VIDEO VOYEURISM, PRIVACY, AND THE INTERNET: EXPOSING PEEPING TOMS IN CYBERSPACE

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It's forbidden fruit. It allows people the luxury of looking up women's skirts without having to stand under stairwells all day. Guys always want what they can't have. That's just a guy thing.[1]

INTRODUCTION

Anyone surfing the World Wide Web[2] today is well aware that "this new marketplace of ideas"[3] is, in fact, a virtual and vibrant marketplace of pornography.[4] This unfortunate reality clearly has not escaped the attention of the United States Congress. It has

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1 *'Upskirt' Web Sites Operate Virtually Unpoliced*, CAPITAL TIMES (Madison, Wis.), Aug. 10, 1998, at 7A (quoting Skip Hambrook, a pornography distributor who sells voyeuristic videotapes on the Internet).

2 The World Wide Web "is a global hypertext system that runs on the Internet" and allows one to navigate "by clicking on hyperlinks (embedded links) that connect to other documents or graphic, audio or video resources." Joseph Kershenbaum, *E-Commerce Primer: A Concise Guide to the New Public Network*, E-COMMERCE L. REP., Sept. 1999, at 14.

3 *See* Reno v. ACLU, 521 U.S. 844, 885 (1997) (referring to the Internet as "this new marketplace of ideas").

The concept of a marketplace of ideas is not new. It "is perhaps the most powerful metaphor in the free speech tradition." RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 6 (1992). The marketplace metaphor "consistently dominates the Supreme Court's discussions of freedom of speech." C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 7 (1989). The metaphor is used frequently today, more than 75 years after it became a part of First Amendment jurisprudence with Supreme Court Justice Oliver Wendell Holmes, Jr.'s often-quoted admonition that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40 (1996) (providing a recent review of the Court's use of the marketplace metaphor).

4 According to Forrester Research, a company that tracks the Internet pornography industry, the market for online adult fare now is worth approximately $1 billion in sales annually. David Lazarus; *Tricks of the Trade*, S.F. CHRON., Sept. 11, 1999, at D1; *see also infra* notes 87-114, 233-249 and accompanying text (describing the Internet pornography business, specifically, and the adult entertainment industry, generally).

made several constitutionally defective attempts to shield children from exposure to sexually explicit images in cyberspace[5]—first in 1996 with the "ludicrously unconstitutional"[6] Communications Decency Act[7] and then in 1998 with the similarly flawed Child Online Protection Act.[8]

In the rush to protect children, however, one particularly pernicious and proliferating variety of Web-based pornography has been ignored by Congress and legal scholars. This variety of sexually explicit speech raises serious questions about invasion of privacy and leaves in its wake real adult victims, *not* simply minors. It is a form of pornography that now has many state legislative bodies concerned and scrambling to change or update their antiquated laws to try to address the problem. What type of pornography is it? It's video voyeurism[9]—"high-tech hunting," as the creator of one voyeuristic website bluntly yet aptly describes it[10]—and it's a far cry from the late Allen Funt's old *Candid Camera* television series.[11]

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[5] "Cyberspace, originally a term from William Gibson's science-fiction novel *Neuromancer*, is the name some people use for the conceptual space where words, human relationships, data, wealth, and power are manifested by people using CMC [computer-mediated communication] technology." HOWARD RHEINGOLD, THE VIRTUAL COMMUNITY 5 (1993).

[6] BRUCE W. SANFORD, DON'T SHOOT THE MESSENGER: HOW OUR GROWING HATRED OF THE MEDIA THREATENS FREE SPEECH FOR ALL OF US 151 (1999).

[7] Communications Decency Act of 1996, tit. V, Pub. L. No. 104-104, 110 Stat. 56, 133-43 (1996). The United States Supreme Court declared portions of the Act unconstitutional in violation of the First Amendment in *Reno v. ACLU*, 521 U.S. 844 (1977).

[8] 47 U.S.C. § 231 (1998). A federal judge in Philadelphia issued a preliminary injunction against enforcement of the law, often referred to by the acronym COPA, in February, 1999. *See* ACLU v. Reno, 31 F. Supp. 2d 473 (E.D. Pa. 1999); *see also* Pamela Mendels, *Setback for a Law Shielding Minors from Adult Web Sites*, N.Y. TIMES, Feb. 2, 1999, at A12 (describing the decision of Judge Lowell A. Reed, Jr., to enjoin the Child Online Protection Act). The Department of Justice appealed that ruling in April, 1999. *See National News Briefs: U.S. Appeals Ruling on Internet Pornography*, N.Y. TIMES, Apr. 3, 1999, at A10. Oral argument before a three-judge panel of the United States Court of Appeals for the Third Circuit took place in November, 1999. *See* Leslie Miller, *Back to Court for Anti-porn Law*, USA TODAY, Nov. 3, 1999, at 7D. The Third Circuit affirmed the preliminary injunction in June, 2000. *See* ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000).

In 1999, Congress considered a third piece of Internet-specific legislation designed to restrict access to pornography, the Children's Internet Protection Act. *See* Amy Svitak, *Bills Would Mandate Internet Filters for Schools*, ARIZONA REPUBLIC, June 14, 1999, at B5 (noting the approval by the Senate Commerce, Science, and Transportation Committee in June, 1999, of the Children's Internet Protection Act).

[9] The fourth edition of the *Diagnostic and Statistical Manual for Mental Disorders* ("*DSM-IV*") provides that voyeurism, as a type of sexual disorder, "involves the act of observing unsuspecting individuals, usually strangers, who are naked, in the process of disrobing, or engaging in sexual activity. The act of looking ('peeping') is for the purpose of achieving sexual excitement, and generally no sexual activity with the observed person is sought." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532 (4th ed. 1994) [hereinafter DSM-IV].

[10] *See* Andrea Simakis, *Skirt-Peeping Video Suspect Blames Net*, PLAIN DEALER (Cleveland, Ohio), Sept. 14, 1999, at 1B (quoting Andrew Drake, creator of a website called *Upskirt.com* that reportedly receives one million visitors each month).

[11] *See* Andy Meisler, *Smile! You're Back on Candid Camera*, N.Y. TIMES, Nov. 22, 1998, at

The prey, as this Article reveals, are countless numbers of unsuspecting men, women, and children; and the predators wield tiny cameras to bag their innocent victims.[12]

Fueled by advances in video technology—dime-sized spy cameras, high-powered lenses—that make eavesdropping on and recording others' private activities both easier to capture and harder to detect,[13] and then accelerated by the growing presence of the Web as a cheap, convenient, and largely unregulated medium on which to display the captured photographs and videos, postings of sexually explicit, voyeuristic images now abound on the Internet.[14] News reports of the troubling trend toward exhibiting secretive, hidden-camera images of women and men in various stages of undress, underwear, or sexual activity on the Web are very recent, only dating back to 1997.[15] Two burgeoning phenomena—video voyeurism and Internet pornography—have coalesced to create a legal nightmare for the new millennium. The maze of new, complex, and largely unexplored legal issues raised by both the rapid rise of video voyeurism and the posting of these sordid images on the Web is the focus of this Article.

A bevy of important questions arises. For instance, what civil remedies do the victims of video voyeurs possess when their images are surreptitiously captured? What remedies, in turn, do they have when those captured images later are posted on the World Wide Web for everyone to see? Are traditional common law tort theories

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sec. 2, 35 (describing both the old and new versions of the *Candid Camera* television series that today appears on the CBS television network). *See generally* ALLEN FUNT, EAVESDROPPER AT LARGE (1952) (describing the original *Candid Camera* show and its radio precursor, *Candid Microphone*).

12 *See generally* Robert Salladay, *Voyeur Videos Skirting the Law?*, S.F. EXAMINER, Aug. 27, 1999, at A-19 ("[T]echnological advances have allowed cameras to be as small as a pager or disguised in a water bottle or boom box. Voyeurs can film someone as they go up an escalator, or place a bag with surveillance equipment under women's skirts while they're waiting in line somewhere.").

13 Robert I. Simon, clinical professor of psychiatry at the Georgetown University School of Medicine, writes:

> Increasingly, voyeurs are discovering and using state of the art video technology to extend their paraphilia into private places never before accessible to the naked eye. Unsuspecting victims, relying on the usual and customary ways of protecting their privacy, are totally oblivious to the peering eye of a covertly placed, miniaturized video camera.

Robert I. Simon, *Video Voyeurs and the Covert Videotaping of Unsuspecting Victims: Psychological and Legal Consequences*, 42 J. FORENSIC SCI. 884, 884 (1997).

14 *See infra* notes 38-44 and accompanying text (identifying websites where voyeuristic images can be found).

15 "News reports from Washington, California, Canada and Singapore dating back to early 1997 show a big market for so-called 'up-skirt' and 'down-blouse' shots that are transmitted to numerous sites on the Internet." Lisa Sink & Linda Spice, *Man Accused of Videotaping under Skirts*, MILWAUKEE J. SENTINEL, July 11, 1998, at 1.

such as trespass,[16] intrusion into seclusion,[17] appropriation,[18] public disclosure of private facts,[19] and intentional infliction of emotional distress[20] at all relevant or sufficient in providing recovery, either for the secretive gathering of voyeuristic images or for the public display of those images on the Web? Are state employment regulations[21] and federal sexual harassment laws under Title VII of the Civil Rights Act of 1964 relevant for victims when the secretive tapings occur in workplace bathrooms, showers, and other areas where one expects privacy?[22]

Is the creation of new laws necessary to deal with these new technological developments? If new laws are constructed to restrict hidden-camera taping by voyeurs, however, isn't there a not-

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16 "To enter upon another's land without consent is a trespass." Desnick v. American Broad. Cos., 44 F.3d 1345, 1351 (7th Cir. 1995). "Trespass may be defined as the intentional, unauthorized entry upon property that is rightfully possessed by others." JOHN D. ZELEZNY, COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS AND THE MODERN MEDIA 197 (2d ed. 1997).

17 *See* RESTATEMENT (SECOND) OF TORTS § 652B (1977) (defining the tort of intrusion into seclusion and providing that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person"). The supreme court of California, which has adopted the *Restatement*'s definition, observed in 1999 that this definition "has two elements: (1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person." Sanders v. American Broad. Cos., 978 P.2d 67, 71 (Cal. 1999).

18 The traditional definition of the tort of appropriation is set forth in the *Restatement (Second) of Torts*, which provides that "one who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." RESTATEMENT (SECOND) OF TORTS § 652D (1977). "An appropriation is usually the unauthorized commercial use of another's name or picture in an advertisement, poster, public relations promotion, or other commercial context." KENT R. MIDDLETON ET AL., THE LAW OF PUBLIC COMMUNICATION 196 (4th ed. 1997).

19 "The claim that a publication has given unwarranted publicity to allegedly private aspects of a person's life is one of the more commonly litigated and well-defined areas of privacy law." Shulman v. Group W Prods., Inc., 18 Cal. 4th 200, 214 (1998). This tort "restricts public disclosure of embarrassing personal facts." PAUL C. WEILER, ENTERTAINMENT, MEDIA, AND THE LAW: TEXT, CASES, PROBLEMS 124 (1997); *see also* RESTATEMENT (SECOND) OF TORTS § 652D (1977) (defining the tort of public disclosure of private facts and explaining that a person "who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter published is of the kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate public concern").

20 The basic elements of the tort of intentional infliction of emotional distress include: (1) extreme and outrageous conduct by the defendant done with the intention of causing or the reckless disregard of the probability of causing emotional distress; (2) severe or extreme emotional distress suffered by the plaintiff; and (3) actual and proximate causation of the emotional distress by the defendant's conduct. *See* Christensen v. Superior Court, 54 Cal. 3d 868, 903 (1991).

21 *See generally* CAL. GOV'T CODE § 12920 (Deering 1999) (setting forth the public policy under California law regarding employment discrimination); *id.* § 12940(h) (declaring workplace harassment an unlawful employment practice in California).

22 *See* 42 U.S.C. § 2000e-2(a)(1) (1999). The Equal Employment Opportunity Commission ("EEOC") guidelines state that sexual harassment in the workplace is a violation of Title VII. *See* 29 C.F.R. § 1604.11(a) (1993).

so-farfetched danger that those same laws could be abused? Couldn't they have negative and unintended consequences on journalists who use hidden cameras when legitimately exercising their First Amendment[23] right to gather news?[24] Could new video voyeurism laws also negatively affect vital law enforcement uses of surveillance technology? What about the impact of laws against video voyeurism on seemingly legitimate private uses of hidden cameras by individuals, such as planting a camcorder in one's home to make sure the babysitter is not abusing the children?[25]

What criminal sanctions do video voyeurs face when they are caught taping or photographing others? Is a new, technologically relevant definition of the conceptually slippery notion of privacy necessary today, to allow an individual to possess a reasonable expectation of privacy even in a public place?[26] Doesn't a woman who stands in an otherwise public checkout line at a shopping mall store nonetheless have an expectation of privacy such that another customer won't carefully place a bag with a hidden camera at her feet and shoot videotape of her underwear? These are some of the multifaceted questions explored in this Article.

Part I of this Article describes the growing phenomenon of voyeurism on the World Wide Web and the technological and commercial forces behind video voyeurism that allow it to propagate.[27] It identifies, defines, and provides numerous examples of two read-

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23 The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

24 "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

For a recent case involving the use of hidden cameras by journalists to gather news—in this case, to take footage documenting patient abuse and neglect in two Texas nursing homes—see Brewer v. Capital Cities/ABC, Inc., 986 S.W.2d 636 (Tex. Ct. App. 1998). Although hidden cameras can bring positive results by exposing such problems, some would argue that they also "are overused and misused by both network and local television." JAY BLACK ET AL., DOING ETHICS IN JOURNALISM 167 (3d ed. 1999).

25 For instance, the so-called "Nanny Cam" can be rented or purchased to monitor the activities of child-care providers when parents are away from the home. *See Nanny Cam Hire* (visited Aug. 9, 1999) <http://www.nannycam.co.uk/baby_sitters.htm> (offering the installation of professional equipment with visual and audio recording capacity to monitor abusive babysitters).

26 "Privacy is an ambiguous concept that does not lend itself easily to definition." LOUIS A. DAY, ETHICS IN MEDIA COMMUNICATIONS: CASES AND CONTROVERSIES 121 (3d ed. 2000). Philosopher Sissela Bok defines privacy as "the condition of being protected from unwanted access by others—ether physical access, personal information, or attention. Claims to privacy are claims to control access to what one takes—however grandiosely—to be one's personal domain." SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 10-11 (1989).

27 *See infra* notes 32-126 and accompanying text.

ily distinct categories of voyeurism—*verité* and *pseudo*—that dominate the genre, each of which creates its own unique set of legal dilemmas. Next, Part II articulates and analyzes the competing privacy and social interests that must be weighed and balanced, from a legal and public policy perspective, in regulating both the capture and the display of voyeuristic images on the Web.[28] Part III describes the gaps and loopholes in existing criminal statutes that, in some states and under federal law, often allow the gatherers of voyeuristic video images to escape punishment.[29] It also discusses the efforts of some states to cope with or address the flaws in their criminal statutes. Part IV explores potential civil remedies for the victims of video voyeurism at two different stages in the peeping process—the actual hunting and gathering of the images, and the public display and posting of those images on the World Wide Web.[30] Finally, Part V suggests that new technologies will continue to push and test the scope and applicability of traditional laws that currently may be borrowed to handle the problems of video voyeurism and its proliferation on the Web.[31] Continuous review is necessary so that evolutions in technology do not again outstrip developments in the law of voyeurism.

I. THE PROBLEM: VIDEO VOYEURISM AND THE WEB

Voyeurism may be thought of as a sexual disorder or a form of sexual deviance. Sigmund Freud, in an essay on sexual aberrations, wrote that the "pleasure in looking [scopophilia] becomes a perversion (a) if it is restricted exclusively to the genitals, or (b) if it is connected with the overriding of disgust (as in the case of *voyeurs* or people who look on at excretory functions), or (c) if, instead of being *preparatory* to the normal sexual aim, it supplants it."[32]

The fourth edition of the *Diagnostic and Statistical Manual for Mental Disorders* ("*DSM-IV*") defines voyeurism as a sexual disorder or paraphilia that "involves the act of observing unsuspecting individuals, usually strangers, who are naked, in the process of disrobing, or engaging in sexual activity. The act of looking ('peeping') is for the purpose of achieving sexual excitement, and generally no sexual activity with the observed person is sought."[33]

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[28] *See infra* notes 127-270 and accompanying text.
[29] *See infra* notes 271-522 and accompanying text.
[30] *See infra* notes 523-70 and accompanying text.
[31] *See infra* notes 571-576 and accompanying text.
[32] SIGMUND FREUD, THREE ESSAYS ON SEXUALITY ON THE THEORY OF SEXUALITY 23 (1962).
[33] DSM-IV, *supra* note 9, at 532.

Diagnostic criteria include recurrent behavior of the kind described above over a six-month period coupled with intense, sexually arousing fantasies or sexual urges, as well as significant distress or impairment in one's social, occupational, or other important areas of functioning caused by the fantasies, urges, or behavior.[34]

The phenomenon of voyeurism is not new. The legend of Lady Godiva, for instance, dates back nearly one thousand years to around 1050 and since has been recaptured and retold in print, on canvas, and carved into stone.[35] It features perhaps the best-known example of voyeurism in legend and folklore. According to some versions of the tale, when Lady Godiva rode naked on a horse through the City of Coventry to protest taxes, a young man named Tom—known today as the Tom behind the moniker "Peeping Tom"—dared to gaze at Godiva.[36] For this he was, depending on the particular account or version of the retelling, killed or blinded. The Peeping Tom character became an essential part of the Godiva story after 1700; today the name is synonymous with a voyeur.[37]

Today, of course, Peeping Tom of Coventry would not need to steal a peek at Lady Godiva on the streets of Coventry and risk blindness for his actions in the process. Instead, he could flip open his laptop computer in the privacy of his home, conduct a search under the key word "voyeur" in a typical search engine such as Yahoo!, and locate a plethora of real-life voyeurism sites.[38] Alternatively, from the *Persian Kitty* home page—a major source for locating many varieties of sexually explicit content on the Web—one can find a list of more than thirty sites that cater to or are dedicated to voyeurism.[39] Sites with names like *Upskirt Heaven*, which boasts "the finest in upskirt, panty, & voyeur images available,"[40] and *Upskirt Pictures*, which bills itself as "a site for the real

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34 *See id.*

35 *See generally* RONALD AQUILLA CLARKE & PATRICK A.E. DAY, LADY GODIVA: IMAGES OF A LEGEND IN ART & SOCIETY (1982) (describing the evolution of the Lady Godiva legend and including photographs of paintings and sculptures of Lady Godiva).

36 *See id.* at 16-18.

37 *See* Browder v. Cook, 59 F. Supp. 225, 231 (D. Idaho 1944) ("Peeping Tom is a name generally pretty well understood as a person who makes it a habit of sneaking up to windows and peeping in, for the purpose generally of seeing the women of the household in the nude.").

38 The authors were able to locate a list of over 60 sites catering to voyeurism on the World Wide Web using the Yahoo! search engine at <http://dir.yahoo.com/Business_and_Economy/Companies/Sex/Online_Picture_Galleries/Voyeurs> (visited July 30, 1999) .

39 *Persian Kitty* (visited July 30, 1999) <http://www.persiankitty.com/indexfetish.html>.

40 *Upskirt Heaven* (visited July 30, 1999) <http://www.upskirtheaven.com>.

voyeur,"[41] abound. Many sites, such as *The VoyeurWeb*,[42] feature amateur "contributor" or "private shots" sections that allow voyeurs to send in their own hidden-camera handiwork of neighbors, relatives, and even significant others.[43] A quick look at the *Online Voyeur* site gives a sample of hidden-camera photographs available to customers.[44] While particular images on some of these sites clearly appear to be of more-than-willing participants—exhibitionists, really—others involve unsuspecting and unwilling women who likely would be startled to know their bodies were being displayed for the prurient viewing pleasure of others.

There are ultimately two primary forms of pornographic voyeurism on the Web. They are identified below. Each, as will be discussed later, poses a different set of legal issues and concerns.

A. Verité *Voyeurism*

The first and most dangerous form of video voyeurism is one that we refer to as *verité voyeurism.* The touchstone characteristic of this form of voyeurism is that the targets of the voyeur's gaze are unaware they are being watched and photographed. They do not, in other words, consent to being viewed and videotaped.

The word *verité* is borrowed from the world of film. The term *cinema verité* sometimes is used in film circles to describe a genre or technique of filmmaking that attempts to convey candid, unmanipulated realism or, as the word *verité* suggests, the truth.[45] The camera, sometimes a lightweight, handheld device, often tracks or follows the action or individuals in unobtrusive, documentary fashion.[46] The camera often is little more than the proverbial fly on the wall.[47]

And, apparently, today there are many flies on many walls. "More than 20,000 women, men, and children are unknowingly taped every day in situations where the expectation and the right to privacy should be guaranteed, i.e., while showering, dressing, using

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[41] *Upskirt Pictures* (visited July 30, 1999) <http://www.upskirt-pictures.com>.

[42] *The VoyeurWeb* (visited Aug. 13, 1999) <http://www.voyeurweb.com>.

[43] *Cf. Panty Man* (visited July 31, 1999) <http://www.pantyman.com/contribute>.

[44] *Online Voyeur* (visited July 31, 1999) <http://www.onlinevoyeur.com/pics/hidden/hidden.html>.

[45] "The utilization of cinema verité codes promises a sense of directness and immediacy, of events captured as they unfold naturally and in an untampered fashion before the camera." Susan Scheibler, *Constantly Performing the Documentary: The Seductive Promise of Lightning Over Water, in* THEORIZING DOCUMENTARY 135, 140 (Michael Renov ed., 1993).

[46] Jeanne Hall, *Realism as Style in Cinema Verité,* 30 CINEMA J. 24, 24 (1991).

[47] Some would argue that the fly-on-the-wall technique is better described as "direct cinema" rather than cinema verité. *See* Brian Winston, *The Documentary Film as Scientific Inscription, in* THEORIZING DOCUMENTARY 37, 40-47 (Michael Renov ed., 1993) (describing direct cinema).

a public rest room, or making love in their own homes," writes Louis R. Mizell, Jr., a former special agent and intelligence officer for the U.S. Department of State.[48] Recent instances of video voyeurism are plentiful. A brief list of cases from across the United States that reads like a parade of horrors makes this clear:

a. A physical education intern at a public middle school near Pensacola, Florida, was arrested in October, 1999, for allegedly setting up a hidden video camera in a corner of the girls' locker room to catch images of girls as they changed clothes.[49]

b. A 46-year-old Maryland computer professional was ordered by a judge in September, 1999, to serve sixty days in jail for videotaping his 12-year-old stepdaughter dressing in her bedroom and then hiding a video camera in her laundry basket with the intent of getting more footage.[50]

c. A maintenance carpenter was arrested after he used a palm-sized camcorder in July, 1999, to capture video images under women's skirts at a church carnival near Cleveland, Ohio.[51]

d. A Weymouth, Massachusetts man was indicted in July, 1999, for allegedly making secret videotapes of three babysitters while they undressed.[52] The 31-year-old suspect allegedly hid a video camera in a bathroom cabinet.[53]

e. The pastor of a Baptist church was arrested in May, 1999, for allegedly aiming a video camera up women's skirts as they rode on escalators and concourse trains at Atlanta's Hartsfield International Airport.[54]

f. A South Carolina man in April, 1999, allegedly used a pinhole camera hidden inside a gym bag to peek up the skirts of women as they walked through a park during an arts festival.[55]

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48 LOUIS R. MIZELL, JR., INVASION OF PRIVACY 23 (1998).

49 *See Teaching Intern Charged with Taping Locker Room*, ST. PETERSBURG TIMES, Oct. 7, 1999, at 5B.

50 *See* Mary Allen, *Peeping Tom Gets 60 Days*, THE CAPITAL (Annapolis, Md.), Sept. 4, 1999, at A9.

51 *See It's Time Women Turned the Tables on Voyeurs*, PLAIN DEALER (Cleveland, Ohio), Sept. 16, 1999, at 11B. The man later pleaded no contest to charges of voyeurism and possession of criminal tools. Andrea Simakis, *Video Voyeur Found Guilty*, PLAIN DEALER (Cleveland, Ohio), Oct. 27, 1999, at 2B.

52 *See Man Accused of Taping Baby Sitters Indicted*, PATRIOT LEDGER (Quincy, Mass.), July 20, 1999, at 17C.

53 *See* Ed Hayward, *Weymouth Man Charged with Videotaping Babysitters*, BOSTON HERALD, May 26, 1999, at News 22.

54 *See Georgia Minister Faces Peeping Tom Charges for Video Camera Shot in Airport*, CHATTANOOGA TIMES, June 21, 1999, at B2.

55 *See* Jeffrey Collins, *Judge to Decide Charges in Peeping Case*, THE HERALD (Rock Hill, S.C.), Oct. 11, 1999, at 1A. The man pleaded guilty in October, 1999, to a series of minor charges related to the incident. *See* James Werrell, *Someone May be Eyeing Your BVDs*, THE HERALD (Rock Hill, S.C.), Oct. 15, 1999, at 8A.

g. The former owner of a tanning salon in Lenexa, Kansas, was sentenced in January, 1999, to a year in jail for secretly videotaping customers and employees as they undressed for tanning sessions.[56]

h. In June, 1998, an Alaskan man who had installed two-way mirrors in the Quonset hut apartments that he leased was convicted of indecent viewing after secretly videotaping tenants in their bathrooms.[57]

Where do images similar to those recorded by the video voyeurs described above end up? Many find their way to the vast pornographic reaches of the World Wide Web.

More than one hundred websites are well-stocked today with pictures that fall into the category of *verité* voyeurism—pictures of unsuspecting men and women showering,[58] undressing, and even engaging in sexual activities with their partners.[59] These pictures are sometimes taken through windows or with hidden cameras placed inside gym bags in men's and women's locker rooms. Within these voyeurism sites are further levels of sexual, voyeuristic-fetish images: pictures of unsuspecting women taken while they sit on toilets, pictures euphemistically known as *upskirts* of women's underwear shot from underneath their skirts while they walk through shopping malls or stand in lines, and cleavage photographs called *downblouses* that, as the name suggests, peer down the blouses of women.[60] For instance, a man was arrested for using a video camera concealed in a gym bag to shoot up the skirts of ten women at Jacobs Field, home of the Cleveland Indians baseball team, while the women stood in line at a concession stand.[61] Sometimes the victim knows the voyeur; a devious boyfriend or husband may capture videotape of an unsuspecting significant

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[56] *See* Scott Orr, *High-tech Peeping Toms Have Little to Fear*, AUSTIN AMERICAN-STATESMAN, Aug. 8, 1999, at K15.

[57] *See* S.J. Komarnitsky, *Peeping Tom Given 7-Year Prison Term*, ANCHORAGE DAILY NEWS, June 30, 1998, at 1C. The Peeping Tom in this case, Lynn Eugene Lacey, escaped from the minimum-security prison where he was serving his sentence for his voyeuristic activities in September, 1998. *See* Karen Aho, *Escaped Peeping Tom Caught*, ANCHORAGE DAILY NEWS, Oct. 8, 1999, at 1B. He remained on the run for over a year, until October, 1999, when he was captured by a multi-agency fugitive task force. *See id.*

[58] In August, 1999, at least two hidden cameras were found in public shower stalls at Yosemite National Park. *See Hidden Cameras in Showers*, SAN DIEGO UNION-TRIB., Aug. 6, 1999, at A3.

[59] *See* Robert Salladay, *California Crusade on Video Peeping*, ARIZONA REPUBLIC, Apr. 11, 1999, at A21 ("[M]ore than 100 Web sites are devoted to voyeurism, where men with tiny cameras hang out at shopping malls, amusement parks and beaches to secretly videotape women's underwear, lingerie, pantyhose or whatever.").

[60] *See* Andrea Simakis, *Lawmaker Planning Bill for Stronger Voyeur Law*, PLAIN DEALER (Cleveland, Ohio), Sept. 17, 1999, at 3B (using the terms "upskirting" and "blousing" and describing the practices of each).

[61] *See id.*

other, friend, or relative while he or she showers or uses the bathroom.[62]

Women, however, are not the only targets of sexual voyeurism on the Internet. This is a crime without gender boundaries. In April, 1999, *The Philadelphia Inquirer* reported a story that hidden-camera videotapes showing members of the University of Pennsylvania men's wrestling team changing and showering in locker rooms at Northwestern University and Penn were displayed as pornography on the Internet.[63] The images appear to have been recorded by a hidden camera placed in a gym bag that featured a mesh opening. Videotapes of the athletes then were allegedly sold on a website called *Young Studs Online* that boasts "the Internet's largest collection on the web of hidden camera locker room photos!"[64]

A collection of male student-athletes from eight universities who claim they were secretly videotaped in locker rooms and then featured in eight videotapes sold on the Web filed a lawsuit in July, 1999, against the marketers of the tapes.[65] "Without their knowledge, the men allegedly were videotaped at urinals, in showers, and weighing in unclothed at competitions."[66] "I pulled up the home page and I am looking at myself naked on the Internet. . . . It is terrible because I have no control over it," one athlete told a reporter for *The New York Times* in August, 1999.[67]

As the remarks of this victim of both video and Web-based voyeurism suggest, there are important privacy concerns at stake for the targets of voyeurism. At this point, however, it is especially important to emphasize that—like the cases at Cleveland's Jacobs Field and Atlanta's Hartsfield International Airport described earlier—*not* all of the voyeuristic images are captured in private places. Some of the images, in fact, are taken in very *public* places, such as shopping malls or amusement parks, where one does *not* generally have a reasonable expectation of privacy.[68] As the *Wash-*

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62 Examples of these types of contributor photographs, along with the descriptions of how they were gathered, can be accessed on *The VoyeurWeb* site located at <http://voy.voyeurweb.com/main/Pictures.html> (visited Aug. 12, 1999).

63 Anne Barnard, *Athletes Caught on Secret Tape*, PHILADELPHIA INQUIRER, Apr. 5, 1999, at B1.

64 *Id.*

65 *See* Eric Fidler, *Lawsuit Claims Secret Filming of Athletes*, BOSTON GLOBE, July 28, 1999, at A7.

66 *See* Marcia Chambers, *Colleges: Secret Videotapes Unnerve Athletes*, N.Y. TIMES, Aug. 9, 1999, at D4.

67 *Id.*

68 "What happens in public is considered public information." DON R. PEMBER, MASS MEDIA LAW 270 (1999).

ington Post recently reported,

> In what they describe as a growing trend, police are beginning to catch video voyeurs trying to shoot private parts in public places. The men are aiming the latest compact camcorders up women's skirts in crowded stores and shopping malls, parks and fairs—and often posting the pictures on the Internet.[69]

Can one be private, at least for purposes of the law, in public? Whether a new conception of privacy is necessary—one that provides an expectation of privacy against video voyeurism in a public place—is an important consideration addressed in Parts II and IV below.

1. Technological Forces Driving *Verité* Voyeurism

The technology necessary to secretly capture images on videotape today is both inexpensive to purchase and relatively easy to operate.[70] With a little tact and a modicum of craftiness, an individual may assemble and conceal a battery-powered camcorder in a duffel bag and record images. Alternatively, for as little as $100, one may purchase a dime-sized camera, situate it in an inconspicuous hiding place in a neighbor's bedroom, connect it to a videocassette recorder and become an anonymous gazer.[71] For a few hundred dollars more, a voyeur may go wireless, transmitting undetected images to either a monitor or recorder.

While small cameras are useful tools for both public law enforcement and private security personnel,[72] concerned parents wishing to covertly monitor their babysitters and children now employ cameras hidden in objects such as clocks, pens, teddy bears, and smoke detectors.[73] And, cameras placed behind what appear to be normal, everyday objects such as mirrors may also record un-

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69 Patricia Davis, *Video Peeping Toms Seeing More Trouble*, WASH. POST, June 7, 1998, at B1.

70 *See* Doug Bedell, *Someone to Watch over You*, SAN DIEGO UNION-TRIB., Aug. 24, 1999, at Computer Link 6 (describing "today's cheap, tiny video cameras" and how they are used for purposes of spying on others).

71 *See* Scott Orr, *Peeping Technology*, PLAIN DEALER (Cleveland, Ohio), May 30, 1999, at 1D.

72 *See infra* notes 250-270 and accompanying text (describing surveillance uses of video technology).

73 The U-Spy Store in Altmonte Springs, Florida sells a surveillance camera disguised as a teddy bear designed to catch babysitters abusing children. Jeff Kunerth, *Trust, Privacy Endangered*, HOUSTON CHRON., Aug. 22, 1999, at A16. The animal is stuffed with more than just foam or a music box—it has a one-inch square camera inside its cowboy hat. *See id.*; *see also* Sally Farhat, *Eye in Sky Could be Neighbor, Boss*, SEATTLE TIMES, Aug. 24, 1999, at B3 (observing that "technologically advanced surveillance and anti-bugging gadgets, once limited to military and law enforcement people have gone civilian" and describing an $800, quarter-sized camera that can be used to spy on a babysitter).

suspecting individuals in compromising positions.[74]

In addition to establishing retail stores in major cities and placing advertisements in magazines, purveyors of video surveillance equipment have discovered that the Internet provides a well-targeted marketing opportunity. Many online vendors now offer an array of products, complete with descriptions, pictures, and prices. For instance, the website for All Secure Alert Systems, Inc. provides descriptions of numerous objects for hiding wireless cameras, including a clock radio, picture, emergency light, and day planner.[75] Voyeurs not pleased with those options can click to International Surveillance Services, which offers cameras concealed in coffee makers, VCRs, and teddy bears.[76]

Mobility also is possible with cameras placed in a backpack, briefcase, or gym bag. For instance, a company called Gadgets by Design offers a wireless backpack camera and transmitter system that "will not draw any attention" because the "lining fully conceals the camera and makes the system totally undetectable."[77] Employing eight AA batteries, the camera can run for hours at a time.[78] Likewise, Spyzone offers its "Gym Bag Covert Video" system featuring a pinhole lens that allows one to record while moving "anywhere a gym bag can be taken."[79] Placing a camera in a gym bag is a favored technique of video voyeurs hoping to capture locker room photographs of men or women changing clothes and showering.[80]

Seeking out the right equipment—more precisely, the right

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[74] *See generally* Sandra Stokly, *Cameras Discovered in Worker Restrooms*, ORANGE COUNTY REG., Sept. 15, 1997, at B4 (describing an instance of workplace voyeurism in which video cameras were installed behind bathroom mirrors at a Mira Loma, California truck terminal operated by Consolidated Freightways).

[75] *All Secure Alert Systems, Inc.* (visited Aug. 30, 1999) <http://www.camerasite.com/wireless/covert/covertmain.htm>. The company sells cameras disguised in household objects such as wall clocks, lamps, pencil sharpeners, jackets and ties, smoke detectors, eyeglasses, air purifiers, boom boxes, eyeglass cases, pagers, cellular phones, and cigarette packs. *See id.* Prices for the cameras can be found at <http://www.camerasite.com/full.htm> (visited Sept. 20, 1999).

[76] *International Surveillance Services, Inc.* (visited Aug. 30, 1999) < http://www.hidden-video-cameras.com/covert-cameras-wireless.html>. The teddy bear costs $399 for a black-and-white camera version. *See* <http://www.hidden-video-cameras.com/nanny-cameras-teddybear.html> (visited Sept. 20, 1999).

[77] *Gadgets by Design* (visited Sept. 20, 1999) <http://www.jeffhall.com/cgi-local/webcart.cgi>. A complete list of product offerings is accessible by searching under the heading "wireless covert camera systems" at <http://www.jeffhall.com/cgi-local/webcart.cgi?ENTER=YES&CONFIG=mountain> (visited Sept. 20, 1999).

[78] *See* <http://www.jeffhall.com/cgi-local/webcart.cgi> (visited Sept. 20, 1999).

[79] Spyzone (visited Aug. 30, 1999) <http://www.spyzone.com/catalog/videosurveillance/cvs-370.html>.

[80] *See* Barnard, *supra* note 63, at B1 (stating that videotapes showing members of the University of Pennsylvania's wrestling team were "probably made with a camera hidden in a gym bag with a mesh opening").

visual weapons—apparently is part of the fulfillment of the act of peeping. Unfortunately, when it comes to explicit material, others not only record but also distribute their *verité* voyeuristic images throughout cyberspace. As a result, entrepreneurs sell voyeuristic videotapes or charge for viewing such material on their websites.[81]

In fact, by using pinhole cameras that may capture images through a space the size of a nail hole in a wall, just about anything imaginable is possible.[82] Lauren Weinstein, a technology professional and moderator of the online Privacy Forum, contends that "what you have going on all over the place now is people who are just kind of planting cameras everywhere they can find places that are at least theoretically in public and then using them however they want."[83]

As the technology develops, the video surveillance market likely will expand and further contribute to the rise of *verité* voyeurism. Industry sales of spy and security equipment grew fourfold in a decade, from $10 billion in 1985 to $40 billion in 1995.[84] Surveillance and anti-bugging technology increasingly is purchased by private individuals, according to CCS International Ltd., one of the largest international spy retailers.[85] The bottom line is that spying technology today is inexpensive and readily accessible to anyone, including, unfortunately, the prurient video voyeur.[86]

2. Commercial Forces Driving *Verité* Voyeurism

Consumers of pornography appear to be gobbling up both *verité* and pseudo voyeurism.[87] Americans spend an estimated $10 billion annually on pornographic materials, including videos, magazines, adult cable, and cybersex.[88] Adult videos, often credited with boosting the initial sales of VCRs, were a $4.2 billion market in 1997, with 697 million tapes rented, a whopping increase from the 75 million rentals in 1985.[89] By September, 1999, the

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81 *See supra* notes 63-67 and accompanying text (describing the Web-based sale of covertly made videotapes of male wrestlers).

82 *See* Stacy Downs et al., *Hidden Cameras Focus on Privacy: Think You Can't be Seen?* SAN DIEGO UNION-TRIB., Sept. 14, 1998, at E4.

83 Eric Fidler, *A Voyeur's Delight: Tiny Cameras Go Anywhere,* ATLANTA J. & CONST., Aug. 13, 1999, at 5E.

84 Downs et al., *supra* note 82, at E4.

85 *See* Nora Zamichow, *Spies Eyes and Ears Go Public,* L.A. TIMES, June 28, 1999, at A1.

86 *See* Suzi Parker, *Backyard James Bonds Take Snooping High Tech,* CHRISTIAN SCI. MONITOR, Feb. 17, 1999, at 4 ("[W]ith today's abundant cheaper technology, spying is increasingly becoming easier for the average American.").

87 *See infra* notes 115-26 and accompanying text (describing the concept of pseudo voyeurism).

88 *See* Tiffany Danitz, *The Gangs behind Bars,* INSIGHT ON NEWS, Sept. 28, 1998, at 34.

89 *See id.* The *Adult Video News,* a leading publication in tracking the adult entertain-

adult entertainment industry was on pace to release 10,000 new adult video titles in that year alone, a record high.[90] The simple fact is, as self-consciously outrageous filmmaker John Waters of *Hairspray* fame put it in 1999, that pornography now is "hip."[91] It is a Dirk Digler world in which even the Starr Referral, focusing heavily on President Clinton's "not appropriate" relationship with erstwhile White House intern Monica Lewinsky, is pornographic.[92]

And what about the Internet, the place where pornographic voyeurism now flourishes? Despite its relative infancy, today pornography on the World Wide Web already represents a $1 billion dollar industry, according to Forrester Research, Inc.[93] A British research firm, Datamonitor, claims that sex sites captured nearly 70 percent of the estimated $1.4 billion sales of Internet-based content in 1998.[94] It is no wonder, then, that the Internet has been called "the world's largest dirty magazine."[95]

Consider the success of one sexually explicit, albeit non-voyeuristic, commercial site. Danni Ashe, a porn star and former stripper, hosts a site called *Danni's Hard Drive*, which averages seven million hits a day and was projected to earn $5.5 million in 1999.[96] The rapid growth of sites such as Ashe's on the Web, in fact, may be partly responsible for the very slight drop in the sales and rentals of adult videos between 1997 and 1998, from $4.2 billion to $4.1 billion.[97] The highly touted online concept of e-commerce,[98] it seems, might better be named p-commerce.

Estimating the exact number of pornographic websites is a difficult and imprecise science, but one thing is certain—they are

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ment industry's production, sales, and rentals figures, can be accessed online at *AVN*, (visited Sept. 10, 1999) <http://www.avn.com>.

90 *See* Jeffrey Gettleman, *L.A. Economy's Dirty Secret: Porn Is Thriving*, L.A. TIMES, Sept. 1, 1999, at A1.

91 *See* William L. Hamilton, *The Mainstream Flirts with Pornography Chic*, N.Y. TIMES, Mar. 21, 1999, at sec. 9 1. Waters helped lead the crossover movement of casting former pornographic movie stars in mainstream films when he cast former underage porn star, Traci Lords, in the movie *Cry Baby*. *See id.*

92 Peter Baker & John F. Harris, *Clinton Admits to Lewinsky Relationship, Challenges Starr to End Personal "Prying,"* WASH. POST, Aug. 18, 1998, at A1. President Clinton acknowledged in a televised speech in August, 1998, that he had "a relationship with Miss Lewinsky that was not appropriate." *Id.*

93 *See* Gettleman, *supra* note 90, at A1. Overall, Internet commerce in 1998 was approximately $17 billion. *See* RAY ELDON HIEBERT & SHEILA JEAN GIBBONS, EXPLORING MASS MEDIA FOR A CHANGING WORLD 312 (2000).

94 *See* Scott Collins, *Magazine Wants to be the CNN of Online Adult News*, L.A. TIMES, July 8, 1999, at C1.

95 HIEBERT & GIBBONS, *supra* note 93, at 313.

96 *See* Lazarus, *supra* note 4, at D1.

97 *See* Gettleman, *supra* note 90, at A1.

98 *See infra* note 233 and accompanying text (describing the concept of electronic commerce).

plentiful. A June, 1998, survey by the World Wide Web Consortium estimated that there were 34,000 publicly viewable pornographic sites.[99] Other estimates place the number "as high as 70,000."[100] A site called *Persian Kitty* offers links to literally hundreds of these sites, breaking them down by fetish categories.[101]

It is also difficult to estimate just how much voyeuristic images contribute to the overall Internet pornography market.[102] Nevertheless, one must concede that, as camera sizes shrink and Internet applications and bandwidth grow, the possibility for secret cameras displaying sexually explicit images will increase. On top of that, voyeuristic pornography simply makes good economic sense for two reasons. First, it is incredibly cheap to produce. After all, unlike typical adult videos and photo shoots, the production costs for paying actors, models, and camera crew are non-existent in a *verité* voyeuristic situation, where those filmed have no knowledge of the hidden camera.[103] Second, like all Web-based pornography, the reproduction and distribution costs are reduced—there is no need to print multiple copies of images on expensive paper or to mass-produce videotapes.[104] One simply uploads and posts the images on a website and the viewers come to that site. One of the primary distribution features of the Internet that allow for the efficient selling of goods and services is disintermediation[105]—cyberspace's ability to be, as Microsoft's Bill Gates puts it, the "ultimate middleman."[106] With respect to sexually explicit material, consumers no longer need to go to an adult arcade or bookstore to obtain content, but instead may do so over the Internet in their own chosen environs.[107] Taken together, the possibilities for *verité* and pseudo

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99 *See* Neil Munro, *Porn Comes in One Color: Green*, NAT'L J., Jan. 9, 1999, at 41.

100 *Id.*

101 *See Persian Kitty* (visited Sept. 20, 1999) <http://www.persiankitty.com>.

102 The authors were unable to locate any precise data about the total revenue generated by voyeuristic pornography on the World Wide Web.

103 Top female porn stars today, such as Jenna Jameson, are paid as much as $5000 per sex scene, while most male stars earn only $500 per sex scene. *See* Gettleman, *supra* note 90, at A1.

104 *See* Michael D. Metha & Dwaine E. Plaza, *Pornography in Cyberspace: An Exploration of What's in Usenet, in* CULTURE ON THE INTERNET 53, 56 (Sara Kiesler ed., 1997) ("[T]he distribution of pornography via computer networks can reduce its costs dramatically, reducing barriers to both publish and receive.").

105 "Middleman functions between producers and consumers are being eliminated through digital networks. Middle businesses, functions, and people need to move up the food chain to create new value, or they face being disintermediated." DON TAPSCOTT, DIGITAL ECONOMY: PROMISE AND PERIL IN THE AGE OF NETWORKED INTELLIGENCE 56 (1996).

106 "The information highway will extend the electronic marketplace and make it the ultimate go-between, the universal middleman." BILL GATES, THE ROAD AHEAD 158 (1995).

107 *Study Finds Sexually Oriented Internet Sites are Popular and Non-Problematic for Most People; But Pose Risks for Some*, APA NEWS RELEASE, (visited on Sept. 29, 1999) <http://www.apa.org.releases/sexsite.html>. A recent survey suggests that of those who view por-

voyeurism seem endless. Such potential led David Bernstein, an adult entertainment industry executive, to proclaim in 1999 that "voyeur sites are the biggest thing on the Internet right now."[108]

This was clear at the 1998 Adult-Dex, an annual Las Vegas trade show for the high-tech pornography industry.[109] According to one report, those keen on voyeurism were flocking to the booth of a Florida-based company called CandidCam.[110] It boasts "unique voyeur feeds" with items such as gay-shower cams, dressing-room cams, and voyeur dormitory cams.[111] At the X Web Expo in Montreal in May, 1999—"an electronic-sex smorgasbord" of a trade show that attracted one thousand developers of pornographic websites—a service called "Naughty Mail" was promoted.[112] It allows X-rated, target marketing via e-mail advertisements sent directly to the inboxes of pornographic website surfers.[113] By the time of that trade show, Naughty Mail had a total of 14,144 people signed up to get e-mail ads related to voyeurism.[114] Voyeuristic pornography, it seems, will not be going away anytime soon.

B. *Pseudo Voyeurism*

A second category of voyeurism sites can be described as containing images of *pseudo voyeurism.* The defining characteristic of this category is that the individuals whose images appear actually know they are being watched and photographed. It is really, then, staged or contrived voyeurism. The object of the voyeur's gaze is well aware of the presence of the camera and thus might be thought of as an exhibitionist.[115]

A prime example of pseudo voyeurism is the *Voyeur Dorm* site.[116] On this site, a group of young women lives together in a house loaded with cameras. As the site's own home page states, it

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nography over the Internet, nearly 80% do so from the confines of their home, compared to only 6% in the workplace. *See id.*

108 Diego Bunuel, *Naked Truth: Voyeur Sites are Hottest Thing on Net,* ARIZ. REPUBLIC, Feb. 28, 1999, at A19.

109 *See* Andy Riga, *Sex on demand: Porn Industry Is Leading Way in Making Money Off the Web, Providers Say,* MONTREAL GAZETTE, Nov. 25, 1998, at E1.

110 *See id.*

111 *Id.*

112 *See* Andy Riga, *Expo A 'Pornucopia,'* MONTREAL GAZETTE, May 22, 1999, at C3.

113 *See id.*

114 *See id.*

115 The authors use the term exhibitionist here in the generic sense of a person who likes to expose his or her body in public. In contrast, exhibitionism can be identified as a sexual disorder. *See* DSM-IV, *supra* note 9, at 525-26 ("The paraphiliac focus in Exhibitionism involves the exposure of one's genitals to a stranger [and]. . .cause[s] clinically significant distress or impairment in social, occupational, or other important areas of functioning.").

116 *Voyeur Dorm* (visited Aug. 1, 1999) <http://www.voyeurdorm.com>; *see also* Steve

provides a chance to "peer into the lives of seven real college coeds" and there "are no taboos. The girls of *Voyeur Dorm* are fresh, naturally erotic, and as young as 18."[117] Almost all of their actions, including intimate ones, are captured by the cameras. The women know they are being watched.

The *Voyeur Dorm* site was extremely popular and profitable in 1999. By April of that year, it had about 5000 subscribers, each paying $34 per month.[118] Apparently the subscribers didn't mind the fact that, according to one report, only three of the seven women who lived in the house/dorm were really college coeds.[119] Unfortunately for its avid fans, however, *Voyeur Dorm* was declared a sexually oriented business by the Tampa City Council.[120] The problem? The house was located in an area zoned exclusively for residential property, and the Council's decision jeopardized its future as a business.[121]

This suggests a legal issue—zoning attacks on homes in which pseudo voyeuristic pornography is produced—that may arise with increasing frequency as pseudo voyeurism ventures proliferate. The United States Supreme Court has made it clear that zoning of "adult" establishments is permissible and may, in fact, be content neutral.[122] The *Voyeur Dorm* case may signal a trend that, ultimately, could hinder the growth of what might be called homegrown voyeuristic pornography.

Also falling into this pseudo voyeurism category is the site hosted by Jennifer Ringley, one of the progenitors of the so-called girl-cam sites[123] now popular on the World Wide Web.[124] Ringley, a 23-year-old 1997 graduate of Dickinson College in sleepy Carlisle, Pennsylvania, has cameras in her Washington, D.C. apartment that provide pictures of her activities—some sexual, most not—around

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Huettel, *Voyeur Dorm is Test of Cyberlaw*, ST. PETERSBURG TIMES, Apr. 26, 1999, at 1B (describing the *Voyeur Dorm* site).

117 *Voyeur Dorm* (visited Aug. 1, 1999) <http://www.voyeurdorm.com>.

118 *See* Huettel, *supra* note 116, at 1B. The site has proven to be lucrative for its owners, who each earn more than $1 million a year from their combined Internet businesses. *See* Steve Huettel, *Adult Web Site Opens Doors for Owners*, ST. PETERSBURG TIMES, Aug. 13, 2000, at 1B.

119 *See* Walt Belcher, *'20/20' Takes Look at City's 'Voyeur Dorm,'* TAMPA TRIB., Aug. 11, 1999, at Baylife 6.

120 *See* David Pedreira, *Voyeur Dorm Cyber Zone Denied*, TAMPA TRIB., Aug. 27, 1999, at Florida/Metro 1.

121 *See id.*

122 Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54-55 (1986).

123 A collection of girl-cam sites can be found by using a website called *The Peeping Moe* located at <http://www.peepingmoe.com/moehome.html> (visited Aug. 12, 1999).

124 *See Jenni Cam* (visited Aug. 1, 1999) <http://www.jennicam.org>; *see also A Real Truman?*, TIME, June 15, 1998, at 22 (describing Jennifer Ringley's website).

the clock to those who log on to her site.[125] The site, which started as a project for a computer class in 1996, is extremely popular, reportedly receiving 4.5 million hits each day.[126]

Because the individuals featured in pseudo voyeurism consent to being watched, concerns with privacy are not as relevant as they are on sites that feature *verité* voyeurism. Pseudo voyeurism thus is much less problematic from a legal perspective. It nonetheless poses some important legal questions, such as the issue of zoning of home-produced Internet pornography facilities that arose in the *Voyeur Dorm* case described above. With these two types of video voyeurism in mind, the next part of this Article discusses the important interests raised by these new forms of sexually explicit expression.

II. Regulating Video Voyeurism and Its Display: The Interests at Stake

The voyeuristic images that appear on the World Wide Web today and the concomitant efforts to regulate both the capture and posting of those images put into play a number of different interests, some of which conflict. These interests include: (1) the privacy concerns of voyeurism victims; (2) the degradation and subordination of women; (3) the social interest in protecting children from both exposure to, and being the subject of, sexually explicit material; (4) the freedom of expression interests in gathering, disseminating, and receiving speech; (5) the economic interest in profiting from information that commercial marketplace forces support; and (6) the law enforcement and private business interests in surveillance and deterrence of criminal activity via video cameras. Each of these six interests is explored separately below.

A. *Privacy*

Privacy[127] is a central concern of any victim of *verité* voyeurism.

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[125] *See Jenni Cam: Vintage Jennifer* (visited Aug. 1, 1999) <http://www.jennicam.org/~jenni/more/vintage/index.html>.

[126] *See* Jennifer Tanaka, *The Whole World Is Watching*, Newsweek, Sept. 20, 1999, at 74, 75.

[127] "Privacy is commonly understood as a value asserted by individuals against the demands of a curious and intrusive society." Robert C. Post, Constitutional Domains: Democracy, Community, Management 51 (1995). The United States Supreme Court has recognized, within specific contexts, an unenumerated constitutional right to privacy. *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (finding a constitutional right to privacy that protects the marital relationship and, concomitantly, a fundamental right to use contraception within that relationship).

In addition to the constitutional right to privacy, there are four common law privacy torts, including intrusion into seclusion, appropriation of name or likeness, public disclo-

In particular, victims of *verité* voyeurism may find their privacy compromised or invaded in either or both of two ways.[128] Each of these two forms of privacy invasion represents an affront to the individual dignity of the victim and may result in severe emotional distress, embarrassment, and a heightened sense of cynicism about the world.[129] Unfortunately and tragically, the victim's sense of privacy and security is sacrificed, not just for the video voyeur's viewing pleasure, but also for the enjoyment of all those other online voyeurs who view the victim's image when it is posted on the World Wide Web.

1. Twice Bitten: The Double Violation of Privacy

The first type of privacy violation occurs when the voyeur initially captures the video or image. For instance, to obtain secretive images, a voyeur may need to install or place a spy camera in a bathroom, bedroom, dressing room, or other location where the victim may not anticipate being watched. A physical zone of privacy and the sense of security that comes with it may be breached in such cases. Privacy, in this sense, may be thought of as a "right to be let alone,"[130] free from unwarranted intrusions into one's space.

The second privacy violation occurs when the images later are posted and displayed on the World Wide Web. The voyeur now has published information—what the victim looks like naked, in her underwear, or other state of undress—that the victim would prefer to keep private. Privacy at this second stage thus refers to the ability of individuals to control the flow of information about themselves. For example, the unsuspecting victim of upskirt voyeurism would not want others to see what she looks like in her underwear and would prefer to control the dissemination of that information by preventing the publication of the image.

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sure of private facts, and false light. RESTATEMENT (SECOND) TORTS § 652A (1977); POST, *supra*, at 49; *see also* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960) (classifying the four privacy torts in this seminal law review article).

[128] In contrast to *verité* voyeurism, pseudo voyeurism raises very few privacy concerns, because the individuals who are videotaped or viewed know they are being observed and consent to the observation. Consent, in turn, is a defense to most legal actions involving claims for invasion of privacy. *See* RICHARD C. TURKINGTON & ANITA L. ALLEN, PRIVACY LAW: CASES AND MATERIALS 29 (1999) ("[C]onsent is a defense that permeates all privacy law and, if available, invariably results in the determination that no responsibility attaches for the individual or government action.").

[129] *See* Simon, *supra* note 13, at 885 (observing that "adolescent girls are particularly vulnerable to psychological injury from covert videotaping" and that, as compared to men, "women are more likely to respond with outrage over invasion of their privacy").

[130] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

2. Being Private in Public Places: An Oxymoron?

Can a person have an expectation of privacy in a public place? Unfortunately for some of the victims of upskirt voyeurism, the answer under civil law initially appears to be an emphatic "no."[131] Professor Andrew Jay McClurg writes, in an excellent article calling for a theory of liability for intrusions in public settings, that "[o]ne lesson of modern privacy law in the tort arena is that if you expect legal protection for your privacy, you should stay inside your house with the blinds closed. Tort law clings stubbornly to the principle that privacy cannot be invaded in or from a public place."[132]

Under this general principle, victims of upskirt voyeurism that takes place in a public location, such as a park or shopping mall, would be left remediless under the privacy theory of intrusion into seclusion.[133] To maintain a cause of action for intrusion into seclusion, one must have a reasonable or legitimate expectation of privacy.[134] If there is no expectation of privacy in the place or location where a photograph or video is taken, the plaintiff will generally lose under this theory.

Amazingly, however, the drafters of the *Restatement (Second) of Torts* seemed to predict the rise of upskirt voyeurism decades before it became a national problem. Buried in a comment relating to their articulation of the tort of intrusion into seclusion, the drafters wrote that "even in a public place, however, there may be some matters about the plaintiff, *such as his underwear or lack of it*, that are not exhibited to the public gaze; and there may still be an invasion of privacy when there is intrusion upon these matters."[135]

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[131] "The appearance of a person in a public place necessarily involves doffing the cloak of privacy which the law protects." Cefalu v. Globe Newspaper Co., 8 Mass. App. Ct. 71, 77 (1979).

[132] Andrew Jay McClurg, *Bringing Privacy Law out of the Closet: A Tort Theory for Intrusions in Public Places*, 73 N.C. L. REV. 989, 990 (1995).

[133] The public voyeurism situation of upskirts in malls and parks should be distinguished from the more private video voyeurism that takes place using cameras hidden in dressing rooms, bedrooms, and bathrooms. These places are generally considered private locations in which people have an expectation of privacy, unless they are given notice that a camera may be watching their movements. *See* People for the Ethical Treatment of Animals v. Berosini, 111 Nev. 615, 635 (1995) (finding that a private bedroom, a restroom, and a dressing room are places "traditionally associated with a legitimate expectation of privacy").

[134] As the supreme court of California recently observed:

> To prove actionable intrusion, the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source.

Shulman v. Group W Prods., Inc., 18 Cal. App. 4th 200, 232 (1998).

[135] RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977) (emphasis added).

a. The Original Upskirt: Flora Bell Graham

The illustration the *Restatement* framers used to inform the comment set forth above is drawn from a real case decided by the Alabama Supreme Court over thirty-five years ago, *Daily Times Democrat v. Graham.*[136] Unlike the covert upskirt voyeurism cases of today, however, this case involved a dress that was, quite literally, *already* up and underwear that was plainly visible to the public. Flora Bell Graham, then a 44-year-old housewife, was attending the Cullman County Fair in Alabama in October, 1961.[137] As she was leaving the funhouse with her two young children, air jets blew up underneath her dress à la Marilyn Monroe in the 1957 Billy Wilder film *Seven Year Itch*—and, as the Alabama Supreme Court put it, "her body was exposed from the waist down, with the exception of that portion covered by her 'panties.'"[138] As misfortune would have it, a photographer for the *Daily Times Democrat* snapped a picture of Graham at that precise moment and the newspaper had the bad taste and profoundly poor journalistic judgment to later publish the photo on its front page.[139] As a result of that publication, Graham claimed to have become "embarrassed, self-conscious, upset and was known to cry on occasions."[140] She filed a lawsuit claiming her privacy was invaded.

One of the central questions faced by the supreme court of Alabama was whether Flora Bell Graham possessed a reasonable expectation of privacy at the time the photograph was taken at the funhouse.[141] The newspaper argued that she did not, claiming that the picture was taken at a time Graham was "part of a public scene"[142] and, therefore, no invasion of privacy was possible.

The high court of Alabama began its analysis of the issue by acknowledging that the principle that one does *not* possess a reasonable expectation of privacy in a public place "is established by the cases."[143] Yet it chose not to follow this general rule in Flora Bell Graham's case. Apparently not wanting to deprive Graham of legal recourse for an obviously embarrassing photograph, the court observed that "a purely mechanical application of legal principles should not be permitted to create an illogical conclusion."[144] The

136 276 Ala. 380 (1964).
137 *See id.* at 381.
138 *Id.*
139 *See id.*
140 *Id.* at 382.
141 *See id.* at 383.
142 *Id.*
143 *Id.*
144 *Id.*

court then reasoned that it would be illogical to conclude that a person who "is involuntarily and instantaneously enmeshed in an embarrassing pose forfeits her right of privacy merely because she happened at that moment to be part of a public scene."[145]

In reaching its conclusion in Graham's favor, the Alabama Supreme Court created a rule that, if followed by courts today, would appear to provide modern-day victims of video voyeurism in public places—upskirt and downblouse victims in malls, parks, and amusement parks—with a line of reasoning useful in creating a reasonable expectation of privacy in a public place. The rule? The court wrote:

> Where the status [the plaintiff] expects to occupy is changed without his volition to a status [that is] embarrassing to an ordinary person of reasonable sensitivity, then he should not be deemed to have forfeited his right to be protected from an indecent and vulgar intrusion of his right to privacy merely because misfortune overtakes him in a public place.[146]

This rule can be dissected into a number of components. First, one *may* have an expectation of privacy, even in a public place. For this to be true, however: (1) there must be "an indecent and vulgar intrusion"; (2) the intrusion must take place without the plaintiff's "volition" (it must be the result, in other words, of "misfortune" beyond the plaintiff's control); and (3) the result of the intrusion must be a situation or position that causes reasonable embarrassment to the plaintiff.[147]

How might this rule be applied to the common, hidden-camera upskirt scenario of today? A real-life example helps to illustrate. Richard Brown of Gillett, Wisconsin, was alleged by police to be an upskirt voyeur at Milwaukee area shopping malls.[148] Specifically, in 1998, police accused Brown of "hiding a video camera in a backpack, cutting a hole to expose the camera lens and then secretly aiming it up the skirts of a half dozen or so female clerks who sat at tables while helping him."[149] Would these female clerks, who work in a public location, nonetheless have a reasonable expectation of privacy that their underwear and buttocks would not be videotaped under the rule articulated in *Graham*?

A number of steps must be analyzed to reach a decision. First, one must determine whether directing a concealed camera up the

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145 *Id.*
146 *Id.* at 383-84.
147 *See id.*
148 Sink & Spice, *supra* note 15, at 1.
149 *Id.*

skirt of sales clerks who are helping a person pretending to be a customer would be, in the words of the *Graham* court, "an indecent and vulgar intrusion."[150] This focuses attention on the conduct and actions of the alleged video voyeur. Is the taping by Brown in this particular factual situation indecent and vulgar?

Second, it is necessary to determine whether the intrusions occurred with or without the volition or help of the clerks. This element, unlike the first, focuses on the conduct of the sales clerks. Did the clerks do anything to trigger this intrusion or, instead, did it occur without their volition and therefore it was, in the words of the *Graham* court, simply a result of "misfortune"?[151]

Finally, one must assess whether a reasonable person in the position of the sales clerks would find this to be an embarrassing situation. Specifically, a judge or jury following the rule in *Graham* would need to determine whether it would be embarrassing to a reasonable person to have her underwear videotaped, without her knowledge and underneath a table, while she was trying to help the voyeur.

Surely if the Alabama Supreme Court, which applied this test, found that Flora Bell Graham had an expectation of privacy when her underwear was clearly exposed—albeit involuntarily—in plain view for all around her to see, then it would necessarily find an expectation of privacy for sales clerks whose underwear was *not* exposed and *not* in plain view but instead required a well-placed video camera to see. To view Flora Graham's underwear, one did *not* need an image-enhancing device. Her dress was blown up in a public place, and anyone standing up near her could see her underwear. It was not necessary to either lie down on the ground to see her underwear or to place a camera at a low angle on the ground in the immediate vicinity of her feet to get a direct look at her undergarments.

To take a gander at the sales clerks' underwear, however, Richard Brown reportedly had to go to great lengths.[152] Because the clerks' underwear could *not* be seen by the naked eye simply by standing next to them, Brown allegedly had to: (1) find a video camera; (2) find a backpack; (3) cut a hole in the backpack; (4) place the video camera in the backpack; (5) make sure the lens of the camera was exposed through the hole in the backpack; (6) pretend to be an interested customer of the sales clerks; and (6) place

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150 276 Ala. at 383-84 CHECK THIS

151 *Id.* CHECK THIS

152 *See* Sink & Spice, *supra* note 15, at 1.

the camera-carrying backpack under the tables at which the women were seated. In other words, a series of well-planned, affirmative steps was necessary on the part of the alleged voyeur, Richard Brown, to see the clerks' underwear. No such similar steps were needed on the part of the *Daily Times Democrat* photographer to see Flora Bell Graham's underwear. It was there, in open view, for everyone to see.

It should be evident, then, that there actually is *greater* reason to find a reasonable expectation of privacy for the sales clerks in Wisconsin than for Flora Bell Graham in Alabama. If snapping a picture of Graham, a woman whose underwear was exposed for all standing around her to see, can be considered "an indecent and vulgar intrusion,"[153] then the truly tortured efforts of Richard Brown to get a glimpse of underwear that was not in plain view certainly constitute an indecent and vulgar intrusion of the sales clerks' privacy. The reasoning of the Alabama Supreme Court, if followed today by other courts, thus would seem to provide an argument for an expectation of privacy to *some* of the upskirt victims of video voyeurism that transpires in public places.

b. The Volitional Upskirt: No Expectation of Privacy in Public

Not all victims of upskirt voyeurism would be able to assert such an expectation of privacy in a public place under the *Graham* approach. For instance, some upskirt photographs posted on the Web are taken of women wearing short skirts while they sit on the ground at fairs and outdoor concerts or lie down in public parks. Their underwear is exposed for anyone else sitting nearby to see. These women know that other people are sitting on the ground. No visual enhancement technology is necessary to see the underwear. In these cases, the actions of the women themselves have created the opportunity for voyeurs to get what amounts to a *plain-view upskirt* video or photograph. Although the women most likely do not know they are being photographed and probably have no intent to expose their underwear, the *Graham* standard suggests they do not have an expectation of privacy. Why?

The *Graham* test, as described above, requires that the embarrassing situation be created *without* the "volition" of the plaintiff, if the plaintiff is to prevail.[154] If a woman *chooses* to sit on the ground wearing a short skirt and knows that others are, quite reasonably, sitting on the ground, she has created the voyeuristic situation and

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153 *Daily Times Democrat*, 276 Ala. at 384.

154 *See id.* at 383-84; *see also supra* note 146 and accompanying text.

placed her underwear in public view. Unlike the sales clerks in the real-life scenario described above, the woman's own conduct has voluntarily exposed her underwear to those around her.

This is analogous to growing instances of beach voyeurism.[155] A person has no reasonable expectation of privacy or seclusion on a public beach.[156] One voluntarily exposes oneself, except for perhaps a small amount of skin covered by a swimsuit, to others who might walk by or similarly lie down on the beach. One also exposes oneself, as is now happening on Miami's South Beach, to cameras placed on nearby buildings.[157] Gazing at members of the opposite sex as they tan while wearing swimsuits, in fact, is a favorite pastime of many.[158] A reasonable person is well aware of this, and there can be no expectation of privacy in this setting.

c. Changing Expectations of Privacy and the Assumption of Risk

As more and more people learn about the practice of upskirt voyeurism in public places like shopping malls and as those events receive more and more media attention, an interesting issue may arise. Because people *know* that video voyeurs are out there with tiny cameras in their bags ready to capture upskirt videos, does one, in fact, begin to lose a legitimate expectation of privacy like that described in the example of the Milwaukee-area sales clerks? Phrased differently, if reasonable people come to understand and recognize that video voyeurs are lurking in shopping malls with hidden cameras aimed up under women's skirts, do women then assume the risk of video voyeurism if they wear short skirts or dresses?[159]

This would surely be a troubling result. Take a typical exam-

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155 *See Sunbathers Unknowingly Star on Internet*, VERO BEACH PRESS J., Feb. 26, 1999, at A14 [hereinafter *Sunbathers*] (describing the photographic voyeurism on Miami's famous South Beach and observing that "the women's images often are sold on the World Wide Web almost always without their knowledge"). For sites featuring images of beach voyeurism, see *Beachbuns* (visited Aug. 13, 1999) <http://www/beachbuns.com> and *Euro Beach* (visited Aug. 12, 1999) <http://www.eurobeach.com>.

156 "Generally speaking, a reasonable expectation of privacy can't exist on public sidewalks, at parks, *on public beaches*, in the aisles of department stores, or in the open dining rooms of restaurants." ZELEZNY, *supra* note 16, at 178 (emphasis added).

157 *See Sunbathers*, *supra* note 153, at A14.

158 *See* Arthur Hirsch, *Beach Life*, BALTIMORE SUN, July 20, 1998, at Features 1E (describing the activity and "protocol of beachfront voyeurism").

159 "Underlying the rule that there is no legitimate expectation of privacy in public places is the idea that persons effectively assume the risk of scrutiny when they venture from private sanctuaries such as dwellings or offices." McClurg, *supra* note 132, at 1037; *see also* RESTATEMENT (SECOND) OF TORTS § 496A (1977) (explaining that the doctrine of assumption of risk holds that an individual who "voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm").

ple of mall-based upskirt voyeurism in Florida. Julie and Josh Harris were shopping at a mall.[160] Josh noticed a bag placed at his wife's feet, and he soon spotted a lens poking out of it. Kenneth James Hofbauer later was arrested for a misdemeanor crime of voyeurism relating to the incident.[161] He eventually pleaded no contest to the charges for videotaping up the skirts of Julie Harris and several other women at the mall.[162]

Now consider a hypothetical civil suit based on these facts. If Julie Harris brought a lawsuit claiming Hofbauer invaded her privacy, one question would be whether she had a legitimate expectation of privacy in a public mall, so that a person could not place a video camera near her feet that shot up underneath her dress. As noted above, the *Restatement (Second) of Torts* comment and the ruling in *Graham* would suggest that Julie Harris would have such an expectation of privacy, despite the general principle of no expectation of privacy in a public place.[163]

But counsel for the defendant conceivably could argue that a reasonable person would have been aware of the phenomenon of upskirt voyeurism in malls and therefore should have known that this might happen. In other words, when a woman wears a short skirt or dress in a public mall, she should reasonably anticipate that the Kenneth James Hofbauers of the world are out there ready to use hidden cameras to take a video peek up her dress. A reasonable person surely would wear pants or slacks to prevent this if she were truly concerned about an alleged invasion of privacy by upskirt voyeurs.

This line of reasoning, of course, sounds absurd. Acceptance of it imposes, essentially and quite literally, a legal dress code on women. Wear a short skirt or dress and you take a risk. Wear slacks or pants and you're protected. The real reason that acceptance of this argument would be so outrageous is that it ignores a simple fact: if Julie Harris didn't care if strangers saw her underwear, she wouldn't have put on a dress in the first place. But she didn't go bare, as it were. She wore a dress that day that, we assume, covered her underwear from direct plain view by people

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160 *See* Ladale Lloyd, *Cops Say Man Tried to Look up Skirts*, TAMPA TRIB., Sept. 9, 1998, at Florida/Metro 4.

161 *See* Sue Carlton, *Man Charged under New Voyeur Law*, ST. PETERSBURG TIMES, Sept. 16, 1998, at 4B.

162 *See* Sue Carlton, *Tampa Video Voyeur Gets Probation*, ST. PETERSBURG TIMES, Mar. 30, 1999, at 3B.

163 *See supra* note 135 and accompanying text (setting forth the text of the *Restatement* comment in question).

standing nearby or next to her. The only way to see it was to take affirmative steps with a low-angle video camera.

d. Summary

As the cases and examples in this Section have suggested, it seems reasonable to conclude that *some* victims of video voyeurism that occurs in a public place should nonetheless maintain a reasonable and legitimate expectation of privacy. Why? *An individual may be in plain view in a public place but, customarily, her underwear is not.* What normally are exposed to the public are *outer* garments, not *under* garments.

That said, two rules or principles emerge to guide judges on the issue of privacy in upskirt video voyeurism cases: (1) unless an individual has taken some voluntary, affirmative step that she knows or reasonably should know will expose her underwear to public view, there should be an expectation of privacy; and (2) if a person's underwear can only be seen by the use of a visual enhancement device, such as a video or spy camera, placed in a position where a person would *not* normally or reasonably be standing or sitting—people do not normally lie down on shopping mall floors next to women to look up their skirts—then an expectation of privacy should exist.

Although Flora Bell Graham may have been in a public place, she did not voluntarily expose her underwear to the public. She wore a dress over it. Without her knowledge of its presence, a wind jet blew up her dress. While Graham may have voluntarily entered the funhouse and, literally, taken the step that exposed her underwear momentarily to the public, she apparently did not know this would occur, and it might not have been reasonable for her to know this would take place. She thus was rightfully entitled to an expectation of privacy in her underwear, even though she was standing in a public place.

She should *not* have been entitled to such an expectation, however, if she had known or reasonably should have known about the presence of the air jet in advance of entering the funhouse. She would have assumed the risk of exposure. Similarly, had she physically pulled up her dress herself, she would not have had a reasonable expectation of privacy.

The sales clerks whose underwear was videotaped while they were ostensibly helping Richard Brown in Milwaukee did not voluntarily expose those garments to the public. No one standing or sitting nearby would have been able to see them. It was necessary,

instead, to plant a visual enhancement device in a place where a person would not normally be standing or sitting—under a table—to see their underwear. The sales clerks thus had a reasonable expectation of privacy in a public place.

In contrast, a woman who wears a short skirt and sits on the ground at a concert in a public park without crossing her legs knows or reasonably should know that others sitting around her or nearby may be able to see her underwear. No visual enhancement device is necessary to see the underwear. The same applies for a person at a public beach wearing a swimsuit. One knows or should know that others sitting on the beach can see her. There is no reasonable expectation of privacy in these two situations that would guard against video voyeurism or protect its victims.

The bottom line is that *some, but not all,* of the victims of video voyeurism should have an expectation of privacy when the images are gathered in a public place. Whether such an expectation exists, as these examples suggest, requires a highly fact-specific analysis that will vary from case to case and depend not only on the setting in which the voyeurism takes place but also on the victim's own actions and those of the video voyeur.

3. Privacy Without a Face?

In addition to the privacy violation that occurs when voyeuristic images are *gathered,* a second privacy violation may occur when the images are *posted* on the World Wide Web for public consumption. The privacy interest here affects the ability of individuals to control the flow and dissemination of private information about themselves to the public. It might be thought of as what some scholars term an "informational privacy" right.[164] Tort law includes a remedy to compensate individuals when this informational privacy right is violated.

Under the tort known as public disclosure of private facts, an actionable privacy invasion occurs if publicity is given to a private fact that would be highly offensive and objectionable to a reasonable person, and the fact in question is not of legitimate public concern.[165] The private fact need not be revealed in words to be actionable; it may include something revealed in a photograph.[166]

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164 *See* SMOLLA, *supra* note 3, at 121 (discussing the concept of informational privacy).

165 Shulman v. Group W. Prods., Inc., 18 Cal. 4th 200, 214 (1998).

166 *See* Cefalu v. Globe Newspaper Co., 8 Mass. App. Ct. 71, 77 (1979) ("The notion of a right of privacy is founded on the idea that individuals may hold close certain manuscripts, private letters, family *photographs,* or private conduct which is no business of the public and the publicizing of which is, therefore, offensive.") (emphasis added).

Plaintiffs will prevail on this cause of action, however, only if they are in fact identified in the communication.[167]

In much of the video voyeurism that occurs today, the victim's face and identity are readily discernible. For instance, video images taken by a spy camera in a locker room, bedroom, or bathroom may show the victim's face or other features that make him or her readily identifiable.[168] When these images are posted on the World Wide Web, there most likely has been a public disclosure of private facts, unless the faces are digitally blurred or altered.

But what happens when the victim's face and identity are *not* readily discernible? This certainly is the case in nearly all instances of upskirt video voyeurism, in which all that is seen in the posted image are the legs, buttocks, and/or underwear of a woman or girl.[169] The face of the victim never appears. Unless there is some amazingly distinctive characteristic on her legs or buttocks, such as a unique or highly unusual tattoo that makes her identifiable to those who know her, the disembodied woman essentially remains anonymous.[170]

In this case, has privacy been violated by posting an image on the World Wide Web? In deciding a public disclosure of private facts case, courts commonly determine whether the plaintiff has been identified by asking if the plaintiff "would reasonably be understood by recipients of the offending communication to be the person to whom it relates."[171] In particular, there must be "a clear and identifiable likeness of the plaintiff recognizable from the photograph itself."[172] It is not essential, however, that all viewers of a photograph be able to identify the plaintiff.[173]

Most victims of upskirt voyeurism would probably be left reme-

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167 *See* ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER AND RELATED PROBLEMS 583 (2d ed. 1994).

168 *See generally* George Hunter, *Teen-ager Suspected as Video Peeping Tom*, DETROIT NEWS, June 21, 1999, at Metro C1 (describing the case of a Farmington Hills resident suspected by police of hiding a spy camera in the bedroom of his parents' home and videotaping several girls, some as young as 16, while they changed clothes before using a hot tub).

169 This type of pornographic voyeurism, in which particular parts of the body are the exclusive focus of the camera's gaze, represents what feminist legal scholar Catharine MacKinnon calls "the fetishization of women's body parts." CATHARINE MACKINNON, ONLY WORDS 23 (1993).

170 It may be that a distinctive tattoo will be enough to make the person identifiable. *Cf.* Miller v. National Broad. Co., 187 Cal. App. 3d 1463, 1477 (involving a cause of action for intrusion into seclusion in which a plaintiff claimed her father was identifiable "because of a distinctive tattoo on the arm of the man being wheeled out").

171 SACK & BARON, *supra* note 167, at 583.

172 Leval v. Prudential Health Care Plan, Inc., 610 F. Supp. 279, 281 (N.D. Ill. 1985).

173 *See* Shulman v. Group W. Prods., 18 Cal. App. 4th 200, 230 n.12 (involving an identification issue of a woman shown in videotape and stating that "an invasion of privacy does not necessarily depend on whether the plaintiff's full name was broadcast or whether she was identifiable to *all* viewers" (emphasis added)).

diless under this standard. If faces are not revealed and names do not accompany the photographs, then there must be some other distinguishing characteristic that makes the plaintiff identifiable from the photograph. Unless the plaintiff has a rare or unusual tattoo on her leg or buttocks that was known to others besides the plaintiff herself, a cause of action for public disclosure of private facts would not be successful.

4. Being Private on the World Wide Web: Another Oxymoron?

There is much on the World Wide Web that is very public. One can log on to the sites of many online newspapers, for instance, and receive an incredible amount of information free of charge.[174] On the other hand, the World Wide Web is also a very private place. In particular, there are a large number of sites that require one to pay a monthly or yearly subscriber fee to download information reserved for "members."[175] This is particularly true for commercial sex sites that charge an access fee.[176]

Sites that traffic in *verité* voyeurism images may charge a monthly fee. In such cases, the victims of voyeurism may never know that their images are essentially for sale. In other words, the privacy violation goes unnoticed. The only ways in which a victim conceivably would find out about a violation would be if: (1) the victim herself were surfing the Web and found the offending images; (2) others who knew the victim were Web surfing and located the images; or (3) the operator of the commercial site actually informed the victim that it was posting her image. The third method, of course, is highly unlikely, since it is tantamount to inviting a lawsuit if the victim does not consent to the use and the operator continues to post the victim's images. The first manner of detection also is improbable, unless the victim herself is a visitor of voyeuristic and pornographic sites. That leaves only the accidental and random discovery by someone who knows the victim as the primary means of detection. Even if such an accidental discovery occurred, a true friend of the victim might feel too embarrassed to tell the victim—either because the friend would not want to admit

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[174] *See generally The Washington Post* (visited Sept. 13, 1999) <http://www.washingtonpost.com> (providing a free online version of one of the nation's leading newspapers).

[175] *See* Paul Franson, *The Net's Dirty Little Secret: Sex Sells*, UPSIDE, Apr. 1998, at 78, 81. For instance, the online version of *Penthouse* charged a $14.95 monthly fee in 1998, while *Playboy* online charged $6.95.

[176] *See supra* notes 116-122 and accompanying text (describing the *Voyeur Dorm* site, which charges a monthly $34 fee for members to access images of women around the clock as they go about their lives in a camera-monitored home).

visiting a pornographic website or because the friend would not want to cause the emotional distress that might result if the victim were informed.

The bottom line is that victims of *verité* voyeurism may never know that their privacy has been violated, either when the images are captured or when they subsequently are posted on the World Wide Web. By its very nature, of course, the act of voyeurism is supposed to be secret. Unfortunately for the victim of the voyeur's gaze, a wrong often goes *unpunished* because it goes *unnoticed.*

5. Summary

This Section has suggested that privacy is an important and major concern in any consideration of regulating *verité* voyeurism. Victims' privacy interests may be violated or compromised at both the image-gathering and image-publishing stages. Despite the offensiveness of the intrusions, this Section has also suggested that a number of potholes mark the victim's road to legal recovery. Given the fact that some voyeurism occurs in a public place where expectations of privacy are reduced, and the reality that many victims never discover that they were the target of a voyeur's camera, redressing privacy concerns is far from an easy task.

B. *Women*

One of the most important arguments supporting pornography regulation is that sexually explicit images not only exploit and degrade women but also construct and define relationships between women and men in a way that subordinates women and, as Catharine MacKinnon writes, "institutionalizes the sexuality of male supremacy."[177] To that extent, Catherine Itzin argues that the "elimination of pornography is an essential part of the creation of genuine equality for women—and for men."[178]

If one accepts this argument,[179] then much of the voyeuristic

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177 CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 148 (1987).

178 Catherine Itzin, *Pornography and the Social Construction of Sexual Inequality, in* PORNOGRAPHY: WOMEN, VIOLENCE AND CIVIL LIBERTIES 57, 70 (Catherine Itzin ed., 1992).

179 *Cf.* EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE 613 (1992). The argument is not universally accepted. Consider the remarks of author Norman Mailer: "The idea that pornography should be censored because it's degrading to women is ridiculous. I've seen any number of pornographic films where you have girls sitting on guys' heads." Some women also disagree with MacKinnon's calls for regulation of pornography, arguing that regulation will do more harm to women than good. *See* ROBERT TRAGER & DONNA L. DICKERSON, FREEDOM OF EXPRESSION IN THE 21ST CENTURY 122 (1999) ("Several women's groups maintain that censorship in the name of protecting women is more degrading than the pornography itself.").

pornography that appears on the World Wide Web is particularly pernicious. Why? First, consider upskirt voyeurism. Most often, only a woman's legs, buttocks, and underwear appear in the on-screen image. The woman's face, however, is strangely absent—it is simply not in the picture, since the video camera that took the picture was underneath the skirt. The upskirt voyeurism victim thus is not even portrayed as a whole woman on the Web, but instead is fragmented and, essentially, dismembered. The woman is broken down into mere body parts—in particular, fetishized body parts.[180] The ramifications? Annette Kuhn writes that "an abstracted bodily part other than the face may be regarded as an expropriation of the subject's individuality. In consequence, the tendency of some pornographic photographs to isolate bits of bodies may be read as a gesture of dehumanisation."[181]

Second, the capture of voyeuristic pornography—the act of taking the video images in secret—inherently embodies power. Why? Kuhn writes that in voyeurism, the voyeur's look has the power "of catching its object unawares."[182] In other words, a male voyeur possesses a sense of power, because the female object of his gaze is unaware of the camera's presence. That the voyeur holds power over the surreptitiously observed individual should be clear. The voyeur is the taker of information, not the giver. The voyeur is able to learn about others' lives simply by watching them. There is no reciprocal responsibility or obligation placed on the voyeur in the watching process. No strings are attached to the receipt of knowledge. The feeling of power that accompanies the voyeur's privileged vantage point may be inherently rewarding. The voyeur knows something important that the individual being watched doesn't know—that the individual is, in fact, being visually devoured by a camera.

Third, the male audience that views voyeuristic pornography depicting women on the World Wide Web is itself participating in this power relationship. How is this the case? The viewing of pornography in private is an inherently voyeuristic activity, especially given the enhanced sense of anonymity—albeit illusory anonymity, given the advent of cookies[183]a—that comes from viewing it from

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180 *Cf.* Kathy Myers, *Towards a Feminist Erotica, in* GENDER, RACE AND CLASS IN MEDIA 263, 268 (Gail Dines & Jean M. Humez eds., 1995) (describing sexual fetishization and commodity fetishization in pornography).

181 Annette Kuhn, *Lawless Seeing, in* GENDER, RACE AND CLASS IN MEDIA 271, 274 (Gail Dines & Jean M. Humez eds., 1995).

182 *Id.* at 276.

183 Cookies are "small files on the user's computer that can contain any information the Web site deposits there, including the names of the pages the user visited or what the user

one's home on a computer instead of at an adult video arcade. With pornography, one gets to stare at images of others, fantasize about them, and even engage in masturbatory physical pleasures,[184] all without the need to physically interact with the person whose image appears on the computer screen. This, in fact, is what real life Peeping Toms do when they peer through windows at women, as the *DSM-IV* suggests in its definition of voyeurism.[185]

The woman whose underwear is displayed on the computer screen cannot look back at the voyeur; her face isn't even symbolically present in upskirt pornography. As Kuhn writes, "in voyeurism, the subject of the look, the Peeping Tom, separates himself in the act of looking from the object, which cannot look back at him."[186] This disconnect between the watcher and the watched exacerbates the problems caused by voyeuristic pornography.

In summary, any decision to regulate the capture and/or display of voyeuristic pornography must take into account the particular types of harms allegedly caused to women by this unique brand of sexually explicit expression. The next Section suggests another interest—protection of children—that also militates in favor of regulation.

C. *Children*

When it comes to restricting the display of sexually explicit images—or, for that matter, any other offensive or allegedly harmful speech—there is perhaps no better judicially or legislatively accepted justification than protecting minors.[187] The courts, in fact, sometimes seem to teeter on the verge of adopting what First Amendment scholar Rodney Smolla calls a "Child's First Amendment"—an amendment which permits the "regulation of speech implicating children in ways that would be impermissible for

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typed." Eric J. Sinrod & Barak D. Jolish, *Controlling Chaos: The Emerging Law of Privacy and Speech in Cyberspace*, 1999 STAN. TECH. L. REV. 1, ¶ 4 (1999), at <http://stlr.stanford.edu/STLR/Articles/99_STLR_1/index.htm>. The impact of cookies is that they "mean less privacy." Lawrence Lessig, *The Limits in Open Code: Regulatory Standards and the Future of the Net*, 14 BERKELEY TECH. L.J. 759, 762 (1999).

184 *See* MACKINNON, *supra* note 169, at 17 ("Pornography is masturbation material. It is used as sex.").

185 *See supra* note 33 and accompanying text.

186 Kuhn, *supra* note 181, at 276.

187 *See* Reno v. ACLU, 521 U.S. 844, 875 (1997). The United States Supreme Court, in considering the constitutionality of the Communications Decency Act, observed that the Court has "repeatedly recognized the government interest in protecting children from harmful materials." Lower courts have followed the Supreme Court's lead in this respect. *See* Action for Children's Television v. FCC, 58 F.3d 654, 656 (D.C. Cir. 1995) (holding that the government has "a compelling interest in protecting children under the age of 18 from exposure to indecent broadcasts"), *cert. denied*, 516 U.S. 1043 (1996).

adults."[188] Yet, the United States Supreme Court has made it clear that even a compelling interest in protecting children "does *not* justify an unnecessarily broad suppression of speech addressed to adults."[189] How, then, does the societal interest in shielding minors from exposure to sexually explicit voyeuristic images factor into the balance of regulating the display of those images on the World Wide Web?

Clearly, *verité* voyeuristic images that depict obscene conduct between unsuspecting adults are outside of the protection of the First Amendment, as is *all* obscene speech.[190] Many of the voyeuristic images that appear on the Web, however, obviously are not obscene under the current three-part test created by the Supreme Court in *Miller v. California.*[191] For instance, the images may simply be of an unsuspecting adult caught in a state of nudity while she showers or sunbathes. The Court has made it clear that nudity by itself does not constitute obscenity.[192]

In addition, the Court has held that "[s]exual expression which is indecent but not obscene is protected by the First Amendment."[193] Thus, an upskirt photograph of a woman's underwear may be offensive or even indecent to many, but it probably is *not* legally obscene and therefore falls within the scope of constitutionally protected expression. If a young girl, however, was the individual whose upskirt image and underwear appeared on the Web, this might constitute child pornography and would thus be unprotected by the First Amendment.[194] Why might this be the case?

In *United States v. Knox,*[195] the United States Court of Appeals for the Third Circuit held that a lascivious exhibition of the genitals or pubic area may constitute unprotected child pornography under federal law, "even when those areas are covered by an article of clothing and are not discernible."[196] In *Knox,* all of the young children "wore bikini bathing suits, leotards, underwear, or other

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188 SMOLLA, *supra* note 3, at 328.

189 *Reno,* 521 U.S. at 875 (emphasis added).

190 *See* Miller v. California, 413 U.S. 15, 23 (1973) (observing that the Court has "categorically settled" that obscene speech is "unprotected by the First Amendment").

191 *Id.* at 24.

192 Erznoznik v. Jacksonville, 422 U.S. 205, 213 (1975) (holding that "clearly all nudity cannot be deemed obscene even as to minors").

193 Sable Communications v. FCC, 492 U.S. 115, 126 (1989).

194 *See* New York v. Ferber, 458 U.S. 747, 756-66 (1982) (holding that "the States are entitled to greater leeway in the regulation of pornographic depictions of children" and that "[t]he test for child pornography is separate from the obscenity standard enunciated in *Miller*").

195 32 F.3d 733 (3d Cir. 1994), *cert. denied,* 513 U.S. 1109 (1995).

196 *Id.* at 754.

abbreviated attire while they were being filmed."[197] Despite the absence of nudity, the images were held to be child pornography, in part because the "photographer would zoom in on the children's pubic and genital area and display a close-up view for an extended period of time."[198] Although none of those images were of the hidden upskirt variety that is the focus of this Article, it may be that the *Knox* decision provides sound precedent for declaring upskirt images of children outside the scope of First Amendment protection. Upskirt images, after all, involve close-up views of underwear. In this case, society's interest in protecting children from unknowing exploitation—the upskirt victim typically is unaware of the presence of the camera—trumps the audience's free speech interest in receiving the images.

If, however, upskirt images posted on the Web are neither obscene under the *Miller* test nor constitute child pornography, then any law restricting their dissemination based on the goal of shielding children from exposure must be narrowly drawn so as not to violate the First Amendment rights of adults to receive those images.[199] Those First Amendment free speech interests are described below in Part D.

D. *Freedom of Expression*

Non-obscene photographs are a form of speech protected by the First Amendment.[200] This simple yet critical fact is an appropriate point at which to begin consideration of the expression interests at stake in any decision to regulate either the capture or display of voyeuristic images. It suggests that careful, constitutional deliberation must be given by state and federal lawmakers seeking to protect the victims of *verité* voyeurism.

Those holding First Amendment interests in the battle to protect video and *verité* voyeurism include: (1) the voyeur who captures the images; (2) the proprietor of the commercial website that distributes the images; and (3) the pornographic Web surfer who views voyeuristic images. Stated differently, the free speech stake-

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197 *Id.* at 737.

198 *Id.*

199 *See* Erznoznik v. Jacksonville, 422 U.S. 205, 217-18 (1975) ("Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential.").

200 "As with *pictures*, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution." Kaplan v. California, 413 U.S. 115, 119-20 (1973) (emphasis added); *cf.* Burstyn v. Wilson, 343 U.S. 495, 502 (1952) (holding that motion pictures are a form of speech protected by the First Amendment).

holders are the voyeur who *gathers* the speech, the Web operator who *distributes* it, and the audience that *consumes* it. The gathering, distribution, and consumption interests are explored separately below.

1. Gathering Images: Guarding against the Slippery Slope

The gathering of images and speech—in particular, the gathering of news—is not without First Amendment protection.[201] This is logical, since an obvious condition precedent to *reporting* news is *gathering* news. Laws that infringe on the gathering of information thus reduce the dissemination of information to the public.

While voyeuristic images like those that are the focus of this Article may be a far cry from news as we traditionally define that contested concept,[202] they are nonetheless speech, and the United States has acknowledged that "[t]he line between the informing and the entertaining is too elusive" to distinguish between protected and unprotected expression.[203] Thus, in deciding whether to create laws to protect the privacy interests of the voyeurism victims described above in Section A, First Amendment considerations that affect the gathering of images for public dissemination—even if they are voyeuristic images—must be taken into account. What harm may be caused to First Amendment interests if voyeur-specific laws are enacted in the name of privacy protection?

First, a central problem with creating new laws specifically designed to restrict the capture of pornographic, voyeuristic images is that such laws may be abused and misapplied to journalists' legitimate newsgathering efforts. Unless voyeur-specific laws are narrowly drafted and carefully crafted, they might be used to attack undercover, hidden-camera investigations by journalists on important issues such as abuse of the elderly at nursing homes.[204] A law intended to stop video voyeurism may be torn from its legislative moorings by crafty attorneys and misused to thwart the activities of investigative reporters, not just voyeurs.

Second, there is a problem of legal overkill. A number of laws

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201 *Cf.* Branzburg v. Hayes, 408 U.S. 665, 681 (1971) (stating that "without some protection for seeking out the news, freedom of the press could be eviscerated").

202 *See* Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of 'Journalist' in the Law*, 103 DICK. L. REV. 411, 411 n.4 (1999) (describing the difficulty of defining news and identifying traditional characteristics of news).

203 Winters v. New York, 333 U.S. 507, 510 (1948).

204 Through the use of tiny hidden cameras and recording devices, broadcast journalists "have exposed horrific abuses of the elderly and institutionalized, international adoption fraud, and home repair ripoffs." Steven Perry, *Hidden Cameras, New Technology, and the Law*, COMM. LAW., Fall 1996, at 1.

already restrict the ability of all citizens—journalists and voyeurs alike—to gather photographs and images. These include the privacy tort of intrusion into seclusion described earlier in this Article,[205] as well as the criminal and civil laws of trespass.[206] Furthermore, anti-harassment and anti-stalking laws can be used against overzealous image gatherers.[207]

In a nutshell, then, the creation of voyeur-specific laws might not only produce duplicative and redundant legislation, but the new laws might hamper and encroach on the legitimate newsgathering efforts of mainstream journalists and photographers. In particular, laws regulating video voyeurs may broadly sweep up the activities of broadcast journalists using lipstick-size cameras and other miniature recording devices. In other words, more laws are not always better laws. They may carry dangerous and unintended consequences.

These dangers are more than speculative. They are, in fact, occurring today with the proposal and passage of laws specifically aimed at the so-called paparazzi. After the death of Princess Diana in France was initially blamed on motorcycle-riding photographers,[208] legislators in the United States began to draft new laws restricting the gathering of images in this country.[209] In October, 1998, then-California Governor Pete Wilson signed into law a regressive piece of Hollywood-lobbied legislation that substantially curbed press freedom.[210] Similar legislation was proposed in the United States Congress and debated in 1998 before the House Judiciary Committee.[211] The California law and the proposed federal legislation have been criticized as "a dangerous and untrustworthy

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205 *See supra* notes 131-35 and accompanying text (describing the law of intrusion into seclusion).

206 *See supra* note 17 and accompanying text (describing the law of trespass).

207 *See* C. THOMAS DIENES ET AL., NEWSGATHERING AND THE LAW 514 (1997) (observing that "[p]ersistent journalists may pursue a story so diligently that a source will seek redress in the criminal law of harassment"). California, for instance, has a statute that establishes a distinct tort of stalking. *See* CAL. CIV. CODE § 1708.7 (West 1999). The state also has a statute that punishes harassment. *See* CAL. CIV. CODE § 527.6(b) (West 1999).

208 *See* Craig R. Whitney, *French Prosecutor Says Pursuers of Diana Did Not Cause Crash*, N.Y. TIMES, Aug. 18, 1999, at A6 (explaining that the charges ultimately were unfounded).

209 *See* Verne Gay, *Flash! The Latest Entertainment News and More*, NEWSDAY, Feb. 19, 1998, at A10 (observing that the federal paparazzi legislation "is, in part, a response to Diana's death").

210 *See* CAL. CIV. CODE § 1708.8 (West 1999). *See also* Note, *Privacy, Technology, and the California "Anti-Paparazzi" Statute*, 112 HARV. L. REV. 1367 (1999) (analyzing the California anti-paparazzi law); Gayle Fee & Laura Raposa, *Inside Track: Whiny Stars Get Anti-paparazzi Bill Passed in a Snap*, BOSTON HERALD, Oct. 13, 1998, at News 8 (describing the passage of the bill and the massive Hollywood lobbying effort that expedited its enactment).

211 *See* Faye Fiore, *Senator, Actors Focus on Bill to Curb Paparazzi*, L.A. TIMES, Feb. 16, 1998, at A1 (describing the proposed federal legislation).

response to a newsworthy event."[212]

Today, legislation like that adopted in California and proposed in Congress affects far more than just the voyeuristic tendencies of the paparazzi to capture real moments of celebrities' lives when they least expect it. As First Amendment attorneys Anne E. Hawke and Bruce D. Brown wrote in *The Legal Times* in 1999, "a media that now routinely smothers the likes of a Betty Currie [President Clinton's secretary] making her way out of a federal courthouse has just as much to lose from these legislative initiatives as any supermarket screamer."[213] The line, in other words, between the mainstream media and the paparazzi has blurred almost to the point of being non-existent. Both groups attempt to bring us unguarded images of celebrities and political figures.

The real danger of paparazzi legislation, of course, involves the First Amendment freedom of the press. A restriction that targets the paparazzi will have a spillover or ripple effect on other members of the media. Carving out a law to regulate one class of photographers surely leads down a slippery slope, with legislative bodies creating more and more statutory exceptions to press freedom. The same danger would arise with the creation of any voyeur-specific legislation.

California's anti-paparazzi legislation, in fact, actually may impact some forms of pornographic voyeurism, particularly images captured from long distances of couples engaged in sexual activity. In particular, the California law creates a cause of action for "constructive invasion of privacy" when an image is captured with a "visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image . . . could not have been achieved without a trespass unless the visual or auditory enhancing device was used."[214] That statute further applies only if the plaintiff is engaged in "personal or familial activity" at the time the photograph is taken.[215]

Assuming that sex is a personal activity and assuming that a voyeur uses a long-distance lens to secretly capture from far away a picture of a couple having sex, the new law might come into play. Not all voyeurism, it must be remembered, is of the up-close upskirt variety. It may be long distance. For instance, if a sexual

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212 Irene L. Kim, *Defending Freedom of Speech: The Unconstitutionality of Anti-Paparazzi Legislation*, 44 S.D. L. REV. 275, 278 (1999).

213 Anne E. Hawke & Bruce D. Brown, *Anti-Paparazzi Legislation Threatens All Those Paid to Take Photos*, LEGAL TIMES, Feb. 15, 1999, at S34.

214 CAL. CIV. CODE § 1708.8(b) (West 1999).

215 *Id.*

voyeur, standing two hundred yards away on a hillside, uses a high-powered camera lens to photograph individuals engaged in sexual activity in their otherwise fenced-in backyard, the California law could provide a remedy to the violated couple if this action could be held to be, as the law requires, "offensive to a reasonable person."[216] The voyeur does *not* need to physically enter the property to be held accountable under California law for a constructive invasion of privacy.[217]

In summary, laws designed to protect the privacy interests of voyeurism victims already exist in traditional newsgathering jurisprudence. New video voyeur laws may actually harm legitimate newsgathering methods and dampen the vigor of the press, not just the prurient observer. Although *verité* voyeurism may be far removed from the work of journalists, statutes designed to restrict the gathering of voyeuristic images may have a significant spillover effect on investigative journalists. This should not be ignored. There is, then, a significant free expression interest in protecting the gathering of voyeuristic images.

2. Distributing Images: Shielding Profit from Governmental Attack

The First Amendment often is used today as a shield by corporate media to ward off attempts at government regulation.[218] The fact that speech is sold for a profit or that it is used for entertainment does not mean that its distribution is unprotected by the Constitution.[219] Furthermore, the fact that speech is sold for a profit on the Web does not exclude it from protection. The distributors and purveyors of voyeuristic pornography thus must be able to assert the First Amendment right to profit from their speech, just as sellers of pornographic magazines and videos rely on that amendment.

There are, of course, legal limits to this right to make a profit from the distribution of non-obscene voyeuristic pornography on

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216 *Id.*

217 *See id.*

218 In the wake of the tragic shootings at Columbine High School in Colorado in April, 1999, the government called for new restrictions on media products such as violent movies. *See* Janet Hook & Nick Anderson, *Ban on Sale of Violent Material to Minors Fails*, L.A. TIMES, June 17, 1999, at A1; *see also* Adam Cohen, *Bullets over Hollywood*, TIME, June 28, 1999, at 64 ("Hollywood lobbyists continue to attack such efforts as a violation of the industry's First Amendment rights.").

219 *See* Olivia N. v. National Broad. Co., 126 Cal. App. 3d 488, 493 (Ct. App. 1981) (holding that "the commercial nature of an enterprise does not introduce a nonspeech element or relax the scrutiny required by the First Amendment" and observing that "freedom of speech is not limited to political expression or comment on public affairs").

the Web. As discussed later in this Article, a woman may succeed under a cause of action for appropriation if her image is used for a commercial purpose without her consent.[220] Such a legal remedy, however, clearly would *not* prevent the for-profit distribution of pseudo voyeurism. As described earlier, pseudo voyeurism involves people who are well aware of the camera's presence and consent to being videotaped.[221]

3. Consuming Images: Protecting the Right to Receive Speech

Another interest at stake is that of the audience. In particular, there is an unenumerated but judicially recognized First Amendment interest in receiving speech and information.[222] Adults have a constitutionally protected right to possess even obscene speech, unless it involves depictions of children.[223] The audience that consumes images of voyeuristic pornography thus holds a First Amendment interest in receiving non-obscene and non-child-pornographic images.

The fact that these images have little, if anything—by any stretch of the imagination—to do with political speech makes no difference. Despite the argument of some scholars to the contrary, the Supreme Court has never limited the scope of First Amendment protection to include only political expression.[224] It is enough to justify protection that individuals may take personal pleasure—cognitive or otherwise—in viewing the images in the privacy of their homes on the World Wide Web. This may sound hedonistic or purely self-gratifying, but as the United States Supreme Court observed in a famous quote from *Cohen v. California*,[225] it is "often true that one man's vulgarity is another's lyric."[226] Free speech principles thus militate that consenting adults possess a le-

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220 *See infra* notes 549-59 and accompanying text.

221 *See supra* notes 115-26 and accompanying text.

222 *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, *the right to receive*, the right to read, and freedom of inquiry, freedom of thought, and freedom to teach.") (emphasis added).

223 *Compare* Stanley v. Georgia, 394 U.S. 557, 559 (1969) (holding that "the mere private possession of obscene matter cannot constitutionally be made a crime") *with* Osborne v. Ohio, 495 U.S. 103, 111 (1990) (holding that the private possession of child pornography is not protected by the First Amendment).

224 *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 201 (1996) (noting that some scholars "have argued, as Robert Bork did, that the First Amendment protects nothing but plainly political speech, and does not extend to art or literature or science at all").

225 403 U.S. 15 (1971).

226 *Id.* at 25.

gitimate interest in viewing non-obscene images of unconsenting adults—the voyeur's victims—on the Web.

4. Strict Scrutiny and Content-Based Regulation of Voyeurism

If either Congress or a state legislative body were to create a law specifically regulating the display of non-obscene, non-child-pornographic voyeuristic images on the World Wide Web, such a content-based law would be subject to a strict scrutiny standard of review.[227] The United States Supreme Court has held that the "government may regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."[228] Even assuming that shielding minors from exposure to prurient voyeuristic content satisfied the compelling interest prong of this standard,[229] the means to accomplish that interest must be as narrowly tailored as possible. Given the unconstitutionality of recent federal legislation designed to punish the display of sexually explicit images on the World Wide Web,[230] it is doubtful that any law would survive this test. Moreover, the Supreme Court has held that speech conveyed on the Internet receives full First Amendment protection, unlike speech transmitted on a broadcast medium, which can be regulated more easily.[231] Sexually explicit material disseminated on the Internet, the Court has recognized, is not as invasive as speech conveyed by either radio or television.[232]

In summary, free speech interests of constitutional significance must be balanced against the important social interests described earlier in Part II—namely, protecting the individual privacy rights of voyeurism victims, mitigating the harm caused to women by pornography, and shielding minors from exposure to sexually explicit expression. The next Section suggests another interest—this one more crassly pecuniary—at stake in any legislative or judicial effort to restrict or punish either the capture or display of voyeuristic pornography on the World Wide Web.

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227 *See generally* Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 McGEORGE L. REV. 69, 76 (1997) (describing content-based laws and the strict scrutiny standard of review).

228 Sable Communications v. FCC, 492 U.S. 115, 126 (1989).

229 *See supra* notes 187-88 and accompanying text (describing judicial acceptance of the interest in protecting children from harm caused by media messages as compelling).

230 *See supra* notes 5-7 and accompanying text (describing the unconstitutionality of the Communications Decency Act and the Child Online Protection Act).

231 *See* Reno v. ACLU, 521 U.S. 844, 868-70 (1997).

232 *See id.* at 869.

E. *Commerce*

Purveyors of voyeuristic pornography on the World Wide Web have a substantial economic interest in protecting the images they sell. Whether or not their content is deemed appropriate for all tastes, pornographers' speech thus far has been the most profitable sector of e-commerce[233] on the Internet,[234] now generating annual revenue of over $1 billion and representing more than 20 percent of the e-commerce industry in 1998.[235] That's a ton of money by anyone's account, and it suggests the magnitude of the commerce-based interests at stake in any effort to regulate sexually explicit speech.

Given its current success, it is not surprising that online pornography has been a regular feature on computer mediated communication, dating back to the 1980s when users employed bulletin board systems ("BBS"), Usenet newsgroups, and free file transfer protocol ("FTP").[236] Before the advent of the World Wide Web, users shared information on pornography found on BBSs and newsgroups and, in turn, traded and distributed such files.[237] As the Web developed during 1993-94, pornographic sites were among the first to capitalize on combining pictures, images, text, and file transfer capabilities;[238] by 1995, pioneering adult commercial sites like *Amateur Hardcore* and *Sizzle* were introduced.[239]

Today, the number of entrepreneurs making money as Internet porn purveyors is significant. Mark Hardie of Forrester Research estimates that while there are a handful of companies earning as much as $150 million annually from online pornography, there are also at least 40,000 smaller sites managing to bring in amounts ranging from a few thousand to a few million dollars.[240] The majority of such revenue is raised by subscription fees, ranging from $5 to $20 per month, which allow subscribers to access image archives and video feeds.[241] Meanwhile, free sites offering teaser

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233 *See generally* U.S. DEP'T OF COMMERCE, THE EMERGING DIGITAL ECONOMY II (1999) (part of a series of annual reports that provides an analysis of the issues facing e-commerce, including current growth and future economic projections).

234 *See* Corey Kilgannon, *What Sex Sites Can Teach Everyone Else*, N.Y. TIMES, Sept. 22, 1999, at G46.

235 *See* Candice Goodwin, *Porn is Flourishing On-Line, But There are Signs of a More Respectable Trade Becoming Popular*, DAILY TELEGRAPH, Dec. 8, 1998, at 12.

236 *See Who is the Trailblazer in E-Commerce?*, THE GUARDIAN, Sept. 30, 1999, at Online Pages 2.

237 *See id.*

238 *See id.*

239 *See id.*

240 *See* Lazarus, *supra* note 4, at D1.

241 *See id.*

photographs profit by providing links to other sites, which pay fractions of a penny each time a customer clicks through.[242] In addition, companies offering adult verification services, such as Adult Check, give commissions to pornographic websites based upon how many members they refer.[243]

The success of online pornography may be attributed to a number of factors, beginning most importantly with the large demand base among consumers. By the end of 1998, nearly one-third of Web users had visited adult content sites.[244] A recent survey found that 86 percent of men and 14 percent of women are likely to view sex sites.[245] Internet marketing consultant expert David Zinman claims e-pornography differentiates itself from others in the world of e-commerce, contending that "[i]n the porn industry, you have a tremendous demand for the material product. Nonadult industry has to acquire the kind of information that consumers will want to pay for to make a profitable business model."[246]

The popularity of Internet pornography is likely to continue, as only one-third of American households are online today.[247] As more people subscribe to the Internet,[248] and as broadband technology proliferates,[249] the appetite for an array of online pornography will increase. Commerce-based concerns, in other words, will mount and, in turn, weigh more heavily in the balancing process when considering regulation of online pornography.

F. *Law Enforcement and Private Security Surveillance*

Any technology may be used for both good and bad purposes.

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242 *See* Kilgannon, *supra* note 232, at G46.

243 *See* Greg Miller, *Law to Control Online Porn Creates Strange Bedfellow*, L.A. TIMES, Feb. 15, 1999, at A1. (For instance, one operator of ten adult websites earns about $6000 per month from Adult Check, the largest provider of adult verification on the Internet. Adult Check has served more than 3 million paying customers and guards about 50,000 adult websites.)

244 *See* Leslie Miller & Bruce Schwartz, *Law to Protect Kids On Line Faces Court Next Week*, USA TODAY, Jan. 29, 1999, at 1A ("Of 56.8 million individuals on the Web in December, 32.3% visited adult content sites, a figure that has varied little since 1996, according to Media Metrix, which measures consumer traffic on the Web.").

245 *See Study Finds Sexually Oriented Internet Sites are Popular and Non-Problematic for Most People; But Pose Risks for Some*, APA NEWS RELEASE, (visited Sept. 29, 1999) <http://www.apa.org.releases/sexsite.html>. The findings were based on a survey of 9000 anonymous users conducted during a seven-week period on the MSNBC website. *See id.*

246 Kilgannon, *supra* note 232, at G46.

247 *See Wiredville, U.S.A*, NEWSWEEK, Sept. 20, 1999, at 62.

248 There are an estimated 196 million Internet users worldwide, and more than 500 million are expected by 2003. *See The Dawn of E-Life*, NEWSWEEK, Sept. 20, 1999, at 41.

249 According to Forrester Research, less than 5% of U.S. Web users access the Internet via digital subscriber line ("D.S.L.") and cable modems. By 2003, an estimated 27% of subscribers will use broadband options to connect to the Internet. *See* Sally McGrane, *Connections that are Fast, Faster, Fastest, (and Even Faster)*, N.Y. TIMES, Sept. 22, 1999, at 59.

This certainly is true of the video camera.[250] While voyeurs may abuse it as a deviant tool of hedonistic and destructive decadence, the video camera also can play an instrumental role in both preventing crime and capturing suspected criminals.[251]

Federal courts have recognized that although "television surveillance is potentially so menacing to personal privacy,"[252] its use by the government in criminal investigations is permitted, provided that Fourth Amendment[253] and federal electronic surveillance and wiretap law requirements are satisfied.[254] For instance, when the government used surveillance cameras to monitor the activities of FALN, a secret terrorist organization of Puerto Rican separatists that engaged in bombing activities in the United States,[255] Judge Richard Posner wrote for the United States Court of Appeals for the Seventh Circuit in 1984 that "[w]e do not think the Fourth Amendment prevents the government from coping with the menace of this organization by installing and operating secret television cameras in the organization's safe houses."[256]

Surveillance cameras are everywhere today, used by both government and non-government entities.[257] Addressing the safety

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250 *See* McClurg, *supra* note 132, at 1022 ("For every laudable episode of surreptitious videotaping, however, there are many more instances in which camcorders have been used to intrude unreasonably upon privacy.").

251 In Baltimore, for instance, the crime rate in areas under camera surveillance dropped 11% in the first year of their use and 33% in the second year. *See* Mark Helm, *Study Urges Regulation of Surveillance*, PATRIOT LEDGER, June 15, 1998, at Business 6.

252 United States v. Torres, 751 F.2d 875, 885 (7th Cir. 1984).

253 The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

254 *See Torres*, 751 F.2d at 884-86; *see also* United States v. Falls, 34 F.3d 674, 678 (8th Cir. 1994) (holding that federal courts are "empowered to authorize silent video surveillance in circumstances that satisfy the requirements of the Fourth Amendment").

255 The group received renewed attention in 1999, when President Bill Clinton offered clemency to 16 of its members imprisoned in the United States. *See* David Johnston, *Justice Dept. Opposed Clemency for Puerto Rican Militants in '96*, N.Y. TIMES, Oct. 20, 1999, at A25. The move was seen by some Republicans as a Clinton attempt "to curry favor with New York Puerto Rican voters on behalf of Hillary Rodham [Clinton's] . . . Senate bid." Charles Babington, *Impact on Gore Mentioned in FALN Clemency Memo*, WASH. POST, Nov. 10, 1999, at A7.

256 *Torres*, 751 F.2d at 883.

257 Reporter John Lang wrote in 1999:

> Run a red light in major cities, and risk a camera catching it. Walk your dog in many parks, and a camera sees. Go to any bank, airport, neighborhood grocery, bus station, many offices[,] most department stores and, yes, into the dressing rooms—and it's increasingly likely you are caught on cameras, usually visible but sometimes hidden.

John Lang, *Video Surveillance of Public is Massive, Unchecked*, SACRAMENTO BEE, Feb. 7, 1999, at H1.

and economic concerns of deterring and capturing thieves, as well as monitoring less-than-honest employees seeking a quick five-fingered discount, cameras are now a pervasive presence in the retail and banking industries.[258] Government-operated surveillance cameras, placed outdoors to monitor streets, sidewalks, and parks, are now used in many cities to deter crime.[259] In Manhattan alone, in fact, the New York Civil Liberties Union conducted a block-by-block survey in 1998 and found 2,380 cameras trained on public places.[260] Public high schools now employ surveillance cameras to deter student violence.[261] Surveillance cameras are even used by parents to capture abusive nannies and babysitters.[262]

Surveillance cameras, of course, can be abused and employed as voyeuristic tools that invade privacy. Many people even object to the use of surveillance cameras in public places.[263] Thus it was that Jerry Brown, the former California governor and erstwhile Democratic presidential aspirant, refused in his newfound incarnation as the mayor of Oakland in 1999 to support a plan to place video cameras in some high-crime sections of that East Bay city.[264] "Installing a few or a few dozen surveillance cameras will not make us safe. . . . It should also not be forgotten that the intrusive powers of the state are growing with each passing decade," Brown told the

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258 *See* Quentin Burrows, *Scowl Because You're on Candid Camera: Privacy and Video Surveillance*, 31 VAL. U. L. REV. 1079, 1080 (1997) (observing that "[s]pecific site deterrence programs, such as those in department stores, have been in existence for a number of years" and stating that people "certainly realize the possibility that in a shopping mall, in a bank, at an ATM machine, or in a convenience store, authorities or security guards may be monitoring their activities").

259 In New York City, for instance, the police department now uses video surveillance cameras in and around Greenwich Village's Washington Square Park to deter drug dealers for conducting business. *See* Richard Weir, *Candid Camera: Some Smile, Some Frown*, N.Y. TIMES, Feb. 28, 1999, at sec. 14, 6. Drug complaints and arrests dropped dramatically after the cameras were installed, and the police claim they serve as a deterrent to all crime—not just drug sales—in the park. *See id.*

260 Bruce Lambert, *Secret Surveillance Cameras Growing in City, Report Says*, N.Y. TIMES, Dec. 13, 1998, at sec. 1, 62.

261 *See* Katie Merx et. al, *Cameras, Stepped-up Security Greets Students*, DETROIT NEWS, Aug. 31, 1999, at D1 (observing that students in the Detroit area began the 1999 school year "greeted by surveillance cameras"); Debbi Wilgoren, *Area Schools Enhancing Security*, WASH. POST, Aug. 25, 1999, at A1 (describing the increased use of surveillance cameras in high schools in the aftermath of the April, 1999, shootings at Columbine High School near Littleton, Colorado); *see also* DEL. CODE ANN. tit. xiv, § 4121 (1999) (giving local school boards in Delaware the authority to use video cameras for school surveillance in certain locations within schools).

262 *See* Kunerth, *supra* note 73, at A16 (discussing a surveillance camera disguised as teddy bear designed to catch baby sitters abusing children).

263 Michael Klein, a First Amendment attorney for the American Civil Liberties Union in Southern California, considers placing cameras in public places a "slippery slope. . . . If you let the police put cameras in this place and that place, then they will be everywhere." Hugo Martin, *Security Cameras Spur Debate*, L.A. TIMES, Apr. 13, 1999, at B1.

264 *See Surveillance Cameras Canned*, SAN DIEGO UNION-TRIB., June 17, 1999, at A3.

media.[265] Despite such concerns, courts have made it clear that the use of video surveillance cameras by the government in public places does not violate privacy rights.[266]

Although video technology may be abused, just as it certainly is abused by video voyeurs preying on unsuspecting women and men, there are, nonetheless, important and legitimate surveillance functions that it may serve. Consider, for instance, the arrest of Elisa Deaine Peterson of Gresham, Oregon, in July, 1999, on charges of sexual abuse.[267] Peterson was a nurse at the Rest Harbor Rehabilitation and Extended Care Center in Gresham.[268] The husband of a woman staying at the facility while recovering from a brain aneurysm planted a hidden video camera in her room after he noted his wife was getting worse and was afraid to go to sleep at night.[269] The camera allegedly caught Peterson sneaking into the patient's room in the middle of the night and sexually abusing her.[270] Had it not been for the hidden camera, there never would have been evidence of the alleged abuse.

As this case suggests, any new legislation designed to stop the use of video technology by voyeurs thus must be drafted narrowly so as not to prevent *legitimate* surveillance uses of video technology by private individuals, public businesses, and government agencies.

G. *Summary*

The right to privacy—in particular, the right to control the flow of information about oneself—is in a state of perpetual tension with the First Amendment protection of free expression. Add to this ongoing duel the subject of pornography, and the tension is exponentially exacerbated. Feminist arguments about the subordination of women and government assertions about the corruption of minors enter into the fray. Place into the volatile mixture concerns about newsgathering. To further complicate matters, toss in economic and safety concerns about preventing criminal activity and punishing offenders though the use of video surveillance equipment. And to top it all off, consider the financial interests of businesses engaged in the for-profit distribution of non-obscene

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265 *Id.*

266 *See, e.g.*, United States v. Taketa, 923 F.2d 665, 677 (9th Cir. 1991) ("Video surveillance does not in itself violate a reasonable expectation of privacy. Videotaping of suspects in public places, such as banks, does not violate the fourth amendment; the police may record what they normally may view with the naked eye.").

267 *See Nurse Accused of Sex Abuse*, SAN DIEGO UNION-TRIB., July 13, 1999, at A-3.

268 *See id.*

269 *See id.*

270 *See id.*

images. This veritable smorgasbord of legal, social, and economic interests must inform judicial and legislative decision-making whenever the question of control of both the capture and dissemination of pornographic video voyeurism is raised.

Keeping this complex mixture of interests in mind, the next part of the Article focuses on the criminal justice system's response to the growing use of video cameras to capture voyeuristic images. As Part III reveals, criminal laws in many states are not always effective in punishing video voyeurs and, in particular, prosecuting upskirt video voyeurs. State legislatures are playing catch-up to nab these high-tech Peeping Toms.

III. PROSECUTING THE VIDEO VOYEUR: LOOKING FOR STATUTES ON LOOKING

Criminal statutes targeting so-called Peeping Toms are not particularly new. Consider Georgia's law, enacted more than eighty years ago in 1919, which makes the practice of being a Peeping Tom unlawful.[271] It provides in relevant part that:

> [T]he term "peeping Tom" means a person who peeps through windows or doors, or other like places, on or about the premises of another for the purpose of spying upon or invading the privacy of the persons spied upon and the doing of any other acts of a similar nature which invade the privacy of such persons.[272]

By its terms, the law clearly punishes the traditional, prowling Peeping Tom who is "on or about the premises of another" and looks through "windows or doors" to spy upon or invade the privacy of another. Unfortunately, however, Georgia's traditional Peeping Tom statute says nothing about video technology, which of course did not exist back in 1919 when the statute first became law.[273] Furthermore, the statute on its face does not apply to voyeurism that transpires on premises *not* possessed by another person. As was made clear in Part I of this Article, many instances of

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271 GA. CODE ANN. § 16-11-61 (1999).

272 *Id.*

273 Georgia now has a criminal statute that would apply to some forms of video voyeurism. In particular, it adopted an eavesdropping and surveillance law in 1967 that provides in relevant part that it is unlawful for "[a]ny person, through the use of any instrument or apparatus, without the consent of all persons observed, to observe, photograph, or record the activities of another person which occur in any private place and out of public view." *Id.* § 16-11-62.

Although this Georgia statute might criminalize video voyeurism in places like tanning booths, where one expects privacy and is out of public view, it clearly would not apply to upskirt video voyeurism that transpires in public places such as malls and parks, because an individual in these settings is *not* out of public view. The Georgia law thus would need to be redrafted or amended to apply to this latter, new high-technology phenomenon.

upskirt voyeurism actually occur in *public* places like parks and shopping malls. Moreover, in cases where video cameras are planted behind two-way mirrors or in household objects, the suspect may not in fact actually be present on the property when the "peeping" occurs.[274] All of this suggests the difficulties in applying a traditional Peeping Tom law to prosecute today's non-traditional voyeurism. Other states' traditional Peeping Tom laws are plagued by similar problems in coping with new-age, high-tech peepers and upskirt voyeurs.[275]

How, then, does the criminal justice system currently address the issues that surround the new phenomena of both video voyeurism and the Web-based display of voyeuristic pornography? This Part examines this question.

In particular, Section A describes the legal loopholes that often have allowed video voyeurs to go unpunished in recent years. As this Section makes clear, the development of technology simply has outstripped the development of the law. Section B then analyzes the recent or current efforts of six states—Alaska, Florida, Pennsylvania, Missouri, Ohio, and Wisconsin—to plug the gaps in their penal codes through which video voyeurism sometimes slips. Finally, Section C describes various alternative criminal statutes under which video voyeurs may be prosecuted for either the taking or posting of voyeuristic images. Section C thus serves as a veritable laundry list of theories through which prosecutors might sort to find an appropriate means of punishing video voyeurs.

A. *The Legal Loopholes*

This Section examines two gaping holes in the criminal law that directly affect video voyeurism. First, it exposes the almost

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274 The voyeur's actual presence is essential under the Georgia statute, as a Georgia appellate court ruled in 1992 that "[t]he gravamen of the offense of peeping Tom is being on the premises of another for the purpose of spying or invading privacy." Longenbach v. Georgia, 415 S.E.2d 546, 547 (Ga. Ct. App. 1992).

275 *See, e.g.*, MISS. CODE ANN. § 97-29-61 (1989) (setting forth the current version of Mississippi's voyeurism law, which dates back to 1942 and which fails by its terms to cover videotaping or recording, and which applies only to prying and peeping in a dwelling or building structure). The Mississippi voyeurism statute at one time was gender biased, applying only if the peeper was male. *See* Burchfield v. Mississippi, 277 So. 2d 623, 624 (1973) (citing an earlier version of the statute that applied to "[a]ny male person who enters upon real property" and considering this a "material element" of the crime of voyeurism at the time).

At least one very old Peeping Tom law that is still on the books remains gender-specific. North Carolina's statute, enacted in 1923, provides that "[a]ny person who shall peep secretly into any room occupied by a female person shall be guilty of a Class 1 misdemeanor." N.C. GEN. STAT. § 14-202 (1999). The North Carolina law is silent as to the use of video cameras, and it applies only to peeping into rooms, thus precluding its application to upskirt video voyeurism in public places. *See id.*

complete absence of state and federal criminal penalties against upskirt and downblouse voyeurism in public places. Then it examines weaknesses in the criminal justice system for dealing with the more general phenomenon of hidden-camera voyeurism in places such as bedrooms and bathrooms.

1. Video Voyeurism in Public Places: Up a Skirt Without a Law

> *I know of no federal law that would punish looking up skirts and posting the photos.*[276]

Those were the words spoken in September, 1999, by Scott Charney, the person most likely to know about such issues.[277] He is the chief of the United States Department of Justice's computer crime and intellectual property section.[278] There is no federal eavesdropping law regarding hidden video cameras.[279] And unfortunately for the victims of upskirt and downblouse voyeurism, the situation is not much better today under many state criminal laws. In fact, only one state today—trend-setting California—has a specific law directed at punishing upskirt and downblouse voyeurism in public places.[280]

But it wasn't until recently, in fact, that the Golden State had such a law. An alleged instance of covert video recording at Disneyland not only exposed flaws in California's voyeurism laws, but also threatened to transform the Magic Kingdom into a Voyeur Kingdom. Police in southern California were forced to release a man who allegedly angled a concealed video camera under the skirts of women waiting in line at the theme park.[281] The reason for his release? At the time of the incident, in 1998, California law did not restrict video voyeurism in public places. California Penal Code section 647(k) provided only that an individual commits the misdemeanor of disorderly conduct if he or she:

> [L]ooks through a hole or opening, into, or otherwise views, by means of any instrumentality, including, but not limited to, a periscope, telescope, binoculars, camera, or camcorder, the interior of a bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy,

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276 Simakis, *supra* note 10, at 1B.
277 *See id.*
278 *See id.*
279 *See* Marcia Chambers, *Colleges: Secret Videotapes Unnerve Athletes*, N.Y. TIMES, Aug. 9, 1999, at D4.
280 *See* Simakis, *supra* note 10, at 1B.
281 *See* Salladay, *supra* note 59, at A21.

> with the intent to invade the privacy of a person or persons inside.[282]

Although this statute clearly prohibited videotaping *inside* a number of rooms, it said nothing about covert videotaping *outside* in a public place. Likewise, California Penal Code section 653n, which prohibits the use of two-way mirrors in places such as restrooms and showers, was not applicable to upskirt cases.[283] As Anaheim Police Sergeant Bob Conklin, who investigated the Disneyland incident, told a reporter, "there was nothing we could charge [the suspect] with."[284]

As a result of this legal loophole, California Assemblyman Dick Ackerman felt compelled to sponsor a bill that ultimately was signed into law by Governor Gray Davis in August, 1999.[285] That law, which amended California Penal Code section 647 and took effect on January 1, 2000, outlaws video peeping in *any place* where there is a reasonable expectation of privacy and makes video voyeurism a misdemeanor punishable by up to six months in jail and a $1000 fine.[286] It was simply time, as Ackerman put it, "for the law to catch up with the advances in technology that make this type of crime possible."[287]

Yet the amended California law only addresses half of the problem. In particular, it fails to criminalize the transmission, display, or dissemination of voyeuristic images on the World Wide Web. Thus it appears that it is legal in California to post either still or moving images on the Internet where, as described earlier in

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282 CAL. PENAL CODE § 647 (k) (Deering 1998).

283 *Id.* § 653n (Deering 1999).

284 *'Upskirt' Web Sites Operate Virtually Unpoliced*, CAPITAL TIMES (Madison, Wis.), Aug. 10, 1998, at 7A.

285 *See* Lynda Gledhill, *Law Targets High-Tech Peeping Toms*, S.F. CHRON., Aug. 27, 1999, at A21.

286 *See id.* The new law provides in relevant part that a misdemeanor occurs when a person:

> [U]ses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another, identifiable 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, without the consent or knowledge of that other person, with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person and invade the privacy of that other person, under circumstances in which the other person has a reasonable expectation of privacy.

CAL. PENAL CODE § 647 (k) (2) (Deering 2000). The history of Assembly Bill 182, which gave rise the amendment to the California Penal Code, can be found on the World Wide Web at <http://www.leginfo.ca.gov/pub/bill/asm/ab_0151-0200/ab_182_bill_19990826_chaptered.html> (visited Oct. 31, 1999).

287 Mark Gladstone, *California and the West: Bill Would Ban Surreptitious Taping by 'Video Voyeurs,'* L.A. TIMES, Apr. 7, 1999, at A3.

this Article, they proliferate.[288]

2. Video Voyeurism in Private Places: Porn on the Bayou and Other Stories

Stephen Glover was a videotape voyeur, or so claim his former friends and neighbors, Gary and Susan Wilson.[289] Glover and the Wilsons were such good friends, in fact, that they had keys to each other's houses in Monroe, Louisiana.[290] Glover allegedly took advantage of that entry pass, drilled holes in the Wilsons' attic, and installed a video camera above the bedroom and bathroom.[291] A former church deacon who now resides Tennessee, Glover then allegedly videotaped the Wilsons' private activities.[292]

After discovering the shocking video voyeurism, Susan Wilson not too surprisingly felt as if her skin had "been ripped off."[293] She developed an eating disorder and spent nights sleeping in a closet because it was dark.[294] She thought Glover's actions should be "treated like rape."[295]

Unfortunately for Susan Wilson, Louisiana law at the time didn't treat Glover's actions as anything close to the crime of rape.[296] In fact, Glover's video voyeurism wasn't even defined as a crime in the southern state.[297] Although Louisiana had a statute making peeping through windows and doors a crime, it was silent on high-technology peeping with video cameras.[298] In other words, had Glover been physically present and peeked through a

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288 *See* Simakas, *supra* note 10, at 1B ("[a]lthough upskirt photography is illegal in California, it's perfectly legal to post the stills on the Internet for worldwide consumption.").

289 *See Today* (NBC television broadcast, Feb. 3, 1999) (transcript on file with authors) [hereinafter *Today*].

290 *See CBS This Morning* (CBS television broadcast, Mar. 2, 1999) (transcript on file with authors) [hereinafter *This Morning*].

291 *See Today*, *supra* note 289.

292 *See* Ed Anderson, *Video-Voyeur Victim Lobbies for New Law*, TIMES-PICAYUNE, Apr. 8, 1999, at A1; Ed Anderson, *House OKs Ban on Video Voyeurs*, TIMES-PICAYUNE, Apr. 10, 1999, at A1.

293 *This Morning*, *supra* note 290.

294 *See* Anderson, *supra* note 292, at A1.

295 *Id.*

296 Rape is defined in Louisiana as "the act of anal or vaginal intercourse with a male or female person committed without the person's lawful consent" and requiring "any sexual penetration, vaginal or anal, however slight." LA. REV. STAT. ANN. § 14:41 (West 1999). *See generally* Lundy Langston, *No Penetration—And It's Still Rape*, 26 PEPP. L. REV. 1 (1998) (analyzing rape statutes in the United States).

297 *See* Anderson, *supra* note 292, at A1 (noting that Glover could not be charged with videotaping Susan Wilson in her bedroom and bathroom "because there were no state laws against it").

298 Louisiana's penal code defines a "Peeping Tom" as "one who peeps through windows or doors, or other like places, situated on or about the premises of another for the purpose of spying upon or invading the privacy of persons spied upon without the consent of the persons spied upon." LA. REV. STAT. ANN. § 14:284 (West 1999).

window, he would have been a Peeping Tom under the statute.[299] But his use of an attic-placed camera exempted him from the reach of that statute. The sad reality was this: Louisiana law had failed to keep pace with the rapid changes in communications technologies. Technology simply had outstripped the law.

Given the gaping hole in Louisiana's penal code, the district attorney in Ouachita County was forced to search for alternative, makeshift theories under which to prosecute Glover. Glover ultimately was charged with unauthorized entry into an inhabited dwelling.[300] He pleaded guilty in January, 1999, and was ordered to pay $2000 in restitution for damage done to the Wilsons' house and placed on three years' probation.[301] One condition of the probation was that Glover turn over all of the videotapes he made inside Susan Wilson's home.[302]

Largely in response to this case, State Representative Willie Hunter of Monroe and the Louisiana legislature set out to create a criminal law that would punish alleged video voyeurs such as Stephen Glover. In July, 1999, the governor approved and signed a new law directly attacking video voyeurism.[303] It defines video voyeurism as:

> [T]he use of any camera, videotape, photo-optical, photo-electric, or any other image recording device for the purpose of observing, viewing, photographing, filming, or videotaping a person where that person has not consented to the observing, viewing, photographing, filming, or videotaping and it is for a lewd or lascivious purpose.[304]

But the Louisiana law goes further than simply punishing the commission of video voyeurism. It begins to reach the problem of the display of voyeuristic images in cyberspace. Specifically, it makes it a criminal offense to transfer an image obtained in the manner described above "by live or recorded telephone message, electronic mail, the Internet, or a commercial online service."[305] Moreover, voyeuristic images admitted into evidence are to be destroyed, unless the victim objects, after the case has been adjudicated.[306]

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299 *See id.*
300 *See* Anderson, *supra* note 292, at A1.
301 *See Three Year's Probation for Man Who Installed Camera in Neighbor's Attic*, AP, Jan. 5, 1999, *available in* LEXIS-NEXIS Academic Universe database.
302 *See id.*
303 *See* 1999 LA. ACTS 1240.
304 *Id.*
305 *Id.*
306 *See id.*

Of course, all of this comes too late for Susan Wilson. She is far from alone, however, as a victim of video voyeurism in a state that did not have an appropriate criminal law to protect her privacy interests and punish video voyeurs. Consider the case of young John Humphreville, a student at Cheshire High School in Connecticut.[307] In 1998, he allegedly made a videotape using a hidden camera of at least four young girls changing into their swimsuits at two pool parties.[308] When one of the girls reportedly came across friends who were watching a video of her undressing, the school suspended Humphreville.[309] Prosecutors, however, reacted more slowly—Connecticut, it seemed, had no laws that addressed video voyeurism.[310] Humphreville ultimately was charged with breach of the peace for distributing and playing the videos, *not* for making them.[311]

The Cheshire High School case, and the absence of an appropriate remedy frustrated an outraged Jack Cronan, a Connecticut prosecutor who handles legislative affairs for the Chief State's Attorney's office.[312] "There are no statutes that fit the seriousness of the crime," he told a reporter for the *Hartford Courant*.[313] He met with state legislators, urging them to make video voyeurism a crime in Connecticut. The legislature responded and in June, 1999, enacted new legislation designed to address video voyeurism.[314] It encompasses both the capture of voyeuristic pornography *and* its display or dissemination.[315] In particular, section 1 of the new law provides that a person is guilty of a class A misdemeanor for voyeurism:

> [W]hen, with malice or intent to arouse or satisfy the sexual desire of such person or any other person, such person knowingly photographs, films, videotapes or otherwise records the images of another person (1) without the knowledge and consent of such other person, (2) while such other person is not in plain

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307 *See* Janice D'Arcy, *Teen Named in Warrant in Cheshire Voyeur Case*, HARTFORD COURANT, Jan. 8, 1999, at A3.

308 *See id.*

309 *See id.*

310 *See id.*

311 *See Student Warned to Stay Away from Accusers*, AP, May 6, 1999, *available in* LEXIS-NEXIS Academic Universe database [hereinafter *Student Warned*]. A second charge—tampering with evidence—was added to the three counts of breaching the peace in September, 1999. *See Teen Faces Charges for Videotaping Female Classmates*, AP, Sept. 16, 1999, *available in* LEXIS-NEXIS Academic Universe database.

312 *See* Janice D'Arcy, *Video Voyeurs Expose Flaws in Laws*, HARTFORD COURANT, Dec. 4, 1998, at A1.

313 *Id.*

314 1999 CONN. ACTS 143 (Reg. Sess.).

315 *See id.*

> view, and (3) under circumstances where such other person has a reasonable expectation of privacy.[316]

The new Connecticut law, like its Louisiana counterpart, goes beyond merely punishing the act of video voyeurism itself. It also tackles the related problem of displaying such images on the World Wide Web. In particular, it creates a class D felony when a person "disseminates a photograph, film, videotape or other recorded image of another person without the consent of such other person and knowing that such photograph, film, videotape or image was taken, made or recorded in violation of section 1 of this act."[317] With that language, in 1999, the Connecticut legislature took a giant step forward toward restricting not only the capture of video voyeurism, but also its subsequent display in the largely unregulated pornographic reaches of the World Wide Web.

B. *Closing the Loopholes: Criminalizing Video Voyeurism*

Like California, Louisiana, and Connecticut, a growing number of states are taking steps to criminalize video voyeurism, raise the penalties for the offense, or strengthen existing statutes against the general practice of voyeurism to cover this fast-growing activity. This Section describes the actions of six states—Alaska, Florida, Pennsylvania, Missouri, Ohio, and Wisconsin—that have recently adopted or revised statutes to address video voyeurism.[318] Their

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316 *Id.*

317 *Id.*

318 Other states beyond the six discussed here have adopted criminal statutes in the 1990s that limit video voyeurism to varying degrees. For instance, Virginia enacted a video voyeurism statute in 1994 that provides in relevant part:

> It shall be unlawful for any person to videotape, photograph, or film any nonconsenting person if (i) that person is totally nude, clad in undergarments, or in a state of undress so as to expose the genitals, pubic area, buttocks or female breast in a restroom, dressing room, locker room, hotel room, motel room, tanning bed, tanning booth, bedroom or other location and (ii) the circumstances are otherwise such that the person being videotaped, photographed or filmed would have a reasonable expectation of privacy.

VA. CODE ANN. § 18.2-386.1 (Michie 1999).

By its terms, this statute would apply to video voyeurism in confined areas—tanning booths, bedrooms—but would not apply to upskirt video voyeurism in outdoor or otherwise public places. Virginia also has a more general voyeurism or Peeping Tom statute that does not refer to videotaping, photographing, or filming. *See* VA. CODE. ANN. § 18.2-130 (Michie 1999).

Another state, Oregon, enacted a video voyeurism statute in 1997. *See* OR. REV. STAT. § 163.700 (1999). Under that law, a person commits the crime of voyeurism if he or she "knowingly makes or records a photograph, motion picture, videotape or other visual recording of another person in a state of nudity without the consent of the person being recorded" and the recording is made "in a place and circumstances where the person has a reasonable expectation of personal privacy." *Id.*

Unfortunately, the Oregon law would not apply to upskirt voyeurism in public places, because it specifically limits and defines "places and circumstances where the person has a

efforts to deal with video voyeurism are illustrative of the problems lawmakers face nationwide.[319]

1. Alaska

In March, 1995, by a 32-8 vote, the Alaska House of Representatives passed House Bill 188, a measure designed to create "the crime of indecent viewing or photography."[320] One month later the same measure passed in the state Senate by a unanimous 20-0 vote.[321] Governor Tony Knowles then signed it into law in May, 1995.[322]

The legislation was introduced after a particularly heinous example of video voyeurism exposed holes in Alaska's criminal laws.[323] The voyeurism occurred in a high school in the southeast Alaska village of Klawock.[324] A maintenance man allegedly secretly videotaped female students in the locker room.[325] However, local prosecutors were unable to find a privacy statute applicable to the case and thus ended up charging the suspect with felony counts of theft and criminal mischief for allegedly stealing school video equipment and drilling holes to set up cameras.[326] The new law, described below, would have addressed this situation.

In particular, the Alaska voyeurism statute targets "indecent viewing or photography."[327] The crime occurs when a "person knowingly views, or produces a picture of, the private exposure of the genitals, anus, or female breast of another person and the view or production is without the knowledge or consent" of the person viewed.[328] The term "picture" sweeps up the use of video technology, as it specifically includes a film or photograph in "print, electronic, magnetic, or digital format."[329] If the target of the voyeur's

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reasonable expectation of privacy" as "any area where a person undresses in an enclosed space that is not open to public view." *Id.* Because much upskirt voyeurism occurs in non-enclosed spaces that are, in fact, open to public view, the utility of the Oregon video voyeurism law is limited.

319 For a once-complete, but now somewhat outdated, review of so-called Peeping Tom and voyeurism criminal statutes from across the country, see RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 233-37 (1996).

320 *Bill History/Action for House Bill 188* (visited Nov. 10, 1999) <http://www.legis.state.ak.us/s/basp1000.dll?Get&S=19&Root+HB188>.

321 *See Legislative News*, ANCHORAGE DAILY NEWS, Apr. 26, 1995, at B3.

322 *Bill History/Action for House Bill 188*, (visited Nov. 10, 1999) <http://www.legis.state.ak.us/s/basp1000.dll?Get&S=19&Root+HB188>.

323 *See Legislative News*, *supra* note 319, at B3.

324 *See id.*

325 *See id.*

326 *See id.*

327 ALASKA STAT. § 11.61.123 (Michie 1999).

328 *Id.* If the person viewed or photographed is under 16 years old, the consent of the parent or guardian must be obtained. *See id.*

329 ALASKA STAT. § 11.61.123(e)(1) (Michie 1999).

gaze is a minor, then the crime is a felony, while it only constitutes a misdemeanor if the target is an adult.[330]

The law already has come into play in a classic case of landlord-tenant video voyeurism. Lynn E. Lacey, a landlord who videotaped tenants in their bathrooms through two-way mirrors, was convicted under the Alaska statute in June, 1998.[331] Lacey had leased space in a Quonset hut apartment building that contained several hidden passageways.[332] A tenant suspected voyeurism when he noticed that the size of the rooms was much smaller than the overall structure of the Quonset hut that housed them.[333]

Although the new Alaska statute could be applied to the Lacey case, it is unclear from its terms whether it would also apply to the typical upskirt voyeurism case. Why? First, most upskirt voyeurism does not involve actual exposure of the genitals or anus, as required by the terms of the statute, but instead involves the buttocks covered or, at least, partially covered by some form of underwear. Strictly and narrowly construed, then, the statute may *not* address the typical problem of upskirt voyeurism in public places. Only future cases in Alaska, however, will definitively resolve this question.

A second problem also appears to hinder the use of the statute in cases of upskirt voyeurism. The Alaska law provides that private exposure "means that a person has exposed the person's body or part of the body in a place, and under circumstances, that the person reasonably believed would not result in the person's body or body parts being (A) viewed by the defendant; or (B) produced in a picture."[334] This language, however, fails to make clear whether "exposure" requires the absence of clothing over a body part or whether it may occur even if clothing—underwear—covers the body part or parts in question. The resolution of this question is pivotal in determining whether the law is applicable to typical instances of upskirt voyeurism. Viewed in one light, the typical victim of upskirt voyeurism in a public place does *not* expose her genitals or anus to anyone—rather, she does cover them up with both underwear and a skirt. In this respect, no public exposure occurs. Such a construction of the Alaska law would render it useless in the majority of upskirt voyeurism cases.

On the positive side, however, the Alaska statute reflects the

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330 *See id.* § 11.61.123(f).
331 *See* Komarnitsky, *supra* note 57, at 1C.
332 *See id.*
333 *See id.*
334 ALASKA STAT. § 11.61.123(e)(2) (Michie 1999).

legislature's recognition of both the legitimate law enforcement and private security interests that miniature video cameras may serve. In particular, it specifically exempts "viewing or photography conducted by a law enforcement agency for a law enforcement purpose."[335] The law also offers a defense to the use of surveillance cameras by businesses. The statute provides that "it is an affirmative defense that the viewing or photography was conducted as a security surveillance system, notice of the viewing or photography was posted, and any viewing or use of pictures produced is done only in the interest of crime prevention or prosecution."[336]

In summary, Alaska's inaugural 1995 effort to restrict video voyeurism—indecent photography, as the statute dubs it—may be effective in cases such as that involving the maintenance man taping inside a high school locker room or Lynn Lacey's videotaping inside an apartment. However, it appears to be inapplicable to the typical case of public upskirt voyeurism, due to its requirement of private exposure of the genitals or anus. The typical victim of upskirt voyeurism never exposes these private parts to anyone, but keeps them cloaked beneath underwear and a skirt. Finally, the law is cognizant of and provides exceptions for the type of legitimate surveillance interests described earlier in Part II of this Article.

2. Florida

Florida's video voyeurism law[337] grew out of House Bill 3709, which was considered during the 1998 legislative session.[338] That bill, substantially revised and amended from its original version, was approved by both the House and Senate in Apri,l 1998, and then became law without Governor Jeb Bush's signature in June, 1998.[339]

The first official "Bill Research and Economic Impact Statement," prepared in March, 1998, by the House Committee on Crime and Punishment, reveals some of the concerns that gave rise to House Bill 3709.[340] At the time, the committee stated that "Flor-

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335 *Id.* § 11.61.123(c).

336 *Id.* § 11.61.123(d).

337 FLA. STAT. ch. 810.14 (1998).

338 *See Florida Legislature Online Sunshine, H 3709: Criminal Justice,* (visited Nov. 10, 1999) <http://www.leg.state.fl.us/session/1998/house/bills/billinfo/html/hb3709.html>.

339 *See id.*

340 *House of Representatives Committee on Crime and Punishment: Bill Research & Economic Impact Statement, HB 3709* (visited Nov. 10, 1999) <http://www.leg.state.fl.us/session/1998/house/bills/analysis/pdf/HB3709.CP.pdf> [hereinafter *Committee on Crime and Punishment*].

ida Statutes contain no law which prohibits conduct amounting to a 'peeping Tom.'"[341] The committee also observed that some states, such as Missouri[342] and Georgia,[343] had Peeping Tom laws on the books, while other states had statutes specifically prohibiting the secret videotaping and filming of people located in private accommodations.[344] Noting that Florida did have a criminal trespass statute,[345] the committee added that the proposed voyeurism law was intended to criminalize "certain 'peeping Tom' situations which are not covered under the trespass statute."[346]

Despite this legislative intent, the original version of the proposed statute actually required a physical trespass for an act of criminal voyeurism to occur, and it specifically did *not* refer to videotaping, filming, or photographing.[347] It was, in other words, a proposed voyeurism law that did not address *video* voyeurism. It was a simply akin to a traditional Peeping Tom law, such as Georgia's statute enacted eighty years earlier.[348]

All of that changed, however, for reasons that are unclear from the official legislative record, and House Bill 3709 was substantially amended before becoming law. In particular, the new Florida voyeurism statute does *not* require physical entry onto property possessed by another, and it specifically addresses and criminalizes *video* voyeurism.[349] It provides that:

> [A] person commits the offense of voyeurism when he or she, with lewd, lascivious, or indecent intent, secretly observes, photographs, films, videotapes, or records another person when such other person is located in a dwelling, structure, or conveyance and such location provides a reasonable expectation of privacy.[350]

Just three months after the video voyeurism law took effect,[351] it was put to its first test in a case involving Kenneth James

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341 *Id.*

342 *See infra* notes 384-403 and accompanying text (describing the Missouri video voyeurism law).

343 *See* GA. CODE ANN. § 16-11-61 (1999) (defining "peeping Tom" and making peeping Tom conduct unlawful).

344 *See Committee on Crime and Punishment, supra* note 338.

345 *See* FLA. STAT. ch. 810.09 (1999) (defining the offense of trespass).

346 *Committee on Crime and Punishment, supra* note 338.

347 *See id.*

348 *See supra* notes 271-74 and accompanying text (referring to Georgia's Peeping Tom law).

349 *See* FLA. STAT. ch. 810.14 (1998).

350 *Id.*

351 The statute became effective on July 1, 1999. *See Florida Legislature Online Sunshine, H 3709: Criminal Justice* (visited Nov. 10, 1999) <http://www.leg.state.fl.us/session/1998/house/bills/billinfo/html/hb3709.html>.

Hofbauer, a man who allegedly used a hidden video camera to film up under the skirts of women in a shopping mall.[352] As discussed earlier in this Article,[353] the Tampa resident took advantage of more than just the mall's Labor Day sales.[354] Julie Harris was browsing in a home decoration store when her husband, Josh, noticed that Hofbauer had placed a black nylon bag, similar to the kind one uses to carry a laptop computer, on the floor near his wife's feet.[355] After seeing a glint from a camera lens, Josh Harris caught on to Hofbauer's alleged activities and, after a brief chase, the suspect was nabbed by mall security guards.[356] Hofbauer was charged with one count under the new Florida voyeurism law, as well as one count each of disorderly conduct and attempting to tamper with evidence.[357] Hofbauer, it seems, had tried to destroy the tape by stepping on it when the security guards caught him.[358]

Although it at first seems like an open-and-shut case of video voyeurism, Hofbauer's conduct reveals a potential flaw with Florida's statute when it comes to upskirt voyeurism in public places. The problem with this statute, at least in a case that occurs out in the open at a public mall, is that it requires the voyeurism to occur in a location that provides a "reasonable expectation of privacy."[359] Unlike being alone in a bathroom stall or tanning booth, there generally is no reasonable expectation of privacy in a line at a public shopping mall. That, in fact, was the precise argument of Hofbauer's attorney, Guy Gilbert, who told a reporter for the *St. Petersburg Times* that "there is no reasonable expectation of privacy given the location. We're talking about a shopping mall. Everybody knows a shopping mall is a public place."[360]

Prosecutor Pam Bondi countered that "it's a given that in a mall a woman has an expectation of privacy under her skirt, or else women wouldn't wear skirts in malls."[361] In other words, the proper "location" under the statute on which to focus is not the shopping mall or building, but that portion of a woman's body cloaked by a skirt. For Bondi, it apparently doesn't make a difference where the woman is standing, so long as the videotaping is

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352 *See* Carlton, *supra* note 161, at 4B.
353 *See supra* notes 160-62 and accompanying text (discussing the facts giving rise to Hofbauer's arrest).
354 *See* Carlton, *supra* note 161, at 4B.
355 *See id.*
356 *See id.*
357 *See id.*
358 *See id.*
359 FLA. STAT. ch. 810.14 (1998).
360 Carlton, *supra* note 161, at 4B.
361 *Id.*

secretive. "We feel that it is a crime to secretly film a woman, whether it be up her skirt or through blinds in the privacy of a dwelling or a bathroom stall," Bondi said.[362]

The terms of the statute, however, suggest that the "location" referred to is not a location such as the place under a woman's dress. Rather, the statute specifically applies only if the victim is "located in a dwelling, structure, or conveyance *and* such location provides a reasonable expectation of privacy."[363] The location, in other words, refers directly to a "dwelling, structure or conveyance," not to a location on a person's body covered with clothing. One would be hard-pressed to make a cogent argument that there is a reasonable expectation of privacy in a public "structure" such as a mall store.

The argument between Gilbert and Bondi illustrates an important point about video voyeurism laws that, by their terms, apply only to locations where there is a "reasonable expectation of privacy." Judges who strictly construe this language most likely will conclude that such laws do *not* apply to upskirt video voyeurism that occurs in an open, public setting such as a mall or park. Under this line of interpretation, such statutes will only protect against video voyeurism in places such as restroom stalls and changing rooms. The statutes thus are rendered meaningless when it comes to typical instances of upskirt voyeurism on public streets and in shopping malls.

In contrast, judges who take a more activist and expansive construction will broadly interpret language requiring a location in which there is a reasonable expectation of privacy to include even public settings. To adopt this interpretation is to accept prosecutor Bondi's argument in the Hofbauer case—that a woman in a location such as a mall possesses a reasonable expectation of privacy under her skirt.

In the case of James Hofbauer, the trial judge was able to avoid this knotty issue. Hofbauer pleaded no contest to misdemeanor charges of voyeurism in March, 1999.[364] The appellate courts in Florida, however, will not have it so easy. The trial judge, Manuel Lopez, stayed Hofbauer's sentence—twelve months of probation, one hundred hours of community service, and mental health counseling—to allow his attorneys to appeal the constitutionality of the statute.[365] At the time this Article was written, no decision had

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362 Lloyd, *supra* note 160, at 4.
363 FLA. STAT. ch. 810.14 (1998).
364 *See* Carlton, *supra* note 162, at 3B.
365 *See id.*

been reached as to whether the statute applies only to areas such as restroom stalls and locker rooms or to more public spaces such as the shopping mall store where Hofbauer used his video camera.

The current challenge to the Florida law reveals the need for careful drafting of video voyeurism statutes. Use of language that limits their application to locations or places that provide a "reasonable expectation of privacy" may render them futile in punishing upskirt voyeurism that transpires in public places. Perhaps it simply was that the Florida legislature did not anticipate or even know about the phenomenon of upskirt video voyeurism when House Bill 3709 was passed in 1998.

However, at least some of the language in the Florida statute suggests that it was carefully crafted to take into account the interests of law enforcement and security surveillance discussed in Part II of this Article. In particular, the offense of voyeurism occurs in Florida *only* if one observes or videotapes "with lewd, lascivious, or indecent intent."[366] This means that legitimate uses of hidden cameras, such as for security surveillance in a shopping mall, are not prohibited under the statute.

It becomes a much closer question, however, if security cameras are placed in or near dressing rooms and bathrooms in shopping malls, ostensibly to prevent shoplifting. Although the mall or store's intent may be to prevent theft of clothes, accessories, or other items, the potential for misuse—viewing "with lewd, lascivious, or indecent intent"—by a voyeuristic security guard always exists.

It is worth noting on this point that both the Alaska statute described above and the Florida video voyeurism law discussed here provide exceptions or defenses for the use of concealed or miniature cameras for legitimate surveillance or security purposes. They do so, however, in two very distinct manners. Alaska does so *explicitly*, by creating separate sections within its statute that, by their terms, exempt "viewing or photography conducted by a law enforcement agency for a law enforcement purpose"[367] and provide an affirmative defense for a security surveillance system used "only in the interest of crime prevention or prosecution."[368] Florida, in contrast, makes such exceptions *implicitly*, by defining the offense of voyeurism directly in terms that require viewing with "lewd, lascivious, or indecent intent."[369]

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366 FLA. STAT. ch. 810.14 (1998).
367 ALASKA STAT. § 11.61.123(c) (Michie 1999).
368 *Id.* § 11.61.123(d).
369 FLA STAT. ch. 810.14 (1998).

In summary, Florida's new voyeurism law clearly regulates some forms of video voyeurism—it applies, by its terms, to a defendant who "observes, photographs, films, *videotapes*, or records another person."[370] Its application to upskirt video voyeurism that occurs in public, however, is unclear, given the law's limiting language requiring that incidents occur in a dwelling or structure that provides a reasonable expectation of privacy. Finally, the law is drafted to exempt uses of hidden and miniature cameras for recording images with something other than lewd, lascivious, or indecent intent.

3. Pennsylvania

Like Florida's statute, Pennsylvania's new video voyeurism law went into effect in 1998. In March of that year, Pennsylvania Governor Tom Ridge signed into law a bill targeting video voyeurism.[371] The new law provides that:

> [A] person commits the offense of invasion of privacy if he knowingly views, photographs or films another person without that person's knowledge and consent while the person is being viewed, photographed or filmed is in a state of full or partial nudity and is in a place where the person would have a reasonable expectation of privacy.[372]

The law, like the Alaska legislation discussed earlier, makes specific exceptions for "viewing, photographing, and filming by law enforcement officers during a lawful criminal investigation" and for security purposes involving correctional facilities.[373] In doing so, the Pennsylvania statute recognizes the important and legitimate role that hidden cameras may play in matters of safety, security, and law enforcement.

There is, however, something very troubling about this law. Like the Florida voyeurism statute described earlier,[374] the language of the Pennsylvania statute narrowly limits its applicability to situations involving a location or place where the victim could have a reasonable expectation of privacy. This language could easily

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370 *Id.*

371 *See House Bill 1189 History* (visited Nov. 3, 1999) <http://www.legis.state.pa.us/WU01/LI/BI/BH/1997/0/HB1189.HTM> (describing the history of the legislation, which added the offense of invasion of privacy to Pennsylvania law).

372 18 PA. CONS. STAT. § 7507.1(A) (1999).

373 *Id.* § 7507.1(D) (providing in pertinent part that the law shall not apply to "viewing, photographing or filming by law enforcement officers during a lawful criminal investigation" or to filming in jails and correctional facilities for purposes of security and investigation).

374 *See supra* notes 337-69 and accompanying text.

preclude its use in penalizing upskirt voyeurism in public areas such as parks, malls, and baseball stadiums. Judges narrowly construing the phrase "a place where the person could have a reasonable expectation of privacy" might quite reasonably limit its application to confined or closed areas such as tanning booths and dressing rooms. Alternatively, prosecutors would likely argue that the "place" in question does *not* refer to a building, but rather to a woman's underwear concealed by a skirt. Surely in this place—underneath a skirt—there is a reasonable expectation of privacy.

The Pennsylvania law, however, goes a long way toward resolving this controversy, and it does so in a manner decidedly in favor of the upskirt voyeur and against the upskirt victim. How so? The statute specifically defines the phrase in question as "a location where a reasonable person would believe that he could disrobe in privacy without being concerned that his undressing was being viewed, photographed or filmed by another."[375] Clearly this militates *against* the application of the new law to the usual upskirt voyeurism scenario in public places such as lines at shopping malls. A woman standing in the checkout line at the Gap, for instance, surely does not have a reasonable expectation that she can "disrobe" while in line and try on a new pair of jeans without being viewed by others. That's why dressing rooms exist. Unfortunately, then, the language of the new Pennsylvania law would seem to penalize only video voyeurism that transpires in dressing rooms and similarly confined areas but would not penalize upskirt voyeurism in the open places where upskirt voyeurism is most likely to take place.

Another aspect of the law is worthy of consideration. The phrase "full or partial nudity" would not by itself preclude application of the statute to most cases of upskirt voyeurism. Why? This phrase specifically is defined to include "all or *any part* of the human genitals or pubic area or buttocks, or any part of the nipple of the breast of any female person, with less than a fully opaque covering."[376] Given that women's underwear often leaves exposed *part* of the buttocks, this would seem to constitute partial nudity within the terms of the Pennsylvania law. The real problem with the statute, as mentioned above, is that the narrow definition of a "place where the person could have a reasonable expectation of privacy" thwarts its relevance to upskirt voyeurism in public places.

The statute, however, already has been used in at least one

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375 18 PA. CONS. STAT. § 7507.1(E) (1999).

376 *Id.* (emphasis added).

case of *non*-upskirt voyeurism in Pennsylvania. In April, 1999, Michael S. Leese was ordered to stand trial on three counts of invasion of privacy after he allegedly used hidden video cameras to secretly tape women undressing and using the bathroom.[377] Leese, a former intern in the Dauphin County district attorney's office, allegedly made the videotapes in his townhouse.[378] In one case, a woman allegedly was captured on tape changing out of her swimsuit after swimming at Leese's home.[379] The Leese incident, as these facts suggest, does not involve upskirt voyeurism, and thus the new Pennsylvania law clearly is relevant to the case.

If Pennsylvania criminal law is to punish video voyeurs who engage in upskirt voyeurism in public places, however, it must be revised to address the concerns noted above. Specifically, the definition of "place" must be changed so as not to limit the statute's application to instances of voyeurism occurring in areas where individuals would reasonably believe they can "disrobe" without being seen. Amendments to the Pennsylvania voyeurism law, in fact, are already in the works. What are the proposed changes?

House Bill 1898, which was referred to the Pennsylvania Committee on the Judiciary in September, 1999, would add a new section to the criminal code involving invasion of a minor's privacy.[380] The current law, as noted above, refers to viewing, photographing, or filming "another *person* without that *person's* knowledge and consent."[381] The new bill would add a more precise provision that uses the term "minor," rather than the more generic "person."[382]

But the proposed law would make changes that go further. Specifically, it does not include the language that now plagues Pennsylvania's voyeurism law with regard to upskirt voyeurism. It jettisons the requirement that the victim—the minor—be in a place where he or she would have a reasonable expectation of privacy. The pending legislation provides in relevant part:

> A person commits the offense of invasion of a minor's privacy if he intentionally photographs or films a minor's genital area, buttocks, breasts or nipples for the purpose of arousing or gratifying the sexual desire of any person while the minor being photographed or filmed is clothed or in a state of full or partial

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377 *See Trial Ordered for Man Charged with Secretly Taping Women*, AP, Apr. 30, 1999, *available in* LEXIS-NEXIS Academic Universe database.

378 *See id.*

379 *See id.*

380 *House Bill No. 1898* (visited Nov. 3, 1999) <http://www.legis.state.pa.us/WU01/LI/BI/BT/1999/0/HB1898P2343.HTM> [hereinafter *House Bill No. 1898*].

381 18 PA. CONS. STAT. § 7507.1(A) (1999) (emphasis added).

382 *House Bill No. 1898, supra* note 380.

nudity.[383]

There is no limiting language in this provision, or anywhere else in the proposed legislation, that restricts its application to filming or photographing in places where the minor would have a reasonable expectation of privacy. This certainly is good news for minors who find themselves the victims of upskirt voyeurism while they shop in malls or walk in the street.

Should this bill be approved and signed by the governor, however, Pennsylvania would face a truly strange situation. It would be a criminal offense to engage in upskirt voyeurism in a public place if the victim was a minor, but it would *not* be a criminal offense to engage in upskirt voyeurism if the victim were an adult. Surely adult victims of upskirt voyeurism are not any more deserving of their tawdry fate than are minors. Ultimately, it would seem that the Pennsylvania legislature should reconcile the two pieces of legislation, so as to eliminate this quirk and to promote a consistent rule regarding the legality of upskirt voyeurism in public places.

4. Missouri

Although Missouri proudly proclaims itself as the "Show Me" state, in 1995, State Representative Jim Kreider introduced a piece of legislation—House Bill 160—designed to protect the privacy interests of individuals against voyeurs who hoped to be shown a little too much.[384] The bill created a crime of invasion of privacy under Missouri law that provides:

> A person commits the crime of invasion of privacy if he knowingly views, photographs or films another person, without that person's knowledge and consent, while the person being viewed, photographed or filmed is in a state of full or partial nudity and is in a place where he would have a reasonable expectation of privacy.[385]

This language should sound very familiar. It mirrors in nearly verbatim fashion the Pennsylvania voyeurism law set forth above.[386] It seems clear that Pennsylvania's legislation, adopted in 1998, was patterned after Missouri's 1995 example.

It is not surprising, then, that Missouri's law, like Pennsylvania's statute, may be plagued by the same pitfalls mentioned

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383 *Id.*

384 For the official online legislative history of House Bill 160, see *Bill Summaries, House Bill 160* (visited Nov. 7, 1999) <http://www.house.state.mo.us/bills95/bills95/hb160.htm>.

385 MO. REV. STAT. § 565.253 (1999).

386 *See supra* note 372 and accompanying text.

earlier. In particular, it is extremely limited in its possible application to upskirt voyeurism that occurs in public places. Missouri defines the term "place where a person would have a reasonable expectation of privacy" to include "any place where a reasonable person would believe that a person could disrobe in privacy, without being concerned that the person's undressing was being viewed, photographed or filmed by another."[387] Since a person would not reasonably believe that he or she could "disrobe" in the middle of a shopping mall or public park without being viewed by others, the above-mentioned language appears to preclude the application of Missouri's voyeurism law to typical instances of upskirt voyeurism in public areas. The authors of this Article could not locate any appellate decisions in Missouri directly addressing this issue.

In e-mail correspondence with one of the authors of this Article in November, 1999, Rep. Kreider addressed the question about the law's applicability to upskirt voyeurism.[388] He wrote:

> Of course this [is] only [ ]my opinion and to date there is no precedent on whether this law pertains to upskirt voyeurism. I believe this law would cover this type of violation because I believe there would be a reasonable expectation of privacy. Of course, I am sure language could be added to make sure and to clarify upskirt voyeurism.[389]

Rep. Kreider noted in his e-mail correspondence that the law has, in fact, "been used several times successfully."[390]

By its terms, the law clearly applies to *non*-upskirt voyeurism cases in places where one would expect to be able to disrobe out of the view of others. Such was the case in 1997, two years after the law was first proposed, when a University City, Missouri, man faced eleven charges of being a Peeping Tom under the law.[391] The suspect was a male management employee at a plumbing supply store called Miracle Supply.[392] He allegedly secretly videotaped women as they used the restroom at the suburban St. Louis store.[393]

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387 MO. REV. STAT. § 565.250 (1999).

388 *See* E-mail letter from Jim Kreider, Speaker Pro Tem, Missouri House of Representatives, to Clay Calvert, Pennsylvania State University (Nov. 15, 1999) (on file with authors) [hereinafter Jim Kreider E-mail].

389 *Id.*

390 *Id.*

391 *See Newschannel 5: Today in St.Louis* (KSDK-TV television broadcast, Apr. 24, 1997) (transcript available from Video Monitoring Services of America online at LEXIS-NEXIS Academic Universe database).

392 *See id.*

393 *See Your News This Morning* (KMOV-TV television broadcast, Apr. 25, 1997) (tran-

The case later sparked civil lawsuits for invasion of privacy that attracted national attention when Patricia Ireland, president of the National Organization for Women, held a protest in November, 1999, outside the store.[394] Peggy Jackson, a Miracle Supply employee whose use of the bathroom had been recorded at least eleven different times, sued the store for invasion of privacy and eventually reached a confidential settlement.[395] Another employee, Betty Hofstetter, filed a civil suit in October, 1999, for numerous causes of action including, but not limited to, intentional infliction of emotional distress and intrusion into seclusion.[396] These civil theories are discussed below in Part IV of this Article.[397]

The legislative history of the Missouri criminal statute suggests that it was *not* intended to target upskirt voyeurism, but rather cases similar to those involving the voyeurism at the plumbing supply store. In particular, proponents of the legislation who testified before Missouri's Committee on Civil and Criminal Law in 1995 cited the so-called "tanning bed" case in the town of Buffalo, Missouri.[398] That incident involved the owner of a video store who was accused in 1994 of secretly videotaping women who tanned in the nude in a tanning booth in the tiny rural Missouri town.[399] A "tanning bed" case from neighboring Kansas was described earlier in this Article.[400]

The bill's supporters claimed it would fill a void in Missouri law, because no statute at the time "cover[ed] the nonconsensual viewing of another person who is nude or partially nude *in an area that is reasonably believed to be private.*"[401] This legislative intent clearly suggests the law was designed to restrict video voyeurism in confined locations that are reasonably believed to be private, *not* in

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script available from Video Monitoring Services of America online at LEXIS-NEXIS Academic Universe database).

394 *See* Tim O'Neil, *NOW Protests at Firm Accused of Voyeurism*, ST. LOUIS POST-DISPATCH, Nov. 12, 1999, at B1.

395 *See* Jeannette Batz, *Of Voyeurs and Lawyers*, RIVERFRONT TIMES (St. Louis, Mo.), Oct. 20, 1999, at News 1.

396 *See id.*

397 *See infra* notes 525-35 and accompanying text (describing the tort theories of intrusion into seclusion and intentional infliction of emotional distress).

398 *See* <http://www.house.state.mo.us/bills95/bills95/hb160.htm> (visited Nov. 7, 1999); *see also* Jim Kreider E-mail, *supra* note 386 ("[The] incident that fostered our video privacy law occurred in Buffalo, MO when a man was caught video taping women in tanning booths. After this was discovered women who were taped felt extremely violated. At that time there was nothing to charge the violator with, hence the video privacy law.").

399 *See* Kim Bell, *Outrage at Violence Results in New Crimes on Books*, ST. LOUIS POST-DISPATCH, May 11, 1995, at 1A.

400 *See supra* note 56 and accompanying text.

401 *Bill Summaries, House Bill 160* (visited Nov. 7, 1999) <http://www.house.state.mo.us/bills95/bills95/hb160.htm> (emphasis added).

open areas like shopping mall checkout lines, which are public and where most upskirt voyeurism, in fact, transpires.

Like other states that have adopted video voyeurism laws, Missouri also provides an exception for the use of hidden cameras by law enforcement officers.[402] The exception protects the use of cameras as part of lawful criminal investigations by law enforcement officers and the use of cameras for security and investigative purposes in correctional facilities.[403]

5. Ohio

Even when a state does have a statute that seems to apply to upskirt video voyeurism in public places, its penalties may not be sufficiently harsh to either punish or deter the conduct. That was the case in Ohio in 1999, and it led at least one legislator to propose a bill calling for stiffer sentences.[404] Ohio's voyeurism law provides that "no person, for the purpose of sexually arousing or gratifying the person's self, shall commit trespass or otherwise surreptitiously invade the privacy of another, to spy or eavesdrop upon another."[405] The crime is classified as a third-degree misdemeanor.[406]

However, the statute, as revised in 1998, goes further to specifically address photographic voyeurism.[407] In particular, it provides that "no person, for the purpose of sexually arousing or gratifying the person's self, shall commit trespass or otherwise surreptitiously invade the privacy of another to photograph the other person in a state of nudity."[408] Such photographic voyeurism constitutes a slightly more severe second-degree misdemeanor.[409] There is no

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402 MO. REV. STAT. § 565.257 (1999).

403 *See id.*

404 Simakis, *supra* note 51, at 3B.

405 OHIO REV. CODE ANN. § 2907.08(A) (Anderson 1998).

406 *See id.* § 2907.08(E)(2).

407 Senate Bill 82 was passed by the General Assembly in 1997 and went into effect in 1998 to add three prohibitions to the Ohio voyeurism law, each of which specifically addressed photographic voyeurism for the first time. As the legislative history available online from the Ohio Legislative Service Commission provides, Senate Bill 82:

> [E]xpands the offense of voyeurism to also prohibit a person, for the purpose of sexually arousing or gratifying the person's self, from committing trespass or otherwise surreptitiously invading the privacy of another: to photograph the other person in a state of nudity; to photograph the other person in a state of nudity if the victim is a minor; or to photograph the other person in a state of nudity if the victim is a minor and the offender is a specified person in a position of authority over that minor.

Ohio Legislative Service Commission, 122nd Final Bill Analysis, Sub. S.B. 82, available on the World Wide Web by starting a search from <http://www.lsc.state.oh.us/analyses/index.html> (visited Nov. 13, 1999).

408 OHIO REV. CODE ANN. § 2907.08(B) (Anderson 1998).

409 *See id.* § 2907.08(E)(3).

limiting language here, unlike in some of the statutes discussed above, restricting the statute's application to places where one has a reasonable expectation of privacy or a place where one would feel free to disrobe out of the view of others. Trespass is not required; the invasion of privacy may occur "otherwise."[410] This militates in favor of the law's application to upskirt voyeurism in public places.

Because this latter provision regarding photographic voyeurism requires the victim to be "in a state of nudity," it would appear that it does not apply to the ordinary upskirt case, which involves not nudity, but underwear covering the buttocks. "Nudity," in other words, limits the scope of the statute, to the detriment of victims of upskirt voyeurism. Thus only the first part of the statute—the less severe third-degree misdemeanor—could be applied to upskirt voyeurism.

The weaknesses in the penalties meted out under the law were exposed in the case of David Bartolucci from South Euclid, Ohio, referred to earlier in this Article.[411] Bartolucci pleaded no contest in October, 1999, to charges of voyeurism and possession of criminal tools for aiming a video camera up a woman's dress at a church carnival.[412] Yet the maximum possible combined penalty for both offenses was only eight months in jail and $1500 in fines.[413] Standing alone, the voyeurism count carried only the potential of sixty days in jail and a $500 fine.[414]

That led Ed Jerse, a state representative, to call for legislation specifically outlawing upskirt and downblouse video voyeurism and classifying such behavior as a more severe first-degree misdemeanor punishable by up to six months in jail and a $1000 fine.[415] Under the current system, Jerse believes "it's too easy for someone to be tempted into trying this because the fine is too low. They don't appreciate the seriousness of the crime."[416]

Ohio's laws against voyeurism were previously strengthened by a 1997 bill that took effect in 1998, making voyeurism a felony in cases involving minors victimized by authority-figure adults and photographed in a state of nudity.[417] That occurred largely in re-

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410 *Id.* § 2907.08(B).
411 *See supra* note 51 and accompanying text.
412 *See* Simakis, *supra* note 51, at 3B.
413 *See id.*
414 *See id.*
415 *See id.*
416 *Id.*
417 *See It's Time Women Turned the Tables on Voyeurs*, PLAIN DEALER (Cleveland, Ohio), Sept. 16, 1999, at 11B; *see also* OHIO REV. CODE ANN. § 2907.08(D)(1)-(6) (Anderson 1998) (setting forth the felony offense forms of voyeurism involving minors).

sponse to a non-upskirt but equally frightening voyeurism scenario involving a high school principal who apparently had a fetish for nubile cheerleaders and hidden cameras.[418]

Walter R. Conte, Jr. was the principal at Brush High School near Cleveland, Ohio, in 1996.[419] He allegedly placed a video camera behind a two-way mirror at his beachfront home in September of that year and captured varsity cheerleaders from his own high school while they changed clothes.[420] Police reportedly confiscated thirty-eight videotapes from Conte's home, including one that showed the partially dressed cheerleaders, all of whom were younger than eighteen years old.[421]

In April, 1997, Conte pleaded no contest to one count of interception of oral communication (eavesdropping on the private conversations of the cheerleaders), one count of possession of a criminal tool (the use of the two-way mirror), and six counts of voyeurism.[422] In May of that year he was sentenced to six months in the Lake County jail, ordered to perform two hundred hours of community service, and placed on three years of probation.[423] And then in June, 1997, Conte was fired as principal of Brush High School.[424] Some of the victims also sought civil remedies against their former principal.[425]

The criminal sentence nonetheless seemed light for many in the Cleveland area, especially because the victims were minors, and the perpetrator was an adult in an authority position. The voyeurism counts were only misdemeanors.[426] As Charles E. Coulson, the prosecutor in the case, remarked at the time, "there's some holes here that need to be plugged."[427] The plug came in a revision to the voyeurism statute, which now provides that it is a fifth-degree

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418 *See House OKs Bill to Toughen Penalties for Peeping Toms,* PLAIN DEALER (Cleveland, Ohio), Oct. 25, 1997, at 5B (observing that the bill to increase penalties for voyeurism involving the videotaping of minors was an attempt to punish individuals such as Walter Conte, a former principal at Brush High School near Cleveland) [hereinafter *House Oks Bill*].

419 *See* Paloma McGregor, *How Did it Come to This?,* PLAIN DEALER (Cleveland, Ohio), Apr. 6, 1997, at 1B.

420 *See id.*

421 *See* John Kuehner, *Principal May Face Voyeur Charges,* PLAIN DEALER (Cleveland, Ohio), Sept. 14, 1996, at 1B

422 *See Principal Guilty of Spying on Girls,* COLUMBUS DISPATCH, Apr. 15, 1997, at 3C.

423 *See School Fires Official Jailed for Voyeurism,* CINCINNATI ENQUIRER, June 17, 1997, at B2 [hereinafter *School Fires Official*].

424 *See id.*

425 *See* James Ewinger, *Peeping Principal Settles with Cheerleader,* PLAIN DEALER (Cleveland, Ohio), Sept. 17, 1999, at 4B (describing the settlement of one of the three civil lawsuits against Conte).

426 *See House OKs Bill, supra* note 418, at 5B.

427 Kuehner, *supra* note 421, at 1B.

felony for a minor to be photographed in a state of nudity for the purpose of sexually arousing a person if that person is "a teacher, administrator, coach or other person in authority" employed by a public school that the minor attends.[428] The law simply came too late to cover Walter Conte's video voyeurism.

As the Ohio voyeurism cases of Walter Conte and David Bartolucci suggest, video voyeurism is forcing states to continually redefine and update their voyeurism statutes and increase the penalties attached thereto. Video technology simply has outstripped the law; now, states like Ohio are left to play legislative catch-up to deter and penalize inventive video voyeurs.

Finally, it should be noted that Ohio's voyeurism law includes an implied exemption for law enforcement and security uses of miniature or hidden cameras. Voyeurism is an offense under state law only if the viewing or photography is done "for the purpose of sexually arousing or gratifying" the voyeur.[429] Legitimate law enforcement investigations, as well as private surveillance security systems, thus would be exempt, since these uses are not for the purpose of sexual arousal or gratification. As noted earlier, Florida has a similar implied exemption for security and law enforcement surveillance purposes, as it limits voyeurism only to viewing committed "with lewd, lascivious, or indecent intent."[430]

6. Wisconsin

Wisconsin adopted two criminal statutes in the late 1990s that apply to video voyeurism. The more recent of the laws was proposed in 1997 as Assembly Bill 276.[431] It was signed into law in 1998.[432] Creating the crime of invasion of privacy and classifying it as an offense against reputation, privacy, and civil liberties, the new law provides that "[w]hoever knowingly installs a surveillance device in any private place, or uses a surveillance device that has been installed in a private place, with the intent to observe any nude or partially nude person without the consent of the person observed is guilty of a Class A misdemeanor."[433] A private place is defined as "a place where a person may reasonably expect to be safe from surveillance."[434]

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428 OHIO REV. CODE ANN. § 2907.08(D)(3) (Anderson 1998).
429 *Id.* § 2907.08.
430 FLA. STAT. ch. 810.14 (1999).
431 *See History of Assembly Bill 276* (visited Nov. 8, 1999) <http://www.legis.state.wi.us/1997/data/AB276hst.html>.
432 *See id.*
433 WIS. STAT. § 942.08(2) (1999).
434 *Id.*§ 942.08(1)(b).

Although this law clearly seems to apply to video voyeurism in confined areas such as tanning booths and dressing rooms, its application to upskirt voyeurism is less apparent. In particular, the definition of "private place" noted above would seem to preclude its application to voyeurism in public places like shopping malls and airports where one does not reasonably expect to be safe from surveillance. A reasonable person knows that malls and airports today have many surveillance cameras. Victims of upskirt voyeurism, however, would probably argue that the "private place" should refer to the place located under one's dress, not to some geographic location or real property setting. Surely, the argument would proceed, the space underneath a woman's dress constitutes "a place where a person may reasonably expect to be safe from surveillance."[435]

This latter, pro-upskirt-victim interpretation, however, amounts to nonsense when considered in conjunction with the rest of the statute. In particular, the statute by its terms punishes the *installation* of a surveillance device in a private place.[436] The upskirt voyeur does not literally install a camera in or under a woman's dress. The camera, in fact, is often placed in a gym bag or backpack, which, in turn, is placed near the feet of an unsuspecting woman. It seems, then, that the most recent Wisconsin effort to address voyeurism may penalize video voyeurism in closed areas where one expects to be free from surveillance, but fails to address mobile upskirt voyeurism in public places.

Wisconsin, however, has a second criminal statute that addresses voyeurism. In particular, section 944.205 of the Wisconsin Statutes creates a Class E felony and a crime against sexual morality for anyone who:

> [T]akes a photograph or makes a motion picture, videotape or other visual representation or reproduction that depicts nudity without the knowledge and consent of the person who is depicted nude, if the person knows or has reason to know that the person who is depicted nude does not know of and consent to the taking or making of the photograph, motion picture, videotape other visual representation or reproduction.[437]

The requirement of "nudity" at first appears to preclude the use of this statute in most cases of upskirt voyeurism, which involve depictions of undergarments rather than depictions of nudity.

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435 *Id.*
436 *See id.* § 942.08(2).
437 *Id.* § 944.205.

The statute, however, borrows from and adopts the definition of nudity provided in another Wisconsin statute:

> [T]he showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.[438]

Many types of women's underwear, such as thongs and bikini briefs, cover "less than a full" portion of the buttocks. This suggests that the nudity requirement would *not*, in fact, thwart the application of section 944.205 of the Wisconsin Statutes to many instances of upskirt voyeurism. It all depends, in other words, on how fully the underwear covers the buttocks, genitals, and pubic area.

But section 944.205 faces a much more serious problem today than whether or not it punishes upskirt voyeurism in public places. The entire law is in jeopardy. In particular, the Wisconsin Supreme Court announced in July, 1999, that it would hear the appeal of a camera-toting voyeur who contends that the law violates his First Amendment rights.[439] Scott Stevenson of Waukesha, Wisconsin, pleaded no contest in December, 1997, to charges that he climbed the roof of his former girlfriend's house and secretly videotaped her through her bedroom and bathroom windows while she was nude.[440] Stevenson's attorney, Daniel Fay, contends on appeal that the statute is overbroad.[441] He also claims the law is vague.[442]

Constitutional scholar Erwin Chemerinsky explains that a law "that regulates more expression than the Constitution allows to be restricted will be declared unconstitutional on overbreadth grounds."[443] In contrast, a law can be declared void for vagueness "if a reasonable person cannot tell what speech is prohibited and what is permitted."[444]

In the case of the Wisconsin voyeurism statute, Stevenson's attorneys have filed briefs illustrating these points with several exam-

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438 *Id.* § 948.11(1)(d).

439 *See State Supreme Court Takes Peeping Tom Case,* MILWAUKEE J. SENTINEL, July 27, 1999, at Wausheka 3.

440 *See* Lisa Sink, *Ruling Sought on Breadth of Voyeur Law,* MILWAUKEE J. SENTINEL, June 24, 1999, at News 1.

441 *See id.*

442 *See* Lisa Sink, *Unauthorized Nude Taping Not a Right,* MILWAUKEE J. SENTINEL, Dec. 29, 1997, at Waukesha 1.

443 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 765 (1997).

444 *Id.*

ples. They contend, for instance, that the law would punish: (1) a person who illustrates Kenneth Starr's Referral on President Bill Clinton with drawings depicting the alleged encounters between the President and then-intern Monica Lewinsky; (2) a person who photocopies, reproduces, or publishes existing photographs of a nude person without obtaining the nude person's consent; and (3) a person who publishes a book or magazine depicting a famous painting of a nude woman without obtaining the model's consent.[445]

At the time this Article was written, the Wisconsin Supreme Court had yet to rule on the case. Regardless of the outcome of Stevenson's case, however, his attack on the Wisconsin statute raises important lessons for other states interested in restricting video voyeurism. Statutes must be narrowly drafted to avoid problems of vagueness and overbreadth. Legislators also must be cognizant in the drafting process of First Amendment concerns for freedom of expression. They must be careful to avoid constructing laws that hamper legitimate newsgathering practices at the same time as they address the activities of sexual voyeurs.

7. Summary

The experiences of Alaska, Florida, Pennsylvania, Missouri, Ohio, and Wisconsin described in this Section, as well as those of California, Louisiana and Connecticut mentioned earlier in Section A, are illustrative of the efforts across the country to grapple with the "growing international trend"[446] of video voyeurism.[447] Several lessons from these states' experiences appear clear:

a. Laws that, by their terms, are designed to punish video voyeurism in "private places" may *not* be effective in punishing upskirt voyeurism in public places like checkout lines at a clothing store or concession lines at a baseball game.

b. Laws that use the term *nudity*, unless carefully crafted and defined also to include *partial* nudity, may preclude their effectiveness in cases of upskirt voyeurism in which underwear, not nudity, was captured on videotape.

c. Laws that address only the capturing or gathering of video voyeurism, but not its subsequent distribution or dissemination, fail to stop the public display of video voyeurism. None of the state

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445 Sink, *supra* note 440, at News 1.

446 Sink & Spice, *supra* note 15, at 1.

447 *See supra* note 318 and accompanying text (describing the efforts of both Virginia and Oregon to regulate video voyeurism).

statutes examined here makes explicit reference to posting voyeuristic images on the Internet or the World Wide Web.

d. Laws that fail to provide an exemption—be it an explicit exemption, such as that provided in the voyeurism statutes of Alaska and Pennsylvania, or an implicit exemption, such as provided for under Florida and Ohio law—for legitimate law enforcement or security surveillance purposes may sweep too broadly in curtailing the use of video technology.

While the states discussed in this Section have adopted statutes that directly target video voyeurism, many states have not yet done so. What happens, then, in the criminal justice system if a state does not have a video voyeurism statute? Must the suspect or perpetrator automatically go free? Alternatively, what happens if a state *does* have a video voyeurism statute, but that law simply fails to punish upskirt video voyeurism in public places? Are there different avenues of redress under criminal law to punish upskirt voyeurs? What other theories, in brief, might a crafty prosecutor use to charge a video voyeur? The next Section discusses several potential alternative theories of criminal prosecution of video voyeurs.

C. *Alternative Criminal Theories for Prosecution of Video Voyeurism*

If a state's criminal voyeurism and Peeping Tom statutes fail to address video voyeurism, be it voyeurism of the public-place variety involving upskirts or the private-place genre involving hidden cameras placed in tanning booths and bathrooms, what alternative theories might provide a means of prosecution? A number of theories seem quite relevant. This Section examines some examples of state criminal statutes, primarily—but not exclusively—those from California and New York, as well as selected federal laws, to illustrate potential alternative or additional means of prosecuting video voyeurs.

1. Criminal Trespass

Criminal trespass is an obvious theory of prosecution for video voyeurism when it occurs on property possessed or controlled by another and when the voyeur is physically present on the property without permission.[448] A video voyeur who sneaks into an apartment and films, without the consent of the tenant, may face charges of criminal trespass. For instance, California Penal Code section 602.5 provides that:

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448 "Criminal intrusion by itself is punished under offenses independent of and less serious than burglaries." PAUL H. ROBINSON, CRIMINAL LAW 779 (1997).

> Every person other than a public officer or employee acting within the course and scope of his employment in performance of a duty imposed by law, who enters or remains in any noncommercial dwelling house, apartment, or other such place without consent of the owner, his agent, or the person in lawful possession thereof, is guilty of a misdemeanor.[449]

New York law is similar. Recognizing several degrees of criminal trespass, it provides generally that "[a] person is guilty of criminal trespass when he knowingly enters or remains unlawfully in or upon premises."[450] This law applies to both residential and nonresidential property.[451]

In addition to these general criminal trespass statutes, the California Penal Code contains another section that could be used, albeit under very limited circumstances, against video voyeurs who leave the audio function turned on when they record the activities of unsuspecting women and men in areas such as motel rooms and locker rooms. In particular, California Penal Code section 634 creates a separate crime for trespass committed during the course of the elsewhere-defined and underlying criminal activities of eavesdropping and wiretapping.[452]

How might this come into play in the case of video voyeurism? California Penal Code section 632—the state's eavesdropping law, described later in this Part—criminalizes the intentional and nonconsensual recording of confidential communications.[453] A video voyeur who records a couple talking while they undress in a motel room or who records women as they talk in an otherwise empty locker room or bathroom conceivably could be prosecuted for eavesdropping if the audio function on the camera was turned on. If the video voyeur is prosecuted for eavesdropping, then California Penal Code section 634 also could kick in to criminalize any trespass by the voyeur while making the video and audio recording.

2. Two-Way Mirror Laws

Two-way mirrors offer video voyeurs both the cover and the means to engage in their voyeuristic activities in places such as ho-

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449 CAL. PENAL CODE § 602.5 (West 1999).

450 N.Y. PENAL LAW § 140.05 (McKinney 1999); *see also id.* § 140.17 (defining criminal trespass in the first degree); *id.* § 140.15 (defining criminal trespass in the second degree); *id.* § 140.10 (defining criminal trespass in the third degree).

451 For purposes of New York criminal trespass law, "premises" is defined to include any real property and building, including but not limited to any structure "used by persons for carrying on business therein." *Id.* § 140.00.

452 CAL. PENAL CODE § 634 (West 1999).

453 *Id.* § 632.

tel rooms, tanning booths, and dressing rooms. Both California and New York, however, have criminal statutes that directly target such illicit installation and use of two-way mirrors.

Under California criminal law, "[a]ny person who installs or who maintains after April 1, 1970, any two-way mirror permitting observation of any restroom, toilet, bathroom, washroom, shower, locker room, fitting room, motel room, or hotel room, is guilty of a misdemeanor."[454] New York law provides in similar fashion that:

> A person is guilty of unlawfully installing or maintaining a two-way mirror or other viewing device when, being the owner or manager of any premises, he knowingly permits or allows such a device to be installed or maintained in or upon such premises, for the purposes of surreptitiously observing the interior of any fitting room, restroom, toilet, bathroom, washroom, shower, or any room assigned to guests or patrons in a motel, hotel, or inn.[455]

New York law clearly applies to video voyeurism. In particular, the phrase "two-way mirror or other viewing device" is defined by statute to include "a mirror, peep hole, mechanical viewing device, *camera*, or any other instrument or method that can be utilized to surreptitiously observe a person."[456] Fitting rooms are exempted if the store owner or manager conspicuously posts notice of the presence of cameras or two-way mirrors.[457] In a recent New York decision involving the installation of a video camera in the women's restroom at a marina, the appellate court held that the law "is breached by the installation of the video camera; whether a plaintiff was actually videotaped is not an essential element of the offense."[458]

The New York two-way mirror law also creates a statutory duty of care for businesses "that may serve as the basis for a cause of action for negligent infliction of emotional distress."[459] As described below in Part IV, negligent infliction of emotional distress may provide a viable form of civil relief for victims of video

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454 *Id.* § 653n.

455 N.Y. GEN. BUS. LAW § 395-b (McKinney 1999).

456 *Id.* (emphasis added). In contrast, California's two-way mirror law is more narrowly drafted and defines a two-way mirror as "a mirror or any surface which permits any person on one side thereof to see through it under certain conditions of lighting, while any person on the other side thereof or other surface at the time can see only the usual mirror or other surface reflection." CAL. PENAL CODE § 653n (West 1999).

457 *See* N.Y. GEN. BUS. LAW § 395-b (McKinney 1999).

458 Adams v. Oak Park Marina, Inc., 689 N.Y.S.2d 828, 829 (1999).

459 Dana v. Oak Park Marina, Inc., 660 N.Y.S.2d 906, 909 (1997).

voyeurism.[460]

In summary, prosecutors in video voyeurism cases that occur in confined areas and involve the use of a two-way mirror should check their state's business and penal codes for two-way mirror statutes. The mere installation of such a mirror may be enough for prosecution.

3. Eavesdropping and Surveillance Statutes

State eavesdropping and surveillance statutes[461] may provide a means of prosecuting video voyeurs. Some states have statutes, for instance, that specifically criminalize the installation and/or use of hidden cameras in places where individuals observed or videotaped have a reasonable expectation of privacy.[462] These statutes clearly cover most tanning booth situations, motel room cases, and private residence instances of video voyeurism.

Statutes that focus more generally on eavesdropping also may be relevant, especially if the law in question either includes video recorders among the regulated devices or, alternatively, the audio function of the video recorder is turned on when the video images are made. A 1989 decision by a California appellate court illustrates the applicability of that state's eavesdropping law in the context of video voyeurism.

In *People v. Gibbons*,[463] a California appellate court considered whether California Penal Code section 632—the state's eavesdropping law—could be successfully used to prosecute a man who videotaped himself having sex with women.[464] Michael Francis Gibbons allegedly would invite young women to his residence and,

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460 *See infra* notes 529-35 and accompanying text (describing civil causes of action for both intentional and negligent infliction of emotional distress).

461 "Nineteen states and the federal government have passed laws outlawing eavesdropping." PEMBER, *supra* note 68, at 312.

462 *See, e.g.*, HAW. REV. STAT. ANN. § 711-1111 (Michie 1999) (providing for the "the offense of violation of privacy in the second degree" in Hawaii for, among other things, the use or installation in any private place, without consent of the person or persons entitled to privacy therein, of "any device for observing, photographing, videotaping, filming, recording, amplifying, or broadcasting sounds or events in that place"); N.H. REV. STAT. ANN. § 644:9 (1999) (creating a misdemeanor in New Hampshire for the non-consensual use or installation in any private place of "any device for observing, photographing, recording, amplifying or broadcasting sounds or events in such place"); S.D. CODIFIED LAWS § 22-21-1 (Michie 1999) (creating a misdemeanor in South Dakota for the unauthorized installation or use in any private place of "any device for observing, photographing, recording, amplifying or broadcasting sounds or events in such place"); UTAH CODE ANN. § 76-9-402 (1999) (providing that a person in Utah is guilty of the Class B misdemeanor of a privacy violation if he or she "installs in any private place, without the consent of the person or persons entitled to privacy there, any device for observing, photographing, recording, amplifying, or broadcasting sounds or events in the place or uses any such unauthorized installation").

463 215 Cal. App. 3d 1204 (Ct. App. 1990).

464 *See id.* at 1206.

without obtaining their consent, use a video recorder hidden in a bedroom closet to capture his sexual activity with them.[465] A jury convicted Gibbons for violating section 632 of the Penal Code.[466] It provides in relevant part that a crime occurs when a person:

> [I]ntentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio.[467]

The appellate court initially concluded that a video recorder falls within the meaning of the term "recording device" in this statute.[468] What's more, the court held that sexual activity constitutes a form of confidential communication within the meaning of the eavesdropping statute.[469] "That sexual relations is a form of communication, be it communication of love, simple affection, or simply of oneself, cannot be readily disputed," the court wrote.[470] It thus concluded that if the California law "covers eavesdropping on or recording of a telephone call, it surely covers the nonconsensual recording of the most intimate and private form of communication between two people."[471] The jury verdict against the defendant thus was affirmed.[472]

Such a generous interpretation of the terms "recording device" and "confidential communication" is a boon to prosecutors seeking to punish video voyeurs. Courts in other states interpreting the meaning of their eavesdropping laws would be advised to follow a similar interpretation if they value the privacy interests of video voyerism victims.

A case from another jurisdiction illustrates the use of eavesdropping statutes in video voyeurism cases. In the Ohio incident described earlier, involving a high school principal who secretly videotaped cheerleaders changing clothes in the bathroom at his home,[473] the principal ultimately pleaded no contest to one felony count of interception of an oral communication, among other

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465 *See id.*
466 *See id.*
467 CAL. PENAL CODE § 632 (West 1999).
468 *Gibbons*, 215 Cal. App. 3d at 1208.
469 *See id.*
470 *Id.* at 1209.
471 *Id.*
472 *See id.* at 1211.
473 *See supra* notes 419-25 and accompanying text.

charges.[474] Another very creative charge that stuck in that Ohio case involved a count for possession of a criminal tool, in this case the video camera.[475] Other states, it should be noted, have criminal statutes forbidding the possession of criminal tools, but these states often limit the scope of their statutes to tools used to commit burglaries or unauthorized entries.[476] This suggests that they would be of little use in most video voyeurism cases.

Like Ohio, New York also criminalizes eavesdropping. It provides that "[a] person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication."[477] The phrase "mechanical overhearing of a conversation" is defined by statute to include the "intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment."[478] Conceivably, a video voyeur who plants a camcorder behind a two-way mirror or other object could be prosecuted under the eavesdropping law if the audio was turned on, the audio recorded the conversations of two people seen on camera, and the voyeur was not physically present.

Federal law also restricts the interception of wire, oral and electronic communications.[479] Video cameras, however, are not specifically covered by the law.[480] On the other hand, using a video recorder *that also captures sound* could lead one to commit a federal crime if the person recording a conversation is not a party to that conversation and the conversation occurs in a setting in which the individuals who are recorded would not reasonably expect it to be intercepted.[481] The law certainly applies to journalists who tape conversations to which they are not parties; thus, it could apply as

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474 *See School Fires Official*, *supra* note 423, at B2; *see also* OHIO REV. CODE ANN. § 2933.52 (Anderson 1999) (containing Ohio's criminal statute against interception of wire, oral and electronic communications).

475 *See School Fires Official*, *supra* note 423, at B2; OHIO REV. CODE ANN. § 2923.24 (Anderson 1999) (providing that "no person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally").

476 *See, e.g.*, CAL. PENAL CODE § 466 (West 1999) (criminalizing the possession of instruments and tools held with the intent to "feloniously to break or enter into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle."); N.Y. PENAL LAW § 140.35 (McKinney 1999) (defining the crime of possession of burglar's tools).

477 N.Y. PENAL LAW § 250.05 (McKinney 1999).

478 *Id.* § 250.00.

479 *See* 18 U.S.C. § 2511 (1999).

480 *See* DIENES ET AL., *supra* note 207, at 576.

481 *See* 18 U.S.C. § 2510(2) (1999) (defining "oral communication" under the federal law); *id.* § 2511(2)(d) (providing an exemption for individuals who are parties to the conversations they are recording).

well to video voyeurs who record others who believe they are conversing in a private setting.[482] There would need to be two victims of video voyeurism for the federal law to apply, however, since there must be an "oral communication" that is recorded. The law would not apply to the typical tanning booth case of video voyeurism, in which a person is alone and recorded from a camera behind a two-way mirror. There simply is no "communication" that is recorded or intercepted.

4. Sex Crimes and Child Pornography

Another method of prosecuting video voyeurs is to use statutes that address sex crimes, particularly if the individual videotaped is a minor.[483] As noted earlier in this Article, federal child pornography laws might provide a means of prosecution of upskirt voyeurs if the victim is a child.[484] Nudity, it is important to note, is *not* required under federal law for there to be a lascivious exhibition of the genitals or pubic area, and such a lascivious exhibition constitutes sexually explicit conduct under federal child pornography legislation.[485] Thus, a close, tightly-focused upskirt shot of a young girl's underwear could constitute child pornography if intended or designed to elicit a sexual response in the viewer.[486] The video voyeur who observes children in a bathroom changing clothes with a camera placed behind a two-way mirror might also face child pornography charges if the video camera is directed to capture a lascivious display of the pubic area or genitals.

California's penal code contains a sex-crimes section that could be used to charge voyeurs who videotape minors, although it has not yet been tested directly in a video voyeurism case. Specifi-

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482 *See* Steven Perry, *Hidden Cameras, New Technology, and the Law*, COMM. LAW., Fall 1996, at 1, 19 ("A reporter armed with a hidden camera or other recording device should be aware that he may be violating federal law if he tapes conversations to which he is not a party.").

483 In addition, if a minor is involved and the video voyeurism is conducted by a parent or guardian of that child, child abuse laws may provide a means of prosecution. *See* Mary Allen, *Peeping Tom Gets 60 Days*, THE CAPITAL (Annapolis, Md.), Sept. 4, 1999, at A9 (describing a case of video voyeurism in which a Maryland man who videotaped his stepdaughter dressing in her bedroom pleaded guilty to child abuse).

484 *See supra* notes 194-98 and accompanying text.

485 *See* 18 U.S.C. § 2256 (1999) (defining child pornography and sexually explicit conduct); *see also* United States v. Knox, 32 F.3d 733, 737 (3d Cir. 1994) ("[T]he federal child pornography statute, on its face, contains no nudity or discernibility requirement, that non-nude visual depictions, such as the ones contained in this record, can qualify as lascivious exhibitions."), *cert. denied*, 513 U.S. 1109 (1995).

486 In determining whether an exhibition of the genital is lascivious, federal courts apply a six-factor analysis, including whether the focal point of display of the visual depiction is the child's pubic area and whether the image was designed to illicit a sexual response in the viewer. *See* United States v. Villard, 885 F.2d 117, 122 (3d Cir. 1989).

cally, California Penal Code section 647.6 creates a crime that targets "every person who annoys or molests a child under the age of 18."[487] This statute has been held to apply to the sexually suggestive photographing of a clothed minor in a case called *People v. Kongs*.[488] In fact, the appellate court in *Kongs* described the photographer's conduct—zooming in on his young model's crotch and asking her to spread her legs apart during an ostensibly legitimate photo shoot[489]—as "voyeuristic" and likened the photographer's conduct to that of a Peeping Tom.[490] The court held that such photographic conduct "could ordinarily cause annoyance or offense to the subject of his attentions."[491]

Most importantly for application of this law to voyeurism cases, the court held that annoyance is not concerned with the child's state of mind, but instead with the defendant's objectionable acts.[492] The minor photographed in a voyeurism case thus would not even need to know that the videotaping was occurring, because the law focuses, in an objective manner, on the defendant's conduct, *not* on the minor's own subjective state of mind. In the *Kongs* case described above, the appellate court thus was able to hold that "a factfinder could objectively conclude that the average person would be unhesitatingly irritated or offended by a photographer *surreptitiously aiming his camera up a child's dress* rather than photographing her face of body."[493] It would seem, then, that the ruling in *Kongs* could easily be expanded to allow California Penal Code section 647.6 to apply to video voyeurism cases involving images of children.

In the cases of pseudo voyeurism—in contrast to *verité* voyeurism—described earlier in this Article, in which the voyeurism actually is staged,[494] the use of a minor could be prosecuted under sexual exploitation laws, depending on the content of the images.[495] New York law, for instance, creates a Class C felony for a

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487 CAL. PENAL CODE § 647.6 (West 1999).

488 People v. Kongs, 30 Cal. App. 4th 1741 (Ct. App. 1999).

489 The appellate court commented that the incident took place at what it called a family photo shoot in which "numerous photographers take pictures of models of varying ages so that both the photographers and models can develop portfolios." *Id.* at 1746.

490 *Id.* at 1752.

491 *Id.* at 1751.

492 *See id.* at 1749 (observing that courts that have interpreted the statute "have focused on the defendant's intent and an objective assessment of the defendant's conduct" in determining whether conduct is annoying).

493 *Id.* at 1751 (emphasis added).

494 *See supra* notes 115-26 and accompanying text (describing pseudo voyeurism).

495 *See* CAL. PENAL CODE § 311.4 (1999) (criminalizing the use of minors in videotapes involving sexual conduct).

person who uses a minor in a sexual performance.[496]

5. Breach of the Peace and Disorderly Conduct

In the case of John Humphreville, the Connecticut teenager described earlier in this Article who allegedly secretly videotaped girls changing clothes at a party,[497] a charge of breach of the peace was filed in connection with the alleged playing and distributing of the video.[498] The Connecticut breach of peace statute was particularly relevant in the Humphreville case, because it creates a misdemeanor offense when an individual "publicly exhibits, distributes, posts up or advertises any offensive, indecent or abusive matter concerning another person" and does so with either the intention of causing, or recklessly creating a risk of causing, inconvenience, annoyance, or alarm.[499] In this case, it could be argued that the videotape of young girls changing their clothes was offensive and/or indecent, and that the alleged decision of Humphreville to play the tape for friends constituted a public exhibition.

In another case described earlier, involving a South Carolina man who used a hidden video camera to film up the skirts of women at an arts festival,[500] the suspect ultimately pleaded guilty to eight charges of disorderly conduct.[501] The video voyeur in that case, a Sunday school teacher and married father of two, was given a suspended sentence of 240 days, one month for each of the eight counts of disorderly conduct.[502] The disorderly conduct statute was used because the antiquated wording of South Carolina's Peeping Tom statute applies only to occurrences on the premises of another, and the suspect was arrested while on public property.[503]

Depending on their specific scope, then, breach of the peace and disorderly conduct statutes may provide a means for attacking either the gathering or the dissemination of video voyeurism.[504] The conduct of an upskirt video voyeur who is caught in the act in

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496 N.Y. PENAL LAW § 263.05 (McKinney 1999).

497 *See supra* notes 307-11 and accompanying text (describing the facts of the Humphreville case).

498 *See Student Warned, supra* note 309.

499 CONN. GEN. STAT. § 53a-181 (1999).

500 *See supra* note 55 and accompanying text (describing the case).

501 *See* Andrew J. Skerrit, *Peeping Case Closes with Lesser Charges*, HERALD (Rock Hill, S.C.), Oct. 14, 1999, at 4A; *see also* S.C. CODE ANN. § 16-17-530 (Law. Co-op. 1999) (setting forth South Carolina's public disorderly conduct statute).

502 *See* Skerrit, *supra* note 501, at 4A.

503 *See id.*; *see also* S.C. CODE ANN. § 16-17-470 (Law. Co-op. 1999) (setting forth South Carolina's Peeping Tom statute, which restricts, in relevant part, being "an eavesdropper or a Peeping Tom on or about the premises of another").

504 "[T]he content of disorderly conduct statutes varies to a greater or lesser extent from state to state." CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 505 (15th ed. 1993).

a public place could possibly lead to the type of disorder or disturbance regulated by these statutes.

In California, for example, California Penal Code section 647 contains a laundry list of acts that constitute the misdemeanor offense of disorderly conduct.[505] Included in that list are the video voyeurism laws described earlier in this Article.[506] It also includes California's more general restriction on the conduct of Peeping Toms, which provides that a person is guilty of disorderly conduct "who, while loitering, prowling, or wandering on the private property of another, at any time, peeks in the door or window of any inhabited building or structure, without visible or lawful business with the owner or occupant."[507]

Consider another, more general, disorderly conduct statute that possibly could apply to upskirt voyeurism in public places. Under Pennsylvania law, a person who recklessly creates a risk of causing "public inconvenience, annoyance or alarm" by creating a "physically offensive condition by any act which serves no legitimate purpose of the actor" is guilty of disorderly conduct.[508] The term "public" is defined to include places of business and amusement and any premises open to the public.[509]

The Pennsylvania disorderly conduct law could come into play to prosecute a case of upskirt voyeurism in a public shopping mall. The place is public; the conduct arguably is physically offensive; it certainly creates a risk of causing annoyance and alarm should the voyeurism be discovered; and it serves no legitimate purpose to the perpetrator.

New York's disorderly conduct law mirrors the Pennsylvania statute to this extent.[510] The New York law also provides that a person who recklessly creates a risk of causing public inconvenience, annoyance or alarm by creating a "physically offensive condition by any act which serves no legitimate purpose" is guilty of disorderly conduct.[511]

6. Stalking, Harassment, and Menacing Statutes

Video voyeurs engage in "high-tech hunting."[512] That's what

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505 CAL. PENAL CODE § 647 (West 1999).

506 *See supra* notes 318-447 and accompanying text; *see also* CAL. PENAL CODE §647(k)(1)-(2) (West 1999) (including the new voyeurism legislation that became law in 1999).

507 CAL. PENAL CODE § 647(i) (West 1999).

508 PA. CONS. STAT. § 5503 (1999).

509 *See id.*

510 *See* N.Y. PENAL LAW § 240.20 (McKinney 1999).

511 *Id.*

512 Simakis, *supra* note 10, at 1B.

Andrew Drake, the creator of a voyeuristic website appropriately dubbed *Upskirt.com*, boldly stated in 1999.[513]

To the extent that video voyeurism is like hunting, one initially would think that stalking statutes might provide a ready means of prosecution. Unfortunately, however, that does not appear to be the case. Why? Consider California's law on stalking.[514] Penal Code section 646.9 applies only to a person who "repeatedly follows or harasses" another person and who "makes a credible threat" with the intent to place the victim "in reasonable fear for his or her safety." Voyeurism, however, is covert by definition and does not involve threats, either verbal or written. What's more, it is highly unlikely that the voyeur repeatedly follows a particular victim. The upskirt voyeur more likely moves from victim to victim in the shopping mall or amusement park.

Conceivably, a harassment law, such as New York's definition of harassment in the second degree, could be used to prosecute a persistent video voyeur.[515] That law provides that a person who intends to annoy, harass, or alarm another person by following that person "in or about a public place or places" is guilty of harassment.[516] An upskirt voyeur might follow a potential victim in a public area such as a mall. However, a voyeur prosecuted under this statute would likely argue that he did not intend in any way to harass the victim, but merely to photograph her. Had he intended to harass her, the suspect might argue, he would have made his presence clear, rather than trying to sneak a videotape recording.

7. Theft of Electricity and Services

A landlord-turned-video-voyeur or a malicious maintenance man plants a hidden camera behind a mirror, in an air conditioning duct, or in a wall from behind the crawlspace in a tenant's apartment. He runs it off of electricity that is paid for either by the victim or by the owner of the apartment building. In such a case, either the victim is funding the video voyeurism or the owner of the building is paying for it. In either situation, neither the victim nor the owner consents to what amounts to the stealing of his or her electricity for the purpose of video voyeurism.

One possible way to prosecute the voyeur, then, is for theft of services or goods, in this case the theft of the victim's electricity. Laws related to larceny may be applicable as one means of prosecu-

513 *See id.*
514 *See* CAL. PENAL CODE § 646.9 (West 1999).
515 *See* N.Y. PENAL LAW § 240.26 (McKinney 1999).
516 *Id.*

tion.[517] Larceny itself, however, only applies to tangible forms of personal property,[518] and electricity may not be considered a tangible form of person property but instead a service.

However, states may have laws that specifically apply to the theft of utility services, although in some cases they apply only to theft from the utility company itself.[519] California not only has a theft of utility services statute,[520] but also a law that prohibits an unauthorized connection with any line "used to conduct electricity."[521] New York's theft of services law makes it a crime for one to intend to avoid payment of charges for electrical services by obtaining electrical services after tampering or making a connection with the equipment of the electrical supplier.[522] Creative district attorneys may be able to use laws such as these to bring to justice video voyeurs who siphon electricity from others to enable their voyeuristic activities.

D. *Summary*

Video voyeurism poses new challenges to the criminal justice system. Traditional laws against voyeurism—Peeping Tom statutes, two-way mirror laws, and disorderly conduct statutes—may provide one means of prosecution. Alternatively, newly revised or created statutes that directly target video voyeurism can also serve district attorneys. The problem with many of these laws, as this Part has suggested, is that they often do little to address the growing phenomenon of upskirt voyeurism in public places. In the absence of statutes that directly target such conduct, prosecutors must be creative in combing through codebooks for other statutes that could be stretched through clever interpretations to cover this burgeoning problem.

IV. Compensating the Victim: A Search for Civil Remedies

An alternative to criminal prosecution of video voyeurs is a civil lawsuit seeking either tort or contractual recovery for voyeurism victims. In some cases, it may be possible for a victim to have it both ways—to see the video voyeur prosecuted under a criminal

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517 Larceny is typically defined as "the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive the possessor of the property." Joshua Dressler, Understanding Criminal Law 508 (2d ed. 1995).

518 *See id.*

519 *See, e.g.*, Cal. Penal Code § 489 (West 1999) (creating a misdemeanor offense for theft of utility services).

520 *See id.*

521 *Id.* § 591.

522 *See* N.Y. Penal Law § 165.15 (McKinney 1999).

statute like one of those described in Part III *and* then to file a civil lawsuit for damages based on harm caused by either the gathering or the dissemination of the voyeuristic images. Section A in Part IV describes potential remedies for harm caused in the process of *gathering* voyeuristic images, while Section B sets forth possible tort theories for compensation of harm caused by the *displaying* of the images on the World Wide Web.

A. *Remedies for the Gathering of Voyeuristic Images*

A number of different torts may provide victims of video voyeurism with a means of civil recovery for harm suffered in the gathering of covert images. Their relevance to a particular case, however, depends in large part upon the unique factual circumstances at play. For instance, where the victim was located at the time the image was gathered and, concomitantly, where either the voyeur or the voyeur's camera was situated at that time may limit the applicability of some of the following torts. In addition, contractual remedies may be possible if the video voyeurism occurs in a place that holds itself out as offering a safe environment, such as a hotel, motel, or tanning salon.

1. Trespass

The video voyeur who enters another's property to capture images without consent may be liable under a common law action for trespass. The essence of a cause of action for trespass, an intentional tort, is the unauthorized entry on to the land of another.[523] In states such as California, a victim may recover for emotional distress caused by the trespass, even if it is not accompanied by physical harm.[524]

Clearly, victims of video voyeurism who learn about the infringement on their privacy interests may suffer emotional harm and mental anguish. Trespass thus provides a means of recovery in cases where the voyeur enters the property of the victim, without consent, to capture voyeuristic images.

2. Intrusion into Seclusion

The privacy tort of intrusion into seclusion provides another means of recovery for the victim of video voyeurism.[525] Intrusion,

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[523] *See* Miller v. National Broad. Co., 187 Cal. App. 3d 1463, 1480 (Ct. App. 1987).

[524] *See id.* at 1481.

[525] However, not all states recognize this cause of action or other privacy torts. For instance, New York courts do not recognize common law claims for invasion of privacy, but instead only acknowledge statutorily created privacy interests in one's name or likeness. *See*

the California Supreme Court reaffirmed in 1998, "encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying."[526] As defined in the *Restatement (Second) of Torts*, "one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[527]

The victim of video voyeurism whose violation occurs in areas where one generally has an expectation of solitude or seclusion, such as dressing rooms and tanning booths, might prevail on this theory, assuming a jury finds that surreptitious video recording for purposes of sexual enjoyment is highly offensive conduct. Likewise, one could even make a case that a victim of upskirt voyeurism in a *public* place, such as a shopping mall or public park, should prevail on a claim for intrusion into seclusion. In this type of public voyeurism scenario, the plaintiff's attorney would need to argue that the area that is concealed underneath a woman's dress and that is not plainly visible to those standing nearby is a place where one reasonably expects privacy. The dress deliberately covers the underwear, thus creating an expectation of privacy in the underwear. One does not expect to have a camera, placed in a duffel bag, dropped near one's feet to videotape this private area. The cunning and conniving placement of such a camera arguably is highly offensive to a reasonable person.

The fact that intrusion does not require a physical trespass, but instead may occur through "sensory intrusions"[528]—the use of cameras and video recorders—also squarely places this tort within the arsenal of legal weapons that an attorney representing a victim of video voyeurism has at his or her disposal. This means that the tort provides an alternative theory to a cause of action for trespass when there is no physical trespass onto the victim's property.

Costanza v. Seinfeld, 693 N.Y.S.2d 897, 899 (1999) (dismissing privacy claims by Michael Costanza, based on the fictional character George Costanza played by Jason Alexander on the hit television show *Seinfeld*, and holding that "New York law does not and never has allowed a common law claim for invasion of privacy").

526 Shulman v. Group W Prods. Inc., 18 Cal. 4th 200, 230-31 (1998).

527 RESTATEMENT (SECOND) OF TORTS § 652B (1977). The *Restatement* definition has been adopted by California courts. *See, e.g.*, Deteresa v. American Broad. Cos., Inc. 121 F.3d 460, 465 (9th Cir. 1997).

528 *Shulman*, 18 Cal. 4th at 231.

3. Intentional and Negligent Infliction of Emotional Distress

A third theory of tort recovery for victims of video voyeurism is based on the argument that the conduct of the video voyeur is done with either intention of or reckless disregard for causing the victim to suffer severe emotional distress. To state a cause of action for intentional infliction of emotional distress, one must show that the defendant engaged in extreme and outrageous conduct, with either the intention of, or reckless disregard for the probability of, causing the plaintiff to suffer severe or extreme emotional distress as a result of that conduct.[529] Outrageous conduct is typically defined as that which exceeds all bounds that are usually tolerated in a civilized community.[530]

An easy case could be made that video voyeurs act with reckless disregard for causing emotional harm to their victims. Moreover, the conduct itself—surreptitiously videotaping a person in a state of undress or in her underwear—seems to exceed the bounds of decency in a civilized community. A good plaintiff's attorney thus should be able to make a solid claim for intentional infliction of emotional distress against a video voyeur.

In New York, an appellate court held in 1997 that the plaintiff had successfully stated causes of action for negligent and reckless infliction of emotional distress when a marina owner in North Rose, New York, installed video surveillance cameras in the bathrooms and taped guests in various stages of undress without their knowledge.[531] The court noted that allegations that the defendant "surreptitiously videotaped plaintiff without her consent, viewed videotapes of plaintiff and others in various stages of undress for personal and unjustifiable purposes and displayed those tapes to others for purposes of trade" were sufficient to constitute conduct "that a jury could find to be extreme and outrageous."[532]

In the Missouri case described above involving video recording in a bathroom at a plumbing supply store, one of the victims—an employee at the store—filed a civil lawsuit in state court that included a claim for both intentional infliction of emotional distress and intrusion into seclusion.[533] In that case, a camera hidden in the ceiling was aimed "down at the toilet" and focused "on the

529 *See* Miller v. National Broad. Co., 187 Cal. App. 3d 1463, 1487 (Ct. App. 1987).

530 *See* Davidson v. City of Westminster, 32 Cal. 3d 197, 209 (1982).

531 *See* Dana v. Oak Park Marina, Inc., 660 N.Y.S.2d 906, 909-911 (1997). In New York, reckless infliction of emotional distress is encompassed within the tort of intentional infliction of emotional distress. *See id.* at 910.

532 *Id.*

533 *See supra* notes 391-96 and accompanying text.

expected location of the user's buttocks."[534] The emotional distress caused by such conduct is undoubtedly severe and extreme. As plaintiff Betty Hofstetter remarked, "you expect privacy when you're going to the bathroom, and when that's taken away, you don't have much privacy left."[535]

4. Sexual Harassment

Covert video voyeurism that occurs in workplace settings, such as that in the Missouri case described above, could be grounds for a sexual harassment lawsuit. Such voyeurism would seem to constitute a hostile or offensive working environment for employees under Title VII of the Civil Rights Act of 1964.[536] The voyeurism, however, would need to be "severe or pervasive."[537] Furthermore, as the United States Supreme Court made clear in 1998, "a sexually objectionable environment must be both objectively and subjectively offensive" such that "a reasonable person would find hostile and abusive, and one that the victim in fact did perceive to be so."[538]

An argument could be made that, upon its discovery, the repeated use of video voyeurism in the workplace, perhaps in a bathroom, could create an environment that is both offensive and abusive to the victim, causing severe psychological harm that makes continued work in the place of employment difficult. Workplace surveillance, in general, has been described by law professor Mark Rothstein and his colleagues as "an emerging issue in employment law."[539] Crossing the line from permissible surveillance in the workplace to illegal video voyeurism may be a move that leads to a sexual harassment complaint. In addition to federal sexual harassment claims under Title VII, state statutes on labor, employment, and human rights might provide a remedy for the voyeur's victim.

5. Fraud

A cause of action for fraud typically requires a plaintiff to prove "(a) a knowingly false misrepresentation by the defendant, (b) made with the intent to deceive or to induce reliance by the plaintiff, (c) justifiable reliance by the plaintiff, and (d) resulting

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534 Batz, *supra* note 393, at News 1.

535 O'Neil, *supra* note 392, at B1.

536 42 U.S.C. § 2000e-2(a)(1) (1999). "Two forms of sexual harassment have been recognized, quid pro quo and hostile environment." MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 296 (1994).

537 Faragher v. Boca Raton, 524 U.S. 775, 786 (1998).

538 *Id.* at 787.

539 ROTHSTEIN ET AL., *supra* note 534, at 307.

damages."[540] In a few limited instances, a cause of action for fraud may provide tort relief for victims of video voyeurism.

Tanning booth operators who represent to potential customers that their beds are private but know in fact that this is false, because they videotape through two-way mirrors, may engage in fraud. Similarly, hotel managers who represent to potential customers that their rooms provide exclusive privacy, when in fact the managers know this is false, because they videotape the activities of patrons in their rooms, may commit fraud.

6. Negligent Hiring, Supervision, and Retention

When the video voyeurism occurs in a place such as a tanning booth, dressing room, or hotel, a plaintiff's attorney would be wise to determine whether the suspect is an employee of the business enterprise. Likewise, if the video voyeurism occurs in an apartment building, the victim's attorney should determine whether the alleged voyeur was a maintenance person employed by the landowner or land management firm.

Vicarious liability issues may arise if the employer failed to adequately check into the background of the voyeur-employee before hiring him[541] or failed to adequately supervise the voyeur-employee in such a way that allowed the voyeurism to occur.[542] Likewise, if the employer had reason to believe that employee was engaging in voyeurism and yet retained him, negligent retention of that employee could provide a theory of recovery for the plaintiff. As Professor Henry H. Perritt, Jr. writes, "if a supervisor or other fellow employee invaded the plaintiff's privacy, the employer might have breached a duty to hire and supervise carefully."[543]

In California, for instance, an employer "may be liable to a

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[540] Wilkins v. National Broad. Co., 71 Cal. App. 4th 1066, 1081 (Ct. App. 1999), *rev. denied*, 1999 Cal. LEXIS 4884 (1999); *see also* Cohen v. Koenig, 25 F.3d 1168, 1172 (2d Cir. 1994) (setting forth the elements of fraud under New York law).

[541] In general, "the employer's duty to investigate is minimal" in the hiring process. JAMES A. BRANCH, JR., NEGLIGENT HIRING PRACTICE MANUAL 51 (1988). However, courts have imposed a higher duty to investigate in some contexts, including the hiring of apartment and condominium employees. *See id.* at 53. This may have particular relevance for video voyeurism cases in apartment buildings involving covert cameras planted by maintenance men or supervisors.

[542] The difference between negligent hiring and negligent retention and supervision is explained by Professor Henry H. Perritt, Jr., as follows:

> Negligent hiring focuses on shortcomings in the employer's conduct at the time the wrongdoer was hired: either failing to obtain all the necessary information, or acting inappropriately based on information that was obtained. Negligent retention and supervision, in contrast, focus on employer conduct after the wrongdoer was hired.

HENRY H. PERRITT, JR., WORKPLACE TORTS: RIGHTS AND LIABILITIES 53 (1991).

[543] *Id.* at 44.

third party for the employer's negligence in hiring or retaining an employee who is incompetent or unfit."[544] In a Florida case involving covert videotaping of young female actors changing clothes at Disney World by a Disney employee, a federal district court denied the theme park's motion for summary judgment on causes of action for negligent supervision and retention of its employees.[545] That case featured multiple causes of action based on the voyeurism, in addition to negligent supervision and retention of employees, including causes of action for intentional infliction of emotional distress, invasion of privacy, sexual harassment, and unlawful interception of oral communications.[546] Disney eventually settled the civil lawsuit brought by the six employees for failure to protect them from the voyeur.[547]

7. Breach of Contract

Video voyeurism that occurs in tanning salons and hotels may give rise to a breach of contract action between the user-guest and the establishment-business. Under New York law, for instance, courts have held that "there is an express or implied understanding between guest and hotel owner that the former shall be the sole occupant during the time that is set apart for his use" and that the innkeeper's right of access is generally limited to reasonable purposes in the conduct of the hotel, including necessary housekeeping.[548]

If a contract is breached by surreptitious voyeurism, there is a potential limitation on the question of damages for emotional distress. In the case of video voyeurism at Disney World described earlier, for instance, the district court observed that "tort damages are not recoverable under Florida law in a breach of contract action absent an accompanying independent tort."[549] In that case, however, the plaintiffs had properly alleged claims for intentional infliction of emotional distress and invasion of privacy, so they could recover for non-contractual damages.[550]

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544 Roman Catholic Bishop v. Superior Court, 42 Cal. App. 4th 1556, 1561 (Ct. App. 1996).

545 Liberti v. Walt Disney World Co., 912 F. Supp. 1494, 1508 (M.D. Fla. 1995).

546 *See id.* at 1500.

547 *See 9 News at 11* (WFTV, Orlando, Fla. television broadcast, Dec. 4, 1995) (transcript on file with authors).

548 People v. Lerhinan, 455 NY.S.2d 822, 824-25 (1982).

549 *Liberti*, 912 F. Supp. at 1501.

550 *See id.*

B. *Remedies for the Posting and Display of Voyeuristic Images*

Victims of video voyeurism may seek tort recovery for harm caused by the display of the offending images. The following are potential causes of action that might facilitate this effort. In all cases, however, it must be remembered that it is not very likely that a victim would even discover or learn about the display of her image on the Web. The victim or the victim's friends or co-workers would need to stumble across it while engaging in the consumption of Web-based pornography. Too often, then, the victim probably is never aware of the posting of the offending image, so an actual lawsuit based on the posting of the images is unlikely.

1. Appropriation

If the image of a voyeurism victim is displayed on a for-profit, commercial site on the World Wide Web, the invasion of privacy theory of appropriation may provide a remedy. Typically, a common law cause of action for appropriation "may be pleaded by alleging: (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."[551] The cause of action may also exist under statutory law, as is the case in New York.[552] Some states, such as California, recognize both statutory and common law causes of action for appropriation.[553]

The trouble, of course, for victims of voyeurism is that they may not be identifiable or recognizable in the images displayed on the Web. Upskirt images do not involve depictions of one's face, but merely one's underwear and buttocks. Assuming the victim does not have some distinguishing or unique characteristics in these areas, there could be no claim for appropriation. Other non-upskirt voyeur images also may not reveal the victim's face or otherwise identifiable characteristics. In some instances, the face may be intentionally marbleized or digitally altered so as to make it non-recognizable and unidentifiable.

Appropriation thus is a highly unlikely remedy for the unauthorized display of upskirt images on commercial websites, but a slightly more likely remedy in other cases of voyeurism where the victim is identifiable in the posted image. It is important to note

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551 Hoffman v. Capital Cities/ABC, Inc., 33 F. Supp. 2d 867, 873 (C.D. Cal. 1999).

552 *See* N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1999).

553 *See* Dora v. Frontline Video, 15 Cal. App. 4th 536 (1993) (involving suit for both common law and statutory appropriation under California law).

that, even if a face is digitally altered to obscure the victim's identity, courts do *not* require an identifiable facial representation as a prerequisite to relief for appropriation.[554] As a New York appellate court observed, that state's appropriation statute applies "to the improper use of a 'picture' of the plaintiff which does not show the face."[555]

In that case, *Cohen v. Herbal Concepts, Inc.*,[556] the appellate court considered whether identification had occurred involving a photograph used in an advertisement that depicted two nude persons—a woman and a child—standing in water a few inches deep.[557] The court noted that "neither person's face is visible but the backs and right sides of both mother and child are clearly presented and the mother's right breast can be seen. The identifying features of the subjects include their hair, bone structure, body contours and stature and their posture."[558] The court concluded that "a jury could find that someone familiar with the person in the photograph could identify them by looking at the advertisement."[559] In this case, a man identified the two people as his wife and daughter.[560]

The *Cohen* decision provides hope for victims of video voyeurism whose "faceless" nude or underwear-clad bodies are displayed on the World Wide Web. The *Cohen* court suggested that the issue of identification within the appropriation tort must be decided based upon "the quality and quantity of identifiable characteristics," including "an assessment of the clarity of the photograph, the extent to which identifying features are visible, and the distinctiveness of those features."[561]

2. Public Disclosure of Private Facts

The common law privacy cause of action known as public disclosure of private facts focuses on offensive and unwanted publicity given to a fact or information that is non-newsworthy and is not in the public record or not well known.[562] Giving publicity to voyeuristic images depicting individuals in their underwear, or in a

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554 *See* Cohen v. Herbal Concepts, Inc., 63 N.Y.2d 379, 384 (1984).
555 *Id.*
556 63 N.Y.2d 379 (1984).
557 *See id.* at 384.
558 *Id.* at 385.
559 *Id.*
560 *See id.* at 382.
561 *Id.* at 384.
562 *See* Shulman v. Group W Prods., Inc., 18 Cal. 4th 200, 214 (1998) (stating the elements of the public disclosure tort).

state of undress or sexual activity that were taken in a private location, such as a bedroom or tanning booth, would seem to fall within the scope of this tort and provide the plaintiff with a means of recovery.[563] As with the appropriation tort, however, the public disclosure tort will not provide a viable remedy if the victim's identity is not revealed in the posted image.

3. Intentional and Negligent Infliction of Emotional Distress

The same theories that apply for claims based on emotional distress caused by the *gathering* of voyeuristic images might also apply to their *posting* on the World Wide Web. An argument can be made that the unauthorized public display of a similarly unauthorized, secretive image of a prurient or sexual nature is extreme and outrageous conduct by the individual or entity running the website. Likewise, a person who discovers that her image has been

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563 The situation may be different, however, if the individuals whose private sexual activities are featured are public figures and the images accompany a newsworthy story. Consider the following real-life case and the very different results reached on two different motions. A tabloid television show, *Hard Copy*, broadcasted a report about the impending Internet distribution of a homemade sex videotape featuring erstwhile *Baywatch*-star-turned-*VIP*-sleuth Pamela Anderson Lee and then-boyfriend Bret Michaels, lead singer for the metal band Poison. *See* Michaels v. Internet Entertainment Group, Inc., No. CV 98-0583 DDP, 1998 U.S. Dist. LEXIS 20786, at *14-29 (C.D. Cal. Sept. 10, 1998). The *Hard Copy* report featured eight blurry and brief excerpts from the tape, including some that were manipulated to make the body parts unrecognizable. *See id.* at *21. The report gave the name of the website and the date on which the complete videotape would be premiered. *See id.* at *15. The federal district judge hearing the case concluded, on the defendants' motion for summary judgment against a complaint-in-intervention filed by Lee, that although a reasonable jury "could find that the excerpts depict private facts regarding the plaintiffs in this action," Lee failed to prove the excerpts were not newsworthy. *Id.* at *21-29. The court thus concluded that Lee's claim for public disclosure of private facts based on the excerpts shown in the *Hard Copy* report "fail[ed] as a matter of law." *Id.* at *29.

The same court reached a very different conclusion, however, on a motion for a preliminary injunction to stop the Internet distribution of the sex tape itself. The distribution of sex tape was *not* protected by the newsworthiness privilege; the court determined "that the plaintiffs are likely to convince the finder of fact that sexual relations are among the most private of private affairs, and that a video recording of two individuals engaged in such relations represents the deepest possible intrusion into such affairs." Michaels v. Internet Entertainment Group, Inc., 5 F. Supp. 2d 823, 841-42 (C.D. Cal. 1998). In finding for Lee, the court also remarked that "the fact that she has performed a role involving sex does not, however, make her real sex life open to the public." *Id.* at 840.

In an earlier federal court decision also involving Pamela Anderson Lee and another homemade sex videotape—this time featuring Lee's former husband, tattoo-covered Motley Crue drummer Tommy Lee—a judge concluded that a claim for public disclosure of private facts based on the distribution by *Penthouse* magazine of photographs of intimate sexual activities failed because "the photographs were previously published in three other magazines." Lee v. Penthouse Int'l Ltd., 25 Media L. Rep. (BNA) 1651, 1656 (C.D. Cal. 1997). The facts, in other words, were not private anymore. Lee's claim for appropriation also failed because the photographs accompanied an article about the sex life of Tommy Lee and Pamela Anderson Lee that, according to the court, was newsworthy. *See id.* at 1655.

posted for all to see could reasonably suffer severe emotional distress.

4. False Light

False light is one of the four traditional privacy torts classified by William L. Prosser in his seminal law journal article on privacy in 1960.[564] The essence of a false light claim is publicity that knowingly or recklessly places another in a highly offensive false light.[565] Very similar to defamation law,[566] it has been argued that "there is not even a single good case in which false light can be clearly identified as adding anything distinctive to the law."[567] Despite such attacks, false light might provide a remedy in the posting of voyeurism images that are digitally manipulated to create a false impression about the person identified in the image.

For instance, with today's computer technology, it is very easy to place the head of a celebrity on the body of another person and make it appear as if there is a nude or nearly nude voyeuristic image of the celebrity.[568] For instance, the head of actress Alyssa Milano was placed on top of a young girl's nude body and then posted on the World Wide Web.[569] Such false images, may cause no reputational harm, but nonetheless can result in mental anguish, and "false light privacy concentrates on the psychological harm done to the plaintiff from objectionable misrepresentations that have been made."[570] False light thus should not be ignored as

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564 *See* Prosser, *supra* note 127, at 398-401.

565 *See* RESTATEMENT (SECOND) OF TORTS § 652E (1997) (defining the false light privacy tort).

566 Defamation includes both libel and slander. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984). The basic elements to state a cause of action for defamation include: (1) a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to at least one third party; (3) fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the statement. *See* RESTATEMENT (SECOND) OF TORTS § 558 (1977). "Libel is written or visual defamation; slander is oral or aural defamation." SACK & BARON, *supra* note 165, at 67.

"A 'false light' cause of action is in substance equivalent to a libel claim, and should meet the same requirements of the libel claim, including proof of malice." Aisenson v. American Broad. Co., Inc., 220 Cal. App. 3d 146, 161 (Ct. App. 1990); *see also* TURKINGTON & ALLEN, *supra* note 128, at 581 (observing that the false light and defamation torts "track each other in many respects"); WEILER, *supra* note 19, at 134-35 (observing that "there is a common core to false light privacy and defamation" and noting "crucial similarities in the impart of the two torts on media defendants").

567 J. Clark Kelso, *False Light Privacy: A Requiem*, 32 SANTA CLARA L. REV. 783, 785 (1992).

568 *See* BLACK ET AL., *supra* note 24, at 231 (providing examples of electronically altered photographs, including one that appeared in *TV Guide* in which talk show host Oprah Winfrey's head was superimposed onto actress Ann Margaret's body).

569 *See* Arlene Vigoda, *Milano Family Sues over Nudity on Net*, USA TODAY, Apr. 29, 1998, at 2D.

570 WEILER, *supra* note 19, at 135.

a remedy when the voyeuristic images have been altered or manipulated to depict a false portrayal of the plaintiff.

C. *Summary*

A variety of civil remedies may be available to victims of video voyeurism. Whether the various theories described here apply to a particular case, of course, depends on the unique factual circumstances of the situation. Ultimately, only future voyeurism cases and appellate decisions on some of the issues addressed in this Part will determine how effective the causes of action discussed here will be in providing remedies for video voyeurism plaintiffs.

V. KEEPING PACE WITH TECHNOLOGY: THE NEED FOR VIGILANCE IN PROTECTING VOYEURISM'S VICTIMS

By now it should be abundantly clear that developments in technology—in this case, miniature video recording devices and the Internet—raise serious new concerns about privacy invasions. What is unclear, as Parts III and IV of this Article have suggested, is whether there always are effective criminal penalties or civil remedies that apply to cases of video voyeurism and the display of voyeuristic images on the World Wide Web. Much seems to depend on the state or jurisdiction in which the voyeurism occurs—whether there are criminal statutes on the books that cover video voyeurism—and the factual particulars of the video voyeurism that may place it beyond the reach of extant laws.

One conceptual issue that has been mentioned earlier and that cannot be ignored in the future is how we, as a society and as a legal system, define privacy. Will we define and stretch the concept of privacy in such a way that it includes zones of privacy in public places? This may seem like an oxymoron—public privacy—but surely we will do this if we want to protect the victims of upskirt voyeurism who are visually violated in public places like shopping malls and amusement parks. Just as we don't condone a person reaching up under a woman's skirt without her consent in a public place—such conduct would constitute the intentional tort of battery[571]—we shouldn't condone a similar visual intrusion.[572] If we don't take such a stance, then we sacrifice individual privacy con-

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571 "A harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent, is a battery." KEETON ET AL., *supra* note 566, § 9, at 39.

572 The interest at stake in a battery "is the plaintiff's interest in protection of his or her bodily well-being and dignity from intentional invasion." KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 22 (1997).

cerns for the spectatorship interest and visual gratification of the community of voyeurs. Or do we choose *not* to take such a stance because we feel that, somehow, physical harms are more real than visual ones, that—to put it bluntly—grabbing a buttock is more harmful that grabbing a peek at one? Each is intentional, each is an invasion, but only one involves physical contact.

Spectatorship, as the lead author of this article has discussed in another context addressing reality-based television programs and tabloid talk shows, is now central to our mediated, Must-See TV lives.[573] We like to watch others' lives unfold and unravel on television shows like *Cops, Jerry Springer, Real World,* and *Dateline.* Do we draw the line on our voyeuristic proclivities, however, when it comes to the pernicious new brands of video voyeurism described in this Article that are made possible through new technologies? This will be a pivotal question for our society and legal system in the new century.

Like the burgeoning practices of video voyeurism and the display of voyeuristic images on the World Wide Web, many privacy-related battles fought today are driven by new technologies. In particular, issues of informational privacy are triggered by the advent of so-called cookies that can be placed by websites on a computer user's hard drive to track Web movement.[574] This and similar informational privacy issues have not gone unnoticed. As Judith Wagner DeCew writes in her recent book, *In Pursuit of Privacy,* "[o]wing to the growth of computer technology and capacities for electronic surveillance and for data collection and storage, there has been increased concern about protection from unwanted observation and exploitation of personal communications and information including academic, medical, and employment records."[575]

In a very real sense, video voyeurism also involves informational privacy—the video voyeur learns information about what victims look like, what they wear, and what they do when they think they are in a private location like a motel room, dressing room, or tanning booth. And the World Wide Web provides the means of further shattering privacy when the images—the units of information—are posted on pornographic sites that cater to voyeuristic fe-

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573 *See* Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence,* 17 CARDOZO ARTS & ENT. L.J. 273, 279 (1999).

574 *See* JEREMY HARRIS LIPSCHULTZ, FREE EXPRESSION IN THE AGE OF THE INTERNET 225 (2000) (describing the use of cookies on the Internet).

575 JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY 1-2 (1997).

tishes. If the legal system is to value privacy in the future, then it must be vigilant in updating existing laws and creating new ones—criminal, civil, or both—that protect the very real privacy interests of individuals against people toting and planting the latest video technologies in the most intrusive locations.

CONCLUSION

This Article has, in the interest of thoroughness, covered a vast amount of territory previously unexplored in legal scholarship. It has identified, defined, analyzed, and provided multiple examples of two emerging new social and technological trends—video voyeurism and the posting of voyeuristic images on the World Wide Web—that coalesce and, in the process, raise serious legal issues for the new millennium that affect privacy, free speech, and commercial interests. The high-tech Peeping Toms of the computer age will face a more difficult task, both in gathering the covert and prurient images that they crave and in posting them in public places like the Web, if the legal system soberly and thoughtfully faces the issues raised here. Perhaps the Alabama Supreme Court reached the correct decision more than thirty-five years ago in the original upskirt case of Flora Bell Graham when it ruled in her favor.[576]

The future surely will bring more legal cases involving video voyeurism, as technology becomes smaller, more affordable, and easier to use. Copycat cases also are inevitable and will arise with greater frequency as more people discover the possibilities of video voyeurism after reading about incidents like those described in this Article. States thus should *act* now, rather than *react* later, so that they may adequately address these situations. In short, the problem is here, and the legal loopholes through which upskirt voyeurism and other invasive forms of "watching" now pass will surely exacerbate it in the future. The legal system must act today.

576 *See supra* notes 136-47 and accompanying text (discussing the case of Flora Bell Graham).