The Reasonableness of Remaining Unobserved: A Comparative Analysis of Visual Surveillance and Voyeurism in Criminal Law

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Abstract

Criminalization of offensive behavior is an important form of privacy protection, but few studies exist of visual observation in criminal law. We address this gap by researching when criminal law protects someone’s reasonable expectations to remain unobserved, and on what basis the law construes this “reasonableness of remaining unobserved,” through a nine-country comparative study (Canada, Czech Republic, Germany, Italy, Netherlands, Poland, Slovenia, UK and US). We focus on two broad offense categories: voyeurism-related crimes (largely relating to nudity or sexual activities), and intrusion-related crimes (such as observation inside dwellings). These offenses explicitly or implicitly reflect reasonable privacy expectations, by listing criteria for situations in which people can reasonably expect to remain unobserved or unrecorded. We analyze these criteria to understand how lawmakers protect visual aspects of privacy in view of individuals’ underlying interests in autonomy, and show how these can be interpreted as ways to assist people in their impression management in situations where disruptions occur in self-presentation and where normal techniques of rebalancing impressions provide insufficient redress. Discussing whether legal frameworks reflect contemporary socio-technical realities, we observe a gap in legal protection relating to non-covert taking of autonomy-undermining images in public, as a major up-coming challenge to impression management.

1. INTRODUCTION: PRIVACY, OBSERVATION AND AUTONOMY

Individuals have a fundamental interest in being able to decide in what circumstances, and by whom, they are seen; that is to say, an interest in being shielded from undesired forms of forms of visual observation. Criminal provisions that penalize unwanted forms of visual observation (common in many jurisdictions) validate and substantiate this interest, which can be grounded in the idea of autonomy. Rössler (2005) suggests that autonomy should be understood in terms of what a person chooses, and how she chooses it. A person is autonomous ‘if her desires and the actions that result from those desires are actually her own’ (Rössler 2005: 53); that they are authentic. The person’s ability to control the circumstances in which she is observed by others is critical to her capacity to form and act on desires that are her own. When a person becomes
aware that others have seen her, or could see her, in circumstances that she would rather they had not seen her, circumstances that were embarrassing or humiliating, there will be an involuntary shift in the person’s perspective. Whereas before she was free to make decisions without regard to others, she must now make them in light of the knowledge others have acquired, as a result of undesired observation. In making choices, she is likely to consider what the other’s perceptions of her might be and how those perceptions might influence his attitudes and behavior towards her. The result is likely to be inhibition, self-censorship, or a tendency to appease. Her choices will no longer be truly her own.

Undesired observation can also undermine agency in other ways. To be autonomous, an individual must adopt a certain attitude towards herself—to engage in self-reflection and evaluation. However, as many privacy scholars point out, the development of an autonomous way of life is not entirely self-regarding. Almost any attempt to act on one’s desires will require co-operating with others. The realization of self-chosen ends will depend on one’s ability to cultivate a diverse range of beneficial social relationships. A person’s ability to conceal and disclose parts of herself, and to establish certain social boundaries, determines the nature of relationships and the attitudes and dispositions that others hold towards her. To give effect to her self-determined ends, she must be able to influence such attitudes. Control over the circumstances in which she is observed will be essential to this endeavor.

Goffman (1959) explains that in social interactions, people are influenced by the information they receive about another. This information can be conveyed by various means—not only through words or actions, but also through the presentation of a particular image. The development of interpersonal relationships will be “achieved largely… by expressing himself in such a way as to give them the kind of impression that will lead them to act voluntarily in accordance with his own plan” (Goffman 1959, 3-4). In situations where people do not expect to be observed, such impression management will often be absent vis-à-vis third parties who watch covertly—either directly or mediated through visual recordings. As a result, third parties acquire impressions the person is not able to control. Photography’s capacity to record and reproduce images adds a temporal element to the threat of the gaze, subsequently affecting people’s freedom to act and manage the boundaries of their private life.

The effect that undesired visual observation might have on people’s capacity for autonomy provides a justification for legal protection. This article is concerned with a particular aspect of legal protection: the criminalization of non-consensual visual observation. We take visual observation to mean watching (with the unaided eye or a through a device), recording, or transmitting images. The existing literature on unlawful visual observation largely focuses on portrait rights (including the right of publicity), other privacy torts, or the criminalization of voyeurism within a particular jurisdiction. The broader comparative analysis of the criminal law of multiple countries set out below fills a gap in the literature and allows us to better conceptualize and understand the regulation of visual observation as a more general matter.

For reasons set out above, we can say that, generally, a person’s desire that others not observe her should be respected. Those who fail to do so commit a wrong and deserve moral
condemnation. However, societies do not, and should not, criminalize all moral wrongs. The criminalization of certain privacy-invading conduct marks it out as a special form of wrong, one that should be met with a collective response and public condemnation through the criminal law. Criminalization is significant because it tells us something about the value that law-making institutions place on particular aspects of privacy, as well as about the circumstances in which this value is considered particularly salient. With this in mind, we address the following questions: When is non-consensual visual observation deemed harmful enough to trigger criminal sanctions? How does the criminal law differentiate between circumstances where people can reasonably expect to remain unobserved and those where their expectations are unreasonable, at least for purposes of holding the viewer criminally liable? What can we say about these value judgments in light of individuals’ underlying interests in autonomy?

To answer these questions, we engage in a comparative analysis of the criminalization of non-consensual visual observation in nine jurisdictions: Canada, the Czech Republic, the United Kingdom, Germany, Italy, the Netherlands, Poland, Slovenia, and the United States. The combination of common-law and civil-law jurisdictions, with diverse histories in surveillance practices, offers interesting insights into what aspects of individuals’ interests in not being observed or visually recorded are worthy of protection. Commonalities and differences found across jurisdictional boundaries enable us to say something about the shared or differentiated value placed on visual aspects of privacy in different socio-legal contexts. They indicate that despite diverse histories and cultural traditions some aspects of privacy are widely valued in Western democracies.

To focus our findings and analysis, we discuss only primary offenses of unlawful observation. We mention and discuss accessory offenses (such as installing devices or possessing or disseminating images) only insofar as they serve as an important stopgap when observation itself is not criminalized. For federated countries, we focus on federal law, with some illustrative references to state-level legislation where it significantly adds to federal law.

In section 2, we provide a broad overview of visual-observation offenses and identify some initial themes. We divide relevant offenses into two primary categories: *voyeurism-related crimes* (largely sexual in character and often containing an element of nudity) and *intrusion-related crimes* (where observation occurs in circumstances that imply a privacy intrusion, e.g., inside dwellings). Common-law countries focus more on the former, and civil-law countries on the latter. In section 3, we focus on specific criminal provisions, mapping the main factors that influence the reasonableness of remaining unobserved. Offenses in both common-law and civil-law jurisdictions generally require, explicitly or by implication, an examination of “reasonable expectations of privacy.” That is, they indicate circumstances in which people can reasonably expect to remain unobserved or to be protected from dissemination of images. In different ways, jurisdictions use factors such as use of devices, place of observation, subject matter, surreptitiousness, sexual purpose, and identifiability as criteria to find someone’s expectation to remain unobserved to be “objectively” reasonable. We conclude in section 4 by drawing
conclusions and putting our findings in the perspective of the socio-technical landscape in which the legal frameworks are operating.

2. **BROAD OVERVIEW: TYPES OF VISUAL OBSERVATION-RELATED OFFENSES**

We suggested in the introduction that inability to control when and by whom we are seen could undermine autonomy in various ways, but that not every instance of undesired observation should be criminalized. In what circumstances do lawmakers consider visual observation serious enough to warrant recourse to criminal law? The jurisdictions we studied can be broadly divided into those that criminalize the observation of persons who are in some state of undress or engaged in sexual activity (voyeurism-related offenses) and those that criminalize the observation of persons in other circumstances that give rise to privacy expectations (intrusion-related offenses).

**Voyeurism-related offenses**

The common-law jurisdictions in our study tend to limit visual observation offences to voyeurism, a voyeur being “a person who derives sexual gratification from the covert observation of others as they undress or engage in sexual activities.” The main elements of this definition are evident in common-law visual observation offenses (although they do not all explicitly require a sexual purpose or intent).

The United States criminalizes someone who “has the intent to capture an image of a private area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy” (18 U.S.C. § 1801(a)), where “private area” is defined as “the naked or undergarment clad genitals, pubic area, buttocks, or female breast” (18 U.S.C. § 1801(b)(3)). Canada penalizes someone “who, surreptitiously, observes…or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy,” if the person is nude, exposes genital organs, anal region or breasts, or is engaged in explicit sexual activity; if she is in a place where one of these conditions can be expected; or if the observation or recording is done for a sexual purpose (s. 162(1) Canadian CC).

Similarly, in England and Wales, someone commits an offence of voyeurism if, he observes another person doing a “private act” for the purpose of obtaining sexual gratification, and he knows that the other person does not consent to being observed for this purpose (Sexual Offences Act (England and Wales) s 67(1)). The person doing a “private act” is someone whose genitals, buttocks or breasts are exposed or covered only with underwear, is using a lavatory, or “doing a sexual act that is not of a kind ordinarily done in public,” in a place which, in the circumstances, “would reasonably be expected to provide privacy” (Sexual Offences Act s 68(1)). Similar provisions exist in the Sexual Offences (Northern Ireland) Order 2008 (art. 71-72). Scottish law provides for similar prohibitions, but also extends criminalization to cases where the perpetrator acts for the purpose of “humiliating, distressing or alarming” the victim (and not for sexual gratification) (Sexual Offences (Scotland) Act 2009 ss. 6-7).
Of the civil-law jurisdictions in our study, only Poland has a voyeurism-related offence, criminalizing someone who “records the image of a naked person or a person during a sexual act, by means of force, unlawful threat or deceit, or disseminates the image of a naked person or a person during a sexual act without permission of this person” (art. 191a Polish CC). The provision is broader than the common-law offenses, however, in that voyeuristic (sexual) intent is not required—it also covers acts such as ridiculing a person’s body (Królikowski and Sakowicz 2015, 556). There is some disagreement in literature as to what constitutes a naked body: some authors consider it sufficient that some naked body parts are visible with private parts not fully exposed or blurred (Królikowski and Sakowicz 2015, 556; Waryliewski 2012, 487), while others think that at least some private parts (genitals, buttocks, female breasts) must be clearly visible (Filek 2012, 68-75; Mozgawa 2010, 391).

**Intrusion-related offenses**

Civil-law jurisdictions tend to criminalize visual observation where it substantially intrudes upon someone’s privacy. The main form of intrusion is visual observation of someone who is in a private place. Thus, Germany penalizes someone who “unlawfully creates or transfers a visual recording of another person located in a dwelling or a space especially protected from view and thereby violates their intimate privacy” (§201a(1)(1) German CC). Italy criminalizes “whoever, through use of visual or auditory recording devices unduly procures information or images pertaining to the private life taking place in [dwellings, places of private abode, and appurtenances]” (art. 615-bis Italian CC). Similarly, the Netherlands penalizes “he who, using a technical device of which the presence has not been clearly made known, intentionally and unlawfully makes an image of a person, present in a dwelling or another place not accessible to the public” (art. 139f Dutch CC). If the unlawful visual recording occurs in public, this is also an offence in the Netherlands, but only if done with “a technical device mounted for this purpose of which the presence has not been clearly made known,” and with a lower penalty than unlawful visual observation in private (art. 441b Dutch CC).

In contrast to these provisions’ focus on private places, Slovenia criminalizes visual observation more generally as a privacy violation, namely when someone “substantially interferes with another person’s privacy by taking unauthorized photographs or other visual recordings of that person or his premises without his consent” (art. 138 Slovenian CC). Germany also introduced an additional offence in 2014, covering the unlawful creation or transmission of “pictures that showcase another person’s helplessness, and thereby violate[ing] their intimate privacy” (§201a(1)(2) German CC).

Visual observation can also intrude upon other privacy-related values, such as secrecy. Poland, in addition to the nudity offence, criminalizes “whoever, aiming to obtain information to which she is not authorized, installs or uses an eavesdropping device, a visual device or another device, or software” (art. 267(3) Polish CC). In addition, reputation can be affected by visual recordings; thus, German law includes a criminalization of the unlawful making available to another of “a visual recording that is suitable for seriously harming the reputation of the
portrayed person” (§201a(2) German CC). Italy has an additional misdemeanor, prohibiting to divulge information or images of victims of sexual violence (art. 734-\(bis\) Italian CC), which protects such victims’ anonymity by not being identified in non-consensual publications as victims of sexual crime (Crespi, Stella and Zuccalà 2008, 2177).

The only country in our study lacking a specific visual observation-related offence is the Czech Republic. However, forms of visual observation that cause “serious detriment to another person’s rights” by “misleading someone” or “exploiting someone’s mistake” will fall under the broad offense of §181 Czech CC on “damaging another person’s rights.” This has been used to prosecute voyeurism or other forms of harmful visual observation, such as covert recording of people in their bathrooms or during sexual activity.\(^6\)

**Criminalized activities**

There is considerable variance in the types of behavior criminalized across the jurisdictions in our study. Overall, we find six main types of activities criminalized: three primary activities (watching, recording, and transmitting\(^7\)), the preparatory activity of installing equipment or adapting a structure to facilitate visual observation, and two ex-post activities, namely possession and dissemination of captured images or information. Recording is the only form shared across all jurisdictions in our study, although unlawful dissemination of images is also widely criminalized (see Table 1).

**Table 1. Forms of conduct criminalized under visual observation-related offenses**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Installing</th>
<th>Watching</th>
<th>Recording</th>
<th>Transmitting</th>
<th>Possessing</th>
<th>Disseminating</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada (federal)</td>
<td>—</td>
<td>CC §162(1)</td>
<td>CC §162(1)</td>
<td>—</td>
<td>CC §162(4)</td>
<td>CC §162(4)</td>
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<tr>
<td>Czech Republic</td>
<td>—</td>
<td>CC §181‡</td>
<td>CC §181‡</td>
<td>CC §181‡</td>
<td>CC §181‡</td>
<td>CC §181‡</td>
</tr>
<tr>
<td>England &amp; Wales</td>
<td>Sex. Offences Act §67(4)</td>
<td>Sex. Offences Act §67(3)</td>
<td>Sex. Offences Act §67(2)</td>
<td>—</td>
<td>(aggravating factor)</td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>—</td>
<td>—</td>
<td>CC §201a(1)</td>
<td>CC §201a(1)</td>
<td>—</td>
<td>CC §201a(2)‡</td>
</tr>
<tr>
<td>Italy</td>
<td>—</td>
<td>—</td>
<td>CC art. 615-bis(i)</td>
<td>CC art. 615-bis(i)</td>
<td>—</td>
<td>CC art. 615-bis(ii)</td>
</tr>
<tr>
<td>Netherlands</td>
<td>—</td>
<td>—</td>
<td>CC art. 139f(1°)</td>
<td>CC art. 139f(1°)</td>
<td>CC art. 139f(2°) (only 139f-images)</td>
<td>CC art. 139g (only 139f-images)</td>
</tr>
<tr>
<td>Poland</td>
<td>CC art. 267(3)</td>
<td>CC art. 267(3)‡ (only with device)</td>
<td>CC art. 191a</td>
<td>—</td>
<td>—</td>
<td>CC art. 191a</td>
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<td></td>
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<td>CC art. 138</td>
<td>CC art. 138</td>
<td>—</td>
<td>CC art. 138</td>
</tr>
<tr>
<td>USA (federal)</td>
<td>—</td>
<td>—</td>
<td>18 U.S.C. §1801</td>
<td>—</td>
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</tr>
</tbody>
</table>
Within these different categories, we also find some interesting variation. For example, within watching offenses, two common-law jurisdictions prohibit all forms of watching (including naked-eye observation), while Poland only prohibits watching with a visual or technical device. Most (but not all) countries that do not criminalize naked-eye observation prohibit real-time transmission of images to others. The Netherlands is the only country that explicitly criminalizes the mere possession of unlawfully created images, although Canada penalizes possession for dissemination-related purposes.

Criminalizing dissemination in addition to recording may seem superfluous (particularly since the maximum punishment is usually the same as for the recording offense), but it covers instances where people disseminate unlawful recordings made by others (usually under the condition that the disseminator knows or should know that the image was unlawfully created), thus furthering the privacy-related harm the laws were designed to address. Canada, the Netherlands, and Slovenia limit the dissemination offense to images that were made unlawfully. In contrast, Germany and Italy also penalize dissemination of pictures that were not unlawfully created (e.g., because there was consent, or absence of criminal intent), but made in the manner indicated in the description of the recording-based crime (e.g., in a dwelling) (§201a(4) German CC; art. 615-bis(2) Italian CC (Crespi, Stella and Zuccalà 2008, 1724)). Moreover, Germany penalizes the dissemination of pictures that can seriously harm someone’s reputation (§201a(2) German CC), while Poland criminalizes the non-consensual dissemination of voluntarily made pictures of a person while naked or involved in sexual activity (art. 191a Polish CC). The latter is particularly relevant for combating revenge porn, something that most of our jurisdictions cannot prosecute on the basis of visual observation-related offenses alone if the published nude images have been made with consent.8

Voyeurism, Intrusion and Autonomy

The offences described above are clearly intended to protect privacy interests that are threatened by non-consensual observation (visible in offense or section headings or in the offenses’ wording, which often contain references to privacy or private life). This relates to the idea, as we suggested in the introduction, that non-consensual visual observation might undermine autonomy in two ways. First, the sense of embarrassment, shame or humiliation that can come with a person’s awareness that she has been observed behaving or engaging in conduct that she did not want others to see, can have a significant inhibiting effect on her decisions and behavior. Second, what is revealed might change others’ attitude towards the person, so that they are less inclined to engage with the person in ways that will enable her to act on her desires.

Our comparative analysis reveals significant differences in protection from unwanted observation. It seems that, when considering the harm in non-consensual observation, common-law legislators have focused on its inhibitory effect while civil-law legislators have constructed provisions to address broader autonomy-related harms. In England and Wales, for example, the criminalization in 2003 was informed by the idea that “secret observation for the gratification of the watcher” was likely to engender in the observed person a sense of violation “not only of their
privacy but of their sense of… integrity” (Home Office 2000, 122). The harm that the proposed
offence was intended to address was the “fear and distress” that persons could suffer when it was
discovered that they had been observed in circumstances presumed to be private. Criminalization
reinforced, on a more explicit basis, the offenses that were used before 2003 to prosecute visual
observation, such as assault (applied to entering a private garden and observing a woman in her
nightdress through a gap in the curtains of her sitting room\(^9\)). In a similar vein, the Slovenian
Supreme Court found that a violation of the right to privacy causes unpleasant feelings such as
sorrow, disappointment, mistrust, shame, and humiliation, so that a “substantial interference with
privacy” in visual recording occurs when a person’s dignity, mental integrity, and inner peace is
violated.\(^10\)

If we take threats to autonomy as the ultimate harm addressed by visual observation
offenses, greater protection is provided in those (generally civil law) jurisdictions that have
enacted intrusion-related offences than those that rely on voyeurism-related offences. The former
seem to consider autonomous agency also to be undermined if we feel inhibited by fear of being
observed in other unwanted ways or circumstances than during sex or in a state of undress. The
Italian offences, for example, help protect “the freedom to manifest one’s personality as it
expresses itself in the domestic and private sphere” (Garofoli 2006, 254) or “the reservedness or
privacy in the places of private abode in which private life principally unfolds” (Dolcini and
Marinucci 2011, 5969). The German heading of §201a CC referring to “intimate privacy”
(\(höchstpersönliches Lebensbereich\)) similarly positions visual-observation offenses in the
intimate zone of life, which primarily takes places in dwellings or other private places. The
Czech Supreme Court has found violations of the general provision protecting against serious
detriment to a person’s rights in recording spaces where people’s intimate privacy is on
display.\(^11\)

We have suggested that inhibition is one possible effect of unwanted observation, and
that a second is the way in which information acquired as a consequence might affect
relationships between the observed and others in ways that undermine autonomy. Of course,
observation and dissemination of intimate acts might affect such relationships, but this does not
seem to be the primary justification for criminalization in those jurisdictions that have
voyeurism-related offences. In jurisdictions with intrusion-related offences, the ability to present
oneself in a way that is consistent with presentation of a particular image of oneself, an image
that will define the relationship that one has with oneself and others, seems to be the rationale of
criminalization. In some jurisdictions we studied, the relevant privacy interest appears to be the
freedom to develop oneself or to construct one’s identity without unreasonable constraints (in
line with Agre’s (1998, 7) privacy definition and a frequently-used Dutch legal framing of
privacy as “being able to be yourself uninhibitedly” (Blok 2002, 43)), which can stretch from the
personal and intimate into the public zone. The Polish protection of information against visual
recording, the German provision on reputation-damaging pictures, the Slovenian provision
protecting one’s own image, and the Dutch criminalization of covert visual recording in public
all contribute to some level of privacy that enables individuals to control the way in which they present themselves and how others are likely to perceive them.

To better understand the relative degree of protection afforded by offences both within and across the two broad categories of offenses described in general terms above requires a more fine-grained analysis. In the next section we identify factors that appear to determine the reach of the criminal law; that is to say, the extent to which the criminal law recognizes a person’s expectations in respect of remaining unobserved to be reasonable and, therefore, worthy of protection.

3. FACTORS AFFECTING THE REASONABLE EXPECTATION OF PRIVACY

Although only the common-law jurisdictions tend to use the “reasonable expectation of privacy” standard explicitly, civil-law jurisdictions implicitly apply a similar standard, by using criteria that define when people can reasonably expect to remain unobserved. Analyzing the factors that seem to shape the reasonableness of such expectations will enable us to say more about institutional conceptions of the value of privacy. Of course, none of these factors is in themselves preponderant—the combination of factors always determines the reasonableness of remaining unobserved.

Technical device

The use of technical devices can significantly amplify the effects of being observed on inhibitory and relational aspects of subjects’ autonomy. Perhaps unsurprisingly, therefore, technical devices appear to be particularly influential in legislative notions of reasonable expectations of privacy. The fact that all jurisdictions criminalize visual recordings underlines the fact that visual observation-related offenses assume some use of technology. Only Canada and the UK explicitly criminalize unaided watching, but this is limited to classic “peeping-tom” scenarios with sexual connotations. Thus, except when nudity or certain intimate activities are being observed, criminal law normally does not protect people against being seen or watched by others. This may be due to an implicit historical assumption that people who do not want to be observed can shield themselves from observation relatively easily by withdrawing behind visual barriers (walls, curtains, clothes). Conversely, if people move beyond visual barriers, they knowingly take the risk that others can see them and they can adapt their behavior accordingly. However, when visibility leads to records, where an exact reproduction can be made of an otherwise transient image, the situation changes. “The image after all is being recorded, it comes within the reach of others, can be multiplied or published; it can even be a tool in… blackmail.” The fact that a fleeting image is captured in a potentially durable record makes people more vulnerable. In addition, the fact that recordings, as mediated images, isolate the observed from their original context and places them in a different context (Brighenti 2007, 339) is a privacy-relevant concern (Nissenbaum 2010). Thus, technology as a record-making and record-keeping tool is an important factor affecting the reasonableness of remaining unobserved.
The reproductive capacity of technology is not limited to enabling durably stored exact reproductions, however. While Italian law uses the term “recording devices” *(strumenti di ripresa)*, Italian doctrine interprets this extensively to include instruments that do not record but only transmit sounds or images in another’s dwelling, as non-recording devices are also “endowed with an extraordinary capacity to penetrate into another’s domiciliary sphere” (Palazzo 1975, 131-132; see also Mantovani 2013, 560). However, non-technical forms of obtaining information, such as from servants or by reading diaries, are not punishable—the law specifically protects against indiscretions that appear particularly insidious because of the use of technological devices (Palazzo 1975, 129-130). Similarly, the Dutch legislature criminalized the live streaming of images, because of the “possibility to produce authentic recordings,” without the recording being necessarily durable or reproducible (Fokkens 2004). It therefore makes a difference whether images are created in technology-based (temporary or permanent) memory or in human memory. The temporal element (as technology enables later viewings) is very important but not a necessary condition. Likewise, many jurisdictions cover spatial reproduction (technologically enabled instantaneous viewing from remote locations) through the inclusion of transmission-related offenses.

Another but less decisive function of technology is the enhancement of human perception, e.g., through binoculars. We see this in Poland’s criminalization of peeping toms who use visual or technical devices. The fact that other countries do not criminalize technology-enhanced perception as such indicates that visibility *at a distance* is generally not considered a protection-worthy legal good. For instance, the Dutch 1971 law did not criminalize visual recordings of people in private yards, because “nowadays telephoto lenses are used so frequently.”. Thus, because of the widespread availability of perception-enhancing technology, people should consider their gardens and yards as similar to public places, in terms of not being protected by criminal law against visual observation. (However, in 2003, Dutch law changed to criminalize covert visual observation in all places, putting more emphasis on surreptitiousness than on place, but zoom lenses were not considered an indicator of surreptitiousness as such.)

**Place**

Places play an important role in determining the scope of visual observation-related offenses. There is a strong presumption that people can reasonably expect to remain unobserved in the most private places (particularly dwellings) but not in public places. However, jurisdictions vary in how they use place as a determining factor in observation crimes.

Dwellings are specifically mentioned in German and Italian law (for privacy-violating images) and Dutch law (for covertly made pictures). While Italy also includes appurtenances, this is limited to spaces protected from vision of external parties: taking pictures of people on deck of a ship or in a garden or courtyard where there is nothing to impede the view does not fall under article 615-*bis* (Dolcini and Marinucci 2011, 5971). Similarly, but extending protection to non-residential places, German law also protects against observation in spaces “especially protected from view” (§201a German CC). Such an extension also features in the Italian and
Dutch protection for people in non-publicly accessible places (e.g., workspaces or private clubs), without, however, a requirement that these places be shielded from public view. Moreover, in contrast to other jurisdictions, Dutch law also explicitly protects against observation in publicly accessible places, but this is limited to surreptitious recordings and a misdemeanor with lower punishment than observation in private places.

In England and Wales, the offense of voyeurism is committed only in respect to observation of persons “in a place which, in the circumstances, would reasonably be expected to provide privacy” (s. 68 Sexual Offences Act). Although broader than in the original proposal (which was limited to persons in buildings or other structures), and potentially covering “open” places, closed places will more readily be reasonably assumed to provide privacy. The sentencing guidelines mention the victim being “observed or recorded in their own home or residence” as a factor indicating increased harm. Similarly, Canadian law covers observation of someone in a “place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity” (§162(1)(a) Canadian CC)—behavior normally occurring in private or closed places, rather than in public. Similarly, US voyeurism law covers recording under “circumstances in which a reasonable person would believe that a private area of the individual would not be visible to the public, regardless of whether that person is in a public or private place” (18 U.S.C. §1801(5)(B)); combined with the general view under US law that reasonable expectations of privacy are greatly diminished in publicly accessible places, the provision would generally only cover observation in relatively “private” spaces. Additionally, jurisdictions that do not specifically refer to (private) place will often apply it implicitly as a relevant factor in determining whether an intrusion is unlawful. The Polish, Slovenian, and Czech provisions, for example, can also apply in public or publicly accessible places, since they are not spatially limited. However, in these jurisdictions, recordings in private places will arguably be more readily considered unlawful than those made in public.

Interestingly, some spaces accessible to the public are nevertheless associated with private acts, such as toilets, bathrooms, fitting rooms, and changing rooms. Given the heightened expectation of privacy, such places are interpreted in Dutch law as non-publicly accessible places protected under art. 139f Dutch CC (Ten Voorde 2016, 8(d)) and are also mentioned alongside dwellings in some US state legislation. The German notion of “spaces especially protected from view” also covers these types of spaces (Kindhäuser, Neumann, and Paeffgen 2013, §5). In the English case of R v. Basset, the defendant was convicted of voyeurism using a camera hidden in a bag in a communal male changing area at a swimming pool, filming a man wearing swimming trunks using the showers. The court recognized that a person could have a reasonable expectation of privacy in places where they could possibly be seen, referring to an unreported case in which marathon runners had gone into bushes to urinate. Although they were not entirely concealed from public view, they had entered the bushes to find a degree of privacy. Here, an expectation that they would not be followed and observed would be reasonable. However, according to the court, while the runners could reasonably expect people not to loiter
near the bushes closely observing them, they could also reasonably expect “casual and innocent” encounters with passers-by coming across them by accident. In such circumstances, no offense of voyeurism would be committed even if the “accidental observer” derived sexual gratification from the view. By analogy, those using a shower cubicle in a communal changing room that was not entirely enclosed from others’ view might have a reasonable expectation of privacy in respect of someone who has drilled a hole in the wall in order to observe them, but not in respect of casual observation by other changing room users. The reasoning of the English court is similar to that used in R. v. Rudiger (Canada) in relation to sexually-charged photo and video-making of young girls’ private areas at a shower area by a swimming pool in a public park, which was punishable voyeurism in light of “the protean and flexible nature of a privacy interest” that may also apply in public.19 However, nude sunbathers on a clothing-optional beach were found by a Canadian court to have no reasonable expectation of privacy not to be photographed.20

Subject matter

In some jurisdictions, subject matter does not seem relevant to criminal liability. In the Netherlands, any surreptitiously taken picture can be punishable. Italy restricts the criminalization to images pertaining to private life, but this is not a substantial limitation since pictures taken inside private spaces will usually depict private-life scenes. Similarly, Germany (in §201a(1)(1)) and Slovenia limit the offenses to recordings that substantially interfere with privacy, but in these provisions, the privacy interference seems to lie more in the modus operandi than in the subject matter itself. However, in other jurisdictions, the subject matter does influence the reasonableness of remaining unobserved, relating to situations of nudity or embarrassment.

Nudity and intimate acts

Voyeurism-related offenses are generally limited to observation of nudity or intimate (sexual or toilet-related) behavior. In terms of nudity, the US federal law’s provision defines someone’s “private area” as “the naked or undergarment clad genitals, pubic area, buttocks, or female breast” (18 U.S.C. § 1801(b)(3)). According to the law’s drafters, this language was designed to “criminalize the appalling practice of filming or photographing victims without their knowledge or consent under circumstances violating their privacy,” including conduct “referred to as ‘upskirting’ or ‘downshirting’.”21 Similarly, the UK provision focuses on a person’s “genitals, buttocks or breasts [being] exposed or covered only with underwear” (s. 68(1)(a) Sexual Offences Act), and Canada mentions “genital organs or anal region or… breasts,” the latter being limited to female breasts, since men have no expectation of privacy in their (bare) breasts.22 Relevantly, privacy expectations in clothing are context-sensitive: the Northern Ireland Court of Appeal held that if a woman were to be filmed wearing bikini bottoms as underwear (in circumstances where she was entitled to expect privacy), an offence of voyeurism would be committed; however, if the bikini bottoms were being worn as swimwear, no offence would be committed.23
Moreover, the Canadian and UK offenses explicitly apply to observation of sexual activity or toilet use as such, regardless whether private parts or underwear are visible, thus protecting against observation of intimate acts done while private parts are kept shielded from view. The UK limits the sexual acts to those “not of a kind ordinarily done in public” (s. 68(1)(c) Sexual Offences Act), thus presumably excluding kissing, similarly to Canada’s mention of “explicit” sexual activity (§162(1)(a) Canadian CC). In contrast to these jurisdictions’ focus on people’s private parts and intimate behavior, art. 191a Polish CC is broader, covering any part of a naked human body that allows for identification of that person (although, as observed, some authors consider some private parts need to be visible). Images do not have to serve a sexual purpose: they can also be recorded with the intention of ridicule, showing ugliness, or generally interfering with the private sphere of the person.

**Embarrassing situations**
The focus on nudity in Polish art. 191a seems to be about protecting people against voyeurs, but also against embarrassing, shameful, or otherwise harmful depictions. We encounter a similar concern in Germany’s criminalization of pictures that showcase another person’s helplessness and thereby violate intimate privacy (§201a(1)(2)). Examples of helplessness include victims of traffic accidents, victims of violence lying bloodied on the ground, drunken people returning home, and drunken teenagers. Protection is considered especially important if it concerns situations that the persons did not cause through their own fault, although the examples of drunkenness indicate that also self-caused helplessness can trigger protection. The emphasis, thus, seems to be on situations outside the depicted person’s control and the harm people can suffer from such depictions. In that sense, also §201a(2) German CC might be understood as protecting people from harmful acts they cannot really control, namely others disseminating pictures of them that can seriously harm their reputation. Especially for embarrassing or degrading situations, there is likely an interest in the picture not being transmitted to other parties.

A similar concern is visible in the English sentencing guidelines, which stipulate that offenses motivated by, or demonstrating, hostility to victims based on religion, race, sexual orientation, transgender identity, or disability trigger raised culpability. Slovenian case-law on unlawful visual recording (as a form of protection of one’s own image) also includes recordings that result in ridicule and feelings of embarrassment, while Italian law (art. 734-bis) protects people from being portrayed in publications as victims of sexual violence.

Interestingly, art. 139f Dutch CC originally also sought to protect people against pictures made “under circumstances that are compromising or at least embarrassing for the person concerned,” by requiring that the picture “could harm the legitimate interest” of the depicted person. In 2003, the law-maker felt that this limitation was “no longer in line with contemporary views on privacy protection,” and changed the provision to ensure that taking pictures surreptitiously in private places is punishable “regardless of the nature of the picture.”
**Privacy-related objects**

One additional form of subject matter bears mentioning. While the jurisdictions we studied focus on observations of people, Slovenia has also penalized the unauthorized recording of a person’s premises (*njegovih prostorov*). This generally refers to someone’s dwelling, but can also include places such as one’s hotel or dorm room, garage, storage room, basement, balcony, garden, courtyard and similar spaces that one can inhabit or that reflect the person (Šugman Stubbs and Gorkič 2011, 123). Where visual recordings of premises substantially interfere with someone’s privacy, this is punishable regardless of whether the person herself was actually recorded. Here, the places most closely connected to a person seem to be regarded as an extension of that person, so that the privacy interested in remaining unobserved applies not only to the person’s body but also to the person’s intimate places, as both can reveal much of private life.

**Surreptitiousness, deceit, force**

Another important factor is the mode of observation, in particular whether the observed person knows about and agrees with the observation that is taking place. Some jurisdictions protect people particularly in situations where they do not know (or cannot be supposed to know) that they are (or may be) observed. The Canadian voyeurism offense is limited to surreptitious observation (§162(1) CC). Thus, sunbathers on a public beach lack a reasonable expectation of privacy that others will not capture images of them overtly.\(^{33}\) Moreover, under Canadian law, while students should expect that their school’s security cameras will capture images of them, female students do have a reasonable privacy expectation *vis-à-vis* a teacher covertly recording their breasts and cleavage with a pen camera.\(^{34}\)

Surreptitiousness also plays a major role in the Dutch offenses, particularly since they apply regardless of subject matter (Fokkens 2004, §1). Taking pictures without consent is only criminalized if the device’s presence has not been clearly made known (e.g., through signs announcing CCTV). In private places, this applies to any type of camera.\(^{35}\) For visual observation in public, however, criminalization is limited to devices “mounted for this purpose” (*daartoe aangebracht*), i.e., placed for the purpose of photographing or filming people. This is, in principle, limited to fixed and somewhat durably installed cameras, such as CCTV cameras operated by owners of publicly accessible places. This excludes portable, hand-held cameras—a significant limitation of the criminalization of observation in public. However, if an additional step is taken so that the presence of a portable camera is no longer readily visible (for example, it is hidden in an object or vehicle), then this counts as “mounting” the camera for the purpose of covert observation.\(^{36}\) Hence, people are not protected against unlawful picture-taking by visible cameras in public, but they are against unlawful picture-taking by hidden cameras. At the same time, Dutch lawmakers have not accounted for the use of zoom lenses at large distances (which can make picture-taking covert in practice), creating the possibly inconsistent situation that observation with hidden cameras is an offense, while observation with a zoom lens at distances where the camera is practically invisible to the photographed person’s naked eye is not.
By contrast, under Canadian law, the use of a zoom lens may tip the balance in the reasonable-expectation-of-privacy test as it enables a secretive “close-up recording of [the victims’] private areas.”\textsuperscript{37} Additionally, the surreptitiousness element of the offense applies to the act of observation itself in Canada, while in the Netherlands it refers to the presence of a recording device. Canada thus criminalizes covert use of an overtly present camera (which the Netherlands does not), while the Netherlands criminalizes overt use (e.g., by using a camera’s flash) of a covertly present camera\textsuperscript{38} (which Canada does not).

Other jurisdictions focus less on covertness and more on consent. The English, Polish (art. 191a), Slovenian, and US (federal) provisions only cover situations where consent is lacking. Consent is also implicitly present in §615-\textit{bis} Italian CC, since lack of consent can be an important factor in deciding whether an observation was “undue.” The Polish provision further narrows the criminalization of recording nude or sex images to a sub-category of non-consensual situations by requiring some form of force, unlawful threat, or deceit. This echoes the original Dutch provision from 1971 that, instead of use of covert devices, required that a recording took place “using an opportunity created by guile or trick.” Some form of deceit may also be necessary for Czech law to apply to observation, as this can only be qualified under the broad provision that prohibits infringing someone’s rights by misleading them or exploiting their erroneous belief (§181 CC), although arguably surreptitious (but not deceitful) recording may also qualify as such if the perpetrator exploited the observed person’s erroneous belief that she was in an unobserved (or unobservable) situation.

In relation to revenge porn, a relevant question is whether recording of consensual sexual activities by one partner without (explicit) consent of the other is criminalized. Under Italian law, this does not violate art. 615-\textit{bis}, as long as the recording is not spread or shown to others.\textsuperscript{39} The same conclusion has been reached in Czech case-law on §181.\textsuperscript{40} Under Dutch law, it depends on the visibility of the recording device; for instance, non-consensual recordings of sexual activities in front of a webcam are not punishable, as the webcam is clearly present and the streaming person should therefore know that the recipient might store the images (Koops and De Roos 2007, 38).

\textbf{Intent}

Besides general intent requirements, some jurisdictions require particular forms of intent. In England & Wales, the voyeurism offenses are limited to behaviors done “for the purpose of obtaining sexual gratification” (Sexual Offences Act 2003 § 67(1)(a)). This is significantly narrower than the originally proposed offense, which would have criminalized observation \textit{per se} of persons inside a structure in circumstances involving a reasonable privacy expectation. Some US states have similar requirements,\textsuperscript{41} but US federal law does not explicitly limit the voyeurism offense to sexually-charged observation of nudity. Interestingly, Canadian law also includes unlawful observation or recording that is “done for a sexual purpose” (§162(1)(c) CC), but this is an \textit{extension} rather than a limitation of criminal liability. As such, Canada’s voyeurism offense also covers observation of non-nude and non-love-making persons, if the observation has a
sexual purpose. In comparison, English criminal law does not protect naked people in their bathrooms from observation by anthropologists studying bathing practices (even if the anthropologist does in fact derive sexual gratification when observing for academic purposes).

Intent requirements may also serve to prevent over-criminalization. In the US and Canadian laws that contain intent requirements, the intent must be focused on capturing the (partial) nudity or sexual activity of the victim. This precludes criminal liability for images that accidentally show nudity (e.g., a removal man suddenly bending down and showing his anal cleft) or sexual activity (e.g., a copulating couple in a copse in the background of a nature photograph) without this having been the photographer’s focus. Similarly, the Dutch criminalization of surreptitious visual recordings in public is limited to covert cameras mounted to surveil people; cameras focused on objects, such as traffic cameras recording speeding or red-light-passing cars, are excluded from the offense, even if captured images accidentally include a person.42

Identifiability
Most criminal provisions do not require the depicted persons in an image to be identifiable, although identifiability may play a role in assessing whether, or to what extent, visual observation violated a reasonable privacy expectation (under common-law offenses) or was unlawful or constituted a privacy violation (under civil-law offenses). Identifiability may also influence other factors discussed above; for instance, the Dutch exclusion of object-focused cameras saves from criminal liability a webcam mounted to record some festivity in public if pictured people are not identifiable, but if it was mounted so that “persons would be systematically pictured identifiably,” then its apparent intent is to surveil people, not objects,43 and consequently its presence needs to be announced.

The Polish offense in article 267(3), criminalizing the use of visual devices to unlawfully obtain information, requires the victim to be identifiable in the recording in order to qualify as an offense, suggesting that this provision is also an offense against data protection and not only against physical privacy. It should be noted that the standard of identifiability is relatively low: if at least one person other than the victim can identify her on the image (Filek 2012, 70), based on any characteristic trait typical to the victim’s body (Filek 2012, 67), the identifiability requirement would be satisfied. Thus, a recording need not necessarily include the face of the victim or any personal data. Some state-level voyeurism provisions in the United States also only criminalize conduct when the victim is identifiable.44 In contrast, the Slovenian Supreme Court has implicitly determined that victims do not need to be identifiable for art. 138 CC to apply, as posting a close-up photograph of the injured party’s sexual organ on Facebook without her name or other data that would make her identifiable to others, was already considered a clear violation of (the most intimate aspects of) one’s privacy.45 In some jurisdictions, the disclosure of intimate images becomes criminal only when the victim is identifiable.46
Counter-indicators

Although observation can infringe privacy, other interests may justify observation. Many jurisdictions explicitly balance other factors against privacy interests. Germany, for instance, mentions “art or science, research or education, news-provisioning on contemporary or historical events or similar purposes” as factors that can outweigh the privacy interest in not recording or transmitting pictures of helpless people or in not disseminating reputation-damaging pictures (§201a(4) CC). Notably, the exception does not apply to visual recordings in dwellings or closed-off spaces, demonstrating Germany’s strong protection of the privacy of home life.

More generally, Canada excludes criminal liability for voyeuristic acts “that serve the public good and do not extend beyond what serves the public good” (s. 162(6) CC). Dutch law includes the term “unlawful” as an element of the offense to leave discretion to the court to balance privacy against other interests, such as freedom of expression (particularly where journalists take pictures without consent) (Ten Voorde 2016, §8b), similar to the Italian law’s inclusion of “undue.” US law excludes federal criminal liability for “any lawful law enforcement, correctional, or intelligence activity” (18 U.S.C. §1801(c)).

Other

Some other factors may affect the determination of liability or level of punishment for visual observation, although these are more connected to the gravity of a privacy infringement than the assessment whether privacy was infringed as such. We encounter several such factors in the English sentencing guidelines for voyeurism. While there is no separate offense of publication of images, distribution is an aggravating factor for sentencing purposes. Also, the location and timing of the offense, the placing of images where they can be seen by many viewers, and the period over which the victim was observed—or within which the images were made or distributed—are aggravating factors under English law.47

4. DISCUSSION AND CONCLUSION

In this paper, we have analyzed when non-consensual visual observation is deemed harmful enough to trigger criminal sanctions. The common-law jurisdictions we studied, with their general focus on voyeurism-related offenses, criminalize a narrower range of observation activities than most civil-law jurisdictions do in their intrusion-related offenses. Apparently, the former consider the inhibitory effect of undesired observation on autonomy to be particularly salient in situations where people are (partly) nude, engaged in intimate bodily activities, or the object of sexually motivated observation. The latter appear to consider visual observation to be harmful in a wider range of situations where people can reasonably expect to remain unobserved, primarily in closed-off places but also, to some extent, in public or otherwise visible spaces.

Despite a general difference in scope of criminalization between voyeurism-focused and intrusion-focused offenses, there are many commonalities between the jurisdictions we studied. Most jurisdictions apply a rather fine-grained combination of factors that must be fulfilled before criminal liability applies. While the particular combinations or weight factors differ from country
to country, all provisions can be interpreted as ways to assist people in their impression management, which is a vital aspect of preserving people’s autonomy in the context of social relationships. The factors influencing the reasonableness of remaining unobserved all see to situations in which disruptions occur in someone’s self-presentation and where normal techniques of “saving the show” (Goffman 1959, 239) provide insufficient redress—particularly where intrusions are intentional rather than accidental.

Thus, places in which people have a reasonable expectation of privacy protect people’s “backstage” life, where, usually in places of intimacy, they relax from playing their public persona(s). Unwanted intrusions into backstage life can have a significant inhibitory effect on people’s subsequent behavior onstage, especially when an observer acquires recordings. Likewise, the specific types of subject matter included in certain observation-related offenses indicate major disruptions to impression management—that is, they protect people from being observed in situations involving nudity, sexual activities, or certain embarrassing conditions where they have limited possibilities to control how others will perceive them, which may strongly affect how they will be perceived in social relationships. Provisions in which surreptitiousness or deceit play a strong role particularly address disruptions in impression management that cause people to be seen, whether off-stage or on-stage, by an audience they did not intend to reach.

However, none of these factors alone are sufficient to trigger criminal liability if no technology were involved, except in the common-law provisions on naked-eye voyeurism (which underline the great harm to autonomy if people feel inhibited in their most intimate activities). Most disruptions in impression management do not reach the threshold of criminal law except if observation occurs with a technical device, which substantially enhances observers’ capacities of human perception and, particularly, enlarges the risk of other audiences watching a recorded or transmitted image. The recording, transmission, and publication of images enables a far larger audience to get an impression than is possible through direct observation; where (the risk of) dissemination is widespread, the humiliation or embarrassment associated with undesired observation will be felt more acutely, and the inhibitory effect is likely to be far greater than when a person becomes aware of having been watched merely at a singular time and place. Additionally, as technology enlarges the distance between observed and observer in space and time, it is more difficult for the observed to rely on traditional measures to minimize the harm from having been observed. This is where criminal law, as a last resort to fill gaps in protection, steps in, by criminalizing (besides, in some countries, the most intrusive forms of naked-eye observation) technology-aided observation in combination with factors such as place, subject matter, or surreptitiousness that create substantial disruptions in impression management. The other factors we have discussed, including intent, identifiability, and counter-indicators, serve largely to prevent over-criminalization, by further limiting criminal liability to situations where the harm to autonomy through non-consensual observations substantially outweighs the interests others may have in making or disseminating images.
While Goffman’s framework of impression management thus seems well suited to explain the privacy value that lawmakers have addressed when criminalizing non-consensual observation, we should still question whether the current state of legislation is capable of preserving this value in situations where technology keeps evolving and opening up new avenues for observation. Most of the legal frameworks we analyzed were developed throughout the 1970s to the 2000s, adapting the law to address then-topical privacy-invasive technologies (such as pocket cameras in the 1970s or camera-equipped cellphones in the 2000s). Although the Internet has been prominent since the mid-1990s, it is questionable whether laws provide sufficient protection against the potential harm to autonomy caused by mass dissemination of non-consensual images enabled by ubiquitous camera-equipped smartphones, one-click uploads and sharing buttons. Nowadays, people always run the risk that others will observe or record them whenever they enter or move about in publicly-accessible places. What control do we have over images that simply record us in a physical state that we would not want permanently recorded and disseminated to a wide audience, e.g. when we are ill, exhausted, or apparently intoxicated? When we wear a sloppy dress, have a bad hair day, or idly pick our noses? In terms of autonomy, being overtly recorded in public is just as bad in such situations as being covertly recorded, since in both cases there is little people can do to prevent being recorded—except at the very high price of always and consistently fitting their behavior in public into the straightjacket of a permanently non-embarrassing appearance. Yet, hardly any jurisdiction we studied criminalizes the non-covert taking of autonomy-undermining images in public. Possibly, the recent German criminalization of privacy-infringing recordings of people in helpless situations will turn out to be the first in a new wave of visual-observation offenses, to address the most serious consequences of non-consensual visual observation in the era of social media and ubiquitous mobile cameras—but this remains to be seen.

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All translations of legal and doctrinal texts in this article are by the authors, unless otherwise indicated. A country’s Criminal Code will be indicated with Canadian/Czech/etc. CC.

In the UK, we focus primarily on the law of England and Wales, the largest jurisdiction within the nation. In the case of the United States, we note that federal law is only applicable in a very small range of cases, but we use it in combination with some state law as an imperfect proxy.

There are exceptions at the US state level, e.g., Florida (Fla. Stat. §810.14(a)) and Washington (RCW §9A.44.115(2)(a)) also criminalize non-voyeuristic observation in places with a reasonable expectation of privacy.

Definition from the Canadian Oxford Dictionary, endorsed by the Department of Justice (Canada) (2002) in a consultation paper concerning the creation of a voyeurism offense.

Some common-law jurisdictions have also enacted intrusion-based offenses. E.g., § 647(j)(1) California Penal Code prohibits (as a misdemeanor for disorderly conduct) merely looking through “a hole or opening” (with the intent to invade a person’s privacy) into a place where a person maintains a reasonable expectation of privacy (such as a bathroom, bedroom, tanning bed, or dressing room).

For example, see Supreme Court Resolutions 6 Tdo 942/2011, 4 Tdo 843/2015, 6 Tdo 1028/2010.

I.e., live-streaming images captured with a device (without necessarily recording the images), e.g., through a webcam.

Revenge porn may fall under various other provisions in these jurisdictions, e.g., defamation, or protection of privately kept documents.

Smith v Chief Superintendent Woking Police Station (1983) 76 Cr App R 234 (violation of s 4 Vagrancy Act 1824).


For example Supreme Court Resolutions 6 Tdo 942/2011, 4 Tdo 843/2015.

Note, however, that some US states criminalize secret unaided observation of people in places with a reasonable expectation of privacy, without a voyeuristic element, e.g., RCW § 9A.44.115; Fla. Stat. § 810.14; Cal. Penal Code § 647(i).

Kamerstukken II (Parliamentary Proceedings Dutch Second Chamber) 1967/68, 9649, no. 3, 3.


E.g., Fla. Stat. §810.145(1)(c).

[2008] EWCA Crim 1174.

R v Swyer [2007] EWCA Crim. 204.


Bundestag (n 25), 28.

Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz, Entwurf eines ... Gesetzes zur Änderung des Strafgesetzbuches – Umsetzung europäischer Vorgaben zum Sexualstrafrecht, 48-49.


Kamerstukken II 1967/68, 9649, no. 3, 1.

Kamerstukken II 2000/01, 27732, no. 5, 2.


Thus, home-owners must generally clearly announce the presence of a camera: guests and visitors can expect not to be infringed in their privacy through covert visual observation when visiting someone’s home, on the basis of the trust relationship between host and guest. Interestingly, however, burglars cannot claim infringement of their privacy under art. 139f Dutch CC if they are captured by a covert camera, as there is no (legitimate) trust relationship.
between hosts and trespassers. *Kamerstukken II* 2000/01, 27732, no. 3, 13; *Kamerstukken I* 2002/03, 27732, no. 57a, 3.

36 *Kamerstukken II* 2000/01, 27732, no. 5, 10-11.
38 *Kamerstukken II* 1967/68, 9649, no. 3, 3.
40 Supreme Court Resolution 6 Tdo 1028/2010.
41 Florida’s voyeurism law requires unlawful observation to be done with “lewd, lascivious, or indecent intent” (Fla. Stat. § 810.14) or for purposes of “sexual arousal” or “gratification” (Fla. Stat. § 810.145).
42 *Kamerstukken II* 2000/01, 27732, no. 5, 9.
43 *Kamerstukken II* 2000/01, 27732, no. 5, 9 and 11.
45 Slovenian Supreme Court, Criminal division, Judgment VSL II Kp 76261/2010.
46 See, e.g., Hawai‘i Rev. Stats. § 711-1110.9(1)(b).