

Exhibitionism: A Psycho-Legal Perspective

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The criminalization of exhibitionism is indicative of our society's unwillingness to deal rationally with sex offenses. As a result of this attitude, present treatment of exhibitionists is ineffective and even harmful. Ms. Riley argues that in order to encourage a more appropriate response to these men, their condition must be viewed from a psycho-legal perspective, which considers the presence of emotional disorders in individuals caught up in the penal system. Applying this perspective, the author proposes a diversion program that incorporates medical understanding of the disorder and therefore offers the possibility of curing exhibitionists and restoring them as productive members of society.

INTRODUCTION

The crime of indecent exposure is a minor offense in the litany of sexual wrongs proscribed by the California Penal Code. It seems trivial when compared with rape or with child molesting. However, because exhibitionism comprises approximately one-third of all reported sex offenses, it is significant for the number of lives affected.¹

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1. J. MACDONALD, INDECENT EXPOSURE 3 (1973); J. MOHR, R. TURNER, & M. JERRY, PEDOPHILIA AND EXHIBITIONISM 154 (1964).

Dr. James Mathis claims that more men are arrested for exhibitionism than for any other sex offense. Mathis, *The Exhibitionist*, MEDICAL ASPECTS OF HUMAN SEXUALITY, June 1969, at 89, 92. In Gagnon's study of 1,740 women who had been

The type of exhibitionism dealt with in this article is practiced by a man suffering from a personality disorder that irresistibly compels him to indecent exposure.² He is generally not aggressive and therefore is not likely to harm his victims. In fact, if this person did not find expressing the impulse necessary, he would probably never be seriously involved with the law, for his lifestyle is not otherwise extraordinary. Thus restricted, in the context of this article, exhibitionists are defined as men who find final sexual gratification in exposing their genital organs to unsuspecting females and who do not attempt any type of physical contact.

Despite scientific recognition that their disorder does not usually endanger the public, the California Penal Code classifies exhibitionists with truly dangerous sex offenders, dealing with them solely in the context of a retributive criminal justice system. The search for a more appropriate treatment is the focus of this article.

The search begins with a psychological profile of exhibitionism and continues with a discussion of our society's responses, both emotional and legal, to this type of sexual deviancy. The inadequacy of these responses is the basis for a proposed diversion program for exhibitionists that is described in the final section of this article.

Of course, not all men charged with indecent exposure are only exhibitionists; in some incidents exposure is actually accidental and in others it is a prelude to violent or aggressive physical contact. However, exhibitionism has been studied to a sufficient extent so that trained professionals are able to detect certain life patterns common to most compulsive exhibitionists. Therefore, generalities about exhibitionists are valid to the degree that they allow predicting which men will only exhibit and thus will respond positively to the correct form of therapy.

A PSYCHOLOGICAL PROFILE OF EXHIBITIONISM

The Offender

According to the American Psychiatric Association, exhibition-

child victims of sex offenses, over half with a single accidental experience had been subjects of indecent exposure. For multiple accidental victims, the percent is 40 for the first event and 66 for subsequent encounters. Gagnon explains these differing percentages by the fact that experienced children are more aware of physical contact. Gagnon, *Female Child Victims of Sex Offenses*, 13 Soc. PROB. 176, 182 (1965).

2. The word *man* and the male pronouns are not used in the generic sense, for this article deals only with male exhibitionists. Interestingly, women rarely indulge in this type of conduct. M. GUTTMACHER, SEX OFFENSES 41 (1951); J. MACDONALD, *supra* note 1, at 3; R. STOLLER, PERVERSION 129 (1975).

ism is a subdivision of the category "Personality Disorder, Sexual Deviation."³ Contemporary researchers seem to agree that three basic elements are usually present in the exhibitionist's psychological makeup—narcissism, passivity, and fear of castration.⁴

As discussed below, the exhibitionist's narcissistic tendencies are induced by his mother's over-solicitousness. Because he was the object of much attention as a child, he feels insecure when he does not receive this quantum of attention as an adult. Thus he exhibits in order to be noticed and admired. Despite his passivity, he has a need to be considered superior to and triumphant over another. He fulfills this need by exhibiting to women because it was his mother who first led him to believe that he is spe-

3. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 44 (3d ed. 1968).

4. Interview with Gary Shepherd, M.D., in San Diego, California (Aug. 1, 1978) (transcript of interview on file with the author) [hereinafter cited as Interview]. Dr. Shepherd was a participant in the therapy program for exhibitionists that was conducted by Dr. Mathis. See text accompanying notes 107-13 *infra*; F. CAPRIO & D. BRENNER, SEXUAL BEHAVIOR 174-75 (1961); M. GUTTMACHER, SEX OFFENSES 100 (1951); J. MACDONALD, *supra* note 1, at 40-41; D. MACNAMARA & E. SAGARIN, SEX, CRIME, AND THE LAW 164-68 (1977). Rickles summarizes the "evolution of exhibitionism" as follows:

1. Normal, natural exhibition of the phallus as practiced and accepted by primitive man
2. Association of pleasure with the phallus, followed by recognition of its reproductive powers
3. Deification and worship of the phallus
4. Emergence of religious and moral taboos with connotation of indecency and insistance [sic] that the phallus be concealed
5. Fortification of castration fears, both male and female, due to cultural taboos and Oedipal situation
6. Masculine protest developed by women reared in an environment of male superiority
7. Use of male child by such women to compensate for their lack of phallus
8. Overattachment of the male child to the mother and overemphasis on the magical power of his body, with consequent arrest of psychosexual development at an infantile level of phallic narcissism
9. Lack of a strong father to counteract the mother's influence and hold back demonstration of the existence of the penis
10. Exhibitionism on the part of the grown-up child . . . as an expression of revolt against the possessive mother and desire to assert his masculine individuality, which is fixated on the phallus.

N. RICKLES, EXHIBITIONISM 65-66 (1950). See generally Gaylin, *Psychiatry and the Law: Partners in Crime*, 8 COLUM. U.F. 23 (1965):

Present a patient to a group of psychiatrists and they will agree to an amazing extent about the nature of the illness, severity of impairment, areas of malfunctioning, prognosis, and indicated therapy. Indeed, a common reaction of the doctor-in-training is surprise that his [or her] first patient talks and acts as though he [or she] had read the textbook.

Id. at 25.

cial and endowed with unique attributes. He wants his mother's feelings to be expressed by other women. The desire for admiration and appreciation is intrinsic to this disorder.

The second general characteristic of an exhibitionist's personality—passivity—is an outgrowth of this narcissism. As a child, the exhibitionist had little need to be aggressive and self-reliant; his mother willingly fulfilled his wants. In fact, she evinced a great deal of pleasure in so doing.

If one is a child, one is expected to be passive and powerless. However, as an adult, the exhibitionist finds that his lack of aggressiveness and self-reliance is a handicap. He therefore feels lost and helpless in the adult world. One way of dealing with these feelings is to recreate the approval and support that he received as a child from his mother. To recapture support, the exhibitionist displays his most prized possession—his penis—wanting to be admired and rewarded for his efforts.

The castration fear experienced by the exhibitionist also results from his relationship with his mother, who most often is domineering and overprotective. Although the exhibitionist accepts her attentions, he is subconsciously threatened by her strength, and he becomes anxious to the point of feeling impotent. The exhibitionist needs reassurance of his masculinity by a female reacting to his exposure. Therefore, he represses his shyness and timidity during the act, manifesting a superior attitude while masking feelings of self-consciousness and inferiority. With the act of exhibiting, the man attempts to break the tie between himself and his mother by emphasizing their differences. He is in effect saying, "Admire what I have and praise me for it, but remember that it is something that you can never have." Thus exposure is a way of both winning his mother's approval and competing with her. "By the dramatic act of self-exposure, the son . . . makes an unconscious effort to break . . . identification with his mother, to cut the cord that binds him to her so tightly and to affirm himself as a separate, *masculine* individual."⁵

Castration fear is also indicated by the fact that exhibitionists have difficulty expressing anger toward women, whom they view as powerful and dangerous. Exhibiting can be an expression of hostility and contempt that the offender must act out rather than verbalize. "[T]he exhibitionist asserts his male prowess only to deny the female and express his contempt for her: he symboli-

5. N. RICKLES, EXHIBITIONISM 57 (1950). "He wishes to assert his separateness, to be taken for a fully masculine individual." J. DE RIVER, CRIME AND THE SEXUAL PSYCHOPATH 140 (1958).

cally shakes his penis at women as he might shake his fist.”⁶

The Offense

An indecent exposure is usually triggered by a crisis or a time of special tension. The problems inducing the exposure are generally associated with the important women in the exhibitionist's life—for example, his mother's death, a broken engagement, his marriage, his wife's pregnancy, or his divorce. Thus the onset of the condition seems to occur most often during the offender's twenties when a strong relationship with a female becomes somehow threatening. Although the stress may be vague and ill-defined, it is almost always something that jeopardizes the man's self-esteem. The problems may be real or fantasized, but their presence is constant.

Indecent exposures usually take place outside during daylight. Most occur in open places such as parks; many exhibitionists exhibit from their cars to passers-by. Before exposing himself, the offender feels restless, vaguely excited, and anxious. During the act his consciousness may be clouded, and he is almost unaware of what he is doing. After the act he experiences a great relief from tension but also a great sense of shame. Although he may resolve never again to repeat the offense, he knows that in reality he will not be able to control himself. “Even though many [exhibitionists] find their practices distasteful, they remain unable to substitute normal sexual behavior for them.”⁷

An interesting fact is that exhibitionists are easily caught. Indeed, they frequently remain at the scene until the police arrive, and when they exhibit from cars, they do not take precautions against their victims being able to copy their license numbers. This phenomenon can be explained by the exhibitionist's desire to be helped, for many believe that part of the law's response to this offense includes counseling. Therefore, it is not unusual for the exhibitionist to repeat his act many times in a place where he can be readily apprehended. In so doing, he is also manifesting a wish to bring punishment and thus expiation upon himself.

Another, but not controlling, reason for this risk-taking is the fact that it enhances the offender's excitement. Many exhibition-

6. W. BROMBERG, *CRIME AND THE MIND* 322 (1965).

7. AMERICAN PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 4 (3d ed. 1968).

ists find that a heightened possibility of being arrested is an integral part of their sexual gratification. Regardless of whether this last component is present, the compulsion to exhibit is greater than any fear of being arrested. When an exhibitionist is arrested, he is usually docile and nonresisting. In his study of exhibitionists, Mathis states that he was

constantly impressed by the need of the exhibitionist to be apprehended. Arrest tends to alleviate his sense of shame and guilt . . . Arrest also gives him excitement . . . Those not arrested soon after the onset of the condition tend to become more and more open with the act until arrest becomes inevitable.⁸

The exhibitionist wants nothing more than to complete the simple act of exhibiting his penis. However, much of his gratification depends upon the victim's reaction; most men desire a confused or horrified response, but they also wish for an expression of pleasure from the female. These reactions assure the exhibitor that he is a man and that he possesses something that is awesome to women. Therefore, if the victim laughs, he is usually extremely distressed and views this behavior as a comment on his lack of manliness.

The Victim

A significant impediment to any attitudinal change toward exhibitionists is the fact that most people believe that the victim of an indecent exposure, especially if she is a child, is traumatized and harmed for life. Actually many children do not even realize what has happened to them, and any subsequent emotional problems are caused either by parental over-reaction or by distress accompanying a courtroom appearance.⁹ In a study by Landis, five per-

8. Mathis, *The Exhibitionist*, MEDICAL ASPECTS OF HUMAN SEXUALITY, June 1969, at 89, 93, 95.

Unlike the rapist, the exhibitionist rarely warns his victims against calling the police. He does not make any threats on their lives or the lives of their families to discourage them from notifying the police. He does not point out the embarrassment of legal proceedings or the difficulties involved in proving the offense in a court of law. He seldom attempts to disguise his appearance, and indeed exposure from his own car or home adds greatly to the risk of detection.

J. MACDONALD, *supra* note 1, at 56-57.

9. Interview, note 4 *supra*. An interesting comment on American attitudes toward sex offenders is the fact that before the California Supreme Court declared unconstitutional the life-maximum recidivist provision of the penal code section governing indecent exposure, *In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (declaring unconstitutional portions of CAL. PENAL CODE § 314 (West 1972)), conviction for repeated indecent exposures carried a heavier penalty than did willful infliction of pain on a child under circumstances likely to produce death (not exceeding one year in county jail or state prison, CAL. PENAL CODE § 273a (West Cum. Supp. 1975)) or willful infliction on a child of any cruel corporal punishment resulting in a traumatic condition (not exceeding one year in county jail or state prison, *id.* § 273d).

cent of the girls who told their parents about the experience said that they were more frightened by their parents' reaction than by the offense itself.¹⁰

Parental response is based on both the outrage parents feel at the violation of important sexual taboos and the sense of impotence and incompetence they experience from believing that they have been unsuccessful in protecting their child.¹¹ Moreover, when a child is a victim of any type of sex offense, her parents are forced to discuss sexual matters with her—a task at which many adults are deficient. The problem thus becomes one for the parents in facing their own anxieties and suppressed fears.¹²

The second source of potentially harmful emotional difficulties for children is the legal process surrounding a report of indecent exposure. Unless parents and officials act carefully, child victims may be put through an ordeal of repetitious questioning, investigations, and court appearances that could both result in a distorted picture of sexual functions and arouse morbid curiosity.¹³

However, Gagnon's findings in his study of 1,740 women who had been child sex victims are encouraging. Included in this group were victims of all types of sex offenses, ranging from indecent exposure to rape and incest. Gagnon found that the experience of indecent exposure had a relatively minor effect on adult adjustment, sexual and nonsexual, and that only a small number of negative outcomes result from early intrusion into normal development of childhood sexuality.¹⁴ Approximately seventy-five percent of the women had no apparent maladjustments, while nine to twelve percent had only minor problems, none of which

10. Landis, *Experiences of 500 Children with Adult Sexual Deviation*, 30 PSYCH. Q. SUPP. 91, 99-100 (1956). Child victims rarely require psychiatric intervention although their parents may need professional guidance. Some parents become needlessly upset and convey their anxiety to the children, who either respond by displaying distress in order to appease them or incorporate the parents' anxiety. J. MACDONALD, *supra* note 1, at 79. See SIECUS, SEXUALITY AND MAN 83, 90 (1970).

11. SIECUS, SEXUALITY AND MAN 84 (1970).

12. The problem for the parent is that, in the process of discussing what may have been a trivial event for the child (much on the order of seeing a minor traffic accident), the discussion itself will become the occasion for anxiety and the expression of the sexual concerns of the parent.

Id. at 93.

13. B. KARPMAN, THE SEXUAL OFFENDER AND HIS OFFENSES 70 (1954); Gagnon, *Female Child Victims of Sex Offenses*, 13 SOC. PROB. 176, 191 (1965).

14. Gagnon, *Female Child Victims of Sex Offenses*, 13 SOC. PROB. 176, 177, 188 (1965).

interfered with their societal and occupational roles.¹⁵

Thus, with exhibitionism, the effect on children is usually not negative unless they are disturbed by adult responses. In fact, "less fear, anxiety, guilt or psychic trauma resulted than might be expected. More frequently, the children were bold, brazen or frankly objective. . . . [E]motional reactions of children are remarkably devoid of guilt, fear or anxiety."¹⁶

With adults, fear of rape is likely to produce a stronger effect than does the act of exhibiting itself.¹⁷ However, even women who are momentarily frightened by the incident quickly realize that danger is not imminent, for rapists do not approach their victims in a public place during daylight hours.¹⁸ Being a victim of indecent exposure causes psychological harm only to an extremely small group of uniquely sensitive women.¹⁹ The great

15. *Id.* at 189.

16. B. KARPMAN, *THE SEXUAL OFFENDER AND HIS OFFENSES* 68 (1954). "Irrationality about sex led to the original offense; it is important that parents and other adults keep their own irrationalities about sex from doing any further damage to the child." SIECUS, *SEXUALITY AND MAN* 84 (1970).

17. J. MOHR, R. TURNER, & M. JERRY, *PEDOPHILIA AND EXHIBITIONISM* 121 (1964).

18. See J. MACDONALD, *supra* note 1, at 12-25. See also E. CHESSE, *STRANGE LOVES* 226-27 (1971):

It seems incredible that these catastrophic consequences should flow from such a trivial cause, yet we see it happening time and again. . . . [Exhibitionism] is what we might term a nuisance offense. The prevailing notion that [this conduct] implies a threat of assault is wholly without foundation. The superficial appearance of aggressiveness on the part of the exhibitionist leads the ignorant observer to the erroneous conclusion that he is a dangerous individual, whereas, as a matter of fact, passivity is probably the outstanding element in his personality make-up

19. Interview, note 4 *supra*. See *Millard v. Harris*, 406 F.2d 964, 976-78 (D.C. Cir. 1968):

Concerning the likely effect of the appellant's exhibitionism on others, psychiatrists agreed that the effect would vary with the viewer. Most women would find the act repulsive, but their distress would be brief. Dr. Owens testified that some women might find such conduct amusing; he declined to concur in the trial judge's "layman's diagnosis" that any woman who laughed "is sick." The consensus of the expert witnesses was that a highly sensitive woman would be more shocked, and that a "very seclusive, withdrawn, shy, sensitive, suspicious" woman might become "quite upset." But even in that case, the effect would be for only "two or three days." There was no evidence presented of any actual harm to adult women from the appellant's past exhibitionism.

. . . .
The unanimous testimony of all the expert witnesses that serious psychological harm would result from public exposure only to unusually sensitive adult women and small children leads us to conclude that the future sexual misconduct of the appellant, if any, is not sufficiently likely to cause the sort of harm required by the statute to justify further commitment [W]e cannot conclude that supersensitive women and small children are likely to suffer serious harm from isolated instances of exhibitionism. "Very seclusive, withdrawn, shy, sensitive" women are a minority. While the law must and does protect them like other citizens, there are limits on the extent to which the law can sweep the streets clear of all possible sources of occasional distress to such women. Small chil-

majority of adult indecent exposure victims recover rapidly, acquiring no lingering problems.²⁰ Ensuring a general understanding of this disorder would allow an even better prognosis. "Since exhibitionism is not an uncommon deviation and since many women are likely to encounter an exhibitionist sometime in their lives, a general knowledge of the deviation should reduce the possible negative effects of fright."²¹

Unfortunately, any attempt to educate the public about exhibitionism will be hampered by society's inability to deal rationally with conduct that is considered aberrant. The following section deals briefly with the reasons behind this inability.

SOCIETAL ATTITUDES TOWARD SEXUAL DEVIANCY

Philosophically, a sex offense is any act that contravenes the sexual mores of the society in which it occurs. This contravention gives rise to feelings of fear and guilt among the members of that society. The fear often stems from ignorance caused by lack of information and from misconceptions that are an integral part of the particular culture.²² The guilt results from the fact that the tendency toward sexual deviation is latent in most of us. Many drives acted out by the sex offender are discernible in the majority of the population that copes with them only by repression and denial. As Karpman has stated, "Equally, there is something of the paraphiliac in every one of us and also something of the sexual psychopath."²³

Most people are able to control their socially unacceptable drives and to express their acceptable ones only under the appropriate circumstances. However, repression and denial are not always completely effective, and deviant urges are at times felt by all of us. These feelings are usually accompanied by guilt, for we have been taught that they are at most sinful and at least abnor-

dren present a different problem. But the expert testimony was not that the typical small child would be injured by witnessing an isolated act of exposure on the part of a stranger.

20. Interview, note 4 *supra*.

21. J. MOHR, R. TURNER, & M. JERRY, PEDOPHILIA AND EXHIBITIONISM 121 (1964).

22. For this author's discussion of the Judeo-Christian tradition as it encourages this sex-negative attitude, see Law Note, *The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer be Denied*, 12 SAN DIEGO L. REV. 799, 800-08 (1975).

23. Karpman, *The Sexual Psychopath*, 42 J. CRIM. L.C. & P.S. 184, 189 (1951). A paraphiliac is a person who displays a preference for unusual sexual practices.

mal. Individuals who are apprehended while manifesting these desires anger and frighten us by vividly calling forth the memory of our own urges—a reaction necessitating even further suppression. Therefore, we create legal and social sanctions against this disturbing behavior in order to reinforce our own unconscious defense mechanisms.²⁴

[P]rohibited acts generate the greatest anxiety in those individuals who themselves have strong unconscious desires to commit similar or related acts and who have suppressed or repressed them. These actions of others threaten our ego defenses. . . .

Since the unconscious tendencies toward sexual deviations are so general, even individual sexual offenses of little moment call forth a punitive public reaction²⁵

In order to substitute this reaction for one based on a rational approach to sexual behavior, a demythifying of sex offenders is necessary. Mathis has identified six common and widely accepted myths about exhibitionists that are the bases of many of these irrational responses.²⁶ These myths are:

1. *The exhibitionist is oversexed.* According to Dr. Mathis, the converse is nearer the truth when frequency of intercourse, number of sexual partners, and age at first intercourse are considered.

2. *The exhibitionist is a dangerous criminal.* One of the exhibitionist's major psychological problems is that he cannot display aggression or hostility. "Exhibiting his penis to a strange female is about as feebly aggressive as he wishes to become!"²⁷

3. *The exhibitionist is inviting sexual intercourse.* In truth, exhibiting is a disavowal of intercourse, for even when a woman reacts with pleasure and invites the man into her home, the exhibitionist leaves the scene quickly without speaking.

4. *The exhibitionist is some type of homosexual.* The occurrence of both homosexuality and exhibitionism in one man is so rare that experts find the combination unimportant in researching sexual deviation.

5. *The exhibitionist can control his behavior with will power.*

24. See H. WEIHOFEN, *THE URGE TO PUNISH* 28 (1957):

There is also likely to be an unconscious motivation at work on those who punish the sex offender. Ironically, while the sexual impulse is often less strong in the sex offender than we suppose, it is much stronger in the rest of us. The urge to punish sex offenders is strong because we know how strong the sexual impulse is in ourselves; consciously or unconsciously we fear that we might do what the sex offender has done. This disturbing thought we exorcise by publicly repudiating the wicked 'wretch and piously calling for his punishment.

25. M. GUTTMACHER, *SEX OFFENSES* 15 (1951).

26. Mathis, *The Exhibitionist*, *MEDICAL ASPECTS OF HUMAN SEXUALITY*, June 1969, at 89, 97.

27. *Id.*

"[T]he exhibiting is not under conscious control and does not represent a willful act. At the moment of impulse, no other thought enters the man's mind" ²⁸

6. *The exhibitionist will progress to more serious sex offenses.* Only extremely rarely do exhibitionists commit more serious offenses. In fact, with the onset of age, even the compulsion to exhibit is reduced.

The belief that exhibitionists generally progress to greater crimes is particularly devastating to any attempt to treat these men as emotionally disturbed rather than as criminal. However, the overwhelming consensus among experts is that "[t]he individual who has found a method for releasing his neurotic tension [by exhibiting] has adopted this way of acting out his intrapsychic conflicts because it best meets his unconscious needs. He is conditioned to it and he is very unlikely to seek other methods to accomplish this end." ²⁹

The California Supreme Court has taken note of and denied this popular misconception that exhibitionists progress to greater crimes. In *In re Lynch*,³⁰ that court stated: "At the outset we may put aside the Attorney General's suggestion that 'in quite a number of such offenders the exhibitionism is only a facet of sexual problems which may manifest themselves in more aggressive acts.' This risk appears to be mere fantasy." ³¹

THE LAW'S APPROACH TO EXHIBITIONISM

Despite the enlightened attitude of the *Lynch* opinion, the legal community for the most part has not accepted the scientific community's understanding of sex offenders. In the United States irrational responses to variant conduct are reflected in laws treating similarly all proscribed sexual activity—whether consensual or nonconsensual, violent or nonviolent. As the American Bar Foundation has stated, "[a] major function of any law is to define clearly that class of persons to which the law applies. In this respect the sex deviate laws have failed." ³² With this area of con-

28. *Id.*

29. Whitehorn, *Sex Behavior and Sex Attitudes in Relation to Emotional Health*, 7 STAN. MED. BULL. 45, 47 (1949).

30. 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

31. *Id.* at 433, 503 P.2d at 936, 105 Cal. Rptr. at 232.

32. AMERICAN BAR FOUNDATION, *THE MENTALLY DISABLED AND THE LAW* 350 (S. Brakel & R. Rock eds. rev. ed. 1971).

duct, definition is especially important, for a vast difference exists between the motives behind and the consequences of a rape as compared to an indecent exposure. In reality "[t]here is as much difference between the average exhibitionist and the average rapist as there is between the shoplifter and the safecracker."³³

Indecent exposure remains one of the most perplexing offenses in legal history. Although crime can usually be attributed to such motives as "greed, envy, revenge, anger, and lust,"³⁴ exposing one's genitals neither results in financial or any other gain, nor punishes a person who has directly wronged the perpetrator. If lust is the motive, it is an unusual, passive sort of lust that satisfies itself without any attempt being made to touch or even to come near the victim.

At early common law, exhibitionism was considered criminal; public lewdness and lascivious behavior were misdemeanors, punishable by both fine and imprisonment.³⁵ Contemporary, supposedly enlightened approaches to exhibitionism display a continuing emphasis on punishment to the exclusion of rehabilitation. The Model Penal Code treats indecent exposure as a misdemeanor punishable by a fine of up to \$1,000 and/or a maximum one-year's imprisonment.³⁶ The drafters' Comment to the relevant sections reveals that they shared the widespread misconceptions about exhibitionists. They state:

The special case of genital exposure for sexual gratification is punishable more severely than ordinary open lewdness, since the behavior amounts to . . . threatening sexual aggression. For the same reason this offense is placed in the article of the Code dealing with other types of sexual aggression, whereas open lewdness is included in the article that encompasses obscenity and prostitution.³⁷

The National Commission on Reform of Federal Criminal Laws denominates indecent exposure "a kind of public nuisance"³⁸ and includes it with class *A* misdemeanors, which are punishable by a

33. M. GUTTMACHER & H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 111 (1952). See letter from James Mathis, M.D., to Marilyn Riley (Oct. 8, 1976) (on file with the author):

[B]y far the vast majority of sexual offenders are relatively harmless, and in view of the fact that they are unable to control their behavior, punishment seems archaic and cruel. This is especially true since I think we have shown fairly well that a good response can be obtained by certain types of treatment.

34. J. MACDONALD, *supra* note 1, at 3.

35. 4 W. BLACKSTONE, *COMMENTARIES* *64.

36. MODEL PENAL CODE §§ 6.03, 6.08 (Proposed Official Draft 1962).

37. *Id.* § 213.4, Comment (Tent. Draft No. 13, 1961). Section 213.4 reads: "A person commits a misdemeanor if, for purposes of sexual stimulation or gratification, he exposes his genitals under circumstances in which he knows he is likely to be observed by others who would be affronted or alarmed."

38. NATIONAL COMM'N ON REFORM OF FED. CRIM. LAWS, *STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE* (Title 18, United States Code), Comment to § 1853 (1970).

one-year maximum term of imprisonment and/or a fine of up to \$1,000.³⁹ Although in the abstract these penalties are not harsh, they become so when applied to men whose nonaggressive crime is the result of a mental disorder.⁴⁰

California Statutes and Cases

In California no statute proscribed indecent exposure until the enactment of the 1872 Penal Code. At that time the legislature declared the offense a misdemeanor, and the maximum penalty was imprisonment in the county jail for not more than six months or a fine not exceeding fifty dollars or both.⁴¹ This statute, now California Penal Code section 314, remains in force today, except that the maximum fine has been raised to five hundred dollars.

In relevant part the statute reads:

Every person who willfully and lewdly,

1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby . . . is guilty of a misdemeanor. Upon the second and each subsequent conviction under . . . this section, . . . every person so convicted is guilty of a felony, and is punishable by imprisonment in state prison.

Until 1972 conviction under the recidivist provision of section 314 could have resulted in life imprisonment, for the sentence prescribed was "not less than one year" in prison.⁴² Recognizing that this provision inflicted a penalty so disproportionate to the crime as to be cruel or unusual, the California Supreme Court, in *In re Lynch*, held it violative of the California Constitution.⁴³ A 1976 amendment deleted the offending words from section 314.⁴⁴ Conviction under the recidivist provision now results in imprison-

39. *Id.* §§ 3204, 3301(1)(C).

40. One of the mistakes made in dealing with these men after they come in contact with legal agencies is the conventional punitive reaction, which insists on long sentences under repressive conditions. In all likelihood, the best protection for society would be some form of treatment rather than severe punishment. The punitive treatment given sex offenders is ineffective in the case of the compulsive offender, and excessive for those whose behavior is linked to processes only indirectly sexual in nature. Furthermore, punitive and anxiety-ridden responses of society reduce the amount of research activity needed to determine the most successful forms of treatment and prevention.

SIECUS, *SEXUALITY AND MAN* 88-89 (1970).

41. CAL. PENAL CODE § 314 (West Cum. Supp. 1978).

42. CAL. PENAL CODE § 314 (West 1975) (amended 1976).

43. 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

44. Ch. 1139, § 98, 1976 Cal. Stats. 5089.

ment for not more than three years.⁴⁵

No California case directly construes "private parts" as used in this section, but the term probably denotes only primary genitalia. This inference can be drawn from the use of the disjunctive in another Penal Code section dealing with public exposure of the body: Section 318.6, authorizing local regulation of live exhibitions, refers to "exposure of the private parts *or* buttocks of any participant *or* the breasts of any female participant."⁴⁶ Thus by limiting its wording to "private parts," the California Legislature apparently intended to exclude secondary sexual organs from the statute dealing with indecent exposure. Moreover, convictions under section 314 have uniformly concerned exhibition of the penis.⁴⁷

Much of the recent litigation involving section 314 has dealt with defining *public place* and *lewd exposure*. In *In re Smith*,⁴⁸ the California Supreme Court established that the concept of public place includes something more than *any* area to which people might have access. For example, an isolated beach, though used by a few individuals, is not a public place for the purposes of section 314.⁴⁹

The *Smith* court also defined the criterion for lewdness. For exposure to be lewd, the conduct must be sexually motivated—that is, the defendant must specifically intend to direct attention to his genitals for sexual purposes, arousal, gratification, or affront.⁵⁰ In this context lewd is synonymous with "lustful, lascivious, unchaste, wanton, and loose in morals and conduct."⁵¹

Because section 314 is worded in the conjunctive, the separate mental elements of lewdness and willfulness must be proved to establish that the accompanying act constitutes indecent exposure. The *Smith* court interpreted "willfully" as requiring "simply

45. CAL. PENAL CODE § 18 (West Cum. Supp. 1978).

46. *Id.* § 318.6 (West 1970) (emphasis added).

47. *E.g.*, the cases discussed in this section and *People v. Succop*, 67 Cal. 2d 785, 433 P.2d 473, 63 Cal. Rptr. 569 (1967); *People v. Merriam*, 66 Cal. 2d 390, 426 P.2d 161, 58 Cal. Rptr. 1 (1967); *People v. Sanchez*, 239 Cal. App. 2d 51, 48 Cal. Rptr. 424 (1965); *People v. Williams*, 183 Cal. App. 2d 689, 7 Cal. Rptr. 56 (1960); *People v. Evans*, 138 Cal. App. 2d 849, 292 P.2d 570 (1956).

48. 7 Cal. 3d 362, 497 P.2d 807, 102 Cal. Rptr. 335 (1972).

49. *Id.* at 366, 497 P.2d at 810, 102 Cal. Rptr. at 338.

50. *Id.* The California Supreme Court's most recent definition of *lewd* is found in *Pryor v. Municipal Court*, No. L.A. 30901 (Cal. Sup. Ct. Sept. 10, 1979). In that case, which concerned a prosecution under CAL. PENAL CODE § 647(a) (West Cum. Supp. 1979), the court cited *Smith* as defining the "reach of the law." The court held that to be lewd, conduct must involve "the touching of the genitals, buttocks, or female breast for purposes of sexual arousal, gratification, annoyance or offense, [if the actor] knows or should know the presence of persons who may be offended by the conduct."

51. *In re Smith*, 7 Cal. 3d at 365, 497 P.2d at 809, 102 Cal. Rptr. at 337.

a purpose or willingness to commit the act.”⁵² Thus the court’s reasoning leads to the conclusion that even if others are offended or annoyed by an individual’s allegedly lewd conduct, he will not be guilty of indecent exposure if he did not intend to offend or annoy.⁵³

Registration of Sex Offenders

The state has seen fit to legislate a penalty in addition to possible imprisonment and/or fine for the commission of indecent exposure. The most devastating effect of a conviction under section 314 is the punitive requirement of mandatory registration as a sex offender under California Penal Code section 290.⁵⁴ This section provides that certain offenders must register with the police chief or sheriff of any city or county where they intend to reside for more than thirty days. In addition, every time such an offender changes his address, within ten days after his move he must inform the law enforcement agency with jurisdiction over his former residence of his new address.

These offenders include all those convicted of committing or attempting to commit specified offenses in any state since July 1, 1944. The registration documents include the person’s photograph, fingerprints, and a written, signed statement, giving *any* information required by the California Department of Justice. These data are filed with the Department, which sends them to the local law enforcement agency having jurisdiction over the person’s current place of residence. These files are open to all “regularly employed peace or other law enforcement” officers. Failure to comply with section 290 is a misdemeanor.

Other registrable offenses under the California Penal Code are rape,⁵⁵ seduction for purposes of prostitution,⁵⁶ incest,⁵⁷ coerced

52. *Id.* at 364, 497 P.2d at 809, 102 Cal. Rptr. at 337.

53. See Comment, *California Penal Code Section 314(1): Nudeness or Lewdness?*, 24 HASTINGS L.J. 1327, 1332 (1973). This conclusion is supported by the recent California Supreme Court decision in *Pryor v. Municipal Court*, No. L.A. 30901 (Cal. Sup. Ct. Sept. 10, 1979). The *Pryor* court, in upholding the constitutionality of CAL. PENAL CODE § 647(a) (West Cum. Supp. 1979) regarding public solicitation of sexual acts, made knowledge of the presence of people who may be offended an integral part of the unlawful conduct.

54. CAL. PENAL CODE § 290 (West Cum. Supp. 1978).

55. *Id.* § 261.

56. *Id.* § 266.

57. *Id.* § 285.

sodomy,⁵⁸ and coerced oral copulation.⁵⁹

The impetus behind this registration statute was the legislative belief that people who commit any of the enumerated crimes have a tendency to continue similar antisocial behavior. Therefore, they should be subject to continuous police surveillance, and whenever any sex offense is committed near their homes, they will probably be investigated.⁶⁰ Thus, "[a]lthough the stigma of a short jail sentence should eventually fade, the ignominious badge carried by the convicted sex offender can remain for a lifetime."⁶¹

The California Supreme Court has noted the severity of the registration sanction and has overturned some section 314 convictions on the grounds that the legislature could not have rationally believed that the particular individuals involved required constant police surveillance in order to prevent them from committing future sex offenses.⁶²

However, registration requirements in general have probably been outdated by the availability of computerized information retrieval systems that require only a person's name, date of birth, and social security number in order to produce her or his criminal record. Moreover, contrary to legislative expectations,⁶³ registra-

58. *Id.* § 286.

59. *Id.* § 288a.

60. See *In re Birch*, 10 Cal. 3d 314, 321, 515 P.2d 12, 17, 110 Cal. Rptr. 212, 217 (1973); *Barrows v. Municipal Court*, 1 Cal. 3d 821, 825-26, 464 P.2d 483, 486, 83 Cal. Rptr. 819, 821-22 (1970).

The fundamental legislative purpose underlying section 290 is to assure persons convicted of such a crime as molestation of children shall be readily available for police surveillance at all times. The Legislature has deemed such persons likely to commit similar offenses in the future and upon this basis the registration is required.

People v. Mills, 81 Cal. App. 3d 171, 176, 146 Cal. Rptr. 411, 414 (1978).

61. *In re Birch*, 10 Cal. 3d 314, 321-22, 515 P.2d 12, 17, 110 Cal. Rptr. 212, 217 (1973). For a discussion of registration as cruel and unusual punishment, see Comment, *Sex Offender Registration for Section 647 Disorderly Conduct Convictions is Cruel and Unusual Punishment*, 13 SAN DIEGO L. REV. 391 (1975). A fifth amendment attack on mandatory registration as self-incrimination is also possible. See *Haynes v. United States*, 390 U.S. 85 (1968); *Marchetti v. United States*, 390 U.S. 39 (1968); *United States v. Kahriger*, 345 U.S. 22, 36 (1953) (Black, J., dissenting).

62. *In re Birch*, 10 Cal. 3d 314, 515 P.2d 12, 110 Cal. Rptr. 212 (1973); *In re Smith*, 7 Cal. 3d 362, 497 P.2d 807, 102 Cal. Rptr. 335 (1972); *Barrows v. Municipal Court*, 1 Cal. 3d 821, 464 P.2d 483, 83 Cal. Rptr. 819 (1970).

CAL. PENAL CODE § 1203.4 (West Cum. Supp. 1978) provides a procedure by which a person who has fulfilled the conditions of his probation or who has been discharged from probation may be freed under court order from all penalties and disabilities of his conviction, including the registration requirement. *Id.* § 4852.01 sets forth a means by which a person who has been released from prison may apply for a certificate of rehabilitation. This certificate also does away with the registration requirement. *Barrows v. Municipal Court*, 1 Cal. 3d 821, 825 & n.6, 464 P.2d 483, 485-86, 486 n.6, 83 Cal. Rptr. 819, 821-22, 822 n.6. (1970).

63. See *People v. Mills*, 81 Cal. App. 3d 171, 176, 146 Cal. Rptr. 411, 414 (1978);

tion of sex offenders does not necessarily promote public safety, for law enforcement agencies have been taxed by attempts to keep track of the vast number of registrants. In order to deal with this administrative burden, law enforcement agencies are diverting resources from their more important activities of preventing and detecting serious offenses.⁶⁴ Even if registration were a valid law-enforcement tool, "[r]equiring offenders who are neither pedophiles nor disposed to using force to register impairs the effectiveness of registration as an aid to law enforcement by adding thousands of superfluous names to the rolls."⁶⁵

The Mentally Disordered Sex Offender Statute

Another penalty to which exhibitionists are subject is being declared a mentally disordered sex offender (MDSO) under California Welfare and Institutions Code section 6300.⁶⁶ If a man is so adjudged, he may, if he is amenable to treatment, be committed to a state hospital or other appropriate facility.⁶⁷

The Act's obvious purpose is to protect the public from the violent propensities of certain mentally disordered sex offenders who are convicted of crime, by confining them during such period as they continue to be a danger to society, and by care and treatment calculated to eliminate their an-

Comment, *Sex Offender Registration for Section 647 Disorderly Conduct Convictions is Cruel and Unusual Punishment*, 13 SAN DIEGO L. REV. 391, 397 (1975).

64. See Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV. 643, 738 (1966).

65. *Id.* at 794.

66. "As used in this article, mentally disordered sex offender means any person who by reason of mental defect, disease, or disorder, is predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others." CAL. WELF. & INST. CODE § 6300 (West 1972).

67. *Id.* § 6316 (West Cum. Supp. 1978). MDSO's who are found amenable to treatment are confined in a state hospital or other mental health facility; those who are not amenable to treatment are returned to the criminal court for processing within regular channels. *Id.* Under a determinate sentencing law that became effective on July 1, 1977, the initial commitment term is designated as the maximum term that may be imposed for the particular crime in question. *Id.* § 6316.1. Because of this differentiation between those amenable and those not amenable to treatment, the court of appeal has declared § 6316.1 unconstitutional as a denial of equal protection. *People v. Saffell*, 87 Cal. App. 3d 157, 150 Cal. Rptr. 804 (1978). A petition for hearing has been granted by the California Supreme Court. 4 Crim. 8900 (Sup. Ct. Cal. Jan. 29, 1979). However, another California Appellate Court has upheld § 6316 against the contention that the automatic imposition of the upper term for the base offense violates equal protection. *People v. Gonzales*, 91 Cal. App. 3d 853, 864-68, 154 Cal. Rptr. 442, 449-50 (1979). See also *In re Moye*, 22 Cal. 3d 457, 466, 584 P.2d 1097, 1103-04, 149 Cal. Rptr. 491, 497-98 (1978).

tisocial compulsions.⁶⁸

Certification as an MDSO must be based on a conviction of a sex offense for which registration is required under Penal Code section 290 or by clear proof that the offense was committed primarily for purposes of sexual arousal or gratification.⁶⁹

As a matter of policy, exhibitionists are usually found not to meet the statutory criterion of dangerousness.⁷⁰ However, because as a matter of law exhibitionists come within the purview of the MDSO statute, considering this section as a potential penalty is necessary.

In the California appellate court case *People v. Stoddard*,⁷¹ the defendant pleaded guilty to a misdemeanor charge of indecent exposure and was certified for determination of sexual psychopathy. The court took this action under Welfare and Institutions Code section 5500,⁷² the predecessor to section 6300. The earlier version defined a sexual psychopath as a person afflicted with certain mental conditions to the extent that he is predisposed to committing sexual offenses "in a degree constituting him a menace to the health or safety of others." The question before the *Stoddard* court was whether a "threat of psychological trauma to others, without likelihood of physical injury, constitutes such a menace."⁷³ The defendant contended that because no likelihood of physical contact existed between him and his victims, he could not be considered a menace to their health or safety. Rejecting this argument, the court of appeal affirmed the order of commitment, holding that a threat of probable psychological trauma is as much a menace as is a threat of probable physical injury.⁷⁴

However, this decision may no longer be relevant, for the *Stoddard* court was considering a statute whose standards were different from the ones now governing the finding that a person is an MDSO. The disjunctive "health or safety" of section 5500 has been replaced by the conjunctive "health and safety," thereby indicating that the legislature intended to make more stringent the test for ascertaining an MDSO. To be found an MDSO, a person must now impair either the mental or the physical health of his victims *and* be an actual danger to their safety. The momentary alarm that the victims of an indecent exposure usually experi-

68. *People v. Oglesby*, 67 Cal. App. 3d 34, 38, 135 Cal. Rptr. 640, 642 (1977).

69. CAL. WELF. & INST. CODE § 6302 (West Cum. Supp. 1978). See *People v. Barnes*, 84 Cal. App. 3d 745, 148 Cal. Rptr. 824 (1978).

70. Interview with Kay Di Francesca, Ph.D., County Mental Health Department, in San Diego, California (Aug. 3, 1978).

71. 227 Cal. App. 2d 40, 38 Cal. Rptr. 407 (1964).

72. Sex Psychopathy Act, ch. 447, § 1, 1939 Cal. Stats. 1783 (repealed 1963).

73. 227 Cal. App. 2d 40, 41, 38 Cal. Rptr. 407, 407 (1964).

74. *Id.* at 42, 38 Cal. Rptr. at 408.

ence⁷⁵ certainly is not such an impairment of health that warrants bringing into play the drastic remedy of section 6300. Moreover, as discussed above, the exhibitionist is not aggressive; he does not physically contact his victims. Therefore, no true danger to their safety exists.

The statute's present language evinces a further legislative intent to make the MDSO test more stringent. The former wording demanded that the individual be only a menace—that he make a “show of intent ‘to inflict an evil or injury upon another.’”⁷⁶ In contrast, the statute now states that the person must actually be “dangerous to the health and safety of others.”⁷⁷ *Dangerous* as used in section 6300 has not been defined by the California courts. The only statutory definition of the word appears in the Government Code, which states that “dangerousness” denotes that which “creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury.”⁷⁸ Experts agree that any such risk to victims of an exhibitionist is insignificant rather than substantial.⁷⁹ However, in order to find a definition more relevant to an indecent exposure, consultation of other sources is necessary.

In *Millard v. Harris*,⁸⁰ the United States Court of Appeals, in construing a sexual psychopath act⁸¹ which used dangerousness as a standard, found that an exhibitionist does not meet the statutory criteria. The court stated:

The record contains no allegations that appellant has ever committed a violent sexual offense, and the testifying psychiatrists agreed that because of “the lack of aggressiveness, inferiority, timidity and heterosexual immaturity of the [typical] exhibitionist,” such individuals are markedly less likely to commit violent sexual crimes than other types of sexual offenders.⁸²

The court's reasoning assumes that the mere fact that ex-

75. See note 19 and text accompanying notes 17-20 *supra*.

76. *People v. Stoddard*, 227 Cal. App. 2d 40, 41, 38 Cal. Rptr. 407, 408 (quoting BLACK'S LAW DICTIONARY 1137 (3d ed. rev. 1957)).

77. CAL. WELF. & INST. CODE § 6300 (West 1972).

78. CAL. GOV'T CODE § 830(a) (West 1966).

79. See note 19 and text accompanying notes 17-20 *supra*.

80. 406 F.2d 964 (D.C. Cir. 1968).

81. D.C. CODE § 3503(1) (1967):

The term “sexual psychopath” means a person, not insane, who by a course of repeated misconduct in sexual matters has evidenced such lack of power to control his sexual impulses as to be dangerous to other persons because he is likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of his desire.

82. 406 F.2d 964, 974 (D.C. Cir. 1968).

tremely sensitive women and children are among an exhibitionist's potential victims is not enough to justify the ultimate conclusion of likely dangerousness. The requirement for commitment for dangerousness is not the possibility of serious harm, but rather, its likelihood. The *Millard* court stated that the defendant was not likely to engage in sexual misconduct other than exhibitionism. Although the defendant did not establish the nonexistence of potential viewers who might be psychologically harmed by indecent exposure, the court found that the law could not protect extremely sensitive people from all sources of possible distress and thus reversed the trial court's finding that the defendant was a dangerous sexual psychopath.⁸³

Professor Brooks' four-part standard for defining dangerousness is relevant to categorizing exhibitionists.⁸⁴ First, Brooks considers the magnitude of the harm. As discussed above, with indecent exposure the possibility of more than temporary disconcertion on the victim's part is not great.

The second part of the test is the probability that the harm will occur. The type of exhibitionism dealt with in this article does not involve physical contact of any kind; in fact, most exhibitionists are nonaggressive men who do not commit violent crimes. Moreover, as discussed above, viewing an indecent exposure causes emotional trauma in only a few victims. Therefore, exhibitionism rarely results in any harm, physical or emotional.

Professor Brooks' third element for determining dangerousness is the frequency of harm's occurrence. (Here Brooks is using the word *harm* to mean the event in question.) Although untreated exhibitionists often recidivate, the cumulated incidents in any one offender's life are not great.⁸⁵ Moreover, frequency means the number of times that the same victim will be subjected to the conduct—an issue especially important in judging harm to children.⁸⁶ Because of his commonly random choice of victims, for an exhibitionist to expose himself to the same person more than once is unusual.⁸⁷

Brooks' fourth criterion is the imminence of the danger. "The object of such a provision is to prevent depriving persons of their liberty because of remote or suppositious harm."⁸⁸ This type of questionable harm is exactly that which is involved with exhibi-

83. *Id.* at 977.

84. A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 680-82 (1974).

85. Interview, note 4 *supra*.

86. *Id.*

87. J. MACDONALD, *supra* note 1, at 73.

88. A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 682 (1974).

tionists. If, as Brooks suggests, these four elements are considered together in determining dangerousness, the exhibitionist clearly does not meet the standard.

Important to a final determination of whether a person convicted under section 314 can be considered dangerous are the words of the statute itself. The response it requires from victims is simply annoyance or offense. Although experiencing either one of these emotions is not pleasant, a suggestion that they constitute a danger to a person's health and safety is at best tenuous. As the California Supreme Court has stated:

[A]lthough indecent exposure is not a "victimless" crime, any harm it may cause appears to be minimal at most . . . [T]he nonviolence of the conduct ensures there is no danger of physical injury to the person who witnesses the exposure. Nor is there any convincing evidence that the person is likely to suffer either long-term or significant psychological damage . . . Indeed, the statute itself defines the offense as exposure in public or in any place where there are persons present who may merely be "offended or annoyed" thereby.⁸⁹

In light of the above discussion, the inadequacy of legal responses to exhibitionism is manifest. Improper classification subjects the perpetrators to sanctions, both legal and social, that have no rational relation to the nature of the act. Furthermore, current treatment neither deters the initial offense nor prevents recurrence. The rate of recidivism among offenders processed through the penal system is high.⁹⁰ The compulsively motivated, nondangerous, but nevertheless antisocial nature of this behavior renders obvious the conclusion that the traditional concept of the primary function of the penal law—restraining and punishing individuals who engage in wrongful conduct—is inapplicable.

Society must realize that the problem of indecent exposure is one that can be dealt with best from a psycho-legal perspective.⁹¹ The solution to the problem does not lie with stricter laws and harsher punishments but rather with treatment directed toward healing the exhibitionist and education aimed at changing the public's attitude toward sex offenders. "As long as every . . . exhibitionist . . . is considered a potential rapist and murderer, no

89. *In re Lynch*, 8 Cal. 3d 410, 431, 503 P.2d 921, 935, 105 Cal. Rptr. 217, 231 (1972) (citations omitted).

90. See authorities cited note 1 *supra*.

91. This term, as used by Caprio and Brenner, "applies to considerations of mental and emotional disorders and problems encountered in matters brought to the attention of the authorities or the courts." F. CAPRIO & D. BRENNER, *SEXUAL BEHAVIOR* 13 (1961).

rational criminal policy can emerge. Statutes providing for treatment centers and for training of more psychiatrists, psychologists and sociologists are the types of laws currently needed."⁹²

Some experts have made tentative attempts to influence through psychiatric considerations the law's approach to this offense. These attempts are based on the growing recognition that the high rate of recidivism among exhibitionists is a result of the compulsive nature of their conduct. Today few authorities would disagree with Karpman's statement that

[e]veryone of them [exhibitionists] comes out of prison as bad as he went in, if not worse, except in the comparatively few cases where the prison is equipped to offer psychotherapeutic treatment—and how many prisons are so equipped? The law which offers as an excuse for its attitude the protection of society fails to accomplish the very thing with which it professes to be most concerned; for society is *not* protected, except temporarily, so long as the offender carries within himself the same emotional reactions that were the cause of his arrest, and which, upon his release, will continue to operate precisely as they did before . . . From a psychiatric point of view, there is no more sense in sending him to prison for tuberculosis. In both cases the man is sick, and one is just as sick as the other.⁹³

Exhibitionists in a Penal Setting

According to Guttmacher, the atmosphere of a penal institution, with its emphasis on suppression, is totally inimical to psychiatric principles. He believes that any basic personality change necessary to achieving a cure for exhibitionism is impossible in a prison.⁹⁴ Frisbie, who conducted a study of 1,921 male sex offend-

92. Note, *Pedophilia, Exhibitionism, and Voyeurism: Legal Problems in the Deviant Society*, 4 GA. L. REV. 149, 159 (1969).

93. B. KARPMAN, *THE SEXUAL OFFENDER AND HIS OFFENSES* 465 (1954).

94. M. GUTTMACHER, *THE ROLE OF PSYCHIATRY IN LAW* 133 (1968).

The practical barriers to adequate treatment of sex offenders in a correctional institution were described in a statement presented to the subcommittee by Dr. David G. Schmidt, chief psychiatrist at San Quentin. Dr. Schmidt's firm position was that "prison is a poor place to treat sick patients." For a variety of reasons, he explained, the setting is inappropriate and largely counter-productive. Civilian personnel "may castigate these patients that have emotional problems, as nuts, and fruits, and sex fiends," and "one sadistic official often destroys the work of a dozen officers." Similarly, "the general prison population is much less accepting, much less tolerant of patients and men that are not well physically or mentally than are the general population. This puts more pressure on these offenders who are proverbially the ones that get into sexual difficulties because of pressure and rigidity, because of a sense of inferiority, prison generally makes this sense of inferiority worse, developes more insecurity feelings in the individual, segregation may be necessary." But "segregation alone without treatment is futile, fixates the aberrated even more." Nor is vocational or industrial therapy a realistic alternative: "Since these men often lack initiative, they lose out on hobby and craft activities and positions that are more desirable, such as office work, positions in industry with prison pay. They also come out on the tail-end often on recreation and other privileges"; "there is comparatively little

ers committed to California's Atascadero State Hospital, condemns also prison sentences imposed on offenders who have been treated and released from state facilities. She believes that such a sentence would be a "legal refutation of clinically determined readiness for release [and] would seem only to encourage bitterness and hostility or promote regression into irrevocable passivity and dependency."⁹⁵

However, Frisbie found in her Atascadero study that enforced group therapy creates a somewhat optimistic result for a majority of the men, among whom were rapists, pedophiles, voyeurs, transvestites, homosexuals, and exhibitionists.⁹⁶ During a five-year follow-up period, three-fourths had not reverted to sexually deviant conduct as measured by a new conviction.⁹⁷ Frisbie declared the program a conservative success but emphasized that a great deal depends on the degree of supervision given by probation officers in the first months following release.⁹⁸

The reason that Frisbie was able to find the Atascadero program only a "conservative success" is that exhibitionists do not respond well to therapy in a group including other types of sex offenders.⁹⁹ As the California Supreme Court noted in *In re Lynch*,¹⁰⁰ other sex offenders tend to look down on exhibitionists. Therefore, placing the latter in a nonhomogeneous group is an "ordeal [that] confirms or even increases [their] prior feelings of insecurity and inadequacy."¹⁰¹

The only kind of therapy that is truly effective for exhibitionists

work in the prison for psychotics and sex offenders that have large emotional or mental problems and they are often relegated to such idle tasks as yard sweeping . . . which lessens their chances for recovery and rehabilitation." To further compound these difficulties, "Unfortunately we have not had sufficient staff to give each offender more than approximately two hours of individual treatment or an hour and a half of individual and approximately 10 hours of group therapy *each year*." In a classic understatement, Dr. Schmidt acknowledged that 10 hours of group therapy and an hour and a half of individual therapy *per year* "is much less than a minimum treatment for these problems."

People v. Feagley, 14 Cal. 3d 338, 368 n.25, 535 P.2d 373, 393 n.25, 121 Cal. Rptr. 509, 529 n.25 (1975) (citations omitted).

95. Frisbie, *Treated Sex Offenders Who Reverted to Sexually Deviant Behavior*, FED. PROBATION, June 1965, at 52, 55.

96. *Id.* at 54.

97. *Id.* at 57.

98. Frisbie, *The Treated Sex Offender*, FED. PROBATION, March 1958, at 18, 24.

99. Interview, note 4 *supra*.

100. 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

101. *Id.* at 434, 503 P.2d at 937, 105 Cal. Rptr. at 233.

is group therapy, conducted with other exhibitionists completely outside an institutional setting. Witzig initiated such a program in Oregon during 1962, when he began accepting exhibitionists referred by the courts.¹⁰² Contrary to general expectations, he found these men to be conscientious patients who were regular in keeping their appointments and welcomed the chance for treatment in an open setting. All patients agreed, however, that they would not have sought counseling on their own and that the anxiety produced by possible imprisonment promoted the therapeutic process.¹⁰³ Of the twenty-five men Witzig dealt with over a two-and-one-half year period, only one exposed himself while under treatment. Significantly, this act occurred during an afternoon when the regular meeting had been cancelled.¹⁰⁴ The typical client attended twenty to thirty sessions before he was discharged, and by 1968, only two had exposed themselves again.¹⁰⁵ This figure is especially impressive because at least half the men in the study were known repeaters when they began therapy.¹⁰⁶

Mathis conducted the program showing the most optimistic results.¹⁰⁷ This program, which took place between 1965 and 1968, was based on three factors: mandatory attendance, common patient goals and symptoms, and female and male co-therapists.¹⁰⁸ The first factor was important because many patients prematurely terminate noncoerced therapy with "a firm conviction that 'it will never happen again.'"¹⁰⁹ Thus Mathis discovered, as had Witzig, that these men, while eager for help when it was offered, found pursuing counseling on their own initiative to be difficult.

Mathis found the second factor, common patient goals and symptoms, to be extremely important, for exhibitionists tend at the start of therapy to deny they expose themselves. Because most of the members of the group had experienced this same period of denial, they were able to recognize it as a defense mechanism and to lead the individual away from his need to deny.¹¹⁰

The reason for having both female and male therapists was to

102. Witzig, *The Group Treatment of Male Exhibitionists*, 125 AM. J. PSYCH. 179 (1968).

103. *Id.*

104. *Id.* at 183.

105. *Id.* at 184-85.

106. *Id.* at 184. Of all sex offenders, untreated exhibitionists have the highest rate of recidivism. *Id.*; J. MOHR, R. TURNER, & M. JERRY, PEDOPHILIA AND EXHIBITIONISM 155 (1950).

107. Mathis & Collins, *Progressive Phases in the Group Therapy of Exhibitionists*, 20 INT'L J. GROUP PSYCHOTHERAPY 163 (1970).

108. Mathis & Collins, *Mandatory Group Therapy for Exhibitionists*, 126 AM. J. PSYCH. 1162 (1970).

109. *Id.* at 1163.

110. Interview, note 4 *supra*.

simulate a family setting and to provide the clients with the opportunity to relate well with a woman. In order to enhance this process, the female therapist remained somewhat passive, understanding, and kind, and she never adopted a seductive attitude. She allowed the patients to practice being "masculine" without the threat of rejection or reprisal.¹¹¹

Dr. Mathis reports that at least six months' attendance is necessary to effect a cure¹¹² and that of those who continued in therapy for this length of time, none had been rearrested by 1970.¹¹³

A PROPOSAL FOR TREATING EXHIBITIONISTS

Certainly filling the prisons with persons whose transgressions are largely, if not wholly, beyond their control is an unfortunate "solution" for any social ill.¹¹⁴

Although the medical profession recognizes exhibitionism as a disease, courts continue to apply criminal sanctions to such conduct. An enormous cost is involved in processing minor offenders through the criminal justice system, in institutionalizing them, and after their release in keeping lifelong records of their names and addresses. Nevertheless, despite the vast amount of time and money spent on dealing with exhibitionists, the system has had little success in either rehabilitation or deterrence. Institutional therapy, if it is available, is not truly effective, and the threat of rearrest does not influence the compulsive nature of indecent exposure. Moreover, traditional methods may only exacerbate the problem, for punishing the exhibitionist simply confirms his low self-image. The additional stigma of having to register as a sex offender makes leading a conventional, productive existence even more unlikely.

At this time the only realistic, nonpunitive approach to the problem is to treat the exhibitionist before his disorder becomes public knowledge. This alternative involves an interruption in the routine criminal process and referral of the defendant to community-based treatment in group therapy. Such a process is called

111. Mathis & Collins, *Mandatory Group Therapy for Exhibitionists*, 126 AM. J. PSYCH. 1162, 1164 (1970). See Veraa, *Probation Officer Treatment for Exhibitionists*, FED. PROBATION, March 1976, at 54, 54, 57-58.

112. Mathis & Collins, *Mandatory Group Therapy for Exhibitionists*, 126 AM. J. PSYCH. 1162, 1162 (1970).

113. *Id.* at 1165-66.

114. *Watson v. United States*, 439 F.2d 442, 466 (D.C. Cir. 1970).

diversion and usually refers to some form of intervention in judicial procedures with the defendant being subject to noncriminal disposition.¹¹⁵ Diversion programs have two important goals: early identification and referral of defendants who can be rehabilitated and a quick and inexpensive disposition of cases that are more efficiently handled outside the criminal system.¹¹⁶

Diversion is humane, for it deals directly with the offender's underlying medical and social problems. Also with the prosecution stayed and dismissal of charges possible, the defendant may avoid the stigma and adverse consequences of a criminal conviction and the expenses associated with prosecution. Finally, statutory diversion helps ensure that disparities in disposition of exhibitionists are lessened.

Thus the potential of diversion programs is great, for they provide a method of protecting the defendant from the overly punitive responses that society usually manifests toward sex offenders. Diversion is in a sense de facto decriminalization. The California Supreme Court, commenting on the drug diversion statute, stated that

diversion may also be viewed as a specialized form of probation, available to a different class of defendants but sharing many similarities with general probation and commitment for addiction. Like those programs, diversion is intended to offer a second chance to offenders who are minimally involved in a crime and maximally motivated to reform, and the decision to divert is predicated on an in-depth appraisal of the background and personality of the particular individual before the court.¹¹⁷

Because of the importance of not allowing the stigma of sex offender to be attached to an exhibitionist, treatment should be carried out with a minimum of publicity. Under the proposed diversion program, as soon as a man is arrested for indecent exposure either as a first offender or as a recidivist, he is informed of the possibility of diversion into mandatory therapy. Of course, if he wishes to contest the question of his guilt, he remains in the regular criminal justice system.¹¹⁸ If he is then found guilty and if

115. Note, *Addict Diversion: An Alternative Approach for the Criminal Justice System*, 60 GEO. L.J. 667, 672 (1971). The federal narcotics diversion program, which became effective in 1966, is found at 28 U.S.C. §§ 2901-2906 (Supp. 1978). A similar diversion proceeding, currently employed in California, is found at CAL. PENAL CODE §§ 1001-1001.11 (West Cum. Supp. 1978).

116. Note, *Addict Diversion: An Alternative Approach for the Criminal Justice System*, 60 GEO. L.J. 667, 673, 675 (1971). See generally Jones, *Decriminalization of the Convicted: A Plea for More Effective Representation*, 13 SAN DIEGO L. REV. 804 (1976).

117. *People v. Superior Court*, 11 Cal. 3d 59, 66, 520 P.2d 405, 410, 113 Cal. Rptr. 21, 26 (1974).

118. See 28 U.S.C. §§ 2901-2906 (Supp. 1978); Collingwood, Douds, & Williams, *Juvenile Diversion: The Dallas Police Department Youth Services Program*, FED. PROBATION, June 1976, at 23.

he meets certain criteria, the better solution would be probation conditioned on attendance at therapy rather than jail or a fine. However, because this alternative is not available to narcotic addicts under the same circumstances,¹¹⁹ the legislature would probably not allow it in the case of an exhibitionist.

The authorities should make clear to the defendant that accepting diversion in no way constitutes a guilty plea. The defendant should be given a limited time, as mandated by statute, to make a decision concerning diversion. For example, Massachusetts allows five days in its drug program.¹²⁰ If feasible, the man should be released on minimal bail or on his personal recognizance during the time he is making his decision.

If the defendant accepts diversion, criminal proceedings are stayed, and he must waive his right to a speedy trial and agree to submit to a psychological examination.¹²¹ He then should be screened immediately by a group of experts to determine if he is the type of exhibitionist who is amenable to therapy. Perhaps the seventy-two hour standard of California Welfare and Institutions Code section 5150 could be applied in this situation.¹²² The question of the right to counsel at this screening cannot be answered without further clarification from the courts.¹²³ However, the defendant should be informed that no information obtained during the examination will be admissible as evidence against him in any subsequent proceeding. Participants in the screening might include the judge, a deputy district attorney, a given number of psychiatrists or psychologists (possibly three), the defendant, and any relatives he wants present. Using the data compiled by Mathis, Witzig, and other researchers and applying criteria as established by the legislature—for example, the lack of a previous conviction for a violent sex offense—these experts will be able to determine with great accuracy the men who are suitable for diversion. Because motivation is essential in effecting a cure for exhi-

119. *Morse v. Municipal Court*, 13 Cal. 3d 149, 529 P.2d 46, 118 Cal. Rptr. 14 (1974) (construing CAL. PENAL CODE § 1000.1 (West Cum. Supp. 1978)).

120. MASS. GEN. LAWS ANN. ch. 123, § 47 (West Supp. 1979). See 28 U.S.C. § 2902 (Supp. 1978) (not to exceed five days).

121. See CAL. PENAL CODE § 1000.1 (West Cum. Supp. 1978).

122. CAL. WELF. & INST. CODE § 5150 (West Cum. Supp. 1978).

123. See *Thornton v. Corcoran*, 407 F.2d 695 (D.C. Cir. 1969); *McGarty v. O'Brien*, 188 F.2d 151 (1st Cir.), cert. denied, 341 U.S. 928 (1951); *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965); *Lee v. Erie County Court*, 27 N.Y.2d 432, 267 N.E.2d 452, 318 N.Y.S.2d 705, cert. denied, 404 U.S. 823 (1971).

bitionism, attitudinal considerations are also important. The defendant's age, employment and service records, educational background, community and family ties, treatment history, and prior offenses should be taken into account when making a decision.

The experts' findings are then submitted to the presiding judge, who, after careful review of the report,¹²⁴ makes the final decision regarding diversion. A defendant found not amenable to treatment has a right to appeal this decision. In this situation an independent psychiatrist is appointed to examine the defendant and testify at a subsequent hearing.¹²⁵

The diversion program at no time requires the institutionalization of the exhibitionist. A man is allowed to carry on his life normally as long as he continues the necessary therapy. If he repeats the offense during the course of therapy, he receives no sanctions, for he has not yet learned to control his compulsion.¹²⁶ However, if he recidivates after having been declared in control of his compulsion, he should, if he wishes, again go through the entire process of examination and determination of status. This solution is rational if exhibitionism is considered a disease, for anyone can suffer a recurrence of an illness.

Researchers working with divertees have found that some amount of control and supervision is necessary for people undergoing treatment within the community.¹²⁷ Probably the most efficacious way of accomplishing this supervision is having the counselor report the men's attendance at group therapy to their probation officers. Cooperation and progress in treatment would, of course, be a specific condition of diversion. Absent cooperation, the man should stand trial as originally scheduled. However, as with a divertree's other antisocial behavior, the group leader should be allowed a great deal of discretion. Although limitations

124. See 28 U.S.C. § 2902 (Supp. 1978); CAL. PENAL CODE § 1000.2 (West Cum. Supp. 1978); MASS. GEN. LAWS ANN. ch. 123, § 47 (West Supp. 1979).

125. See MASS. GEN. LAWS ANN. ch. 123, § 47 (West Supp. 1979).

126. Under 29 U.S.C. § 2903(b) (Supp. 1978), if an addict taking part in a diversion program is found to have returned to using narcotics, the court, with the Surgeon General's recommendation, may either allow treatment to continue or resume criminal proceedings. Under CAL. PENAL CODE § 1000.3 (West Cum. Supp. 1978), the court also has the discretion to terminate diversion if the divertree is not performing satisfactorily or not benefitting from treatment or if the divertree is convicted of a misdemeanor that reflects a propensity for violence or if she or he commits a felony.

127. Klonsky, *Extended Supervision for Discharged Addict Parolees*, FED. PROBATION, March 1965, at 39; Vaillant, *A Twelve-Year Follow-Up of New York Narcotic Addicts*, 122 AM. J. PSYCH. 727 (1966); Vaillant & Rasor, *The Role of Compulsory Supervision in the Treatment of Addiction*, FED. PROBATION, June 1966, at 53.

are put upon the length of narcotics diversion,¹²⁸ establishing such a limitation for exhibitionists is not now desirable. However, with more experience in the area, experts will perhaps be able to predict how long treatment should continue.

An integral part of the program is an attempt to include the important women in the offender's life. These women should be encouraged to attend therapy so that they can be helped to understand the role they play in fostering exhibitionism. Moreover, these women often feel guilty—"that this was their fault and the men let them feel that way."¹²⁹ Therefore, they might also profit from counseling.

Upon successful completion of the diversion program, the man should have the original charges against him dismissed and the records pertaining to his arrest and attendance at group therapy sealed. He should be free to respond in the negative, regarding his exhibitionism, to any question concerning whether he has a criminal record or whether he has been arrested and diverted.¹³⁰

Of course this type of program would initially require a great deal of expenditure. Finding the money necessary for its instigation might be difficult: "The mentally ill offender is not an attractive patient, and he has few supporters fighting for his share of the budget dollar."¹³¹ However, the authorities who have worked with diversion therapy agree that from an economic standpoint it is feasible.¹³² It allows a productive man to continue functioning in society without bearing the stigma of being a sex offender. It guards against the possibility that if he is supporting a family, his dependents might have to receive welfare aid. Finally, it obviates maintaining the offender in the penal system. According to

128. 28 U.S.C. § 2903 (Supp. 1978) (not to exceed 36 months); CAL. PENAL CODE § 1000.2 (six months to two years). The six months of therapy recommended by Dr. Mathis corresponds with the jail sentence that may be given first-time offenders under § 314. However, if the therapy should have to continue beyond this period, no constitutional problems would arise even under the present legislation, for the period of coerced therapy is analogous to probation, which at present is three years for first-time offenders.

129. Interview with Kay Di Francesca, Ph.D., County Mental Health Department, in San Diego, California (Aug. 3, 1978).

130. See CAL. PENAL CODE §§ 1000.5, 1001.9 (West Cum. Supp. 1978).

131. A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 398 (1973).

132. Interview, note 4 *supra*; Frisbie, *Treated Sex Offenders Who Reverted to Sexually Deviant Behavior*, FED. PROBATION, June 1965, at 52, 57; Mathis & Collins, *Mandatory Group Therapy for Exhibitionists*, 126 AM. J. PSYCH. 1162, 1164 (1970); Witzig, *The Group Treatment of Male Exhibitionists*, 125 AM. J. PSYCH. 179, 184 (1968).

Witzig, "[a] continuing group therapy program for exhibitionists can easily and effectively be operated within a public mental health clinic with significant economic saving to the community as well as to the offender."¹³³

CONCLUSION

Because indecent exposure is, in general, not a progressively dangerous sexual offense, legislation that groups exhibitionists with rapists, child molesters, and other aggressive offenders should be examined with a view toward establishing more meaningful treatment for exhibitionists. Community-based group therapy programs should be instituted so that these offenders may continue their otherwise unremarkable lives, cured of their disorder. Sexual offenses evoke especially emotional reactions; therefore, correctional procedures should be based on what the problem actually is and not on what most of society fears it to be. H.L.A. Hart wrote that "[i]n a civilized [legal] system only those who *could have* kept the law should be punished . . . [T]he individual has a right not to be [punished] unless [she or] he could have avoided doing what [she or] he did."¹³⁴ If we accept this humane and rational standard of legal morality, we must recognize that the compulsive, nondangerous acts of a mentally disordered individual, although they may offend or annoy us, should not suffice to institutionalize that individual when alternative, effective treatment is feasible.

Exhibitionists do not acquire their disease through any morally blameworthy act; therefore, punishing them will not deter others from the same conduct, for the dominant symptom of the disease is the inability to abstain from indecent exposure. The disease causes an overpowering psychological drive that affects the man's entire personality; it is a compulsion that cannot be resisted without appropriate therapy. Also although isolation from the public will, for the period of incarceration, stop the exposures, it will not cure the disorder. Even if therapy is provided in the institution, the prognosis is not optimistic.

Perhaps the strongest argument for establishing a new method of treating exhibitionists is the fact that currently employed means have proved futile in reforming or deterring these men for

133. Witzig, *The Group Treatment of Male Exhibitionists*, 125 AM. J. PSYCH. 179, 184 (1968).

134. 1 H. HART, *THE MORALITY OF THE CRIMINAL LAW* 8 (1965).

any length of time. Thus a new system must be found that serves the goals of rehabilitating the offender and of protecting the public from future indecent exposures: The diversion program described in this article is such a system.

