

Wrongful observation

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Wrongful Observation*

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1. Introduction

According to common-sense morality, agents can become morally connected to the wrongdoing of others, such that they are rendered liable to bear costs to prevent or rectify the wrongs committed by the primary wrongdoer. Various possible grounds of this connection have been proposed, such as causally contributing to another's wrongdoing¹, sharing particular kinds of intentions with the primary wrongdoer², and shared membership in certain types of group or collective³. As we employ it, to say that a person is morally liable to bear a cost is to say that she has, through her actions, forfeited her usual rights against bearing that cost. In virtue of her liability, she is not wronged by the imposition of that cost.⁴

In this paper, we argue that, under certain conditions, *observation* can establish the relevant connection to another's wrongdoing. We address, specifically, observation in the context of what we call *degrading wrongs*. Examples of degrading wrongs include sexual assault and harassment, bullying, slavery, and racially-motivated harms (we elaborate on the notion of degrading wrongs in Section Two). We defend the following thesis:

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¹ See e.g. Chiara Lepora and Robert E. Goodin, *On Complicity and Compromise* (Oxford: OUP, 2013), pp.41-42. Lepora and Goodin call this 'complicity simpliciter'.

² See e.g. Christopher Kutz, *Complicity: Ethics and Law for a Collective Age*, (Cambridge: CUP, 2007); Saba Bazargan, 'Complicitous Liability in War', *Philosophical Studies*, 165, No. 1 (2013), 177-195.

³ See e.g. Anna Stilz, 'Collective Responsibility and the State', *Journal of Political Philosophy* 19 (2011): 190-208; Avia Pasternak 'The Collective Responsibility of Democratic Publics', *Canadian Journal of Philosophy* 41 (2011): 99-124.

⁴ See e.g. Jeff McMahan, 'The Moral Basis of Liability to Defensive Killing', *Philosophical Issues* 15 (2005): 386-405; Kimberly Ferzan, 'Justifying Self-Defence', *Law and Philosophy* 24, No. 6 (2005), 711-749; Jonathan Quong, 'Liability to Defensive Harm', *Philosophy and Public Affairs* 40 (2012): 45-77; Helen Frowe, *Defensive Killing* (Oxford: OUP, 2014).

Observer Liability: Voluntary and unjustified observation of another agent’s degrading wrongdoing, or of the product of their degrading wrongdoing, can render an agent morally liable to bear costs for the sake of the victim of the primary wrong.

Our project is partly motivated by how internet and mobile phone technology has made the observation of others both easy and widespread. One result of these technological developments has been an explosion of what we can (loosely, for now) call ‘wrongful observation’. The term is intentionally broad, and covers at least two types of case.

The first involves observing the commission of a degrading wrong. Consider, for example, the infamous Steubenville High School rape case, in which a teenage girl was repeatedly sexually assaulted at a party.⁵ The assaults were not only observed by several onlookers at the time; videos and images of the attacks were also widely circulated and viewed by many others. Cases like this are not rare.⁶ Another prominent example is the widespread dissemination and viewing of videos produced by terrorist groups depicting violent attacks and the killing of hostages.⁷

The second form of wrongful observation does not, strictly speaking, involve observation of others’ wrongdoing. Rather it involves observation that is *made possible* by other’s wrongdoing. Consider, for example, the practice of ‘upskirting’ – that is, the covert taking (and often subsequent sharing) of photographs or videos under a person’s clothing without their consent. Once largely the province of the tabloid press, the ubiquity of camera phones has made upskirting so common that the UK parliament is currently reviewing legislation that will make upskirting a specific criminal offence.⁸ The internet has also given rise to a vast swathe of so-called ‘revenge porn’ – that is, the non-consensual sharing of intimate images. This is often perpetrated by victims’ former partners, as well as by strangers who have hacked into the victim’s data storage. Recent studies suggest that the number of victims of this abuse may be vast, indicating also the huge numbers of

⁵ See Melinda Henneberger, ‘Steubenville, the media and ‘rape, essentially’’, *The Washington Post*, 18th March 2013.

⁶ For another high-profile case, see Michael Safi, ‘Two men arrested over alleged rape on shore of Ganges’, *The Guardian*, 4th October 2018.

⁷ As brought to particular attention by the recent terrorist attacks on two mosques in Christchurch, New Zealand, in which the attacker livestreamed the shootings on Facebook. See Amanda Meade, ‘Australian media broadcast footage from Christchurch shootings despite police pleas’, *The Guardian*, 15th March 2019.

⁸ Voyeurism (Offences) (No. 2) Bill 2017-19. The problem is by no means restricted to the UK. Japanese mobile phone vendors now require all devices to make loud noises when taking photographs in an effort to deter offenders, while officials in South Korea conduct daily patrols of public toilets in Seoul to root out hidden cameras. See Justice McCurry and Nemo Kim “A part of daily life”: Korea confronts its voyeurism epidemic’, *The Guardian*, July 3rd 2018. Nor is it a uniquely modern phenomenon. A Wisconsin court case from 1956 (*Joekel vs. Samonij*) featured a bar owner who secretly photographed a female customer while she was in the toilet and circulated them among the bar’s customers. Cited in Anita Allen, *Uneasy Access: Privacy for Women in a Free Society* (Totawa, NJ: Rowman and Littlefield, 1988), p.125.

people who view these images online.⁹ In this class of cases, observers view what we call the *product* of other's wrongdoing (that is, wrongfully created and/or shared images) but not the wrongdoing itself (that is, the wrongful creation and/or dissemination of those images).

We anticipate that while most people would agree that there is *something* morally problematic about these forms of observation, the claim that observation can trigger special obligations to protect and compensate victims may seem farfetched. There is, however, one area in which this idea is not only widely accepted, but also instituted in law. Under US criminal law, those who are convicted of possessing child pornography are potentially liable to pay restitution to the victims whose sexual abuse is depicted in the pornographic material that they possess.¹⁰ This principle was reaffirmed in the recent Supreme Court opinion in *Paroline v. United States et al.* and legislation is currently being reviewed that will make it easier for courts to impose restitutional requirements on offenders.¹¹ Following the US example, there are now calls to introduce similar legislation in the UK.¹²

Our contention is that the law reflects underlying principles of interpersonal morality in this case, and that these principles apply beyond the particular context of child pornography. And yet it is hard to articulate precisely what is wrong with merely looking at images of wrongdoing, or images that have been wrongfully created or shared. Our goal here is to provide a general account of when and why observation is wrongful, that can explain why observers can be liable to bear costs with respect to the primary wrong.

On our account, observation is not a *sui generis* basis of liability. Instead, observation grounds liability in virtue of manifesting other, more general, bases of liability. These should be familiar from broader discussions of preventive and compensatory duties. But the case of observation sheds new light on the specific mechanisms by which these liabilities can be activated, revealing them to be more diverse than typically assumed. Ours is thus a pluralist account, since it holds that there are multiple ways in which observation can result in liability, only some of which might be manifested by any particular instance of observation. Importantly, we take the conditions

⁹ Amanda Lenhart, Michelle Ybarra, Myeshia Price-Feeney, 'Non-Consensual Image-Sharing: One in 5 Americans Has Been a Victim of "Revenge Porn"', Data and Society Research Institute and The Center for Innovative Public Health Research. Data Memo 13.12.2016. Available at: https://www.datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf; Nicola Henry, Anastasia Powell, and Asher Flynn, 'Not Just "Revenge Pornography": Australians' Experience of Image-Based Abuse. A Summary Report'. RMIT University, 2018. Available at: https://www.rmit.edu.au/content/dam/rmit/.../revenge_porn_report_2017.pdf; 'Young people's experiences of online sexual harassment'. A Cross-Country Report from Project deSHAME, 2017. Available at: https://www.childnet.com/ufiles/Project_deSHAME_Dec_2017_Report.pdf

¹⁰ 18 U.S.C. § 2259 – Mandatory Restitution

¹¹ Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018

¹² Children's Charities' Coalition on Internet Safety, *Letter to Michael Gove, Lord Chancellor and Secretary of State for Justice*. Available at: <http://www.chis.org.uk/2016/01/17/letter-to-the-secretary-of-state-for-justice-and-lord-chief-justice>

we identify to be sufficient, rather than necessary, for observer liability. We do not claim to provide an exhaustive account of the wrongs one can commit through observation, but rather one that explains a broad range of cases in which observation is intuitively wrongful, and supports the idea that observation can implicate individuals in the moral wrongs of others.

The paper proceeds as follows. Section Two makes some preliminary remarks on the scope of the argument. Section Three sets out three central cases that we use to motivate and develop our account of observer liability, and elaborates on the relationship between liability to prevent wrongs *ex ante* and liability to rectify wrongs *ex post*. The following three sections each set out a distinct way in which observation of a primary wrong, or its product, can render the observer liable to bear costs. Section Four argues that observation can *compound* a primary wrong, making that wrong more harmful for the victim. Section Five argues that observation can constitute *degrading treatment* of the victim. Section Six shows how observation can *enable* primary wrongdoing. Section Seven explains why two further candidates for grounding observer liability – that wrongful observation involves violating privacy and benefitting from injustice – are excluded from our account. Section Eight explores the conditions under which one might be justified in observing wrongdoing, even when one’s observation manifests at least some of the wrong-making (and so potentially liability-grounding) features that we identify. Section Nine concludes.

2. Preliminaries

We take wrongful observation to involve sensory perception – for example, seeing or hearing a wrong take place. This includes perceiving first-hand, at the time and place wrongdoing occurs; remotely via live video link or audio streaming; and after the fact via recordings or photographs.¹³ Contrast this with knowledge of wrongdoing acquired via others’ testimony. Though we do not rule out the possibility that testimony might enable a form of non-perceptual ‘observation’ of wrongdoing (for example, by reading extremely detailed descriptions of wrongdoing¹⁴), we do not explore that possibility here.

We do not claim that observing any and all forms of wrongdoing generates liability. Our account applies only to the observation of what we call *degrading wrongs*. We understand this to cover two distinct types of wrong. The first is a wrong that treats an undeserving person in a way that expresses that he or she lacks equal moral status (for example, full rights over her body or equal citizenship rights), in virtue of some morally irrelevant group-based characteristic, such as race, gender, or disability. The second is a wrong that treats an undeserving person in a way that

¹³ We omit smelling, tasting, and touching since these senses seem unlikely to be relevant.

¹⁴ Consider, for example, someone who reads sealed court transcripts of rape cases – which include the testimony of rape victims – simply because he enjoys the fine-grained details of the assault.

expresses that *he or she specifically* lacks equal moral status. Bullying is often degrading in this way, since it typically aims at expressing a particular person's inferiority, but not necessarily in virtue of their having particular group-based characteristics of the sort just described.¹⁵

Many wrongs are not degrading in this way. Breaking a promise to a friend is wrong, but one does not typically degrade one's friend by doing so. Usually, breaking a promise does not express that the subject of the promise has an inferior moral status to others. Similarly, burglary violates property rights, but does not normally express that the homeowner *lacks* property rights – that her things have been taken because she (unlike other people) is not really entitled to own them.¹⁶ By contrast, sexual assault and harassment, slavery, racial abuse and racially-motivated discrimination, domestic violence and abuse, some types of torture, and bullying are all degrading wrongs, in that the wrongdoer treats the victim as if her moral status is diminished.¹⁷ Such wrongs do not simply set back the interests protected by rights; they are an assault on one's status as a rights-bearer. As Saba Bazargan-Forward puts it, in these cases,

the wrongdoer here commits a double wrong (or perhaps a morally aggravated wrong). She fails to abide by the rights in question, but she also violates the recognition-respect of the victim at least partly out of the belief that the victim lacks the fundamental dignity-as-status grounding a moral protection against such rights-

¹⁵ The thought that actions can express inferiority in the way we suggest is familiar from legal discussions of expressive harm in the context of discriminatory laws. The Harvard Law Review Association describe these harms as “specifically concerned with the *message* – often a message of racial, gender or religious inferiority – expressed by government action.” (‘Expressive Harms and Standing’, *Harvard Law Review* 112 (1999): 1313-1330, at p.1314). See also, Elizabeth S. Anderson and Richard H. Pildes, ‘Expressive Theories of Law: A General Restatement’, *University of Pennsylvania Law Review* 148 (2000): 1503-1575; Simon Blackburn, ‘Group Minds and Expressive Harms’, *Maryland Law Review* 60 (1999): 467-491. As Saba Bazargan-Forward explains:

“[W]hat individuals express in their actions matters morally in that such expressions play a substantial role in explaining or grounding the wrongfulness of certain kinds of immoral conduct. When a harm we commit is motivated or otherwise explained by a wrongful attitude – such as the belief that the victim lacks fundamental moral worth – the manifestation of that attitude in our action makes the act especially wrongful. This is an expressive wrong...On this view, the wrongfulness of an expressive wrong is not limited to what it reveals about the wrongdoer's attitudes. The reification and manifestation of that attitude via action constitutes part of the wrong. The medium, as it were, is an ineluctable part of what is expressed.”

Saba Bazargan-Forward, ‘Dignity, Self-Respect, and Bloodless Invasions’, in Bradley Jay Strawser, Ryan Jenkins, and Michael Robillard (eds), *Who Should Die? The Ethics of Killing in War* (New York: OUP, 2018), 142-162, at pp. 149-150.

¹⁶ For similar distinction, see Bazargan-Forward, ‘Dignity, Self-Respect, and Bloodless Invasions’, pp. 148-149; Mari Mikkola, *The Wrong of Injustice: Dehumanisation and its Role in Feminist Philosophy* (New York: OUP, 2016), p.174. (Mikkola talks of ‘dehumanising’ rather than degrading.)

¹⁷ The literature here is vast, but see, for example: David Sussman ‘What Is Wrong with Torture?’ *Philosophy and Public Affairs* 33 (2005): 1-33; Jean T. Griffin, ‘Racism and Humiliation in the African-American Community’, *Journal of Primary Prevention*, 12 (1992): 149-167; Mikkola, *The Wrong of Injustice*; Joshua Glasgow ‘Racism as Disrespect’, *Ethics*, 120 (2009): 64-93; Judith M. Hill, ‘Pornography and Degradation’, *Hypatia* 2 (1987): 39-54.

violations.¹⁸

We take it that these wrongs are *typically* degrading: setting aside some outlier cases, it is *part* of wrongs such as rape, slavery, or racial abuse that they express a sense of inferior moral status. These degrading attitudes can also be manifested in wrongs that are typically not degrading. If one steals a black farmer's crops in part because one believes that black people are not entitled to own land, then one's theft constitutes a degrading wrong in the sense identified here. As we argue below, reflecting on the nature of degrading wrongs reveals various ways in which observation can manifest wrongdoing. We grant that the boundaries of the class of degrading wrongs are likely to be vague or indeterminate, and that the case for liability will correspondingly be contentious in borderline cases.¹⁹ However, this does not undermine the plausibility of liability in the central cases.

Our account is also restricted to cases of *voluntary* observation, in which observers both know that the conduct they observe is wrongful and freely choose to observe.²⁰ Someone who is paralysed by fear or horror and unable to avoid watching is not a voluntary observer on our account.²¹

Moreover, even in cases of voluntary observation of degrading wrongs, our account does not hold that observers are necessarily liable to bear costs. Our claim is rather that observation generates liability at least when it manifests one (or more) of the three forms of wrongdoing that we identify below, and is not justified in the ways that we discuss in Section Eight. As noted above, we are open to the idea that observation can manifest further forms of wrongdoing. But there may well be cases in which none of the relevant wrong-making features are present.

Finally, our aim is to establish the connections between observation and primary wrongdoing that can explain why observers are liable to bear costs. However, beyond offering

¹⁸ Bazargan-Forward, 'Dignity, Self-Respect, and Bloodless Invasions', pp.148-149. For a similar view, see Mathias Iser, 'Beyond the Paradigm of Self-Defense? On Revolutionary Violence' in Saba Bazargan-Forward and Samuel C. Rickless (eds.) *The Ethics of War: Essays* (Oxford: Oxford University Press, 2017), 207-226, esp. pp.212-213.

¹⁹ For discussion of indeterminacy, see Blackburn, 'Group Minds and Expressive Harms', esp. Sections III-VI.

²⁰ Most accounts of liability to e.g. defensive harm hold that only responsible behaviour can ground liability, although we remain neutral on whether involuntary observers can be liable to bear costs. See e.g. Michael Otsuka, 'Killing the Innocent in Self-Defense', *Philosophy and Public Affairs* 21 (1994): 74-94; McMahan, 'The Basis of Moral Liability to Defensive Harm'; Frowe, *Defensive Killing*. For a broader view of the basis of liability to defensive harm, see Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011). We also remain neutral on whether epistemically justified but objectively unjustified observers (e.g., someone whose evidence is that he is observing consensual sex, when he is in fact observing rape) are liable to bear cost. The liability of people who pose these types of threat is contested in the self-defence literature. For opposing views, see McMahan, 'The Basis of Moral Liability to Defensive Harm', esp. 393-394 and Jonathan Quong, 'Liability to Defensive Harm', *Philosophy and Public Affairs* 40 (2012): 45-77, at p. 59. Our goal is not to settle the limits of observer liability, but rather to establish the liability of at least some voluntary observers.

²¹ For a discussion of the alleged irresistible allure of images of suffering and wrongdoing, see Susan Sontag, *Regarding the Pain of Others* (London: Penguin, 2004), pp.85-87.

some intuitions about the cases we explore, we do not take a stand on the further, difficult question of proportionality – that is, of precisely how much cost observers are liable to with respect to a given wrong. We also remain neutral on the closely related question of how costs ought to be distributed amongst those who satisfy the conditions for liability. Resolving these issues requires an additional, and largely independent, theory of how to determine individuals’ comparative and non-comparative degrees of involvement in others’ wrongdoing. A complete account of observer liability will need to incorporate such a theory. We take ourselves here to be providing the groundwork required to make that account worth pursuing.

3. Motivating Observer Liability

Our discussion revolves around three hypothetical cases. The first illustrates offline, “in real life” observation of wrongdoing²²:

Rape: Victim is being raped by Rapist. Two others enter the room after first listening outside. One – call him Helper – assists in the rape by holding Victim down. The other – call him Observer – stays to watch the rape.

The second case involves the online observation of wrongdoing:

Beheading: A terrorist organisation kidnaps Journalist. They force him to ‘confess’ to various alleged crimes, and then behead him. All of this is filmed and later distributed via the internet. Daniel visits a website in order to view the video.

Our third case features the online observation of images that do not depict wrongdoing, but are wrongfully shared:

Revenge: After their relationship ends, Adam posts intimate photographs of Brenda on a ‘revenge porn’ website without her consent. Craig visits the website in order to view these sorts of pictures, and sees the pictures of Brenda.

²² Loosely based on *R v. Clarkson* [1971]. In the actual case, there were four initial attackers and three additional men entered the room and observed. Two of the observers successfully appealed their convictions for aiding-and-abetting the rape, on the ground that their presence during the rape did not satisfy the ‘encouragement’ requirement for aiding-and-abetting.

We assume that Observer's actions in *Rape* will strike most people as morally repugnant. As we shall argue, his conduct is not only wrongful, but also (like Helper's) implicates him in the rape in a way that makes him liable to bear costs for the sake of the victim. Moreover, the wrongness of Observer's behaviour in *Rape* also illuminates the moral status of Daniel's and Craig's conduct in *Beheading* and *Revenge*.

To provide some initial support for the claim that Observer is liable to bear costs with respect to the primary wrong, consider two variations on *Rape*:

Defence 1: Victim can curtail the rape by throwing a concealed grenade into the room. The explosion will enable Victim to escape, but will cause harm to Observer.

Defence 2: Victim can curtail the rape by throwing a concealed grenade into the room. The explosion will enable Victim to escape, but will cause harm to Bystander in the apartment below, who is unaware of the rape.

There seem to be (at least) two clear moral asymmetries between these cases. First, Victim is permitted to impose considerably greater defensive harm on Observer than she is on Bystander. Second, if Victim permissibly harms Bystander in the course of her escape, then Bystander can legitimately complain that his rights were transgressed. Victim (or, more plausibly, her attackers) might then owe some form of compensation to Bystander for his injuries. The same is not true of harms Victim permissibly imposes on Observer. Intuitively, Observer has no valid complaint against bearing those costs, nor does Victim (or anyone else) owe him compensation. This holds even if he suffers significantly greater harm than Bystander.

We take these asymmetries as strong evidence that Observer, unlike Bystander, is connected to the primary wrong of rape in some morally significant way, such that he is liable to bear costs in respect of the rape for the sake of Victim. Harms to innocent bystanders are limited to those that can be justified as the lesser evil. Lesser-evil justifications involve *overriding* an individual's right against harm; this is why Bystander is plausibly entitled to compensation. If Victim may permissibly impose more harm on Observer than on a bystander – that is, more harm than is justified as the lesser evil – Observer must *lack* his normal right not to be harmed, in virtue of his connection to the rape. Moreover, a person who is liable to a harm is not wronged by that

harm, and as a result may not, for example, use counter-defence to avoid the harm, or demand compensation for being harmed.²³ All of these are plausibly true of Observer.

Of course, the situation of Observer in *Defence 1* is unusual, in that imposing harm on Observer is a side effect of an effective means of curtailing the primary wrong. This will not be true in most real-world cases; harming observers will rarely be a means (or a side-effect of a means) of preventing the wrongs they observe. One might think that this significantly limits the scope of observer liability. But this would be a mistake, since defensive harms are only one kind of cost that a person can be liable to in virtue of being implicated in primary wrongs. Most obviously, even if someone cannot bear costs *ex ante* in order to prevent or curtail a wrong, they may be able to bear costs *ex post* in order to mitigate the effects of that wrong (most obviously, by providing compensation to the victim). Moreover, both forms of liability share the same underlying moral rationale. Consider, for example, the view that liability to defensive harm is grounded in considerations of distributive fairness. On this view, it is fairer that the costs of threatened wrongs be redistributed towards those who are morally implicated in that threat, rather than borne by the victim. Hence, implicated parties have no complaint against bearing that cost for the sake of the prospective victim.²⁴ But if the wrong has already occurred, fairness similarly requires that the implicated parties bear costs *ex post* in order to reduce the harm done to the victim. While *ex ante* redistribution would have been better, *ex post* redistribution is the next-best approximation of what justice requires.²⁵

To help illustrate the shared structure of *ex ante* and *ex post* liabilities, consider *Rescue*:

Rescue: Attacker is culpably trying to break Victim's leg. Rescuer tries to prevent this by throwing a rock at Attacker, which will break Attacker's leg if it hits him. The rock misses, and Attacker succeeds in breaking Victim's leg. Victim is lying injured on the ground. Rescuer can drag Victim to her car and drive her to hospital, but only by trampling over Attacker, breaking Attacker's leg.

It seems clearly permissible for Rescuer to break Attacker's leg in order to get Victim to hospital. But it would not be permissible for Rescuer to break a bystander's leg to that same end. It cannot

²³ For a helpful overview of liability and lesser-evil justifications, see David Rodin, 'Justifying Harm', *Ethics* 122, (2011): 74-110.

²⁴ This view is associated most prominently with Jeff McMahan. For a classic statement, see McMahan, 'The Moral Basis of Liability to Defensive Harm'.

²⁵ For a detailed account of the moral priority of prevention over compensation, see Adam Slavny, 'Negating and Counter-Balancing: A Fundamental Distinction in the Concept of a Corrective Duty', *Law and Philosophy* 33 (2014): 143-172. For related discussion, see Robert E. Goodin, 'Theories of Compensation', *Oxford Journal of Legal Studies* 9 (1989): 56-75.

be Attacker's liability to defensive harm – to *ex ante* costs – that explains why Rescuer may break Attacker's leg. Breaking Attacker's leg now does not prevent the breaking of Victim's leg. Rather, the considerations that grounded Attacker's liability to bear costs *ex ante* now ground his liability to bear costs *ex post* in order to make good the harm done to Victim.²⁶

The same is true of Observer's liability in *Rape*: if Observer is potentially liable to suffer costs *ex ante* to curtail the rape, then Observer is also potentially liable to bear costs *ex post* in order to mitigate the harm done to Victim. After all, Rapist and Helper are clearly liable to bear both *ex ante* and *ex post* costs for Victim's sake. If Observer joins them in liability *ex ante*, the same should be true *ex post*.²⁷

We recognise that, given the nature of the wrongs under discussion, it will not generally be possible to fully compensate victims, if full compensation requires putting the victim in a position 'as good' as if the wrong had not occurred. But this is true of many wrongs, such as those involving serious physical or psychological harms, and is not a distinctive problem for our account. The appropriate response to such wrongs is to do the best one can to improve the victim's situation, rather than doing nothing. It would be implausible, for example, to conclude that viewers of child pornography have no compensatory obligations to the victims because the harms of child abuse cannot be fully repaired. On the contrary, the fact that one has suffered an irreparable harm is partly what makes the demand for compensation especially compelling, even though we recognise that compensation is nonetheless inadequate. Hence, the fact that one cannot restore the victim to her previous position is no bar to compensatory liability.²⁸

We contend that observer-liability is not limited to observers who – as in *Rape* – are physically present at the primary wrongdoing. The three grounds of observer-liability that we spell out in Sections 4–6 apply generally to cases involving observation of degrading wrongs (or the product of such wrongs). But before moving on, it is worth considering three sceptical responses to our claim that Observer incurs liability *in virtue of his observation*.

²⁶ We take this to be continuous with the more general thesis that the grounds of our duties to respect others' rights significantly overlap with the grounds of our corrective duties to correct our breaches of those duties. For differing articulations of this thesis, see Joseph Raz, 'Personal Practical Conflicts' in Paul Baumann and Monika Betzler (eds) *Practical Conflicts: New Philosophical Essays* (Cambridge: CUP, 2004), 172-196, esp. pp.194-198; John Gardner, 'What is Tort Law For? Part 1: The Place of Corrective Justice', *Law and Philosophy* 30 (2011): 1-50, esp. pp.28-37; Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995), p.135; Victor Tadros, 'Secondary Duties' in John Oberdiek and Paul B. Miller (eds) *Civil Wrongs and Justice in Private Law* (Oxford: OUP, forthcoming).

²⁷ We remain neutral here on whether suffering *ex ante* costs bears on the degree of *ex post* cost one can be made to bear. (Robert Nozick, for example, argues that defensive harms already imposed on a wrongdoer should be deducted from the costs they are liable to as a matter of punishment. *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp.62-63.)

²⁸ For an interesting recent account of *ex post* obligations in cases of non-compensable harm, see Todd N. Karhu, 'Non-compensable Harms', *Analysis* 79 (2019): 222-230.

The first holds that Observer's connection to the rape, and his resultant liability, is grounded in his *failure to rescue* Victim, and not his observation.²⁹ We grant that Observer wrongfully fails to rescue. However, this does not exhaust his wrongdoing or liability. To see this, consider two further cases:

Helpless Rape: Rapist rapes Victim in a locked and isolated cabin. Observer notices the attack when passing the window while hiking. Observer has no means of preventing the rape or summoning the police. Observer decides to watch the rape. Observer shouts to Friend to tell him about the rape. Friend declines to come and watch. Friend is also unable to prevent the rape or summon the police.

Rescue Rape: Rapist rapes Victim in a locked and isolated cabin. Observer notices the attack when passing the window while hiking. Observer cannot get into the cabin to prevent the rape, but he immediately calls the police, who will take ten minutes to arrive. Observer decides to watch the rape until the police arrive. Observer shouts to Friend to tell him about the rape. Friend declines to come and watch.

In *Helpless Rape*, Observer cannot rescue or aid Victim. In *Rescue Rape*, Observer fulfils his obligation to rescue Victim. In neither case, then, does Observer fail in his duty to rescue. But he nonetheless acts wrongly by staying to watch, just as in the original *Rape* case. Moreover, Observer is intuitively liable to non-trivial defensive harm in *Rape*, *Helpless Rape* and *Rescue Rape*. Here too, his position is not that of an innocent bystander; Observer may be harmed to a greater degree than Friend, who does not observe. If these intuitive judgements are sound, we cannot reduce the wrongness of Observer's behaviour in *Rape* to his failure to rescue.

One might grant that proximate observers incur liability, but doubt that this extends to either physically or temporally remote observers.³⁰ But two further cases support the idea that even remote observers may in principle be liable to bears costs:

Online Rape: As *Rape*, but the rape is being live-streamed on the internet. Observer is watching on his computer from the other side of the world. There is no identifying information about the location of the rape (the rapists have masked their IP address), and so there is nothing viewers can do to prevent it. Rescuer can curtail the rape by releasing a

²⁹ On failure to aid as a ground of liability, see Victor Tadros, 'Resource Wars', *Law and Philosophy* 33 (2014): 361-389, at pp.364-367.

³⁰ Christopher Cowley, 'Complicity and Rape', *Journal of Criminal Law* 83 (2019): 30-38, at p. 34

computer virus that will shut down Rapist's recording equipment, causing him to stop his assault on Victim. The virus will also cause Observer's computer to explode, injuring Observer (as well as destroying his property).

It seems clear that there's no difference between the degree of harm that Rescuer may impose on Observer in *Online Rape* compared to that which Victim may impose on Observer in *Rape, Helpless Rape* or *Rescue Rape*. Whether one watches the rape via a screen, or through a window, or from within the same room is morally irrelevant. What matters is that one watches.

Just as distance is morally irrelevant, so too is whether one watches live or after-the-fact. Consider:

Historical Rape: As *Online Rape*, but Observer watches a recording of the rape, which took place six months ago, and is caught by the police. Judge can confiscate Observer's computer, auction it, and transfer the proceeds to Victim.

If Rescuer is permitted to impose the same financial cost on Observer *and* injure him for Victim's sake in *Online Rape*, it is hard to see why it would be impermissible for Judge to impose a lesser cost for the same end. Note, also, that *Historical Rape* is directly analogous to the *Paroline* case cited above, in which the permissibility of imposing costs on observers finds widest support.

The *Helpless Rape*, *Rescue Rape* and *Online Rape* cases also dispel a second response to our proposal, which holds that Observer's liability in *Rape* is grounded in his sharing joint 'participatory intentions' with the primary wrongdoers, and not in his observing their wrongdoing.³¹ In these three cases, Observer knows that he cannot participate in the rape. Moreover, the primary wrongdoer may be utterly unaware of Observer's existence, in which case his actions cannot plausibly be governed by any joint intentions. Yet Observer remains intuitively liable to bear substantial costs for the sake of Victim.

Third, and finally, one might respond that our intuitive condemnation of Observer in *Rape* simply reflects the fact that he is a thoroughly unpleasant individual, rather than his being specially connected to the primary wrongdoing. We do not object to his observing as such, but rather to the bad character that is thereby revealed. But this response struggles to explain why Observer *specifically* may be made to bear more defensive harm than a bystander. If Observer is liable to significant harm in virtue of his bad character, this suggests that Victim may similarly harm any

³¹ For a detailed account of this possible basis of liability, see Kutz, *Complicity*.

sufficiently morally culpable person in the course of averting the rape.³² Similar worries apply to *ex post* liabilities: while Observer is intuitively liable to contribute to compensating Victim, it's implausible that bad people in general are specially obligated to compensate. To illustrate, consider:

Ex-Boyfriend: Victim's ex-boyfriend does not witness or know about the rape.

However, if he had known and been able, he would have gleefully observed the rape.

Both Observer and the ex-boyfriend are clearly of bad character. And yet, we contend, Observer wrongs Victim in a way that her ex-boyfriend does not, and only Observer incurs special obligations to bear costs for the sake of Victim.

4. Observation as compounding wrongdoing

In this and the following two sections, we outline and defend three different grounds of liability to cost that can be manifested in cases of wrongful observation. The first focuses on the fact that degrading wrongs very often involve the humiliation, demeaning, embarrassing or belittling of the victim as a way of expressing her allegedly inferior status. Sexual assault, for example, is intended, in part, as an expression of power and domination, and part of that expression is the humiliation of the victim at the hands of the principal. (Our discussion will focus on humiliation, but our arguments will likely also apply to the related notions just mentioned.)

4.1 Humiliation and exacerbation

Attending to the humiliatory dimension of degrading wrongs explains why observing, for example, rape or sexual assault is unlike observing a bank robbery.³³ Humiliation is exacerbated by publicity. Consequently, the more public the relevant event, the more one is humiliated.³⁴ Being discretely fired by one's boss can be humiliating. But it is much more humiliating to be fired in front of the whole office – even if everyone knows about the firing either way. Being made the object of an unkind joke is much worse in front of a large crowd. And so on.³⁵

When a primary wrong has this humiliatory dimension, voluntary observation can be wrong in virtue of making the wrong more public and thereby increasing the victim's humiliation.

³² This is a well-known problem for desert or culpability-based accounts of liability. See McMahan 'Self-Defence and Culpability', *Law and Philosophy* 24 (2005): 751-774, at pp.360-364

³³ Cowley, 'Complicity and Rape', p.31.

³⁴ Andrei Marmor, 'What is the Right to Privacy?', *Philosophy and Public Affairs* 43 (2015): 3-26, at p.23.

³⁵ Of course, it is not always wrong to humiliate someone. Our thesis concerns humiliation as a component of degrading wrongs. For a discussion of the justification of humiliation, see Thomas Parr and Paul Billingham, 'The Morality of Public Shaming' (unpublished manuscript).

As Christopher Cowley argues, observation in these cases *compounds* the primary wrongdoing by making it more harmful.³⁶ And it is not only humiliation and the like that might be so compounded. It is common, for example, for the victims of revenge porn to experience severe anxiety – about losing their job, or being recognized in the street – that increases the more widely their images are viewed. They may also be frightened for their physical safety, since victims’ email, home and work addresses are often listed under their photographs. The mere fact that one’s home address is being viewed by strangers on these kinds of sites would reasonably cause one to be afraid, and that fear plausibly increases the more people who see this information, whether they plan to use it maliciously or not.

These are just some of the ways in which observation can be form of contributing to a primary wrong, by increasing the wrong’s harmfulness. Even though, for example, Observer does not rape Victim himself, he makes her experience of the rape worse by making it more humiliating and, plausibly, more frightening for her. Compounding the primary wrong, then, is one way in which observation can connect a person to someone else’s wrongdoing, and so ground liability to bear costs.³⁷

Note that there need be no shared intention to humiliate between the observer and the primary wrongdoer in order for observation to humiliate. For example, there might be instances of sexual assault in which the perpetrator lacks an intention to humiliate or degrade his victim, perhaps falsely believing that the victim has consented, whereas the observer knows that she has not. Yet the victim might still find the rape humiliating, and being observed during the assault still plausibly compounds the victim’s humiliation, even in the absence of a shared intention to humiliate.³⁸

Each of our central cases – *Rape*, *Revenge* and *Beheading* – exhibits this type of connection between the observer and the primary wrong, because there is a humiliatory dimension to the primary wrong in each case: in *Rape*, because sexual assault typically aims at expressing power over

³⁶ Cowley, ‘Complicity and Rape’, p.34.

³⁷ This view underpins the Supreme Court’s affirmation of the liability of child pornography viewers in the *Paroline* case. As the Court’s Opinion puts it (p.3):

The full extent of this victim’s suffering is hard to grasp. Her abuser took away her childhood, her self-conception of her innocence, and her freedom from the kind of night-mares and memories that most others will never know. These crimes were compounded by the distribution of images of her abuser’s horrific acts, which meant the wrongs inflicted upon her were in effect repeated; for she knew her humiliation and hurt were and would be renewed into the future as an ever-increasing number of wrongdoers witnessed the crimes committed against her.

³⁸ However, as we argue in Section Six, when the victim’s humiliation *is* part of the primary wrongdoer’s intended goal, watching and thereby increasing the humiliation can be wrong in virtue of enabling the primary wrongdoer to achieve their wrongful aims.

the victim; in *Revenge*, because the public circulation of these images humiliates Brenda; and in *Beheading*, because Journalist is forced to ‘endorse’ his own murder.

4.2 Humiliation and ignorance

What should we say about cases in which a person is ignorant of being observed, or even of being wronged? Could observation nonetheless exacerbate the harmful features of the primary wrong in the way we have described?

The answer might depend, in part, on how we understand concepts such as humiliation, belittling and so on. There’s a sense in which humiliation is an essentially experiential notion – that it consists in someone’s *feeling* a particular way. This suggests that someone who is ignorant of being observed or wronged, and thus does not feel humiliated, is not humiliated. And yet our ordinary use of such terms is loose. Consider *Affairs*:

Affairs: It is common knowledge, and something of a joke, in Wife’s social circle that Husband is having a string of affairs. Wife, however, is unaware of Husband’s infidelity.

Wife is wholly ignorant of both the fact that her husband is wronging her, and that she is the subject of demeaning gossip. But it doesn’t stretch ordinary language to describe Husband as humiliating Wife. We might similarly say that Adam is humiliating Brenda in *Revenge* even if Brenda doesn’t know that Adam has posted photographs of her online.

We remain neutral on whether humiliation is experiential in this way, since it seems plausible that, even if one can be humiliated only if one knows the relevant facts and experiences the relevant emotion, one can still be wronged by someone’s behaving in a way that *risks* causing one to experience humiliation. On this account, describing Brenda as humiliated is shorthand for saying that she *would be* humiliated, were she to learn about the pictures. That Adam risks making Brenda suffer such humiliation wrongs her; that an observer risks compounding that humiliation also wrongs her.³⁹ Thus, the humiliatory dimension of certain types of wrongs can still feature in an explanation of how observation can compound the primary wrong, even when the victim is ignorant of even the primary wrong.

Note that our account does not commit us to the claim that the victim of a degrading wrong must be humiliated by that wrong (or that she should). There can clearly be cases in which the victim of, say, a sexual assault does not experience it as humiliating, and explicitly rejects the

³⁹ For defences of the idea that risks can constitute wrongs see, for example, David McCarthy, ‘Rights, Explanation, and Risk’, *Ethics* 107 (1997): 205-225; John Oberdiek, ‘Towards a Right Against Risk’, *Law and Philosophy* 28 (2009): 367-391.

idea that she has been humiliated. But these cases do not undercut our argument that when observation *does* exacerbate the victim's sense of humiliation, it compounds the primary wrong. That argument holds irrespective of whether those reactions are in some way misplaced.

5. Observation as degrading treatment

In this section, we argue that the observation of degrading wrongs can itself constitute degrading treatment of the victim. We remain neutral on the question of whether having degrading attitudes that never manifest in behaviour counts as degrading treatment.⁴⁰ But to voluntarily watch or listen to someone is do more than have an attitude towards her; it is to *treat* her in a particular way. This is true even if the observer does nothing but look. Consider, for example, familiar forms of sexual harassment, such as the office worker who noticeably looks his colleague 'up and down' every time she walks into the room, or the commuter who stares at a fellow passenger throughout her train journey. Such a person does more than hold an objectionable attitude towards members of the relevant group. He also subjects the victim to degrading treatment, conveying that her role is primarily that of a sexual object, rather than a person due proper respect *qua* person. We rightly object to such treatment, even though the observer is, indeed, 'just looking'. As Anita Allen, in her detailed analysis of sexual harassment, puts it:

For a victim of sexual harassment whose face, body, and gender subject her to lewd attention, there is an intense awareness of self as a *mere* social object. She is a mere sexual object, not a person worthy of respect as a unique subject of experience, but a mere object for others; not an individual with feelings and sensibilities that matter, but an instance of a type that counts for naught.⁴¹

In the above cases of sexual harassment, the observation itself constitutes the primary wrong, and the observer the primary wrongdoer. But, we suggest, voluntarily watching someone else degrade a person can also constitute a form of degrading treatment. To watch degrading treatment is to do more than fail to object to it; it is to engage in the treatment oneself, by affirming the moral inferiority of the victim expressed by the primary wrongdoing.⁴² The role of third-party

⁴⁰ So, for example, it is consistent with our account that an utterly discreet racist, who believes that white people are intellectually superior but who never gives any outward sign of his views, does not wrong anyone.

⁴¹ Allen, *Uneasy Access*, p.131.

⁴² It might be helpful to distinguish this idea from Ishani Maitra's claim that an observer might license someone else's wrongful act. Maitra argues that the silence of an audience in the face of hate speech, for example, can confer authority on the speaker, such that she acquires a derived authority that suffices to make her speech subordinating in the sense identified by Rae Langton. (See Ishani Maitra, 'Subordinating Speech' in Ishani Maitra and Mary Kate McGowan (eds.) *Speech and Harms: Controversies Over Free Speech* (Oxford: OUP, 2012), 94-120; Rae Langton, 'Speech

observation in degradation is perhaps clearest in cases of ‘street’ sexual harassment – such as catcalling and overt leering – in which the harassing behaviour is addressed not only to the victim but to a wider audience. As Allen points out:

Leering at a woman is more than noticing her; it is more than tracing the contours of her face or figure with the eyes. In the sense intended, leering is a mode of evaluative observation...Flamboyant leering communicates to the target *and to third-parties* that a sexual evaluation is taking place.⁴³

In these public cases of harassment, the harasser not only conveys that *he* regards the victim as an object rather than a person, but that *we* do; that ‘around here’ the victim does not possess the moral status to which she is entitled. As Judith M. Hill puts it:

an agent who treats his victim as less than a person in public places, for the whole world to observe, demonstrates a conviction that her worthlessness is so extreme that all the world can be counted upon to regard him as treating her accordingly. In short, the more public the display of contempt, the stronger is the imputation of moral worthlessness.⁴⁴

By voluntarily observing the harasser’s primary wrongdoing, third-parties help to create or maintain an evaluative environment in which the victim’s personhood is denied, thereby participating in the victim’s degradation.⁴⁵ This can be true even if the third party does not actively encourage the harasser. This degrading treatment plausibly grounds special obligations to bear costs for the sake of the victim.

We contend that the role of third-party observation in degradation extends beyond the specific case of street harassment, to other forms of degrading wrongs (including our three cases – *Rape, Revenge, and Beheading*). Consider, for example, the well-known photographs of smiling and laughing crowds present at lynchings of African Americans in the US South. The utter degradation of the black victims was effected not only by those who carried out the lynchings, but also by the

Acts and Unspeakable Acts’, *Philosophy and Public Affairs* 22 (1993): 293-330). This may well be true. But ours is a stronger claim – namely, that the observer *herself* degrades the victim, rather than merely enabling someone else to degrade her.

⁴³ Allen, *Uneasy Access*, p.128 (emphasis added)

⁴⁴ Hill, ‘Pornography and Degradation’, p.42.

⁴⁵ As we discuss in Section 8, we grant that justified observers of degrading wrongs might not subject the victim to degrading treatment.

crowds of white observers, who created an evaluative environment in which the victims mattered only as a source of spectacle and amusement; as persons they counted ‘for naught’. Again, the creation of this degrading environment does not depend on the crowds’ actively encouraging the harms: the mere fact of their voluntary presence can express these attitudes towards the victim. It seems clear that a member of the crowd would not be able to evade a claim for compensation by pointing out that she was ‘just looking’. The account of degradation that we have offered can explain why this is so. It can also explain why looking at the photographs of these lynchings can be wrongful, in the same way looking at historic images of child pornography can be wrongful (even after the depicted person has died).⁴⁶ One way to see this is to think about cases in which the subject of the photograph (or perhaps her descendants) requests that one not look at them – perhaps, for example, they ask that the photograph of their ancestor not be included in an exhibition, or used for teaching purposes. It seems very plausible that one ought not to use the photographs in these cases (absent the kind of justifying reasons that we discuss in Section 8).⁴⁷

Note that this ground of observer-liability does not depend on the victim’s subjective experience, and applies irrespective of whether she knows that she is being wronged or observed. The office worker who leers at his colleague when her back is turned subjects her to degrading treatment. *Bully* also depicts degrading treatment:

Bully: Bully persuades Neighbour, who has severe learning difficulties, to play a ‘game’ he has concocted to make Neighbour look foolish. Bully and his friends laugh at and mock Neighbour. Neighbour has no concept of being humiliated and enjoys playing the game.

Let’s grant that Neighbour is not humiliated, and that there is nothing that could make her come to experience the game as humiliating (there is no equivalent of ‘finding out’, as Wife might in *Affairs*). It hardly follows that she is not wronged by Bully and his friends. On the contrary, their treatment of her is wrongfully degrading, because they treat Neighbour in a way that expresses

⁴⁶ As Susan Sontag argues, with respect to a 2000 book and exhibition of photographs depicting lynching spectatorship, “The display of these pictures makes us spectators too.” Sontag, *Regarding the Pain of Others*, p.82.

⁴⁷ This view is exemplified by the ongoing lawsuit against Harvard University regarding Harvard’s continued use of the (wrongfully created) daguerreotypes of the slaves Renty and Delia against the expressed wishes of their descendants. Whilst not precisely an observation case – the main complaint is that Harvard is exploiting the images for financial gain – the case against Harvard nonetheless rests on the claim that the descendants have moral, and ought to have legal, control over what happens to the photographs, which presumably includes whether or not they are on display. See Eileen Kinsella, ‘Morally, Harvard Has No Grounds: Inside the Explosive Lawsuit That Accuses the University of Profiting From Images of Slavery’, *Artnet News*, 28th March 2019, available at <https://news.artnet.com/art-world/harvard-university-slaves-images-1500412>.

that she is not entitled to the respect afforded to other people. And, the larger the audience, the more Neighbour is wronged, since each observer treats Neighbour in this degrading way.

6. Observation as enabling primary wrongdoing

Some wrongs require observation for their success, in that the wrong cannot be achieved unless a third-party observes. Term these *observation-dependent* wrongs. In these cases, a potential observer has the ability to *enable* the primary wrong. This reveals a third way in which observation can ground preventative and compensatory obligations.

Revenge is the clearest example of this kind of enabling. To illustrate, consider a variation on the original case:

Revenge II: Adam and Brenda's relationship ends. David hacks into Brenda's computer to steal photographs of her. David then gives those photographs to Adam, who posts them on a 'revenge porn' website without her consent. Craig visits the website in order to view these sorts of pictures, and sees the pictures of Brenda.

Clearly, David's theft of the images is an independent wrong to Brenda. But he commits a further wrong in virtue of enabling Adam to wrong Brenda. Having enabled Adam's wrongdoing, David is now liable to bear costs with respect to that wrong. But, we contend, the same is true of Craig, who views the images of Brenda. Sharing photographs, by its very nature, requires that other people look. The success of Adam's wrongful sharing thus depends on the participation of others. If nobody else looks, Adam's is merely a failed attempt to share Brenda's images. Since Adam acts wrongly in sharing the images, those who enable that sharing without justification also act wrongly. This wrongful enabling renders observers liable to bear costs for the sake of the primary wrongdoer's victims.

Of course, the ways in which Craig and David enable Adam's wrongdoing are quite different. David's behaviour exhibits the 'standard' form of enabling, which involves *causally* contributing to others' wrongs. Causal enabling should be very familiar: consider someone who drives the car for a bank robbery, or who sells the robbers safe-cracking equipment. But the case of Craig reveals that causation is not the only way in which we can enable others' wrongs. The relation between Craig's observation and Adam's wrong is one of partial *constitution*, not causation.

Adam's wrong *just is* the conjunction of his intentionally making the images available and Craig's viewing them.⁴⁸

One complicating factor is that cases such as *Revenge* often involve large numbers of observers. We might think that successful sharing requires only one viewer, and thus Adam's attempt to wrong Brenda succeeds just in case at least one person looks at the images. This suggests that subsequent observers cannot count as enabling the primary wrong, since its success is overdetermined. But this strikes us as a mistake, since it misconceives the nature of the wrong in question. *Each* act of sharing – that is, each observation that constitutes the sharing of the images – wrongs Brenda. Brenda stands in a one-to-one relationship with everyone who looks at her images without her permission, and each person who unjustifiably looks wrongs Brenda.⁴⁹ There is a multitude of primary wrongs here: even though Adam may perform only one action of uploading the images, he commits multiple wrongs, since Brenda is wronged every time someone looks at her images.

The foregoing explains why those who unjustifiably look at wrongfully shared images become connected to the primary wrong done to the victim, and why they are liable to bear costs with respect to that wrong. In addition, the extent of their wrongdoing (and thus the extent of their liability) plausibly increases as we consider how observation can contribute to the success of the primary wrongdoer's other goals. For example, Adam doesn't merely aim to share the images: he shares them *in order to humiliate Brenda*. Since, as we argued above, humiliation increases with wider publicity, each observer plays an enabling role by making Adam's plan *more* successful.⁵⁰ Adam might also have other goals – for example, that Brenda lose her job, or commit suicide, or that her new partner leaves her – that might depend on passing a certain threshold of publicity. Individuals whose observations help to reach this threshold contribute to achieving this further wrong. Moreover, even if one's observation does not cross the threshold, one plausibly wrongs a person by unjustifiably risking that the threshold will be crossed.⁵¹ Finally, it is worth reemphasising the plural bases of liability on our account. Hence, even once the threshold is crossed (and known to have been crossed), observation in these cases could still be wrong on the other grounds that

⁴⁸ On the distinction between causal and constitutive consequences of action, see Philip Pettit, 'Three Mistakes and Doing Good (and Bad)', *Journal of Applied Philosophy* 35 (2018): 1-25, at pp.6-9.

⁴⁹ This mirrors the Supreme Court's opinion in *Paroline* that multiple viewings of the victim's image meant that "the wrongs inflicted upon her were in effect repeated".

⁵⁰ For discussion and endorsement of the idea that we have strong moral reasons not to act in ways that satisfy others' unjust goals, see Tom Parr, 'On the Moral Taintedness of Benefitting from Injustice', *Ethical Theory and Moral Practice* 19 (2016): 986-997, at 993-996; Göran Duus-Otterström 'Benefitting from Injustice and the Common-Source Problem', *Ethical Theory and Moral Practice* 20 (2017): 1067-1081, at pp.1072-1074; Daniel Butt, *Rectifying International Injustice* (Oxford; Oxford University Press), pp.129-130.

⁵¹ On this point, see Shelly Kagan, 'Do I Make a Difference?' *Philosophy and Public Affairs* 39 (2011): 105-141, esp. Sections VII-IX.

we have identified. For example, observation in *Revenge* may still humiliate and degrade Brenda independently of Adam's plans.

7. Wrongful observation: Violating privacy, and benefitting from injustice

The preceding three sections each outlined a mechanism by which observation of wrongdoing can generate liability to bear costs to prevent or mitigate that wrong. Here we explain why two further candidates – that wrongful observation involves violating privacy and benefitting from injustice – are excluded from our account.

7.1 Privacy

What is the relationship between our account of wrongful observation, and the more familiar wrong of violating the right to privacy, which protects our interest in having a measure of control over the information that others have about us?⁵² We grant that, in many of the cases under discussion, engaging in wrongful observation does involve violating the victim's privacy. This is clearest in cases – like *Rape* and *Revenge* – where the content of the observation includes intimate areas of the victim's body and/or sexual activity (things are less clear in the case of observation of non-sexual wrongs, such as terrorist beheadings or racist lynchings).

This is true even though wrongful observation often occurs in public places, in which we typically lack our normal privacy rights. Even though, for example, one does not ordinarily have a right not to be observed at a party, non-consensual sexual activity triggers conditions in which one has a privacy right not to be observed. Someone wrongly forced to walk down the street naked has a right to privacy that enjoins people not to observe her, even if she is in a public place, and would have no such right had she volunteered to walk down the street naked.⁵³ Of course, that the victim is in a public place might affect how costly or difficult it is to avoid observation, which might in turn affect whether third-parties act wrongly in observing. But that the victim is publicly wronged does not in itself diminish her privacy rights.

Despite the intermingling of wrongful observation and privacy violations in certain cases, we doubt that wrongful observation can be adequately explained in terms of our privacy interests. There seems an intuitive difference between, say, deliberately watching someone being sexually assaulted (as Observer does in *Rape*), and observation of consensual sexual activity. Consider:

⁵² We take this to be compatible with fairly diverse views about the specific nature of the interest (including those that reduce it to a more basic underlying interest). See, for example, Judith Thomson, 'The Right to Privacy', *Philosophy and Public Affairs* 4 (1975): 295-314; James Rachels, 'Why Privacy is Important', *Philosophy and Public Affairs* 4 (1975): 323-333; Marmor, 'What is the Right to Privacy?'

⁵³ On rights of privacy in public places, see Allen, *Uneasy Access*, Ch.5.

Peeping Tom 1: Eric and Fiona have consensual sex. Tom deliberately watches through the window without their knowledge or consent.

Peeping Tom 2: Eric has sex with inebriated Fiona despite knowing that she has not consented to sex. Tom deliberately watches through the window without their knowledge or consent, and knows that the sex is non-consensual.

Assume that the content of Tom's visual experience is roughly identical in each case. Clearly, in both cases, Tom violates Fiona's privacy rights (and also Eric's privacy rights in the first case). But we find it intuitive that Tom's conduct is not only more seriously wrong in the second case – in which he additionally observes *wrongdoing* – but also different in character. It seems hard to account for this difference solely by appeal to victims' interest in controlling access to information about themselves. By contrast, our account of wrongful observation can straightforwardly capture this asymmetry, since it treats observation of wrongdoing (or its product) as a mechanism for sharing liability for a primary agent's wrongdoing. In cases where there is no primary wrongdoing – as in *Peeping Tom 1* – there is no basis for this liability (though, of course, observing may still be wrong on other grounds, such as privacy).⁵⁴

Invoking wrongful observers' connection to primary wrongdoing also explains the extent of observers' intuitive liability. Recall, for example, our initial discussion of the *Rape* case, where we argued that Observer seems intuitively liable to bear non-trivial physical harms for the sake of Victim. It seems unlikely that protecting Victim's privacy interests can justify the seriousness of these costs. By contrast, these costs can be justified once we recognise that what is at stake is Victim's interest in avoiding the *primary wrong* of rape, and not simply protecting her privacy. Observer is liable to bear substantial costs because rape is a substantial wrong. Our account of wrongful observation treats the degree of observer liability as (at least partly) a function of the magnitude of the wrong committed by the primary wrongdoer.

All this being said, the right to privacy is a notoriously loose notion, as evidenced by the huge range of protections that have been claimed to be covered by the right.⁵⁵ This malleability leaves open the possibility of trying to subsume our account of wrongful observation within an

⁵⁴ Cases like *Revenge* are a somewhat special case, because the primary wrongdoing (non-consensually sharing intimate images) is *itself* a clear privacy violation. Since, on our account, engaging in the three forms of wrongful observation morally implicates the observer in the primary agent's wrongdoing, wrongfully observing in cases like *Revenge* both implicates the observer in the primary agent's privacy violations, *and* constitutes a violation of privacy in its own right.

⁵⁵ For a helpful overview of this diversity, see Anita Allen, 'Privacy' in Hugh LaFollette (ed) *The Oxford Handbook of Practical Ethics* (Oxford: OUP, 2005), 485-513.

expansive account of privacy rights. More specifically, one might argue that the forms of wrongful observation we have identified are better understood as picking out distinct ways in which some privacy violations can be *worse* than others, rather than isolating additional distinctive wrongs that privacy violators also commit. Such a view might be able to account for the intuitive difference between pairs of cases like *Peeping Tom 1* and 2. On this alternative picture, the difference would be one of the *gravity* of the privacy violation, and this difference would be grounded in elements of our account of wrongful observation.

We grant that the two of the wrong-making features that we identify – that observation compounds a primary wrong, and constitutes degrading treatment of the victim – may be amenable to this expansive conception of privacy. It doesn't seem implausible that violations of privacy that add to the humiliation of the victim, or contribute to her degradation, might be characterised as worse violations *of privacy*. However, we remain unconvinced that our account can be fully captured under the notion of 'aggravated' privacy violations.

For one, the third wrong-making feature that we identify – that observers enable the primary wrongdoing – is not plausibly accommodated by the notion of violating privacy. Someone who enables a primary wrong typically does something quite different in character to violating privacy.⁵⁶

Second, it is not clear that the alternative characterisation of our account can easily explain the potentially extensive liability of people like Observer in *Rape*, who observe extremely serious wrongdoing (or its product). This would require the controversial claim that some violations of privacy are sufficiently grave to justifying imposing significant physical harms on observers (or correspondingly extensive compensatory obligations). That would be a startlingly revisionary view of the enforceability of privacy rights. By contrast, our characterisation of wrongful observation as a mechanism for sharing liability for primary wrongdoing seems a more natural way to explain why wrongful observers' liability can be significant.

Third, as mentioned above, it is not clear that our privacy interests are implicated in cases of observation of non-sexual wrongdoing. The boundaries of degrading wrongs seem to significantly exceed the scope of our privacy rights. If so, then the 'aggravated privacy violation' view appears to arbitrarily draw a distinction between the wrongfulness of observation in cases of sexual and non-sexual degrading wrongs. Our account, by contrast, provides an attractively unified model.

Overall, however, we doubt that much turns on whether one subsumes the wrongs of observation under privacy violations, or (as we do) treats them as distinct wrongs. Either we have

⁵⁶ Although see n.54 above.

proposed a novel ground of liability for others' wrongs, or we have proposed a novel account of the scope and sensitivity of our privacy rights, and of the consequences of their violation. Though conceptually distinct, the alternative privacy-based proposal would not only be extensionally equivalent to our account, but also rely on our account for its substance.

7.2 Benefitting from injustice

In many of the cases we have discussed, observers view degrading wrongs (at least partly) in order to derive certain benefits, such as entertainment, pleasure, or peer-group bonding.⁵⁷ In other contexts, many endorse the idea that those who benefit from unjust acts thereby incur special obligations to assist the victims of those acts, even if they make no contribution to the primary wrongdoing.⁵⁸ For example, this idea has been invoked to ground special obligations on the part of present-day citizens of affluent states to contribute to mitigating the effects of climate-change, since they are chief beneficiaries of historical carbon emissions. We might then think that benefitting from injustice provides an additional independent ground of *Observer Liability*.⁵⁹ Indeed, we might think that the benefit-based case for liability is even stronger in our observation cases, for two reasons. First, the benefits are deliberately sought out by the beneficiary, in full knowledge of the injustice involved. They are certainly not innocent beneficiaries. Second, the relationship between the benefits and the injustice is not merely causal. In addition, the benefit is often partly constituted by the wronging of the victim. This is particularly salient in cases like *Revenge*. The websites that disseminate this material are typically explicit that it is being shared without the consent of the subject, and it is *this* feature that attracts viewers (rather than simply nudity or sexual images, which can be viewed on any (consensual) pornography website).⁶⁰

⁵⁷ The diversity of motivations for wrongful observation is emphasized in several evidence submissions accompanying the draft Voyeurism (Offences) (No. 2) Bill 2017-19. See, in particular, the evidence submitted jointly by Annette Zimmerman and Alice Schneider, and by the charity Victim Support. Available at: <https://services.parliament.uk/bills/2017-19/voyeurismoffencesno2/documents.html>

⁵⁸ For a classic statement, see Daniel Butt, 'On Benefitting from Injustice', *Canadian Journal of Philosophy* 37 (2007): 127-152. For debate, see Cristian Barry and Robert Kirby, 'Scepticism about Beneficiary Pays: A Critique', *Journal of Applied Philosophy* 34 (2017): 285-300; Robert Huseby, 'Should the Beneficiaries Pay?', *Politics, Philosophy, and Economics* 14 (2015): 209-225; Carl Knight, 'Benefitting from Injustice and Brute Luck', *Social Theory and Practice* 39 (2013): 581-598; Daniel Butt, "'A Doctrine Quite New and Altogether Untenable': Defending the Beneficiary Pays Principle", *Journal of Applied Philosophy* 31 (2014): 336-348.

⁵⁹ The secretary of the Children's Charities' Coalition on Internet Safety – John Carr – appeals to a similar idea in support of introducing legislation that would require those convicted of possessing child pornography to pay restitution to the victims. As he puts it, "Under the Proceeds of Crime Act, villains are made to forfeit their ill-gotten gains. By analogy, here is a mechanism to force a different kind of villain to pay for what they have done to an innocent child." Cited in Jamie Doward and Anthony Cornish, 'Viewers of child abuse could lose homes', *The Guardian* 16th January 2016.

⁶⁰ For example, one of the most well-known 'revenge porn' websites, 'MyEx.com', carries the tagline 'Get Revenge'.

However, we doubt that *Observer Liability* can be grounded in the normative implications of benefitting from injustice. Our thesis is not simply that observers can have special obligations to victims of primary wrongdoing, but rather that observers can be liable to bear costs for the sake of victims *with respect to that primary wrongdoing*. As explained above, it is the fact that observers' liability is indexed to the primary wrong that explains why observers' liability may be quite extensive.

By contrast, special obligations arising from benefitting from injustice are typically limited to disgorging the relevant benefit.⁶¹ For example, if someone gives me stolen property, my obligation is limited to returning the property to its rightful owner (or, if that is not possible, transferring an equivalent quantum of benefit to the owner). Obligations to disgorge are not plausibly construed as liabilities to compensate victims, which specifically address the harm suffered by the victim; one does not compensate a person by returning what is rightfully hers (or by providing an equivalent). Whatever benefit-based obligations a wrongful observer may incur, they are insufficient to establish his liability to bear costs for the sake of preventing or mitigating the primary wrong that generated the benefit. As we have argued, those liabilities are potentially significant, yet the benefits derived from observation of wrongdoing will typically be trivial in comparison to the wrong suffered by the victim.

In some cases, however, benefitting from injustice does plausibly give rise to obligations that exceed the benefit received, including obligations to compensate. As Avia Pasternak has argued, individuals who *knowingly* and *willingly* benefit from injustice incur liability to compensate the victims, insofar as they culpably fail in their duty to transfer the benefit to its rightful owner, and thereby wrong the victim.⁶² Given that our observation cases involve knowingly benefitting from injustice, one might appeal to these additional obligations in order to ground *Observer Liability*. But, again, this would be a mistake. Though additional compensatory obligations may be generated, these do not require compensation *for the primary wrong* that created the benefit. Someone might be delighted to receive what they know to be stolen property, and even persuade the thief to hand it over, but this doesn't make them liable to bear costs with respect to the theft. Instead, compensation is owed only with respect to the additional, independent wrong they do to the victim: the wrong of failing to disgorge the wrongful benefit. As in the case of violating privacy, this separate wrong is intuitively insufficient to explain the extent of observers' liability.

⁶¹ This is a standard assumption among proponents of the view that benefitting from injustice gives rise to special obligations. See Avia Pasternak, 'Voluntary Benefits from Injustice', *Journal of Applied Philosophy* 31 (2014): 377-391, at p.378 and the works cited there at n.4.

⁶² Pasternak, 'Voluntary Benefits from Injustice'. See also, Avia Pasternak and Robert E. Goodin, 'Intending to Benefit from Wrongdoing', *Politics, Philosophy, and Economics* 15 (2016): 280-297.

We thus reject benefitting as an independent ground of *Observer Liability*. While it is true that those who observe degrading wrongs in order to derive benefits are typically liable with respect to those wrongs, this is because the mechanism by which the benefit is obtained manifests one of the other grounds of liability that we defend. Indeed, such benefitting seems to *necessarily* manifest the wrong of subjecting the victim to degrading treatment. Moreover, our account can recognise a derivative role for observers' beneficiary status.⁶³ This is because the fact that an individual (knowingly, willingly, and constitutively) benefits from observing can increase the extent to which that observation manifests other grounds of liability. The presence of an observer who seeks out wrongdoing for the purposes of entertainment plausibly increases the degree to which the victim is subjected to degradation, and additionally compounds her humiliation (via the knowledge that one's suffering is a source of enjoyment to others – a benefit that others have deliberately sought out), compared to the presence of an otherwise identical observer who does not experience enjoyment.

8. Justified observation

In identifying the wrong-making features of observation, we have focused on observers who lack positive moral reasons for observing, and so lack a justification for doing so. But uncovering these features helps us to better understand the conditions under which observation might be morally permissible. This has significant practical import: a range of roles and professions – journalists, police officers, judges, jurors, online content moderators, museum curators – involve observing degrading wrongs, or the product of such wrongs. Here we provide some first steps towards an account of justified observation. One notable aspect is that different wrong-making features may be sensitive to different forms of justification, and so disaggregating the wrongs helps us better identify instances of justified observation

Sometimes, when we engage in a typically wrongful activity for the sake of a valuable end, the fact that we do so for that reason expunges some or all of the features that would otherwise make that activity wrongful. Our suggestion is that this applies to the degradation-based wrong of observation. On the account we developed earlier, this wrong inheres in observation that expresses an attitude that the victim lacks equal moral status. However, when one is guided by the right kinds

⁶³ Indeed, recent defences of the moral significance of benefitting appear to be moving towards a derivative approach, in order to distinguish cases in which benefitting intuitively does and does not generate special obligations. See e.g., Christian Barry and David Wiens, 'Benefitting from Wrongdoing and Sustaining Wrongful Harm', *Journal of Moral Philosophy* 13 (2016): 530-552; Parr, 'On the Moral Taintedness of Benefitting from Injustice'; Duss-Otterström 'Benefitting from Injustice and the Common-Source Problem'.

of ends – of the kind discussed below – one does not justifiably contribute to the victim’s degradation. Instead, one plausibly does not contribute at all.⁶⁴

Of course, contributing to degradation is but one wrong-making feature of observation. A police investigator who looks at images of revenge porn still enables the primary wrongdoer to share the images, and may well add to the victim’s humiliation, even if they do not engage in degrading treatment. These grounds of wrongdoing are not plausibly expunged by the value of an observer’s reasons for observing, and so remain in need of justification.

One form of justification holds that observation need not transgress the victim’s rights, despite its having these objectionable features. This is clearest in cases where the reasons for observation are grounded in the victim’s interests, and aim at benefitting her overall. Though one central function of rights is to protect individuals from bearing costs for the sake of marginal net benefits to others, this concern for the separateness-of-person does not similarly constrain *intra*-personal trade-offs.⁶⁵ The most obvious cases of victim-benefitting observation are those in which observation is a necessary means of rescuing the victim from an ongoing wrong (for example, in order to identify the victim’s location). But observation may still provide a benefit to victims even when it is not a means of preventing wrongs. Observation may, for example, enable one to corroborate the victim’s evidence in a subsequent prosecution, to show solidarity with the victim, or to ensure that she will not be forgotten.⁶⁶

In addition, whether one wrongs the victim in such a case plausibly depends not only on whether observation aims at benefitting the victim, but also one’s evidence that the victim would consent to being observed for the sake of the benefit. To take an example from a different context: a doctor does not wrong an unconscious patient by performing surgery on them to save them from serious harm, even though they act without consent. But if they have good evidence that the patient would refuse treatment, then surgery would be wrongful. Similarly, even if one observes in order to convey a sense of solidarity with the victim, observation typically wrongs the victim if she has made it clear that she does not want to be observed.⁶⁷

⁶⁴ John Gardner makes a structurally similar suggestion with regard to negligence torts. If one has a justification for risking harm to others, one does not commit justified negligence if the harm eventuates; one commits no negligence tort at all. Gardner, ‘What is Tort Law For? Part 1: The Place of Corrective Justice’, p.42.

⁶⁵ For a detailed articulation of this line of thought, see Daniel Viehoff, ‘Legitimacy as a Right to Err’ in Jack Knight and Melissa Schwarzberg (eds), *Nomos LXI: Legitimacy* (New York: NYU Press, forthcoming).

⁶⁶ On the importance to victims of being remembered, see Zofia Stemplowska, ‘Remembering War: Fabre on Remembrance’, *Journal of Applied Philosophy* (forthcoming in print, published online at <https://doi.org/10.1111/japp.12321>)

⁶⁷ Note that presumed consent cases are distinct from the cases of epistemically-justified-yet-mistaken observation that we mentioned in n.20 (in which e.g. an observer reasonably but mistakenly believes that she is observing consensual sex rather than rape). In a presumed consent case, the observer knows that she is observing wrongdoing, and her evidence is that she has a justification for doing so, grounded in the victim’s interests. In contrast, someone who observes what she mistakenly believes to be consensual sex is not acting out of concern for the victim. Thus, our

When observation would not be to the advantage of the victim, or when the victim does not want to be observed, observation usually wrongs her. However, it does not follow that observation is unjustified. An observer may be able to offer a different form of justification, which holds that the victim's right to non-observation is permissibility infringed as the lesser-evil, in virtue of the benefits of observation to *others*, rather than the victim.⁶⁸ For example, even if a journalist's observation of the Steubenville video increases the victim's humiliation, their observation could be justified if it helps them expose institutional failings by the school or police in a way will significantly improve the treatment of future rape victims.⁶⁹ This may be justified even if the victim asks the journalist not to look. Since the journalist's justification does not rely on the interests of the victim, the victim lacks a veto on whether the journalist may look. Moreover, in some cases, the interests of *the observer* may be sufficient to override the victim's right not to be observed. For example, in a recent newspaper article on the abuse of refugees in Libyan processing centres, Patrick Wintour reports that "A commonly reported torture technique involved forcing men to stand in a circle to watch the rape and sometimes murder of women; men who moved or spoke out were beaten or killed."⁷⁰ It strikes us that when the costs of non-observation are so high, observers possess a lesser-evil justification – and not merely an excuse – for watching.

Observation justified on the basis of lesser-evil raises a further issue about the moral status of observers, which we can only flag here. Since, in these cases, observation – though morally permissible – nonetheless infringes the victim's right, the question remains as to whether the observer is liable to bear costs for the sake of the victim. Theorists of liability are divided on this issue. One view takes the fact that an agent transgresses a right to be sufficient for liability, independently of whether the transgression was all-things-considered justified.⁷¹ An opposing view

suggestion that those who act on the basis of presumed consent do not incur liability is compatible with our neutrality on the question of whether other types of mistaken observers might incur liability

⁶⁸ One might worry that if wrongful observers are potentially liable to significant costs for unjustified observation, the burden of lesser-evil justification must be very high, such that one may only override victims' right not to be observed in order to achieve a very great good. This would make lesser-evil justifications very hard to come by. But this would be a mistake. The good required to justify a rights-transgression (either to the potential transgressor or to third-parties) does not closely track the extent of liability for *unjustifiably* transgressing that right. (On this point, see Helen Frowe, 'Civilian Liability', *Ethics* 129 (2019): 625-650, at pp. 629-634). Of course, even if the good required to justify observation is not especially high we should, as Sontag points out, avoid excessive optimism about whether observation will realise any goods. Sontag, *Regarding the Pain of Others*, p.82.

⁶⁹ For discussion of journalists' permissions to observe and record wrongdoing, see Richard Stupart and Katherine Furman, 'Bearing Witness: What are Journalists Doing in Conflict Zones?' *The Ethical War Blog*, October 19th 2018. Available at <http://stockholmcentre.org/bearing-witness-what-are-journalists-doing-in-conflict-zones/>; Sontag, *Regarding the Pain of Others*; Sue Tait, 'Bearing Witness, Journalism, and Moral Responsibility', *Media, Culture, and Society* 33 (2011): 1220-1235; John Durham Peters, 'Witnessing', *Media, Culture, and Society* 23 (2001): 707-723.

⁷⁰ Patrick Wintour, 'Refugees report brutal and routine sexual violence in Libya' *The Guardian* 25th March 2019.

⁷¹ See, for example, Uwe Steinhoff, 'Jeff McMahan on the Moral Equality of Combatants,' *Journal of Political Philosophy* 16 (2008): 220-226; Rodin, 'Justifying Harm', at pp.86-87; Gardner, 'What is Tort Law For', at pp.43-44.

holds that justified agents are shielded from personal liability.⁷² Note that the first view is compatible with the idea that justification defeats an agent's *culpability* for transgressing rights. Insofar as an agent's culpability bears on the extent of their liability, justification may still play an important derivative role in determining the extent of an agent's liability. Note, also, that the second view does not claim that victims' rights to compensation are extinguished by the transgressor's justification. The claim is only that a victim's claims do not correlate with a specific liability on the part of the transgressor. This is compatible with compensatory obligations falling on third-parties. For example, one might hold that losses arising from justified infringements should be compensated by beneficiaries of the infringement, or from the public purse.⁷³

Though our sympathy is with the second view – those who have a lesser-evil justification for observing degrading wrongs are not specifically liable to bear costs⁷⁴ – our account of wrongful observation is neutral on this issue. The considerations that will settle the debate surrounding the liability of justified agents are external to, and more general than, the specific claims that we have defended in this paper.

9. Conclusion

Observation of wrongdoing is not new. What is new is the extent to which, thanks to modern technology, one can easily observe both wrongdoing and its products. In this article, we have provided a principled basis for the idea, reflected in limited parts of the law, that such observation is not merely distasteful, but constitutes a wrong capable of grounding liability. On the view defended, there are multiple routes to this liability. Observation can compound a primary wrong by exacerbating harmful features of that wrongdoing, such as the victim's humiliation. Observation of degrading wrongs can itself constitute a form of degrading treatment. Finally, observation can enable primary wrongdoing, since some wrongs depend on observation for their success. While it is natural to think that observation is a purely passive activity, which therefore cannot generate liability, we have shown that this is often a mistake.

⁷² Jeff McMahan, 'Self-Defence Against Justified Threateners' in Helen Frowe and Gerald Lang (eds.), *How We Fight* (Oxford: OUP, 2014), 104-137; Helen Frowe, 'On Lesser-Evil Justifications for Harming: Why We're Required to Turn the Trolley', *The Philosophical Quarterly* 68 (2018): 460-480, at pp. 475-478.

⁷³ McMahan, 'Self-Defence Against Justified Threateners', pp.119-120.

⁷⁴ Both views are compatible with observers having corrective obligations *qua* beneficiary and/or *qua* contributor to the public purse.