

TESTIMONY OF JACQUELINE O'HARA
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Mr. Chairman, and Committee Members, thank you for allowing me to testify before you about this important issue. I am here in support of House Bill 406, which will amend the statute for the criminal offense of voyeurism.

The current law has four subsections, making four different types of voyeuristic acts illegal. Subsection A, covers activity that we commonly refer to as a peeping tom situation. The bill before you today does not propose any amendment to that subsection.

Subsections B and C prohibit the taking of pictures or video of another person when the offender is either trespassing or invading the privacy of another. Both of these subsections also require the State to prove that:

- (1) the offender took pictures/video of the other person while in a state of nudity; and
- (2) for the purpose of sexual arousal or gratification.

The only difference between subsections B and C is that subsection C applies when the victim is a minor.

Lastly, subsection (D) prohibits an offender from taking pictures or video of another, secretly or surreptitiously,

- (1) under or through the clothing being worn by the other person; and
- (2) for the purpose of viewing their body or undergarments.

The current law leaves a gap where certain activity that I/We believe should be illegal, is not. For example, under the current law it is illegal for an offender to put a phone under a person wearing a skirt and take pictures or video under their skirt, to view their body or underwear.

It is not illegal for an offender to take a picture or video of someone changing clothes, wearing undergarments, in a dressing room, when the offender takes the video from overtop of the partition or wall.

This second scenario is the exact situation Hannah (who just testified/or will testify next) found herself in on January 1, 2020. She was shopping at Target. She went into the dressing room and unbeknownst to her a man followed in behind her. As she was trying shirts on and off, she looked in the mirror and saw a hand, holding a phone, over top of the partition of her dressing room. She was in the process of putting a shirt on and was wearing a bra, so she was not in a state of nudity.

The offender later admitted to taking pictures of Hannah but claimed he deleted them and no pictures were recovered as evidence to use in the case. He never gave a reason for taking the pictures. He never said anything to Hannah while they were both in the dressing room. As such, it was difficult for the State to prove that he committed this act for the purpose of sexual arousal or gratification.

Since she was not in a state of nudity, the State charged the offender under subsection (D), which reads in its entirety:

No person shall secretly or surreptitiously videotape, film, photograph, or otherwise record another person under or through the clothing being worn by that other person for the purpose of viewing the body of , or the undergarments worn by, that other person.

The State's argument was that when he took photos of her it was under her shirt for the purpose of viewing her body or undergarments.

During the course of the prosecution, the defense attorney presented the case of *City of Middletown v. Reuss*, from the 12th District Court of Appeals which interpreted subsection (D) of the voyeurism statute. In this case, a young woman was in a tanning bed, she was topless and wearing underwear. She saw a phone held above the partition wall with the camera lens pointed toward her. The offender was charged with voyeurism under subsection (D). He was convicted of attempted voyeurism, and he appealed the conviction. The 12th District Court of Appeals held that "under" clothing literally meant the photo or video must be taken from underneath the victim, as in a picture up a skirt. The subsection did not apply if the offender took the photo or video from above the victim, even though, she was in undergarments.

In a concurrence to the opinion, Judge Piper wrote "to express my (his) grave concern regarding the narrow way in which R.C. 2907.08(D) was drafted, and to emphasize that the narrow drafting needs to be corrected by the legislature." He went on to say "Criminalizing an invasion of privacy like this must be codified regardless of sexual arousal or gratification". This is why we are here today asking you to revise Ohio Revised Code to close this loophole.

The bill before you today makes 6 revisions:

- (1) adds a definition of a "place where a person has a reasonable expectation of privacy";
- (2) adds a definition of "private area" to include private body parts that are covered by undergarments, not just nudity;
- (3) adds the terms "broadcast" and "stream" to subsections (B) and (C) – [note: it should also add it to subsection (D) but currently does not]



- (4) removes the language of sexual arousal or gratification from subsections (B) and (C);
- (5) adds the word “above” to subsection (D); and
- (6) Revises penalties for each subsection of Voyeurism.

I will address each of these revisions in more detail.

1st Revision

In subsections (B) and (C), the current statute says “no person... shall commit trespass or otherwise surreptitiously invade the privacy of another.” The bill changes that language to “no person shall knowingly commit trespass or otherwise secretly or surreptitiously videotape, film, photograph, broadcast, stream, or otherwise record another person, in a place where a person has a reasonable expectation of privacy”.

“A place where a person has a reasonable expectation of privacy” is defined as “a place where a reasonable person would believe that they could fully disrobe in private”.

This definition is flexible but not vague. The reasonable person knows when they are in a place in which they feel they can disrobe in private.

2nd Revision

Subsections (B) and (C) in the current statute also requires proof that the victim was in “a state of nudity” when they were recorded. The bill changes this language to “for the purpose of viewing the private areas of that person”.

“Private area” is defined as: “the genitals, pubic area, buttocks, or female breast below the top of the areola, where nude or covered by an undergarment”.

This means if you are standing in your underwear in a dressing room, and someone secretly takes your picture it will be illegal. It will not make a difference if your picture is taken from underneath, above, or through a hole in the wall.

3rd Revision

The bill adds the words “broadcast” and “stream” to the list of videotape, film, or photograph. Technology is constantly changing. Many apps allow for live streaming but then later delete the picture/video. By adding these terms we expand to meet ever changing technological ways offenders can violate another person’s privacy.

4th Revision

The current law requires proof of sexual arousal or gratification for subsections A, B, and C. The bill would remove that requirement from subsections B and C when the offender is recording another secretly in a place where they expect privacy. It will remain in subsection A, which is not about taking pictures or video, but covers the stereotypical “Peeping Tom” case of someone spying on you through your window without your knowledge.

5th Revision

The proposed bill would amend subsection (D) by simply adding “above” so that it would read “above, under or through the clothing being worn by that other person”. I do not believe that this amendment is helpful. If the amendments of subsection (B) and (C) are enacted, the fact patterns I presented earlier are covered because it would not matter whether the victim was nude or in their undergarments when they were recorded.

Subsection (D) is still necessary though, because the law should prohibit the situation where someone is in public and an offender attempts to take a picture of their undergarments, such as up a skirt. Adding the word “above” does not clarify this subsection. I would urge the legislature to consider clarifying the language of subsection (D) to include any situation where a person’s private area could be recorded, without their consent, while they are in a public setting.

6th Revision

Lastly, this bill would revise the penalties for voyeurism. The current law provides that a violation of subsection (A) is a misdemeanor of the 3rd degree; a violation of subsection (B) is a misdemeanor of the 2nd degree; a violation of subsection (C) is a felony of the 5th degree; and a violation of subsection (D) is a misdemeanor of the 1st degree.

The bill provides that a violation of subsection (A) remain as a misdemeanor of the 3rd degree, but enhance to a misdemeanor of the 2nd degree if the offender has 1 prior conviction for Voyeurism and further enhance to a misdemeanor of the 1st degree if the offender has 2 or more prior convictions for Voyeurism.

A violation of subsection (B) or (D) would be a misdemeanor of the 1st degree, but enhance to a felony of the 5th degree if the offender has 1 prior conviction for Voyeurism and further enhance to a felony of the 4th degree if the offender has 2 or more prior convictions for Voyeurism.

A violation of subsection (C), which is when the victim is a minor, would be a felony of the 5th degree, but enhance to a felony of the 4th degree if the offender has 1 prior conviction for Voyeurism and further enhance to a felony of the 3rd degree if the offender has 2 or more prior convictions for Voyeurism.

Under the prior law the penalties for subsections (B) and (D) were different, and actually provided a higher sentencing option for subsection (D) which did not require proof of sexual arousal or that the victim be in a state of nudity. I think it makes sense that if the language of the subsections are amended as provided in the bill that these two subsections have the same penalty level.

The bill provides for the sentencing options to enhance with prior convictions. This is consistent with the law of public indecency under R.C. §2907.09 which also enhances the penalty when an offender has prior convictions. In my experience as a prosecutor, many offenders under the sex offense codes reoffend. It is my hope that by enhancing penalties for repeat offenders the law will give courts more flexibility in sentencing and reduce recidivism.

Mr. Chairman, and Committee Members, thank you for listening to and considering my testimony today in support of H.B. 406. I would be happy to answer any questions you may have.

