

# THE VOYEURISM VALUE IN FIRST AMENDMENT JURISPRUDENCE

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## I. INTRODUCTION

Over the years<sup>1</sup> scholars and jurists have offered a laundry list

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<sup>1</sup> "The First Amendment's speech and press clauses have generated a particularly large

of reasons to protect expression under the First Amendment.<sup>2</sup> The freedoms of speech and press, for example, are said to promote and to protect discovery of truth,<sup>3</sup> democratic self-governance,<sup>4</sup> self-realization,<sup>5</sup> dissent,<sup>6</sup> tolerance,<sup>7</sup> and honest government.<sup>8</sup>

To this catalogue I add a new, emerging First Amendment value in the post-modern, mediated visual age of television, the Internet, and the hidden camera—*voyeurism*.<sup>9</sup> The First Amendment increasingly safeguards, or is called upon to safeguard, our right to peer and to gaze into places from which we are typically forbidden, and to facilitate our ability to see and to hear the innermost details of others' lives without fear of legal repercussion.<sup>10</sup> The voyeurism

literature exploring the underlying rationales for those clauses." JOHN H. GARVEY & FREDERICK SCHAUER, *THE FIRST AMENDMENT: A READER* 35 (2d ed. 1996). Although there are many rationales for protecting speech and press, "[a]cceptance of one rationale need not bump another from the list, as if this were First Amendment musical chairs." RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 5 (1992). "The standard list of candidates for a free speech principle ranges from the pursuit of truth to democratic self-governance." Robert Post, *Recuperating First Amendment Doctrine*, 47 *STAN. L. REV.* 1249, 1271 (1995).

<sup>2</sup> 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 are incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local governments. See U.S. CONST. amend. XIV; *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>3</sup> "[T]he 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).

<sup>4</sup> See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

<sup>5</sup> See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989).

<sup>6</sup> See STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE* (1990).

<sup>7</sup> See LEE C. BOLLINGER, *THE TOLERANT SOCIETY* (1986).

<sup>8</sup> See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 *AM. B. FOUND. RES. J.* 521.

<sup>9</sup> Technically, voyeurism "is viewing some form of nudity or sexual activity, accompanied by sexual arousal. To be classified as a sexual disorder, or a paraphilia, voyeurism must be characterized by observing unsuspecting individuals, usually strangers, who are naked or engaging in sexual activity, for the purpose of sexual excitement." Meg S. Kaplan & Richard B. Kruger, *Voyeurism: Psychopathology and Theory*, in *SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT* 297, 297 (D. Richard Laws & William O'Donohue eds., 1997).

The DSM-IV definition for voyeurism developed by the American Psychiatric Association in 1994 requires two criteria for voyeurism to be classified as a sexual disorder:

A. Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving the act of observing an unsuspecting person who is naked, in the process of disrobing, or engaging in sexual activity.

B. The fantasies, sexual urges, or behaviors cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.

R. Karl Hanson & Andrew J.R. Harris, *Voyeurism: Assessment and Treatment*, in *SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT* 311, 312 (D. Richard Laws & William O'Donohue eds., 1997).

I use voyeurism here in the more generic sense of the "urge to gaze at the alien and the intimate." *FLESH AND BLOOD: THE NATIONAL SOCIETY OF FILM CRITICS ON SEX, VIOLENCE, AND CENSORSHIP* 2 (Peter Keough ed., 1995).

<sup>10</sup> "Due to the proliferation of 'reality based' television shows, in which camera-persons accompany public officials into homes to record arrests or rescues, there has been a corresponding increase in the number of suits brought by such citizens." Charles C. Scheim,

value thus conflicts, or at least competes, with fundamental notions of both constitutional and tort privacy law.<sup>11</sup> It also contradicts the value of discourse in democracy and First Amendment theory,<sup>12</sup> since voyeurism, by its very nature, involves merely watching others, *without* interacting or participating with them.<sup>13</sup> The audience of voyeurs never speaks with or engages in a dialogue with either the source or the subject of the message. It exercises, instead, its right to remain silent.

Although the contours of the voyeurism value are still rough, courts now are actively shaping our right to watch, from a safe distance<sup>14</sup> tucked away in the comfortable confines of our television rooms and in front of our computers, people, places, and things that we never imagined seeing or watching just twenty years ago.<sup>15</sup>

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*Trash Tort or Trash TV?: Food Lion, Inc., v. ABC, Inc., and Tort Liability of the Media for Newsgathering*, 72 ST. JOHN'S L. REV. 185, 205 (1998).

<sup>11</sup> "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 Supreme Court has recognized, within specific contexts, an unenumerated constitutional right to privacy. *See, e.g., 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 disclosure of private facts, and false light. *See* RESTATEMENT (SECOND) OF TORTS § 652A (1977); POST, *supra*, at 51; *see also* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960) (classifying the four privacy torts in this seminal law review article).

<sup>12</sup> "Ever since 1791, the judicial and scholarly keepers of the [First] Amendment have invoked the high ideals of discourse to define the boundaries of protected expression." RONALD K. L. COLLINS & DAVID M. SKOVER, *THE DEATH OF DISCOURSE* xx (1996).

<sup>13</sup> The voyeurism value began to emerge in the mid-to-late 1980s. For example, in his 1986 commencement address at Stanford University, ABC broadcast journalist and *Nightline* host Ted Koppel warned graduates that America was becoming "a nation of electronic voyeurs whose capacity for dialogue is a fading memory." *Koppel for Commencement '98*, STANFORD, May-June 1998, at 39. The reality-based media voyeurism featured on *COPS* also emerged in the 1980s. *See* Bob Sokolsky, *'Cops' gets green light for fifth year*, PRESS-ENTERPRISE, Apr. 5, 1993, at D4 (calling *COPS* one of the senior members in the genre of reality television shows and observing the show's rating success). The *COPS* formula proved so successful that it spawned numerous clones. *See* John Motavalli, *Top of the "Cops,"* INSIDE MEDIA, Mar. 3, 1993, at 27. These reality-based shows continue to thrive today. *See Back on the 'Beat,'* HOLLYWOOD REP., May 28, 1998 (noting that the program *LAPD: Life on the Beat* was renewed for a fourth season based on its strong ratings).

*America's Funniest Home Videos*, a voyeuristic/exhibitionist show that features a collection of amateur videotapes of people revealing embarrassing and/or funny moments to the world, debuted in November, 1989. *See ABC to Dump 'Living Dolls,' 'Homeroom,'* L.A. TIMES, Dec. 5, 1989, at Calendar, Part P, 8. By February 1990, the show finished first in the national television ratings. *See* Daniel Cerone, *America's Ubiquitous Home Videos*, L.A. TIMES, at TV Times, 81.

<sup>14</sup> "We are reduced to watching *Court TV* and *Hard Copy* in secret these days because we're not supposed to want such titillation. It makes us feel like media sluts." DOUGLAS RUSHKOFF, *MEDIA VIRUS! HIDDEN AGENDAS IN POPULAR CULTURE* x (1996 ed.).

<sup>15</sup> Voyeurism is particularly popular on new media, such as the World Wide Web, that feature real-time moving pictures. *See* Rick Marin, *And Now, The Human Show*, NEWSWEEK, June 1, 1998, at 64 (describing a number of so-called "girlcam" sites on the World Wide

The voyeurism in the 1998 summer hit film, *The Truman Show*,<sup>16</sup> is but an over-the-top version of the voyeurism that draws us in real life to watch others' intimate and revealing moments on television and the Internet.<sup>17</sup>

The voyeurism value emerges from a dynamic confluence of

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Web on which one can watch individuals 24 hours a day). The Internet provides a protective sense of anonymity to the voyeur in the communication process. See Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639 (1995) (discussing anonymity in cyberspace).

In many ways, the 1997 Supreme Court decision striking down the Communications Decency Act, Pub. L. No. 104-104, 110 Stat. 133 (1996), as a violation of the First Amendment was a victory for voyeurism on the World Wide Web. See *Reno v. ACLU*, 117 S. Ct. 2329, 2346 (1997) (holding that the Communications Decency Act "lacks the precision that the First Amendment requires when a statute regulates the content of speech."). The decision allows the viewing of the type of girl-cam sites described above that may feature speech that the Communications Decency Act would have restricted as indecent. In addition, the decision allows a flourishing pornography industry on the web to continue to thrive. Pornography, of course, is voyeurism in the extreme—one gets to watch or look at photographs and videos of others, fantasize about the women or men in those images, and yet one never needs to interact with them or have to worry about them knowing that one is looking at them.

<sup>16</sup> See Richard Corliss, *Smile! Your Life's on TV*, TIME, June 1, 1998, at 76 (describing *The Truman Show*, starring Jim Carrey, as a film about a man whose life is taped, 24 hours a day, without his notice, and watched by the rest of the world on television). At least five reviews of *The Truman Show* published in major newspapers across the United States used the word "voyeurism" in describing the film and its meaning. See Mark Caro, *The Making of "Truman"; New Voyeurism*, CHI. TRIB., May 31, 1998, at Arts & Ent. 1 (using the word voyeurism in the headline and observing that "[w]e've become a nation obsessed with watching lurid, real-life tales spin out before our eyes"); Edward Guthmann, *Remote Control Jim Carrey is a born TV star in The Truman Show*, S.F. CHRON., June 5, 1998, at C1 (describing the movie as a "wondrous, thought-stirring parable about privacy and voyeurism"); Rita Kempley, *Theatre of the Observed: In 'Truman Show,' the Camera Never Sleeps*, WASH. POST, June 5, 1998, at F1 (describing the movie as "a sugar-spun nightmare of pop paranoia that addresses the end of privacy, the rise of voyeurism and the violation of the individual"); Janet Maslin, *So, What's Wrong With This Picture?*, N.Y. TIMES, June 5, 1998, at E1 (calling the film "must-see" and describing its premise as asking what would happen "if our taste for trivia and voyeurism led to the purgatory of a whole life lived as show-biz illusion?"); Philip Wuntch, *Trapped in the Box*, DALLAS MORNING NEWS, May 31, 1998, at 1C (describing the film as "one of the decade's most scathing looks at contemporary society and its infatuation with voyeurism and celebrity").

<sup>17</sup> One can already watch the life, 24 hours a day, of recent college graduate Jenni Ringley via her web site at <<http://www.jennicam.org>>. See *A Real Truman?*, TIME, June 15, 1998, at 22. The World Wide Web, the graphics-rich portion of the Internet, is replete with numerous sites devoted to voyeurism. See generally *The Voyeur Playground* (visited June 28, 1998) <<http://www.voyeurplay.inter.net>> (providing hidden camera pictures of women and couples in various stages of undress).

Perhaps the most infamous example of Web-based voyeurism—and exhibitionism—to date occurred in June, 1998, when a woman in Orlando, Fla., gave birth to a baby boy, with the most intimate of moments captured on cameras and shown live on the Internet for the world to watch. See *Tech Week: A quick look at the latest technology news; Millions try to watch birth of child on Net*, ATLANTA J. & CONST., June 21, 1998, at 1P; *What's a Kid Gotta Do to Get Privacy Around Here?*, CHI. TRIB., June 23, 1998 at Kidnews 3. Exhibitionism, as used here, refers to the generic sense of the word as "the act or practice of behaving so as to attract attention to oneself." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 435 (1983). This should not be confused with the technical definition of exhibitionism as a sexual disorder. See William D. Murphy, *Exhibitionism: Psychotherapy and Theory*, in SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT 22 (D. Richard Laws & William O'Donohue eds., 1997) (describing characteristics and issues surrounding exhibitionism as a sexual disorder).

shifts and social, legal, and technological changes in recent years in the United States. These include: (1) the proliferation of so-called reality TV shows like *COPS*,<sup>18</sup> tabloid television programs such as *Inside Edition*<sup>19</sup> and *Extra*,<sup>20</sup> and popular daytime trash talk shows such as those hosted by the likes of Jerry Springer<sup>21</sup> and Jenny Jones<sup>22</sup> that, taken as a whole, blur the already suspect line between news and entertainment,<sup>23</sup> and often are about little more than watching others' lives unfold—frequently, in fact, unravel—in front of our eyes;<sup>24</sup> (2) the erosion of the legal standards for news-

<sup>18</sup> The term reality television is "used to describe a genre of television programming often featuring live video coverage of dramatic events. Popular segments include footage of police officers stopping, questioning, searching, or arresting motorists, and emergency response teams, such as firefighters or paramedics, responding to calls for assistance." Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 898, 990 n.1 (1995). Reality television programs "feature actual footage of police, fire, or emergency medical personnel during performance of their duties." Kevin E. Lunday, *Permitting Media Participation in Federal Searches: Exploring the Consequences for the United States Following Ayeni v. Mottola and a Framework for Analysis*, 65 GEO. WASH. L. REV. 278, 279 n.3 (1997). Reality-based programs, along with tabloid television shows, are "cheap to make, easy to syndicate, and wildly profitable." JEAN FOLKERTS ET AL., *THE MEDIA IN YOUR LIFE* 266 (1998).

The British enjoy such reality television fare as well. For example, *Real TV*, broadcast on media mogul Rupert Murdoch's Sky One cable channel, "mixes together camcorder footage of police drug busts, skidding car wrecks, tourist encounters with threatening wild life and all the grainy, unrehearsed collisions with reality that have become a staple of contemporary television." Peter Humm, *Real TV: Camcorders, Access, and Authenticity*, in *THE TELEVISION STUDIES BOOK* 228, 228 (Christine Geraghty & David Lusted eds., 1998).

<sup>19</sup> Over the course of its ten-year run, *Inside Edition* has become increasingly well respected for its investigative reporting, winning six journalism awards during the 1996-97 season alone. See Allan Johnston, *Tabloid Perspective: 'Inside Edition' Hits the 10-year Mark, Picking Up a Lot of Respect Along the Way*, CHIC. TRIB., Jan. 12, 1998, at Tempo 3.

<sup>20</sup> Tabloid television, sometimes called trash TV, includes "nonfiction television programs that feature murders, celebrity breakups, and sex scandals." Philip Weiss, *Bad Rap for TV Tabs*, COLUM. JOURNALISM REV., May-June 1989, at 38.

The term "tabloid" has a pejorative quality today but it originally referred to the shape or size of the newspaper page. See PETE HAMILL, *NEWS IS A VERB: JOURNALISM AT THE END OF THE TWENTIETH CENTURY* 1-2 (1998). A tabloid page is about one-half the size of a normal newspaper page. See JOSEPH R. DOMINICK, *THE DYNAMICS OF MASS COMMUNICATION* 102 (5th ed. 1996).

For background reading on the pros and cons of tabloid television, see Emily Erickson Hoff, *The Legacy of Tabloid TV News*, in *CONTEMPORARY MEDIA ISSUES* 327 (William David Sloan & Emily Erickson Hoff eds., 1998).

<sup>21</sup> See generally James Collins, *Talking Trash*, TIME, Mar. 30, 1998, at 62 (describing the *Jerry Springer Show* and its success).

<sup>22</sup> "Jerry Springer and Jenny Jones tape two of the nation's least high-minded syndicated talk shows." Steve Johnson, *How Low Can TV News Go?*, COLUM. JOURNALISM REV., July-Aug. 1997, at 24.

<sup>23</sup> For television news the "pressure to win ratings has resulted in the distinctions between news and entertainment becoming worryingly blurred." JOHN LANGER, *TABLOID TELEVISION: POPULAR JOURNALISM AND THE 'OTHER NEWS'* 3 (1998).

<sup>24</sup> *Court TV* also is an example of programming propelled by the voyeurism value, as it takes individuals into court rooms that they would never otherwise enter and provides viewers with sensational trials packed with entertainment value. See Angelique Paul, *Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About Real Law?*, 58 OHIO ST. L.J. 655, 694 (1997) (arguing that "*Court TV* will always be entertaining. It is voyeurism, pure and simple."). Indeed, "the success of the televised trial is based in part upon the

worthiness<sup>25</sup> and public interest<sup>26</sup> to the point where they protect voyeurism; (3) the development and use of sophisticated electronic recording devices that make voyeurism easier than ever before;<sup>27</sup> and (4) decreased political participation concomitant with news coverage of political affairs as a voyeuristic event.<sup>28</sup> Although we may have always liked to know about others' private lives,<sup>29</sup> today electronic technology, the economic realities of broadcasting, the development of the Internet, and the norms of political participation coalesce with the law to push the voyeurism value to the forefront as a justification for protecting freedom of expression.

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audience's voyeuristic thirst for details of others' private lives." Stephen D. Easton, *Cameras in Courtrooms: Contrasting Viewpoints: Whose Life Is It Anyway?: A Proposal to Redistribute Some of the Economic Benefits of Cameras in the Courtroom from Broadcasters to Crime Victims*, 49 S.C. L. REV. 1, 5 n.11 (1997).

<sup>25</sup> Newsworthiness is a defense for the invasion of privacy tort known as public disclosure of private facts. See *Anonsen v. Donahue*, 857 S.W.2d 700, 703 (Tex. Civ. App. 1993). See generally Geoff Dendy, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L. J. 147 (1996) (providing an overview of the variations used by courts to determine the newsworthiness of information).

Newsworthiness also is a defense for the appropriation privacy tort. See *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 542 (Cal. Ct. App. 1993) (providing that "every publication of someone's name or likeness does not give rise to an appropriation action. Publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it, is not ordinarily actionable."). "Traditional defenses in appropriation and publicity suits have been newsworthiness and consent." KENT R. MIDDLTON ET AL., *THE LAW OF PUBLIC COMMUNICATION* 201 (4th ed. 1997).

<sup>26</sup> The Communications Act of 1934 provides in relevant part that the Federal Communications Commission shall create laws "from time to time, as public convenience, interest, or necessity requires." 47 U.S.C. § 303 (1998). The FCC is required to consider "whether the public interest, convenience, and necessity will be served by the granting" of licenses to broadcasters. 47 U.S.C. § 309 (1998).

This authority to regulate broadcasting has been dubbed a "nebulous" public interest standard. KENNETH C. CREECH, *ELECTRONIC MEDIA LAW AND REGULATION* 54 (1996). "The public interest standard in American communications legislation has been under concerted assault during most of the past two decades." Willard D. Rowland, Jr., *The Meaning of "The Public Interest" in Communications Policy, Part I: Its Origins in State and Federal Regulation*, 2 COMM. L. & POL'Y 309, 309 (1997).

<sup>27</sup> See generally Quentin Burrows, *Scowl Because You're on Candid Camera: Privacy and Video Surveillance*, 31 VAL. U. L. REV. 1079 (1997) (describing increasing concerns over, and abuses with, video surveillance technology in the United States and abroad).

There has been a dramatic increase in intrusion into seclusion cases against the media that "derives principally from advances in surveillance technology, as the equipment becomes more compact and more powerful. Today, hardly a news cycle passes without word of some intrusion claim or potential claim." Victor Kovner et al., *Recent Developments in Newsgathering, Invasion of Privacy and Related Torts*, in *COMMUNICATIONS LAW* 1997 at 539, 543 (PLI Pat., Copyright, Trademarks & Literary Prop. Course Handbook Series No. G-498, 1997).

<sup>28</sup> See *infra* notes 46-52 and accompanying text (describing an increasing lack of political participation today).

<sup>29</sup> Samuel Warren and Louis Brandeis complained more than a century ago, in their seminal article on the right to privacy, about intrusions by the news media. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890). The authors dealt, however, only with the print media. They never could have anticipated the development of television and the Internet and the evolution of—and shift to—a jump-cut, visual society. Today, we like to watch, not to read.

The emerging voyeurism value is not without its benefits. It clearly protects and serves our right to receive information;<sup>30</sup> we can't, after all, be voyeurs without receiving any videotapes, photographs, or other forms of the visual images that we like to watch. In addition, we certainly can learn from the images we like to watch.<sup>31</sup> Despite these advantages, however, the voyeurism value does precious little to actually facilitate and encourage participation in the activities of the real world. Instead, *it privileges watching and viewing media over participating and interacting in democracy*. Indeed, communication researchers suggest that our massive amounts of viewership and media consumption actually may have a narcotizing dysfunction that substitutes passive observation and spectacle for active participation.<sup>32</sup>

*Spectatorship, in brief, now is central to our mediated, "must-see TV"*<sup>33</sup> *lives*. As a culture, we like to watch others and take pleasure from the watching experience, even though we don't always like to admit to it.<sup>34</sup> We rely on the media to satisfy our craving for lurid

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<sup>30</sup> The Supreme Court has recognized that, in the realm of broadcasting, it is the right of the viewer to receive information that is paramount. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); see also *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (providing that the Court has recognized in a variety of contexts "a First Amendment right to 'receive information and ideas'").

<sup>31</sup> "How better to see what the heartland of America looks like than barging in unannounced with the crew of *COPS*—and how better to evaluate the role of drugs and alcohol (even TV-network-advertised beer) in contributing to domestic violence, robbery, and homicide?" RUSHKOFF, *supra* note 14, at xi.

<sup>32</sup> The narcotizing dysfunction suggests that "the result of a flood of communications may be a superficial concern with problems and this superficiality may cloak mass apathy. The interested and informed individual may know about the problems of society without recognizing that he or she has failed to make decisions and do something about them." WERNER J. SEVERIN & JAMES W. TANKARD, JR., *COMMUNICATION THEORIES: ORIGINS, METHODS AND USES IN THE MASS MEDIA* 300 (3d ed. 1992).

<sup>33</sup> "Must See TV" is the slogan for the NBC television network. See James Collins, *Is Anyone Watching?*, *TIME*, Oct. 20, 1997, at 96, 98.

<sup>34</sup> The public's interest in the President Clinton-Monica Lewinsky sex scandal illustrates this paradox. Seventy-five percent of those surveyed by *The New York Times/CBS News Poll* reported that the press had spent too much time on the issue and that they did not want to hear about it. See James Bennet & Janet Elder, *Despite Intern, President Stays in Good Graces*, *N.Y. TIMES*, Feb. 24, 1998, at A1. Traffic on Internet news sites, as well as newspaper and magazine sales, however, rose "markedly" after the Lewinsky story broke in early 1998. See Richard E. Berke, *Clinton's O.K. in the Polls, Right?*, *N.Y. TIMES*, Feb. 15, 1998, at Week in Review 1. More people, for example, watched the NBC Sunday morning news show, *Meet the Press*, on the Sunday after the scandal broke than since the height of the 1991 Persian Gulf War. See *id.*; see also *CNN Reliable Sources: The Dangerous Backlash Against the Media* (CNN television broadcast, Feb. 14, 1998) (observing that "coverage of this story has been a ratings bonanza. Particularly for cable shows, viewership is up"). In other words, we like to watch the sex scandal but we don't like to admit to it.

The public's reaction to press coverage of the death of Princess Diana also reflects this paradox. See Jacqueline Sharkey, *The Diana Aftermath*, *AM. JOURNALISM REV.*, Nov. 1997, at 18, 22 (observing that "[p]eople respond to certain types of coverage, then criticize the press for providing it").

and/or private peaks at others' lives and intimate moments.<sup>35</sup> The media, in turn, must push the envelope of First Amendment protection<sup>36</sup> to guard their ability both to *gather*—sometimes by hidden camera, sometimes by false pretenses, too often by a combination of both—the visuals and videotape that we like to watch, and then to *publicize* these images.<sup>37</sup> The bottom line is that media organizations turn a profit while they simultaneously test the reaches of First Amendment freedoms and feed our appetite for gazing and our somewhat scopophilic tendencies.<sup>38</sup>

The voyeurism value is an extremely realistic, even primordial theory for protecting speech and the media today, giving changing social norms, attitudes, and economic conditions. These changes, concomitantly, have rendered more traditional theories of free speech increasingly irrelevant or, at least, suspect. Even a cursory examination of two of the most established free speech theories—the marketplace of ideas and democratic self-governance—makes this clear.

The marketplace of ideas metaphor, with the discovery and

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<sup>35</sup> The voyeurism value sweeps up more than watching videotape or film that appeals to prurient interests or sexual appetites. It also includes watching what many would consider the private lives or intimate moments of others, be they sexual, painful, embarrassing, or even boring.

For example, the proliferating NBC television news magazine, *Dateline*, broadcast a segment in June, 1998, that featured three women who allowed cameras to record their reactions when doctors told them about whether their cancer had spread or gone into remission. See *Dateline: Time in a Bottle* (NBC television broadcast, June 15, 1998). The cameras followed the women into their doctors' offices and into their homes, recording intimate conversations that normally would be protected by a doctor-patient privilege and heartfelt discussions between two of the women and their spouses. There is nothing erotic or sexual about this subject matter, the conversations, or the videotape, but the segment is an example of the voyeurism value at work—we watch others' ostensibly private moments, from the safety and distance of our homes, without having to interact or engage in a dialogue with the others.

The slick-packaged, videotape-driven *Dateline* is incredibly successful, airing four nights each week on NBC and garnering high ratings. See *People's Choice*, BROADCASTING & CABLE, June 8, 1998 (containing the Nielsen ratings of television shows for the week of May 25-31, 1998, and revealing *Dateline's* high ratings for its Monday, Tuesday, Friday and Sunday episodes that week).

<sup>36</sup> See Dan Trigoboff, *Watcha gonna do? Sue*, BROADCASTING & CABLE, June 8, 1998, at 32 (describing the fractured decision of the California Supreme Court in *Shulman v. Group W Productions*, 955 P.2d 469 (Cal. 1998), which involved the liability of the producers of a reality TV show, *On Scene: Emergency Response*, for gathering audiotape and videotape at the scene of an auto accident).

<sup>37</sup> There is a clear need on the part of broadcasters to push First Amendment protection in order to protect profits and ratings. See Dennis F. Hernandez, *Litigating the Right to Privacy: A Survey of Current Issues*, in LITIGATING LIBEL AND PRIVACY SUITS 425, 437 (PLI Pat., Copyright, Trademarks & Literary Prop. Course Handbook Series No. G-446, 1996) (observing that "[w]hile hidden cameras have been great for ratings, they have been problematic for television stations and their attorneys").

<sup>38</sup> Freud called the obsessive force of the pleasure in looking scopophilia. See Stuart Hall, *The Spectacle of the 'Other,' in REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES* 223, 268 (Stuart Hall ed., 1997).



testing of the truth as its telos, “consistently dominates the Supreme Court’s discussions of freedom of speech.”<sup>39</sup> But today, of course, the marketplace of ideas is controlled by a handful of megamedia conglomerates that represent “a new communications cartel within the United States.”<sup>40</sup> These effective monopolies permit and deny access to the marketplace of ideas as they choose, based on bottom-line considerations.<sup>41</sup> Furthermore, the marketplace of ideas is polluted by media content that does little to further any search for the truth—if truth, in fact, can ever be discovered—and, more often than not, plays to emotions rather than to the rational discourse necessary to arrive at the truth.<sup>42</sup> Marketplaces of ideas in the real world are biased toward those with the most resources, giving the economically advantaged the loudest and most powerful voices.

The marketplace of ideas metaphor is not the only theory that, although appealing in the abstract, is riddled with flaws today. The democratic self-governance theory articulated by philosopher-educator Alexander Meiklejohn,<sup>43</sup> for example, holds that the ultimate aim of protecting speech is “the voting of wise decisions.”<sup>44</sup> Yet

<sup>39</sup> BAKER, *supra* note 5, at 7.

<sup>40</sup> BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* ix (5th ed. 1997). Diversity of radio ownership has already decreased significantly since the signing of the Telecommunications Act of 1996. See John Merli, *BIA study tracks decrease of ownership diversity*, BROADCASTING & CABLE, June 8, 1998, at 40. But see Eli M. Noam & Robert N. Freeman, *The Media Monopoly and Other Myths*, 29 TELEVISION Q. 18, 19-20 (1997) (containing the findings of what the authors somewhat immodestly describe as “probably the most detailed study ever of media concentration in America” and concluding that “the overall concentration of ownership of the information industry did not increase, but declined somewhat in the past decade.”).

<sup>41</sup> Todd Gitlin, *Introduction to CONGLOMERATES AND THE MEDIA* 7, 12 (Erik Barnouw et al. eds., 1997). See Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1415 (1986) (observing that “[a]ll the so-called private media operate within the same structure of constraint, the market, which tends to restrict and confine the issues that are publicly aired.”).

<sup>42</sup> The many criticisms of the marketplace theory are rooted in what critics of the theory consider to be its four false assumptions:

- (1) everyone has access to the market, (2) truth is objective and discoverable rather than subjective and chosen or created, (3) truth is always among the ideas in the marketplace and always survives, and (4) people are basically rational and, therefore, are able to perceive the truth.

W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40, 44 (1996)

<sup>43</sup> Although legal scholars tend to think of Meiklejohn today only for his writings on free speech, it should be remembered that by education and profession Meiklejohn was first and foremost a philosopher and educator. See ALEXANDER MEIKLEJOHN, *TEACHER OF FREEDOM: A COLLECTION OF HIS EDUCATIONAL, PHILOSOPHICAL, AND LEGAL WRITINGS, ALONG WITH A BIOGRAPHICAL STUDY AND INTRODUCTION TO THE SELECTIONS* 4-7 (Cynthia Stokes Brown ed., 1981) (describing Meiklejohn’s studies of philosophy at Brown and Cornell and his work as an instructor of philosophy at Brown). Meiklejohn served as dean at Brown University and later as president of Amherst College, where he was fired. See *id.* at 8-19.

<sup>44</sup> ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26 (1960). “Meiklejohn anchors the First Amendment firmly to the value of self-government.” POST, *supra* note 11, at 270.

today voting is not taken seriously and politics is reduced to a spectator sport in which we watch gadfly pundits who pontificate pointlessly.<sup>45</sup>

The electorate is shrinking. The turnout of the voting-age population in the 1996 presidential election was only 49%, less than half of all potential voters and the lowest figure since 1924.<sup>46</sup> Voter turnout for the presidential election in 1988 was just 50.1 percent of the voting-age population.<sup>47</sup> Although the figure was a slightly higher 55.2% in 1992, this is still far less than the voter turnout during the elections of 1960, 1964, and 1968, each of which topped more than 60 percent.<sup>48</sup> There has been, writes Columbia University communication scholar James W. Carey, a steady "evacuation of the public realm."<sup>49</sup>

Apathy towards politics is reflected in the attitude of a whole new generation of college students. A recent UCLA survey found that freshmen who entered college in 1997 were less interested in politics and social issues than any class in a generation.<sup>50</sup> In 1997, about twenty-seven percent of incoming freshmen reported that keeping up to date with politics was important, while at the start of

<sup>45</sup> See generally JAMES FALLOWS, *BREAKING THE NEWS: HOW THE MEDIA UNDERMINE DEMOCRACY* 16-20, 92-97 (1996) (describing and criticizing such shows as *The McLaughlin Group* and *Crossfire* that feature news pundits).

<sup>46</sup> Eric Schmitt, *Half the Electorate, Perhaps Satisfied or Bored, Sat Out Voting*, N.Y. TIMES, Nov. 7, 1996, at B6. The decrease in voter turnout is especially troublesome because registration is probably at its highest level since 1968. See *id.*

To put the voting figures into perspective, more people watched, on television, the slow-speed pursuit of O.J. Simpson in the white Bronco during the summer of 1994 (approximately 95 million) than voted in the 1996 presidential election (approximately 92.8 million). See David Cay Johnston, *Voting, America's Not Keen On. Coffee Is Another Matter*, N.Y. TIMES, Nov. 10, 1996, at E2. Likewise, more Americans brew a cup of coffee each day (approximately 94 million) than voted in the most recent presidential election. See *id.*

<sup>47</sup> See Jon R. Sinclair, *Reforming Television's Role in American Political Campaigns: Rationale for the Elimination of Paid Political Advertisements*, COMM. & L., Mar. 1995, at 65, 84.

<sup>48</sup> *Id.* at 84. The turnout in 1960 was "a post-World War II high of 64.5 percent." Mark J. Fenster, *The Impact of Allowing Day of Registration Voting on Turnout in U.S. from 1960 to 1992*, 22 AM. POL. Q. 74, 74 (1994).

The most recent data available suggests that little is changing. As of July, 1998, the voter turnout for primary elections in 1998 was a scant 16.8 percent, a figure well below even the historic low primary turnout of 19.58 percent of 1994. See *Numbers*, TIME, July 20, 1998, at 21.

<sup>49</sup> James W. Carey, *The Press, Public Opinion, and Public Discourse*, in PUBLIC OPINION AND THE COMMUNICATION OF CONSENT 373, 374 (Theodore L. Glasser & Charles T. Salmon eds., 1995). Communication and law scholar David S. Allen observes:

[W]e are confronted with an inactive public composed of individuals who have become isolated from their political institutions. It is a public that has been separated from political life—a public that rarely enters the political arena and, when it does, lives that political life through the institutional press.

David S. Allen, *The Supreme Court and the Creation of an (In)active Public Sphere*, in FREEING THE FIRST AMENDMENT: CRITICAL PERSPECTIVES ON FREEDOM OF EXPRESSION 93 (David S. Allen & Robert Jensen eds., 1995).

<sup>50</sup> See Rene Sanchez, *Freshmen Apathetic, Survey Shows*, WASH. POST, Jan. 12, 1998, at A1.

the 1990s the figure was over forty percent.<sup>51</sup> Alexander Astin, a UCLA professor who helped to conduct the survey, called the numbers “part of a larger pattern of disengagement of the American people from political and civic life in general.”<sup>52</sup>

The marketplace, in a nutshell, is rigged and political participation is passé. Traditional theories of free speech are no longer sufficient, by themselves, to justify protecting speech in our mediated and visual society. Those theories don’t match reality; they don’t even come close. Realism about the nature and uses of speech and, in particular, visual images must transpire if our post-modern, mediated-age of First Amendment jurisprudence is to have any relevance in twenty-first century American life.

Today, we’d rather watch than think. We’d rather spectate than participate. We’d rather gawk than talk. The primary value at play is voyeurism. After all, voyeurism entails watching without actually participating or letting others know one is there. This, ultimately, is what the First Amendment increasingly is called upon today to protect.

Part II of this article explores the multitude of social, legal, and technical changes that underlie the emergence of the voyeurism value. Part II then explains the relationship between the voyeurism value and other, more traditional theories of free expression. It argues that voyeurism lurks in other theories of free speech and expression, but nonetheless is substantially different from these theories.

Finally, Part III suggests the implications and limitations of the voyeurism value in justifying protection of media-related activities

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<sup>51</sup> See *id.*

<sup>52</sup> *Id.* The words of the late angst-ridden Kurt Cobain, singer for the pioneering Aberdeen, Washington-based grunge band Nirvana, aptly seem to reflect the disillusionment with politics felt by a new generation of potential voters—“oh well, whatever, nevermind.” NIRVANA, *Smells Like Teen Spirit*, on NEVERMIND (DGC 1991). The passivity is echoed by the mocking refrain in Nirvana’s anthem, *Smells Like Teen Spirit*, “here we are now, entertain us.” *Id.*

Cobain’s observations about the entertain-us mentality are echoed in a new book about teaching today’s college students. See PETER SACKS, *GENERATION X GOES TO COLLEGE* (1996). Sacks, the *nom de plume* of a former journalist who now teaches college journalism, observes that “the demands by students to be entertained has produced a sharp split among educators in colleges and universities about how far teachers should go to pander to the new generation.” *Id.* at 146. Sacks suggests that Cobain’s line “here we are now, entertain us” is “a lyric that hits upon the domination of entertainment values in contemporary culture, spanning politics, education, and even religious institutions.” *Id.* at 118.

For an overview of Kurt Cobain and Nirvana, see MICHAEL AZERRAD, *COME AS YOU ARE: THE STORY OF NIRVANA* (1994) (providing a comprehensive review of the band Nirvana’s history, high moments, and ultimately the 1994 suicide of Kurt Cobain). Cobain shot himself at home at age 27, less than two months after surviving a tranquilizer-induced coma while on tour with Nirvana in Europe. See Bruce Handy, *Never Mind*, TIME, Apr. 18, 1994, at 70.

that satisfy our increasing desire to gaze. In particular, this part criticizes the voyeurism value for sacrificing privacy concerns—concerns that may be intimately tied to one's own identity and sense of self—for the viewing pleasure of the audience. Part IV also attacks the voyeurism value for privileging a one-directional flow of communication that frustrates dialogue and participation by promoting passivity of the audience. In addition, voyeurism emphasizes individuals' *wants* and preferences for specific types of visual information that may be entertaining, escapist, and hedonistic, but it largely ignores, or at least relegates to a lesser priority, the type of information that serves the collective-level *needs* and requirements of society, independent from and uninfluenced by marketplace forces. It is the realities of the economic marketplace that force broadcasters to cater to our voyeuristic wants, *not* to our societal needs.

## II. WATCHING, LISTENING, GAZING: THE AMERICAN PASTIMES

Looking across the mediated, legal, and political landscapes of the United States today, one finds the signs and symptoms of the voyeurism value in First Amendment jurisprudence. This Part analyzes those underpinnings and suggests how they push, some with more authority and energy than others, the voyeurism value to the forefront of free expression theory at the close of the millennium.

### A. *Television, Titillation, and Show-Alls*

Reading is old fashioned.<sup>53</sup> Every age group is reading less now than ten years ago.<sup>54</sup> Many Americans simply cannot read.<sup>55</sup>

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<sup>53</sup> A recent study by the American Society of Newspaper Editors reveals that so-called "Generation Xers" are about one-third less likely than so-called baby boomers to read newspapers everyday and more likely, by a 26% to 18% difference, to agree that reading is old fashioned. See Carl Sessions Stepp, *The X Factor*, AM. JOURNALISM REV., Nov. 1996, at 34, 36. Household penetration of newspapers, in turn, has dropped steadily over the past 20 years and direct competition among newspapers has all but disappeared. See JEAN FOLKERTS ET AL., *supra* note 18, at 118-23. "To more and more Americans, newspapers are simply irrelevant. The old daily newspaper habit is eroding; for many it isn't even forming." HAMILL, *supra* note 20, at 18-19.

As of Feb. 1, 1998, there were only 1509 daily newspapers in the United States. EDITOR & PUBLISHER INTERNATIONAL YEARBOOK I (78th ed. 1998). Less than 80 years ago, there were more than 2000 daily newspapers in the United States. See MELVIN L. DEFLEUR & EVERETTE E. DENNIS, UNDERSTANDING MASS COMMUNICATION 76 (6th ed. 1998). The household penetration of newspapers today is substantially less than it was just 50 years ago. See WILSON DIZARD, JR., OLD MEDIA NEW MEDIA: MASS COMMUNICATIONS IN THE INFORMATION AGE 171-72 (2d ed. 1997).

<sup>54</sup> See Stepp, *supra* note 53, at 36. In particular, research suggests that baby boomers, especially women, have not developed a newspaper-reading habit. See Janet A. Bridges & Lamar W. Bridges, *Changes in News Use on the Front Pages of the American Daily Newspaper, 1986-1993*, 74 JOURNALISM & MASS COMM. Q. 826, 826 (1998).

<sup>55</sup> The United States ranks 49th in the world in literacy, according to a study conducted

Instead of reading, we like to watch.<sup>56</sup> Television monitors are everywhere—in lines at amusement parks, in the walls of hotel elevators, in the gate areas at airport terminals. Americans, on average, have their televisions turned on for more than seven hours each day.<sup>57</sup> We also, increasingly, watch others' lives unfold or be exposed on the Internet as media converge.<sup>58</sup>

What we like to watch, however, is no longer the network television news.<sup>59</sup> Audience share and ratings have dwindled significantly over the past twenty years.<sup>60</sup> The audience for cable news networks is even smaller.<sup>61</sup> Local television news may be watched these days, but much of it really can't pass for news. As NBC news anchor Tom Brokaw observed recently, "[t]he most powerful instruments of local news, the local television stations, have all but abandoned serious political and government coverage."<sup>62</sup>

So if we don't watch hard news anymore, what do we like to watch? Television shows that cling together around a common, albeit unspoken, theme: voyeurism. These are the tabloid talk shows, the reality television programs, and the evening television news magazines—the shows that often expose individuals' dirty laundry, telecast a parade of freaks for our enjoyment and amusement, and take us to places, sometimes via the use of hidden cameras and tactics such as lying and false identification, that we would not otherwise see. As journalism and law professor Robert D. Richards aptly observes in his new book, *Freedom's Voice*, daytime television talk shows feed "the tastes of *electronic voyeurism*."<sup>63</sup>

These shows give us a glimpse, often a prurient, private, or lurid glimpse, of others' ostensibly private lives. The others often are not like ourselves; they are admired or scandalized celebrities

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by the United Nations Educational, Scientific and Cultural Organization. See WARREN K. AGEE ET AL., *INTRODUCTION TO MASS COMMUNICATIONS* 130 (12th ed. 1997).

<sup>56</sup> "Today it is very unusual to find a family without a television set, and most have more than one." DEFLEUR & DENNIS, *supra* note 53, at 196. A 1996 survey revealed that 48% of households with children under the age of 18 had three or more television sets. See Steve Sherman, *A Set of One's Own: TV Sets in Children's Bedrooms*, J. ADVERTISING RES., Nov. 21, 1996, at 9.

<sup>57</sup> See KATHLEEN HALL JAMIESON & KARLYN KOHRS CAMPBELL, *THE INTERPLAY OF INFLUENCE: NEWS, ADVERTISING, POLITICS, AND THE MASS MEDIA* 1 (4th ed. 1997).

<sup>58</sup> "In 1997, it was estimated that there were 50 million people worldwide using the Internet and the World Wide Web." DEFLEUR & DENNIS, *supra* note 53, at 221.

<sup>59</sup> See Andie Tucher, "You News," *It's not Your Father's Newscast Anymore*, COLUM. JOURNALISM REV., May-June 1997, at 26.

<sup>60</sup> See *id.*

<sup>61</sup> See Michael Rust, *Bringing News to the Masses*, INSIGHT, June 30, 1997, at 10, 11.

<sup>62</sup> Tom Brokaw, *The Brokaw Proposal: Fixing the System From the Ground Up*, HARV. INT'L L. J. PRESS/POL., Winter 1998, at 5, 6.

<sup>63</sup> ROBERT D. RICHARDS, *FREEDOM'S VOICE: THE PERILOUS PRESENT AND UNCERTAIN FUTURE OF THE FIRST AMENDMENT* 67 (1998) (emphasis added).

or total strangers. What we are watching is another world, a mediated world of others brought to us safely as we spectate from our homes and apartments.

Ellen Hume, executive director of the Democracy Project at the Public Broadcasting Service, observes that "the private eccentricities of ordinary citizens are revealed on *Oprah* and *PrimeTime Live*, where they become substitutes for real conversation about real problems. Instead of acting like a nation of citizens, we have become a *nation of voyeurs*."<sup>64</sup> Indeed, watching is in, while dialogue and acting are out. What passes for dialogue about real problems today merely is the pointless pontification and verbal masturbation of Washington pundits on frenetic talk shows like CNN's *Crossfire*.<sup>65</sup> We like to watch these shows, however, because of the entertainment value created when the metaphorical sparks fly among the soundbite-astute panelists.

Traditional broadcast television news itself is "going more tabloid, blurring the lines between news, entertainment, and propaganda."<sup>66</sup> As Carl Bernstein, half of the Woodward and Bernstein duo behind the heroic Watergate reporting of *The Washington Post*, puts it, "[i]n this new culture of journalistic titillation, we teach our readers and viewers that the trivial is significant and that the lurid and loopy are more important than real news."<sup>67</sup> Indeed, researchers from the watchdog organization, Rocky Mountain Media Watch, after conducting a content analysis of local television news, concluded that "the very idea of news has been perverted into a steady diet of titillating, terrifying, and manipulative entertainment."<sup>68</sup>

Reality television shows, tabloid talk shows and, increasingly, local television news, are driven by either live visuals or videotape that typically have very little to do with promoting democratic self-governance or the discovery of truth but, instead, have everything to do with titillation and keeping viewers' attention. In fact, at least one court has held that whether the events on a television talk

<sup>64</sup> Ellen Hume, *The New Paradigm for News*, ANNALS AM. ACAD. POL. & SOC. SCI., July 1996, at 141, 147 (emphasis added).

<sup>65</sup> See generally FALLOWS, *supra* note 45, at 92-3 (describing the political talk shows as a new industry and describing "[t]he differences between John McLaughlin's spawn and Phil Donahue's—that is, between the weekend talk shows about politics and the weekday Jenny Jones-Jerry Springer programs.").

<sup>66</sup> *Id.* at 144. "[E]xcess violence, trivia, and sensation in local television news, the empty calories of tabloid television, have become the standard fare on newscasts." Paul Klite et al., *Local TV News: Getting Away With Murder*, HARV. INT'L J. PRESS/POL., Spring 1997, at 102.

<sup>67</sup> Dean Alger, *Megamedia, the State of Journalism, and Democracy*, HARV. INT'L J. PRESS/POL., Winter 1998, at 126, 130.

<sup>68</sup> Klite et al., *supra* note 66, at 102.

show are fake—whether they are staged and thus have nothing to do with the truth—in no way affects First Amendment protection for the media.<sup>69</sup> These shows focus on watching other people's lives as they get arrested on *COPS*, commit suicide live on television,<sup>70</sup> fight with former friends and lovers or find out that their current lover is having an affair with another person, on shows like *The Jerry Springer Show*.<sup>71</sup> All of this reeks of voyeurism.

In the process of satisfying our desire to watch others' lives as they simultaneously unfold and unravel, these shows test the limits of the First Amendment protection afforded to the press. Many of these shows depend largely on the existence of videotape—the stuff on which the material we like to watch is recorded. Gathering the voyeuristic videotape for shows like *COPS*, *On Scene: Emergency Response*, *Inside Edition*,<sup>72</sup> and *PrimeTime Live* often raises questions about the extent to which the First Amendment protects the press from liability for a bevy of torts. These torts include, but are not limited to, trespass, fraud, intrusion into seclusion, intentional infliction of emotional distress, and public disclosure of private facts in so-called ride-along<sup>73</sup> and fly-along scenarios.<sup>74</sup> Gathering sensa-

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<sup>69</sup> See *Howell v. Tribune Entertainment Co.*, 106 F.3d 215, 221 (7th Cir. 1997) (providing, in the context of a cause of action for publication disclosure of private facts arising from an episode of the *Charles Perez Show*, that "there is no principle in the law that by staging an event at which one person is likely to defame or invade the privacy of the other, the media become complicit in the defamation or the invasion of privacy.").

<sup>70</sup> See Howard Chua-Eoan, *Too Many Eyes in the Sky?*, *TIME*, May 11, 1998, at 30; D.M. Osborne, *Overwhelmed by Events*, *BRILL'S CONTENT*, July-Aug. 1998, at 67 (describing coverage by local television of freeway suicide in Los Angeles, Cal., in April, 1998).

<sup>71</sup> *The Jerry Springer Show* has been rocked recently, albeit not too surprisingly, by allegations that its "producers encourage or tell guests to say certain things and to pick fights with other guests." Joe Schlosser, *'Jerry Springer': Scraps or scripts?*, *BROADCASTING & CABLE*, Apr. 27, 1998, at 10.

<sup>72</sup> See *Wolfson v. Lewis*, 924 F. Supp. 1413 (E.D. Pa. 1996) (ordering a preliminary injunction against journalists working for *Inside Edition* based on their intrusive and harrassive news gathering practices, including the use of shot-gun microphones, telescopes, ultra-sensitive microphones, and zoom lens video cameras).

<sup>73</sup> A ride-along consists "of footage obtained when television crews accompany police officers on patrol and film them in action." David E. Bond, *Police Liability for the Media "Ride-Along"*, 77 B.U. L. REV. 825, 825 (1997).

<sup>74</sup> See *Reeves v. Fox Television Network*, 983 F. Supp. 703 (N.D. Ohio 1997) (involving unsuccessful causes of action for public disclosure of private facts, false light, appropriation, and negligent and intentional infliction of emotional distress arising from videotaping of a segment for the series *COPS*); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1217 (M.D. N.C. 1996) (involving successful causes of action for fraud and trespass resulting from the hidden camera footage for *PrimeTime Live* obtained by the undercover media defendant employees who lied on their employment applications to obtain jobs at the plaintiff's supermarkets); *Shulman v. Group W Productions, Inc.*, 955 P.2d 469 (Cal. 1998) (involving causes of action for intrusion into seclusion, public disclosure of private facts, appropriation, and intentional infliction of emotional distress arising from the videotaping of an auto accident victim for the show *On Scene: Emergency Response* by an employee of the media defendant who flew along in an air ambulance, and the audiotaping of the victim's plea to die made by a nurse wearing a wireless microphone).

tional videotape to feed local television news also tests the limits of First Amendment freedoms.<sup>75</sup> Sometimes the press are found liable for their actions and other times they are not.<sup>76</sup> What is clear, however, is that the need for dramatic videotape to satiate our desire to watch and to satisfy the needs of profit-hungry producers of reality television shows, local newscasts, and evening news magazines is testing the scope and reach of First Amendment freedom.

As the next section reveals, local television newscasts and daytime talk shows have also helped to push the meaning of the term "newsworthiness" far beyond traditional notions of news. The "cash-for-trash phenomenon"<sup>77</sup> that is tabloid television cloaks itself in the First Amendment to protect its profits and to continue to feed our voyeuristic cravings.

### B. *The Vacuous Nature of Newsworthiness and the Public Interest*

Newsworthiness and public interest are two critical legal standards with a direct bearing on the voyeurism value. Newsworthiness is a defense to the invasion of privacy tort known as public disclosure of private facts.<sup>78</sup> It also is a defense to the appropriation tort of using a person's photograph or image without consent.<sup>79</sup> The public interest, in turn, is a government-imposed

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<sup>75</sup> See *KOVR-TV, Inc. v. Whittle*, 31 Cal. App. 4th 1023 (Cal. Ct. App. 1995) (holding that a cause of action for intentional infliction of emotional distress could proceed to trial, and arising from the actions of a television news reporter who, on videotape with cameras rolling and while they were home alone, abruptly informed three young children, ages five, seven and eleven, that the children in the house next door with whom they played were killed by their own mother).

<sup>76</sup> For example, in the celebrated case involving the Food Lion supermarket chain and undercover reporting by *PrimeTime Live*, a federal jury found ABC/Capital Cities liable for fraud and trespass in its efforts to gather videotape. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 25 Media L. Rep. (BNA) 2185, 2186 (M.D. N.C. 1997). See generally Eduardo W. Gonzalez, "Get That Camera Out of My Face!": An Examination of the Viability of Suing "Tabloid Television" for Invasion of Privacy, 51 U. MIAMI L. REV. 935 (1997) (analyzing liability for tabloid television shows based on the intrusion to seclusion tort).

<sup>77</sup> Robert C. Weaver, Jr., *The Impact of the Mass Media Revolution*, 4 KAN. J.L. & PUB. POL'Y 53, 56 (1995).

<sup>78</sup> See *Anonsen v. Donahue*, 857 S.W.2d 700, 703 (Texas 1993). This tort is sometimes referred to as "publication of truthful but embarrassing facts." ROBERT D. SACK & SANDRA S. BARON, *LIBEL, SLANDER AND RELATED PROBLEMS* 552 (2d ed. 1994).

The basic common law elements of the tort are set forth in the *Restatement (Second) of Torts*:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

RESTATEMENT (SECOND) OF TORTS § 652D (1977).

<sup>79</sup> The basic common law elements of the tort of appropriation are set forth in the *Restatement (Second) of Torts*, which provides that "[o]ne 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



obligation on all broadcasters that affects the licensing process and, ostensibly, the nature of the content of the broadcast medium.<sup>80</sup> How the law defines these concepts affects our ability to be voyeurs. Today, these terms have been interpreted by courts and/or the Federal Communications Commission in a manner that directly promotes and enhances the voyeurism value and our right to watch whatever we want to watch.

### 1. Newsworthiness: The Journalism Perspective

News is a social construction and, concomitantly, defining what constitutes news is extremely difficult and elusive.<sup>81</sup> It is often identified by characteristics such as timeliness, proximity, prominence, and consequence.<sup>82</sup> In fact, "the old fashioned view that 'news' is simply a mirror placed before reality still lives."<sup>83</sup>

Today, however, many scholars recognize that news is *not* something that simply exists "out there," independent of the journalist, waiting to be discovered. Rather, news is something that journalists and editors *make*, that they construct, that they produce.<sup>84</sup> News is a story that journalists tell—that they shape and create—using different narrative devices.<sup>85</sup>

The news stories that journalists tell today are often derided.<sup>86</sup> This is especially true in the realm of television, a medium that allows us to watch and satiate our voyeuristic appetites. This ap-

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privacy." RESTATEMENT (SECOND) OF TORTS § 652D (1977). A California court has provided that "[a] common law cause of action for appropriation of name or likeness may be pleaded by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of the plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 417 (Cal. Ct. App. 1984). See *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 542 (Cal. Ct. App. 1993) (stating that "every publication of someone's name or likeness does not give rise to an appropriation action. Publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it, is not ordinarily actionable.").

<sup>80</sup> Broadcasters must serve the public interest, convenience, and necessity to be granted a license by the FCC. See 409 U.S.C. § 309 (1998).

<sup>81</sup> "Just what is news? Despite many efforts, no neat, satisfactory answer to that question has been found." JAMIESON & CAMPBELL, *supra* note 57, at 39.

<sup>82</sup> See Carlin Romano, *The Grisly Truth about Bare Facts*, in *READING THE NEWS* 38, 59 (Robert Karl Manoff & Michael Schudson eds., 1986).

<sup>83</sup> *Id.*

<sup>84</sup> See Michael Schudson, *The Sociology of News Production*, in *SOCIAL MEANINGS OF NEWS* 7, 7 (Dan Berkowitz ed., 1997).

<sup>85</sup> See Robert Karl Manoff, *Writing the News (By Telling the "Story")*, in *READING THE NEWS* 197 (Robert Karl Manoff & Michael Schudson eds., 1986) (describing different narrative devices, such as ironic juxtaposition, that journalists use in writing stories).

<sup>86</sup> "In recent years, there has been much concern expressed about the increasing 'tabloidization' of the news media and the media's role in the general degradation of the dialogue of democracy." Alger, *supra* note 67, at 126.

plies to broadcast news at all levels—local and national newscasts, as well as so-called news magazines like *Dateline* and *20/20*.

Richard M. Cohen, former senior producer of the *CBS Evening News*, observes:

In television, journalism is no longer a calling. It's a big deal job with a fat paycheck. Objectives have changed. We are audience driven now. We are not mission driven: propelled by our responsibility to inform. We're just here to entertain, to soothe. We're here to sell our wares.<sup>87</sup>

Broadcast journalism is not only money driven; it is also picture and video driven.<sup>88</sup> After all, we like to watch, and, in particular, we'd like to watch something other than a news anchor reading directly to us from the newspaper. Stories that are visually appealing, that is stories that have great pictures, laden with emotion or blood, inevitably get more play on the 22-minutes of a 30-minute newscast that are devoted to something other than commercial advertisements or the station's own promotional announcements.<sup>89</sup> These stories, in turn, oust other news stories altogether from the 22-minute news window, because even though they may be more important for an informed electorate, they lack good videotape.<sup>90</sup>

The pictures, especially on local television news, often are of crime and violence.<sup>91</sup> As researchers at UCLA recently wrote, "[t]elevision's insatiable demand for 'good pictures' and riveting stories means that the most gruesome or notorious episodes of crime receive extensive attention while other forms of crime are virtually ignored."<sup>92</sup> Pictures of violence and crime drive out other

<sup>87</sup> Richard M. Cohen, *The Corporate Takeover of News*, in CONGLOMERATES AND THE MEDIA 31, 32 (Erik Barnouw et al. eds., 1997).

<sup>88</sup> See *id.* at 46.

<sup>89</sup> See *id.* at 46-7.

<sup>90</sup> For example, the 1998 primary race for governor of California received very little coverage on local television newscasts. See Todd S. Purdum, *Race for California Governor Is Not Necessarily the News*, N.Y. TIMES, May 6, 1998, at A1.

<sup>91</sup> Crime and violence "are as ubiquitous on local news shows as the winsome male-female anchor team and the happy chat between bite-sized bits of coverage." Joe Holley, *Should the Coverage Fit the Crime?*, COLUM. JOURNALISM REV., May-June 1996, at 27. See Barbara Bliss Osborn, *If It Bleeds, It Leads . . . If It Votes, It Don't*, EXTRA, Sept.-Oct. 1994, at 15 (observing that crime coverage is a staple of local television newscast in Los Angeles and that "the nightly pandemonium that passes for news covers the issue on a crime-by-crime basis, with lots of dramatic visuals—police tape, surveillance footage, fires and explosions—but no context, nothing that might shed light on causes and solutions.").

In 1994, Hillary Rodham Clinton rebuked the news media for increasing use of violent images, observing that "[c]hildren can't cope with much of what they see" on television. See Lynn Smith, *First Lady Says News Violence Harms Young*, L.A. TIMES, Mar. 5, 1994, at A21.

<sup>92</sup> Franklin D. Gilliam et al., *Crime in Black and White: The Violent, Scary World of Local News*, HARV. INT'L J. PRESS/POL., Summer 1996, at 6, 7.

stories.<sup>93</sup> Per the voyeurism value, however, local television news is propelled by “the fetish for video.”<sup>94</sup> Local news amounts to little more than “an extension of the entertainment programs that surround it.”<sup>95</sup>

Despite this pandering to violence and videotape, we love to watch local newscasts—in line, once again, with the voyeurism value. In fact, local newscasts are the public’s number one source of news and people rank them higher in quality and credibility than network news, local news, or any other news source.<sup>96</sup>

Network television news also is accused of dumbing down our standards of news.<sup>97</sup> NBC recently has been accused of offering “news lite” on its evening newscast because it supposedly features lighter, softer news stories.<sup>98</sup> News coverage of the death of Princess Diana, according to some journalists and press analysts, “reflect[s] how entertainment values have replaced traditional news values in many U.S. newsrooms.”<sup>99</sup> Poorly sourced and gossip-laden television news coverage of the Monica Lewinsky<sup>100</sup> and President Clinton sex scandal was attacked as a sign of declining news values.<sup>101</sup>

Howard Kurtz, media reporter and columnist for *The Washington Post*, calls it “a crisis of tabloidism. The whole business has

<sup>93</sup> “The old joke about local news is that ‘if it bleeds, it leads.’ But it is the corollary that should concern us: If it doesn’t bleed—or choke with emotion—it doesn’t air. Unfortunately, most matters of public consequence fail to pass the blood-and-tears litmus test of local television news.” Phyllis Kaniss, *Bad News: Too Few Reporters*, AM. JOURNALISM REV., Sept. 1993, at 20, 20.

A recent study conducted by Mark Crispin Miller, a professor at New York University, concluded that nearly 40% of local newscasts from four stations in Baltimore, Md., was devoted to crime and another ten percent to accidents and disasters. See Dan Trigoboff, *Study Blasts Baltimore News*, BROADCASTING & CABLE, July 6, 1998, at 33. Miller concluded that such extensive coverage of crime and disasters leaves little time for reporting on government, education, business, health, and the environment. See *id.* The study was conducted over a three-week period in Spring, 1998. See *id.*

<sup>94</sup> Jamie Malanowski, *Bad News: Murder Travels*, AM. JOURNALISM REV., Sept. 1993, at 21, 22.

<sup>95</sup> Howard Rosenberg, *Bad News: The Cult of Personality*, AM. JOURNALISM REV., Sept. 1993, at 18.

<sup>96</sup> See Lawrence K. Grossman, *Why Local TV News is so Awful*, COLUM. JOURNALISM REV., Nov.-Dec. 1997, at 21.

<sup>97</sup> See William Kirtz, *Dancy Laments TV News Today*, THE QUILL, Jan.-Feb. 1997, at 11. Television news “is both journalism and show business, a key political institution as well as a seller of detergent and breakfast cereal.” Daniel C. Hallin, *We Keep America on Top of the World*, in WATCHING TELEVISION 9, 11 (Todd Gitlin ed., 1986).

<sup>98</sup> See Tucher, *supra* note 59, at 27.

<sup>99</sup> Sharkey, *supra* note 34, at 18, 20.

<sup>100</sup> For background on the upbringing and life of Monica Samille Lewinsky, see Romesh Ratnesar, *The Days of Her Life*, TIME, Feb. 2, 1998, at 36.

<sup>101</sup> See generally Jules Witcover, *Where We Went Wrong*, COLUM. JOURNALISM REV., Mar.-Apr. 1998, at 18 (describing both print and broadcast journalism coverage of the Clinton-Lewinsky sex scandal).

channel-surfed lately, from Marv Albert to Diana to the nanny trial to O.J. and back again. We are complicit, in varying degrees, in the paparazzi phenomenon."<sup>102</sup> Likewise, Tom Rosenstiel, director of the Project for Excellence in Journalism, observes a "philosophical collapse in the belief in the purpose of journalism and the meaning of news."<sup>103</sup> Television news ultimately becomes, as Neil Postman of New York University observes, "only a commodity that is used to gather an audience which will be sold to advertisers," and it is "delivered as a form of entertainment."<sup>104</sup>

In summary, what broadcast journalists think of as news today often has very little to do with truth seeking or promoting democratic self-governance. Instead, it has much to do with using videotape that panders to our voyeuristic proclivities and, at the same time, produces a profit for the stations and networks. News amounts to little more than whatever it is we want to watch.

## 2. Newsworthiness: The Legal Perspective

Just as journalists have trouble defining news, so too do courts and the legal system.<sup>105</sup> What news is, however, is important in the law as it relates to the voyeurism value because newsworthiness is a defense, a complete bar, in fact, for journalists who give publicity to private and embarrassing facts about individuals.<sup>106</sup> It is a commonly used defense by members of the mass media faced with liability under the public disclosure privacy tort.

Courts often defer to journalistic judgment, the same ratings-grabbing, videotape-driven judgment described above in the previous section, when deciding whether a particular story is newsworthy.<sup>107</sup> They generally adopt what law professor Diane Zimmerman describes as the "Leave-it-to-the-Press Model" for de-

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<sup>102</sup> *The Erosion of Values: A Debate Among Journalists Over How to Cope*, COLUM. JOURNALISM REV., Mar.-Apr. 1998, at 44.

<sup>103</sup> *Id.* at 45.

<sup>104</sup> NEIL POSTMAN & STEVE POWERS, *HOW TO WATCH TV NEWS* 161 (1992).

<sup>105</sup> "The big difficulty, of course, is drawing a line between what is newsworthy and what is not. This has been a tough definition for the courts, and the articulated newsworthiness tests vary from state to state." JOHN D. ZELEDNY, *COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA* 169 (2d ed. 1997).

<sup>106</sup> "A media defendant is constitutionally permitted to private facts about an individual's private life when those facts are newsworthy." *Green v. Chicago Tribune Co.*, 675 N.E.2d 249, 261 (Ill. 1996).

<sup>107</sup> See Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683, 700 (1996). Courts "are reluctant to restrict or define newsworthiness, deferring instead to the press." *Id.* "Essentially, if an item has been printed it is deemed newsworthy by the courts." *Id.* See DONALD M. GILLMOR ET AL., *FUNDAMENTALS OF MASS COMMUNICATION LAW* 92 (1996) (stating that "[t]he news media have for the most part been able to persuade the courts to accept their standards of what is newsworthy.").

fining news.<sup>108</sup> In other words, journalists are awarded, by judicial default, the power to provide the legal definition of news. As Zimmerman observes, “the vast majority of cases seem to hold that what is printed is by definition of legitimate public interest.”<sup>109</sup> Courts, in turn, have “increased the scope of the newsworthy defense since its initial formulation in 1890.”<sup>110</sup>

This definition promotes and serves the voyeurism value. Broadcast journalists, are increasingly driven by economic concerns—not concerns of whether they are serving some abstract public good or democracy. They are, in turn, driven to provide sensationalistic videotape that captures and holds the attention of a large audience. In other words, broadcasters are compelled to provide videotape that the public *wants* to watch, not necessarily what it *needs* to watch to engage in wise and informed decision making. If the public wants to watch something, news shows will keep serving it up to the audience on behalf of the advertisers who want to reach that audience.<sup>111</sup>

It should be clear by now that *both* the legal and journalistic definitions of news ultimately are shaped by economic marketplace forces. Broadcast news will keep feeding us whatever we *want* to watch.<sup>112</sup> The courts, in turn, will keep trusting the news judgment of broadcasters in determining newsworthiness. The courts will then protect what we want to watch only if it is chosen by journalists who know that we want to watch it. The power of journalists to define newsworthiness for the courts thus protects their ability to pander to our desires to voyeuristically watch others, provided the videotape is packaged as news.

It is critical to note that when courts actually do attempt to define newsworthiness, they often do so in terms of nebulous and expansive concepts like “matters of public interest”<sup>113</sup> and “legiti-

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<sup>108</sup> See Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 353 (1983).

<sup>109</sup> *Id.* In contrast to this general rule, California courts have adopted a specific three-part test for newsworthiness that considers the social value of the facts published, the depth of the intrusion into ostensibly private affairs, and the extent to which the plaintiff voluntarily rose to a position of public notoriety. See *Wasser v. San Diego Union*, 191 Cal. App. 3d 1455, 1461 (Cal. Ct. App. 1987). Connecticut courts apply these same factors. *Goodrich v. Waterbury Republican-American, Inc.*, 448 A.2d 1317 (Conn. 1982).

<sup>110</sup> Dendy, *supra* note 25, at 152.

<sup>111</sup> Media scholars have observed that “the primary function of the mass media is to attract and hold large audiences for advertisers.” JAMIESON & CAMPBELL, *supra* note 57, at 4.

<sup>112</sup> “Market-based incentives will lead media producers to provide audiences with what they want.” C. Edwin Baker, *Giving the Audience What it Wants*, 58 OHIO ST. L. J. 311, 313 (1997).

<sup>113</sup> *Anonsen v. Donahue*, 857 S.W.2d 700, 702 (Tex. 1993).

mate public interest."<sup>114</sup> Almost anything can be said to be of public interest, of course, if the public is interested in it.<sup>115</sup> In turn, broadcast journalists will produce whatever it is that the public is most interested in at the time—whatever it is that we want to watch.

The judicial admonition to consider "community mores"<sup>116</sup> in determining whether something is newsworthy does little to stop a community that likes to watch from watching. In other words, as we become a nation, a community, of voyeurs, and more and more people watch reality TV shows and become accustomed to hidden-camera investigative news shows like *PrimeTime Live*, the community standards issue is rendered moot. If the community wants to watch, then that's the community value and norm.

It is this kind of logic that allowed a federal court in California to hold, in the context of a cause of action for appropriation, that "the scope of newsworthiness is extremely broad"<sup>117</sup> and includes photographs of "sexual touchings"<sup>118</sup> between erstwhile couple Pamela Anderson Lee of *Baywatch*<sup>119</sup> fame and Motley Crüe<sup>120</sup> bad-boy drummer Tommy Lee.<sup>121</sup> It is the same type of logic that extends the newsworthiness defense outside of the area of newscasts to talk shows that cater to audiences that crave the public revelations of embarrassing facts, such as *The Sally Jesse Raphael Show*<sup>122</sup> and the *Phil Donahue Show*.<sup>123</sup>

It is the kind of logic underlying the California Supreme Court's recent holding, in *Shulman v. Group W Productions, Inc.*,<sup>124</sup>

<sup>114</sup> *Sipple v. Chronicle Pub. Co.*, 154 Cal. App. 3d 1040, 1048 (Cal. Ct. App. 1984) (stating that "the cases and authorities further explain that the paramount test of newsworthiness is whether the matter is of legitimate public interest which in turn must be determined according to community mores").

<sup>115</sup> "All information is arguably of public concern." Dendy, *supra* note 25, at 157.

<sup>116</sup> *Sipple*, 154 Cal. App.3d at 1048.

<sup>117</sup> *Lee v. Penthouse Int'l, Ltd.*, 25 Media L. Rep. (BNA) 1651, 1654 (C.D. CA 1997).

<sup>118</sup> *Id.* at 1652.

<sup>119</sup> *Baywatch* is the world's most popular television show. See Greg Spring, *The Insider*, ELECTRONIC MEDIA, Jan. 12, 1998, at 8. In 1997, however, the show increased its so-called "babe count" to counter falling ratings. See Alison Boshoff, *Baywatch Cues More Babes*, DAILY TELEGRAPH, Apr. 15, 1997, at 12.

<sup>120</sup> For information about the band Motley Crüe, including its members, musical releases, and concert schedule, see *The Motley Files* (visited February 16, 1999) <<http://www.motleycrue.com>>.

<sup>121</sup> *Lee*, 25 Media L. Rep. (BNA) at 1655 (concluding that "[i]f Clint Eastwood's sexual relations with Tanya Tucker and Sandra Locke are newsworthy, then the sex life of Tommy Lee and Pamela Anderson Lee is also a legitimate subject for an article in *Penthouse*").

<sup>122</sup> See *Weber v. Multimedia Entertainment Inc.*, 26 Media L. Rep. (BNA) 1376, 1380 (S.D.N.Y. 1988) (holding that the newsworthiness defense, under New York law, can apply to television talk shows).

<sup>123</sup> See *Anonsen v. Donahue*, 857 S.W.2d 700 (Tex. 1993) (extending the newsworthiness defense in the context of a cause of action for public disclosure of private facts arising from a revelation on the *Phil Donahue Show*).

<sup>124</sup> 955 P.2d 469 (Cal. 1998).

that a videotape and an audiotape taken for a reality TV show, *On Scene: Emergency Response*, that captured the identity of a woman crushed in a car accident, rendered paraplegic, and pleading with a microphoned nurse to die—she's caught on tape stating "I just want to die"<sup>125</sup>—are newsworthy as a matter of law.<sup>126</sup> Car accidents, of course, always appeal to voyeuristic instincts; why else do people slow down as they drive by a wreck on the highway and rubberneck? What the television show did was to give the entire nation—not just drivers on that particular stretch of Interstate 10 in Riverside County, California—the chance to rubberneck at Ruth Shulman's grave medical conditions. New technologies, operating in the name of newsworthiness and corporate profits, extend our voyeurism, giving us the right to watch a grown woman's life nearly end.

The *Shulman* Court observed that "[a]n analysis measuring newsworthiness of facts about a limited involuntary public figure by their relevance to a newsworthy subject matter incorporates deference to reporters and editors."<sup>127</sup> Although the videotape could have been edited so as not to reveal the woman's identity, the California Supreme Court found this irrelevant to the newsworthy determination:

That the broadcast *could* have been edited to exclude some of [the victim's] words and images and still excite a minimum degree of viewer interest is not determinative. Nor is the possibility that the members of this or another court, or a jury, might find a differently edited broadcast more to their taste or even more interesting. The courts do not, and constitutionally could not, sit as superior editors of the press.<sup>128</sup>

A victory for press freedom, then, often is a victory for voyeurism. Decisions such as *Shulman* on the meaning of newsworthiness simply protect our voyeuristic rights. We have a right to see nude photos of Pamela Anderson Lee because her sex life is newsworthy; we have a right to see *and* to hear a grown woman, identifiable to

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<sup>125</sup> *Id.* at 476.

<sup>126</sup> As the California Supreme Court put it:

The more difficult question is whether Ruth's [Shulman's] appearance and words as she was extricated from the overturned car, placed in the helicopter, and transported to the hospital were of legitimate public concern. Pursuant to the analysis outlined earlier, we conclude the disputed material was newsworthy as a matter of law.

*Id.* at 228.

<sup>127</sup> *Id.* at 225.

<sup>128</sup> *Id.* at 229. See *Cinel v. Connick*, 15 F.3d 1338, 1346 (5th Cir. 1994) (stating that "we are not prepared to make editorial decisions for the media regarding information directly related to matters of public concern").

others on a videotape, plead with a microphoned nurse to let her die. We are truly a nation of voyeurs, and courts are more than willing to stretch the standards of newsworthiness to protect our rights to be voyeurs. They accord incredible deference to journalists who pander to our wants to see the embarrassing, the erotic, and the grotesque. It cannot be emphasized enough—journalists, talk shows, and reality TV shows serve up what we *want* to see. The formula is simple: call what we want to see news, package it up under the cloak of news or a talk show or a reality TV show, and courts will bend over backwards to protect journalists' ability to serve it up on a nightly basis.

Courts are extremely hesitant, of course, to second guess the news and editorial judgment of the media press for fear of intruding on the First Amendment right of freedom of the press. What is ironic, of course, is that this judicial deference is increasingly naive and misguided. What the First Amendment really protects today is not just news about events of political concern but largely the ability of corporate media to turn a profit by catering to our voyeuristic desire to watch others as they suffer in pain or revel in sexual passion on television and the Internet. News is a commodity, and increasingly, a voyeuristic commodity. So long as courts give deference to journalists in defining news, our voyeuristic proclivities will be satiated by the media.

### 3. The Public Interest: Here We Are Now, Entertain Us<sup>129</sup>

Broadcasting is the medium that most panders to our sense of voyeurism. It is a medium that, according to government mandate, must serve the public interest.<sup>130</sup> Today there really are two meanings for this concept—one public interest standard tailored for adults, the other designed for children. For adults, the public interest is whatever economic marketplace forces suggest adults *want* to watch.<sup>131</sup> This applies to both news and entertainment.<sup>132</sup>

<sup>129</sup> NIRVANA, *Smells Like Teen Spirit*, on NEVERMIND (DGC 1991) (singing "here we are now, entertain us"). See *supra* note 52 and accompanying text (discussing the lyrics).

<sup>130</sup> See *supra* note 26 and accompanying text.

<sup>131</sup> See *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593 (1981) (observing that the FCC relies on the market as "the best method of promoting diversity of entertainment formats.")

<sup>132</sup> Despite the greater ability of the government to regulate broadcasting, the FCC "refrains from directly or indirectly attempting to interfere in the exercise of news judgment by licensees and from intervening in the area of broadcast news presentation in any way except when extrinsic evidence of deliberate distortion or staging of news is presented." *In re Hon. Ronald Reagan* 38 F.C.C.2d 378, 378 (1972). See *In re KCOP Television, Inc.*, 59 F.C.C.2d 1321, 1329 (1976) (stating that "[n]ews programming is a sensitive area in which we are particularly hesitant to intrude."); 47 U.S.C. § 326 (1998) (prohibiting the FCC from exercising "the power of censorship over the radio communications or signals trans-



For children, in contrast, the public interest means whatever the government, politicians, and public interest groups think children *need* to watch.<sup>133</sup> Children are used as the excuse for compelling broadcasters to put on three hours of educational television programming per week,<sup>134</sup> channeling indecent broadcast space into certain safe-harbor time periods when children are less likely to be in the audience,<sup>135</sup> and creating a controversial and somewhat suspect<sup>136</sup> ratings system for most broadcast fare.<sup>137</sup>

Setting aside the token three-hours devoted to the children's public interest and the benign ratings,<sup>138</sup> the public interest today largely is synonymous with adult *wants*. Corporate media's need to turn a profit means that they will serve up whatever the largest and most demographically attractive section of the public wants to

mitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.”).

As described earlier in the article, the broadcast fare that journalists serve up is largely determined by economic pressures to capture large and demographically attractive audiences. Thus leaving editorial decisions in the hands of broadcast journalists, as the courts and the FCC do, really amounts to letting marketplace forces shape news choices that give the most favorable demographic share of the public what it wants.

In terms of entertainment, the Supreme Court has observed that the FCC's reliance on marketplace forces to satisfy the “entertainment preferences” of the audience “does not conflict with the First Amendment.” *WNCN Listeners Guild*, 450 U.S. 604.

<sup>133</sup> See James J. Popham, *Passion, Politics and the Public Interest: The Perilous Path to a Quantitative Standard in the Regulation of Children's Television Programming*, 5 COMM. LAW CONSPICUOUS 1, 1 (1997) (describing the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996, and the requirement that broadcasters carry three hours-per-week of shows specifically designed for children's educational and information needs).

<sup>134</sup> See *id.*

<sup>135</sup> See *Action for Children's Television v. FCC*, 58 F.3d 654, 656 (D.C. Cir. 1995) (concluding that channeling speech to certain time periods “would not unduly burden the First Amendment”).

<sup>136</sup> Research already suggests that some children are using the ratings system to select programming that has been rated as unsuitable for their viewing. See Bob Dart, *Channel Surfer: Kids Using TV Ratings to Ferret out Forbidden*, ATLANTA J. & CONST., May 28, 1998, at 6D. Research also suggests that one-fifth of parents are completely unfamiliar with the ratings scheme. See David Hatch, *Study Give Ratings Mixed Results*, ELECTRONIC MEDIA, June 1, 1998, at 4.

<sup>137</sup> Section 551 of the Telecommunications Act of 1996 contained extensive findings by Congress with respect to the influence that television has on children and the need to provide parents with timely information about the nature of video programming. See Telecommunications Act of 1996, Pub. L. No. 104-104, § 551(a), 110 Stat. 56, 139-141 (1996). See generally Lawrie Mifflin, *F.C.C. Approves Ratings System for TV*, N.Y. TIMES, Mar. 13, 1998, at A16 (describing the ratings system).

<sup>138</sup> The ratings are benign for several reasons. First, research suggests that of those parents who are aware of the ratings, only 14% can explain nine or more of the eleven ratings symbols, and just over two-thirds of the parents using the ratings have looked for a rating icon and missed it. See Hatch, *supra* note 136, at 4. What's more, 46% of parents do not rely on ratings to police their kids' viewing habits. See *id.* In addition, the ratings system—and the discussion that lead up to the ratings system—has done very little, if anything, to actually change the content of television programming. Research suggests that the level of television violence has stayed relatively constant over the past three years. See Sara Brown, *Television Violence Stays Constant*, BROADCASTING & CABLE, Apr. 20, 1998, at 20.

watch, all in the service of attracting advertising dollars. Because the public *wants* to watch programs that cater to voyeurism, such as *COPS* and *The Jerry Springer Show*, and because the economic marketplace forces therefore support such programming, the public interest standard protects these shows. This is perfectly acceptable to the courts as well as to the FCC. As the Supreme Court held in 1981, the FCC's reliance on marketplace forces to satisfy the entertainment preferences of the audience does not conflict with the First Amendment.<sup>139</sup>

Programming obligations under the public interest standard that catered to adults' *needs*, as compared to adults' *wants*, have dried up. The controversial Fairness Doctrine, for example, that imposed content obligations on broadcasters to serve up issues of public concern "is now officially moribund."<sup>140</sup> In its place are rules that deregulate ownership of the media and that "have fueled a consolidation so profound that even insiders are surprised by its magnitude."<sup>141</sup> These conglomerates ultimately are interested in the bottom lines, which means giving the public what it wants.<sup>142</sup> And today it often wants voyeuristic content.

A recent high-profile<sup>143</sup> license renewal dispute involving four television stations illustrates that the FCC will *not* use its public interest power to stop the erosion of news content into a quagmire of sensationalistic videotape infotainment. In April, 1998, the FCC's Mass Media Bureau rejected a petition filed by a public interest group, Rocky Mountain Media Watch,<sup>144</sup> to deny the license re-

<sup>139</sup> See *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 604 (1981); Theodore L. Glasser, *Press Responsibility and First Amendment Values*, in *RESPONSIBLE JOURNALISM* 81, 95 (Deni Elliott ed. 1986) (writing that the *WNCN* decision allows the FCC to "move ahead with plans to equate the 'public interest' with the public's interest").

<sup>140</sup> ROBERT BRITT HORWITZ, *THE IRONY OF REGULATORY REFORM* 4 (1989). See generally WOLFGANG HOFFMANN-REIM, *REGULATING MEDIA: THE LICENSING AND SUPERVISION OF BROADCASTING IN SIX COUNTRIES* 34-38 (discussing the life and death of the Fairness Doctrine).

<sup>141</sup> Jon Lafayette, *Who Owns the Airwaves?: Ownership Ranks Rapidly Thinned By Consolidation*, *ELECTRONIC MEDIA*, May 18, 1998, at 1A.

<sup>142</sup> Martin Koughan, an Emmy-winning television producer who worked for CNN's investigative unit, recently observed that, in the production of television news magazines like *Dateline*, "everyone is trying to figure out what people want to see and then feed it to them. If the only thing that you're trying to do is titillate, then the point of the story is not even relevant." Doreen Carvajal, *Fast Track to Anxiety in TV News*, *N.Y. TIMES*, July 20, 1998, at D1.

<sup>143</sup> The dispute generated articles in media across the country. See James Brooke, *Rejecting Petitions, FCC Supports TV News as Free Speech*, *N.Y. TIMES*, May 3, 1998, at 37; Michael Grunwald, *Air War In The Mile High City*, *BOSTON GLOBE*, Mar. 9, 1998, at A1; Jillian Lloyd, *Denver Revolt: Film at 10: Whose News Judgment?*, *CHRISTIAN SCIENCE MONITOR*, Apr. 3, 1998, at 1; Joanne Ostrow, *FCC Rejects Complaint About Denver TV News*, *DENVER POST*, May 1, 1998, at B7.

<sup>144</sup> Paul Klite, a former doctor and journalist, founded Rocky Mountain Media Watch in 1994. See Grunwald, *supra*, note 143. The homepage for Rocky Mountain Media Watch

newal applications of four Denver, Colorado television stations.<sup>145</sup> Media Watch had contended that local newscasts on the four stations contained: (1) excessive violence and mayhem; (2) inadequate coverage of local politics and social issues such as education, poverty, and AIDS; and (3) inappropriately high levels of soft news, chit-chat between anchors, and celebrity-driven stories.<sup>146</sup> The watch-dog organization cleverly dubbed the end product of this mixture *toxic television news*, claimed that it was harmful to the citizens of Colorado, and alleged that the stations therefore were not serving the public interest as required by the FCC.<sup>147</sup>

In rejecting Media Watch's argument, the FCC concluded that "although we believe that Media Watch's views regarding violence in news programming are legitimate matters for discussion within the Denver community, the alleged predominance of violence in the stations' local evening newscasts does not present a basis for intervention by the Commission in connection with a license renewal application."<sup>148</sup> The FCC added that, under the First Amendment, "editorial judgments regarding news programs are committed to a broadcaster's good faith discretion."<sup>149</sup>

As emphasized earlier in this article,<sup>150</sup> news judgments of broadcast journalists are heavily influenced today by the need to attract large audiences, not necessarily by what news the community needs to engage in wise and informed decision making. Packaging violent and voyeuristic videotape as news largely exempts it

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can found at <<http://www.oneimage.com/~rmmw/index.html>>. According to its homepage, the organization is a tax-exempt, non-profit corporation that:

was founded in 1994 by media activists with media and research skills to challenge the unbalanced and unhealthy diet of information presented by the media corporations. Our focus is local TV news. RMMW is funded by grants from Hunt Alternatives Fund, Agape Foundation, Boehm Foundation, Gill Foundation and individual contributors.

*Id.*

<sup>145</sup> See *In Re: Applications for Renewal of Licenses of Television Stations at Denver, Colorado* (visited Feb. 16, 1999) <[http://www.fcc.gov/Bureaus/Mass\\_Media/Orders/1998/tvautho.txt](http://www.fcc.gov/Bureaus/Mass_Media/Orders/1998/tvautho.txt)> [hereinafter *Applications for Renewal*]. The four television stations are: KCNC-TV, Channel 4 (CBS); KMGH-TV, Channel 7 (ABC); KUSA-TV, Channel 9 (NBC); and KWGN-TV, Channel 2 (WBN). See *id.*

After the FCC rejected Rocky Mountain Media Watch's petition, the organization continued its attack on the four Denver television stations by filing, in May, 1998, an application for review of the FCC's decision, see (visited July 10, 1998) <<http://oneimage.com/~rmmw/texts4.html>>; Dusty Saunders, *Media Watch Asks FCC to Reconsider, ROCKY MOUNTAIN NEWS*, June 2, 1998, at 2 (providing a brief overview of Media Watch's application for review of the FCC's decision to grant license renewals to four Denver television stations).

<sup>146</sup> See *Petitions to Deny the Re-licensing of 4 Stations* (visited July 10, 1998) <<http://www.oneimage.com/~rmmw/texts2.html>>.

<sup>147</sup> See *id.*

<sup>148</sup> *Applications for Renewal*, *supra* note 145.

<sup>149</sup> See *id.*

<sup>150</sup> See *supra* notes 87 & 104 and accompanying text.

from the FCC's control. Violent news programming is even exempt from the television ratings system,<sup>151</sup> suggesting that the FCC clings to an increasingly false dichotomy between news and entertainment in the age of infotainment.<sup>152</sup>

The Media Watch battle ultimately suggests that the marketplace forces that often determine the judgment of broadcast journalists are protected under both the First Amendment and the marketplace-defined public interest standard. The FCC will do little, then, under the public interest standard to stop voyeurism in both the entertainment and news media.

#### 4. Summary

The concepts of newsworthiness and public interest have been broadly interpreted by journalists and courts in ways that allow the voyeurism value to emerge as the century comes to a close. The economic realities of the real marketplace have forced the metaphorical marketplace of ideas to cater to public wants and preferences. In this atmosphere our wants and preferences for viewing others' lives and intimate moments are allowed to rise to the surface.

##### C. *Technology and the Increasing Ease of Voyeurism*

The changes that support the emergence of the voyeurism value go beyond the types of programs that media conglomerates produce and so beyond the journalistic and legal definitions of newsworthiness and public interest. Technology also has unmasked the voyeurism value.

Today, surveillance cameras are everywhere—literally. They are located in public parks and at public swimming pools.<sup>153</sup>

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<sup>151</sup> See *Applications for Renewal*, *supra* note 145.

<sup>152</sup> Doris Graber, professor of political science at the University of Illinois at Chicago, summarizes the confluence of factors that produce what she calls infotainment:

The media's dilemma lies in the structure of the media system in the United States. It is predominantly a private business that receives its financial support largely from advertisers or audience fees. To stay lucrative, the general audience media must maximize the number of viewers. This often results in news formats geared to publics that are not well versed in political issues and not particularly interested in them. Generally, media organizations have responded to this challenge with more brevity, simplicity, and, if possible, entertaining angles to news stories. When they operate in this spirit of these guidelines, they often produce shallow infotainment.

Doris A. Graber, *Whither Televised Election News? Lessons from the 1996 Campaign*, HARV. INT'L J. PRESS/POL., Spring 1998, at 112, 117.

<sup>153</sup> See Christina M. Parker, *Leighton Opts to Install Cameras*, MORNING CALL, May 27, 1998, at B1.

They're placed in pre-schools.<sup>154</sup> They're hidden in locker rooms and restrooms.<sup>155</sup>

The camcorder<sup>156</sup> has made would-be detectives and journalists out of private citizens, capturing people on tape when they least expect it. The powerful videotape shot by George Holliday involving Rodney King and a group of Los Angeles Police Department officers helped to spark of new breed of video vigilantes.<sup>157</sup>

Professional journalists use the new recording technologies to obtain hidden-camera videotape that provides voyeuristic video—video taken in places we don't ordinarily see and video that captures unsuspecting people at moments when they think no one is watching.<sup>158</sup> Indeed, the cameras sometimes are used to take pictures in places journalists would ordinarily be denied access.<sup>159</sup> Journalists, in turn, must often use false pretenses—they lie, to put it bluntly—to gain access to these places in order make use of the voyeuristic technologies.<sup>160</sup> The celebrated case involving the undercover investigation of the food handling practices at the Food Lion supermarket chain by reporters for ABC's news magazine, *PrimeTime Live*, illustrates this point, as well as the concomitant

<sup>154</sup> See P.J. Huffstutter, *Cyber-Surveillance Debuts in Preschools*, L.A. TIMES, Oct. 13, 1997, at A1. The pictures captured in preschool often are broadcast via the Internet to concerned parents who want to know what their children are doing. See *id.*; *An Eye on the Kids; Internet-Based Surveillance Cameras for Child-Care Centers*, SECURITY MANAGEMENT, Nov. 1997, at 17 (describing systems in place in Marietta, Ga., and Ridgefield, Conn.).

<sup>155</sup> See Sandra Stokly, *Cameras Discovered in Worker Restrooms*, ORANGE COUNTY REG., Sept. 15, 1997 (describing the planting of surveillance cameras in two men's restrooms at a Consolidated Freightways truck terminal in Mira Loma, Cal.); Mary-Kathryn Zachary, *Taping without Consent Involves Many Variables*, SUPERVISION, June 1988, at 20 (describing a lawsuit resulting from the videotaping of employees of a hotel in the men's locker room without their knowledge).

<sup>156</sup> From 1985 to 1989, camcorder sales jumped from 517,000 a year to 2.3 million. See Cerone, *supra* note 13, at 81.

<sup>157</sup> See Melinda Beck, *Video Vigilantes*, NEWSWEEK, July 22, 1991, at 42, 43.

<sup>158</sup> "The electronic age, plus a continuing interest in and demand for investigative reporting, has made video and audio recording devices an important part of journalists' arsenal for documenting their discoveries." LOUIS A. DAY, *ETHICS IN MEDIA COMMUNICATIONS: CASES AND CONTROVERSIES* 128 (2d ed. 1997). "[H]idden cameras and phony identities became standard tactics of many TV news programs in the early 1990s." GENE GOODWIN & RON F. SMITH, *GROPING FOR ETHICS IN JOURNALISM* 207 (3d ed. 1994).

As the author of a recent textbook on media law observes, "in this era of miniaturized electronic listening devices and long telephoto lenses, technology has created a variety of new newsgathering opportunities (or threats to personal privacy, depending on your point of view)." WAYNE OVERBECK, *MAJOR PRINCIPLES OF MEDIA LAW* 165 (1998).

According to one media critic, the growing use of hidden cameras by television news magazines such as *Dateline* and *Primetime Live* "is part of a ratings-driven descent by the major networks into the swamp of tabloid journalism. Teaser promos for the programs hype concealed-camera feats to snag viewers who like to watch people who don't know they're being watched." Paul Starobin, *Why Those Hidden Cameras Hurt Journalism*, N.Y. TIMES, Jan. 28, 1997, at Op-Ed.

<sup>159</sup> See JAY BLACK ET AL., *DOING ETHICS IN JOURNALISM* 123 (2d ed. 1995).

<sup>160</sup> See *id.*

legal risks that such practices entail.<sup>161</sup>

Pictures ultimately are essential for storytelling in broadcast journalism.<sup>162</sup> The pictures today often are of places and people the public generally would not see. We demand them—we demand to watch.<sup>163</sup> New technologies facilitate the supply that feeds our demand.

The justification, however, for our demand to watch via new technologies often is cloaked in reasons that cover, obscure, or hide the voyeurism value. For example, the rationale for wanting to watch via cameras may be justified on the grounds of security measures and helping law enforcement reduce criminal activity and property destruction.<sup>164</sup> In the context of journalism, the justification for hidden cameras is similar—exposing wrongdoing and other practices that could harm society.<sup>165</sup> The press is playing a pseudo-law enforcement role, akin to its Fourth Estate function.

In both cases, however, the underlying justification is a need to watch others, engaging in acts or activities that expose their secrets, without them knowing we are watching. The real rationale, then—the one lying beneath security and law enforcement—is voyeurism. It is *voyeurism in service of security*.<sup>166</sup> The question of the moment, of course, is whether the First Amendment freedom of the press will protect our desire to watch against claims of invasion

<sup>161</sup> See generally Clay Calvert, *Sifting Through the Wreckage of ABC Reportage: Little Victories, Big Defeats & Unbridled Media Arrogance*, 19 HASTINGS COMM. & ENT. L.J. 795 (1997) (describing the battle between ABC and Food Lion, and criticizing the news gathering practices of *PrimeTime Live*).

<sup>162</sup> See BLACK ET AL., *supra* note 159, at 124.

<sup>163</sup> "Today, the public, fed for years—mostly by *PrimeTime* itself—on the satisfaction of seeing perpetrators caught in the act, may not easily accept anything other than actual footage." Russ Baker, *In Greensboro: Damning Undercover Tactics as "Fraud,"* COLUM. JOURNALISM REV., Mar.-Apr. 1997, at 28, 32.

<sup>164</sup> See *Control the Use of High-Tech Surveillance*, ROANOKE TIMES & WORLD NEWS, June 1, 1998, at A6 (observing that "state-of-the-art equipment can assist police in capturing images and other evidences of crimes" and that "[a] number of U.S. communities have effectively deployed video cameras on downtown streets and in other public areas as crime deterrents.").

Surveillance cameras were installed in New York City's Washington Square Park, on the southern edge of the park, to deter drug-dealing, but their actions also capture the behavior of law-abiding citizens. See *Police Cameras in the Park*, N.Y. TIMES, Feb. 9, 1998, at A22 (opining that the use of surveillance cameras by police suggests "a fundamental change in policing strategy that essentially assumes that all behavior within the cameras' view is suspicious" and calling for "significant public debate about the wisdom of 24-hour videotaping of lawful movement.").

<sup>165</sup> "[N]etwork news magazine programs like ABC's *20/20* and *PrimeTime Live*, CBS's *60 Minutes*, and similar programs on NBC, were using hidden cameras to uncover insurance fraud, auto repair rip-offs, and poor treatment of children in day-care centers." GOODWIN & SMITH, *supra* note 158, at 207.

<sup>166</sup> "[S]urreptitious surveillance manifests itself in the form of crime prevention, safety programs, productivity monitoring and outright voyeurism." BURROWS, *supra* note 27, at 1079.

of privacy and other intrusive newsgathering practices.<sup>167</sup> Technology is forcing this issue, and the voyeurism value, to emerge today.<sup>168</sup>

#### D. *Politics as Voyeurism*

Turnout of eligible voters in the 1996 presidential election (approximately 49 percent) was the lowest for a presidential election since 1924.<sup>169</sup> This was a dramatic drop from the 55 percent who voted in 1992.<sup>170</sup> The low turnout does not, however, necessarily mean that Americans are not interested in politics or that they just do not care about democracy. Indeed, a number of reasons can be offered for the recent low turnout, ranging from boring or unappealing candidates<sup>171</sup> to contentment with the current political officials.<sup>172</sup>

On the other hand, the lack of turnout has at least one expert speculating that it is because “[t]elevision has made people spectators.”<sup>173</sup> Yet even spectating about the presidential election was down in 1996, with the television ratings for the party conventions down 40 percent from 1992.<sup>174</sup>

Politics *is*, however, portrayed by many journalists today as a spectator sport—something that one watches from a safe distance.

<sup>167</sup> The House Judiciary Committee heard testimony from professors, actors, and others in May, 1998, on two bills now pending that target the paparazzi. See Rob Wells, *Celebrities Urge Congress to Outlaw Harassment by Tabloid Photographers*, LEGAL INTELLIGENCER, May 22, 1998, at 4.

In his testimony before the full committee, actor Michael J. Fox, of *Family Ties* and *Spin City* fame, discussed the relationship between new technologies and the economic marketplace forces in the media business that fuels their use and, ultimately, voyeurism:

Time and time again, we've seen “ordinary folks,” through one unexpected circumstance or another, burn in the white-hot glare of uninvited and relentless media scrutiny. Tabloids, TV tabloids, and even some members of the so-called “legitimate” media will go to any lengths and use the latest technologies to obtain pictures or soundbites that will give them advantage over their rivals in an increasingly competitive marketplace.

*Privacy Protection: Hearings on H.R. 2448 and H.R. 3224 Before the House Comm. on the Judiciary*, 105th Cong. (1998) (statement of Michael J. Fox).

<sup>168</sup> The American Bar Association formed a task force that recently issued a report on the balance between privacy and law enforcement. See Mark Helm, *Study urges regulation of surveillance*, PATRIOT LEDGER, June 15, 1998, at 6.

<sup>169</sup> See Peter Becker, *Motor Voter Apparently Didn't Drive Up Turnout*, WASH. POST, Nov. 6, 1996, at B7.

<sup>170</sup> See *id.*

<sup>171</sup> “The best explanation for lagging turnout in 1996 is that the electorate was not inspired by any of the candidates.” Charles E. Cook, *Climate, Issues Offer Little Hope for 1998 to See Rise in Turnout*, ROLL CALL, Apr. 9, 1998, at Political Surveyor.

<sup>172</sup> Non-participation may be “a leading indicator of contentment.” TOM DELUCA, *THE TWO FACES OF POLITICAL APATHY I* (1995) (quoting journalist Charles Krauthammer).

<sup>173</sup> Vic Ostrowidzki, *U.S. Young Elected to Forgo the Pools*, TIMES UNION, Nov. 24, 1996, at A10 (quoting Curtis Gans, Director, Committee for Study of the American Electorate).

<sup>174</sup> See Edwin Diamond et al., *Panting After Youth*, WKLY. STANDARD, Nov. 11, 1996, at 34.

We speak of horse-race coverage of campaigns that emphasizes who's gaining and who's fading at the expense of issue-based coverage.<sup>175</sup> The candidates often are portrayed as combatants—"as self-interested Machiavellians unconcerned with the public good."<sup>176</sup>

The coverage of the Monica Lewinsky sex scandal is probably the height of politics as voyeurism, and we watch it.<sup>177</sup> Shows such as *Crossfire* and *The McLaughlin Group* are little more than frenetic entertainment shows<sup>178</sup> with "sound bite superstars"<sup>179</sup> that portray politics as a game in which those who can scream the loudest win. But they make colorful spectating.

Perhaps more importantly, and in line with the voyeurism value's emphasis on watching rather than discussing, these talk shows do not feature the kind of deliberate dialogue that is prized under other theories of free speech. For example, Meiklejohn's theory of democratic self-governance prized the order and structure of discussion at the town hall meeting in which a moderator would direct discussion.<sup>180</sup> In contrast, television political talk shows have "little time for context, subtlety, or caveats. Seat-of-the-pants judgments—up or down, yes or no, who won and who lost, and who committed the outrage of the week—have become a driving force behind the shrill and often mean-spirited politics of the 1990s."<sup>181</sup> The shows feature only "combative political talk,"<sup>182</sup> not discussion. As James Fallows, former editor of *U.S. News & World Report*,<sup>183</sup> wrote in 1996, "the pressure to keep things lively means

<sup>175</sup> See ROBERT M. ENTMAN, *DEMOCRACY WITHOUT CITIZENS: MEDIA AND THE DECAY OF AMERICAN POLITICS* 21 (1989).

<sup>176</sup> JOSEPH N. CAPPELLA & KATHLEEN HALL JAMIESON, *SPIRAL OF CYNICISM: THE PRESS AND THE PUBLIC GOOD* 32 (1997).

<sup>177</sup> See *supra* note 34 and accompanying text. See also James Carey, *Publisher's Note: The Decline of Democratic Institutions*, *COLUM. JOURNALISM REV.*, Mar.-Apr. 1998, at 6 (observing that one of the driving forces behind the sex scandal is "journalists who revel in voyeurism").

<sup>178</sup> Pat Buchanan is a successful media gadfly on these shows, "for he understands that politics is also entertainment." Howard Kurtz, *D.C. Pundits: Takes One to Know One*, *WASH. POST*, Feb. 19, 1996, at A7.

<sup>179</sup> Howard Kurtz, a *Washington Post* reporter who writes about the media, uses the term "sound bite superstars" to describe "an elite fraternity of academics, politicians, journalists, lawyers, lobbyists, strategists, retired colonels, authors, analysts and activists who fill the screen with snatches of breathtakingly conventional wisdom." Howard Kurtz, *How to Succeed in Washington By Going on Television*, *WASH. POST MAG.*, May 19, 1991, at 14, 16.

<sup>180</sup> See MEIKLEJOHN, *supra* note 44, at 24.

<sup>181</sup> HOWARD KURTZ, *HOT AIR: ALL TALK, ALL THE TIME* 4 (1996).

<sup>182</sup> Juan Rodriguez, *Lifestyles of the Rich and Lippy: The Life Stories of TV Talk-Show Hosts Could be Fodder for Their Own Programs*, *MONTREAL GAZETTE*, Feb. 8, 1998, at D3.

<sup>183</sup> Fallows was dismissed in June, 1998, from his position as editor of *U.S. News & World Report* after less than two years in that position. See Robin Pogrebin, *U.S. News & World Report Decides to Replace Its Editor*, *N.Y. TIMES*, June 30, 1998, at A14.



that squabbling replaces dialogue.”<sup>184</sup> Ultimately, Fallows points out, “[t]he discussion shows that are supposed to add to public understanding may actually reduce it, by hammering home the message that ‘issues’ don’t matter except as items for politicians to squabble about.”<sup>185</sup>

The bottom line today is that politics is often portrayed by journalists as a spectator sport, be it a horse race or wrestling match between commentators.<sup>186</sup> Dialogue is out—it’s replaced by sound bites<sup>187</sup> and pointless pontification by pundits—and watching is in.

### E. Summary

Changes—legal, social, and technological—have forced the emergence of the voyeurism value in recent years. The next part of this article analyzes the relationship between the voyeurism value and more traditional theories for protecting expression in First Amendment jurisprudence.

## III. VOYEURISM AND THE FREE SPEECH TRADITION

In the field of communication research and theory, traditional linear models of communication usually include at least four basic components: 1) the *source* of a message; 2) the *message* itself; 3) the *channel* through which the message is conveyed; and 4) the *receiver* or *audience* of the message.<sup>188</sup> Keeping an eye on the source-message-channel-receiver components of the communication flow is helpful to gain a better understanding of the voyeurism value. In particular, this Part uses these four elements of the communication

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<sup>184</sup> FALLOWS, *supra* note 45, at 16.

<sup>185</sup> *Id.* at 20.

<sup>186</sup> “Historically, studies have shown that media concentrate more on aspects of the *contest*—winning and losing, strategy and logistics, appearances and excitement—than on issues.” Shirley A. Serini et al., *Of Horse Race and Policy Issues: A Study of Gender in Coverage of a Gubernatorial Election by Two Major Metropolitan Newspapers*, 75 JOURNALISM & MASS COMM. Q. 194, 195 (1998).

<sup>187</sup> See generally Daniel C. Hallin, *Sound Bite News: Television Coverage of Elections, 1968-1988*, J. COMM., Spring 1992, at 5 (tracing the shrinking size of sound bites in presidential elections). “Soundbites are no longer informational. They are only punctuational. Soundbites are mere production devices.” Cohen, *supra* note 87, at 37.

<sup>188</sup> See DOMINICK, *supra* note 20, at 6 (identifying the general elements in the communication process, including: source, a process of encoding, a message, a channel, a process of decoding, a receiver, the potential for feedback, and the chance for noise). This type of linear model is reflected in what communication scholar James Carey calls the transmission model of communication. See JAMES W. CAREY, COMMUNICATION AS CULTURE 15 (1989). The transmission view focuses on the transmitting, distributing, and sending of information to others for the purposes of control. See *id.* In contrast to the transmission model of communication is a ritual definition of communication that reflects a cultural studies approach in which “communication is a symbolic process whereby reality is produced, maintained, repaired, and transformed.” *Id.* at 23.

process to compare the voyeurism value with other, more traditional—or at least accepted—theories for protecting expression in First Amendment jurisprudence.

A. *The Receiver Link: Focusing on the Audience's Rights.*

At the heart of the voyeurism value is the ability of the audience to receive speech. It is the right of the audience—the receiver in the source-message-channel-receiver model of communication—that is paramount under this free speech principle.

To watch others—to be a voyeur—is to view them, to see them, to ogle them. Protection of the voyeurism value thus compels protection of messages—in particular, visual images—for the benefit of the audience. The rights of the audience to receive a message must be privileged, over and above the rights and abilities of the person who is the subject of the message to control its dissemination to the audience.

For example, the right of the audience of a show like *Prime-Time Live* to watch hidden camera footage must trump the right of the unsuspecting individual caught on that footage to suppress its dissemination. Likewise, the right of the audience to watch the police raid a home on *COPS* must trump the right of the homeowner to keep the cameras out of his home in the first place.

The right of the audience to receive messages is not unique, of course, to the voyeurism value. It also is important in a number of traditional theories of free speech. For example, the marketplace metaphor pivots on the ability of the audience to receive the information it needs in order to discover the truth.<sup>189</sup> Likewise, Meiklejohn's theory of democratic self-governance privileges the rights of the audience over the speaker in the quest for wise and informed decision making.<sup>190</sup> As Meiklejohn famously wrote, "the point of ultimate interest is not the words of the speakers, but the minds of the hearers."<sup>191</sup> Under the theory of self-realization, people must be able to receive speech—they need access to information—to fully develop their capacities as individuals and to shape their identities.<sup>192</sup>

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<sup>189</sup> "The marketplace theory assumes that unrestrained speech aids listeners in finding truth." BAKER, *supra* note 5, at 11.

<sup>190</sup> The purpose of the First Amendment, in Meiklejohn's view, was "not to protect the rights of persons to self-expression." POST, *supra* note 11, at 270 (emphasis added).

<sup>191</sup> MEIKLEJOHN, *supra* note 44, at 26.

<sup>192</sup> Self-realization requires "the right of the individual to access knowledge." THOMAS EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 5 (1966).

But our desire to watch today often has very little to do with promoting the lofty goals of truth discovery or wise voting. It has very little to do with fully developing our capacities as evolved, intellectually engaged human beings or with self-enlightenment. Instead, our desire to watch appears to have everything to do with the *experience* of the watching itself—the experience of seeing something otherwise forbidden or private. The experience may be hedonistic or prurient, or it may simply be the thrill of watching others—without obligation, moral or otherwise, to interact with them—that is so attractive today. Whatever the case, the end or telos has very little to do with some instrumental or external quality of the speech—its strength of argument, its informational value—serving a purpose to society at large. It also has very little to do with the noble goal of promoting intellectual fulfillment under the self-realization principle.<sup>193</sup>

To enhance and promote the voyeurism value of speech, then, the government has several options. It may adopt a media version of the chicken-in-every-pot/car-in-every-garage vision of the American dream. In brief, the government could provide every citizen—every potential audience member—with a television set and/or a computer powerful enough to view the World Wide Web and the visual images it displays. In other words, the government could furnish and equip the audience with the *tools* to receive the speech that it wants to watch. That high-cost measure, obviously, is not likely to occur in the near future.

Alternatively, and perhaps more realistically, the legislative and judicial branches of both the state and federal governments can revise or reinterpret existing laws, or create new laws, that make spectating and media voyeurism easier. Rather than focusing on providing the audience with the tools it needs to receive messages, however, these changes would entail giving increased protection to the *sources* that both gather and bring publicity to those messages.

For example, these legal changes might provide the media sources that feed up voyeuristic content with increased *access* to

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<sup>193</sup> Rodney Smolla emphasizes that to equate the self-realization theory solely with pleasure and gratification “is to trivialize it.” SMOLLA, *supra* note 2, at 10. Instead, under that theory, “[t]he fulfillment that comes from speech is bonded to man’s capacity to think, imagine, and create. Conscience and consciousness are the sacred precincts of the mind and soul.” *Id.*

Such noble goals, however, are not requisite for protection of speech under the voyeurism principle. Indeed, it is the very pleasure and gratification that we receive from watching others from a distance without obligation to interact with them that lies at the core of the voyeurism value.

places and events that we traditionally think of as private. Privacy, a social construction to begin with that varies from time to time and place to place, thus would be reconceptualized and diminished in the name of electronic voyeurism. The talismanic “reasonable expectation of privacy”<sup>194</sup> standard, used to determine privacy in tort law, could shift, with the reasonable expectations of yesteryear becoming unreasonable today, changing to adopt both to new technological developments that lessen our expectations of privacy and to our appetite—an appetite whetted and fed by those same technologies—for voyeurism.

Looking back at the source-message-channel-receiver communication flow, it becomes clear that, to serve the receiver’s voyeuristic proclivities, the source must be afforded expanded protection both to gather and to publicize the speech—the video, the images, the live-action shots—that the receiver wants. Courts are asked to do this every time media organizations use the newsworthiness defense in a public disclosure of private facts case and when they claim there is no reasonable expectation of privacy in an intrusion into seclusion case.

The benefits in the source-message-channel-receiver chain from such changes in the law are twofold. In particular, the source of the message, not just the audience, gains from this transaction. The audience benefits from the experience of voyeurism. The source gains a monetary reward for giving the audience what it wants to watch. The voyeuristic content attracts a large audience, which, in turn, attracts advertising revenue, which, again in turn, leads to a profitable transaction for the message source.

What is sacrificed in the name of the voyeurism value relates directly to the *message* component of the source-message-channel-receiver model. In particular, the individual who is the *subject of the message*—the unsuspecting person who is caught on tape, whose secrets or intimate moments are exposed on television or the Internet—loses. This individual’s loss of privacy, of course, is the voyeur’s gain, as well as the message source’s locus of profit.

#### B. *The Message Flow: Protecting Unidirectional Communication*

One characteristic that distinguishes the voyeurism value from other theories for protecting speech is the one-directional, non-discursive nature of the communication. The voyeurism value piv-

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<sup>194</sup> The threshold question that courts ask in an intrusion into seclusion case is whether the individual was in a place where he or she could reasonably expect privacy. See Zelezný, *supra* note 105, at 178.

ots on our ability to watch others, *not* to converse or to hold a discussion with them. It is, as mentioned earlier, the watching experience of the audience—the act of media consumption—that is pleasurable.

The voyeur who watches behind the one-way glass of the TV or computer screen has no obligation to correspond with the individual who is the subject matter of the message communicated.<sup>195</sup> Indeed, the voyeur likes to watch from a distance, a safe distance, from which no interaction with the individual who is at the center of the message is necessary. Thus, we never interact with the individuals whose lives are exposed on the daytime tabloid television shows, whose arrests are captured for reality television programs, or whose crimes are captured on videotape by industrious, and perhaps, duplicitous journalists. We can simply watch these individuals, free from commitment to them. We can turn them off when the program ends and forget about them, much like a john who is serviced by a prostitute ends all involvement with the person when the sex act is over and then drives off back to his wife and home. The difference, of course, with this analogy is that the television or Internet voyeur *never* even has direct personal contact with the other party.

This is not to say, however, that there is no feedback<sup>196</sup> to the source of the message. The source of the message—the producer of the television program—receives feedback in the form of audience ratings.<sup>197</sup> In other words, the feedback for the message source is measured in terms of profits and costs, dollars and cents. If no one watches—and watching is what voyeurism is all about—poor ratings will be the demise of a program. Thus, even the feedback between the audience and source is not dialogue. Rather, it is dollars.

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<sup>195</sup> From the perspective of the audience or receiver, the voyeurism value cherishes what might be called “the freedom of silence.” Cf. Curtis Bok, *The Duty of Freedom*, in *THE FIRST FREEDOM* 457 (Robert B. Downs ed., 1960) (using the concept of “the freedom of silence” in a different sense). The voyeur can look to various Supreme Court decisions embodying a right not to speak for this concept. See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977) (finding a right not to be forced to speak the message on a state’s license plates).

<sup>196</sup> “If the receiver or audience in the communication process transmits back to the source an observable response to the message, a component called feedback has been added. Feedback enables the source to determine if the message was correctly understood and, if it wasn’t, to modify it.” JAMES WILSON & STAN LE ROY WILSON, *MASS MEDIA/MASS CULTURE* 9 (4th ed. 1998).

<sup>197</sup> In television, “[t]he rating of a show is the percentage of all households having TV sets that viewed the particular program.” AGEE ET AL., *supra* note 55, at 296. In addition to ratings, television success is measured in terms of audience share, defined as “the number of households having their sets turned on at a given time; it measures a program’s audience against other shows on the air at the same time.” *Id.*

More traditional theories of communication prize dialogue and discourse.<sup>198</sup> The marketplace metaphor pivots on robust discussion and debate about the truth.<sup>199</sup> A message source offers up an idea and the audience can laud or attack it, debate it and discuss it, all in the name of finding and testing the truth. Meiklejohn's theory of democratic self-governance hinges on the town hall rubric, in which a moderator controls the flow of discussion so that ultimately a wise decision can be made.<sup>200</sup> The voyeur, of course, never even enters the metaphorical town hall. Instead, the voyeur crouches outside the walls and peers secretively through the windows at the people and events inside. These theories thus are readily distinguished from the voyeurism value on the dialogue dimension.

The distinction, however, between the voyeurism value and the self-realization principle is more subtle on the question of dialogue. Specifically, self-realization through speech may be accomplished, in part, *without* dialogue or conversation with others. The obvious example is the individual who keeps a diary. Translating one's thoughts into coherent, written form may help that individual deal with his or her own life. The dialogue is purely internal, a form of *intra*-personal communication. The transcribed thoughts thus are kept in a diary, a book that by its very nature is to be kept away from others. No one is supposed to read another person's diary. The diary writer thus engages in an internal monologue, reduced to tangible form, but no dialogue with *others* is necessary or required for this to be a valuable communication experience.

At first glance, this mirrors the voyeurism value's privileging of the lack of dialogue and the absence of interpersonal interaction in the communication process. There is, however, a critical difference. That difference lies in the distinction between the individuals involved in the source-message-channel-receiver process. In the act of writing a diary, there is a message source: the diary writer. But there is *no* intended receiver or audience, excluding, of course, the diary writer who may look back on past entries. In fact, the presence of a receiver *other* than the writer herself frustrates the self-realization process of putting down intimate details and

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<sup>198</sup> See *supra* note 12.

<sup>199</sup> The Supreme Court recognized this principle in its seminal defamation decision constitutionalizing libel law. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In *Sullivan*, the Court observed that there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270.

<sup>200</sup> See MEIKLEJOHN, *supra* note 44, at 24 (providing that a moderator at the town meeting makes sure rules of order are observed).

thoughts about one's life.<sup>201</sup> If an individual knew that there would be an audience for the diary entries, self-censorship would occur and only blank pages or muted, restrained thoughts would be made.

The voyeurism value, conversely, requires an audience for fulfillment. For an instance of voyeurism to arise, a message, communicated *by* someone else and *about* someone else, must be received and viewed by a receiver. The communication act is not simply internal. Indeed, the reading of a diary by *others* is an ultimate act of voyeurism. Insert an audience or receiver into the diary scenario and one suddenly converts an intimate act of self-realization into a prurient act of voyeurism. The experiential pleasure of sneaking a peak at someone else's words without them knowing it is a form of voyeurism. If the diary writer finds out, then future diary entries are less likely to occur.

In summary, the one-directional flow of communication privileged by the voyeurism value in First Amendment jurisprudence is distinct from both the dialogue-driven marketplace metaphor and the democratic self-governance theory of Meiklejohn. Although the self-realization value *may* be served without dialogue, it is distinct from the voyeurism value, which *requires* an audience, not simply a message source, for completion.

### C. *The Content of the Message: Public Interest and Private Wants*

The voyeurism value privileges speech that private individuals want to watch, regardless of whether that speech facilitates truth seeking, truth testing, or wise voting. This principle becomes clear when focus is directed to the *message* step in the source-message-channel-receiver model of communication. In particular, the *content and function* of the message in the voyeurism value may be distinguished from that in other theories of free speech.

For example, Meiklejohn's theory of democratic self-governance privileges public/political speech "upon matters of public interest—roads, schools, poor houses, health, external defense, and the like."<sup>202</sup> The First Amendment, Meiklejohn wrote, "protects

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<sup>201</sup> Philosopher Sissela Bok writes about the relationship between privacy, diaries and one's identity:

Secrecy guards, then, the central aspects of identity, and if necessary, also plans and property. It serves as an additional shield in case the protection of privacy should fail or be broken down. Thus you may assume that no one will read your diary; but you can also hide it, or write it in code, as did William Blake, or lock it up.

SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 13 (1989).

<sup>202</sup> MEIKLEJOHN, *supra* note 44, at 24.

the freedom of those activities of thought and communication by which we 'govern.'<sup>203</sup> Although Meiklejohn also advocated protection of art and literature, he did so only to the extent that this speech would "lead toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created."<sup>204</sup>

The key distinction here between the voyeurism value and the democratic self-governance principle pivots on the critical concept of the *public interest*. For Meiklejohn, the substance and content of the message must in some way *benefit* the public interest—a collective-level, general welfare understanding of that concept.<sup>205</sup> The public interest, under Meiklejohnian theory, relates to the speech that a democracy needs to function effectively and wisely. In contrast, the voyeurism value *panders* to the public's interest—individual-level, autonomous wants and preferences, *not* collective-level needs.<sup>206</sup> In fact, there is very little "public" at all about the interests of the voyeur, who tries to keep his or her voyeuristic habits private.

The nude photographs of Pamela Anderson Lee deemed newsworthy<sup>207</sup> illustrate this difference in the concept of the public interest. It is highly doubtful that the viewers of those photographs *needed* to see them to engage thoughtfully in democratic self-governance or to vote wisely. Rather, the viewers *wanted* to see the photographs themselves because the experience of seeing them itself is valuable in serving the desires of individuals who view them. The *needs versus wants* dichotomy thus separates the theory of democratic self-governance from the voyeurism value when one focuses on the message variable in the source-message-channel-receiver communication process.<sup>208</sup>

In addition to the needs versus wants dichotomy, a second and

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<sup>203</sup> Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255.

<sup>204</sup> *Id.* at 257.

<sup>205</sup> As law professor Robert Post writes, Alexander Meiklejohn believed that the purpose of speech was "to achieve an orderly, efficient, and rational dispatch of *common business*." POST, *supra* note 11, at 274 (emphasis added).

<sup>206</sup> For a brief discussion about the distinction between these conceptions of the public interest, see Clay Calvert, *Balancing Corporate Duties and Civic Responsibilities*, in CONTEMPORARY MEDIA ISSUES 173, 183 (William David Sloan & Emily Erickson Hoff eds., 1998).

<sup>207</sup> See *supra* notes 117-121 and accompanying text.

<sup>208</sup> The needs versus wants dichotomy is central to issues of media criticism in the journalism profession. For example, journalists often face a tough choice in deciding what stories to print. Should they "give readers what they need to make intelligent decisions in a participatory democracy, or should they give readers what they want, even if it means forgetting public policy considerations?" George Albert Gladney, *Giving Readers What They Want or Need?*, in CONTEMPORARY MEDIA ISSUES 291, 292 (William David Sloan & Emily Erickson Hoff eds., 1998).



more subtle difference between the democratic self-governance and voyeurism values turns on the distinction between *collectivist* and *individualist* goals. In Meiklejohn's theory, the content of messages is designed to benefit the needs of the collective, sometimes even at the expense of individuals' rights of speech.<sup>209</sup> The collective, for Meiklejohn, is democracy. The voyeurism value, in contrast, privileges the individual's interests in receiving speech, regardless of whether the rest of the community is interested in that speech or receives any benefits from it.<sup>210</sup> The benefit of speech protected by the voyeurism value is for the individual, not for society at large. *In the voyeurism value, individual gratification trumps collective self-determination.*

Focus on the message variable also distinguishes the voyeurism value from the marketplace theory. The idealistic marketplace of ideas has as its telos or goal the discovery of the truth or, perhaps more precisely, the testing of accepted notions of the truth.<sup>211</sup> The metaphor suggests, with regard to the message component of the source-message-channel-receiver communication flow, that a message must contain an idea *and* that this idea must be the kind that is *subject to rational discussion and testing* by others. Thus, it can be said that so-called hate speech subverts, or is even outside of the type of speech protected by, the marketplace metaphor because it is rarely little more than an emotional appeal to hate and prejudice rather than a rational idea about race or gender.<sup>212</sup>

The voyeurism value *may*, like the metaphorical marketplace of ideas, protect speech that contains an idea that tests notions of the truth or that furthers our quest for truth, *but* it also protects speech that does *not* serve these ideals. For example, voyeuristic video taken via hidden cameras for the television news magazine *PrimeTime Live* furthers our understanding of the truth about abu-

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<sup>209</sup> Robert Post observes that Meiklejohn's "orientation toward the needs of the collectivity, rather than the individual, underlies one of Meiklejohn's most quoted aphorisms: 'What is essential is not that everyone shall speak, but that everything worth saying shall be said.'" Post, *supra* note 11, at 270.

<sup>210</sup> Enough individuals in the rest of the community, however, must want to view or watch the voyeuristic speech for it to survive in the economic marketplace, especially on the medium of television. The audience must be large enough—the ratings must be high enough—and the speech must be profitable enough for it to continue to be disseminated on television, otherwise it will be forced off the air.

However, the Internet, with its niche web sites that target individual interests, survives by allowing speech in which only a few individuals might be interested. As noted earlier, the Internet increasingly is becoming a voyeuristic medium. See *supra* note 17 and accompanying text.

<sup>211</sup> See SMOLLA, *supra* note 2, at 8 (observing that the ultimate benefit of the marketplace metaphor is not the discovery of the truth but the process of testing the truth—"the intellectual acid bath of adversarial contest").

<sup>212</sup> See *id.* at 7.

sive conditions in some board and care homes and may influence or shape public policies of laws relating to such homes.<sup>213</sup> On the other hand, the justification for protecting the gathering and dissemination of such speech may be based on an alternative rationale that has little or nothing to do with the outcome of changing public policy or law. The video can be protected simply because people enjoy watching it—because they enjoy the consummatory or aesthetic communication experience of looking at a world they would not see or visit were it not for the undercover camera work by ABC's journalists.

Likewise, the voyeuristic video for *COPS* may be protected under the marketplace rationale because the content of the message furthers our understanding of, and truths about, law enforcement and the criminal justice system. But that same video may be protected for the sole justification that people want to watch it for the pleasure of seeing others humiliated or disgraced. That we can watch and enjoy this from a distance, at home or in a bar, insulates us from fear of retaliation or interaction from those whose lives unravel on *COPS*. That is part of the pleasure of voyeurism—the lack of an obligation or commitment to do anything more than to watch and to enjoy.

The voyeurism value thus may protect some material that the marketplace of ideas will not guard. The content of the nude photographs of Tommy Lee and Pamela Anderson Lee *cannot* be said to represent a rational or thoughtful idea that furthers truth testing, much like some feminists would argue that pornography is not an idea subject to First Amendment protection.<sup>214</sup> But the pleasure of seeing tattoo-covered and silicone-enhanced celebrities in the buff is protected by the voyeurism value.

In terms of message content, the theory of self-realization is perhaps closest to the voyeurism value. Under the principle of self-realization, all messages should be protected—and the audience has an affirmative right to receive those messages—that in any way enhance an audience member's capacity to reach to his or her own intellectual potential or ability to achieve his or her own goals. As First Amendment theorist Thomas Emerson wrote, "the achievement of self-realization commences with development of the

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<sup>213</sup> BLACK ET AL., *supra* note 159, at 123.

<sup>214</sup> "In the centuries before pornography was made into an 'idea' worthy of First Amendment protection, men amused themselves and excused their sexual practices by observing that the penis is not an organ of thought." CATHARINE MACKINNON, *ONLY WORDS* 17 (1993).

mind."<sup>215</sup>

The content of the messages necessary for developing one's mind need not have anything to do with helping society discover the truth or facilitating the public in making voting decisions. Thus, the self-realization principle sweeps up and demands protection for a wider variety of messages than either the marketplace or democratic self-governance theories.

The self-realization principle, of course, protects more than just the *audience's right* to receive messages that may help it achieve self-fulfillment. It also protects the *speaker's right* to express herself.<sup>216</sup> The content of the speaker's message must be protected even if it serves no value extraneous to that individual, "even when no plausible case can be made that the search for truth will be advanced."<sup>217</sup>

In summary, then, the self-realization principle protects message content that serves the *private* interests of either the audience or the speaker that have nothing to do with the *public* interest. To this extent it mirrors the nature of the content protected by the voyeurism value—speech that serves the private interests of the audience in watching others'. But as noted earlier, the function of the message content in the voyeurism value need not serve the noble purpose of intellectual growth or mental development of the message source.<sup>218</sup> Rather, the function of the message content may be the pure hedonistic gratification and selfish pleasure of the audience.

#### IV. THE IMPLICATIONS AND RAMIFICATIONS OF THE VOYEURISM VALUE

It must be emphasized that the voyeurism value that underlies much of our desire to receive speech today does not deny the value or goals of other theories of free speech. As professor Erwin Chemerinsky observes in considering more traditional theories for protecting expression, free speech theories are not mutually exclusive.<sup>219</sup> Thus the voyeurism value may exist as yet another justification—a supplement or addition to traditional values—for protecting expression, another theory to be added to the laundry

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<sup>215</sup> EMERSON, *supra* note 192, at 4-5.

<sup>216</sup> "[F]reedom to speak without restraint provides the speaker with an inner satisfaction and realization of self-identity essential to individual fulfillment." SMOLLA, *supra* note 2, at 9.

<sup>217</sup> *Id.*

<sup>218</sup> See *supra* note 192 and accompanying text.

<sup>219</sup> See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 756 (1997).

list set forth in the Introduction to this article.<sup>220</sup> To stop there, however, would be to ignore both the positive and dangerous implications of adoption of the voyeurism as a foundation for protection of speech.

#### A. *Privacy at What Price*

The voyeurism value thrives on legal constructions and interpretations that are long in protecting the audience's right to receive speech but that give short shrift to protecting the privacy interests of the individuals who are the subjects of those messages. Our desire to watch, in brief, conflicts with our desire to keep private certain aspects of our lives and to control the dissemination of information about ourselves to others. A balance, in other words, must be struck between protecting our voyeuristic pleasures of watching others, especially unsuspecting others and others whose lives are falling apart, and guarding our own privacy interests so that we, as audience members, don't find ourselves as the subject matter of others' voyeuristic pleasures.

A point of reference from popular culture illustrates the principle about the need to control the flow of information about ourselves and the concomitant need to preserve a realm in which others are not watching. As noted earlier in the article, the film *The Truman Show* reeks of voyeurism; it portrays a man, who, unbeknownst to him, lives his entire life before hidden cameras that feed his daily activities to a mass television audience.<sup>221</sup> One reviewer called it the "ultimate example of an invasion of privacy."<sup>222</sup> The unsuspecting protagonist is monitored twenty-four hours a day, sacrificing all privacy for our voyeuristic viewing pleasures.

However, two aspects of *The Truman Show* resonate with the voyeurism value aside from the obvious questions regarding privacy invasions and the tension between voyeurism and privacy. First, the film portrays, albeit mockingly, our fascination and obsession with watching others and, in particular, the importance of watching not only for the individual, but, perhaps more importantly, for our society, our culture, and our nation. As Andrew Niccol, the person who wrote the screenplay for *The Truman Show*, astutely observes, "[t]elevision is our community now. It has taken on the role that the church once played in medieval times. It's the thread that holds us together."<sup>223</sup> Our individual obsessions with watching, in

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<sup>220</sup> *Supra* notes 3-8 and accompanying text.

<sup>221</sup> *See supra* note 16 and accompanying text.

<sup>222</sup> Wuntch, *supra* note 16.

<sup>223</sup> *Id.*

other words, coalesce to bond and to hold society together. This suggests the power of the voyeurism value goes beyond providing First Amendment protection for our individual desires to watch. It also protects the maintenance of society in time.

The watching aspect of the communication process, as Niccol suggests, is what bonds us today in an otherwise often anonymous and impersonal society. *Our desire to watch sustains a sense of community when we watch the same messages.* And, as Niccol points out, “[t]here is virtually no limit as to what will be shown on TV, it seems, and there is virtually no limit on what people will watch. If there were televised executions, people would watch. I used to think this was farfetched and tongue-in-cheek, but I’m not so sure now.”<sup>224</sup> It is the voyeurism value in First Amendment jurisprudence that may be called up to justify our individual *and* communal desires to watch. Watching not only satisfies our individual desires but promotes community.

The second aspect of the movie that needs unpacking is the protagonists’ name, Truman Burbank. Like the California city on which television shows are created by buck-raking media conglomerates, Burbank is an appropriate last name for a man whose life is conceived and lived on the airwaves. But the more important aspect, perhaps, is the name Truman. Why? It is only when we *believe* that we are in private, free from the glare of prying eyes, that we can be ourselves. In private, we can act without self-conscious circumspection while others’ voyeurism is sacrificed. It is only then that a person can be a “true man.” When we know we are being watched, we are merely actors. James Carrey’s character is the “true man,” an unsuspecting individual whose honesty makes us laugh; the other characters are merely actors and, we, in television land, merely voyeurs. *The Truman Show* thus provides “a cautionary tale of unchecked voyeurism.”<sup>225</sup>

The tension, then, is clear between individual and societal desires<sup>226</sup> to watch and individual needs for privacy that promote self-identity and allow individuals to flourish and to develop outside of others’ watchful eyes. Where the balance is struck will be determined by courts and legislative bodies who expand or contract existing laws or create new ones that either serve voyeurism or privacy.

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<sup>224</sup> *Id.*

<sup>225</sup> Christina Cheakalos et al., *Take Two*, PEOPLE, June 29, 1998, at 117.

<sup>226</sup> The desires to watch may be cloaked in terms of pleasurable individual gratification, mass communal bonding, or, more instrumentally, security and safety interests that are enhanced when we can watch over others’ behaviors.

B. *Communication Without Dialogue, Politics Without Participation*

A second concern with the voyeurism value, beyond the issue of privacy, is the distinct lack of dialogue and conversation in this model. As emphasized earlier in the article, the voyeur never interacts or communicates with the individual that is the focus of the message. Voyeurs need only watch; they don't interact.

For a democracy to thrive, of course, there must be dialogue and conversation so that all voices are heard. The voyeurism value, however, is content with promoting politics as spectacle—a politics in which we watch mediated images of candidates, without interaction with them or their ideas. It is a politics of observation, not a politics of participation. As noted previously, media coverage of politics today directly mirrors this politics-as-sports phenomenon.<sup>227</sup> The voyeurism value also lies behind the politics-as-sex stories of the Monica Lewinsky scandal.

At a time when political apathy is thriving among a new generation of young voters,<sup>228</sup> one must, then, hesitate to embrace the voyeurism value. It is a value that can only further erode political participation, replacing it with political observation. It is a value that can only reduce politics to a sensationalistic and salacious focus on the sex lives of our political candidates and office holders. It is critical, then, that the premises and principles of Alexander Meiklejohn's theory of democratic self-governance not be abandoned or replaced by the voyeurism value.

C. *The Wants Versus Needs Dichotomy*

The voyeurism value may be criticized for pandering to individual wants and desires to watch at the expense of communal and societal needs to learn and to be informed. Media organizations will serve up whatever images it is that we want to watch. The voyeurism value protects this transaction by protecting the media's ability to gather and disseminate these images, cloaked as news or wrapped up in the name of the public interest.

But, as mentioned in Section A, the individual-level desires to see images *do* serve an important community-level need—sustaining a sense of shared identity and conversation around images. If we all watch the same pictures, we share a bond that may promote a sense of community that might otherwise be lacking in anonymous urban settings in which apartment dwellers often have little or no contact with their next door neighbors.

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<sup>227</sup> See *supra* notes 175-87 and accompanying text.

<sup>228</sup> See *supra* notes 50-52 and accompanying text.

In addition, we *can* learn from what we like to watch; the pleasure of watching is not mutually exclusive from the conveyance of information and understanding. The wants versus needs dichotomy, some might say, is a false dichotomy created by critical media scholars, and it is thus too flimsy a rationale for rejecting outright the voyeurism value as a part of First Amendment jurisprudence. As news and entertainment blur into infotainment, the merit of the wants/needs dyad must be called into question.

## V. CONCLUSION

*On television, the private sphere of intimate relations, personal problems, illicit and illegal acts, embarrassing behavior, and confidential activities remain magically open to the viewer. Whereas in real life a defined barrier (and a few laws) separate private and public experiences, on television the barrier is breached by the omnipresence of the camera.*<sup>229</sup>

In many television shows—some fictitious, a bevy today based on the news or real life—and on the Internet, public exposure to private feelings and experiences is the ruling dynamic.<sup>230</sup> As media scholar Robert Abelman writes, “[i]n the world of television everything is everyone’s business and the viewers are curious, invisible, silent, third-party voyeurs peeking into other people’s lives.”<sup>231</sup>

The lead quote for the concluding part of this article, then, is largely on point but, at the same time, it is slightly off base. Today, the barrier in real life between public and private experiences is eroding; it is *not* well defined. The few laws that once helped to separate the public and private spheres are tested in courts, under attack. The media push the laws of privacy, trespass, and fraud to bring us the real-life videotape, the live-to-tape talk shows, the hidden-camera journalism that we crave. The First Amendment, the media argue, must protect such actions, must provide the push. But why?

This article has argued that the voyeurism value emerges today as a logical justification for protecting speech—in particular, the gathering and dissemination of images—in our mediated society as the twentieth century draws to a close. A convergence of technological, economical, legal, and social factors has pushed our almost primordial urges to look at and to watch the strange, different, and private to the forefront of First Amendment jurisprudence as the

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<sup>229</sup> ROBERT ABELMAN, REACHING A CRITICAL MASS: A CRITICAL ANALYSIS OF ENTERTAINMENT TELEVISION 97 (1998) (emphasis added).

<sup>230</sup> *See id.*

<sup>231</sup> *Id.* at 98.

underlying premise for eroding standards for privacy and extending newsgathering and news reporting privileges.

The candid video format, once relegated to contrived stunt shows like *Candid Camera*, today has emerged with a force that pushes and tests the First Amendment's protection of speech and press. This format "undoubtedly offers various forms of voyeuristic pleasure—both the securities and insecurities—associated with a kind of televisual equivalent to 'eavesdropping' on events."<sup>232</sup> The question the legal system now faces as the next millennium approaches is how much protection our voyeuristic pleasures will receive and at what expense to individuals and to society at large.

We have, as Meg Greenfield of *Newsweek* observes, begun to turn "our national life into performance art."<sup>233</sup> Whether the voyeurism value that underlies this national obsession will provide the audience with the legal right to gaze at either the unsuspecting performers or the willing exhibitionists is, ultimately, what lies at stake in both First Amendment jurisprudence and society.

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<sup>232</sup> Tim O'Sullivan, *Nostalgia, Revelation and Intimacy: Tendencies in the Flow of Modern Popular Television*, in *THE TELEVISION STUDIES BOOK* 198, 205 (Christine Geraghty & David Lusted eds., 1998).

<sup>233</sup> Meg Greenfield, *Life Under the Lens*, *NEWSWEEK*, Sept. 22, 1997, at 94.