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Application of Indecent Exposure Statute to Nude Sunbathing, In re Smith 497 P.2d 807 (1972)

APPLICATION OF INDECENT EXPOSURE STATUTE TO NUDE SUNBATHING

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

Petitioner went to an isolated public beach, removed all his clothes, lay down on his back to sunbathe and fell asleep. Several hours later, petitioner was arrested. At the time of the arrest, several persons were present on the beach.[1] At no time had petitioner engaged in any activity directing attention to his genitals. Petitioner was convicted of indecent exposure for "wilfully[2] and lewdly[3] . . . expos[ing] his person, or the private parts thereof, in [a] public place . . . ."[4] On appeal, the California Supreme Court reversed and *held*: for an exposure to be committed "lewdly" within the meaning of the indecent exposure statute, the exposure must be intended for sexual purposes.[5]

At common law, the purpose of proscribing indecent exposure was to protect public morals by deterring acts which would either offend the community's sense of decency or tend to lower the community's moral standards.[6] The elements of the common law offense[7]

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1. The trial court summarized the police report as stating that "A young couple had just walked by [Smith]. A group of juvenile boys came out of the surf about fifty feet west of Smith. Three juvenile girls were lying on the beach approximately fifty feet south of Smith. One of the girls was looking up, looking in Smith's direction." *In re* Smith, 7 Cal. 3d 362 n.2, 497 P.2d 807 n.2, 102 Cal. Rptr. 335 n.2 (1972).

2. CAL. PENAL CODE § 7 (West 1970) provides: "The word 'willfully' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to."

3. *See* notes 23-27 *infra* and accompanying text.

4. CAL. PENAL CODE § 314 (West 1970) provides, in pertinent part, that: "Every person who wilfully and *lewdly* . . .1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby . . . is guilty of a misdemeanor." (Emphasis added.)

CAL. PENAL CODE § 290 (West 1970) requires that any person convicted of violating § 314 register with the chief of police of the city or county in which the person temporarily or permanently resides. *See* note 33 *infra.*

5. *In re* Smith, 7 Cal. 3d 362, 497 P.2d 807, 102 Cal. Rptr. 335 (1972).

6. *See* Truett v. State, 3 Ala. App. 114, 57 So. 512 (1912) (intentional exposure before other persons on a public highway held to offend public decency and affect public morals); Commonwealth v. Haynes, 68 Mass. (2 Gray) 72 (1854) (criminal charge held sufficient where it alleged, in part, that defendant "devis[ed] and intend[ed] the morals of the people to debauch and corrupt"); State v. Roper, 18 N.C. 213 (1835) (public exposure of the naked person constitutes an outrage on decency and public morality); Rex v. Gallard, 25 Eng. Rep. 547 (Ch. 1733) (indictment of

were an intentional[8] exposure of the person[9] in a public place[10] and in the presence of others.[11] Although a few states still retain the offense in its common law form,[12] indecent exposure is now commonly pro-

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women for running in common, naked above the waist, dismissed for lack of immodest or unlawful conduct); 33 MICH. L. REV. 936, 937 (1935). *Cf.* Winters v. New York, 333 U.S. 507, 515 (1948) (acts of gross and open indecency, injurious to public morals, are indictable at common law).

7. Indecent exposure was classified as a nuisance at common law and was punishable as a misdemeanor. Annot., 93 A.L.R. 996, 997-98 (1934).

8. The element of intent must always be alleged and proved before conviction. Hines v. Commonwealth, 308 Ky. 859, 215 S.W.2d 1014 (1948) (conviction reversed on the grounds that the jury was not instructed that defendant could be acquitted for lack of intent); Miller v. People, 5 Barb. 203 (Sup. Ct. N.Y. 1849) (conviction reversed where factual question of intent withheld from jury). *Accord,* 50 AM. JUR. 2d *Lewdness, Indecency, and Obscenity* § 17 (1970).

Proof of intent may be difficult to sustain. *See, e.g.,* Case v. Commonwealth, 313 Ky. 374, 231 S.W.2d 86 (1950) (intent not proved where witnesses' testimony conflicted as to exact place of exposure and where evidence did not show that defendant had attracted attention to his exposure). However, intent may be inferred from the circumstances surrounding the exposure. Truett v. State, 3 Ala. App. 114, 57 So. 512 (1912) (intent inferred from recklessness of defendant's conduct in exposing herself on public highway in presence of several persons); Messina v. State, 212 Md. 602, 130 A.2d 578 (1957) (intent inferred from exposure in automobile parked on public street).

9. Virtually all of the common law cases deal with exposure of the person's genital area. *E.g.,* State v. Walter, 16 Del. (2 Marv.) 444, 43 A. 253 (1895); Commonwealth v. Broadlands, 315 Mass. 20, 51 N.E.2d 961 (1943). *Cf.* Rex v. Gallard, 25 Eng. Rep. 547 (Ch. 1733) (women seen naked above waist in public common charged with indecent exposure).

10. Although the cases adopt slightly different interpretations of the public place aspect of the offense, it appears that the requirement will be satisfied if the exposure is made in a place where it is likely to be open to public view. *E.g.,* State v. Goldstein, 72 N.J.L. 336, 62 A. 1006 (1906), *aff'd mem.,* 74 N.J.L. 598, 65 A. 1119 (1907) (public place refers to any place where the exposure is likely to be seen by casual observers). *Accord,* Noblett v. Commonwealth, 194 Va. 241, 72 S.E.2d 241 (1952). *See generally* 67 C.J.S. *Obscenity* § 5, at 26 (1950).

11. An exposure capable of being seen by only one person is not an offense at common law. *E.g.,* Truett v. State, 3 Ala. App. 114, 57 So. 512 (1912); State v. Wolf, 211 Mo. App. 429, 244 S.W. 962 (1922); Regina v. Farrell, 9 Cox Crim. Cas. 446 (Ir. Crim. Ct. App. 1862). *Contra,* Commonwealth v. Bishop, 296 Mass. 459, 6 N.E.2d 369 (1937) (it is sufficient for conviction if the exposure is offensive to one or more persons). The requirement that the exposure must be committed where it is capable of being seen by other persons does not mean, however, that the exposure must actually be witnessed. Van Houten v. State, 46 N.J.L. 16 (1884); State v. King, 268 N.C. 711, 151 S.E.2d 566 (1966).

12. Case v. Commonwealth, 313 Ky. 374, 231 S.W.2d 86 (1950); Noblett v. Commonwealth, 194 Va. 241, 72 S.E.2d 241 (1952). Other states which do not have indecent exposure statutes are Delaware, Rhode Island and Tennessee.

hibited by statute.[13] A number of statutes have limited the offense of indecent exposure to instances in which the exposure is committed

13. ALA. CODE tit. 14, § 326 (1959); ALASKA STAT. § 11.40.080 (1970); ARIZ. REV. STAT. ANN. § 13-531 (1956); ARK. STAT. ANN. §§ 41-2701, 2703 (1964); CAL. PENAL CODE § 314 (West 1970); COLO. REV. STAT. ANN. § 40-9-15 (Supp. 1969); CONN. GEN. STAT. REV. § 53-220 (1958); FLA. STAT. ANN. § 800.03 (Supp. 1972); GA. CODE ANN. § 26-6101 (1953); HAWAII REV. STAT. § 727-1 (1968); ILL. ANN. STAT. ch. 38, § 11-9 (Smith-Hurd 1972); IND. ANN. STAT. § 10-2801 (1956); IOWA CODE ANN. § 725.1 (1950); KAN. STAT. ANN. § 21-3508 (1971); LA. CODE CRIM. PRO. art. 14, § 106 (1968); ME. REV. STAT. ANN. tit. 17, § 1901 (Supp. 1972); MD. ANN. CODE art. 27, § 122 (1957); MASS. GEN. LAWS ANN. ch. 272, § 53 (1968); MICH. STAT. ANN. § 28.567 (1963); MINN. STAT. ANN. § 617.23 (1964); MISS. CODE ANN. § 2290 (Supp. 1971); MO. REV. STAT. § 563.150 (1959); MONT. REV. CODES ANN. § 94-3603 (1947); NEB. REV. STAT. § 28-920 (Supp. 1967); NEV. REV. STAT. § 201.220 (1968); N.H. REV. STAT. ANN. § 570.6 (1955); N.J. REV. STAT. § 2A:115-1 (1937); N.M. STAT. ANN. § 40-34-20 (1953); N.Y. PENAL LAW § 245.00 (McKinney Supp. 1971); N.C. GEN. STAT. § 14-190 (1971); N.D. CENT. CODE § 12-21-10 (1960); OHIO REV. CODE ANN. § 2905.30 (Page Supp. 1971); OKLA. STAT. ANN. tit. 21, § 1021 (Supp. 1971); ORE. REV. STAT. § 167.145 (1971); PA. STAT. ANN. tit. 18, § 4519 (1963); S.C. CODE ANN. § 16-413 (Supp. 1971); S.D. CODE § 22-24-1 (Supp. 1972); TEX. PENAL CODE ANN. art. 526 (1952); UTAH CODE ANN. § 76-39-5 (Supp. 1971); VT. STAT. ANN. tit. 13, § 2601 (1958); VA. STAT. ANN. § 18.1-236 (1950); WASH. REV. CODE ANN. § 9.79.120 (1961); W. VA. CODE ANN. § 61-8-28 (1966); WIS. STAT. ANN. § 944.20 (1969); WYO. STAT. ANN. § 6-102 (1959).

In addition to these statutes, numerous local ordinances prohibit indecent exposure. Such ordinances typically employ a wide variety of standards as to what is considered indecent exposure. G. MUELLER, LEGAL REGULATION OF SEXUAL CONDUCT 58 (1961).

The statutes have generally incorporated the common law requisites of the indecent exposure offense. However, some statutes have altered slightly the "public place" element of the offense. For examples of cases interpreting these statutes, *see* Baker v. State, 39 Ala. App. 221, 96 So. 2d 821 (1957) (exposure prohibited when made in any public place or on the private premises of another, or so near thereto as to be seen from such premises); Weymouth v. State, 368 S.W.2d 610 (Tex. Crim. 1963) (intentional exposure is within the statutory proscription if committed in a public place or in or near a private house).

In addition, several cases have implied that the consent of witnesses may be a valid defense to a charge of indecent exposure, although such a defense is not authorized by statute. Excelsior Pictures Corp. v. Regents of Univ. of State of N.Y., 3 N.Y.2d 237, 144 N.E.2d 31, 165 N.Y.S.2d 42 (1957); People v. Burke, 267 N.Y. 571, 196 N.E. 585 (1935). *Contra,* State *ex rel.* Church v. Brown, 165 Ohio St. 31, 133 N.E.2d 333, *appeal dismissed,* 352 U.S. 884 (1956); Campbell v. State, 169 Tex. Crim. 515, 338 S.W.2d 255, *cert. denied,* 364 U.S. 927 (1960). In Michigan, whether the consent of witnesses is a defense in organized nudism cases is still questionable. In People v. Hildabridle, 353 Mich. 562, 92 N.W.2d 6 (1958), the court reversed a conviction obtained against defendants who operated a secluded nudist camp. The decision of the divided court, however, did not resolve the question of the validity of an earlier contrary decision in People v. Ring, 267 Mich. 657, 255 N.W. 373 (1934). *See generally* Annot., 94 A.L.R.2d 1353 (1964); 50 AM. JUR. 2d *Lewdness, Indecency, and Obscenity* § 18 (1970).

lewdly.[14] Cases arising under these statutes usually involve exposures (1) designed solely for "public entertainment,"[15] (2) accompanied by additional conduct intended to direct public attention to the exposure,[16]

14. ALASKA STAT. § 11.40.080 (1970); ARIZ. REV. STAT. ANN. § 13-531 (1956); CAL. PENAL CODE § 314 (West 1970); GA. CODE ANN. § 26-6101 (1953); ILL. ANN. STAT. ch. 38, § 11-9 (Smith-Hurd 1972); IOWA CODE ANN. § 725.1 (1950); MINN. STAT. ANN. § 617.23 (1964); MISS. CODE ANN. § 2290 (Supp. 1971); MONT. REV. CODES ANN. § 94-3603 (1947); OKLA. STAT. ANN. tit. 21, § 1021 (Supp. 1971).

15. *E.g.*, Southeastern Promotions, Ltd. v. Atlanta, 334 F. Supp. 634 (N.D. Ga. 1971) (theatre); P.B.I.C. Inc. v. Byrne, 313 F. Supp. 757 (D. Mass.) (theatre), *vacated*, 401 U.S. 987 (1970); *In re* Giannini, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968) (dancing). *Cf.* Comment, *The Applicability of General Lewdness Statutes in Live Theatre Performances*, 5 VALPARAISO U. L. REV. 184 (1970). Some courts have held that certain types of exposure are forms of expression and entitled to first amendment protection. *E.g.*, Southeastern Promotions, Ltd. v. Atlanta, 334 F. Supp. 634 (N.D. Ga. 1971) (theatre); P.B.I.C., Inc. v. Byrne, 313 F. Supp. 757 (D. Mass.), *vacated*, 401 U.S. 987 (1970) (theatre); Reichenberger v. Warren, 319 F. Supp. 1237 (W.D. Wis. 1970) (dancing); Glancy v. County of Sacramento, 17 Cal. App. 3d 504, 94 Cal. Rptr. 864 (1971) (topless waitressing). *But cf.* City Court of Tucson v. Lee, 16 Ariz. App. 449, 494 P.2d 54 (1972) (dancing); Hoffman v. Carson, 250 So. 2d 891 (Fla. 1971) (dancing); City of Portland v. Derrington, 253 Ore. 289, 451 P.2d 111, *cert. denied*, 396 U.S. 901 (1969) (dancing). It has also been held that the first amendment does not protect an intentional exposure at a public gathering, even though the exposure was designed to protest alleged exploitation of the female body. State v. Nelson, 178 N.W.2d 434 (Iowa 1970), *cert. denied*, 401 U.S. 923 (1971).

Generally, exposures for entertainment purposes are markedly different than the type of conduct with which this comment is concerned, that is, exposures which are directed at unwilling or unsuspecting audiences. *Cf.* P.B.I.C., Inc. v. Byrne, 313 F. Supp. 757, 764 (D. Mass) (dictum), *vacated*, 401 U.S. 987 (1970) (where district court maintained that to apply the common law or statutory prohibition of indecent exposure to a theatrical performance would be to ignore that the audience at such a performance is both willing and forewarned); Reichenberger v. Warren, 319 F. Supp. 1237, 1239 (W.D. Wis. 1970) (in statute proscribing "publicly" exposing a sex organ, the word "publicly" limits the applicability of the statute to those situations in which the conduct exposes children to obscenity or in which the conduct assaults the sensibilities of unwilling adults). The significance of the "unwilling audience" argument was recognized in Redrup v. New York, 386 U.S. 767 (1967). In examining three related obscenity cases, the Court noted:

> In none [of these cases] was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.

Id. at 769.

16. *E.g.*, State v. Wayman, 104 Ariz. 125, 449 P.2d 296 (1969) (defendant exposed himself in car to passerby); *In re* Bevill, 68 Cal. 2d 854, 442 P.2d 679, 69 Cal. Rptr. 599 (1968) (defendant exposed himself and masturbated before two children); People v. Tadla, 110 Ill. App. 2d 119, 249 N.E.2d 155 (1969) (defendant emerged from car on public street and exposed himself to witness); Davison v. State, 281 P.2d 196 (Okla. Crim. 1955) (defendant seen nude and masturbating in garage with door open); Commonwealth v. Pride, 143 Pa. Super. 165, 18 A.2d 879 (1940) (defendant exposed himself to female witness on public street). Most indecent exposure cases

or (3) unaccompanied by any attempt to attract public observation to the exposure.[17] Within the context of indecent exposure[18] statutes, courts have interpreted "lewd" as "an irregular indulgence of lust,"[19] "import[ing] lascivious intent,"[20] and as synonymous with "lustful, libidinous, lascivious . . . obscene, [and] salacious."[21]

In the principal case,[22] the California Supreme Court construed the

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stem from exhibitionist acts. For a discussion of the factors involved in this type of behavior, see P. GEBHARD, J. GAGNON, W. POMEROY & C. CHRISTENSON, SEX OFFENDERS 380-99 (1965); Slovenko, *Sexual Deviation: Response to an Adaptional Crisis*, 40 COLO. L. REV. 222 (1968); Note, *Pedophilia, Exhibitionism and Voyeurism: Legal Problems in the Deviant Society*, 4 GA. L. REV. 149, 153 (1969).

17. *E.g.*, United States v. Hymans, 463 F.2d 615 (10th Cir. 1972) (conviction for nude sunbathing in national forest sustained); *In re* Smith, 7 Cal. 3d 362, 497 P.2d 807, 102 Cal. Rptr. 335 (1972) (conviction for nude sunbathing on isolated public beach reversed); State v. Rocker, 52 Hawaii 336, 475 P.2d 684 (1970) (conviction for nude sunbathing on isolated public beach sustained); Pendergrass v. State, 193 So. 2d 126 (Miss. 1966) (conviction for nude sunbathing on private property concealed from public view reversed); People v. Dohen, 280 App. Div. 956, 116 N.Y.S. 2d 351 (1952) (conviction reversed where exposure took place in cellar of defendant's home); People v. Ulman, 258 App. Div. 262, 16 N.Y.S.2d 222 (1939) (conviction reversed where evidence indicated exposure was accidental or negligent); McKinley v. State, 33 Okla. Crim. 434, 244 P. 208 (1926) (conviction reversed where evidence indicated that defendant's exposure in his home while preparing to bathe had been seen by persons outside the house).

18. The courts have also construed the term "lewd" as connoting sexual conduct in cases not involving indecent exposures. *See, e.g.*, Swearingen v. United States, 161 U.S. 446 (1896) (allegedly obscene publication); *In re* Steinke, 2 Cal. App. 3d 569, 82 Cal. Rptr. 789 (1969) (lewd and dissolute conduct); State v. Baldino, 11 N.J. Super. 158, 78 A.2d 95 (1951) (house of prostitution); Jamison v. State, 117 Tenn. 58, 94 S.W. 675 (1906) (carnal knowledge of child). *Webster's New International Dictionary* (2d ed. 1957) defines "lewd" as "sexually unchaste or licentious," "dissolute, lascivious," "suggestive of or tending to moral looseness," "inciting to sensual desire or imagination," and "indecent, obscene, salacious."

19. Piercy v. State, 92 Ga. App. 599, 600, 89 S.E.2d 554, 555 (1955).

20. McKinley v. State, 33 Okla. Crim. 434, 244 P. 208 (1926).

21. Wainwright v. Procunier, 446 F.2d 757, 759 (9th Cir. 1971), citing *Webster's New International Dictionary* (2d ed. 1957).

22. There are only three reported cases dealing with nude sunbathing as indecent exposure in addition to the principal case. They are United States v. Hymans, 463 F.2d 615 (10th Cir. 1972); State v. Rocker, 52 Hawaii 336, 475 P.2d 684 (1970); Pendergrass v. State, 193 So. 2d 126 (Miss. 1966).

In *Pendergrass*, the defendant was seen sunbathing in the nude on her private property by three uninvited visitors. The evidence indicated that the defendant, upon seeing the approaching witnesses, immediately dressed herself and was fully clothed when she met the visitors. The statute under which defendant was convicted prohibited "wilfully and lewdly expos[ing] [the] person or private parts thereof in a public place. . . ." The court held that the defendant's nude sunbathing did not come within the statute's proscriptions since (1) the defendant's exposure had occurred out of public

lewdness provision of the indecent exposure statute to require sexually-

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view, and (2) the defendant's conduct on seeing the approaching visitors demonstrated that she had not wilfully and lewdly exposed herself.

The defendants in *Hymans* were apprehended while sunbathing in the nude near a public campground in a national forest. Defendants admitted having seen posted notices which described the area as one of concentrated public use and prohibited public nudity. The court sustained defendants' conviction for violating administrative regulations which proscribed "indecent conduct in a developed recreation site and a posted area of concentrated public recreation use."

In *Rocker,* the defendants sunbathed in the nude on a public beach which was isolated from adjoining beaches and roads. Testimony at the trial revealed that several persons were present on the beach at the time of defendants' arrest, but that the beach was usually frequented only by fishermen. The court sustained defendants' conviction for creating a common nuisance by indecent exposure, holding that the trier of fact could have concluded that defendants' exposure where it was likely to be observed by others evinced a general intent to offend the community's common sense of decency, propriety and morality. In State v. Miller, —Hawaii—, 501 P.2d 363 (1972), the Hawaii Supreme Court subsequently upheld the constitutionality of the common nuisance statute as applied to nude sunbathers convicted of indecent exposure.

It is interesting to analyze the differing results in these nude sunbathing cases. First, the two decisions—*Pendergrass* and *Smith*—dealing with lewdness statutes led to reversals of lower court convictions for indecent exposure, concluding respectively that nude sunbathing was not lewd when it occurred without sexual activity (1) on private property removed from public view, and (2) on an isolated public beach. Therefore, when compared to the results of *Rocker* and *Hymans,* it can be concluded that the burden of proof necessary for conviction of nude sunbathing as indecent exposure will be greater under lewd exposure statutes than under statutes not prescribing lewdness as an element of an indecent exposure offense.

Second, explaining the results in terms of prosecutorial discretion, *see generally* F. MILLER, PROSECUTION—THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1969), a conviction will not be upheld where the decision to charge is unsound, that is, when the defendant's conduct inflicts no serious injury on the public, as in *Pendergrass,* where the exposure was not visible to the general public, or where unwarranted onerous consequences flow from the conviction, as in *Smith.* The latter factor is particularly important in the principal case, since a conviction would have required the defendant to register as a sex offender. *See* note 33 *infra.* In contrast, the conviction sustained in *Rocker* reflected a sound decision to charge as a deterrent to continuing repeated offenses. The court in *Rocker* had noted that the defendants had frequently sunbathed in the nude on the beach prior to their arrest and that one of the defendants had sunbathed in the nude on the beach on several occasions subsequent to his arrest. State v. Rocker, 52 Hawaii 336, 342, 475 P.2d 684, 690 (1970). *Hymans* occupies a neutral position in terms of the decision to charge. It may be argued that, since no evidence was presented that anyone but the arresting official(s) saw the defendants' nudity, the offensiveness of the conduct to the public was questionable. However, the area in which the defendants sunbathed was one of concentrated public recreational use, a fact of which the defendants were aware. Therefore, prosecution of these defendants could be viewed as a deterrent to other nude sunbathers. This interpretation is additionally supported by the court's finding that the defendants had apparently decided to challenge the validity of the indecent conduct prohibition.

Third, viewing the critical element as the place where the exposure occurred, a con-

motivated conduct,[23] and specifically held that an exposure was not committed "lewdly" unless the actor "intended by his conduct to direct attention to his genitals for purposes of sexual arousal, gratification, or affront."[24] In formulating this definition, the court relied heavily on the language of California's child assault statute.[25] In attempting to define the "wilfully and lewdly" phrase of the indecent exposure statute, the court interpreted the same phrase of the child assault statute to mean "with the intent of arousing, appealing to, or gratifying . . . lust or passions or sexual desires."[26] The court, therefore, incorporated this intent element into the "wilfully and lewdly" provision of

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viction will be sustained when nude sunbathing occurs in a public place, such as near a public campground (*Hymans*), but not in the privacy of one's secluded yard (*Pendergrass*). Thus, nude sunbathing will be permissible as long as the exposure takes place in an area which will not, in all probability, be open to public view. By this formulation, "isolated public beaches" is a marginal area as indicated by the inconsistent results in *Rocker* and *Smith*.

Closely related to the nude sunbathing cases is State v. Borchard, 24 Ohio App. 2d 95, 264 N.E.2d 646 (1970), in which the defendant swam in the nude in the presence of numerous persons, including women and children, at a gathering on private property. The court sustained defendant's conviction for wilfully exposing himself in a public place in violation of Ohio's indecent exposure statute.

23. *In re* Smith, 7 Cal. 3d 362, 365, 497 P.2d 807, 810, 102 Cal. Rptr. 335, 338 (1972).

24. *Id.*

25. CAL. PENAL CODE § 288 (West 1970) provides that: "Any person who shall wilfully and lewdly commit any lewd or lascivious act . . . upon . . . a child under the age of fourteen years, *with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires* of such person or of such child, shall be guilty of a felony. . . ." (Emphasis added.)

The court's reliance on the child assault statute, albeit important, was only one of the grounds on which the court based its conclusion that an exposure committed lewdly required sexually-motivated conduct. The court also relied on two child assault cases which had judicially defined the term "lewd," People v. Loignon, 160 Cal. App. 2d 412, 325 P.2d 541 (1958); People v. Webb, 158 Cal. App. 2d 537, 323 P.2d 141 (1958); as well as the dictionary definition of the term, *Webster's New International Dictionary* 1423 (3d ed. 1961). Although there were no indecent exposure cases construing the word "lewd," the court noted that the cases arising under California's indecent exposure statute in which convictions had been sustained had involved more than mere nudity. *See In re* Bevill, 68 Cal. 2d 854, 442 P.2d 679, 69 Cal. Rptr. 599 (1968); People v. Succop, 67 Cal. 2d 785, 433 P.2d 473, 63 Cal. Rptr. 569 (1967); People v. Merriam, 66 Cal. 2d 390, 426 P.2d 161, 58 Cal. Rptr. 1 (1967); People v. Kerry, 249 Cal. App. 2d 246, 57 Cal. Rptr. 289 (1967); People v. Sanchez, 239 Cal. App. 2d 51, 48 Cal. Rptr. 424 (1965); People v. Williams, 183 Cal. App. 2d 689, 7 Cal. Rptr. 56 (1960); People v. Evans, 138 Cal. App. 2d 849, 292 P.2d 570 (1956). *Accord,* Wainwright v. Procunier, 446 F.2d 757 (9th Cir. 1971).

26. *In re* Smith, 7 Cal. 3d 362, 364, 497 P.2d 807, 809, 102 Cal. Rptr. 335, 337 (1972). *See* CAL. PENAL CODE § 288 (West 1970), quoted in note 25 *supra*.

the indecent exposure statute. A comparison of both statutes indicates, however, that while the child assault statute explicitly requires wilfulness, lewdness *and* intent to act for sexual purposes, the indecent exposure statute refers only to wilfulness and lewdness, excluding any mention of sexual intent. Thus, the court's statutory construction would appear peculiar, for the court, in effect, transmuted the three elements of the child assault statute—wilfulness, lewdness and intent to act for sexual purposes—into the two elements—wilfulness and lewdness—of the indecent exposure statute. The consequence of this transmutation is to read the element of sexual intent into the meaning of lewd.[27] This construction may present difficulties in that those persons who lack intent may escape conviction under the indecent exposure statute for conduct which would clearly offend the general community's sense of sexual decency or morality.[28] In this regard, an objective standard of lewd, measured solely by one's conduct, would prove more effective in proscribing offensive behavior.

In support of its conclusions that "lewdly" requires an intent to act for sexual purposes and that nude sunbathing[29] in itself is not proof of sexually-motivated activity, the court reasoned that the legislature could not have intended the consequences imposed by the sex offender registration statute to apply to persons found sunbathing in the nude on an

27. The court's construction would seem to leave little doubt that the intent to act lewdly refers only to the actor's state of mind. This conclusion is also indicated by the wording of the indecent exposure statute itself in that the statute, quoted in note 4 *supra*, refers to exposures in a public place or in any place where persons are present "to be annoyed or offended thereby." Brief for Petitioner at 4, *In re* Smith, 7 Cal. 3d 362, 497 P.2d 807, 102 Cal. Rptr. 335 (1972).

28. In Crownover v. Musick, 18 Cal. App. 3d 181, 187, 95 Cal. Rptr. 691, 694-95 (1971) (dictum), the court asserted that the state had an interest in regulating nudity on a crowded public street, even if the nudity were exercised "without a scintilla of lewd intent." If a given instance of nudity in a crowded public area were not lewd, then the principal case would dictate that the indecent exposure statute could not be applied to such conduct. However, the court's repeated emphasis in the principal case on the "isolated" nature of the area in which petitioner's exposure occurred may suggest that the court would be willing to infer that an exposure, if it took place in a crowded public area, would be committed lewdly. Arguably, of course, other sections of the California Penal Code, such as section 415 (disturbing the peace), might be invoked to penalize exposures in crowded public areas. Brief for Petitioner at 2, *In re* Smith, 7 Cal. 3d 362, 497 P.2d 807, 102 Cal. Rptr. 335 (1972).

29. A number of cases have held that nudity per se is not obscene. *E.g.*, Manual Enterprises v. Day, 370 U.S. 478 (1962); Excellent Publications, Inc. v. United States, 309 F.2d 362 (1st Cir. 1962); Bruns v. Pomerleau, 319 F. Supp. 58 (D. Md. 1970); *In re* Panchot, 70 Cal. 2d 105, 448 P.2d 385, 73 Cal. Rptr. 689 (1969); Robins v. Los Angeles County, 248 Cal. App. 2d 1, 56 Cal. Rptr. 853 (1966).

isolated public beach. It would appear from the court's discussion[30] that the sex offender registration provision constituted a critical factor motivating the result reached by the court in the principal case.[31] Thus, the court may well have adopted a strained statutory construction[32] in order to prevent application of the sex offender registration statute.[33] It may be concluded from the principal case, then, that a conviction for indecent exposure will occur only when the exposure is

30. *In re* Smith, 7 Cal. 3d 362, 365-66, 497 P.2d 807, 810-11, 102 Cal. Rptr. 335, 338-39 (1972).

31. The court's decision may have implicitly recognized the recent popularity of nude sunbathing on some California beaches. *See, e.g.*, St. Louis Post-Dispatch, Aug. 20, 1972, at 16G, cols. 1-8. Thus, the court may have considered that nude sunbathing, at least in relatively isolated areas, does not justify a conviction for indecent exposure and registration as a sex offender, especially in view of the apparent popularity of nude sunbathing in some areas of California.

32. *See* notes 23-27 *supra* and accompanying text.

33. *See* note 4 *supra*. In accordance with California's sex offender registration statute, any person convicted of indecent exposure under section 314 must submit to the state a signed informational statement, fingerprints and photographs, and must report any change of address within ten days. Failure to comply with any of the terms of section 290 is punishable as a misdemeanor. In addition to the legal disabilities imposed by section 290, serious reputational harm may follow a person's designation as a sex offender. For this reason, it is not uncommon in cases involving sexual offenses for a prosecutor to charge a lesser offense, such as disorderly conduct or disturbing the peace, to avoid subjecting the suspect to the unnecessary collateral harm which derives from a record of conviction for a sex offense. F. MILLER, PROSECUTION—THE DECISION TO CHARGE A SUSPECT WITH A CRIME 209-10 (1969).

In Barrows v. Municipal Court, 1 Cal. 3d 821, 464 P.2d 483, 83 Cal. Rptr. 819 (1970), the court noted that "The purpose of section 290 was to assure that sex offenders were readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future." *Id.* at 825-26, 464 P.2d at 486, 83 Cal. Rptr. at 833. In *Smith*, the court's concern with the sex offender registration statute was clearly evident. *In re* Smith, 7 Cal. 3d 362, 366, 497 P.2d 807, 811, 102 Cal. Rptr. 335, 339 (1972):

> [W]e cannot attribute to the Legislature a belief that persons found to be sunbathing in the nude on an isolated public beach "require constant police surveillance" to prevent them from committing such "crimes against society" in the future.

A similar judicial concern was expressed in State v. Wayman, 104 Ariz. 125, 449 P.2d 296 (1969). The trial court there had equated indecent exposure with "lewd and lascivious conduct." Arizona's Prior Offender statute authorized prison sentences to a maximum of five years for second convictions for lewd and lascivious conduct. In holding that indecent exposure was not lewd and lascivious conduct, the Arizona Supreme Court reasoned that if the words "lewd" and "lascivious" were not strictly construed, many "relatively harmless offenders," including "go-go girls . . . or . . . immodestly clad swimmers," would be faced with the possibility of lengthy prison terms. *Id.* at 128, 449 P.2d at 299 (1969). The court concluded that the legislature could not have intended such severe penalties to be applied to these "relatively harmless offenders." *Id.*

committed under such circumstances as to warrant future surveillance of the actor in accordance with the purposes of the sex offender registration statute.[34] This approach to indecent exposure cases appears desirable since it demands a circumspect evaluation of what types of conduct will require subjecting an individual to the serious disabilities of the sex offender status.

34. *See* note 33 *supra.*