

TO SEE AND BE SEEN: RECONSTRUCTING THE LAW OF VOYEURISM AND EXHIBITIONISM

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INTRODUCTION

Lady Godiva was an 11th-century Anglo-Saxon noblewoman who lived with her husband, Lord Leofric, in the English village of Coventry.¹ According to a legend dating back to as early as the 13th century, the compassionate Godiva, concerned about the harsh tax burden her husband had placed on his subjects, appealed to him, over and over, for their relief. At last, weary of her entreaties, Leofric set forth this challenge: if his wife would ride naked through the center of town, the tax would be lifted. Lady Godiva took him at his word, and the next day rode her horse down the main street of Coventry, covered only by her long hair. According to one version of the legend, a proclamation was issued that all persons should stay indoors and shutter their windows during Godiva's ride.² According to an alternate version, the people stayed indoors voluntarily, shuttered behind closed windows as a gesture of respect and appreciation for her actions on their behalf.³ In the end, Lord Leofric made good on his promise and announced that the tax burden on his subjects would indeed be lifted.⁴

A subplot in a later version of the Lady Godiva legend involves the role of a young tailor known forever after as "Peeping Tom." According to the story, the lustful Tom drilled a hole in his shutters so that he might see Godiva pass. As divine punishment, Tom was subsequently struck blind (or dead, according to yet

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1. DANIEL DONOGHUE, *LADY GODIVA: A LITERARY HISTORY OF THE LEGEND* 7 (2003); Charles Coe, *Lady Godiva: The Naked Truth*, HARV. MAG. (Jul.–Aug. 2003), <http://harvardmagazine.com/2003/07/lady-godiva-the-naked-tr.html>; *Lady Godiva: The Naked Truth*, BBCNEWS (Aug. 24, 2001), http://news.bbc.co.uk/2/hi/in_depth/uk/2000/newsmakers/1507606.stm; *Lady Godiva*, WIKIPEDIA, https://en.wikipedia.org/wiki/Lady_Godiva. The story of Lady Godiva and Peeping Tom is also discussed in John Draeger's analysis of voyeurism's wrongs. See John Draeger, *What Peeping Tom Did Wrong*, 14 ETHICAL THEORY & MORAL PRAC. 41, 42 (2011).

2. See, e.g., Alfred Lord Tennyson, *Godiva* (orig. publ. 1842), reprinted in THE POETICAL WORKS OF ALFRED TENNYSON, POET LAUREATE 63–64 (1870) (Godiva "sent a herald forth, And bade him cry, with sound of trumpet . . . From then till noon no foot should pace the street, No eye look down, she passing; but that all Should keep within, door shut, and window barr'd").

3. DONOGHUE, *supra* note 1, at 69.

4. *Id.*

another version of the story).⁵

The hero of the legend, of course, is Lady Godiva. In response to her husband's challenge, she was willing to put her own virtue at risk to achieve relief for her husband's subjects. Courageous and beautiful, Godiva is memorialized in paintings and sculpture, a poem by Tennyson, and a luxury brand of Belgian chocolates. The villain, needless to say, is Peeping Tom. Unable to constrain his sexual curiosity, he uses Godiva for his own gratification. In the end, it is Tom who is shamed, Tom who is punished, and Tom whose name is still used today to refer to a particular form of deviant sexual behavior.

Viewed through the lens of modern criminal law, however, the Lady Godiva/Peeping Tom story looks considerably more ambiguous. To prove the case against Tom—for voyeurism—the state would typically need to show not only that he peeped to obtain sexual gratification, but also that he violated Godiva's expectation of privacy in doing so.⁶ Ordinarily, one would think that a person who rode naked on a horse through the middle of town would have no such expectation. If there really was a proclamation requiring the townspeople to stay behind shuttered windows during the ride, however, the case against Tom would seem more plausible.

To prove the case against Lady Godiva—for exhibitionism, or indecent exposure—the state would have to show that at least some of Godiva's "private parts" were visible under her long hair.⁷ Whether she had the requisite *mens rea*, however, would depend on exactly how the offense was defined. Under those statutes that require an "intent to arouse or gratify the sexual desire of himself or another person" or an intent to cause "affront" or "alarm," her guilt seems doubtful. But under statutes that require no showing of intent, the case would be quite strong.

One point, at least, is clear: the two charges would be mutually exclusive. If Godiva were engaged in exhibitionism, then Tom could not be a voyeur; and if Tom were engaged in voyeurism, Godiva could not be an exhibitionist. It is also quite possible that neither committed an offense.

The legend of Lady Godiva and Peeping Tom raises a host of intriguing questions about sexual politics and marital relations, social class and noblesse oblige, deviance and normalcy, guilt and shame, and the line between what is public and what is private. As one commentator put it:

The Godiva myth is filled with contradictions. The lady is obedient to her husband, yet boldly challenges his position on taxes. She rides naked through

5. *Id.* at 72–73.

6. *See, e.g.*, GA. CODE ANN. § 16-11-61 (2017); MINN. STAT. § 609.746 (2017).

7. *See, e.g.*, HAW. REV. STAT. ANN. § 707-734 (LexisNexis 2017); IOWA CODE ANN. § 709.9 (West 2017).

the streets of the city, yet remains chaste. She is a member of the ruling class who nonetheless sympathizes with the plight of ordinary people.⁸

My interest in the Godiva/Tom legend, for present purposes, is narrower. The story provides a useful starting point for an inquiry into the underlying meaning of indecent exposure and voyeurism, two offenses that have been largely overlooked in the criminal law theory literature. Both offenses have been criminalized in some form for centuries, and they continue to be a presence in most modern criminal codes. But there has been very little discussion of the underlying rationale for such laws or how exactly they should be formulated.

Voyeurism and exhibitionism are particularly worth considering in relation to each other. As we shall see, the offenses mark out, and mutually reinforce, the borders of the ever-changing and culturally variable understanding of what is public and what is private. In voyeurism, the offender views his *victim's* private activities (often of a sexual nature) without her consent. In indecent exposure, the offender forces his victim to view *his own* intimate activities (again, typically sexual) without her consent. The interests and rights at stake in the two offenses are in a sense complementary. As Thomas Nagel has observed, we have an obligation of mutual restraint concerning persons' private and intimate spaces.⁹ "The public-private boundary faces in two directions," he writes, "keeping disruptive material out of the public arena and protecting private life from the crippling effects of the external gaze."¹⁰

But the two offenses also reflect significant asymmetries. As we shall see, the wrongs of voyeurism seem relatively clear and uncontested, and this is true even across otherwise wide cultural divides. The law of public indecency, by contrast, will prove to be messier, more sensitive to cultural variations, and more attuned to the specific circumstances in which such exposure occurs. We will see this, for example, when we consider cases in which a person exposes himself or herself in contexts as varied as Mardi Gras parades, breastfeeding, political protests, performance art, nude beaches, and fraternity streaking pranks. We will also want to consider the ways in which the emergence of new technologies and new social practices—including cheap and easily reproduced videography, smart phones, social media, reality TV shows, sexting, upskirting, and so-called revenge porn—have simultaneously lowered the threshold of what society regards as private while increasing the potential for resulting harm to victims.

One of the difficulties with which this project will have to contend is that both voyeurism and exhibitionism are defined differently in different jurisdictions. In attempting to develop a coherent and principled understanding of the norms that inform these offenses, it will be necessary not only to describe the various

8. Coe, *supra* note 1.

9. Thomas Nagel, *Concealment and Exposure*, 27 PHIL. & PUB. AFF. 3, 17 (1998).

10. *Id.*

approaches the law takes but also to advocate for a conception that departs from one or more prevailing formulations. In doing so, I shall engage in a kind of *normative reconstruction*, the purpose of which will sometimes be critical and sometimes justificatory.¹¹

This article proceeds in four parts. Part I considers the definitions of voyeurism and exhibitionism from the perspectives of psychiatry, the criminal law, and general cultural norms. Part II offers a basic framework for thinking about what kinds of conduct are properly criminalized. Part III considers why we criminalize voyeurism, focusing specifically on the wrongs it entails, the harms it causes, and the offense it elicits, as well as when a potential victim of voyeurism can be said to have assumed the risk of, or consented to, being watched. Part IV focuses on the argument for criminalizing indecent exposure. Considered again are the act's potential for causing harm, entailing a wrong, and eliciting offense. This part pays particular attention to the difference between public and private places, the value of the offender's conduct to himself and to society, the victim's susceptibility to offense, and the ways in which cultures differ with respect to norms concerning nudity and partial nudity.

I. DEFINING VOYEURISM AND EXHIBITIONISM

Before we can ask why voyeurism and exhibitionism are wrong and why and how they should be criminalized, it will be helpful to consider how these concepts have been understood not only in positive criminal law, but also in the realm of psychiatry and in the general culture. And we will want to ask how our understanding of voyeurism and exhibition in each of these contexts reciprocally informs our understanding in the others.

A. *Psychiatric Disorders*

Within the sphere of psychiatry, both “voyeurism” and “exhibitionism” are classified as paraphilia, or “deviant” sexual tendencies or practices. Implicit in this categorization is a normative judgment that such practices are wrong, a judgment we will examine in due course. For the moment, however, I want to focus on how these conditions have traditionally been defined from a clinical perspective.

As with pedophilia, the terms “voyeurism” and “exhibitionism” can refer both to sexual urges that are acted on and those that are felt but not necessarily carried out.¹² The American Psychiatric Association's Diagnostic and Statistical Manual-V (DSM-V) defines voyeurism as a sexual interest in, or the practice of, spying on

11. See, e.g., Neil MacCormick, *Reconstruction After Deconstruction: A Response to CLS*, 10 OXFORD J. LEGAL STUD. 539, 556 (1990). See generally STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE (2012) (employing a similar reconstructive methodology); Nicola Lacey, *Normative Reconstruction in Socio-Legal Theory*, 5 SOC. & LEGAL STUD. 131 (1996).

12. See Margot Kaplan, *Taking Pedophilia Seriously*, 72 WASH. & LEE L. REV. 75, 86–87 (2015) (distinguishing these concepts in the context of pedophilia).

people engaged in intimate behaviors, such as undressing, engaging in sex, or other actions usually considered to be of a private nature.¹³ In relatively rare cases, the target of the person displaying voyeuristic behavior “is aware of the presence of [the] voyeur and consents to [such] behavior”; much more commonly, the voyeur acts in such a manner without the target’s consent.¹⁴ Not everyone who has voyeuristic tendencies, however, suffers from voyeuristic disorder. The DSM-V treats voyeurism as a disorder only when a person acts on his intense “sexual urges with a nonconsenting person, or the sexual urges or fantasies cause clinically significant distress or impairment” to his social, occupational, or other significant areas of normal functioning.¹⁵

The etiology of voyeurism is not well-understood. The behavior tends to be highly compulsive.¹⁶ Its causes seem to be multi-faceted, stemming from a combination of biological, social, and cultural determinants.¹⁷ In voyeurism, the actor’s desire to see another undressed, in a sexual act, or in an act of excretion is said to be “so intense that it surpasses in importance the sexual act” itself.¹⁸

Exhibitionism refers to a mental illness that involves an urge to expose one’s genitals to other people. The audience for this type of behavior is usually unsuspecting strangers; the result is sexual satisfaction for the exhibitionist.¹⁹ As with voyeurism, the DSM-V treats exhibitionism as a specific disorder only when it interferes with a person’s quality of life or normal functioning.²⁰

As in the case of voyeurism, the etiology of exhibitionism is fairly obscure. Possible causes include achievement of sexual excitement from the exposure itself, reduction of stress (especially when accompanied by masturbation), and expression of anger, particularly in cases involving male offenders and female victims.²¹ Like the voyeur, it is rare for the exhibitionist to have any direct physical contact with his victim.²² Yet, unlike the voyeur, who hopes to go undetected by his victim, the reaction of the exhibitionist’s victim is an important element of the act. Indeed, the exhibitionist’s excitement is normally heightened

13. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 686–88 (5th ed. 2013) [hereinafter DSM-V].

14. Laran Joseph, *Voyeuristic Disorder DSM-5 302.82 (F65.3)*, THERAVIVE, [https://www.theravive.com/therapedia/voyeuristic-disorder-dsm--5-302.82-\(f65.3\)](https://www.theravive.com/therapedia/voyeuristic-disorder-dsm--5-302.82-(f65.3)) (last visited Feb. 14, 2018).

15. DSM-V, *supra* note 13, at 686.

16. See DONAL E.J. MACNAMARA & EDWARD SAGARIN, SEX, CRIME, AND THE LAW 168 (1977) (describing the compulsiveness of these behaviors).

17. STEPHEN T. HOLMES & RONALD M. HOLMES, SEX CRIMES: PATTERNS AND BEHAVIORS 68 (3d ed. 2009).

18. Joseph Davis, *Voyeurism: A Criminal Precursor and Diagnostic Indicator to a Much Larger Sexual Predatory Problem in Our Community*, in CURRENT PERSPECTIVES ON SEX CRIMES 73, 75 (Ronald M. Holmes & Stephen T. Holmes eds., 2002).

19. See DSM-V, *supra* note 13, at 689.

20. *Id.* at 686.

21. HOLMES & HOLMES, *supra* note 17, at 76.

22. *Id.* at 77.

by the victim's fright.²³

How common are voyeurism and exhibitionism? A recent study surveyed a random sample of 2,450 Swedes, both male and female, aged eighteen to sixty.²⁴ A total of 7.7% of the sample reported at least one incident of being sexually aroused by spying on others having sex. This was in contrast to the 3.1% who reported at least one incident of feeling sexually aroused by exposing their genitals to a stranger.²⁵ In general, men were both more voyeuristic than women (11.5% vs. 3.9%) and more exhibitionistic (4.1% vs. 2.1%).²⁶ This same study also indicated that there are high levels of co-occurrence between voyeurism and exhibitionism: 63% of voyeurs also reported exhibitionist behavior.²⁷

What is important to note about these psychiatric definitions of voyeurism and exhibitionism is that they reflect particularly extreme, and relatively unusual, manifestations of tendencies that are otherwise fairly common. A great deal of conduct that arguably constitutes voyeurism or exhibitionism from a legal or cultural perspective would not qualify as such within the narrow constraints of the DSM. Many people without a psychological disorder obtain pleasure from seeing others nude or engaged in sexual acts, as is evidenced by the prevalence of pornography. Many people also engage in what arguably qualifies as exhibitionism, whether in the form of sexting, mooning (displaying bare buttocks by pulling down one's trousers and underwear), streaking (running naked through a public place), flashing (briefly lifting a shirt to expose the breasts or other private parts), or nude sunbathing. The difference between these kinds of normal acts and what qualifies as deviance or mental illness is in some respects a matter of degree and context.

B. Criminal Offenses

Although voyeurism refers to both a psychiatric condition and a criminal offense, exhibitionism is generally used to refer exclusively to the psychiatric condition. The corresponding offense of exposing oneself to another without that person's consent is referred to as indecent exposure, or sometimes, public lewdness. When I am speaking specifically about the criminal offense, those are the terms I will use. Otherwise, I tend to use "exhibitionism" and "indecent exposure" interchangeably. Also, I should note that I leave to the side cases of voyeurism and indecent exposure that involve juveniles, on the grounds that they involve a distinct set of issues, which are best addressed separately.

23. *Id.*

24. Niklas Långström & Michael C. Seto, *Exhibitionistic and Voyeuristic Behavior in a Swedish National Population Survey*, 35 ARCHIVES SEXUAL BEHAV. 427, 429 (2006).

25. *Id.* at 427.

26. *Id.* at 431.

27. *Id.* at 428.

In this section, I describe the basic elements of each offense in turn, and I identify where significant definitional differences exist across jurisdictions.²⁸ My goal here is purely descriptive. Before we discuss which formulations are preferable, we first must have a clear idea of the justifications for criminalizing each offense.

I. Voyeurism

We begin with some history. At English common law, there was no distinct offense of voyeurism.²⁹ The crime of peeping was prosecuted under the more general rubric of trespass, disorderly conduct, or breach of the peace.³⁰ It was not until the early twentieth century that Anglo-American legislatures began codifying statutes that were specifically aimed at Peeping Toms.³¹

Perhaps reflecting the traditional property conception of voyeurism, an older group of still-extant statutes requires that the defendant “trespass,” “loiter,” or “enter,” onto another’s premises (usually for the purpose of invading their privacy).³² More recently enacted provisions tend to require simply that the defendant “look,” “spy,” or “peep” through a window or door or into a room or aperture (again, typically for the purpose of invading privacy).³³ An even newer group of statutes prohibits the installation or use of a device for observing another without their permission, a practice that has been called “video voyeurism.”³⁴

Some voyeurism statutes expressly require that *D* look into *V*’s premises,³⁵ while others are broad enough to apply to private activities conducted in “public” spaces, such as a dressing room, restroom, or locker room.³⁶ A few specialized provisions apply to cases in which the defendant secretly records an image under a victim’s skirt while she is in a public place, such as a subway.³⁷

Another basic distinction is between those voyeurism statutes that require a lewd or licentious purpose and those that do not. In the U.S., many statutes require

28. My work here has been aided by the useful, though now somewhat dated, compilation assembled by RICHARD A. POSNER & KATHARINE B. SILBAUGH, *A GUIDE TO AMERICA’S SEX LAWS* (1996).

29. Bill Prewett, *Act 62: The Crimination of Peeping Toms and Other Men of Vision*, 5 *ARK. L. REV.* 388, 388 (1951).

30. See 1 JOEL PRENTISS BISHOP, *NEW COMMENTARIES ON THE CRIMINAL LAW UPON A NEW SYSTEM OF LEGAL EXPOSITION* 671 (8th ed. 1892); 4 WILLIAM BLACKSTONE, *COMMENTARIES* *64–65.

31. See, e.g., *In re Banks*, 244 S.E.2d 386, 389 (N.C. 1978).

32. See, e.g., *ARK. CODE ANN.* § 5-71-213 (2017); *MISS. CODE ANN.* § 97-29-61 (2017); *S.D. CODIFIED LAWS* § 22-21-3 (2017).

33. E.g., *N.C. GEN. STAT.* §14-202 (2017); *S.C. CODE ANN.* § 16-17-470 (2018); see also STRAFGESETZBUCH [STGB] [PENAL CODE], §§ 183, 183a, 201, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/ (Ger.).

34. E.g., Video Voyeurism Prevention Act of 2004, 18 U.S.C. § 1801 (2012) (making it a crime to “capture an image of a private area of an individual without their consent, and knowingly [doing] so under circumstances in which the individual has a reasonable expectation of privacy”); *MINN. STAT.* § 609.746(b)(2) (2017).

35. See, e.g., *GA. CODE ANN.* §16-11-61 (2017); *MD. CODE ANN., CRIM. LAW* § 6-408 (LexisNexis 2017).

36. See, e.g., *NEB. REV. STAT.* § 20-203 (2017); *N.Y. GEN. BUS. LAW* § 395-b (McKinney 2018).

37. *MASS. GEN. LAWS* ch. 272, § 105(b) (2017).

merely that the defendant peep or look into a victim's dwelling secretly or "surreptitiously," or for the purpose of "invading the privacy of the persons spied upon."³⁸ For example, under Nebraska law, it is a crime to intrude on another's place of "solitude or seclusion, if the intrusion would be highly offensive to a reasonable person."³⁹ Statutes of this sort make no explicit reference to the victim's being nude, engaged in a sexual act, or excreting, and they say nothing about the victim's specifically "sexual" privacy. Nor do they refer to the offender's motive as sexual. Such statutes would thus apply, for example, to the case of a paparazzo taking pictures through the windows of a celebrity's house, even though such persons are normally motivated by a desire to earn money rather than to be sexually aroused.

A narrower form of voyeurism is voyeurism of a specifically sexual kind. In a minority of U.S. jurisdictions, peeping is a crime only if it is done for the purpose of obtaining specifically "sexual gratification," or with a "lewd, licentious and indecent purpose of spying upon the occupants," or for "the purpose of sexually arousing or gratifying the person's self."⁴⁰ Similarly, under English law, a defendant must "observe another person doing a private act" "for the purpose of obtaining sexual gratification."⁴¹ Likewise, in Canada, a person commits voyeurism if he "surreptitiously, observes . . . a person who is in circumstances that give rise to a reasonable expectation of privacy" and if the observation involves the sexual organs or "sexual activity" or is done for a "sexual purpose."⁴² Statutes of this sort normally would not apply to the case of the paparazzo.

2. *Indecent Exposure*

As was true in the case of voyeurism, there was no separate offense of indecent exposure at common law. The offense was prosecuted under the label of the more general common law crime of public nuisance, along with offenses such as public lewdness, adultery, fornication, and swearing.⁴³

State indecent exposure laws reflect three basic distinctions. The first is between being nude in public and having sex in public. "Indecent exposure" statutes make it a crime to be nude or display certain body parts in a "public place" or location, or in public view.⁴⁴ The offender must, with an intent that he be seen, "expose[]" himself or his "private parts," or his genitals, pubic area, buttocks or anus, or be

38. See, e.g., GA. CODE ANN. § 16-11-61; MINN. STAT. § 609.746; S.C. CODE ANN. § 16-17-470.

39. NEB. REV. STAT. § 20-203.

40. See, respectively, HAW. REV. STAT. ANN. § 711-1111(c) (LexisNexis 2017); MISS. CODE ANN. § 97-29-61(1)(a) (2017); OHIO REV. CODE ANN. § 2907.08(A) (West 2017).

41. Sexual Offences Act 2003, c. 42, § 67(1)(a) (Eng. & Wales).

42. Criminal Code, R.S.C. 1985, c C-46, § 162(1) (Can.). For more on the Canadian approach, see *Voyeurism as a Criminal Offense: A Consultation Paper*, CAN. DEP'T OF JUST., <http://www.justice.gc.ca/eng/cons/voy/toc-tdm.html> (last modified Jan. 7, 2015).

43. See, e.g., *Duvallon v. State*, 404 So. 2d 196, 196 (Fla. Dist. Ct. App. 1981).

44. See, e.g., CONN. GEN. STAT. § 53a-186 (2017); FLA. STAT. ANN. § 800.03 (West 2018).

naked, or in a state of partial or complete nudity.⁴⁵ Some states also make it a crime for a woman (but not a man) to expose her breasts.⁴⁶ “Public lewdness” statutes, by contrast, make it a crime to engage in various sex acts in public or in the presence of a minor.⁴⁷ Interestingly, public lewdness does not necessarily require nudity; it would arguably apply to public sexual behavior in which the parties kept most of their clothes on. As we will see below, few, if any, of these statutes actually define what it means to be doing such acts “in public.”

The second basic distinction is between those statutes that are intended to prohibit the display of body parts or sex acts before *nonconsenting* observers and those that are aimed at displays before *consenting* observers, as in a live sex show or swingers’ club or in a nudist colony.⁴⁸ For the most part, we will be concerned only with statutes of the first sort.

A third distinction concerns the offender’s intent or motive. A few states prohibit the public display of genitalia without regard to the offender’s intent or motive.⁴⁹ Others make it a crime to expose body parts only if the actor acted lewdly or with the “intent of arousing the sexual desire of the person or another person.”⁵⁰ Yet another set of statutes applies where the offender is exposing his body parts or engaging in public sex with an intent to cause “affront[,],” “alarm[,],” or “distress,” to another.⁵¹ This last kind of statute would thus potentially apply to cases in which an offender exposed body parts for some purpose that was non-sexual, but which might nevertheless be intended to cause affront or alarm.

The incidence of voyeurism and exhibitionism, as crimes, is lower than that of more serious sexual offenses such as rape and sexual assault. For example, according to statistics maintained by the Ministry of Justice, a total of 53,700 sexual offenses were recorded by the police during 2011–12 in England and

45. See, respectively, HAW. REV. STAT. § 707-34; MINN. STAT. § 617.23 (2017); MISS. CODE ANN. § 97-29-31; MODEL PENAL CODE § 213.5 (AM. LAW INST. 1985); TENN. CODE ANN. § § 39-13-511(a)(1)(A)(i)(a) (2017) (buttocks); TEX. PENAL CODE ANN. § 21.08 (West 2011) (anus); FLA. STAT. ANN. § 800.03 (nudity); GA. CODE ANN. § 16-6-8 (2017) (prohibiting “[a] lewd appearance in a state of partial or complete nudity”). The Sexual Offences Act of 2003 requires that defendant “intentionally expose[] his genitals.” Sexual Offences Act 2003, c. 42, § 66(1).

46. See, e.g., ARIZ. REV. STAT. ANN. § 13-1402(A) (2017); DEL. CODE ANN. tit. 11, § 764(b) (2017); LA. STAT. ANN. § 14:106(A)(1) (2017). For discussion of a case challenging such a law, see *infra* note 246.

47. See, e.g., KAN. STAT. ANN. § 21-5531(a)(1) (2007); NEV. REV. STAT. § 201.220 (2017); N.H. REV. STAT. ANN. § 645:1 (2017).

48. See, e.g., IND. CODE § 35-45-4-1 (2016). This statute was at issue in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

49. See, e.g., D.C. CODE ANN. § 22-1312 (2017); FLA. STAT. ANN. § 800.03 (2017).

50. E.g., OR. REV. STAT. ANN. § 163.465(1)(c) (West 2016); see also MODEL PENAL CODE § 213.5 (Indecent Exposure). It should be noted that the subject of indecent exposure is omitted from the currently proposed revisions to the Model Penal Code’s sexual assault provisions. The commentary states that it is redundant on Model Penal Code § 251.1 and “in any case inappropriate in an Article concerned with conduct involving more serious injury to individual victims.” MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES 20 (AM. LAW INST., Council Draft No. 1 2013).

51. E.g., MODEL PENAL CODE § 251.1 (Open Lewdness); N.J. STAT. ANN. § 2C:14-4 (West 2017); Sexual Offences Act of 2003, c. 42, § 66(1)(b) (Eng. & Wales).

Wales.⁵² Of these, rape and sexual assault accounted for 71% of the total, while indecent exposure and voyeurism together accounted for another 13%, or approximately 7,000 incidents.⁵³

Given the often compulsive nature of such behavior, and its association with mental illness, one might expect that some offenders charged with voyeurism and exhibitionism would find a defense in a theory of “irresistible impulse” insanity or diminished capacity, similar to the way in which kleptomania once served as a defense to theft.⁵⁴ The number of instances in which such a defense was successful, however, appears to be quite small.⁵⁵ Somewhat more often, defendants have been successful in using voyeuristic and exhibitionistic behavior as evidence of their diminished capacity in defending against other, more serious charges.⁵⁶

There is also another distinguishing characteristic of voyeurism and exhibitionism that deserves mention. It has sometimes been argued that the line between those infringements of sexual autonomy that should be treated as crimes and those that should be treated as mere civil wrongs depends on whether there is physical contact.⁵⁷ For example, we treat as crimes nonconsensual or unwanted sexual touching such as that involved in rape, sexual assault, abuse of position, child incest, statutory rape, and female genital mutilation, but we treat as a civil violation unwanted non-contactual conduct such as that involved in many cases of sexual harassment. Voyeurism and indecent exposure constitute interesting exceptions to this usual pattern, insofar as neither involves any actual physical contact.

C. Cultural Senses

So far, we have considered voyeurism and exhibitionism, first, as psychiatric conditions and, second, as criminal offenses. There is also a third, less well-defined, but nevertheless significant, sense in which the terms are used. Both cultural critics and ordinary speakers use “voyeurism” and “exhibitionism” to refer to practices they deem unseemly, including popular television shows and movies, pornography, manners of dress, and social media practices. Although few of these

52. HOME OFFICE & OFFICE FOR NAT'L STATISTICS, MINISTRY OF JUSTICE, AN OVERVIEW OF SEXUAL OFFENDING IN ENGLAND AND WALES 6 (2013), <https://www.gov.uk/government/statistics/an-overview-of-sexual-offending-in-england-and-wales>.

53. *Id.* It should be noted, though, that the more serious an offense, the more likely it is to be reported to the police; moreover, as we will see below, voyeurism often is never discovered by the victim.

54. *See generally* Elaine B. Abelson, *The Invention of Kleptomania*, 15 SIGNS: J. WOMEN CULTURE & SOC. 123 (1989).

55. *See* *People v. Laeke*, 271 P.3d 1111, 1114 (Colo. 2012); *In re Kolocotronis*, 660 P.2d 731, 733 (Wash. 1983).

56. *See, e.g., In re Chonis*, No. CX-90-1724, 1990 WL 157429, at *1-3 (Minn. Ct. App. Oct. 23, 1990). *But see* *People v. Davison*, 686 N.E.2d 1231, 1238 (Ill. App. Ct. 1997) (rejecting the defense even though voyeurism contributed to the hospital's diagnosis of insanity).

57. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1746 (1998) (citing and criticizing cases that make such a distinction).

practices would satisfy either the psychiatric or criminal law definitions of voyeurism or exhibitionism, they are worth considering because they offer insight into how such acts are informed by broader social norms.

To begin, it seems obvious that a great number of people have some curiosity about the private lives, including the sexual lives, of others with whom they are not actually intimate (whether they are celebrities, casual acquaintances, or complete strangers). Many people also seem to have an urge to expose some aspects of their own private lives, including their sex lives, to others with whom they are not otherwise intimate. And such practices seem to be increasingly common and in some sense acceptable.

Many social critics have noted that our popular culture has become ever more voyeuristic. Clay Calvert, for example, has written about the advent of reality TV programs such as MTV's *The Real World*, talk shows like *Jerry Springer*, and news entertainment programs such as *Dateline* and *20/20*, as well as paparazzi who stake out celebrities, and reporters with video cameras who accompany police officers executing warrants in the private homes of citizens.⁵⁸ According to Calvert, rather than considering voyeurism as a form of moral deviance, contemporary culture now looks at it as a form of entertainment, a kind of "guilty pleasure," available to anyone with a television or Internet access.⁵⁹

Psychiatrist Jonathan Metzl makes a parallel point, offering a perspective on what he calls the "expansion of the acceptable at the expense of the pathological."⁶⁰ According to Metzl, what once was viewed as deviant voyeurism has become normalized.⁶¹ In the process, he says, psychiatry has lost some of its authority to speak about why

even the most innocent act of voyeurism is never value free. Rather, voyeurism is a practice that is imbued with power, gender, and other types of nonchemical imbalances that let us see the voyeur as an exaggerated extension of society, as well as an aberration from it. This point allowed psychiatry to connect the voyeurism practiced by a civilization's deviants with the acts of looking that are performed by its most upright member⁶²

In other words, voyeurism, at least in some contexts, has come to be understood not as a discrete, well-defined form of mental illness, or even as a criminal offense, but rather as a more pervasive practice, one that informs, and perhaps infects, much of our modern world.

58. CLAY CALVERT, *VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE* 3–9 (2000); *see also* JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* (2000); DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 161–62 (2007).

59. *See* CALVERT, *supra* note 58, at 15–16.

60. Jonathan M. Metzl, *Voyeur Nation? Changing Definitions of Voyeurism, 1950–2004*, 12 *HARV. REV. PSYCHIATRY* 127, 130 (2004).

61. *Id.*

62. *Id.* at 130–31.

Although both Calvert and Metzl are concerned primarily with voyeurism rather than exhibitionism, their analysis seems relevant in the latter context as well. Just as it has become “normal” to seek entertainment by peering into other people’s private lives on television or the Internet, it has also become socially acceptable to reveal one’s most private matters to complete strangers. Many people have become, to some extent, indifferent to their own privacy.⁶³ For example, according to one leading study, nearly 20% of U.S. teenagers surveyed said “they had . . . sent a sexually explicit image of themselves via cell phone while almost twice as many reported that they had . . . received” a picture of this sort.⁶⁴ To this, we might add even more mundane practices such as wearing highly revealing clothing on the street, speaking loudly on a cell phone in a public place about the most intimate aspects of one’s life, or writing about one’s sex life on a blog or social media site.

Two points about the sort of conduct being discussed in this section warrant emphasis. First, much of this conduct, especially that which appears on television and the Internet, appears to be consensual on the part of both the exposé and the witness. Second, while most of this conduct lies beyond the scope of the criminal law, it is nevertheless relevant to our inquiry, as it will help us situate the norms that underlie the offenses of voyeurism and exhibitionism in a broader social and cultural context. That is, unless we know what conduct society regards as “normal” and “acceptable,” we will hardly be able to say what conduct it views as “harmful” or “wrongful” such that criminalization might be an appropriate response.

II. CRIMINALIZATION BASICS

Under what circumstances is it justifiable to subject voyeurism and exhibitionism to criminal sanctions? Why do we punish voyeurism but not most other kinds of privacy violations? Why are some acts of public nudity treated as crimes and others are not? How can we prevent the overzealous or selective or discriminatory prosecution of such conduct, especially in a pluralistic society in which norms of privacy and modesty vary greatly within and across communities?

To answer these questions, we first need to have an idea of when it is justifiable to subject *any* conduct to criminal sanctions. That is, we need a theory of criminalization. But that, of course, is a highly complex and controversial matter, and no place more so than in the realm of sexual offenses. Rather than try to devise or defend a foundational theory of criminalization, I shall simply *assume* a version of the liberal, civil libertarian stance, one that is influenced by the work of J.S. Mill,

63. See Anita L. Allen, *The Wanted Gaze: Accountability for Interpersonal Conduct at Work*, 89 GEO. L.J. 2013, 2015 (2001); see also BERNARD E. HARCOURT, *EXPOSED: DESIRE AND DISOBEDIENCE IN THE DIGITAL AGE* (2015).

64. Donald S. Strassberg et al., *Sexting by High School Students: An Exploratory and Descriptive Study*, 42 ARCHIVES SEXUAL BEHAV. 15, 15 (2013). See generally Anupam Chander, *Youthful Indiscretion in an Internet Age*, in *THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION* (Saul Levmore & Martha C. Nussbaum eds., 2010).

H.L.A. Hart, and especially Joel Feinberg, a stance that reflects a strong presumption in favor of personal liberty and liberal neutrality, and against government interference in citizens' private affairs.⁶⁵ In adopting this approach, I exclude other leading approaches, such as feminism, paternalism, legal moralism, and queer theory. At times, though, I will indicate points on which liberal theory diverges from these other theories, and where liberal theory might be modified to account for some of the concerns that the alternative theories raise.

Under the liberal approach, criminal sanctions can be justified only when they will efficiently prevent harm (or possibly "offense"—more on that later) to others (or possibly self). According to Feinberg, "harm" should be understood as comprising a significant setback to interests.⁶⁶ Typically, this occurs through the infringement of some tangible aspect of *V*'s "welfare interests," whether in life, bodily integrity and function, freedom of movement, shelter, sustenance, or the opportunity to form relationships with other people. Acts that set back interests of this sort—including killing, raping, battering, and stealing—are considered "harmful."

Core sexual offenses, such as rape, sexual assault, sex trafficking, child molestation, and female genital mutilation, all cause, or risk, serious harm to others. For example, rape victims potentially suffer the risks of unwanted pregnancy, infection, damage to tissue, and the like. They can also suffer serious significant psychological trauma, such as nightmares, flashbacks, or difficulty sleeping; they may find romantic attachments impaired, be unable to concentrate on work, or suffer fear of future assaults.⁶⁷

A corollary of the harm principle is sometimes referred to as the "wrong principle."⁶⁸ Not only must conduct cause or threaten harm, it must also be wrongful, typically in the sense that it violates another's rights. Sometimes, the requirement of wrongfulness is satisfied by the lack of consent to some action; rape is an obvious example. Other times, it is supplied by a lack of justification. For example, it is not murder to kill a human being when it is justifiable to do so, as when the killer acts in self-defense. Such acts, though constituting an obvious

65. For the seminal works, see 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* (1984); H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963); JOHN STUART MILL, *ON LIBERTY* (Dover Publ'ns 2002) (1859). For a more recent statement, see DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008).

66. FEINBERG, *supra* note 65, at 37–38.

67. See, e.g., Kaitlin A. Chivers-Wilson, *Sexual Assault and Posttraumatic Stress Disorder: A Review of the Biological, Psychological and Sociological Factors and Treatments*, 9 MCGILL J. MED. 111 (2006). Some feminist scholars have argued that offenses like rape (and perhaps voyeurism and exhibitionism as well) harm not only the individual victims of such acts but also women as a whole, by shaping a political or social landscape that reinforces their subordination. See generally CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCLOSURES ON LIFE AND LAW* (1987); Robin West, *Sex, Law, and Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 221–50 (Franklin G. Miller & Alan Wertheimer eds., 2010). Although I do not pursue here the question whether such harms would satisfy the liberal harm theory, I hope to do so in future work.

68. See generally GREEN, *supra* note 11, at 71–73.

setback to a victim's interests, nevertheless lack the requisite element of wrongfulness. These two elements of the wrong principle—lack of consent and lack of justification—are not mutually exclusive. Under the traditional liberal approach, harmfulness and wrongfulness constitute necessary, but not sufficient, conditions for criminalization; other factors would also have to be satisfied before criminal sanctions could be fully justified.

III. CRIMINALIZING VOYEURISM

Having considered the concepts of harm, wrong, and offense in the abstract, and their role in setting the limits of the criminal law, we are now in a position to consider how these concepts should apply in the particular contexts of voyeurism (in this Part) and of indecent exposure (in the next Part).

Recall the various definitions of voyeurism described above. While recognizing that not every statute conforms to this model, I shall assume for purposes of discussion that the offense requires that the offender: (1) looks into (2) another's premises, (3) with the intent of invading a person's privacy. I leave open for now the question whether the victim must be in her own home or in some other "private" space; whether she must be in a state of undress, engaged in sex, or excreting; whether the victim must be observed at the same time she is exposed; and whether the defendant must act with the purpose of obtaining specifically "sexual" gratification or intruding on the victim's specifically "sexual" privacy. I also leave to the side, as anachronistic, the requirement that the defendant must physically enter onto the victim's property.

The literature on why voyeurism should be criminalized is quite limited. Feinberg, in *Offense to Others*, probably has as much to say on the subject as anyone, but even his discussion is brief and leaves a wide range of issues unaddressed. He begins by describing a 1983 civil case in which women employees of a Kentucky coal mining company were spied on by male coworkers while they were in the shower and rest room.⁶⁹ Most of Feinberg's discussion is about the extent to which voyeurism can be said to cause harm. We will return to this issue in Part III.B. Feinberg has even less to say about exactly how voyeurism entails a wrong. That is the issue to which we turn first.

A. *The Wrongs in Voyeurism*

Prior to the twentieth century, in Anglo-American law, the act of voyeurism was understood, and classified, primarily as a wrong against property rights. To commit the crime, a person typically had to go onto another's property for the purpose of spying. During the twentieth century, however, the rationale for prohibiting voyeurism evolved. Apparently under the influence of Warren and Brandeis' seminal article, *The Right to Privacy*, the concern of voyeurism law shifted from

69. 2 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS* 51–52 (1985).

protecting rights in property to protecting those in privacy.⁷⁰

Although a concern with protecting privacy rights does not exhaust the moral content of voyeurism, the notion of privacy is clearly central. Many voyeurism statutes now make explicit that the defendant must “disregard . . . the inhabitant’s right of privacy”⁷¹ or “invad[e] the privacy of another.”⁷² Thus, we will need to consider exactly what is meant by privacy in this context and how it is violated in the kinds of situations contemplated by voyeurism statutes.

Our consideration of privacy will hardly be comprehensive; the literature is far too wide-ranging for that.⁷³ But among the issues we will need to consider are: how voyeurism effects a violation of privacy; under what circumstances the victim can be said to consent to, or assume the risk of, a privacy violation; and when the victim’s right to privacy can be mediated by competing concerns. Moreover, because most violations of privacy are treated as violations of civil law,⁷⁴ we will also want to ask whether there is something distinctive about the kind of privacy violation that occurs in the case of voyeurism that would justify specifically criminal sanctions.

1. The Right to Privacy in General

Some degree of privacy is surely central to most people’s conception of a good life. Privacy has been variously described as a concept of human dignity; as key to developing varied and meaningful interpersonal relationships; and as necessary to enhance personal expression and choice.⁷⁵ Warren and Brandeis understood the right to privacy as one based on a principle of “inviolate personality” which was part of a general “right to one’s personality.”⁷⁶ Privacy is also central to our ability to develop relationships with others. As Judith DeCew put it, “love, friendship and trust are only possible if persons enjoy privacy and accord it to each other.”⁷⁷ Privacy also seems essential to preserving a person’s reputation, preventing embarrassment, and maintaining the respect of others and perhaps even oneself. It allows us to “control who knows what about us . . . and thereby allows us to vary

70. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193, 195 (1890) (arguing, in the wake of then-new technologies and media practices, for recognition of a right to privacy, understood primarily as a right to be “let alone”).

71. See ARIZ. REV. STAT. ANN. § 13-1504 (2017).

72. See ARK. CODE ANN. § 5-71-213(a)(8) (2017).

73. For examples of the leading works, see ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988); *PRIVACY* (J. Roland Pennock & John W. Chapman eds., 1971); DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* (2008); Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980); William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295 (1975).

74. See generally DANIEL J. SOLOVE & PAUL M. SCHWARTZ, *PRIVACY LAW FUNDAMENTALS* (2011).

75. Judith DeCew, *Privacy*, STAN. ENCYCLOPEDIA PHIL. (2002, rev. 2013), <https://plato.stanford.edu/entries/privacy/> (surveying the rationales for right to privacy).

76. Warren & Brandeis, *supra* note 70, at 205, 207, 211.

77. DeCew, *supra* note 75.

our behavior with different people so that we may maintain . . . our various social relationships.”⁷⁸ In addition, privacy plays an important role in preserving our proprietary and financial interests.

The term “privacy” has many uses in the law. It is probably best understood as an umbrella term for a cluster of related concepts that includes the right to: (1) be immune from scrutiny or being observed in private settings, such as one’s own home; (2) limit the access others have to one’s personal information; (3) control others’ use of information about oneself; (4) conceal information about oneself that others might use to one’s disadvantage; and (5) protect intimate relationships.⁷⁹ The kinds of information that the right to privacy protects can involve any number of different subjects, including personal affections and affiliations, religious and spiritual matters, political and ideological beliefs, finances, and academic achievement, as well as matters related to sexual activity, health, and the body.

Of course, privacy is not always an unmitigated blessing. Many feminist scholars, in particular, have argued that privacy has often been used as a “shield” to cover up the degradation and abuse of women and others, making it difficult or impossible for the state to intervene.⁸⁰ Thus, it is important to recognize that the same societal norms that allow individuals to feel secure in the idea that they can have sex in private, without the scrutiny of third parties, may also make *offenders* secure in the idea that they can engage in marital rape, sexual harassment, or domestic violence without detection.

2. *Cultural Variety and Universal Norms*

Every society has a concept of privacy, according to which certain aspects of a person’s life are considered beyond the scrutiny of others.⁸¹ The specific content of what should be free from scrutiny, however, varies significantly. One factor is culture. For example, in the U.S., we have relatively strong norms regarding the privacy accorded to individuals’ medical health information.⁸² Notions of privacy have varied significantly over time as well. What was regarded as private in the early 20th century, before the widespread use of photography, videography, television, and the Internet, almost certainly differed from what is regarded as private in this century.

Despite such variation, however, certain aspects of privacy seem universal. According to anthropologist Donald Brown, every society has a specific norm according to which copulation is performed in private.⁸³ This norm now almost

78. *Id.*

79. See SOLOVE & SCHWARTZ, *supra* note 74.

80. See, e.g., CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

81. See generally Jeffery L. Johnson, *Privacy and the Judgment of Others*, 23 J. VALUE INQUIRY 157 (1989).

82. As manifested by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. 104–191, 110 Stat. 1936 (codified in scattered sections of 29 U.S.C. and 42 U.S.C.).

83. DONALD E. BROWN, *HUMAN UNIVERSALS* 139 (1991).

certainly extends to various non-copulative sexual acts as well, such as oral and anal sex and masturbation. Most societies also have specific norms regarding those parts of the body that should be covered up, including the genitalia, the buttocks, and perhaps the female breast. These prohibitions seem to have even greater force when family members are involved, presumably as a result of a separate taboo regarding incest.⁸⁴ Norms regarding the privacy of defecation and urination are also widespread, though they are perhaps slightly less than universal.⁸⁵

But even with respect to the display of body parts (if not copulation), norms can vary with context. Most people normally expose their naked bodies only to their lovers, but there are obvious exceptions: We go naked, for example, in front of strangers in the shower and locker room at the gym, though traditionally only when they are of the same gender. Even these norms may be changing, however, with the recognition that gender is a more fluid concept than previously thought, and with the introduction of unisex bathrooms.

3. *How Voyeurism Violates the Right to Privacy*

Because privacy refers to a diverse collection of rights, it is no surprise that the “invasion of privacy” should encompass a diverse collection of wrongs. Under William Prosser’s famous formulation, there are four commonly recognized forms of invasion of privacy: “false light,” “intrusion,” “public disclosure of private facts,” and “appropriation.”⁸⁶ Of these four, it is the tort of intrusion that seems closest to being the civil law analogue of the criminal offense of voyeurism.

Intrusion involves an invasion of the plaintiff’s private space or solitude, such as occurs in eavesdropping on private conversations or peeping through a bedroom window.⁸⁷ Concerns about “publication of private facts,” “appropriation,” and “false light” all seem less relevant in the context of voyeurism than concerns about avoiding scrutiny in private settings and the protection of intimate relationships. Consider a case in which *V*’s lover or physician, without her knowledge, peers into her window at night while she is undressing. Even if the lover or physician already knew everything there was to know about what *V*’s naked body looked like, and even if no new information about *V* would be obtained by her being peered upon,

84. Perhaps most famously, in the Hebrew Bible, Ham, one of Noah’s sons, sees his father drunk and naked within his tent, and alerts his two brothers, Shem and Japheth. *Genesis* 9:20–27. The brothers then enter the tent backwards so as not to see their father’s nakedness, and with eyes averted, cover him up. When Noah awakes, and discovers what Ham “has done to him” (there is some ambiguity about exactly what this means), Noah blesses Shem and Japheth, and curses Ham’s son, Canaan. *Id.* Interpretations of this story vary greatly, but the most straightforward one seems to focus on the traditional taboo on seeing one’s parents nude, and the connotation that such nudity has of sexual intimacy and possible incest. See, e.g., John Sietze Bergsma & Scott Walker Hahn, *Noah’s Nakedness and the Curse of Canaan (Genesis 9:20–27)*, 124 *J. BIBLICAL LIT.* 25, 25–26 (2005).

85. See 1 NORBERT ELIAS, *THE CIVILIZING PROCESS: THE HISTORY OF MANNERS* 129–43 (Edmund Jephcott trans., 1978) (discussing the development of Western norms regarding the privacy of so-called “natural functions”).

86. Prosser, *supra* note 73, at 389.

87. See 9 STUART M. SPEISER ET AL., *THE AMERICAN LAW OF TORTS* § 30.9 (2012).

we would still say that *V*'s privacy had been invaded and that she had been the victim of voyeurism.

4. *Other Wrongs in Voyeurism*

So far, we have considered primarily the various ways in which the voyeur violates his victim's privacy. But the concept of privacy does not exhaust voyeurism's moral content. Indeed, if privacy invasions were all there was to voyeurism, we would not expect it be subject to criminal sanctions in the first place, since, as noted above, the great majority of privacy invasions are treated as civil wrongs, if they are legally cognizable at all. We need to ask: what is it about voyeurism that makes it so especially wrongful, and therefore, worthy of criminalization?

There are at least two additional ways in which voyeurism entails a moral wrong. First, voyeurism involves a kind of objectification of, and domination over, its victims,⁸⁸ a domination that presumably would exist even in the case of the socially inferior Tom peeping on the noble woman Godiva.⁸⁹ Like the consumer of pornography, the voyeur *uses* the object's nudity for his own sexual gratification. But unlike most cases involving pornography, he does so without the object's consent. In that sense, voyeurism involves a significant infringement of the victim's sexual autonomy.⁹⁰

The domination that occurs in the case of voyeurism is quite different from the sort of domination that occurs in the case of rape or sexual assault. Voyeurism is normally a furtive act. Few, if any, voyeurs want their victims to be aware of their being subjected to scrutiny. If we were to analogize to theft law, we might say that voyeurism was like fraud or burglary (i.e., stealthy and hidden), while sexual assault was like robbery (i.e., overt and physically threatening). Part of what is so disconcerting about voyeurism is precisely the fact that its victim is often entirely unaware that it is occurring.

The second way in which voyeurism entails a moral wrong concerns the notion of trespass. Although the law of voyeurism no longer requires a trespass in the literal sense of going onto the victim's property, the core meaning of voyeurism still entails what we might think of as "visual trespass."⁹¹ It involves a virtually physical intrusion into the victim's personal space. In comparison with other serious privacy invasions, such as hacking into a person's computer or reading her

88. See Martha C. Nussbaum, *Objectification*, 24 PHIL. & PUB. AFF. 249, 251 (1995). For another attempt to analyze voyeurism's wrongs, see Draeger, *supra* note 1 (focusing on the ways in which voyeurism entails disrespect for others).

89. Thanks to Jeremy Horder for offering this point.

90. Cf. Daniel O. Nathan, *Just Looking: Voyeurism and the Grounds of Privacy*, 4 PUB. AFF. Q. 365, 375 (1990).

91. Indeed, this is precisely how the act of voyeurism has been conceptualized under Jewish law, which refers to voyeurism as a kind of *hezzek re'iyah* (literally, visual trespass). See ROSEN, *supra* note 58, at 18.

diary without her permission, voyeurism seems more visceral, more tangible, and more directly threatening.

Finally, it should be noted that voyeurism has traditionally required that the victim's nakedness and the offender's observation or recording of such nakedness be contemporaneous.⁹² Under this conception, if *A* recorded a surreptitious video of *V* naked, which *B* subsequently watched without *V*'s knowledge, *A* would be liable for voyeurism, but *B* would not. My point is not that such third party, non-consensual watching is not wrong or should not be a crime, but rather that it seems to go beyond the paradigm of voyeurism. And my argument is based on more than simply the fact that it departs from the traditional historical understanding of the offense. It is based on the conception of voyeurism described above, one that entails a distinctive kind of "visual trespass" and "domination," which occurs only when the offender's observation (or recording) and the victim's nakedness occur simultaneously.⁹³

5. *Looking vs. Listening*

To say that the wrong involved in voyeurism involves "looking" is to focus on the visual aspect of the act. There are good historical and etymological reasons for doing so. The term comes from the French *voyeur*, meaning "one who views or inspects," which in turn derives from the French *voir*, "to see."⁹⁴ As its etymology would suggest, voyeurism has traditionally implied unwanted looking, and voyeurism statutes have almost invariably required that the offender "look," "spy," "peep," or "gaze" through a window or door or into a room or aperture, rather than listening to another's conversations or activities (though a few jurisdictions do have separate criminal eavesdropping provisions).⁹⁵

Of course, a person who is eavesdropped upon, or surreptitiously recorded, while making love or having an intimate conversation has also had her privacy rights violated. In some cases, an aural intrusion can be even more intrusive and embarrassing than a visual one.⁹⁶ But, in general, aural intrusions are not included within the scope of voyeurism.⁹⁷ Why should this be?

Part of the answer may lie in an accident of history. As we saw above, voyeurism was originally viewed as an offense against property, and presumably visual

92. Thanks to Michelle Dempsey for encouraging me to consider this issue.

93. For a discussion of this issue in the context of so-called revenge porn, see *infra* notes 172–74 and accompanying text.

94. See ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/voyeur> (last visited Feb. 14, 2018).

95. *E.g.*, N.Y. PENAL LAW § 250.05 (McKinney 2018) ("A person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication.").

96. Thanks to Nicky Padfield for pressing me on this point.

97. Though a few jurisdictions make it a distinct crime. See, *e.g.*, N.H. REV. STAT. (2017) § 570-A:2; N.Y. PENAL LAW § 250.05.

intrusion into a physical space violates property rights in a way that eavesdropping does not.⁹⁸ But it may also be that sights are somehow viewed as more central to the concepts of privacy and modesty than sounds, and that visual intrusions are therefore viewed as more revealing and intrusive, other things being equal, than aural ones.

6. *Nudity and Sex*

As we saw above, some voyeurism statutes require that the offender have a “lewd,” “licentious,” or “sexual purpose,” or that he invade a specifically “sexual” interest of the victim, while other statutes require merely an intent to invade another’s privacy, without any mention of sex or a sexual purpose.⁹⁹ Which approach makes the most sense? Or, to frame the question differently, how central to the concept of voyeurism are sex and nudity?

Frank O’Connor’s elegiac short story, “The Man of the World,” provides an interesting case in this regard.¹⁰⁰ The protagonist, Larry, is a young boy, naïve in the ways of the world. He goes to visit his older friend and neighbor, Jimmy Leary, whom he admires for his sophistication and self-confidence. Jimmy proposes that the two of them spy on a young couple whose house is just across the way from the Leary attic.¹⁰¹ It is unclear exactly what their expectations are, but in the end, what they observe is the couple praying, rather than making love. Larry realizes that he has been intruding on something intimate and personal, and he is ashamed.¹⁰²

Larry and Jimmy’s acts clearly violated the young couple’s privacy. But, assuming that Larry, at least, had no specifically lewd or licentious purpose when he looked out of Jimmy’s attic window, that he was acting out of nothing more than youthful curiosity, we might wonder whether his act should be included within the scope of voyeurism law, or addressed instead under a separate body of generic privacy law.

An analogous question arises with respect to putatively sexual offenses such as female genital mutilation, sexual assault, necrophilia, and bestiality.¹⁰³ Under current law, each of these offenses is normally classified as a distinctively *sexual* offense, despite the fact that each such act could also be treated under a generic, non-specifically-sexual statute—whether it be mayhem, simple assault, corpse desecration, or animal cruelty, respectively. In deciding how each such offense should be defined and classified, we would need to ask if sex is functioning as a necessary conceptual element of the conduct prohibited, or if it is merely

98. See *Katz v. United States*, 389 U.S. 347, 365 (1967) (Black, J., dissenting).

99. See *supra* notes 38–42 and accompanying text.

100. Frank O’Connor, *The Man of the World*, NEW YORKER, July 28, 1956, at 19–22.

101. *Id.* at 19.

102. *Id.* at 20–22.

103. See Stuart P. Green, *What Are the Sexual Offenses?*, in *THE NEW PHILOSOPHY OF CRIMINAL LAW* 57–76 (Chad Flanders & Zach Hoskins eds. 2016).

contingent. We would need to consider if there was a qualitative difference between those acts of mayhem, assault, corpse desecration, and animal cruelty that *were* sexual in nature and those that were not.¹⁰⁴

My own intuition is that voyeurism that involves sex or the display of genitals should be treated as qualitatively different from voyeurism that involves neither. My best guess is that, for most people in our society, as unnerving and intrusive as it would be to be spied on while praying, brushing one's teeth, or playing the piano, it would feel even worse to be spied on while showering or making love. Our system of law is normally reluctant to criminalize invasions of privacy. Voyeurism constitutes a significant departure from that norm. In a liberal society, the use of criminal sanctions should be limited to the most egregious cases.

7. *When the Right to Privacy is Overridden*

It is important to recognize that privacy normally exists as a prima facie right, meaning that it can sometimes be overridden by competing claims. For example, the right to privacy sometimes comes into conflict with the right to know.¹⁰⁵ Although this is likely to happen only rarely in the context of voyeurism, it is a possibility nevertheless worth considering.

Imagine that *A* and *B* are domestic partners, and that the police have probable cause to believe that *A* is about to sexually assault *B*. In that case, the right of government authorities to surveil the parties' home to prevent a possible criminal act from occurring would normally outweigh whatever right to privacy *A* or *B* otherwise would enjoy, provided that proper procedures were followed.

Other cases of "right to know" voyeurism seem less defensible. Tabloid newspapers and websites are willing to pay paparazzi for photographs of celebrities in compromising positions (say, in bed with someone who is not their spouse), and many readers are willing to pay to see them. It seems doubtful, however, that such a "right to know" should ordinarily override the right to privacy that even celebrities presumably enjoy. In short, even voyeurism conducted by a paparazzo should be regarded as voyeurism (so long as mens rea requirements are met).

A more difficult case would arise where *X* had reason to believe that his significant other, *Y*, was having an affair with a third party. Would *X*'s presumed right to know about these matters trump *Y*'s right to privacy? Would it justify *X* in placing a hidden camera or microphone to monitor *Y*'s activities? What if *X* was worried about contracting a sexually transmitted disease or being drawn into an embarrassing scandal as a result of *Y*'s indiscretions? *X*'s behavior in such cases is likely to fall within the language of various voyeurism statutes cited above,

104. Cf. Sharon Cowan, *Offenses of Sex or Violence? Consent, Fraud, and HIV Transmission*, 17 *NEW CRIM. L. REV.* 135, 157–61 (2014).

105. For a classic statement of the conflict in a different context, see Thomas I. Emerson, *The Right of Privacy and Freedom of Press*, 14 *HARV. C.R.-C.L. L. REV.* 329, 350 (1979).

though, in theory, he should be able to argue a defense of necessity or choice of evils.

B. Voyeurism and the Harm Principle

In the discussion so far, we have been considering the complex ways in which the moral content of voyeurism is informed by the wrongs of invading *V*'s privacy and infringing her right to sexual autonomy. But, as we saw above, simply because a given act is wrongful does not necessarily mean that its criminalization will be justified. Under the liberal approach to criminalization, we must also ask if the act is “harmful” to others. And if it is not harmful, we must ask if criminalization can be justified on some other basis, such as that it is “offensive.”

1. The Harms of Voyeurism

Although there do not appear to be any systematic studies of voyeurism's effects on its victims, there is at least anecdotal evidence to suggest that some victims of voyeurism do indeed suffer significant psychological injury. These injuries occur when the victim catches the voyeur in the act, and suffers embarrassment at that time, or when she discovers sometime later that she has been spied on, for example, when she finds the camera the offender left behind, or learns that a surreptitiously-taken video of her has been posted online. The harm in these later-discovered cases is latent, though presumably no less harmful than harms discovered contemporaneously.

Victims of voyeurism can suffer depression, sleeplessness, loss of self-esteem, damage to their reputations, and impaired relationships with romantic partners, neighbors, and colleagues.¹⁰⁶ Two recent cases in the news provide poignant examples of the kinds of serious harms that at least some acts of voyeurism can trigger:

- Barry Freundel was the rabbi of a prominent Orthodox synagogue in Washington, D.C. In early 2015, he pled guilty to fifty-two counts of voyeurism, and was sentenced to six-and-a-half years in prison, for secretly filming numerous women, over the course of many months, while they were undressing before immersing themselves in a *mikvah*, a Jewish ritual bath that is used as part of the conversion process and by married women following menstruation and childbirth.¹⁰⁷ At Freundel's sentencing hearing, eighteen of his victims testified as to the pain that his acts had caused them. “‘He lectured us about the evils of porn while turning us into his own porn stars,’ one victim told the court, choking back tears. Another said she

106. See FEINBERG, *supra* note 69, at 51–52; *Peeping Toms' Voyeurism Scars Victims' Psyches*, NPR (Aug. 29, 2012), <https://www.npr.org/2012/08/29/160256476/peeping-toms-voyeurism-scars-victims-psyches>.

107. John Clarke, *Rabbi Barry Freundel Gets 6-1/2 Years for Mikveh Peeping*, FORWARD (May 16, 2015), <https://forward.com/news/breaking-news/308317/rabbi-barry-freundel-faces-sentencing-in-mikveh-peeping/>.

fell into a deep depression and began using drugs. ‘I fell off the edge of this earth,’ she said.”¹⁰⁸ Some said they were “now fearful of using public restrooms or locker rooms.”¹⁰⁹

- In 2010, Rutgers University students Dharun Ravi and Molly Wei used a computer webcam to view, without his knowledge or consent, Ravi’s roommate, Tyler Clementi, kissing another man. The incident was not recorded.¹¹⁰ Shortly thereafter, Ravi gossiped about him on Twitter: “I saw him making out with a dude. Yay.”¹¹¹ Later that day, Clementi wrote to University officials in a formal email, describing the viewing incident and stating, “I feel that my privacy has been violated and I am extremely uncomfortable sharing a room with someone who would act in this wildly inappropriate manner.”¹¹² Two days later, Ravi (who did not know about the complaint Clementi had lodged with the university) tried to set up another viewing, but Clementi seems to have disabled the webcam. A few hours later, Clementi took the train to the George Washington Bridge, posted a status update on Facebook (“Jumping off the gw bridge sorry”) and then jumped to his death.¹¹³

As these cases suggest, victims of voyeurism can suffer significant mental anguish and shame.

Do cases like these, in which the harm is purely, or primarily, psychological, satisfy the harm principle? We normally think of harm as involving a significant setback to a victim’s interests, typically in physical security or property. But where the defendant’s action caused his victim to suffer not mere affront, but psychological trauma, depression, sleeplessness, sexual dysfunction, difficulty in concentrating, impaired personal relationships, and the like, and where such psychological

108. *Id.*

109. Keith L. Alexander & Sarah Pulliam Bailey, *D.C. Rabbi Sentenced to 6½ Years in Prison on Voyeurism Charges*, WASH. POST (May 15, 2015), https://www.washingtonpost.com/local/crime/dc-rabbi-scheduled-to-be-sentenced-today-on-voyeurism-charges/2015/05/14/4a1187b0-fa77-11e4-9030-b4732caefe81_story.html.

110. Ian Parker, *The Story of a Suicide*, NEW YORKER (Feb. 6, 2012), <http://www.newyorker.com/magazine/2012/02/06/the-story-of-a-suicide?currentPage=all>.

111. *Id.*

112. *Id.*

113. *Id.* At trial in 2012, Ravi was convicted on fifteen counts that included invasion of privacy and attempted invasion of privacy. He was sentenced to thirty days in jail and three years of probation. In 2016, a New York state appellate court reversed his conviction and remanded the case for a new trial because of a change in the state’s bias intimidation law. See Patrick McGeehan, *Conviction Thrown Out for Ex-Rutgers Student in Tyler Clementi Case*, N.Y. TIMES (Sept. 9, 2016), <https://www.nytimes.com/2016/09/10/nyregion/conviction-thrown-out-for-rutgers-student-in-tyler-clementi-case.html>. After the reversal, Ravi pled guilty to attempted invasion of privacy as part of a plea agreement that dropped all outstanding charges and sentenced him to “time served and fines paid.” Nate Schweber & Lisa W. Foderaro, *Roommate in Tyler Clementi Case Pleads Guilty to Attempted Invasion of Privacy*, N.Y. TIMES (Oct. 27, 2016), https://www.nytimes.com/2016/10/28/nyregion/dharun-ravi-tyler-clementi-case-guilty-plea.html?_r=0. Wei had the charges against her dropped in return for agreeing to testify against Ravi. Aman Ali, *Plea Deal Means Student to Testify Against Rutgers Roommate*, REUTERS (May 6, 2011), <https://www.reuters.com/article/us-rutgers-suicide/plea-deal-means-student-to-testify-against-rutgers-roommate-idUSTRE7454JS20110506>.

harms were a reasonably foreseeable consequence of the defendant's conduct, we ought to regard it as sufficient to satisfy the harm principle.¹¹⁴

2. Harmless Voyeurism

Although some victims of voyeurism eventually discover the act they have been subjected to, and suffer mental anguish as a result, other victims remain entirely unaware of what has happened, and thus psychologically unaffected. For example, imagine a case in which *D* spies on *V* and is observed by *W*; *W* reports the crime to the police, and *D* is prosecuted, but *V* never becomes aware of the crime she was subjected to. Can “harmless voyeurism” of this sort nevertheless be said to justify criminalization?

There are at least three possible ways to approach the problem. The first involves what has been called a “preventive rationale,” namely, the idea that the criminal law is properly used to prevent significant risks of harm.¹¹⁵ One common belief about voyeurism is that such acts, as bad as they are, often serve as a precursor to something even worse, such as rape, sexual assault, or sexual blackmail.¹¹⁶ Under this reasoning, criminalizing voyeurism would be justified for reasons similar to those underlying the criminalization of child grooming, failing to register as a sex offender, and the English offense of administering a substance with intent to commit a sexual offense.

Unfortunately, the empirical evidence that would support such an approach to criminalization is inconclusive. On the one hand, the evidence suggests that the typical voyeur has no interest in having any physical contact or interaction with his victims, and indeed the vast majority of voyeurs do not go on to molest their

114. Cf. *R v. Burstow* [1997] UKHL 34, <https://publications.parliament.uk/pa/ld199798/ldjudgmt/jd970724/irland01.htm> (holding psychiatric injury can amount to bodily harm under Offences Against the Person Act). A similar point about psychological harm is made in Andrew von Hirsch and A.P. Simester, *Penalising Offensive Behaviour: Constitutive and Mediating Principles*, in *INCIVILITIES: REGULATING OFFENSIVE BEHAVIOUR* 115–17 (Andrew von Hirsch & A.P. Simester eds., 2006).

115. See, e.g., Andrew Ashworth & Lucia Zedner, *Just Prevention: Preventive Rationales and the Limits of the Criminal Law*, in *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 281–93 (R.A. Duff & Stuart P. Green eds., 2011).

116. The story of Susanna and the Elders, from Chapter 13 of the Book of Daniel (viewed as canonical by the Catholic and Eastern Orthodox churches, and apocryphal by Protestants), provides an interesting example of the kinds of harm that might “follow on” from voyeurism. Susanna was a “very beautiful and God-fearing” Jewish wife. *Daniel* 13:2. She liked to bathe in the private garden attached to her house. See *id.* at 13:15. Two lecherous “elders” from the community secretly watched her while she was doing so. *Id.* at 13:14–18. This clearly constituted voyeurism. But their criminal conduct did not stop there. They threatened that, unless she would “lie” with them, they would go to court and testify that a “young man was here with you and that is why you sent your maids away.” *Id.* at 13:19–21. They thus subjected her to sexual blackmail. As the story turns out, Susanna resisted their coercion, the matter ended up in court, and eventually Susanna’s virtue was vindicated and the voyeurs were punished. *Id.* at 13:22–63. The story has proved an irresistible subject for a wide range of painters, including Rubens, van Dyck, Tintoretto, Rembrandt, Lorenzo Lotto, Artemisia Gentileschi, Picasso, and Thomas Hart Benton. See generally *Category: Paintings of Susanna and the Elders*, WIKIMEDIA COMMONS https://commons.wikimedia.org/wiki/Category:Paintings_of_Susanna_and_the_Elders (last visited Feb. 14 2018).

victims.¹¹⁷ On the other hand, there is some evidence to suggest that a small number of rapists do engage in voyeurism as a means of selecting their victims.¹¹⁸ There is also some evidence that voyeurism can serve as a gateway to more serious sex offenses.¹¹⁹ If a significant causal link between voyeurism and more serious crimes could in fact be established, that would arguably provide a basis for criminalization.

A second approach to the problem would focus on the protection of the broader community's sense of privacy. If a person knew that a voyeur had been looking through her neighbors' windows, she might feel threatened and anxious about her own privacy, begin leaving her shades down, and become distrustful of her neighbors. She might feel constrained in her ability to live her life in the way she would like. The quality of life in her neighborhood would suffer as a result. The harm would be one not of "broken windows," but of "peered-through windows." Once again, however, such prophylactic criminalization has proved controversial.¹²⁰

Finally, there is a more direct route to the problem of what we might call "pure" or harmless voyeurism, in which the victim remains unaware that her privacy has been invaded, and her neighbors unaware of the threat they face; the voyeur is the only person who knows what he is doing, and he tells no one about his activities, keeps no record of them, and is no more likely to commit other sexual offenses as a result.¹²¹ In cases like this, it seems correct to say that there has indeed been no harm, even though there has been a wrong.¹²²

Cases of this sort are analogous to the hypothetical case of so-called "pure" rape described by John Gardner and Stephen Shute.¹²³ That case involves a rapist who wears a condom and causes no physical harm to his victim, and a victim who is unconscious at the time of the rape and never subsequently becomes aware of the act.¹²⁴ Although it obviously involves a serious wrong, such a case would seem to

117. See HOLMES & HOLMES, *supra* note 17, at 162; see also Gene G. Abel et al., *Multiple Paraphilic Diagnoses Among Sex Offenders*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 153, 156–59 (1988).

118. See JANET WARREN ET AL., THE GEOGRAPHIC AND TEMPORAL SEQUENCING OF SERIAL RAPE 17 (1995), <https://www.ncjrs.gov/pdffiles1/Digitization/162419NCJRS.pdf>.

119. HOLMES & HOLMES, *supra* note 17, at 68.

120. See generally PREVENTION AND THE LIMITS OF THE CRIMINAL LAW (Andrew Ashworth et al. eds., 2013) (analyzing what principles should guide the use of coercive preventive power).

121. Consider the notorious case of Gerald Foos, who spent the 1960s through 1980s spying, through vents in the ceiling, into the rooms of the guests at his Colorado motel. No one other than Foos, his wife, and the journalist Gay Talese knew about Foos' activities until Talese wrote about it in a 2016 article in the NEW YORKER. Gay Talese, *The Voyeur's Motel*, NEW YORKER (Apr. 11, 2016), <http://www.newyorker.com/magazine/2016/04/11/gay-talese-the-voyeurs-motel>. I suspect that those surviving guests who learned about Foos' crimes by reading about them in the magazine, long after they had occurred, might well have suffered intense distress and humiliation at the revelation.

122. For an argument that undetected voyeurism is not only not harmful, but also not wrongful, see Tony Doyle, *Privacy and Perfect Voyeurism*, 11 ETHICS & INFO. TECH. 181 (2009).

123. John Gardner & Stephen Shute, *The Wrongness of Rape*, in OXFORD ESSAYS IN JURISPRUDENCE 193, 195 (Oxford Univ. Press, Ser. No. 4, Jeremy Horder ed., 2000).

124. *Id.* at 196.

involve no harm, at least as that term has been used by many criminal law theorists. Despite this, Gardner and Shute argue that it would be a mistake to assume that it should not be criminalized. As they put it:

It is no objection under the harm principle that a harmless action was criminalized, nor even that an action with no tendency to cause harm was criminalized. It is enough to meet the demands of the harm principle that, if the action were not criminalized, *that* would be harmful. This test is passed by the pure case of rape with flying colours. If the act in this case were not criminalized then, assuming at least partial efficacy on the part of the law, people's rights to sexual autonomy would more often be violated.¹²⁵

In other words, according to Gardner and Shute, even if a wrongful act causes no harm in the usual sense of the term, criminalization could still be justified, provided that the failure to criminalize the original act would result in subsequent wrongful behavior.¹²⁶

While Gardner and Shute's case of harmless rape might seem like a clever law professor's hypothetical, the case of pure or harmless *voyeurism* must be quite common in the real world. So, it is crucial to ask if their argument is correct; and, if so, whether it would apply in this context.

There is a certain ambiguity in the way Gardner and Shute's argument is expressed. The most straightforward interpretation is that failing to criminalize rape would be "harmful" because "people's rights to sexual autonomy would more often be violated."¹²⁷ But this claim is problematic. Harms and autonomy violations are properly understood as distinct concepts. Autonomy violations sometimes cause harms, but not always. Indeed, that is the whole point of the harmless rape hypothetical in the first place. Under their approach, any time a failure to criminalize would lead to more wrongful conduct, the harm principle would be satisfied. There would be no need for a separate requirement that *D*'s conduct cause *V* a setback to interests. Gardner and Shute's argument would essentially replace the harm principle with a mere wrong principle.¹²⁸

There is, however, a way to rescue their argument. We might reinterpret them to be saying that, unless we criminalize pure rape, we are likely to have more genuinely *harmful* rapes—that is, more cases in which victims suffer actual harm. That is certainly true as an empirical matter, and it provides a valid reason, under the harm principle, for criminalizing rape. But it is different from saying that the

125. *Id.* at 216.

126. *See id.*

127. The quotations come from *Id.*

128. For a work that seems to endorse such an approach, see Alessandro Spena, *Harmless Rapes? A False Problem for the Harm Principle*, 10 DIRITTO & QUESTIONI PUBBLICHE 497 (2010), http://www.dirittoquestionipubbliche.org/page/2010_n10/3-12_stu_A_Spena.pdf.

harm principle would be satisfied simply because, without criminalization, “people’s rights to sexual autonomy would more often be violated.”¹²⁹

In the case of voyeurism, we might follow similar reasoning: it is not enough to say, following Gardner and Shute, that if pure voyeurism “were not criminalized, then, assuming at least partial efficacy on the part of the law, people’s rights to sexual autonomy would more often be violated.”¹³⁰ On the other hand, in a world that did not criminalize voyeurism, we would presumably have more voyeurism overall, including more cases of discovered voyeurism and, as a result, more instances of psychological harm. Assuming that is so, criminalization would be justifiable under the harm principle.

C. Voyeurism and the Offense Principle

Regardless of whether voyeurism does or does not cause harm within the meaning of the harm principle, we still need to consider whether it could be criminalized under what has been recognized by some theorists as an alternative to the harm principle—namely, the offense principle.

1. *The Development of the Offense Principle*

After having argued that the harm principle is the only legitimate liberty-limiting principle, Mill, in the final chapter of *On Liberty*, offers an “afterthought” that is particularly relevant to the current discussion.¹³¹ According to Mill:

[T]here are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners, and coming thus within the category of offences against others, may rightly be prohibited. Of this kind are offences against decency; on which it is unnecessary to dwell¹³²

Unfortunately, Mill never tells us exactly which offenses he has in mind. Perhaps he is thinking about indecent exposure, though it is not clear why nudity should be thought of as “directly injurious only to the agents themselves.” Whether he is also thinking about voyeurism is even less clear. Nor does Mill explain whether offenses against decency can be justified under the harm principle itself, or whether they must be classified under some separate “offense principle.”

It has remained for others, in particular Joel Feinberg, to develop the offense principle as a justification for criminalization.¹³³ In doing so, Feinberg had in mind conduct that is harmless in itself yet so unpleasant that we can rightly demand

129. The quotation comes from Gardner and Shute, *supra* note 123, at 216.

130. The quotation comes from *id.*

131. MILL, *supra* note 65, at 295–96.

132. *Id.*

133. See generally FEINBERG, *supra* note 69; INCIVILITIES, *supra* note 114.

criminalization.¹³⁴ For Feinberg, conduct involving offense causes a range of disliked mental states such as “disgust, shock, shame, embarrassment, annoyance, boredom, anger, fear, or humiliation.”¹³⁵ These states are distinct from harm, says Feinberg, in that they do not necessarily set back a person’s interests.¹³⁶ Analyzing such conduct, Feinberg offers a famous thought experiment in which riders on a hypothetical bus engage in a wide range of conduct that produces offensive noises, smells, and sights, including: nails on chalk boards; belches and farts; garish clothing; a range of sexual exhibitionism; inappropriately familiar conversation; hate speech; and the like.¹³⁷ To determine whether conduct of this sort should be subject to criminal penalties, Feinberg proposes that we use something like the model used in tort law to determine whether conduct constitutes a nuisance, weighing the seriousness of the offense against the reasonableness of the offender’s conduct.¹³⁸

2. *Voyeurism as an Offense Crime*

Assuming that voyeurism fails, in at least some cases, to satisfy the harm principle, could it nevertheless satisfy the offense principle? Feinberg never really addresses this question. Rather, he is at pains to make clear that whatever offense voyeurism entails must affect a “direct[ly] intended target[] of the behavior” (that is, the person who is being spied on) rather than third parties who might be disturbed, even “profound[ly],” to learn that someone else has been spied on.¹³⁹ Feinberg believes, correctly in my view, that only the first kind of direct offense to an individual victim is the proper concern of a liberal system of criminal law.¹⁴⁰ Concern with the latter kind of offense reflects a kind of legal moralism, which is inconsistent with the tenets of liberalism.¹⁴¹

If Feinberg’s distinction between direct and indirect offense is correct, as I believe it is, then it follows that the concept of offensiveness is essentially inapplicable to voyeurism. Unlike the exhibitionist, the voyeur rarely, if ever, intends to cause affront to his victim. Indeed, he does everything he can to avoid detection; his is a surreptitious act. Given this, it makes no sense to say that his act

134. See generally FEINBERG, *supra* note 69.

135. *Id.* at 5.

136. See *id.* at 2–3.

137. *Id.* at 10–13.

138. *Id.* at 5–10.

139. See *id.* at 60. For Feinberg, “profound” offense differs from “nuisance”-like offense in three basic ways: First, acts of this sort differ in “tone” from nuisances. *Id.* at 58. The offense caused by acts like flag burning and corpse desecration is “deep, profound, shattering, [or] serious.” See *id.* Second, such offense is directed not at some “lower order sensibility,” such as sight or smell, but at a “higher order sensibility,” such as a moral value or cultural symbol. See *id.* at 55, 58. Finally, and crucially, profoundly offensive acts normally differ in the way they are experienced. *Id.* at 59–60. They need not be perceived directly by a specific victim in order to cause offense. We can be offended simply by learning that someone has burned a flag or desecrated a corpse. See *id.*

140. *Id.* at 50–96.

141. *Id.*

is intended to cause offense. The justification for criminalizing voyeurism must reside solely in its wrongfulness and potential to cause harm.

D. Expectations of Privacy

Having considered the wrongfulness, harmfulness, and potential offensiveness of voyeurism, we now need to take a step back and consider an issue that is potentially relevant to all three aspects of moral content—namely, the possibility that the putative victim of voyeurism might have consented to, or assumed the risk of, such an act. As we saw above, modern voyeurism statutes frequently say that the victim being surreptitiously observed must have what is normally termed a “reasonable expectation of privacy.”¹⁴² This requirement, in turn, raises several key questions for the law of voyeurism. First, is the expectation of privacy test the right one to apply, as opposed to simply asking whether the victim has “consented” to being observed? Second, assuming it is the right test, exactly when should an expectation of privacy be regarded as reasonable, and under what circumstances should that expectation be regarded as lost? Third, in particular, when is it reasonable to expect privacy outside of one’s home, in quasi-public spaces such as restrooms, changing rooms, locker rooms, and showers? Fourth, how does the use by voyeurs of enhanced surveillance and video recording technologies affect the analysis? And finally, how should we deal with the problem of so-called revenge porn, in which the offender posts online, without the victim’s consent, a revealing image or video of her that was originally given to the offender with the victim’s consent?

1. Assuming the Risk That One’s Privacy Will Be Violated

Consider, for a start, two cases:

- (a) *A* works in a sex club. *B* pays money to enter the club to watch *A* dance nude or engage in various sex acts. While watching *A*, *B* becomes sexually excited.
- (b) *C* lives in a densely populated urban neighborhood. One day, she keeps her blinds open while undressing or engaging in sex. Her neighbor, *D*, catches sight of *C* and peers in, becoming sexually excited in the process.

In the first, case, it seems clear that *B* is not a voyeur, at least from a criminal law perspective. He has not peered at *A* in “disregard of infringing on . . . [her] right of privacy.”¹⁴³ The privacy rights *A* has while in her own home are forfeited when she voluntarily dances in a strip club. Essentially, *A* has consented to *B*’s watching her. The second case is more complicated. In that hypothetical, there is no suggestion

142. This is most explicit under Canadian law, which says that a person commits voyeurism only if he “surreptitiously, observes . . . a person who is in circumstances that give rise to a reasonable expectation of privacy.” Criminal Code, R.S.C. 1985, c C-46 § 162(1) (Can.) (emphasis added).

143. See ARIZ. REV. STAT. ANN. § 13-1504 (2017).

that *C* has affirmatively consented to *D*'s watching her. The most we might say is that *C*, by leaving her blinds open, has "assumed the risk" that *D* might watch her. But should the fact that *C* assumed such a risk be enough to conclude that *C* forfeited her cognizable privacy right such that the charge of voyeurism would fail?

The first thing to note is that, for most criminal offenses, assumption of risk is not sufficient to negate criminality. As Heidi Hurd has pointed out, we should never say that "a woman who wore a low-cut red dress to a rough bar reduced her rights against rape if she knew that in dressing provocatively she might incite the unwanted attentions of a drunken aggressor."¹⁴⁴ Nor should we say that a "jogger who entered Central Park at dusk knowing of the risk of being mugged was complicit in his own mugging," or that "a person who knowingly left her keys in her car invited its theft, thus reducing the penalty justifiably imposed on the car thief."¹⁴⁵ In each of these cases, we properly demand that the would-be victim actually consent before concluding that a rape, assault, or theft did not occur.

Should the rule in the case of voyeurism be any different? In at least one other important context—involving police searches under the Fourth Amendment—assumption of risk *is* considered sufficient to negate a claim of privacy. Under the line of cases beginning with *Katz v. United States*, the Supreme Court has said that the Fourth Amendment's protection against unreasonable searches and seizures exists only if the defendant has a reasonable expectation of privacy in the thing to be searched.¹⁴⁶ Therefore, as Justice Harlan explained in his concurrence, objects and activities that have been exposed "to the 'plain view' of outsiders are not 'protected' because no intention to keep them to [oneself] has been exhibited."¹⁴⁷ In short, such persons have "assumed the risk" that the government might subject them to surveillance. Thus, a person has no claim that his right to privacy has been violated when the police conduct surveillance of his activities in an open field or through the open windows of his house.¹⁴⁸

There are at least three reasons why the law of voyeurism should follow a similar assumption-of-risk-type rule rather than the consent rule followed in the law of rape and sexual assault. First, the interests protected by the law of rape are generally more significant than those protected by the law of voyeurism. Being forced to have sex one does not wish to have is simply more harmful and wrongful

144. Heidi M. Hurd, *Blaming the Victim: A Response to the Proposal That Criminal Law Recognize a General Defense of Contributory Responsibility*, 8 *Buff. Crim. L. Rev.* 503, 510 (2005).

145. *Id.* For more on the differences, and similarities, between consent and assumption of risk, see Kenneth W. Simons, *Exploring the Relationship Between Consent, Assumption of Risk, and Victim Negligence*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* 281–89 (John Oberdiek ed., 2014); Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 *BUFF. CRIM. L. REV.* 385, 468–71 (2005).

146. *E.g.*, *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)

147. *Id.*

148. *See, e.g.*, *Oliver v. United States*, 466 U.S. 170, 178 (1984).

than being peeped at without one's permission. Because the interests are greater, more protection is needed.

Second, the dynamic of the sexual encounter at issue in rape is quite different from that at issue in voyeurism. If *A* wants to have sex with *B*, it should be relatively easy for him to secure her consent before proceeding: he merely needs to ask. But imagine a case in which *C* keeps her blinds open while walking around naked in her apartment. Any one of her neighbors might catch a glimpse of her and decide to peer in. It is unclear how any of them, let alone all of them, are supposed to obtain *C*'s consent to being watched. Unlike *A* and *B* in the rape case, *C* and her neighbors in the voyeurism case are physically removed from each other.

Third, the costs of prohibiting the conduct at issue are arguably greater in the case of voyeurism than in the case of rape. If everyone who peered into a neighbor's window without first obtaining affirmative consent could potentially be liable to charges of voyeurism, life in urban areas would be radically altered. People would have to avert their eyes every time they walked down the street or looked out the windows of their home. This is different from the case of rape. Although some social relations arguably might be chilled, and some "spontaneity" lost, requiring people to get consent before engaging in sex would not adversely affect most people's lives.¹⁴⁹

I should be clear, though, about exactly what I am arguing here. The "assumption of risk" test adopted in the Supreme Court's Fourth Amendment jurisprudence has often been criticized for its one-size-fits-all approach, according to which a defendant who exposes a private matter to one party (such as a bank or the phone company) thereby loses her claim of privacy with respect to the rest of the world as well, including the police.¹⁵⁰ Although I embrace the assumption of risk test in some form, I reject this one-size-fits-all version of it. As we saw above, privacy is a context-specific concept, and the assumption of risk approach that I recommend in the context of voyeurism is context-specific as well. It is limited as to the specific persons with respect to whom the risk has been assumed. For example, by walking around nude with the blinds open, *V* assumes the risk that her immediate neighbor will see her naked; that hardly means that she has also assumed the risk that the neighbor will invite in all of his fraternity brothers to have a look as well.¹⁵¹ Moreover, it is limited as to the mode of observation. *V* may assume the risk that the neighbor will look through her windows with his unaided eyes; once again, that does not mean she thereby assumes the risk that he will look through her window

149. On the debate over using an "affirmative consent" standard in the law of rape and sexual assault, see, e.g., Janet Halley, *The Move to Affirmative Consent*, SIGNS: J. WOMEN CULTURE & SOC'Y (Nov. 10, 2015), <http://signsjournal.org/currents-affirmative-consent/halley/>.

150. See, e.g., *United States v. Jones*, 565 U.S. 400, 417–18 (2012) (Sotomayor, J., concurring).

151. As famously put in a somewhat different context, "[w]hen you invite a person into your house to use the staircase, you do not invite him to slide down the banisters, you invite him to use the staircase in the ordinary way in which it is used." *The Calgarth* [1927] P.93, 110 (Scrutton, LJ).

using high-powered binoculars, or that he will make a digital recording of her performance and post it on YouTube.

2. *The Reasonableness of Privacy Expectations*

Three recent cases provide good vehicles for testing the contours of the assumption of risk doctrine. The first case, *In re Spencer*, involved a security guard at a high school.¹⁵² Spencer's responsibilities included monitoring the security cameras installed throughout the school. He was dismissed from his job for surreptitiously watching the school's cheerleaders on the monitors during practice.¹⁵³ His conduct included "zooming in" on various (fully clothed) body parts.¹⁵⁴ Upon discovering what Spencer had done, the assistant cheerleading coach said she felt like she had been watched by a "peeping Tom."¹⁵⁵ In reversing Spencer's dismissal, the New Jersey state appellate court held that, because the practices were held in public, and because the video monitoring was well known, the "cheerleaders had no expectation of privacy" that they would not be viewed in such a manner.¹⁵⁶

The reasoning in *Spencer* seems correct in principle but wrong in its application. The evidence in the case suggested that the cheerleaders knew, or should have known, that their basic cheerleading activities would be captured on closed circuit camera. To that extent, they assumed the risk that the security guard would watch their rehearsal. It seems unlikely, however, that they had any idea that a security guard might zoom in on their body parts. Conduct of that sort arguably goes beyond any reasonable assumption of risk.

The second case, *Commonwealth v. Robertson*, involved a man who, while riding the MTA in Boston, aimed his cell phone camera at the covered crotch area of a seated female passenger and attempted to make a video recording.¹⁵⁷ He was prosecuted under a Massachusetts statute which made it a crime to videotape a person who is "nude or partially nude, with the intent to secretly conduct . . . such activity, when the other person . . . would have a reasonable expectation of privacy in not being so photographed, [or] videotaped."¹⁵⁸ The Massachusetts Supreme Judicial Court held that the case was properly dismissed on the grounds that the victim was not "nude or partially nude" as those terms were defined under state

152. *In re Spencer*, 2010 WL 1924714, at *1 (N.J. Super. Ct. App. Div. May 7, 2010).

153. *Id.*

154. *Id.*

155. *Id.* at *1–2.

156. *Id.* at *9. Very similar is the Canadian case of *R. v. Jarvis*, 2017 ONCA 778 (Can.) (upholding acquittal of voyeurism charges against high school teacher who surreptitiously filmed fully-clothed students, focusing on their breasts, on the grounds that such filming did not violate the expectation of privacy required by the applicable statute).

157. *Commonwealth v. Robertson*, 5 N.E.3d 522, 523 (Mass. 2014).

158. MASS. GEN. LAWS ch. 272, § 105(b) (2017); *Robertson*, 5 N.E.3d at 524.

law.¹⁵⁹ The court also considered whether the victim had a “reasonable expectation” in not being videotaped in this manner.¹⁶⁰ It concluded that the statute should not be understood to apply to cases in which the victim was traveling on a public transit system operated in a public place where cameras are commonly used for surveillance.¹⁶¹

The decision in *Robertson* was clearly correct that the partial nudity required by the statute was lacking. But its assumption of risk analysis is problematic in the same way as that in *Spencer*. Both courts seem to say that a person has no cognizable expectation of privacy, and therefore cannot be the victim of voyeurism, unless she is (1) naked, and (2) on her own premises (rather than in a “public” place). I am doubtful that this squares with common intuitions about the scope of privacy in such situations. I think that people generally do have an expectation that they will not be “zoomed” in on or “upskirted” even when they are clothed and in a public space.

The final case comes from England. Benjamin Wilkins was a BBC radio producer who used a hidden camera to secretly record himself having consensual sex with various women in his London flat.¹⁶² Wilkins was charged under Section 67(3) of the Sexual Offences Act, which makes it a crime to record another person doing a private act with the intent of obtaining sexual gratification and without the person’s consent.¹⁶³ He pled guilty to eleven counts, was sentenced to eight months in jail, and was ordered to register as a sex offender.¹⁶⁴ Wilkins was clearly liable under the broad language of Section 67(3). But it is nevertheless worth asking exactly how his making of the videos violated his lovers’ privacy rights. The case certainly seems less egregious than those involving Freundel and Ravi, discussed above. Unlike their victims, Wilkins’ victims obviously consented to being seen naked (by Wilkins) at the time they engaged in sex with him. Moreover, and crucially, it appears that Wilkins did not share the videos with anyone; they were made exclusively for his own personal viewing.¹⁶⁵ The case is thus unlike the “revenge porn” cases we will consider below. Wilkins’ violation of his lovers’ rights consisted in the fact that they did not consent to, or even assume the risk of, having their intimate behavior *recorded* and viewed by him at a later time. This was indeed a violation of their privacy rights, but it was different from the kind of

159. *Robertson*, 5 N.E.3d at 523. Partially nude means “not wearing any clothes covering . . . ‘the human genitals, buttocks, public area or female breast below a point immediately above the top of the areola.’” *Id.* at 528.

160. *Id.* at 529.

161. *Id.* at 528–29. Within days of the court’s ruling, the statute was amended to apply to upskirt cases of this sort. See Jessica Ravitz, ‘Upskirt’ Ban in Massachusetts Signed into Law, CNN (Mar. 7, 2014), <http://www.cnn.com/2014/03/07/justice/massachusetts-upskirt-bill/>.

162. *BBC Radio Producer Jailed over Sex Tapes*, BBC NEWS (Mar. 4, 2010), http://news.bbc.co.uk/2/hi/uk_news/england/london/8549608.stm.

163. See Sexual Offences Act 2003, c. 42, § 67(3) (Eng. & Wales).

164. *BBC Radio Producer Jailed*, *supra* note 162.

165. *Television Producer Who Filmed Himself Having Sex with Women Jailed*, TELEGRAPH (Mar. 4, 2010), <http://www.telegraph.co.uk/news/uknews/crime/7367805/Television-producer-who-filmed-himself-having-sex-with-women-jailed.html>.

violation that occurs in the typical case of voyeurism in which the voyeur peeps at an entirely nonconsenting victim.

3. *Privacy in Public Places*

As noted earlier, at common law, the law of voyeurism focused on protecting people from unwanted scrutiny while they were in their own “home,” “dwelling,” “inhabited building,” or “residential structure,” or on their own “premises” or “real property.” This was consistent with the traditional understanding, also expressed in Fourth Amendment jurisprudence, that the home lies at the center of our private lives.¹⁶⁶ Should the law of voyeurism be expanded to apply to cases in which a person is unknowingly observed while going nude or having sex in a place that is not her home (or a clearly analogous place, like a hotel room)? Should it apply in places such as a restroom, shower, fitting room, locker room, sex club, bathhouse, *mikvah*, or a doctor’s office? Should it apply to cases in which a person is spied on while on the subway?

Whether a place can be regarded as public or private is not a quality that resides in the place “in itself.” Rather, it turns, once again, on the expectations individuals and society bring to such a place, at a particular time, under particular circumstances. Consider again the case of Lady Godiva. Normally, we would have no hesitation in saying that a person who rode naked down the main street of Coventry would have no expectation of privacy. But if there really was a proclamation ordering everyone to stay indoors and shutter their windows while she was riding, the main street of Coventry would be transformed into a private space, and Godiva might well have a reasonable expectation that no one would see her. Parallel reasoning applies with respect to places that, under different circumstances, normally would be thought of as inherently “private.” For example, under current Supreme Court jurisprudence, prison inmates have little or no cognizable right to privacy even in the place where they sleep and use the toilet.¹⁶⁷

Should a person have a reasonable expectation of privacy in a locker room or public restroom? The question whether such places are “public” or “private” has arisen mainly in the context of indecent exposure cases, as we will see below. Defendants charged with public lewdness for having sex in bath houses and sex clubs have argued that, under some circumstances, such places should be regarded as non-public.¹⁶⁸ Here, the question is whether one who spies on another person who is nude or having sex in such a venue should be regarded as a voyeur.

166. A handful of modern statutes have tended to broaden the class of places in which voyeurism can occur to include hotels and motels, *e.g.*, TEX. PENAL CODE ANN. § 42.01(a)(11)(B) (West 2011), and fitting rooms and restrooms, *e.g.*, N.Y. GEN. BUS. LAW § 395-b (McKinney 2018), as well as, more generally, a “private place,” *e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 511 (West 2017), or “place of solitude or seclusion,” *e.g.*, NEB. REV. STAT. § 20-203 (2017).

167. *See Hudson v. Palmer*, 468 U.S. 517, 525–26 (1984).

168. *See generally* Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 COLUM. J. GENDER & L. 1 (2008).

While I am unable to resolve the question definitively here, three points are worth considering. The first is that, although society expects locker rooms to be used for undressing and showering (without scrutiny from anyone outside), it does not expect those places to be used for sexual liaisons. If that is correct, it would suggest that an offender who spies on others while they are getting undressed in a locker room *would* be committing voyeurism, whereas an offender who spies on others while they are having sex in a locker room would *not* be doing so—a somewhat paradoxical conclusion, given that the latter intrusion seems greater.

Second, as the facts of *Robertson* suggest, although a person is in a “public space” such as a subway car, she might nevertheless retain a right of privacy with respect to some activities conducted within that space. For example, even though she would have no expectation that others on the train would not look at her face, torso, or legs, she would retain an expectation that they not attempt to look up her skirt.

The final point is that simply because a place is considered public for purposes of voyeurism law does not necessarily mean it should be considered public for purposes of indecent exposure law. For example, imagine that *A* is spying on *B* while *B* is masturbating in a secluded area of a public park. In such a case, the park might be both public for purposes of voyeurism law (meaning that *A* would not be liable) and not public for purposes of indecent exposure law (meaning that *B* would also not be liable). The converse, however, is not true: there is no *A*-spying-on-*B* case in which both *A* would be liable for voyeurism *and* *B* would be liable for indecent exposure.

4. *Voyeurism and New Technologies*

In an earlier, less technologically advanced, age, voyeurs like Peeping Tom invaded others’ privacy using their unaided eyes. In our modern world, voyeurs do so using hidden cameras, binoculars, telescopes, zoom lenses, cell phones, and other enhanced surveillance devices. Sometimes, they record their observations digitally and share such recordings with others over the Internet. The question thus arises: even if *V* had no reasonable expectation that *D* would not peer through her open window with just his eyes, might she still have a reasonable expectation that *D* would not peer through her window using enhanced surveillance equipment or make a video recording of her and post it on his website for others to see?

An analogous issue has arisen, once again, in the Fourth Amendment context. Various defendants have argued that there is a significant difference, in terms of privacy expectations, between cases in which the police conduct surveillance using the naked eye or low-tech equipment and cases in which they make use of high tech devices.¹⁶⁹ For the most part, arguments of this sort have failed to

169. See generally Richard S. Julie, Note, *High-Tech Surveillance Tools and the Fourth Amendment: Reasonable Expectations of Privacy in the Technological Age*, 37 AM. CRIM. L. REV. 127 (2000).

persuade the Court.¹⁷⁰ In *Kyllo v. United States*, however, the Court agreed that even though a defendant would enjoy no privacy protection with respect to “visual observation” of his house, he would be protected from surveillance by means of a technologically advanced thermal imaging device.¹⁷¹

Whatever the Court’s holdings in these Fourth Amendment cases, my own view is that, in the voyeurism context, there is a significant difference between cases in which *D* looks through his neighbor *V*’s open window from across the street using his unaided eyes and those in which he watches her from a great distance or from the air using a high-powered lens. Even if *V* has no cognizable expectation of privacy in the first such case, she might still have such an interest in the second.

5. *Revenge Porn*

The practice of so-called revenge porn raises a novel twist on the problem of voyeurism by means of new technologies. In such cases, typically, *V* voluntarily sends or “sexts” a nude picture or video of herself to *D*.¹⁷² Later, *D* sends the images to third parties, or posts them on a social media site, frequently accompanied by *V*’s name and other personal information. Often, such postings occur after the relationship between *D* and *V* has soured.¹⁷³ The photos can then be viewed by numerous third parties, including current and prospective employers. Victims of such treatment have been subjected to harassment, stalking, and threats of sexual assault.¹⁷⁴ Should we say in such cases that *D*, in sharing *V*’s photos, has committed voyeurism? Should we say that the third parties who view *V*’s picture on line have done so? Or do such cases need to be conceptualized as involving a different offense altogether?

Let us assume, for purposes of discussion, that *V* had no reason to believe that *D* would share her image with anyone else and that she sent it to *D* solely for his own use. *D*’s posting of the image online would clearly constitute a wrong and potential harm to *V*. Nevertheless, I am not convinced that it would fit the paradigm of voyeurism. I suggested above that voyeurism requires not merely a violation of privacy but also a virtually physical intrusion into the victim’s personal space. For this to occur, the victim’s nakedness and the offender’s observation, or recording, of such nakedness would need to occur simultaneously. That is not the case here.

What about the third parties who view the images of *V* posted online by *D*? Assuming they knew, or had reason to believe, that the images of *V* were posted

170. *See, e.g.*, *Florida v. Riley*, 488 U.S. 445, 450–52 (1989) (aerial surveillance using helicopter did not constitute search under Fourth Amendment); *California v. Ciraolo*, 476 U.S. 207, 215 (1986) (surveillance using airplane did not constitute search).

171. *Kyllo v. United States*, 533 U.S. 27, 32, 40 (2001); *see also* *United States v. Jones*, 565 U.S. 400, 404 (2012) (tracking by means of GPS device constituted search).

172. *See generally* Ari Ezra Waldman, *A Breach of Trust: Fighting Nonconsensual Pornography*, 102 *IOWA L. REV.* 709 (2017).

173. *See id.* at 714.

174. *See id.* at 714–15.

without her knowledge or consent, such viewing would again entail a wrong to *V*. It would not, however, be voyeurism, for the same reason it would not be voyeurism for *D* to post the images online—namely, there would be no simultaneity between exposure and observation. My point here is not that posting or viewing a naked image of *V* without *V*'s consent or assumption of risk should not be a crime, but merely that it is conceptually problematic to think of it as voyeurism.

IV. CRIMINALIZING EXHIBITIONISM

Having considered the rationale for the law of voyeurism, we now turn to the law of exhibitionism. Part of what we will explore here is the relationship between the two offenses. Although there are some significant parallels, there are also important differences: the criminalization of exhibitionism will prove to be more complicated and more controversial than that of voyeurism. The conduct involved will be more varied, the wrongs less obvious, the harms more uncertain, the social and cultural norms more diverse, and the cost-benefit analysis more complex.

The definition of exhibitionism in criminal law is itself quite varied. In this discussion, I will focus mainly on indecent exposure statutes that require the *actus reus* of (1) publicly displaying (2) one or another “private” body part (3) to a nonconsenting observer.¹⁷⁵ I will also have something to say about both public sex *acts* and exposure to *consenting* observers. As for *mens rea*, I will consider three basic kinds of statutes: those that require an intent to arouse or gratify the sexual desire of the offender or his victim;¹⁷⁶ those that require an intent to cause (non-sexual) “affront” or “alarm” to another;¹⁷⁷ and those that require no *mens rea* at all.¹⁷⁸

The means by which exhibitionism is committed can vary. The definition of public indecency in some jurisdictions is broad enough to cover conduct as diverse as a person masturbating on a city bus, a couple making love in a public park, a mother breastfeeding a baby in a hotel lobby, a skinny dipper swimming in a public lake, and a late-night reveler publicly urinating, as well as nudity involving performance artists, political protesters, and fraternity pranksters. As in the case of voyeurism, the wrong involved in indecent exposure is only a *prima facie* wrong. But more often than in the case of the voyeur, the exhibitionist will be exercising a right that is owed significant deference. Sometimes that right will be a specifically sexual one. Other times, it may be more generally expressive, political, or artistic. Thus, even more than in the case of voyeurism, the criminalization of exhibitionism is likely to present substantial moral and legal conflicts.

175. See, e.g., IDAHO CODE § 18-4105 (2017).

176. See, e.g., IOWA CODE ANN. § 709.9 (West 2017); MONT. CODE ANN. § 45-5-504 (2017).

177. See, e.g., ME. STAT. ANN. tit. 17-A, § 854 (West 2017); N.H. REV. STAT. ANN. § 645:1 (2017).

178. See MASS. GEN. LAWS ch. 272, § 16 (2017); WIS. STAT. ANN. §§ 944.15, .17 (West 2017).

Elsewhere, I have described sexual autonomy as consisting of a “bundle” of rights and liberties¹⁷⁹ organized around the idea of securing for its possessor various forms of sexual self-determination, including the prima facie right or liberty to engage in (or forgo) activities such as: vaginal intercourse; anal intercourse; oral sex; kissing; fondling; foreplay; masturbation; preserving or giving up one’s virginity; inflicting or receiving sexual pain; using sex toys; displaying (or concealing) one’s sexual identity and history; cross-dressing; changing one’s gender identity; mutilating or modifying one’s genitals; becoming pregnant; undergoing fertility treatments; having an abortion; using contraception; being protected from or allowing oneself to be exposed to sexually-transmitted diseases; selling sex; buying sex; and thinking, talking, reading, and writing about sex.¹⁸⁰

In addition to the rights and liberties just identified, I would also include within the bundle of rights and liberties that comprise sexual autonomy the prima facie right or liberty: (1) to go naked or have sex where one wants; (2) not to have others see one naked or having sex when one does not wish them to; (3) to see others going naked and having sex; and (4) not to have to see others going naked or having sex where one does not wish to see them. Voyeurism involves a potential conflict between claims (2) and (3). I argued above that *D*’s prima facie liberty to see *V* naked will almost always be trumped by *V*’s right not to be viewed naked (assuming no consent or assumption of risk on the part of *V*). Exhibitionism involves a potential conflict between claims (1) and (4). Here, I shall argue that when *D*’s liberty to go naked comes into conflict with *V*’s right not to have to see *D* naked, resolution of the conflict will prove more complex and case-specific.

Why should this be? There are two interrelated reasons. First, unlike the voyeur’s act, the exhibitionist’s act can have socially-recognized value. It can, in appropriate circumstances, provide a means of communing with nature, promoting health, breaking down social barriers, or nurturing a baby.¹⁸¹ And precisely because of its ability to preempt one’s attention and jar one’s sensibilities, going nude or partially nude in public can have powerful expressive, political, or artistic force. Even having sex in public can be a meaningful way of finding human

179. “Rights” are claims, enforceable by state power, that others act in a certain manner vis-à-vis the right-holder. If *A* has a right against *B*, *B*’s rights are thereby limited by his duty to *A*. “Liberties” (or “privileges”) are permissions to act in a certain manner without being liable for damages to others and without others being able to summon state power to prevent those acts. A liberty is thus a right which does not entail obligations on other parties but rather only freedom or permission for the claim-holder. A person has a liberty right permitting him to do something only if there is no other person who has a claim right forbidding him from doing so. For the classic account, see Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

180. See Stuart P. Green, *Lies, Rape, and Statutory Rape*, in *LAW AND LIES: DECEPTION AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM* 194–253 (Austin Sarat ed., 2015).

181. See *infra* notes 236–46 & accompanying text.

connection and expanding one's erotic horizons.¹⁸² Second, and related, laws prohibiting nudity or partial nudity have themselves often served to oppress traditionally disfavored groups; in particular, they have provided a means by which men have sought to control women's sexuality.¹⁸³ If we are to keep such laws at all in a liberal, pluralistic society, we need to apply them with considerable care.

This part considers the harms, wrongs, and offense associated with exhibitionism. In the course of doing so, it offers an approach for resolving conflicts between the rights of the exhibitionist and the unwilling observer.

A. *The Harms of Exhibitionism*

Like voyeurism, exhibitionism causes no direct physical or economic harm to its victims, and the evidence regarding psychological injury is quite limited. Victims of exhibitionism do report that they become more cautious following such exposure, looking for ways to avoid being alone.¹⁸⁴ But there is hardly any evidence that victims of indecent exposure suffer the kind of deep and lasting psychological harm that voyeurism is capable of causing and which would thereby potentially satisfy the harm principle.

There are, however, several kinds of non-psychological harm that are worth considering. First, in some cases, exhibitionism has served as a precursor to unwanted physical contact.¹⁸⁵ In that sense, indecent exposure serves as a "preventive" offense of the sort described above in the discussion of voyeurism. Second, there are cases in which exhibitionism can cause public disruption, as when the exposure occurs in the middle of a busy street, at a political rally, or at a sporting event.¹⁸⁶ Such cases are often prosecuted as "disturbing the peace" or "disorderly conduct," generic offenses that are also used to prosecute public drunkenness, disruption of a public assembly, using profanity, playing loud music, and the like.¹⁸⁷ The problem with prosecuting exhibitionism as such, however, is

182. See *infra* notes 243–44 & accompanying text.

183. See generally ALAN HYDE, *BODIES OF LAW* 131–50 (1997); Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108 (2005).

184. See Stephanie K. Clark et al., *More Than a Nuisance: The Prevalence and Consequences of Frotteurism and Exhibitionism*, 28 *SEXUAL ABUSE: J. RES. & TREATMENT* 10–13 (2014); see also Anna Maxted, *Why Flashers Are No Laughing Matter, Even When the Victim's a Man*, INDEP. (May 27, 1995), <http://www.independent.co.uk/life-style/why-flashers-are-no-laughing-matter-even-when-the-victims-a-man-1621499.html>.

185. See, e.g., Susan Jacobson, *Man Accused of Indecent Exposure at Farmers Market*, Orlando Sentinel (June 4, 2014), http://articles.orlandosentinel.com/2014-06-04/news/os-farmers-market-lewd-indecnt-exposure-20140604_1_farmers-market-indecnt-exposure-deputies.

186. See, e.g., Thomas Bristow, *Sarasota Open Tennis Match Interrupted by Couple Having Loud Sex - Player Smashes Ball at Them*, MIRROR (Apr. 19, 2017), <http://www.mirror.co.uk/sport/tennis/sarasota-open-tennis-match-interrupted-10254514>; Barbara Brownie, *Naked Protest and the Revolutionary Body*, GUARDIAN (Jan. 15, 2014), <https://www.theguardian.com/fashion/costume-and-culture/2014/jan/15/naked-protest-revolutionary-body>.

187. Massachusetts is unusual in expressly including indecent exposure within its disorderly conduct law. MASS. GEN. LAWS ANN. ch. 272, § 53 (2017).

that disturbing the peace and disorderly conduct are potentially vague and overbroad offenses, which fail to capture the distinctive wrongs that define the crime of exhibitionism.¹⁸⁸ Finally, there is a sense in which certain forms of exhibitionism can be seen as contributing to the oppression of women. For example, some college disciplinary codes list streaking and mooning as forms of sexual harassment or misconduct that, when practiced by men, create a “hostile environment” similar to that created by the workplace display of pornography; engaging in such conduct can subject a student to disciplinary action.¹⁸⁹ At the same time, restrictions on exhibitionism are themselves often seen as intended to oppress women; and, ironically, some feminist groups have used nudity or partial nudity as a means to protest what they regard as sexist practices that occur, for example, in the fashion industry.¹⁹⁰

B. *The Wrongs in Exhibitionism*

As we saw above, all societies worldwide attach special significance to nudity and the performance of sex, shielding them in some way from public scrutiny. The wrong in voyeurism, I argued above, consists in violating the right to exclude others from observing the most intimate aspects of one’s life. Now I want to inquire into the wrongs of exhibitionism.

There are at least four concepts we need to consider. The first is obscenity. In the landmark case of *Miller v. California*, the Supreme Court held that a work of literature was obscene, and therefore not protected by the First Amendment’s free speech clause, if, among other things: “the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest,” and “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”¹⁹¹ As we shall see below, determining whether a given act of public nudity or public sex should be prosecuted as indecent exposure involves a somewhat similar analysis. But it seems unlikely that the concept of obscenity really adds anything to the present discussion. To label speech or conduct “obscene” is essentially to reach a legal conclusion that it is not protected.¹⁹²

188. See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 544–50 (1965) (invalidating state “breach of the peace” law on vagueness grounds).

189. See, e.g., CORNELL COLL., STAFF HANDBOOK: SEXUAL HARASSMENT/MISCONDUCT/ASSAULT DEFINITIONS, <https://www.cornellcollege.edu/student-affairs/compass/student-policies-information/safety-sexual.shtml#Definitions>; KAN. STATE UNIV., RESOLUTION REGARDING STREAKING, <https://www.k-state.edu/greek/images/resources/Resolution%20on%20Streaking.pdf>.

190. See Brownie, *supra* note 186.

191. *Miller v. California*, 413 U.S. 15, 24 (1973) (internal citations omitted).

192. This is not to say that one could not attempt to construct a theory of obscenity as a moral concept. See, e.g., Matthew Kieran, *On Obscenity: The Thrill and Repulsion of the Morally Prohibited*, 64 PHIL. & PHENOMENOLOGICAL RES. 31 (2002).

The second concept is that of immodesty. As Anita Allen has explained, by restricting nudity and sexual behavior in public places, the law “compel[s] sexually modest behavior,” which, “according to traditional moralities” “is an ethical virtue.”¹⁹³ Thus, if one took the view that the absence of virtue was a vice (itself a controversial claim), one might think that the purpose of laws regarding indecency was to prevent the vice of immodesty. But even if this were so, it would hardly provide an argument for criminalization in a liberal society. Rather, as Allen herself recognizes, it would essentially constitute a form of legal moralism, which liberalism rejects.¹⁹⁴

The third concept is disgust. Legal moralists tend to believe that the fact that a given practice causes disgust in a sufficiently broad range of citizens can make it morally wrong and potentially subject to prohibition and even criminalization.¹⁹⁵ Meanwhile, liberal scholars, such as Martha Nussbaum, have argued against the relevance of disgust in a wide range of areas of public policy, noting, among other things, that, throughout history, the notion of disgust has been used as a justification for persecuting racial and religious minorities, females, and gays.¹⁹⁶ I am sympathetic to Nussbaum’s view. The fact that *X* is disgusted by consensual acts that *Y* performs in the privacy of his own home should be of no concern for the liberal. On the other hand, if *Y* engages in conduct *in front of X without X’s consent and does so for the purpose of causing X disgust*, that is something with which the liberal *should* be concerned. But to state the issue this way is essentially just another way of restating the offense principle. I doubt that the concept of disgust really adds anything to the analysis.

The fourth concept, developed by Feinberg, is “disquietude.” A person confronted unexpectedly by an offender who is naked or engaged in a sexual act in a public place is likely to be shocked, distressed, or disgusted.¹⁹⁷ Unlike some other kinds of nuisance-causing conduct, however, exhibitionism is not unequivocally repellant. Often, it disgusts and repels at the same time it fascinates and attracts, thereby causing what Feinberg calls “disquietude” in “captive observers.”¹⁹⁸ Such a state, he says, involves:

193. Anita L. Allen, *Disrobed: The Constitution of Modesty*, 51 VILL. L. REV. 841, 841–42 (2006) [hereinafter Allen, *Disrobed*]; see also ANITA L. ALLEN, UNPOPULAR PRIVACY: WHAT MUST WE HIDE? (2011).

194. Allen, *Disrobed*, *supra* note 193, at 848–54.

195. For example, Leon Kass has appealed to disgust or repugnance as a basis for prohibiting human cloning. See Leon R. Kass, *The Wisdom of Repugnance*, in LEON R. KASS & JAMES Q. WILSON, THE ETHICS OF HUMAN CLONING 3, 17 (1998).

196. See, e.g., MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW (2004). For a useful summary of the literature, see DANIEL KELLY, YUCK!: THE NATURE AND MORAL SIGNIFICANCE OF DISGUST (2011); see also Douglas Husak, *Disgust: Metaphysical and Empirical Speculations*, in *Incivilities*, *supra* note 114, at 91–114.

197. See Clark, *supra* note 184; see also Maxted, *supra* note 184.

198. FEINBERG, *supra* note 69, at 17.

a complicated psychological phenomenon, difficult to explain not only because of wide individual differences, but also because so many psychic elements are involved To begin with, nude bodies and copulating couples, like all forms of nuisance, have the power of preempting the attention and absorbing the reluctant viewer, whatever his preferences in the matter Part, but only part, of the explanation [for why we feel displeasure in being forced to witness such behavior] no doubt rests on the fact that nudity and sex acts have an irresistible power to draw the eye and focus the thoughts on matters that are normally repressed The unresolved conflict between instinctual desires and cultural taboos leaves many people in a state of unstable equilibrium and a readiness to be wholly fascinated, in an ambivalent sort of way, by any suggestion of sexuality in their perceptual fields.¹⁹⁹

In short, exhibitionism offends by creating tension between “attracting and repressing forces,” a combination that can be at “once exciting, upsetting, and anxiety-producing.”²⁰⁰

Feinberg’s account reflects considerable psychological insight. But it does not quite capture what is truly distinctive about exhibitionism. The same combination of repulsion and fascination can be seen in any number of other, non-sexual forms of conduct. For example, one might feel that way while witnessing a late night domestic shouting match, a drunk stumbling down the street, or a person threatening suicide while standing on a window ledge. What distinguishes exhibitionism from other nuisance offenses is its distinctively *sexual* nature. The exhibitionist exposes himself for the purpose of eliciting a disgusted reaction from his victim, which in turn is meant to heighten his own sexual excitement. When *D* exposes himself to an unwilling *V*, he doesn’t merely preempt her attention, he infringes on her sexual autonomy. Like the voyeur, he uses his victim for his own sexual gratification. In that sense, exhibitionism is properly understood as a specifically sexual offense.

C. *Exhibitionism as a Cause of Offense*

So far, we have been talking mainly about exhibitionism’s harms and wrongs. But under the traditional liberal approach, a wrong by itself is insufficient to justify criminalization. With the harmfulness of exhibitionism in doubt, we also need to consider if it causes offense.

For Feinberg, offense consists of a range of disliked mental states, such as disgust, shock, shame, embarrassment, annoyance, boredom, anger, fear, or humiliation, when caused by the wrongful conduct of others.²⁰¹ These states are distinct from harm in that they do not necessarily set back a person’s interests, and they are distinct from wrongs in that their focus is less on a violation of rights as

199. *Id.*

200. *Id.* at 18.

201. *Id.* at 1, 2.

such than on the causing of unwanted psychological states. In practice, though, the three concepts of wrong, harm, and offense consistently overlap.

In determining whether the prevention of offensive conduct provides a prima facie valid reason for coercive legislation, Feinberg proposes that we weigh the seriousness of the offense to the victim against the reasonableness of the offender's conduct.²⁰² The seriousness of the offense, he says, reflects three basic factors:

(1) the intensity and durability of the repugnance produced, and the extent to which repugnance could be anticipated to be the general reaction . . . to [such] conduct . . . ; (2) the ease with which unwilling witnesses can avoid the offensive displays; and (3) whether or not the witnesses have willingly assumed the risk of being offended either through curiosity or the anticipation of pleasure.²⁰³

The reasonableness of the defendant's conduct, in turn, depends on: "(1) its personal importance to the actors themselves and its social value generally . . . ; (2) the availability of alternative times and places where conduct . . . would cause less offense; (3) the extent . . . to which the offense" was carried out "with spiteful motives."²⁰⁴

I agree with Feinberg that determining whether an offensive act merits coercive legislation should entail a balancing-type analysis. But I see several significant problems with his formulation of that analysis. The most serious is that it focuses on the reaction of the *victim* rather than on what was intended by the *offender*. From a retributivist perspective, it is the offender's mental state that matters, since it is that mental state that will determine whether the offender has the requisite culpability to justify punishment. The second problem is that by focusing on the victim rather than the offender, there is an increased danger that the offense principle will be applied too broadly; after all, almost anything *D* did could conceivably offend *someone*. By focusing on whether the offender's act was reasonably intended to cause offense, the principle will normally be construed more narrowly.²⁰⁵ Finally, Feinberg's framework is designed to apply to a very wide range of offensive behavior, and so it needs a certain amount of modification to apply specifically in the context of exhibitionism. For example, we need to consider not only cases involving persons with "abnormal susceptibility" to offense, but also the relevance of deep cultural divisions over what kind of conduct is considered socially acceptable.

To determine whether an act of exhibitionism is a good candidate for criminalization, I propose that we consider four basic factors. The first factor concerns the conduct of the potential victim, while the last three focus on the conduct of the

202. *Id.* at 6, 7.

203. *Id.* at 26.

204. *Id.*

205. See von Hirsch & Simester, *supra* note 114, at 118–19.

offender. Under my approach, we would consider the extent to which: (1) the victim consented to, or assumed the risk of, witnessing the offender's conduct and of thereby being offended; (2) the offender's conduct was intended to cause, or recklessly caused, significant disgust, shock, embarrassment, fear, or distress in a victim; (3) the offender's exhibitionism was of significant value to him personally or to society generally; and (4) the offender had available to him alternative times or places in which his conduct would have been less likely to cause offense. In what follows, we consider each factor in turn.

1. Witness' Consent or Assumption of Risk

I argued above that when *A* peeps on *B*, *A* will normally be liable for voyeurism unless *B* has assumed the risk of, or consented to, *A*'s act. I also contended that this assumption-of-risk defense, which imposes a not insignificant burden on *A*, was nevertheless easier to prove than the fact that *B* consented to the act. The question in this section is whether a similar regime should apply with respect to exhibitionism.

a. The Argument for an Assumption of Risk Standard

There are certainly cases in which it makes sense to say that *B* has affirmatively or constructively consented to *A*'s exposing himself, and that *A* should therefore not be liable for his act. We would say this, for example, if *B* was: a student in a live studio art class in which *A* was a nude model; a spectator at a live sex show in which *A* was a performer; or *A*'s fellow nude sunbather, sauna-user, or showerer at the gym.

Perhaps surprisingly, there are still some jurisdictions that make it a crime to engage in indecent exposure even if the observer does consent. Indeed, the Supreme Court, in *Barnes v. Glen Theater*, held that such statutes are constitutional.²⁰⁶ From a liberal or libertarian perspective, however, cases like *Barnes* are virtually impossible to defend. Simply put, where persons exposed to *A*'s nudity have validly consented to such nudity, they have no claim that their rights have been violated or that they have been wronged.²⁰⁷ The only rationale for applying the law of exhibitionism in such a case would be one founded in legal moralism or perhaps paternalism (based on the idea that we should make it a crime to work in, or be a patron at, a strip club as a means of protecting women from the exploitation that such work often entails).²⁰⁸

206. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567–68 (1991).

207. *See R. v. Labaye*, 2005 SCC 80, [2005] S.C.R. 728 (Can.) (no “indecency” occurred in alleged bawdy house where group sex was consensual).

208. And it is precisely a moralistic approach of this sort that Justice Scalia takes in his concurrence in *Barnes*:

Perhaps the dissenters believe that “offense to others” ought to be the only reason for restricting nudity in public places generally The purpose of Indiana’s nudity law would be violated, I

But should consent be the only defense to charges of indecent exposure? For reasons similar to those described in the discussion of voyeurism, I would argue that assumption of risk on the part of the potential victim should normally be enough for the exhibitionist to avoid liability. The interests of potential victims in not being subjected to another's exhibitionism are obviously less significant than the interests of potential victims of rape or sexual assault. Moreover, the interests of potential offenders in exposing themselves without consent are more likely to be recognized as significant by society than any conceivable interest one might have in having sex without consent. In addition, as in the case of voyeurism, it will ordinarily be quite difficult for potential exhibitionists to obtain consent from everyone who could potentially be exposed to their nakedness.

b. What Constitutes an Assumption of Risk?

How should we determine whether a witness has assumed the risk that she will be exposed to an exhibitionist's acts? As in the case of voyeurism, we will need to consider whether the victim was reasonable in her expectations that she would not be so exposed. For example, if the witness loiters near a beach marked "Nude Bathing," it seems reasonable to expect that she has assumed the risk of seeing others nude. Similarly, if she attends a parade in the French Quarter of New Orleans on Mardi Gras, it is quite likely she will see people flashing and mooning. In such cases, I believe, the exhibitionist should be relieved of liability.

Other cases are more challenging. For example, Paul Reubens, the actor known for playing Pee-wee Herman, was charged with indecent exposure for masturbating openly in a pornographic movie theater.²⁰⁹ Could Reubens have argued that the other customers who patronized the theater assumed the risk that they would be exposed to such conduct? The answer is unclear. On the one hand, the patrons were there precisely for the purpose of watching sex acts being performed. On the other hand, it could be argued that the sex acts involving Reubens were of a quite different character than those they expected to see, and were therefore beyond the scope of their consent.

A case involving the rock star Jim Morrison, of the Doors, involves a converse situation. At a concert in Miami in 1969, Morrison allegedly exposed his penis and simulated sex acts during his performance on stage in a public theater.²¹⁰ He was convicted and later pardoned for indecent exposure.²¹¹ Could he have argued that

think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd.

Barnes, 501 U.S. at 574–75 (Scalia, J., concurring).

209. Larry Rohter, *Pee-wee Herman Enters a Plea of No Contest*, N.Y. TIMES (Nov. 8, 1991), <https://www.nytimes.com/1991/11/08/us/pee-wee-herman-enters-a-plea-of-no-contest.html>.

210. Gary Fineout, *Jim Morrison Is Pardoned in Indecent Exposure Case*, N.Y. TIMES (Dec. 9, 2010), http://artsbeat.blogs.nytimes.com/2010/12/09/jim-morrison-is-pardoned-in-indecnt-exposure-case/?_r=0.

211. *Id.*

his fans assumed the risk of such conduct? Possibly so. Morrison apparently had a well-deserved reputation for outrageous and raunchy behavior onstage and off. It seems at least reasonable to suggest that anyone attending his concerts would have assumed the risk of exposure to such conduct.

c. Cases Where the Witness Has Not Assumed the Risk of Exposure

To this point, we have discussed cases in which a witness assumed the risk that she would be subject to an exhibitionist's exposure. But how should we deal with cases in which the witness has *not* assumed the risk of, or consented to, the other party's going naked? Should the witness's right not to be subjected to the exhibitionist's nakedness necessarily trump the exhibitionist's right to be publicly naked? I believe the answer is no; while the fact that *V* has assumed the risk of being exposed to *D*'s nakedness will resolve some cases of indecent exposure, the fact that *V* has *not* assumed such risk will leave many others unresolved. To settle such cases, we will need to turn our attention from the witness's conduct to a more detailed and fact-sensitive consideration of the exhibitionist's conduct.

2. Offender's Intent to Cause Offense

As described earlier, there are three basic ways in which indecent exposure statutes deal with the requirement of mens rea. The first is to require that the offender act "lewdly" or "with an intent to arouse or gratify the sexual desire of himself or another person." The second is to require an intent to cause "affront" or "alarm."²¹² The third prohibits the public display of genitalia without regard to the offender's intent or motive; it creates what is essentially a strict liability offense. In this section, I explain what these various statutes mean in practice, what kind of evidence would be used to prove each form of mens rea, and which type of statute would best serve what I contend are the proper goals of indecent exposure law.

a. Statutory Rules and Illustrative Cases

We can begin the analysis with four illustrative cases. In the first, *A* exposes himself to a non-consenting victim with the purpose of eliciting a frightened or disgusted reaction, a reaction that he hopes will heighten his own sexual excitement.²¹³ In such a case, *A* would satisfy the requirements of both the "lewd" intent and intent to "cause affront"-type statutes. In the second case, *B* and *C* have intercourse in a city park because they believe that doing so, outside, in novel circumstances, will heighten their sexual experience. An unexpected witness

212. See MASS. GEN. LAWS ch. 272, § 16 (2017); WIS. STAT. ANN. §§ 944.15, .17 (West 2017).

213. This is the kind of exhibitionism described in the DSM-V, *supra* note 13.

observes them in the act, and is offended by the sight.²¹⁴ Both *B* and *C* have an intent to gratify their own and their partner's sexual desires but no intent to cause affront. The third case involves the radical advocacy group known as "Breasts Not Bombs," which in the first decade of this century engaged in unannounced public displays of mass nudity to protest wars in Iraq and elsewhere. The group asserted that "the war in Iraq is indecent, not their nakedness."²¹⁵ The protesters had no intent to arouse or gratify the sexual desire of themselves or other persons, though they did seem to have an intent to cause affront of a non-sexual kind.²¹⁶ Indeed, the whole point of their protests was to shock people out of their complacency. In the fourth and final case, *D* goes naked on a nudist beach because he believes it will enhance his health and social relations with others. He has no intent to cause affront or to arouse or gratify anyone's sexual desires.²¹⁷

The question I want to ask is which of these offense definitions, and the hypotheticals that exemplify them, best captures the proper purpose of indecent exposure law in a liberal society. Which is most consistent with the picture of wrongful and offensive conduct I have been describing? For reasons I will now explain, I believe that the "intent to cause affront" formulation (as exemplified by case 3) does a better job of capturing the essence of what is wrong with exhibitionism than either the "intent to gratify sexual desires" formulation (as exemplified by case 2) or the strict liability formulation (as found in case 4). The couple in case 2 certainly had an intent to gratify sexual desire. But, in a liberal system of criminal law, such an intent should hardly be considered an incriminating factor. Indeed, in a system that values sexual autonomy, the fact that *B* and *C* had a sexual motive should arguably qualify them for *more*, not less, consideration. Under the conception of indecent exposure that I have been developing, what is relevant is not whether *B* and *C* had an intent to *gratify* anyone's sexual desire, but whether they intended to *infringe* on another's sexual autonomy in the process.

By contrast, the activists in case 3, though they had no intention to gratify anyone's sexual desires, clearly did have an intent to cause affront. And their means for causing affront was to display their nude bodies, a stimulus that often causes the "disquietude" that Feinberg described. Notwithstanding the ultimate justification for their acts (more on that below), I believe their conduct constitutes a *prima facie* infringement of their unwilling witnesses' sexual autonomy. And I would say the same with respect to most cases of mooning, streaking, and flashing.

214. See Helen William, *Couple Accused of Sex Act at Hyde Park 'Went Beyond the Bounds of Public Decency'*, MIRROR (Aug. 10, 2015), <https://www.mirror.co.uk/news/uk-news/couple-accused-sex-act-hyde-6228601>.

215. Meredith May, *Baring Their Anti-War Feelings: Fighting in Iraq is Indecent, Not Their Nakedness, They Say*, SFGate (July 1, 2005), <https://www.sfgate.com/bayarea/article/SAN-FRANCISCO-Baring-their-anti-war-feelings-2658616.php>.

216. See *id.*

217. Indeed, as Camille Paglia once observed, "[T]here is nothing less erotic than a nudist colony." CAMILLE PAGLIA, *SEXUAL PERSONAE: ART AND DECADENCE FROM NEFERITTI TO EMILY DICKINSON* 36 (1990).

As for the “strict liability” exhibitionism statutes, which require no showing of mens rea, there is a more obvious problem from the liberal perspective. Such statutes would apply not only to people who go nude in a nudist colony but even to a mother who breastfeeds her baby in a public park, or a skinny dipper who goes for a swim in a secluded lake. Nudists of this sort normally do not intend to cause affront or dismay in others, and they have no intent to arouse or gratify anyone’s sexual desire. I would oppose the use of strict liability in this last context for the same reasons I oppose most uses of strict liability.²¹⁸ Exhibitionism is no mere “regulatory” crime, like fishing without a license. It is a sexual offense that carries a significant degree of stigma, and conviction potentially subjects offenders to punitive rules regarding registration as a sex offender.²¹⁹ Strict liability in such contexts is, from the liberal perspective, unwarranted.

b. Proving the Offender’s Intent

In the absence of a confession that the exhibitionist intended to cause his victim distress or embarrassment, his intent must be inferred from his conduct. In doing so, we should consider factors such as which body parts or sex acts the offenders exposed, the location of the exposure, the distance between the offender and victim, the length of the exposure, the sex of the parties, and the number of victims. Let us look at each factor in turn.

(1) Which Body Parts or Sexual Acts Did the Offender Expose?

As we saw above, deep-seated cultural norms and possibly innate wiring cause human beings to experience anxiety when exposed unwillingly to the sight of others’ copulative functions or genitalia. But the witness’ reaction will vary depending on exactly what sight she is exposed to. For example, it seems reasonable to infer that a person who exposed others to the unwanted sight of a sexual act such as intercourse or masturbation would intend greater offense than a person who exposed others to the unwanted sight of a nude or partially nude body.

Exposure of breasts raises a particularly contentious issue. In general, female toplessness is regulated more heavily than male toplessness.²²⁰ Some commentators and litigants have argued that this constitutes a discriminatory “double standard[,]” and a handful of courts have agreed.²²¹ It is no doubt true that, in many traditional cultures, men have sought to control female sexuality by dictating what

218. See Stuart P. Green, *Six Senses of Strict Liability: A Plea for Formalism*, in APPRAISING STRICT LIABILITY 1–20 (A.P. Simester ed., 2005).

219. See, e.g., CHARLES PATRICK EWING, JUSTICE PERVERTED: SEX OFFENDER LAW, PSYCHOLOGY, AND PUBLIC POLICY 114–16 (2011).

220. See *supra* note 46 & accompanying text.

221. See *Free the Nipple v. City of Fort Collins*, 216 F. Supp. 3d 1258, 1260, 1264–66 (D. Colo. 2016) (holding that plaintiffs stated an equal protection claim in challenge to city ordinance banning female toplessness); *Free the Nipple v. City of Springfield*, 153 F. Supp. 3d 1037, 1044–47 (W.D. Mo. 2015) (holding that plaintiffs stated free

women may or must wear, while imposing less demanding standards on men.²²² Even given this history, however, there could be a reasonable argument for treating women's and men's breasts differently. If it could be proved that unwanted exposure to the naked female breast did in fact cause more disquietude (whether in men or women) than the naked male breast, a different rule might well be justified. On the other hand, it may be that continuing to enforce such laws perpetuates precisely the sort of sexist norms and practices that give rise to such different reactions in the first place.

There is also a question about public excretion. Although typically non-sexual in nature, such an act can cause in an unwanting observer a mental state that is not unlike the disquietude caused by public sex and nudity. Yet the norms associated with public excretion in modern societies are highly complex, especially in public restrooms, where practices vary depending on the gender of the parties present and the particular act (whether defecation or urination) involved; and, with the recent advent of unisex restrooms, these norms are probably more complex now than ever.²²³ Perhaps the less problematic way to regulate public excretion would be as a matter of public health rather than as a form of offense.

(2) *How "Public" Was the Place Where the Exposure Occurred?*

The extent to which an offender's exposure will cause offense in his observer will depend very much on venue and context. For example, a person who went nude or wore skimpy clothing to church or to the opera would presumably be more likely to offend his observers than a person who appeared that way at the beach. The same is true regarding sexual conduct. Necking and slow dancing seem acceptable at a high school senior prom in a way they do not at a funeral. It seems reasonable to infer that offenders who expose themselves at "inappropriate" places and times generally intend more offense than those who expose themselves in more appropriate circumstances.²²⁴

A threshold issue here is whether the place where the exposure occurs should be considered "public" in the first place. The question directly parallels one we saw in the context of voyeurism, where we asked when the place into which the voyeur peeped should be regarded as "private."

Five recent cases provide vehicles for considering this question. The first involves the comedian Louis C.K., who in late 2017 was alleged to have: invited several female colleagues, on different occasions, to "hang out" with him in his

speech, due process, and equal protection claims in challenge to similar city ordinance); *see also* Allen, *Disrobed*, *supra* note 193.

222. *See generally* HYDE, *supra* note 183; Adler, *supra* note 183.

223. For an interesting discussion, see Julie Beck, *The Private Lives of Public Bathrooms*, ATLANTIC (Apr. 16, 2014), <https://www.theatlantic.com/health/archive/2014/04/the-private-lives-of-public-bathrooms/360497/>.

224. This has partly to do with the witness's assumption of risk, an issue dealt with previously. *See supra* Part IV.C.1.

hotel room and in his dressing room; asked them if he could take out his penis; and in at least one instance taken off his clothes and started to masturbate in front of them.²²⁵ As offensive as C.K.'s conduct surely was, and even assuming that he intended to cause distress or disgust in his witnesses, he probably did not commit the offense of indecent exposure or public lewdness. The conduct occurred in his hotel or dressing room, and not in a public place, as these offenses require. (This is not, of course, to suggest that his conduct did not constitute sexual harassment, a civil wrong.)

In the second case, a man was charged with indecent exposure after a passing pedestrian observed him standing naked behind an uncurtained window inside his own home.²²⁶ At first glance, one might think that a person going naked in his own home could not possibly commit indecent exposure. However, if he was living in a sufficiently dense urban area, knowing that passing pedestrians were likely to look in, and if he wished to cause them affront, then an indecent exposure charge would seem reasonable.²²⁷ Unlike Louis C.K., who exposed himself only to people in his private room, the "naked guy" in the window exposed himself to passing pedestrians.

In the third case, the defendant was charged with indecent exposure after a building security guard caught him with his pants down engaging in simulated intercourse with a mannequin in a closet at the YMCA.²²⁸ The South Dakota Supreme Court held that the defendant's behavior, "lewd though it may have been," did not constitute indecent exposure because he was alone in a darkened room with the door closed and no other patrons in the area.²²⁹ The court concluded, properly in my view, that he lacked the intent to expose himself in public.²³⁰

The fourth and fifth cases both involve nudity in cars. In the North Carolina case of *State v. Streath*, the defendant exposed himself while sitting in a car in a business parking lot during daylight hours, where he could easily be seen by passing pedestrians and drivers.²³¹ The court held that the car in which he sat should be regarded as a "public place" for purposes of the state's indecent exposure law.²³² By contrast, in the New York case of *People v. Anonymous Female*, the defendant engaged in "lewd acts" while sitting in a car parked at the curb of a quiet residential street at during late night hours under overcast skies

225. Melena Ryzik et al., *Louis C.K. Is Accused by 5 Women of Sexual Misconduct*, N.Y. Times (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html>.

226. Tom Jackman, *Jury Clears 'Naked Guy' at Home of Indecent Exposure Charge*, WASH. POST (Apr. 8, 2010), https://www.washingtonpost.com/wp-dyn/content/article/2010/04/07/AR2010040704537_pf.html.

227. The actual case seems not to have met these criteria, and perhaps for this reason the jury quickly returned a verdict of not guilty. *See id.*

228. *State v. Plenty Horse*, 741 N.W.2d 763, 764 (S.D. 2007).

229. *Id.* at 766.

230. *See id.*

231. *See State v. Streath*, 327 S.E.2d 240, 244 (N.C. Ct. App. 1985), *cert. denied*, 329 S.E.2d 402 (N.C. 1985).

232. *Id.*

when there was no pedestrian traffic and low automobile traffic.²³³ There, despite the potentially more offensive conduct involved, the court held that the defendant's car should *not* be regarded as a "public place."²³⁴ I believe that both courts took the right approach in asking if the car in which the defendant sat should be regarded as a public place in the particular circumstances of the case, though I am skeptical about the North Carolina court's conclusion that a person who sits naked in a car, even in a business parking lot, has exposed himself in "public."

(3) Other Considerations in Determining Intent

In addition to considering the kinds of body parts or sex acts exposed and the public nature of the place where it happens, there are several other factors we would want to consider in deciding the extent to which the defendant intended to cause offense. First, we would want to ask how close in proximity the offender was to his victim. The closer he was, the stronger the inference that he intended offense. Second, we would want to know how long the exposure lasted. It is reasonable to infer that, other things being equal, a person who briefly "flashes" open a raincoat to reveal a naked body intends less offense than a person who displays his body for an extended period of time. Third, we would want to know the sex of the offender and of the victim. A woman (or a man) confronted unexpectedly by a nude man would probably be more offended, and more fearful of being assaulted, than if confronted by a nude woman. No doubt this has something to do with traditional sex roles and the perception that men pose a greater threat in such circumstances. Finally, we would want to ask how many victims were exposed to the offender's conduct. Normally, we would expect that the greater the number of potential victims, the more harm or offense was intended. In the case of indecent exposure, however, a different dynamic may apply once a certain threshold level in the number of victims was reached. Imagine a case in which a flasher exposed himself before a large crowd at a football game. In such a case, the offense to each individual witness would likely be small, perhaps as a result of what has been called, in other contexts, the "misery loves company" effect.²³⁵

3. Value of Conduct to the Offender and to Society

Having considered in the previous section the offender's intent to offend, we now turn to two additional factors that might affect the offensiveness of his conduct. In this section, we consider the value of the exhibitionist's conduct to

233. *People v. Anonymous Female*, 539 N.Y.S.2d 868, 871 (Buffalo City Ct. 1989).

234. *See id.*

235. *Cf. Delaware v. Prouse*, 440 U.S. 648, 664 (1979) (Rehnquist, J., dissenting) (criticizing Court's reasoning that questioning all motorists at roadblocks was reasonable under the Fourth Amendment because it did not involve the unconstrained exercise of discretion).

himself and to society. In the next section, we consider the availability of alternative times and places for exposure.

Some people engage in exhibitionism because of the personal benefits they attribute to such practices. For example, people who engage in public nudity often report a feeling of freedom and relaxation, a new acceptance of their bodies, enhancement of self-esteem, a communion with nature, heightened honesty and intimacy, escape from normal routines and mindsets, and an opportunity for self-expression.²³⁶ Other forms of nudism or partial nudism can produce other kinds of benefit. “Skinny dipping” can be fun, liberating, and physically pleasurable. Fraternity brothers may streak through campus or at a football game out of a sense of fraternal bonding and to have a thrill. A reveler might go topless to attract attention—and free plastic beads—at a Mardi Gras parade. The performance artist known as Narcissister claims to be expressing herself artistically when she exposes herself in New York City.²³⁷ Even topless panhandlers who populate Times Square derive a benefit from their activities—namely, the income they receive from tourists.

Breast feeding presents a particularly obvious case of socially useful exposure.²³⁸ Breast milk is believed to be healthier than formula, pumping breast milk is time consuming and tiring, and many women report that breast feeding helps them bond with their babies. The act is non-sexual and is generally observable only by someone who is in close proximity to the mother. It need not even involve any nudity. It is hard to imagine any circumstances in which criminal prosecution would be appropriate.

In some cases, nudists also benefit, or claim to benefit, society at large. The “Breasts Not Bombs” protesters used their nudity to make a point about matters of great public concern. An all-female theatrical troupe recently presented a nude version of Shakespeare’s *The Tempest* in Prospect Park, Brooklyn.²³⁹ Similarly, “naturists” everywhere claim to be challenging antiquated moral and social norms; resisting lookism, sexism, homophobia, and class distinctions; and expanding the limits of artistic expression.²⁴⁰ Even Lady Godiva used her nudity as a means of saving the people of Coventry from burdensome taxation.

Stephen Gough, known as the Naked Rambler, presents a particularly prominent case of the supposedly altruistic nudist. Gough spent seven months during 2003 and 2004 walking naked (apart from boots, socks, a rucksack, and a hat) from

236. See William E. Hartman & Marilyn A. Fithian, *Nudism*, in HUMAN SEXUALITY: AN ENCYCLOPEDIA 419–21 (Vern L. Bullough & Bonnie Bullough eds., 1994); Jeffrey C. Narvil, Note, *Revealing the Bare Uncertainties of Indecent Exposure*, 29 COLUM. J.L. & SOC. PROBS. 85, 113 (1995).

237. Tim Murphy, *The Mannequin Also Speaks*, N.Y. TIMES (Jan. 16, 2013), <https://www.nytimes.com/2013/01/17/fashion/the-mannequin-also-speaks-up-close-with-narcissister.html>.

238. See HYDE, *supra* note 183.

239. CBS N.Y., *All-Female Nude Shakespeare Performance Seeks to Change Perceptions in Prospect Park* (Aug. 23, 2016), <https://newyork.cbslocal.com/2016/08/23/prospect-park-nude-shakespeare/>.

240. See generally BRIAN HOFFMAN, NAKED: A CULTURAL HISTORY OF AMERICAN NUDISM 1–15 (2015).

Lands End to John O’Groats, England, and was arrested over twenty times in the process.²⁴¹ In media interviews, Gough expressed a desire to “share his insight about the freedom nudity brings” and challenge people’s “false beliefs about who they are.”²⁴²

What about lovemaking in public? According to various psychological studies, many people find satisfaction having sex “outside the bedroom,” whether at the beach, in the park, in a car, train, or airplane, in a changing room, office, library, or elsewhere.²⁴³ Rationales for such conduct can vary, from the heightened sensation of novelty, to the thrill of knowing one might be discovered.²⁴⁴ In addition, some people have sex in public places because they have no private alternative, an issue discussed below.

Finally, there are people who go nude in public because they make their living doing so, a fact that was widely noted during the summer of 2015, when the City of New York sought to bar female, body-painted panhandlers, known as *desnudas*, from going topless in Times Square.²⁴⁵ New York law allows women to bare their breasts in public, but only if they do so for noncommercial reasons.²⁴⁶ This seems backwards. Other things being equal, the fact that a person earns her living by exposing herself ought to count *more*, not less, in her favor in determining whether her behavior counts as legally offensive.

4. Availability of Alternative Times and Places

In some cases, *D* will be able to achieve his desired ends in going nude or having sex by doing so at an alternative time or place at which the possibility of offending a potential victim will be lessened. In other cases, there will be no adequate

241. Ruth Styles, *The Naked Rambler Reveals Why He Just Can’t Keep His Clothes On*, DAILY MAIL (Jan. 21, 2014), <http://www.dailymail.co.uk/femail/article-2543309/Naked-Rambler-reveals-insists-going-nude.html#ixzz3olc5j4TA>; see also RA Duff & SE Marshall, *How Offensive Can You Get?*, in INCIVILITIES, *supra* note 114, at 59, 64.

242. See Styles, *supra* note 241.

243. See Kathleen Kelleher, *For Some, Intimacy Beyond the Bedroom Adds a Thrill*, L.A. TIMES (Apr. 29, 2002), http://articles.latimes.com/2002/apr/29/news/lv-birds29_.

244. Research psychologists have found that couples who engage in activities that are both novel and “physiologically arousing” report feeling more content. See, e.g., Arthur Aron et al., *Couples Shared Participation in Novel and Arousing Activities and Experienced Relationship Quality*, 78 J. PERSONALITY & SOC. PSYCHOL. 273, 279, 281–83 (2000).

245. See James C. McKinley, Jr., *Topless in Times Square: A Legal View*, N.Y. TIMES (Aug. 20, 2015), <https://www.nytimes.com/2015/08/21/nyregion/topless-in-times-square-a-legal-view.html>.

246. See *People v. Santorelli*, 600 N.E.2d 232, 234 (N.Y. 1992). Female defendants were prosecuted under N.Y. Penal Law § 245.01 (exposure of a person) for “remov[ing] their tops in a public park, exposing their breasts in a manner that all agree was neither lewd nor intended to annoy or harass.” *Id.* (Titone, J., concurring). The defendants argued that the law violated equal protection in that it applied to women, but not men. *Id.* at 233. The court avoided this issue by holding that the statute “should not be applied to the noncommercial, perhaps accidental, and certainly not lewd, exposure alleged” in this case. *Id.* at 233–34. The opinion thus left open the possibility that, in future cases, the statute could be applied to female defendants who went topless out of commercial motives. See *id.* at 234–35 (Titone, J., concurring).

alternative. For example, a person who wished to achieve the health and social benefits of going nude in public could achieve most of those benefits by doing so on a clearly marked nudist beach or in a nudist colony, rather than on a city bus or at the public library. Similarly, a couple who wished to achieve the physical and psychological pleasures they associate with outdoor sex could normally do so in a manner that would not involve exposing themselves to numerous witnesses: for example, they could choose to have sex in a secluded area of a park at a time of day when few people were around. On the other hand, there are some people who choose to have sex in public precisely because they have no access to a private place to do so. For example, homeless people, young people who live with their parents, people who are institutionalized, and people engaged in traditionally disfavored forms of sexuality such as homosexuality or adultery all may have difficulty finding a private place to have sex. The same principle applies to pressure groups that wish to use nudity to protest, say, bull fighting, the waging of war, or the wearing of fur. Normally, they would have no non-public alternatives for doing so, since the whole point of their public display is to shock witnesses into consciousness and action. In order to achieve their ends, they need to go nude in a place and time where they will be widely witnessed, whether in the streets of Pamplona, at a political rally of a public official whose policies they oppose, or at a high-profile fashion show. The same could be said for performance artists who take their nudity into public streets.

C. Victims' Special Susceptibility to Offense and Cultural Variation

There are two final issues, closely related, that have been lurking in the background, but which need to be considered directly before we conclude. First, one of the difficulties that potentially occurs in any case involving a claim of offense is that reactions will differ from person to person, and some victims will be particularly susceptible. We can easily imagine a case in which an observer, when confronted with a subway raincoat flasher, is amused by what he's seen, so much so that he looks forward to telling friends about the strange thing that happened to him while he was on his morning commute. A different witness, however, might be truly disgusted and distressed by the very same sight, unable to get the disturbing image out of her mind.²⁴⁷ How should the law respond? It should focus not on the victim's response, but rather, on the offender's intent. In determining if the defendant should be held liable, we need to ask if he should have foreseen that his conduct was likely to cause the victim distress.

247. Cf. Paul Rozin et al., *Individual Differences in Disgust Sensitivity: Comparisons and Evaluations of Pencil-and-Paper Versus Behavioral Measures*, 33 J. RES. PERSONALITY 330, 349–50 (1999) (explaining that “[c]ompared to other emotions usually considered negative . . . disgust offers a royal road to understanding of elicitors, sequelae, and individual differences”).

The more pervasive issue is that of cultural variation. What may be a reasonable reaction to nudity or partial nudity, say, on the liberal and diverse Upper West Side of Manhattan is far less likely to be viewed as reasonable in the Orthodox Jewish community of Borough Park, Brooklyn, and vice versa. And variations in culture affect not only what constitutes a *prima facie* case of indecency, but also what constitutes a reasonable assumption of risk that one will be exposed to such sights. As Judge Posner once observed:

Nudity as titillation or outrage is relative rather than absolute. In a society in which women customarily go about in public bare-breasted, there is no shock value in a bare breast, while in Victorian England, where decent women were expected to wear dresses that reached from the top of the neck to the floor . . . a bare ankle was a sensation. Since then female dress has become progressively less modest, and today many decent women appear in public in states of undress . . . that would have been considered nakedness, or the garb of prostitutes, thirty years ago.²⁴⁸

So how should the law respond to such a diversity of norms? I see three possible approaches. First, the law could be enforced to protect those who are most “sensitive” to being offended. For example, the law of indecency could be enforced to protect those who are likely to be offended by seeing a woman expose her shoulders or thighs, even though a majority of the broader culture does not subscribe to such norms. Second, the law could be enforced to protect the majority view. For example, if most people would be offended to see topless women in public, the law of indecency would apply. Finally, the law could be applied only to the most egregious kinds of cases, those which would offend all but the most “insensitive” members of society. For example, if everyone, or almost everyone, would be offended by being forced to witness people having sexual intercourse on a public bus, that would be an appropriate case for enforcement. We can think of this as a “lowest common denominator” approach.

In a liberal, pluralistic, Western society like ours, I believe that the third approach would be best.²⁴⁹ The criminal law is the most coercive tool society has to enforce its norms. Although it may well be good manners to respect others’ practices when one is in their community, that hardly means we should force people to do so by means of criminal sanctions. Sometimes, observing another culture’s rules of modesty is a sign of respect; other times, it seems to be a sign of submission to misogynistic norms. Wearing a miniskirt and halter top in Crown Heights, Brooklyn, home to the Hasidic Lubavitcher community, may be either culturally insensitive and boorish or courageously progressive. Wearing a hijab

248. *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1091 (7th Cir. 1990) (Posner, J., concurring), *rev’d sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991).

249. *Cf. Duff & Marshall, supra* note 241, at 57–90 (offering liberal argument for limiting state sanctions in response to offensive conduct).

can be a sign of submission to patriarchal hierarchies or a symbol of ethnic and religious pride, even a feminist choice.²⁵⁰ Such rules can be enforced through the strength of stigma and public censure. A mosque or synagogue or church should be free to exclude those who do not adhere to their dress code. But the criminal law should not intervene unless the brightest of bright lines is crossed.

CONCLUSION

Lady Godiva and Peeping Tom probably would have been surprised at the complexity of issues raised by their conduct that fateful day in Coventry. The offenses with which they could be charged—indecent exposure and voyeurism, respectively—are in some respects outliers within the criminal law. They are rare among the sexual offenses in that they do not require any physical contact between offender and victim. And they are exceptional as well in that the victim's lack of consent is not enough to prove liability for either offense; the state must also ordinarily show that the victim did not assume the risk of such conduct occurring. The two offenses are also linked in terms of the reciprocal rights they protect: in the case of voyeurism, the right not to have one's private activities seen by others; in the case of indecent exposure, the right not to have to see others' private activities. But for all their complementariness, the two offenses also reflect a significant divergence: while the law of voyeurism tends to be categorical in its application, the law of indecent exposure functions in a much more case-specific manner.

250. See WENDY SHALIT, *A RETURN TO MODESTY: DISCOVERING THE LOST VIRTUE* 217–26 (1999).