons of the opposite sex. However, that statute is directed not at the practice of nudism in secluded private grounds by wholesome family groups like those depicted in this film, but rather (as described by then-Governor Lehman when signing the bill), at exploitation of the general public for profit or financial gain.

Even if nudism were made criminal, however, its depiction in an artistic medium would not confer criminality upon the medium; to hold otherwise would abolish the drama and the novel in one stroke. Considering the foregoing, it is not necessary for us to resolve the constitutional question. Affirmed.

FIRST CONCURRENCE--Motion pictures fall within free speech and press guarantees which penal laws must accommodate.

SECOND CONCURRENCE--The argument for affirmance is compelling.

FIRST DISSENT--The state may prevent the showing of such indecent acts as nudists exhibiting their privates to each other, a situation unlike, *e.g.*, the simulated stage murder of a Caesar or a Desdemona which constitutes no real crime.

SECOND DISSENT--The judiciary should accord respect to the will of the people without resort to semantics.

MOTION FOR REARGUMENT (1957)
Denied.

. . .two theatre employees were charged with possessing and displaying--over a three-day period, including the Lord's day--a work suggestive of lewdness, obscenity, indecency, immorality, or impurity.

Commonwealth v. Moniz/Commonwealth v. Rogers (1957)
Supreme Judicial Court of Massachusetts, Bristol

336 Mass. 178, 143 N.E.2d 196 (1957), *Further opinion*, 338 Mass. 442, 155 N.E.2d 762 (1959)

FACTS--The motion picture film *Garden of Eden* depicts a nonnudist family visiting a nudist colony. It contains scenes of nude men, women, and children (visible, however, only from the rear and from the front above the waist) engaging in such pursuits as walking in the woods, bathing in the lake, lying on the shore, and playing games.

Following exhibition of the film in Fall River, two theatre employees were charged with possessing and displaying--over a three-day period, including the Lord's day--a work suggestive of lewdness, obscenity, indecency, immorality, or impurity. At an ensuing trial, the judge directed the jury to return verdicts of guilty. Upon entry of judgments, the employees now bring exceptions.

ISSUE--Was there good cause for the directed verdicts?

OPINION--Allegations as to the tendency of a work to deprave or corrupt those to whom it is exposed raise a question of fact which should be submitted to a jury. Plainly, the effect of the instant film upon its viewers is a matter requiring a jury determination, not a ruling by the trial judge. It was error to direct the verdicts of guilty. Exceptions sustained.

FURTHER PROCEEDINGS (1959)

FACTS--Subsequent to this Court's having sustained defendants' exceptions to the trial judge's direction to the original jury, another jury found them guilty. They now except to denial of their motions for directed verdicts of not guilty.

ISSUE--In view of the U.S. Supreme Court's 1958 decision in *Sunshine Book Co. v. Summerfield* [*supra* at page 136], protecting nonsalacious discussion and picturing of nudist life, does the film in question here contain any aspect of prurience (as opposed to innocent nudism) justifying a fact-finding role for a jury?

OPINION--In our judgment, this film (simply portraying how nudists live normal lives, notwithstanding their nakedness) lacks erotic appeal. Therefore, its showing

is not an act which can be found criminal, irrespective of its having offended a number of citizens. The matter here decided was not necessarily presented by the earlier exceptions. Exceptions sustained.

. . . charged the operator with violating an ordinance prohibiting the sale of obscene publications.

City of Cincinnati v. Walton (1957)
Municipal Court of Cincinnati (Ohio)

76 Ohio L.Abs. 162, 3 Ohio Op.2d 352, 145 N.E.2d 407 (Ohio Mun. 1957)

FACTS--A store on Eighth Street carries a number of publications, among which are several nudist magazines (viz., *Sunshine and Health*, *Sun Magazine*, and *Sunbathing*) containing individual and group pictures of nude men, women, and children. Although public areas are visible, none of the pictures are posed in a sexually suggestive manner; the texts are not concerned with sex.

Police entered the store and, in connection with the nudist and certain other magazines, charged the operator with violating an ordinance prohibiting the sale of obscene publications. The matter was heard by this court sitting as both judge and jury.

ISSUES--Can concern for the effect of the publications upon minors (a number of whom attend nearby schools and are inclined to congregate in and around the store) influence the outcome of these proceedings? What is the proper test for obscenity? Are the nudist magazines obscene?

OPINION--While concern for youth is understandable (indeed, when earlier serving as a legislator, this court coauthored a measure dealing with distributing to minors published accounts of immoral deeds), an interpretation of the ordinance so as to restrict sales to all purchasers to the level of that suitable for minors would violate the defendant's Fourteenth Amendment rights. Actually, to so interpret would be comparable to restricting the diet of all of this community's citizens to baby food. Also, as Mr. Justice Frankfurter once observed in connection with overrestrictive legislation, we must not "burn the house to roast the pig."

In view of a paucity of Ohio cases addressing the meaning of the word "obscene," this court must perforce fashion a definition distinguishing between material that is constitutionally protected and that which is not. Care must be exercised in doing so because the past failure of some courts to have observed such distinction has regrettably resulted in encouraging the Anthony Comstocks of the world to shake their censor's scissors at any work they perceive as being even remotely associated with sex. [Comstock, 1844-1915, was a notorious special agent and secretary of The New York Society for the Suppression of Vice, which organization was, incidentally, a party to a 1936 case included in this work at page 120 *supra*.] Thus, this court holds that for material to be found obscene, it must have been calculated to appeal to prurient interest (*i.e.*, be "dirt for dirt's sake") and have a substantial tendency to excite lustful desire or deal with sexual perversion.

As to the merits of the case at bar, in this day and age--when bathing suits are like handkerchiefs and virtual nudes stare down from every garage wall--I do not believe that these nudist magazines conform to the definition of obscenity propounded in the test above. Hence, defendant is found not guilty with respect thereto.

. . .exhibited allegedly indecent, obscene, and immoral motion pictures including the nudist film *Garden of Eden*.

State *ex rel.* Murphy v. Morley (1957)
Supreme Court of New Mexico

63 N.M. 267, 317 P.2d 317 (1957)

FACTS--The State (through its District Attorney as relator) cited the San Jose Drive-In Theatre in Bernalillo County for having exhibited allegedly indecent, obscene, and immoral motion pictures including the nudist film *Garden of Eden*.

At an ensuing trial in the local district court, the prosecutor sought to enjoin the screening of lewd scenes by invoking nuisance-abatement provisions of the New Mexico "red-light" statute. That court granted the injunction as sought; the theatre owner now appeals to us.

ISSUES--Does the red-light statute apply to motion pictures? Can the State buttress its position at the appeal stage by also invoking its general equity powers?

OPINION--In enacting the red-light statute, the Legislature associated the word "lewdness" with acts of assignation and prostitution only. Hence, we believe its use should be limited to cases of such nature and not broadened to include motion pictures.

We are not convinced by the State's contention that its general equity powers--necessarily *civil* in nature--can apply *incriminal* proceedings such as this one, especially where such a course was not specified at the outset.

Reversed and remanded, with direction to the court below to dissolve the injunction and dismiss the complaint.

DISSENT--I see nothing in the record suggesting that the ends of justice require a remand of this cause.

The manager was charged with violating a code provision prohibiting motion picture exhibitions creating imminent public disorder, the prima facie establishment of which is deemed to arise from advocacy of criminal law violation (in this instance, the state antinudism statute. . .

State v. Rothschild (1958)
Court of Common Pleas of Ohio, Montgomery County

78 Ohio L.Abs. 292, 149 N.E.2d 57 (Com.Pl. 1958) *Rev'd*, 109 Ohio App.101, 10 Ohio Op.2d 264, 163 N.E.2d 907 (1958)

FACTS--The manager of the Sunset Cruise-In, a drive-in movie theatre at 4249 Germantown Pike in this county, booked a film entitled *Garden of Eden*, depicting life in a Tampa, Florida, nudist camp. In the film, pubic areas are obscured by shorts, towels, magazines, dogs, branches, or bushes. However, prior to the first public screening the projectionist asked the manager if in his opinion they "could get away with ... showing bare breasts of the women," to which the manager is purported to have replied, "Sure, it's educational." Admissions to the film generated cash receipts from eight to ten times the normal amount; the intermission between showings was increased from the usual ten minutes to thirty minutes to allow for the large number of exiting automobiles.

After the first showing on the fourth night of screening, the sheriff's office confiscated the film. The manager was charged with violating a code provision prohibiting motion picture exhibitions creating imminent public disorder, the prima facie establishment of which is deemed to arise from advocacy of criminal law violation (in this instance, the state antinudism statute [also discussed in *State v. Brown, supra* at page 13]).

The cause was docketed for trial before this court without a jury. Prior to the taking of testimony, counsel for both sides and the court viewed the film in a local theatre. A similar screening was also arranged after the trial at the urging of the court.

ISSUE--Does the film advocate violation of a criminal statute (viz., the antinudism statute) and, hence, create the kind of public disorder that the motion picture code requires in order to justify a prohibition of its screening?

OPINION--It is evident that people in the nudist colony observed genitalia of both sexes while parading their naked forms in the presence of each other. The showing of such scenes disturbs otherwise tranquil minds and shocks the sensibilities. Since advocacy of nudism (the practice of which is illegal in Ohio) pervades the

entire film, the statutory presumption of imminent public disorder ensuing from such advocacy rendered its exhibition in violation of the motion picture code. Guilty.

FURTHER PROCEEDINGS (1958)

Court of Appeals of Ohio, Montgomery County

OPINION--There is not the slightest evidence on the record of the imminence of public disorder. Mere conjecture as to how others may react is insufficient to show the required criminal intent. Box office appeal--being the happy concomitant of many films of outstanding quality--is not evil in itself. Anyhow, rather than advocate violation of the antinudism statute, the film may simply imply that it should be repealed.

Reversed. Defendant will be released and the film returned.

[EDITORIAL COMMENT--The antinudism statute involved here (Ohio Revised Code Annotated, Section 2905.31, effective October 1, 1953) is reported in the 1987 Replacement Volume, Title 29 at page 83, to have been repealed.]

The defendant herein was arrested and charged with intent to sell an indecent, obscene, and lascivious magazine, to wit, *1958 Annual Sunshine and Health* (a publication dealing with nudism).

People v. Cohen (1960)
Queens County Court (New York)

Motion for inspection of grand jury minutes or in the alternative to dismiss the indictment, denied, 22 Misc.2d 722, 205 N.Y.S.2d 481 (County Ct. 1960) *Motion for certificate of reasonable doubt and order admitting to bail pending appeal, granted*, 208 N.Y.S.2d 49 (Sup.Ct. 1960) *Motion to enlarge time to perfect appeal, granted*, 13 App.Div.2d 518, 214 N.Y.S.2d 705 (1961) *Conviction rev'd*, 22 App.Div.2d 932, 255 N.Y.S.2d 813 (1964)

FACTS--The defendant herein was arrested and charged with intent to sell an indecent, obscene, and lascivious magazine, to wit, *1958 Annual Sunshine and Health* (a publication dealing with nudism). Following a preliminary hearing in the Felony Court and the filing of an information in the Court of Special Sessions, the state Supreme Court granted his application for prosecution by indictment. Subsequently, a grand jury found an indictment which also expanded the original charge to include illegal advertising. He now moves for an inspection of the grand jury minutes or, alternatively, to dismiss the indictment.

ISSUES--(1) May an indictment charge more criminal activities than those originally brought by information? (2) Must the Foreman of a jury, rather than the Assistant Foreman, sign an indictment? (3) Should the District Attorney initially have sought a civil injunction to halt sales before proceeding under the penal law? (4) Does Post Office acceptance for mailing of this magazine establish that it is not obscene? (5) Is the decision of the U.S. Supreme Court in *Sunshine Book Co. v. Summerfield* [*supra* at page 136--reversing obscenity findings relative to a 1955 issue of the same magazine involved here--*res judicata* and, hence, dispositive of the case at bar?

OPINION--The court is not impressed by defendant's arguments: (1) A criminal defendant must subject himself to whatever charges the proof may establish. (2) The Assistant Foreman of a jury is vested with the same power and authority as that of the Foreman. (3) The District Attorney has discretion whether to seek a civil injunction. (4) This court is not bound by constitutionality determinations of the Post Office. (5) The decision regarding the 1955 issue cannot give the magazine *carte blanche* immunity for all time, particularly since the 1958 pictures--greater in number and sharper in focus--could lead to a petit jury finding that the dominant theme appeals to prurient interest.

Defendant's motion denied. (Defendant was subsequently convicted; he

received a one-year jail sentence and a \$2,000 fine.)

APPLICATION FOR CERTIFICATE OF REASONABLE DOUBT AND FOR ORDER
ADMITTING TO BAIL PENDING APPEAL (1960)
Supreme Court, Queens County; Special Term, Nassau County, Part I

OPINION--It appears that substantial questions require resolution by an appellate court. These include whether the 1958 edition is covered by the ruling on the 1955 pictures, and if examination of other magazines circulating locally could aid in ascertaining standards of community acceptance. The defendant should not be forced to exhaust his sentence in jail while awaiting appellate court review. Certificate of reasonable doubt granted and defendant admitted to bail.

FURTHER PROCEEDINGS (1961/1964)
New York Supreme Court, Appellate Division, Second Department

OPINION--(Appellant's motion to enlarge his time to perfect an appeal was granted.) We would affirm the conviction; however, *Sunshine Book Co. v. Summerfield* and *Excelsior Pictures Corp. v. Regents of University* [*supra* at page 136 and page 141, respectively] constrain us to hold that the 1958 edition is not obscene. Judgment reversed, indictment dismissed, fine remitted, and bail exonerated.

Garden of Eden. . . film assertedly is obscene.

Excelsior Pictures Corp. v. City of Chicago (1960)
United States District Court, Northern Dist. of Illinois, Eastern Div.

182 F.Supp. 400 (N.D.Ill. 1960)

FACTS--The motion picture film *Garden of Eden* portrays nudist living, although private parts of adult characters are not revealed. As of 1955, it had been viewed by approximately 1.6 million persons in the United States, Alaska, and the Hawaiian Islands.

A company having the exclusive right to distribute, license, and exhibit this film in Chicago applied for the requisite permit. However, the city--invoking a municipal ordinance identifying various grounds for denial of such permits--rejected the application for reason that said film assertedly is obscene. The company has now filed a complaint in this court against Mayor Daley and Police Commissioner O'Connor, seeking that they be compelled to issue a permit.

ISSUE--Is this film immoral or obscene within the meaning of the city ordinance?

OPINION--It is a well-established maxim that the construction placed upon a municipal ordinance by the highest appellate court of the state is binding upon the federal judiciary. Accordingly, based upon previous construction of the ordinance involved here by the Supreme Court of Illinois--requiring that for a film to be obscene, it must arouse sexual desire--this court finds that the film now in question simply portrays nudism in a healthful and happy context and is, therefore, not obscene. Although the film is not of the type which this court might recommend for public viewing, it is not a court's function to weigh personal inclinations or individual proclivities in determining legal issues. Moreover, the mere fact that the Chicago community or Americans as a whole may not embrace nudism for their own way of life cannot control us. Also, it should be noted that nude statues and pictures are on prominent exhibition in most art museums and galleries and that numerous popular books and magazines frequently depict human nudity without offending the law.

For the above reasons, to deny plaintiff the right to show the film would deprive it of protection guaranteed by the Fourteenth Amendment. Order in favor of company.

. . .purportedly obscene publications, viz., *American Nudist*, *Sunbathers Calendar*, *Naturist*, and *Nudist Calendar*.

Mier v. Culver Municipal Court and Culver City (1962)
California Court of Appeal, Second District, Division 3

211 Cal.App.2d 470, 27 Cal.Rptr. 602 (1962)

FACTS--A magazine wholesaler and certain retailers are being prosecuted by Culver City for dealing in purportedly obscene publications, viz., *American Nudist*, *Sunbathers Calendar*, *Naturist*, and *Nudist Calendar*. They obtained a peremptory writ of prohibition from the superior court, Los Angeles County, commanding the municipal court to desist from proceedings against them that arise from the local obscenity ordinance. The City now appeals that ruling to us.

ISSUE--In enacting the state obscene publications code, did the Legislature occupy the field and, thus, retain exclusive jurisdiction on questions related thereto?

OPINION--The state code deals with all criminal aspects of selling, distributing, keeping for sale, exhibiting, and advertising publications charged as obscene. Hence, there was no room left for local regulation. Prohibition is a proper remedy to restrain a trial court from proceeding under such circumstances. Affirmed.

. . . state censors ordered deletion of the boat nudity scenes.

Fanfare Films, Inc. v. Motion Picture Censor Board (1964)
Court of Appeals of Maryland

234 Md. 10, 197 A.2d 839 (1964)

FACTS--A film company desires to screen the motion picture *Have Figure, Will Travel*. It depicts the story of three girls taking a vacation cruise through the inland waterways from upper New York to Florida on a cabin cruiser belonging to the father of one. Two of the girls are confirmed nudists. As the trip progresses, interrupted by stops at nudist camps in New Jersey and Florida, the third girl becomes a convert to nudism. Scenes on the boat show the girls nude above the waist; in the nudist camps, both men and women are seen totally unclothed.

While not expressing an objection to the camp nudity, state censors ordered deletion of the boat nudity scenes. According to these censors, since normal people [*sic*] do not so comport themselves on a boat, the girls' nudity will necessarily arouse viewers' sexual desires, thus making such scenes subject to deletion orders applicable to instruments of obscenity. The censors concede that on the boat the girls are observed only by each other and that they are not pictured engaging in sex together. Following affirmance of the censors' order by the Baltimore city court, the film company now appeals to us.

ISSUES--Does the statute conferring the censor board's authority violate free expression protections embodied in the First Amendment to the U.S. Constitution (as made binding on the state by the Fourteenth Amendment) and in Article 40 of the Maryland Declaration of Rights? Can the girls' nudity be adjudged obscene?

OPINION--Subsequent to the film company's filing of this appeal, we rendered an opinion in another censorship case also involving questions of free speech and publication. Relying therein upon an earlier U.S. Supreme Court case (in which a similar censorship code in Illinois was ruled not void on its face as an invasion of constitutional guarantees), we held that provisions and requirements of the Maryland code are not unconstitutional infringements. Accordingly, appellant's contentions here must be rejected.

However, in adjudicating previous state cases involving allegations of obscenity in motion pictures and magazines, we determined that mere nudity is not strictly obscene. There is nothing in the record here to indicate that the essential facts of the case at bar are basically any different. Accordingly, we conclude that the censors' action deleting the girls' boat nudity scenes was unwarranted.

Reversed.

. . .selling purportedly obscene nudist magazines in violation of a local ordinance.

Royal News Co. v. Schultz (1964)
United States District Court, Eastern Dist. Michigan, Southern Div.

230 F.Supp. 641 (E.D.Mich. 1964) *Aff'd as modified*, 350 F.2d 302 (6th Cir. 1965)

FACTS--In its municipal court, the city of Highland Park (located in Wayne County) had charged the House of Books retail shop and one of its officers with selling purportedly obscene nudist magazines in violation of a local ordinance. Alleging that the city was threatening to seize future issues, the shop then sought and obtained from this court (1) a ruling that as matters of fact and law the magazines are not obscene under the applicable federal standard, and (2) an injunctive order restraining city officials from seizing the magazines and conducting criminal prosecutions.

Thereafter, Wayne County (not a party to the Highland Park case) obtained from the county Circuit Court an order restraining the distribution of certain magazines--some of which were covered by this court's previous order--and also charging the shop in Recorder's Court and (on the complaint of a state police officer) in Common Pleas Court with selling the magazines. The shop now moves to hold the city officials and the state police officer in contempt of this court's injunctive order.

ISSUES--In considering the contempt remedy proposed by the shop, should the court broaden the scope of the injunctive order against the *city* officials so as to include *county* officials? Should the latter be held in contempt?

OPINION--Recognizing that county officials had cooperated with city officials and had actual notice of the injunctive order, we hold the former to be within its terms. The county's institution of criminal proceedings with respect to the specific magazines considered by this court in the earlier proceeding involving the city was obviously intended to harass the plaintiff in an attempt to circumvent the injunctive order. To permit the county to do that which we have enjoined the city from doing would be a stultification of the judicial process.

Since it may surely be assumed that the county will respect this decision, it is unnecessary to hold the individuals in contempt.

Order in accordance with opinion.

FURTHER PROCEEDINGS (1965)
United States Court of Appeals, Sixth Circuit

OPINION--The granting of an injunctive order halting county prosecution under

the local ordinance was within the power of the District Court. Nevertheless, we hold that the order should be modified--in accordance with Rule 65(d) of the Federal Rules of Civil Procedure requiring that such orders be "specific in terms"--so as to specifically include the county officials. It shall not, however, be construed to restrain separate prosecution under appropriate state statutes.

A large quantity of nudist magazines and books was confiscated and a local dealer arrested for purportedly trading in obscene publications. . .

Outdoor American Corp. v. City of Philadelphia (1964)
United States Court of Appeals, Third Circuit

333 F.2d 963 (3d Cir. 1964) *Cert. denied*, 379 U.S. 903, 85 S.Ct. 192, 13 L.Ed.2d 176 (1964)

FACTS--A large quantity of nudist magazines and books was confiscated and a local dealer arrested for purportedly trading in obscene publications in violation of a state statute. Thereupon, the publisher and distributor--together with the dealer--brought suit against city officials in U.S. District Court. They prayed therein for a declaration that the publications are not obscene and for an injunction against criminal prosecution.

The District Court dismissed the complaint [in an unreported opinion] on the ground that clear and imminent irreparable injury justifying federal interference in the state criminal proceedings had not been shown. The plaintiffs now appeal to us.

ISSUE--Was the District Court correct in declining to exercise its equitable power?

OPINION--A federal court of equity should not ambush state courts on the fundamental basis of obscenity. All matters which the plaintiffs brought in the District Court may be raised at the state level, with the right of petition to the U.S. Supreme Court for writ of certiorari after exhaustion of state remedies. Also, there is no reason to believe that the city officials will either enforce the obscenity statute in question against the distributor and publisher or fail to return the confiscated publications to the dealer if the latter prevails in the criminal proceedings. Affirmed.

CERTIORARI DENIED (1964)
Supreme Court of the United States

RELATED LITIGATION--The dealer's arrest and the subsequent hearing on his civil suit were reported in news bulletins on Philadelphia radio station WIP. The texts thereof referred to the dealer as a "smut peddler." Claiming spoiled business relationships as a result, the dealer brought a libel action in U.S. District Court against the station's owner. Based upon evidence that WIP had relied upon hearsay and conjecture, the jury found that station personnel bore outrageous motives and operated with reckless indifference to truth; it awarded \$25,000 general damages and \$3/4 million punitive damages (the latter reduced on remittitur to \$1/4 million). *Rosenbloom v. Metromedia, Inc.*, 289 F.Supp. 737 (E.D.Pa. 1968).

However, the U.S. Court of Appeals reversed on grounds that the evidence lacked sufficient substance and clarity to show the required malice. 415 F.2d 892 (3d Cir. 1969). The U.S. Supreme Court granted certiorari. 397 U.S. 904, 90 S.Ct. 917, 25 L.Ed.2d 85 (1970). By a five-to-three vote (five separate opinions in all, with one justice not participating), the high court affirmed the appeals court judgment. 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971).

[HISTORICAL NOTE--Outdoor American Corporation was headed by Mervin Mounce, a well-known nudist who had earlier prevailed in the U.S. Supreme Court against the government in the seizure case titled *United States v. 4200 Copies* (*supra* at page 139).]

Invoking a state obscenity statute in connection with the sale of nudist magazines. . .

Dale Book Co. v. Leary (1964)
United States District Court, Eastern District of Pennsylvania

233 F.Supp. 754 (E.D.Pa. 1964) *Aff'd*, 389 F.2d 40 (3d Cir. 1968)

FACTS--Invoking a state obscenity statute in connection with the sale of nudist magazines, Philadelphia officials ordered the seizure of several thousand such copies at a newsstand located at 18th and Arch streets and the dealer's arrest. Within a few days, similar seizures and arrests occurred elsewhere in the city. The magazine distributor suffered monetary losses through (1) an obligation to give the arrested dealers credit for the seized copies, and (2) cancellation of their orders for future issues.

The distributor now files a petition for injunction under federal civil rights statutes against certain of the officials. He contends therein that the police commissioner's attendance at a book-burning conducted by a particular pastor demonstrated vindictiveness.

ISSUES--Does the distributor have standing? Should the court consider an injunction? Are the magazines obscene?

OPINION--The arrests of the dealers and the seizures of their magazines confer no standing upon the plaintiff distributor to bring civil rights challenges.

In the possible circumstance that a higher court were to rule that the foregoing finding is in error, the petition for injunction will now be ruled upon in order to obviate a future remand: In view of the pendency of the state proceedings and in the absence of a showing of irreparable injury not compensable in money damages, neither inconvenience nor financial loss can be recognized as a ground for federal intervention. The court will thus follow *Outdoor American Corp. v. City of Philadelphia* [*supra* at page 158] and abstain.

Against the contingency that a higher court may find abstention to have been in error, this opinion will now address the obscenity issue on its merits: A court of equity need not separate the more offensive publications from the less offensive. In evaluating questioned material, the overall impact upon the community is considered, rather than the prurience of any particular page of any individual publication. Under such a standard, an examination of twenty-five pictorial specimens of the seized material reveals that in some the female external genitalia and mammary apparatus are too prominent or overreach customary limits of candor. Accordingly, it must be found that the magazines are obscene as a whole; moreover, plaintiff failed to prove deprivation of any federal constitutional rights.

Judgment for defendants.

FURTHER PROCEEDINGS (1968)

United States Court of Appeals, Third Circuit

ARGUMENT OF CITY--As a direct result of a U.S. Supreme Court decision (in an unrelated case) holding that there may be no seizure of publications prior to an adversary hearing before a court, all prosecutions against the dealers were terminated in their favor. The City now argues that the instant appeal of the District Court opinion is, therefore, moot.

OPINION--We are satisfied that the District Court judge did not abuse his discretion by abstaining. However, we accept the City's argument that the cause of action for an injunction is moot. Any claim for damages should be dealt with in state court. Affirmed.

Western Nudist. . . evaluated as obscene by the City Counsellor and the Associate Prosecuting Attorney. . .

State v. Vollmar (1965)
Supreme Court of Missouri, Division No. 1

389 S.W.2d 20 (Mo. 1965)

FACTS--On successive days, two nonuniformed St. Louis vice squad detectives entered the House of Publications at 719 Pine Street, purchasing a different magazine on each occasion. While the contents of the first are not specified, both it and the second, *Western Nudist*, were later evaluated as obscene by the City Counsellor and the Associate Prosecuting Attorney. Shortly thereafter, the detectives returned a third time and--informing the store manager that they desired something to generate interest at an upcoming stag party--asked about another magazine on display, *Sun Fun*. Producing a copy for the detectives' examination, the manager remarked that pictures of nudists therein show "everything." The detectives purchased the magazine and immediately placed the manager under arrest for knowingly possessing obscene publications with intent to sell. Next, they searched the premises and seized as evidence a quantity of miscellaneous nudist magazines (one is printed in Danish) selected from thousands of publications of various kinds.

In the Court of Criminal Correction, the trial judge--reserving questions of community standards for the jury's determination--sustained prosecution objection to proffered testimony by a *St. Louis Globe-Democrat* reporter and a photographer. Deliberating under an instruction that "obscene" refers to something indecent--which, in turn, arouses lewd and lascivious thoughts in the susceptible--the jury found the manager guilty.

ISSUES--Were the arrest, search, and seizure (all made without warrant) proper? Are the magazines protected? Is there proof of scienter? Did the trial court properly instruct the jury relative to the legal significance of the word "obscene"?

OPINION--[The Supreme Court has jurisdiction of this appeal because constitutional questions have been presented.]

It is elementary that police may make an arrest when there is reasonable cause to believe a crime has been committed. Also, it is settled law that following an arrest for possessing obscene publications, search of the arrestee's person and premises for the purpose of identifying similar publications for seizure is permitted.

In recognition that these magazines are replete with photographs--many in color--brazenly depicting genitalia and pubic hair of male and female nudists (including close-ups of a number of attractive, shapely women 16-25 years of age), we deem them outside the scope of protected speech or press. Accordingly, the

trial court did not err in overruling defendant's motion for acquittal.

In view of pictures of nudes appearing on all of the front covers and defendant's ability to describe the contents of the copy requested by the detectives, there was ample evidence from which the jury could reasonably find that defendant was aware of the offensive character of the magazines.

However, contrary to the *susceptible* person standard used by the trial court to instruct the jury, the approved test for obscene material requires a determination of whether to an *average* person applying contemporary community standards the dominant theme appeals to prurient interest. Thus, we find the instruction reversibly erroneous.

Reversed and remanded for a new trial.

Four magazines (viz., *Urban Nudist*, *Western Nudist*, *American Nudist*, and *Suntan*). . . advocating the nudist mode of living were found obscene by a trial court.

State v. Martin (1965)
Circuit Court of Connecticut, Appellate Division

3 Conn.Cir. 309, 213 A.2d 459 (1965)

FACTS--Four magazines (viz., *Urban Nudist*, *Western Nudist*, *American Nudist*, and *Suntan*), containing full-page color or black and white photographs of nude persons together with text explaining and advocating the nudist mode of living, were found obscene by a trial court. Hence, they were condemned as a nuisance and ordered confiscated and destroyed. The defendant--Martin's News Service, Inc.--now appeals to us.

ISSUE--Are the magazines substantially beyond customary limits of candor and, therefore, suppressible for lack of constitutional protection?

OPINION--*Sunshine Book Co. v. Summerfield* [*supra* at page 136] is decisive of the instant appeal. That is to say, it seems to us that the U.S. Supreme Court's having granted certiorari and reversed [*i.e.*, overturned the judgment that had denied Sunshine the injunction it was seeking against the Post Office] must mean that nudist publications are not to be deemed obscene. Accordingly, the judgment of the court below is set aside and the case remanded to vacate the order of confiscation and destruction.

DISSENT--One judge dissents. [No reason is given.]

. . . seizure of 107 nudist publications. In connection therewith, the store operator was arrested on a charge of violating an obscenity statute. . .

Rosenbloom v. Commonwealth (1966)
Supreme Court of Appeals of Virginia

Unreported (Va. 1966) *Rev'd*, 388 U.S. 450, 87 S.Ct. 2095, 18 L.Ed.2d 1312 (1967)

FACTS--A retail store in the heart of downtown Richmond (The Booktrader, 211 N. 7th Street) carries a variety of publications, including those of specialized or technical content. Shortly after a police officer entered the premises and purchased a German nudist magazine, a police lieutenant led a contingent of officers in a seizure of 107 nudist publications. In connection therewith, the store operator was arrested on a charge of violating an obscenity statute, found guilty in police court, and fined.

On appeal to the local court of record, the owners of a Virginia nudist resort (Buck's-Kin Lodge) and the editor of a newspaper (*Richmond News Leader*) testified in the store operator's behalf that they regard nudism as harmless to society. Nevertheless, the judge of that court--characterizing such assertions as "so much manure and so little grass"--upheld the police court. The case is now here on a petition for writ of error and supersedeas.

ISSUE--Are photographs of nudists, with pubic hair showing, obscene?

OPINION--Petition rejected; judgment affirmed.

CERTIORARI GRANTED (1967)
Supreme Court of the United States

ARGUMENT OF COMMONWEALTH--The public has a right to keep the rattlesnakes of obscenity out of the public square where the venom will poison the minds of men, women, and children.

OPINION--Per Curiam. Reversed on the basis of *Sunshine Book Co. v. Summerfield* [*supra* at page 136].

SEPARATE OPINION--One justice would affirm based upon minority opinions in other cases not, however, involving recreational nudity.

. . .the seizure of. . . *American Nudist* and *Urban Nudist*. . . all were in violation of the state obscenity code.

City of Phoenix v. Fine (1966)
Court of Appeals of Arizona

4 Ariz.App. 303, 420 P.2d 26 (1966)

FACTS--Following the seizure of several sample publications (including the magazines *American Nudist* and *Urban Nudist*) from a downtown store, the City filed a complaint in superior court, Maricopa County, that all were in violation of the state obscenity code. Without having read the publications, the judge issued on the same day an *ex parte* temporary restraining order halting further sale or distribution. At a hearing ten days later to show cause why the order should not be made permanent, the store owner moved to quash and to dismiss on the ground of unconstitutional prior restraint upon freedom of the press. Both motions were denied; the temporary restraining order was continued by stipulation pending trial on the merits.

At the trial, the Assistant City Attorney, testifying solely with regard to the circumstances under which the publications had been taken, was the only witness. The owner, invoking the Fifth Amendment, declined to testify. Without explanation, the judge found certain of the publications not obscene but others--including the nudist magazines--obscene. He enjoined the latter's sale and distribution. This is defendant's appeal from that judgment.

ISSUES--Did the trial judge's signing of the temporary restraining order, without a prior adversary hearing or any showing of immediate and irreparable damage, violate the store owner's constitutional rights? Does the code define "obscenity" with sufficient specificity? Does the record in this case permit a finding of obscene content (viz., a showing that to an average person applying contemporary community standards, the dominant theme of the publications as a whole appeals to prurient interests and is utterly without redeeming social value)?

OPINION--The extraordinary procedure followed here, by which the superior court issued the temporary restraining order without notice or hearing, violated rights protected by the Fourteenth Amendment. Since such violation infected the proceedings from the outset, reversal of the injunction order is required, irrespective of any ultimate conclusion on the obscenity questions.

It is our duty to sustain Arizona's statutes when reasonable interpretation so permits. This statute's definition of "obscenity" is consonant with both the American Law Institute's Model Penal Code and federal case law. Hence, we hold the language to be acceptable.

However, by not having introduced evidence purporting to show that the challenged items satisfy the legal criteria for establishing obscene content, the City failed to meet its burden of proof. Hence, the superior court's injunction--which to be valid must necessarily be predicated upon some supportable obscenity finding--lacks a proper foundation and, therefore, is unwarranted. We cannot allow a trial judge to rely upon either his own ideas or such sources as psychological works, literary criticisms, and social surveys which he may consult; the adversaries would then have no opportunity to challenge these "experts" or present contrary views. Indeed, the nudist magazines involved here appear to represent the sincere philosophy of an organized group whose legitimacy has not been questioned.

Reversed and case dismissed.

. . .two nudist magazines. In connection therewith, the shop operator was subsequently indicted for violating an obscenity statute outlawing material appealing to prurient interest.

People v. Biocic (1967)

Appellate Court of Illinois, First District, Second Division

80 Ill.App.2d 65, 224 N.E.2d 572 (1967)

FACTS--A book shop in the 400 block of South State Street, Chicago, carries a variety of publications. Two magazines in its inventory, *Nudist Colorama* and *Utopia*, are devoted to nudist living. Both contain photographs of men, women, and children engaging in activities such as swimming, volley ball, tennis, boating, and lounging; some depict genitalia, while others show partially or fully clothed persons. Interspersed throughout one of them are reproductions of classical art portraying nudes. These magazines also include a number of articles and editorials describing, *e.g.*, the "humanness" of nudism.

A police officer entered the shop and purchased copies of the two nudist magazines. In connection therewith, the shop operator was subsequently indicted for violating an obscenity statute outlawing material appealing to prurient interest. A trial was held in circuit court, Cook County. The judge--taking judicial notice that the shop is located in proximity to nationally known department stores and places of entertainment for adults of all ages--found that any innate obscenity relative to "girly" publications also offered for sale is not a "literary contagion" affecting the remainder, including the nudist magazines. When the judge evaluated the latter on their merits, he found them not obscene as a matter of law and, therefore, entitled to First Amendment protection. Accordingly, the indictments were dismissed; the People now appeal to us.

ISSUES--Are the nudist magazines obscene? Did the trial judge err in using his personal knowledge to take judicial notice of the respectability of the area in which the shop is located? Need the judge have evaluated the magazines against a listing in the statute of the kinds of evidence which may be considered in determining the presence of obscenity?

OPINION--Nothing in these nudist magazines portrays sex in a morbid or shameful manner. Hence, the material--including frank and revealing nudity in the photographs--cannot be regarded as dirty or lewd or otherwise appealing to prurient interest. To the contrary, the magazines expound the virtues of nudist living and advance the theory that nudism has a place in our culture. The nudists' poses are much like those seen elsewhere in photographs of fully clothed persons, while the action shots depict normal recreational pursuits. Nudity without

lewdness is not obscene.

Trial courts are presumed to be as well informed as the public generally. They may take judicial notice of that which everyone knows to be true.

The statutory listing of the kinds of evidence establishing obscenity serves only as a guide. However, the trial judge's reference to literary contagion demonstrates that he did consider the content of the nudist magazines relative to that of other publications on the shop racks.

Affirmed.

International Nudist Sun contains . . . photographs of nude men and women . . . judge wants to know if a freshly shaved mons Veneris on several of the females is obscene.

People v. Noroff (1967)
California Court of Appeal, Second District

58 Cal.Rptr. 172 (Cal.App. 1967) *Vac'd*, 67 Cal.2d 791, 63 Cal.Rptr. 575, 433 P.2d 479 (1967) *Cert. denied*, 390 U.S. 1012, 88 S.Ct. 1261, 20 L.Ed.2d 161 (1968)

FACTS--The magazine *International Nudist Sun* contains thirty-two pages of text and photographs of nude men and women in both indoor and outdoor settings. In connection therewith, an individual and Mag's Incorporated were charged in the municipal court, Los Angeles Judicial District, with violating a penal code section proscribing possession for distribution of obscene matter.

After examining the magazine in chambers, the trial judge (1) ruled that it falls within the protection of the First and Fourteenth amendments, (2) concluded that it is not obscene, and (3) granted motions to dismiss. The People appealed the dismissals to the superior court. Upholding the trial judge, that court has now certified the proceedings to us.

ISSUE--Should the trial judge have submitted certain factual questions to a jury?

OPINION--The circumstances here warranted an inquiry into such aspects as defendants' manner of presenting the material (*e.g.*, the significance--if any--of a freshly shaved mons Veneris on several of the females) and prevailing community standards of acceptability, matters for expert testimony and jury determination. A judge would have no specialized competence in these areas. Reversed.

HEARING ON APPEALS COURT REVERSAL OF DISMISSAL (1967)
Supreme Court Of California, In Bank

ISSUES--Was there pandering here, *i.e.*, an appeal to customers' erotic interest? Is the magazine obscene in the constitutional sense?

OPINION--We reject the People's pandering argument because (1) it was not raised in the indictment, and (2) there is no such statutory offense.

It would be hard to conclude that the articles in this magazine--dealing with such matters as the perceived rightness of nudism in the eyes of God and the ability of nude swimmers to avoid fungus organisms associated with moist bathing suits--are in bad taste. Viewed as a whole, the work seems in no sense calculated to stimulate a predominantly sexual response. Indeed, the U.S. Supreme Court has

reversed numerous decisions of the federal circuit courts which had held that magazine pictures focusing upon genitalia are obscene. The judiciary cannot place legal fig leaves upon presentations of the human figure; ultimately, the marketplace will reject and discard whatever a discerning public may perceive as offensive, dull, or tawdry.

Judgment of the municipal court affirmed; opinion of the Court of Appeal vacated.

DISSENT--The magazine's pious platitudes and use of studio props are window dressing belying a prurient emphasis upon adult genitalia. If redeeming social importance can be ascribed to this obscene publication, justice is truly blind.

CERTIORARI DENIED (1968)
Supreme Court of the United States

. . .newsstands selling nudist magazines were charged with violating an obscenity ordinance.

Felton v. City of Pensacola (1967)
District Court of Appeal of Florida, First District

200 So.2d 842 (Fla.App. 1967) *Cert. denied*, 204 So.2d 210 (Fla. 1967) *Rev'd*, 390 U.S. 340, 88 S.Ct. 1098, 19 L.Ed.2d 1220 (1968)

FACTS--The police chief instructed one of his officers to ascertain whether obscene publications were being sold in the city. Thereupon, the officer visited various newsstands (without, however, obtaining a search warrant) and seized a quantity of nudist magazines. Each of them contains photographs of nude men, women, and children engaging in recreation at a beach or pool.

Five individuals involved in operating the newsstands were then charged with violating an obscenity ordinance. At an ensuing municipal court trial, their counsel stipulated that the magazines would become part of the record. All five were convicted; the judgments were affirmed by the circuit court, Escambia County.

ISSUES--Is there a constitutional problem with respect to the seizures? Are the magazines obscene?

OPINION--The seizure procedure, allowing police such broad discretion, lacked the safeguards due process demands to assure nonobscene material the constitutional protection to which it is entitled. However, having waived their right to object to the magazines' admission into evidence, the operators are now precluded from pressing this issue.

As to the magazines themselves, the repeated appearance of some persons in posed photographs indicates that professional models were sometimes used, further suggesting an absence of newsworthy pictures of chance scenes at nudist gatherings that might appeal to the "card-carrying" nudist. Accordingly, we think that the only sales value of these magazines is their showing of pictures excluded from other publications through the latter's deference to the moral code of the community. Applying the accepted contemporary standards test, the trial court could legitimately find that the dominant theme of the magazines appeals to prurient interest. This appellate court, far removed from the city where the events occurred, may not substitute its judgment when sufficient, competent evidence supports the factual findings.

Affirmed.

CERTIORARI DENIED (1967)
Supreme Court of Florida

CERTIORARI GRANTED (1968)
Supreme Court of the United States

OPINION--Per Curiam. Convictions reversed by the majority on the basis of another high court case (not, however, involving recreational nudity) wherein obscenity findings relative to magazine pictures of unclad females had been overturned. Voting separately, the Chief Justice would reverse on the ground that the trial court failed to adhere to a previously enunciated obscenity standard (in a second case not involving recreational nudity); one Associate Justice would affirm.

. . .the judge found both nudist magazines obscene on the basis of a limited number of photographs of prone females which--to him--are enticing and provocative.

Donnenberg v. State (1967)
Court of Special Appeals of Maryland

1 Md.App. 591, 232 A.2d 264 (1967)

FACTS--Attendant to an investigation of Baltimore retail stores believed to be carrying obscene publications, a plain-clothes police officer visited the Book Nook (216 E. Baltimore Street.) When he began to remove the plastic wrapper from an issue of the magazine *International Nudist Sun*, a store employee informed him that he should pay for it first. Thereupon, the officer identified himself, announced that he was making an inspection, and offered to purchase the magazine. The employee replied that he was sick and that the store was closing permanently. At this point, the officer took the magazine without paying and departed. Meanwhile, another officer purchased selected publications elsewhere in the city, including a different issue of *International Nudist Sun* from the Cut Price Book Company (645 N. Howard Street).

Next, the proprietors and employees of the stores involved were charged with selling or giving away obscene material. In a nonjury trial in the criminal court, the judge found both nudist magazines obscene on the basis of a limited number of photographs of prone females which--to him--are enticing and provocative. The proprietors and employees were convicted.

ISSUE--Did any of the store personnel violate the obscenity code? (Under U.S. Supreme Court guidelines, publications categorizable as hard-core pornography--*i.e.*, where the focus is upon the morbid, perverse, and bizarre, as recognized by the insult offered to sex and human spirit--are rendered utterly unprotected. For publications not reaching such a level, a trial judge may formulate an obscenity test based upon evidence submitted on "contemporary community standards.")

OPINION--The record makes clear that the Book Nook employee neither sold nor gave away the magazine (as charged). Accordingly, the trial court should have acquitted him; we therefore reverse his indictment.

As to the other appellants, notwithstanding that the nudist photographs depict fully exposed female breasts and the genitalia of both sexes (though none of the men have erections), we do not think they are hard-core or otherwise scream for all to hear that they are obscene. But the absence from this record of expert testimony and full argument on the matter of community standards precludes our applying an obscenity test. Accordingly, the indictments must be reversed.

However, as the State may be able to facilitate a future obscenity test by producing the required community standards testimony through qualified expert witnesses, we remand the cases of these other appellants for a new trial.

Avant Nude containing articles on nudism and pictures of nude men and women both separate and together. . . subsequently charged by affidavit with violating an indecent literature ordinance. . .

City of Youngstown v. DeLoreto (1969)
Court of Appeals of Ohio, Mahoning County

19 Ohio App.2d 267, 48 Ohio Op.2d 393, 251 N.E.2d 491 (1969)

FACTS--Police officers entered a small convenience store at 2112 South Avenue during business hours. From a magazine rack in a narrow aisle opposite grocery shelves, they selected one copy each of several publications believed obscene, including the magazine *Avant Nude* containing articles on nudism and pictures of nude men and women both separate and together. The store operator voluntarily waived payment. He was subsequently charged by affidavit with violating an indecent literature ordinance, convicted in the municipal court, and fined \$200 plus costs.

ISSUES--Was the affidavit, which charged the offense solely in statutory language without the elements of guilty knowledge (*scienter*) and guilty purpose (*mens rea*), sufficient? How should substantive questions relative to constitutionality and obscenity be resolved?

OPINION--Omission from an affidavit of material elements of a crime (in this instance, guilty knowledge and purpose) is fatal to its validity. Accordingly, the trial judge erred in overruling a motion to dismiss.

Our decision on the above point would ordinarily dispose of the case, but counsel for both sides have requested that we address all issues to provide guidelines for future efforts in this area. Thus, we hold that the *voluntary* surrender of the magazines to the police--although fostering self-censorship--did not constitute unlawful search or seizure on the part of the officers. Next, pornography is not art, no matter how pretty the colors. While many of the nudist pictorials portray acceptable activity, several show the knees and legs of females in a manner that fully exposes the genital area, including the sex organs. Such exposure is unusual even for a married woman in the presence of her husband in their private bedroom. That these pictures can be detrimental to moral standards is supported by criminologists and clergy. Although advocacy of legislation is not the proper function of a court, we do feel that--in contrast to written material which is constitutionally protected--pictorial matter is less an expression of an idea than a representation of conduct and, hence, amenable to legislation rendering judicial

determinations of what is prohibited unnecessary.
Conviction reversed.

The magazine *Arcadia* contains photographs of naked men and women in nudist camp. . . Seller charged with violating an obscenity ordinance.

City of Chicago v. Geraci (1970)
Supreme Court of Illinois

46 Ill.2d 576, 264 N.E.2d 153 (1970)

FACTS--The magazine *Arcadia* contains sixty-three pages of text and unretouched photographs, many in color, of completely naked men and women depicted together in a nudist camp setting. Although genitals are prominently shown, the various indoor and outdoor activities in which the models are seen engaging are nonsexual in nature.

Police officers purchased an issue from a defendant below. He was charged with violating an obscenity ordinance, convicted by the circuit court for Cook County sitting without a jury, and fined. That judgment was consolidated with others (pertaining to nonnudist magazines) for argument here.

ISSUE--Is this nudist magazine constitutionally protected?

OPINION--In view of the U.S. Supreme Court's having summarily reversed obscenity convictions involving similar nudist magazines in *Sunshine Book Co. v. Summerfield*, *Rosenbloom v. Commonwealth*, and *Felton v. City of Pensacola* [*supra* at pages 136, 165, and 172, respectively], we are bound by these First Amendment freedom decisions. Therefore, we must hold the instant magazine to be constitutionally protected. Conviction reversed.

. . .order restraining . . . theatre. . . from screening nudist films. . .

Mini-Art Operating Company, Inc. v. Smith (1971)
United States District Court, W.D. Arkansas, Texarkana Div.

Injunction denied, 336 F.Supp. 638 (W.D.Ark. 1971) *Cir. Ct. rev'd sub nom.*
Mini-Art Oper. Co., Inc. v. State, 253 Ark. 364, 486 S.W.2d 8 (1972)

FACTS--At the behest of the State, the circuit court for Miller County entered a temporary restraining order (1) enjoining the operator, lessor, and mortgage holder of the Capri Theatre--located in this city's Ferguson Garden Addition--from screening nudist films; and (2) directing the sheriff to padlock the premises. During a subsequent hearing relative to issuance of a permanent abatement-of-nuisance injunction, the State alleged that the individuals involved with the theatre were aiding and abetting in the violation of an Arkansas statute making it "unlawful to advocate, demonstrate, or promote nudism or to permit one's premises to be used for that purpose."

After the close of the hearing, the circuit court entered another order which permanently enjoined the screening of nudist films. The padlock was then removed. The theatre operator now brings this federal action to restrain and enjoin state and local officials from further interference with operation of the theatre.

ISSUE--May a federal court nullify the state court order?

OPINION--For this court to grant the relief sought would amount to a stay of the state proceedings. Under the U.S. Constitution, lower federal courts are not empowered to review state court cases unless warranted by a federal interest. Relative to the case at bar, it has not been shown that the facts herein involve such an interest; hence, this court is precluded from granting an injunction. Plaintiff's motion therefor is denied.

FURTHER PROCEEDINGS *sub nom.* Mini-Art Co., Inc. v. State (1972)
Supreme Court of Arkansas

FACTS--The theatre operator now appeals the circuit court's injunction order [discussed above] to us.

ISSUE--Does the screening of a nudist film constitute a violation of the statute prohibiting nudism?

OPINION--Penal statutes must be strictly construed. Since the theatre building was not being used as a nudist camp, we therefore must hold that the underlying basis

for the injunction (*i.e.*, alleged violation of the antinudism statute) was without foundation. In other words, to say--as the prosecutor does--that screening of a nudist film constitutes violation of an antinudism statute is no more logical than to say that similar screening of a film depicting a person striking another constitutes violation of an assault statute. Moreover, there is no proof that the purpose of the films is to promote or encourage nudist camps. Reversed.

[EDITORIAL COMMENT--Arkansas continues to retain an antinudism statute. Readers may find the provisions thereof in the Arkansas Code of 1987 Annotated, Volume 3, Title 5, Subchapter 3, Section 68-204 at pages 567-8.]

State penitentiary staff personnel had refused to allow two inmates to receive certain matter, viz., nudist publications...

Gall v. Scroggy (1987)
Court of Appeals of Kentucky

725 S.W.2d 867 (Ky.App. 1987)

FACTS--State penitentiary staff personnel had refused to allow two inmates to receive certain matter, viz., nudist publications and high school and university yearbooks. The inmates then filed a *pro se* suit in Lyon Circuit Court to enjoin the warden, senior captain, and mail clerk from continuing such refusal which assertedly violates federal and state constitutional rights, state regulations, and an inmate-staff agreement.

Prior to the issuance of any summons, the trial judge dismissed the complaint *sua sponte* for failure of the inmates to have stated a cause of action upon which the requested relief could be granted. They now appeal the dismissal to us.

ISSUE--Did the trial judge improperly dismiss the complaint?

OPINION--Although this state's Rules of Civil Procedure specifically provide for dismissals of complaints upon motions therefor by named defendants in suits, the rules are silent with respect to *sua sponte* dismissals by judges. While the latter class do emanate from the federal courts, there is a split among the various circuits as to whether a notice or hearing is first required. We believe the position taken by the Sixth Circuit [having jurisdiction in Kentucky]--that dismissals without such notice or hearing frustrate our traditional adversarial system of justice by casting the court in the role of a proponent, rather than an independent entity--most closely comports with the mandates of procedural due process. Moreover, dismissals involving *pro se* plaintiffs unskilled in the art of pleading are particularly prejudicial.

For the above reasons, the judgment of the Lyon Circuit Court is vacated and the case remanded for further proceedings consistent with this opinion.

POSTSCRIPT

With the emergence in the latter part of the twentieth century of the modern naturist movement, extending the scope of nude recreation from secluded nudist colonies (a quaint-sounding term in today's world) to beaches and parks of mainstream society, the pattern of litigation has shifted direction. Thus, the last criminal case on private nudism, category [A], antedated the first such case on public nudity, category [B]. The tapering off both of the former and of the book/magazine/motion picture cases, category [C], can perhaps be explained by a series of nudist victories in the courts as noted herein, specifically the acceptance of privacy rights in some states and First Amendment rights by the U.S. Supreme Court.

As shown by the category [B] cases, court decisions on public nudity have been mixed. In addition to the formal cases abstracted herein, the writer knows of two other recent appellate opinions not published in a standard law reporter (and, hence, not included in this volume), both of which take a positive view of nude recreation. In 1988, California's Placer County Superior Court, Appellate Department, reversed (in *People v. Bost*) the conviction of an individual arrested for nudity in the Bear Cove area of the Granite Bay portion of Folsom State Park, on the ground that then-state parks director Russell W. Cahill had effectively permitted, on a limited basis, clothing-optional use of facilities administered by that agency. In 1994, the Wisconsin Court of Appeals affirmed (in *County of Milwaukee v. Froemming*) a local circuit court's dismissal of an indecent exposure charge against an individual cited for nudity on a secluded section of the Lake Michigan shoreline parallel to the 3400 block of North Lake Drive, on the ground that no citizen had complained.

Also, the 1992 decision of the New York Court of Appeals which invalidated application in recreational settings of a statute designed to outlaw bare-breasted waitresses--*People v. Santorelli* (abstracted at page 92 herein)--may be noteworthy. Nonetheless, that state's legislature could react by devising an alternative statute to correct the legal shortcomings which the court identified.

Gordon Gill
1995

NOTES

People v. Ring and *People v. Burke* were discussed in: 33 U.Mich.L.Rev. 936 (April 1935) 69 U.S.L.R. 346 (July 1935) and *The Body Taboo: Its Origin, Effect, and Modern Denial*, by Elton Raymond Shaw, M.A., Shaw Pblshng. Co., Wash. DC, 1937.

People v. Hildabridle was referenced in 51 A.B.A.J. 564 (June 1965).

People v. David (in the context of nudism and naturism generally) was discussed in *The New Yorker*, March 19, 1990, pp. 73-98.

Principles of law dealing with nudism and naturism were discussed in: 20 U.Rich.L.Rev. 589 (Spring 1986) 94 A.L.R.2d 1379-82.

An overview of nude beach law appeared in *Newsweek*, September 10, 1990, p. 60.

The nudist film *Garden of Eden*, the subject of five cases herein, was reviewed in: *Variety* (August 31, 1954) *Film Daily* (September 27, 1954).

References to the nudist magazine *Sunshine and Health*, published in a discussion of *State v. Lerner*, appeared in 13 U.AkronL.Rev. 522-3 (Winter 1980).

TABLE OF CASES

[Letter suffix indicates category in which case is grouped.]

- Baker v. State, 510 P.2d 1005 (Okla.Cr.App. 1973) [B]
- Bartholomew v. Staheli, 195 P.2d 824 (Cal.App. 1948) [A]
- Board of Supervisors v. Gaffney, 244 Va. 545, 422 S.E.2d 760 (1992) [A]
- Borough of Belmar v. Buckley, 187 N.J.Super. 107, 453 A.2d 910 (1982) [B]
- Bruns v. Pomerleau, 319 F.Supp. 58 (D.Md. 1970) [A]
- Campbell v. State, 169 Tex.Cr.App. 515, 338 S.W.2d 255 (1960), *Cert. denied*, 364 U.S. 927, 81 S.Ct. 356, 5 L.Ed.2d 267 (1960), *Reh'g denied*, 365 U.S. 825, 81 S.Ct. 703, 5 L.Ed.2d 704 (1961) [A]
- Chapin v. Town of Southampton, 457 F.Supp. 1170 (E.D.N.Y. 1978) [B]
- City of Chicago v. Geraci, 46 Ill.2d 576, 264 N.E.2d 153 (1970) [C]
- City of Cincinnati v. Walton, 76 Ohio L.Abs. 162, 3 Ohio Op.2d 352, 145 N.E.2d 407 (Ohio Mun. 1957) [C]
- City of Cincinnati v. Wayne, 23 Ohio App.2d 91, 52 Ohio Op.2d 95, 261 N.E.2d 131 (1970) [B]
- City of Phoenix v. Fine, 4 Ariz.App. 303, 420 P.2d 26 (1966) [C]
- City of Seattle v. Buchanan, 90 Wash.2d 584, 584 P.2d 918 (1978) [B]
- City of Youngstown v. DeLoreto, 19 Ohio App.2d 267, 48 Ohio Op.2d 393, 251 N.E.2d 491 (1969) [C]
- Commonwealth v. Botzum, 225 Pa.Super. 268, 302 A.2d 381 (1973) [B]
- Commonwealth v. Moniz/Rogers, 336 Mass. 178, 143 N.E.2d 196 (1957), *Further opinion*, 338 Mass. 442, 155 N.E.2d 762 (1959) [C]
- Craft v. Hodel, 683 F.Supp. 289 (D.Mass. 1988) [B]
- Dale Book Co. v. Leary, 233 F.Supp. 754 (E.D.Pa. 1964) *Aff'd*, 389 F.2d 40 (3d Cir. 1968) [C]
- Davis v. Gates, Unreported (9th Cir. 1992) *Cert. denied*, ___ U.S. ___, 113 S.Ct.

1846, 123 L.Ed.2d 470 (1993) [B]

Donnenberg v. State, 1 Md.App. 591, 232 A.2d 264 (1967) [C]

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Duvallon v. State, 404 So.2d 196 (Fla.App. 1981) [B]

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Elysium Institute, Inc. v. County of Los Angeles, 232 C.A.3d 408, 283 Cal.Rptr. 688 (1991) *Cert. denied*, 502 U.S. 1098, 112 S.Ct. 1180, 117 L.Ed.2d 424 (1992) [A]

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Excelsior Pictures Corp. v. Regents of University, 2 App.Div.2d 941, 156 N.Y.S.2d 800 (1956) *Aff'd*, 3 N.Y.2d 237, 165 N.Y.S.2d 42, 144 N.E.2d 31 (1957) *Reargument denied*, 3 N.Y.2d 942, 167 N.Y.S.2d LXXIII, 145 N.E.2d 895 (1957) [C]

Fanfare Films, Inc. v. Motion Picture Censor Board, 234 Md. 10, 197 A.2d 839 (1964) [C]

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Outdoor American Corp. v. City of Philadelphia, 333 F.2d 963 (3d Cir. 1964) *Cert. denied*, 379 U.S. 903, 85 S.Ct. 192, 13 L.Ed.2d 176 (1964) [C]

Parmelee v. United States, 72 U.S.App.D.C. 203, 113 F.2d 729 (D.C. Cir. 1940) [C]

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ABOUT THE AUTHOR. . . .

Gordon Gill holds a Bachelor of Science degree in Business Administration from the University of Maryland, where he majored in the economics of transportation. His early working career involved analysis of railroad operating and capital costs while in the employ of a major U.S. rail carrier. Rising to a midlevel managerial position, his chief responsibilities entailed testifying in legal proceedings relative to the reasonableness of freight and passenger rates and charges. It was during this period that he passed the examination for admission to practice before the Interstate Commerce Commission, entitling him to represent clients in matters adjudicated by that agency. Later, he became employed on its professional staff and assisted in drafting formal ICC decisions. Now engaged in writing on financial and legal subjects, he resides in Fairfax County, Virginia.

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