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Verdict

October 4, 2011

Joanna L. Grossman and Lawrence M. Friedman

Towels Under Tailbones? Naked San Franciscans Protest Proposed Restrictions on Public Nudity



The Folsom Street Festival in San Francisco is an enormous—indeed, maybe the world’s largest—gathering of fetish paraphernalia and leather. This year, it was also home to a public “Nude-In,” a gathering convened to protest a new ordinance proposed by Scott Wiener, the Castro District’s new city supervisor.

Wiener’s law would forbid naked people from entering restaurants. It would also require naked people to put down a towel or other barrier before sitting down in public—say, for example, while riding a city bus.

Wiener proposed the new ordinance in response to what he perceived to be a noticeable uptick in the number of public nudists in the Castro (which is known as the city’s gay district).

Most people who have read this story in the newspapers may, perhaps, be surprised to realize that in San Francisco, public nudity is not altogether illegal. As we will discuss, San Francisco is in fact one of the few cities in America that does not ban public nudity. There are restrictions, but, as a general matter, simply walking around naked outside the privacy of your own home does not, in San Francisco, constitute indecent exposure, nor is it any kind of crime.

California State Law: Nude is Not Necessarily Lewd

As in most states, the penal code in California criminalizes public nudity in some circumstances. What circumstances? The answer is, when it amounts to “indecent exposure.” Under section 314, the crime of indecent exposure is defined as follows:

Every person who willfully and lewdly, either:

1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or,
2. Procures, counsels, or assists any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of

persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts, is guilty of a misdemeanor.

Note that a person who is completely nude is obviously exposing “private parts,” but you can also be very non-nude and still violate the statute. But whatever else it means, doesn’t the statute make it a crime to walk around the Castro District, or anywhere else in California, without any clothes?

Not necessarily.

Under this statute, nakedness or indecent exposure has to be both willful and lewd. A willful act is one that is knowing and intentional. Public nudity is seldom accidental, so this provides no safe harbor for the typical person who walks around nude in the open.

The second limitation—based on lewdness—is more significant. A lewd act, according to the California Supreme Court, is one in which the individual “not only meant to expose himself, but intended by his conduct to direct public attention to his genitals for purposes of sexual arousal, gratification, or affront.”

In this case, *In re Smith* (<http://law.justia.com/cases/california/cal3d/7/362.html>) (decided in 1972), the defendant took off his clothes at a public but sparsely used beach. While lying on his back on a towel, he fell asleep. The police came and arrested him; at that time, at least a handful of other people were at the beach. It was stipulated at trial that the defendant “at no time had an erection or engaged in any activity directing attention to his genitals.”

The defendant was convicted of indecent exposure and given a suspended three-year sentence, along with a \$100 fine. He might have simply swallowed the punishment, which was not in itself particularly severe. But he learned that he would also have to register as a sex offender because of the conviction; and that is no small matter. Thus, the defendant, Smith, appealed, on the grounds that his public nudity was not “lewd.”

The court agreed. “[M]ere nudity” did not violate the statute, it held. In earlier cases in which convictions were upheld, the defendant had masturbated, or committed other overtly sexual acts. However, a decision to sleep naked on the beach, so long as it was not sexually motivated, was not a crime.

Local Regulation of Public Nudity

The California Penal Code has two additional provisions that are also relevant to the current controversy:

First, section 318.5 expressly grants localities the right to pass ordinances that regulate the “exposure of the genitals or buttocks of any person, or the breasts of any female person, who acts as a waiter, waitress, or entertainer”

Second, section 318.6 gives localities the power to regulate “topless and bottomless exhibitions in public places” occurring within “adult or sexually oriented businesses.”

These two provisions were enacted in 1969 to permit cities to regulate nudity in restaurants and “adult” establishments. The California Supreme Court had earlier held that the state had preempted the whole field of control of sexual activity in public places; the two provisions were meant to give back to localities the power to regulate live performances and restaurants—a power that the court had taken away. It has been interpreted broadly to give localities the power to regulate or even ban all public nudity. As one might expect, the localities in California have exercised their power in different ways.

The City of Berkeley, for example, though notoriously liberal, enacted an ordinance banning all public nudity in 1993, after the uproar caused by the so-called “Naked Guy.” This was Andrew Martinez, who stood up for nudists’ rights by going everywhere naked—including classes and parties at the University of California at Berkeley.

The university eventually adopted a no-nudity policy for public areas of campus, and Martinez was expelled after

showing up naked to his disciplinary hearing. The ordinance makes it a misdemeanor “for any person to appear nude in any place open to the public or any place visible from a place open to the public.” “Nude” is defined to include both male and female genitalia and female breasts “below the areola.”

In other words, when in Berkeley, wear clothes.

That other notoriously liberal city, San Francisco, home of the “Nude-In,” also has its own ordinance on public nudity. The ordinance, section 1071.1 of the Police Code of San Francisco, prohibits waiters, waitresses, and entertainers who work in an establishment that serves food or drinks from exposing genitalia or female breasts. Nudity by customers in restaurants is not prohibited in San Francisco, nor is nudity (as long as it is not “lewd”) in public parks, plazas, and beaches.

The Proposed New Ordinance

Wiener’s law would add additional, though minor, restrictions to San Francisco’s current law on nudity. His proposed ordinance would expand the restaurant ban on nudity to include the customers, as well as the waiters and entertainers. Thus, nude dining would be out. The ordinance would also require nudists to carry around a towel or similar item to put down before sitting down in public places. (The Internet consensus, however, seems to be that this behavior with a towel is already part of standard nudist etiquette).

Wiener’s proposal seemed to have provoked more nudity than it has stopped. One prominent local nudist (who is 65 years old) claims that nudity is a tourist attraction. Tourists love to have their picture taken with local nudists; the only complaints, the nudist reported, come from what he called “religious nutcases.” The nudists in San Francisco seem to be mainly men; and, frankly, as one account put it, they are hardly “supermodel types.” Why is it, one woman asked a *New York Times* reporter, that “it’s always the people who should not be naked who get naked?”

Why, indeed. One answer, of course, is that most people look better with clothes on. It is a sad fact of life.

Nudism in History

The San Francisco nude-in, of course, has little or nothing to do with the long history of nudism as a movement. This movement was especially strong in Germany, but “nudist colonies” have sprouted in many countries.

Nudist propaganda places heavy emphasis on wholesomeness and exposure to nature, and features sincere, earnest families playing volleyball in the nude and doing other respectable family things. The object of this strain of nudism is to liberate people from real or imagined social shackles and conventions. Thus, this kind of nudism has little or nothing to do with the seamy business of sex. Indeed, the point is to separate nudity from sexuality.

A lot of people have signed on to the program. Indeed, the American Association for Nude Recreation claims to be affiliated with more than 260 “family nudist” resorts in North America. There are also “naturist” beaches in dozens of countries—three in Lithuania, for example, and many in such countries as Spain and France. There are none, of course, in Saudi Arabia.

There is also the World Naked Bike Ride, an international event designed to protest the dangers of a “car-dominated” culture rather than to promote nudism as a way of life.

And what about the nude-in? Nudity in the nude-in, to be sure, is not classical nudism, which is discreet, likes privacy, and insists on conventional morality. The nude-in, rather, is a form of rebellion. It is an expression of contempt for bourgeois morality, a finger stuck in the eye of respectability.

According to one irate message on the Web, objecting to the nude-in, “real nudists” respect and care for their bodies; while the nude-in people “look to have been put through the wrong cycle in the wash-and-dry machine and then not ironed properly;” they have “pathetic, ugly unkempt bodies.” They would not do, in short, as poster people for the American Association for Nude Recreation.

The nude-in participants, however, are trying to send a message. Some of them are probably just having fun, by shocking or amusing the tourists. Their conduct is, in this respect, a bit like the various outbursts of streaking, on college campuses and elsewhere—only much slower and less transient.

Nudists Still Risk Indecent Exposure Charges in Some States

Meanwhile, far to the north of San Francisco, in Medical Lake, Washington, in August of this year, one Dean Maginnis, 54 years old, went fishing without the benefit of clothing. After complaints about the “eyeball-scarring” view of this man, Spokane County authorities arrested him, and charged him with indecent exposure. The fact that he had a criminal record revealing a prior charge of indecent exposure—and was wanted for stalking—no doubt influenced them to do more than tell him to kindly put his clothes back on.

Maginnis was charged with “indecent exposure.” This was a crime in Washington State, just as it is in California. In fact, such state laws are on the books practically everywhere, with slight variations. In Alabama, the crime is called “public lewdness,” and the statute, like California’s, clearly refers to behavior in public that has sexual overtones, or is explicitly sexual. Perhaps surprising is the fact that most state public nudity laws do not ban women from going topless in public. New York is one of the few states that have passed a statute that specifically bans female toplessness, but that portion of the statute was ruled unenforceable by the state’s highest court. So now, women in New York, as in most states, have the right to go shirt-free.

“Indecent exposure” is indeed highly objectionable, and not only to prudes and Victorians. “Indecent exposure” has little or nothing to do with the nudist movement, or even with behavior at “nude-ins.” Indecent exposure, in many cases, is considered a genuine sex offense; and most people would agree that it ought to be—perhaps even the naked people in San Francisco. It is invariably men who violate the laws against indecent exposure; and it is often a sign of some underlying pathology. In any event, it is behavior that is ominous, threatening, and extremely distasteful to women.

Overall, American Law Features a Complex, Patchwork Approach to Public Nudity.

To sum up: Public nudity is a complex social phenomenon. It goes all the way from harmless sun worship on one end of the scale, to a blatant sex offense at the other. Much depends, of course, on why a person chose to take off his clothes (or, if the person is a woman, chose to go topless). The Washington fisherman is somewhere in the middle of the scale, perhaps a little closer toward “real” indecent exposure. The bald, pudgy men in the nude-in are also in the middle, though closer toward the harmless side.

Ultimately, the legal response to nudity is as complex as the social reality. Nobody really wants to abolish laws against indecent exposure—at least, not totally. But in most places in the United States, nobody feels much of an urge to arrest the families in nudist colonies, discreetly fenced in; or even to bother bathers at quiet, isolated nude beaches.

Old-fashioned prudery, to be sure, is far from dead. John Ashcroft, when he was Attorney General, took offense at a statue of Lady Justice, at his headquarters, because Lady Justice had bare breasts. Most people, we imagine, laughed at him. But many places in the United States are much less tolerant than San Francisco. Naked people are unwelcome. Other places do not much care. The general trend seems fairly clear: Going naked is becoming less and less illegal, at least in any absolute sense. Thus, as with alcohol and gambling, so goes it with nudity as well: Regulation not prohibition seems to be the watchword of the day.



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