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“Reality TV and the Entrapment of Predators”

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[289] I. Introduction: “To Catch a Predator”

Dateline NBC’s “To Catch a Predator,” airing from 2004-2008, was a reality TV program in which NBC staff worked with police and a watchdog group of private citizens called ‘Perverted Justice’ (PJ) in order to televise arrests of men who were lured by the prospect of having sex with a minor. A typical episode works like this: a member of PJ, collaborating with NBC, poses as a 14 year old girl in an online chat room and engages in a lurid exchange with a 40-year old man, eventually inviting him to Dateline NBC’s ‘undercover house’, which is wired with hidden cameras. The man shows up at the house and after he briefly talks with a 19 year old actress posing as the 14 year old girl, Dateline Correspondent Chris Hansen enters and asks his squirming target a series of questions: ‘What are you doing here?’ ‘Who did you come to see?’ ‘How old is she?’ ‘How old are you?’ ‘Why did you bring condoms and lotion?’ ‘Do you think it’s appropriate that you’re here?’ If the man reveals he has his own children, Hansen will ask, “How would you feel if it was your 14 year old daughter home alone?” After this exchange, people with hand-held cameras enter, at which point Hansen reveals that he is a correspondent for Dateline. The sting target tries to exit. The police, waiting outside in ambush, rush at him shouting, guns pointed, and push him to the ground and cuff him. Viewers then see video clips of an ensuing police interrogation of the suspect, who is charged with attempting to engage in sex with a minor.

“To Catch a Predator” continually found ways to maintain audience interest.¹ At first there was no police presence. In Series I, many of the men just walked out, their only punishment being Hansen’s chastisement (“Clearly this man knows he’s done [290] something wrong”), though PJ did turn online chat dialog over to the police, who in some cases pursued misdemeanor charges for engaging in sexual dialogue online with someone thought to be underage. The third series began by Hansen observing that NBC received numerous inquiries from audience members who wondered why these men were able to walk away. Apparently in response to viewer demand, the sting targets were now arrested by the police on film as they attempted to leave the undercover house. With police involved, prosecutors could pursue more serious charges because showing up at the house with the intent to have sex with someone believed to be a minor is a felony.

Series IV shifted to a small town in Ohio, to demonstrate that predators lurk even in rural America. For the first time we saw video of the courtroom arraignments, and arrestees in striped

¹ NBC broadcast 12 sting operations, which I cite as: I (Long Island, NY, aired Nov. 2004), II (Herndon, Virg., Nov. 2005), III (Riverside, CA, Feb. 2006), IV (Ohio, April/May 2006), V (Ft. Myers, FL, May 2006), VI (Fortson, GA, Sept 2006), VII (Petaluma, CA, Sept-Oct, 2006), VIII (Long Beach, CA, Jan-Feb 2007), IX (Murphy, TX, Feb. 2007), X (Flagler Beach, FL, Feb-March 2007), XI (Ocean County, NJ, July 2007), XII (Bowling Green, KY, Jan. 2008).

jail suits. For series V, in Ft. Myers, Florida, police now tackled the suspects violently when they left the sting house; Hansen explained that in Florida the police needed to be proactive because it is legal to have a concealed weapon. Police violence escalated still more in Series VIII, in which a taser is used on one man who “didn’t respond fast enough.” More likely the arrests on “To Catch a Predator” are high intensity not because the suspect is potentially violent or likely to evade police, but because the cameras are rolling, and shouting and gun-wielding police add to the humiliation and make for good ratings. As the show progresses, the decoys get younger. In series VIII, one “girl” says she is only 11, though a study of internet sex-crimes revealed that no reported victim was under 12.² Another innovation, begun in series VII, is that the decoy now talks in person with the sting target before Hansen appears. In the earlier shows, the decoy would typically shout from another room as the target entered the house, and before they could meet, Hansen would arrive on scene. NBC played on the increased tension we feel in observing the suspect and decoy together especially in series XI, where the man and the decoy would be alone on a beach with Hansen nowhere in sight--though he assured us that he and police were nearby.

Crime-based reality TV series tend to promote a law and order ideology.³ Their message is that bad people permeate society and the police are catching them. “To Catch a Predator” in particular portrays a society teeming with child predators, many of whom are people we would never suspect.⁴ Like other crime-related reality TV programs, “To Catch a Predator” arguably overstates the crime threat.⁵ Internet-initiated statutory rape offenses are relatively infrequent, offenders are rarely violent, and one [291] study reported that more men were arrested for soliciting online sex in undercover sting operations than for soliciting actual youths.⁶ Though his goal is to convince us that children face a grave threat from strangers prowling online, Hansen, in his book about the show, cannot conceal evidence to the contrary. One person he quotes concedes that “Your child has an almost zero percent chance of being harmed by anyone on the Internet.” Most molestation of children, in fact, is committed by family members.⁷

Feeding on a fear that it helped stir, the show’s strangely captivating character made it among Dateline NBC’s highest rated programs.⁸ One reason the show was popular was its voyeuristic appeal: the audience can witness the hidden depravities of outwardly respectable people: teachers, doctors, a district attorney, a rabbi. Viewers get to see them caught red-handed, and then partake in their punishment by bearing witness to their shame. More perversely (and

² See Janis Wolak, et.al., “Online ‘Predators’ and their Victims,” *American Psychologist* 63(2) (2008): 115.

³ Cf. Aaron Doyle, “Cops: Television Policing as Policing Reality,” in Mark Fishman and Gray Cavender, *Entertaining Crime: Television Reality Programs* (New York: Aldine de Gruyter, 1998).

⁴ Hansen labels one section of his book “An Epidemic?” (7); and emphasizes how NBC was “besieged” by predators showing up at its sting house (23). Chris Hansen, *To Catch a Predator* (NY: Penguin, 2008).

⁵ Barry Blasser, *The Culture of Fear* (New York: Basic Books, 1999) 32, 35, 39-40; Vanessa Grigoriados, “The New American Witch Hunt,” *Rolling Stone* 1032 (Aug. 9, 2007):64-71; Douglas McCollam, “The Shame Game,” *Columbia Journalism Review* (Jan/Feb 2007):28-33; Steven Kohm, “Naming, Shaming, and Criminal Justice: Mass-Mediated Humiliation as Entertainment and Punishment,” *Crime, Media, Culture* 5(2)(2009):188-205. Some studies suggest that those exposed to reality-based police programs overestimate the prevalence of crime—Mary Beth Oliver and G. Blake Armstrong, “The Color of Crime,” in Fishman and Cavender, eds., 30.

⁶ Wolak, et.al., “Online ‘Predators’ and their Victims,” 114-15, 119.

⁷ Hansen, *To Catch a Predator*, 119; cf. 6, 193-4.

⁸ Brian Stelter, “‘To Catch a Predator’ is Falling Prey to Advertisers’ Sensibilities,” *New York Times*, Aug. 27, 2007.

hypocritically for a show taking the moral high ground by shaming men for succumbing to their sexual fantasies), “To Catch a Predator” dwells on racy, titillating details of their sexual desires and deviancies, appealing to the prurient interests of the viewing audience. Hansen reveals to his national audience that a 28 year old man chatted online with a decoy about sex acts with a dog (II), relates to us another’s online boast about the size of his genitals (VII), and tells us that one man likes to suck on toes (VIII). In videotapes of police interrogations, viewers learn that one arrestee, a married man, has had sex with other men (III), that another uses Viagra (III), and, another, a penis pump (VII). We see police ask an arrestee, “Do you wear condoms when you have sex with your wife?”(IV), and “Do you masturbate while you (chat with 13 year olds)?”(IV)

The entertainment value of the show comes at a price. One sting target, Texas Assistant District Attorney Louis Conradt, shot himself as a SWAT team entered his home. He had declined his chat room decoy’s invitation to go to an undercover house, so police came to him, at Hansen’s urging, and he could not live with the humiliation of an on-air exposure of his depravities. Conradt’s sister and his estate brought a suit against NBC seeking \$100 million in damages. After a federal district court judge ruled that a reasonable jury could find that NBC acted outrageously, created a substantial risk of suicide, and that there was no legitimate law enforcement need for a heavily armed SWAT team to enter Conradt’s home, the case was settled under undisclosed terms, and the show ended shortly thereafter.⁹ But many of its episodes remain viewable online; and the premise of baiting criminals has been copied by other shows such as Tru-TV’s “Bait-Car, in which people are enticed to steal an unlocked car with keys in the ignition, while cameras hidden in the car allow the crime to be publicly aired.¹⁰

[292]“To Catch a Predator” differs from most other reality-TV programs, where the program’s subjects want to be on the air. It differs even from most reality-TV crime shows. It is not a ride-along show in which cameras merely accompany the police, as in “COPS”; nor does it reenact past crimes, as does “America’s Most Wanted.” Nor, like “COPS,” does it digitize the faces of those appearing on camera who decline to sign a release form.¹¹ It is helpful to compare “To Catch a Predator” with A&E’s “Investigative Report: Cybersex Cops”(1996). The A&E show used surveillance camera footage and cameras following law enforcement agents as they investigate a crime. The faces of suspects whose cases are still pending are blurred. Where a child predator’s face was shown undistorted, the man had been convicted and his face had already appeared in the newspapers following his arrest. “To Catch a Predator,” in contrast, does not show past crimes, or crimes that the police happen upon by chance or are dispatched to. Rather, it entices people to commit a crime which it then captures on air, and it has no interest in blurring the faces of the predators it shows. Hansen makes this clear when in his book he relates a story about the episode that ensnared a rabbi. The rabbi was upset and berated the producer, writes Hansen, “as if we were the cause of all his trouble.” NBC offered to let the rabbi tell his side of the story and he said he’d agree only if NBC promised to obscure his face, not mention he

⁹ Conradt v NBC Universal, 536 F. Supp. 2d 380 (2008); “NBC Resolves Lawsuit Over ‘To Catch a Predator’ Suicide,” *Los Angeles Times*, June 24, 2008, accessed Mar. 26, 2010, <http://latimesblogs.latimes.com/showtracker/2008/06/nbc-resolves-la.html>.

¹⁰ See <http://www.trutv.com/video/bait-car/index.html> (accessed June 2, 2011).

¹¹ Doyle, Cops: Television Policing as Policing Reality," 96.

is a rabbi, and not use the video of him being confronted by Hansen. Hansen replies, “These were obviously conditions we couldn’t comply with.”¹² “Could not” here means “were unwilling to” because obscuring a predator’s face would detract from what makes the show such compelling TV—the public shaming of an outwardly respectable but deviant person.

“To Catch a Predator” engenders conflicting responses: Did NBC act as a news provider and fulfill a public service by informing the public about a real danger and deterring potential predators? Or did it take advantage of human weakness by entrapping and then inappropriately shaming and humiliating men before they could be properly tried and convicted in a court of law, all to entertain and garner ratings? Because the show captures people widely regarded as among the most abhorrent and threatening, it might be seen as a force for justice.¹³ I shall argue, rather, that the ‘justice’ it metes out is perverse. My argument has three parts: Dateline-NBC usurps the authority of the state as the exclusive instrument of punishment (Section II); it inappropriately bears the First Amendment shield of the press to publicize private facts, disguising entertainment as news, and in doing so it hypocritically appeals to the very prurient interests it seeks to condemn by dwelling repeatedly on men’s sexual fantasies and desires (Section III); and it uses promiscuous decoys to evoke these fantasies and desires, luring and entrapping people rather than meting out justice (Section IV). [293]

II. Public Shaming and Punishment

Perhaps the most striking feature of “To Catch a Predator” is how it shames and humiliates those it lures.¹⁴ When Hansen finally reveals that he is a reporter who is interviewing the sting target for a national television broadcast, the revelation can be traumatic. One man was put into diabetic shock and carted to a hospital (V); another had an asthma attack (V); still another man became ill and collapsed (XI). One man said he wanted to kill himself, and he tried to use a pen as a shiv in a half-hearted attempt (IV). Conrad did kill himself (IX). Lest we feel remorse for sting targets whose unbearable pain is exposed, Hansen reminds us of what they were planning to do. For example, one time he tells us “this is the same man who chatted online for more than 3 weeks” to a girl he thought was 14 (VI). Much of Hansen’s dialogue with his sting targets is intended not to provide newsworthy information about the dangers of Internet predators, but to shame them. Hansen asks, “What made [having sex with a 13 year old girl] tempting for you?(VI); “You ask [online] if she can do a ‘deep throat’. Explain that to me” (VI). Hansen succeeded at shaming one of his sting targets when the target pleads, “Can I just go to jail, sir? You guys win.” But Hansen was not satisfied and continued reading lewd chatroom dialog for his national audience (VII). Hansen humiliates his targets, sometimes by making fun of them for reasons other than their moral failings. Hansen noted how it took one sting target

¹² Hansen, *To Catch a Predator*, 27.

¹³ See Bridget Bogges, “Attempted Enticement of a Minor: No Place for Pedophiles to Hide Under 18 U.S.C. Sec. 2422(B),” 72 *Mo. L. Rev.* 909 (2007) and Hansen, *To Catch a Predator*.

¹⁴ Cf. Steven Kohm, “Naming, Shaming, and Criminal Justice: Mass-Mediated Humiliation as Entertainment and Punishment,” *Crime, Media, Culture* 5(2) (2009), 188-205. Kohm characterizes “To Catch a Predator” broadcasts as shaming punishment. See also Robert Lissit, “Gotcha,” *American Journalism Review* 17(2) (1995), 16-22, quoting Neville Johnson concerning an ABC Prime Time Live show: “Imagine being scourged and whipped in front of 24 million people. You’re tried, convicted, sentenced and buried at sea, with no right of appeal.”

“extra time to get on a stool because he’s five feet tall”(IV). Another sting target said “I don’t want to be on the news, dawg”; Hansen replied, “Well it’s a little late for that, dawg!”(V) In another segment, a man told Hansen about how he once met a woman who turned out to be a transvestite. Hansen interjects, “[so she] had a little Adam’s apple thing going on? How’d that work out for ya?”(VIII).

This public shaming and humiliation is particularly troubling because it is inflicted by someone who falsely passes himself off as having the authority to judge and punish. Hansen notes that the sting targets “think I’m a cop”(IV); “he has no idea if I’m the father or the police. He has no idea he’s on film”(V). Hansen takes advantage of this deception by acting as if he has authority. While sometimes Hansen tells the sting target he is free to leave at any time (though he says this with a smirk, knowing that police lie in wait outside), often he takes an authoritative tone, saying such things as “I’m not finished asking questions yet” (V). He frequently barks orders we would expect to hear from the police but not a journalist: “Keep your hands out of your pocket for me” (III, VII), “I need you to sit down” (III), or “I want to see what’s in your pocket”(III). Hansen even revels in his position of pseudo-authority, boasting on one occasion that he made one sting target so nervous the man sweated and had to take off his jacket (V).

[294]At times Hansen acts like a prosecutor, confronting his suspect with evidence proving his guilt. Hansen’s stock charge is that sting targets came to the home to have sex with someone they thought was underage, and he frequently produces transcripts of the online chat to prove they were told the decoy was a child. For example, one man said “I was here to look at real estate. I thought she was 18.” Hansen replies: “come clean,” and then reads from the transcript: “she tells you she was 12. So 18 was a lie”(II). Some of these men try to defend themselves by saying they didn’t believe the decoy was really that age. Most of the men themselves lied about their own age, and several claimed that they come to chat rooms to role-play. They might assume that no one is being entirely truthful. But Hansen ignores this and on at least one occasion browbeats his interrogee:

Sting target: “She said she was 13, but...”

Hansen interrupts him: “She said she was 13. And how old are you?”(VII)¹⁵

In addition to police officer and prosecutor, Hansen sometimes plays the judge who will mete out retribution. On one occasion Hansen says “He’s not going to get off so easy. It’s time to tell him who I am” (V). On another, Hansen, after reading a chat transcript, asks a man, incredulously, “You were gonna make a 14 year old perform a sex act on a cat?” The man laughs, and Hansen responds like a disciplining authority, “So it’s funny?”(V)

Hansen’s deception works: the sting targets believe he is in authority. Some targets invite Hansen to search them to prove they didn’t bring condoms (I). It is striking how consistently

¹⁵ On another occasion, a sting target tries to explain that the online exchanges were fantasy and Hansen retreats from the moral high ground and says only, “but it is illegal”(IV).

they deferentially call him “Sir.” Many apologize to him. One man says “Thank you for kicking me in the pants and setting me straight, Chris...”(V)

The men snared on “To Catch a Predator,” while publicly shamed and humiliated, are not always punished legally. Fewer than half of 256 arrestees were convicted; most had no prior arrests, or even traffic citations, though they are now registered as sex offenders.¹⁶ In its series in Murphy, Texas which included the Conratt incident, 23 men were arrested, but no indictments were pursued.¹⁷ Many “To Catch a Predator” targets who were convicted for attempted lewd or lascivious behavior with a child received as little as probation or a few months in jail, a far cry from the sentence of 12 years in prison that a man recently received for meeting an actual 14-year-old girl for sex.¹⁸

But while “To Catch a Predator” does not (because it cannot) punish legally, it judges its targets and *in effect* punishes them by publicly shaming them and airing their sexual fantasies and behavior. “To Catch a Predator” aims to fulfill the primary [295] purposes of punishment by deterring potential predators--although it did not deter a few sting targets who said they had seen the show before; and by meting out retributive justice.¹⁹ The punishment it metes out could mean loss of one’s career, friends and family, and be far more devastating than a prison term.

Though the men “To Catch a Predator” exposes are deviant and deserve blame, and society needs to deter people from preying on children, there are good reasons to object to NBC’s handling of its sting targets. Perhaps the most compelling is that only the state and no one else may legitimately punish lawbreakers. Punishment is hard treatment imposed by one with the authority to punish.²⁰ Only the state can administer legal punishment, just as only a child’s parents can mete out parental punishment and only a teacher or school administrator can punish students. In all of these cases, the punisher is guided by formal and informal rules.²¹ I can’t punish someone else’s children, even if I think they deserve it, because I lack authority over them.²² Taking justice into your own hands is revenge, not punishment.²³

¹⁶ Brian Stelter, “‘To Catch a Predator’ is Falling Prey to Advertisers’ Sensibilities,” *New York Times*, Aug. 27, 2007.

¹⁷ Luke Dittrich, “Tonight on Dateline this man will die,” *Esquire* 148(3) (2007), 233-44.

¹⁸ *Nguyen v. State*, 676 S.E. 2d 246 (2009). According to MSNBC’s website, sentencing of 16 Ohio “To Catch a Predator” sting targets ranged from 30 days to 11 months; there were a few sentences of 3 years in Riverside, CA; the state’s standard offer in Long Beach, CA was 18 months and many defendants received probation and no jail time, though they were required to register as sex offenders. Georgia was tougher, with sentences ranging from 2 to 6 years; and a rabbi received a federal sentence of 6 ½ years; see Chris Hansen, Reflections on ‘To Catch a Predator,’” *Dateline NBC*, Mar. 13, 2007, accessed May 11, 2010, http://www.msnbc.msn.com/id/17601568/ns/dateline_nbc/?page=4.

¹⁹ See Mark Tunick, *Punishment: Theory and Practice* (Berkeley, CA: University of California Press, 1992).

²⁰ Joel Feinberg, “Expressive Function of Punishment,” *Monist* 49(3) (1965), 397-408.

²¹ John Rawls, “Two Concepts of Rules,” *Philosophical Review* 64(1) (1955):10; H.L.A. Hart, *Punishment and Responsibility* (New York: Oxford University Press, 1968).

²² Cf. John Locke, *Second Treatise of Government*, ed. C.B. Macpherson (Indianapolis: Hackett, 1980) §74.

²³ Leo Zaibert disagrees and speaks of non-state or private punishment, see Leo Zaibert, *Punishment and Retribution* (Aldershot, UK: Ashgate, 2006) 17-18, 23-4, 29-42. On his view, I can punish a friend who doesn’t keep a secret, or an acquaintance who cheats at a game, and presumably a stranger’s child who misbehaves: so long as I find

One reason we reserve to the state the power to punish is that its agents must provide due process. They must ensure that the accused have the opportunity to explain and defend themselves at greater length than Chris Hansen affords in his brief interviews with his sting targets, the editing of which is under NBC's control.²⁴ NBC metaphorically prosecutes, judges and punishes its targets—accusing and making them defend themselves on air is punishment itself -- before there is a trial with an impartial judge. Apart from instances of outrageous conduct intended to inflict emotional distress, it is normally not illegal for private parties to humiliate others, though in some circumstances doing so can be immoral. NBC exposes its sting targets to a peculiar form of hard treatment in the form of public humiliation, using media resources that far exceed what most private parties could muster. Even if NBC's actions did not rise to the level of tortious conduct, it acts irresponsibly by abusing the power accorded to it as a member of the free press. NBC uses its credentials as news provider, and collaborates with the police, in passing itself off as an instrument of public justice when in fact it is but a force of summary vengeance. Were the state to proceed to punish the predators NBC exposes, it is not clear that it should humiliate and shame them even while exposing them as criminals.²⁵

[296] The rush to judgment that we see in "To Catch a Predator" is endemic to reality TV crime shows that present only pieces of information about a person and the circumstances surrounding their arrest. One important reason why we protect a person's privacy is to avoid formation of judgments that are based on snippets of information taken out of context that lead people falsely to assess a person's character.²⁶ Anderson notes that shows like "COPS" relieve us "of the burden of knowing what has come before, or what will come after"; "there are no second- or third-person perspectives offered to provide a context for the action at hand."²⁷ In the case of "To Catch a Predator," we do not see unexpurgated transcripts of the online chat exchanges that lead up to the arrests.

This objection may ring hollow to some since the people captured by "To Catch a Predator" have demonstrated their guilt—they are caught red-handed; and the degree to which they deserve blame may seem magnified by the seriousness of their offense. One problem with this response is that private punishment is inappropriate regardless of the seriousness of the offense or guilt of the offender. The job of catching predators is not NBC's, but the state's. The state has a monopoly on the power to punish criminals and must adhere to rules in place to protect all citizens against potential abuses of this power. All of us are at risk if vigilantes, unconstrained by these rules, usurp this power. While NBC may claim it is no vigilante because

someone blameworthy, I can punish them. Whereas others, including myself, regard the above examples as 'metaphorical' as distinct from legitimate punishment, Zaibert rejects that distinction. For Zaibert, retributive punishment is warranted because it is imposed upon those "we find blameworthy." The problem with his view is that not just anyone gets to decide who is blameworthy.

²⁴ Cf. Grigoriadas.

²⁵ See Annabelle Lever, "Mill and the Secret Ballot," *Utilitas* 19(3) (2007): 371 (arguing that "public shame and humiliation threaten our ability to see and treat each other as equals").

²⁶ See Jeffrey Rosen, *The Unwanted Gaze* (New York: Random House, 2000).

²⁷ Robin Anderson, "'Reality' TV and Criminal Injustice," *The Humanist* (Sept/Oct 1994): 8; cf. Gray Cavender, "In Search of Community on Reality TV," in Su Holmes and Deborah Jermyn, eds. *Understanding Reality Television* (London: Routledge, 2004) 167.

it collaborates with the police, it metes out effective punishment (shaming) before the police enter the scene, by rolling the cameras as a predator approaches. The police are like mere actors in NBC's show.

III. Publication of private facts

Even if police were running the show, broadcasting to a national audience the events and dialog leading up to and following the sting targets' arrests is inappropriate. The magnitude of this publication is vast—the show reaches millions, and because it is archived on the web, it will likely continue to be in the public view for generations. “To Catch a Predator” metes out such harsh metaphorical punishment because it so grossly violates privacy by widely publicizing private facts.

NBC exposes to a national audience the inner struggles and demons within people that they most want to keep hidden. The sting targets do not want to broadcast their behavior. When the cameras finally appear, one pleads: “Could you please turn the camera off?”²⁸ Catching them when they are in a state of shock and most vulnerable, Hansen gets many of these men to reveal their deepest inner thoughts, often unaware they are sharing these thoughts with a national viewing audience. Some men, for example, reveal how lonely they are (IV, XI). Hansen asks one apparently religious [297] person to justify himself: “I want you to square [your asking a young girl if she can do ‘deep throat’] with what’s on your Myspace website where you talk about how ‘Jesus rocks!’” Hansen promises we’ll learn more about this person’s ‘inner struggle’ later on, a promise he keeps when we hear the man say he is still a virgin confronting the conflict between his spirituality and his desire for sex with teenage girls (VI). In some cases NBC shines a spotlight on people with obvious psychological problems. The second series focuses on one man who showed up at the house naked and who attempted to meet another decoy the very next day. Hansen asks him on air: “Why do you do it?”; he responds, “I need help—that’s why I’m seeing a psychologist.” As if to confirm the man’s mental problems, NBC shows a close up of his untied shoe laces. We might wonder what business NBC has in exposing to the world the troubled mental state of people who are not public figures, just as we can wonder what business NBC has in punishing individuals.

NBC might defend itself by saying it is just bearing witness to behavior that is of legitimate public interest and newsworthy. Hansen has defended “To Catch a Predator” by saying that because Dateline NBC is a “news broadcast” and part of the news division, NBC may legally film people and use their names on TV without their consent.²⁹ These people have already committed a crime by talking about sex online to someone they believe is a minor, illegal in most every state,³⁰ and their conduct is “not only illegal, it is outrageous.”³¹ Hansen and NBC might argue that the public has a legitimate interest in knowing about outrageous or criminal

²⁸ Hansen replied: “I can’t do that”(VII).

²⁹ Hansen, *To Catch a Predator*, 12.

³⁰ See, for example, Fla. Stat. Ann. §847.0135 (2009): “Any person who knowingly uses a computer online service...to seduce, solicit, lure [a person] believed by the person to be a child...to commit any illegal act” commits a felony of the third degree, punishable by up to 5 years in prison.

³¹ Hansen, *To Catch a Predator*, 4-5.

conduct, that the predators it captures on video cannot reasonably expect privacy in such activities, and that NBC, as part of the free press protected by the First Amendment, has a right, perhaps even a duty, to expose their dark secrets to the world. Does this defense succeed?

NBC could rightly broadcast the arrest of a public figure, or of someone accused of a notorious crime that has captured the public's attention and concern, such as gunning down a member of Congress. Showing such an arrest may put the public at ease. Public figures have reduced expectations of privacy, as do people who become newsworthy by thrusting themselves into the public eye.³² But the people caught on "To Catch a Predator" are neither public figures nor accused of a notorious crime.

Today, however, the expectation of privacy even for non-public figures may be less than it once was, given the wide use of digital cameras to upload photos or video to websites such as Facebook and YouTube. Merely by attending a public event one may forfeit an expectation of privacy against being broadcast, perhaps to the surprise of the overweight man who attends a major league baseball game and, in one of the close-ups of the crowd, is shown on TV eating a salad while the broadcasters comment with a chuckle that "salad won't be enough for this guy."³³ Courts have allowed such embarrassing broadcasts. CBS was permitted to broadcast a video clip of a man and woman holding hands in public, over their vehement protests, each being in relations with [298] other people; the court noted that the plaintiff could not refute the reality captured.³⁴ Even if you are indoors, courts have held, if you are in a public place where you cannot reasonably expect privacy and are engaged in a newsworthy activity, photos or video of you may be published or broadcast, with the proviso that you may have a cause of action for appropriation of your name or likeness if the publication is for commercial gain.³⁵ One might argue in NBC's defense that with the exception of Conradt, who was in his own home, its sting targets are not filmed in a place where they can reasonably expect privacy; and that their arrest is a public fact which one cannot keep private, any crime being newsworthy and of legitimate public interest.

We know from their shock at discovering they are on video that the men lured by "To Catch a Predator" did not expect or want to be on television. They expected privacy. They were not in a public place such as a stadium, gym, or bar. Conradt's suicide, like the suicide of Tyler Clementi, the college student whose roommate posted on the internet a video he secretly took of Tyler kissing another student in their dormitory room, illustrate just how devastating an unwanted intrusion upon privacy can be. In the coming years, the law will need to adapt to unprecedented technological advances that permit people's private affairs to be widely broadcast.³⁶ As it does develop, a strong case can be made that society should not regard it as

³² Sipple v. Chronicle Pub. Co., 201 Cal. Rptr. 665 (1984); Gertz v Robert Welch, 418 U.S. 323 (1974).

³³ Broadcast of Florida Marlins homegame on Fox Sports Florida in 2009 (date unknown).

³⁴ DeGregorio v. CBS, 473 N.Y.S. 2d 922, 926 (N.Y. Sup. Ct. 1984); cf. Sweenek v. Pathe News, 16 F. Supp 746, 747-8 (E.D. N.Y. 1936) (permitting broadcast of women using a new gym apparatus to lose weight).

³⁵ Daniel Solove and Paul Schwartz, *Privacy and Media* (New York: Aspen, 2008): 206-7.

³⁶ Don Terry, "Eavesdropping Laws Mean that Turning on an Audio Recorder Could Send You to Prison," *New York Times*, Jan. 22, 2011 ("Our society is going through a technological transformation...[T]ens of millions of

legitimate to broadcast surreptitiously-recorded videos that deeply intrude upon one's privacy, whether or not the cameras "catch a predator" in the act. The interest in fighting crime can be served by keeping such video evidence *in camera* and not broadcasting it to the world.

While it is true that crimes are newsworthy and arrests are often publicized,³⁷ suspects of non-notorious crimes who have yet to be convicted still retain some reasonable expectations of privacy. At least one court has hinted that broadcasting the arrest of such people may not be appropriate.³⁸ But "To Catch a Predator" does far more than merely publish a photo or broadcast a video of a person being brought to the stationhouse for booking. It details the moral failings of people who are not public figures, using deception to get them to give an account of themselves when they are most vulnerable. It then broadcasts this to the world without the individuals' consent. Even if their arrest were a public fact, their inner struggles are not.

Under the protection of the First Amendment, NBC may broadcast what is newsworthy, or of legitimate public concern. Some courts have defined what is newsworthy quite broadly to include any subject of public interest.³⁹ Harper's Magazine was permitted to publish a photo of a couple posing in Los Angeles' Farmer's Market for a story [299] about everyday people in love, as the publication served "the function of entertainment as a matter of legitimate interest."⁴⁰ But some courts have set limits to what counts as news. Publicizing private facts about someone who is not a public figure can be a cause of legal action if they are published merely to satisfy the public's curiosity rather than to fulfill a legitimate public interest, or if the publication amounts to morbid and sensational prying into private lives for its own sake.⁴¹ For example, privacy rights may be violated by the broadcast of a tape of a victim's sexual assault if the broadcast serves only sensational interests and is inessential to the news that a rape took place.⁴² One court held that publishing the details of someone's private life, such as who they date or other gossip about their love life, even if true, violates privacy rights insofar as a person's romantic life "is not a

Americans carry around a [d]evice in their pocket that has an audio-video capacity. Ten years ago, Americans weren't walking around with all these devices" (quoting lawyer Adam Schwartz)).

³⁷ Anyone arrested in Palm Beach County, Florida, for example, might have their mug shot appear online even though they have not yet been convicted, *see* The Palm Beach Post News (Florida), <http://www.palmbeachpost.com/news/crime/>, accessed May 11, 2010. *Cf.* Penwell v. Taft Broadcasting, 469 N.E. 2d 1025 (1984) (permitting multiple broadcasts of a false arrest in a public bar).

³⁸ *Cf.* Lauro v. Charles, 219 F. 3d 202, 213 (2002) (acknowledging while refusing to address the issue of whether a television broadcast of an arrest is appropriate).

³⁹ Messenger v. Gruner + Yahr Printing and Pub., 208 F. 3d 122 (2000).

⁴⁰ Gill v. Hearst Publishing Co., 253 P. 2d 441, 444 (Cal. 1953). *Cf.* Meetze v Associated Press, 95 S.E. 2d 606 (S.C. 1956) (that a 12 year old girl gave birth would "naturally excite public interest" and so the identity of the woman and her 20 year old husband could be published).

⁴¹ See the cases discussed in Amy Gajda, "Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press," 97 *Cal. L. Rev.* 1066, 1081-6, 1104 (2009).

⁴² Doe v Luster, Not Reported in Cal.Rptr.3d, 2007 WL 2120855 (Cal. App. 2 Dist. 2007). *Compare with* Anderson v. Blake, Not Reported in F.Supp.2d, 2006 WL 314447 (W.D. Okla. 2006).

matter of public concern.”⁴³ Some courts have set limits to the publication even of public facts if they serve little purpose apart from satisfying the public’s curiosity.⁴⁴

Does “To Catch a Predator” serve a legitimate public interest as a provider of news, or does it merely satisfy the public’s prurient curiosity and desire for entertainment?

Several Reality TV crime programs present themselves as news providers by using interviewers who describe themselves as correspondents. That status has been challenged by those who characterize these programs as infotainment rather than news, and point to the shows’ use of subjective camera angles or tension-heightening music that a genuine news broadcast would not employ.⁴⁵ “To Catch a Predator” notably does not use such devices. It does use hidden cameras as part of its sting operation, a tactic Hansen defends by arguing that it is often “the only way to capture a crime.”⁴⁶ While some journalists criticize use of hidden cameras as unethical because they create mistrust,⁴⁷ most people seem to agree with Hansen that hidden cameras can be a legitimate tool of news providers. They have been fruitfully used to expose corruption or other illicit activities.⁴⁸

[300] However, “To Catch a Predator” does not merely use hidden cameras to uncover criminal activity: it creates the specific crime.⁴⁹ The show may not create child predators. But it entices individuals to commit a felony. This distinguishes it from legitimate investigative journalism. When ABC Prime Time Live secretly sent undercover producers into Food Lion stores to videotape unsafe food handling practices, they did not “create a situation that would not have otherwise existed.”⁵⁰ In contrast, NBC does not merely report a story; it makes it. That casts doubt on Hansen’s claim that “To Catch a Predator” is broadcasting news or simply portraying a reality that cannot be refuted. Arguably it constitutes entrapment (see Section IV).

“To Catch a Predator” purports to serve a legitimate news function by informing parents of the dangers awaiting their children on the Internet.⁵¹ On occasion the show offers advice to

⁴³ Benz v Washington Newspaper Publishing Co. and Bisney, 34 Media L. Rep. 2368 (D.C. 2006).

⁴⁴ In *Briscoe v. Reader’s Digest Association*, 483 P. 2d 34, 39-40 (Cal. 1971), California’s Supreme Court ruled that while facts about past crimes may always be published, names of past criminals who are rehabilitated should be kept private so that they can return to an anonymous life. *Gates v. Discover Communications Inc.*, 101 P. 3d 552, 560 (2005), largely undermined *Briscoe* by holding that in light of intervening opinions by the U.S. Supreme Court, the media may air facts about a previous crime that were obtained from “public official court records.”

⁴⁵ Cavender and Fishman, *Entertaining Crime: Television Reality Programs*, 4, 10-12. Cf. Gajda, “Judging Journalism,” 1096.

⁴⁶ Hansen, *To Catch a Predator*, 3.

⁴⁷ See Cavender, “In Search of Community on Reality TV,” 164-5; Ron Smith and H. Eugene Goodwin, *Groping for Ethics in Journalism* (Iowa: Iowa State University Press, 1999), 221-3; Lissit, “Gotcha.”

⁴⁸ *Desnick v. ABC*, 44 F. 3d 1345, 1355 (1995); Gajda, “Judging Journalism.”

⁴⁹ See Steven Kohm, “Naming, Shaming, and Criminal Justice,” *Crime, Media, Culture* 5(2) (2009): 195; Douglas McCollam, “The Shame Game,” *Columbia Journalism Review* (Jan/Feb 2007): 32, and Sec. IV, below.

⁵⁰ *Food Lion v. ABC*, 964 F. Supp. 956, 964 (1997).

⁵¹ Hansen says the “real reason for the show” is “of course” to bring home the dangers...”(V); cf. XII: the purpose of “To Catch a Predator” is to warn people of the dangers of predators.

parents, such as noting the existence of software that monitors children's computers (I); and NBC might argue that only by broadcasting the predators entering a home and seducing someone they think is a minor, and showing the sorts of behavior they may be capable of, can it convincingly and effectively demonstrate the real nature of the threat they pose and show that the problem is not remote or hypothetical.⁵² Sometimes this account of the show's purpose may seem credible, as when we see a man bring a case of Smirnoff Vodka to a girl who presented herself as a young teen (III). Hansen asks, "What would have happened if I wasn't here?" and that is surely an important question. But it is also a misleading question, because if Hansen and NBC weren't there, the man would not be either. Not many children profess to be as sexually promiscuous as the decoys PJ uses to lure men like him to the undercover house.⁵³ These decoys are a far cry from the innocent children they are supposed to represent. One decoy, Samantha_gurl001, for example, tells her sting target that she got laid 4 months before (VIII). Another decoy tells her target, 'my mom is gone, and I'm 13...and we can get naked'(VII). Hansen and NBC never once address the incoherence of their project: they invoke the fearful image of dangerous predators preying on innocent children, but employ decoys who act anything but innocent to reel in men.

"To Catch a Predator"'s broadcasts of graphic sexual dialogue and staged arrests in which police brandish guns and tackle suspects for no legitimate law enforcement needs smacks more of entertainment rather than news meant to fulfill a legitimate public interest.⁵⁴ The show does not provide an objective assessment of an existing threat. In one case, Hansen tell us that some of the men "To Catch a Predator" exposed [301] "have criminal histories that are frightening"—these potential predators, he says, had "real victims." One expects to hear that one of the men was convicted for a violent rape, perhaps even for murder. Instead, we hear that one man was convicted of stalking a woman, and another, of manslaughter (III). Such men could be frightening, but we aren't told the circumstances of their crimes. Was the stalker a dangerous brute like Max Cody in *Cape Fear* or a husband in a contested divorce? Was the manslaughter conviction for a vicious assault or a hunting accident?

The show's purpose is not objectively to report about actual dangers;⁵⁵ it is to alarm, shock, shame, humiliate, and titillate. "To Catch a Predator" played clips in which it ensnares a rabbi and a member of the NYFD on multiple episodes (in I and II) not because parents need to be warned of the dangers of rabbis and firemen, but because it is shocking to see the moral depravities of people in such greatly respected roles. Revealing one man's foot fetish (IV),

⁵² See Gajda, "Judging Journalism," 1090 and n. 310, citing Judge Posner in *Haynes v. Alfred A. Knopf, Inc.*, 8 F. 3d 1222 (7th Cir. 1993).

⁵³ See Janis Wolak, et.al., "Online 'Predators' and their Victims," *American Psychologist* 63(2) (2008): 116. Only 5% of youth report talking online to unknown people about sex.

⁵⁴ Luke Dittrich, "Tonight on Dateline this man will die," *Esquire* 148(3) (2007); cf. Deborah Jermyn, "This is About Real People! Video Technologies, Actuality and Affect in the Television Crime Appeal," in Su Holmes and Deborah Jermyn, eds. *Understanding Reality Television* (London: Routledge, 2004): 167, 171-90. Discussing 'Crimewatch', Jermyn argues that showing still images rather than film would suffice to reconstruct the crime for the audience, but notes one producer's view that "it is fair to help people be entertained at the same time." *Ibid.* at 83.

⁵⁵ Dangers surely exist. But some studies indicate that men using the Internet to have sex with minors are rarely violent. Wolak, et.al., "Online 'Predators' and their Victims," 119.

asking another man about his rape fantasies (VIII), and sharing that one target likes to be treated like a dog and a toilet (X) constitute egregious intrusions upon privacy. Dwelling on sexual acts that will make some audience members blush may titillate others. None of this is needed to warn parents about the dangers their children face on the Internet.

Its ratings success demonstrates that “To Catch a Predator” broadcasts something people are interested in seeing. But “[i]nvading privacy because people are interested is the moral equivalent of stripping someone in public against their will.”⁵⁶ The public might be interested in seeing an adulterer get caught cheating, a wife learn that her husband is gay, or a job applicant’s deceptive resume exposed. But just because this might be interesting does not mean it is newsworthy and would not justify reality shows such as “To Catch an Adulterer,” “To Catch a Homosexual,” or “To Catch a Liar.” That actual predators, unlike the cheat or liar or self-identifying homosexual, are likely to cause serious harm is an argument for pursuing them diligently with the full force of the law, but not for broadcasting a deviant person’s private struggles coping with temptation.

Even if the fact that a crime took place is always newsworthy, details about the crime may not be.⁵⁷ That a 7-year old girl has been allegedly abused is newsworthy. But the identity of the particular child might not be.⁵⁸ A story about a coach who sexually abuses young athletes is newsworthy, but a photo of his Little League team may not be.⁵⁹ NBC could have satisfied the legitimate public interest of alerting the public to a general threat of child predators without identifying the men it ensnares.⁶⁰ If they were found guilty, their names will be publicly available in court records and broadly accessible, and they might serve a jail or prison term. They will register as sex offenders and police and residents of their neighborhood will be notified. NBC had the ability [302] to blur faces and protect individuals’ identities.⁶¹ The only reason it does not is to maximize the voyeuristic appeal and entertainment value of the show by humiliating someone. Showing the face of the rabbi who enters NBC’s undercover house and identifying him might promote deterrence and retribution; but those functions are reserved to the state and not NBC. And no legitimate news purpose is served by graphically describing the sting targets’ sexual fantasies and idiosyncrasies and pointing out their use of Viagra or penis pumps.

IV. Entrapment

“To Catch a Predator” does not passively capture newsworthy images it finds in a public place. While much news reporting involves some ferreting out of facts that goes beyond mere passive discovery, “To Catch a Predator” does not merely report on crime with a healthy

⁵⁶ Karen Sanders, *Ethics and Journalism* (London: Sage, 2003), 90.

⁵⁷ *Briscoe v. Reader's Digest Association, Inc.*, 483 P.2d 34, 38, n.7 (Cal. 1971). Cf. Elizabeth Pater-Simpson, “Private Circles and Public Squares: Invasion of Privacy by the Publication of ‘Private Facts,’” *Modern Law Review* 61(3) (1998):318-40.

⁵⁸ *Foretich v. Lifetime Cable*, 777 F. Supp. 47 (1991).

⁵⁹ *M.G. v. Time Warner*, 107 Cal. Rptr. 2d 504 (2001), cited in Gajda, “Judging Journalism,” 1075.

⁶⁰ One might think that criminal suspects deserve less privacy than do victims. But that would fly in the face of a cherished principle that people accused of crime still have rights.

⁶¹ In one segment, a man comes to the sting house with his little boy, and NBC blurs the boy’s face (but not the father’s) (V).

aggressiveness: it creates the conditions that result in the crime. That makes it problematic for NBC to screen itself from privacy tort claims by arguing that it is a news provider. It also casts doubt on whether the public shame, humiliation, and hard treatment NBC metes out, while punishment only metaphorically, is in any case just.

Some crimes are hard to detect, especially when there is no victim or witness to the crime, as may be the case with consensual sex offenses. To catch the criminal in these cases police may need to use deception, by going undercover. In offering enticements to expose criminals, the police risk convincing a normally law abiding person to commit a crime that they would not have otherwise committed. If that happens, enticement may become entrapment: rather than catch a true criminal, the police make someone a criminal.

If I commit a crime by taking advantage of an opportunity wholly created by the police but it is an opportunity I could readily have been presented with in my encounters with ordinary citizens without any involvement by the police, it is reasonable to conclude that I was predisposed to commit the crime and am therefore a true criminal who deserves to be punished. However, if the police do more, offering me inducements I would not otherwise receive, I may not be a true criminal deserving of punishment.⁶² (If a man is enticed to commit a sex offense by an actual 14 year old girl, no matter how persistent she is, he has no excuse as there is no private entrapment defense. But though NBC and the members of PJ are not state actors, because they collaborate with the police the distinction between private and state entrapment dissolves.⁶³) Many courts decide whether a defendant was entrapped simply by asking whether the defendant was predisposed, looking at, for example, their past criminal [303] record.⁶⁴ But some courts also look at the means used to entice the defendant. If police were so persistent as to risk luring an ordinarily law-abiding citizen, a defendant could still be entrapped even if he was predisposed.⁶⁵

It may be appropriate for the police to target people who they have reasonable cause to suspect are true criminals, in order to secure sufficient evidence to convict them, but doing that is not the same as testing the susceptibility of ordinary people to the lure of ill-gotten gains. In an early entrapment case, Judge Marston of the Michigan Supreme Court offers a reason why doing the latter is troubling: “Human nature is frail enough at best, and requires no encouragement in wrong-doing. If we cannot assist another and prevent him from violating the laws of the land, we at least should abstain from any active efforts in the way of leading him into temptation.”⁶⁶ “To Catch a Predator” tests the virtue of people who may not be predisposed to crime. The police and NBC do not passively observe someone who they reasonably suspect is a criminal based on prior

⁶² Cf. Richard McAdams, “Political Economy of Entrapment,” *Journal of Criminal Law and Criminology* 96(1) (2005): 126-9.

⁶³ See *U.S. v. Morris*, 549 F. 3d 548 (7th Cir. 2008); and Mark Tunick, “Entrapment and Retributive Theory,” In Mark White, ed., *Retributivism: Essays on Theory and Policy* (NY: Oxford University Press, 2011):171-91, at 176-77.

⁶⁴ See *Sorrells v. U.S.*, 287 U.S. 435 (1932); *Hampton v. U.S.*, 425 U.S. 484 (1976). This is called the “subjective test.”

⁶⁵ This is called an “objective test”; see *State v. Kummer*, 481 N.W. 2d 437 (N.D. 1992). See generally Paul Marcus, *The Entrapment Defense*, 3rd ed. (Newark, NJ: Lexis-Nexis, 2002).

⁶⁶ *Saunders v People*, 38 Mich. 218 (1878).

record or witness accounts. Rather, they lure targets in chat rooms, using promiscuous decoys to create opportunities the sting target is unlikely to encounter otherwise.

Hansen defends “To Catch a Predator” against the charge that it entraps by claiming that the PJ decoys “never make the first contact”—the potential predator does.⁶⁷ The predator sees a profile set up by a PJ decoy with a picture of an underage teen, and sends an instant message.⁶⁸ It certainly is true that NBC and PJ do not pick out people randomly: their targets come to them in the online chat room, and one might argue that this conduct itself constitutes reasonable suspicion that the person is up to no good.

But ‘first contact’ can be misleading. On at least one occasion we see that PJ used a Craigslist ad that said, “Boy looking for friends,” which seems like an invitation or offer (VII). Even though the sting targets may make first contact in the online chat room, unlike true predators they may be merely curious, and reluctant to turn their fantasy into reality. The decoys can be aggressive in getting them to make that transition.⁶⁹ We may not know how aggressive they were. There is reason to be skeptical of the transcripts of PJ’s online conversations with sting targets that NBC makes public: one of NBC’s producers accused PJ of providing incomplete transcripts and was subsequently fired.⁷⁰ But the show provides some evidence that the sting targets were lured with considerable persistence. One encounter escalates from chat room [304] exchange to phone conversation at the suggestion not of the target but of the decoy (II). Another decoy senses that her target is having a change of heart and so she tries to keep him interested in her by saying “I’m so bored” (IV). A cancer doctor who was publicly shamed on air when he showed up to meet a young girl said: “she asked to meet me on several occasions. I declined. And today she asked (again)” (VII). One target says, “She was the one who started” the talking about sex (VII). And the oldest sting target, a 60 year old man, tried to walk away from the decoy, but she said, “Come on, it’s okay” (XI). Conrad in particular was lured with unusual perseverance.⁷¹

The U.S. Supreme Court supported an entrapment defense for a man who was targeted by undercover government agents in a sting operation to catch purchasers of pornography that showed nude boys engaged in sex. The defendant, Jacobson, became a person of interest after he ordered magazines with pictures of nude pre-teens which, at the time, were legal since the law only prohibited pictures showing boys actually having sex. Over a two year period the government encouraged Jacobson to buy illegal pornography. Jacobson eventually succumbed,

⁶⁷ Hansen, “To Catch a Predator,” 5. In “To Catch a Predator” (I), Katie Couric asks Hansen, “you didn’t make the first move?” Hansen replies, “No, they entered the chatroom.”

⁶⁸ *Ibid.* p. 21.

⁶⁹ On the aggressiveness of PJ decoys see Douglas McCollam, “The Shame Game,” *Columbia Journalism Review* (Jan/Feb 2007): 31; Brian Montopoli, Does “Dateline” Go Too Far “To Catch A Predator?”, CBS News Online, Feb. 7, 2006, http://www.cbsnews.com/8301-500486_162-1290135-500486.html?tag=mncol:lst:1; Vanessa Grigoriados, “The New American Witch Hunt,” *Rolling Stone* 1032, Aug. 9, 2007.

⁷⁰ *Bartel v. NBC Universal, Inc.*, 543 F. 3d 901, 903 (7th Cir. 2008). The producer sued for breach of contract. While not challenging her account of the facts as true, the U.S. Court of Appeals affirmed the dismissal of her claim since her contract contained no restrictions on allowable reasons for firing.

⁷¹ Dittrich, “Tonight on Dateline this man will die.”

and was arrested. A majority of the Court held that while the defendant had certain “generalized inclinations,” that itself did not establish a predisposition to commit a crime. The idea of committing a crime was implanted in Jacobson by the government.⁷² Many of “To Catch a Predator’s” targets have generalized inclinations; but before they actually meet an underage teen for sex they may, like Jacobson, have to be coaxed. To help know if this is the case, we would need to see the complete online exchange.

Predators by definition do not need to be lured; they actively seek out their prey. They are “true criminals” but difficult to catch. When police are aware that someone is attacking runners in a park, they may set up a decoy target with the hope of catching the attacker. If they succeed, they will have nabbed a true criminal. Their use of an inducement—a potential victim-- does not constitute entrapment as they are not implanting the idea to commit a crime into a susceptible person’s mind; rather, the police are using a strategy of surveillance to detect a crime they do not create.⁷³ “To Catch a Predator’s” sting targets, in contrast, may not be true criminals. They may be susceptible, as Mr. Jacobson was, but the idea of meeting a minor for sex may, nevertheless, have been implanted in them by PJ decoys. The operations of NBC and PJ are more analogous to an undercover agent’s offering of drugs to a man undergoing treatment for drug addiction, knowing he has a weak trigger. Courts have held that to be entrapment.⁷⁴ That the entrapped target ensnared by “To Catch a Predator” is tempted to commit an act of a kind that can cause great harm, whereas the entrapped drug offender commits a self-regarding act that may cause no harm, does not necessarily matter in deciding if a defendant deserves punishment. A child predator may be worse than a drug user but a false criminal induced to attempt to have sex with a minor is no more a criminal than a false criminal induced to commit a drug offense; both may be equally entitled to a defense of entrapment.⁷⁵

[305] Whether a legal defense of entrapment would succeed for a defendant caught in a “To Catch a Predator” sting may hinge on the extent to which the defendant was predisposed to have sex with a minor before contacting PJ’s decoy. Even if an entrapment defense could not be made in particular cases, NBC’s methods distinguish its show from a legitimate news broadcast and make suspect the justice it metes out.

V. Conclusion

“To Catch a Predator” targets are not sympathetic. They attempt to have sex with a child whom they think is a minor. It is no defense that the defendants were mistaken about the decoy’s age—only their intent matters.⁷⁶ And the fact that they fail to complete the crime is irrelevant because most laws punish individuals who make a substantial step towards commission of the

⁷² Jacobson v. U.S., 503 U.S. 540 (1992).

⁷³ See Tunick, “Entrapment and Retributive Theory.”

⁷⁴ Sherman v U.S., 356 U.S. 369 (1958); cf. State v. Lively, 921 P.2d 1035 (Wash. 1996).

⁷⁵ In Section II I made a similar point: private punishment is inappropriate regardless of the seriousness of the offense.

⁷⁶ U.S. v. Morris, 549 F. 3d 548 (7th Cir. 2008), 550, citing U.S. v. Cote, 504 F. 3d 682 (7th Cir. 2007); cf. U.S. v. Helder, 452 F.3d 751 (8th Cir. 2006).

crime.⁷⁷ Though children would most likely not be as sexually promiscuous as the decoys NBC employs, there are actual children who respond to online advances of adult strangers. They are often troubled, depressed, and may have suffered previous sexual abuse.⁷⁸ The men who manipulate them for their own sexual gratification deserve to be blamed. But it is the state and not NBC that is the proper institution to blame them, and, in our society, shaming a person on national television should not be a permissible means of expressing blame.

“To Catch a Predator” seduces its viewers with the immediate gratification of seeing a perverted crime followed by an arrest, conviction, and punishment all in the span of minutes. The viewers themselves become the punishers by bearing witness to the sting target’s shame and humiliation. The show itself is a perverted enterprise in disguising entertainment as justice. Hansen and his crew deceptively present themselves as agents of the law and instruments of justice but fail to afford any of the due process protections essential to a system that provides genuine justice. They use sexually promiscuous decoys to lure men with inducements they are unlikely to encounter otherwise. They take the moral high ground by shaming these men for succumbing to their sexual fantasies while parading the lascivious details of their sexual deviancies, and don the First Amendment armor of ‘news media’ to do so, even though broadcasting deeply private details about people who are not public figures serves no legitimate news purpose and merely entertains.⁷⁹ [306]

⁷⁷ State v. D. Stephens-Tun, 2008 WL 2698639 (Ohio App. 2 Dist. 2008), but see Bridget Boggess, “Attempted Enticement of a Minor: No Place for Pedophiles to Hide Under 18 U.S.C. Sec. 2422(B).” 72 *Mo. L. Rev.* 909, 2007.

⁷⁸ Wolak, et.al., “Online ‘Predators’ and their Victims,” 116-17 and studies cited therein.

⁷⁹ For their helpful feedback I thank Alan Gray and this volume’s editors and anonymous reviewers.

References

- Anderson, Robin. "‘Reality’ TV and Criminal Injustice." *The Humanist* (Sept/Oct 1994): 8-13.
- Blasser, Barry. *The Culture of Fear*. NY: Basic Books, 1999.
- Bridget Boggess. "Attempted Enticement of a Minor: No Place for Pedophiles to Hide Under 18 U.S.C. Sec. 2422(B)." *72 Missouri Law Review* 909 (2007).
- Cavender, Gray, and Mark Fishman. "Television Reality Crime Programs: Context and History." In Fishman and Cavender, eds., 1998.
- Cavender, Gray. "In Search of Community on Reality TV." In Holmes and Jermyn, eds., 2004.
- Dittrich, Luke. "Tonight on Dateline this man will die." *Esquire* 148(3) (2007): 233-44.
- Doyle, Aaron. "Cops: Television Policing as Policing Reality." In Fishman and Cavender, eds. Feinberg, Joel. "Expressive Function of Punishment." *Monist* 49(3) (1965): 397-408.
- Fishman, Mark. "Ratings and Reality: The Persistence of the Reality Crime Genre." In Fishman and Cavender, eds., 1998.
- Fishman, Mark, and Gray Cavender. *Entertaining Crime: Television Reality Programs*. New York: Aldine de Gruyter, 1998.
- Gajda, Amy. "Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press." *97 California Law Review* 1039 (2009).
- Grigoriados, Vanessa. "The New American Witch Hunt." *Rolling Stone* 1032, Aug. 9, 2007: 64-71.
- Hansen, Chris. *To Catch a Predator*. NY: Penguin, 2008.
- Hart, H.L.A. *Punishment and Responsibility*. NY: Oxford University Press, 1968.
- Holmes, Su, and Deborah Jermyn, eds. *Understanding Reality Television*. London: Routledge, 2004.
- Jermyn, Deborah. "This is About Real People! Video Technologies, Actuality and Affect in the Television Crime Appeal." In Holmes and Jermyn, eds., 2004.
- Kohm, Steven. "Naming, Shaming, and Criminal Justice: Mass-mediated humiliation as entertainment and punishment." *Crime, Media, Culture* 5(2) (2009): 188-205.
- Lever, Annabelle. "Mill and the Secret Ballot." *Utilitas* 19(3) (2007): 354-78.
- Lissit, Robert. "Gotcha," *American Journalism Review* 17(2)(March 1995): 16-22.
- Locke, John. *Second Treatise of Government*, ed. C.B. Macpherson. Indianapolis: Hackett, 1980.
- Marcus, Paul. *The Entrapment Defense*, 3rd ed. Newark: Lexis-Nexis, 2002.

- McAdams, Richard. "Political Economy of Entrapment." *Journal of Criminal Law and Criminology* 96(1) (2005):107-85.
- McCollam, Douglas. "The Shame Game." *Columbia Journalism Review* (Jan/Feb 2007): 28-33.
- Montopoli, Brian. Montopoli, Does "Dateline" Go Too Far "To Catch A Predator?", CBS News Online, Feb. 7, 2006, http://www.cbsnews.com/8301-500486_162-1290135-500486.html?tag=mncol;lst;1.
- Oliver, Mary Beth, and G. Blake Armstrong. "The Color of Crime." In Fishman and Cavender, eds., 1998.
- Pater-Simpson, Elizabeth. "Private Circles and Public Squares: Invasion of Privacy by the Publication of 'Private Facts'." *Modern Law Review* 61(3) (1998):318-40.
- Rawls, John. "Two Concepts of Rules." *Philosophical Review* 64(1) (1955):3-32.
- Rosen, Jeffrey. *The Unwanted Gaze*. NY: Random House, 2000.
- Sanders, Karen. *Ethics and Journalism*. London: Sage, 2003.
- Smith, Ron, and H. Eugene Goodwin. *Groping for Ethics in Journalism*. Iowa State University Press, 1999.
- Solove, Daniel, and Paul Schwartz. *Privacy and Media*. New York: Aspen, 2008.
- Stelter, Brian. "'To Catch a Predator' is Falling Prey to Advertisers' Sensibilities." *New York Times*, Aug. 27, 2007.
- Terry, Don. "Eavesdropping Laws Mean that Turning on an Audio Recorder Could Send You to Prison." *New York Times*, Jan. 22, 2011.
- Tunick, Mark. "Entrapment and Retributive Theory." In *Retributivism: Essays on Theory and Policy*, ed. Mark White. NY: Oxford University Press, 2011.
- Tunick, Mark. *Punishment: Theory and Practice*. Berkeley, CA: University of California Press, 1992.
- Wolak, Janis, et.al. "Online 'Predators' and their Victims." *American Psychologist* 63(2) (2008):111-28.
- Zaibert, Leo. *Punishment and Retribution*. Aldershot, England: Ashgate, 2006.