

Penal Law Section 245.00: New York Court of Appeals Holds that Sexual Activity in a Parked Vehicle Is Not a Per Se Violation of the Public Lewdness Statute

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members of the bar. This would have the ironic result of impeding the very objective the disciplinary rules seek to achieve.

Daniela V. Zenone

PENAL LAW

Penal Law section 245.00: New York Court of Appeals holds that sexual activity in a parked vehicle is not a per se violation of the public lewdness statute

The New York statute prohibiting public lewdness¹ has historically been broadly construed.² In determining whether a particular

¹ N.Y. PENAL LAW § 245.00 (McKinney 1989). The statute provides that "[a] person is guilty of public lewdness when he intentionally exposes the private or intimate parts of his body in a lewd manner or commits any other lewd act (a) in a public place, or (b) in private premises under circumstances in which he may readily be observed from either a public place or from other private premises, and with intent that he be so observed." *Id.*

Section 245.00 was part of an overall revision of the Penal Law based on recommendations by the Temporary Commission on Revision of the Penal Law and Criminal Code, which reorganized specific offenses and grouped like offenses together. The section replaced § 1140, which provided that "a person is guilty of public lewdness when, in a public place, he intentionally exposes the private or intimate parts of his body in a lewd manner or commits any other lewd act." N.Y. PENAL LAW § 1140 (McKinney 1967). "[T]he statute was amended. . . to make it clear that lewd conduct in a public place where it is reasonable to assume the actor intends to be observed by the general public" as well as "lewd conduct in a private place when the actor can and intends to be observed from a public place or other private premises constituted the crime of public lewdness." N.Y. PENAL LAW § 245.00 commentary at 296 (McKinney 1989).

Section 245.00 has been challenged numerous times as being unconstitutionally vague, however, these challenges have been rejected. *See People v. Darryl M.*, 123 Misc. 2d 723, 726-27, 475 N.Y.S.2d 704, 709 (N.Y.C. Crim. Ct. N.Y. County 1984) (gravamen of § 245.00 is "lewd public behavior" and not simply exposure of private or intimate parts of body); *People v. Sullivan*, 87 Misc. 2d 254, 254, 383 N.Y.S.2d 791, 792 (Sup. Ct. App. T. 9th Dep't and 10th Dep't 1976) (section 245.00 not void for vagueness). *See generally* Note, *The Proposed Penal Law of New York*, 64 COLUM. L. REV. 1469, 1539 (1964) (discussing sex offenses in Penal Law).

² *See People v. Gilbert*, 72 Misc. 2d 75, 76, 338 N.Y.S.2d 457, 459 (N.Y.C. Crim. Ct. Kings County 1972). To constitute a violation of the public lewdness statute, the defendant must have committed the allegedly lewd acts in a "public place." *See id.* In determining whether such conduct took place in public, New York courts have defined the term quite liberally. One of the earliest cases involving public lewdness was *People v. Bixby*, 4 Hun 636 (1875). In *Bixby*, the court held that a room in a house of prostitution where women exposed themselves in the presence of men was a "public place," despite the fact that the doors, windows, and shutters of the house were closed. *Id.* The defendants were found guilty of indecent exposure "in a public place." *Id.* Although later cases stated that the statute should be narrowly and strictly construed, these cases held that § 1140 prohibited exposure

incident is sufficiently "public" in character, early cases held that the circumstances surrounding the conduct at issue were more significant than the place of its occurrence.³ However, this dependence on surrounding circumstances often resulted in conflicting conclusions regarding what constituted a "public place."⁴ Recently, in *People v. McNamara*,⁵ the New York Court of Appeals held that the interior of a parked vehicle was not a "public place" un-

not only in public places, but in "quasi-public" places as well. See *Excelsior Pictures Corp. v. Regents of Univ. of N.Y.*, 3 N.Y.2d 237, 245, 144 N.E.2d 31, 36, 165 N.Y.S.2d 42, 48 (1957).

³ Many of the early cases addressing the "publicness" issue dealt with the charge of disorderly conduct. See *People v. Chesnick*, 302 N.Y. 58, 61, 96 N.E.2d 87, 89 (1950) (test is not whether activity complained of was indoors or outdoors, but whether it had traditional elements of actual or likely breach of peace); *People v. Perry*, 265 N.Y. 362, 365, 193 N.E. 175, 177 (1934) (fighting in closed restaurant at 4:00 a.m. did not warrant conviction for disorderly conduct); *People v. Hipple*, 263 N.Y. 242, 244, 188 N.E. 725, 725 (1934) (defendant, standing inside doorway of building while congregating with persons standing on public street, guilty of disorderly conduct); see also *infra* note 21 and accompanying text (discussing disorderly conduct).

The Penal Law employs the term "public place" in defining several offenses. See N.Y. PENAL LAW § 240.20(3), (6) (McKinney 1989) (disorderly conduct); *id.* § 240.25(2), (3) (harassment); *id.* § 240.35(1)-(4) (loitering). For example, article 240, entitled "Offenses Against Public Order," defines "public place" as

a place to which the public or a substantial group of persons has access, and includes, but is not limited to, highways, transportation facilities, schools, places of amusement, parks, playgrounds, and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence.

Id. § 240.00(1).

⁴ Compare *People v. Conrad*, 70 Misc. 2d 408, 410, 334 N.Y.S.2d 180, 183-84 (Buffalo City Ct. 1972) (adult entertainment club not a public place) with *Bixby*, 4 Hun at 636 (room in prostitution house was a public place) (discussed *supra* note 2). *Conrad* involved a "topless" dancer employed in an adult entertainment club to perform sexually-suggestive dances. *Id.* at 408, 334 N.Y.S.2d at 182. The interior of the premises was not readily visible from the street, and the club's patrons were consenting adults who were there by their own volition. *Id.* at 408-09, 334 N.Y.S.2d at 182. The dancer was charged with violating the public lewdness statute, but the court ruled that the statute did not apply to a performance restricted to persons above a certain age, who knew the nature of the performance, were willing to pay for the privilege to observe, and were gathered in a place where the performance could not be seen by nonconsenting nor unsuspecting members of the general public. *Id.* at 410, 334 N.Y.S.2d at 183.

The ambiguity of "public place" within article 245 ("Offenses Against Public Sensibilities") N.Y. PENAL LAW §§ 245.00(1) (McKinney 1989) is also evidenced in cases brought under article 240 ("Offenses Against Public Order"), *id.* §§ 240.00(1) even though article 240 contains its own definition of "public place," see *People v. Richardson*, 104 N.Y.S.2d 336, 338 (N.Y.C. Magis. Ct. Kings County 1951) (hallway of multiple dwelling may be public place). But see *People v. Taylor*, 92 Misc. 2d 29, 31, 399 N.Y.S.2d 575, 576 (N.Y.C. Crim. Ct. Queens County 1977) (stoop and inner hallway of two-family house are not public places).

⁵ 78 N.Y.2d 626, 585 N.E.2d 788, 578 N.Y.S.2d 476 (1991).

less objective circumstances established that acts committed therein could and likely would be seen by the casual passerby.⁶

In *McNamara*, the respondents were separately charged⁷ with having violated section 245.00(a) of the New York Penal Law for committing sexual acts in cars parked on various streets in the City of Buffalo, including a "well lit area," a "well lit residential area," and a "public residential street."⁸ The Buffalo City Court

⁶ *Id.* at 633-34, 585 N.E.2d at 793, 578 N.Y.S.2d at 481 (1991). Although the court in *McNamara* did not address the constitutional right of privacy, the court did engage in a detailed analysis regarding whether the conduct had been performed in a public place. *See id.* It is worth noting that section 245.00 is not entitled "Lewdness," but rather "Public Lewdness." Consequently, courts have historically limited the applicability of the section to sexual acts performed in "public," recognizing, although not specifically addressing, the participant's right of privacy. This Survey does not address the issue of an individual's constitutionally protected right of privacy; however, for further discussion, see *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Griswold*, Justice Douglas "skipped through the Bill of Rights like a cheerleader—'Give me a P . . . give me an R . . . an I . . .,' and so on, and found P-R-I-V-A-C-Y as a derivative or penumbral right." Robert G. Dixon, Jr., *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. Rev. 43, 84 (1976) (footnote omitted). *See generally* Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1425 (1974) (interpreting Supreme Court privacy); Paul G. Kauper, *Penumbra, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 250 (1965) ("the right of privacy has been much discussed in the Supreme Court decisions, . . . but substantively nothing much came of that discussion until *Griswold*"); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 197 (1890) ("It is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual. . .").

⁷ *McNamara*, 78 N.Y.2d at 627, 585 N.E.2d at 789, 578 N.Y.S.2d at 477. Separate informations were filed against each of the four respondents. The four cases were later consolidated for purposes of the People's appeal. *Id.* at 629, 585 N.E.2d at 790, 578 N.Y.S.2d at 478.

⁸ *Id.* at 627-28, 585 N.E.2d at 789, 578 N.Y.S.2d at 477-78. The Court of Appeals described the charges against the respondents as follows:

The information against respondent Cheryl McNamara charged that on September 27, 1989, at or about 1:50 A.M., "while at 291 15th Street, a public place . . . in the rear seat of a 1989 Ford" she exposed private parts of her body while engaged in sexual intercourse with another person, and that the "vehicle in which the defendant was seated, was parked in a well lit area, and its interior was readily visible to passer-byers [sic]."

Separate informations filed against respondents Rose Marie Terrell and Martyn D. Hill charged that on December 5, 1989, "while at 34 Colorado, a public place . . . seated in a 1988 Ford Bronco II" respondent Terrell committed a sexual act upon respondent Hill, and that those "actions were being committed on a public residential street." The information against respondent Alma Harrison charged that on December 5, 1989, at or about 12:45 A.M., "while at 70 Colorado, a public place . . . in the passenger seat of a GMC Jimmy truck" respondent committed a sexual act upon another person while "parked in a well lit residential area."

Id. (alteration in original) (citations omitted).

dismissed the complaints against the respondents, and these decisions were affirmed by the Erie County Court.⁹ The county court's decision was "apparently [based] on the ground that the informations failed to allege facts supporting the conclusion that the acts complained of occurred in public places."¹⁰

Affirming the judgment of the county court, the New York Court of Appeals held that the interior of a parked vehicle may be deemed a "public place" if the interior is visible to a casual observer and the vehicle is situated in a place where such a person would likely encounter it.¹¹ Writing for the court, Judge Kaye reasoned that the term "public place," as used in the statute, "has no single readily ascertainable 'plain meaning,'" ¹² and therefore must be defined in accordance with legislative intent.¹³ Because section 245.00 was clearly aimed at protecting public sensibilities,¹⁴ the court concluded that the statute is not violated unless objective

⁹ *Id.* at 628-29, 585 N.E.2d at 790, 578 N.Y.S.2d at 478. The court stated:

The McNamara information was deemed insufficient because it alleged "no facts which would show that the defendant intentionally exposed the private or intimate parts of her body in a lewd manner, with intent that she be so observed." . . . The court dismissed the Harrison information because the allegation that the acts occurred in a vehicle parked in a well-lit residential area did not establish a "public place" under Penal Law § 240.00. The Terrell and Hill informations were found insufficient on the grounds that the area of occurrence was not a "public place," and the prosecution was an attempt to criminalize consensual sodomy.

Id. (citations omitted) (footnote omitted).

¹⁰ *Id.* at 629, 585 N.E.2d at 790, 578 N.Y.S.2d at 478.

¹¹ *Id.* at 633-34, 585 N.E.2d at 793, 578 N.Y.S.2d at 481. By establishing objective criteria for applying the statute's language and purpose, the court avoided defining "public place" as "you know it when you see it," *id.* at 633-34 n. 4, 585 N.E.2d at 793 n.4, 578 N.Y.S.2d at 481 n.4, referring to Justice Stewart's famous aphorism concerning obscenity, *see Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

¹² *McNamara*, 78 N.Y.2d at 629, 585 N.E.2d at 790, 578 N.Y.S.2d at 478.

¹³ *Id.* at 633, 585 N.E.2d at 792, 578 N.Y.S.2d at 480. Before turning to legislative history, the court considered the language of the statute, for "[t]he starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring); *accord* *Federal Trade Comm'n v. Bunte Bros.*, 312 U.S. 349, 350 (1941) ("While one may not end with the words of a disputed statute, one certainly begins there.").

¹⁴ *McNamara*, 78 N.Y.2d at 631, 585 N.E.2d at 791, 578 N.Y.S.2d at 479. The court stated that "it is obvious that article 245 was aimed at protecting the public." *Id.*; *see also* N.Y. PENAL LAW § 245.00 commentary at 296 (McKinney 1989) ("The statute plainly seeks to prohibit lewd conduct that can impact on the sensibilities of the general public."). In essence, the Legislature intended to proscribe indecent or lewd exposure or acts directed towards "unsuspecting, unwilling, nonconsenting, innocent, surprised or likely-to-be offended or corrupted types of viewers." *People v. Conrad*, 70 Misc. 2d 408, 410, 334 N.Y.S.2d 180, 183 (Buffalo City Ct. 1972) (discussed *supra* note 4); *see also infra* note 21 and accompanying text (discussing court's focus on statute's purpose).

facts indicate that the acts committed in the vehicle "can, and likely would, be seen by the casual passerby."¹⁵

In a spirited dissent, Judge Bellacosa argued that the majority erred in failing to apply what he perceived as the plain meaning of the term "public place."¹⁶ Contending that a residential street is clearly "public," Judge Bellacosa concluded that the majority had, without authority, inserted "a judicial gloss which, in effect, add[ed] a culpable mental state or new element into the penal statute."¹⁷

It is submitted that the majority ruled correctly in determining that "public place," as used in section 245.00(a) of the Penal Law, "has no . . . readily ascertainable 'plain meaning,'"¹⁸ and

¹⁵ *McNamara*, 78 N.Y.2d at 633-34, 585 N.E.2d at 793, 578 N.Y.S.2d at 481.

¹⁶ *Id.* at 635-36, 585 N.E.2d at 794, 578 N.Y.S.2d at 482 (Bellacosa, J., dissenting); see *Doctors Council v. New York City Employees' Retirement Sys.*, 71 N.Y.2d 669, 674-75, 525 N.E.2d 454, 456-57, 529 N.Y.S.2d 732, 734-35 (1988) (where statutory language is clear and unambiguous, court should construe it so as to give effect to plain meaning of words used); *People v. Cruz*, 48 N.Y.2d 419, 427-28, 399 N.E.2d 513, 517, 423 N.Y.S.2d 625, 629 (1979) (words and phrases contained in statute should be given their ordinary meaning when legislature has given no indication that different meaning was intended), *appeal dismissed*, 446 U.S. 901 (1980).

¹⁷ *McNamara*, 78 N.Y.S. at 637, 585 N.E.2d at 795, 578 N.Y.S.2d at 483 (Bellacosa, J., dissenting). Judge Bellacosa also asserted that the criminal information against the respondents were satisfactory "even under the test which the majority adopt[ed]." *Id.* at 636, 585 N.E.2d at 794, 578 N.Y.S.2d at 482 (Bellacosa, J., dissenting); see also *supra* note 8 (describing charges against respondents). Finally, noting that police officers witnessed the respondents performing sexual acts, Judge Bellacosa concluded that "nothing could be more public than what actually happened, where it happened, what the police officers observed and what the prosecutor charged—other than perhaps the actors engaging in their criminal sexual conduct on the sidewalk itself or in a vehicle with windows, doors or convertible roofs open." *Id.* at 637, 585 N.E.2d at 795, 578 N.Y.S.2d at 483 (Bellacosa, J., dissenting).

The majority, addressing whether the information sufficiently charged the respondents with lewdness in a "pubic place," rejected the dissent's "contention that allegations of sexual activity in parked cars at stated addresses alone satisfy the statute." *Id.* at 633, 585 N.E.2d at 792, 578 N.Y.S.2d at 480. The court determined that the *McNamara* information "failed to establish that the vehicle was situated in a place where it was likely that respondent's lewd acts would be observed by . . . a [casual passerby]" and that the remaining informations against the other respondents "failed to establish that respondents' acts were capable of observation, as they did not indicate that the vehicle interiors were visible to passersby." *Id.* at 634, 585 N.E.2d at 793, 578 N.Y.S.2d at 481.

¹⁸ *Id.* at 629, 585 N.E.2d at 790, 578 N.Y.S.2d at 478. The People contended that the informations satisfied the statute since the cars in which the respondents engaged in lewd conduct were parked on a public street, and that no intent that one be observed was required. *Id.* In contrast, the respondents urged that "public place," as used in § 245.00, import[ed] such a degree of "publicness" as to require intent that they be observed or reckless disregard that they might be observed. The [c]ity [c]ourt, in dismissing the *McNamara* and *Hill* informations, relied on an even broader understanding of intent, requiring not only an intent to be seen, but [also] a purpose for

that the definition must therefore be determined in accordance with well established principles of statutory construction.¹⁹

Responding to inconsistent interpretations of the term "public place,"²⁰ the Court of Appeals properly turned its attention to the

"public entertainment, in turn to titillate the defendant."

Id. Thus, the Court of Appeals noted three purported interpretations of the term "public place" and consequently concluded that the term, in the context of this statute, "has no single readily ascertainable 'plain meaning.'" *Id.* The court further explained why intent to be observed, reckless disregard of observation, or intent to arouse or gratify sexual desires by means of public observation is not required by section 245.00(a). The crime is defined as a lewd exposure or act (a) in a public place, or (b) in private premises under circumstances in which [the actor] may readily be observed from either a public place or from other private premises, and with intent that he be so observed.

Id. at 630, 585 N.E.2d at 791, 578 N.Y.S.2d at 479 (alteration in original). Noting that the "phrase with intent that he be so observed [is positioned] after subsection (b) rather than at the [beginning] of the section," the court determined "that intent to be observed is required only in cases involving private premises." *Id.*

¹⁹ See *id.* at 630-31, 585 N.E.2d at 791, 578 N.Y.S.2d at 479. Since the phrase "public place" is not defined in § 245.00, the People urged the court "to adopt the definition found in the immediately preceding article—article 240 However, section 240.00 specifies that its definitions are 'applicable to this article,' signalling at the outset that they are inapplicable to article 245." *Id.* at 630, 585 N.E.2d at 791, 578 N.Y.S.2d at 479.

The court also rejected the "People's argument that the definition of 'public place' should be drawn from Fourth Amendment decisions and held that there is a diminished expectation of privacy in automobiles," and held that "the existence of [such] a diminished expectation . . . [plainly] does not transform the interior of an automobile into a 'public place.'" *Id.*

²⁰ See *supra* note 4. These inconsistencies result from the Court of Appeals' conflicting approaches to statutory interpretation. Often, the court has held that the words of a statute "are sufficient in and of themselves to determine the purpose of the legislation," and has followed the plain meaning. See *New York State Bankers Ass'n v. Albright*, 38 N.Y.2d 430, 437, 343 N.E.2d 735, 738-39, 381 N.Y.S.2d 17, 20 (1975). However, the court has also held that when adherence to plain meaning produces an unreasonable result, one which is 'plainly at variance with the policy of the legislation as a whole,' the court will follow the purpose behind the statute rather than the literal words. *Id.* at 437, 343 N.E.2d at 739, 381 N.Y.S.2d at 21 (quoting *United States v. American Trucking Assns.*, 310 U.S. 534, 543-44 (1940)).

Generally, the plain meaning rule operates to exclude extrinsic evidence, such as legislative history, in the interpretation of statutes. See *Harry Willmer Jones, The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U. L.Q. 2, 25-26 (1939). However, the rule has been widely criticized since language is generally imprecise and uncertain, and it is difficult to attach a fixed or absolute meaning to words. See *William F. Young, Jr., Equivocation in the Making of Agreements*, 64 COLUM. L. REV. 619, 626-27 (1964). The meaning that a writer intends the words to convey may vary significantly from the meaning that the words actually convey to others. See generally *B.F. SKINNER, VERBAL BEHAVIOR* 29-30 (1957) (imprecision of language is due to conditioning process which precedes learning use of words).

Case law has provided an array of illustrations of the inexactness of language. See, e.g., *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (citations omitted) ("A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color

Legislature's purpose in enacting the statute.²¹ In a previous case, the court determined that "statutes 'punishing indecent exposure, though broadly drawn, must be carefully construed to attack the particular evil at which they are directed.'" ²² The "particular evil" at which section 245.00(a) is directed is the offense created by the lewd conduct, and thus the statute prohibits such behavior only

and content according to the circumstances and the time in which it is used."); *N.L.R.B. v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (Hand, J.). ("[W]ords are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . ."). Judge Hand further warned that in attempting a solution, it is "one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945).

²¹ See *McNamara*, 78 N.Y.2d at 631-32, 585 N.E.2d at 791-92, 578 N.Y.S.2d at 479-80. This method of statutory interpretation, namely, focusing on the statute's purpose, is often applied when the court believes that the conduct involved should be considered criminal only if the evil the statute addresses is indeed at issue. See *People v. Munafo*, 50 N.Y.2d 326, 331, 406 N.E.2d 780, 783, 428 N.Y.S.2d 924, 926-27 (1980) (defendant engaged in protest who failed to move from path of construction crew was not guilty of disorderly conduct since his actions were in broad daylight on secluded stretch of his own property). In such cases, the court seeks not to criminalize the conduct immediately upon the defendant's performance of the acts (in essence, the court refuses to follow a "strict liability" approach), but rather to hold the defendant liable only when the circumstances surrounding the conduct indicate that the problem the statute sought to remedy was actually present. See *id.*

Consider the court's decisions in cases dealing with the article immediately preceding the public lewdness statute, article 240, and specifically, the charge of disorderly conduct. Parts of the definition of disorderly conduct require that the acts occur in a "public place." See N.Y. PENAL LAW § 240.20 (McKinney 1989). Subdivision three states that a person is guilty of disorderly conduct when "[i]n a public place, he uses abusive or obscene language, or makes an obscene gesture." *Id.* § 240.20(3). In this context, the Court of Appeals has held that "[i]n deciding whether an act carries public ramifications, courts are constrained to assess the nature and number of those attracted, taking into account the surrounding circumstances, including, of course, the time and the place of the episode under scrutiny." *Munafo*, 50 N.Y.2d at 331, 406 N.E.2d at 783, 428 N.Y.S.2d at 926-27 (citations omitted); see also *People v. Krull*, 18 Misc. 2d 1027, 1028, 194 N.Y.S.2d 75, 76 (Niagara County Ct. 1959) (defendant who used offensive language while engaged in dispute with next-door neighbor in common driveway did not engage in "public" conduct where only residents of disputants' homes and one neighbor were aware of disturbance); *People v. La Sister*, 9 Misc. 2d 518, 518-19, 170 N.Y.S.2d 702, 703-04 (N.Y.C. Spec. Sess. N.Y. County 1958) (vulgar and offensive language directed solely towards police officer and not used in presence of any other person and that did not "annoy, disturb, interfere with, obstruct, or [become] offensive to others" insufficient to constitute disorderly conduct) (alteration in original). See generally *supra* note 3 and accompanying text (discussing disorderly conduct).

²² *McNamara*, 78 N.Y.2d at 631, 585 N.E.2d at 791, 578 N.Y.S.2d at 479 (quoting *People v. Price*, 33 N.Y.2d 831, 832, 307 N.E.2d 46, 46, 351 N.Y.S.2d 973, 974 (1973)). In *Price*, the court held that Penal Law § 245.01 entitled "Exposure of a Person," was "aimed at discouraging 'topless' waitresses and their promoters, and should not be applied to noncommercial, perhaps accidental, and certainly not lewd, exposure . . ." *Price*, 33 N.Y.2d at 832, 307 N.E.2d at 46, 351 N.Y.S.2d at 974 (citations omitted).

under circumstances in which it is likely to be observed by "unsuspecting, unwilling, . . . [or] nonconsenting . . . types of viewers."²³ Criminalizing sexual conduct in all locations to which the public has access would conflict with the Legislature's intent by ignoring the reality that "places that are public in a property sense can be very private in terms of the likelihood of casual observation."²⁴

When courts attempt to ascertain the meaning of words and phrases embodied in a statute, they do more than merely elucidate the obscurities of statutory language. Instead, a court's interpretation, in essence, extends or limits the scope of the language, thus strengthening or weakening the statute's operation.²⁵ The decision

²³ *McNamara*, 78 N.Y.2d at 631, 585 N.E.2d at 791, 578 N.Y.S.2d at 479-80 (quoting *People v. Conrad*, 70 Misc. 2d 408, 410, 334 N.Y.S.2d 180, 183 (1972)).

²⁴ *Id.* at 633, 585 N.E.2d at 793, 578 N.Y.S.2d at 481. For example, assume two people are engaged in sexual activity in a car completely covered with snow on a deserted street at 4:00 A.M. on Christmas Eve. If the plain meaning approach is applied, then these two people have violated section 245.00(a) even though the circumstances clearly indicate that the "public sensibilities" were not at risk. *See id.* at 633-34, 585 N.E.2d at 793, 578 N.Y.S.2d at 481. *But cf. id.* at 637, 585 N.E.2d at 795, 578 N.Y.S.2d at 483 (Bellacosa, J., dissenting) ("[C]onduct itself—public lewdness—is sufficiently offensive.").

Two years prior to *McNamara*, the Buffalo City Court held that § 245.00 was not intended to "embrace fact situations . . . where the parties were obviously attempting . . . to be clandestine." *People v. Anonymous Female*, 143 Misc. 2d 197, 198-99, 539 N.Y.S.2d 868, 870-71 (Buffalo City Ct. 1989) (public lewdness statute should not be "applied or interpreted to apply to any situation where it could be said that, under all the circumstances of the case, that defendants reasonably should have expected privacy"); *see also* *People v. Sacks*, 2 Misc. 2d 201, 206, 150 N.Y.S.2d 222, 228 (N.Y.C. Magis. Ct. N.Y. County 1956) (innocent acts "do not become crimes, unless there is a clear and positive expression of the legislative intent to make them criminal"). The *McNamara* court's holding, however, indicates that actors who take steps to lessen the likelihood of observation may succeed in immunizing themselves from criminal prosecution under § 245.00(a), since the statutory objective of protecting the public sensibilities is met. *See McNamara*, 78 N.Y.2d at 633-34, 585 N.E.2d at 793, 578 N.Y.S.2d at 481.

²⁵ *See generally* Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385 (1984) (discussing role of modern adjudication). "[J]udges sometimes make law. Both participants in and observers of the judicial process have recognized this fact for many years." *Id.* at 388. Judge Learned Hand wrote:

A judge must think of himself as an artist . . . who, although he must know the handbooks, should never trust to them for his guidance; in the end he must rely upon his almost instinctive sense of where the line lay between the word and the purpose which lay behind it; he must somehow manage to be true to both.

Learned Hand, *Mr. Justice Cardozo*, 52 HARV. L. REV. 361, 361-62 (1939); *see also* BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113 (1925) (judges "fill the open spaces in the law"). *But see* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947).

As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legisla-

in *McNamara* that the interior of a parked vehicle is not per se a "public place" properly narrows the public lewdness statute's applicability. Had the court ruled that sexual acts are always criminal when performed outside private premises, it would have expanded the statute beyond the Legislature's intent,²⁶ since an examination of the purpose of section 245.00(a) reveals that, under certain circumstances, New York has given the green light to sex in the back seat.

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ture. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. . . . A judge must not rewrite a statute, neither to enlarge nor to contract it.

Id. See generally Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 293 (1981) (judging is "mixing of linguistic and moral intuitions"); Arthur W. Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 VAND. L. REV. 456, 467-68 (1950) (discussing court's role in statutory construction).

²⁶ See *supra* notes 14, 20, 21, 24 and accompanying text.